John A.D. Vellone
T (416) 367-6730
F 416.367.6749
jvellone@blg.com

Jessica-Ann Buchta
T (416) 367-6066
F 416.367.6749
jbuchta@blg.com

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada M5H 4E3
T 416.367.6000
F 416.367.6749
blg.com

Borden Ladner Gervais

November 29, 2018

Delivered by Email, RESS & Courier

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

Dear Ms. Walli:

Re: Brantford Power Inc.
Application for Approval of 2019 Electricity Distribution Rates
Board File No.: EB-2018-0020
Reply Submissions

Pursuant to Procedural Order No. 2, please find enclosed the Reply Submissions of Brantford Power Inc.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:

Original signed by John A.D. Vellone

John A.D. Vellone

cc: Oana Stefan, Brantford Power Inc.
Brian D'Amboise, Brantford Power Inc.
Intervenors of record in EB-2018-0020

EB-2018-0020

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended (the "Act");

AND IN THE MATTER OF an Application by Brantford Power Inc. under Section 78 of the Act for an order approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2019.

REPLY SUBMISSIONS
OF
BRANTFORD POWER INC.

November 29, 2018

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide St W.
Toronto ON M5H 4E3

John A.D. Vellone
Tel: (416) 367-6730
Facsimile: (416) 361-2758
Email: jvellone@blg.com

Counsel to the Applicant

REPLY SUBMISSIONS
OF
BRANTFORD POWER INC.

November 29, 2018

A. INTRODUCTION

1. Brantford Power Inc. ("**BPI**") makes these written reply submissions in accordance with the Ontario Energy Board's (the "**OEB's**") Procedural Order No. 2 dated November 2, 2018 in respect of an Application filed by BPI on August 13, 2018, as amended, under Section 78 of the *Ontario Energy Board Act, 1998* ("**OEB Act**") seeking an order of the OEB approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2019 (the "**Application**"). The Board assigned file number EB-2018-0020 to the Application.

2. These submissions are made in reply to the submissions of OEB staff ("**OEB Staff**"), the School Energy Coalition ("**SEC**") and the Vulnerable Energy Consumers Coalition ("**VECC**") each dated December 22, 2018. OEB Staff, SEC and VECC are referred to collectively as the "**Parties**", and each a "**Party**".

3. The Parties made detailed submissions in respect of the following three key topics:

    a. request for disposing of Account 1568 LRAMVA;

    b. request for not disposing Group 1 DVA Balances; and

    c. proposed adjustments to the balances in Accounts 1588/1589 in 2015 and 2016.

    BPI will address the submissions made on each topic in-turn.

B. ACCOUNT 1568 – LRAMVA

4. In the Application, BPI applied for recovery of a debit balance of $339,765 (as updated to correct for a minor update on the interest rate applied on carrying charges in Q4 2018, which wasn't available at the time the Application was submitted) in lost revenue associated with conservation activities in 2016 and 2017.[1]

5. In their submissions, OEB Staff had no concerns with BPI's request to dispose of this revised LRAMVA balance.[2] OEB Staff noted that they have reviewed the calculations, and in their view the amounts have been calculated in accordance with OEB policy. No other party objected to the disposition of this LRAMVA balance.

6. BPI submits that the Board should approve the recovery of $339,765 in lost revenue associated with conservation activities in 2016 and 2017.

C. GROUP 1 DVAS

7. In its original Application, BPI proposed no disposition of its Group 1 DVA balances. BPI acknowledges that the account balances exceed the OEB's threshold for disposition.

