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BY EMAIL

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Our File No. 2090068

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2008-0230 – Greater Sudbury Hydro 2009 Rates

We are counsel for the School Energy Coalition in this proceeding. We have reviewed the submissions of the Applicant with respect to the cost claims in this matter, and have the following reply comments.

The Applicant's Approach

We are increasingly concerned with the number of electricity distributors who are seeking to compare the cost claims of different intervenors in the same proceeding. In our view, this is entirely the wrong approach to analysis of cost claims. Not only does it make a comparison that is inimical to the efficient functioning of the Board in rate applications, but it also completely misses what is important.

One of the most important process-related expectations of the Board is that intervenors work together on applications, so that costs are kept down and duplication is avoided. The Board will be aware that intervenors do just that, actively sharing information and assigning responsibility for issues or leadership amongst themselves. As the Board has sought more intervenor co-operation in the last few years, the intervenors have in fact responded positively and co-

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operation has increased accordingly. Not only do intervenors meet on individual matters, but when the list of upcoming matters – electricity distribution cost of service proceedings, for example – is identified the intervenors discuss and agree on who will be participating in which proceedings, and what role they will play in each.

Without referring specifically to this proceeding, intervenor co-operation in any given proceeding can include such things as:

- Allocating responsibility for individual issues or subject areas
- Assigning tasks such as finding external evidence or hiring an expert witness
- Identifying a lead negotiator in ADR
- Assigning lead cross-examination responsibility in oral hearings, either issue by issue or overall

and many other, less critical, divisions of responsibility. Each of these may, in a particular proceeding, involve a greater time commitment for one intervenor relative to other intervenors.

In this environment of co-operation and efficiency, it is rare that all parties will have the same level of activity in a particular matter. For example, the party who has the most senior or experienced counsel may have more responsibility for things like ADR or cross-examination. Depending on which parties are involved in the matter, that may mean that Peter Thompson, or Bob Warren, or myself may have to spend some extra time. Conversely, there may be particular issues that are unusually important in a case, thus requiring a particular intervenor group to ramp up their activity. If CDM, ARC or load forecasting is particularly problematic, for example, it may be VECC that spends extra time. If tax issues are complex, it may be BOMA, Energy Probe or SEC. If capital spending is central to the application, it may be VECC, CCC or CME.

It is not in the Board's interests to try to get intervenors to each spend the same amount of time on each matter. It is in fact more efficient to have those who are most expert or most able on particular issues, or components of the process, to take primary responsibility for those items. This is what is happening today, and the informal process by which intervenors have allocated responsibility between them has, in our submission, benefited the Board and its process in the past.

If, on the other hand, the message from the Board is that intervenors should spend equal time, the result is not, logically, less time spent. Since someone will still have to do a thorough job on each issue - and it will normally be whoever has the most expertise or interest - that would not change. Right now everyone else still has a base amount of work to do, to understand the application and the issues, and then can leave the details of allocated issues to the person who has that responsibility. But if the Board compares the hours of intervenors to each other on the assumption that their contributions must necessarily be similar, the only way intervenors could

bring their hours and claims closer together would be if those who right now do less – relying on those with more expertise – in fact start to do more. This is not appropriate, and neither the Board nor intervenors want to see that kind of wasted resource. We don't have the time to spend on wasted activities, and the Board is not well served by that result.

In our submission, the push from regulated entities to make comparisons between cost claims is contrary to the Board's express desire to have maximum co-operation and the elimination of duplication. It should be rejected.

A More Appropriate Approach

That does not mean that intervenor cost claims should not be scrutinized. However, in our view the role of the Applicant is to look at the overall cost claim total, and comment on that. If it appears high, it is then up to the Board panel, in our view, to determine who should be cut back based on its experience with the parties and knowledge of the relative contributions of the intervenors to the proceeding. That exercise should only arise if the overall cost of intervenor participation in the particular proceeding is out of line with what is appropriate..

Thus, the main task, in our view, is to assess whether the total intervenor time spent was appropriate in light of the nature and contents of the Application, and the issues and dollars involved. Utilities do not want to do that, of course, because implicitly it involves whether their Application was well done, whether their requests were reasonable, and how they approached the process.

It is understandable that a utility does not want any part of the cost claim process to be about them, but it is in most cases. Most of the variation of cost claims from one case to the next is driven by the Application, and the Applicant. The Board is well aware that, in general, the regulatory costs for any distributor are controlled in large part by the Applicant's approach to the process, both in terms of how well the Application and the underlying budget are put together, and how appropriately the Applicant engages the process.

GSHI is a case in point. The Application had numerous problems, some arising out of their approach to its preparation, but most arising out of their internal budget and corporate relationships. The reason the Application was filed so late appears to be a result of the Applicant's challenge at doing their first full cost of service (a challenge with which other utilities have also struggled, to be fair), and perhaps (we can't know for sure) personnel turnover that was occurring in the same time frame. The Application reflects this situation, and that is the reason why the evidence, revised during the process anyway, ended up being supplemented with more than 1500 pages of interrogatory responses in two rounds, technical conference questions and oral hearing undertakings. That is also the reason why the time from (late) filing to rate order was thirteen months, much longer than the normal time frames for this Board.

