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August 9, 2013

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Our Matter Number: 1144445

SENT BY ELECTRONIC MAIL

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
27th Floor
23 Yonge Street
Toronto, ON M4P 1E4

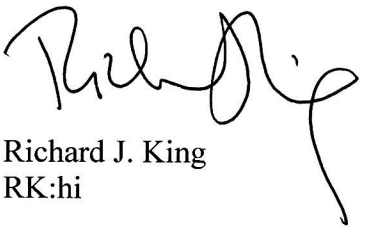
Dear Ms. Walli:

Union Gas 2013-2014 Large Volume Demand Side Management Plan (EB-2012-0337)
Association of Power Producers of Ontario ("APPrO") - Rely Submissions

Please find attached APPrO's reply submissions in the above-noted proceeding.

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

Yours very truly,



Richard J. King
RK:hi

Enclosure
c: Union Gas Limited

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.

REPLY SUBMISSIONS
ASSOCIATION OF POWER PRODUCERS OF ONTARIO

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

August 9, 2013

INTRODUCTION

1. This reply submission is in response to the submissions of Board Staff (dated July 24, 2013) on APPrO's motion to review and vary the Board's cost order in the above-noted proceeding (the "Motion"), which was filed with the Board on May 21, 2013.

2. APPrO notes that Union Gas Limited did not file any submissions on the Motion.

3. APPrO relies on its submissions made in its May 21st Motion. This reply submission briefly address three points:

(a) Board Staff's submission that even if the Board finds it committed an error of fact as to the purpose of the Navigant survey, the Board is still not compelled to change its ultimate cost award;

(b) Board Staff's continued misunderstanding about the purpose of the Navigant survey; and,

(c) Board Staff's submission that the substitute Navigant witness costs could have been avoided.

ERROR IN FACT DOES NOT COMPEL AMENDING THE COST AWARD

4. At pages 3 to 4 of its submissions, Board Staff states that the awarding of costs in a proceeding is at the Board's discretion, and even if the Board makes an error of fact in determining a cost award, that does not necessary automatically mean the Board must reverse its cost award.

5. As a matter of law, APPrO does not disagree with this submission. It may be that the Board bases its cost award decision on a variety of facts and considerations and getting one of these facts wrong would not have made a difference to the Board's determination.

6. However, in this particular case, the Board placed significant emphasis on the purpose of the Navigant survey as a reason for reducing APPrO's cost claim. This was, for the Board, an important consideration in its decision. As a result, APPrO submits that the Board cannot get the facts underpinning the Navigant survey incorrect, without necessitating some change to the cost award.

7. For that reason, the following statement by Board Staff (at page 4 of its submissions) is problematic:

> *To the extent that the Board determines it did make errors of fact in the original decision, it should consider APPrO's cost claim in light of the "corrected" facts. This may or may not result in a different decision. Ultimately the Board must make a determination on the value of APPrO's contribution measures against the claimed costs.*

8. As a general statement of law, the above quote is correct. However, if the corrected fact is material to the Board's decision, the above quote cannot be correct.

9. It is very clear from the Board's cost decision in this proceeding that the facts surrounding the purpose of the Navigant survey were material to the Board's decision to reduce APPrO's claimed costs. Consequently, if the Board finds that there was an error of fact related to the Navigant survey, the Board cannot simply ignore that and leave the cost award unchanged.

THE NAVIGANT SURVEY

10. Board Staff does not dispute that the Board believed the Navigant study was used by APPrO to determine its position in this proceeding. The point is indisputable, given the wording of the Board's 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 <u>in order to determine what position it would take in this proceeding</u>.*** *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]

11. Board Staff also does not dispute that the above finding was a key reason for the Board's reduction of APPrO's cost claim.

12. In its submission, Board Staff states (at page 4):

> *It appears to Board staff that although APPrO argues it did not conduct the survey to **<u>establish</u>** its position in this proceeding, the survey's results have been used to **<u>confirm</u>** APPrO's position that an opt-out provision would be used by its members.* [emphasis added]

13. Board Staff's argument appears to be that even if the Navigant survey was not used to determine or establish APPrO's position, it was used to "confirm" APPrO's position, and neither purpose should be covered by a cost claim.

14. The Navigant survey was not used to determine, establish or confirm APPrO's position. The Navigant survey played absolutely no role in APPrO's decision to participate in the proceeding or the position it took in the proceeding.

15. APPrO was going to participate in this proceeding and argue for an opt-out regardless of: (a) whether or not a survey was done; and (b) if a survey was done, the results of that survey.

16. APPrO regularly participates in OEB proceedings at the request of its members. For each of the proceedings in which APPrO participates, APPrO engages in deliberations with its members about whether to participate, the scope of participation, and the position APPrO will take. This is ongoing work for APPrO and never forms part of any cost claim. It is done informally as issues arise, or via one of APPrO's formal standing committees.

17. APPrO <u>never</u> hires consultants to prepare and carry out a survey to determine or confirm a APPrO's position for a hearing. That is never necessary.

18. APPrO knew there would be members that would welcome an opt-out of the Union DSM programs, but APPrO needed to be able to, as a matter of evidence, put that option before the Board in as compelling a way as possible.

19. In order to bring a credible "opt out" proposal forward, APPrO could have: (a) had an expert testify that he/she believed an opt-out would be taken up by customers; (b) had a few APPrO company

representatives indicate (on the witness stand) that they would opt-out of the Union DSM programs; or (c) carry out a broader, empirical survey to determine how many large volume customers would opt-out.

20. It was determined by APPrO and its counsel that the latter option was probably what the Board would need to see if it was inclined to agree with an opt-out proposal.

21. As noted in our original Motion, it is difficult to understand how APPrO could have brought forward a credible 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.

22. 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. Nor was it a tool to "confirm" APPrO's position, as Board Staff argues.

23. APPrO had already established and confirmed its position long before deciding to pursue any survey. 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).

24. 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".

25. 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.

26. 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.

UNNECESSARY COSTS FOR SUBSTITUTE NAVIGANT WITNESS

27. Board Staff states, at page 5 of its submission:

> *Board staff submits that although the exact hearing schedule was not confirmed until the Board issued Procedural Order No. 4 on January 25th, APPrO was aware of the potential conflict well in advance of January 25th and may have been able to avoid some of the costs associated with preparing a new witness.*

28. The suggestion in this quote is that APPrO wilfully chose to avoid reducing costs (or at least was negligent in failing to reduce costs) associated with the substitute Navigant witness.

29. This cannot be the case.

30. Unlike many intervenors, APPrO does not fully recover its legal or consultant costs for OEB proceedings. That is why, for example, APPrO is typically very surgical in terms of the issues it chooses to contest in any hearing, and often lets other consumer groups do the heavy lifting on generic issues that could benefit ratepayers broadly (which include APPrO members).

31. Simply put, OEB hearings cost APPrO money, so no decision to participate in a proceeding is made lightly, and once in a proceeding, costs are well-managed.

32. APPrO has no incentive to spend money preparing extra witnesses.

33. In this proceeding, APPrO was forced to find a replacement for a Navigant witness (Mr. Williams). This was not something APPrO welcomed, and in fact, as noted in our Motion, was necessitated by the Board scheduling the APPrO panel in the only time slot that APPrO's initial witness could not participate.

CONCLUSION

34. For all of the reasons noted in this submission, together with the initial Motion filed by APPrO on May 21, 2013, APPrO submits that the Board should vary its cost award and grant 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 9th day of August, 2013.

ASSOCIATION OF POWER PRODUCERS OF ONTARIO

By its Counsel, Osler, Hoskin & Harcourt LLP
Per: Richard J. King