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Ontario

BY E-MAIL

December 6, 2013

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

Re: Board Staff Submission
Ojibways of Pic River First Nation
Motion for Review of Board Decision and Order on
Phase 2 Cost Awards in EB-2011-0140 Proceeding
EB-2013-0375

In accordance with Procedural Order #1, please find attached Board Staff's submission in the above noted proceeding.

Yours truly,

Original signed by

Robert Caputo
Project Advisor
Applications and Regulatory Audit

c. All Parties in EB-2011-0140
Canadian Niagara Power Inc.
Five Nations Energy Inc.
Great Lakes Power Transmission LP
Hydro One Networks Inc.

Encl.

ONTARIO ENERGY BOARD

STAFF SUBMISSION

Ojibways of Pic River First Nation

Motion for Review of Board Decision
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BOARD STAFF SUBMISSION

Ojibways of Pic River First Nation
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EB-2013-0375

BACKGROUND

The Ontario Energy Board recently held a proceeding (EB-2011-0140) to designate an electricity transmitter to undertake development work for a new electricity transmission line between Wawa and Thunder Bay: the East-West Tie line.

The Board heard the EB-2011-0140 proceeding in two separate phases. In Phase 1, the Board decided on intervention and cost award eligibility for both phases of the designation proceeding, established the criteria and filing requirements specific to the East-West Tie line project, and invited interest from prospective electricity transmitters. In Phase 2, the Board received applications for designation from six electricity transmitters and evaluated them through a hearing process.

The Board's Phase 2 Decision and Order was issued on August 7, 2013, naming Upper Canada Transmission Inc. ("UCT") as the designated transmitter.

On October 1, 2013, the Board issued its Phase 2 Decision and Order on Cost Awards (the "Phase 2 Cost Decision"). Therein, the Board reduced the Ojibways of Pic River First Nation's ("PFRN") cost award from PRFN's claimed amount of $130,715.24 to $40,751.25 (including disbursements), for a total reduction of approximately $90,000. PRFN is a First Nation whose traditional territory the East-West Tie line would cross and was one of eight cost-eligible intervenors in the proceeding. As well, PRFN has an ownership interest in an electricity transmitter (EWT LP) that registered and filed an application, but was ultimately unsuccessful, in the designation proceeding.

On October 21, 2013, PRFN filed a Notice of Motion for the Board to review and vary the Phase 2 Cost Decision (the "Motion"). The Motion seeks to vary the Phase 2 Cost Decision to permit PRFN to recover its full cost claim amount of

$130,715.24 for its participation in Phase 2 of the EB-2011-0140 proceeding. On November 15, 2013 the Board issued a Notice of Written Hearing and Procedural Order No. 1 which, among other things, set out dates for parties to file submissions on the Motion.

PRFN's grounds for the Motion are that the Board made factual errors in its decision, which call into question the correctness of the Board's decision. As stated in Procedural Order No. 1, the alleged errors of the Board include the following:

1. Failure to consider the fundamental principle of Aboriginal Consultation that a First Nation participating in the consultation process will be made whole with respect to its costs and expenses incurred;
2. Overlooking the time spent by counsel for PRFN in adequately preparing to interpret case law and legal issues raised by another intervenor in the proceeding (the Métis Nation of Ontario);
3. Failure to account for PRFN's reasonable expectations regarding the interrogatory process based on procedures followed in other Board proceedings; and
4. Reducing PRFN's cost awards on the basis that PRFN changed its legal representatives during the proceeding.

PRFN filed a factum on the Motion with the Board on November 22, 2013.

The following are Board staff's submissions on the Motion.

LEGISLATIVE AND POLICY FRAMEWORK

The Board's power to make cost awards arises from section 30 of the *Ontario Energy Board Act, 1998* (the "Act"), which states:

> *The Board may order a person to pay all or part of a person's costs for participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board.*

The Board's Practice Direction on Cost Awards (the "Practice Direction") uses similar permissive, not mandatory, language. Section 2.01 of the Practice

Direction states that the Board may order by whom and to whom costs are to be paid. And, section 3.01 states that the Board may determine whether a party is eligible or ineligible for a cost award.

The language used by the legislature in section 30 of the Act, particularly the use of the word "may", indicates that the Board's authority to award costs to an intervenor is discretionary. The discretionary nature of the Board's authority to award costs is also clearly reflected in the language of Practice Direction.

