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BY EMAIL and RESS

July 29, 2016
Our File: EB20150072

Ontario Energy Board
2300 Yonge Street
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2015-0072 – Grimsby Power Inc. – SEC Final Argument

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order No. 3, enclosed please find SEC's Final Argument.

Yours very truly,
Jay Shepherd P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and intervenors (by email)

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ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Grimsby Power Inc. for an Order approving rates and other service charges for the distribution of electricity as of May 1, 2016.

**FINAL ARGUMENT
OF THE
SCHOOL ENERGY COALITION**

July 29, 2016

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1 OVERVIEW

1.1 Introduction

- 1.1.1** On December 23, 2016, the Applicant, Grimsby Power Inc. (“GPI”) filed an application with the Ontario Energy Board (“the Board”) to set just and reasonable rates for the distribution of electricity for the period, commencing May 1, 2016. A Settlement Proposal was filed with the Board on June 24th, 2016, settling most of the issues in this proceeding.
- 1.1.2** Three issues remain unsettled and proceeded to an oral hearing: i) the appropriate level of OM&A expenses, ii) calculation of Payments in Lieu of Taxes (“PILS”) amount, and iii) the effective date.
- 1.1.3** Pursuant to Procedural Order No.3, this is the Final Argument of the School Energy Coalition (“SEC”).
- 1.1.4** The ratepayer groups who intervened in this proceeding have worked together closely throughout the hearing to avoid duplication, including exchanging drafts or partial drafts of their final arguments. We have been assisted in preparing this Final Argument by that co-operation amongst parties.

1.2 SEC Position

- 1.2.1** GPI is a distributor with significant issues that were evident during the hearing, and those issues require remedying. While seeking an increase in OM&A of 34.5%, GPI admits it will not come close to actually spending that much, yet it still filing evidence at the last moment to change its position to increase its request revenue requirement. It did not seek feedback from its customers regarding its enormous proposed increases, consider any incremental productivity initiatives, and nor determine if the increases were commensurate with the outcomes they would achieve. This application is simply not compatible with the objectives under the Renewed Regulatory Framework For Electricity (“RRFE”).¹
- 1.2.2** Twice it has been demonstrated that GPI will say one thing in one proceeding if it furthers its objectives, and then once it obtained its requested relief, will say the complete opposite in another proceeding. It told the Board in its 2012 rates application that it would not seek a significant OM&A increase as it requested in that proceeding, and yet in this application it has even exceeded that level. It also told the Board in furtherance of its request for leave to amalgamate GPI with Niagara West Transmission Corporation (“NWTC”) that the loss carry forwards that it had would go to the benefit of ratepayers in setting the PILs amount in GPI’s next rate application. Yet, right before the oral hearing in this proceeding, it

¹ Report of the Board, *Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, October 18 2012

amended its request to have those very loss carry forwards retained to the benefit of the shareholder. All of this demonstrates GPI's significant credibility issue before the Board.

1.2.3 With respect to the unsettled issues, SEC submits the following:

- (a) **OM&A.** SEC submits based on the evidence, the Board should reduce GPI's requested OM&A by \$900,301 and approve an amount of \$3,024,982.
- (b) **PILS.** GPI should apply actual regulatory loss carry forwards that existed in 2015 to the 2016 Test Year PILs calculation, including those that were acquired in the amalgamation with NWTC.
- (c) **Effective Date.** Consistent with Board practice, the Board should approve an effective date to coincide with the implementation date of this decision, as GPI filed its application late.

2 SEC POSITION

2.1 Overview

2.1.1 GPI's requested OM&A increase should be drastically reduced. Its request of an increase of 34.5%² for the 2016 Test Year over 2015 actuals is enormous and represents a 63% increase over its 2012 Board-approved amount³, and a 260% increase since 2006.⁴ Such an increase is beyond unreasonable. What makes the request even more extraordinary is that GPI readily admits that it will not actually spend close to that amount in the Test Year.⁵ Yet, at no point in the hearing did it seek to amend its request. It is still seeking the full amount.⁶

2.2 Context

2.2.1 In its 2012 cost of service application (filed in 2011), GPI requested a very significant increase from the Board. At the time, Mr. Curtiss, who is still the CEO, had been hired a year earlier and had come to the conclusion that GPI was in serious trouble due to some significant deficiencies in its operation which needed to be corrected. Mr. Curtiss testified that GPI was not in a sustainable position because basic department tools and equipment were found to be absent or in disrepair, the company had for the previous few years operated without a CEO, unnecessary risks were being taken to keep costs down even if it meant not meeting basic utility standards, getting basic financial information in a timely manner was not possible, and there were serious deviances in health and safety.⁷ GPI's evidence in that proceeding stated that the 2012 OM&A amount it had requested "reflects an ongoing sustainable level, in our opinion."⁸

