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ONTARIO ENERGY BOARD

Via Courier and Email

January 19, 2007

Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

*EW
19/01/07*

Attention: Kirsten Walli, Board Secretary

→ EB-2007-0016

Dear Ms. Walli:

**Re: Erie Thames Powerlines Corporation
Notice of Motion for Varying
Board File No.: RP-2005-0020/EB-2005-0361/EB-2006-0197**

We are counsel to Erie Thames Powerlines Corporation.

Please find attached a Notice of Motion to rehear and vary the decision and order of the Board dated January 2, 2007 in the above referenced matter. A copy of the Notice of Motion is being sent to the intervenors.

Please direct all future correspondence in this matter to the undersigned.

Yours very truly,

AIRD & BERLIS LLP



Scott Stoll
SAS/lc

CC: Intervenors
J. Skeoch
G. Pettit

2228513.1

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

AND IN THE MATTER OF A MOTION by Erie Thames Powerlines Corporation for an order or orders varying the Decision and Order of the Board dated January 2, 2007.

NOTICE OF MOTION OF THE APPLICANT

ERIE THAMES POWERLINES CORPORATION

Pursuant to the Ontario Energy Board's Rules of Practice and Procedure (the "Rules"), Erie Thames Powerlines Corporation ("ETPC") will make a motion to the Board for the matter described herein on a date to be determined by the Board at the Board's office located at 2300 Yonge Street, Toronto, Ontario. It is ETPC's preference that this matter be dealt with through a written procedure.

THIS MOTION IS FOR:

- 1) An order of the Board varying the Decision and Order of the Board (the "Final Decision") dated January 2, 2007 in the following manner:
 - a) Permitting ETPC to recover the entire amount of revenue it has foregone during the period between May 1, 2006 and January 1, 2007 when the interim rates were in effect; and
 - b) The establishment of the necessary accounts and/or recovery mechanism(s), a rate rider or other recovery mechanisms the Board deems appropriate, to implement the recovery over an appropriate time period.

THE GROUNDS FOR THIS MOTION

- 2) The Final Decision has resulted in:
- a) a change of circumstances (Rule 44.01(a)(ii)) as the Final Decision effectively transformed an interim order into a final order without the knowledge of ETPC;
 - b) a change of circumstances and the introduction of a new issue (Rule 44.01(a)(ii) and (iv)) - "retroactivity" which was relied upon by the Board to deny ETPC's recovery of its legitimate revenue requirement - which:
 - i) was never raised as an issue prior to the Final Decision and therefore, was not and could not be addressed by ETPC; and
 - ii) should not have been an issue as interim rates, not final rates, were in effect at the time;
- and
- c) a dramatic reduction in the revenues that ETPC is able to recover despite the recognition of the validity of ETPC's costs and expenditures; thereby resulting in rates that are not just and reasonable contrary to section 78(3) of the *Ontario Energy Board Act, 1998* (the "Act").

Background

- 3) On April 28, 2006, more than six months after ETPC filed its 2006 Electricity Distribution Rate application (the "Application"), the Board issued an interim order to ETPC establishing interim rates to commence on May 1, 2006 (the "Interim Order").
- 4) This Interim Order extended ETPC's existing 2005 approved rates which were significantly lower than the 2006 requested rates requested in the Application. This Interim Order also required ETPC to file audited financial statements for the fiscal years 2002, 2003 and 2004. ETPC complied with the Board's order and filed the audited financial statements on July 6, 2006.

- 5) Pursuant to section 21(7) of the Act, the Board may make interim orders *pending* the final disposition of the matter before it.
- 6) For the interim order provision of the Act to be given substantive meaning, the rates established by such an interim order are transitory and cannot be considered final. Therefore, the final disposition of the matter must recognize and account for the impact created by the use of the interim order for the period of time during which the interim order was in effect. This was the legitimate expectation of ETPC.

The Final Decision

- 7) On January 2, 2007 the Board issued the Final Decision and established rates for ETPC for the distribution of electricity effective January 1, 2007. This Final Decision replaced the rates that were established by the Interim Order.
- 8) The Final Decision established customer unit rates which were not materially different than the customer unit rates sought in ETPC Application. These customer unit rates were generated using the Board approved methodology which identified the annual revenue requirement and then allocated such revenue requirement over the rate classes based upon a 12 month recovery period.
- 9) However, the Final Decision permitted the use of the new rates for only 4 out of the 12 months of the 2006 rate year, meaning for 8 months ETPC's rates were insufficient to recover the approved revenue requirement.
- 10) The Final Decision raised for the first time and relied upon "retroactivity" to deny ETPC the ability to recover its legitimate annual revenue requirement. Prior to the Final Decision "retroactivity" had not been raised in this proceeding. Therefore, ETPC could not have foreseen that "retroactivity" would have been an issue.
- 11) Even though the Board approved process has recognized the legitimacy of the expenditures and ETPC's annual revenue requirement; the method of implementation of the

Final Decision has denied ETPC the ability to earn revenues sufficient to cover such expenditures.

- 12) By not permitting ETPC to recover the foregone revenue, the Final Decision effectively transformed the Interim Order into a final order without notice to ETPC.
- 13) ETPC's shortfall in revenue resulting from the Final Decision is approximately \$1,000,000.00 or 12% of its annual revenue requirement which would be a financial blow to any utility. ETPC will provide a detailed analysis to support the amount sought.
- 14) As such, the Final Decision has resulted in rates that are not just and reasonable as required by the Act, section 78(3). Furthermore, the Final Decision is not in keeping with the Board's statutory mandate of ensuring a viable electricity industry pursuant to section 1(1) of the Act.
- 15) ETPC will file materials in support of this motion with the Board and intervenors by 4:30 p.m., January 31, 2007, unless the Board orders otherwise.
- 16) Such further grounds as counsel may advise and this Board permits.

MATERIALS TO BE RELIED UPON

- 17) ETPC will rely upon the following materials:
 - a) The evidentiary record to date in this proceeding;
 - b) Additional evidence to support the quantum of revenue to be recovered;
 - c) The *Ontario Energy Board Rules of Practice and Procedure*;
 - d) The 2006 Electricity Distribution Rate Handbook;
 - e) The Board's decisions in other such similar matters; and
 - f) Such other materials as counsel may advise and this Board will permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

ERIE THAMES POWERLINES CORPORATION



**By its Counsel
Scott Stoll**

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TO:

THE ONTARIO ENERGY BOARD

AND TO:

SCHOOLS ENERGY COALITION

AND TO:

ROGERS CABLE COMMUNICATIONS INC.

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