

# AIRD & BERLIS LLP

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June 8, 2011

BY COURIER, RESS AND EMAIL

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
27th Floor, Box 2329  
Toronto, ON M4P 1E4

Dear Ms. Walli:

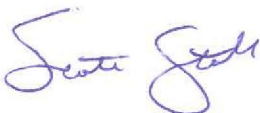
**Re: Ontario Waterpower Association  
Submissions in Motion to Review  
Board File No.: EB-2011-0212**

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Pursuant to Procedural Order No. 1, please find attached a copy of the submissions of the Ontario Waterpower Association.

Yours truly,

AIRD & BERLIS LLP



Scott A. Stoll

SAS/hm  
Encl.

cc: Vincent J. DeRose  
Mark C. Graham  
Miriam Heinz  
Paul Clipsham  
Paul Norris  
M. Engelberg

**ONTARIO WATERPOWER ASSOCIATION**

**REQUEST FOR A REVIEW AND VARIANCE OF THE  
BOARD'S DECISION IN EB-2011-0067**

**SUBMISSIONS OF THE APPLICANT**

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**June 8, 2011**

## **ONTARIO ENERGY BOARD**

**IN THE MATTER** of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B;

**AND IN THE MATTER** a request for an order(s) pursuant to section 74(1)(b) amending the distribution license of Hydro One Networks Inc. to provide an exemption from compliance with sections 6.2.4.1(e) and 6.2.18(a) of the Distribution System Code in respect of waterpower generating facilities;

**AND IN THE MATTER OF** a Motion by the Ontario Waterpower Association pursuant to the Board's Rules of Practice and Procedure for a review by the Board of its decision in EB-2011-0067 dated May 5, 2011

## **SUBMISSIONS OF ONTARIO WATERPOWER ASSOCIATION**

### **Introduction**

- 1) These are the submissions of the Ontario Waterpower Association (the "OWA") in respect of the motion as set out in Procedural Order No. 1, dated June 1, 2011.
- 2) The motion deals with the exclusion of four projects from the benefit of the Decision of May 5, 2011. Those projects are the North Bala Small Hydro Project (Proponent: Swift River Energy LP), Marter Twp., Cascade and McPherson (Proponent: Xeneca Limited Partnership). The OWA has requested that the Board review its Decision to exclude paragraph 7 of the requested relief which would have permitted these 4 projects to benefit from the revised payment schedule approved by the Board for the remaining 24 projects included in the Application.
- 3) The OWA submits that these four projects:
  - a) were subjected to the same development process as the other 24 projects included in the Application;
  - b) are located on Crown land and within the capacity restrictions approved by the Board (not greater than 10MW) in the preamble; and

- c) merely had the misfortune of receiving the Connection Cost Agreement slightly earlier than the other 24 projects.
- 4) Further, the OWA understands that a proponents' ability to pay was not a determinative factor in the granting of the requested relief and, as such, that should not have precluded these projects from receiving the requested relief.
- 5) On March 23, 2011, the OWA provided further submissions to the Board to the effect that the request for interim relief was to avoid the potential for irreparable harm that could arise in the situation where interim relief was not provided and the allocated capacity was removed. In the present situation, the developers could make the payment (hopefully for a temporary period until a decision was rendered), and did make the payment. The developers, Xeneca and Swift River, could not submit to the Board that the financial hardship was so great that it precluded the payment of the 100% deposit. Irreparable harm was avoidable, at least in the short term, by the developer executing the document and making the payment.
- 6) For two of the four projects, North Bala Small Hydro Project and Marter Twp, the developers executed the agreements prior to the filing of the Application with the Board on March 10, 2011. It did not seem appropriate in such an instance to pursue the requested interim relief rather – it was felt to be more appropriate to permit the Board to finally determine the outcome of the Application given the compressed schedule and deal with the changes, if any, to the Connection Cost Agreement once.
- 7) The situation for the other two projects, Cascade and McPherson, was similar but slightly different. For Cascade and McPherson, the requirement to execute was after the filing of the Application but prior to the March 30, 2011 response from the Board. Further, for these two projects, the amount of the deposit was significantly smaller than many of the other deposits being required.
- 8) As noted during the oral testimony by Mr. Chan, in respect of the 3 Xeneca projects that form the basis of this motion, the requirement to execute the Connection Cost Agreement and pay Hydro One the 100% connection cost deposit occurred prior to appearing before the Board and prior to the March 30, 2011 response from the Board which dealt with the

original request for interim relief. The payment was made as a protective measure to ensure the capacity allocation was not lost. [Tr. May 4, 2011, p. 93, ll. 16 to 26]. The same rationale would apply for North Bala Small Hydro Project.

- 9) It was also noted by the OWA that a developer does not have publicly available information regarding the capacity allocation. Therefore, the developer pays the required deposit or becomes exposed to an unknown risk regarding the removal of the capacity allocation. The OWA submits the developers acted in a reasonable manner given the circumstances and that these projects should not be denied the benefit of the May 5, 2011 Decision.

**All of which is respectfully submitted.**

Dated: June 8, 2011



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Association