



EB-2007-0805

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

AND IN THE MATTER OF an Application by Enbridge Gas
Distribution Inc. for an order or orders approving or fixing just
and reasonable rates and other charges for the sale,
distribution, transmission and storage of gas commencing
January 1, 2007.

AND IN THE MATTER OF a Motion for a review by the
Board of its decision dated September 17, 2007 denying the
HVAC Coalition Inc. an order of costs in the EB-2006-0034
proceeding and a variation of that decision granting HVAC
an award of its reasonably incurred cost in that proceeding.

BEFORE: Cynthia Chaplin
Presiding Member

Ken Quesnelle
Member

Cathy Spoel
Member

DECISION AND ORDER ON MOTION TO REVIEW

November 30, 2007

Introduction

On July 5, 2007, the Ontario Energy Board (the “Board”) issued its Decision with Reasons in EB-2006-0034, the Enbridge 2007 rates proceeding (the “Decision”).

The HVAC Coalition Inc. (“HVAC”) had requested and received intervenor status in that proceeding. In its letter to HVAC confirming HVAC’s intervenor status dated October 27, 2006, the Board found HVAC to be ineligible for an award of costs:

In reaching this conclusion, 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 of the Board’s Practice Direction on Cost Awards. The Board does not believe that HVAC has provided sufficient justification for the Board to deviate from its practices on cost awards. All matters that the Board accepts as issues to be canvassed in a proceeding are deemed to be in the public interest.

Although HVAC had been found ineligible for an award of costs, it included submissions regarding its view that it should be found eligible for an award of costs with its final argument in the EB-2006-0034 proceeding, filed on March 30, 2007. HVAC also filed a cost claim with the Board on April 30, 2007.

On September 17, 2007, the Board issued its Decision on Cost Awards – Phase I. In this decision the Board held that HVAC was not eligible to receive an award of costs.

By Notice of Motion dated October 3, 2007, HVAC requested that the Board reconsider its decision regarding HVAC’s eligibility for costs in the EB-2006-0034 proceeding.

Threshold Issue

Rule 44.01 of the Board’s Rules of Practice and Procedure states that every motion made 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.

Rule 45.01 of the Board's Rules of Practice and Procedure states that in respect of a motion, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Findings

The Board has determined the threshold question without holding a hearing. The Board has decided that the motion to review does not pass the threshold question for the reasons set out below.

Having initially been found ineligible for costs, HVAC made submissions in its final argument as to why the Board should exercise its discretion and find HVAC eligible in recognition of the public interest aspect of its involvement in the proceeding. HVAC subsequently filed its cost claim, making submissions again as to why it should be found eligible for a cost award. The Board, in its September 17, 2007 Decision on Cost Awards – Phase 1, stated:

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.

HVAC argues that the Board inappropriately fettered its discretion 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." In stating "the Board confirms that decision" (the initial decision on eligibility), HVAC takes the position that the panel simply deferred to the prior decision and that the panel's reasons are "wholly inadequate". The Board disagrees. The panel did not fetter its discretion, nor are the reasons inadequate: a plain reading of the cost award decision makes this clear. The panel explicitly reconsidered the earlier decision on eligibility, turned its mind to HVAC's submissions, and confirmed the earlier decision. In other words, the panel reached the same conclusion, despite HVAC's submissions.

HVAC's motion to review has not raised grounds that would lead this reviewing panel to question the correctness of the original panel's decision on a discretionary matter such as cost awards. HVAC's motion to review does not claim that there was an error in fact in the panel's decision. Also, there is no change in circumstance, nor any new facts. None of the grounds in Rule 44.01 of the Board's Rules of Practice and Procedure have been met.

Since the original panel clearly articulated its reasons for finding HVAC ineligible for a cost award and since none of the appropriate grounds were met for a review, this reviewing panel is dismissing the motion at the threshold question.

THE BOARD THEREFORE ORDERS THAT:

This motion to review is dismissed at the threshold question. No adjustment will be made to HVAC's eligibility for an award of costs.

DATED at Toronto, November 30, 2007

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary