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May 10, 2010

BY EMAIL & COURIER

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge St, Suite 2701
Toronto ON M4P 1E4

Dear Ms. Walli:

Board File No. EB-2009-0265
Haldimand County Hydro Inc. – 2010 Cost of Service Application
Applicant Costs Objection – Energy Probe Reply

Pursuant to the Decision and Order, issued by the Board on March 31, 2010, please find attached two hard copies of the Reply of Energy Probe Research Foundation (Energy Probe) to the Costs Objection of the Applicant in the EB-2009-0265 proceeding for the Board's consideration. An electronic version of this communication will be forwarded in PDF format.

Should you require additional information, please do not hesitate to contact me.

Yours truly,

David S. MacIntosh
Case Manager

cc: Lloyd Payne, Haldimand County Hydro Inc. (By email)
Jacqueline A. Scott, Haldimand County Hydro Inc. (By email)
James C. Sidlofsky, Borden Ladner Gervais LLP (By email)
Randy Aiken, Aiken & Associates (By email)
Interested Parties (By email)

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Ontario Energy Board

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
Haldimand County Hydro Inc. for an order approving just
and reasonable rates and other charges for electricity
distribution to be effective May 1, 2010.

**ENERGY PROBE RESEARCH FOUNDATION
("ENERGY PROBE")**

**REPLY TO HALDIMAND COUNTY HYDRO INC,
COSTS OBJECTION**

May 10, 2010

**HALDIMAND COUNTY HYDRO INC.
2010 RATES**

EB-2009-0265

ENERGY PROBE REPLY TO COSTS OBJECTION

How these Matters came before the Board

1. On August 28, 2009, Haldimand County Hydro Inc. (the “Applicant” or “Haldimand”), filed an Application seeking approval for changes to the rates that it charges for electricity distribution, to be effective May 1, 2010. The Board issued a Notice of Application and Hearing on September 16, 2009, assigning the application file number EB-2009-0265, and noting the following in its third paragraph:

Haldimand County indicates that if the application is approved as filed, residential customers consuming 800 kWh per month would experience an approximate increase of 15% in their current delivery charges. This is a \$6.86 per month increase on their total bill. General service customers consuming 2,000 kWh per month and having a monthly demand of less than 50 kW would experience an approximate increase of 12% in their current delivery charges. This is a \$9.98 per month increase on their total bill.

2. Energy Probe Research Foundation (“Energy Probe”), School Energy Coalition (“SEC”) and the Vulnerable Energy Consumers Coalition (“VECC”) applied for and were granted intervenor status and were found to be eligible for costs; no objections had been received by the Board from the Applicant.

3. Procedural Order No. 1 was issued by the Board on October 14, 2009 and provided a procedural schedule for interrogatories to be asked and answered. Energy Probe filed its Interrogatories on October 30, 2009.

4. Procedural Order No. 2 was issued by the Board on November 13, 2009, granting the Applicant the two week extension, until November 30, 2009, it had requested for filing interrogatory responses.

5. Procedural Order No. 3 was issued by the Board on December 11, 2009, and stated that upon review of the responses to written interrogatories, it was making provision for a round of written supplemental interrogatories, to be followed by a settlement conference between the Applicant and intervenors.

6. Energy Probe filed supplemental interrogatories on December 23, 2010 and actively participated in the Settlement Conference, which commenced on January 21, 2010 and concluded on January 22, 2010. Subsequently, a Partial Settlement Agreement was filed with the Board on February 12, 2010 and was accepted by the Board on February 18, 2010 in its Decision on Partial Settlement Agreement. The schedule for written argument ordered in Procedural Order No. 4 was confirmed.

7. Following written submissions on the five unsettled issues, the Board issued its Decision and Order on March 31, 2010. As part of the Decision and Order, the Board ordered Haldimand to file with the Board and forward to intervenors a draft Rate Order within 14 days of the date of the Decision.

