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BY RESS and EMAIL

December 13, 2010
Our File No. 20100139H

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

Dear Ms. Walli:

Re: EB-2010-0139 – Norfolk 2011 Rates

We are counsel for the HVAC Coalition. The Applicant has sent a letter to the Board dated December 6th challenging the intervenor and cost eligibility requests of HVAC Coalition. This is the response of the HVAC Coalition to that letter.

It is important in considering the Applicant's letter to separate their concerns over HVAC's intervention, and their objection to cost eligibility. They raise different questions and relate to different Board rules, so are evaluated separately below.

Intervenor Status

NPDI sets out a number of reasons why it believes that HVAC should not be granted intervenor status in this proceeding.

1. The Applicant claims that HVAC believes NPDI is in violation of the Affiliate Relations Code for Electricity Distributors and Transmitters (ARC) and because of that HVAC will seek to turn the rate proceedings into a compliance proceeding. This is not our client's intent, nor does out client believe that it would be successful if it attempted to do that. HVAC is well aware that this is a rate case, and understands the issues that legitimately arise in such a case. The Board will be aware that, when HVAC has had ARC concerns with respect to regulated utilities in the past, it has pursued compliance action. This is not that situation, and HVAC knows that its participation in this proceeding is about rates, not ARC compliance. The Board may wish to look at "Issues to be Addressed" contained in HVAC's Notice of Intervention as the correct indication of HVAC's intentions, which are entirely directed at ratepayer impacts. HVAC has always conducted itself in any Board proceeding in a constructive manner, and there is no reason to believe it will not continue to do so in this proceeding.

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2. The NPDI letter argues that two of the issues HVAC intends to address relate to competitive interests, and a rate proceeding is not the proper forum for these concerns. This is not correct. The aim of a rate proceeding is to set "just and reasonable" rates. If any related individual or business is financially benefiting from the use of the utility's assets, branding, reputation or other advantages, and the utility is not properly compensated for it, then ratepayers do have an interest. This is because the utility should be getting revenue from this source which would reduce the revenue requirement. It may be that the reason for the situation is non-compliance with ARC, but that need not be the case. None of this is reliant on the utility being in contravention of any Board codes of conduct, guidelines or rules. It is about normal commercial practice, and about ensuring that the revenue requirement is calculated to reflect the real net cost to distribute electricity.

3. NPDI takes the position that HVACs intention to address the "proposed costs for the test year, the resulting revenue requirement, the forecast of the revenues, and the resulting deficiency, all as they are impacted by the utilities relationship with the unregulated affiliates", will be addressed by other interveners who represent consumers group who represent both residential and commercial customers. This is not a legitimate reason to exclude an intervenor. It is incumbent upon parties to avoid duplication and contribute to the efficiency of the process, and HVAC will ensure that it does so (as it has in the past). It is not the Board's practice to exclude intervenors because their interests may overlap with those of other parties. There is always some overlap. It is up to the parties to ensure that it is not allowed to result in inefficiency.

4. The Applicant also complains that our firm is already representing School Energy Coalition. In our submission, this is irrelevant to whether HVAC Coalition should be granted intervenor status. If the Applicant wishes to challenge the retainer of counsel, it should do so directly, and on legally allowable grounds. There are no such grounds presented here, and none in fact exist. The two clients have assessed the situation, and concluded that this dual representation is appropriate. The Applicant has no interest in that decision. The Board's interest is in the efficiency and integrity of its process, and dual representation does not present any problems in this regard. We note that counsel has represented both SEC and HVAC in the same proceeding in the past, and there have been neither concerns from parties or the Board, nor problems resulting from that dual representation.

5. Finally, the Applicant also says that it is not in any case carrying on the business activities that have raised HVAC's concerns. That, of course, is a matter for the proceeding itself, not a reason to deny intervenor status to HVAC. While it is true that the Applicant has, since the filing of the HVAC Notice of Intervention, amended its website to remove references to the business referred to, HVAC expects to, at least initially, file interrogatories to ascertain the extent to which the business is still being carried on, and how much utility resources are being used, without compensation, within the affiliate. The hearing process is there in part to determine the facts. The process of establishing the parties to the proceeding is not the time to do that.

Cost Eligibility and Award

The Applicant raises a concern about duplication relative to cost eligibility. Rather than being duplicative, the dual representation of two intervenors by our firm creates cost savings. The Application needs to be read only once for two parties. Interrogatories will be asked by only one of the two parties on any given issue. Attendance at any meeting, technical conference, or oral hearing will generally require only one counsel, representing two parties, or at most one counsel with a student. As long as the parties have concluded that their interests are aligned, the result of the dual representation should create economies of scale that reduce the overall cost of the proceeding.

That Applicant has also raised concerns about HVAC Coalition's claim for cost eligibility on the basis that the *Practice Direction on Cost Awards* does not contemplate trade groups being eligible. We accept that characterization, and normally HVAC Coalition is not found eligible for costs. However, the Board has a discretion to find any party eligible for costs where their participation is in the public interest and costs eligibility will allow them to add additional value to the process. In the past the Board has found HVAC eligible for cost awards in some proceedings on that basis, as it has with other groups that are otherwise disqualified, such as the Electrical Contractors Association of Ontario, the Association of Power Producers of Ontario, and others.

Our submission is that this Applicant is one of the first of what may be many distributors who are testing the boundaries of their competitive businesses' relationship with the regulated utility. HVAC is in a good position to assist the Board in understanding these relationships, and the ways in which the costs borne by ratepayers could be impacted. However, HVAC has limited funds, and has to seek contributions from its members to participate in interventions. As a result, HVAC must severely limit its intervention when it does not have costs available to it. In our submission it is in the Board's interests to have HVAC participate fully on these specific issues.

Conclusion

For the above reasons, it is submitted that:

- HVAC Coalition should be granted intervenor status, and
- The Board should exercise its discretion to allow recovery by HVAC Coalition of its reasonably incurred costs.

All of which is respectfully submitted.

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Yours very truly,
JAY SHEPHERD P. C.

Jay Shepherd

cc: Martin Luymes, HVAC (email)
Interested parties (email)