8. One reason BPI proposed this approach was because of ambiguity arising out of the Board's July 30, 2018 letter which indicated that Group 1 DVA balances would be approved on an interim basis, or not approved at all, on a case-by-case basis.[3] It was unclear to BPI how subsequent corrections would be made to these accounts (BPI has not had to make any such adjustments in recent experience, and consequently was simply not familiar with the mechanisms employed by the OEB to make these adjustments).[4]

9. Another reason BPI requested deferral of the disposition of Group 1 DVA balances is to create an opportunity to mitigate significant volatility in customer rates that would otherwise arise from a sizeable rebate of Group 1 DVA balances lowering 2019 rates followed by an

[1] Application at pg. 12-13 and Table 1.5.6; BPI Responses to Staff-IR 10.
[22] OEB Staff Submissions at pg. 10.
[3] July 20, 2018 Letter on the OEB's Plan to Standardize Processes to Improve Accuracy of Commodity Pass-Through Variance Accounts.
[4] BPI Response to Staff-7.

anticipated increase in 2020 rates arising from a planned ICM funding request.[5]

10. Despite these concerns, BPI noted that it would not object to the disposition of Group 1 DVA balances if the OEB does not agree that the deferral request is appropriate.[6]

11. In their submissions, OEB Staff addressed BPI's first concern noting that "any changes to previously approved rate riders would be rolled into the next year's DVA rate riders."[7] OEB Staff also address BPI's second concern noting that "OEB staff does not support Brantford Power's request to use Group 1 DVA credit balance as a bill reduction measure for a future application. OEB staff notes that the ICM request has neither been made nor approved in the current application."[8]

12. BPI acknowledges OEB Staff's submissions on both points. If the OEB agrees with the submissions of OEB Staff, BPI is willing to withdraw its proposal to defer disposition of its Group 1 DVA balances.

D. ACCOUNTS 1588/1589

13. The OEB has recognized that the electricity commodity is a large cash item that distributors are expected to manage on a monthly basis. BPI takes its responsibility in this regard very seriously.

14. Account 1588 ($RSVA_{Power}$) is used monthly to record the net difference between the energy amounts billed to customers, including accruals, and the energy charge to a distributor by, *inter alia*, the Independent Electricity System Operator (the "IESO"). Account 1589 ($RSVA_{GA}$) is used monthly to record the net difference between the global adjustment amount billed to non-Regulated Price Plan consumers, including accruals, and the global adjustment charge to BPI for non-Regulated Price Plan consumers from, *inter alia*, the IESO.

15. Accounts 1588 and 1589 are both commonly referred to as "electricity commodity"

[5] BPI Response to Staff-7.
[6] Ibid. at Staff-7(d).
[7] OEB Staff Submissions at pg. 9.
[8] Ibid.

accounts that relate to "pass through" costs. Amounts collected from ratepayers by BPI in accordance with an OEB order are remitted to the IESO, and vice versa, using these accounts.

16. BPI has not, does not, nor is it proposing to, benefit financially from either of these two pass-through accounts.

D.1 Summary of the Facts

17. On September 18, 2017, BPI disclosed to the Board that it had identified an error in the July 2016 consumption data received from BPI's third party smart meter data provider.[9] BPI promptly began an internal investigation to assess the impact of the error in data received from this third party service provider, which required coordination with that third party to identify the cause and scope of the error.[10]

18. As a result of the identification of this error, BPI withdrew its request for disposition of its Group 1 deferral and variance accounts as part of its 2018 IRM proceeding. The OEB agreed that BPI should complete an investigation and analysis in order to determine the exact impact of the error identified in its Group 1 deferral and variance account balances, and the OEB approved BPI's request to defer the disposition of its Group 1 deferral and variance accounts to a future rate application.[11]

19. In this Application, BPI confirmed that it has now completed these investigations and that as a result it had discovered a data error in the smart metering data provided by its third party Operational Data Store (ODS) provider in 2015 and 2016.[12] This erroneous data was never used for customer billing purposes,[13] however it was used for settlements with the IESO.[14]

20. BPI acknowledged in the Application that its 2015 DVA balances were disposed of on a

[9] http://www.rds.oeb.ca/HPECMWebDrawer/Record/585266/File/document
[10] Response to Staff Follow-up Question #3 at http://www.rds.oeb.ca/HPECMWebDrawer/Record/587725/File/document
[11] OEB Decision and Rate Order in EB-2017-0028 dated December 14, 2017 at pg. 6.
[12] Application at pg. 17.
[13] BPI Response to SEC-6(a) dated Nov. 15, 2018.
[14] BPI Response to OEB Staff-2(a) dated October 18, 2018.

final basis in its last cost of service. Later, BPI confirmed in its IR responses that it would not be seeking approval of any adjustments to the 2015 previously approved balances.[15] Any such adjustment to 2015 balances would violate the principle of "no retroactive ratemaking".