8. Haldimand filed the draft Rate Order on April 13, 2010. Energy Probe filed its Comments on the draft Rate Order on April 14, 2010 requesting further clarification in three areas. The Rate Order was issued by the Board on April 26, 2010.

9. As directed by the Board, Energy Probe filed its Costs Submission on April 23, 2010.

10. On April 29, 2010, the Finance Manager of the Applicant, Jacqueline A. Scott, filed a letter on behalf of Haldimand objecting to a portion of the costs submitted by Energy Probe, related to activity taking place within the Board ordered Settlement Conference.

The Settlement Conference

11. The Settlement Conference commenced at 9:30 am, January 21, 2010; the first day ended at 7:00 pm. The second day, January 22, 2010, began for Intervenors at 10:30am and ended at 12:30 pm.

12. Inasmuch as the Applicant has objected to costs related to activity taking place within the Settlement Conference, Energy Probe has reviewed the Board's Settlement Conference Guidelines to ensure that it does not commit a breach in responding to Haldimand and notes that Rule 38.10 of *the Rules of Practice and Procedure of the Ontario Energy Board* states:

Parties, their representatives and other persons attending a settlement conference shall treat admissions, concessions offers to settle and related discussions as confidential and shall not disclose them outside the conference.

13. It appears to Energy Probe that revealing the identity and attendance records of the parties attending the Settlement Conference does not breach Rule 38.10 but discussion of the strategy of any party attending the Settlement Conference, or the interaction among parties or between parties during the Settlement Conference, would constitute a breach. Energy Probe has taken care to respond to the Applicant with that caution.

The Objection

14. The Objection from the Applicant is contained within the following four sentences: the first two presented as facts, the third as opinion, and the fourth as a request to the Board.

- VECC's and SEC's submitted costs include only one consultant to attend the Settlement Conference held on January 21st and 22nd, 2010, for a total of 11.80 hours and 13.50 hours respectively.
- Energy Probe's submitted costs include two consultants to attend this Settlement Conference, represented by David MacIntosh at 10.50 hours and Randy Aitken at 10.75 hours, for a total of 21.25 hours.

- Haldimand County Hydro feels that the attendance of Energy Probe's two consultants at the Settlement Conference was excessive and objects to those costs.
- Accordingly, it is requested that David MacIntosh's claim including fees of \$2,415.00 plus GST of \$60.38 and disbursements of \$39.00 (GST included) for a total of \$2,514.38 be disallowed.

Order of Reply

15. Energy Probe will present its Response to the Objections of the Applicant in the following order:

- ✓ A response to each of the four sentences listed in Paragraph 14 above.
- ✓ Outcome of the Settlement Conference
- ✓ Quantum of Costs Objected to by Haldimand
- ✓ Who benefits from a reduction in Intervenor Costs post Decision
- ✓ Final Comments

Reply to Objections

VECC's and SEC's submitted costs include only one consultant to attend the Settlement Conference held on January 21st and 22nd, 2010, for a total of 11.80 hours and 13.50 hours respectively.

16. Energy Probe disagrees with this statement; it is incorrect.

17. Intervenor normally do not review the costs submissions of the other intervenors taking parting a proceeding and Energy Probe has not seen the Costs Submission of SEC. However, Energy Probe did request and receive a copy of the Costs Submission of VECC.

18. To the knowledge of Energy Probe, only counsel for SEC took part in the Settlement Conference; no consultant for SEC was in attendance.

19. During the initial day of the Settlement Conference, both the counsel for VECC, Michael Buonaguro, and a consultant for VECC, William Harper, took part in the Settlement Conference. Mr. Harper took part by telephone through the Board's teleconferencing technology. Counsel for VECC took part in person. On the second day of the Settlement Conference, counsel for VECC took part in person. Energy Probe does not recall the consultant for VECC being present on the second day by telephone.

