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**BY EMAIL**

January 23, 2009

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, Suite 2700  
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Motion by LOW to Vary the Board's Cost Claim Decision and Order in the  
Integrated Power System Plan and Proposed Procurement Processes  
Proceeding  
Board File No.: EB-2009-0014**

Pursuant to Procedural Order No. 1, please find enclosed Board Staff's Submission.

Yours truly,

*Original signed by*

Neil McKay  
Manager, Facilities Applications

cc: Miriam Heinz, Ontario Power Authority  
Peter Faye, LOW

Attachment

## **Board Staff Submission on a Motion from Lake Ontario Waterkeeper to Vary the Board's Cost Claim Decision and Order**

**Board File No. EB-2009-0014**

### **Background**

Lake Ontario Water Keeper ("LOW") is a cost award eligible intervenor in the Board's Integrated Power System Plan ("IPSP") proceeding. In accordance with the Board's Procedural Order No. 8, LOW filed a cost claim for its participation in the IPSP on September 17, 2008. Included in the claim were costs relating to a meeting that LOW had organized and attended in Moosonee (the "Meeting"). According to LOW's Notice of Motion, "[t]he meeting involved a presentation by an OPA representative on the IPSP and was conducted to gather input from local stakeholders on the impacts of northern river hydroelectric development proposed in the IPSP." The Board denied the portion of the cost claim relating to the Meeting in its decision dated November 28, 2008, stating:

Waterkeeper submitted travel expenses for a public meeting in Moosonee, which was facilitated by Waterkeeper. As this meeting is not directly related to the IPSP proceeding and not specifically related to Waterkeeper's "mandate" as stated in its application for intervenor status filed November 14, 2007, the expenses will not be considered. The claim will be adjusted accordingly.

LOW has filed a motion to review and vary this portion of the Board's decision.

### **The Statutes and the Practice Direction**

The Board's powers to award costs to parties is grounded in both the *Ontario Energy Board Act* (the "Act") and the *Statutory Powers Procedure Act* (the "SPPA").

The Act states:

**30. (1)** The Board may order a person to pay all or part of a person's costs of participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board.

The SPPA states:

**17.1 (1)** Subject to subsection (2), a tribunal may, in the circumstances set out in rules made under subsection (4), order a

party to pay all or part of another party's costs in a proceeding.  
2006, c. 19, Sched. B, s. 21 (2).

**Exception**

(2) A tribunal shall not make an order to pay costs under this section unless,

- (a) the conduct or course of conduct of a party has been unreasonable, frivolous or vexatious or a party has acted in bad faith; and
- (b) the tribunal has made rules under subsection (4). 2006, c. 19, Sched. B, s. 21 (2).

**Amount of costs**

(3) The amount of the costs ordered under this section shall be determined in accordance with the rules made under subsection (4). 2006, c. 19, Sched. B, s. 21 (2).

**Rules**

(4) A tribunal may make rules with respect to,

- (a) the ordering of costs;
- (b) the circumstances in which costs may be ordered; and
- (c) the amount of costs or the manner in which the amount of costs is to be determined.

In accordance with s. 17.1(4) of the SPPA, the Board has also issued a *Practice Direction on Cost Awards* (the "Practice Direction").

Both the Act and the SPPA state that the Board may award costs for participating "in a proceeding." The Practice Direction defines a process as: "a process to decide a matter brought before the Board whether commenced by application, reference, Order in Council or on the Board's own initiative (including, but not limited to, a notice and comment process under section 45 or 70.2 of the Act and any other consultation process initiated by the Board)".

Section 6.03 of the Practice Direction further states: "The burden of establishing that the costs claimed were incurred directly and necessarily for the party's participation in the process is on the party claiming costs."

## **Submission**

In Board staff's submission, the statutes and the Practice Direction are clear that the Board will only award costs to eligible intervenors for participation directly in the Board's hearing processes. The question that then arises is as follows: was the Meeting a part of the Board's IPSP process?

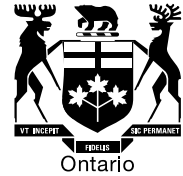
There is no doubt that the Meeting was related to the IPSP generally. However, it is not clear that the Meeting was a part of the Board's IPSP hearing process. The Meeting was initiated by LOW with the participation of the OPA. The Meeting was not overseen by the Board in any way; in fact, prior to the receipt of LOW's cost claim, the Board was not directly aware that the meeting had even taken place. Prior to filing the IPSP, the OPA conducted a number of public information sessions around the province. Although the OPA may have provided some funding for groups to participate in these sessions, the Board did not.

Like the meetings arranged by the OPA, the Meeting appears to have been an effort to raise awareness about the IPSP. Traditionally this type of activity has not been funded through the Board's cost awards process.

Although the Board provides cost awards to eligible intervenors for their participation in Board processes, it does not generally allow funding for their activities outside of these processes. There may be any number of activities an intervenor undertakes that are indirectly related to Board hearings for which costs are not provided. For example, intervenors are expected to canvass their own memberships without funding from the Board.

The Board addressed a similar issue in a previous cost award decision. In EB-2005-0234 (supplemental cost award decision issued December 27, 2006 – see attached) the Board disallowed recovery of certain amounts on the basis that they had not been incurred directly or necessarily for the intervenor's participation in the Board's process. In that case the disputed claim related to time spent on items such as media releases, interviews and handing out flyers.

