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May 13, 2015

**Delivered by RESS, Email and Courier**

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
Suite 2701  
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Submissions regarding proposed issues list  
North Bay Hydro Distribution Ltd. ("NBHDL")  
Board File No. EB-2014-0099**

NBHDL makes these written submissions pursuant to Procedural Order No. 2 dated May 12, 2015 in EB-2014-0099 in reply to the submissions of Mr. Rennick on behalf of the North Bay Taxpayers Association (hereinafter referred to as "Mr. Rennick") regarding a proposed addition to the draft issues list attached as an appendix to the Procedural Order.

Mr. Rennick has requested that a new issue be added to the approved issues list to address an alleged rounding error in the 2010 load forecast for the GS 3,000 - 4,999 kW rate class.

NBHDL does not agree with the addition of this issue for a number of reasons.

First, Mr. Rennick has failed to demonstrate that the issue could be material. The materiality threshold for this application is \$65,000. Mr. Rennick has indicated that his concern relates to an alleged "overcharging" of customers in the GS 3,000 - 4,999 kW rate class of approximately \$20,000 over 2010-2015 for each of the two customers in that class.<sup>1</sup>

Second, Mr. Rennick's concern relates to an alleged error that occurred in the load forecast model that was used to set just and reasonable rates in EB-2009-0270 which, as noted in response to 3-NBTA-28, is not relevant to the matters at issue in this application. Furthermore, NBHDL does not accept Mr. Rennick's characterization of this requested addition to the proposed issues list as an error. It is NBHDL's position that in fact, no error occurred.

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<sup>1</sup> NBHDL Interrogatory 3-NBTA-28.

On May 7, 2015, Board staff advised Mr. Rennick that generally speaking, an application for new rates (such as the case for North Bay Hydro's current rate application) deals with the costs a utility expects to incur during the new rate year (in this case 2015). Absent special circumstances, the Board does not typically use a rates application to review or adjust rates from the past. A rate hearing is usually a forward looking exercise.

NBHDL agrees with Board staff in this regard. Adding the requested issue would permit discovery into all aspects of the 2010 rate application, greatly increasing the cost and scope of this proceeding without eliciting facts that would help the Board make a better determination on this Application for 2015 distribution rates.

Going back to analyze the purported "error" from 2010, as Mr. Rennick requests, is also contrary to the principle of no-retroactive rate making espoused by the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 (along with several other decisions). For the benefit of Mr. Rennick, whom we understand is not a lawyer, we have attached as Appendix "A" some highlights from relevant court decisions articulating the principle.

The rule against retroactive ratemaking has a distinct purpose and rationale. A utility must be able to rely on final decisions and orders of the Board to have revenue certainty in order to be able to plan its investments. If the revenue requirement is subject to change this is impossible. In other words, a utility must be able to rely on a Final Order and the revenues that flow from the Final Order unless there is clear notice that this is not the case. NBHDL received no such notice as it relates to the EB-2009-0270 final rate order. In addition, the rule against retroactivity helps to avoid intergenerational equity problems.

Mr. Rennick is not suggesting that NBHDL failed to charge the rates that were set by the Board in EB-2009-0270. Rather, Mr. Rennick appears to be saying that the rates established in EB-2009-0270 were calculated incorrectly based on an alleged error in a load forecast model.

Rates were established in the EB-2009-0270 case on the basis of the Board's acceptance of a March 26, 2010 settlement agreement. In that settlement, four intervenors (including Mr. Rennick) and NBHDL came to a complete settlement on, among other things, the proposed load forecast and methodology. Mr. Rennick is now trying to re-open a matter that was previously settled. NBHDL respectfully requests that the Board enforce the terms of the March 26, 2010 settlement agreement by barring the addition of the issue in this proceeding.

Finally, NBHDL submits it has never knowingly deceived or purposefully confused any customer, and specifically not the customer identified in Mr. Rennick's submissions. NBHDL has

at all times conducted itself ethically, professionally and within the Board's Rules of Practice and Procedure.

Yours very truly,

**BORDEN LADNER GERVAIS LLP**

Per:

*Original signed by James Little per John A.D. Vellone*

John A.D. Vellone

cc: Todd Wilcox, Cindy Tennant, Melissa Casson and Matthew Payne, NBHDL  
Parties in EB-2014-0099

TOR01: 5929850: v1

## **APPENDIX “A”**

The following is a selection of paragraphs pulled from relevant decisions before the courts and the Ontario Energy Board regarding the issue of retroactive ratemaking (in the context of utilities and other rate controlled industries).

