Shepherd Rubenstein

By EMAIL and RESS

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Our File: EB20200194

Ontario Energy Board
2300 Yonge Street
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Toronto, Ontario
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Attn: Christine Long, Registrar

Dear Ms. Long:

Re: EB-2020-0194 – Hydro One Tax Implementation – SEC Cost Claim

We are counsel to the School Energy Coalition ("SEC"). Pursuant to the Board's Decision in this matter, this letter consititutes SEC's response to the Applicant's objections to SEC's cost claim filed on June 21, 2021.

The Board will perhaps appreciate the irony of Hydro One spending more ratepayer money objecting to SEC's cost claim than the amount it is seeking to have disallowed. One could argue that a ten page factum of opposition, plus a 270 page Book of Authorities, is over the top. It could not be to save Hydro One money, of course. It could only be to create a chill amongst intervenors who seek to put the best case forward for their members, the customers who pay all of Hydro One's bills.

That having been said, there are issues raised in the submissions of Hydro One that should be addressed. They include at least the following:

- The suggestion that winning or losing on a motion or the overall substantive issues is a deciding factor in assessing costs. The Board does not use the concept of "loser pays" in cost awards.

- The proposal that arguing strongly for the position of customers is not allowed, while arguing strongly for the position of the utility is just fine.

- The argument that a modernized OEB should include greater restrictions on the participation in Board proceedings by customers and their representatives.

We will deal with each of those below.

The Motion

Hydro One objects that SEC asked interrogatories relating to the calculation of their claim to collect in rates $2.6 billion of federal and provincial income taxes that they will never pay. The purpose of the SEC questions was to understand the best ratemaking approach for that collection, and the methods the Board should employ to ensure that the customers did not pay tax again later if any of the "bumped" assets were sold for more than their tax UCC.

Hydro One refused to answer those questions, and SEC filed a motion asking the Board to order them to respond. Other customer groups supported SEC's position. Board ultimately determined that the answers were out of scope for this proceeding, although they could well be in scope in a subsequent proceeding (i.e. Hydro One's next rebasing).

In our submission, the Board should not deny costs for any step in the proceeding unless it determines that the step was frivolous, repetitive, or obviously unhelpful to the Board.

In this, the Board's approach is not similar to that in a court proceeding. In a court proceeding, often the loser pays the costs of the winner's participation. Two or more sides each have different economic interests, and are spending their own money to defend those interests. Loser pays the winner.

In proceedings before the OEB, the ratepayers, in their rates, pay all of the costs associated with the proceeding. Costs of intervenors are reimbursed because a) intervenor organizations bring perspectives before the Board that might not otherwise be presented, and b) the ratepayers are in any case paying for the utility costs to defend utility interests, and the Board's costs to adjudicate the issues, so it is right that the same source (the ratepayers via the utility) pay the costs of those defending ratepayer interests. The concept of costs is completely different.

From a pragmatic point of view, a utility should prefer this approach. It is a rare that a utility "wins" in a contested Board proceeding, in the sense that the Board approves what they asked for. Therefore, a principle that the winner is reimbursed and the loser pays would tend to hurt utility shareholders more than intervenors.

On the other side, it is self-evident that the utilities have significantly more financial and other resources than intervenors (since they are funded by the ratepayers). To introduce a significant risk of "winner takes all" could be expected to prevent the customers and their representatives from raising legitimate issues to the Board, for fear they would have to suffer debilitating financial consequences. This is already the case with court proceedings, where utilities rely on teams of $1000 per hour lawyers, while intervenors rely on pro bono lawyers, and could not participate at all if there were any risk of cost awards against them.

There are circumstances in which intervenors should be denied costs at the OEB, but they are those that are outlined above. If a step initiated by an intervenor, like a motion, is frivolous or repetitive, or otherwise obviously unhelpful to the Board, the OEB can step in to impose a costs penalty where warranted. This is part of the OEB's overall responsibility to control its own process. It is also part of the expectation on intervenors that they will only raise legitimate issues, and not waste the Board's time.

SEC has a long history before the Board, and has many times faced refusals by utilities to answer interrogatories. How many times has SEC responded to those refusals with a motion for better answers? Is it 2% of the time, or 5%? It is not a lot. SEC does not file motions for better answers lightly, although often we believe that better answers should be provided, and

would be helpful to the Board. We have to weigh that conclusion with the impacts on the process. Most of the time, we try to find another way to deal with the missing information.

SEC has also only rarely had its cost claims reduced. Hydro One searched around for some examples, and found a couple. One of them was a reduction of 20 hours (about $6,000, i.e. 4%) against the Toronto Hydro cost claim of $150,000, because of an error in SEC's allocation of hours between categories. The second was the Hydro One Distribution 2021 rates proceeding, where SEC and others made submissions on an issue that was known to be out of scope, and requested that the Board exercise its discretion to allow costs. While the Board did not exercise that discretion in favour of SEC and other intervenors, the situation is not similar to the current one. Costs were not denied because we wasted the Board's time. They were denied because we knowingly took the risk that we might not be able to recover for those issues.

SEC has for many years required their counsel – the undersigned – to undertake a rigorous approach to cost claims. We often write off hours that we think should not be included, and we have multiple layers of review of every claim. The Board knows our history, and knows that our approach is a responsible one.

