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Our File: EB20180020

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2018-0143 – Brantford Power Inc. 2019 IRM – SEC Submissions

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order No.2, these are SEC's submissions limited to the issue of the appropriate treatment of errors discovered by Brantford Power Inc. ("BPI") related to the balance in certain Deferral and Variance Accounts that were previously cleared on a final basis. SEC submits the Board should order BPI to refund to those customers who overpaid due to its errors.

Background

In 2017 and 2018, BPI discovered that due to errors from information provided to it by its smart meter service provider, the Ontario Data Store ("ODS"), it had made errors in entries in Retail Settlement Variance Accounts ("RSVA") 1588 and 1589. The impact of the errors is that for RSVA amounts in 2015 that have already been cleared on a final basis, account 1588 was improperly credited with an amount including interest of \$421,060 and Account 1589 was improperly debited an amount of \$713,712.

Based on the evidence, there were errors in the smart meter data provided to BPI from its contractor ODS, which it then used to bill to the IESO, and used for allocating costs between these two RSVA accounts. The errors led to misallocating amounts between accounts 1588 and 1589, and also an error in the settlement with the IESO in which it collected more money than it should have which was ultimately credited to account 1588.¹

Since Account 1588 is cleared to all customers (RPP and non-RPP) and Account 1589 is cleared to just non-RPP customers, the impacts to each of those types of customers will differ. Due to the BPI's error, RPP customers were undercharged \$181,103 and non-RPP customers were overcharged \$473,750.²

Further, since there are significantly less non-RPP customers than RPP customers, the bill impacts related to the errors are significant. By way of example, excluding interest, non-RPP GS >50

¹ BPI IRM Application, p. 17-18; Interrogatory Response SEC-5, Table 5EC-5A

² Interrogatory Response SEC-5, Table 5EC-5A

customers will have overpaid by about \$148.91 a month, whereas GS>50 RPP customers will have underpaid by \$43.19 a month.³

In its original application, BPI was seeking to make adjustments and to refund/recover the correct 2015 balances from customers on the basis that there was a net owing to customers.⁴ After making a number of corrections, including recognizing that the difference is that non-RPP customers are the ones who have been harmed by its errors, it withdrew its request and is proposing to return to the IESO the incorrect billed and received amounts.⁵ While this will ensure that BPI is not profiting off its errors, it does nothing to alleviate the harm caused to non-RPP customers who have overpaid.

SEC submits that the Board should require BPI to refund non-RPP customers that it overcharged due to errors made in its application that it is responsible for. BPI should bear the costs of the mistake, not its non-RPP customers.

Retroactive Ratemaking

As the amounts at issue related to 2015 balances have been cleared on a final basis, the Board must determine two questions. First, does it have the legal authority to order an adjustment to be made to the previously cleared 2015 balances? Second, if it does have the legal authority, should it exercise its discretion to order the adjustment, and if so, how.

The well-established rule against retroactive ratemaking is that the Board can only act prospectively in setting rates. That means the Board may not establish rates that recover expenses or costs incurred in the past, and were not recovered through the final rates established for those past periods.⁶ The rule against retroactive ratemaking is not a discretionary decision by the Board; if it is found to be applicable, it prevents the adjustment from being made unless there is a recognized exception⁷ to the rule.⁸

The generally accepted exceptions are a) rates are interim, or b) a deferral or variance account “encumbers” past amounts with the expectation of all parties that they will be adjusted in the future.⁹ Neither of these exceptions is available for the amounts at issue in this proceeding. The amounts at issue were cleared on a final basis in its last cost of service application (EB-2016-0058).¹⁰ The Board has applied its rule consistently with respect to customers being undercharged.

BPI is correct not to seek recovery from RPP customers who, due to the errors, underpaid.

