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July 29, 2016

VIA COURIER, EMAIL AND RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Application by Grimsby Power Inc. ("GPI") for electricity distribution rates
beginning May 1, 2016
Board File No.: EB-2015-0072**

We are counsel to Niagara Peninsula Energy Inc. ("NPEI"), in the above noted proceeding.

Please find enclosed the Responding Submissions and Brief of Authorities of NPEI dated July 29, 2016.

If there are any questions, please contact the undersigned.

Yours very truly,

AIRD & BERLIS LLP



Pec:

Scott Stoll

SAS/ar

cc: Doug Curtiss, Grimsby Power Inc. (via email)
Paul Blythin, NPEI (via email)
James Sidlofsky (via email)
Intervenors (via email)

Encl.

26818428.1

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, 3 Schedule B, as amended (the “OEB Act);

AND IN THE MATTER OF an Application by Grimsby Power Incorporated under Section 78 of the *Ontario Energy Board Act, 1998* for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of May 1, 2016.

**RESPONDING SUBMISSIONS OF
NIAGARA PENINSULA ENERGY INC.**

July 29, 2016

Scott Stoll
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Counsel for Niagara Peninsula Energy Inc.

1. Niagara Peninsula Energy Inc. (“NPEI”) is a licensed electricity distributor and the sole member of the new Embedded Distributor class proposed by Grimsby (“Grimsby”). Under the original Application, the revenue requirement for Grimsby was \$6,574,945¹ and for the Embedded Distributor class was \$543,909² which was reduced pursuant to the Settlement Agreement to \$6,401,246³ and \$400,469⁴ respectively.
2. The Settlement Agreement settled some but not all issues. The oral proceeding involved three outstanding issues: (a) Operations, Maintenance & Administration costs; (b) PILs; and (c) the effective date of rates.
3. For the reasons provided herein, NPEI requests the Board: (a) reduce the OM&A by \$710,817 to \$3,214,546; (b) require Grimsby to apply the loss-carry forward of \$391,821 from NWTC to reduce rates; and (c) set rates effective no earlier than September 1, 2016 and no later than October 1, 2016.

Operations, Maintenance & Administration costs

4. Grimsby applied for a 2016 Test Year rebasing and acknowledges it did not apply for a Custom IR.⁵ Despite saying there were no deviations from the Board’s application requirements for such rebasing,⁶ Grimsby further acknowledged that it did in fact deviate with its use of “normalized” staffing levels for the period from 2016 to 2020 to account for additional positions, succession planning that would occur over that time period.⁷
5. Grimsby has sought recovery of \$3,925,363⁸ for OM&A which is a significant increase over the 2012 Board approved OM&A of \$1,521,624 and the amount actually spent in 2015 of \$2,918,395. In response to Undertaking J1.1 (Revised), Grimsby indicated its revised forecasted spend on OM&A was \$3,733,648.⁹ It did not however reduce its request of the Board.

Niagara West MTS

6. On October 1, 2015, Grimsby and NWTC merged to form a single entity. NPEI submits it is important to understand the changes in OM&A that are not related to the Niagara West MTS Station and the responsibilities of the former NWTC. From the evidence, Grimsby incurred \$64,576 for the three-month period in 2015 and is forecasting OM&A for 2016 to

¹ EB-2015-0072, Exhibit 1, Table 1-3, page 20 of 122.

² Grimsby SettlementP_Detailed_CA_Model_Run1.XLSM filed December 23, 2015.

³ Proposed Settlement Agreement, Grimsby_SettlementP_2016_Rev_Reqt_Work_Form_V6_20160624.XLSM, Tab “Utility Income”.

⁴ Grimsby SettlementP_Detailed_CA_Model_Run3.XLSM filed June 24, 2016.

⁵ EB-2015-0072, Tr. Vol. 1, July 13, 2016, page 114, lines 22-27.

⁶ EB-2015-0027, Exhibit 1, page 5 of 122, Lines 18 and 19.

⁷ EB-2015-0072, Tr. Vol. 1, July 13, 2016, page 115, line 1, to page 116, line 10.