21. BPI does not stand to gain as a result of the 2015 error. Rather, if the Board accepts the approach proposed by BPI, BPI would return a total of $279,884 back to the IESO.[16] This amount reflects the total amount BPI recovered from the IESO as a result of the 2015 IESO settlement error.

22. BPI does propose to adjust its 2016 DVA balances, which have not been disposed of on a final basis, to correct for the ODS error and consequential adjustments. These adjustments shown in Table Staff S4-C filed in response to Staff-S4(b) and are correctly summarized in the table found at page 6 of OEB Staff Submissions. This is reproduced again below for ease of reference as Table 1.

Table 1: BPI Proposed Adjustments to 2016 balances of 1588 and 1589

Corrected Adjustments:	Account 1588	Account[20] 1589
2016 Remapping RPP vs Non RPP split [21]	$ (371,340)	$ 371,340
2016 IESO Settlement Error [22]	$ 375,315	$
Revised debit adjustment	$ 3,975	$ 371,340

23. Finally, in response to the supplementary IRs, BPI agreed that it would be appropriate to remove any retroactive interest adjustments arising from the ODS data errors because the settlement correction with the IESO would not have resulted in any interest paid to/from the IESO and thus BPI was not out-of-pocket any amounts.[17] Table 1 above reflects the proposed 2016 adjustments after excluding any such interest adjustments.

24. In response to these errors, BPI retained KPMG to complete a regulatory process review

[15] BPI Response to OEB Staff-1(c) dated October 18, 2018.
[16] Ibid. See also BPI Response to OEB Staff-S2 dated November 15, 2018.
[17] BPI Response to OEB Staff-S3(a) dated November 15, 2018.

related to its Form 1598 reporting. A copy of the KPMG's report dated December 18, 2017 was filed as Supplementary Interrogatory Attachment H (the "**KPMG Report**").

25. In the KPMG Report, KPMG noted that BPI had a "[w]ell thought out excel methodology" and that "[k]nowledgeable staff administer the regulatory process."[18] With the benefit of hindsight, the KPMG Report also identified a number of specific areas where BPI's processes could be improved going forward. BPI management agrees with and has taken steps to implement each of the recommendations made in the KPMG Report to improve data accuracy going forward.

26. It is worth noting that there is no financial incentive for BPI to make errors of this nature. And there is no need to impose a financial penalty to deter BPI from making errors in the future. BPI, much like the OEB, has an inherent interest in ensuring that all of the work it does is correct and free of errors. Like any institution that is composed of human staff, errors will occasionally occur, despite best efforts to prevent them.

D.2 The Parties Submissions

27. In their submissions, OEB Staff agreed with BPI's request to withdraw the proposed corrections to the 2015 Group 1 DVA balances. OEB Staff noted correctly that the 2015 balances were previously approved on a final basis.[19] OEB Staff also agreed with the adjustments to the 2016 balances along with the approval of 2016 balances proposed by BPI.[20]

28. In this context, SEC (supported by VECC[21]) argues that the OEB should require BPI to refund to non-RPP customers amounts that were overcharged as a result of the 2015 error, without collecting from RPP customers amounts that were undercharged as a result of the 2015 error.[22] In SEC submissions – the Board should apply an asymmetric approach because "BPI should bear the costs of the mistake, not its non-RPP customers." On this

[18] KPMG Report at pg. 2.
[19] OEB Staff Submissions at pg. 6.
[20] Ibid.
[21] VECC Submissions at pg. 3.
[22] SEC Submissions at pg. 2.

basis, SEC argues that BPI should be required to incur a substantial financial penalty by funding a refund of $713,712 to non-RPP customers.[23]

D.3 BPI Reply Submissions

29. BPI notes at the outset that OEB staff support BPI's proposals with regards to its request to withdraw the proposed corrections to the 2015 Group 1 DVA balances, and its request to make the proposed adjustments to 2016 balances.

