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February 1, 2010

## Via Email and Courier

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
27<sup>th</sup> Floor  
2300 Yonge Street  
Toronto, ON M5P 1E4

Dear Ms. Walli:

**Re: Reply Argument of Brant County Power Inc.  
Board File Number EB-2009-0063**

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Please find attached the Reply Argument of Brant County Power Inc. in the above-noted proceeding. This will be filed on the Ontario Energy Board's RESS System later today.

Yours very truly,

AIRD & BERLIS LLP



Scott Stoll

SS/br  
Encl.

cc: James Sidlofsky  
All Intervenors  
Christie Clark  
Bruce Noble

6314734.1

**IN THE MATTER OF** the *Ontario Energy Board Act*, 1998, being Schedule B to the *Energy Competition Act*, 1998, S.O. 1998, c.15;

**AND IN THE MATTER OF** an Application by Brantford Power Inc. to the Ontario Energy Board for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of May 1, 2008.

**AND IN THE MATTER OF** a Motion being brought by Brant County Power Inc. to review and vary the implementation of the Board's Interim Order Dated April 21, 2008 in this proceeding;

**AND IN THE MATTER OF** a Motion being brought by Brant County Power Inc. to review and vary the implementation of the Board's Decision dated July 18th, 2008 and the Board's Order dated August 29th, 2008 in this proceeding;

**REPLY ARGUMENT  
OF THE MOVING PARTY  
BRANT COUNTY POWER INC.**

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## **OVERVIEW**

1. Pursuant to Procedural Order No. 6 this proceeding, Brant County Power Inc. ("**BCP**") is responding to the submissions of Brantford Power Inc ("**Brantford**") dated January 13 and 25, 2010 and those of the Ontario Energy Board Staff ("**Board Staff**") dated January 15, 2010.
2. Brantford characterizes the subject of this motion as a billing dispute and that misses the point. BCP submits the distribution charge issue is fundamentally a rate classification and "just and reasonable rate issue" which has manifested itself as a billing dispute. The Retail Transmission Service ("**RTS**") issue pertains to the appropriate period for which BCP is obligated to pay Brantford when Brantford failed to issue an invoice for over 4 years.

## **STANDARD OF REVIEW**

3. BCP has submitted that the standard of review is correctness based upon previous decisions of the Board and the specific wording of the Board's Rules of Practice and Procedure, rule 44.01(a) wherein it states "sets out the grounds for the motion that raise a question as to the correctness of the order or decision..." Further, the Board in *Re: Hydro One Networks Inc.* (2007 WL 50953121) Board Proceeding, EB-2007-0797, stated the following:

"This panel acknowledges that the scope of the Board's power to review is broad, but remains of the view that a motion to review must raise a question as to the correctness of the decision at issue....the grounds for the review set out in 44.01 are not exhaustive. It may be that the emergence of previously unknown or

unforeseen implications of a decision could be considered a ground for review..."<sup>1</sup>

4. The Board, in *Re: Hydro One* confirmed the correctness standard and that the Board's enumerated grounds are not exhaustive. At no time did the evidence clearly indicate the total charges that BCP would incur, that BCP would be subsidizing Brantford ratepayers approximately \$125,000 or that Brantford had committed to pursuing a certain course of action (the embedded distributor rate) and changed course without informing BCP or the Board. Further, according to the cost allocation information filing not only does BCP demand more than 5,000kW but there are two additional customers with such a demand.<sup>2</sup> These factors would indicate that a new rate applicable to BCP was warranted rather than permitting Brantford to leave BCP in the GS>50kW rate class.

#### **Rate Classification**

5. One of the first steps to determine whether rates are just and reasonable is whether the proper rate classifications have been used. BCP has submitted that the proper rate classification has not been used. BCP generally agrees with the comments of Board Staff regarding the factors that would make indicate that BCP is sufficiently different than the other GS>50kW ratepayers to warrant a separate rate classification.
6. Brantford makes allegations that BCP's position is inconsistent because BCP provides service to Brantford at Jennings Road and invoices Brantford as a General Service greater than 50kW ("**GS>50kW**") customer rather than as a embedded distributor. BCP submits there are several problems with Brantford's statement.

