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Newmarket-Tay Power Distribution Ltd.

September 27, 2013

Ontario Energy Board
P.O. Box 2319
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2300 Yonge Street
Toronto, ON
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Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

RE: Review of Framework Governing the Participation of Intervenors in Board Proceedings – Consultation and Stakeholder Conference Submission of the Co-operating Utilities
EB-2013-0301

Attached please find the Co-operating Utilities initial written submission on the questions posed in the Board's notice of August 22, 2013.

Since the time that the Co-operating Utilities requested participation status, Halton Hills Hydro Inc. ("Halton Hills") and Essex Powerlines Corporation ("Essex") have joined the consultation forum provided by the Co-operating Utilities. Halton Hills has previously registered their intent to participate in this matter and the Co-operating Utilities ask for the Board's indulgence in allowing Essex to be granted this status as well.

Yours truly,

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EB-2013-0301

Review of Framework Governing the Participation of Intervenors in Board Proceedings

Submission by the Co-operating Utilities

Introduction

By letter dated August 22, 2013 the Ontario Energy Board ("the Board") has initiated a review (Board File No. EB-2013-0301) of the framework governing the participation of intervenors in applications, policy consultations and other proceedings before the Board. The objective of the review is to determine whether there are ways in which the Board's approach to intervenors might be modified in order to better achieve the Board's statutory objectives.

The Board noted that the review will proceed through two phases. The first phase will examine whether there are modifications that should be made, in the near term and within the existing framework, regarding the Board's approach to intervenor status, cost eligibility and cost awards. The second phase will examine whether, over the longer term, the Board should consider adopting a different model regarding the representation of consumer interest in Board proceedings as the Board seeks to determine the public interest.

This submission is on the first phase. The submission is made by the eight electricity distributors shown below. For purposes of this submission this group of distributors will be referred to as The Co-operating Utilities. The distributors are:

- Newmarket-Tay Power Distribution Ltd.
- Bluewater Power Distribution Corporation
- Greater Sudbury Hydro Inc.
- Whitby Hydro Electric Corporation
- North Bay Hydro Distribution Limited
- PUC Distribution Inc. (Sault Ste. Marie)

- Halton Hills Hydro Inc.
- Essex Powerlines Corporation

Our Recommendations

By way of general comment, and for clarity, we are not opposed to intervenor participation being funded. We believe there is value for the Board in having others' viewpoints. What we are concerned with is efficiency. Our comments on the specific questions posited by the Board were guided by that concern. Our belief is that the current policy can lead to inefficiencies and we discuss why later in the submission. We believe that the provisions in the current policy to deter inefficiency are no longer operable and we discuss why later in our submission. We believe that efficiencies would need to come about through meaningful, built-in behavioral incentives. Specifically we believe such incentives should come about by reflecting the "cost of doing business" principle for intervenors.

Our recommendations are set out below as three options. They are meant to be a workable reflection of our comments to the questions set out in the Board's letter for purposes of assessing policy options. The comments are summarized below and should be read in conjunction with our recommendations in this entire submission for context and rationale. Also contained in our comments that follow are other details that we believe would be of assistance to the Board, but are not listed in our specific options listed below.

Option 1

- Funding for each intevenor eligible for costs awards should require the intervenor to partially fund their participation – we recommend recovery limited to 60% of eligible costs.
- Total intervenor funding should be capped with the cap being differentiated by utility size. For example, smaller utilities should have smaller caps - we do not make recommendations on the caps at this time
- No capping for Motions but recovery of costs should be linked to degree of success – for Motions found frivolous or vexatious we recommend cost assessment against the moving party

Option 2

- Funding for each intevenor eligible for costs awards should be pre-approved similar to that used for policy consultations
- Total intervenor funding should be capped with the cap being differentiated by utility size. For example, smaller utilities should have smaller caps - we do not make recommendations on the caps at this time
- No capping for Motions but recovery of costs should be linked to degree of success – for Motions found frivolous or vexatious we recommend cost assessment against the moving party

Option 3

- Total intervenor funding should be capped with the cap being differentiated by utility size. For example, smaller utilities should have smaller caps - we do not make recommendations on the caps at this time
- No capping for Motions but recovery of costs should be linked to degree of success – for Motions found frivolous or vexatious we recommend cost assessment against the moving party
- Cooperation and coordination for the revenue requirement part of the application should become a Board requirement, not just a principle

Board's Stated Reasons for Review

The Board stated the following as reasons for initiating its review:

> "The review is appropriate at this time for several reasons. First, the Board is implementing, under the Renewed Regulatory Framework for Electricity, a new approach to the regulation of electricity distributors. A central feature of this new approach is a strong emphasis on the need for each electricity distributor to engage with a broad range of customers and other stakeholders during the development of the capital and operational plans reflected in the distributor's rate application. The Board is interested in considering how this early consultation and engagement by a distributor with customers and other stakeholders might affect the role of intervenors

in the more formal process that is initiated by the Board once an application is filed.

