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Our Matter Number: 1145084

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Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Further Written Comments -- Review of Framework Governing the Participation of
Intervenors in Board Proceedings -- Consultation and Stakeholder Conference
OEB File No. EB-2013-0301**

We are counsel to the Association of Power Producers of Ontario (“APPrO”). After attending the Stakeholder Conference held on October 8, 2013, APPrO wishes to make submissions – supplementing its written submissions dated September 27, 2013 – on the following points:

- **Cost caps and pre-approved budgets**
- **Principles the Board should consider in this Review**

A. Cost caps and pre-approved budgets

In its questions posed to stakeholders, the Board offered examples of different approaches to administering cost awards, including pre-approved budgets, and pre-established amounts for each hearing activity and for disbursements (i.e., “caps”). While cost caps or pre-approved budgets are attractive at first glance, APPrO believes that caps and budgets are an impractical and ineffective means of controlling intervenor costs, for several reasons.

First, it is not always easy to predict the cost of participating in a proceeding. This is particularly true of the Board’s multi-party adversarial proceedings (which make up the large majority of Board matters). A good estimate of the time and effort spent by APPrO on any particular issue in a proceeding is not always discernable at the outset of a proceeding (i.e., at the draft issues stage). Indeed, the scope of any particular issue will depend upon the positions taken by other intervenors at various stages in the proceeding (i.e., in intervenor evidence, as discerned from intervenor interrogatories, or at the oral

hearing). As a result, depending upon how a particular issue(s) evolves through the course of a proceeding, a seemingly straightforward intervention can escalate into a much more complex and expensive matter than initially anticipated. The cost uncertainty of participating fully in any issue in a proceeding is amplified where an intervenor believes it important or necessary to file intervenor evidence. For example, in the most recent Hydro One transmission rate proceeding (EB-2012-0031), the only unsettled issue dealt with the export transmission service (“ETS”) charge. The applicant (i.e., Hydro One) took a passive role on this particular issue, and the Independent Electricity System Operator (“IESO”) filed a report on the issue but took no position until final argument. Given the importance of the issue to APPrO’s members, APPrO felt the need to prepare and file evidence to support an ETS charge level. In that circumstance, APPrO took on a significant role (arguably, akin to an applicant) and bore the burden associated with tendering that evidence, including expert costs, costs incurred responding to interrogatories, cross-examinations, witness preparation, etc. It has been APPrO’s experience that it is very difficult to anticipate these costs, especially in the context of adversarial hearings.

Secondly, a cap or pre-approved budget would entail an increased administrative burden for the Board and for intervenors, with little discernible benefit. The *process* of establishing a cap would be a drain on the Board’s resources and would create an undesirable preliminary stage in an intervention. In setting caps or budgets, Board Staff would likely have to use a sliding scale depending on the nature of the proceeding (i.e., a stakeholder consultation proceeding versus an adversarial hearing), the issues involved, and whether or not evidence is filed. Further, if faced with a cap, most intervenors (out of caution) will simply apply for the maximum allowable amount *in every instance*, thereby transforming a prospective process into a defensive exercise by the proposed intervenors who would merely be trying to protect themselves from the arbitrary constraints imposed by the cap.

Additionally, any budget or cap would have to have a mechanism in place to address unexpected costs on a real-time basis. In complex proceedings, the Board would likely have to contend with a number of interlocutory motions (or other procedural mechanisms) seeking exemptions from a cap or budget. Time spent dealing with procedural issues is time not spent on the important substantive issues of any proceeding, and is consequently time spent unwisely. Further, imposing additional procedural steps may have the perverse effect of driving up intervenor costs, as counsel are forced to embark on these interlocutory funding issues in addition to addressing the new issues unaccounted for in a cap or budget.

Finally, as noted in our original submission, the Board has been granted a broad statutory discretion to award costs. In other words, the Board does not need the existence of a cap or budget in order to limit or manage intervenor costs.

If the Board's objective through this proceeding is to make intervenor participation more efficient, then APPrO's view is that pre-approved caps and budgets would have the opposite effect. If the Board's objective is to curb what it perceives to be abuses of the cost award regime, the Board has already has discretion to do so.

B. Principles the Board should consider in this Review

Ken Rosenberg, moderator of the Stakeholder Conference, asked the parties to discuss what principles the Board should consider while undertaking this Review. In answering Mr. Rosenberg's question, a helpful starting point may be found in the Board's statutory objectives (see subsection 1(1) of the *Ontario Energy Board Act, 1998*) which state that the Board, in carrying out its responsibilities, must be guided by, *inter alia*, the protection of "the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service" and the promotion of "economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry."

It is APPrO's submission that the best way for the Board to meet these objectives is for it to understand a broad range of interests and to make a decision that reflects an appropriate balancing of those interests, thereby acting in the public interest. In order to do this, the Board must hear from an appropriate range of parties so that the Board has available to it the kind of record it needs to make a decision that is in the public interest. In other words, APPrO believes that the most important guiding principle the Board should take into account is ensuring that it has the *best available information* before it so that it can make the best decision for the public. Having a complete, representative record before it in any proceeding should be the Board's overriding guiding principle. As such, the Board's policies and procedures should reflect a desire to broaden, rather than restrict, stakeholder and intervenor participation, so as to ensure that the Board has a complete record before it.

At the same time, APPrO believes that the Board should not shy away from other, secondary principles, namely transparency, openness, and value-for-money. As discussed in APPrO's September 27 letter, the \$5.5 million in intervenor funding is ultimately ratepayer money, and the Board should take the necessary steps to ensure that those funds are well spent. In this vein, APPrO believes that it is entirely reasonable for the Board to consider means by which duplicative interventions, interventions with a tenuous or superficial connection to the subject matter of the proceeding or to the jurisdiction of the Board, and interventions where there appears to be little in the way of supervision or instruction by the proposed intervenor over its counsel (i.e., where the intervention appears to be driven by counsel) can be minimized.

C. Conclusion

APPrO commends the Board on its efforts aimed at improving the intervenor process and looks forward to a continuing dialogue as this consultation and review enters its Second Phase.

Yours very truly,

Handwritten signature of Richard King, consisting of the initials 'RK' and a small 'per' to the left.

Richard King

RK:pw

c: David Butters, APPrO
Patrick Welsh, Osler, Hoskin & Harcourt LLP