2.2.2 The Board accepted the evidence of the grave situation that GPI found itself in and only made relatively minor reductions to its 2012 OM&A request, finding that "this is a significant increase (approximately 26% over 2010 actuals), but one necessary

² Appendix 2-JA; Tr.1, p.116

³ *Ibid*

⁴ 4-SEC-19; Tr.1, p.116

⁵ Tr.1, p.111

⁶ Tr.1, p.112:

MR. RUBENSTEIN: From what you're saying and as I understand, you're seeking \$3,925,000. But it's your view that you won't actually spend that in the 2016 test year.

MR. CURTISS: That's correct.

⁷ EB-2011-0273, Tr.1, p.17; K1.5, p.15

⁸ EB-2011-0273, Tr.1, p.61; K1.5, p.22:

MR. SHEPHERD: And so my question is: Of the budget that you are proposing for the test year, how much of that is a new normal, a new level that you have to maintain going forward, and how much of that is catch-up for the spending that should have been done in prior years? Have you done any analysis of that?

MR. CURTISS: Not specifically, but what I can say, that the 2012 budget reflects an ongoing sustainable level, in our opinion.

to ensure the appropriate operations of the distributor”.⁹

- 2.2.3** Mr. Curtiss was asked by his own counsel in the that proceeding if it would be asking the Board for similar significant rate increases in the future. The answer was that he did not anticipate seeking such an increase again:¹⁰

MR. SIDLOFSKY: And Mr. Curtiss, finally, if the Board grants your requested increase in OM&A, are you anticipating similar increases in the coming years?

MR. CURTISS: The objective of our 2012 budget was to identify tasks, activities and service levels which would allow Grimsby Power to operate at a sustainable level. The resultant increase in costs is significant, but I believe it represents an accurate accounting of where Grimsby Power needs to be, provided that the utility environment is stable through the next four years.

I would not anticipate any increases of this magnitude in the years to follow.
[emphasis added]

- 2.2.4** Yet in this application, GPI is seeking approval for a staggering 34.5% increase over only its previous year’s OM&A actuals. Its own evidence is that it is now operationally running the utility in a sustainable manner; that is something it was not doing before 2012.¹¹ Mr. Curtiss tried to explain away his statement in the 2012 proceeding by saying it was qualified by the statement that if the utility environment remains stable, and that it has not since, there are new customer expectations, surveys, and succession planning issues.¹²

- 2.2.5** SEC submits the Board should reject this explanation. If it took GPI a 26% increase over 2 years to remedy a utility with significant operational issues, it does not require a 34.5% increase over 1 year, to deal with issues that are not remotely comparable in scope, and as GPI itself admitted, not unique to it.¹³ The RRFE is premised on providing value to customers through the requirement of continued improvements and matching increased costs with increased outcomes. It is in no way such a monumental burden on utilities that it requires possibly the largest requested Test Year increase that SEC has encountered.

2.3 GPI’s 2016 Request

- 2.3.1** GPI is seeking a total OM&A increase from its approved amount for 2012 of 63%¹⁴, compared to the inflation level set by the Board of about 9% over that same period.¹⁵ This requested OM&A increase from its previous Board approved level,

⁹ Decision and Order (GPI – EB-2011-0273), January 16 2012, p.11

¹⁰ EB-2011-0273, Tr.1, p.23-24; K1.5, p.19-20

¹¹ Tr.1, p.121

¹² Tr.1, p.120

¹³ Tr.1, p.178

¹⁴ Appendix 2-JA

¹⁵ Decision and Order (EB-2015-0089 – Milton Hydro Distribution Inc.), July 28 2016, p.21

an amount that itself was very significant, is 7 times higher than inflation. Such a proposal is beyond unreasonable amount to ask ratepayers to pay for, especially when GPI's only seeing on average 1.7% increase in customers per year over the 2012-2016 period.¹⁶

2.3.2 GPI's request for approval of \$3,925,363 for the Test Year 2016 should be rejected not just because it is unreasonable but that its own evidence is that it will not actually require that amount for 2016 based on own spending plans.¹⁷ Undertaking J1.1 alone states that it expects to spend only \$3,733,648 in 2016.¹⁸ However, SEC notes that the number in itself appears to be significantly inflated as discussed in detail below.