⁸ EB-2015-0072, Exhibit 1, Page 20 of 122, Table 1-3.

⁹ EB-2015-0072, Undertaking J1.1 (Revised), July 21, 2016, page 3 of 10, Table 1

be \$217,738 related to the Niagara West MTS.¹⁰ Further, in EB-2010-0345 the Board approved OM&A of \$210,000 for NWTC related to the Niagara West MTS.¹¹ Given the relative stability of the OM&A costs for the Niagara West MTS, NPEI has no concerns about such expenditure levels.

7. Removing the additional costs associated with OM&A related to the Niagara West MTS (the former NWTC asset) still leaves almost a 30% increase for the 2016 Test Year as opposed to 2015 Actuals. Clearly, such an increase would require very detailed evidence regarding the immediate need for such increased costs to create a compelling justification for such an increase. In NPEI's submission, the evidence of Grimsby is that it is meeting its performance metrics¹² and there is no evidence that it is in immediate danger of falling below the acceptable level of such metrics. Mr. Curtiss indicated that the worst performing metric had deteriorated but was still meeting the Board's requirements.

	2012 OM&A	2015 OM&A	2016 OM&A
OM&A Grimsby	\$1,521,624	\$2,918,395	\$3,925,363
OM&A related Niagara MTS	\$0	\$64,576	\$217,738
Non-NWTC	\$1,521,624	\$2,853,819	\$3,707,625

Employee Additions and FTEs

8. Grimsby included normalized costs for 4.02 new FTE equivalents positions and a further 2.20 positions as a result of retirements and succession planning.¹³ It further indicated that in respect of the additional positions and filling of vacancies that the not-normalized forecast for all of these positions was \$298,223 and that the normalized forecast included in the Application was \$947,100. This means Grimsby's actual labour in the 2016 Test Year will be \$648,877 (= \$947,100 - \$298,223) less than requested in the Application. Given the Board's Rate Handbook and Grimsby's selection of a 2016 Test Year, NPEI is of the view that normalizing the labour force is not appropriate in the present circumstances.
9. Grimsby provided a breakdown on non-labour expenditures that differed from forecast. This represents a further reduction of \$61,940.¹⁴ Given this is a material¹⁵ amount NPEI submits it is appropriate to reduce the OM&A by such amount.
10. NPEI submits that it is appropriate for the Board to reduce the OM&A by \$648,877 related to labour reductions and \$61,940 related to non-labour reductions and therefore requests

¹⁰ EB-2015-0072, Response to IR 1-Energy Probe-5, dated 2016-05-06.

¹¹ Undertaking JT1.13 link to EB-2010-0345 Decision and Order dated August 25, 2011.

¹² EB-2015-0072, Transcript. Vol. 1, July 13, 2016, page 149, lines 4 to 14.

¹³ EB-2015-0072, Undertaking J1.3, July 21, 2016.

¹⁴ EB-2015-0072, Undertaking J1.1 (Revised), July 21, 2016, page 3 of 10, Table 1.

¹⁵ Grimsby's materiality threshold is \$50,000.

the Board approve \$3,214,546 in OM&A for the Test Year. The reductions should be applied against each of operations, maintenance and administration as appropriate.

11. NPEI submits \$3,214,546 is appropriate in the circumstances as it represents an increase of approximately 5.01% over 2015 actual expenditures when the costs related to the Niagara West MTS are factored in. This is a substantial increase given today's current inflation.

		NPEI Submission Re:2016	2015 Actuals
1	OM&A	\$3,214,546	\$2,918,395
2	Niagara West MTS	\$217,738	\$64,576
3	(1) – (2)	\$2,996,808	\$2,853,819
4	Increase 2016 - 2015	\$142,989	
5	% increase over 2015	5.01%	

12. NPEI further submits that Grimsby is still able to pursue the additions to staff forecasted for this year. While NPEI has some concerns about the proposed staffing, the individual amounts for each of the positions included for the 2016 Test Year are below the materiality threshold and in NPEI's view represent an appropriate balancing in the current application and the desire for future planning.
13. In making these submissions, NPEI acknowledges attracting employees and succession planning can be difficult for smaller utilities. Further, NPEI supports proper succession planning to ensure that service quality does not falter. NPEI credits Grimsby for considering future years. However, there is no evidence that these normalized employee costs are needed in the test year to maintain appropriate levels of service and this is a cost of service rebasing based upon the 2016 Test Year. Grimsby had the option of choosing a custom IR approach and did not do so. Therefore, NPEI requests the Board approve Grimsby's OM&A at \$3,214,546.

