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Ontario

BY E-MAIL

May 30, 2014

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

Dear Ms. Walli,

Re: Council of Canadians, Notice of Motion Board File Number EB-2014-0183

In accordance with the Notice of Motion and Procedural Order No. 1, please find attached Board Staff's submission on the Motion filed on behalf of the Council of Canadians.

Yours truly,

Original signed by

Zora Crnojacki
Project Advisor

c. All Parties

Encl.

Background

On April 17, 2014 the Council of Canadians ("COC") filed a Notice of Motion (the "Motion") with the Board requesting that the Board review and vary its Decision on Cost Awards (the "Decision") (EB-2012-0451/EB-2012-0433/EB-2013-0074) in relation to applications by Union Gas Limited ("Union") and Enbridge Gas Distribution Inc. ("Enbridge") for constructing major system expansion projects. These applications were heard by the Board in a combined proceeding ("combined proceeding").

The grounds for the Motion alleged by COC are that the Board made errors of fact in making its Cost Award thereby calling into question the correctness of its Decision.

In the Decision the Board made the following finding:

> *"COC claimed $206,572, of which $30,789 was claimed for the experts who provided testimony. The Board finds the claims for the experts to be reasonable. The balance of $175,783 is claimed for legal fees, and is driven primarily by the 451 hours attributable to Mr. Shrybman. This claim can be compared to the claims by GEC and ED, which claimed 284 hours and 244 hours, respectively, for legal fees. Each of these three intervenors is a policy advocacy group and each sponsored expert testimony. In some respects, COC's scope was narrower than either GEC or ED. The Board finds that the claim for 451 hours by COC for senior counsel is excessive. The level of involvement by COC and its contribution to the Board's understanding of the issues in the proceeding was not significantly greater than GEC or ED. Therefore, the significantly higher number of hours is not justified. The Board will reduce the fees for COC to $144,777. (OEB EB-2012-0452/EB-2012-0433/EB-2013-0074 Decision and Order on Cost Awards, issued March 31, 2014 and revised April 3, 2014, page 5)*
>
> Note: The reference to GEC is the Green Energy Coalition and ED is Environmental Defence

The Board asked for submissions on the threshold issue of whether the matter should be reviewed. Board staff submits that the Motion does not meet the threshold test for review, and accordingly, Board staff does not believe that the Board should hear the Motion.

Threshold Test

Under Rule 45.01 of the Board's Rules of Practices and Procedure (the "Rules"), the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducing any review on the merits ("threshold question").

Rule 44.01(a) provides the grounds upon which a motion may be raised with the Board:

> *Every notice of motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:*
>
> *(a) Set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:*
> *I. Error in fact;*
> *II. Change in circumstances;*
> *III. New facts that have arisen;*
> *Facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.*

The threshold test was articulated in the Board's decision on several motions filed in the *Natural Gas Electricity Interface Review Decision* (the "NGEIR Decision").

The Board, in the NGEIR Decision, stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raised a question as to the correctness of the order or the decision, and whether there was enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling, or suspending the decision. Further, in the NGEIR Decision, the Board indicated that in order to meet the threshold question there must be an "identifiable error" in the decision for which review is sought and that "the review is not an opportunity for a party to reargue the case".

In demonstrating an error, the moving party must show the findings are contrary to the evidence, the panel failed to address a material issue or something of a similar nature. The alleged error must be material and relevant to the outcome of the decision. The review is not an opportunity to reargue the case. A motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and there is no purpose in proceeding with the motion to review.

COC's Submissions on Threshold Question

In its submissions, COC provided the following reasons why the Board should review the Decision on its merits:

a. A review of the Decision on its merits could result in a decision to vary the original cost Decision; and

b. There are identifiable errors in fact in the Decision.

Board staff addresses each of these issues below.

a. Could a Review of the Decision by the Board Result in Varying the Decision?

Board staff submits that under a scenario where the Board would have indeed made an error in fact, this does not automatically mean that the Board should vary its decision. If the Board were to determine that it did make errors of fact in the original decision, it should consider a disputed cost claim in light of the "corrected" facts. This may or may not result in a different decision.

b. Are there Identifiable Errors in the Decision?

