

January 6, 2016

RESS, EMAIL & COURIER

Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4


Attention: Ms. K. Walli, Board Secretary

Dear Ms. Walli:

**Re: Windlectric Inc. - Application for Leave to Construct (EB-2014-0300) -
Applicant Submissions Objecting to APAI Cost Claim**

We are counsel to the applicant, Windlectric Inc. ("Windlectric"), in the above-referenced proceeding. In accordance with the Board's Decision and Order dated December 10, 2015, please find enclosed a copy of Windlectric's submissions objecting to the cost claim filed on behalf of the intervenor APAI.

Yours truly,



Jonathan Myers

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cc: Mr. A. Tsopelas, Windlectric Inc.
Intervenors

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, schedule B (the Act);

AND IN THE MATTER OF an application by Windlectric Inc. for an Order or Orders pursuant to sections 92, 97 and 101 of the Act granting leave to construct transmission facilities in Loyalist Township in the County of Lennox and Addington.

SUBMISSIONS ON APAI COST CLAIM

January 6, 2016

A. INTRODUCTION

On September 22, 2014, Windlectric Inc. (“Windlectric” or the “Applicant”) filed an application with the Ontario Energy Board (the “Board”) seeking leave to construct certain transmission facilities pursuant to Section 92 of the *Ontario Energy Board Act* (the “Act”). In Procedural Order No. 1, dated November 26, 2014, the Board granted intervenor status to Laurie Kilpatrick and John Moolenbeek, on behalf of the Association to Protect Amherst Island (“APAI”). The Board granted cost eligibility to APAI in Procedural Order No. 3, dated February 24, 2015. The Board issued its Decision and Order on December 10, 2015 and invited APAI to file its cost claim in accordance with the Board’s *Practice Direction on Cost Awards* (the “Practice Direction”). The focus of Windlectric’s cost claim objection is on APAI’s December 16, 2015 cost claim.

B. WINDLECTRIC’S OBJECTION TO APAI’S COST CLAIM

APAI’s cost claim is for \$7,089.00 in legal fees, plus \$883.72 in disbursements and \$1,036.45 of HST, for a total claim of \$9,009.17.

APAI's claim for legal fees does not include any supporting invoices/dockets from its counsel that would permit a proper assessment of the billable hours being claimed. Based on the statement of legal fees provided by APAI, it cannot be determined whether such fees pertain exclusively to matters directly within the scope of the proceeding.

Whether or not APAI's claim for legal fees should be denied, in whole or in part, is a matter for the Board to determine consistent with the Practice Direction. To assist the Board, Windlectric offers its comments and observations below which, in Windlectric's view, show that APAI has not complied with certain principles set out in Section 5.01 of the Practice Direction with respect to the need to participate in the proceeding in a reasonably focused and responsible manner and to avoid unnecessarily lengthening the duration of the proceeding. On this basis, as discussed below, Windlectric objects to APAI recovering the full amount it claims for legal fees.

In addition, Windlectric objects to APAI recovering the full amount it claims for disbursements. As discussed below, this aspect of the claim has not properly been made, is not adequately supported and pertains to costs incurred largely for printing significant volumes of material that the Board found to be unrelated to the scope of the proceeding.

(a) Legal Costs

APAI seeks to recover \$7,089.00 for legal fees, plus \$921.57 in HST, for a total of \$8,010.57. APAI's cost claim does not include any supporting invoices or dockets from its counsel that would permit a proper assessment of the billable hours being claimed. Therefore, there is no way to ascertain whether the legal fees being claimed relate to matters that are exclusively and directly within the scope of the proceeding.

Even if it assumed that the amounts claimed are directly within the scope of the proceeding, it is Windlectric's submission that the Board should reduce the amount that APAI is permitted to recover on account of APAI's participation in the proceeding not being in accordance with key principles established under Section 5.01 of the Practice Direction¹, including in particular the

¹ Practice Direction, Section 5.01: "In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party has demonstrated through its participation and documented in its cost claim that it has:

- (a) participated responsibly in the process;
- (b) contributed to a better understanding by the Board of one or more of the issues in the process;

need to participate in a reasonably focused and responsible manner and to not unnecessarily lengthen the duration of the proceeding. Windlectric's submission in this regard is premised on the following observations, which show a consistent disregard for the timelines established by the Board's Procedural Orders and the scope of the Board's jurisdiction in the proceeding:

- Pursuant to the Notice of Application published on October 31, 2014, intervention requests were to have been received by the Board by November 17, 2014. APAI's intervention request was filed one week late on November 25, 2015.
- Pursuant to Section 4.01 of the Practice Direction, APAI's request for cost eligibility was to have been filed as part of its letter of intervention. APAI instead filed its request for cost eligibility on January 21, 2015, which was over two months after the filing deadline for intervention requests as specified by the Notice of Application.
- While APAI intervened on behalf of its members, it is apparent that APAI also engaged in a broader campaign to encourage and facilitate (through the preparation and distribution of a template or form of letter) the filing of numerous letters of comment and other correspondence from the individual members of APAI that it represents. This had the effect of duplicating representation for those individuals in the proceeding and introducing significant additional volumes of materials in the proceeding, which imposed considerable burden on both the Applicant and the Board.
- The Notice of Application asked for parties, at the time of requesting intervenor status by November 17, 2014, to indicate whether they thought an oral hearing was needed and to explain the supporting rationale. APAI made an unsupported request for an oral hearing in its intervention request on November 25, 2014. APAI subsequently filed a letter on December 15, 2014 setting out its reasons for seeking an oral hearing. APAI also

(c) complied with the Board's orders, rules, codes, guidelines, filing requirements and section 3.03.1 of this Practice Direction with respect to frequent intervenors, and any directions of the Board;

(d) made reasonable efforts to combine its intervention with that of one or more similarly interested parties, and to co-operate with all other parties;

(e) made reasonable efforts to ensure that its participation in the process, including its evidence, interrogatories and cross-examination, was not unduly repetitive and was focused on relevant and material issues;

(f) engaged in any conduct that tended to lengthen the process unnecessarily; or

(g) engaged in any conduct which the Board considers inappropriate or irresponsible.”

engaged in a broader campaign to encourage and facilitate the filing of multiple requests for an oral hearing by persons that were not parties to the proceeding and who appeared to have been APAI members. In Procedural Order No. 3, the Board noted: “[i]t is disappointing that on several occasions APAI submitted arguments concerning the type of hearing after the OEB deadline”.

- Pursuant to Procedural Order No. 2, an intervenor wishing to submit evidence in the proceeding was required to file such evidence by January 19, 2015. Interrogatories on the intervenor’s evidence were due January 29, and interrogatory responses from the intervenor were due February 12. APAI filed its evidence in a piecemeal and poorly organized manner which made it very difficult to follow. In addition, a significant amount of evidence was filed after the January 19 deadline. As the Board noted in Procedural Order No. 3, “APAI filed a substantial amount of additional evidence on January 25, 26, 28 and 29 and February 2nd”. By letter to the Board dated February 9, Windlectric expressed concerns with APAI’s late filings and pattern of delays and disregard for the timelines established by the Board. In Procedural Order No. 3, the Board stated it would not accept further evidence from APAI but allowed on the record evidence filed by APAI to and including February 2. As described in Procedural Order No. 3, APAI requested and received an extended deadline of February 20 for filing interrogatory responses. In addition, the Board permitted an additional round of interrogatories on the late-filed evidence. APAI was to file its responses to those further interrogatories by March 9, which entailed a total delay of one month from the February 12 deadline for filing APAI’s interrogatories responses under the initial interrogatory process. This month of delay was directly attributable to APAI.
- APAI was first notified as to the scope of the proceeding and the Board’s jurisdiction in the Notice of Application, which expressly specified that the Board would not consider factors such as “environmental, health, aesthetics or property value impacts”. The Board reiterated and expanded upon this pronouncement in Procedural Order No. 1. Nevertheless, APAI filed substantial volumes of materials that concerned matters outside the scope of the proceeding and required significant time and cost for review by Windlectric and Board staff. In Procedural Order No. 3, the Board observed that “most

of the evidence submitted by APAI concerns matters outside the OEB mandate in this proceeding as established by sections 92 and 96 of the Act” and that the “same is true of most of the new evidence that APAI proposes to introduce in an oral hearing”. In the Decision and Order, the Board noted that “[APAI] and a number of persons who are not Intervenor submitted a large volume of evidence related to environmental matters including the Applicant’s Renewable Energy Approval... which falls under the jurisdiction of Ministry of the Environment and Climate Change”.