20. Time for Mr. Harper's participation is not part of the 11.80 hours referred to by the Applicant.

Energy Probe's submitted costs include two consultants to attend this Settlement Conference, represented by David MacIntosh at 10.50 hours and Randy Aitken at 10.75 hours, for a total of 21.25 hours.

21. During Day One of the Settlement Conference, both Randy Aiken and David MacIntosh, consultants to Energy Probe, attended in person. On Day Two, David MacIntosh attended in person; Randy Aiken attended through the Board's teleconferencing technology. On neither day was Energy Probe represented by counsel, although there were at times up to 4 counsel in the ADR room.

Haldimand County Hydro feels that the attendance of Energy Probe's two consultants at the Settlement Conference was excessive and objects to those costs.

22. The Applicant has not provided the Board with a reasonable yardstick or standard for the measurement of "excessive" in this context. Neither consultant for Energy Probe claimed as many hours for the Settlement Conference as did each counsel for the other two intervenors. But that is not in itself determinative of reasonableness. The Board will know that some intervening parties place preparation for a Settlement Conference in the costs category of "Attendance – Settlement Conference" while others include it in the category "Preparation".

23. Did the Applicant believe that it was “excessive” because Haldimand appeared to have only one consultant, Mr. Bacon, present among the five people that represented it at the ADR? Energy Probe is not aware if other consultants were among the persons that Haldimand did consult with off line during the Settlement Conference.

24. Energy Probe notes that the representatives of the parties that were *physically* in the room on Day One, the far longer day of negotiations, were as follows:

- ✓ Applicant: 3 staff (at least), 1 counsel, 1 consultant
- ✓ Board staff; 2 staff, 1 counsel
- ✓ Energy Probe: 2 consultants
- ✓ VECC: 1 counsel
- ✓ SEC: 1 counsel

Accordingly, it is requested that David MacIntosh’s claim including fees of \$2,415.00 plus GST of \$60.38 and disbursements of \$39.00 (GST included) for a total of \$2,514.38 be disallowed.

25. As stated below, Energy Probe submits that it contributed to a successful Settlement Conference. While Rule 38.10 of *the Rules of Practice and Procedure of the Ontario Energy Board* precludes Energy from presenting its settlement strategy or the part it played in negotiations, the outcome of the Settlement Conference and the nature of the Objections, as discussed below, make the request of the Applicant unwarranted by any reasonable standard.

Outcome of the Settlement Conference

26. Energy Probe submits that it contributed to a successful Settlement Conference. All but five issues were included in the Settlement Agreement. Those remaining issues were submitted to the Board by way of Written Argument.

27. Perhaps the outcome was best summarized in the following passage from Page 3 of the Decision on Partial Settlement Agreement, issued by the Board on February 18, 2010:

BOARD FINDINGS

The Board has reviewed Haldimand County Hydro's Settlement Agreement of February 12, 2010. The Board has also noted Ms. Pryor's objection to the Agreement. However, *the Agreement has resulted in a substantial reduction to the revenue deficiency, reducing it from \$1,584,943 to \$961,358*. The Board is satisfied with the outcome of the settlement reached between the parties and approves the Settlement Agreement as filed for rates effective May 1, 2010. (emphasis added)

Quantum of Costs Objected to by Haldimand

28. The Applicant has requested the Board to disallow fees of \$2,415.00 plus GST of \$60.38 and disbursements of \$39.00 (GST included) for a total of \$2,514.38 out of the Energy Probe Costs Submission of \$19,490.00 plus GST of \$495.78 and disbursements of \$380.07 for a total of \$20,365.85, a reduction of some 12%, for activity related to the Settlement Conference that it described as "excessive".

29. To be clear in respect of quantum, in addressing the concerns of Haldimand, the 2010 Rate Rebasing Costs, of which intervenor award costs form part, are amortized over 4 years. The request of Haldimand for a reduction in Energy Probe's Costs of \$2,514.38 will, if granted by the Board, have an annual impact of approximately \$630.00 on a Revenue Requirement of \$13,735,891.00 (2010).

