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Newmarket-Tay Power Distribution Ltd.

October 16, 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
Supplemental Submission of the Co-operating Utilities
EB-2013-0301

Attached please find the Co-operating Utilities supplemental written submission in this matter.

Yours truly,

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EB-2013-0301

Review of Framework Governing the Participation of Intervenors in Board Proceedings

Supplemental Submission by the Co-operating Utilities

(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. ; Halton Hills Hydro Inc.; Essex Powerlines Corporation)

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.

Phase 1 provided for initial written comments, a stakeholder conference and supplementary written comments on the issues explored at the stakeholder conference.

The Co-operating Utilities did not make a presentation at the stakeholder conference but representatives did monitor the conference and reviewed the transcript.

Our comments in this supplemental submission serve as adjuncts, not substitutes, to our comments and recommendations made in the main submission. However, for the Board's convenience we have included in this supplemental submission the salient points, with some necessary edits, from our main submissions that gave rise to our recommendations in that submission. We conclude by iterating

our initial recommendations with an additional recommendation regarding the role of Board Staff.

(We wish to make to note a word correction in our main submission. In discussing the issue of duplication of effort, the word “duplicity” appeared instead of the word “duplication” on page 7 of our main submission. We apologize to the intervenors and to the Board for that unfortunate drafting error.)

Our Discussion Points

The intervenors are of the view that the principles adopted the Board in its EBO 116 Report when it liberalized and institutionalized cost awards equally apply today, and that in fact the principles are more relevant today with the add-on of regulation of the electricity sector. Also, the intervenors suggest that cost awards are a “bargain” compared to the “savings”, and that nothing is broken and any changes should be within the ambit of “tweaking”. However, there was acknowledgment by the intervenors that the role of Board Staff is pivotal and should be the first consideration by the Board in assessing what changes may be needed.

Below, we add our views on these matters and discuss whether the recommendations we made in our main submission need to be altered, and if so how.

- **Circumstances changed since EBO 116**

The intervenors suggest that the principles of broader representation and the complexity of the issues that were noted by the Board in its 1985 EBO 116 Report, when it liberalized and institutionalized cost awards, equally apply today and that in fact the principles and complexities are more relevant today with the add-on of regulation of the electricity sector.

In our September 27, 2013 submission we provided several reasons why the Board's conclusions and policies of those days are not operable in today's circumstances. We set out below extracts of our comments on that matter from our main submission.

Up to the 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 on Cost Awards.

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. Also, it is very rare that there are objections by the utilities to claimed intervenor costs. If there are objections to costs awards when a case is settled, 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 potential for overlap and repetition. The question that the Board must ask itself is this: has the Board been assisted proportionally by the increased number of intervenors

and the increased costs of intervention? It is only the Board itself that can answer this.

We wish to put forward one further point about the multiplicity of funded interventions. It is Principle 5(f) in the Practice Direction which outlines 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 may be serving as a disincentive for efficiency and is a challenge for the Board in assessing relative contributions.

Rate regulation in the gas sector has been streamlined since EBO 116, and the electricity sector has been substantially streamlined since its early days. Rate regulation for electricity utilities is now comprised of a comprehensive set of policies and Board-driven models resulting in significantly fewer issues left for adjudication. Clearly, the perplexities noted by the Board some 18 years ago in EBO 116 are no longer valid, or at least are less valid.

In its August 22, 2013 letter, the Board clearly noted that one of the purposes of its review is around the implementation of its new approach for regulating of electricity distributors under the Renewed Regulatory Framework for Electricity (RRFE).

A central feature of the new approach is the shift in setting rates based on performance outputs rather than inputs. There was a good deal of discussion in the submissions and in the stakeholder conference as to what, if any, changes this would entail to the process and to the role of the parties. The intervenors generally maintain that nothing ought to change in the current cost awards policy on account of the RRFE.

