

**Ontario Energy Board**  
P.O. Box 2319  
27<sup>th</sup> Floor  
2300 Yonge Street  
Toronto ON M4P 1E4  
Telephone: 416- 481-1967  
Facsimile: 416- 440-7656  
Toll free: 1-888-632-6273

**Commission de l'énergie de l'Ontario**  
C.P. 2319  
27e étage  
2300, rue Yonge  
Toronto ON M4P 1E4  
Téléphone: 416- 481-1967  
Télécopieur: 416- 440-7656  
Numéro sans frais: 1-888-632-6273



**BY EMAIL**

October 29, 2013

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, Suite 2700  
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: **Nishnawbe Aski Nation Motion to Review the Ontario Energy Board's Decision on the Application for Distribution Rates by Hydro One Remote Communities Inc.**  
**Board File: EB-2013-0331**

Pursuant to Procedural Order No. 1, please find enclosed Board Staff's submissions on the threshold question with respect to the motion to review the Board's Decision.

Yours truly,

Neil Mather  
Project Advisor

cc:

Attachment

**BOARD STAFF SUBMISSION**

**Threshold Question**

**Motion to Review Board Decision**

**Nishnawbe Aski Nation**

**Hydro One Remote Communities Inc.**

**2013 Electricity Distribution Rates**

**EB-2013-0331**

**October 29, 2013**

Nishnawbe Aski Nation (“NAN”) filed a Motion to Review (the “Motion”) a Decision of the Ontario Energy Board (the “Board”) issued on August 22, 2013 (EB-2012-0137) (the “Decision”). NAN is asking the Board to revise its Decision by restricting the rate increase for residential customers served by Remotes to 2.0% rather than the 3.45% which was approved.

In its Motion, NAN has stated that the Board should conduct a review of its Decision because it raises a *serious question* or, alternatively, *questions of general public interest* about the *correctness* of the Board's conclusion that Ontario Regulation 442/01 -- *Rural or Remote Electricity Rate Protection* (made under the *Ontario Energy Board Act, 1998*) (“Regulation 442/01”) requires the Board to approve a rate increase for Hydro One Remote Communities Inc. (“Remotes”) which is the “average for all distributors in the same year”. NAN takes this position because the Board stated in its Decision that it was bound by Regulation 442/01 which provides a method for calculating the appropriate rate increase.

**NAN sets out the following as grounds for review:**

- 1. The Board erred in stating it was bound by Regulation 442/01 and fettered its decision making discretion.**
- 2. Board erred in failing to consider ability to pay of residential customers in remote communities in determining acceptable rate increases. Further, the Board erred in stating the RRRP framework takes into account ability to pay.**
- 3. The Board made several factual errors including stating that if it were to restrict residential rate increase to 2% “there would be a gap between approved revenue requirement, which Hydro One Remotes is entitled to recover”.**

By way of Procedural Order No. 1, the Board asked the parties to file submissions on the threshold question of whether or not the Board should hear the Motion.

Board staff makes submissions on the following:

- i. The threshold test
- ii. The grounds for review do not raise a question as to the correctness of the Decision
  - a) Fettering Discretion

- b) Ability to Pay
- c) Error in Fact

**i. The Threshold test**

Under Rule 45.01 of the Board's *Rules of Practice and Procedure*, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits. Section 45.01 of the Board's Rules of Practice and Procedure (the "Rules") provides that:

In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

The threshold question was articulated in the Decision on a Motion to Review Natural Gas Electricity Interface Review Decision (the "NGEIR Decision", EB-2006-0322, -0338, -0340, May 22, 2007). The Board stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raised a question as to the correctness of the order or the decision, and whether there was enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling or suspending the decision.

Further, in the NGEIR Decision, the Board indicated that in order to meet the threshold question there must be an "identifiable error" in the decision for which review is sought, and that "the review is not an opportunity for a party to reargue the case".

Board staff submits that in accordance with NGEIR, the threshold question requires the motion to review to meet the following tests:

- the grounds must raise a question as to the correctness of the order or decision;
- the issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended;
- there must be an identifiable error in the decision as a review is not an opportunity for a party to reargue the case;
- in demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made

inconsistent findings, or something of a similar nature; it is not enough to argue that conflicting evidence should have been interpreted differently; and the alleged error must be material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.<sup>1</sup>

**ii. The grounds for review do not raise a question as to the correctness of the Decision**

**a) Fettering Discretion**

In its Decision the Board specifically addressed NAN's view that, "the Board should exercise the discretion granted to the Board in setting just and reasonable rates and as upheld by the Divisional Court in *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, [2008] O.J. No. 1970 (Div. Ct.)." The Board stated in its Decision that it did not agree with NAN's position because,

... the Board is bound by Regulation 442/01. The regulation clearly establishes what level of funding may be provided through the RRRP, and in doing so requires that forecast revenues incorporate a level of increase that is the average for all distributors in the same year.

NAN's submits that the Board erred in its statement that it is "bound by Regulation 442/01" and that rate increases must be the "average for all distributors in the same year" raises the issue that the Board is fettering its discretion and decision-making powers as they relate to proposed rate increases.

Board staff disagrees. In its Decision the Board approved the proposed 3.45% rate increase as it was based on the average of approved rates for Ontario distributors between 2010 and 2011. The Board noted that the calculation is consistent with Regulation 442/01, and the approval granted by the Board in EB-2007-0744. Board staff submits that the Board has not fettered its discretion by relying on Regulation 442/01 in determining the appropriate rate increase

Board staff submits that Regulation 442/01 requires the Board to determine the annual amount to be collected and distributed for rural or remote electricity rate protection.

