

EB-2007-0707
EB-2009-0014

ONTARIO ENERGY BOARD

IN THE MATTER OF sections 25.30 and 25.31 of the *Electricity Act, 1998*;

IN THE MATTER OF an Application by the Ontario Power
Authority for review and approval of its integrated power system plan
and approval of its proposed procurement process;

AND IN THE MATTER OF a motion by Lake Ontario Waterkeeper to vary a
decision and Order by the Ontario Energy
Board (the “Board”)

REPLY SUBMISSIONS OF
LAKE ONTARIO WATERKEEPER

TO THE SUBMISSIONS OF
THE ONTARIO ENERGY BOARD STAFF

AUTHORITIES

Practice Direction on Cost Awards

3.03 A party in a Board process is eligible to apply for a cost award where the party...

(b) primarily represents a public interest relevant to the Board's mandate;...

3.04 In making a determination whether a party is eligible or ineligible, the Board may also consider any other factor the Board considers to be relevant to the public interest.

5.01 In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party: ...

(c) made reasonable efforts to ensure that its evidence was not unduly repetitive of evidence presented by other parties; ...

(f) contributed to a better understanding by the Board of one or more of the issues addressed by the party; ...

6.03 The burden of establishing that the costs claimed were incurred directly and necessarily for the party's participation in the process is on the party claiming costs.

6.11 No differentiation will be made between the rates for preparation and attendance. Travel time spent working should be claimed as preparation time with the appropriate time documented. There will be no compensation for other hours spent in travel, although reasonable disbursements for travel costs will be allowed in accordance with the Board's Tariff.

7.01 Reasonable disbursements, such as postage, photocopying, transcript costs, travel and accommodation, directly related to the party's participation in the process, will be allowed in accordance with the Board's Tariff.

7.02 A party may be compensated for the reasonable disbursements of an employee or officer of the party, which are necessarily and directly incurred as a result of participation in a Board process.

In their submission, Board staff question whether the meeting “was part of the Board’s proceeding” which raises the following issues:

1. Were the costs claimed necessarily for Waterkeeper’s participation in the proceedings before the Board?
2. Were the costs directly related to the IPSP proceeding before the Board?
3. Is the case relied on by Board Staff, EB-2005-0234, analogous to the present case?
4. Should the Board exercise its discretion to consider any other issue relevant to the public interest?

LAKE ONTARIO WATERKEEPER’S REPLY

By the beginning of August 2008, it became apparent that the Ontario Power Authority (OPA) had not conducted a local consultation or fact-finding trip to the Moosonee/Moose Factory area in relation to the IPSP hearing, and was unlikely to do so before the proceeding commenced in early September. Lake Ontario Waterkeeper (Waterkeeper) received inquiries from residents of Moosonee and Moose Factory concerned about the potential impacts of the IPSP and decided to offer what assistance it could. Waterkeeper arranged a meeting in Moosonee (the Meeting), and invited the OPA to attend. The ensuing Meeting was the purpose of the trip to Moosonee, the costs of which are the subject of this written hearing.

ISSUE 1: Were the costs claimed necessarily for Waterkeeper’s participation in the proceedings before the Board?

The Meeting was necessary to Waterkeeper’s participation in the proceeding.

According to section 6.03 of the Ontario Energy Board’s (the Board) Practice Direction on Cost Awards (PDCA), the test for establishing a cost claim is

whether the costs were, “incurred directly and necessarily for the party’s participation in the process”.

In their submissions, Board Staff state that, “the Meeting appears to have been an effort to raise awareness about the IPSP”, and that, “the Meeting was initiated by Waterkeeper with the participation of the OPA”. In Waterkeeper’s submission, these statements contain errors of fact that appear to be the basis for Board Staff’s position. To clarify the nature and purpose of the Meeting:

- a) the Meeting was not initiated by Waterkeeper, but rather by members of the Moosonee and Moose Factory communities. Waterkeeper was responding to the requests of community members to fill a gap left in the OPA’s consultation plan; and
- b) the Meeting was not held to raise awareness or to distribute information about the IPSP. Instead, it was conducted as a fact-finding exercise, at the request of a community that Waterkeeper specifically represents, members of which will be directly and substantially affected by the IPSP.