The analysis is different when it comes to refunds to overcharged non-RPP customers. The Board has in the past concluded that it has authority to order *credits* going forward for a one-time adjustment to a past overpayment of costs that the regulator finds unjust, and that does not

³ Interrogatory Response SEC-5

⁴ BPI IRM Application, p.18

⁵ Interrogatory Response SEC-5, Table SEC-5C/5D

⁶ *Union Gas Limited v. Ontario Energy Board*, 2015 ONCA 453, para 82; *Decision and Order* (RP-2005-0013/EB-2005-0031 - Great Lakes Power), February 24, 2006, p.17, citing *Northwest Utilities Ltd. v. City of Edmonton*, [1979], 1 S.C.R. 684. *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140, para 71

⁷ There is confusion in the language in many decisions on retroactive ratemaking. Some consider certain situations where the rule does not apply as exceptions, others treat them as simply contours that define its general scope. See for example, *Northland Utilities et al v. NWT Public Utilities Board*, 2010 NWTSC 92, para 5, regarding the exception for deferral accounts, compared to *Bell Canada v. Bell Aliant Regional Communications*, [2009] SCC 40 the leading authority on the issue, in which the Supreme Court makes no reference to it being an exception. Further, see the discussion in *Calgary (City) v. Alberta (Energy and Utilities Board)*, 2010 ABCA 132 beginning at para. 163.

⁸ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC, para 71; *Decision and Order* (EB-2005-0031 - Great Lakes Power), February 24 2006, p.8.

⁹ *Bell Canada v. Canada (Canadian Radio Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722. *Bell Canada v. Bell Aliant Regional Communications*, [2009] 2 S.C.R. 764

¹⁰ BPI IRM Application, p.18

constitute retroactive ratemaking.¹¹ As noted previously by Vice Chair Kaiser in dissent (on the issue of whether retroactive ratemaking was engaged on the facts, not its scope):

There is ample authority in the regulatory jurisprudence that credits going forward do not constitute retroactive ratemaking". This is particularly the case where it reflects a one-time fixed amount adjustment to an overpayment that the tribunal finds unjust.¹²

This should not come as much of a surprise. Utilities have a significant asymmetry of information over ratepayers and the Board. They should not be allowed to benefit from their mistakes, which only they have the ability to control.

The overarching principle is the knowledge of the utility and consumers that rates may change retrospectively.¹³ The Alberta Court of Appeal has summarized what is the essential inquiry in determining if a ratemaking decision that impacts on past rates is impermissible: "the critical factor for determining whether the regulator is engaged in retroactive ratemaking is the parties' knowledge."¹⁴

Consistent with the principle behind those exceptions to the rule, a utility knows that if they make accounting or similar errors in limited circumstances which results in customers overpaying, then the Board has the discretion to order it to repay the overcharge.¹⁵ This is because they control their books. In a similar situation of misallocation of costs between Accounts 1588 and 1589, the Board discussed the harms of these errors on customers and the range of options available to the Board:

Utilities such as Essex Powerlines have ultimate control of their books and records and therefore bear the responsibility of ensuring that there are no mistakes in their filings with the Board. Errors crystalized in final rates can have long term adverse impacts on consumers. In situations where errors are the result of a utility's negligence, the Board could impose financial or other consequences on the utility. For example, the Board could order the utility to repay customers, deny the accrual of interest on outstanding balances or deny the inflation adjustment to base rates.¹⁶

There is no requirement for symmetrical treatment in situations of retroactive ratemaking. In that same decision, the Board found that innocent third party customers can be treated differently than the utility:

Does the rule against retroactive ratemaking prohibit the refund of money to customers because rates were declared final? RPP customers are innocent third parties. There is Board precedent for requiring a utility to repay money to customers if negligent or if the utility would profit on account of its own errors (EB-2009-0013 and EB-2014-0043). In other words, the Board is not driven by a need for symmetrical treatment of customers and utilities in final rate situations.¹⁷ [emphasis added]

More recently, the Board has reached two conflicting decisions on the issue. In its decision on the request by Kitchener-Wilmot Hydro for an adjustment of balances in the same RSVA accounts at