Who benefits from a reduction in Intervenor Costs post Decision

30. Once the Board has rendered its Decision on a cost of service rebasing proceeding under an incentive regulation scenario, the rates are set for ratepayers for the coming four years subject to adjustments under the guidelines of the incentive regulation regime.

31. Under the incentive regulation scenario, it would appear that the reduction requested by the Applicant, with an impact of \$630 annually, would go to the account of the shareholder.

Final Comments

32. In the letter of objection, the Applicant has made observations concerning the manner in which Energy Probe conducted its participation in the Settlement Conference and requested a monetary penalty to be imposed by the Board.

33. Energy Probe submits that none of those observations were linked to the Board's Practice Direction on Cost Awards, Section 5 – Principles in Awarding Costs. The Principles comprise 10 areas that the Board may consider, among other things, in “determining the amount of a cost award to a party.”

34. Granted, the 10 Principles that the Board has listed in Section 5 are not exhaustive, but they are the areas of conduct that the Board felt worthy of mention and they are comprehensive.

35. If the objection of Haldimand to the activities of Energy Probe in respect of the Settlement Conference are not related to Section 5 – Principles in Awarding Costs, and are of negligible financial impact, Energy Probe submits that the question arises as to why the Applicant would request the Board to deploy its resources to adjudicate this matter. What is to be gained by the Applicant?

36. In EB-2003-0259 Canadian Cable Television Association, Energy Probe was the subject of a joint Costs objection by the Electricity Distributors (the “EDA”) and the Canadian Electricity Association (the “CEA”) in respect of a total cost claim of \$49,789.77.

37. In the letter of costs objection, dated June 17, 2005, the counsel representing both the EDA and the CEA, Kelly Friedman of Ogilvy and Renault, stated their position in respect of Mr. MacIntosh and the “claimed 170 hours of consultant/analysts time for a contribution to their costs of \$24,902.11”, as follows:

There was simply no need to have two individuals in attendance throughout the hearing in light of the role taken by Energy Probe in the proceeding. As Energy Probe’s consultant was not going to give evidence or be cross-examined, it was not reasonable for Mr. Macintosh to attend each and every day of the hearing, instead of simply consulting with Mr. Dingwall as necessary;

38. In paragraph 38 of the Reply to the joint submission of the EDA and CEA, dated June 24, 2005, Energy Probe submitted that, among other things:

“...This is clearly an attempt to constrict the manner in which a customer/public interest intervenor should conduct their intervention. ...”

39. The Board Panel hearing the EB-2003-0259 proceeding was:

Gordon E. Kaiser, Vice Chair and Presiding Member

Paul Sommerville, Member

Cynthia Chaplin, Member (now Vice Chair)

40. Energy Probe submits to the Board that it is unable, in view of the Applicant not referring to any of the Principles listed in the Board’s Practice Direction on Cost Awards, Section 5 – Principles in Awarding Costs, and in view of the negligible financial impact of the reduction in Costs requested compared to the 2010 Revenue Requirement, or compared to the reduction in the 2010 Revenue Requirement in the Settlement Agreement, to explain the Applicant’s actions other than as an attempt to constrict the manner in which a customer/public interest intervenor should conduct their intervention.

41. The Applicant had more representatives in the Settlement Conference, physically in the Settlement Conference, than the number of all intervenors combined. No intervenor complained.

42. In the EB-2003-0259 proceeding referenced above, Energy Probe was awarded its Costs without reduction.

43. For all the reasons submitted to the Board in this Reply, Energy Probe Research Foundation requests that it be awarded a full recovery of its costs incurred in its participation in this proceeding, which is only in the public interest and without pecuniary purpose.

Respectfully submitted at Toronto, Ontario this 10th day of May, 2010.

ENERGY PROBE RESEARCH FOUNDATION