May 21, 2013

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Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
27th Floor
2300 Yonge Street
PO Box 2319
Toronto ON M4P 1E4

NORTON ROSE

Barristers & Solicitors / Patent & Trade-mark Agents

Norton Rose Canada LLP
Royal Bank Plaza, South Tower, Suite 3800
200 Bay Street, P.O. Box 84
Toronto, Ontario M5J 2Z4 CANADA

F: +1 416.216.3930
nortonrose.com

Your reference
EB-2012-0337

John Beauchamp
+1 416.216.1927
John.Beauchamp@nortonrose.com

Our reference
01015413-0031

Assistant
+1 416.216.1877
Monique.Massabki@nortonrose.com

Dear Ms. Walli:

Union Gas 2013-2014 Large Volume Demand Side Management Plan (EB-2012-0337)
Association of Power Producers of Ontario ("APPrO")
Motion to Review and Vary Decision on Cost Awards Issued May 1, 2013

Please find attached APPrO's Request for Review and Variance of the Ontario Energy Board's May 1st, 2013 Decision on Cost Awards in the above-mentioned proceeding.

Please do not hesitate to contact me should you have any questions or concerns

Yours very truly,

Original signed by

John Beauchamp
Associate

JB/mm

Enclosure

Cop(y/ies) to: All interested parties

EB-2012-0337

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Union Gas Limited pursuant to Section 36(1) of the Ontario Energy Board Act, 1998, for an Order or Orders approving the 2013-2014 Large Volume Demand Side Management Plan.

NOTICE OF MOTION FOR REQUEST FOR REVIEW AND VARIANCE ASSOCIATION OF MAJOR POWER PRODUCERS OF ONTARIO

Union Gas' 2013-2014 Large Volume Demand Side Management Plan

May 21, 2013

The Association of Power Producers of Ontario ("APPrO") will make a Request for Review and Variance (the "Motion") pursuant to Rule 42.01 to the Ontario Energy Board (the "Board") on a date and at a time to be determined by the Board.

PROPOSED METHOD OF HEARING: APPrO proposes that the Motion be heard in writing. APPrO proposes to rely on the content of this Notice as its submission in chief and reserves the right to file reply submissions.

A. THE MOTION IS FOR:

1. An order:

   (a) varying the Board's May 1, 2013 Decision and Order on Cost Awards in the EB-2012-0337 proceeding (the "Decision") to award APPrO 100% of the legal and consultant costs it submitted for recovery in its original cost claim, adjusted to remove the cost of work conducted prior to the Board's Notice of Application and Procedural Order No. 1 and hours claimed after the Board's decision was rendered (resulting in a final cost award of $189,546.20); and

(b) such further and other orders as counsel may request and the Panel deem just.

B. THE GROUND FOR THE MOTION: ERROR IN FACT

2. As set out in Rule 42.01 of the Board's *Rules of Practice and Procedure* (the "Rules"), any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

3. Rule 44.01(a) of the Rules provides the grounds upon which a motion to review and vary may be made to the Board:

> *Every notice of motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:*
>
> *(a) Set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:*
>
> *I. Error in fact;*
>
> *II. Change in circumstances;*
>
> *III. New facts that have arisen;*
>
> *IV. Facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.*

4. As the Board has expressed in prior decisions, under Rule 45.01 of the Rules, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits. The purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and whether there is enough substance to the issues raised that a review could result in the Board varying, cancelling, or suspending the decision.

5. The Board has also commented that for an error of fact to constitute ground of review, it must be an error capable of affecting the outcome of a decision.

6. APPrO respectfully submits that the Board erred in its Decision by awarding APPrO only a portion of its legitimate costs incurred in this proceeding. Specifically, the Board made two material errors of fact in its Decision by stating that:

(a) APPrO conducted a survey of its members to determine what position APPrO might take in the proceeding. This is incorrect.

(b) The consultant and legal costs are unreasonable, in part because APPrO had to prepare a second Navigant witness in response to scheduling issues that APPrO should have been aware of. This is incorrect.

