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April 3, 2009

Delivered by Courier and E-mail

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, Suite 2700
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

**Re: OEB File No. EB-2009-0063
Brant County Power ("BCP") Review Motion - Ontario Energy Board
Order for Brantford Power Inc. 2008 Electricity Distribution Rates and
Charges**

We are counsel to Brantford Power Inc. ("Brantford Power") in the above-captioned matter.

On March 30, 2009, Brantford Power filed submissions with respect to the timing of this proceeding. Brantford Power is in receipt of Procedural Order No.1 ("P.O. #1") in this matter. Brantford Power understands that the Board has determined that this matter will be disposed of by way of an oral hearing that is now scheduled for April 28th.

The purpose of this letter is twofold, namely to (i) request that the Board alter the schedule to permit Brantford Power to receive necessary assistance in its response from a professional who is out of the country from April 1st through the 17th; and (ii) request that the Board alter the procedure that appears to have been set by P.O. #1, to permit Brantford Power to lead evidence in response to the motion. Both of these requests engage fundamental principles of procedural fairness.

Key Consultant Out of the Country Until After Materials Due

In our letter sent during the morning of March 30th, we advised that Bruce Bacon, our firm's Senior Utility Rate Design Consultant, who assisted Brantford Power in the preparation of its Cost Allocation Informational filing and its 2008 forward test year cost of service distribution rate application, and whose assistance will be essential to Brantford Power's preparation for this proceeding, will be out of the country from April 1st through the 17th. In that letter, we suggested that it is important that Brantford Power have a reasonable opportunity to prepare responding material, and that the Board have a reasonable opportunity to review it.

The scheduling of April 15th as Brantford Power's deadline to file responding material provides the Board with a longer period for reviewing the responding material than the two days provided for in the *Rules of Practice and Procedure*, but it effectively prevents Brantford Power from working with its consultant to finalize its responding material. We also note that a number of days of preparation time will be lost due to Good Friday and Easter Monday, April 10th and 13th, respectively.

If the Board, notwithstanding our comments that follow, maintains April 28th as the date for this proceeding, we respectfully request that the Board adjust the deadline for the filing of Brantford Power's responding material from Wednesday, April 15th to Tuesday, April 21st, in order that Brantford Power is able to obtain Mr. Bacon's assistance upon his return.

Right to File Evidence is a Matter of Procedural Fairness

There is a more fundamental issue arising out of P.O. #1.

PO #1 directs BCP to produce witnesses to give evidence and be cross-examined at the oral hearing. It also sets a date by which parties responding are to file a factum. It does not appear to make any provision for the filing of responding evidence, or for evidence to be given by responding witnesses. Therefore, the effect of P.O. #1 is that BCP will have an opportunity to present a case and be heard by the Board, while Brantford Power will be restricted to attempting to make its case through cross-examination and argument. Our concerns in this regard are set out below.

The motion is based on BCP's motion record, consisting of a document termed "submissions," an affidavit, and other documents. BCP's affidavit evidence includes allegations of discussions among BCP and Brantford Power staff. The submissions put forward (among other matters) criticisms and alternative analyses of Brantford Power's load forecasts, and discuss distribution rates that BCP would prefer to be charged rather than those being charged by Brantford Power. While the submissions are not evidence, as BCP has now been directed to produce a witness panel at the hearing, BCP will have the opportunity to seek to substantiate the facts referenced in their submissions and to create an evidentiary basis for their motion.

While the motion is for a review and variance of Brantford Power's 2008 Distribution Rate Order, it is clearly based on material not before the Board during the 2008 Brantford Power proceeding, because BCP did not participate in that proceeding. While the Board did consider the matter of BCP being charged on the basis of Brantford Power's GS>50 kW rate and accepted Brantford Power's approach, the Board did not have BCP's material before it. Therefore, the fact that Brantford Power may refer in its argument to material on the record of the original application is not an answer to the suggestion that the process established by P.O. #1 represents a denial of the opportunity for Brantford Power to be heard in this matter.

In the normal course, a responding party would receive the opportunity to file a responding motion record, including its own affidavit evidence and supporting material that would form part of the evidentiary record – otherwise, as is the case here, the only evidence before the Board is that of the moving party. The Board has directed BCP to produce one or more witnesses at the hearing to address the details of the motion. There is no similar direction with respect to Brantford Power. A factum, which is the Brantford



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Power filing contemplated by P.O. #1, is a statement of fact and law, but it is not a document through which new facts are placed on the record. Any facts referred to in argument in order to resist the motion must arise from an evidentiary record, which P.O. #1 does not permit Brantford Power to establish. Accordingly, as discussed previously, BCP becomes entitled to a hearing by the Board, while Brantford Power does not.

We submit that this approach represents a denial of natural justice in relation to Brantford Power, contrary to fundamental administrative law principles. The common law duty of fairness requires “...that those who may be adversely affected by some administrative action or decision be afforded **a reasonable opportunity to participate in the decision-making process by tendering proofs** and making submissions” [emphasis added].¹ In this case, P.O. #1 appears to afford Brantford Power no opportunity at all to “tender proofs” of its position on the motion.

The Proposed Solution

Brantford Power submits that there is a reasonable way to address the problems set out above. In our letter of March 30, 2009, we requested that the Board schedule the oral session for no earlier than the week of May 25, 2009, and we advised that Brantford Power will attempt to have any responding material to the Board by Friday, May 1, 2009. We respectfully request that the Board establish May 1st as the date for the filing of a responding record, which may include affidavit evidence and related material; that the hearing of this matter be scheduled for a date during the week of May 25th; and that Brantford Power be permitted to present one or more witnesses at the hearing. If the Board still wishes Brantford Power to file a factum, it would be prepared to do so closer to the hearing date. We again suggest that this timing will allow Brantford Power a reasonable opportunity to prepare any necessary responding material (including affidavit evidence), and the Board a reasonable opportunity to review it.

We have already responded to (and refuted) the suggestion from counsel to BCP that a May date for the oral proceeding may in some way jeopardize the timely filing of BCP’s 2010 forward test year distribution rate application. As we have noted previously, the hearing would still be completed over three months in advance of the August 28, 2009 filing deadline for 2010 rebasing applications. To that comment, we add that any rate order arising out of BCP’s application will only come into effect, at the earliest, on May 1, 2010, almost a full year after the hearing on this motion; and that the forward test year applications are necessarily subject to change in any event in order to implement the Board’s updated cost of capital parameters in the spring of the test year. Even if it became necessary to file the application in the absence of a decision on this motion, there is nothing to prevent BCP from using Brantford Power’s GS > 50 kW rate, which is currently applicable, subject to adjustment at a later date. The unfounded suggestion of possible prejudice to the timing of BCP’s 2010 application should not become a reason to deny natural justice to Brantford Power.

¹ D.M. Brown and the Hon. J.M. Evans, *Judicial Review of Administrative Action in Canada*, 1998+ (Toronto: Canvasback Publishing) at 7.1100



Should you have any questions or require further information in this regard, please do not hesitate to contact me.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Original Signed by James C. Sidlofsky

James C. Sidlofsky

JCS/dp

Copies to: G. Mychailenko, Brantford Power
 H. Wyatt, Brantford Power
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 Intervenors of Record in EB-2007-0698

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