It is our view that the shift from an input driven to an output driven rate setting regulatory construct would, initially at least, require modifications of current practices. The output driven regulatory construct is based on benchmarking. To enable benchmarking, there needs to be more standardization of decisions on RRFE-driven issues. To enable standardization of decisions, RRFE-driven issues would likely have to be heard directly by the Board. This suggests a more standardized issues list and fewer issues going to settlement. Furthermore, an output driven rate setting model will by definition not focus on inputs, which will further change the degree of required scrutiny of an application going forward. Moreover, the new requirement for utilities to consult with their customers before they finalize their proposals, and report on such consultations, is a paradigm that might alter the nature of involvement by intervenors. While we are in the early stages of these matters playing out in practice, nevertheless they are examples of how the RRFE is changing the rate making landscape. For intervenors to suggest or infer that it is business as usual may be a false premise.

- **Re-institutionalization is needed, not tweaking**

Intervenors advanced analyses to support their contention that intervenor costs are a bargain when compared to the "savings" that result from lower revenue requirements.

First off, the $5.5 million OEB-reported annual intervention costs are not the only costs. There is a multiplier effect. There is nothing "nefarious" about the multiplier proposition, as was suggested by an intervenor. There are very legitimate incremental utility costs incurred in dealing with and responding to interventions and there are incremental Board costs. The intervenors seem to suggest that even if the true costs of intervention are higher, there should not be cause for concern as the costs would be below the "savings". Based on the intervenors' "savings" analyses, the inference could be drawn that costs can be many times the current levels and intervenor funding will be still be reasonable.

The true costs of course are not only $5.5 million. They are not known and it would be difficult to estimate them with any degree of confidence.

Any claim that reductions to a utility's revenue requirement is the direct result of the "expertise" of intervenor representatives requires further examination. Revenue requirement reductions from start to finish come about for a number of reasons. There is no evidence that a more streamlined and more efficient intervention process with Board Staff taking the primary role could not produce the same "savings".

What is the nature of “savings”? Given the Board’s regulatory policies on many other aspects affecting revenue requirement they would come primarily from the utility’s plans around capital expenditures and from the utility’s assumptions about operating costs and revenues.

Most reductions in capital expenditures are not really a “saving”; they are a deferment. In the long run plant has to be upgraded, or replaced or replenished. In fact, the Board’s new policies under the RRFE with respect to regional planning largely removes the uncertainty with respect to system plant. What remains is general plant. Even here it is pay now or pay later.

Reductions in assumed operating costs come to a large degree from accounting policies, such as depreciation and capitalization. The transition to MFIRS and ultimately IFRS will drive significant alignment of capital policies of the various rate regulated entities, reducing the need for scrutiny. Also, in the context of total revenue requirement, this is a zero-sum gain.

For other forecast operating costs and revenues, these are legitimate areas for scrutiny. We suggest such scrutiny does not require the need to fully fund separate interventions. We also question if the intervenor representatives really possess monopoly expertise in scrutinizing the utility’s assumptions when compared to Board Staff in a primary role.

The point of all this is that if the Board charges Board Staff to take on a primary role, there is a need for re-institutionalization, not tweaking.

In the context of the need for more collaboration and coordination among intervenors, the question arose at the stakeholder conference but was not discussed at length whether the Board itself should select a party among the registered intervenors to lead in all or certain areas or leave it to the intervenors. We believe that having the Board itself select would be the preferred approach. Under this approach, collaboration would be assured by the need to have to demonstrate it. The Board should determine the areas in a given application that it would be prepared to provide funding for and invite proposals by interested parties seeking funding. It is hoped that in assessing proposals the Board would consider proportionality of interest as a prime criterion. We suggest an Issues and Intervenor Funding Day be established as part of a proceeding. There should not be cost awards associated with activities leading up to and including the Issues and Intervenor Funding Day. That would fall within the ambit of cost of doing business.

- **Board Staff should be charged with a primary role**

The role of Board Staff became a focal point at the consultation. It is our take that there appears to be consensus that the role of Board Staff is a pivotal consideration towards a meaningful resolution to the matters, or at least many of the matters raised by the Board in its August 22, 2013 letter.

