Colm Boyle
T: 416-367-7273
cboyle@blg.com

Borden Ladner Gervais LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto ON M5H 4E3
Canada
T 416-367-6000
F 416-367-6749
blg.com

Borden Ladner Gervais

File No. 61604.57

November 28, 2024

VIA RESS

Ms. Nancy Marconi
Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Dear Ms. Marconi:

Re: EB-2024-0063 – Generic Proceeding – Cost of Capital and Other Matters Association of Power Producers of Ontario ("APPrO") Submissions

We represent APPrO in the above noted matter. Enclosed are the reply submissions of APPrO pursuant to the Ontario Energy Board's ("**OEB**") letter dated October 15, 2024. APPrO has reviewed the submissions of other parties in this proceeding and is filing this brief submission in reply.

The original question posed by the OEB in the Notice of Hearing was "whether changes should be made to the OEB's current approach to determining the allowable cost of capital for utilities." For the reasons that follow, APPrO is of the view no changes should be made. APPrO submits that the current cost of capital framework allows regulated utilities to charge rates that are fair to customers while simultaneously providing the utilities with a reasonable opportunity to earn a fair return on their capital investment.

1. Utilities Currently Meet the Fair Return Standard

APPrO submits that the first question the OEB ought to ask before diving into detailed analysis on cost of capital is: *what are the structural or systematic issues with the current cost of capital framework that prevents a regulated utility from earning a fair return?*

As has been cited by many other parties, the fair return standard generally consists of requirements: (1) the comparable investment standard; (2) the financial integrity standard; and (3) the capital attraction standard.[1] A fair return may be described as one that is fair to the consumer on the one hand, and which, on the other hand, would secure to the company a fair return for the capital invested. Unless a regulated utility is allowed to earn its cost of capital, further investment will be discouraged and it

[1] EB-2009-0084, Report of the Board on the Cost of Capital for Ontario's Regulated Utilities, pg. 31, online: <https://www.oeb.ca/oeb/_Documents/EB-2009-0084/CostofCapital_Report_20091211.pdf>

will be unable to expand its operations or even maintain existing ones. This will harm not only its shareholders, but also its customers.[2]

The evidence and submissions of parties has been, in APPrO's view, largely focused on the comparable investment standard, which has manifested into lengthy discussions about what percentages should be ascribed to the cost of capital parameters based on a contentious list of comparable utilities. However, when the experts opined on the actual outcomes of the current cost of capital framework, it is not clear to APPrO any structural or systemic issues exist to discourage further investment when:

- Concentric Energy Advisors, retained by the OEA, agrees that Ontario utilities have not either failed to attract capital on reasonable terms or have had their financial integrity threatened.[3]

- London Economic Inc., retained by the OEB, is not aware of OEB-regulated entities facing notable issues in attracting equity and debt capital since 2009 and Ontario's existing regulatory regime is viewed favorably by investors.[4]

- The EDA (who retained Nexus Economics) advised that it is "unaware of" its member utilities having notable issues attracting equity and debt capital.[5]

- Dr. Cleary, retained by AMPCO/IGUA, states that utilities attract capital at attractive terms currently and have done so for quite some time.[6]

In APPrO's submission, these statements all indicate that the existing cost of capital framework, which has been in place for over 15 years, is working as intended and does not require amendment. Individual utilities experiencing unique challenges or hardship related to cost of capital can address this issue during a cost of service application.[7]

2. Bonbright Principles of Fair Return

In the seminal book by James C. Bonbright on the Principles of Public Utility Rates ("**Bonbright**"), Bonbright sets out five major criteria of a fair return. These five principles, which may at times conflict with each other, include:[8]

1. The Capital-Attraction Criterion: *Judged by this test alone, choice should rest with whatever principles of rate control are best designed to permit well managed, soundly financed public*

[2] *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 SCR 147, paras 15-16.

[3] Transcript V3P61L15-24

[4] London Economics International, Independent expert report for the Generic Proceeding on cost of capital and other matters (EB-2024-0063), Issued: June 21, 2024; Revised September 23, 2024, pgs.127 & 177, online: <https://www.rds.oeb.ca/CMWebDrawer/Record/865977/File/document>

[5] M3-10-SEC-77; Transcript V5P5-8

[6] Interrogatories to Dr. Cleary, August 22, 2024, N.M4.10.OEA14(f), online: <https://www.rds.oeb.ca/CMWebDrawer/Record/862899/File/document>

[7] APPrO Submission, EB-2024-0063 November 7, 2024, pg. 4.

[8] J.C. Bonbright, Principles of Public Utility Rates, Columbia University Press, 1961, pgs. 147-158.

utility companies to attract needed capital. Capital-attracting adequacy is a basic test of a fair return.

