

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

AND IN THE MATTER OF an Application by Enbridge
Gas Distribution Inc. for an Order or Orders approving
or fixing rates for the sale, distribution, transmission
and storage of gas commencing January 1, 2007.

**MOTION RECORD OF THE
HVAC COALITION INC.**

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

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing rates for the sale, distribution, transmission and storage of gas commencing January 1, 2007.

AND IN THE MATTER of a Decision of the Ontario Energy Board dated September 17, 2007 denying an Order of costs to the HVAC Coalition Inc.

NOTICE OF MOTION

TAKE NOTICE that HVAC Coalition Inc. (“HVAC”) will make a motion to the Ontario Energy Board (the “Board”) 26th Floor, 2300 Yonge Street, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is proposed to be orally.

THE MOTION IS FOR:

1. A review by the Board of its decision dated September 17, 2007 denying the HVAC Coalition Inc. (“HVAC”) an order of costs in this proceeding and a variation of that decision granting HVAC an award of its reasonably incurred costs in the proceeding.

THE GROUNDS FOR THE MOTION ARE

1. HVAC applied for a cost award in this proceeding.

2. HVAC argued that its participation in the proceeding was primarily focused on the interests of ratepayers, both as customers of the regulated utility and as consumers in the heating, ventilation and air conditioning services market.

I. Hearing Panel Failed to Consider HVAC Submissions

3. In its decision dated September 17, 2007, the panel of the Board in the proceeding (the “Hearing Panel”) refused HVAC’s request. The Hearing Panel’s reasons in respect of this issue, in their entirety, are as follows:

The HVAC Coalition intervened in the proceeding and although it was found ineligible for a cost award, it sought recovery of its costs. Enbridge did not comment on HVAC’s cost claim. In its letter to the HVAV (sic) Coalition dated October, 27, 2006 the Board found the HVAC Coalition to be ineligible for cost awards and set out the reasons for that decision in that letter. Having reviewed the HVAC Coalition’s explanation for filing its cost claim, and the Board’s October 27, 2006 decision and reasons for the HVAC Coalition’s ineligibility for a cost award, the Board confirms that decision. The Board therefore does not award costs to the HVAC Coalition. [Motion Record, Tab 7]

4. The Hearing Panel’s reasons appear to simply defer to the “decision” of the Board made prior to the commencement of the hearing.
5. That decision, dated October 27, 2006, stated that the Board “was not persuaded by HVAC’s argument that the public interest nature of the issues to be addressed by HVAC in this proceeding brings HVAC within the eligibility criteria of section 3.” [Motion Record, Tab 3]

6. In its Notice of Intervention, however, HVAC specifically stated that it did not want to argue the issue of its eligibility for a cost award at that point, but rather preferred to leave the issue to the end of the proceeding “when the Board is in a position to assess the value of HVAC Coalition’s participation, and to determine whether in the circumstances an award of costs is an appropriate exercise of its discretion.” [Motion Record, Tab 2, pg. 4].
7. HVAC intentionally waited until after the hearing was over to present the full weight of its cost submissions to the hearing panel. The Hearing Panel’s decision did not address the extensive submissions made by HVAC that its participation in the proceeding furthered a “public interest relevant to the Board’s mandate” and that therefore HVAC should be granted an order of costs under section 3.03(b) of the Practice Direction on Cost Awards. Rather the Hearing Panel’s decision appears to simply “confirm” the decision made by the Board prior to the commencement of the hearing.
8. The Hearing Panel, therefore, incorrectly fettered its jurisdiction by failing to give due consideration to HVAC’s submissions on their merits and instead deferring to the decision of the Board made prior to the hearing when the nature of HVAC’s participation in the hearing was not yet evident.
9. The Board’s Cost Award Guidelines give it the discretion to award costs to intervenors who are not ratepayers. If the sections of the Board’s Practice Direction on Cost Awards, specifically section 3.03(b), and 3.04, that give the Board discretion to award costs to non-ratepayer groups is to have any meaning, parties need to know under what circumstances the Board will exercise its discretion.

10. Intervenors before the Board are, accordingly, entitled to know what criterion the Board will employ in determining whether their participation in the proceeding will be viewed as being worthy of an award of costs under the Board's discretionary powers.
11. The Board's decision in respect of HVAC's cost submission is wholly inadequate in that it fails to address in any meaningful way HVAC's submissions that, in view of the nature of its participation in the proceeding, the Board should exercise its discretion, pursuant to s. 3.03(b) and 3.04 of the Practice Direction Cost Awards, and award costs to HVAC.

II. HVAC's Participation Contributed to Determination of Issue of Importance to the Public Interest

12. The cost award regime was established in EBO 116, in which the Board said as follows:

The Board believes it should have available to it a broad range of opinions and information for its decision making. Hearings before the Board are becoming increasingly complex. In such circumstances, the Board considers that in fulfilling its duty towards the public interest, which is implicit in the OEB Act, there is increasing need to ensure that a broad range of interests is represented at the Board's hearings and that the essential points are canvassed in sufficient depth to have developed a record that will provide maximum assistance to the Board.

