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File No. 01009188-0006

Toronto, February 7, 2011

BY EMAIL AND COURIER

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

Dear Ms. Walli:

RE : In the Matter of a Proceeding Initiated by the Ontario Energy Board pursuant to a Notice of Proceeding dated October 29, 2010 – Reply Argument of the Electricity Distributors Association on Behalf of The Affected Electricity Distributors
Ontario Energy Board File No: EB-2010-0295

We are the solicitors for the Electricity Distributors Association (the "EDA").

Please find enclosed the Reply Argument of the Electricity Distributors Association on Behalf of The Affected Electricity Distributors.

Yours very truly,

Alan Mark

Alan H. Mark

AHM:il
Enclosures

cc. Jennifer Teskey

EB-2010-0295

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.

REPLY ARGUMENT OF THE ELECTRICITY DISTRIBUTORS ASSOCIATION ON BEHALF OF THE AFFECTED ELECTRICITY DISTRIBUTORS

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TO: Board Secretary
Ontario Energy Board
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Attn: Board Secretary, Kirsten Walli
Email: boardsec@oeb.gov.on.ca

NATURE OF PROCEEDINGS AND OVERVIEW

1. On October 29, 2010 the Ontario Energy Board (the "Board") issued a Notice of Proceeding on its own motion to determine (i) whether Affected Electricity Distributors (as defined in the Notice of Proceeding) should be allowed to recover from their ratepayers the costs and damages incurred in the late payment penalty ("LPP") class action ("LPP Class Action"), and if so, (ii) the form and timing of such recovery. This proceeding was commenced pursuant to sections 19 and 78(2) of the *Ontario Energy Board Act, 1998.*

2. The Board directed all Affected Electricity Distributors to collectively file evidence on these issues. On November 8, 2010, the Electricity Distributors Association (the "EDA") filed evidence on behalf of all Affected Electricity Distributors seeking recovery of their proportionate share of their costs and damages incurred in the LPP Class Action (the "Costs"). Toronto Hydro Electric System Limited ("THESL") filed supplemental evidence on November 12, 2010.

3. Pursuant to Procedural Order No. 3, the EDA and THESL filed Argument-In-Chief on January 26, 2011. Board Staff and intervenors filed submissions on the evidence and argument put forward by the EDA and THESL. Also pursuant to Procedural Order No. 3, the EDA makes these submissions in reply on behalf of all Affected Electricity Distributors, which address:

(a) the submissions of the School Energy Coalition ("SEC") with respect to the fairness of the Affected Electricity Distributors recovering costs and damages arising from the settlement from electricity ratepayers;

(b) the submissions of SEC regarding LPPs charged for services other than electricity distribution;

(c) the submissions of SEC regarding procedural options available to the Board with respect to determining the recoverable amounts for each Affected Electricity Distributor;

(d) the submissions of the Vulnerable Energy Consumer Coalition ("VECC") with respect to the nature of the rate rider to be applied; and

(e) the submissions of Donald Rennick that allowing the Affected Electricity Distributors to recover the Costs from ratepayers would effectively be "nullifying" the Court's ruling approving the settlement.

I. FAIRNESS OF RECOVERY OF THE AMOUNTS ARISING FROM THE SETTLEMENT

4. The EDA agrees that, overall, ratepayers will be worse off than if the LPP Class Action had never been brought. However, changing that fact is not a luxury that either the LDCs or this Board have. The EDA repeatedly asked the Plaintiffs and the Court to dismiss the action because of the absurdity of reimbursing late payers for the costs they imposed on other ratepayers. The fact that the litigation was allowed to proceed nonetheless is both not the fault of the LDCs and irrelevant to the question at hand.

5. SEC's other assertion, that the LPPs charged by the Affected Electricity Distributors were unjust, ignores the fact that these Costs were reasonably and prudently incurred by the Affected Electricity Distributors. They were incurred in connection with the LPP regime which was established by the Government of Ontario and imposed on utilities by binding regulatory directives, including rate orders of the Board. Moreover, the LPP revenues which were in dispute benefited ratepayers – not distributors - when they were received. As such, it is appropriate that the Costs be recovered from ratepayers. The greater injustice would occur if a regulated entity were not permitted to recover costs prudently incurred in compliance with a mandatory regulatory directive.

