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March 2, 2011

Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, 27<sup>th</sup> Floor  
Toronto, ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: Motion for Review of Cost Eligibility in EB-2010-0331/0332 and  
EB-2010-0279 - Response to Staff Submissions**

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This letter sets out the submissions of the Ontario Sustainable Energy Association (OSEA) in response to Board Staff's submission on OSEA's Notice of Motion for a review of cost eligibility in EB-2010-0331/0332 and EB-2010-0279.

OSEA asks the Board exercise its discretion to extend or abridge the time limit for submitting a reply submission in accordance with Rule 7.01. The reason for this request is that the procedural order was filed in our office without documentation of deadlines. We appreciated the telephone call from OEB staff to Ms. Abouchar on February 28 who brought the matter, and the Board's willingness to entertain a late reply to my attention. We will endeavour to ensure that this does not happen again in the future.

OSEA provides the following replies to Board Staff's submission on this motion:

**OSEA BASES ITS CLAIM ON APPROPRIATE AND ACCEPTED GROUNDS**

- 1 In accordance with the NGEIR decision (EB-2006-0322/0388/0340), OSEA's Notice of Motion submitted that the Board made an error of fact. The evidence provided by OSEA to the Board stated that OSEA is not a service provider or a group of generators. The evidence before the Board was also clear that OSEA represents both the direct interests of consumers and the public interest.
- 2 Further, in accordance with the NGEIR decision (EB-2006-0322/0388/0340), OSEA's Notice of Motion stated that the Board made inconsistent findings. In other cases, the Board has found OSEA eligible for costs, including EB-2007-0707 and EB-2010-0377/0378/0379.



### **OSEA ALLEGES AN ERROR OF FACT**

- 3 OSEA does not argue that the evidence before the Board should have been interpreted differently. Rather, OSEA argues that the Board made an error of fact. The Board failed to consider the information before it when deciding to deny cost eligibility to OSEA.
- 4 The grounds set out in the Notice of Motion are direct allegations that the Board committed an error of fact. Specifically, OSEA's Notice of Motion states that the Board erred in:
  - classifying OSEA as a service provider and/or a generator
  - stating that OSEA does not represent the interests of consumers.

These are both errors of fact about OSEA's mandate. The absence of the specific phrase "error of fact" in OSEA's Notice of Motion does not alter the nature of the claim.

- 5 OSEA's Notice of Motion submits that the Board committed an error of fact by failing to recognize that OSEA represents a public interest.

OSEA submits that its contribution to renewable energy is not solely for the generation of renewable energy but for the larger concept of 'green energy'.

Ontario's policy on renewable energy is most clearly stated in the *Green Energy and Green Economy Act (2009)* and its related regulations. This policy speaks not only to the generation of green power, but also to the importance of energy conservation as a public interest.

Further, the integration and interdependence as discussed by Mr. Wetston and quoted in OSEA's Notice of Motion is a reflection of the Board's mandate. The electricity sector in Ontario must be viewed as an integrated and interdependent whole. The green energy policies of the Government of Ontario must spread through all aspects of the electricity sector to ensure that we move forward with a green and sustainable Ontario.

Based on this concept, OSEA's public interest perspective is of great value in numerous proceedings, including proceedings that relate to:

- issues of renewable energy generation
- conservation and demand management plans, whether or not those plans are for the purpose of imposed targets under the *Green Energy and Green Economy Act*



- funding (through rate setting or otherwise), particularly where the organization has a mandate under the *Green Energy and Green Economy Act*.

Conservation and demand management programs are requirements of Minister of Energy Directives and are an integral part of a “green” Ontario. Similarly, the fees claimed by the OPA and the use of those fees by the OPA in accordance with the OPA’s mandate under Ministerial Directives and energy policy are also central to a “green” Ontario.

There is a clear role in these proceedings for a public interest organization to ensure that OPA and LDCs are implementing their mandate and requirements from Ontario’s energy Directives and policies and are allocating funds and providing projects that support this mandate.

It is noteworthy that in EB-2010-0377/0378/0379, the Board found that OSEA represents a public interest relevant to the Board’s mandate.

### **OSEA ALLEGES THE BOARD MADE INCONSISTENT FINDINGS AND BREACHED THE DUTY OF FAIRNESS**

- 6 Even where a tribunal or board is given discretion to make decisions, that discretion cannot be abused. The exercise of discretion is bounded by good faith, the rule of law. In accordance with the NGEIR decision (EB-2006-0322/0388/0340), the board will have made an error where there are inconsistent findings. Discretion cannot be used in a way that is arbitrary.


To assess if discretion is used in a way that is arbitrary, it is necessary to look at the outcome of the decision. As noted in point 2 and point 5 of this submission and more generally in the Notice of Motion, the Board has come to alternative conclusions about OSEA’s cost eligibility in other proceedings. Specifically, in other proceedings the Board has found that OSEA represents the public interest and has granted OSEA cost eligibility.

The Board’s inconsistent conclusions about OSEA’s qualifications for cost eligibility are evidence of inconsistent and arbitrary use of discretion by the Board.

OSEA maintains that the Board’s decision on cost eligibility in EB-2010-0331/0332 and EB-2010-0279 are the proper subject of a motion to review.



OSEA relies on the arguments provided in its Notice of Motion and its clarifications provided by way of this reply.

Yours truly,  
  
Cherie Brant

cc: Kristopher Stevens

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