

October 27, 2006

VIA COURIER AND EMAIL

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

Attention: Peter H. O'Dell, Assistant Board Secretary

Dear Mr. O'Dell:

**Re: EB-2006-0088
Cost of Capital (EB-2006-0088) and 2nd Generation
Incentive Regulation Mechanism (EB-2006-0089)**

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

Please find enclosed seven hard copies of the Submission filed by Power Workers' Union in accordance with directions contained in your letter dated October 11, 2006. An electronic copy has been provided to you by email delivery.

Yours very truly,

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP


Richard P. Stephenson

RPS:jr

encl.

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

Chris G. Paliare
Ian J. Roland
Ken Rosenberg
Linda R. Rothstein
Richard P. Stephenson
Nick Coleman
Margaret L. Waddell
Donald K. Eady
Gordon D. Capern
Lily I. Harmer
Andrew Lokan
John Monger
Odette Soriano
Andrew C. Lewis
Megan E. Shortreed
Massimo Starnino
Karen Jones
Robert A. Centa
Nini Jones
Jeffrey Larry
Brydie C.M. Bethell
Emily Lawrence

HONORARY COUNSEL
Ian G. Scott, Q.C., O.C.

Distribution List Name: OEB EB-2006-0088 and 0089 Distribution List

Members:

Bernadette Corpuz (Enersource) bcorpuz@enersource.com
 Bill Harper (Econalysis Consulting) bharper@econalysis.ca
 Bob Menard rmenard@pwu.ca
 Bob Williams (School Energy Coalition) bwilliams@opsba.org
 Cameron McKenzie (Horizon Utilities) chmckenzie@horizonutilities.com
 Chris Wray (Algoma) cwrap@wawa.ca
 Colin McLorg cmclorg@torontohydro.com
 David macIntosh (Energy Probe) davidmacintosh@nextcity.com
 George Armstrong (Veridian Connections Inc.) garmstrong@veridian.on.ca
 Gerry Hilhorst (Waterloo North Hydro) ghilhorst@wnhydro.com
 Giovanna Gesuale (ENWIN Powerlines) ggesuale@enwinpowerlines.com
 Glen MacDonald (Hydro One) regulatory@hydroone.com
 Guru Kalyanraman (Electricity Distributor's Assoc) gkalyanraman@eda-on.ca
 Ian MacKenzie (London Hydro) mckenzie@londonhydro.com
 James Sidlofsky (North Bay Hydro) jsidlofsky@blgcanada.com
 Jay Shepherd (School Energy Coalition) jay.shepherd@shibleyrighton.com
 Jim Hogan jimhogan@ckenergy.com
 Jim Snider (North Bay Hydro) jsnider@northbayhydro.com
 Judy Kwik jkwik@era-inc.ca
 Julie Girvan (Consumer Council of Canada) jgirvan@ca.inter.net
 Kathy Litt (Enersource Hydro Mississauga) klitt@enersource.com
 Kirstin Walli (Board Secretary) boardsec@oeb.gov.on.ca
 Lynne Anderson (Hydro Ottawa) lynneanderson@hydroottawa.com
 Michael A. Smith (City of Toronto) msmith10@toronto.ca
 Michael Buonaguro (PIAC) mbuonaguro@piac.ca
 P Tunley ptunley@mccarthy.ca
 Patrick McMahon (Union Gas Limited) pmcmahon@duke-energy.com
 Paul R. Cassan (Algoma) pcassan@wishartlaw.com
 Paula Conboy (PowerStream Inc.) paula.conboy@powerstream.ca
 Peter Fournier (Industrial Gas Users Assoc) pfournier@iqua.ca
 Peter Thompson Q.C. (Industrial Gas Users Assoc) pthompson@blgcanada.com
 Richard Zebrowski (Toronto Hydro) rzebrowski@torontohydro.com
 Robert Reid (Algoma) rreid@nsci.ca

Roger White (Energy Cost management Inc. rew@worldchat.com
Scott Stoll (London Hydro) sstoll@airdberlis.com
Stephen Perry (Barrie Hydro) sperry@barriehydro.com
Tanya Watson (School Energy Coalition) tanya.watson@shibleyrighton.com
Thomas Adams (Energy Probe) tomadams@nextcity.com
Viggo Lundhild (Great Lakes Power) vlundhild@glp.on.ca

**COST OF CAPITAL (EB-2006-0088) AND 2ND
GENERATION INCENTIVE REGULATION
MECHANISM (EB-2006-0089)**

SUBMISSION OF THE POWER WORKERS' UNION

1. These comments are filed by the Power Workers' Union ("PWU") pursuant to the direction of the Board contained in its correspondence dated October 11, 2006.

Introduction

2. The PWU recognizes that this proceeding is not a "hearing", but rather is a "consultation". The PWU further recognizes that these proceedings are at an early stage, and there are a number of steps that the Board would take prior to issuing finalized codes pursuant to s. 70.2 of the *Ontario Energy Board Act, 1998* (the "Act"). Nevertheless, it is submitted that there are such apparent and fundamental jurisdictional defects with the proposed codes, that this proceeding should be discontinued at this stage.