### **Relevant decisions of the Courts**

***ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board, 2006 SCC 4.***

**71.** From my discussion above regarding the property interest, the Board was in no position to proceed with an implicit refund by allocating to ratepayers the profits from the asset sale because it considered ratepayers had paid excessive rates for services in the past. As such, the City's first argument must fail. The Board was seeking to rectify what it perceived as a historic over-compensation to the utility by ratepayers. There is no power granted in the various statutes for the Board to execute such a refund in respect of an erroneous perception of past over-compensation. It is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates (*Northwestern 1979*, at p. 691; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705 (Alta. C.A.), at p. 715, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc.* (C.A.), at pp. 734-35). But more importantly, it cannot even be said that there was over-compensation: the rate-setting process is a speculative procedure in which both the ratepayers and the shareholders jointly carry their share of the risk related to the business of the utility (see MacAvoy and Sidak, at pp. 238-39).

***Beau Canada Exploration Ltd. v. Alberta (Energy and Utilities Board) [2000] A.J. No. 507 (C.A.)***

A fundamental principle of statutory interpretation is that retrospective power can only be granted through clear legislative language. This principle is based on notions of fairness and the reliability of expectations.<sup>1</sup>

***Northwestern Utilities Ltd. v. Edmonton (City), (1979) 1 S.C.R. 684 at 699.***

It is clear from many provisions of The Gas Utilities Act that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered under rates established for past periods.

### **Relevant decisions of the Ontario Energy Board**

***Kingston Hydro Corp. (Re), 2011 LNONOEB 183.***

**32** The Board agrees with the submissions of intervenors and Board staff and finds that restatement of historical rate base is not appropriate for cost of service applications. The Board

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<sup>1</sup> Note from EB-2005-0031 - The Ontario Energy Board Act, 1998 does not contain any provisions that deal specifically with retroactive ratemaking, and the Board is therefore not empowered to alter a final rate order retroactively.

accepts the submissions of Board staff in this case, that the application filing requirements are forward looking and are meant to outline the rate setting methodology for future test years, not to be used to retroactively adjust past years.

***COLLUS Power Corp. (Re), 2010 LNONOEB 42.***

**76** With respect to the \$66,410 relief amount associated with revenue loss for the period November 1, 2009 to April 30, 2010, and as COLLUS' application has not been accepted of a Z factor type, the Board denies this part of COLLUS' application. Given the timing of the application and the time that is required for its assessment, any relief provided in respect of the 2009 rate year would be retroactive ratemaking. The Board is on record that it does not endorse retroactivity. The Board finds no compelling reasons to deviate from this principle and general practice in this case.

***Enbridge Gas Distribution Inc. (Re), 2007 LNONOEB 44.***

**267** The prospect of retroactivity is always problematic for the Board. To be clear, having declared the Company's interim effective January 1, 2007, the effective date for the new rates in not a legal issue in this case. The Company can in this case request and the Board can grant an effective date of January 1, 2007. Rather, the issue of retroactivity is one of rate impacts and customer acceptability. The Board has stated numerous times that it does not endorse retroactivity, regardless of how the monies are recovered. The Board has attempted to work with the utilities and other parties so that retroactivity can be avoided. Some progress was made in recent years but now that progress appears to have been stalled.

***Union Gas Limited (Re), 2005-0211/2006-0081***

The principle behind the prohibition on retroactive rate making is that rates are presumed to be final, and just and reasonable until altered. Parties are entitled to assume they are final unless there is a clear exception.

***Great Lakes Power Limited (Re), EB-2005-0031***

Therefore we are of the view that changing rates prior to April 1, 2005 would be retroactive ratemaking. As the Board has stated in numerous cases, the Board does not endorse retroactive ratemaking. The Board must be mindful of the negative implications of retroactive rates. When investors and consumers cannot be assured that final rates are indeed final, the resultant risks increases costs for everyone. In addition, intergenerational inequities arise, with today's consumers paying the costs of past events. In this case, it is not appropriate for either the utility or its ratepayers to bear the implications of a retroactive rate change. To burden the utility would be contrary to the regulatory compact. To burden the ratepayers would be wrong, especially given the length of the retroactivity.

***West Coast Huron Energy Inc. (Re), 2006 LNONOEB 8, EB-2004-0513***

**55** The [Ontario Energy] Board abhors retroactive ratemaking.

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