At least one Canadian appellate court has also considered the question of a tribunal's discretion to award (or deny) costs to interested parties in a regulatory proceeding. In *Wood Buffalo (Regional Municipality)* v. *Alberta (Energy and Utilities Board),* 2007 ABCA 192, [2007], the Alberta Court of Appeal found that the Alberta Energy and Utilities Board's exercise of its discretion to not award costs to two interested parties did not involve an issue of law or jurisdiction. The Court stated (at page 6) that even "the failure of the Board to explain how or why it exercised its discretion to award costs in a particular case does not turn that exercise of discretion into a question of law". Board staff notes that the legislative scheme of then Alberta Energy and Utilities Board was similar to the legislative scheme of the Ontario Energy Board with regard to the matter of intervener costs.

While the Board is not required to make any cost awards at all, in any proceeding before it, there is a long standing practice at the Board of awarding intervenors their reasonably incurred costs. In order to ensure that cost awards are reasonable, the Board must assess the value of the contribution of the party to the process. It is not always easy to assess and assign the specific dollar value that a party provides to a process. A Board panel is not privy to all of the activities that a party may undertake and it would also not be efficient or practical to do a line by line review of all docket entries to assess the merit of each individual entry. For these reasons, it is not uncommon for the Board to compare the cost claims of parties that engaged in similar levels of participation in a process. Where one party's claimed costs are significantly in excess of other parties', it is reasonable for the Board to make disallowances without any other specific finding. As stated by the Board in its Phase 1 Decision and Order on Cost Awards in EB-2011-0140, "it is not wrong for the Board to make disallowances if the claimed costs are simply "too high"; in other words if the value of a party's

participation does not match the level of costs requested."

Costs awards are ultimately (albeit indirectly) paid by ratepayers. In exercising its discretion to make cost awards, the Board should ensure that the party requesting costs acted appropriately and provided value to the process. The Board's role is not simply to add up the hours submitted by parties and ensure that the appropriate rates were applied.

In its Motion, PRFN alleges errors of fact. Board staff discusses these alleged errors in further detail below. Board staff submits, however, that even if the original decision was based in part on erroneous facts, this does not automatically mean that the Board should reverse its decision. To the extent that the Board determines it did make errors of fact in the original decision, it should consider PFRN'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 PFRN's contribution measured against its claimed costs.

GROUNDS

i. The "Fundamental Principle" of being "Made Whole"

PRFN contends that the Board erred in fact by "failing to consider the fundamental principle of Aboriginal Consultation that a First Nation that is participating in the consultation process will be made whole with respect to the costs and expenses incurred".

Board staff notes that PRFN did not raise this issue during the course of the designation proceeding. To the contrary, in its Notice of Intervention filed with the Board on March 2, 2012, PRFN requested intervenor status and cost eligibility in the designation proceeding based on the Board's Practice Direction at the prevailing Cost Award Tariff. PRFN stated as follows:

> *The PRFN has retained Harrison Pensa LLP as its legal counsel in this matter and may retain qualified consultants to ensure that its interests are protected and will proceed on the basis that the PRFN can recover the related fees and disbursements incurred based on the Board's Practice Direction on Cost Awards at the prevailing Cost Award Tariff.*

Tribunals such as the Board are confined to the powers conferred on them by their constituent legislation. In the matter of the designation proceeding, the legislature has not delegated the Board the power to engage in consultation or to assess the adequacy of consultation. The duty to consult with respect to the development of the East-West Tie line remains with the Crown. Board staff submits that the Board's authority to award costs in a regulatory proceeding does not attract considerations of the duty to consult.

ii. Failure to consider time spent by PRFN on research

PRFN claims that the Board overlooked the time spent by counsel for PRFN in adequately preparing to interpret case law and legal issues raised by another intervenor in the proceeding (the Métis Nation of Ontario). At paragraph 9 of its factum, PRFN also submit that the Board erred in its analysis that PRFN's intervention was comparable to that of other intervenors by failing to consider the depth of the affected interests.

As there is no legal requirement to make any awards of costs, absent extraordinary circumstances the Board cannot make a legal error by making an order for costs in favour of an intervenor that is different than the amount claimed by that intervenor.

The Phase 2 Costs Decision was made by a three member panel of the Board that presided over the entirety of Phase 2 of the designation proceeding. Board staff submits that, as the hearing panel, they were clearly aware of the scope of the record and the volume of evidence filed. The Phase 2 Decision and Order and the Phase 2 Costs Decision describe the hearing panel's review of the substantive submissions made by PRFN as well as the account submitted on its behalf by its counsel. In Board staff's submission, there is nothing in either decision to suggest that the hearing panel did not understand or otherwise appreciate the participatory efforts of PRFN and its counsel in Phase 2 of the designation proceeding.

iii. Failure to account for PRFN's reasonable expectations regarding the interrogatory process

PRFN submits that the Board did not consider PRFN's reasonable expectation for an interrogatory process similar to other proceedings. PRFN states in its

Motion that "[a]t no time, prior to the submissions of the interrogatories, did the Board communicate that the interrogatory process would be restricted or different from other proceedings which include an interrogatory process".

Board staff submits that, to the contrary, the Board made it clear at various times that the interrogatory process in the designation proceeding would not be the same as in other proceedings. In Procedural Order No. 5 dated January 8, 2013 the Board stated:

> *The Board invites all parties, including Board staff, applicants and other intervenors to propose written interrogatories for the Board's consideration. As indicated in its Phase 1 Decision and Order, the Board will require all parties to send their interrogatories to the Board, and the Board will issue a combined set of interrogatories to the applicants for responses. The Board will combine and edit the interrogatories proposed by the parties.*
>
> *This proceeding involves multiple competitive applicants and has elements similar to a procurement process that are absent from most Board proceedings. In a typical Board proceeding, interrogatories serve to complete the record and possibly augment the evidence filed by the applicant. In this designation proceeding, however, it would not be appropriate for applicants to use the interrogatory process to fill any gaps in their applications after those applications have been filed.*

Prior to the issuance of Procedural Order No. 5, the Board issued on November 21, 2012, a letter providing "guidance and information" to all participants in the designation proceeding. With respect to the matter of the "Content of Interrogatories", the Board's letter provided as follows:

> *As the Board stated in its Phase 1 decision, this designation proceeding is unique in that it involves multiple competing applicants and has elements which are similar to a procurement process but are absent from most Board proceedings. In a typical Board proceeding, interrogatories serve to complete the record and possibly augment the evidence filed by the applicant. In the designation proceeding, however, it would not be appropriate for applicants to use the interrogatory process to fill any gaps in their*

> *applications after those applications have been filed. The Board will control the interrogatory process to ensure that no particular applicant gains an unfair competitive advantage through that process.*

Moreover, Board staff submits that all parties, including PRFN, were aware of this issue as early as April 24, 2012. On that date, Board staff filed its Phase 1 submission proposing (in a bullet list at page 18) that the Phase 2 hearing contain the following elements ***(emphasis added)***:

- *Applications for designation filed with the Board*
- ***All parties file with the Board proposed interrogatories (not directly sent to applicants)***
- ***Interrogatories to applicants from the Board, informed by suggestions from all parties***
- ***Answers to interrogatories from all applicants***
- *Oral questions from Board if necessary*
- *Written submissions from all parties*
- *Reply submissions from applicants*

Subsequently, in its Phase 1 submission filed on May 7, 2012, PRFN confirmed (at page 20) that it agreed substantially with Board staff's submission as to the elements of the Phase 2 hearing process.

iv. Change of Legal Representation

PRFN submits that the Board reduced PRFN's cost awards on the basis that PRFN changed its legal representatives during the proceeding.

Board staff submits that PRFN was not penalized for having to change its counsel. Rather, in its Phase 2 Decision and Order on Cost Awards, the Board simply found "that there is no justification for allowing additional costs related to PRFN's decision to change legal representatives during the proceeding."

v. Other Considerations

In the Affidavit of Byron Leclair filed in support of the Motion, Mr. Leclair states (at page 4), that with respect to the "fundamental principle", as described above,

"[c]osts and expenses incurred are not visited on the First Nation, but rather on the party who will benefit from the consultation."

Board staff notes that in Procedural Order No.1, issued March 9, 2012, the Board ruled that the costs of the designation proceeding (both cost awards to eligible intervenors and the Board's own costs), would be recovered from licensed transmitters whose revenue requirements are recovered through the Ontario Uniform Transmission rates; namely Canadian Niagara Power Inc., Five Nations Energy Inc., Great Lakes Power Transmission LP, and Hydro One Networks Inc.

Board staff submits that while it is reasonable for the Board to apportion the costs between these transmitters (based on their respective transmission revenues), it would not be appropriate for them to also incur the full costs and expenses incurred by PRFN or other First Nations for their participation in Phase 2 of the designation proceeding; namely, because it is the Crown, and not these transmitters, that is the party who will benefit from the consultation.

CONCLUSION

Board staff submits that PRFN have failed to demonstrate that the hearing panel committed an error of law or fact when it awarded PRFN a reduced cost claim. Board staff submits that the review panel dismiss the Motion.

All of which is respectfully submitted.