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File No. 339583.000273

February 11, 2021

By electronic filing

Christine Long
Registrar and Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th floor
Toronto, ON M4P 1E4

Dear Ms. Long

Re: Consultation on Deferral Account – Impacts Arising from the Covid-19 Emergency
Board File #: EB-2020-0133

Pursuant to the Board's letter dated December 16, 2020, please find enclosed the written reply comments to the comments provided by other stakeholders on January 25, 2021, on behalf of our client, Canadian Manufacturers & Exporters ("CME")

Yours very truly

Scott Pollock

c. Alex Greco (CME)

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1.0 INTRODUCTION

1. Pursuant to The Board's letter of December 16, 2020, parties are able to make responding comments to the comments provided by other stakeholders on January 25, 2021. These responding comments are made on behalf of Canadian Manufacturers & Exporters ("**CME**").

2. While the Board received a number of sets of comments from various stakeholders, CME wishes to respond to the comments provided by the Ontario Energy Association ("**OEA**"). To the extent that CME's comments do not address certain comments made by other stakeholders, it should not necessarily be construed as an endorsement of those comments.

2.0 The Principle of Necessity Does Not Violate the OEB's Legal Framework

3. In its comments on Board Staff's proposal, the OEA stated that the principle of necessity likely violates the framework within which the OEB operates.[1] In support of this assertion, the OEA commissioned a legal analysis conducted by Aird & Berlis LLP (the "**A&B Opinion**").[2]

4. The A&B Opinion takes the position that the principle of necessity, articulated by Board Staff in its proposal as being a precondition of recovery of amounts recorded in the COVID-19 Accounts, violates the OEB's existing legal framework. The A&B Opinion asserts that the Supreme Court in the *ATCO Gas* case and the *Ontario Power Generation* ("***OPG***") case determined that utilities are always entitled to earn a 'fair' return regardless of the circumstances. As a result, the A&B Opinion concludes that the only way for 'necessity' to

[1] Ontario Energy Association on Behalf of CLD+ - Consultation on the Deferral Account – Impacts Arising from the COVID-19 Emergency: Staff Proposal, EB-2020-0133, January 25, 2021, p. 12.
[2] Ontario Energy Association on Behalf of CLD+ - Consultation on the Deferral Account – Impacts Arising from the COVID-19 Emergency: Staff Proposal, EB-2020-0133, January 25, 2021, pp. 21-37.

fit within the existing OEB framework is for it to be synonymous with the fair return standard.[3]

5. CME disagrees with the A&B Opinion, and submits that the principle of necessity is not only permitted within the Board's legal framework, but it should be applied in this instance in order to adequately balance the Board's statutory objectives.

6. If the Board accepted the position set out in the A&B Opinion, it would essentially be limiting itself to prudence reviews of operating costs incurred by the utility. To the extent that operating costs were found to be prudently incurred, they would necessarily be allowed for recovery. There would be no room for the use of any other analysis, such as the "necessity principal". However, constraining the Board's analysis in this way not only is not supported by the Board's legal framework, the Supreme Court of Canada and the Board itself have rejected such an approach.

7. Section 36(2) of the *Ontario Energy Board Act*, 1998, S.O. 1998, c 15., Sched. B (the "**OEB Act**") sets out the Board's authority with respect to gas regulation. It provides that the Board may make orders approving or fixing just and reasonable rates. This permissive grant of power is repeated in section 78(3) with respect to electricity distributors and transmitters, and 78.1 for setting payment amounts to generators.

8. In setting just and reasonable rates, the Board is not confined to simply reviewing the costs incurred and determining prudence. In the *OPG* case cited by the A&B Opinion, the crux of OPG's argument was that the Board was legally required to compensate OPG for all of its prudently committed or incurred costs.[4] The Supreme Court disagreed. The Supreme Court found that:

> ***"I do not find support in the statutory scheme or the relevant jurisprudence for the notion that the Board should be* required *as***

[3] Ontario Energy Association on Behalf of CLD+ - Consultation on the Deferral Account – Impacts Arising from the COVID-19 Emergency: Staff Proposal, EB-2020-0133, January 25, 2021, p. 35.
[4] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at para 3.

> ***a matter of law, under the* Ontario Energy Board Act, 1998*, to apply the prudence test as outlined in* Enbridge *such that the mere decision not to apply it when considering committed costs would render its decision on payment amounts unreasonable. Nor is the creation of such an obligation by this Court justified. As discussed above, where a statute requires only that the regulator set "just and reasonable" payments, as the* Ontario Energy Board Act, 1998 *does in Ontario, the regulator may make use of a variety of analytical tools in assessing the justness and reasonableness of a utility's proposed payment amounts."***

9. The Board came to a similar conclusion in EB-2018-0085. When OPG argued that the *ATCO* decision, cited by the A&B Opinion, stood for the proposition that utilities must recover prudently incurred costs, the Board determined:

> ***"The setting of reasonable rates can include factors that go beyond the determination of the total amount of prudently incurred costs."***[5]

10. The Board is not confined to simply determining the prudence of costs and allowing recovery. It can use a variety of tools to assess what rates (or payment amounts) would be just and reasonable in the circumstances.