Specifically, the Meeting was held to address a gap in the Intervenor evidence created because members of the Moosonee and Moose Factory communities did not learn about the process in time to become Intervenors themselves. If they had, the Board would surely have granted these groups Intervenor status. However, given the short time remaining before the commencement of the IPSP hearing in September of 2008, and Waterkeeper’s direct and ongoing relationship with the communities in question, all parties agreed that Waterkeeper should raise the issues facing communities on the northern rivers.

In order to do so effectively, and without misrepresenting their unique perspective on the rivers, a Meeting was necessary. The Meeting provided the opportunity for Waterkeeper to learn and document the concerns, comments and questions of residents from those areas likely to be affected by the Plan, and to obtain evidence for our counsel to rely on at the IPSP hearings before the Board. In

accordance with section 5.01(f) of the PDCA, the Meeting was held to allow Waterkeeper to contribute “to a better understanding by the Board of one or more of the issues addressed by the party”.

Waterkeeper only conducted this Meeting after learning that no other parties had done so, in accordance with section 5.01(c) of the PDCA, which states that, “the Board may consider, amongst other things, whether the party... made reasonable efforts to ensure that its evidence was not unduly repetitive of evidence presented by other parties...”.

The costs were incurred necessarily because the issues and concerns gathered during Waterkeeper’s Meeting are central to the issues before the Board.

The information collected by Waterkeeper in Moosonee and Moose Factory comprised the basis for most of the cross-examination that Waterkeeper was able to complete before the IPSP hearing was suspended. On September 11, 2008, approximately 50% of Waterkeeper’s cross-examination questions were based on the issues facing northern rivers (See Transcript EB-2007-0707, Vol. 4, p.177-193). On October 2, 2008, approximately 36% of Waterkeeper’s submission to the Board was based directly on the information obtained at the Meeting (See Transcript EB-2007-0707, Vol. 10, p.135-140).

This information was also a major source for Waterkeeper’s planned cross-examination questions for the Renewables section. Peter Faye, counsel for Waterkeeper, was asked by Board Counsel to lead the cross-examination on Renewables, Section D-5-1, of the OPA’s evidence. He was able to comply with the request primarily because of Waterkeeper’s experience in Moose Factory and Moosonee.

If Waterkeeper had not met with members of those communities and had the opportunity to hear their concerns and questions about the IPSP firsthand, we would not have been in a position to lead cross-examination on this section of the Plan. Discussions over the phone or by email would not have sufficed, since a large part of the Meeting involved reviewing maps and evidence with experts on the geography and biology of the area. Without the Meeting, Waterkeeper would not have had legitimacy in raising the issues and concerns regarding northern rivers that are central to the IPSP. These concerns and questions may not have reached the Board without Waterkeeper's interventions.

Without that direct community input, Waterkeeper submits that important impacts of hydroelectric development would not have been identified and proper testing of the IPSP evidence on the subject would be impossible. That, in Waterkeeper's submission, makes the meeting in Moosonee directly related to the IPSP proceeding.

ISSUE 2: Were the costs directly related to the IPSP proceeding before the Board?

The Meeting was directly related to the IPSP proceeding because it was specifically related to Lake Ontario Waterkeeper's mandate, as stated in our Application for Intervenor Status.

In their submissions, Board Staff assert that the proper test to apply in this case is not whether Waterkeeper was acting within its mandate, but whether the Meeting was part of the Board's proceeding. Board Staff did not make submissions on the question of Waterkeeper's mandate.

Waterkeeper submits that both issues are part of the test in this case because both are cited as the basis for the Board's decision. In its decision to exclude the costs associated with Waterkeeper's Meeting, the Board wrote, "this meeting is

not directly related to the IPSP proceeding and not specifically related to Waterkeeper's "mandate" as stated in its application for Intervenor status...".

According to section 6.03 of the PDCA, the test for establishing a cost claim is whether the costs were, "incurred directly and necessarily for the party's participation in the process". Waterkeeper submits that in order to determine whether a cost was incurred necessarily for a party's participation in the process, it is essential to consider the party's mandate. The mandate, as stated by Waterkeeper and accepted by the Board, determines the scope of participation in the process. It delineates the four corners of that participation. If the party's mandate cannot properly be fulfilled without a certain cost, that cost is "incurred directly and necessarily for the party's participation in the process". Accordingly, the question of whether the Meeting falls within Waterkeeper's stated mandate is central to whether the Meeting was necessary to participation in the IPSP hearing.

It is clear that the Meeting falls within Waterkeeper's mandate for participation in the IPSP hearing, as defined in the Application for Intervenor Status.