2.3.3 GPI's explanation of why it should still receive \$3,925,363 for 2016 even though it will not actually spend that money in 2016 is that it will need that money in future years.¹⁹ SEC submits that this application is a single year cost of service rebasing application, not a Custom IR application which spans multiple years. The RRFE provides that a utility may choose one of three rate-setting options, but in doing so, it must meet the requirements set out for that option. GPI has not met any of the requirements for anything more than a 1 year cost of service rebasing application as part of the price-cap IR rate setting plan. It has filed no evidence regarding its costs for any year besides 2016. It is not requesting anything more than its cost of service of 2016, which the evidence shows, even if all the proposed increases were considered reasonable, would be substantially less than the amount it is actually requesting.

2.3.4 GPI has not even met the requirements of a single year cost of service rebasing application. It has not done any customer engagement regarding its application as required by the Filing Requirements.²⁰ Its rationale is that "[w]ith its late filing, Grimsby power was faced with a decision to organize and perform its customer engagement activities to meet the filing requirements or to proceed and file the application without this step".²¹ At the oral hearing, Mr. Curtiss further explained his personal view on the value of any application engagement activities required by the Filing Requirements and RRFE:²²

MR. CURTISS: I personally don't feel that presenting this application to a limited number of customers has much value. It's certainly not statistically valid. If you hold an open house and you get -- and ten people show up, yes, it's information, but the validity of that information is certainly not statistically valid.

¹⁶ 4-EP-24, Table 4-6

¹⁷ Tr.1, p.111; Undertaking J1.1

¹⁸ Undertaking J1.1

¹⁹ Tr.2, p.17

²⁰ 1-Staff-4(a)

²¹ *Ibid*

²² Tr.1, p.129-130

2.3.5 For GPI, customer engagement is simply “one requirement of many.”²³ And the fact that it did not do it should not be any bar to the Board granting its request relief. SEC submits there is a great irony of GPI seeking extraordinary increase in costs based on new regulatory requirement, yet it does not actually undertake one of the most central activities set out in the RRFE: engaging with its customers on its application or striving for continuous improvement. Its rationale is in some ways itself extraordinary. It was late in filing its application for a significant rate increase, so it decided to forego asking its customers directly for feedback on its proposals, in order to get that rate increase earlier.

2.3.6 The Board should see this lack of engagement for what it is. GPI knew what its customers would say when it sought a year-over-year increase in OM&A costs of 34.5%, or 63\$ since its last cost of service application. They would be far from supportive.

2.3.7 The Board has recently confirmed that recovery from ratepayers of costs is limited to those that satisfy the objectives of the RRFE:²⁴

Under the outcomes approach, recovery from ratepayers is limited to the OEB’s determination of amounts that satisfy the operational effectiveness and other performance objectives of the RRFE. The fact that a utility either spends or plans to spend money does not, in and of itself, lead to a finding that the amount is recoverable from ratepayers. The Supreme Court of Canada has recently held that utility spending does not, in and of itself, give rise to a presumption of prudence. Rather, the onus is on the utility to demonstrate to the satisfaction of the regulator that the money was spent wisely to achieve outcomes that customers value. [emphasis added]

2.3.8 GPI has also not approached its Test Year budgeting using an outcomes based approach. It has not provided any measureable outcomes associated with an incremental OM&A request.²⁵ While it has requested enormous OM&A increases for 2016, it has not made any attempt to relate those to any outcomes, besides simply saying they are related to the measures in the scorecard and its own internal performance metrics.²⁶ Yet, there are no targets about how those will improve because of the spending. When asked directly at the oral hearing how the Board can then judge the value for money of the new costs, Mr. Curtiss response was that the industry has not evolved to that level.²⁷ SEC disagrees. Not only has it evolved, it is the basis of the Board’s outcomes based approach.

2.3.9 The RRFE focus is also on continued improvement. GPI is getting worse in every single relevant cost metric. Its OM&A per customer is forecast to increase

²³ Tr.1, p.129

²⁴ *Decision and Order* (EB-2015-0089 – Milton Hydro Distribution Inc.), July 28 2016, p.8

²⁵ I-SEC-6

²⁶ Tr.1, p.124-125

²⁷ Tr.1, p.125

significantly²⁸, its PEG benchmarking performance is expected to get worse as a result of its proposed OM&A increase²⁹, and its relative rates as compared to all of Ontario LDCs and its neighboring utilities (a cohort it presented in its evidence) will be much worse.³⁰ Moreover, GPI has not budgeted for a single incremental productivity improvement (as opposed to past improvement which persists into the future), that it expects to achieve in 2016.³¹

2.3.10 All that ratepayers are getting from this application is more costs with no benefits, let alone those commensurate with the amount of increases sought

2.3.11 GPI has a past practice of overstating its budget. It has come in below in each of the last 3 years, including in 2015, by approximately 10%.³²

2.4 Increases Are Unreasonable

2.4.1 The vast majority of the increases are based on the proposed increases in staffing related costs, as well as increased compensation to existing employees. SEC submits that the proposed increase in positions in 2016 of over 25% is not justified. The evidence shows that the positions have not and will not be filled during this year. Further, the increased compensation to existing employees is not justified and should be reduced.

