EB-2007-0744

THE ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Great Lakes Power Limited for an Order or Orders approving just and reasonable rates for the distribution of electricity.

NOTICE OF MOTION

Great Lakes Power Limited ("GLPL") will make a motion to the Ontario Energy Board (the "Board") at its offices at 2300 Yonge Street, at a time and date to be set by the Board. The motion is for a review of the Board's Decision and Order on Interim Rates dated December 20, 2007 in this proceeding (the Decision") and to calculate the average of any adjustment to rates in accordance with Ontario Regulation 442/01.

I. Relief Sought

The relief sought in this motion is for:

1. the Board to review and vary its Decision by ordering that GLPL's distribution rates be made interim as of September 1, 2007 (Section II below); and

2. the Board to calculate the average of any adjustment to rates approved by the Board for other distributors in 2007, in accordance with Ontario Regulation 442/01 (Section III below).

II. Motion to Review and Vary the Decision

A. Background

The Importance of Interim Rates

3. On August 31, 2007 GLPL filed its distribution rate application for approval of a 2007 revenue requirement and applicable rates (the "Application") on the basis of a 2007 forward test year. In its Application, GLPL requested that its current rates be made interim as of September 1, 2007 and that the proposed rates be made effective as of September 1, 2007 to permit partial recovery of its 2007 revenue requirement.

4. The timing of GLPL's rates becoming interim is extremely important to GLPL and its customers. If the Board makes GLPL's rates interim as of September 1, 2007, the Board would have the discretion to make its final order in this proceeding effective on September 1, 2007. If the Board makes its final order in this proceeding effective on September 1, 2007, the additional rural rate protection contemplated by Ontario Regulation 442/01 (as amended) (the "RRRP Regulation") and Ontario Regulation 445/07 (the "Reclassification Regulation") (collectively the "Regulations") would be available to GLPL's customers commencing on September 1, 2007.

5. As a result of the Reclassification Regulation, GLPL's customers (not including seasonal and street lighting customers) will be reclassified as residential rate-class customers for the purpose of fixing rates under section 78 of the *Ontario Energy Board Act, 1998* (the "OEB Act"), as of the date of GLPL next rate order. This reclassification will make GLPL's customers eligible for rural rate protection under the RRRP Regulation.

6. As indicated in GLPL's pre-filed evidence, the rural rate protection afforded by the Regulations will cause the distribution rates for GLPL's GS<50 and Large Customer B rate classes to decrease. Dubreuil Forest Products Ltd. ("DFP") is GLPL's largest customer and is the only customer in GLPL's Large Customer B rate class. Rate impacts for the other classes are minimal. If GLPL's rates are made interim as of January 1,

2008, GLPL's GS<50 and Large Customer B rate classes will lose the benefit of the rural rate protection from September 1, 2007 to December 31, 2007 as proposed by GLPL.

7. As set out in the affidavit of Mark Faught at Appendix "A" attached, a delay in making GLPL's rates interim until January 1, 2008 would result in DFP having to pay an additional $124,000.

8. With respect to GLPL, GLPL will, as a result of the Board establishing interim rates as of January 1, 2008, be precluded from the opportunity to recover approximately $1.7 million of a deficiency of approximately $8 million in 2007.

B. Grounds for the Motion to Review and Vary the Decision

i) Pre-Judgement of Effective Date

9. The date that GLPL's rates become interim will be the earliest date that the Board will have the jurisdiction to make GLPL's final rates effective. This principle was acknowledged by the Board in RP-2005-0020/EB-2007-0016 (Erie Thames):

> The Board has the legal authority to set the effective date at any time from the date rates were set interim forward.

10. Therefore, if the Board chooses a January 1, 2008 interim rate date, it will not be able to consider effective dates that pre-date January 1, 2008 during the course of this proceeding.

11. The Board in its Decision provided that as part of this proceeding, it will make a determination of the effective date for GLPL's final rates as at January 1, 2008 or as at a later date:

> The Board will render its decision on Great Lakes' proposed new rates in 2008. At that time, it will determine if those new rates should be effective as at January 1, 2008 or as at a later date.

12. During the course of a proceeding, all of the parties should have the opportunity to make submissions on the appropriate effective date for of the Board's final order. In this proceeding, some parties may argue that the effective date should be later than January 1, 2008, while others, such as GLPL and DFP, may argue that the effective date should pre-date January 1, 2008.

13. By choosing an interim rate date of January 1, 2008 at this stage of the proceeding, prior to entertaining any submissions from parties on an appropriate effective date, the Board is pre-judging any arguments that may be made by parties who support a pre-January 1, 2008 effective date.

14. GLPL respectfully reminds the Board of its decision in the Erie Thames proceeding (please see reference above) where it stated:

> The effective date that the Board selects will be determined after a consideration of all the relevant circumstances.

15. The Board did not consider all of the relevant circumstances for an effective date when it limited the effective date to January 1, 2008 or later by deciding to make GLPL's rates interim on January 1, 2008.

16. GLPL submits that such pre-judgement in the absence of submissions by the parties and therefore without consideration of all of the relevant circumstances for an effective date is unfair.

