



EB-2009-0014

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

AND IN THE MATTER OF an Order by the Ontario Energy
Board dated November 28, 2008 which approved cost
awards for eligible intervenors in an application by the
Ontario Power Authority for review and approval of the
Integrated Power System Plan and proposed procurement
processes;

AND IN THE MATTER OF Rules 42 and 44 of the Board's
Rules of Practice and Procedure.

BEFORE: Pamela Nowina
Presiding Member and Vice Chair

Ken Quesnelle
Member

David Balsillie
Member

DECISION ON MOTION

Background and Grounds for the Motion

Lake Ontario Waterkeeper ("LOW" or "Waterkeeper") is a cost award eligible intervenor in the Board's proceeding to review the Ontario Power Authority's ("OPA") Integrated Power System Plan ("IPSP") proceeding. In accordance with the Board's Procedural Order No. 8, LOW filed a cost claim for its participation in the IPSP on September 17, 2008. Included in the claim were costs relating to a meeting that LOW had organized and attended in Moosonee (the "Meeting"). According to LOW's Notice of Motion, "[t]he

meeting involved a presentation by an OPA representative on the IPSP and was conducted to gather input from local stakeholders on the impacts of northern river hydroelectric development proposed in the IPSP.” The Board denied the portion of the cost claim relating to the Meeting in its decision dated November 28, 2008, stating:

“Waterkeeper submitted travel expenses for a public meeting in Moosonee, which was facilitated by Waterkeeper. As 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 filed November 14, 2007, the expenses will not be considered. The claim will be adjusted accordingly.”

On December 17, 2008 LOW filed a motion to review and vary the Board’s decision in this matter.

The Statutes and the Practice Direction

The Board’s power to award costs to parties is grounded in both the *Ontario Energy Board Act* (the “Act”) and the *Statutory Powers Procedure Act* (the “SPPA”).

In accordance with s. 17.1(4) of the SPPA, the Board has also issued a *Practice Direction on Cost Awards* (the “Practice Direction”).

Both the Act and the SPPA state that the Board may award costs for participating “in a proceeding.” The Practice Direction defines a process as: “a process to decide a matter brought before the Board whether commenced by application, reference, Order in Council or on the Board’s own initiative (including, but not limited to, a notice and comment process under section 45 or 70.2 of the Act and any other consultation process initiated by the Board)”.

Section 6.03 of the Practice Direction further states: “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.”

On January 19, 2009 the Board issued Procedural Order 1 with respect to this motion proceeding. Procedural Order 1 made provisions for submissions on the motion to be filed by Board staff and the OPA by January 23 and January 28, 2009 respectively. In addition, Procedural Order 1 allowed for responses on the submissions to be filed by LOW by February 4, 2009.

Board Staff Submission

Board staff submitted that the statutes and the Practice Direction are clear that the Board will award costs to eligible intervenors only for participation directly in the Board's hearing processes. The question that arises, according to Board staff, is whether the Meeting should be considered part of the Board's IPSP proceeding.

Board staff submitted that the Meeting was related to the IPSP generally, however, staff questioned whether it was a component of the Board's IPSP hearing process. The Meeting was initiated by LOW with the participation of the OPA but was not overseen by the Board in any way. Board staff pointed out that prior to the receipt of LOW's cost claim, the Board was not directly aware that the meeting had taken place. Board staff submitted that similar to sessions previously arranged by the OPA, the Meeting appears to have been an effort to raise awareness about the IPSP at a specific location. Board staff took the position that this type of activity has not previously been funded through the Board's cost awards process. Staff concluded that although the Board provides cost awards to eligible intervenors for their participation in Board processes, it does not generally allow funding for their activities outside of these processes.

Board staff's submission made reference to a previous Board proceeding [EB-2005-0234; Supplemental Cost Award Decision issued December 27, 2006]. In that Decision the Board disallowed recovery of certain costs on the basis that they had not been incurred directly or necessarily for the intervenor's participation in the Board's process. In this case, the disputed claim related to time spent on items such as preparing media releases, conducting interviews and handing out flyers.