7. Making these errors of fact necessarily calls into question the correctness of the Board's Decision, given that the Board decided to reduce APPrO's claimed costs on the basis of these factual mistakes. Correcting these mistakes will necessarily lead to an increase in APPrO's awarded costs.

C. APPRO DID NOT CONDUCT A SURVEY TO DETERMINE ITS POSITION

8. The Panel wrote in the Decision:

> *The Board accepts that* ***the survey APPrO conducted of its members to determine whether they were in favour of participating in Union's DSM programs or would prefer the option to opt-out is something APPrO needed to do in order to determine what position it would take in this proceeding****. However, the Board finds that a survey of APPrO members is not something that should be included in a cost claim but funded by APPrO itself…* (Decision, pages 3-4) [emphasis added]

9. The highlighted excerpt from the Board's Decision in the paragraph above is entirely incorrect.

10. APPrO and its members are well acquainted with Union's DSM programs, and had long held the view that large industrial customers should be provided the ability to opt-out of Union Gas' DSM programs.

11. APPrO knew it was going to participate in this proceeding, and APPrO knew that it would advance an "opt-out" proposal.

12. The decision to carry out a survey was made, with the advice of counsel, in the context of determining how best to make the case for an "opt out" proposal.

13. In order to bring a credible "opt out" proposal forward, APPrO believed that it needed to at a minimum address two issues for the Board:

    (a) From a pure rate-making perspective, consider whether there were other jurisdictions that had "opt-out" provisions.

    (b) Provide some empirical data to demonstrate that if the Board approved APPrO's opt-out proposal, Union ratepayers would actually use it (and if so, some factual information about the rationale for opting out).

14. This second point is important, and forms the basis for APPrO's decision to have a survey conducted as the evidentiary basis for APPrO's "opt out" proposal. It is difficult to understand how APPrO could have brought forward a proposal based on allowing customers to opt out of a program without any empirical evidence brought forward to inform the Board about whether customers would in fact opt out (and why). To omit this type of evidence could have, and most certainly would have, let the Board dismiss the opt out proposal simply on the basis of having no evidence as to its need or support.

15. So a survey was critical to the evidentiary basis of APPrO's case. It was not, as the Board states in its Decision, something done to help APPrO figure out the position it was going to take in this proceeding. APPrO had already done that, and knew its position. Indeed, even Union's original application acknowledges that APPrO had an established position, stating that "some customers, such as power producers, have indicated that they would like to opt-out of the Plan" (Union's application, Exhibit A, Tab 1, Page 36, Lines 23-24).

16. APPrO would not have engaged Navigant unless it had already formulated its position in this proceeding (unlike other intervenors, any costs granted to APPrO only cover a portion of its actual costs and retaining external experts requires a financial commitment on the part of APPrO). The Navigant Report actually recognizes this fact – that APPrO had already determined its position for the proceeding:

> *Navigant understands that APPrO takes the position that these customers should be provided the ability to opt-out, while Union Gas (Union) is opposed to offering an opt-out program. (Navigant Report, page 1)*

17. Once a survey was determined to be an important part of the evidence, APPrO retained Navigant Consulting ("Navigant") to conduct the survey (i.e., *DSM Funding Options for Large Natural Gas Customers* (the "Navigant Report"). As explained in the evidence:

> ***Navigant was retained by the Association of Power Producers of Ontario (APPrO)*** *to undertake research with regards to funding options for Demand Side Management (DSM) program costs applicable to large natural gas customers…*
>
> ***Navigant was retained*** *to carry out two specific tasks:*
>
> > *1. A jurisdictional review to better understand the background and specific conditions for the opt-out provisions in the jurisdictions identified in the Union study; and*
> >
> > *2.* ***A survey of Union's large gas customers who are APPrO members to explore their recent and projected energy efficiency spending vis-à-vis any DSM funding provided by Union****.* [emphasis added] (Navigant Report, page 1)

18. APPrO retained an independent consultant to conduct the survey so that the Board and other parties to the proceeding could receive impartial, untainted data (APPrO did not want to influence the results by conducting a survey of its own members).

