SHIBLEY RIGHTON LLP
Barristers and Solicitors

TORONTO OFFICE:
250 University Avenue, Suite 700, Toronto, Ontario, M5H 3E5
Main 416 214-5200 Toll free 1-877-214-5200
Facsimile 416 214-5400

WINDSOR OFFICE:
2510 Ouellette Avenue, Suite 301, Windsor, Ontario, N8X 1L4
Main 519 969-9844 Toll free 1-866-422-7988
Facsimile 519 969-8045

www.shibleyrighton.com

Please reply to the TORONTO OFFICE

John De Vellis
Direct Line (416) 214-5232
Direct Fax (416) 214-5432
john.devellis@shibleyrighton.com

BY COURIER

21/11/07

November 21, 2007
Our File No. 2070766

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: Milton Hydro Distribution Inc. EB-2007-0771

Please find enclosed Submissions of the School Energy Coalition on the preliminary issues in respect of the above-captioned matter. An electronic copy has already been sent to the parties.

Yours very truly,
SHIBLEY RIGHTON LLP

John De Vellis

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

AND IN THE MATTER OF an application by Milton Hydro Distribution Inc. for an Order or Orders approving and fixing just and reasonable distribution rates and other charges effective May 1, 2006;

AND IN THE MATTER OF a Notice of Motion by Milton Hydro Distribution Inc. seeking an Order Varying the Decision and Order of the Board in RP-2005-0020 / EB-2005-0391;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

SUBMISSIONS OF THE SCHOOL ENERGY COALITION ON THE PRELIMINARY ISSUES

1. These are the submissions of the School Energy Coalition ("SEC") on the three preliminary issues raised in the Procedural Order #1 in this proceeding.

2. The three questions the Board sought submissions are as follows:

   i. The late filing of the Motion, after the deadline set out in Rule 42.03 of the Board's Rules;
   ii. The threshold question, under Rule 45.01;
   iii. The impact of the fact that the 2006 rates appealed from have now been superseded by the 2007 rates decision.

3. As discussed in greater detail below, SEC believes issues i.) and iii.) are related and will deal with them sequentially.

<u>Late Filing of Motion</u>

4. According to the timeline submitted along with Milton Hydro's submissions, this is now the fifth time that this issue has come before the Board.

    i. **January 23, 2004**: The first was a January 23, 2004 application for Recovery of Regulatory Assets, wherein Milton Hydro included a request to recover extraordinary event losses. According to Milton Hydro, this application was later withdrawn on the advice of Board Staff;

    ii. **January 13, 2005**: Milton then included the request again in its 2005 rates application. SEC supported part of the relief Miltion Hydro was requested, being the request to recover lost revenues stemming from the bankruptcy of a major customer. SEC did not, however, support Milton Hydro's further request that the lost revenue be reflected in future rates. SEC's rationale was that that amounted to "cherry picking"- i.e. singling out one factor to be adjusted without adjusting all other factors as well. The Board rejected Milton Hydro's request in its decision dated **March 29, 2005**;

    iii. **October 18, 2005**: on the advice of Board Staff, Milton Hydro files a separate supplemental Rate Application for rates effective May 1, 2006 for recovery of loss due to bankruptcy and loss of revenue due to loss of load of large customer. This application is rolled into Milton Hydro's 2006 rates application and rejected by the Board in a decision dated April 12, 2006.

    iv. **January 25, 2007**: in its 2007 rates application, Milton Hydro asks the Board to reconsider its April 12, 2006 decision. This request is subsequently withdrawn, with plans by Milton Hydro to bring the within motion.

    v. **September 13, 2007**: Milton Hydro files the within motion seeking a review of the April 12, 2006 decision.

5. As can be seen from the above timeline, it is evident, firstly, that the Board has already considered and rejected this proposal twice- first in the 2005 rate application and then again in the 2006 rate application.

6. In addition, although part of the delay in bringing this motion may perhaps be attributed to advice from Board Staff along the way, there appear to be several large and unexplained gaps in time that should give the Board reason to dismiss this motion for being out of time.

7. Milton Hydro's explanation that it could not file this motion within 20 days of the April 12, 2006 decision because it was busy filing its CDM motion would be tenable if it acted promptly thereafter to bring the motion. It did not. Instead, Milton Hydro's submissions are that it acted only after discussing the matter with Board Staff in the Fall of 2006.

8. SEC views the subsequent events- Milton Hydro's inclusion of the motion for review in its 2007 rates application and subsequent withdrawal- as perhaps a forgiveable error given Milton Hydro's relative lack of experience before the Board. However, Milton Hydro then waited a further seven months (from February 2007 to September 2007) to file this motion.

9. In SEC's submission, the elapsed time from the last time the Board considered this issue, in April 2006, when combined with the time between the original application in 2005, is simply too long. While some of it can be excused on the basis of inexperience with Board processes or relying on advice from Board staff, much of the delay can be attributed to Milton Hydro.

10. In addition, if the Board hears this motion it could potentially mean ratepayers in 2008 would be asked to pay for losses that occurred in 2001 and 2003. In SEC's view, doing so would undermine the public's confidence in the regulatory system.

