



EB-2010-0377
EB-2010-0378
EB-2010-0379
EB-2011-0004
EB-2011-0043

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF cost award eligibility for
interested parties in a coordinated consultation process
for the development of a renewed regulatory framework
for electricity distributors and transmitters.

BEFORE Paula Conboy
Presiding Member

Karen Taylor
Member

DECISION ON COST ELIGIBILITY

On November 8, 2011, the Board issued a letter announcing further details about its coordinated consultation process to develop a renewed regulatory framework for electricity distributors and transmitters ("RRFE"). The consultation encompasses five inter-related policy initiatives which support RRFE development:

- Distribution Network Investment Planning (EB-2010-0377);
- Regulatory Framework for Regional Planning for Electricity Infrastructure (EB-2011-0043);

- Establishment, Implementation and Promotion of a Smart Grid in Ontario (EB-2011-0004);
- Approaches to Mitigation for Electricity Transmitters and Distributors (EB-2010-0378); and
- Defining and Measuring the Performance of Electricity Transmitters and Distributors (EB-2010-0379).

In earlier communications, the Board had indicated that cost awards would be available to eligible persons under section 30 of the *Ontario Energy Board Act, 1998* in relation to their participation in one or more of the above-noted initiatives. The costs to be awarded will be recovered from licensed rate-regulated electricity distributors and/or licensed rate-regulated electricity transmitters, as applicable depending on the initiative. As discussed below, the Board has already issued a number of decisions pertaining to cost award eligibility in respect of the above-noted initiatives.

The Board's November 8, 2011 letter made provision for the filing of additional requests for cost eligibility. It also made provision for eligible participants to seek eligibility to claim the costs of an expert to produce a separate expert report for consideration by the Board. The deadline for the filing of these new requests was November 14, 2011.

Electricity distributors and transmitters were given until November 21, 2011 to file any objections that they might have in relation to the new cost eligibility requests. The Board did not receive any objections from distributors or transmitters.

Eligibility of Participants

The Board, in various decisions on cost eligibility as noted below, has previously determined the cost award eligibility status of certain participants in respect of each of the five initiatives that comprise this coordinated consultation. Table 1 below reflects the Board's earlier decisions, as well as the requests for cost eligibility received further to the Board's November 8, 2011 letter as follows:

- i. the symbol “✓” denotes that the participant has already been determined by the Board to be eligible in respect of a particular initiative;
- ii. the symbol “✗” denotes that the participant has already been determined by the Board to be ineligible in respect of a particular initiative;
- iii. a blank space indicates that no request for cost eligibility has been received from the participant in respect of a particular initiative; and
- iv. participants that have filed a request for cost eligibility further to the Board’s November 8, 2011 letter are identified using bold-faced type. The “**R**” denotes that the request has been made, and an “**E_x**” denotes that the participant is seeking eligibility to claim the costs of an expert.

This Decision on Cost Eligibility pertains specifically to the requests referred to in (iv) above.