Based on the foregoing, it is Windlectric’s submission that APAI, in the course of its intervention, has failed to respect certain key principles of participation which are germane to the Board’s assessment of cost awards pursuant to Section 5.01 of the Practice Direction. Recognizing that APAI is not an experienced intervenor before the Board, Windlectric has been very tolerant of APAI’s late filings and inconsistent service of documents on Windlectric and its counsel. However, given APAI’s repeated delays and lack of respect for the filing deadlines, as well as its efforts to introduce repetitive submissions from non-parties and substantial materials that are beyond the clearly delineated scope of the proceeding, Windlectric submits that the Board should permit APAI to recover 25% of its legal fees. Moreover, the recovery of this limited portion of its legal fees should be conditional upon the filing of appropriate supporting invoices/dockets which confirm the amounts claimed are directly and entirely within the scope of the proceeding. In Windlectric’s view, this approach represents a reasonable balance in the circumstances between the need to encourage participation by intervenors and the importance of encouraging that such participation is undertaken responsibly so as to respect the Board’s authority, the integrity of the Board’s processes and the need for procedural efficiency.

(b) Disbursements

APAI seeks to recover \$883.72 for disbursements, plus \$114.88 HST, for a total of \$998.60. In Windlectric’s view, APAI should not be permitted to recover the full amount claimed for disbursements because this aspect of the claim has not properly been made, the amounts are not adequately supported and the bulk of the disbursements relate to costs incurred for printing material that the Board found to be unrelated to the scope of the proceeding.

The claim for disbursements has not been properly made because it is unclear as to who incurred the relevant costs. On the one hand, the claim indicates that the disbursements were all incurred by Mr. Safayeni in the course of providing legal services. This is because the amounts are listed on the form completed in Mr. Safayeni's name. On the other hand, the disbursements are supported by a series of receipts from Staples stores in the Kingston area, for purchases that were for the most part made prior to Mr. Safayeni's firm being retained by APAI on March 2, 2015. It therefore appears that the disbursements were instead made directly by APAI. One exception may be the courier costs, but no supporting invoice or particulars are provided.

The claim for disbursements is not adequately supported. Aside from the absence of support for the courier cost, there is no information to demonstrate the relationship between the items listed in the Staples receipts and APAI's activities undertaken in connection with the proceeding. APAI has not shown that the amounts claimed are properly related to the proceeding and distinct from APAI's costs incurred to support other activities, such as its intervention in Windlectric's renewable energy approval proceeding or general office supply costs. For example, it is not clear whether purchases of items such as a "paper case", "jumbo hook", data storage devices, 3-hole punch, and file folders are directly related to its participation in the proceeding.

Finally, we observe that the bulk of the disbursements claimed are for printing and photocopies. As noted above, the Board observed in Procedural Order No. 3 that "most of the evidence submitted by APAI concerns matters outside the OEB mandate in this proceeding as established by sections 92 and 96 of the Act" and that the "same is true of most of the new evidence that APAI proposes to introduce in an oral hearing". In the Decision and Order, the Board noted that "[APAI] and a number of persons who are not Intervenors submitted a large volume of evidence related to environmental matters including the Applicant's Renewable Energy Approval... which falls under the jurisdiction of Ministry of the Environment and Climate Change". APAI was given clear instructions as to the scope of the proceeding in the Notice of Application and again in Procedural Order No. 1, but nevertheless chose to prepare and file large volumes of materials that it knew or ought to have known were not relevant to the proceeding. APAI should not now be permitted to recover its full costs of preparing those materials.

Based on the foregoing, Windlectric submits that APAI should be permitted to recover 25% of its claimed disbursement costs.

C. SUMMARY OF AMOUNTS OBJECTED TO

In summary, Windlectric submits that the Board should award APAI 25% of its claims for legal fees and disbursements. Based on APAI's total cost claim of \$9,009.17, the resulting cost recovery should be for a total of \$2,252.29. More particularly:

- the claim for recovery of legal fees, in the amount of \$7,089.00 plus \$921.57 HST, should be reduced by 75%. This works out to a reduction of \$5,316.75 on the fee portion and \$691.18 on the HST portion. The resulting award would provide \$1,772.25 plus \$230.39 for HST in respect of legal fees; and
- the claim for disbursements, in the amount of \$883.72 plus \$114.88 HST, should be reduced by 75%. This works out to a reduction of \$662.79 on the disbursement cost portion plus \$86.16 on the HST portion. The resulting award would provide \$220.93 plus \$28.72 HST in respect of disbursements.

All of which is respectfully submitted this 6th day of January, 2016.

WINDLECTRIC INC.

By its counsel

Torlys LLP



Jonathan Myers