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January 31, 2011

**VIA MAIL and E-MAIL**

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
P.O. Box 2319  
2300 Yonge St.  
Toronto, ON  
M4P 1E4

Dear Ms. Walli:

**Re: Recovery of 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  
OEB File No: EB-2010-0295  
VECC's Final Submissions**

Please find enclosed the submissions of the Vulnerable Energy Consumers Coalition (VECC) in the above-noted proceeding.

Thank you.

Yours truly,

Michael Buonaguro  
Counsel for VECC  
Encl.

**ONTARIO ENERGY BOARD**

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

**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 are recoverable from electricity distribution rate payers, and if so, the form and timing of such recovery.**

**FINAL SUBMISSIONS**

**ON BEHALF OF**

**VULNERABLE ENERGY CONSUMERS COALITION (VECC)**

**January 31, 2011**

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**Vulnerable Energy Consumers Coalition (VECC)**  
**Final Argument**

**1 The Proceeding**

- 1.1 On October 29, 2010, the Ontario Energy Board (the “Board”) commenced a proceeding on its own motion to determine whether Affected Electricity Distributors should be allowed to recover from their ratepayers the costs and damages incurred as a result of the Minutes of Settlement approved on April 21, 2010 by the Honourable Mr. Justice Cumming of the Ontario Superior Court of Justice (Court File No. 94-CQ-50878) and as amended by addenda dated July 7, 2010 and July 8 (the “Minutes of Settlement”) in the late payment penalty class action (the “LPP Class Action”), and if so, the form and timing of such recovery.
- 1.2 In a Procedural Order issued on December 17, 2010, the Board confirmed the approved Issues List as follows:
1. As a threshold question, whether Affected Electricity Distributors should be allowed to recover from ratepayers the costs and damages incurred in the LPP Class Action; and
  2. If the answer to the first issue is yes, what would be an appropriate methodology to:
    - a) apportion costs across customer rate classes, and
    - b) recover such allocated costs in rates.
- 1.3 VECC’s submissions, which focus on Issue #2, are set out in the following sections.

**2 Apportionment of Costs to Customer Classes**

- 2.1 Two parties filed Evidence and Argument-in-Chief in the proceeding: i) the Electricity Distributors Association (the “EDA”) and ii) Toronto Hydro-Electric System Limited (“THESL”). In both its initial Evidence<sup>1</sup> and its Argument-in-Chief<sup>2</sup>,

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<sup>1</sup> Page 13

the EDA has taken the position the costs to be recovered by each distributor should be allocated to metered customer classes<sup>3</sup> on a per customer basis. In contrast, THESL has proposed that the amount to be recovered from customers be allocated to customer classes based on the historical percentages of Late Payment Revenue by rate class<sup>4</sup>.

2.2 The EDA's rationale for using a per (metered) customer approach appears to be two fold:

- This was the approach adopted in the Enbridge CASDA Decision<sup>5</sup>, and
- "LPP revenues, when received, were considered general revenues and were applied to mitigate the rates of customers. A per metered customer charge is a reasonable proxy for the apportionment of the Allocated Amount across all classes"<sup>6</sup>.

2.3 VECC has a number of concerns regarding the allocation methodology proposed by the EDA. First, it is clear from the Board's Enbridge CASDA Decision that the basis for accepting a per customer approach in allocating similar costs for Enbridge to customer classes was that "this allocation method reflects the allocation of the LPP revenues and is therefore appropriate"<sup>7</sup>. VECC submits that the precedent, if any, established by the Enbridge CASDA Decision is that the recovery should be allocated in the same manner as the revenues initially received were allocated to (and benefited) the various customer classes.

2.4 For all distributors except THESL, the exposure period for damages is from the end of 1998 to approximately mid-2001. In the case of THESL, the period is from 1994 to 2001<sup>8</sup>. Both the EDA and THESL have confirmed that the revenues from

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<sup>2</sup> Page 7

<sup>3</sup> In both documents there are places where the EDA makes to a per customer allocation/charge whereas in other places reference is made to a per metered customer charge. The EDA's response to Board Staff #7 (iii) confirms that the proposal is "per metered customer".

<sup>4</sup> THESL Evidence, page 2 and Argument-in-Chief, pages 3-4.

<sup>5</sup> EDA Evidence, page 13

<sup>6</sup> EDA Argument-in-Chief, page 7

<sup>7</sup> EB-2007-0731 Decision, page 13

<sup>8</sup> EDA Evidence, page 9

late payment penalty charges were used to reduce the revenue requirement from all customer classes<sup>9</sup>. However, VECC notes that the OEB's Cost Allocation methodology was not developed until after the end of the "exposure period" and the elimination of late payment penalties (LPP). In fact, during the actual exposure there was no established methodology (as there was for Enbridge) for allocating LLP revenues to customer classes. As a result, VECC submits, that the Enbridge CASDA Decision provides no justification for allocating the costs of the LLP Settlement to (metered) customer classes on a per customer basis.

