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November 7, 2018

Kirsten Walli

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

Dear Ms. Walli:

Re: EB-2018-0165: Response to letter of November 1, 2018 and submissions on confidentiality requests

We are counsel to the Distributed Resource Coalition (**DRC**) in the EB-2018-0165 distribution rates proceeding (the **Proceeding**) and in receipt of Mr. Smith's letter dated November 1, 2018 (the **Letter**). We write in response to the Letter, to provide the DRC's submissions on the confidentiality requests made by the Applicant in accordance with Procedural Order No. 1 (**PO1**), and to provide an administrative correction.

Response to Letter

In the Letter, Mr. Smith objects to the Board's approval of DRC as an intervenor after the Board's deadline for doing so, apparently on the basis that DRC includes certain commercial customers directly or indirectly in its broad membership (the **Late Objection**). Spark Power Corp. (**Spark Power**) is no longer participating in DRC for the purpose of the Proceeding. Energy Storage Canada (**ESC**) is a collective of energy storage entities, many of which are customers of the Applicant.

The Late Objection appears to be based on the grounds that Spark Power, ESC, or certain of ESC's members, are commercial customers and not end-use consumers. The Late Objection is therefore at odds with the Applicant's acceptance of other commercial/industrial intervenor groups, and curious given the long-standing history of commercial and industrial customer interests being appropriately represented in Ontario Energy Board rate proceedings that may impact them. Specifically, each and all of AMPCO, BOMA, and SEC are, and have been, approved, cost eligible intervenors. None of these intervenors met with objection.

Similarly, we note that not all members of AMPCO, BOMA, and SEC are direct customers of the Applicant. Therefore, if the Board were to accept the direct customer rationale in the Letter, none of AMPCO, BOMA, SEC, or IGUA would be permitted the right to be heard in accordance with the procedural fairness that has, and should continue to be, afforded to them for the benefit of all ratepayers in a wide variety of Board proceedings. Further, the Letter appears to rely upon Board jurisprudence that supported ESC's customer/intervenor status and cost eligibility in EB-2017-0049. In that proceeding, the Board reversed its initial exclusion of ESC, and upheld ESC's intervenor status and cost eligibility.¹ Moreover, the exclusion of the customers included in ESC appears to be inconsistent with section 22.02 of the Board's *Rules of Practice and Procedure*, as revised (the **Rules**), which would allow for the grant of intervenor status to entities that have a substantial interest, and will participate actively and responsibly, in the proceeding.² The inclusion of ESC is also supported by common law jurisprudence, which confirms that an entity whose legal rights or interests will be directly affected by a regulatory decision should generally be afforded standing to participate in a tribunal's decision-making process on the matter.³

Finally, DRC submits that its coalition model may best support the Board's enhanced efficiency and customer protection mandates, and the Applicant's prudent initiatives to address reliability, affordability, innovation, and related challenges. DRC confirms that it:

- has a direct and substantial interest in the Proceeding, in that members of DRC are directly affected by the rates, services, and approaches being proposed in Toronto Hydro's application and specifically in the Customer Price Cap Index framework;
- anticipates significant integration of DERs into the Toronto Hydro grid and customer base during the 2021 to 2024 period covered by the Customer Price Cap Index framework; and
- therefore has a substantial interest in the Proceeding, including insofar as it addresses integration of DERs into local distribution system planning (including O&M considerations), rate design, and cost allocation.

We therefore request that the Board clarify that ESC as a group of commercial/industrial customers, including customers of the Applicant, is generally appropriately included as a potential intervenor. We nonetheless note that ESC will not be taking an active role in DRC for this Proceeding, but reserves the right, subject to the Board's approval, to intervene actively in future similar proceedings. Alternatively, the Board may wish to understand how commercial industrial customers represented by all other relevant intervenors are afforded standing when other commercial customers are not. In the event that the Board is, in fact, considering excluding only one type of commercial/industrial customer from having standing in a proceeding that directly affects them and the rates and fees that they pay, the Board may wish to seek the input of all potentially impacted customer groups in this Proceeding (including, without limitation, AMPCO, SEC, BOMA) in order to avoid unintended and perverse outcomes that impede the Board's customer service mandate.

¹ EB-2017-0049, Decision on Motions to Review Intervention Request Decisions (November 2, 2017) at 2.

² Ontario Energy Board *Rules of Practice and Procedure* (last revised October 28, 2016), section 22.02.

³ Sara Blake, *Administrative Law in Canada*, 6th ed (LexisNexis, 2017) at 28; see generally *Corp. of the Canadian Civil Liberties Association v Ontario (Civilian Commission on Police Services)*, [2006] OJ No 4699 (ONCA), leave to appeal refused [2007] SCCA No 40; *Alberta Wilderness Association v Alberta (Environmental Appeal Board)*, [2013] AJ No 72; *Pembina Institute v Alberta (Environment and Sustainable Resources Development, Director)*, [2013] AJ No 1047.

Procedurally, the Late Objection is also at odds with the timing and process dictated by the Board in PO1 and the Rules. The Applicant was made aware of DRC's intent to intervene in writing on October 3, 2018 and DRC filed its Notice of Intervention requesting status and cost eligibility (the **Notice**) with the Board on October 16, 2018. The Notice was filed in accordance with the Rules and through the RESS system, which we understood to effect service on counsel. No objection was received on or before the timelines dictated by section 22.07 of the Rules, and in fact a further nine (9) days passed after the requisite date for objections before the Letter was filed. We therefore request that the Board give minimal weight and consideration to the Late Objection given its timing and impact on the orderly procedures set out by the Board in this Proceeding and the Rules, and the clarifications provided in this letter.

Confidentiality Requests

The Letter also advises of counsel's departure from the Board's direction in PO1, the Rules, and normal practice on confidentiality claims. PO1 requires the Applicant to provide the confidential materials to all counsel who have signed the Declaration and Undertaking with respect to confidential information. This includes counsel for DRC, who have signed the Declaration and Undertaking. However, the Letter indicates that Mr. Smith has unilaterally determined that the materials need, and will, not be provided to DRC counsel without further direction of the Board. DRC has therefore been deprived of the procedural rights afforded to it and the other Board-approved intervenors to make full response on the confidentiality claim and hereby reserves the right to do so once provided with the materials. In the absence of the specific filings that the Board ordered disclosed, and the inability to better assess the Applicant's confidentiality claim, DRC only generally relies upon the Rules to submit that the process should favour openness, transparency, and disclosure. DRC therefore submits that the materials should be disclosed, and where need be, the Applicant should be afforded the ample protections of the confidentiality and undertaking process.

Administrative Matters

Please update the Board's contact information for this Proceeding to reflect the correct telephone number for Mr. Steimle of the Electric Vehicle Society, which is 416.230.9271.

Sincerely,



Lisa (Elisabeth) DeMarco

- c. Crawford Smith and Charles Keizer, Torys LLP
Andrew Sasso, Toronto Hydro
Distributed Resource Coalition