Second, the Board is undertaking a review of its application and hearing process, with the goal of enhancing the efficiency and effectiveness of that process. The Board is interested in considering whether changes to the Board's approach to the determination of intervenor status, cost eligibility and cost awards might further enhance the efficiency and effectiveness of the application and hearing process.

Third, the Board is also undertaking a review of the way in which it consults with stakeholders, including consumers, in the review and development of regulatory policy, including the amendment of codes and rules under the *Ontario Energy Board Act*. The Board anticipates that, going forward, it will, in appropriate circumstances, include the use of consumer focus groups and consumer surveys in the policy development process."

Key Sections in the Rules and Practice Direction

Under section 23 of the Rules of Practice and Procedure, key provisions regarding intervenor status are:

> 23.02 The person applying for intervenor status must satisfy the Board that he or she has a substantial interest and intends to participate actively and responsibly in the proceeding by submitting evidence, argument or interrogatories, or by crossexamining a witness.
>
> 23.09 The Board may grant intervenor status on conditions it considers appropriate.

Under section 3.03 of the Board's Practice Direction on Cost Awards, a party is eligible to apply for a cost award where the party:

> (a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board;
>
> (b) primarily represents a public interest relevant to the Board's mandate;

Under section 5 of the Board's Practice Direction, **i**n determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party:

(a) participated responsibly in the process;

(b) asked questions in interrogatories or on cross-examination which were unduly repetitive of questions already asked by one or more other parties;

(c) made reasonable efforts to ensure that its evidence or intervention was not unduly repetitive of evidence presented by or the intervention of one or more other parties;

(d) made reasonable efforts to co-operate with one or more other parties in order to reduce the duplication of interrogatories, evidence, questions on cross examination or interventions;

(e) made reasonable efforts to combine its intervention with that of one or more similarly interested parties;

(f) contributed to a better understanding by the Board of one or more of the issues in the process;

(g) complied with directions of the Board, including directions related to the prefiling of written evidence;

(h) addressed issues in its interrogatories, its written or oral evidence, its

questions on cross-examination, its argument or otherwise in its intervention which were not relevant to the issues in the process;

(i) engaged in any other conduct that tended to lengthen unnecessarily the

duration of the process; or

(j) engaged in any other conduct which the Board considers inappropriate or irresponsible.

BOARD'S SPECIFIC QUESTIONS

Intervenor Status

1. *What factors should the Board consider in determining whether a person seeking intervenor status has a "substantial interest" in a particular proceeding before the Board? For instance, should the Board require a person seeking intervenor status to demonstrate consultation or engagement with a constituency directly affected by the application?*

2. What conditions might the Board appropriately impose when granting intervenor status to a party? For instance, should the Board also require an intervenor to demonstrate how the intervening group or association governs the participation by its legal counsel and other representatives in the application?

Submission:

We recognize that the right to intervene is a legal right if an application affects the interests of an individual. Attempting to find the factors and conditions that would satisfy the legal rights of persons but prohibit intervenor status is a tricky, cumbersome proposition. The recommendations contained in our submission offer different approaches that would avoid the need to attempt to go this route.

Cost Eligibility

1. *What factors should the Board consider in determining whether a party primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board? For instance, should the Board require the party to demonstrate consultation or engagement with a class of consumers directly affected by the application?*

2. What factors should the Board consider in determining whether a party primarily represents a public interest relevant to the Board's mandate?

Submission:

Determining and articulating factors would constitute micromanagement and would not circumvent the inherent difficulties in being able to apply these, the same way that the current provisions have been ineffective. Here again, the recommendations contained in our submission would avoid the need to attempt to go this route.

3. *What conditions might the Board appropriately impose when determining the eligibility of a party for costs? For instance, what efforts should the Board reasonably expect a party to take to combine its intervention with that of one or more similarly situated parties? Should the Board reasonably expect parties representing different consumer interests to combine their interventions on issues relating to revenue requirement (as opposed to cost allocation)?*

Submission:

There are a number of interest groups claiming to represent the residential consumer and there are a number of groups that claim to represent non-residential consumers.