30. In this context, BPI was quite surprised by SEC's arguments. SEC has quite recently argued vigorously in EB-2017-0039 in defense of a strict application of the "no retroactive ratemaking" principle (their argument was backed by a 520 page[24] book of authorities).[25] The facts in the EB-2017-0039 case are quite different from the present Application, however in essence SEC argued that the utility should suffer a $1.8 million penalty as a result of an inadvertent duplicate disposition of a net refund to customers. As discussed below, the Board did not agree.

31. Similarly, the Board has previously rejected SEC's attempt to make essentially the same arguments it is making in the present Application in the Kitchener-Wilmot Hydro 2018 IRM case (EB-2017-0056).[26] In that case, SEC argued that "KWHI was clearly negligent in its regulatory accounting that led to the errors, and it should bear the costs of refunding to customers amounts overcharged due to its own errors in the calculation of Account 1589."[27] On this basis, SEC argued that KWHI should suffer a $2.195 million penalty as a result of an in advertent error, a result of which was that RPP customers underpaid, and non-RPP customers overpaid. As discussed below, once again the Board did not agree.

32. The facts the Board considered in EB-2017-0056 and the facts in this Application are quite similar. The Board's Decision and Order dated March 1, 2018 in EB-2017-0056 sets out a

[23] Ibid. at pg. 5.
[24] Available online at: http://www.rds.oeb.ca/HPECMWebDrawer/Record/613874/File/document
[25] SEC Public Submissions dated July 18, 2018 in EB-2017-0039. Available online at: http://www.rds.oeb.ca/HPECMWebDrawer/Record/613873/File/document
[26] SEC Submissions dated December 18, 2017 in EB-2017-0056. Available online at: http://www.rds.oeb.ca/HPECMWebDrawer/Record/594191/File/document
[27] Ibid. at pg. 6.

clear, well thought-out analytic approach to assessing situations of this nature (the "**Kitchener-Wilmot Decision**").[28] As noted, the facts addressed in the Kichener-Wilmot Decision were quite similar to the facts at issue in this Application.

33. In consideration of the Kitchener-Wilmot Decision, BPI notes that:

a. All rate regulated utilities, including BPI, are entitled to rely on the finality of Decisions and Orders issued by the OEB to be able to operate their business. Rate regulated utilities cannot obtain revenues except through Orders of the OEB. These utilities then expend monies on the operations and maintenance of the local distribution system, relying on the finality of these Decisions and Orders. Any departure from principle of "no retroactive ratemaking" would risk undermining this reliance interest and consequently the maintenance of a financially viable electricity industry.

b. The tariff approved by the OEB under which the accounts containing the errors were disposed was final and both the utility and the customers should be able to rely on the finality of rates.

c. While the particulars of the underlying cause of the error differ slightly from the facts considered in Kitchener-Wilmot Decision, nothing turns on those differences. Ultimately, BPI did and does have control of its books and is expected to maintain accurate accounts. BPI acknowledges this, and has been transparent and forthcoming about the error throughout this process, including the steps it is taking to improve data accuracy going forward. However, there was no willful misconduct by BPI, nor will BPI be enriched by the error.

d. The OEB has not previously established an expectation that there could be subsequent adjustments related to 2015 RSVA amounts once final tariffs have been approved to dispose of account balances for that period.

34. SEC attempts to contrast the Kitchener-Wilmot Decision with the Board's Decision and Order in EB-2017-0039 dated August 23, 2018 (the "**Essex Powerlines Decision**")[29] to

[28] Available online at: http://www.rds.oeb.ca/HPECMWebDrawer/Record/600989/File/document
[29] Available online at: http://www.rds.oeb.ca/HPECMWebDrawer/Record/617683/File/document

suggest that there is some ambiguity on the Board's approach to "no retroactive ratemaking".

35. BPI disagrees. The facts addressed in the Essex Powerlines Decision are completely different from the facts at issue in this Application for two reasons.