PILs – Loss Carry Forward

14. NPEI is only commenting upon the allocation of the loss carry forwards that were created by NWTC prior to the merger with Grimsby. The amount of the loss-carry forward from NWTC is \$684,153. This was reduced from the original Application as a result of the loss of the 2005 loss which could not be applied beyond the 10th taxation year for NWTC and a deduction to reduce taxable profit to an amount of \$391,821.¹⁶
15. Grimsby is seeking to retain the benefit of loss-carry forward obtain through the amalgamation of the former Niagara West Transformation Corporation and Grimsby

¹⁶ EB-2015-0072, KPMG Report.

Hydro Inc. NPEI submits the loss carry forward should, in these circumstances, be made available to the ratepayers and allocated on the basis agreed to in the Settlement Agreement for directly allocating costs between the New Embedded Distributor class and the remaining ratepayers of Grimsby.

16. During EB-2014-0344 interrogatory process,¹⁷ NPEI directly asked NWTC and Grimsby who would receive the benefit of the loss-carry forwards. Intervenor and the Board were told in the response, that ratepayers would receive the benefit from these loss carry-forwards “*consistent with the method to allocate PILs to each customer class*”. In NPEI’s submission, Grimsby should be obligated to fulfill the commitment given to the Board.
17. Grimsby acknowledged that intervenors and the Board may have relied upon such information. Grimsby filed the Application in a manner that was consistent with this approach. It was not until updates were filed virtually on the doorstep of the hearing room that Grimsby changed its position on the basis of an expert report. Such a late filing of an expert’s report hinders the proper consideration of the matter as intervenors are not able to retain their own experts.
18. Grimsby sought the expert opinion of Mr. Picard, KPMG, regarding the proper treatment of the loss-carry forward. Mr. Picard was unaware of the prior commitments of Grimsby to the Board and intervenors in EB-2014-0072 at the time of preparing his expert’s report.¹⁸ NPEI submits such an omission should have been a material consideration to be included in the report.
19. Further, there is no evidence on the record that the current shareholder of Grimsby actually paid a portion of the acquisition price specifically for the value of the tax loss carry-forward which is not compensable through rates. Had the shareholder specifically paid for the acquisition of the tax loss carry forward - similar to the purchase of goodwill or for others assets outside of the regulatory sphere where there will be no shareholder benefit via the return on equity - then it would be appropriate for the shareholder to retain the benefit of such acquisition. Grimsby did not acquire any asset outside of the regulatory sphere. In EB-2014-0344, it was stated that no consideration would be given or received in connection with the amalgamation.¹⁹ As such, Grimsby will receive a return for 100% of the assets acquired through the amalgamation via the inclusion of the assets in Grimsby’s rate base and the return on equity. Further, Grimsby may still benefit from use of the tax loss carry forward to the extent it can be used faster than its inclusion in rates.
20. Mr. Picard acknowledged that he did not review the evidence that supported prior Board decisions in the proceedings and that he relied solely upon the decisions.²⁰ NPEI is

¹⁷ EB-2015-0072, JT1.17, being Appendix B – EB-2014-0344 GPI & NWTC Response to NPEI Interrogatory NPEI No. 2K.

¹⁸ Transcript Vol. 1, July 13, 2016, page 82, lines 13 to 20.

¹⁹ EB-2014-0344, Application, page 3 of 9, line 26 and 27.

²⁰ Transcript Vol. 1, July 13, 2016, page 82, lines 19 to 23.

concerned that the analogy to interest expenses equalling the losses of NWTC is not a complete picture and cannot be relied upon by the Board as a sound tested foundation upon which to base a decision. Further, it ignores the deliberate choices that were made by NWTC when it sought earlier rates. It had the option of requesting the Board permit recovery of losses during periods of interim rates. It chose not to do so.