In its submission, Board staff asserted that the test as to whether an intervenor should receive a cost claim award for conducting a meeting is not whether the intervenor was acting within its mandate when it arranged the meeting, but whether the meeting was part of the Board's proceeding.

LOW'S Response to Board Staff Submission

LOW stated that by the beginning of August 2008, it became apparent that the 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. LOW indicated that it had 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. LOW arranged the Meeting in Moosonee and invited the OPA to attend.

LOW stated the Meeting was not initiated by Waterkeeper (as Board Staff had asserted), but rather by members of the Moosonee and Moose Factory communities. Waterkeeper indicated that it was responding to the requests of community members to fill a gap left in the OPA's consultation plan and it was conducted as a fact-finding exercise at the request of a community that Waterkeeper specifically represents, members of which would be directly and substantially affected by the IPSP.

LOW indicated that 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. LOW stated that the information was also a major source for Waterkeeper's planned cross examination questions for the Renewables portion of the hearing. Mr. Faye, counsel for Waterkeeper, had been requested by Board staff to lead the cross-examination on Renewables. Mr. Faye stated that he was able to commit to lead on this issue primarily because of knowledge gleaned from Waterkeeper's Moose Factory and Moosonee meeting.

Waterkeeper submitted that in order to determine whether a cost was incurred for a party's participation in the process, it is essential to consider the party's mandate. Accordingly, LOW stated that the question of whether the Meeting falls within Waterkeeper's stated mandate is central to whether the Meeting was necessary to its participation in the IPSP hearing. LOW emphasized that in its Application for Intervenor Status it stated 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".

LOW submitted that the Meeting conducted by Waterkeeper attempted to fill the resulting consultation gap. Since consultation was key to the IPSP and it was one of the items on the IPSP Issues List, LOW submitted that the Meeting related directly to the proceeding.

LOW stated that the reference case attached to Board staff's submissions, EB- 2005-0234, is not analogous to Waterkeeper's claim and the cost claim by the "Save Our Hydro Group" (SOHG) described in that decision can be distinguished from Waterkeeper's claim as SOHG activities were more related to the preparation of the hearing than the hearing itself. LOW submitted that the costs that Waterkeeper claimed were incurred as part of a fact-finding consultation effort made in preparation for the hearing. In contrast, LOW submitted that SOHG's activities did not enhance the hearing or SOHG's participation in the hearing.

LOW also stated that the Board has the power to award costs in exceptional circumstances per 3.04 of the Practice Direction, 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"*. Low submitted that there were exceptional circumstances that led Waterkeeper to incur these costs and the Board has the discretion to grant this motion.

Board Findings

The Board acknowledges that the community concerns relating to the development of hydroelectric facilities near Moosonee/Moose Factory were within the mandate of LOW, contrary to the assertion on page 6 of the Board's Decision and Order on Cost Awards, dated November 28, 2008. Recognizing that matters associated with these hydroelectric resources are within LOWs mandate, however, does not make all expenditures related to these concerns cost claim eligible. As noted in the statutes and the Practice Direction for intervenor cost eligibility, these costs must be directly related to a Board proceeding. Although some component of this meeting may have involved an aspect of acquiring input and direction from clients/stakeholders, it was essentially a public consultation meeting and as such is not cost award eligible. If there is a lack of consultation by the applicant in a Board proceeding it's the Board's expectation that the applicant would be questioned by intervenors on this deficiency, but the Board does not consider it appropriate that the intervenors would seek funding to carry out consultations in place of the normal duties of intervenors.

Therefore, the Board finds that expenses that LOW incurred to carry out its consultations in Moosonee are not eligible for cost claim recovery from the Board.

The Motion is denied.

ISSUED at Toronto March 17, 2009

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary