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BY EMAIL and RESS

January 21, 2011

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2010-0295 --- Late Payment Penalties
Reply Submissions to the Motions of the School Energy Coalition

We are counsel for the School Energy Coalition ("SEC"). Please accept our joint submissions in response to submissions of the Electricity Distributors Association ("EDA") and Toronto Hydro Electric-System Limited ("THESL") on SEC's Motions to require production of certain documents requested in its Interrogatories.

Yours Truly,
JAY SHEPHERD P.C.

Originally signed by

Mark Rubenstein

cc: Wayne McNally, SEC
Maurice Tucci, EDA
Alan Mark, Ogilvy Renault LLP
Colin McLorg, THESL
Rudra Mukherji, Board Staff

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EB-2010-0295

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 a proceeding initiated by the Ontario Energy Board to determine whether the costs and damages incurred by electricity distributors as a result of the April 21, 2010 Minutes of Settlement in the late payment penalty class action, as further described in the Notice of Proceeding, are recoverable from electricity distribution ratepayers, and if so, the form and timing of such recovery;

AND IN THE MATTER OF Rules 8 and 29.3 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

JOINT REPLY SUBMISSIONS TO THE SCHOOL ENERGY COALITION MOTIONS REGARDING RESPONSES TO INTERROGATRIES BY THE ELECTRICITY DISTIBUTORS ASSOCIATION AND TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

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Mark Rubenstein
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Representing the Moving Party,
School Energy Coalition

TO: Ontario Energy Board
Attention: Kirsten Walli
Board Secretary
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1. Pursuant Procedural Order #3, this is the School Energy Coalition's ("SEC") joint submission in response to the submissions of the Electricity Distributions Association ("EDA") and Toronto Hydro Electric-System Limited ("THESL"), on SEC's Motions for an order requiring production of certain documents requested in Interrogatories.

General Reply Submissions

2. In answering the Board's first approved issue in this proceeding, whether there should be recovery from ratepayers, an initial question must first be answered. Is there another source from which the Affected Electricity Distributors could seek recovery instead, and if so, should they? The aims of SEC's Interrogatories in this proceeding are to try to answer that question.

3. The onus in this proceeding is on the Affected Electricity Distributors, through the EDA and THESL, to demonstrate to the Board that the ratepayers are the appropriate group from whom they should recover the costs and damages for the LPP Class Action Settlement from.

4. Due to the unique nature of the process of electricity restructuring in Ontario, for at least some period of the exposure reflected in the Settlement Agreement, the Affected Electricity Distributors were MEUs. The Board must determine if there is any other entity that the Affected Electricity Distributors may have a legal claim to reimbursement. These entities may include but are not limited to:

a) Vendor MEUs who transferred assets to LDCs (typically municipalities).
b) Predecessor and former shareholders of other LDCs that due to the terms of acquisition or amalgamation retained certain liabilities.
c) Insurance Companies, that due to the terms of liability insurance policies then in place covered liability over the LPP Class Action

5. The Board needs evidence to be able to determine whether any of these other parties are an appropriate source of reimbursement of this cost. This information includes but is not limited to the agreements on transfer and/or sale of assets, transfer by-laws, insurance policies, and acquisition and/or amalgamation agreements.

6. Throughout both the EDA's and THESL's submissions in response to the Notice of Motion, both groups conflate liability to the plaintiff class in the litigation, with the Boards determination of who, if anyone, should reimburse the LDCs for paying that liability. It is correct that through the Settlement Agreement and the corresponding judicial implementation order, the Affected Electricity Distributors are liable to the plaintiff class. SEC does not dispute this. The issue that is important to the Board in this proceeding, though, is whether any other entity is or should be liable to the Affected Electricity Distributors. While related, these are not the same issue.

7. We note that there is a subsequent issue that may flow from this. In many commercial agreements that apportion liability upon transfer of assets or a business, a vendor who holds the liability may require notice of the action or the right to defend it. If by the actions of the Affected Electricity Distributors, they did not follow terms of a transfer, sale or insurance agreement and now have now lost the right to seek reimbursement, this may be an important for the Board in determining the issue of prudence of the amount that is being sought in recovery.

8. While it is very possible that all liabilities were properly assumed by the Affected Electricity Distributors, and were not insured, without any evidence to confirm this provided by the EDA or THESL, the Board is unable, to nor should it, reach this finding. The onus is on the Affected Electricity Distributors who are seeking recovery from ratepayers to provide the documentation that the legal liability for the entire period of exposure was theirs and only theirs.

Specific Reply to EDA's Submission

Interrogatory #2

9. As SEC's letter to the Board dated January 18th stated, after speaking with the Superior Court of Justice, Court Reporters Office, SEC no longer requests the information contained in Interrogatory #2 and has amended the Motion accordingly.

Interrogatory #3

10. EDA's claim that "[f]or any liability for LLP incurred by predecessor MEUs during this period, it is generally known upon incorporation and assumption of the distribution business

LDCs assumed the associated liabilities". SEC disagrees. Unsupported statements by counsel in argument are not evidence, and in any case the EDA's statement is not intuitive.