21. Another issue is the incomplete mixing actual tax matters and deemed regulatory amounts may further distort the picture. Grimsby had no witnesses that could speak to the evidence underpinning the NWTC proceedings and the differences between the deemed and actual amounts tax filings and regulatory proceedings. To place the basis solely on deviations between actual and deemed interest, especially given the unique lending structure of NWTC, is inappropriate without detailed evidence in that regard. Simply matching numbers because they are similar is not sufficient.
22. Grimsby bears the onus of proving its application. The shortfall in such evidence reinforces the appropriateness of relying upon Grimsby's prior commitment to allocate the loss carry forward to ratepayers.

Effective Date

23. Grimsby had requested that rates become effective May 1, 2016. It was Grimsby's position that it would forego any rate increase for the period January 1, 2016 to April 30, 2016. On July 14, 2016, the Board declared Grimsby's rates to be interim.²¹
24. This request gives rise to two issues: (a) the Board's authority to grant the request; and (b) the Board's use of its discretion in regard to the period during which interim rates were in place.
25. During cross-examination, Mr. Curtis confirmed that Grimsby was aware existing rates were not interim rates.²² NPEI would note that Grimsby could have requested or pursued the declaration of interim rates at any time during the process – and they did not.
26. The primary distinction between final and interim rates are that the interim rate order can be reviewed retrospectively as part of the final rate order. This distinction was recognized by the Supreme Court of Canada in *Bell Canada v. Canada (CRTC)*²³ where it stated, "A consideration of the nature of interim orders and the circumstances under which they are granted further explains and justifies their being, unlike final decisions, subject to retrospective review and remedial orders." [Emphasis Added].

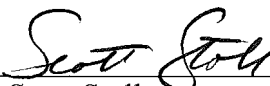
²¹ EB-2015-0072, P.O. 3.

²² Transcript Vol. 1, July 13, 2016, page 110, lines 15 to 19 and Transcript Vol. 2, July 14, 2016, page 27, lines 26 to page 28, line 20.

²³ *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 SCR 1722, 1989 CanLII 67 (SCC), found at page 1754

27. Rates in place prior to July 14, 2016 were final rates. Grimsby was aware the rates were final. There is no confusion about this fact. The only ability to deal with a final order, which are just and reasonable, is through an appeal or a review and vary motion under the Board's Rules of Procedure. Neither appeal nor review is applicable and therefore the Board lacks the jurisdiction to consider the period prior to July 14, 2016 and so the request for an effective date of May 1, 2016 cannot be granted.
28. As the Board can only retrospectively consider the time period during which interim rates were in place after July 14, 2016 it leads to the consideration of how the Board should exercise its discretion in this regard.
29. Grimsby submitted the Application on December 23, 2015, and applications of this nature typically take approximately 8 months to be completed. As such, Grimsby should have anticipated at the time of filing that rates would not be implemented prior to September 1, 2016.
30. The only reason given by Grimsby for the delay in filing is waiting to complete the merger of NWTC with Grimsby. However, it is not clear on the evidence in this proceeding that the merger really impacted the forecasting of costs for 2016. OM&A costs for the transformer station have been very constant and so there is not significant impact from such to warrant the delay. Second the inclusion of the asset at the outset of 2016 could have been forecasted. The merger may have impacted the actuals costs for 2015 but that does not justify the delay in filing.
31. Further, Board policy has been to make rates effective the beginning of the month following the issuance of the decision. NPEI sees no reason to deviate from this policy, unless a decision of the Board is not issued to permit implementation on or before October 1, 2016 in which case, NPEI submits October 1, 2016 is a reasonable effective date.
32. Grimsby has not provided compelling reasons to justify any delay in filing. Therefore, depending upon when a decision is ultimately rendered by the Board, the effective date should be no earlier than September 1, 2016 and no later than October 1, 2016.

All of which is respectfully submitted.



Scott Stoll
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