II. RECOVERY OF AMOUNTS RELATED TO ELECTRICITY DISTRIBUTION

6. SEC submits that Affected Electricity Distributors should not be permitted to recovery all of the Allocated Amount because not all of the LPPs necessarily related to electricity distribution.

7. The LPP revenues at issue in the litigation did not include LPP revenues from non-distribution businesses such as water. Whether they included *de minimus* LPP Revenues related to matters such as hot water heaters is irrelevant – those were lawful distribution functions at the time and those revenues reduced distribution rates. The fact that the electricity

distribution business has since changed such that these ancillary services do not form part of electricity distribution today should not prevent the Board from allowing recovery of these costs.

III. OPTIONS FOR SETTING RECOVERABLE AMOUNTS AND RATES

8. SEC asserts at paragraph 15 of its submissions that Affected Electricity Distributors who wish to recover 100 percent of the subject Costs should provide the Board with "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 [*sic*] of exposure, and iii) evidence showing that none of the LPPs applied to non-electricity distribution", or accept an arbitrarily reduced recovery.

9. In its decision of January 25, 2011, the Board made a determination in respect of item (i) above. SEC is bound by this determination. It is not clear what the SEC fails to understand here. If the LDCs were not responsible for some portion of the liability, that would have been a defence available in the settlement discussions. The amount of the settlement is already net of any such argument (without acknowledging that any such defence existed). The settlement reflects a proper settlement of the liability of the LDCs and does not include a settlement of the liability of any other entities.

10. In respect of item (ii) above, while the EDA supports the position that other avenues for the recovery of an Affected Electricity Distributor's respective portion of the Allocated Amount should be exhausted (such as through the prior recovery of legal costs through rates by THESL and insurance coverage, if any), such a process can be implemented quite simply by requiring each Affected Electricity Distributor in their next rate application to advise the Board whether such other avenues apply. To require each Affected Electricity Distributor to file the kind of evidence as suggested by SEC in order to be eligible for 100 percent recovery of their respective portion of the Allocated Amount will result in the Board being inundated with large volumes of documentation, when a simple declaration would suffice.

11. In respect of item (iii) above, the EDA opposes the need for such documentation for the reasons outlined in paragraph 6 above.

IV. THE RATE RIDER

12. In its submissions, VECC asserts that a volumetric rate rider should be applied by all Affected Electricity Distributors (as opposed to a fixed per customer rate rider) across all customer classes.

13. The variable charge approach is a much more complicated way of calculating recovery and is unnecessary given the relatively small amount sought to be recovered from customers. Having regard to the amounts in issue, the bill impact (generally under $.50 per month) and the benefits of simplicity, a per customer charge is appropriate. Furthermore, given that a variable charge would be based on usage, there would be potential for a much larger variance and it would be much more difficult for the Affected Electricity Distributors to track the variance.

14. In the case of THESL, where the bill impact would be more significant due to its proportionately larger liability because of circumstances unique to it, a different apportionment across customer classes or recovery on a volumetric basis may be appropriate.

V. THIS PROCEEDING HAS NO IMPACT ON THE COURT ORDER

15. Donald Rennick asserts at paragraph 1 of his submissions that allowing Affected Electricity Distributors to recover the Costs from ratepayers would effectively be "nullifying" or "overturning" the Court's ruling approving the settlement.

16. We rely upon our Argument-In-Chief. Further, the Minutes of Settlement in the LPP Class Action were filed with the Court in support of the motion wherein approval of the settlement was sought. The Minutes of Settlement specifically provided as follows:

> The plaintiffs acknowledge that the defendant class members will be making an application to the Ontario Energy Board to recover the cost of the settlement through rates. Plaintiff, Pichette and Griffiths, acknowledge in their personal capacities, not to oppose, or appeal to Cabinet, any rate orders sought by the defendant class members from the Ontario Energy Board with regards to amounts paid under this settlement or otherwise in connection with this litigation.

17. As such, it was known to the Court at the time that settlement approval of the LPP Class Action was granted that these proceedings would be brought before the Board by the Affected Electricity Distributors to seek recovery through rates. Furthermore, the fact that these proceedings have been brought is consistent with the Court-approved terms of the settlement. Rate recovery cannot "nullify" the settlement as it was specifically permitted by the settlement.

All of which is respectfully submitted this 7th day of February, 2011.