11. The board has in recent years introduced new process standards designed to increase the efficiency of the regulatory process. While SEC does not advocate a rigid approach to the Rules that would automatically disqualify applicants to who fail meet deadlines, having no discipline whatsoever on parties to act promptly to seek a review of Board decisions would undermine the Board's efforts to improve regulatory efficiency in the regulatory process.

Can the Board Review a Rate Order that has already been Superseded?

12. In SEC's submission, this is not so much a legal question as a question of whether Milton Hydro *should* be granted the relief it is seeking in view of the fact that the rates it is seeking to have reviewed have, due to the passage of time, already been superseded by a new rate order. Thus, however one characterized the relief sought by Milton Hydro when it was brought at the first instances, at this point it can only be charactherized as an attempt at retroactive ratemaking.

13. If Milton Hydro's position with respect to these charges is correct, then proper relief would have been to revise 2006 rates accordingly. It is unfair to ratepayers to have new charges imposed on them on the basis that, in 2006, an error was made in determining Milton Hydro's rates. If an error was made, it should have been corrected in 2006 and dealt with in 2006 rates. Imposing the charge on 2008 rates would hit ratepayers with two rate increases in one year: one resulting from

the normal year over year rate increases and one resulting from this correction of a 2006 error.

Related Procedural Question

14. The last two issues of timing raise indirectly what may be a more fundamental point. Whenever parties have an opportunity to seek review of a decision, a tribunal will run the risk that the review process will be overused, or used in a manner that undermines the regulatory process. Here we have a utility that has sought specific relief from this Board several times, taking it all the way to a decision on the merits by the Board twice, and losing both times. In our submission there is a point at which the Board should be saying "Enough" and treating its own decisions as final.

15. This is not, in our view, simply a question of whether Milton Hydro is overusing the review process. The Board must be cognizant of the fact that other utilities will be watching the Board's response to Milton Hydro's repeated attempts to win on this point. If it appears in the end that a utility can keep trying to get a result it wants until it finds a Board panel sympathetic to its request, other utilities may come to believe that the correct strategy would be to continue to seek reviews of any decision they don't like until they get the right answer.

16. Therefore, whether or not the timing issues militate against the applicant here, and whether or not an appropriate question on which a review can be founded is identified, it may well be in the interests of the regulatory process for the Board to say here that Milton Hydro has already "had its day in court". Two panels of the Board have decided against the applicant on this point. It may be inappropriate for a third panel to consider the same issues.

Threshold Question

17. SEC notes, firstly, that Milton Hydro's motion appears to be one of mixed fact and law and does not fit squarely within the enumerated grounds of review in Rule 44.01. However, in the decision in respect of the Motions to Review the Natural Gas Electricity Interface Review Decision[1], the Board said that it had the discretion to hear a motion for review "even though the grounds are errors of mixed fact and law which do not fall squarely within the list of enumerated grounds in Rule 44.01." [pg. 15]

18. In the NGEIR Threshold Decision the Board also addressed the threshold test under Rule 45.01 of the Board's Rules and stated:

[1] EB-2006-0322/EB-2007-0338/EB-2007-0340, Decision dated May 22, 2007; hereinafter the "NGEIR Threshold Decision".

> In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.
>
> The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.
>
> In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.
> [NGEIR Threshold Decision, pg. 18]

19. In SEC's submission, this test requires Milton Hydro to demonstrate an identifiable error on the face of the record and that that error is material to the outcome of the decision.

20. The Board decision that Milton Hydro seeks to review was based on a handful of legal or factual findings, primarily involving whether the amounts sought to be recovered were "out of period" and whether awarding them would constitute retroactive ratemaking.

21. In SEC's submission, while these would undoubtedly be errors material to the outcome of the decision, there is no reasonable prospect of demonstrating that the amounts sought to be recovered would not constitute retroactive rate making or that the amounts were not out of period. In cost of service rate making, rates are set prospectively and utilities are compensated for the risk that revenues will be lower than expected or that costs may be higher than expected. The utility also reaps the rewards if the reverse is true. Any application that seeks to recover losses in a prior period, therefore, is by definition a prior period loss, or retroactive ratemaking.

22. In SEC's submission, the real issue was whether, notwithstanding the fact the amounts sought were out of period and would constitute retroactive ratemaking, they should be awarded on the basis that they represent an extraordinary risk to the utility. That appears to be the basis upon which the Board in the Oakville Hydro decision, cited by Milton Hydro in its submission, allowed Oakville Hydro to recover similar losses.

23. The basis of the Board's decision in Oakville Hydro was not that the amounts were not retroactive or out of period, but rather that the "loss that would otherwise

be incurred is material, beyond the control of the utility and beyond a reasonable level of business loss." [Excerpt from EB-2004-0527, Affidavit of Donald R. Thorne, para. 4.2]

24. Therefore, SEC submits that, if the Board is to consider the motion at all in view of the two timing issues, the only issues which meets the threshold test is whether the Board erred in determining whether the loss incurred is material, beyond the control of the utility and beyond a reasonable level of business loss.

Costs

25. SEC has participated responsibly in this proceeding and submits that it has contributed to the Board's analysis of the issues. SEC therefore respectfully requests that it be awarded 100% of its reasonably incurred costs.

All of which is respectfully submitted this 20th day of November, 2007.

John De Vellis
Counsel to School the Energy Coalition