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ONTARIO ENERGY BD

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OEB BOARD SECRETARY
File No: 9-0130 SubFile: 19
Panel: Paul S. GK
Licensing: Kristi S
Other: Martin D.
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June 10, 2009

Delivered by Courier and E-mail

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

Re: Innisfil Hydro Distribution Systems Limited and COLLUS Power Corp. Applications to the Ontario Energy Board for 2009 Electricity Distribution Rates effective May 1, 2009 - VECC motions for review of Decisions – EB-2009-0130

As you know, we are counsel to Innisfil Hydro Distribution Systems Limited ("Innisfil") in the above-captioned matter. We also confirm that we are now acting as counsel to COLLUS Power Corp. ("COLLUS") in this matter.

This proceeding pertains to the combined motions of the Vulnerable Energy Consumers Coalition ("VECC") for the review and variance of the Ontario Energy Board's (the "Board's") Decisions in the Innisfil and COLLUS applications for approval of their 2009 electricity distribution rates (Board File Nos. EB-2008-0233 and EB-2008-0226, respectively). The Board's 2009 Rate Orders for both of these distributors are in force – the Board has not stayed them, but it granted VECC's request that the revenue requirement impact of the two motions be tracked through a variance account to be established by each of Innisfil and COLLUS.

On April 24, 2009, VECC filed a Notice of Motion to Review and Vary the Innisfil Decision and Order. On April 28, 2009, VECC filed a Notice of Motion to Review and Vary the COLLUS Decision and Order. On April 27, 2009, we filed a letter with the Board on behalf of Innisfil opposing both motions as well as VECC's proposal for a stay of both decisions. On the same date, COLLUS filed a letter of support for Innisfil's position. A copy of our letter of April 27th is enclosed, for the Board's reference. In that letter, Innisfil submitted that

> "…Innisfil does not believe that the Board should conduct a review of either of these Decsions. Rather, Innisfil submits that pursuant to Rule 45 of its *Rules of Practice and Procedure* (the "Rules"), the Board should determine in the negative the threshold question of whether these matters should be reviewed. However, if the Board determines that the matters should be reviewed, Innisfil anticipates that

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> it will have an opportunity to respond to the VECC motion, which will include a reasonable period of time in which to prepare and file responding material and submissions."

On May 21, 2009, the Board issued an acknowledgement letter stating that it would hold an oral hearing to consider the threshold question as to whether each of these matters should be reviewed and that a Notice and Procedural Order would be issued in due course. That letter was followed by Procedural Order No.1 ("P.O. #1"), which provides, in part:

> The Board has determined that it will proceed under Rule 45.01 of the Board's *Rules of Practice and Procedure* to hear, in a joint proceeding for both Notices of Motion, the threshold question of whether each of these matters should be reviewed. Should the Board determine that the threshold has been met, the Board will also consider the merits of each of the Innisfil and COLLUS Motions and the requests submitted by COLLUS in its June 2, 2009 correspondence.

The oral hearing is currently scheduled for June 26, 2009. Although it is not entirely clear from the Procedural Order, COLLUS understands from a discussion with Board staff that it is Board Staff's belief that the Board intends to hear argument on the merits of the motions immediately following its determination of the threshold question, if its determination is that the motions should proceed.

The purpose of this letter is threefold, namely to request (i) that the Board change the hearing date to a date no earlier than the third week of July, as a key member of COLLUS staff will be unavailable that day and I will be out of the country from June 25th through July 10th; (ii) that the Board alter the procedure that has been set by P.O. #1, to separate the hearing of the threshold issue from any subsequent hearing on the merits of the motion; and (iii) that the Board alter the procedure that has been set by P.O. #1 to permit Innisfil and COLLUS to lead evidence in response to the motions.

Key COLLUS Staff Member Unavailable

Mr. Tim Fryer is the Chief Financial Officer for COLLUS, and he was a key member of the COLLUS team that prepared its 2009 forward test year cost of service rate application. His assistance will be of critical importance to the argument of the motion on behalf of COLLUS. Due to an unavoidable family matter, Mr. Fryer will not be available for the motion on June 26th.

Additionally, as noted above and as I have advised the Board with respect to the scheduling of another proceeding, I will be out of the country from June 25th through July 10th, and will therefore not be available for the motion. It is critical to both Innisfil and COLLUS that this matter be scheduled for a date when their counsel is able to attend.

As discussed below, though, the matter of availability on June 26th is secondary to the issues of procedural fairness raised by P.O. #1.

Right to File Evidence is a Matter of Procedural Fairness

The Board has taken a slightly different approach to the threshold question than had been contemplated in our letter of April 27th. The Board has not made a determination on whether the review should take place. Instead, the Board has provided for further argument on that question. If the question is answered in the affirmative, it appears that the parties will be expected to immediately proceed to argument of the merits of the motions.

