

October 20, 2006

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Toronto, Ontario M4P 1E4  
Attention: Kirsten Walli, Board Secretary

**Re: EB-2006-0087  
Electricity Distributors Licence Amendments**

We act as counsel to the Power Workers' Union, an Intervenor in the above-referenced proceedings.

Please find enclosed ten hard copies of the Submissions filed by Power Workers' Union. An electronic copy has been provided to you by email delivery.

Yours very truly,

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

  
Richard P. Stephenson

RPS:jr

HONORARY COUNSEL

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cc: Intevenors in attached list (*via email*)

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

**IN THE MATTER OF** a generic proceeding initiated by the Ontario Energy Board pursuant to section 74 of the *Ontario Energy Board Act, 1998* to amend the licenses of electricity distributors to make provision for methods and techniques to be applied by the Board in determining distribution rates for licensed electricity distributors.

## **SUBMISSION OF THE POWER WORKERS' UNION**

### **Introduction**

1. The Power Workers' Union ("PWU") files these submissions pursuant to Procedural Order No. 1 issued by the Board on October 6, 2006.
2. The PWU submits that the Board should not continue with this proceeding because it has no jurisdiction to do so. In the alternative, it is the position of the PWU that it is premature for the Board to receive submissions at this time on the substance of this proceeding. Rather, the Board should await the conclusion of the outcome of EB-2006-0088 and EB-2006-0089, at which time it should conduct a full evidentiary hearing on all issues.

### **The Board Has No Jurisdiction to Make the Proposed Amendment**

3. In this proceeding, the Board is purporting to exercise its authority pursuant to s. 70(1) of the *Ontario Energy Board Act, 1998* (the "Act"), to include in the licences of electricity distributors provisions of a Code made pursuant to s. 70.1 of the *Act*.
4. The PWU does not dispute the jurisdiction of the Board to issue codes governing electricity distributors pursuant to s. 70.1. Moreover, the PWU does not dispute the jurisdiction of the OEB to make compliance with such

codes a condition of an electricity distributor's licence pursuant to s. 70(1) of the *Act*.

5. The fundamental problem with this proceeding is that the Board has not issued any code relating to these matters pursuant to s. 70.1 of the *Act*. It will not do so unless and until it completes the process it has undertaken in EB-2006-0088 and EB-2006-0089. As a result, there are no "codes" in existence for the Board to make conditions of any electricity distributors pursuant to s. 70(1) of the *Act*.
6. The language of s. 70.1 of the *Act* is clear – while the Board may incorporate the provision of a code as a condition of a licence, it must first *issue* the code. The Board has not done so. In the absence of this fundamental precondition the Board has no authority under the *Act* to amend a licence to purport to incorporate a code. For this reason alone, the Board lacks the jurisdiction to continue with this proceeding.
7. The requirements of s. 70.1 are not merely formal or technical requirements. To the contrary, they reflect a fundamental fairness enshrined in the *Act*. The *Act* requires the Board to conduct a hearing prior to issuing or amending a licence. This obligation is an acknowledgment of the need for a process which complies with basic requirements of natural justice.
8. At an absolute minimum, natural justice requires that affected parties have adequate notice of a proceeding in order to know whether and how their interests may be affected. This obligation enables affected parties to determine what the issues in the proceeding will be, what evidence may be required, and what submissions should be made.
9. The Board has purported to comply with its obligation to give adequate notice. In particular, it has issued Procedural Order Number 1, and

appended to it the proposed licence amendment. However, the proposed amendment is ultimately devoid of any substantive information, for the simple reason that it purports to incorporate by reference documents that have not yet come into existence. As a result, Board has failed in its fundamental obligation to provide adequate information sufficient to permit an affected party to structure its response to the Board's Notice of Hearing.

10. As a result, it is submitted that the Board should discontinue this proceeding. In the alternative, the Board should adjourn this proceeding until such time as the EB-2006-0088 and EB-2006-0089 proceedings are concluded.

