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BY EMAIL and RESS

July 9, 2010

Ms. Kirsten Walli, Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
27th Floor  
Toronto, Ontario  
M4P 1E4

Dear Ms. Walli:

**Re: EB-2010-0159 – Canadian Niagara Power Inc.**

In accordance with Procedural Order No. 1 in the above-referenced matter, we have attached the reply submissions of Canadian Niagara Power Inc.

If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,



Andrew Taylor

cc. Energy Probe Research Foundation

**Ontario Energy Board**

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

**AND IN THE MATTER OF** an Application by Canadian Niagara Power Inc., requesting approval to establish a deferral account to record certain preliminary costs.

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**REPLY SUBMISSIONS OF  
CANADIAN NIAGARA POWER INC.  
("CNPI")**

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**July 9, 2010**

These are the submissions of CNPI in reply to Board Staff's and Energy Probe Research Foundation's ("Energy Probe") submissions dated July 5, 2010.

## **I. Reply to the Submissions of Energy Probe:**

According to Energy Probe, the Board's decision in RP-1999-0034 established four criteria that apply to deferral account requests. In other words, Energy Probe is suggesting that every request for a deferral account, including CNPI's, must satisfy the four criteria established in RP-1999-0034 (the "criteria").

CNPI submits that it is unnecessary for the Board to consider the generic application of the criteria to all deferral account requests to make a decision in this case. As explained in CNPI's June 22nd Submission, CNPI has already recorded the Preliminary Costs in Account 2055 Construction Work in Progress. In the normal course, CNPI would have capitalized the Preliminary Costs with the other development and construction costs related to the Project. However, now that the Project will not proceed and Account 2055 contemplates the completion of work-in-progress, CNPI believes that it would be appropriate to establish a new deferral account for the Preliminary Costs. In other words, CNPI's request is more of an accounting housekeeping matter than a request to establish a deferral account to record new costs. CNPI would have no objection to the Board ordering it to leave the Preliminary Costs in Account 2055 for future disposition at its next transmission rate application. As such, CNPI submits that the circumstances in this proceeding do not necessitate the consideration of whether the criteria apply to every deferral account request.

In any event, should the Board wish to engage in such an analysis, CNPI disagrees with Energy Probe's assertion that all deferral account requests must meet the criteria for the following reasons:

- 1) The part of the Board's decision in RP-1999-0034 (the "Decision") that established the criteria did so for the purpose of z-factors. It said nothing about generic application to all deferral account requests.
- 2) The Decision only applied the criteria to z-factors, which were described as follows, "The very nature of a Z factor is that it must be extraordinary, unpredictable and unmanageable." Not every deferral account request deals with costs that are extraordinary, unpredictable and unmanageable.
- 3) The Decision pertained to the Distribution Rate Handbook, which applied to distributors. CNPI has filed this application in its capacity as a licensed transmitter.
- 4) The panel in this proceeding is not bound by the Decision, even if the Decision had commented on deferral accounts generally (which it did not).
- 5) The Board has granted deferral accounts in other proceedings without applying the criteria. For example, without any analysis of the criteria, the Board ordered Cambridge North Dumfries

Hydro Inc. to establish a deferral account to record incremental savings due to the implementation of the HST (EB-2009-0260).

Should the Board wish to apply the criteria to CNPI's request for a deferral account, CNPI maintains that it has satisfied the criteria for the reasons set out in its June 24 Submission. Nevertheless, CNPI replies to Energy Probe's submissions on each of the criterion as follows:

***Causation:*** According to Energy Probe (at paragraph 12), it is unable to assess CNPI's argument that the costs of the Project are outside of the base on which its rates have been derived. CNPI submits that the Project was not a capital project that was conceived or contemplated at the time of its last transmission rate application, and is therefore outside the base from which rates are derived.

***Materiality:*** Energy Probe accepted that the Preliminary Costs satisfy the materiality threshold (at paragraph 13).

***Management Inability to Control:*** According to Energy Probe, CNPI did not satisfy this criterion for the following reason:

“the Project was conceived and initiated solely by CNPI under the assumption that it needed to improve its transmission system reliability. Therefore, with no external driver for the project, the costs must have been within management control...”