As a result, there are two important procedural fairness issues that arise out of P.O. #1.

First, the Board apparently contemplates moving directly to the argument of the merits of the motions in the event that it determines that they should be heard. Therefore, if Innisfil and COLLUS are to prepare responding material, they must do so in advance of the determination on the threshold question and in respect of both the threshold question and the merits of the motions. This will needlessly occupy the resources of these utilities and add to their regulatory costs if the threshold question is determined in the negative.

Second, while VECC has filed motion records and notwithstanding our request in our letter of April 27th, P.O. #1 makes no provision for the filing of responding motion material, or for evidence to be given by responding witnesses. Therefore, the effect of P.O. #1 is that VECC will have an opportunity to present a case (based on a motion record that will have been before the Board for over two months) and be heard by the Board, while Innisfil and COLLUS may be restricted to attempting to make a case through argument, and may be prevented from filing a motion record on which to base that argument.

In the normal course, a responding party would receive the opportunity to file a responding motion record, including its own affidavit evidence and supporting material that would form part of the evidentiary record – otherwise, as is the case here, the only evidence before the Board on the motion is that of the moving party. Rule 8.04 of the Board's Rules of Practice and Procedure does permit a party to file and serve a written response at least two calendar days prior to the motion's hearing date. It is not, however, clear that Rule 8.04 applies in the present case, since P.O. #1 does not provide a schedule for filings in respect of the motion and Rule 4.04 provides that a procedural order shall prevail to the extent of any inconsistency with the Rules. If Innisfil and COLLUS are not to be permitted to file a motion record, in effect, VECC becomes entitled to a hearing by the Board, while Innisfil and COLLUS do not.

This approach would represent a denial of natural justice in relation to Innisfil and COLLUS, contrary to fundamental administrative law principles. The common law duty of fairness requires "...that those who may be adversely affected by some administrative action or decision be afforded **a reasonable opportunity to participate in the decision-making process by tendering proofs** and making submissions" [emphasis added].[1] In this case, P.O. #1 appears to afford Innisfil and COLLUS no opportunity to "tender proofs" of its position on the motion. It is to be noted that, in its letter of April 28, 2009 to the Board, VECC took specific issue with Innisfil's correspondence of April 27, 2009, stating that it consists solely of the assertions of counsel "without supporting evidence."

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[1] D.M. Brown and the Hon. J.M. Evans, *Judicial Review of Administrative Action in Canada*, 1998+ (Toronto: Canvasback Publishing) at 7.1100

The Board's duty of procedural fairness requires, under the circumstances, that the schedule set by the Board specifically contemplate and provide for the filing of responding evidence.

The Proposed Solution

Innisfil and COLLUS submit that there is a reasonable way to address the problems set out above, by way of an amendment to P.O. #1 made under Rule 4.03.

The most cost effective approach would be to permit Innisfil and COLLUS to file such responding material on the threshold question as may be necessary, followed by written submissions on the threshold question, with VECC filing its submission first, followed by Innisfil's and COLLUS' response. In light of the availability issues mentioned above, the date for the filing of the responding material should be no earlier than the week of July 20, 2009.

If the Board instead considers it necessary to hear oral submissions on the threshold question, then dates should be set for the Innisfil and COLLUS responding material on the threshold question, and for the oral submissions. Once again, the date for the filing of the responding material should be no earlier than the week of July 20, 2009.

Only if the threshold question is determined in the affirmative should the Board schedule a date for a hearing on the merits of the motions. If the Board considers it necessary to set a provisional date now, that date should allow a reasonable period for the preparation and filing of responding material on the merits of the motion and for the review of that material by the Board.

We note that the revision of the process for this proceeding is not prejudicial to the parties. The Innisfil and COLLUS rate orders are already in force, and the utilities will abide by the Board's directions with respect to the tracking of differences, when those directions are received. We note that those directions, requested in Mr. Fryer's letter of June 2, 2009, will be needed regardless of the process ultimately adopted by the Board.

Should you have any questions or require further information, please do not hesitate to contact me.

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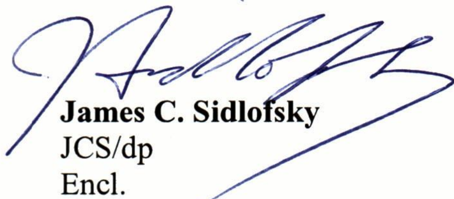
Yours very truly,
BORDEN LADNER GERVAIS LLP



James C. Sidlofsky
JCS/dp
Encl.

cc: Laurie Ann Cooledge, CFO/Treasurer, Innisfil Hydro Distribution Systems Limited
Mr. Tim Fryer, CFO, COLLUS Power Corp.
Bruce Bacon, BLG
Intervenors of Record in EB-2008-0226/0233

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