**There is Serious Doubt Whether the Board Has Jurisdiction to Make the Proposed Codes**

11. The authority of the Board to make codes pursuant to s. 70.1 is not open ended. To the contrary, the Board must find specific authority in the *OEB Act* to make any such code. If a purported "code" is *ultra vires* the Board, the Board will, by definition, lack the jurisdiction to incorporate such a "code" into the licence of an electricity distributor.
12. The Board has suggested that its jurisdiction to make the proposed codes lies in s. 70(2)(e) of the *OEB Act*, which provides that:
  - s. 70(2)            **The conditions of a licence may include provisions,**
  - (e)            **specifying methods or techniques to be applied in determining the licensee's rates;**
13. The PWU submits there is serious doubt whether either of the two proposed codes is in fact a "method or technique" to be applied in determining the licensee's rates. A number of parties in the Board's code making consultations have raised concerns whether the proposed codes are actually "methods or techniques" or whether they are simply an attempt to set the rates of LDCs without conducting a rate hearing.

14. It is not possible to determine the merit of these concerns. It is simply impossible for anyone to determine whether the proposed codes are, or are not *ultra vires* the Board. That is because no final codes have been issued by the Board. The Board has not even issued draft codes for comment by interested parties. All that is known is that serious issues have been raised and there is a real prospect that the validity of any codes which are ultimately issued will be challenged. This is an additional reason for the Board to defer any consideration of whether to incorporate the proposed codes by licence until after the code making process is complete.

**The Proposed Process Should not be Continued Because it is Bad Regulatory Practice**

15. Even leaving jurisdictional concerns aside, the PWU submits that the proposed licence amendment proceeding should be discontinued because it constitutes bad regulatory practice. The issues of cost of capital determination and incentive regulation design are complex and serious issues for both LDCs and their customers. Both issues can materially impact the financial position of LDCs and the cost of electricity to their customers.
16. These issues are not new for this Board, either in its regulation of electricity, or gas. However, to this date, whenever the Board has made binding determinations on either of these issues, it has done so in the context of a formal rate hearing.
17. The advantages of formal hearings are self evident. They permit parties to make out their cases by way of evidence, not assertion or speculation. The evidence is subject to testing and the parties are afforded full procedural rights.

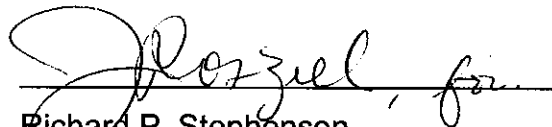
18. The Board has repeatedly stressed that the code making process is not a hearing. The apparent rationale for using this process rather than a hearing process is expediency. The PWU understands the Board is justifiably concerned about the time and resources that would be consumed in conducting 90 individual rate hearings to deal with these issues.
  
19. The Board's concern regarding resources is valid; however, it does not justify the adoption of the highly unorthodox procedure chosen by the Board. This is particularly the case where, as here, there are a number of other available procedures which can deal with these issues in an expeditious fashion, and yet do not sacrifice the parties' expectation and right to a process that respects their procedural rights. For example:
  - a. The Board could implement the proposed changes through revisions to the EDR Handbook. Revisions to the Handbook do not require a formal hearing. However, an LDC seeking alternative treatment need not meet a stern evidentiary threshold if it considers a treatment to be appropriate in its specific circumstances. It need simply demonstrate in the context of a rate hearing that its proposed alternative is just and reasonable in the circumstance. It is likely that the number of LDCs seeking alternative treatment would be low and manageable;
  - b. The Board could conduct a generic rate hearing, limiting the issues for the hearing to the two prescribed issues. Such a proceeding would afford the parties procedural rights and would not likely be materially longer or more expensive than current process;
  - c. The Board could maintain the status quo. The current "Cannon" methodology is sound and is consistent with regulatory treatment afforded to the gas utilities and other electricity distribution utilities in Canada. With respect to the "second generation" incentive rate mechanism, there appears to be a widespread consensus that the

currently proposed mechanism is of very marginal utility, particularly given its very short duration.

### **Conclusion**

20. In conclusion, it is submitted that for the reasons outlined above, the Board should discontinue this proceeding. In the alternative, the Board should:
- a. Adjourn the licence amendment proceeding until after the conclusion of the code development proceedings;
  - b. Conduct a full oral hearing on the proposed licence amendments, as informed by the finalized and issued codes;
  - c. Permit a full examination of the merits of the finalized and issued codes to determine the appropriateness of their inclusion as licence conditions; and
  - d. Permit a full examination of the basis upon which exemptions from the codes should be granted.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**



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