11. In most asset sales or transfers, liabilities do not transfer unless specified by the agreement or because of statute. The onus is on the Affected Electricity Distributors to prove to the Board that they assumed the LPP liabilities that rose prior to incorporation. If it is generally known that this is the case, then they should have little trouble producing the documents that support this contention.

12. Even if the period of exposure covered by the Settlement Agreement is partially post-incorporation for the Affected Electricity Distributors other than THESL, production of the requested documents should be ordered. For any Affected Electricity Distributor, if liability did reside with a predecessor MEU, and was not properly assumed the LDC, even a small amount of that exposure is important for the Board in the determination of the prudence of the Settlement, and therefore the quantum, if any, that they should recover from ratepayers.

Interrogatory #4

13. The EDA's reasoning for its failure to provide the requested documents is insufficient and incorrect. They claim that as a matter of law, upon merger, the merged entity becomes liable for the obligations of the merging entities. While SEC agrees that in most cases this is correct, it depends on the terms and the structural specifics of the merger.

14. Moreover, their response only addresses one half of the Interrogatory. The Interrogatory asked for documents that were "for each LDC that was acquired by, or amalgamated with, another LDC or entity…". The response that the EDA provided above does not apply to acquisitions of LDCs. Depending on the method and terms of the acquisition, liabilities may or may not be assumed by the acquiror. In many transactions there are specific terms in the agreement of sale that specify the apportionment of legal liabilities that are not otherwise mandated by statute.

Interrogatory #5

15. By the very nature of this proceeding, it is relevant to the Board to determine if any Affected Electricity Distributors were covered by insurance. EDA's initial response that the "information cannot be obtained within the time lines prescribed by the Board for responding to interrogatories" was the part of the response that SEC had objected to in its Notice of Motion. At the very least the EDA should have requested an extension of time to file a response to SEC's Interrogatories, as their Counsel did in his letter to the Board dated January 11th in asking for an extension to file EDA's argument-in chief. It was a request that was for legitimate grounds and was not opposed by SEC. In the alternative, SEC should be allowed to designate a small number of LDCs from whom this information is provided, so that the Board can see a sample of the insurance coverage and determine if there is any reasonable potential for recovery from insurers.

Interrogatory #6

16. The onus is on the Affected Electricity Distributors to provide evidence to the Board detailing how much of the historic bills were for the purpose of electricity and its distribution and how much for other goods and services. In its submissions, the EDA concedes that at least some portion of the LPP Revenues came from good and services other than electricity distribution. Regardless of how small the amount was on any individual bill, in its aggregate it could be a significant amount. The Board must see some evidence of these amounts in order to determine how much, if any, should be recoverable from ratepayers. It is not enough to say, without evidence, that the number is small. Once an apparently non-recoverable amount is known to exist, the Affected Electricity Distributors are obliged to provide evidence as to that non-recoverable portion.

Specific Reply to THESL's Submissions

17. Most of THESL's submissions in response to the Notice of Motion are based on the premise that even if the documents were produced, and regardless of what the documents did reveal, it would be irrelevant to THESL's ability to recover from ratepayers. THESL provides no justification in law or in policy for why this would be the case. They have simply asserted it. SEC disagrees. Without such proper justification or authority, SEC submits that the Board should order that THESL provide the documents requested in Interrogatories.

18. THESL claims that SEC is attempting to raise an irrelevant question of "whether statutory mandated process of corporatization that THESL went through somehow provided for the transfer of liability". As discussed already in these submissions, SEC submits that the onus is on the Affected Electricity Distributors to provide evidence that they assumed these LPP liabilities upon transfer of assets from predecessor MEUs.

19. THESL's initial response to the Interrogatories makes reference to the matter having already been determined by the Supreme Court. Even though THESL provided no specific reference or citation to a Supreme Court of Canada decision, SEC submits that there has never been Supreme Court of Canada decision on the issue of recovery from ratepayers of the LPP class action or on the issue of liabilities between predecessor MEUs and the Affected Electricity Distributors.

Remedy

20. SEC realizes that its Interrogatories are requesting documents that might take significant time for the EDA to retrieve from the Affected Electricity Distributors, and once filed as evidence ultimately may only serve to confirm their claim that the LDCs have no one to look to but the ratepayers.

21. On the other hand, since the EDA has provided no evidence with respect to the issues raised by SEC in its Notice of Motion and this submission, the Board only has the unsupported assertions that the ratepayers are the only ones from whom the Affected Electricity Distributors can seek recovery. In doing so the EDA and THESL are attempting to shift the onus to the intervenors, and denying us access to the information we would require to challenge these claims.

22. Therefore, SEC requests that Board make an order requiring the EDA to provide the materials requested in SEC Interrogatories to EDA #3, 4, 5 and 6 and an order requiring THESL to provide the materials requested in SEC Interrogatories to THESL #2 and 3.

23. In the alternative, the Board could create a mechanism under which if recovery from ratepayers is ordered, each Affected Electricity Distributor seeking recovery in this generic proceeding must i) provide proof to the Board that they properly assumed pre-incorporation liabilities and, ii) provide copies of the general liability insurance policies in place at the time of exposure, both before any amount of the recovery is remitted to them.

All of which is respectfully submitted.