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DECISION AND ORDER ON COST AWARDS

EB-2018-0165

TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

**Application for electricity distribution rates beginning January 1, 2020 until
December 31, 2024**

BEFORE: Lynne Anderson
Presiding Member

Susan Frank
Member

Michael Janigan
Member

April 9, 2020

INTRODUCTION AND SUMMARY

This is a decision of the Ontario Energy Board (OEB) on cost claims filed with respect to this Toronto Hydro-Electric System Limited (Toronto Hydro) proceeding.

Toronto Hydro filed a five-year Custom Incentive Rate-setting application with the Ontario Energy Board (OEB) on August 15, 2018 (updated September 14, 2018) under section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to its distribution rates, to be effective January 1, 2020 to December 31, 2024.

The OEB granted the following parties intervenor status and cost award eligibility:

- Association of Major Power Consumers of Ontario (AMPCO)
- Building Owners and Managers Association, Greater Toronto (BOMA)
- Consumers Council of Canada (CCC)
- Distributed Resource Coalition (DRC)
- Energy Probe Research Foundation (Energy Probe)
- Greater Toronto Apartment Association (GTAA)
- Mr. Norman Hann (Mr. Hann)
- School Energy Coalition (SEC)
- Vulnerable Energy Consumers Coalition (VECC)

On February 20, 2020, the OEB issued its Decision and Rate Order in which it set out the process for intervenors to file their cost claims by March 5, 2020, for Toronto Hydro to object to the claims by March 12, 2020 and for intervenors to respond to any objections raised by Toronto Hydro by March 19, 2020.

AMPCO, BOMA, CCC, GTAA, SEC and VECC each filed cost claims by the March 5, 2020 deadline specified in the Decision and Rate Order. DRC and Energy Probe filed cost claims on March 9, 2020 and Mr. Hann filed his cost claim on March 11, 2020.

On March 12, 2020, the OEB issued Procedural Order No. 10 noting that a number of intervenors filed cost claims after the deadline and Toronto Hydro would be allowed a reasonable period of time in which to review the claimed costs. The revised schedule set out in Procedural Order No. 10 allowed Toronto Hydro to object to the cost claims by March 18, 2020 and allowed intervenors to respond to any objections raised by Toronto Hydro by March 25, 2020.

On March 18, 2020, Toronto Hydro filed a letter stating that it had no objections to the claims made by AMPCO, BOMA, CCC, GTAA, SEC and VECC. Toronto Hydro stated that it had concerns with DRC, Energy Probe, and Mr. Hann's cost claims as summarized below. DRC, Energy Probe and Mr. Hann responded to Toronto Hydro's objections. These responses are also summarized below.

DRC

Toronto Hydro submitted that DRC's claim was disproportionate to the narrow scope of DRC's interest and contribution to the proceeding as compared to other intervenors. Toronto Hydro noted that DRC's cost claim of \$133,453.37 exceeded the average claim among all of the intervenors. Toronto Hydro further noted that DRC's claim was on par with (and in some instances higher than) the claims made by other parties (AMPCO, BOMA, CCC, SEC and VECC) whose interventions had a much broader scope in the proceeding and who contributed to exploring all of the material and relevant issues.

Toronto Hydro noted that DRC stated that its role as intervenor was to provide the OEB with the "unique perspective of DER residential customers, small commercial and industrial customers, as well as DER-related non-profit organizations, owners, and developers."¹ Toronto Hydro further noted that DRC stated in its costs claim that it "made reasonable efforts to ensure that its participation in the hearing was focused on material issues" and that it took a "surgical, principled, and coordinated approach" in addressing those issues. Toronto Hydro submitted that DRC's cost claim did not reflect such an approach. Rather, DRC sought costs at a level commensurate with, or higher than, other intervenors whose contributions assisted the OEB in exploring all of the relevant and material issues on the OEB-approved Issues List. Toronto Hydro submitted that the OEB should reduce the cost award to DRC to reflect DRC's proportionate contribution to the proceeding.

In response to Toronto Hydro's objection, DRC noted that Toronto Hydro failed to acknowledge that DRC was the only intervenor to incur the costs of expert evidence, which was sanctioned and relied upon by the OEB. DRC noted that even with the expert evidence and all attendant processes, DRC's costs were less than or consistent with most of the other intervenors.

DRC estimated that approximately 32% of its costs were associated with unanticipated expert evidence interrogatory and qualification challenges. DRC further noted that its expert evidence and submissions also contributed to the OEB's understanding of new

¹ DER refers to Distributed Energy Resources.

and emerging issues directly in Toronto Hydro's application. DRC's interrogatories, submissions, and expert evidence probed key issues that were not addressed by any other intervenor relating to load forecasts, productivity, reliability, Operations, Maintenance & Administration (OM&A) costs, capital budget and plans, electrification of City of Toronto fleet resources, Toronto Hydro fleet renewal, data requirements, and energy storage proposals.