2.4.2 *New Positions Not Actually Filled.* GPI is seeking to increase its FTEs from 19.48 in 2016 to 25.16 in 2016.³³ That is an increase of over 25% in a single year. This is after increasing its FTEs by only 1 compared to 2012. Yet, even while requesting the funds for these additional FTEs in this application for 2016, as of the middle of the year, it not only has hired none of the new employees for which it is seeking funding, it actually has fewer FTEs currently than it had in 2012.³⁴ In fact, according to its own Undertaking response J1.3, by August 1st, it will be down to 16.94 FTEs.

2.4.3 GPI does not expect to begin *recruiting* for most of these positions until either Q4, or after approval of the application, which is likely not to occur at least until Q4.³⁵ So any expectation that it will hire these employees by the end of 2016 is not reasonable.

2.4.4 Yet, even after budgeting for 2016 25.16 FTEs on a full year basis, with half the

²⁸ Tr.1, p.173-174

²⁹ Tr.2, p.13-14

³⁰ EP Clarification Questions, 1; K1.5, p.50-52

³¹ Tr.1, p.127;Ex.1, p.76-77

³² 4-Staff-3433

³³ Appendix 2-K

³⁴ Responses to Energy Probe Materials for Oral Hearing, Question 2; K1.5, p.42

³⁵ 4-Staff-37

year completed, 7.21 FTEs³⁶ have yet to be filed to date. In its response to Undertaking J1.1, GPI showed that this will cause a variance of the budgeted amount of only \$129,775. SEC submits this is not correct. The number is derived from GPI's process of "normalizing" the vacancies by treating 2016 as 1/5 of the total 2016-2020 employee compensation costs. As Undertaking J1.3, Table 5 shows, the actual reduction on a non-normalized basis (i.e. the amount it expects to actually spend in 2016) is \$648,877 less on new positions charged to OM&A than it is seeking in its rate application.³⁷

2.4.5 GPI is only requesting relief for rates in 2016. This is a one year cost of service rebasing application, not a Custom IR application. There should not be a 'normalizing' process.

2.4.6 SEC submits that it is likely that even the positions it does expect to fill this year are unlikely to actually occur. If anything, the reduction for 2016 should be even greater than the \$648,877 undertaking J1.3 shows.

2.4.7 *New Positions Not Required.* Even if the positions were to be filled by the end of the year in 2016, most should not be recoverable as they are not required or prudent. First, GPI has not justified the need to hire two additional customer accounts personnel (Customer Accounts Supervisor and Customer Accounts Representative).³⁸ While succession planning is important, GPI is seeking to hire two journeyman apprentices to replace those who are eligible to retire in the future. Hiring one to replace the eligible retiree in 2018 maybe reasonable, but it is not reasonable to replace, at this time, the one who is eligible to retire in 2023.³⁹ GPI may want to increase its FTEs by over 25% in the Test Year but it is simply not prudent to do so, and especially not at once. It has not provided any evidence regarding why in 2016, its current complement of employees, is not able to properly manage the utility. Potentially, the Board should allow one or two additional FTEs at most, but not a 25% increase.

2.4.8 Based on allowing an increase of only 2 of the proposed 6.22 new positions⁴⁰, a further reduction of \$73,500 from requested amount is required.⁴¹

2.4.9 *Compensation.* Another major driver of GPI's 2016 Test Year OM&A is the increase in compensation for existing management employees. GPI is seeking an

³⁶ Tr.1, p.137

³⁷ Undertaking J1.3, Table 5, \$648,877 = Rate Application Request (\$947,100) – Forecast 2016 Not Normalized (\$298,223)

³⁸ 4-Staff-37 (b)

³⁹ 4-Staff-37(d)

⁴⁰ Appendix 2-K as well as other places in the evidence show an addition of 7.21 FTEs. While Appendix J1.3 show 6.20 additional new FTEs. SEC assumes that means that there is roughly one current position that is simply remained unfilled in 2015.

