



EB-2014-0183

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B);

AND IN THE MATTER OF a Motion by the Council of Canadians pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* to review and vary its *Decision and Order on Cost Awards* in EB-2012-0451, EB-2012-0433 and EB-2013-0074 combined proceeding.

BEFORE:

Paula Conboy
Presiding Member

Ellen Fry
Member

Peter Noonan
Member

**DECISION
ON MOTION TO REVIEW AND VARY
August 7, 2014**

INTRODUCTION

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 on Cost Awards”) (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 the construction of major pipeline system expansion projects. Those applications were heard by the Board in a combined proceeding . The Decision on Cost Awards was issued on March 31, 2014. An *Errata* was issued on April 3, 2014 to correct a minor error in the text of that decision.

The grounds for the Motion submitted by the COC are that the Board made errors of fact in the Decision on Cost Awards which call into question the correctness of that Decision.

The Board issued its Notice of Motion and Procedural Order No. 1 on May 15, 2014 (the “Notice”) in which the Board determined that before ruling on the merits of the Motion, it would first consider the threshold issue of whether the matter should be reviewed pursuant to section 45.01 of the Board’s *Rules of Practice and Procedure* (the “Rules”).

The COC filed submissions on the threshold issue on May 23, 2014. Board staff filed its submissions on May 30, 2014. COC filed its reply to Board staff submissions on June 6, 2014.

For the reasons that follow the Board has determined that the threshold test has not been met and denies the request to review the matter on its merits.

BACKGROUND

In the Motion, COC asked the Board to vary the following finding set out in the Decision on Cost Awards:

“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)

The COC alleged that the Board erred in fact by:

- (i) Comparing COC's costs claim with those of the Green Energy Coalition ("GEC") and the Environmental Defence ("ED") group 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.

Comparison of the COC's Cost Claim with that of the GEC and ED

COC's position is that the Board erred in comparing the number of hours spent by legal counsel of COC to those of GEC and ED. The COC explained that its legal counsel significantly more time than counsel for GEC and ED because its expert witnesses were not experienced in regulatory proceedings. As a result of that inexperience legal counsel for COC spent more time doing the same work that was done by GEC or ED expert witnesses. Accordingly, COC argued that therefore the hours claimed by its legal counsel are justified and should not be reduced.

Mischaracterizing the Scope of COC's Intervention

In COC's view the Board erroneously characterized the interests and scope of the COC's participation in the proceeding as similar to the interests of GEC and ED. The Board indicated in its Decision on Cost Awards that it compared the cost claims of COC, GEC and ED, as these three intervenors were, in terms of their interests, in the Board's view, "policy advocacy groups and each sponsored expert testimony"¹. COC submitted that it should have been compared to APPRO and BOMA. The COC argued

¹ 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

that “while the [COC’s] interests certainly include broader policy issues”² similarly to GEC and ED, it also has a similar scope of interests to APPrO and BOMA in “its concern for supply and related cost risks to Ontario consumers”³.

The COC also submitted that the Board erred in fact when it found that “In some respects, COC’s scope was narrower than either GEC or ED”⁴. In addition, the COC stated that the Board’s finding about the scope was inconsistent with another finding of the Board that “the level of involvement by COC and its contribution to the understanding of the issues was not significantly greater than GEC or ED”⁵.

Board Staff’s Submission

Board staff submitted that COC failed to establish that the Board erred in comparing COC’s cost claim with that of GEC or ED or that the Board mischaracterized the scope of COC’s intervention. Board staff further submitted that the Board properly assessed each party’s contribution to the process when making its determination on cost awards. Board staff noted that the Board has set out, in detail, the types of factors it considers in determining an appropriate amount of costs in the *Practice Direction on Cost Awards* (the “Practice Direction”).

Board staff further submitted that a decision regarding the amount of cost awards is a discretionary matter for the panel as set out by the statutory framework and the Practice Direction.

THE THRESHOLD TEST

The application for review has been brought under what was then *Rule 44* of the *Rules*⁶.

Rule 44.01(a), now Rule 42, sets out some of the grounds upon which a motion may be raised with the Board:

² COC Submissions on Threshold Question on a Motion to Review and Vary Decision and Order on Cost Awards (EB-2014-0183), May 23, 2014, page 9, para 31

³ *Ibid* at para 32

⁴ *Ibid*, page 5

⁵ *Ibid* page 5

⁶ *Ontario Energy Board Rules of Practice and Procedure*, revision of April 2014 .resulted in certain amendments to the Rules which resulted in a numbering change for certain Rules and for the purpose of this motion, Rule 44 (Motion to Review) is now Rule 42 (Motion to Review). The language of the Rule was not amended in the revised Rules.

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;
 - iv. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

In addition, the Board's *Rules* provides that, with respect to a motion for review the Board may determine, with or without a hearing, a threshold question whether the matter should be reviewed before conducting any review on the merits.

The threshold test was considered by the Board in its Decision on a Motion to Review the Natural Gas Electricity Interface Review Decision⁷ (the "NGEIR Review Decision"). The Board, in the NGEIR Review Decision, stated that the purpose of the threshold test is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and whether there is 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 Review Decision, the Board indicated that in order to meet the threshold test 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".

Finally, the onus of proof rests with the applicant to demonstrate that the original panel made an error in fact.

FINDINGS

In this case, the original Board panel assessed the degree to which each party contributed to the panel's understanding of the case. The COC may well have been alone among the intervenors in addressing certain issues. However, the key element in considering the cost awards is what value each party brought to the panel's understanding of the case. In making that determination the original panel had to balance the public interest in encouraging participation by intervenors with the public

⁷ EB-2006-0322/EB-2006-0338/EB-2006-0340, *Motions to Review the Natural Gas Electricity Interface Review Decision*.

interest in limiting the financial exposure of ratepayers, who ultimately bear the burden of cost awards made by the Board.

The original panel made assessments based on the facts that they thought were appropriate in the circumstances. The COC has failed to discharge the burden of establishing that the Decision on Cost Awards under review contains any identifiable errors of fact.

The Board does not consider that the original panel's determination that GEC and ED are reasonable comparators to COC could be considered an error in fact. Whether and how the Board uses comparators is not a question of fact, it is an assessment that is within the discretion of the Board panel.

Similarly, characterizing the scope of COC's intervention in contributing to the Board's decision-making process is not a question of fact, it is an assessment that is within the discretion of the Board panel.

For all of the reasons noted above, the Board finds that the COC has failed to meet the threshold test and accordingly the Board denies the Motion.

DATED at Toronto, August 7, 2014

ONTARIO ENERGY BOARD

Original Signed By

Paula Conboy, Presiding Member

Original Signed By

Ellen Fry, Board Member

Original Signed By

Peter Noonan, Board Member