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Our File No. 131682

VIA EMAIL AND COURIER

Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario
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Attention: Ms. Kirsten Walli,
Board Secretary

Dear Ms. Walli:

Re: EB-2013-0029/0010 – Submission on Costs

BOMA is writing in response to the Board's invitation at page 3 of Procedural Order No. 2 as to which of, and if both, in what proportion, the applicant and the IESO should be responsible for the costs of this proceeding, including the Board's costs, and to provide further comments on the related issue of when the parties' eligibility for costs should be determined.

In BOMA's view, the costs for the request for review proceeding should be borne by the IESO for several reasons.

First, the IESO is a not-for-profit public institution created by legislation and regulated by the OEB, with the responsibility for operating the IESO-administered markets to promote the purposes of the Electricity Act. It is IESO decisions, which it can make unilaterally after consultation with market participants, that is the ultimate driver of the requests for review. For example, it is the decision of the IESO to make several rule changes, in spite of significant opposition throughout the stakeholder process, and in the full knowledge that some parties would request a review, that was the underlying driver of the current proceeding. It is the appropriate party to bear the cost of requests for review. Requests for review are usually launched by groups of market participants. They are about matters which affect the broad public interest. They are not a private dispute between one company and the IESO.

Second, the Board directed the IESO to pay the costs of the proceeding in the ramp-rate case (EB-2007-0040). The Board should follow that precedent. By making it clear that in the normal

course, the IESO shall be responsible for costs, the Board will avoid time-consuming disputes in future cases over who is responsible for costs.

Third, requiring the applicant in this case to pay all or a part of the hearing costs would set a harmful precedent for the Board. While most of the members of the "Affected Generators" group, to use the applicant's words in this case, are large corporations and would be financially able to afford a share of such costs, future applicants may not be so substantial. Consequently, the effect of setting the precedent that applicants must pay all or part of the costs of a review proceeding would place a chill on any future requests for review of market rule changes, which would be harmful to the Ontario market. In BOMA's view, the IESO is an independent organization whose costs are paid by Ontario energy consumers, accountable only to the OEB, with wide latitude to make decisions on operations of the market, based on its view of what is right in the circumstances. There needs to be an affordable and available path for review by an informed, independent, third party, in a public forum. The Board has the procedural tools (for example, sections 17.01(c) and section 18 of the Rules of Practice and Procedure) to deal with frivolous requests to review IESO rule changes.

BOMA would also like to address the Board's statement in Procedural Order No. 2, with respect to intervenor costs. It stated:

"The Board will determine all requests for cost eligibility at the end of the proceeding".

That is a significant change in policy for the Board. BOMA is aware of no precedent for this position. While BOMA understands that this approach may be required in this proceeding in respect of the applicant's request for costs, given that at this time, the Board is considering the applicant a potential payor of costs, there is no such impediment with respect to intervenors who have requested costs.

BOMA urges the Board to reconsider its position with respect to BOMA for the following reasons:

First, BOMA, as a trade association, has a very limited budget to finance interventions in OEB cases, and relies mainly on cost awards to finance this work. Deferring the decision on eligibility until the end of the hearing places a significant risk on the lawyers and consultants who advise BOMA on this matter.

Second, while the timelines for this proceeding are relatively short, it is not a simple case. Costs will not be as high as in a major rate case, but they will not be de minimus.

Third, BOMA has been accepted as an intervenor and has thus satisfied the Board that it has a substantial interest and that it intends to participate actively and responsibly in the proceeding (Rule 23.02). Having done so and cognizant of the financial circumstances of this intervenor, for the Board not to determine its eligibility for costs at the outset of the proceeding, is anomalous and would create a harmful precedent.

While BOMA appreciates the fact that the sixty day window for the Board's review makes it imperative that the hearing be pursued expeditiously by the Board and all parties, BOMA notes that VECC applied for and was determined to be eligible for costs at the outset of the proceeding. Moreover, BOMA has no intention of conducting itself in a manner which would impede the hearing, and indeed has never done so. The Board also has the power to discourage repetitive activity by reducing the amount of costs it would otherwise reimburse.

Yours truly,

FOGLER, RUBINOFF LLP



Thomas Brett

TB/dd

CC: Marion Fraser, Fraser & Company
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