⁴¹ This amount was calculated removing 4.22 of the 6.22 (68.8%) of the new or succession planning positions proposed for 2016 as of J1.3, Table 5 from the remaining forecasted amount (\$49,525+\$52,191).

increase for management compensation of \$154,268 in 2016.⁴²

Management Compensation					
	<u>2012</u>	<u>2013</u>	<u>2014</u>	<u>2015</u>	<u>2016</u>
Management (including executive) FTEs	6.83	6.91	6.91	8.43	10.61
Total Salary and Wages	\$605,941	\$663,416	\$685,615	\$805,218	\$1,096,873
Total Compensation (Salary, wages and benefits)	\$765,177	\$829,992	\$854,377	\$992,186	\$1,360,402
Total Salary and Wages per Management FTE	\$88,718	\$96,008	\$99,221	\$95,518	\$103,381
Year over Year variance		8.22%	3.35%	-3.73%	8.23%
Total Compensation per Management FTE	\$112,032	\$120,115	\$123,644	\$117,697	\$128,219
Year over Year variance		7.21%	2.94%	-4.81%	8.94%
source: Appendix 2-K					

2.4.10 As the 2-K form shows, the average increase in total salary and wages, and total compensation, per management FTE (which includes not just existing but new management positions) is increasing by 8-9% from 2016. This is a dramatic increase and is not justified. When asked about this during the oral hearing, Mr. Curtiss pointed to the fact that they reset all their management salaries to be competitive with the market, and it is based on the MEARIE survey of the 50th percentile level for utilities with 20,000 customers or below.⁴³ But that resetting took place in 2012, not 2016.⁴⁴ No evidence has been provided to demonstrate why the 2016 average compensation is increasing so significantly for existing management employees. SEC doubts the industry is seeking an 8-9% year-over-year increase in salaries and if it is, then that is unreasonable. This is especially true for a distributor that does not appear to be performing very well, as demonstrated by the myriad of issues in this application.

2.4.11 SEC submits the Board should decrease the average salary increase in total compensation for management salaries to no more than 2-3%. SEC submits that would result in a reduction of at least \$100,000 in OM&A increases.⁴⁵

2.4.12 Incremental Productivity. As discussed earlier, GPI has no forecasted savings in 2016 due to any incremental productivity and efficiency initiatives. The Board should require GPI to build into its budget a reduction to represent a reasonable amount of productivity gains. As Mr. Curtiss responded to Board Member Frank's questions, a 1% target is reasonable as it is what they have achieved in the past.⁴⁶

MS. FRANK: If we looked at 2015, and I think it was Exhibit Staff-435, and we looked at -- Mr. Janigan and, I think, Mr. Rubenstein had this in both of their

⁴² Appendix 2-JB, Management Wages Incentives & Benefits (\$154,268)

⁴³ Tr.1, p.138

⁴⁴ Tr.1, p.138

⁴⁵ If the current proposed increase is \$154,269 based on 8.94% increase total compensation (Appendix 2-JB), then a 3% increase would result in a reduction of that amount by approximately two-thirds.

⁴⁶ Tr.2, p.19

compendiums. They had a demonstration that in 2015, there were initiatives that totaled savings approaching 1 percent of OM&A -- not quite but approaching 1 percent of OM&A. Having done this in the past, is that a reasonable target that you might set for yourself?

MR. CURTISS: Yes, I would say so.

MS. FRANK: And would you see that as an incremental 1 percent to what you've got in the plan? MR. CURTISS: Incremental in terms of?

MS. FRANK: More savings, beyond what you budgeted?

MR. CURTISS: Yes, I think so.

2.4.13 Other Revised Forecast Reductions. Based on the response to Undertaking J1.1, GPI expects to spend an addition \$51,914 less the amounts built into the budget. This accounts for a number of areas where costs are expected to come in below the originally budgeted amounts in areas such as Cable Locate Services, and Help Desk Services.⁴⁷

2.5 Total Reductions

2.5.1 Based on the evidence, SEC submits a reduction of \$900,381 is appropriate. This is shown in the table below.

2016 GPI OM&A Request	\$3,925,363
<u>Reduction</u>	
FTE Postions Budged But Not Filled in 2016	(\$648,877)
Postions To Be Filled Are Not Prudent	(\$69,009)
Other Items Tracking Below Budget	(\$51,940)
Management Compensation Increases Unreasonable	(\$100,000)
Total Base Reduction	(\$869,826)
1% Productivity Improvements on Revised OM&A Request	(\$30,555)
Total Reduction	(\$900,381)
SEC OM&A 2016 Position	\$3,024,982

2.5.2 A 2016 OM&A amount of \$3,024,982 is more appropriate based on the evidence. This leads to a much more reasonable, yet still significant, increase of 3.65% increase compared to 2015 actuals.