Table 1: Cost Eligibility by Initiative and Participant

Participant		EB-2010-0377 ¹	EB-2010-0378 ²	EB-2010-0379 ³	EB-2011-0043 ⁴	EB-2011-0004 ⁵
1	Agrienergy Producers' Association of Ontario (APAO)		R	R	R	
2	Association of Major Power Consumers in Ontario (AMPCO)	✓	✓	✓	✓	✓
3	Association of Power Producers of Ontario (APPo)	✓		✓	✓	
4	Building Owners and Managers Association of the Greater Toronto Area (BOMA)	R	R	R	R	✓
5	Canadian Energy Efficiency Alliance (CEEA)	x	x	x		
6	Canadian Federation of Independent Business (CFIB)	✓/ E _x	✓	✓	R / E _x	R / E _x
7	Canadian Manufacturers & Exporters (CME)	✓	✓	✓	✓	R
8	City of Thunder Bay (Thunder Bay)				x	
9	Common Voice Northwest (CVNW)	R		R	R	R
10	Consumers Council of Canada (CCC)	✓	✓	✓	✓	
11	Council of Canadians (CoC)	✓	✓	✓		
12	Electrical Contractors Association of Ontario (ECAO)	✓	x	✓		
13	Electricity Distributors Association (EDA)⁶	?	?	E _x	?	?
14	Energy Probe Research Foundation (EPRF)	✓	✓	✓	✓	
15	Federation of Rental-housing Providers of Ontario (FRPO)	✓	✓	✓		
16	Kinectrics					x
17	London Property Management Association (LPMA)	✓	✓	✓	✓	✓
18	Low-Income Energy Network (LIEN)	✓	✓	✓		
19	National Chief's Office (NCO)	✓	✓	✓	✓	
20	Nishnawbe Aski Nation (NAN)				✓	
21	Northwatch	R / E _x				
22	Northwestern Ontario Associated Chambers of Commerce (NOACC)				✓	R
23	Northwestern Ontario Municipal Association (NOMA)				x	
24	Ontario Sustainable Energy Association (OSEA)	✓	✓	✓	✓	✓
25	Ontario Waterpower Association (OWA)		R	R	R	
26	Pollution Probe	R	R	R	✓	R
27	REGEN Energy					x
28	School Energy Coalition (SEC)	✓	✓	✓	R	
29	Town of Atikokan (Atikokan)				x	
30	Vulnerable Energy Consumers Coalition (VECC)	✓	✓	✓	✓	R

¹ February 1, 2011 Decision on Cost Eligibility and May 16, 2011 Supplemental Decision on Cost Eligibility (EB-2010-0377, EB-2010-0378, EB-2010-0379).

² ibid.

³ ibid.

⁴ May 4, 2011 Decision on Cost Eligibility (EB-2011-0043).

⁵ April 4, 2011 Decision on Cost Eligibility and April 8, 2011 Supplemental Decision on Cost Eligibility (EB-2011-0004).

⁶ While it is not clear whether the EDA is seeking eligibility for one or all of the initiatives comprising this coordinated consultation, the Board's decision applies equally to each initiative.

Based on the criteria set out in section 3 of the Board's *Practice Direction on Cost Awards* (the "*Practice Direction*"), the Board has determined that the following participants are eligible for an award of costs in respect of their participation in all of the initiatives requested by each, in some cases subject to the qualifications noted below:

- Building Owners and Managers Association of the Greater Toronto Area (BOMA)
- Canadian Federation of Independent Business (CFIB)
- Canadian Manufacturers & Exporters (CME)
- Northwatch
- Northwestern Ontario Associated Chambers of Commerce (NOACC)
- Pollution Probe
- School Energy Coalition (SEC)
- Vulnerable Energy Consumers Coalition (VECC)

The Board has also determined that Northwatch and CFIB are eligible to claim costs for their proposed experts in all the initiatives for which they have requested eligibility, as listed in the table above.

The Board's determination on NOACC's eligibility in respect of the smart grid initiative (EB-2011-0004) is subject to the same limitations as those imposed by the Board's June 27, 2011 Decision on Motions to Review regarding cost eligibility for the Regional Planning initiative (EB-2011-0043); namely:

NOACC's cost award eligibility and any costs awarded to them will be limited to participation that is focussed on the interests of small commercial or business consumers in their capacity as ratepayers (for example, in relation to cost responsibility for electricity infrastructure), and not in relation to the broader business interests of this class of consumers in terms of matters such as regional economic development more generally.⁷

⁷ June 27, 2011 Decision on Motions to Review (EB-2011-0043).

The Board takes this opportunity to extend this same limitation to CFIB in relation to its participation in all initiatives for which CFIB has requested eligibility. For greater clarity, the CFIB's cost award eligibility and any costs awarded to them will be limited to participation that is focussed on the interests of the small business community in their capacity as ratepayers, and not in relation to the broader business interests of this class of consumers in terms of matters such as regional economic development more generally.