13. The main focus of HVAC's participation in the proceeding was the "EnergyLink" issue. The program involved spending over four million dollars (O&M and capital combined) of ratepayers' money.

14. HVAC strongly opposed this program. Although ratepayer groups such as CCC, VECC and IGUA also opposed the program, HVAC was by far the most active intervenor opposing the program. In particular:

- It was HVAC that insisted on the issue of ratepayer funding for the program being added to the Issues List;
- HVAC introduced its own evidence, including a survey of the HVAC industry and a five-person witness panel;
- HVAC led extensive cross-examination of EGD's, and prepared extensive written submissions.

15. HVAC's intervention focused on the public interest, or lack thereof, in the program. HVAC's arguments were echoed by ratepayer groups, such as CCC and IGUA, who also expressed concerns about the risk of anti-competitive impact from the program. [Motion Record, Tab 6, pg. 26]. However, as stated above, the participation of these groups- and therefore the costs claimed by them in respect of this issue- was greatly reduced as a result of HVAC's involvement.

16. In its decision rejecting funding for the EnergyLink program, the Board stated the program was not in the public interest. Many of the Board's specific findings as to why the program would not be in the public interest were predicated on evidence or argument put forward by HVAC.

17. The Board stated, for example, that the program would undermine the Company's demand side management programs with the result that "consumers would be receiving confusing messages and funding competing programs." [Motion Record, Tab 6, pg. 32] The impact of the program on EGD's demand-side

management programs was a key component of HVAC's cross-examination of the EGD witness panel and HVAC's final argument in the proceeding.

18. In addition, the Board found that the unintended result of the Enbridge program might be to dampen the competitive development of the HVAC market. Central to the Board's determination of this issue was its finding that, although many of the customer leads that now go to the gas utility may be wasted without a referral program, "the evidence before the Board is that there is a growing and substantial industry capable of meeting market requirements."
19. That "evidence before the Board" was provided by HVAC, without whose participation key evidence in respect of an issue of important consequence to the public interest would not have been heard.
20. Finally, the Board said that it was "not convinced that the cost of the program justify the benefits" and that the issue of declining average uses "should be addressed in a more fundamental fashion as has been done in a number of jurisdictions that dealt with the issue of declining use." Again, HVAC led extensive cross-examination and devoted much of its Final Argument to the issue of whether the purported intent of the EnergyLink program, to increase gas throughput, would achieve those goals and whether it could do so in a manner that was cost efficient and not detrimental to the competitive market.
21. The participation of HVAC, therefore, greatly assisted the development of the record and the Board's understanding of a program that would have involved spending millions of ratepayer dollars and, according to the Board, detrimental to the public interest.

22. HVAC's costs were also increased as a result of opposition from Enbridge to questions and document requests that later proved to be important in completing the record in the proceeding. These include requests to provide the business plans and other documents related to the predecessor of the EnergyLink program, and information regarding Enbridge's plans to use its affiliation with the EnergyLink program to benefit its non-regulated affiliates.

23. In the circumstances, it would be unfair to HVAC to deny it funding for its participation. If any of the ratepayers groups had spent an equal amount of time and effort opposing the EnergyLink program- as would have been required absent HVAC's involvement- their costs of doing so would very likely have been paid. The fact that HVAC may also have a private interest in the matter should not, in and of itself, be the determining factor in whether or not to grant HVAC a cost award.

24. If HVAC is not awarded costs for its participation, then we would have a situation in which:

- EGD's costs of defending the program are covered, despite the fact the Board found the program to be not in the public interest, and despite the fact that EGD forced many of the intervenors, especially HVAC, to incur needless expense by denying access to information later adjudged to be relevant ;
- Ratepayer costs of opposing the program are covered;
- EGD is able to recover the Operations and Maintenance costs associated with the program that it incurred up to the date of the Board's decision,

despite the fact that EGD did not seek prior approval for the program and the Board found the program to be contrary to the public interest;

The only costs not covered would be HVAC's costs, even though, as stated above, it was HVAC who raised the issue, was the only intervenor to have introduced its own evidence to support its opposition to the program, pursued, in the face of stiff opposition from EGD, evidence showing the history of the program, and generally led the intervenor opposition to the program.

25. In other jurisdictions, intervenors representing private interests have been granted costs awards in circumstances where their participation was found to be beneficial to ratepayers.

26. HVAC also relies upon:

- i. section 21.2, *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22;
- ii. Rules 42, 43 and 44 of the Board's *Rules of Practice and Procedure*;
- iii. *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Schedule B.; and
- iv. such further and other grounds as counsel may advise and the OEB may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- a) HVAC's Notice of Intervention in the proceeding;
- b) letter from the Board dated October 27, 2006;

- c) HVAC's Final Argument in the proceeding, dated March 30, 2007, and supplementary submissions, dated April 20, 2007;
- d) the Board's Decisions with Reasons dated July 5, 2007;
- e) the Board's Cost Decision dated September 17, 2007;
- f) the record in the proceeding;
- g) such further and other material as HVAC may propose and the OEB permit.

October 2, 2007

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