The interest of all ratepayer intervenor groups for the revenue requirement component in a rate application is indistinguishable. It is to lower the revenue requirement. Yet, all ratepayer groups take an active role in revenue requirement matters. The ratepayer should not be funding what appears to be duplicity in effort and resultant costs. It is our assessment that a high percentage of the costs associated with rate proceedings is associated with revenue requirement matters.

Cooperation of and coordination with other intervenors are principles of section 5 of the Practice Direction. Our view is that there has not been enough cooperation and coordination in revenue requirement matters, which is an obvious area of common interest. We recommend that cooperation and coordination for the revenue requirement components of a rate application become a Board requirement, rather than just a principle.

The Board could pre-authorize only one funded party. Alternatively, the Board could pre-authorize funded parties for different areas of the revenue requirement parts of an application.

4. *Should the Board consider different approaches to administering cost awards in adjudicative proceedings? For instance, should the Board consider adopting an approach that provides for pre-approved budgets, pre-established amounts for each hearing activity (similar to the approach for policy consultations), and pre-established amounts for disbursements?*

Submission:

Incentives

Noteworthy in the Board's policy is that costs can be fully recoverable (subject to maximum hourly fee rates and restrictions on disbursements) for all facets of a proceeding.

Under such policy there is, theoretically at least, the potential for inefficiencies. The safeguards against inefficiency are the principles found in section 5 of the Practice Direction - the Board can deny or reduce costs on the basis of irresponsibility, repetition, lack of cooperation, lack of coordination, irrelevancy, and unruly conduct.

It would appear that the Board's practice is not to review cost award claims unless they are challenged by the utility. It has been rare that a utility objects to intervenors' claimed costs as it is widely believed that this is the Board's job. The Co-operating Utilities also note that they are reluctant to challenge cost claims as this action might be construed by intervenors as being adversarial rather than prudent verification of the value added, a practice we normally adhere to whenever payment for service is made.

It may be that the Board has concluded, as we have, that review of the appropriateness of cost claims is not doable with any degree of confidence. To explain our assessment we need to provide some history here.

Up to mid-1980's, participants had generally borne their own costs. The Board did award costs but under "special" or "extraordinary" circumstances. In 1985 the Board initiated a proceeding (EBO 116) to review cost awards, the result of which was the liberalization and institutionalization of the Board's cost awards policy. One of the issues for that proceeding was whether there should be safeguards to ensure that money was not wasted. In liberalizing and institutionalizing cost awards, the Board did introduce deterrents. These are the principles that comprise section 5 of the current Practice Direction, which we have set out at the beginning of our submission.

However we submit that the operability of the deterrents is different today compared to when they were first introduced. This is because the steps of a typical proceeding have changed over time. In the mid-1980's there were no settlement conferences. All proceedings went to hearing. The Board Panel therefore had a direct interaction with the intervenors. Objections to cost claims by applicants was the rule and the Board Panel could assess the disputes on an informed basis.

Today many cases are settled. Notably, most if not all applications for 2013 rates were settled, and most of them were fully settled. We are not aware of any 2013 cases or prior where cost claims were objected to and required a Board decision on costs. Should there have been objections, the Board Panel would have to render its decision on the basis of the written record only, not from the additional benefit of interacting with intervenors.

The point of this is that given the evolution of the regulatory construct through settlements, the principles enunciated in the 1980's cannot be relied on today to identify and deter inefficiency, at least in the majority of rate proceedings before the Board.

When the Board liberalized and institutionalized cost awards in the 1980's, there were only two primary ratepayer intervenors – the Industrial Gas Users Association ("IGUA") representing large gas consumers and the Consumers Association of Canada (now Consumers Council of Canada) representing residential consumers. Now there is a multiplicity. The greater the number of funded intervenors the greater the collective effort and the greater the overlap and repetition. The question that the Board must ask itself is this: has the Board

been assisted proportionally to the increased number of intervenors and the increased costs of intervention? It is only the Board itself that can answer this.

One further point about the multiplicity of funded interventions. Principle 5(f) in the Practice Direction is whether a party contributed to a better understanding by the Board of one or more of the issues in the process. This may be incenting each funded intervenor to build an identifiable record on which to claim contribution or greater relative contribution to secure cost recovery if challenged. This is a disincentive for efficiency and is a challenge for the Board in assessing relative contributions.

Pre-established amounts

An approach similar to that used for policy consultations is worthy of consideration. It would cap the cost awards to predetermined amounts and this would prioritize the effort to the important issues that matter for each intervenor's constituency. This would in effect cause coordination among the intervenor groups without the Board itself having to direct it and possibly having to administer it. The attraction of this approach is that the Board will be able to determine the cap on a case by case basis based on the number of requests for cost awards, and on ability to pay by the applicant's ratepayers.