- 2.5 VECC's second concern is with the EDA's proposal to only allocate the recovery to "metered" customers. The EDA's rationale for not allocating the recovery to all customer classes is that the LPP revenues from un-metered customers were nil or negligible and that un-metered classes represent a small proportion of the allocation of LLP-related revenue offsets<sup>10</sup>. In VECC's view it is totally inappropriate to allocate the recovery on the basis of how much each customer class "paid" in late payment penalties. Indeed, such an approach is counter-intuitive as it suggests that those who were deemed to be wrongfully treated in the first place should be allocated the "costs" the electricity distributors have now been order to pay in compensation.
- 2.6 Rather, in VECC's submission, the "costs" should be allocated to those who benefitted from distributors collecting LLP charges. Such an approach is also consistent with the rationale underlying the allocation approach adopted by the Board for Enbridge. The evidence provided<sup>11</sup> by both THESL and the EDA is that all customer classes benefitted and therefore, in VECC's submission, all customer classes should be allocated a portion of the costs. The fact that the costs that would be allocated to un-metered classes is small is function of the fact that they tend to represent a small portion of overall distribution revenues and costs. However, in VECC's view, this does not mean they should be absolved from sharing a portion of the amount to be recovered.

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<sup>9</sup> THESL Response to VECC # 1 b) & c) and EDA Response to VECC #1

<sup>10</sup> Board Staff #7 (iii).

<sup>11</sup> THESL Response to VECC # 1 b) & c) and EDA Response to VECC #1

- 2.7 THESL's proposal to allocate the amount to recovered to classes according to the historical percentages of Late Payment Revenue is on the basis that this parallels the allocation of late payment penalties<sup>12</sup>. VECC acknowledges that under the Board's current Cost Allocation methodology late payment charges are allocated to classes based on historical late payment revenues by class<sup>13</sup>. However, as noted above, this methodology was not adopted and used by electricity distributors in the province until well after the practice of levying LLP penalties had ceased. During the "exposure period" when LLP penalties were applied, there was no established methodology for allocating the revenues to customer classes.
- 2.8 The EDA has acknowledged<sup>14</sup>, and VECC agrees, that it would be impossible to in many cases to determine how LLP revenues were distributed over customer classes. As a result, VECC submits that since LLP penalty revenues were effectively used to offset the base distribution revenue requirement for all customer classes, the amount to be recovered should be allocated to (all) customer classes based on distribution revenues. As a result, the allocator would be the same as that generally used in the disposition of Account #1508.

### **3 Recovery From Customers**

- 3.1 Consistent with its approach on allocation to customer classes, EDA proposes that the recovery from customers be done using a per (metered) customer rate rider and effected over a 12 month period starting May 1, 2011<sup>15</sup>. The EDA claims that a per customer approach has the benefit of simplicity.
- 3.2 THESL suggests that a reasonable approach would be to set the recovery on a variable consumption basis, on the grounds that consumption correlates more closely with the total bill – which is the determinant of the LLP charge<sup>16</sup>. THESL also submits that, given its greater comparative recovery amount, it would be

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<sup>12</sup> THESL Evidence, page 2

<sup>13</sup> RP-2005-0317 Report, page 80

<sup>14</sup> EDA Argument in Chief, page 7

<sup>15</sup> EDA Argument in Chief, page 7

<sup>16</sup> THESL Argument in Chief, page 4

reasonable to establish a longer recovery period (two years was proposed).

- 3.3 Given that there was no specified methodology for assigning LLP revenues to customer classes during the exposure period, it is also fair to conclude that it would be impossible to determine the extent to which the offset was used to reduce the customer charges versus the volumetric distribution charge. Based on VECC's recommended approach to allocation, it would be reasonable to establish both fixed and volumetric rate riders based on the fixed variable split for each class. However, in the interest of simplicity, VECC acknowledges that the Board may wish to only set one rate rider.
- 3.4 If this is case, VECC submits that a volumetric based rate rider is comparable to a fixed (per customer) rate rider in terms of simplicity. However, VECC notes that in other instances where Distribution Revenues are used to allocate costs to customer classes (e.g., Account #1508) the rate rider is usually a variable charge. Given this precedent, VECC recommends the recovery of the costs allocated to each class be done on a variable basis.
- 3.5 VECC generally agrees with the EDA's proposal for a one year recovery period over the period May 1, 2011 to April 30, 2012. VECC also agrees that in circumstances such as THESL's a longer recovery period should be adopted.
- 3.6 The EDA proposes that any differences between the allocated amount and the amount billed to customers (together with any refund due to overestimation of the allocated amounts) should be recorded, interest calculated and the residual balance cleared upon expiry of the rate riders and finalization of the revenues. VECC generally agrees with this approach.
- 3.7 However, VECC notes that the amounts payable by each distributor are due on June 30, 2011<sup>17</sup> and that interest accrues after that point in time. VECC submits that any interest to be accrued on the amount recorded in the variance account as having been paid by the distributor should only be for the period after June 30,

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<sup>17</sup> EDA Evidence, Appendix B, page 10

2011. Furthermore, VECC submits that the LDCs should not be eligible to recover any interest charges assessed against them as a result of missing the June 30, 2011 payment deadline.

#### **4 Recovery of Reasonably Incurred Costs**

- 4.1 VECC submits that its participation in this proceeding has been focused and responsible and has provided ratepayer input to the review of the LRAM Claim.. Accordingly, VECC requests an award of costs in the amount of 100% of its reasonably-incurred fees and disbursements.

All of which is respectfully submitted this 31<sup>st</sup> day of January 2011