2. Management-Efficiency Criterion: *For the amount of the allowed return may be designed, not just to enable a company to attract capital but also to reward efficiency and discourage inefficiency of management.*

3. The Criterion of Rate-Level Stability: *If public utilities were required to raise and lower their rates year by year, with the object of maintaining a fixed annual rate of return, the resulting necessary changes in rate schedules would prove inconvenient alike to the consumers and to the corporate managements. Even more serious would be the countercyclical direction of the change in rate levels required by an attempt to offset a depression-created decline in the demand for the service by an increase in the unit rates of charge.*

4. The Consumer-Rationing Criterion: *Each rate should be designed to encourage all consumption for which consumers are ready to pay escapable, marginal costs, and so as to deter any consumption for which consumers are not prepared to pay these costs.*

5. The Criterion of Fairness to Investors: *The only return directly at issue is, not the return necessary to attract new capital but rather the return necessary to compensate the existing investors for capital already attracted or for the use of properties already acquired with this capital. "Capital attraction" depends on the indirect argument that existing, captive investments are fairly compensated if permitted to receive whatever rates of return would currently induce free investments. Most public utility companies, in order to render good service, must be able to repeatedly attract new capital from investors who are free to commit their funds to any alternative investments.*

Much of this proceeding has focused on principles 1 and 4, but APPrO submits the OEB should also give due consideration to principles 3 and 5.

With respect to principle 3, and relying on the table prepared by the School Energy Coalition that "understates" the impact of various proposals,[9] APPrO is concerned that tinkering with cost of capital parameters may result in rate changes that undermine consumer and investor confidence. APPrO urges the OEB to resist the temptation to make changes. Maintaining the existing cost of capital approach provides clarity, stability, and predictability for consumers and investors, while allowing utilities to earn a fair return.

The concepts of clarity, stability, and predictability are found throughout the OEB's legislation and rules.[10] For example, stable and predicable electricity pricing were primary factors in the development of a regulated price plan ("**RPP**") for consumers under section 79.16 of the *Ontario Energy Board Act, 1998* in 2004. The frequency of RPP rate setting was subsequently changed in 2021 from twice per year to once per year to provide RPP consumers greater rate stability.[11] Indeed, the Government

---

[9] SEC Argument at para 1.4.3.

[10] EB-2009-0084, pg. 32, *supra note 1*.

[11] Ontario Government, Changing Ontario Energy Board's Regulated Price Plan (RPP) Rate Setting Frequency, online: <https://www.ontariocanada.com/registry/view.do?postingId=38547&language=en>

of Ontario released a statement in October 2024 that rate stability and predictability is a priority for energy affordability and the Minister of Energy stated in September 2024 that the Premier has a "vision of trying to create some stability in this sector".[12]

With respect to principle 5, the OEB must be mindful that the only return directly at issue in this proceeding is the return necessary to compensate the existing investors for capital already attracted or for the use of properties already acquired with this capital. Several consumer groups advocate in this proceeding for a reduction to regulated utilities' rate of return. APPrO does not think it is fair or just for the OEB to adversely change the terms of utility capital investment after the fact. This amounts to confiscatory regulation from existing utility investors.

APPrO agrees with OEB Staff's endorsement of the following practical advice from Mr. Coyne that the OEB needs to look at the reasonableness of end results. The truth does not lie in tinkering with the cost of capital input parameters:[13]

> So I think, going back to the wisdom of these court decisions from 100 years ago, I liked what they said in the Hope decision. And, in the Hope decision, one of the conclusions was: It's not about which input to the model or which model you use; **it's about the end result and is it a reasonable one**.
>
> And I really do think that's the high ground from which this Board best operates, and that's why we think it's important for the Board to consider – I think it would be a real shame if the Board was lost in the minor detail of determining whether or not beta should be adjusted and by how much, because you'll find various academic opinions from experts on those issues, and **I don't think that's where the truth lies at the end of the day**. [Emphasis added]

Bonbright's framing of the fair return standard appears to be fundamentally based on whether a utility is able to repeatedly attract new capital from investors. Utilities in Ontario appear to be meeting this test under the current cost of capital framework and no changes are required.

Please contact the undersigned with any questions.

Yours truly,

BORDEN LADNER GERVAIS LLP

Colm Boyle

---

[12] Ontario Government, Ontario's Affordable Energy Future: The Pressing Case for More Power, October 22, 2024, online: <http://www.ontario.ca/page/ontarios-affordable-energy-future-pressing-case-more-power>; Ontario Legislative Assembly, *Official Report of Debates (Hansard)*, Standing Committee on the Interior, 43rd Parl., 1st Sess., No. IN-30, pgs. IN-579 to IN-580, IN-584, IN-588, online: <https://www.ola.org/sites/default/files/node-files/hansard/document/pdf/2024/2024-09/09-SEP-2024_IN030.pdf>

[13] Transcript V4P94L11-24