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VIA EMAIL TO: boardsec@ontarioenergyboard.ca

ONTARIO ENERGY BOARD **FILE NO. EB-2015-0051**
P.O. Box 2319
2300 Young Street, 27th Floor
Toronto, ON
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Attention: Ms. K. Walli
Board Secretary

Dear Ms. Walli:

RE: ALGOMA POWER INC.
Decision and Procedural Order No. 2
Board File No.: EB-2014-0055
Our File No.: 12524-7

In keeping with the Board's instructions provided in the above noted Procedural Order and Decision issued on November 5, 2015 please find accompanying this letter Algoma Coalition's submissions.

Board Staff, API and the other intervenors have been copied on this filing.

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Enclosures

1) THE COALITION'S DIRECTION & REPRESENTATION

Giving a voice to its members

The Coalition is spearheaded by Mr. Chris Wray, CAO/Clerk-Treasurer of the Municipality of Wawa. Traditionally, the Coalition has held town hall meetings at its member locations inviting all members to attend. At each of these meetings members are made aware of the Coalition's activities and are provided an opportunity to comment on strategic direction and particular issues of concern. Often, in past these meeting would be accompanied by resolutions. In sum, the Coalition's town hall meeting have enabled the unique perspective of all of its members to be voiced and taken account of as the Coalition has moved forward with participation in Board proceedings. Resulting Board decisions have always been provided to the Coalition and shared amongst its members.

The Board has never previously commented on or provided any direction with respect to the Coalition's direction and/or governance. Notwithstanding that the Coalition is proud of its operational framework and the collective voice it has given to its members, it is unclear why this is a relevant consideration for the Board in the context of its present decision on cost eligibility. No standard has been set by the Board nor has any expectation been provided to the Coalition against which it is able to effectively measure itself. In sum, fairness dictates that whatever standard or expectation against which the Board purports to judge the Coalition in this respect should have been previously disclosed. Any resulting Board decision on this issue cannot, therefore, be other than a subjective and arbitrary exercise of discretion.

Representing marginalized consumer interests

Specifically regarding section 3.03 (a) of the Practice Direction on Cost Awards the Coalition submits that it represents the direct interests of consumers (e.g. ratepayers). As noted above, the Coalitions members are small Northern Ontario municipalities whose ratepayer interests are collectively represented by the Coalition. The interests of these ratepayers is distinct from those of ratepayers in larger Southern Ontario communities and are otherwise unrepresented before the Board. Denying the Coalition eligibility for

costs deprives these ratepayers of having a voice in Board proceedings and creates a barrier to access to justice (note: section 3.03 does not require the Coalition to directly represent the ratepayers themselves only their direct interests).

The Coalition states that it is inappropriate, however, for the Board to consider section 3.03(a) in isolation from sections 3.03 (b) and (c), 3.04 (d), 3.06 and 3.07.

Section 3.03 (b) grants eligibility to a party that primarily represents and interest or policy perspective relevant to the Board's mandate and to the proceeding for which cost award eligibility is sought. The Coalition submits that it brings both a unique and valuable interest and policy perspective to Board proceedings. As noted above, the Coalition represents a number of small Northern Ontario municipalities with distinct ratepayer interests. All of these municipalities bring a unique policy perspective that is articulated through the collective voice of the Coalition. It cannot reasonably be said that the Coalition's history of participation in Board proceedings has been other than entirely meaningful.

Section 3.03 (c) grants eligibility where a party is a person with an interest in land that is affected by the process. The Coalition submits it is such a person. Section 1.01 defines "person" as follows:

"person" includes (i) an individual; (ii) a company, sole proprietorship, partnership, trust, joint venture, association, corporation or other private or public body corporate; and (iii) an unincorporated association or organization;

The Coalition is an association whose member municipalities are affected by the outcome of Algoma Power's rate applications. Moreover each member is public body corporations having an interest in the lands within each members' respective jurisdiction.

Section 3.04 (d) allows the Board to consider any other factor the Board considers relevant to the public interest. The Coalition submits that the public interest is best served by the Board hearing from a wide variety of affected interests especially those of interests

of Northern Ontario ratepayers who are isolated, marginalized, and lack the financial resources to individually participate. This is Coalition's raison d'être, namely to give voice to those who would otherwise be unrepresented before the Board and, in so doing overcoming an important access to justice barrier.

Section 3.06 provides that, notwithstanding section 3.05 a party may be eligible for a cost award if it is a customer of the applicant. As more particularly set out in its motion materials, the Coalition submits that its members are all customers of Algoma Power and that it should correspondingly be eligible.

Finally, section 3.07 also provides that, notwithstanding section 3.05 the Board may, in special circumstances find a party eligible even though it falls into one of the categories listed in section 3.05. The Coalition submits that the financial circumstances of its members the direct interests it represents, the unique perspective it brings to the Board, and the access to justice issue(s) involved are all "special circumstances" contemplated by section 3.07.

2) THE COALITION'S FUNDING

Limited Member Resources

The Coalition's funding is entirely through cost awards. Its members, being small Northern Ontario municipalities, have extremely limited financial resources and the Coalition's participation has always been predicated on its eligibility for cost awards. This is not to say that members do not make in-kind contributions. As noted above Mr. Wray devotes a significant portion of his valuable time spearheading all facets of the Coalitions activities. Its member's employees also devote significant time in communicating with Mr. Wray, co-ordinating Coalition meetings, and articulating results of Board decisions to their respective Councils. As such, the Coalition's members all have "skin in the game".