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<sup>1</sup> *Motions to Review, Natural gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007* (EB-2006-0322, EB-2006-0338, EB-2006-0340)

This limitation on the Board's discretion is not analogous to the traditional administrative law principle which prohibits a tribunal from fettering its own discretion which arises in the context of the application of "soft laws" such as policies and guidelines.

The *Ontario Energy Board Act, 1998*, (the "Act") requires that the Board provide rate protection for prescribed classes of consumers. This is set out in section 79(1) of the Act:

**Rural or remote consumers**

**79. (1)** The Board, in approving just and reasonable rates for a distributor who delivers electricity to rural or remote consumers, shall provide rate protection for those consumers or prescribed classes of those consumers by reducing the rates that would otherwise apply in accordance with the prescribed rules. 1998, c. 15, Sched. B, s. 79 (1).

Section 79(2) describes the location of rural and remote consumers that are eligible, and the Act then goes on to provide, at section 79(5) (a), that:

"The Lieutenant Governor in Council may make regulations,  
prescribing the consumers or classes of consumers eligible for rate protection under this section in addition to those described under subsection (2)."

While Board staff agrees that a tribunal must, of course, avoid "fettering" any statutory discretion it is granted, Board staff submits that where the statute specifically gives the authority to make regulations concerning the exercise of the discretion, and regulations have been issued, the scope of any fettering argument is limited<sup>2</sup>. Board staff submits that Regulation 442/01 sets out the appropriate methodology to calculate the rate increase for the customers of a utility for consumers who are eligible for rate protection.<sup>3</sup> Further, Board staff submits that this interpretation of Regulation 442/01 has been employed by the Board in previous decisions including Algoma Power Inc.'s Cost of Service Application in EB-2009-0278.

**b) Ability to Pay & Regulation 442/01**

NAN argues that there are serious reasons to doubt the correctness of the Board's decision that it has no discretion to consider "ability to pay" issues in communities or for consumers who receive RRRP assistance. Board staff submits that the Board did specifically consider "ability to pay" issues and noted this in its Decision:

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<sup>2</sup> *Canada (Citizenship and Immigration) v. Thamothers*, 2007 FCA 198 and *Benitez v. Canada (Citizenship and Immigration)*, 2007 FCA 199

<sup>3</sup> Ontario Regulation 442/01, sections 4(3.1) and 4 (3.2). See also *Algoma Power Inc. (Re)* (2012) LNONOEB 11

"... the legislature has already taken "ability to pay" into account directly through the framework of the RRRP. The RRRP provides a substantial reduction in the rates which would otherwise be paid by rural and remote customers. Although the costs to serve these customers are generally significantly higher than other customers in the province, the RRRP framework ensures their rates only increase by the province-wide average."

NAN takes issue with the Board's statement that the "ability to pay" is taken into account directly through the framework of the RRRP. Board staff submits that NAN's position on this particular point fails to acknowledge that the mechanism for remote rate protection is available to NAN's customers through the RRRP Regulation (Regulation 442/01)

NAN's other arguments concerning the Board's alleged failure to consider ability to pay relate to NAN's advancement of findings by the Divisional Court in *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*<sup>4</sup> ("*Advocacy Centre*) that the Board should take into account "ability to pay" of customers in setting utility rates. Board staff submits that NAN's submissions on this ground are a restatement of legal arguments it made in the main proceeding. For example, at paragraphs 2 – 10 of NAN's written submissions in the main proceeding, NAN made the same arguments as it is raising in this Motion about the Board's jurisdiction to take into account "ability to pay" in setting rates and that the Board's mandate to fix just and reasonable rates is unconditioned and broad.<sup>5</sup>

In the *Grey Highlands v. Plateau* decision the Divisional Court dismissed an appeal of a Board decision where the Board determined that the motion to review did not meet the threshold test and the Board did not proceed to review the earlier decision. In upholding the Board's decision, the Divisional Court stated:

"The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing."<sup>6</sup>

**c) NAN has failed to demonstrate an Error in Fact**

Board staff submits that in demonstrating an error sufficient to challenge the correctness of the Decision, NAN must show that the findings are contrary to the evidence, that the panel failed to address a material issue, or something of a similar

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<sup>4</sup> *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board* (2008) O.J. No. 1970 (Ont. Div. Ct.)

<sup>5</sup> See Written Submissions on behalf of NAN filed in EB-2012-0137, dated July 12, 2013, paras 1-8

<sup>6</sup> *Grey Highlands v. Plateau Wind*, [2012] O.J. No 847 (Ont. Div. Ct.)

nature. The alleged error must be material and relevant to the outcome of the decision. Board staff submits that NAN has failed to identify any error in fact in the Decision. Also Board staff submits that the alleged error – that there would be a revenue shortfall to Remotes with a rate increase lower than the 3.45% as requested, was an observation of the Board and not relevant to the outcome of the Decision. Board staff submits that the continued existence of the Rural and Remote Rate Protection Variance Account would mean that any revenue shortfall to Remotes would be temporary only, and would be restored later when variance account balances would be cleared.

In conclusion Board staff submits that the Board should dismiss the Motion without a hearing, pursuant to Section 45.01 of the Board's *Rules of Practice and Procedure*. Board staff submits that NAN has failed to provide any convincing argument that the original Decision was incorrect on grounds that are additional to those made in the original proceeding. Board staff submits that NAN has failed to identify any error or change in the facts or circumstances that could give rise to a different interpretation or any material issue not considered by the Board.

NAN has failed to set out circumstances that would present sufficient grounds, within the context of Rule 42.01 of the Board's *Rules of Practice and Procedure*, to raise questions as to the correctness of the Board's original Decision. Board staff submits that the Motion does not meet the threshold test required for further consideration of the motion to review.

- All of which is respectfully submitted -