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December 12, 2018

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Our File No. 184946

**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-2018-0164: Motion by Building Owners and Managers Association ("BOMA")  
to Vary Decision and Order on Cost Awards EB-2016-0296/0300/0330**

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Please find enclosed herewith BOMA's Reply Submission.

Yours truly,

**FOGLER, RUBINOFF LLP**

Thomas Brett

TB/dd

Encls.

cc: Laurie Klein, OEB  
Ljuba Djurdjevic, OEB  
All Parties of Record in the  
EB-2016-0296/0300/0330 proceeding  
(via email)

**Ontario Energy Board**

**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 Enbridge Gas Distribution Inc., Union Gas Limited and EPCOR Natural Gas Limited Partnership for approval of the forecast costs arising from their Cap and Trade Compliance Plans for the January 1 - December 31, 2017 time period;

**AND IN THE MATTER OF** a motion by the Building Owners and Managers Association pursuant to Rule 42 of the Ontario Energy Board's Rules of Practice and Procedure for an order or orders to vary the Decision and Order on Cost Awards EB-2016-0296/0300/0330.

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**Reply Submission of**

**Building Owners and Managers Association, Greater Toronto  
("BOMA")**

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December 12, 2018

**Tom Brett  
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**Counsel for BOMA**

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BOMA's reply submission addresses the comments of the Board Staff on BOMA's materials dated November 29, 2018.

BOMA notes that neither Union nor EGD made submissions on BOMA's appeal motion, notwithstanding the Board's invitation to do so. The only submission with respect to BOMA's claim was submitted by Board Staff.

The fundamental basis of the rehearing motion is that the Board's seventy-five percent (75%) reduction of BOMA's cost claim was, given the circumstances, unreasonable, and should be reviewed.

The Board Staff agrees with BOMA's position that Rule 42.01 is not exhaustive, but illustrative. The Board has made it clear in recent cases that a rehearing may be grounded on factors other than the points listed in Rule 42.01. For example, in EB-2015-0122, the Board stated:

*"The Board has broad discretion to determine when it will review a decision. The four delineated grounds for review under Rule 42.01 of the Board's Rules of Practice and Procedure are not exhaustive, and the Board may where it chooses to do so, review a decision even if it is not persuaded that the grounds fall squarely within the four enumerated grounds set out in Rule 42.01. The Board has chosen to do so in this case" (EB-2015-0122, October 22, 2016)."*

Thus, Staff parsing of the words of the NGEIR decision to determine whether the threshold test has been met is somewhat beside the point.

While the Board does have wide discretion in cost awards, it must still make a reasonable decision, one that reflects the principle and Board's well-established practice that eligible intervenors should recover the reasonable costs of participating in board proceedings.

The Board Staff argued that the Panel did consider all the evidence in the hearing, including all the intervenors' submissions. The Board Staff does not comment on the length, breadth, and quality, of BOMA's submission. Furthermore, at p7 of its submission, it quotes only a part of the passage in the Board decision, that addresses BOMA's submissions. Staff quotes the passage from the decision as follows:

*"... BOMA has defended its claim on the basis that it had to complete extensive research and analysis on the regulatory framework in Ontario and on the broader anticipated cap and trade market. 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 (emphasis added)".*

However, the full paragraph on p4 of the Board's Decision and Order on Cost Awards, from which Staff extracted the quote above, reads as follows:

*"BOMA has defended its claim on the basis that it had to complete extensive research and analysis on the regulatory framework in Ontario and on the broader anticipated cap and trade market. 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. The OEB does not consider BOMA's efforts to be commensurate with what would be required to assess the reasonableness of the cost consequences of the proposed plans." (Decision, p4)*

The Board made two substantive comments in that paragraph. The first was 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". Perhaps not, but not being "fully eligible" is a long way from what the Board did in this case, which was to reduce the claim by seventy-five percent (75%). Staff did not address this discrepancy, an important aspect of BOMA's request for a rehearing.

Second, contrary to Board Staff's assertion that BOMA read between the lines of the paragraph, the paragraph from the decision makes clear in the last two (2) sentences that the Board determined that BOMA had analyzed the proposed plans themselves, rather than the reasonableness and cost consequences of the proposed plans. There is no inference required.

