

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 a Motion to Review and Vary by Council of Canadians pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review of the Board's Decision and Order on Cost Awards in the combined proceeding EB-2012-0451, EB-2012-0433 and EB-2013-0074.

IN THE MATTER OF The Threshold Question For a Motion To Review And Vary a Decision And Order On Cost Awards

REPLY SUBMISSION OF THE COUNCIL OF CANADIANS

1. On May 23rd, the Council of Canadians ("COC") served and filed its record in response to the *Notice of Motion to Review and Vary and Procedural Order No. 1*, issued on May 15, 2014.
2. In response, Enbridge has written to the Board indicating that it has "no comments on the submissions filed by COC..." Union Gas has filed no response.
3. Board staff have filed written submissions and take the position that "Motion does not meet the threshold test for review, and accordingly, Board staff does not believe that the Board should hear the Motion."
4. Board staff do not contest the COC's submission that a review of the issues raised could result in a decision to vary the award of the Board. Rather it makes the point that "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." We agree, but that question is for the panel reviewing the

motion, if the threshold test is satisfied. That threshold test, as set out in NGEIR, is that issues raised, “could”, not necessarily would, result in a decision to vary the award. As stated by the Board in NGEIR, the test is:

“... whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended. [emphasis added]”¹

5. Board staff submit that the COC has failed to “raise an error in fact,” but they do not address the specific factual errors which the COC contends warrant a review of the Board’s cost award, namely that Board erred in fact, in finding:

- i) the COC costs claim to be excessive when the COC claim was substantially lower than that submitted by GEC and ED;²
- ii) the COC’s claim for costs on account of counsel fee to be excessive in comparison with the claims for counsel fee by ED and EGD without taking into account the very different roles of counsel and experts as documented by these respective claims; and
- iii) that it was not appropriate to compare the COC claim on account of counsel fee with those submitted by Appro and BOMA, both of which called no evidence, but were awarded substantially higher counsel fees than was the COC.³

6. Board staff emphasize the discretionary nature of the Board’s decision on costs. We agree that the Board’s decision on costs involves the exercise of discretion, but that authority must be exercised reasonably, and be based on factual findings that, according to the

¹ EB-2006-0322/0388/0340, Motions to Review the Natural Gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007 (“NGEIR Decision”), page 18.

² COC Motion Record, Appendix “A”, Table 1, p. 23.

³ COC Motion Record, Appendix “A”, Table 2, p. 27

threshold test set out in NGEIR, must not “be contrary to the evidence that was before the panel;” “[fail] to address a material issue”; or be based on “inconsistent findings.” As set out in the submissions of the COC on this motion, the factual findings of the Board in respect of the COC’s costs award runs afoul of each of these requirements.

7. Board staff indicate that they do not disagree with the Council’s submissions on the public interest importance of the Board’s decision, but state that there is also a public interest in the Board’s exercise of discretion in determining the appropriate amount of cost to be awarded to a party. However, the *Rules* provide a party with the right to move to have that decision varied, and in a case where parties who will pay that award have raised no objection to the claim, the motion to vary is the only opportunity a party would have to respond to issues raised for the first time about its costs claim. In our submissions, fairness requires that the COC be given an opportunity to do so.

All of which is respectfully submitted.

June 6, 2014.

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