19. In addition, the nature of the survey required Navigant to request sensitive commercial information for respondents. As indicated in the introduction to the survey form, responses were provided on the condition that they "be protected as confidential" unless as authorized in question 9. To this day, APPrO has no idea how its individual members responded to the survey. For the purposes of obtaining honest, untainted data, Navigant never discloses personal or confidential commercial information submitted by survey respondents without their consent. Information was collected on the premise that only aggregated information would be published and any/all personal confidential commercial information will remain private. This is standard industry protocol when conducting market research – as requiring Navigant to disclose such information would impede its ability to obtain the data it requires to prepare useful results.

20. It was precisely these issues – the preparation of honest, untainted data and the protection of sensitive commercial information – that led APPrO to employ an external consultant. APPrO could not have ensured that these issues were properly addressed had it conducted the survey itself.

21. This is the background to the survey and its purpose. Clearly, it was not something that helped APPrO to formulate its position in the hearing.

22. The fact that the Board erred in understanding the purpose of the survey most certainly would impact the outcome of the cost award Decision, because the Board asserts that the survey "is not something that should be included in a cost claim but funded by APPrO itself", and that the Board's final cost award reflects adjustments to remove costs claimed for "the survey of APPrO members".

23. The survey was a topic of major discussion and analysis throughout the proceeding. Environmental Defence, Union Gas, LIEN and GEC all asked a substantial number of interrogatories relating to Navigant's survey, obligating APPrO's consultants and legal counsel to devote extensive time and resources when preparing answers. GEC's motion to compel further and better interrogatory responses also compelled Navigant and APPrO's counsel to prepare additional survey-related data. One interrogatory in particular (GEC IR #18(d)) required Navigant to formulate two entirely new sets of survey-related data (see Appendices "A" and "B" to Exhibit D5). In addition, much of the cross examination of APPrO's panel was focused on the results of the survey.

24. In light of the fact that a large portion of the interrogatory process and hearing were devoted to analysis of the survey, and APPrO's consultants and counsel were obligated to dedicate extensive time and resources to address survey-related issues, it seems clear that APPrO's costs related to the survey form a substantial portion of APPrO's costs.

25. Consequently, a significant portion of the costs disallowed must be related to the survey – a fact the Board clearly misapprehends.

26. APPrO submits that these errors of fact – namely, who conducted the survey (Navigant, not APPrO) and more importantly the purpose of the study (evidentiary basis for case, not to formulate APPrO's position) – constitute a legitimate ground for review of the Board's Decision, capable affecting the outcome of a decision. All costs associated with the preparation and analysis of the survey are reasonable, and should not be removed from the Board's cost award.

D. UNNECESSARY COSTS FOR SUBSTITUTE NAVIGANT WITNESS

27. In its Decision, the Board wrote the following:

> *Secondly, the hours claimed for consultants and legal fees exceeds what might be considered reasonable. While some overlap between consultant and counsel is reasonable, the Board finds the amount claimed here to be excessive. APPrO argued that its consultant needed to properly prepare its expert, Mr. Zarumba on certain technical aspects in this case given that Mr. Zarumba was brought in at the "eleventh hour" because its original consultant was not available. Parties to the proceeding were made aware of the commencement of the hearing in Procedural Order No. 2 issued on November 2, 2012. The Board does not consider it appropriate to fund additional preparation time for APPrO's substitute expert because its original expert was not available on a date that had been set out in early November.* (Decision, page 4)

28. The Board declares that additional preparation time associated with APPrO's substitute expert should not be funded because the hearing date was established in early November. With respect, the Board's facts with respect to scheduling are inaccurate.