The Board made it perfectly clear by the position of the two (2) sentences, as follows:

*"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. The OEB does not consider BOMA's efforts to be commensurate with what would be required to assess the reasonableness of the cost consequences of the proposed plans." (Decision, p4)*

However, as BOMA pointed out in its submissions in Additional Materials filed on November 14, 2018, this conclusion is incorrect. In order to assess the reasonableness and cost consequences of the proposed plans, the intervenors must understand the content of the plans, and the context in which they were made. The Board's failure to accept this proposition, combined with its failure to offer any reason for such failure, and consequently, its decision to disregard three quarters of BOMA's analysis as unreasonable. BOMA accepts the fact that it may have gone too deeply into the context of the plan and its costs, but contends that the reduction to its claim was excessive. The error is all the more egregious given that the Board drew a veil of near total secrecy over the evidence, while at the same time, expecting the intervenors to make detailed comments. Staff's comments simply compounded that by arguing that BOMA did far too much (four times too much) work to address the reasonableness and cost consequences of the plans. BOMA's additional effort was necessary, in part because of the magnitude of the redactions.

Staff went on to make the following comment:

*"OEB staff submits that, in determining "reasonable" costs, the OEB is permitted to consider the cost claims of all participants and, where the scope of participation of all intervenors (or groups of intervenors) is comparable, then comparison of cost claims is appropriate. Furthermore, when the majority of cost claims of comparable participants fall within a relatively narrow range and, all other things equal, there is an outlier cost claim amount, then it may be necessary and appropriate to bring the outlier within the range of the majority." (Staff Submission, p9)*

This comment is curious in many respects. First, it ignores the very large difference in the scope of participation of the intervenors. The depth and breadth of their submissions were not comparable, as BOMA demonstrated in its submissions. So, the comparison of BOMA's cost claim to the average claim in this instance is not appropriate.

The second sentence "all other things equal", is not correct. "All other things" are not equal, given the breadth, depth, and quality, of BOMA's submission. Board Staff have simply ignored the difference between BOMA's submissions and those of other intervenors, which reflects the different approach BOMA took to its task.

Moreover, outlier is a pejorative term for a claim that is different from the majority position. Second, why is it "necessary and appropriate" that the "outlier" be brought within the range? What is the basis for this statement? As BOMA pointed out in its additional materials (p11), requiring all the cost claims to be within a narrow range is not a reasonable method for allocating costs. Claims must be judged on an individual basis in order that claimants may receive their reasonable costs of participating in the proceeding. Using the average, or mean, claim as the principal guide to award costs is an arbitrary decision, rather than a reasonable one. Staff ignored BOMA's submissions on this point.

### **The Merits of the Motion**

It is telling that Board Staff had very few comments on the merits of the motion.

The Board Staff's comments at p11, reproduced below, in particular the underlined part of the paragraph, are difficult to understand:

*"OEB staff suggests that BOMA's in-depth research resulted in BOMA speculating that the Gas Utilities' 2017 compliance strategies would consist of allowances purchased in the primary and secondary markets. BOMA's speculations (or inferences) about the Gas Utilities' 2017 compliance strategies was not based on the non-confidential evidence but on the strictly confidential evidence that none of the intervenors had access to. Therefore, OEB staff suggests that BOMA's inferences or speculation about the possible makeup of the Gas Utilities' 2017 compliance strategies would most likely not have assisted the panel in its review of the cost effectiveness of the 2017 Compliance Plans as the panel already had access to the strictly confidential evidence."* (our emphasis)

BOMA, of course, did not rely on strictly confidential evidence, as Staff claimed, as it did not have access to the strictly confidential evidence. More importantly, Staff misses the main point of BOMA's submissions, which was that by doing additional, more detailed, analysis of publicly available materials, BOMA was able to draw conclusions about the extent to which the utilities' plans were cost-effective and reasonable, even though it did not have access to the confidential information. Moreover, one would expect the Board to be interested in having input on the key issues from more than one source, especially if that second source involved a thorough and professional analysis by a very experienced counsel.

As to Staff's comment under "Level of Effort" on p12, BOMA cannot understand the comment, and so cannot respond to it.

In conclusion, BOMA believes that Staff did not address the substance of BOMA's submissions, on either the threshold or the substantive issues.

All of which is respectfully submitted, December 12, 2018.

A handwritten signature in black ink, appearing to read "Tom Brett", written over a horizontal line.

**Tom Brett**  
**Counsel for BOMA**