⁴⁷ Undertaking J1.1, Table 1

3 PILs

3.1 Loss Carry Forwards

- 3.1.1** After the filing of the Settlement Proposal, GPI sought and was allowed to file expert evidence regarding the appropriate treatment of loss carry forwards for the purpose of calculation of Test Year PILs.
- 3.1.2** As a preliminary matter, the evidence though did more than provide clarification of GPI's position; it, in fact, was an amendment to its original request. While the Board allowed the evidence to be filed, SEC is troubled that a distributor, after a Settlement Conference, filing new evidence and changing its position on an issue, where no new facts have come to light. GPI's new proposal regarding the loss carry forwards that it has from its amalgamation with NWTC was not based on any new information but simply new advice it had received, on a potential way to treat loss carry forwards, from its advisor KPMG.⁴⁸ Applicants should not at such a late stage, after parties had revealed information confidentiality during a settlement conference, be allowed to file new evidence and change positions when no new facts have arisen.
- 3.1.3** SEC disagrees with GPI's proposal regarding the treatment of loss carry forwards. First, GPI believes that the 2015 PILs calculation, for the purposes of determining the loss carry forward to be applied into 2016, should be done on an actual accounting basis, not an actual regulatory basis. Second, it disagrees that the loss carry forwards that it received from its amalgamation of NWTC be kept to the sole advantage of its shareholders.

3.2 Accounting versus Regulatory PILs

- 3.2.1** GPI has taken the position that for the purposes of calculating any bridge-year loss carry forwards to apply to offset PILs in the test year, they should be determined on an actual accounting basis, and not on an actual regulatory basis.
- 3.2.2** The Filing Requirements are clear that in the calculation of PILs, "[r]egulatory assets and liabilities must generally be excluded for PILs calculations both when they were created and when they were disposed, regardless of actual treatment accorded to those amounts".⁴⁹
- 3.2.3** The rationale for this is that regulatory assets are simply a timing difference.⁵⁰ While actual accounting taxable income may be higher in a year where a distributor is recovering those assets through clearance of a deferral/variance account, it would have taken a deduction for tax purposes in prior years where it would not have cleared those accounts but recorded the amounts as regulatory assets. The Board

⁴⁸ Tr.1, p.15

has repeated this rationale and denied similar recovery in past proceedings.⁵¹

3.2.4 GPI, in its latest evidence, updated the loss carry forward that has accrued from its 2015 Test Year calculation by including recovery of regulatory assets in the bridge year which has the effect of eliminating the accrued 2015 loss carry forward for actual accounting PILs. It has done so by adjusting the Board's PILS model by changing some of the formulas.⁵² As discussed above, this is inappropriate since it provides GPI with the benefit of the regulatory assets in one year, but at the same time since it was not included previously, it would have had lower accounting PILs than were built into rates.

3.2.5 Removing regulatory assets from the PILs calculation, even in non-Test Years, is consistent with how the Board requires distributors to report their regulatory ROE as part of its reporting requirements.⁵³

3.2.6 SEC submits that calculation of PILS should not include the inclusion of regulatory assets, consistent with Board policy as set out in the 2006 EDR Handbook, Filing Requirements, and the Board's PILS model. The loss carry forwards on a regulatory basis that have accrued in 2015, should be included to offset loss carry forwards in the Test Year.

3.3 NWTC Losses

3.3.1 GPI has now taken the position that loss carry forwards accrued by NWTC before its amalgamation with GPI should not, as is the normal course, be applied to reduce Test Year regulatory income for PILS purposes, but should be a shareholder benefit. This position is on the basis of KPMG's view that, in its opinion, since those losses were borne by NWTC shareholders, they should receive the benefit.⁵⁴ SEC disagrees with GPI's position.

3.3.2 First, this position, which was first revealed in the KPMG Report filed two weeks before the hearing, is the complete opposite position that GPI itself took in the NWTC-GPI MAADs proceeding (EB-2014-0334). In that proceeding, it explicitly stated that those NWTC non-capital losses that GPI would be acquiring would be

⁴⁹ *Filing Requirements For Electricity Distribution Rate Applications*, July 16, 2015, section 2.4.5

⁵⁰ 2006 Electricity Distribution Rate Handbook (RP-2004-0188), May 11 2015, p.61

⁵¹ For example, see EB-2007-0723, EB-2005-0412, EB-2007-0522

⁵² Tr.1, p.56-59

⁵³ RRR 2.1.5.6 ROE Complete Filing Guide, March 2016, p.23:

The activity of regulatory asset and liability accounts is not allowed in PILs embedded into the rates as stated in the 2006 EDR Handbook, Report of the Board and Chapter 2 of the Filing Requirements. As a result, if a distributor has included the activity of regulatory accounts in its taxable income, it must be removed from the current tax provision for the purposes of determining regulatory ROE.