To deny the Coalition eligibility for costs is to take away the voice of small Northern Ontario municipalities. This voice has always been a positive contribution to Board proceedings and the Coalition has always participated in such proceeding respectfully and in good faith.

The Importance of Precedence

In Procedural Order No. 1 the Board cites section 3.05 (i) of the *Practice Direction on Cost Awards* as the basis upon which to deny the Coalition eligibility for an award of costs. This section came into effect with the revised *Practice Direction on Cost Awards* the Board issued on March 19, 2012. Algoma Coalition has since been found eligible for an award of costs.

On June 30, 2014 the Board issued Procedural Order No. 1 in EB-2014-0055. In that order the Board determined that:

VECC, Energy Probe and the Algoma Coalition are eligible for an award of costs under the Board's Practice Direction on Cost Awards.

This determination was in keeping with all previous interventions by the Coalition in which it was similarly granted eligibility for cost awards.

In Procedural Order No. 1 of the within proceeding, the Board does not address the inconsistency with its previous findings nor does it offer any reason (aside from a recitation of Rule 3.05 (i)) for denying the Coalition eligibility for costs. It is thus impossible to reconcile Procedural Order No. 1 with previous Board Orders including that in EB-2014 0055, in which the Coalition was granted eligibility for costs notwithstanding the coming into effect of section 3.05 (i) over two years prior.

3) CLARIFYING THE COALITION'S MOTION

In its decision the Board unfairly chastised the Coalition's for filing its "Notice of Motion" in light of the Board's finding that the Procedural Order was a decision made by delegated authority. The Coalition is concerned that this chastisement was not only sharp Board practice, but may reflect internal bias against the Coalition.

Rule 8.01 of the Board's Rules of Practice and Procedure states:

8.01 Unless the Board directs otherwise, ***any party requiring a decision or order of the Board on any matter arising during a proceeding shall do so by serving and filing a notice of motion****.*

(emphasis added)

Rule 3.01 defines "motion" as "a request for an order or decision of the Board made in a proceeding.

Rule 2.01 and 2.02 provide:

2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious, and efficient determination on the merits of every proceeding before the Board.

2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

A plain reading of these Rules discloses that requests for Board decisions or orders on **any matter arising during a proceeding shall be made be through serving and filing a notice of motion**. This is precisely what the Coalition did. The Rules disclose no timeframe for bring filing such notice of motion and it should not be incumbent on the Coalition to pierce the Board's "corporate veil" to determine which of its decisions are made under delegated authority. The Coalition submits that, per the legal principle of

contra proferentem, any ambiguity in the Board's Rules should be interpreted in the Coalition's favour.

In addition, having reflected on this issue, Algoma Coalition submits that neither Rule 45.01 nor Rule 44.01(a) apply to its motion. There are two reasons for this.

First, if the Board is correct that Procedural Order No. 1 was made by an employee of the Board with delegated authority, then per Rule 1.01 these Rules would not apply given they are set out in Part VII.

Second, Part VII concerns motions requesting the Board review "all or part of a final order or decision". Although much ink has been spilled over what constitutes a final order, it is generally clear that for an order to be considered final it must dispose of the subject matter in its entirety or terminate a particular proceeding, leaving nothing else to be done but to enforce the execution of what has been determined. In contrast, an interlocutory order leaves something more to be adjudicated upon. As such, the term "final" order signifies an order which disposes of the case as to all the parties, where an "interlocutory" order leaves substantial proceedings yet to be had and does not end the task of adjudicating the parties contentions or rights. It cannot reasonably be said that Procedural Order No. 1 is anything but interlocutory.

Notwithstanding the foregoing, the Coalition submits that its notice of motion is in full compliance with Rule 44.01(a). For convenience Rule 44.01(a) is reproduced below:

Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
(i) error in fact;
(ii) change in circumstances;
(iii) new facts that have arisen;

> *(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.*

The Board cites the *Natural Gas Electricity Interface Review Decision* (the "NGEIR Decision") for an articulation of the threshold test. Before discussing the threshold test two preliminary matters must be addressed. First it should be noted that the NGEIR Decision concerned motions to review a "final" decision (i.e. EB-2008-0551). Second the NGEIR Decision interpreted the words "may include" as used in Rule 44.01(a) finding that Rule 44.01(a) simply gives a list of examples of grounds. As a result, in the NGEIR Decision, the Board found that it had jurisdiction to review the errors of mixed fact and law set forth in the motions at issue, which did not fall squarely within the list of enumerated grounds in Rule 44.01.

The threshold test, as articulated in the NGEIR Decision, is that

> *the grounds must "**raise a question as to the correctness of the order or decision**"*
> ...
> *In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel **failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature**"*

(emphasis added)

To briefly reiterate the Coalition's position in its notice of motion the Board's decision to deny the Coalition eligibility for an award of costs was:

1. incorrect;
2. inconsistent with above-noted sections of the Practice Direction on Cost Awards and the Board's Rules of Practice and Procedure; and
3. inconsistent with precedent decisions granting the Coalition eligibility.

The Coalition's position was clear in its notice of motion and the grounds set out therein are precisely as contemplated by the threshold test.

Further, the Coalition submits that the Board's decision to fix the evidentiary record after having erroneously denied the Coalition's eligibility for an award of costs in the procedure was unfair and significantly prejudices the Coalition.

4) CONCLUSION

For all the herein reasons, Algoma Coalition submits that it is eligible for an award of costs for its participation in this proceeding.

All of which is respectfully submitted