Energy Probe

Toronto Hydro noted that Energy Probe's claim of \$140,606.59² was disproportionate to Energy Probe's contribution to the proceeding, as demonstrated by the substantial and unexplained increase from the costs awarded to Energy Probe in Toronto Hydro's 2015-2019 Custom IR proceeding.³

Toronto Hydro stated that, in this proceeding, many intervenors were able to draw on their experience from Toronto Hydro's previous Custom IR proceeding to streamline their efforts and reduce costs. However, Energy Probe is the sole intervenor seeking more costs in the current proceeding. Toronto Hydro stated that the requested increase is not immaterial and is not justified by a greater contribution to the proceeding. Toronto Hydro submitted that the OEB should reduce Energy Probe's costs award to reflect a decrease from the 2015-2019 Custom IR proceeding, or at the very least be commensurate with the costs that the OEB awarded Energy Probe in that proceeding.

In response to Toronto Hydro's objection, Energy Probe noted that its cost claim has been revised to \$135,686.29 to correct an error pointed out by OEB staff. Energy Probe also stated that its cost claim is lower than BOMA's claim of \$157,692.80 and SEC's claim of \$150,667.97.

Energy Probe noted that Toronto Hydro argued that the OEB should not award Energy Probe more than the \$75,085.15 amount that it awarded to Energy Probe in Toronto Hydro's 2015-2019 Custom IR proceeding. Energy Probe submitted that although the two proceedings may seem similar at a high level, the evidence presented in support of the issues of concern to Energy Probe was very different. Energy Probe noted that in the current proceeding Toronto Hydro filed evidence claiming increased frequency of severe weather events in support of its capital and OM&A expenditures and Energy Probe was one of the few intervenors that tested this evidence by interrogatories and cross-examination and addressed it in argument.

² On March 18, 2020, Energy Probe revised its total cost claim to \$135,686.29 due to errors in its original filing.

³ EB-2014-0116.

Energy Probe also stated that it was one of the few intervenors that addressed system reliability, Total Factor Productivity and Total Cost Benchmarking. Energy Probe also stated that it was only intervenor to address the issue of revenue / cost ratios for the residential rate class and the OEB accepted Energy Probe's submission, resulting in a material reduction to residential rates for 2020-2024.

Energy Probe also noted that in the current proceeding, DRC filed evidence and put forward an expert witness dealing with matters of concern to Energy Probe but not to most other intervenors. Energy Probe posed interrogatories to DRC, cross-examined the DRC expert witness and filed argument on matters brought forward by DRC. Energy Probe noted that DRC was not an intervenor in Toronto Hydro's previous Custom IR proceeding.

Energy Probe submitted that its cost claim of \$135,686.29 for its participation in the current proceeding is a reasonable amount for its effort in dealing with the many issues and the large amount of evidence in this case, and considering that it is lower than the amounts claimed by two other intervenors.

Mr. Hann

Toronto Hydro noted that Mr. Hann claimed a total of \$96,071.66 in costs in this proceeding at the OEB consultant / expert rate of \$330 per hour. However, the OEB was clear in granting him intervenor status that his participation would be as "an individual representing his own interests" and not as an expert or consultant.

Toronto Hydro stated that the OEB advised Mr. Hann in its November 27, 2018 letter, that section 6.04 of the *Practice Direction on Cost Awards* restricts the types of costs and disbursements that an individual such as Mr. Hann may claim in OEB proceedings. In particular, "while wage or salary losses incurred as a result of participating in an OEB hearing, may be claimed, legal or consultant fees are not generally permitted to be claimed by individuals under the OEB's Cost Award Tariff."

Toronto Hydro further stated that despite the individual nature of Mr. Hann's participation, his claim exceeded the claims of CCC and VECC that focused on all the relevant and material issues in the proceeding and contributed to a better understanding of all of these issues. Toronto Hydro submitted that, even if Mr. Hann is entitled to costs as an expert (which he should not be), any award should be substantially reduced to reflect Mr. Hann's proportionate contribution to the proceeding.

In response to Toronto Hydro's objection, Mr. Hann noted that in the OEB's November 27, 2018 letter, the OEB did not explicitly state that "legal or consultant fees" were not permitted for individuals. The letter stated the fees "are not generally permitted to be claimed by individuals". Mr. Hann further noted that Toronto Hydro did not provide any evidence to support the claim that Mr. Hann was not an expert nor that he only represented himself and did not represent the customers of Toronto Hydro.

Mr. Hann submitted that the total cost claim of \$96,071.66 for his full professional participation in this proceeding was both reasonable and worthy of being awarded. Mr. Hann further submitted that this is based on his professional experience / expertise and the complexity and volume of the record. Mr. Hann also stated that for the key activities of Interrogatories Preparation, Argument Preparation and Oral Hearing Preparation and Attendance, the work effort was at or below the other intervenors.

Mr. Hann also stated that he represented all customers from a perspective that other intervenors, for the most part, did not. Mr. Hann stated that the *Practice Direction on Costs Awards* does not preclude an individual from receiving compensation provided they meet the requirements listed in sub-sections (a) to (g) of section 5.01 of *Practice Direction on Costs Awards*. Mr. Hann stated that Toronto Hydro did not argue that Mr. Hann did not adhere to those requirements.

