DOUGLAS M. CUNNINGHAM
Barrister & Solicitor

Suite 600
10 King Street East
Toronto, Ontario
M5C 1C3

DOUGLAS M. CUNNINGHAM, B.A. (Hons.), M.A. LL.B.
Telephone No.: (416) 703-5400
Direct Line: (416) 703-3729
Facsimile No.: (416) 703-9111
Email: douglasmcunningham@gmail.com

November 4, 2013

Delivered by Courier
and Email

Kirsten Walli
Board Secretary
Ontario Energy Board
2700 – 2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

Re: Reply Submissions of the Nishnawbe Aski Nation ("NAN") / EB-2013-0331 /DMC File No. 10068

Further to the Board's Procedural Order No. 1, dated October 11, 2013, please find herein NAN's Reply Submissions to the submissions of Board Staff and the Applicant, Hydro One Remote Communities Inc. ("Remotes"), in this proceeding.

The first issue which NAN wishes to raise is the *jurisdiction* of Board Staff to be assuming an adversarial or litigation role in a motion before the Board, including in responding submissions on a Threshold Question under Rule 45.01.

In this case, the submissions of Board Staff are akin to the submissions of a party which is adverse in interest to NAN in the latter's motion to review. In NAN's respectful submission, Board Staff lack party status in the proceeding and, for a number of reasons, they should not be assuming such a role.

NAN is aware of the expertise which Board Staff bring to applications by participating in the interrogatory process. However, the nature of the submissions of Board Staff on the Threshold

Question are such that they raise issues about Board Staff usurping the adjudicative function of the Board on the Threshold Question or, alternatively, advising the Board, as an arm of the Board itself, what the Board should be doing in the circumstances.

NAN understands that Board Staff are not actually a "party" to the proceeding. Although NAN appreciates that Board Staff assist the Board and the parties in the evidentiary process in OEB proceedings (e.g. by formulating and submitting helpful interrogatories, and identifying salient issues), NAN is not aware of any *statutory* or *judicial* authority which would authorize Board Staff to adopt and argue a position in a motion as if it were a party to a *lis*. If Board Staff are aware of such authority, NAN would be pleased to be advised of same.

In their respective submissions, Board Staff and Remotes concede that NAN has raised issues about the correctness of the Board's decision. However, instead of stopping at that observation, Board Staff and Remotes have also tried to argue the actual motion to review by submitting that the Board did *not* err in its decision and that, in fact, the Board's decision was correct.

With the greatest of respect, considering whether the Board's decision is indeed correct or not is not a task on a Threshold Question and that task certainly does not lie within the authority of Remotes or Board Staff. Reviewing and determining the correctness of the Board's decision falls exclusively within the authority of the Board itself during an actual review of a Board decision; it is at that time that the parties should be making substantive submissions whether a decision or its constituents conclusions were, in law, correct.

Also, far from being restrictive, NAN submits that the Board confirmed in the NGEIR decision (dated May 22, 2007) the following about motions to review Board decisions:

1. A tribunal is free to create whatever procedures it thinks appropriate to handle them, provide they are consistent with the *Statutory Powers Procedure Act* ("*SPPA*");

2. There is nothing in the *SPPA* indicating that rules governing motions to review should be interpreted or applied any differently from other provisions of the Board's *Rules*;

3. The Board's *Rules*, including rules relating to motions to review, shall be "liberally construed in the public interest to secure the most just, expeditious and cost-effective determination of every proceeding before the Board" as per *Rule 2.01;*

4. The grounds outlined in *Rule 44.01* are *not* exhaustive and that *Rule 1.03* gives the Board ample authority and discretion to supplement the list in *Rule 44.01* as it sees fit. As such, the Board has jurisdiction to consider motions to review even though the grounds may be errors of mixed fact and law which do not fall squarely within the list of enumerated grounds in *Rule 44.01.*

NAN submits that the grounds in its Notice of Motion to Review and NAN's previous submissions certainly establish the following, as required by the NGEIR decision:

1. NAN's grounds raise a question as to the correctness of the Board's August 22, 2013 order or decision; and

2. If, as requested by NAN, the Board were to review and correct the impugned conclusions in its decision, the reviewing panel might change the outcome of the decision.

In NAN's view, both Remotes and Board Staff have conflated two very different issues in their submissions and that same conflation lies at the heart of the error which NAN submits the Board has made. In its decision, the Board stated:

> ...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* [emphasis added].

NAN's questioning of the correctness of this conclusion in the Board's decision is twofold.

First, the level of funding which Remotes can obtain under Regulation 442/01 is not fixed in an absolute sense. The Board is to determine what level of funding to grant to Remotes based on a broad range of factors. Indeed, the level of funding granted to Remotes has changed

dramatically from one application to the next. Regulation 442/01 is therefore not the constraining or *Procrustean Bed* which the Board has concluded it is.