¹¹ *Decision and Order (EB-2014-0043 – Enbridge)*, April 10 2014; *Decision and Order (EB-2005-0031 - Great Lakes Power)*, February 24 2006, p.17

¹² *Decision and Order (EB-2005-0031 – Great Lakes Power)*, February 24 2006, p.21, citing *New York Water Service Corp v. Public Service Commission*, 208 N.Y.S. 2d 587 (1960) see *ATCO SCC 2006*, para. 137

¹³ *Bell Canada v. Bell Aliant Regional Communications*, [2009] SCC 40, para. 61

¹⁴ *ATCO Gas and Pipelines Ltd v Alberta (Utilities Commission)*, 2014 ABCA 28, para 56.

¹⁵ *Decision and Order (EB-2014-0043 - Enbridge)*, April 10 2014; *Decision and Order (EB-2009-0113 – North Bay Hydro)*, September 8, 2009, p.10; *Decision and Order (EB-2005-0031 - Great Lakes Power)*, February 24 2006, p.17

¹⁶ *Partial Decision and Procedural Order No.3 (EB-2014-301/0072 -- Essex Powerlines)*, March 25 2015, p.7

¹⁷ *Ibid*

issue in this proceeding that had been previously cleared on a final basis, the Board determined that it was not required to refund customers who had overpaid or that it be allowed to adjust the balances.¹⁸ In that decision, the Board commented that “there was no willful misconduct by Kitchener-Wilmot Hydro, or has it been enriched by the error”.¹⁹ Although, it should be noted the quantum of the error was significantly larger than at issue in this proceeding. Kitchener-Wilmot Hydro had overcharged certain customers by approximately \$2.2M. In coming to its decision that no adjustment or refund was appropriate, the Board commented that the “[t]he OEB also recognizes the current approach to group 1 accounts does not explicitly recognize the potential for ongoing adjustments to these amounts once final rates are approved”.²⁰

The Kitchener-Wilmot Hydro decision needs to be contrasted with the Board’s decision in the 2018 rates application by Essex Powerlines Corporation. In that decision the Board approved on a final basis that a previously interim order’s retroactive adjusting of a previously cleared final amount on the basis that the Board *does* contemplate some discretion:

OEB staff submitted that the inference of retroactive ratemaking has been eliminated by the existence of residual balances in account 1595. However, the clearance of residual balances in account 1595 is not the controlling factor in this case. The filing requirements contemplated some discretion that may be exercised by the OEB regarding adjustments to deferral and variance account balances. The adjustments were incorporated in the rates that were approved in the 2015 IRM order on an interim basis. The OEB is prepared to allow the adjustments to stand.

The OEB notes that the end result to customers is consistent with the principles of just and reasonable rates as the consequences were the same as if the errors had not been made.²¹ [emphasis added]

SEC submits the Board does have the discretion to order a refund to customers who overpaid, while it does not with respect to customers who have overpaid, due to errors made by a utility.

BPI Was Negligent and Should Refund the Overpayment made by Non-RPP Customers

The Board should exercise its discretion and order BPI to repay non-RPP customers the amounts it has overpaid.

BPI’s evidence is that in 2017 it discovered that the 2016 consumption data provided by ODS for a number of customers showed anomalous consumption levels, exceeding a reasonable level of monthly consumption for smart meter eligible customers.²² In its review of that error it went back and looked at 2015 data and found a similar erroneous data issue from ODS that caused an error in the amount settled with the IESO and mapped to Accounts 1588 and 1589.²³ Even though the error was not intentional, that does not absolve BPI of its responsibility to ensure to have a proper oversight in place to ensure that the data it used to make entries into its RSVA accounts are correct. Since it outsourced the smart meter data work to ODS, it had a responsibility to do an integrity control on the data itself, or have a process in place to ensure that ODS had integrity controls in place. The evidence shows that it did not do so.

SEC recognizes that after discovering the issue, BPI appears to have taken the issue seriously, including having KPMG undertake a regulatory process review of its RSVA accounting practices. But what that review does show is how woefully inadequate its processes were at the time the error

¹⁸ *Decision and Order* (EB-2017-0056 – Kitchener-Wilmot Hydro 2018 IRM), March 1 2019, p.12

¹⁹ *Ibid*

²⁰ *Ibid*

²¹ *Decision and Order* (EB-2017-0039 – Essex Powerlines 2018 Rates), August 23 2018, p.8

²² Interrogatory Response Staff 2(a)

²³ Interrogatory Response VECC #6(a)

occurred. For example, KPMG noted that while “[s]ome informal data integrity checks are performed on certain data in the spreadsheet but these checks are not documented or noted as tasks to be included”.²⁴

Only now has BPI implemented a process to “identify any unreasonably high data points and these points are investigated and/or normalized from the data set and associated data points”.²⁵ It was negligent of BPI to have no process in place previously. Unlike Kitchener-Wilmot Hydro, the situation was not an error caused by manual adjustment r.²⁶ It was a situation of an absence of any oversight and data integrity checks on the information it was receiving from a third-party it chose. As BPI put it, until the error was discovered its “processes for settling with the IESO had relied on the notion that ODS represented smart metered consumption data completely accurately, and therefore did not true up this component of its settlement”.²⁷

BPI’s view that smart metered data that was collected by ODS would be 100% accurate is very surprising considering that for final customer billing purposes distributors by regulation are not allowed to use their own data, and must use the data provided by the Smart Meter Entity’s MDMR which provides a validation service.²⁸ Those services are specifically designed to “identify and account for missed or inaccurate smart metering data”.²⁹ For the purposes of IESO settlement, which then impacts the RSVA account mapping, the data must be checked to ensure accuracy. Something BPI now recognizes, but should have also in 2015.

While the errors that led to the overcharge were not intentional, it still resulted in certain customers being required to pay through rates more than they should have due to BPI’s lack of any oversight of the data. This is not about intent. It is about responsibility. BPI’s customers should not bear the cost of the errors, the utility should.

Requiring BPI to refund \$713,713 to non-RPP customers will not cause material harm to BPI. If refunded in a single year, it would be within 300 basis points (3%) of its return on equity.³⁰ Further, based on BPI’s latest approved scorecard, in its last audited year of 2017, its actual ROE was higher than the approved level by 2.6%.³¹ In fact, it has significantly over-earned for 4 of the previous 5 years.

Summary

SEC submits that the Board has the legal authority to order BPI to refund to non-RPP customers only amounts previously cleared on a final basis. Based on the evidence of BPI’s negligence, the Board should exercise its discretion and order a refund.

²⁴ Supplementary Interrogatory Responses, Attachment H, p.9

²⁵ Interrogatory Responses SEC-2

²⁶ *Decision and Order* (EB-2017-0056 – Kitchener-Wilmot Hydro 2018 IRM), March 1 2019, p.7

²⁷ Interrogatory Responses SEC-2(a)

²⁸ See O. Reg. 393/07

²⁹ *Ibid*, s.0.1

³⁰ SEC calculation is based on a rough estimate using information provided in the approved settlement of its 2017 rates application. In that application the Board approved an ROE of 8.78% which resulted in a revenue requirement of 2,599,011. Thus a 1% of ROE is the equivalent of \$296,015 in 2017 and would be higher for 2019 rates as the amount approved in the 2017 rates application would be inflated in the subsequent 2 years by the IRM adjustment. (See *Decision and Order* (EB-2016-0058 - BPI 2017 Rates), November 24, 2016, Appendix A, Attachment D, p.7).

³¹ See BPI 2017 Scorecard <<https://www.oeb.ca/documents/scorecard/2017/Scorecard%20-%20Brantford%20Power%20Inc..pdf>>



Yours very truly,
Shepherd Rubenstein P.C.

Original signed by

Mark Rubenstein

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