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<sup>1</sup> Final Argument of Brantford Power Inc., dated January 13, 2010, Tab 3, at para. 24.

<sup>2</sup> Brantford Response to Board Staff Interrogatories, Attachment F(a), Reference Issue 2.6, Sheet I6, Col. GS>5MW.

- (a) The average consumption at Jennings Road is approximately 82kW and did not exceed 185kW over the past year (BCP, response to I.R.#4). This is much different than the present scenario where the consumption is, at one location, approximately 180 times the minimum class requirement ( $180 \times 50 = 9,000\text{kW}$ ) and more than 30 times the demand of the average GS>50kW customer. Even at the other connection locations, the demand is approximately 8 to 15 times the demand of the average GS>50kW customer. This is a significant difference and would indicate that a separate rate classification is required.
  - (b) BCP has not made a cost of service rate application and has not had the opportunity to revisit the appropriateness of a rate classification for embedded distributors. BCP has committed to considering the appropriateness of a new rate classification in its upcoming rate application.
7. Board Staff recognized that BCP's consumption was not appropriate for the GS>50kW. Further the "services" being provided to BCP are different than other customers in the GS>50kW classification. This was recognized during the original hearing, but without BCP's participation, and the significant evidence that Brantford had committed to BCP that Brantford would apply for an "embedded distributor charge", the Board accepted the rate classification.
8. BCP would submit that Brantford has approached ratemaking from the wrong perspective. The intent of customer classification is not to justify maintaining the existing rate classifications despite clear and obvious differences in customer composition but rather, it is intended to group similar customers together in one rate classification to establish just and reasonable rates.

**Just and Reasonable Rates**

9. In addition to rate classification, BCP has stated that it has two primary concerns with the appropriateness of the determination of the specific rate. First, the forecast appears to understate the number of kW. The forecast only seems to capture the addition of BCP and not the other Large User that Brantford acknowledged existed. Second, BCP submits the allocated costs are not appropriate.
10. Brantford was aware of another new large user at the time of the application. Brantford did not include a specific forecast of such user<sup>3</sup>. In response to Board Staff Interrogatories, Attachment: F(a), Sheet I6, it states there 408 GS>50kW customers, 2 large use customers with a demand of 137,423kW and 3 embedded distributors customers. In Brantford's original application it only acknowledged a single other Large Use customer. Excerpts of Brantford's response to I.R. #1 are provided below:

	2006 Historical Actual Normalized	2007 Bridge Normalized	2008 Test Normalized
BCP Powerline	0	0	27,265
BCP- Colborne West	0	0	37,489
BCP – Colborne East	0	0	105,652
Other Large Use	0	0	0
Remaining GS>50	1,463,650	1,477,561	1,465,200

11. The forecast for the GS>50kW rate classification a net increase of 158,045kW. Yet Brantford acknowledges at least one relatively new customer with a demand exceeding 60,000kW and BCP's demand forecast of 170,406kW. The forecast demand appears to be understated.

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<sup>3</sup> Brantford Response to I.R.#1 of Brant County Power.

12. The support for the cost allocation is based upon the cost allocation informational filing provided by Brantford to the Board. This information was prepared prior to the filing of the application. BCP raised several concerns with the legitimacy of certain costs. The percentage of certain costs that were allocated to BCP seemed inappropriate and the logic internally inconsistent.
13. Brantford has the onus of demonstrating that rates are just and reasonable. Further, Brantford had the ability to provide a reconciliation of the forecast but chose to only indicate the BCP comments were wrong. BCP would therefore submit that Brantford has not met their onus to demonstrate rates are just and reasonable.

#### **Cross Utility Subsidization**

14. Brantford recognizes that the current rate order, which came into effect September 1, 2008, would result in BCP subsidizing other Brantford customers. This cross-utility subsidization is warranted, in Brantford's submission, because it provided service in the past without payment. Brantford always had the option to bring forth a rate application that included BCP in its forecast. In 2006, it chose not to do so but rather to file based on historical costs prior to BCP receiving service. Brantford made the conscious decision, presumably on balancing the interests of Brantford and the other ratepayers, to not include BCP in the 2006 rate application. The notion that BCP is responsible because of Brantford's decision is not tenable. Further, Brantford was not deprived of a single penny of its revenue requirement during this period.
15. Board Staff submits that a Large User classification should be created and that the maximum revenue to cost ratio of such classifications is 1.15:1. BCP would repeat its

request for a separate embedded distributor class. BCP submits that licensed, rate regulated distributors should not be expected to subsidize other distributors and that the proper revenue to cost ratio would be 1:1, especially where the rate classification is new and the Board is trying to reduce cross-subsidization. BCP submits that because it is newly included in the rate application that such inclusion will necessarily have a positive impact on other rate payers and therefore it should not be expected to over-contribute by cross-subsidizing the other Brantford customers.

