



EB-2010-0021

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

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine methodologies for commodity pricing, load balancing and cost allocation for natural gas distributors;

AND IN THE MATTER OF an application by Enbridge Gas Distribution Inc. for approval of its 2010 Natural Gas Demand Side Management Plan;

AND IN THE MATTER OF an application by Union Gas Limited for approval of its 2010 Natural Gas Demand Side Management Plan;

AND IN THE MATTER OF a Notice of Motion by the Low-Income Energy Network for review of the Board's Decision and Order on Cost Awards in EB-2008-0106, EB-2009-0154 and EB-2009-0166;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

BEFORE: Ken Quesnelle
Presiding Member

Paul Sommerville
Member

DECISION AND ORDER ON MOTION TO REVIEW COST AWARDS

This Decision and Order considers three motions to vary brought by the Low Income Energy Network ("LIEN"). LIEN seeks to vary three cost awards made by the Ontario Energy Board (the "Board"). On January 4, 2010, the Board issued its Decision and

Order on Costs Awards (the “QRAM Cost Decision”) in relation to a proceeding it commenced on its own motion (EB-2008-0106). On January 7, 2010, the Board issued its Decision and Orders on Cost Awards in relation to the 2010 Demand Side Management applications filed independently by both Enbridge Gas Distribution Inc. and Union Gas Limited (EB-2008-0154 and EB-2009-0166 collectively “DSM Cost Decisions”). LIEN was an intervenor found to be eligible for a cost award in all three proceedings; in all three cost award decisions the Board reduced LIEN’s cost claims.

On January 25, 2010, LIEN filed a Notice of Motion seeking a review of the Board’s QRAM Cost Decision; on January 27, 2010, the Board received two more Notices of Motion for Review from LIEN seeking reviews of the Board’s DSM Cost Decisions. LIEN requested that the hearings of all motions be combined on the basis that there is a substantial overlap of the grounds in each motion for review, which the Board did.

On February 12, 2010, the Board issued its Notice of Written Hearing and Procedural Order No. 1 and set out a schedule for proceeding by way of a written hearing to determine the threshold question of whether the matters should be reviewed before conducting any review on the merits.¹

The Decisions Appealed From

In the QRAM Cost Decision, the Board made the following findings:

With respect to the claims filed by LIEN, the Board notes that of the total cost claim of 116.85 hours filed by LIEN, 58.7 hours are for attendance/hearing costs and 24.6 hours for case management. Both of these claims stand at the very high end of claims advanced by other intervenors. The Board notes that LIEN did not file any interrogatories and at the oral hearing, and in its brief written argument, focused only on issues related to QRAM; no questions or submissions were asked or made on the issues of cost allocation and load balancing. Given the nature and scope of the proceeding, and the modest contribution of LIEN in this proceeding, the Board finds that LIEN’s claim is excessive. Therefore, the Board will award LIEN an amount equal to the average total cost claims, net of disbursements, of the other claimants, and will grant LIEN its corrected disbursements.²

In the DSM Cost Decision—Union Gas, the Board made the following findings:

The Board finds that LIEN’s claim is excessive in the circumstances. Its claim of \$8,785 in fees is almost four times as high as the average claim for fees of

¹ Rule 45.01, Rules of Practice and Procedure

² QRAM Cost Decision, pp. 2-3

\$2,228 for the other 5 intervenors. A comparison to the average is not a determinative factor of reasonableness, but is an indication of reasonableness. A claim which is almost four times the average may be reasonable in certain circumstances, for example if the intervenor took a larger role than others in the proceeding or provided expert testimony or otherwise distinguished itself in the proceeding. There are no such circumstances in this proceeding. This proceeding dealt with Union's 2010 DSM program, *excluding* low-income programs. LIEN's submissions were limited in nature and largely adopted the submissions of other parties. The Board finds that the contribution provided by LIEN to the proceeding does not warrant an award of costs beyond that of the average or the other participants.

LIEN will be awarded costs for fees to the level of the average of other participants, \$2,228. LIEN will also be awarded its claim for disbursements.³

In the DSM Cost Decision—Enbridge, the Board made the following findings:

The Board finds that LIEN's claim is excessive in the circumstances. Its claim for \$8,460 in fees is more than twice as high as the average claim for fees of \$3,312 for the other 5 intervenors. A comparison to the average is not a determinative factor of reasonableness, but is an indication of reasonableness. A claim which is more than twice the average may be reasonable in certain circumstances, for example if the intervenor took a larger role than others in the proceeding or provided expert testimony or otherwise distinguished itself in the proceeding. There are no such circumstances in this proceeding. This proceeding dealt with Enbridge's 2010 DSM program, *excluding* low-income programs. LIEN's submissions were limited in nature and largely adopted the submissions of other parties. The Board finds that the contribution provided by LIEN to the proceeding does not warrant an award of costs beyond that of the average or the other participants.