In this case, the interrogatories and the motion were fully justified. The amount involved in this proceeding is substantial. The case had already been through four previous levels of adjudication (three by the Board, one by the Court, not all of them consistent), and there was legitimate doubt about how much room intervenors would have to minimize the impact of this $2.6 billion tax claim on customers.

SEC did not in any way deny the Court decision, nor ignore the Board's procedural order. Rather, we sought to find an interpretation of the Court decision that would allow the Applicant to recover the full amount they sought to collect, while keeping the impact on customers as low as possible.

In that respect, SEC took an approach similar to that of counsel for Hydro One. That is, we interpreted the facts and the law in the manner most beneficial to our clients. SEC made an argument on the motion that was not only grounded in the facts, and based on the Court decision, but specifically gave up the previous positions SEC had espoused that Hydro One should not be able to collect all of the deferred taxes.

What Hydro One appears to say, in their submissions, is that they are perfectly entitled to keep pushing as hard as possible for the utility's interests, and against the customers' interests, but counsel for customers cannot do the same.

Had the interrogatories and motion been frivolous, SEC would assume the Board would have so stated in its decision on the motion. It did not. In fact, what the Board said is that it would not deal with the concerns raised by SEC in this proceeding, but that the Board panel in the next cost of service case may deal with those issues.

Hydro One has proposed that 50% of the time spent preparing interrogatories ($2204.07), and 100% of the time spent on the motion ($10,289.78), should be denied.

Final Argument

Hydro One also proposes that the Board deny 50% of SEC's costs associated with Final Argument ($6442.13) on the basis that it was not appropriate for SEC to propose a method and

structure of recovery of the deferred taxes from customers that was different from the ones proposed by Hydro One.

Hydro One's position on this is inappropriate.

SEC was faced with a Court decision in which Hydro One was to be entitled to collect $2.6 billion of "expenses" from customers that would not actually be spent. What should we have done? Hydro One thinks SEC should have rolled over and played dead. "Just give us our money", they apparently thought.

What SEC actually did is re-think this $2.6 billion problem within the parameters expressed by the Court, and binding on the Board. That's what lawyers do. Indeed, that is what they are supposed to do, or they are not properly serving their clients, and they are not working to be helpful to the Board.

In this case, SEC identified two areas in which it could reduce the impact of the Court decision on its member schools, while still being consistent with the Court decision. First, it could spread the recovery over the lives of the assets. Second, it could legitimately argue that carrying costs should be zero. However, the first proposition only really worked if the second was decided favourably.

Interestingly, on the carrying costs the Board rejected SEC's argument (which had the support of others), but also rejected Hydro One's argument, and instead came down somewhere in the middle.

The inclusion of carrying costs, of course, meant that on the recovery period, it no longer made sense to consider the lengthy periods proposed by SEC and others.

Hydro One argues that SEC should not have made its argument on the recovery period, apparently because it was not one of the options Hydro One had proposed. That is not how this process works. Counsel for intervenors make arguments on the customers' behalf, and counsel for utilities make arguments on the utility's behalf. The Board sees different perspectives, and makes a determination for one or the other, for somewhere in the middle, or for something completely different.

In short, you don't have to win to be helpful. SEC often loses on points it raises in argument. That doesn't make them unhelpful arguments. That just makes them perspectives the Board needed to hear.

The Modernized OEB

Hydro One proposes to the Board that the modernization of the OEB should involve additional restrictions on intervenors, including more "assertive" denials of cost reimbursement.

It is, of course, true that utilities like Hydro One would prefer it if customers did not fight so hard against their proposed rate increases. Those utilities (and it is certainly not all of them) would prefer if customers would simply rely on utilities to be fair, and to ensure that proper information is placed before the regulator. Not all customers agree.

To the best of our knowledge, neither the Modernization Review Panel nor the OEB has said that less participation by customers is a goal that should be pursued. Hydro One has said that, certainly, but the Board has not.

Thus, to hang their hat on modernization as a reason to reduce cost reimbursement for customers defending their rights is perhaps to hang that hat on a non-existent hook. Modernization is about making better decisions, and making them in a more efficient manner. It is not about implementing a bias in favour of utilities, and against the customers. That would be a real surprise, but is not really likely to happen at the Ontario Energy Board.

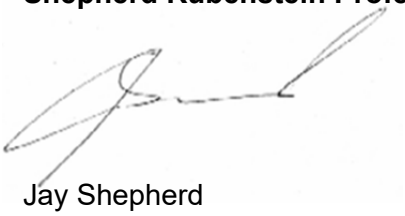
SEC has a history of participating responsibly in hundreds of Board proceedings. We have won and we have lost, and some of the positions taken by SEC have been strong, even strident sometimes. They have never been unreasonable. They are the positions taken by customers intent on defending their rights, often vigorously. We believe the Board will agree that SEC has added value to OEB processes, and has not abused its position as an intervenor to harm or disrupt the Board in any way.

Equally, it did not do so in this case.

Fighting for the customers is not the same as harming the Board's proceedings. Fighting for the customers is why the Board has intervenors, and why they are needed. Hydro One's attempt here to stifle that participation is ill-conceived, and should be completely rejected.

All of which is respectfully submitted.

Yours very truly,
Shepherd Rubenstein Professional Corporation



Jay Shepherd

cc: Ted Doherty, SEC (by email)
Interested Parties (by email)