Pre-established budgets

The pre-approval budget option is a possibility. We note that it may require considerable effort by intervenors to prepare and defend their submission and this would require more involvement by the Board and perhaps the Applicant.

Cost of doing business

Every ratepayer intervenor group, and other groups such as environmental and public policy groups, claim that they have a mandate to intervene before Board rate proceedings. However the mandate has not come with dollars.

A legitimate mandate should entail some funding from the claimed constituency. It is the cost of doing business. If parties want to intervene they should be prepared to do so financially to some degree.

The concept around financial incentives/disincentives is to induce behavior. It is a concept that is applied on every aspect of a business and persons. The Board's own regulatory framework for rate regulation has been centered and will continue to be centered on the concept of incentives. The Board's cost award policy has been exempted from that philosophy to this point.

The principle that there should be a cost of doing business is absent from the Board's cost award policy. That is where the problem lies. If the Board's policy reflected the cost of doing business principle, we suggest that this will produce more efficient proceedings.

We remind the Board that such policy would not be novel. The Board's cost award policy of the past only funded a portion of the reasonably incurred costs. For example, for many years IGUA's cost recovery was capped at 60%. This did not deter IGUA from being a most active participant in rates proceedings. We recommend that funding should be capped at 60% of an intervenor's reasonable incurred costs.

It is noteworthy that in the EBO 116 proceeding IGUA opposed the awarding of costs to intervenors on a more regular basis. The Board's EBO 116 Report summarized IGUA's submission as follows:

> "IGUA maintained that costs should be awarded to intervenors only in special or unusual circumstances, or when the extraordinary nature of the proceedings justifies such an award. IGUA considered that proceedings may be "extraordinary" in either a procedural or substantive sense. It was concerned that the regular awarding of costs to intervenors might increase the number of intervenors, fragment the constituent base for the various sectors of the public interest, and thus impede the efficiency of the proceedings. IGUA's view was that the fundamental reason why a party should intervene before the Board is to obtain some relief for the sector of the public interest which that party represents. To encourage interventions by only financially responsible parties (financially responsible through a

broad base of constituents or otherwise), the Board should not grant costs to intervenors on a routine basis. Moreover, the Board's cost awards policy should provide for orders of costs against intervenors where appropriate."

Ability to pay

As the Board knows there is a momentous difference in the size of the regulated utilities. Measured by revenue they range from billions to under one million. Yet, the current policy does not differentiate recovery of intervenor costs by any measure; it presumes that there is equal ability to pay intervenor costs, regardless of size. This of course is not the case.

The reason we suggest for the non-differentiation lies in the history of the policy. As noted elsewhere, the genesis of the policy is back in the mid-1980's when the Board only regulated the gas sector and advised on Ontario Hydro bulk rates. These were large utilities and to our reading of the Board's EBO 116 Report the ability to pay issue was not raised in that proceeding.

Clearly size should matter. The ratepayers of smaller utility cannot not bear the costs of funding interventions in the same way that larger utilities can. While in practice this may or may not have been a problem, this is matter that should not be left to chance. The Board should take this opportunity to address this matter. We have no specific recommendations at this time as what would be appropriate differentiations.

Motions

Motions brought by intevenor groups are a common occurrence during a proceeding (Motions can also be brought for review of a Board decision). Many motions are unsuccessful or are only partially successful but there is no exception to the 100% cost recovery policy. There is no monetary incentive to not exploit the threat of bringing a motion or bringing a motion at will. Motions during a proceeding can have material adverse impacts on costs and on the efficiency of a proceeding.

Whatever the Board concludes by way of amendments to the current policy in other respects, the Board should deal with the matter of Motions as a separate, stand-alone matter.

Intervenor cost recovery for motions should be linked to the degree of success or failure of the Motion. In cases where the Board finds a motion was frivolous or vexatious, there should be costs assessed against the moving party.

We suggest the Board institute a practice where the Board Panel deciding on a motion also renders its decision on cost matters at that same time.

Recommended Modifications

1. Are there modifications that the Board should consider making to the Rules and the Practice Direction?

Submission:

Based on our submissions in this document, it is not necessary to make any changes to either the Rules or the Practice Direction documents. Any and all of our suggestions can be implemented through the Board's Report that would flow from this initiative or other companion documents.

Respectfully Submitted,

September 27, 2013