11. Moreover, the A&B Opinion asserted that a utility must have the opportunity to recover its operating and capital costs through rates.[6] This is only part of the requirement stated by the Supreme Court of Canada. In the *OPG* case, the Board stated that a utility must be given the opportunity to recover its operating and capital costs *over the long run*.[7]

12. This distinction is critical. The Board is not required to match every cost to a recovery in every short run period. This would be akin to a cost of service type of regulation. Instead, the Board must allow the utility the opportunity to recover its operating and capital costs over the broader span of time through which the utility was operating.

[5] Ontario Energy Board, Decision and Order, EB-2018-0085, p. 16.
[6] Ontario Energy Association on Behalf of CLD+ - Consultation on the Deferral Account – Impacts Arising from the COVID-19 Emergency: Staff Proposal, EB-2020-0133, January 25, 2021, p. 28.
[7] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at para 16.

13. The Board's role as a market proxy can lead to outcomes where the Board disallows recovery, and in so doing makes it difficult for a utility to recover its capital and operating costs in the short run. The Supreme Court, in upholding the Board's disallowance of compensation costs in OPG specifically accepted the fact that it could adversely impact OPG's ability to earn cost of capital in the short run:

> ***"I have noted above that it is essential for a utility to earn its cost of capital in the long run. The Board's disallowance may have adversely impacted OPG's ability to earn its cost of capital in the short run…Sending such a signal is consistent with the Board's market proxy role and its objectives under s. 1 of the* Ontario Energy Board Act, 1998*."***[8]

14. There is no conflict between the use of the 'necessity principle' as articulated in Board Staff's proposal, or indeed in the way advocated for by CME and other ratepayer groups in their comments, and the Board's legal framework. The Board must balance competing interests, including those of customers/ratepayers, and must act as a market proxy.

15. The market and economic data is clear. As set out in LEI's report, utilities have been impacted, but not as severely as the broader market. Accordingly, when determining what amounts are recoverable by utilities from the Covid-19 Accounts, the Board can and should be guided by the idea of necessity, and use it as a tool to determine the appropriate balance between utility earnings and increases to the burden borne by ratepayers, given how many are struggling to stay afloat during Covid-19.

3.0 BOARD STAFF'S PROPOSAL IS NOT PENAL

16. The OEA also commissioned a review by ScottMadden of what other jurisdictions are doing in response to the Covid-19 pandemic. According to the OEA, ScottMadden's findings are that other jurisdictions are universally more favourable to utilities, so much so

[8] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44 at para 120.

that the OEA considers Board Staff's proposal to be the "most penal framework that would exist across the U.S. and Canada".[9]

17. CME disagrees with the OEA's conclusion, which is not supported by ScottMadden's findings.

18. ScottMadden's jurisdictional review found that 31/60 jurisdictions, or 52% have approved deferral or tracking of direct Covid-19 related expenses. However, that means that 48%, or nearly half of the jurisdiction have not approved deferral or tracking of Covid-19 costs. This includes Colorado, which has specifically declined to allow deferral or tracking of Covid-19 costs.[10]

19. Given that Board Staff's proposal builds off the ability to track Covid-19 accounts, and allows recovery for a significant portion of the costs incurred/lost revenue, CME submits that it is likely more favourable to utilities than approximately half of the jurisdictions that ScottMadden reviewed.

20. Furthermore, Board Staff's proposal is more generous to utilities in certain respects than the majority of the jurisdictions surveyed. For instance, ScottMadden found that only 18% of jurisdictions allow for deferral or tracking of lost revenue as a result of lost load/decreased sales.[11] However, Board Staff's proposal takes the position that these amounts should not only be tracked, but should be recoverable on the same basis as most other customer driven impacts.[12]

[9] Ontario Energy Association on Behalf of CLD+ - Consultation on the Deferral Account – Impacts Arising from the COVID-19 Emergency: Staff Proposal, EB-2020-0133, January 25, 2021, p. 18.
[10] Ontario Energy Association on Behalf of CLD+ - Consultation on the Deferral Account – Impacts Arising from the COVID-19 Emergency: Staff Proposal, EB-2020-0133, January 25, 2021, p. 53.
[11] Ontario Energy Association on Behalf of CLD+ - Consultation on the Deferral Account – Impacts Arising from the COVID-19 Emergency: Staff Proposal, EB-2020-0133, January 25, 2021, p. 57.
[12] OEB Staff Proposal: Consultation on the Deferral Account – Impacts Arising from the COVID-19 Emergency, EB-2020-0133, December 16, 2020.

21. Consequently, even if Board Staff's proposal were less favourable to utilities in certain respects, the fact that it is more favourable to them in others prevents the framework from being 'penal' or overly-favourable to ratepayers.

4.0 COSTS

22. CME requests that it be awarded 100% of its reasonably incurred costs in connection with this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of February, 2021.

Scott Pollock

Counsel for CME