### **Notice**

16. Brantford's defence to the lack of effective notice is that it published what was directed by the OEB. BCP does not dispute that fact. Nor does BCP dispute the fact that Brantford may have mailed the Notice of Application. BCP does strenuously object to the characterization of reasonable alternatives put forth by Brantford. Once again, Brantford is taking no responsibility for its role in this proceeding and the place where it finds itself. It would have been preferred if Brantford had utilized a service that would prove receipt such as email or fax with confirmation or registered mail.
17. Brantford asserts that because it published what it was directed to publish that everything is therefore satisfactory. The content of the Notice of Application is informed by the opening words of the Application which provided no indication of any significant changes to the way in which Brantford was approaching the rate application.

### **Retail Transmission Services**

18. With respect to the Retail Transmission Services, BCP has acknowledged that it owes Brantford certain monies. The provisions from the Retail Settlement Code are directed

to billing errors with retailers and consumers. BCP is not a consumer or a retailer – it is a distributor.

19. Further, BCP would submit that, aside from the *Limitations Act*, the policy is that residential customers should have a limited amount of exposure – maximum 24 months. These costs will be passed along to BP's customers. Brantford's proposal would mean that BCP's residential customers have greater liability to Brantford, a company with whom they have no direct relationship, than they would have with BCP where there is a direct relationship. BCP would submit that such a result is not what was intended by the Retail Settlement Code.

#### **Limitations Act**

20. BCP would submit the *Limitations Act, 2002*,<sup>4</sup>, (the "**Limitations Act**") is an indication of policy but is not binding on the Ontario Energy Board. Further, BCP would submit that Brantford's position and its interpretation of the applicability of the Limitations Act is incorrect.
21. BCP would submit that the principles used in developing the analytical regime for limitation issues should be informed, but not be bound, by the provisions of Limitations Act. The relevant sections of Limitations Act are provided below:

1. In this Act,.....

"claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;.....

2.(1)This Act applies to claims pursued in court proceedings other than,  
(a) proceedings .....

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<sup>4</sup> S.O. 2002, chapter 24, Schedule B.

4. Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered.

5.(1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

22. There is a need for a loss or injury to be suffered by the claiming party. BCP would submit there has been no loss as Brantford has not been deprived of revenue, rather it seeks to change the allocation of its past revenue through this proceeding.
23. This is not a claim being pursued in "court" and so the Limitation Act is not binding. The Board, pursuant to section 19(6) of the OEB Act, has exclusive jurisdiction in all matters where the OEB Act confers jurisdiction. As BCP has submitted this is fundamentally a rates issue and so the Board has jurisdiction but is not bound by the Limitations Act.
24. The Limitations Act provides a general rule, section 4, of a two year limitation period for civil claims which reflects a policy that after a two year period has elapsed, people should be free to carry on without fear of being held to account for long past events.

25. BCP would note that limitation periods vary across statutes and purpose – civil, criminal or quasi-criminal<sup>5</sup> but there is a common thread - at a certain point, a person should not have to worry about past acts or omissions.

26. The policy - as of the quotation of the Supreme Court of Canada by Himel J. in *Canadian Microtunnelling Ltd. v. Toronto (City)*<sup>6</sup> - is expressed as:

In *M.(K) v. M.(H.)*, [1992] 3 S.C.R. the Supreme Court of Canada outlined the underlying rationale of a limitation period which may be summarized as follows:

(i) there comes a time when a potential defendant should be secure in his /her] reasonable expectation that he/[she] will not be held to account for ancient obligations;

27. The court or tribunal must analyse the situation to determine the event or issue that causes the limitation period to commence and the Limitation Act to become an issue. BCP would suggest the right arises and the period would commence from the time the service was provided and should have been invoiced.