36. First, the Essex Powerlines Decision dealt with an issue that related to 2015 residual balances in subaccounts of 1595, where the OEB had yet to dispose of residual balances for those subaccounts for 2015 on a final basis. Since the subaccount was not disposed of on a final basis for the year in question, there was no issue of retroactive ratemaking. This was clearly detailed by OEB Staff in their submissions and noted by the Board in the Essex Powerlines Decision:

> "OEB staff submits that since the issue in this case relates to the balances in subaccounts of Account 1595, and as there have been no OEB orders that dispose of the residual balances in those subaccounts on a final basis, whether for 2012, 2014 or 2015, there is no issue of retroactive ratemaking in this case."[30]

37. Second, in the Essex Powerlines Decision the Board noted that the utility was able to cite credible evidence that the OEB had previously established an expectation that there could be subsequent adjustments to the residual balances exactly of the type proposed by the utility. Specifically, the OEB ascribed importance to a paragraph in the 2015 Filing Requirements which allowed Essex Powerlines to propose adjustments to amounts included in rates that were approved in the 2015 IRM on an interim basis.[31]

38. In the present Application, there are no such adjustments proposed. The amounts in the 2015 RSVAs have been disposed of on a final basis. And SEC failed to point to any credible evidence of an expectation of subsequent adjustments of the type it is proposing being established in the present Application.

39. BPI acknowledges that the OEB's practice of applying the rule of "no retroactive

[30] OEB Staff Submissions in EB-2017-0039 dated July 4, 2018. Available online at: http://www.rds.oeb.ca/HPECMWebDrawer/Record/613299/File/document
[31] Ibid. at pgs. 8-9.

ratemaking" to DVA balances that are disposed of on a final basis are subject to some exceptions. As more fully detailed below, none of those exceptions apply in this case.

40. The Ontario Court of Appeal has ruled that "[s]lavish adherence to the use of interim rates and deferral accounts should not prohibit adjustments in a proper case"[32] and "[t]he critical factor for determining whether a regulator is engaging in retroactive ratemaking is the parties' knowledge that the rates were subject to change."[33]

41. Knowledge that rates were subject to change is the guiding principle that clearly explains both the Kitchener-Wilmot Decision and the Essex Powerlines Decision. Contrary to the arguments of SEC, the decisions are not contradictory. They are entirely consistent.

42. In the present Application, BPI had no knowledge that the rates that were previously disposed of on a final basis would be the subject of change. BPI is not in any way waiving its legitimate reliance interest in the finality of prior OEB Decisions and Orders.

43. In general, the OEB's policy on "no retroactive ratemaking" has been tempered over time by the introduction of the principle of unjust enrichment. In particular, in instances where the utility in question would profit as a result of errors, both the CRTC and the OEB have been willing to correct those errors to ensure the utility does not profit unjustly from an error that the utility itself made.

44. As one example, the OEB permitted a retroactive adjustment to Enbridge's QRAM orders that were previously declared as final in EB-2012-0352. The principle that arose from this decision is that "[a]n out of period adjustment can be justified if it ensures that a utility does not profit on account of its own errors".[34]

45. This Application is clearly distinguishable from this line of cases, however. Unlike Enbridge, BPI has not, will not, and is not proposing to profit from its error. BPI has not

[32] The Ontario Court of Appeal Decision in *Union Gas Ltd. V. Ontario (Energy Board),* 2015 OCA 453, citing favourably the Alberta Court of Appeal at para 91.
[33] Ibid.
[34] Decision and Order dated April 10, 2014 in EB-2014-0043 at pg. 2. See also *MCI Telecommunications v. Public Service Commission*, 840 P. 2d 765 (Utah 1992).

been unjustly enriched as a result of the error.

46. What SEC (and VECC) fail to acknowledge is that the OEB has never once approved their recommended "asymmetric disposition" of accounts previously disposed of on a final basis to account for errors to a utility's detriment in the absence of express consent from the utility.

47. This makes sense. BPI has a legitimate reliance interest in the finality of prior OEB Decisions and Orders. To undermine this reliance interest would undermine the maintenance of a financially viable electricity industry as a whole.

