May 25, 2009

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Kirsten Walli
Board Secretary
Ontario Energy Board
Suite 2701
2300 Yonge Street
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Dear Ms Walli:

Re: EB-2008-0227

We are counsel to the Consumers Council of Canada ("the Council"), in this matter. What follows is the Council's response to the objection of EnWin Utilities Ltd. ("EnWin") to the Council's cost claim, as set out in Mr. Sasso's letter to you of May 15, 2009.

EnWin does not object to the Council's individual cost claim. We must conclude, accordingly, that EnWin has no concerns with it. Rather, EnWin proposes a global reduction in all of the cost claims. It proposes that the total cost award, for all of the intervenors, be approximately $35,000. It then proposes that that sum be divided among the four intervenors delivering cost claims. Since there is no mechanism by which the Board, without being entirely arbitrary, and therefore unfair, can allocate that amount among those four intervenors, the result of accepting EnWin's objection would be that each intervenor would be awarded costs in the amount of approximately $8,750.

EnWin's proposal is based on its reading of the implications of the cost award data that was attached as an appendix to Procedural Order No. 1. It is the unstated assumption in EnWin's argument that the data gives rise to a formula which is determinative of the way cost awards should be calculated. It is EnWin's position that "each intervenor had due and proper notice from the very outset of its participation that there would be limits on cost awards and that regard should be had to the awards granted in the Cost of Service proceedings cited in PO 1".

EnWin's argument is fundamentally flawed, for many reasons. The first is that the intervenor cost data, which is attached as an appendix to Procedural Order No. 1, is not binding on the Board. The most that the Board claims itself for the data is that it is a "guide". The logic of EnWin's argument is, however, that the data is more than a guide, and that it gives rise to a formula which is binding on the Board and on intervenors. It clearly cannot have that status. The Board would err were it to consider it binding in any respect.

Beyond that, it is the Council's position that, even as a guide, the data is misleading, and any reliance on it would be unfair. All that the data shows is intervenor cost claims, in a number of other cases, calculated on a per customer basis. Among other limitations, the data does not reflect the reduction in ratepayer rates that resulted from the interventions. It would only be on a comparison of the reduction in rates per ratepayer with the cost of interventions that the Board would, using purely mechanical considerations, be able to determine the net benefit of interventions to ratepayers. If, for example, the cost per customer is X, but the reduction in rates per customer is greater than X, then there has been a net benefit to ratepayers. Again, if the only consideration is a mechanical or numerical one, then if the cost of intervention to ratepayers is to be relevant in determining cost awards, then surely the benefit to ratepayers is equally relevant.

Even without that net benefit calculation, the data would not reflect the full benefit to ratepayers of ratepayer representation, particularly in the applications setting the base for the determination of second and third generation IR rates. It was essential that ratepayer interests be represented in establishing the base for the utilities whose applications are reflected in the data attached to Procedural Order No. 1, in order that the appropriate rate-making principles be adhered to. That factor, and the benefit that accrued to ratepayers as a result of that, is nowhere factored into the data on which EnWin so completely relies.

The final point is that the Board's use of the data is, at bottom, unfair. The Board did not seek any intervenor input into the calculations, or the use of those calculations as a "guide" to the determination of intervenor cost claims. Given that, it would be unfair for the Board to rely on that data now, in any way. If, as EnWin by implication suggests, the data amounts to Board policy on the calculation of intervenor cost claims, then the Board should have so stated and allowed intervenors an opportunity to make representations before adopting it.

The other component of unfairness to EnWin's position is its argument that the intervenors had notice of the implications of the data, for their cost claims, from the time Procedural Order No. 1 was issued, and so should have governed their activities accordingly. If that is true for the intervenors, then it is also true for EnWin. If EnWin knew, from the time of the issuance of Procedural Order No. 1, that it was going to take the position that intervenors were limited in their cost claims to approximately $8750 each, it should have so stated. It never disclosed that position when it knew that intervenors would have to review the approximately 1,800 pages of material that EnWin produced in support of its application. EnWin and its representatives spent more than three days negotiating, ostensibly in good faith, a settlement of the application. At no point during that settlement discussion did EnWin tell the intervenors, "Oh, by the way, you're all off the clock".

To take that position now, after the fact, is not only unfair, it is acting in bad faith. Participating in a settlement discussion in bad faith is fundamentally contrary to the Board's settlement process guidelines.

It is instructive to explore the practical implications of what EnWin proposes. Any responsible review of the approximately 1,800 pages of material produced by EnWin, in support of its application and in response to interrogatories, would take enough time to exhaust the $8750 that EnWin says is the limit of any individual cost claim. Having exhausted the amount of the available cost claim, each intervenor would then have been precluded from participating in a settlement process or in any oral hearing. The alternative would have been for the intervenors to pool their positions and have one individual represent them. However, as EnWin well knows, each intervenor has a unique position which is, in many respects, in conflict with the positions of other intervenors. It would be impossible, both as a practical and as a professional matter, for one counsel to represent four divergent interests. Imposing that requirement would make a mockery of the Board's decision-making process.

EnWin's argument, as patently silly as it is, reflects the increasing pressure being placed on intervenors to reduce the cost of their interventions. It would be naive to think otherwise. The pressure typically takes the form of the imposition of what amounts to formulae for assessing the cost of claims. One example of that increasing pressure has been the tendency of utilities to require that the cost of interventions to be more-or-less the same. To be frank, comparing one cost claim to another, in the absence of egregious differences, is unfair. Each intervenor brings to the task of intervention a different level of knowledge, a different set of interests, and a different sense of what is required to properly represent their constituency. To insist that the cost of interventions be more-or-less the same is to deny intervenors the opportunity to properly represent their individual interests. The practical result is to drive interventions to the lowest cost intervention, without regard to the circumstances of individual intervenors and the interests they represent. While EnWin does not make that argument, given that it does not challenge individual cost claims, its argument is of a piece with a number of arguments, the objective of which is to make it very difficult for intervenors to properly represent the interests of their individual constituencies.

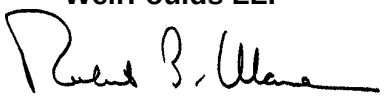
If EnWin, in making its argument, were acting in good faith, and being honest, it would acknowledge that its ratepayers benefit from the scrutiny of its application by ratepayer representatives. Indeed, as the Settlement Agreement discloses, the interventions resulted in a reduction of the rates for residential consumers from the level proposed by EnWin in its application. EnWin implicitly acknowledged that ratepayers had benefitted from the interventions when it agreed to a settlement that reduced the rates for residential consumers

from the level proposed by EnWin in its application. However, EnWin whose to ignore that position when it filed its objection to the cost claims. Instead, it has mounted an argument that would be dismissed as silly were its implications not so insidious.

The Council asks the Board to reject EnWin's argument in clear and unequivocal language and to award its cost of this claim.

Yours very truly,

WeirFoulds LLP



Robert B. Warren

RBW/dh

cc: EnWin Utilities Ltd.
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