EB-2012-0031

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

AND IN THE MATTER OF a review of an application filed by Hydro One Networks Inc. for an order or orders approving a transmission revenue requirement and rates and other charges for the transmission of electricity for 2013 and 2014.

Submissions of the IESO on Appropriate Procedure for Oral Hearing of Concurrent Expert Witness Panel

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1. Pursuant to Procedural Order No. 8, these are the submissions of the IESO on the appropriate procedure for the oral hearing of the concurrent expert witness panel.

Background

2. The procedure the Board adopts should be informed by the general purpose for convening concurrent expert panels and the specific circumstances of this case.

3. Procedural Orders 7 and 8 do not specifically state the Board's objectives for convening a joint expert panel in this case; however, the generally accepted purpose is to provide a more objective, less partisan process for untangling complex technical issues than that offered by the conventional adversarial process.[1] As Justice Binnie of the Supreme Court of Canada commented:

> ... the courtroom...is a poor schoolhouse, and "dueling experts" may make bad teachers ... experts testifying in the presence of one another are likely to be more measured and complete in their pronouncements, knowing that exaggerations or errors will be pounced upon instantly by a learned colleague[2]

4. This case does not entail "dueling experts" and therefore the procedure for any concurrent panel should be appropriately moderated.

5. Charles River Associates' (CRA) ETS Tariff Study was administered by the IESO and filed by HONI; however, it was not filed by HONI in support of a particular ETS tariff. Nor does CRA's study recommend a particular tariff option.

6. Rather, pursuant to the Board's direction the IESO administered the ETS study to "identify a range of proposed rates and the pros and cons associated with each proposed rate".[3] The IESO administered the CRA tariff study in a neutral and transparent manner with input from interested stakeholders, including input from many of the parties to this proceeding.[4] The study specifically identifies five tariff options, including the current tariff,

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[1] Edmond, Gary, "Morton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure" (2009) 72 Law & Contemp. Probs. 159 at 160 and 186-187.

[2] Binnie, Hon. Justice Ian, "*The Changing Role of the Expert Witness*" (2010) Sup. Ct. L. Rev (2d) 179 at 191-192.

[3] EB-2012-0031, Exhibit H1, Tab 5 Schedule 1, p. 2.

[4] EB-2012-0031, Exhibit H1, Tab 5, Schedule 2.

and qualitatively and quantitatively assesses their respective pros and cons vis-à-vis a number of relevant metrics relative to the status quo.

7. The Navigant and Elenchus reports are qualitatively different than the CRA study. Both are sponsored by and filed in support of parties — APPrO and Hydro Quebec — who favour a particular tariff option.[5]

8. The Elenchus report is further distinct in that it addresses a matter — i.e., what are generally accepted regulatory principles and how should they be applied in this case — which is not specifically addressed by either CRA or Navigant.

IESO Proposal

9. In the unique circumstances of this case, the IESO proposes that procedures be tailored to reflect the fact that the sponsoring parties and their experts are not truly adverse and in some respects do not opine on the same issues. The IESO therefore proposes that:

(a) Any opening statements by the experts summarizing their evidence or commenting on other experts' evidence should be brief — not more than 15 minutes;

(b) Following questioning of the experts by the hearing panel, there should not be any questioning or cross-examination by the experts of each other. The usefulness of this technique is questionable, but is particularly inappropriate in this case where the parties and experts are not truly adverse. Questioning of the experts by the hearing panel should be sufficient.

(c) Cross-examination of experts by the parties should be appropriately restrained to accord with the principle that cross-examination is limited to parties who are adverse in interest.[6] In particular, this should be taken

[5] No party who supports a higher ETS tariff has filed any supporting expert evidence in opposition to the Navigant or Elenchus reports.

[6] Sopinka, John and Lederman, Sidney, "The Law of Evidence in Canada", 2d ed. (Butterworths: Toronto, 1999) at pp. 897-98.

into account with regards to CRA, which does not recommend a particular tariff option.

10. Lastly, the IESO proposes that for purposes of assisting the hearing panel, Darren Finkbeiner, the IESO's Manager of Market Development, be included on (or made an adjunct to) any joint panel for the purpose of answering any clarifying questions the hearing panel may have in regards to the IESO market.

11. CRA's study and Navigant's report are, in part, informed by their understanding of the functioning of the IESO markets (wholesale market, TR market). Therefore, to the extent any disagreement between CRA and Navigant turns on underlying differences about how the IESO markets function, it may be helpful for the hearing panel to be able to ask clarifying questions of Mr. Finkbeiner. Mr. Finkbeiner appeared and answered questions about the IESO market at the Technical Conference.

12. APPrO objects to Mr. Finkbeiner sitting as part of the joint experts panel on the grounds that he is a "company witness" not an expert witness and the purpose of concurrent expert panels is to assist the adjudicator in comprehending complex expert evidence. The IESO disagrees with this objection for the following reasons:

(a) The IESO does not propose that Mr. Finkbeiner sit as a company witness to support the IESO's position. The IESO has not taken a position on an appropriate ETS tariff; it has not filed any evidence; it does not wish to include Mr. Finkbeiner as part of any supplementary panel with CRA; and, it does not intend to examine Mr. Finkbeiner in chief, nor cross examine any other witnesses. If at the conclusion of the hearing, the IESO decides to file written submissions advocating a particular tariff option, it will do so based on the evidentiary record as it stands.[7]

(b) The very purpose of proposing Mr. Finkbeiner's inclusion as part of (or as an adjunct to) a joint expert panel is to fulfill the objectives of Rule 13A

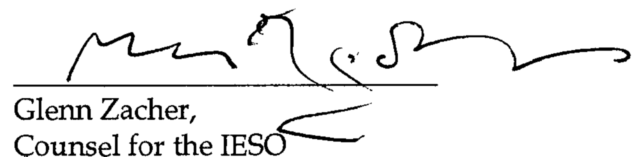
[7] At the conclusion of this hearing after all of the evidence has been heard, the IESO may file submissions in support of a particular tariff option if it determines that a particular tariff option furthers its statutory objectives.

and the general purpose of concurrent expert panels – that is, to assist the hearing panel in comprehending complex expert evidence. In this respect, the IESO proposes the Mr. Finkbeiner's role be limited to answering any clarifying questions the hearing panel has with regards to the operation of the IESO markets. If the panel has no such questions, then Mr. Finkbeiner will not need to testify; if it does, then it will be helpful to have him there to answer such questions. In any event, the concerns expressed by APPrO that Mr. Finkbeiner may give new evidence can be easily addressed by the hearing panel which has broad powers to appropriately control its own processes, including the nature and extent of Mr. Finkbeiner's participation.

13. In contrast, APPrO's power trader witness Mr. Laurin from Brookfield is a fact witness whose evidence has been filed to support APPrO's position, specifically as foundational evidence for the opinion of its expert witness Navigant. In the circumstances, Mr. Laurin should testify as part of separate panel; and since Mr. Laurin's evidence is the foundation for Navigant's opinion, Mr. Laurin should testify prior to Navigant testifying as part of the joint expert panel.

14. Lastly, the IESO takes no position on whether HQEM's expert Elenchus sits alone or as part of the joint expert panel.

All of which is respectfully submitted this 22 day of January, 2013.



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