Common Voice Northwest (CVNW) is a not-for-profit organization whose members represent business (from NOACC), organized labour, post-secondary education facilities, school boards, multicultural associations, townships and cities. In assessing the cost eligibility of an organization such as CVNW, the Board has previously stated that it will consider whether the organization's members would themselves be eligible for an award of costs rather than considering the association as a distinct entity separate and apart from its members.⁸ The Board notes that CVNW's membership consists of, among other entities, municipalities^{9,10} and organized labour. The Board has generally found these entities to be ineligible for an award of costs. The Board finds that CVNW is not eligible for an award of costs under the *Practice Direction* by the virtue of its membership. The Board also notes that NOACC, a member of CVNW, has been found to be eligible for an award of costs in its own right in respect of two of the initiatives for which CNVW is seeking eligibility, and that educational facilities are also already represented in four of the five initiatives that comprise this coordinated

⁸ See the Decision on Issues and Cost Eligibility issued on March 22, 2011 in the Toronto Hydro CDM proceeding (EB-2011-0011). Specifically, the Board stated as follows: "To the extent that an entity's membership is comprised largely of organizations that would themselves be ineligible for cost awards, so too should the entity be considered ineligible absent special circumstances."

⁹ June 27, 2011 Decision on Motions to Review (EB-2011-0043). The Board stated: "Where a municipality is the effective owner of an electricity distributor, the Board likens that municipality to the electricity distributor for cost award purposes, resulting in ineligibility for cost awards absent special circumstances."

¹⁰ August 29, 2011 Decision on Motion to Review (EB-2011-0256). The Board made a number of findings: (i) that the Municipality has an enforceable revenue stream through taxation and fees, penalties and grants, that is intended to finance all of its activities, including the participation as an intervenor in the instant proceeding; (2) that the Municipality is accountable to its constituents for whatever point of view it chooses to advance in the course of the proceeding and that the linkage between funding and accountability is an important consideration in determining whether a Municipality should be granted edibility for costs; and (3) allowing Municipal cost recovery from ratepayers would amount to a kind of double-recovery... and compromises the accountability of the Municipality to its taxpayers.

consultation by SEC. Further, the Board does not believe that special circumstances exist such as to warrant extending cost award eligibility to CVNW.

The Electricity Distributors Association (EDA) is an association whose members comprise most, if not all, electricity distributors in the province; “commercial members” that include commercial service providers, and “associate members” that include gas utilities, generators and retailers. It is not clear whether the EDA is seeking: (a) cost award eligibility for all of the initiatives comprising this coordinated consultation, together with eligibility to claim the costs of an expert for one of those initiatives (Defining and Measuring Performance (EB-2010-0379)), or (b) cost award eligibility (including for its expert) only in relation to the initiative on Defining and Measuring Performance.

The EDA’s request for cost eligibility includes the following statement:

The EDA is eligible for a cost award pursuant to section 3 of the Board’s Practice Direction on Cost Awards. In particular, the EDA represents an important public interest relevant to this proceeding, namely, the promotion of a reliable and efficient distribution system to serve Ontario ratepayers.

The EDA is not ineligible for costs as it is neither an applicant in these proceedings, nor a distributor or a group of distributors. It is a distinct organization which presents a unique and independent perspective on matters affecting electricity distribution. It does not represent the interests of a particular distributor or group of distributors. Rather, it presents perspectives and information which ensures the best overall distribution system in the public interest of all Ontarians. It is an entity distinct from individual distributors or group of distributors who frequently intervene separately before the Board. The EDA will assist the Board in determining the public interest by ensuring that the Board understands the implications of potential decisions on the distribution system as a whole and on the public interest as it pertains to the distribution system.

