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BY EMAIL and RESS

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Ontario Energy Board
2300 Yonge Street
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Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2010-0295 --- Late Payment Penalties
Final Submissions of the School Energy Coalition

We are counsel for the School Energy Coalition ("SEC"). Please accept our final submissions with respect to the generic proceeding on the recovery of damages and costs related to the Late Payment Penalties Class Action.

Yours Truly,
JAY SHEPHERD P.C.

Originally signed by Mark Rubenstein

Mark Rubenstein

cc: Wayne McNally, SEC
Maurice Tucci, EDA
Alan Mark, Ogilvy Renault LLP
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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;

SUBMISSIONS OF THE SCHOOL ENERGY COALITION

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Representing the School Energy Coalition

1. Pursuant to Procedural Order # 3, these are the submissions of the School Energy Coalition (“SEC”) with respect to the evidence filled by the Electricity Distributors Association (“EDA) on behalf of the Affected Electricity Distributors, and the supplementary evidence of Toronto Hydro Electric Systems Limited (“THESL”).

Issue 1: Whether Affected Electricity Distributors Should Be Allowed to Recover from Ratepayers the Costs and Damages Incurred in the LPP Class Action?

2. As the Board stated clearly in the CASDA Decision, “the issue before the Board isn’t who is responsible for the wrongful acts; the issue is: are the costs recoverable from ratepayers.”¹ The Board first approved issue is actually two separate questions that need to be addressed. First, should the Affected Electricity Distributors be able to recover the damages and costs arising from the LPP Class Action from ratepayers, and second, if so, how much is the share of those damages and costs that the ratepayers should bear?

Should Recovery From Ratepayers Be Allowed?

3. SEC notes the fundamental unfairness of ratepayers being asked to reimburse the Affected Electricity Distributors, which unfairness has been expressed by the numerous comment letters received from the public. The plaintiff class in the LPP Class Action were ratepayers who were illegally charged LPPs by the Affected Electricity Distributes and their predecessors. Neither as a whole are the ratepayers being reimbursed directly for the LPPs charged, nor are the vast majority indirectly benefiting through the *cy pres* distribution of the Settlement.

4. For a substantial proportion of those charged LPPs, they are being asked to pay the cost of the Settlement of the action in which they were, as a member the plaintiff class, wronged but for which they will receive no compensation. The ratepayers and plaintiff class are worse off now than if the litigation had never occurred.

The Amount Sought For Recovery

5. If the Board decides that recovery from ratepayers should be allowed, it must still determine the amount. SEC submits that there are two bases on which deductions from the

¹ Decision in EB-2007-0731 at page 10.

amount of recovery should occur: a) other entities may have liability to reimburse the Affected Electricity Distributors for some or all of the costs, and b) some part of the costs do not relate to LPPs for electricity distribution billings.

a) Affected Electricity Distributors Should Seek Recovery From Other Entities

6. SEC submits that the amount that Affected Electricity Distributors should be able to recover should be reduced in cases where an LDC seeking reimbursement is able to recover from other entities. These entities may include but are not limited to:

- a) Predecessor MEUs who transferred assets to LDCs (typically municipalities), that due to the terms of the acquisition of the business retained certain liabilities or did not have them assumed fully by the LDCs;
- b) predecessor LDCs and former shareholders of predecessor LDCs that due to the terms of the acquisition by, or merger with, the successor LDC retained liabilities;
- c) Insurance Companies, which due to the terms of liability insurance policies then in place covered liability over the LPP Class Action.

7. While there is no doubt that the Affected Electricity Distributors named in the LPP Class Action are liable to the plaintiff class as outlined in the terms of the Settlement, this should have no effect on the obligation and ability of the Affected Electricity Distributors to recover these amounts first from other entities if possible. .

8. SEC recognizes the Decision with respect to its Motions in this proceeding. The Board found it unnecessary for each Affected Electricity Distributor seeking recovery to provide proof of properly assumed liabilities or to provide copies of its general liability insurance as a precondition for recovery.

9. While we understand the Board's Motion Decision in the context of the evidence that it wishes to see in this generic proceeding, SEC submits that the Board must, as a matter of both law and regulatory policy, put some conditions upon any recovery of funds by individual LDCs in this matter, i.e. a requirement to provide at least some evidence that there are no other entities

from which these Affected Electricity Distributors have a right to reimbursement. If not, then the onus will have shifted completely from the utilities to ratepayers.

b) Non-Electricity Good & Services Should Not Be Recoverable

10. SEC submits that a portion of the Settlement damages should not be recoverable from ratepayers at all, because not all of the LPPs were charged on electricity distribution rates.

11. In its submissions in response to SEC's Motion, the EDA stated, "[it] is evident, without referring to the historical bills, that only minuscule portion of the LPP Revenues could possibly have related to charges for goods and services other than electricity and its distribution". This statement confirms that some portion of the LPP revenues came from non-electricity goods and services. Even if the EDA's assertion is correct - that the amount was only a small portion of the overall LPPs charged, it could still be a material amount. Since it has nothing to do with electricity distribution, this amount should not be recoverable from ratepayers.

12. While SEC recognizes that its Motion to compel production of specific documents related to this issue was denied by the Board, there are still other methods to acquire an approximation of how much of LPPs were charged to non-electricity goods and services. SEC recommends that each of the Affected Electricity Distributors review its financial statements covering the period of exposure, and calculate the percentage of its gross revenues applicable to non-electricity goods and services. This should be relatively simple and easy to do, and would provide the Board with a proxy for the portion of the LPPs that did not relate to electricity distribution. Using this proxy information, the LDC should deduct the equivalent percentage from the money it seeks to recover from ratepayers.

13. Both of the above sub-issues involve the provision of additional evidence by Affected Electricity Distributors. The EDA and others, including perhaps the Board, could legitimately ask whether the time and effort involved in gathering, filing, and reviewing that additional evidence is worth the benefit in terms of increased precision in the outcome.

14. In 2005, the Board developed a practical policy in a similar situation where there was a need for effective, expedient and efficient process for recovery from a large number of distributors. In its letter to all electricity distributors dated July 15, 2005, the Board described its method for Final Recovery of Regulatory Assets. The Board allowed any distributor who wanted to recover 100% of their transition costs to do so, but they were required to undergo a comprehensive review process. For those who did not want to go through that process, they could undertake a minimum review but could only seek 90% of their costs.

15. SEC submits a similar system could be an option in this situation. If an individual Affected Electricity Distributor wants 100% recovery from ratepayers then it should provide to the Board i) all documents showing that all relevant liabilities were effectively transferred to the LDC, ii) a copy of the general liability insurance in place at of exposure, and iii) evidence showing that none of the LPPs applied to non-electricity distribution. In the alternative, if individual LDCs prefer, they can recover a predetermined lesser percentage without providing any further documentation to the Board.

Issue 2: What is the appropriate methodology to (a) apportion costs across rate class, and (b) recover such allocated costs in rates?

13. If the Board decides that the Affected Electricity Distributors should be allowed to recover all or a portion of the LPP damages and costs in rates, SEC does not object to the EDA's or THESL's proposed method of recovery from ratepayers through a fixed per-customer rate rider.

Costs

14. The School Energy Coalition hereby requests that the Board order payment of our reasonably incurred costs in connection with our participation in this process. It is submitted that the School Energy Coalition has participated responsibly in all aspects of the process, in a manner designed to assist the Board as efficiently as possible.

All of which is respectfully submitted.