STAFF SUBMISSION

Board Staff
Submission on Costs

Board File Number EB-2011-0011

April 12, 2011

Background

On January 10, 2011, Toronto Hydro-Electric Systems Ltd. ("THESL") filed an application with the Board seeking approval for certain conservation and demand management ("CDM") programs pursuant to the Board's CDM Code. In Procedural Order No. 1, the Board sought written submissions from parties regarding an appropriate issues list for the proceeding.

Several parties, including Pollution Probe, filed submissions. Pollution Probe asked that the Board add two issues to the issues list:

1) Proposed issue 3.3 – Are the proposed participation rates for Toronto Hydro's OPA-Contracted Province-Wide CDM Programs appropriate?

2) Proposed issue 3.4 – Should Toronto Hydro be encouraged to proposed additional Board-Approved CDM Programs?

After receiving and considering all submissions on the issues list, the Board issued a final issues list on March 11, 2011 (the "Issues Decision"). The Board did not include the two issues proposed by Pollution Probe, finding them to be outside the scope of the proceeding.

On March 22, 2011, Pollution Probe filed a motion to review the Issues Decision (the "Motion"). Pollution Probe alleged that the Board had made various identifiable errors that called into question the correctness of the decision. The Motion was heard orally on April 5, 2011. In an oral decision delivered that day, the Board dismissed the Motion. The Board held that none of the grounds raised by Pollution Probe raised a question as to the correctness of the Issues Decision. The Board found that the Motion represented a "substantial repetition of the argument made by Pollution Probe when the issues list was first considered."[1] The Board further held that Pollution Probe had failed to meet the "threshold test" as described in Rule 45 of the Board's Rules of Practice and Procedure.

[1] Motion Transcript, April 5, 2011, pp. 58-59.

With respect to costs for the Motion, the Board stated as follows:

> The Board will consider costs related to this motion separately, and would ask parties to submit their cost claims within seven days.
> Parties are invited to comment on whether the cost of the motion should be allocated in the normal manner, or whether there should be a different approach taken.[2]

What follows are the submissions of Board staff with respect to costs for the Motion.

Legal and Regulatory Framework

The Board's powers to make orders with respect to costs derive from section 30 of the *Ontario Energy Board Act, 1998* (the "Act"):

> **Costs**
> **30.** (1) The Board may order a person to pay all or part of a person's costs of participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board.
>
> **Same**
> (2) The Board may make an interim or final order that provides,
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> (a) by whom and to whom any costs are to be paid;
>
> (b) the amount of any costs to be paid or by whom any costs are to be assessed and allowed; and
>
> (c) when any costs are to be paid.

[2] Motion Transcript, April 5, 2011, p. 59.

Rules

(3) The rules governing practice and procedure that are made under section 25.1 of the *Statutory Powers Procedure Act* may prescribe a scale under which costs shall be assessed.

Inclusion of Board costs

(4) The costs may include the costs of the Board, regard being had to the time and expenses of the Board.

Considerations not limited

(5) In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court.

Application

(6) This section applies despite section 17.1 of the *Statutory Powers Procedure Act*.

The Board has also established rules with respect to cost awards[3], and established a *Practice Direction on Cost Awards* (the "Practice Direction"). The Practice Direction provides further guidance regarding the Board's costs powers:

> 2.01 The Board may order any one or all of the following:
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> (a) by whom and to whom any costs are to be paid;
>
> (b) the amount of any costs to be paid or by whom any costs are to be assessed and allowed;
>
> (c) when any costs are to be paid;
>
> (d) costs against a party where the intervention is, in the opinion of the Board, frivolous or vexatious; and
>
> (e) the costs of the Board to be paid by a party or parties.

The Practice Direction also discusses the principles the Board will apply in considering the amount of costs to award a party, potentially relevant excerpts of which are reproduced below:

[3] Ontario Energy Board Rules of Practice and Procedure, Rule 41.

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;
(f) contributed to a better understanding by the Board of one or more of the issues addressed by the party;
(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.

Submission

Pollution Probe applied for and was granted eligibility for an award of costs in this proceeding. Costs eligibility, of course, does not guarantee that costs will be awarded to a party for every element of its participation in a proceeding, or indeed at all. Both the Act and the Practice Direction are clear that the Board has significant discretion with respect to when an award of costs is appropriate.

In the great majority of cases before the Board, it is the applicant that pays eligible intervenors for their reasonably incurred costs. Unlike the practice before the courts, the Board's decisions with respect to costs are not ordinarily impacted by whether a party "wins" or "loses"; in other words, eligible parties generally recover their reasonably incurred costs even where the Board does not accept their arguments. The Practice Direction also contemplates that this will normally be the case; for example many (though not all) of the "Principles in Awarding Costs" assume that the party entitled to costs is an intervenor. However, both the Act and the Practice Direction are clear that this need not always be the case. In appropriate circumstances, the Board has the power to order any party to pay the costs (or a portion of the costs) of any other party – including ordering an intervenor to pay the costs of an applicant. Although this power is seldom used, the principle is an important one. Cost awards from applicants are almost

always passed on to ratepayers in one manner or another. The Board has a responsibility to protect the interests of consumers[4], and should not countenance cost awards for wasteful participation in a process.

In its decision dismissing the Motion, the Board signaled the possibility that it may stray from its ordinary practice with respect to cost awards in this case. It is the submission of Board staff that the Board should only consider ordering an intervenor to pay the costs of the applicant where the intervenor has clearly acted in a frivolous or vexatious manner (as specified in section 2.01(d) of the Practice Direction). The broad purpose of the Board's costs regime is to allow for the participation of ratepayer and public interest groups that might otherwise not be able to intervene. An award of costs from an intervenor to an applicant would send a serious signal to intervenors, and might discourage their participation in the process. Although the Board found little or no merit in Pollution Probe's arguments, it is not clear to Board staff that the Motion could properly be characterized as frivolous or vexatious.

Board staff submits that the Board should consider Rule 5.01 closely in determining whether Pollution Probe should be eligible to recover its costs for the Motion. Board staff submits that the Motion resulted in additional costs, time and resources for the Board, the applicant and other parties without contributing to a better understanding of the issues or adding value to the application process. To the extent the Board found the Motion to be an unproductive use of the parties' (and the Board's) time and resources, it should consider ordering that Pollution Probe not recover any of the costs they incurred to pursue the Motion. This would send a signal that eligible parties cannot assume that all the time and expense they invest in a proceeding will be recoverable through the cost award process, and will discourage motions of marginal merit.

[4] See, for example, the Board's statutory objectives with respect to electricity regulation in section 1 of the Act: "To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service."

All of which is respectfully submitted.

April 12, 2011.