⁵⁴ KPMG, Grimsby Power Inc. - Review of Rate Setting Implications of Tax Losses Car Forward, June 29 2016 , p.11 (KT1.1)

used for the benefit of its customers at its first rebasing proceeding:⁵⁵

GPI will receive these non-capital losses as part of the amalgamating both entities. It is anticipated that these non-capital losses will be incorporated into the test year of GPI's next of service application. They will be considered in in the calculation of Payment in Lieu of Taxes (PILS) and allocated to each customer class consistent with the method to allocate PUILs to each customer class.

.....

Regardless of their application the incorporation of tax losses into the revenue requirement would benefit all customer classes. [emphasis added]

- 3.3.3** When it benefited GPI in the NWTC-GPI MAADs proceeding to tell the Board that those losses were to be applied to the benefit of ratepayers, GPI did not hesitate to tell the Board so. Now that it has obtained the relief it sought in that proceeding – the approval of the transaction – it has totally changed its tune. Now in the rates proceeding, when it actually has to pass on those benefits, it has taken a 180 degree turn in its position, and now says it is should not have to do so.
- 3.3.4** The Board, in the MAAD application, relied on GPI's position in determining if there was any harm in the transaction. It is now not open for GPI to change its position in the absence of the re-opening of the MAAD application process. To do otherwise would be unfair and tantamount to a collateral attack on that proceeding.
- 3.3.5** Regardless of its commitment to the Board on this issue, as a matter of Board policy, those losses should be applied for the benefit of ratepayers in this proceeding. Loss carry forwards accumulated by distributors have consistently been applied to reduce rates in the Test Year.⁵⁶ As the Board recently stated in the most recent OPG Decision (EB-2013-0321), upheld on a Motion to Review (EB-2014-0369):

The rate regulation of the electricity distribution sector shows a history of tax loss carry forwards being routinely used in the rate setting process for distributors. This approach is completely consistent with Board policy for tax losses to be applied to reduce income tax to be included in rates.⁵⁷

- 3.3.6** It is also consistent with the Board's Filing Requirements⁵⁸, a document which

⁵⁵ EB-2014-0344, Response to NPEI IR No.2(k)

⁵⁶ See applications: EB-2005-0335 (Atikokan Hydro Inc), EB-2005-0359 (EnWin Powerlines), EB-2005-0428 (Welland Hydro-Electric System Corp.), EB-2005-0412 (PUC Distribution Inc.), EB-2007-0870 (Veridian Connections Inc.), EB-2007-0901 (Espanola Regional Hydro Distribution Corp.), EB-2008-0232 (Hydro One Remote Communities), EB-2009-262/EB-2010-0121 (West Perth Inc./Clinton Power Corp), EB-2009-0056 (Espanola Regional Hydro Distribution Corp), EB-2011-0177 (Kenora Hydro)

⁵⁷ *Decision and Order* (OPG- EB-2013-0321), November 30, p.101

⁵⁸ *Filing Requirements For Electricity Distribution Rate Applications*, Chapter 2, July 14, 2016, p.42

KPMG appears to not even consider in its Report.⁵⁹

3.3.7 GPI's basis for its position on the correct treatment of these loss carry forwards is incorrect, and inconsistent with previous Board decisions. GPI's position, adopting the view of KPMG, is that since no PILS amount was included in the previous NWTC transmission rates, those losses should be to the benefit of shareholders. SEC submits this is not what occurred.

3.3.8 While NWTC rates set in 2011 included a PILS amount of zero, it is only because previous loss carry forwards were applied from a previous period to offset the PILS that would have been owed.⁶⁰ If not for those loss carry forwards from a previous period, GPI would have had built into rates an amount of \$37,312.⁶¹ This is consistent with the "benefits follow the cost principle". The "benefits follow costs" principle was never intended to allow a utility to collect money from ratepayers for PILs, then keep that money for their own purposes because they were unable to operate the regulated business at a profit. Ratepayers paid for PILS before 2011, but ultimately NWTC operated at a loss and did not pay the amount of PILS it ultimately collected that were built into the UTRs during that period. This is true even though the UTRs did not reflect NWTC costs directly but were the costs of all the other transmission companies.