The best example of this was in the rate order. Normally, intervenors do not have to spend much time on the draft rate order, because the Board has already made its decision. The rate order process is complicated but largely mechanistic. In this case, there were extensive problems with the draft rate order that had to be corrected before an order could be issued. This was, in effect, the same difficulty as we had earlier seen in the Application, but in microcosm.

A somewhat different problem arose because there were underlying difficulties with the Applicant's business and accounting approaches. The Applicant did not adopt the half year rule, and throughout the process, even after being told numerous times that it is a standard Board policy (and is inherently logical, which is why it also applies for tax purposes), insisted on pursuing it. The Applicant had a water billing structure that had obvious issues, yet insisted on pushing them to a hearing. Even the Board of Directors budget, on which the Applicant ultimately prevailed at hearing, was ramped up as an issue because the Applicant said on the record that their budgeting was based on ensuring that they had sufficient budget in the IRM years.

These are only a few of the many examples of problems with this Application and the process all parties had to navigate as a result. In our submission, it is clear that this is an Application, and a process, that required more time investment from intervenors than many other rate cases.

We should point out that, in saying this, we are not at all intending to "cast blame" on the Applicant. Yes, they had errors in their Application and throughout the process, both in terms of what they filed and their tactical approach. That, in our view, is a function of being new to the process, and it would be unreasonable and unfair to criticize them for this. Some utilities have had a better first experience with cost of service than others, but GSHI was, it appeared to us, trying their best to act appropriately. The fact that they made mistakes due to inexperience does not attract blame. It does, however, explain the time and effort involved in the application process.

The other part of the appropriate analysis starts with the amounts involved. We can't forget that the Applicant was asking for an order from the Board to collect $25.5 million from ratepayers, each year for four years. The total amount in issue, therefore, was more than $100 million. In the result, the regulatory process reduced that to $24.4 million per year, so the GSHI ratepayers will end up saving about $4.4 million because of this Board's review. That may increase depending on the result of the transfer pricing study.

Against that, compare the total amount of cost claims: $115,000. We note that the Applicant does not pay this amount. This is paid by the ratepayers as part of the revenue requirement. In our submission, the ratepayers of GSHI would say that, whether or not the substantial rate savings had resulted, this $115,000 was money well spent to have intervenors there protecting their interests.

Thus, it is submitted that the total of the cost claims submitted, relative to the complexity of the matter and the amounts involved, is the key relevant fact. Whether one intervenor spent more time than another, due to allocations of responsibility between them, is not only not the point, but making it the point is inconsistent with the Board's drive to make its processes efficient.

This raises the final, practical matter. Does the Board want to have to assess whether intervenor A or intervenor B is "worth" more in every proceeding? In our submission, there are two situations in which this is necessary. First, there have been occasions where an intervenor's conduct in the proceeding has led the Board to believe that they have not been contributing as much as they should. Perhaps the intervenor obviously wasted the Board's time in the hearing room, or things like that. Where this is the case, the Board has, with considerable care, used the costs discretion to "punish" that intervenor for inappropriate behaviour. Second, the Board may determine in a particular case that the overall cost of intervenor participation was too high. In that case, the Board is faced with determining how to apportion an overall cut between those who made cost claims.

Aside from these situations, it is in our view not in the Board's interests to try to compare intervenor contributions. If the intervenors are working together, and the overall cost is reasonable, the Board's goals are achieved. Any attempt to further fine tune that situation is more likely to detract from the Board's goals, rather than enhance them.

Specific Comments

The Applicant seeks to provide some "metrics" for the Board to measure the relative contribution of the parties involved. In our view, this is not a useful exercise, for two main reasons.

First, it is not in the Board's interest to base cost claims on quantity. As a general rule, an efficient Board process requires a drive to quality. This applies in all proceedings. An intervenor who asks one very important or thoughtful interrogatory may have contributed more to a process than another who asks fifty. An intervenor who has a focused ten page argument may assist the Board more than one whose argument is all over the place, but is sixty pages.

Lawyers and consultants no longer get paid by the page, and a good thing that. The last thing the Board wants to do is base a cost claim decision on who managed to be the most verbose in the least number of hours.

Second, even looking at metrics involves measurement issues that the Applicant simply ignores. A series of interrogatory questions can be asked as subparts of a single question, or as all separate questions. Does the method selected affect the quality of the questions, or their value to the process? Similarly, argument can be single spaced, double spaced, or otherwise, and can have extensive quotes or more dense reasoning. We could give other examples.

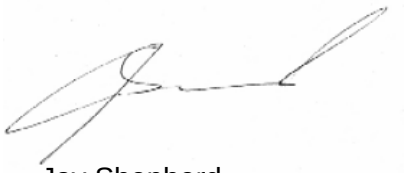
We understand why a utility would want to find some measuring stick for the activities of intervenors, but like many things in which quality is more important than quantity, judgment is the better approach, not metrics of dubious genesis and value. As the Board saw in the Electricity Distributor Cost Benchmarking process, there is a place for metrics, and there is also a place where they hinder rather than help the Board's decision-making. The metrics the Applicant is proposing for these cost claims do not add to the process.

Conclusion

In our submission, this Application process benefitted not only from the overall participation of all of the ratepayer groups, but also from the thoughtful way in which the intervenors allocated responsibilities between them to make the process more efficient. For an Application and process like this one, with all the problems and issues that arose, the Applicant should in our view be pleased that the total cost was $115,000, about one-tenth of one percent of the overall amounts for which they were seeking a Board order.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P.C.



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