Waterkeeper's primary focus at the IPSP is on the environmental impacts and the cost effectiveness of proposed generation and transmission projects. This includes taking an active role in identifying aspects of the IPSP that may affect the rivers in Northern Ontario and the communities that live in their watersheds. Section 4 of Waterkeeper's Application for Intervenor Status explains that, "although Waterkeeper's primary interest lies in the Great Lakes basin, it has ties through the Waterkeeper Alliance to northern river watershed protection efforts and may take an active role in identifying the issues raised by proposed hydraulic generation projects in those areas".

Many Moosonee and Moose Factory residents derive their livelihood from such activities as trapping, guiding and fishing all of which have given them intimate knowledge of the region's rivers. In order to fulfill its mandate and identify issues

facing northern rivers and those who depend on them, it was necessary for Waterkeeper to consult directly with those residents and to review the evidence with them.

The Application made explicit that Waterkeeper intended to take an active role in identifying issues related to hydroelectric development on northern rivers. The acceptance of the Application for Intervenor Status by the Board affirmed Waterkeeper's mandate as that set out in the Application, including the intention to identify issues raised by hydroelectric projects on northern rivers. Therefore, the meeting in Moosonee to identify impacts of northern river developments proposed in the IPSP was within Lake Ontario Waterkeeper's mandate.

The Meeting was directly related to the IPSP Proceeding in that it filled a gap in the OPA's mandated consultation process.

Part of the IPSP hearing involves an evaluation of the OPA's consultation process with various interests. This is encapsulated in issue A-27, Consultation with non-Aboriginal Interests in Developing the IPSP, and in issue C-1, Aboriginal Peoples Consultation for both the IPSP and the Procurement Processes.

The communities of Moose Factory and Moosonee represent both Aboriginal and non-Aboriginal interests that should have been canvassed by OPA prior to commencement of the oral hearing. Other than the meeting arranged by Waterkeeper, no consultation appears to have been conducted for the community of Moosonee and consultation with the community of Moose Factory appears to have been limited to discussions with member(s) of the Band Council.

Residents of Moosonee comprise both non-Aboriginal interests and off reserve Aboriginal interests that will be directly impacted by hydroelectric development on northern rivers. OPA consultation efforts focused on Band Councils ignores the

off reserve Aboriginal constituency as well as the non-Aboriginal constituency of communities like Moosonee.

The meeting conducted by Waterkeeper attempted to fill the resulting consultation gap by providing both those constituencies, Waterkeeper, and Waterkeeper's counsel with an opportunity to understand the potential impacts of the IPSP, thereby satisfying the requirements of consultation set out in Issues A-27 and C-1. This, in Waterkeeper's submission, makes the meeting directly related to the IPSP proceeding.

Conclusion to Issues 1 and 2

Lake Ontario Waterkeeper (Waterkeeper) submits that the travel expenses associated with the Meetings, held in Moosonee and Moose Factory in August 2008, represent reasonable disbursements for travel costs, per section 6.11 of the Practice Directive on Cost Awards (PDCA). The public meeting in Moosonee and the meeting with Band Council representatives in Moose Factory were directly related to Waterkeeper's participation as an Intervenor in the IPSP process, and the expenses were necessarily and directly incurred as a result of our participation in the Board process, as per sections 7.01 and 7.02 of the PDCA.

ISSUE 3: Is the case relied on by Board Staff, EB-2005-0234, analogous to the present case?

The case identified in Board Staff's submissions is not analogous to Waterkeeper's claim.

It is clear that the central purpose of the Meeting was not to raise awareness of the IPSP in general. The precedent attached to Board Staff's submissions, EB-2005-0234, is therefore not analogous to Waterkeeper's claim. The cost claim by

the “Save Our Hydro Group” (SOHG) described in that decision can be distinguished from Waterkeeper’s claim in several important ways.

First, the claim submitted by the SOHG was for time spent:

- preparing for the hearing, including calls and emails to the Board;
- handing out flyers; and
- preparing for media interviews and media releases.

Therefore, **Issue 1** in that case was whether the costs of the activities listed were incurred directly and necessarily for SOHG’s participation in the hearing.

The Board found that certain activities undertaken by SOHG were not directly related to the proceeding before the Board; namely, media releases and interviews and handing out flyers.

As a charity, Waterkeeper works to make information available and educate the public on processes like the IPSP. However, unlike SOHG, our claim is not based on media or public education, even though we engage in those activities on a regular basis. Instead, Waterkeeper recognized that those activities serve an important purpose, but fall outside the scope of the hearing.