LIEN will be awarded costs for fees to the level of the average of other participants, \$3,312. LIEN will also be awarded its claim for disbursements.⁴

Positions of the Parties

LIEN argued that when the Board reduced LIEN's costs without giving proper consideration to the Board's Practice Direction on Cost Awards ("Practice Direction"), the Board failed to meet the legitimate expectations of LIEN, thereby breaching the duty of procedural fairness. LIEN submitted that the list of criteria in section 5 of the Practice Direction (the "section 5 criteria"), which may be considered by the Board when determining a cost award, are exhaustive. LIEN submitted that it relied upon the Practice Direction as revealing the criteria upon which the Board would analyze costs

³ DSM Cost Decision, Union Gas, p. 2.

⁴ DSM Cost Decision, Enbridge Gas Distribution Inc., pp. 2-3.

claims. LIEN submitted that the Board failed to analyze LIEN's cost claims in terms of the section 5 criteria when it decided to reduce LIEN's cost awards; in doing so, the Board failed to meet LIEN's legitimate expectations and breached its duty of procedural fairness.

Board Staff, Enbridge Gas Distribution Inc. and Union Gas Limited ("Union") all filed written submissions on the threshold question. Each of the responding parties argued that LIEN had failed to meet the threshold question and urged the Board to dismiss the motions.

Board staff submitted that each of the cost claims had been reduced because the Board had found LIEN's costs to be excessive when compared to their contribution to the proceeding; that section 5 of the Practice Direction was permissive, and was applied properly by the Board; and that in its application of the Practice Direction, the Board exercised its discretion reasonably and appropriately.

Union submitted that LIEN was dissatisfied with the result and was seeking to reargue its costs submissions; that the error identified by LIEN in its submissions was not an identifiable error which raised questions about the correctness of the decisions; section 5 of the Practice Direction is permissive and not exhaustive, and the factors that must be considered in assessing costs are discretionary; and the Board followed and applied section 5 in arriving at its decision.

Enbridge submitted that the section 5 criteria were a list of non-exhaustive factors that it may consider in determining the amount of a cost award, and the reasons of the Board considered and applied section 5.

In its reply submission LIEN argued that the natural reading of the cost decisions showed that the Board did not turn its mind to the section 5 criteria; that the motions involve questions of procedural fairness, legitimate expectation and access to justice which are of significance to all intervenors who rely on the costs awards regime to participate in proceedings before the Board; and that procedural fairness issues which affect organizations rather than individuals are equally important.

Board Findings

The Board finds that LIEN did not put forward any grounds which raised a question as to the correctness of the cost decisions and so has not passed the threshold question. In assessing the grounds raised by LIEN, and arriving at its determination, the Board considered the purpose of the threshold question as set out in the *Natural Gas Electricity Interface Review Decision with Reasons*.⁵ The Board denies LIEN's request for a hearing to review the Board's three cost award decisions.

The two main arguments raised by LIEN throughout its submissions were that the Board did not undertake any consideration or analysis of the Board's criteria for awarding costs as set out in section 5 of the Practice Direction when making its decisions to reduce LIEN's cost award; and that the Board breached its duty of procedural fairness by doing so and failed to meet the legitimate expectation of LIEN that the Board would comply with its own procedure. The implication is that if the Board applied the Practice Direction properly, LIEN would have been awarded all of its claimed costs.

When considering cost claims, the Board has complete discretion in determining the amount of any costs to be paid: section 2.10(b). In determining the amount of the costs awards the Board may consider the criteria listed in section 5. The Board views section 5 of the Practice Decision as being permissive, not exhaustive and expressive of the discretion which resides within the Board when determining cost claims.⁶

⁵ Natural Gas Electricity Interface Review Decision with Reasons, EB-2006-0322/0338/0340 (May 22, 2007), p. 18. In NGEIR Review Decision the Board found that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raised a question as to the correctness of the order or the decision, and whether there was 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.

⁶ Section 5.01: In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party:

- (a) participated responsibly in the process;
- (b) asked questions on cross examination which were unduly repetitive of questions already asked by other parties;
- (c) made reasonable efforts to ensure that its evidence was not unduly repetitive of evidence presented by other parties;
- (d) made reasonable efforts to co-operate with other parties in order to reduce the duplication of evidence and questions on cross-examination;
- (e) made reasonable efforts to combine its intervention with that of similarly interested parties;
- (f) contributed to a better understanding by the Board of one or more of the issues addressed by the party;
- (g) complied with directions of the Board including directions related to the pre-filing of written evidence;

In each of the appealed cost decisions, it is clear that each panel took certain factors into account in their review and determination of each cost claim. As the majority of a reviewing panel held in reasons dismissing a previous motion to vary a cost award brought by LIEN, a decision regarding the quantum of cost awards is a discretionary matter for the original panel presiding over the proceeding and it is the original panel's decision as to what factors it will take into account when determining the amount of costs awards.⁷

The Board finds that in each decision under appeal, the original panel clearly articulated their reasons for disallowing a portion of LIEN's claimed costs. In each instance the original panels found that LIEN's participation in the proceeding was not reflected in the cost claims which were submitted. Put simply, the panels found that what LIEN contributed to the hearing process did not merit the cost claims put forward, particularly when compared to the contributions and cost claims of other intervenors.

The Board notes that 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: section 6.03. It is clear that in each decision under appeal, LIEN failed to discharge that burden and that the original panels exercised their discretion to award cost claims that reflected LIEN's contribution. The Board reiterates that it is the original panel that is in the best position to evaluate the validity of the cost claim put forward as it is the original panel which presided over the proceeding which gave rise to the cost claim.

The Board finds no grounds to question the correctness of the decisions made by the original panels nor their exercise of discretion. The Board finds the Practice Direction was properly applied in each decision.

As the Board has found the Practice Direction was properly applied, it follows that there is no breach of the Board's duty of procedural fairness, and no failure to meet the legitimate expectations of LIEN.

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- (h) addressed issues in its written or oral evidence or in its questions on cross examination or in its argument which were not relevant to the issues determined by the Board in the process;
 - (i) engaged in any other conduct that tended to lengthen unnecessarily the duration of the process; or
 - (j) engaged in any other conduct which the Board found was inappropriate or irresponsible.

⁷ Decision and Order on Motion to Review Cost Awards (EB-2006-0302), October 29, 2007, p. 3

Despite this finding the Board will address LIEN's apparent misapprehension that the filing of a cost claim in accordance with the Board's administrative criteria will result in payment in full of the claims made. Once submitted, the Board, through its review of the case material and assessment of each cost claim, will either grant or reduce cost claims in accordance with the exercise of its discretion which may include the criteria set out in section 5 of the Practice Decision, as was done by the original panels in these proceedings. As the costs that are awarded are ultimately paid by ratepayers, the Board must be satisfied that the costs are appropriate and warranted.

The Board has now upheld cost decisions by four different panels hearing applications where LIEN has had its cost claims reduced and motions dismissed. The Board, in each instance, has noted that the original panel clearly provided its reasons for disallowing a portion of LIEN's claimed costs and in each, none of the appropriate grounds for review were met and each motion dismissed. The Board advises LIEN to consult with other intervening parties at the outset of a proceeding to coordinate efficiencies in their review of the application and focus of their interrogatories and arguments. If LIEN decides to address a single issue or take a limited role in a proceeding, its cost claims should so reflect.

LIEN has asked for the cost eligibility in this motion to review proceeding. The Board grants LIEN's cost eligibility request on the basis that LIEN was eligible for cost awards in the original proceeding and will therefore be eligible for cost awards in this motion to review proceeding. The process for the cost awards for the motion to review proceeding is set out below.

THE BOARD THEREFORE ORDERS THAT:

1. The motions to review are dismissed.
2. LIEN shall submit its cost claim for the motion to review proceeding by April 16, 2010. A copy of the cost claim must be filed with the Board and one copy is to be served on each of Union and Enbridge. The cost claims must be done in accordance with section 10 of the Board's Practice Direction on Cost Awards.
3. Union and Enbridge will have until April 30, 2010 to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on LIEN.

4. LIEN will have until May 14, 2010 to make a reply submission as to why its costs claim should be allowed. Again, a copy of the submission must be filed with the Board and one copy is to be served on each of Union and Enbridge.

DATED at Toronto, April 1, 2010.

Original signed by

Ken Quesnelle
Presiding Member

Original signed by

Paul Sommerville
Member