28. Brantford's submission that the cause of action arises from the time of refusal to pay the debt is not logical. To accept such a position would be to accept that Brantford could have presented an invoice in 20 years for these costs. The cause of action would be based upon the time the service was provided and the right and obligation to bill arose.

29. The court considers whether the event giving rise to the claim was discoverable from both a subjective (did Brantford actually know) and an objective perspective (would a reasonable utility have discovered), section 5 of the Limitations Act. The onus is on Brantford to establish when the event was not discoverable. Brantford claims it did not

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<sup>5</sup> For example, section 126(5) limits the Board's ability to take enforcement action in respect of an offence to 1 year. BCP is aware that such a situation is significantly different than a civil claim but wished to highlight the fact that the application of a limitation period can be as short as 1 year.

<sup>6</sup> Brantford Reply to Staff Submissions, January 25, 2010, Tab 4(A). This quotation begins at para. 104 of the trial decision.

know and should not, through reasonable diligence have been expected to know that Brantford was failing to invoice BCP for the RTS service. Brantford's submissions should be rejected.

30. Brantford's explanation as to why the error was not discovered introduces evidence during the argument stage of this proceeding and should be disregarded. Further, Brantford had, since April 2009, the ability to explain the error and did not.
31. Brantford was aware of the fact that prior to Brantford's acquisition of the Colborne Street, East and West, assets Hydro One was the correct utility to charge BCP. Brantford was aware that it purchased the asset from Hydro One in 2005 and was aware that the Board had considered the ownership and had considered the same issue in 2002 and 2003. Management at Brantford has not changed.<sup>7</sup> Brantford began billing BCP for RTS services for Powerline Road in 2005/2006. Brantford was aware in 2005 that BCP was being supplied power by such assets. It is reasonable to conclude that billing should have commenced at that time and it was Brantford's responsibility to do so. BCP would submit that Brantford's explanation is not sufficient to explain, at law, why such an error was not discoverable by Brantford.
32. Finally, in respect of discoverability, it was not an employee of Brantford, but an employee of Brantford's shareholder and service provider that Brantford has claimed was the linchpin on the discoverability of the event. Part of the reason a utility would contract out for service is because the service provider is better able to ensure the service is performed correctly.

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<sup>7</sup> Brantford Rate Application, December 20, 2007, Exhibit 1, Tab 1, Schedule 19, Appendix A, Page 1 and 8 of 8.

33. The letter of BCP, Brantford Response to Staff Submissions, Tab 2, is not a refusal to pay but rather a pragmatic response of a regulated entity in the midst of a proceeding dealing with the very issue of the invoice. It does not create a new cause of action and is not the event against which the commencement of a limitation period should be referenced.
34. Otherwise, BCP maintains its position in respect of its liability to Brantford.

#### **Other Issues**

35. In response to Brantford's submission at para. 76, BCP's position was stated in response to Board Staff I.R. #4.
36. In respect of Brantford's submission that it should be kept whole, BCP does not dispute that a distributor is entitled to earn its revenue requirement.
37. With respect to Para. 79 of Brantford's submissions, BCP would indicate that the annual distribution charge of \$425,000 is approximately 8% of the BCP 2006 Revenue Requirement. This is a completely new charge and is of such significance, in light of the general regulatory concern with the avoidance of rate shock and Board's policy of mitigating rate impacts, and other factors such as the imposition of the Harmonized Sales Tax that it will necessarily limit the flexibility and options available to BCP in the rate application.


#### **CONCLUSION**

38. Brantford should not be permitted to reach back almost 5 years to recover costs.

39. Brantford would ask the Board to endorse cross utility subsidization such that BCP's residential ratepayers subsidize Brantford, when Brantford does not even require its own residential ratepayers to pay the full cost of distribution. This disparity in treatment is not supportable. BCP therefore requests an embedded distributor rate, wherein it will contribute the actual costs of Brantford providing service to BCP.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

**BRANT COUNTY POWER INC.**

  
By its Counsel  
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**TO:**

THE ONTARIO ENERGY BOARD

**AND TO:**

BRANTFORD POWER INC.

**AND TO:**

SCHOOLS ENERGY COALITION