CNPI submits that it has an obligation to maintain the reliability of its transmission system in accordance with its Electricity Transmission Licence (ET-2003-0073), notwithstanding external drivers such as directions from the IESO.<sup>1</sup> Under its licence, CNPI is required to comply with the Transmission System Code, which provides:

"6.3.6 A transmitter shall develop and maintain plans to meet load growth and maintain the reliability and integrity of its transmission system."

Once CNPI identified the Project, which it believed was needed for reliability purposes, it undertook the various prescribed feasibility, system and customer impact studies in Ontario involving the IESO and Hydro One Networks Inc. Only after receiving positive results from these studies did CNPI proceed with completion of the additional studies in the New York jurisdiction involving the New York Independent System Operator and National Grid US. These processes are required to bring a leave to construct application. As such, CNPI's identification of the Project in accordance with its obligation to develop plans to maintain the reliability of its transmission system initiated a series of steps that lead up to and included the leave to construct application. CNPI does not believe that ignoring its obligations under the Transmission System Code is an option. Therefore, the steps taken by CNPI and their associated costs were outside management's ability to control.

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<sup>1</sup> CNPI questions whether the IESO even has the jurisdiction to direct transmitters to construct transmission facilities as suggested by Energy Probe.

***Prudence:***

Energy Probe submitted that the Preliminary Costs were not prudently incurred based on the Board's findings in the leave to construct proceeding (EB-2009-0283). CNPI submits that Energy Probe's analysis is based on hindsight. The Board has stated that hindsight should not be used in determining prudence, and that a prudent decision is one that was reasonable under the circumstances that were known or ought to have been known at the time the decision was made. The test for prudence has been described by the Board and the Ontario Court of Appeal as follows:<sup>2</sup>

“The Board agrees that a review of prudence involves the following:

- Decisions made by the utility's management should be generally presumed to be prudent unless challenged on reasonable grounds.
- To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.
- Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
- Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.”

CNPI's decisions to incur the Preliminary costs were prudent based on the circumstances at the time the decisions were made. CNPI believes that it is worth repeating that it had identified the Project and recognized its potential value to the IESO controlled grid. The result of the Ontario system studies (Feasibility, System Impact Study and Customer Impact Study) identified the project as feasible. Subsequent to the Ontario studies, the New York Independent System Operator System Reliability Impact Study also indicated that the Project was feasible. In the IESO's 18-Month Outlook: *An Assessment of the Reliability of the Ontario Electricity System*, dated June 23, 2006, in Section 5.1 Transmission Projects, the IESO wrote:

“Planned transmission projects that are identified by transmitters and that have a significant impact and that have an estimated in-service date within the 18 month period under study are listed in Appendix B by transmission zone. These transmission projects do not include all transmission projects submitted to the IESO for Connection Assessments and Approval. Only those projects that are considered significant are included.”

Appendix B of the 18-Month Outlook included the Project. Furthermore, on July 9, 2008, senior staff at the IESO hosted a meeting with CNPI representatives to discuss the Project. During that meeting, IESO staff gave CNPI a positive indication in respect of the Project. Furthermore, a measure that the IESO uses to assess the reliability performance of a local area transmission system is the unsupplied energy (UE) in each year. CNPI's annual UE had violated the

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<sup>2</sup> *Enbridge Gas Distribution Inc., v. Ontario Energy Board*, [2006] O.J. No. 1355, April 7, 2006, para. 10 Ont. C.A. (Quoting from OEB Decision setting EGD Rates for 2002 Fiscal Year, December 13, 2002 (RP-2001-0032), at p. 62.

established baseline on three occasions over the past 5 years.<sup>3</sup> Therefore, at the time, CNPI had good reason to believe that proceeding with the preliminary work on the Project was prudent.

For these reasons, CNPI submits that under the circumstances that were known at the time it made the decisions to proceed with the Project, the Preliminary Costs were prudently incurred.

**II. Reply to the Submissions of Board Staff:**

CNPI has no objection to Board Staff's suggestion that the Preliminary Costs be transferred to Account 1508 for disposition at CNPI's next rates rebasing application.

All of which is respectfully submitted this 9th day of July, 2010.

A handwritten signature in dark ink, appearing to read 'Andrew Taylor', is positioned above a horizontal line.

Andrew Taylor  
Counsel to Canadian Niagara Power Inc.

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<sup>3</sup> EB-2009-0283, IESO interrogatory response #16 (at page 5 of 7) dated December 4, 2009