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File No.: 96289

November 23, 2011

Ms. Kirsten Walli
Secretary
Ontario Energy Board
Suite 2700, 2300 Yonge Street (27TH Floor)
P.O. Box 2319
Toronto, ON
M4P 1E4

Dear Ms. Walli,

Re: EB-2011-0361

This letter constitutes Goldcorp's anticipatory submission respecting:

- The scope of the issue and legal test in Goldcorp's Application;
- Notice to the Public;
- Intervenors;
- Costs.

Goldcorp makes this submission now to clearly communicate its position on these matters and to avoid any misapprehension about its position.

Scope of the Issue and Legal Test

Goldcorp submits that its Application raises only one narrow jurisdictional issue: whether the *Ontario Energy Board Act, 1998 (the Act)* confers power on the Board to impose sections 4.1.3, 6.7.6, 6.7.7 and 11.2 of the *Transmission System Code (TSC)*.

Canadian jurisprudence requires that a court - in this case the Board - in deciding any issue to decide it as narrowly as possible and not to determine matters that are not before the court.

The issue raised in Goldcorp's Application is whether the Board's statutory grant of powers gives it the authority to impose the challenged TSC provisions. In law, Goldcorp's issue is a *true jurisdictional issue*. The significance of this characterization is that if the Divisional Court subsequently reviews the Board's decision on this issue, it would probably apply the *correctness standard of review* (*Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 196, at para. 59).

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The Board therefore must treat this Application as a court would treat a similar *ultra vires* issue; apply the law to the facts of the case and exclude extraneous considerations.

Notice

Goldcorp respectfully requests the Board to inform the public that this Application raises a discrete issue of jurisdiction that will have no immediate effect on electricity consumers. Goldcorp's says this because if it is successful, it will not be bound by the challenged TSC provisions and will not be responsible for the \$8 to \$11 million dollars of bypass compensation requested by HONI. A subsequent regulatory proceeding will determine the appropriate rate making treatment of any costs of unutilized capacity at HONI's Red Lake Transformer Station.

Intervenors

As mentioned, this Application seeks a Board decision on a narrowly defined legal issue. It is not a typical proceeding where several different interests might be affected in different ways and where the Board's determination will benefit from the assistance of several intervenors.

To date, three parties have sought to intervene in the Application. Goldcorp expects other requests to intervene. Goldcorp anticipates that some will seek to intervene on the grounds that the Board's decision may affect other provisions of the TSC or other codes. Because, however, Goldcorp's Application is confined to the challenged provisions of the TSC, Goldcorp suggests that Board grant intervenor status to transmitters and transmission customers and grant others concerned about the broader implications of the Application observer status.

Costs

Goldcorp refers to Exhibit A, Tab 1, Schedule 1, page 1, paragraph 2(d) of its Application which seeks:

an order, under section 3.06 of the Board's Practice Direction on Cost Awards and subsection 30(2) of the Act, granting Goldcorp all costs of this Application.

The Board's Practice Direction on Cost Awards was primarily designed for multi-party proceedings concerning applications by, for example, transmitters or distributors respecting rates, facilities and other approvals. Again, Goldcorp's Application is sharply defined and can be effectively and efficiently processed using the "*Party A vs Party B*" process used in the courts and other statutory bodies.

Goldcorp suggests that the Board require one legal argument supporting Goldcorp's position and another legal argument supporting the contrary position. Goldcorp anticipates that such a



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process would produce a complete record to support the Board in its decision making and would control the costs of the proceeding. Goldcorp suggests that the Board can do this by adhering to its *Practice Direction on Cost Awards, Section 5. Principles in Awarding Costs* which allows it to instruct intervenors of the same interest to co-ordinate their participation.

If it is successful, Goldcorp will seek an award of costs under section 3.06 of the Board's Practice Direction on Costs. Goldcorp submits that it would be entitled to its costs because:

- It is always proper to question the authority of a statutory body to impose financial burdens on persons;
- The Board would have been purporting to tax persons without proper legal authority (See: *Eurig Estate (Re)*, [1998] 2 S.C.R. 565, at paras. 25 and 31-32); and,
- The Board's Decision on Goldcorp's Application will further the legal public policy issue of the keeping the Board's authority within the limits granted by the Legislative Assembly.

Goldcorp will also seek an Order that it is not responsible for the costs incurred by either intervenors or the Board. If Goldcorp is successful it would be unreasonable to require it to pay other parties or the Board costs for the reasons just described.

Goldcorp hopes that these submissions will be of assistance to the Board and intervenors when considering Goldcorp's Application.

Yours truly,

Gardiner Roberts LLP

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Naomi Martin

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