29. In Procedural Order No. 2, issued on November 2, 2012, the Board did state that "[t]he Board will sit on Thursday, January 31, 2013 at 9:30 a.m. in the Board's West Hearing Room on the 25th Floor at 2300 Yonge Street, Toronto, ON to review any settlement proposal, and if necessary, begin the oral hearing." The final schedule for the hearing, however, was not made available to APPrO until the Board issued Procedural Order No. 4 – which parties received by email at approximately 4:40 p.m. on Friday, January 25th.

30. Prior to the Board issuing Procedural Order No. 4, APPrO's counsel had numerous discussions with Board Staff regarding the scheduling of panels for the hearing. Up until January 23, 2013, APPrO's counsel was under the impression that its panel could be heard in the afternoon of February 1, 2013 (it advised Board Staff of this by email).

31. APPrO had only become of aware of the fact that, while its original Navigant witness (Mr. Todd Williams) was available on January 31st, he could only be available on February 1st after 1:00pm due to a morning meeting with another client. This fact was passed onto Board Staff for the purposes of informing the panel as soon as APPrO's counsel was aware of the issue.

32. Despite APPrO's pleas to Board Staff that its panel appear anytime except for the morning of February 1st (i.e., either any time on January 31 or the afternoon of February 1), the Board issued Procedural Order No. 4 on January 25th, which read as follows:

> *The oral hearing shall begin on Thursday, January 31, 2013 at 9:30 a.m. in the Board's North Hearing Room on the 25th Floor at 2300 Yonge Street, Toronto, Ontario, and continue, if necessary, in the morning of Friday, February 1, 2013*.

33. As a result, APPrO was forced over the following days to find a replacement for Mr. Williams who could attend the morning of February 1st. The only consultant who had knowledge of the Navigant Report and was available at that time was Mr. Ralph Zarumba (whose availability was officially confirmed with APPrO's counsel on January 29th). Mr. Zarumba subsequently flew up to Toronto in the evening on January 29th for the purposes of beginning witness preparation on Wednesday, January 30th (the day before the hearing began).

34. In light of the fact that the Board scheduled APPrO's panel for the one time slot that Mr. Williams was unavailable to attend (despite APPrO informing Board Staff and the Panel of the issue prior to Procedural Order No. 4), APPrO respectfully submits that the costs it incurred to have Mr. Zarumba attend – including any consultant/counsel overlap required to get him up to speed – are reasonable.

E. CONCLUSION

35. The Board states that its $100,000 award is intended to reflect adjustments to remove costs claimed for certain activities, including "the hours of work conducted prior to the Board's Notice of Application and Procedural Order No. 1, the survey of APPrO members, consultant and legal preparation time and hours claimed after the Board's decision was rendered." APPrO agrees that the hours of work conducted prior to the Board's Notice of Application and hours claimed after the decision was rendered should be removed. What is unclear, is how the survey and consultant and legal preparation time add up to approximately $90,000 (or 47% of APPrO's claim).

36. More generally, APPrO believes the cost disallowance to be at odds with APPrO's contributions to the proceeding. The Board Panel itself stated:

> *…APPrO introduced a new issue, one which was of importance to its constituency and relevant to the Board's consideration of the application. It is without dispute that one of the main issues in this proceeding was a result of APPrO's proposing an opt-out option from Union's large volume DSM programs*

> *for power producers. Other intervenors in this proceeding, for the most part, participated on the periphery, mainly to ensure that unintended consequences of the Board's decision on this issue didn't result in negative impacts to their constituents. (Decision, page 3)*

37. For all of the above reasons, APPrO submits that the Board should vary its Decision and award APPrO 100% of the legal and consultant costs it submitted for recovery in its original cost claim, adjusted to remove the cost of work conducted prior to the Board's Notice of Application and Procedural Order No. 1 ($4,894.31), and hours claimed after the Board's decision was rendered ($1,305.15). This results in a final cost award of $189,546.20.

All of which is respectfully submitted this 21st day of May, 2013.

ASSOCIATION OF POWER PRODUCERS OF ONTARIO

Original signed by

By its Counsel, Norton Rose Canada LLP
Per: John Beauchamp