Second, even though the Board has concluded that *forecast revenues* must incorporate a level of (rate) increase that is the average for all distributors in the same year, that does not mean that the Board is *compelled* or mandated by Regulation 442/01 to approve the *same* rate of increase in an application by Remotes.

What may be mandated by Regulation 442/01 is that the *forecasted revenues* which are part of Remote's rate increase application should, for the purposes of the application and the Board's review of the application, incorporate a level of increase that is the average for all distributors in the same year as a matter of basic accounting. That having been said, it does not follow that the Board is required to *approve* that same rate increase in making determinations about the application before it. Regulation 442/01 is therefore not the "limitation on the Board's discretion" which Board Staff claim it is.

Indeed, no one would assert that the Board is required to approve the forecasted revenue requirements of Remotes in a rate increase application before the Board. Accordingly, even though a rate increase application should include as part of forecasted revenue a proposed rate increase that is the "average for all distributors in the same year", it does not mean that the Board is legally bound to accept that "average" percentage. It simply means that the forecast revenues which the Board will be reviewing will have already included some revenue attributable to a rate increase for Remotes' customers. The Board, however, would still enjoy broad discretion to accept or not accept such a rate increase in reviewing Remotes' overall revenue requirements.

If that were not the case, and the Board enjoyed no such discretion, rate increase applications would be a "slam dunk" for Remotes. So long as Remotes had included the provincial average as the (percentage) rate increase in its revenue forecasts, the Board would have no alternative but to approve that rate increase. There would be no need for any hearing, let alone submissions from persons other than Remotes, in rate increase applications under Regulation 442/01.

The Board, like Remotes and Board Staff, should not conflate the issues of (a) the general information which should be included in forecasted revenues in applications with (b) the actual

authority or discretion of the Board to accept or reject the rate increase that has been included in such forecasted revenues.

Further, the fact that the Board has applied such a (conflated) methodology in previous decisions, including *Algoma Power Inc.'s Cost of Service Application* (EB-2009-0278), does not mean that it was a correct methodology and it certainly does not mean that it should be continued if that approach is incorrect.

In its August 22, 2013 decision, the Board came to a clear conclusion that the RRRP subsidy under Regulation 442/01 confirms that the Legislature had already taken into account "ability to pay" issues in passing that Regulation.

NAN's submission on that simple issue is that the Board's conclusion-- which was certainly not expected by NAN before the August 22, 2013 decision was released to the parties -- is incorrect factually and in law. NAN is not asking the Board for the opportunity to re-argue the same issues before the Board; it is requesting the Board to correct its decision on this issue.

In doing so, additional factors would have to be considered by the Board and, in NAN's further submission, the acceptable and approved rate increase would likely be different.

Further, if the Board did *not* consider "ability to pay" issues in its decision-making process (because the Board concluded that they had already been considered and taken into account by the Legislature) that would, in itself, be a ground for review.

The Board has an obligation to consider all of the evidence before it and a failure to do so, including a failure to render a proper decision on the issues before it, goes to the proper exercise of the Board's jurisdiction and the discharge of its statutory mandate.

NAN is therefore seeking to have the Board review the correctness of two significant legal conclusions of the Board of which NAN was not aware until the Board released its decision on August 22, 2013 for the reasons outlined in NAN's Notice of Motion and its submissions to the Board.

NAN disagrees with the submission of Board Staff that all of the "tests" outlined in Staff's Responding Submissions have to be met in order for the Board to permit a review of its August 22, 2013 decision. NAN also disagrees with Board Staff's characterization of the proper tests. The situation is much simpler than that presented by Board Staff.

NAN's submission and motion to review do not rest principally on assertions that the Board has made a specific "error in fact".

However, errors in fact flow from the Board's legal conclusions because those conclusions resulted in the Board deciding that it (a) did not have to review any evidence relating to the "ability to pay" of Remotes' customers, or (b) did not have to consider a percentage increase for electricity rates that was different from that identified by Remotes in its forecasted revenues.

The Board has released a very significant decision which NAN submits contains fundamental errors relating to the Board's authority to approve a rate increase which is *different* than the average rate increase approved elsewhere in Ontario, and whether the Board has jurisdiction or the responsibility to consider "ability to pay" issues in making determinations on rate increase applications by Remotes.

For these reasons, NAN submits that the Threshold Question of whether any review of the Board's decision (dated August 22, 2013) should be conducted has been satisfied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF NAN.

Yours very truly,

Douglas M. Cunningham
(Legal counsel for NAN)

DMC/am

c: Client