In its Notice of Motion, LOW seeks to rebut the Board's finding that the Meeting was not directly related to LOW's mandate as set out in its letter of intervention. The test in this case, however, is not whether the LOW was acting within its mandate when it arranged the meeting, but whether the Meeting was part of the Board's proceeding.



**EB-2005-0234**

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

**AND IN THE MATTER OF** an application by Greater Sudbury  
Hydro Inc. under section 86 of the *Ontario Energy Board Act,*  
1998 seeking leave to acquire all outstanding shares in West  
Nipissing Energy Services Ltd.

**BEFORE:** Paul Sommerville  
Presiding Member

Cynthia Chaplin  
Member

### **SUPPLEMENTAL COST AWARD DECISION AND COST ORDER**

On February 23, 2005, Greater Sudbury Hydro Inc. ("GSHI") filed an application with the Ontario Energy Board (the "Board") under section 86 of the *Ontario Energy Board Act, 1998* (the "Act") seeking leave to acquire all outstanding shares in West Nipissing Energy Services Ltd. ("WNESL") (the "proceeding").

A Notice of Application and Written Hearing was published as directed by the Board. Mr. Brian LaFleche and Mr. Len LaFleche, representing the Save Our Hydro Group, were granted intervenor status in respect of the proceeding. The Save Our Hydro Group was also deemed eligible for an award of costs for its participation in the proceeding.

In its September 16, 2005 Decision and Order, the Board determined that the Save Our Hydro Group would be awarded 100% of its reasonably incurred costs of participating in the proceeding. The Board ordered GSHI and WNESL to pay the eligible costs of the Save Our Hydro Group upon receipt of the Board's cost order.

The Save Our Hydro Group filed its cost claim in relation to the proceeding on October 6, 2006. The cost claim included time spent by Mr. Brian LaFleche and Mr. Len LaFleche to prepare for the hearing (including calls and emails to the Board) as well as time spent handing out flyers, preparing for media interviews and media releases. Mr. Brian LaFleche and Mr. Len LaFleche included 150 hours of preparation time in their cost claim for time they spent preparing for the proceeding as well as a claim for disbursements.

GSHI filed its objection to the Save Our Hydro Group's cost claim on October 10, 2006. GSHI stated that section 6.05 of the Board's Practice Direction on Cost Awards (the "Practice Direction") states that a party "will not be compensated for time spent by its employees or officers in preparing for or attending at Board processes." GSHI submitted that since Mr. Brian LaFleche and Mr. Len LaFleche are the public officers of the group known as Save Our Hydro Group and that they should therefore not be eligible for preparation costs.

The Save Our Hydro Group submitted its response to GSHI's objections on October 15, 2006. Mr. Brian LaFleche and Mr. Len LaFleche submitted that they were not "public officers of a group" but concerned citizens. They submitted that since the Board had granted them cost eligibility (i.e., that they would be allowed reasonable costs for time and expenses related to the proceeding), they stood by their original cost claim.

The Board has reviewed and considered the submissions made by the parties and has determined that the 150 hours claimed as preparation time are not reasonably incurred costs of participating in the proceeding.

Section 6.03 of the Practice Direction states that the burden of establishing that costs claimed were incurred directly and necessarily for the party's participation in the process is on the party claiming the costs. The Board finds that some of the activities listed in the cost claim of the Save Our Hydro Group were not proven to be incurred directly and necessarily for the group's participation in the proceeding. Activities that are not directly related to the proceeding before the Board (i.e., media releases and interviews; handing out flyers) should not be recoverable as part of a cost claim.

Section 6.04 of the Practice Direction states that an individual party that has incurred a wage or salary loss as a result of participating in the proceeding may recover all or part of such wage or salary loss (subject to a review by the Cost Assessment Officer). However, no such claim was made in this case and no evidence of such a loss was provided. Section 6.05 of the Practice Direction states that a party will not be compensated for time spent by its employees or officers in preparing for a Board process. Lastly, the tariff included in Appendix A to the Practice Direction and Form 1 of Appendix B to the Practice Direction are meant to be used to recover costs for legal counsel and consultants hired by parties to the Board's proceedings or processes. The tariff and form are not meant to be used for individuals or members of a group. This is evidenced by the wording of the tariff (i.e., it sets out rates for legal fees and for analyst/consultant fees) and Form 1 (i.e., it asks for the name, year of call, and law firm name for the legal counsel or the name, number of years of relevant experience, and the consultant firm name for the consultant). Overall, the Board finds that Mr. Brian LaFleche and Mr. Len LaFleche should not be entitled to claim their own preparation time because the costs: were not shown to be a lost wage or salary, the costs were not costs of a consultant or legal counsel, and the Board considers Mr. Brian LaFleche and Mr. Len LaFleche to be officers of the Save Our Hydro Group.

The Board is therefore disallowing the 150 hours claimed in preparation time which amounts to \$7,500.00 of the costs claimed.

The Board accepts the disbursements claimed in the amount of \$708.09. The Board would like to note the efforts of the Save Our Hydro Group in relation to this proceeding; therefore, in accordance with section 3.07 of the Practice Direction, the Board awards the Save Our Hydro Group an honorarium of \$500.00.

**THE BOARD THEREFORE ORDERS THAT:**

Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Greater Sudbury Hydro Inc. shall immediately pay the Save Our Hydro Group the sum of **\$1,208.09**.

**ISSUED** at Toronto, December 27, 2006.

ONTARIO ENERGY BOARD

*Original Signed By*

Peter H. O'Dell  
Assistant Board Secretary