The Board notes that the manner in which the EDA presents itself as set out above does not appear to be consistent with the manner in which it does so on its own website or has done so in proceedings before the Board, including when it notified the Board of its intention to participate in the RRFE consultation in January 2011:

*The Electricity Distributors Association is the voice of Ontario's local electricity distributors, the publicly and privately owned companies that safely and reliably deliver electricity to over four million Ontario homes, businesses and public institutions.*¹¹

*"[The EDA] is the voice of Ontario's local distribution companies (LDCs). The EDA represents the interests of over 80 publicly and privately owned LDCs in Ontario... The EDA engages its members to obtain their feedback in providing input to the Board's consultations."*¹²

*"(t)he Electricity Distributors Association (EDA) is the voice of Ontario's local distribution companies (Distributors). The EDA represents the interests of the over 80 publicly and privately owned Distributors in Ontario."*¹³

In assessing the cost eligibility of an association such as the EDA, the Board will consider whether the association's members would themselves be eligible for an award of costs rather than considering the association as a distinct entity separate and apart from its members. Electricity distributors and other entities regulated by the Board are ineligible for an award of costs under section 3.05 of the *Practice Direction*. It has been the Board's practice that commercial entities such as commercial service providers are generally ineligible for an award of costs. Commercial entities primarily represent their own commercial interests rather than "primarily representing" a public interest, even if they may be in the business of providing services that can be said to serve a public

¹¹ <http://www.eda-on.ca/eda/edaweb.nsf/0/8215DEDEF02AED6A85256D470067B0A3>

¹² Letter dated January 21, 2011 regarding participation in EB-2010-0377, EB-2010-0378 and EB-2010-0379.

¹³ For example, EB-2007-0722 and EB-2010-0215.

interest relevant to the Board's mandate.¹⁴ The Board finds that the Electricity Distributors Association is *prima facie* ineligible for an award of costs by virtue of its membership. The Board's finding in this regard applies whether the EDA is seeking eligibility for one or all of the initiatives comprising this coordinated consultation.

The EDA's request for cost eligibility notes that, if the Board considers the EDA ineligible under section 3.05 of the *Practice Direction*, the Board should nonetheless exercise its discretion and find that the EDA is eligible by virtue of special circumstances under section 3.07 of the *Practice Direction*. The EDA states that:

[T]he broad scope and implications of the issues being considered by the Board in this consultation process requires that the Board facilitate interventions by an organization such as the EDA which has the expertise and perspective to assist the Board in determining the public interest and making optimal decisions with respect to the distribution system and its ongoing regulation.

The EDA also noted that the Board has granted cost eligibility to the Association of Power Producers of Ontario ("APPrO") and the Electrical Contractors Association of Ontario ("ECAO") in respect of certain initiatives that comprise this coordinated consultation, and argued that the Board should extend the same treatment to the EDA. With respect to APPrO, the Board determined that organization to be eligible by virtue of the fact that its members are customers of electricity transmitters and distributors. With respect to the ECAO, the Board determined that, in the context of the distribution planning and performance measurement initiatives, the ECAO represents a public interest that is relevant to the Board's mandate because access to competitive services, as an alternative to utility-provided services, is an important component of ensuring efficient outcomes for ratepayers. The Board did, however, deny ECAO's request for cost eligibility in relation to the Mitigation initiative (EB-2010-0378). The same considerations do not apply to the EDA.

¹⁴ April 4, 2011 Decision on Cost Eligibility (EB-2011-0004).

While the Board is interested in the expert advice of Dr. Adonis Yatchew, the expert proposed by the EDA, the Board does not believe that special circumstances exist as to warrant extending cost award eligibility to the EDA to claim an award of costs in relation to the provision of that expert advice. The Board's finding in this regard applies regardless of whether the EDA is seeking eligibility for one or all of the initiatives comprising this coordinated consultation.

Late Cost Award Eligibility Requests

On November 28, 2011 the Board received a request for cost eligibility from the Ontario Waterpower Association (OWA) and on November 30, 2011 a similar request for cost eligibility was received from the Agrienergy Producers' Association of Ontario (APAO). Both cost eligibility requests were filed with the Board later than the November 14, 2011 date stipulated in the Board's letter of November 8, 2011.

As set out on the OWA's website, the OWA represents the common and collective interests of the waterpower industry, including waterpower generators and other commercial interests.

APAO states in its letter to the Board that it is a member-based organization of approximately 85 members and is the collective voice of Ontario's biogas industry, representing farmer biogas developers, technology suppliers, financial and learning institutions and other interested individuals and organizations. APAO indicates in its letter that given its financial limitations, participation in the Renewed Regulatory Framework for Electricity would be reliant upon successful eligibility for cost awards.