Mr. Hann further submitted that he provided an important contribution, in terms of both quality and quantity of issues addressed in the proceeding, that he believes was of assistance to the OEB in reaching its decision.

Findings

The OEB has reviewed the claims filed to ensure that they are compliant with the *Practice Direction on Cost Awards*.

The OEB has assessed the costs claims and considered whether they are reasonable in the context of this proceeding, and the scope of the intervention by each intervenor.

The OEB approves the cost claims for AMPCO, CCC, GTAA, and VECC. The OEB concludes that the cost claims filed by the other intervenors must be adjusted to reflect appropriate levels of participation, informed by the OEB's assessment of the assistance provided to the hearing panel by that participation.

The OEB finds the preparation time claimed by BOMA to be excessive, and the cost award is reduced by 60 hours. The preparation time claimed by BOMA is more than 325

hours. The OEB believes that this time could have been reduced if BOMA had better coordinated its approach to assessing the application with other intervenors. In the absence of coordination, the OEB expects intervenors to focus on the areas that are the most important to their clients. The OEB is also reducing BOMA expenses by \$679.80 to be compliant with the Government Travel, Meal and Hospitality Expenses Directive. Business class travel is not permitted, therefore the travel-related disbursement has been reduced to reflect an equivalent economy class fare. In addition, the maximum amount for accommodations is \$200 per night, therefore the accommodation-related disbursement has been reduced to reflect this maximum amount.

DRC's intervention was specifically directed to issues related to distributed energy resources. The OEB acknowledges that DRC filed expert evidence, and was required to respond to interrogatories, to qualify the expert witness and to prepare for cross-examination. Even with these requirements, given the limited scope of DRC's intervention and the narrowly focused assistance that it provided to the OEB, the OEB concludes that DRC's claim for preparation for the oral hearing, argument preparation and case management of over 200 hours is excessive. The OEB is reducing the cost award for this time by 90 hours apportioned pro rata between legal counsel. The OEB permitted the filing of expert evidence based on DRC's estimate that the evidence would cost between \$15,000 and \$25,000 excluding hearing time. This provided a very broad range that should have been sufficient for the work that was provided including witness hearing time. The amount claimed was \$30,538.25. The OEB is reducing the cost award for the expert evidence by \$5,538.25 to \$25,000, inclusive of HST.

The OEB concludes that Energy Probe's claim of over 235 hours for interrogatory preparation and oral hearing preparation is excessive and the OEB is reducing the cost award by 50 hours. When there is extensive preparation early in the proceeding, such as for interrogatory preparation, the OEB expects that preparation time later in the proceeding would be reduced.

Mr. Hann was granted intervenor status as an individual representing his own interests. Mr. Hann was not granted status as either an analyst or a consultant. On that basis, the OEB is not providing compensation that would be provided under the *Practice Directions on Cost Awards* for eligible analysts / consultants. This decision is not based on an individual intervenor's qualifications. Mr. Hann stated that he did not represent just himself as a customer but all customers who are trying to manage their electricity costs. The OEB disagrees. Toronto Hydro has nearly 800,000 customers. It would not be reasonable for the OEB to provide ratepayer-funded cost awards to individual customers in a regulatory proceeding. Self-appointment does not confer representative status on an individual intervenor. It is clear that the OEB did not grant Mr. Hann

intervenor status in a representative capacity, but rather to advance his own interests and concerns with Toronto Hydro's application. Despite this, in recognition of the effort that Mr. Hann undertook in this proceeding, the OEB will grant an honorarium of \$1,000 and recovery of the claimed disbursement costs.

While SEC's cost claim is significantly greater than other intervenors, the OEB notes that SEC coordinated its efforts with other intervenors and took the lead on numerous aspects of the application. The OEB also found that SEC's participation was of significant value in assessing the application. However, SEC recorded 96.1 hours for attendance at the oral hearing. The duration of the oral hearing was approximately 10 ½ days, therefore 96.1 hours is difficult to reconcile with the record. No other intervenor claimed more than 65 hours for attendance at the oral hearing. Taking all of these factors into consideration, the OEB is reducing SEC's claim by 20 hours apportioned pro rata between legal counsel.

THE ONTARIO ENERGY BOARD ORDERS THAT:

Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Toronto Hydro-Electric System Limited shall immediately pay the following amounts to the intervenors for their costs:

• Association of Major Power Consumers of Ontario	\$114,175.20
• Building Owners and Managers Association, Greater Toronto	\$134,639.00
• Consumers Council of Canada	\$84,275.40
• Distributed Resource Coalition	\$102,935.53
• Energy Probe Research Foundation	\$118,158.28
• Greater Toronto Apartment Association	\$56,521.81
• Mr. Norman Hann	\$2,168.61
• School Energy Coalition	\$144,831.78
• Vulnerable Energy Consumers Coalition	\$69,522.66

DATED at Toronto April 9, 2020

ONTARIO ENERGY BOARD

Original signed by

Christine E. Long
Registrar and Board Secretary