3.3.9 Furthermore, any reliance on the Board's decision in the 2007 Great Lakes Power Limited ("GPGL") application (EB-2007-0744) is misplaced. In that case the Board allowed GLPL retain the taxes losses that arrived since that amount was clearly attributable to costs that were explicitly been denied recovery from the Board:⁶²

Since the Board has denied recovery of the amount accrued for rate mitigation in account 1574, the resulting losses should not be attributed to ratepayers but rather to GLPL, which sustained those losses and should retain the related tax benefits.
[emphasis added]

3.3.10 In the present case, those tax losses did not arise due to the Board making any previous disallowance of costs. In fact, in its 2011 rates application, the Board approved the full request ultimately made by NWTC.⁶³ Any previous years where its revenue was derived from the UTR, and not its own costs, was a decision it made. It could have brought forward rate application based on its own proposed costs and revenues much sooner than 2012, but it itself chose not to. In the GLPL case, account 1574 did not only include a portion of its return for a previous period, but also the tax impacts.⁶⁴ Neither of which was ultimately disposed in rates. The

⁵⁹ See list of documents KPMG reviewed, at p.2 of KPMG, Grimsby Power Inc. - Review of Rate Setting Implications of Tax Losses Car Forward, June 29 2016 , p.11 (KT1.1)

⁶⁰ Tr.1, p.65-66

⁶¹ JT1.12; Tr.1, p.66

⁶² *Decision and Order* (EB-2007-0744-GLPL), October 30 2008, p.43

⁶³ *Decision and Order* (EB-2010-0345 - NWTC), August 25 2011, p.8

⁶⁴ EB-2007-0744, Response to Board Staff IR No.39

difference is here, NWTC ratepayers did pay for PILs.

4 EFFECTIVE DATE

- 4.1.1** GPI is seeking a May 1st, effective date, even though rates were only declared interim as of July 14, 2016.⁶⁵ SEC submits the Board should reject this request and set the effective date at the same time as the implementation date.
- 4.1.2** First, the Board has no authority to set the effective date to anything before July 14th, when rates were declared interim.⁶⁶ To do otherwise would be impermissible retroactive ratemaking.⁶⁷
- 4.1.3** Second, the Board should not set an effective date any earlier than the implementation date for any new rates. The Board has on many occasions stated that the board would not allow a utility to retrospectively recover amounts from the period, where rates were interim, when it has not filed its application on time.⁶⁸ To do so would send unfair to customers. As the Board has previously commented, to allow recovery of rates back to when rates were set on an interim basis, while legally permissible, should be avoided as a policy matter as it will cause customers who consumed electricity in the past, to learn that they will be required to be responsible for additional costs, through higher rates included in future bills. It also raises intergenerational equities concerns to the extent that customer load profiles have changed.⁶⁹
- 4.1.4** GPI filed its application in late December 2015, almost 8 months⁷⁰ after it was supposed to file its application for January 1st rates, and almost 4 months after it would have been required to file for May 1st rates.⁷¹ The delay was entirely their fault. GPI tries to explain away the delay by saying that the legal documents required due to the merger between GPI and NWTC is the primary reason for the delay and that they didn't want to file until the transaction closed.⁷² SEC submits this is not a valid reason. GPI has not provided a single reason why this would have any effect on its 2016 forecast budget and Distribution System Plan that underlies its application, and which would have been worked on long before. In its letter of

⁶⁵ Tr.2, p.74

⁶⁶ Interim Rate Order and Procedural Order No.3, July 15 2016, p.1

⁶⁷ See *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722

⁶⁸ See for example, *Decision and Order*, (EB-2013-0321 - Ontario Power Generation), November 12 2014, p.135; Also see decisions in the following proceedings: EB-2012-0165 (Sioux Lookout), EB-2013-0139 (Hydro Hawkesbury), EB-2012-0113 (Centre Wellington), EB-2013-0130 (Fort Frances)

⁶⁹ See for example, *Decision and Order*, (EB-2013-0321 - Ontario Power Generation), November 12 2014, p.135-136

⁷⁰ January 1, 2016 rate applications supposed to file by April 24th, 2015. See Letter from Kristen Walli (Board Secretary) Re: Applications for 2016 Electricity Rate, January 29 2015, p.2.

⁷¹ May 1, 2016 rate applications supposed to file by August 28th, 2015. See Letter from Kristen Walli (Board Secretary) Re: Applications for 2016 Electricity Rate, January 29 2015, p.2.

⁷² Tr.1, p.109

March 12, 2015 to the Board, informing the Board that it would be a delayed in filing for up to three months (it filed 8 months later), it did not mention this supposed rationale at all.⁷³ The delay was entirely in control of the GPI and it should not now be allowed to retrospectively collect previous costs.

⁷³ Letter from GPI to the Board, dated March 12 2015

5 OTHER

5.1 Costs

- 5.1.1** SEC hereby requests that the Board order payment of our reasonably incurred costs in connection with our participation in this proceeding. It is submitted that SEC has participated responsibly in all aspects of the process, in a manner designed to assist the Board as efficiently as possible.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Original signed by

Mark Rubenstein
Counsel for the School Energy Coalition