17. As stated above, DFP will have to pay an additional $124,000 and GLPL will forego approximately $1.7 million of revenue requirement as a result of the Board's Decision. In light of the significant financial implications associated with the Board's Decision, the Board should vary the Decision by making GLPL's rates interim as of September 1, 2007, and give all parties the opportunity to make submissions on an effective date during the course of the proceeding.

ii) The Board's Interpretation of the Reclassification Regulation

18. According to the Decision, the Board's assessment of GLPL's request for interim rates commencing September 1, 2007 included a consideration of the implications of issuing an interim rate order on the timing of the rate reclassifications required by the Reclassification Regulation. Subsection 1(3) of the Reclassification Regulation provides that the rate reclassifications set out in subsection 1(1) "take effect on the date of the distributor's next rate order made on or after August 15, 2007."

19. In the Decision, the Board stated:

> The Board panel's view of that section is that the relevant date is the effective date of the Board's final rate decision. That date will be determined and communicated in 2008 as part of the Board's final rate order. **In the panel's view neither the date of the release of an interim order nor the date that current rates are declared to be interim are dates that are relevant for the purpose of section 1(3) of Regulation 445/07.** [emphasis added]

20. It appears from this statement that the Board has concluded that an order making GLPL's rates interim as of September 1, 2007 is unrelated to (and therefore will have no impact on) the timing of the availability of rural rate protection for GLPL's customers. If this is the Board's conclusion, GLPL submits that this conclusion is incorrect. The date that the

Board makes GLPL's current rates interim is directly relevant to the availability of the rural rate protection under subsection 1(3) of the Reclassification Regulation.

21. Subsection 21(7) of the OEB Act gives the Board the power to make interim orders pending the final disposition of a matter before it. Accordingly, the Board can make a final order effective prior to the date a final order is issued.

22. Therefore, if the Board were to make GLPL's rates interim as of September 1, 2007, the Board would have the discretion to make the effective date of the final rate order in this proceeding September 1, 2007. If the effective date of the Board's rate order were September 1, 2007, the reclassification described under Reclassification Regulation and rural rate assistance under the RRRP Regulation would also take effect on September 1, 2007.

23. Because the timing of GLPL's rates becoming interim is relevant for the purposes of section 1(3) of the Reclassification Regulation, GLPL requests that the Board reconsider its denial of GLPL's request that its rates be made interim as of September 1, 2007.

iii) Reasons for Decision

24. If the Board's Decision to make GLPL's rates interim as of January 1, 2008 was unrelated to the timing of subsection 1(3) of Reclassification Regulation 445/07, then GLPL submits that the Board has not provided reasons for its decision to deny GLPL's request that its rates be made interim as of September 1, 2007, and requests that the Board do so in accordance with the *Statutory Powers Procedure Act*.

25. Whatever the Board's reasons may be for denying GLPL's request that its rates be made interim as of September 1, 2007, GLPL submits that the Board should reconsider those

reasons in light of the customer prejudice (described above and in the affidavit of Mark Faught) that would occur as a result of GLPL's rates being made interim as of January 1, 2008.

26. Further, GLPL submits that the Board should reconsider its reasons in light of the purpose of subsection 21(7) of the OEB Act, which is to prevent an applicant (and in this circumstance customers) from being prejudiced by the duration of a proceeding. This concept was explained by the Supreme Court of Canada in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)* [1989] S.C.J. No. 68:

> Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are **granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings.** Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order. [emphasis added]

27. A significant amount of time has passed since GLPL filed its Application. The chronology of this proceeding to date can be summarized as follows:

August 2, 2007:	Regulation 445/07 was filed and came into effect
August 31, 2007:	GLPL filed its Application
September 10, 2007:	The Board issues a Letter of Acknowledgement to GLPL in which it indicated that it expected a decision and/or order to be rendered on or about June 6, 2008
October 4, 2007:	The Board issued its Letter of Direction to GLPL
October 5, 2007:	GLPL notified the Board of certain errors in the Board drafted Notices of Application

October 18, 2007:	The Board issued a subsequent Letter of Direction, including the revised French and English Notices of Application
October 25, 2007:	Copies of both the French and English Notices of Application are published in the Sault Star
December 20, 2007:	The Board's Decision to make GLPL's rates interim as of January 1, 2008 was released
January 7, 2008:	Procedural Order No. 1 is issued.

28. The Board acknowledged in its letter dated September 10, 2007 that it estimated that a decision and/or order would be rendered in June of 2008. At that time, the Board could have made GLPL's rates interim with the foresight that it would take approximately 10 months to render a decision. Unfortunately, the January 1, 2008 date for GLPL's rates becoming interim is more in line with the typical six month period prescribed by the Board for a rates proceeding and not a ten month period of which four months have already elapsed.

29. GLPL understands that the Board has recently been processing numerous rate applications and that procedural errors and delays can occur. However, more than four months have passed since GLPL filed its Application, and Procedural Order No. 1 has just been issued. GLPL has not contributed to this delay in any way whatsoever. GLPL submits that it is unnecessary for GLPL and customers like DFP to be prejudiced by such delays, which would be the outcome if GLPL's rates are made interim as of January 1, 2008, as opposed to September 1, 2007.