It would appear from the stakeholder conference that many stakeholders, including some intervenors, would endorse a greater and more involved role of Board Staff. We agree. There would be numerous benefits with Board Staff taking on a more active and in fact leading role in a rates proceeding, including settlement conferences.

Unquestionably, the growth in the number of intervenors and the degree of their participation has been the result of a liberalized and institutionalized cost awards policy. As it turned out, one of the consequences of this policy (unintended perhaps) has been a reduced role for Board Staff. While the role of Board Staff has oscillated in past years, the general trend has been for a reduced role. The gap has been filled by intervenor representatives who as a result have developed, for the most part, considerable expertise. Intervenors warn that if the Board were to reduce the number of funded intervenors or the level of funding, this would deprive the Board of expertise and suggest that the complexity of the issues makes this non-feasible.

The question that the Board needs to ask itself is what its objective is. If it is to buy outside expertise, continuation of its current liberalized cost award policy would not be in need of major change, maybe just tweaking here and there would suffice. We caution that this would most likely perpetuate and perhaps worsen the vicious circle where increasing reliance on intervenor representatives' expertise results in lowering expectations of expertise from Board Staff. This cannot be a good thing for Board Staff, for the Board itself and for the public interest.

It is not disputed by any stakeholder that the vast majority of rate cases are settled or mostly settled. Board Staff are not a signatory party to a settlement. Intervenor representatives divulged that they themselves drive the settlement agreement process. This means that Board Staff are largely bystanders. Unless one holds that a collection of private interests does indeed sum up to the public interest, a notion which is questionable at best, consideration of the public interest is in the hands of the Board Panel reviewing the settlement agreement. It stands to reason that the Board Panel would be indisposed in upsetting a settlement except in the most blatant circumstances. If Board Staff were a signatory to the settlement proposal, there would be more confidence that the settlement agreement was endorsed by a party that has a broader interest, or at least not a private interest. For further confidence, and for more balanced settlement process, Board Staff should be charged with the responsibility of taking the lead role in settlement conferences.

Of course Board Staff would have to act as an independent party for purposes of adjudicative proceedings. They would have to abstain from acting as advisors to the Board Panel. This does not mean that the Board has to resort to a two-staff model as was once the case. The same adjudicative staff can provide technical support to the Board Panel; they just cannot act as advisors. What is needed is institutionalization and transparency of that role.

A leading role for Board Staff would also make coordination among other parties more achievable, which we discuss elsewhere.

One further consideration for the Board to want Board Staff to take on the primary role is the invaluable experience the Board will gain for Phase 2 of the Board's initiative.

Our Initial Recommendations

In our September 27, 2013 written submission, we made certain recommendations in the form of options. These are reproduced 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 preapproved 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

The rationale for these recommendations was in the discussion of the questions posited by the Board. Below are extracts from our main submission with some necessary edits that gave rise to our recommendations.

- **Revenue Requirement**

There are a number of interest groups claiming to represent the residential consumer and there are a number of groups that claim to represent the 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 duplication in effort and resultant costs. It is our assessment that a high percentage of the costs associated with rate proceedings are 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 latest submission by the intervenors in this process has been that they indeed are cooperating together. While we do not dispute this, we question the need to fully fund intervenors in their review of all associated materials but provide minimal questions. This seems to be a source of duplication.

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.

- **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.

- **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.

- **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 on 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 reasonably-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 significant 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 a matter that should not be left to chance. The Board should take this opportunity to address this matter and we would be pleased to participate in a further dialogue of specific recommendations to appropriately differentiate LDCs by size.

- **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.

Our Final Recommendations

In our view, others' submissions and of the discussion that ensued in the stakeholder conference have validated the sensibility of the recommendations we made in our main submission. The one other explicit recommendation we would add to each of our three options is that Board Staff be charged with the responsibility of taking on the primary role in rate proceedings and perhaps in other proceedings, including settlement conferences.

Respectfully Submitted

October 16, 2013