One attendee of the Meeting was author and journalist, Joseph Boyden, who subsequently published an article in Maclean’s Magazine about the experience. However, Mr. Boyden decided to attend the Meeting because of his connection to the area and local residents, and only after Waterkeeper had organized it. Recognizing the clear distinction between our educational mandate and our role as an Intervenor in the hearing, Waterkeeper did not claim any expenses related to Mr. Boyden’s article, or other media releases, interviews, our radio show or website.

The costs that Waterkeeper claimed are separate and apart from our educational mandate. They were incurred as part of a fact-finding consultation effort made in preparation for the hearing. The consultation was directly related to the hearing in that it was conducted to gather information and questions to enhance the hearing and the Board's understanding of the issues. The information collected on the trip was used, in much the same way as a commissioned expert report, to form a basis and reference point for cross-examination and submissions to the Board. Whereas SOHG's activities did not enhance the hearing or their participation in it, Waterkeeper's activities did just that.

In the SOHG case, Greater Sudbury Hydro Inc. filed an additional objection to their claim, arguing that the PDCA states that a party will not be compensated for time spent by its employees or officers in preparing for or attending at Board processes. Therefore, **Issue 2** in that case was whether the representatives of SOHG were or were not "public officers" of the group. The Board found that a party will not be compensated for time spent by its employees or officers in preparation for a hearing. Further, the Board found that the costs claimed should be for a consultant or legal counsel, or that a lost wage or salary must be shown.

Waterkeeper did not claim any time spent by an officer or employee in preparation for the hearing, nor did we claim lost wages or salary. Instead, our claim is for disbursements associated with travel to Moosonee to facilitate the Meeting. While the disbursements claimed reflected the cost of travel for two officers of Waterkeeper, it also included the costs for Waterkeeper's legal counsel, Peter Faye, and articling student, Joanna Bull. These disbursements reflect legal costs that the Board's Tariff is designed to reimburse.

A more apt analogy for Waterkeeper's Meeting expenses is the cost of obtaining an expert report for use at the hearing. The people who contributed to the fact-finding trip have specialized knowledge of the geography of the area. They have

knowledge of the history of development on the rivers and the effects that ensued that cannot be obtained from any other source.

The Meeting led to necessary disbursement costs because the information derived from the expense will contribute substantially to the evidence that is heard by the Board. The issues and concerns identified by residents of Moosonee and Moose Factory during Waterkeeper's Meeting are central to the matter before the Board. They could not have been heard or documented without the face to face meeting, which allowed for candid questions and concerns to be expressed, and for a joint exploration of the evidence, including maps, the OPA's evidence, fish caught in the river, and the geographical features of the river.

ISSUE 4: Should the Board exercise its discretion to consider any other issue relevant to the public interest?

Waterkeeper incurred these costs in exceptional circumstances.

The Board has the power to award costs in exceptional circumstances per 3.04 of the PDCA, which reads:

In making a determination whether a party is eligible or ineligible, the Board may also consider any other factor the Board considers to be relevant to the public interest.

Given the exceptional circumstances that led Waterkeeper to incur these costs, we submit that the Board has the discretion to grant this motion without opening the door to a multitude of claims. Instead, granting this motion is consistent with the Board's practice of considering cost claims on an individual basis to decide if they are necessarily incurred and directly related to the proceedings.

Waterkeeper incurred these costs in the public interest.

Compared to other cost claims submitted to the Board, the claimed disbursement costs are diminutive. However, for a small charity like Waterkeeper, these costs are substantial. Waterkeeper recognizes the privilege of being granted Intervenor status in the IPSP proceeding. We sought only to assist residents particularly vulnerable to significant impacts from the Plan in getting their voices heard, and to ensure that these important and relevant issues were presented to the Board for their consideration.

In accordance with section 3.04 of the PDCA, we ask that the Board consider this motion in light of the contribution to the public interest made by Waterkeeper's engagement with northern communities and the OPA around the impacts of the IPSP.

All of which is respectfully submitted this 4th day of February 2009 by

Peter Faye
Counsel
Lake Ontario Waterkeeper

TO: Board Secretary
Ontario Energy Board
Suite 2700, 2300 Yonge Street
P.O. Box 2319
Toronto, ON M4P 1E4

AND TO: The Ontario Power Authority