48. In EB-2009-0113, the OEB strictly applied the "no retroactive ratemaking" principle. The OEB did not apply the "no retroactive ratemaking" in an asymmetric way – to some accounts and not to others. North Bay Hydro's reliance interest on the finality of prior OEB Decisions and Orders was not threatened by this Decision.

49. In EB-2014-0043, Enbridge proposed to refund $10.1 million and the OEB did permit a retroactive adjustment to Enbridge's QRAM orders that were previously declared as final in EB-2012-0352. The principle that arose from this decision is that "[a]n out of period adjustment can be justified if it ensures that a utility does not profit on account of its own errors".[35] Enbridge's reliance interest on the finality of the OEB's prior Decision and Order was not threatened, because Enbridge consented to the refund (Enbridge proposed it).

50. In EB-2016-0090, the OEB also permitted a retroactive adjustment to Accounts 1588 and 1589 in respect of Lakeland's Parry Sound service area arising from an after-the-fact discovery of accounting errors. Specifically, the OEB allowed for a violation of the principle of "no retroactive ratemaking" allowing Lakeland to refund $65,112.46 to customers that overpaid "because the adjustment in is in favor of customers and Lakeland Power consented."[36] Lakeland's reliance interest in the finality of prior OEB Decisions and Orders was not threatened, because Lakeland consented to the adjustment.

[35] Decision and Order dated April 10, 2014 in EB-2014-0043 at pg. 2. See also *MCI Telecommunications v. Public Service Commission*, 840 P. 2d 765 (Utah 1992).
[36] Decision and Order dated December 8, 2016 in EB-2016-0090 at pg. 10.

51. In EB-2014-0072/EB-2014-0301, Essex Powerlines did not consent to an "asymmetric disposition" and based on this the OEB refused to retroactively adjust final approved amounts in 2011 and 2012, and instead applied the "no retroactive ratemaking" principle strictly to all accounts. Once again, Essex Powerlines' reliance interest in the finality of prior OEB Decisions and Orders was not threatened.

52. In the present Application, the error was self-identified by BPI and promptly reported to the OEB, there is no question about the facts and there is no further need to conduct another compliance audit.

53. BPI does not consent to the "asymmetric disposition" of Accounts 1588 and 1589 for 2015 amounts as proposed by SEC (and VECC) in their submissions.

54. The amount at issue in this proceeding of $713,712 is material to BPI. An "asymmetric disposition" of this amount, as proposed by SEC, would constitute an unjustified penalty that is entirely disproportionate to the errors that occurred.

55. By way of comparison, the OEB does have the jurisdiction under Section 112.5 of the OEB Act to impose administrative penalties for violations of enforceable provisions under the OEB Act. These are not mere data, accounting or administrative errors. These are violations of statutory provisions that are so important, the legislative assembly of Ontario deemed them to be "enforceable provisions."

56. BPI has reviewed the administrative penalties imposed by the OEB under Section 112.5 over the past five years (i.e. going back to January 2013).[37] From November 25, 2014 to today, the OEB has imposed administrative penalties ranging from a low of $1,500 to a high of $75,000 for breaches of enforceable provisions.

57. The penalty of $75,000 was imposed on SNC Lavlin for operating a generation facility without a generation license for a period ranging over 10 years in contravention of Section 57 of the OEB Act. BPI has done nothing nearly as egregious as operate its distribution

[37] This includes EB-2017-0088, EB-2017-0005, EB-2016-0282, EB-2016-0200, EB-2016-0180, EB-2014-0259, EB-2013-0394, EB-2013-0392/EB-2014-0393, and EB-2012-0443. Full decisions for the enforcement proceedings can be found at https://www.oeb.ca/industry/rules-codes-and-requirements/enforcement-proceedings.

business without an OEB license over a ten year period. Yet SEC propose a penalty which is nearly 10 times higher than what the OEB fined SNC Lavalin.

58. A penalty of the magnitude proposed would constitute an administrative penalty thereby triggering a proceeding under Section 112.5. However, the Parties have not engaged the Act and the associated Regulation,[38] which include a number of criteria that the Board is to consider prior to imposing a penalty including the criterion that the determined amount "shall not, by its magnitude, be punitive in the circumstances."