30. Accordingly, GLPL requests that the Board avoid this unnecessary prejudice by exercising its discretionary interim rate-setting powers under subsection 21(7) and making GLPL's rates interim as of September 1, 2007.

iv) The Board's Statutory Objectives

31. Section 1 of the OEB Act states that

> (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:
> 1. To protect the interests of consumers with respect to prices...

32. As set out above and in the affidavit of Mark Faught, the Board's Decision to make GLPL's rates interim on January 1, 2008 will result in DFP having to pay an additional $124,000.

33. GLPL submits that by denying its request for rates to be made interim on September 1, 2007, the Board is causing financial harm to DFP contrary to the Board's statutory obligation to protect consumers with respect to prices.

v) Natural Justice

34. GLPL was included on the Board's April 4, 2007 proposed list of distributors to be rebased for 2008 rates (EB-2006-0330). GLPL requested that it be permitted to file an application based on a 2007 test year instead of a 2008 rebasing. By letter dated May 7, 2007 the Board approved of GLPL filing on the basis of a 2007 forward test year. Specifically, the Board stated in its May 7, 2007 letter:

> Following consideration of the comments set out in your letter, the Board has decided to remove GLPL from the list. This decision is made on the understanding that GLPL will file a forward test year rate application for 2007

based on the Board's November 14, 2006 *Filing Requirements for Transmission and Distribution Rate Applications.*

35. As required by the Board, GLPL's Application followed the Board's *Filing Requirements for Transmission and Distribution Applications*. GLPL's Application was based on a 2007 forward test year.

36. By making GLPL's rates interim as of January 1, 2008, the earliest that the Board may make a final rate order effective in this proceeding is January 1, 2008. Therefore, GLPL submits that the Board has changed GLPL's Application from a 2007 forward test year application, on the basis of which a 2007 revenue requirement was sought, to an historic test year application that eliminates the opportunity to recover any of GLPL's 2007 revenue requirement.

37. The effect of the forgoing is that the Board has denied GLPL's Application without a hearing. Prior to the Decision being issued, GLPL was not provided an opportunity to comment on or file submissions related to this significant departure from its Application. Accordingly, GLPL respectfully submits that the Decision is unfair and violates the rules of natural justice. For this further reason, GLPL requests that the Board reconsider the Decision to deny its Application for 2007 rates.

III. Motion to Calculate the 2007 Average of Rate Adjustments

38. Under subsection 4(3.1) of the RRRP Regulation, the amount by which forecasted revenue requirement exceeds the forecasted consumer revenue is the amount of rate assistance available to be paid to the distributor. Forecasted consumer revenue is based

upon the average, as calculated by the Board, of any adjustment to rates approved by the Board for other distributors for the same rate year.

39. At the time of filing its application, GLPL was not aware of a published average distribution rate adjustment for 2007. As a result, for illustrative purposes GLPL used a 5% average adjustment in its pre-filed evidence.

40. GLPL requests that the Board calculate the average of any adjustment to rates approved by the Board for other distributors in 2007. This information is required as soon as possible so that GLPL can revise its pre-filed evidence to accurately reflect the proposed rate impacts on consumers.

41. GLPL submits that it would be helpful to intervenors and Board staff if they could review GLPL's revised pre-filed evidence prior to January 18, 2007 when their interrogatories are due.

IV. Supporting Evidence

The following documentary evidence will be relied upon for these motions:

1. the affidavit of Mark Faught;
2. GLPL's Application and pre-filed evidence; and
3. such further evidence as counsel may advise and the Board permit.

All of which is respectfully submitted this 9th day of January, 2008.

GREAT LAKES POWER LIMITED

By its Counsel

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TO: All Parties in EB-2007-0744

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AFFIDAVIT OF MARK FAUGHT

I, Mark Faught, of the City of Sault Ste. Marie, **MAKE OATH AND AFFIRM**:

1. I am the Business Controller at Great Lakes Power Limited ("GLPL") and, as such, have knowledge of the matters herein deposed to.

2. As set out at Exhibit 8, Tab 1, Schedule 6 of GLPL's pre-filed evidence, the rates proposes by GLPL would result in a 17.4% decrease for GLPL's Large Customer B rate class. Dubreuil Forest Products Ltd. ("DFP") is the only customer in this rate class.

3. Based on my calculations, the proposed rate adjustment would amount to a savings for DFP of approximately $124,000 from September 1 to December 31, 2007.

4. If GLPL's rates are made interim on January 1, 2008 instead of September 1, 2007, GLPL will not be able to recover its incremental revenue requirement from September 1, 2007 to January 1, 2008. This will result in GLPL foregoing approximately $1.7 million of its revenue requirement.

SWORN BEFORE ME at the City of Sault Ste. Marie, in the Province of Ontario this 9 day of January, 2008.	))))	
Carol Spadoni	))	Mark Faught
A Commissioner for taking Affidavits.	)	

Carol Lynn Spadoni, a Commissioner, etc., District of Algoma, for Laidlaw, Paciocco, Melville, Barristers and Solicitors. Expires February 1, 2008.