The Board Has No Jurisdiction to Issue the Proposed Codes

3. The Board has now received submissions in the companion proceeding (EB-2006-0087) wherein it seeks to make these proposed codes conditions of the electricity LDCs in Ontario. Those filings contained many persuasive submissions outlining the jurisdictional shortcomings to the proposed codes and accompanying licence amendments. The PWU submits that the Board should consider all of those submissions in its consideration of this proceeding. For reasons outlined more fully below, it is the PWU's position that these submissions provide a compelling basis which should persuade the Board to discontinue this proceeding.

It Is Not Premature to Discontinue this Proceeding

4. The statutory basis upon which the Board relies for jurisdiction to issue the proposed codes is a combination of s. 70.1, and s. 70(2)(e). In essence, the Board only has the jurisdiction to issue the proposed codes if, in substance, they constitute a "method or technique" to be applied in determining an LDC's rate. Obviously, the Board has not issued any finalized codes as yet. As a result, it is not possible to determine with certainty whether proposed codes would, or would not comply with the provisions of s. 70(2)(e) of the *Act*

5. In the circumstances, it is arguably premature for the Board or the parties to conclude that the finalized codes would inevitably exceed the jurisdiction of the Board. In the particular circumstances of this case, however, it is submitted that such a conclusion is possible. That is because the Board has made it clear that its avowed purpose in developing the proposed codes is to make them licence conditions of the electricity LDCs such that LDC rates would be adjusted from year to year, *without a rate hearing being conducted*.

6. As submitted by a number of parties in EB-2006-0087, it is clear that the combined effect of s. 21(2) and s. 78(2) of the *Act* is that an LDC cannot charge rates which have not been approved by the Board pursuant to an "order" and that the Board cannot make an "order" without conducting a hearing. As a result, the Board cannot set or change the rates of an LDC on an automatic basis through a licence condition, rather than through a rate hearing.

7. In view of its express purpose of establishing a mechanism to adjust LDC rates without conducting a rate hearing, it is submitted that the proposed codes cannot be within the jurisdiction of the Board, regardless of the

precise terms contained in any finalized codes. As a result, in the circumstances, it is submitted that it is not premature for the Board to discontinue this proceeding.

If The Board Has Jurisdiction, the Board Should Not Exercise It

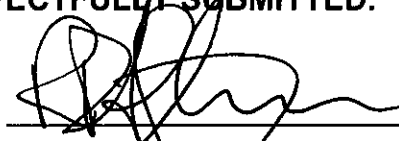
8. The PWU understands the Board's desire to resort to formulaic rate-setting as a means to achieve regulatory efficiency. The PWU recognizes that regulatory efficiency is a laudable objective. On the other hand, there is grave doubt whether a single, simplistic formulaic adjustment could in fact achieve rates which are "just and reasonable" for the myriad different LDCs across Ontario. If it cannot, the Board will have failed in its statutory responsibility.
9. Moreover, any regulatory efficiency gained through the proposed process will be minimal, if not nil. The efficiency sought to be achieved is the avoidance of multiple rate hearings. However, it is simply not possible for the Board to avoid its statutory duty to conduct rate hearings if it seeks to set or change LDC rates.
10. The PWU submits that the Board already has an existing mechanism through which it can achieve its objective of regulatory efficiency without entering the jurisdictional thicket. That mechanism is the Electricity Distribution Rate Handbook. This Handbook serves as a default mechanism that LDCs may use, but are not required to follow. LDCs can propose and have different provisions approved if they can justify their use. It is submitted that the proposed Second Generation Incentive Regulation and Cost of Capital codes are entirely appropriate matters for inclusion in a revised Electricity Distribution Rates Handbook. The PWU notes that both first generation incentive regulation and cost of capital determination were contained in the first Electricity Distribution Rates Handbook.

11. Inclusion of these matters in a Rate Handbook format would permit the Board to achieve all, or virtually all of the regulatory efficiency it seeks. On the other hand, it would not have the jurisdictional or fairness pitfalls associated with the making of binding codes through licence amendments.
12. As a result, it is submitted that regardless of the jurisdictional issues, as a matter of regulatory policy, it is appropriate for the Board to discontinue the current proceedings, and to pursue these matters through revisions to the Electricity Distribution Rate Handbook.

Substance of the Proposed Codes

13. For the reasons expressed above, it is submitted that the Board should not proceed with its consideration of the proposed codes. In the event the Board chooses to do so, the PWU reserves the right to participate fully in the review and consideration of any draft codes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.



Richard P. Stephenson
LSUC Reg. No. 28675D
Tel. 416-646-4325
Fax 416-646-4335
Email richard.stephenson@paliaroland.com

Paliare Roland Rosenberg Rothstein
LLP
Suite 501, 250 University Ave.
Toronto, ON, M5H 3E5

Counsel for the PWU