In its Motion and in its submissions on the threshold question, COC alleges errors of fact. COC submitted that "the Board erred in fact in several material respects that warrant variance of cost order". COC alleged that the Board erred in the following:

(i) Comparing COC's costs claim with those of GEC and ED rather than those of the Association of Power Producers of Ontario ("APPrO") and the Building Owners and Managers Association - Toronto ("BOMA"); and
(ii) Mischaracterizing the scope of COC's intervention.

COC submitted that the Board erred in comparing its costs claim with those of GEC and ED stating that COC's expert witnesses were not experienced in regulatory proceedings and the Board's hearing process. As such, COC's legal counsel spent comparably greater number of hours doing the work that was done by GEC or ED expert witnesses. COC further submitted that the Board erred in fact when it chose not to compare its cost claims to those of APPrO and BOMA. The Board explained in its Decision that it compared the cost claims of COC, GEC and ED as these intervenors are in Board's view "policy advocacy groups".

Board staff submits that the submissions made by COC do not raise an error in fact. The Board had the information on the number of hours spent by all of the parties and on a division of labour between their expert witnesses and counsel, as submitted by the parties. The Board properly assessed the contribution of each party to the process when making its determination on cost awards.

Board staff submits that the decision regarding the amount of cost awards is a discretionary matter for the panel presiding as set by statutory framework and practice directions explained below.

The Board's power to make cost awards arises from section 30 of the Act: "The Board may order a person to pay all or part of a person's costs for participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board." The *Practice Direction on Cost Awards*(the "Practice Direction") uses similar permissive, but not mandatory, language. Section2.01 states: "The Board may order any one or all of the following: (a) by whom and to whom costs are to be paid; […]". Section 3.01 states: "The Board may determine whether a party is eligible or ineligible for a cost award."

Cost awards, as evidenced by the word "may" in both the Act and the Practice Direction, are entirely discretionary. Although there is a long standing practice at the Board of awarding intervenors their reasonably incurred costs, the Board is not required to make any cost awards at all.

Costs awards are ultimately (albeit indirectly) paid by ratepayers. In exercising its discretion to make cost awards, the Board should ensure that the party requesting costs acted appropriately and provided value to the process. The Board's role is not simply to add up the hours submitted by parties and ensure that the appropriate rates were applied. In order to ensure that cost awards are reasonable, the Board must assess the value of the contribution of the party to the process.

It is not always easy to assess and assign the specific dollar value that a party provides to a process. The Board Panel is not privy to all of the activities that a party may undertake: for example a party's participation in a settlement conference. It would also not be efficient or practical to do a line by line review of all docket entries to assess the merit of each individual entry. For these reasons, it is not uncommon for the Board to compare the cost claims of parties that engaged in similar levels of participation in a process. Where one party's claimed costs are significantly in excess of other parties', it is reasonable for the Board to make disallowances even when there is no finding of misconduct. Similarly, it is not wrong for the Board to make disallowances if the claimed costs are simply "too high"; in other words if the value of a party's participation does not match the level of costs requested.

Public Interest Importance of the Board's Cost Powers

COC raises several arguments about the public interest importance of the Board's cost powers. In summary, COC submits the following:

(i) that the particular circumstances of an intervenor should be recognized so as not to discourage the intervention of groups that have an important contribution to Board proceedings; [1]

(ii) the Board's Rules should be understood in relation to the mandate of the Board in proceedings such as the present one, which under s. 2 of the Act states that in relation to gas, the Board has the objectives of protecting the interests of consumers with respect to prices and the reliability and quality of gas service; to facilitate rational expansion of transmission and distribution systems and to promote energy conservation and energy efficiency[2]; and,

(iii) the Board's provision of cost awards for eligible expenditures by intervenors "allows for broader public interest groups, such as environmental advocates, to participate and contribute their views" to allow the Board to make informed decisions[3].

Board staff does not disagree with any of the arguments made by COC with respect to the public interest importance in providing cost awards to eligible intervenors for eligible expenses. However, Board staff submits that there is also a public interest importance in recognizing that the Board has discretion in determining the appropriate amount of cost awards for each party, and the Board has set out in detail the types of factors it considers in determining an appropriate amount of costs in the Practice Direction.

All of which is respectfully submitted.

[1] COC Submissions on Threshold Question on a Motion to Review and Vary Decision and Order on Cost Awards, EB-2014-0183, page 12 paragraph 46.
[2] *Ibid* at para 42
[3] *Ibid* at para 43