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BY EMAIL

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

Dear Ms. Walli:

**Re: Submissions of Enbridge Gas Distribution Inc. ("Enbridge") responding to the Cost Submissions of Harten Consulting ("Harten") consultant to Hunter's Green Ratepayers Association ("HGRA")
York Energy Centre Pipeline Project
Board File No. EB-2009-0187**

We are in receipt of the application for cost award submitted by Harten Consultants dated March 2, 2010 in the amount of \$48,444.90. Enbridge does not take issue with the disbursements of \$268.00, but for the reasons outlined below, does take issue with the legal consultant fees claimed.

Cost Eligibility

In a letter dated October 15, 2009 (the "**Letter**") the Board accepted Harten's participation as representing the HGRA in this proceeding and indicated that Harten would be eligible to make a cost claim. It is important to note that section 6.03, reproduced below, of the Board's Practice Direction on Cost Awards (the "**Direction**") states that the onus of proving the claimed costs are appropriate is on the person making such a claim.

6.03 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.

Further, the Board reminded Harten to focus on the issues relevant to the issues to be determined by the Board in a leave to construct proceeding. Specifically, the Letter stated:

"As you prepare for your participation in this case it is important you have a clear idea as to the scope of the Board's jurisdiction in such cases.

The Board's jurisdiction in this case is restricted to the review of matters related to the construction and operation of Enbridge's proposed pipelines. Matters related to the location, construction, operation or impacts of the proposed generating station are not within the scope of the Board Review. Accordingly, your participation should be strictly limited to matters respecting the pipeline, and any

consideration of cost awards will be strictly limited to costs incurred with respect to such matters.”

Once a party seeking costs provides sufficient information regarding the time spent and manner of participation in respect of relevant issues, the Board considers a number of factors as set out in the Direction, Section 5.01, provided below:

5.01 In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party:

- (a) participated responsibly in the process;
- (b) asked questions on cross examination which were unduly repetitive of questions already asked by other parties;
- (c) made reasonable efforts to ensure that its evidence was not unduly repetitive of evidence presented by other parties;
- (d) made reasonable efforts to co-operate with other parties in order to reduce the duplication of evidence and questions on cross-examination;
- (e) made reasonable efforts to combine its intervention with that of similarly interested parties;
- (f) contributed to a better understanding by the Board of one or more of the issues addressed by the party;
- (g) complied with directions of the Board including directions related to the pre-filing of written evidence;
- (h) addressed issues in its written or oral evidence or in its questions on cross-examination or in its argument which were not relevant to the issues determined by the Board in the process;
- (i) engaged in any other conduct that tended to lengthen unnecessarily the duration of the process; or
- (j) engaged in any other conduct which the Board found was inappropriate or irresponsible.

Enbridge submits that Harten has not discharged its onus in demonstrating the required factors to warrant the cost award claimed.

Issues in the Proceeding

The Board established the following issues list for the proceeding:

- 1) *Is there a need for the proposed pipeline?*
- 2) *Are there any undue negative rate implications for Enbridge’s rate payers caused by the construction and operation of the proposed pipeline?*
- 3) *What are the environmental impacts associated with construction of the proposed pipeline and are they acceptable?*
- 4) *Are there any outstanding landowner matters for the proposed pipeline routing and construction?*

The contribution of Harten was primarily focused on Issue 3, the potential environmental impacts of the Pipeline.

Costs Claims

Enbridge is unable to support the cost claim for the following reasons:

- 1) There is no detail of the tasks performed for any of the 139 hours or a breakdown regarding the 57 hours of unclassified time. Therefore, Enbridge cannot make specific comments regarding the appropriateness of the time spent.
- 2) Harten has claimed at the maximum rate for the highest level of relevant experience - \$330/hour in respect of Mr. Tenenbaum. It is unclear from the information provided in the C.V. of Mr. Tenenbaum, whether all such experience is relevant to the issues in this proceeding. The information provided does not include any references to the construction of pipelines but rather provides the following general statement:

"As the lead consultant in Harten Consulting, which he formed in 1996, he has directed numerous studies on projects including the operation of landfill sites and leachate contamination, sanitary sewer systems, industrial waste disposal, the format of ballots in the electoral process, socio-economic impact of computer games, and an analysis of the operations and economics of thoroughbred horse racing in Canada."

Enbridge would request that Harten and its client, the HGRA, confirm for the Board, that the Harten retainer contemplated a rate that is equal to or exceeds the tariff rate specified in the Direction. Enbridge does not require such information, but merely seeks to have the Board confirm such information to its satisfaction.

- 3) Enbridge is unclear regarding who Harten actually represented. Harten's cost claim states that "Harten has represented private parties and a rate payer group, all residents of King Township". Harten's letter of October 2, 2009 indicated that it was representing the Hunter's Green Rate Payers Association and other interested parties. The Board, in the October 15, 2009 letter, confirmed the status of the HGRA as an Intervenor and Harten's representation of the HGRA. Costs claimed that are not attributable to an Intervenor in the Application should be disallowed.
- 4) Harten's participation was at times irrelevant and did not contribute to a better understanding of the issues to be decided by the Board. Examples of such include:
 - a) Unsubstantiated/Exaggerated Statements – As previously indicated, much of Harten's content was not evidence but rather unsupported statements. Several of such statements included assertion that Harten did not substantiate with facts even when requested to provide such evidence by Enbridge. For example, Harten did not substantiate the validity or relevance of the references to the York Durham Sewage System. In another instance, Harten's claim that the proposed pipeline poses a "**far greater risk** [emphasis added] than the gas pipelines Enbridge currently operates because it delivers gas at a pressure of 3240 kPa, the pipeline is 16 inches in diameter and transports 186,000 cubic meters of gas per hour" (February 15, 2010), is incorrect and unsubstantiated.

- b) Irrelevant references - Harten made several references to the Toronto Region Conservation Authority whose jurisdiction does not encompass the geographic area in which the Pipeline is to be constructed. Harten also made repeated comments regarding the legal representatives of Enbridge and the Ontario Power Authority (the "OPA"). The OPA was not a party to this proceeding and these comments were irrelevant to the Proceeding.
- c) Incorrect statements – Examples of such include: Harten misquoting Enbridge's position in respect of the conditions of approval and Harten miscalculating the depreciation associated with the Pipeline and financial risk posed to other ratepayers.
- d) Board Process - Harten made several comments and asked certain questions which indicated that Harten's issue is with the legal regime for approval of the pipeline and the generating facility. These issues are more properly dealt with in the legislative process. Harten made several comments regarding the environmental assessment process under the Ontario *Environmental Assessment Act* which did not apply to the Application.

Enbridge, Intervenor and Board Staff, would have to review such statements and documents and consider whether and how to respond to these issues. It was incumbent upon Harten to ensure the statements, interrogatories and submissions were relevant to the issues and to demonstrate such in the claim for costs. Enbridge submits that Harten has fallen short of meeting its onus in a claim for costs.

Summary

In conclusion, Enbridge does recognize that intervenors perform a valuable function in the hearing process, and certain of the issues commented upon by Harten and questions posed, did help clarify the record and were appropriate in the circumstances. However, for the reasons outlined above, Enbridge submits that the claim of 139 hours was unsubstantiated and appears excessive and that a substantial portion of the time was not spent on issues relevant to this proceeding. Therefore, Enbridge would support a cost award for approximately 50 to 60 hours. Further, Harten has not demonstrated the maximum rate of \$330/hour is appropriate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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