59. The highest penalty ever imposed by the OEB over the five year period considered was $450,000 imposed on Just Energy on April 4, 2014 in an enforcement proceeding where: (i) **in 132 cases**, Just Energy breached section 22(2) of the *Energy Consumer Protection Act, 2010* by failing to apply the correct cancellation fee for consumers as prescribed under section 23(1) of Ontario Regulation 389/10; and (ii) **in 2,060 cases** Just Energy misled consumers about their cancelation rights in breach of sections 10, 5(1)(i), (xi) and (14) of the *Energy Consumer Protection Act* and Part B, section 1.1 of the Code of Conduct for Marketers and/or the Electricity Retailer Code of Conduct.

60. Just Energy admitted to breaching enforceable provisions in a total of 2,192 different cases. And yet received a penalty which would need to be multiplied by 1.59 times to equal the penalty that the proposed "asymmetric disposition" would have the effect of imposing on BPI for three errors which BPI identified, voluntarily reported and is now simply attempting to fix.

61. For the absence of doubt - no Party has alleged, and BPI has not, violated any enforceable provision of the OEB Act. Yet the Parties appear to believe the OEB may impose a penalty pursuant to its "just and reasonable" rate setting methodology which is neither just nor reasonable.

E. CONCLUSIONS

62. In conclusion, BPI submits that:

[38] O. Reg. 51/16 Administrative Penalties.

a. The Board should approve the recovery of $339,765 in lost revenue associated with conservation activities in 2016 and 2017. The amount is material to BPI. No Party objected to this recovery, and OEB Staff reviewed the calculations and confirmed the amounts have been calculated in accordance with OEB policy.

b. If the OEB agrees with the submissions of OEB Staff on BPI's proposed deferral of disposition of Group 1 DVAs, BPI is willing to withdraw its proposal to defer disposition of its Group 1 DVA balances.

c. The Board should accept BPI's request to withdraw any corrections to the 2015 Group 1 DVA balances and should reject SEC's argument that BPI should suffer a $713,712 financial penalty arising from an inadvertent third party data error. The error was inadvertent, was immediately reported, investigated, results disclosed and steps taken to avoid similar errors going forward. There was no willful misconduct by BPI, nor will BPI be enriched by the error. The amounts were previously disposed of on a final basis, and any adjustments would violate the "no retroactive ratemaking" principle. BPI has a legitimate reliance interest in the finality of prior OEB Decisions and Orders. To undermine this reliance interest would undermine the maintenance of a financially viable electricity industry as a whole.

d. The Board should accept the adjustments to the 2016 DVA balances to correct for the ODS error and consequential adjustments, and should approve the 2016 balances proposed by BPI. Unlike the 2015 balances, the 2016 balances have not yet been disposed of on a final basis and the adjustments will ensure that the amounts disposed of reflect the corrected and best available information.

63. Finally, BPI submits that:

a. The Board should approve the Price Cap IR adjustment to the monthly service charge and volumetric distribution rate arising as a direct result of the Board's IRM rate setting methodology, and updated with the Input Price Index for 2019 rates released by the Board on November 23, 2018. No Party expressed concerns with BPI's proposed price cap adjustment.

b. The Board should approve BPI's transition of residential customers to fully fixed monthly distribution charges. The evidence demonstrates that no mitigation is required, and no Party expressed concerns with BPI's proposal.

c. The Board should approve BPI's proposed update to its RTSRs. BPI agrees that if the OEB issues an order updating the current UTRs or the current Energy+ rates prior to a Decision and Order in this proceed, then it would be appropriate to update the BPI IRM rate generator model. BPI would ask that OEB Staff provide BPI with a copy of any such updated model, together with a description of the specific changes that were made.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 29TH DAY OF NOVEMBER, 2018

BORDEN LADNER GERVAIS LLP

Per:

Original signed by John A. D. Vellone

_____

John A.D. Vellone

TOR01: 7703481: v2