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April 17, 2018

Reply To: Thomas Brett  
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Our File No. 168193

**VIA RESS, EMAIL AND COURIER**

Ontario Energy Board  
2300 Yonge Street  
27th Floor  
Toronto, Ontario  
M4P 1E4

Attention: Kirsten Walli,  
Board Secretary

Dear Ms. Walli:

**Re: EB-2016-0296/0300/0330: Union/EGD/NRG, Cap and Trade Compliance Plans  
BOMA's Motion to Review and Vary Decision and Order on Cost Awards**

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Please find attached BOMA's Notice of Motion to Review and Vary the Board's Decision and Order on Cost Awards.

Yours truly,

**FOGLER, RUBINOFF LLP**

A handwritten signature in black ink, appearing to read "Thomas Brett".

Thomas Brett

TB/dd

Encls.

cc: All Parties (*via email*)

**EB-2016-0296**

**EB-2016-0300**

**EB-2016-0330**

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

**AND IN THE MATTER OF** an application by Union Gas Limited, Enbridge Gas Distribution Inc., and Natural Resource Gas Limited for approval of 2017 Cap and Trade Compliance Plan cost consequences;

**AND IN THE MATTER OF** the Board's Decision and Order on Cost Awards dated March 28, 2018.

**NOTICE OF MOTION**

The Building Owners and Managers Association ("BOMA") will make a Motion to the Ontario Energy Board (the "Board") on a date and at a time to be determined by the Board.

**PROPOSED METHOD OF HEARING:** BOMA proposes that the Motion be heard orally.

**THE MOTION IS FOR** an Order of the Board:

To review and vary its March 28, 2018 Decision and Order on Cost Awards in the EB-2016-0296/0300/0330 proceeding (the "Cost Recovery Decision"), and make a cost award to BOMA of no less than \$60,000.00.

**THE GROUNDS FOR THE MOTION ARE:**

1. BOMA submitted a cost award of \$80,914.45. The Board panel awarded BOMA costs of \$22,000.00, or approximately one quarter the requested amount. BOMA is of the view that the decision contains errors of fact and that the reduction of seventy five percent

(75%) is unjustified, unfair, and punitive, and requests the Board to reconsider its decision.

2. First, neither EGD nor EPCOR raised the issue of the amount of BOMA's claim. Union was the sole complainant, and solely on the basis that BOMA's claim was substantially higher than the next highest. The next highest claims were \$25,532.86 (IGUA), \$25,451.84 (CME), and \$24,878.69 (APPrO). Union stated it was concerned with the discrepancy.
3. In replying to Union's concern, in its letter of December 7, 2017, BOMA stated that in order to properly address whether the cost consequences of companies' Cap and Trade Compliance Submissions should be recovered from ratepayers, BOMA needed to review the reasonableness, optimization, and cost-effectiveness of the Compliance Submissions. BOMA stated that since the utilities' compliance plans were the first ones submitted under the new Cap & Trade program, BOMA needed to understand the legal, regulatory, and economic context in which the submissions were made. To gain such an understanding, and to ensure that the utilities' compliance plans were consistent with both the legislative framework and the Board's Cap and Trade Framework, BOMA reviewed the Cap and Trade legislation and Ontario Regulation 144, both of which were lengthy and complicated documents. BOMA was the only intervenor to do that. BOMA also included a review of Quebec and California programs, given the fact that the imminent accession of Ontario to the WCI, planned for January 1, 2018 (and now in place), might well have had an impact on the shape of the 2017 compliance plan. In addition, BOMA reviewed several other documents, such as offset regulation protocols, the economic analysis of Ontario only versus an Ontario, Quebec and California allowance market,

including the short and longer term impacts on allowance prices, the secondary markets in Ontario and California, including the ICE futures market. Finally, it reviewed relevant material, including related to offsets, included abatement activities, the impact of the Green Investment Fund, and various ICF studies done for the Board or the utilities.

4. In its December 7, 2017 letter, BOMA also noted that its final argument:

- *"addressed a comprehensive analysis of the "prudency issue", given the nuances in the utilities' proposals on the prudency topic, including when the prudency review of the costs would take place;*
- *made a comprehensive analysis of the importance of enhanced DSM to the success of the utilities' cap and trade initiatives, and how those enhancements could be made;*
- *conducted a thorough assessment of the resources, personnel and otherwise, that the utilities were requesting to formulate and execute their compliance plans;*
- *offered support for some of the utilities' future investment ideas, and proposals for annual reports;*
- *presented the need for additional transparency in future cases;*
- *made suggestions to the Board for enhancements to the utilities' future submissions."*

With respect to the second bullet, the Board itself suggested there were parallels with respect to DSM, which BOMA noted in its IRs, cross examination and argument. BOMA contends that the interrelationship between DSM and Cap and Trade must be considered, that these matters cannot be treated as silos and it is critical to consider how synergies can be achieved for the sake of all customers and given that buildings account for such a large proportion of greenhouse gas emissions, the members of BOMA in particular. Our clients and all customers do not have the luxury of compartmentalizing these two critical policy imperatives and fully understanding the similarities and differences underpinning the duality of the policy and regulatory frameworks is critical.

5. Finally, given the fact that the utilities submissions were highly redacted, and given the intervenors' responsibility to provide a coherent assessment of the cost consequences of the utilities' proposals, BOMA needed to have as full an understanding as possible of the legislative and policy and regulatory underpinnings of the utilities' Compliance Plans. The time spent acquiring that understanding allowed BOMA to infer the approximate shape of the utilities' Compliance Plans (in a more thorough and comprehensive manner), which allowed BOMA to address the costs issue.
6. The Board panel, in its Cost Award Order, took issue with the eligibility for cost recovery of BOMA's costs incurred in order to understand the policy and legislative context of the utilities' Compliance Plans, the cost consequences of which the Board would determine to be recoverable in rates, or not.

The Board stated that:

*"The OEB finds that the level of BOMA's effort with respect to gaining its understanding of the broad cap and trade framework is not fully eligible for reimbursement. As per the OEB's Report of the Board – Regulatory Framework for Assessment of Costs of Natural Gas Utilities' Cap and Trade Activities, the OEB's role is not to approve the Compliance Plans but to assess these plans for cost-effectiveness and reasonableness".*

BOMA agrees with the OEB's statement of its mandate in the above quoted passage. However, the Board erred in asserting that BOMA asked the Board to approve, or assumed that the Board would approve, the utilities' Cap and Trade programs. Rather, BOMA addressed whether the cost consequences of the utilities plans were reasonable, cost-effective, and optimized, given the legislative and policy framework in which the plans were formulated. That is the test that the Board itself stated at p1 of the Cap and Trade Framework:

*"The OEB will assess the utilities' Compliance Plans for cost-effectiveness, reasonableness, and optimization and ultimately to determine whether to approve the associated cap and trade costs for recovery from customers".*

7. In order to determine whether costs of the Compliance Plans should be recovered from customers, the Board needs to determine whether these costs are reasonable, appropriate, and cost-effective in the circumstances, and that determination requires the Board to understand whether the Compliance Plans, the costs of which were in issue, were cost-effective, reasonable, and optimized, in light of the obligations and options the utilities had, given the legislative and policy framework within which those plans were formulated.
8. In other words, the reasonableness, cost-effectiveness, and optimization, of the Plans themselves, and the issue of whether the costs of the Plans should be recovered from ratepayers, are inextricably linked.
9. BOMA notes at least one major intervenor commented favourably on BOMA's Final Argument, and another intervenor, having requested and obtained BOMA's permission to do so, utilized some of BOMA's research and analysis in its own cross-examination. In addition, BOMA was one of very few intervenors that addressed all of the issues.
10. The Severity of the Reduction

The Board erred when it made an unreasonable and punitive reduction in BOMA's claim, from \$80,914.45 to \$22,000.00, a reduction of almost seventy five percent (75%), a virtually unprecedented percentage reduction of a cost claim. The only explanation the Board gave, other than to compare it with other cost claims that it had found

"reasonable", was to find that "the level of BOMA's effort to gain its understanding of the broad cap and trade framework is not fully eligible for reimbursement" (our emphasis).

11. Even accepting that the Board's proposition, cited at p3 above, may justify some reduction in BOMA's claim, it is not justification for a seventy five percent (75%) reduction in BOMA's claim. And, given that this was the first OEB proceeding dealing with the new Cap and Trade regime, BOMA would suggest that a major effort to understand the legislation, the regulations, and the policy background was necessary.
12. Moreover, rather than making a reasonable reduction to BOMA's claim, the Board awarded it \$22,000.00, which it stated "is the midpoint between the approximate average of all other intervenors' claims (\$19,000.00) and \$25,000.00, which is the approximate claim of the highest four of the other nine intervenors". In other words, the Board awarded BOMA costs in an amount several thousand dollars (over twelve percent (12%)) lower than the cost awards to several other intervenors. Several intervenors received awards well above BOMA's, including APPrO (\$24,878.69), CME (\$25,451.84), and FRPO (\$24,953.02). That was inappropriate and unfair, given the quality, breadth and depth of BOMA's efforts and submissions, made separately for each of Union and EGD.
13. BOMA submits that these errors of fact, and the punitive level of the disallowance constitutes grounds for the Board to rehear the portion of the Board's cost award order that relates to BOMA.

**THE FOLLOWING DOCUMENTARY EVIDENCE WILL BE USED AT THE HEARING OF THE MOTION:**

1. Final Argument of BOMA.

2. Cost Claim of BOMA.
3. Such further and other documents as counsel may advise and the Board may permit.

**All of which is respectfully submitted, this 17<sup>th</sup> day of April, 2018.**

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**TO: ONTARIO ENERGY BOARD**

P. O. Box 2319  
2300 Yonge Street  
Toronto, Ontario M4P 1E4

Kirsten Walli, Board Secretary

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**AND TO: INTERVENORS OF RECORD IN  
EB-2016-0296/0300/0330**



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

EB-2016-0296/0300/0330

AND IN THE MATTER OF an Application by Union Gas Limited, Enbridge Gas Distribution Inc., and Natural Resource Gas Limited for approval of 2017 Cap and Trade Compliance Plan cost consequences;

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## ONTARIO ENERGY BOARD

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### NOTICE OF MOTION

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