Generators, either as a group or individually, are usually ineligible for a cost award under section 3.05 of the *Practice Direction*. However, in respect of similar cost award eligibility requests from APPrO and OSEA, the Board has found pursuant to section 3.07 of the *Practice Direction* that special circumstances exist that would allow cost eligibility, as set out in Table 1. Specifically the Board has found that generators are

customers of electricity utilities and, in that sense, they can be likened to customers in the circumstances of the consultations for which cost eligibility has been granted.

The Board notes that there are or may be interrelationships between APPrO, OSEA, APAO and OWA. For example, the Board observed that APAO is a member of OSEA and that APPrO is a member of OWA. The Board also notes that while generators, either as a group or individually, can be likened to customers, their relationship with electricity utilities is very different from that of load customers, who generally have an ongoing responsibility to pay for the costs of the system, including the costs of this consultation broadly, through rates.

As such, **by December 9, 2011** the Board invites the OWA and APAO to explain why their respective interests as customers of electric utilities cannot be incorporated into or are distinct from the positions put forth by APPrO and/or OSEA in relationship to each initiative for which cost eligibility is sought. Further, should the Board determine that cost award eligibility for the requested initiatives is appropriate, OWA and APAO should also explain how duplication and overlap will be minimized.

Extension of Time to Claim Costs for an Expert

In its cost eligibility request, CME requested that the Board extend the deadline for participants to determine whether or not to retain and request eligibility to claim the costs of an expert. CME stated that it will be in a better position to determine if an expert should be retained after the Information Session scheduled for December 8 and 9, 2011 has concluded and participants have had further time to consider the staff Discussion Papers and related materials. Although no other participants requested an extension of time, some have indicated that they have not yet determined whether they will retain an expert.

The Board believes that CME's request is reasonable, given that the purpose of the Information Session is to allow stakeholders the opportunity to better understand the

consultation materials. The Board will therefore extend the deadline by which eligible participants may request eligibility to claim the costs of an expert to **December 16, 2011**. Participants should follow the filing instructions set out in the Board's November 8, 2011 letter in relation to such further eligibility requests.

All requests for cost eligibility in respect of the costs of an expert will be posted on the Board's website. Licensed electricity distributors and transmitters will be provided with an opportunity to object to any of these requests for cost award eligibility. If an electricity distributor or transmitter has any objections to any of the requests for cost eligibility, such objections must be filed with the Board by **December 30, 2011**. Any objections will be posted on the Board's website. The Board will then make a final determination on the cost eligibility of the requesting participants.

Cost Awards Generally

Based on the content of some of the requests for cost eligibility, the Board considers it desirable to confirm the following in relation to cost awards generally:

- i. The Board's expectation is that experts whose costs are funded through cost awards will, in addition to providing commentary on the staff discussion papers, prepare separate expert reports to assist the Board by providing objective and impartial expert advice on the issues in this coordinated consultation.
- ii. The Board cautions participants that cost awards are available only in respect of issues that are clearly within the scope of the initiative(s) in which they are participating, and not in respect of issues that, while perhaps related, are already addressed by existing Board policies (such as conservation and demand management).
- iii. Where similar interests are shared by participants that are eligible for cost awards, the Board expects that reasonable efforts will be made to combine participation or

to cooperate. As stated in the Practice Direction, the Board will consider any lack of cooperation when determining the amount of a cost award.

- iv. Cost awards are available in relation to the costs associated with external legal and/or expert consultant fees (among others) incurred specifically for the purposes of participating in activities that are eligible for an award of costs. As stated in the Practice Direction, cost awards are not available in relation to time spent by employees or officers of a participant.
- v. Except as may otherwise be expressly provided by the Board at the relevant time, the hourly limits for eligible activities apply to each participant that is eligible for an award of costs, and not to each individual that may be acting on behalf of an eligible participant.

ISSUED at Toronto, December 2, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary