

December 14, 2007

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street, 27<sup>th</sup> Floor  
Toronto, Ontario  
M4P 1E4

Dear Ms. Walli:

**Re: Appeal of Decision on Motion to Review Cost Award EB-2006-0301  
Canadian Manufacturers & Exporters (CME)**

We are in receipt of the Board's EB-2006-0301 Decision on Motion to Review Cost Awards, dated November 29, 2007, and submit that:

1. Contrary to the reviewing panel's recommendation of October 29, 2007<sup>1</sup>, the November 29, 2007 panel was not the same panel as the original November 6, 2006 panel.
2. Contrary to the reviewing panel's recommendation of October 29, 2007, the November 29, 2007 decision did not provide reasons as to why the original panel disallowed a portion of CME's consultants / witnesses costs.<sup>2</sup>
3. The November 29, 2007 panel incorrectly asserts that:

*"None of the grounds raised by CME go to the Board's discretion of what the quantum of costs ought to have been awarded to CME"*<sup>3</sup>.

Each of these submissions is discussed more fully below.

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<sup>1</sup> OEB, Decision and Order on Motion to Review Cost Awards, October 29, 2007, page 3

<sup>2</sup> OEB, Decision on Motion to Review Cost Awards, November 29, 2007, page 3



## 1. Composition of Original and Reviewing Panels

On October 29, 2007 the reviewing panel asserted that:

*“Because this panel was not present during the generic proceeding, it is not possible for this panel to determine whether or not CME’s contribution was useful to the Board.”*<sup>4</sup>

This statement is not entirely true. The reviewing panel comprised three members one of whom was the presiding member of the original panel,

On October 29, 2007 the reviewing panel also asserted that:

*“The Board allows the review of the cost award and recommends that the issue of costs be determined by the original panel”*.<sup>5</sup>

However, the panel that undertook the November 29, 2007 review was not comprised of the three member original panel, but only two of the original members. The original presiding member did not participate.

The Board cannot take the position that:

1. *“It is not possible for the reviewing panel to determine whether or not CME’s contribution was useful to the Board”*, even though the presiding member of the original panel sat on the reviewing panel, and then claim that:
2. The November 29, 2007 panel is the “original” panel when it comprised only two of the three original members, and not the original presiding member.

In our view, the Board cannot have it both ways.

## 2. Insufficient Reasons

On October 29, 2007, the reviewing panel stated that:

*“Upon review of the November 6, 2006 Decision on Cost Awards, the Board finds that there were insufficient reasons to disallow a portion of CME’s consultant / witnesses costs.”*<sup>6</sup>

At issue is the question set out in CME’s November 13, 2006 submission, namely:

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<sup>4</sup> OEB, Decision and Order on Motion to Review Cost Awards, October 29, 2007, page 3

<sup>5</sup> Ibid, page 3

<sup>6</sup> Ibid, page 3

*“On what basis did the Board Panel decide that CME’s evidence and witness in the evidence and oral hearing phase ‘provide little benefit’ and merited an award of only 50% of the claimed costs?”<sup>7</sup>*

Neither the original panel nor the November 29, 2007 panel answered this question. Rather, the panels obfuscated, with the November 29, 2007 panel disingenuously asserting that CME should have requested *“a review of the substantive parts of the decision when the decision was issued”<sup>8</sup>*.

The implication of this assertion being that since it did not request such a review, CME missed its chance to receive reasons why CME’s evidence and arguments were of little benefit.

Moreover, having missed its chance, CME is now “ineligible” to learn how its arguments and evidence were of little benefit. This in spite of the fact that reviewing panel found that there were insufficient reasons given by the original panel to substantiate the conclusion that it was reasonable to disallow a portion of CME’s consultants / witnesses costs. This intransigence by the November 29, 2007 panel is at odds with the reviewing panel’s finding.

Instead of providing reasons why it found CME’s arguments / evidence of little benefit, the panel chose to hide behind an Alberta Court of Appeal decision, stating that:

*“The level of detail must be balanced against the possible negative and unintended consequences to the reputations of those appearing before the Board ...”<sup>9</sup>*

The panel failed to identify whose reputations and which unintended consequences.

Since it is CME’s evidence alone that is involved, and since it is CME that is seeking transparency, the panel’s concern for *“possible negative and unintended consequences to the reputations of those appearing before the Board”* seems misplaced.

In our view, the reason why the original and subsequent panels refuse to provide reasons is that they are unable to justify their unjustifiable conclusion that CME’s evidence and submission were of little benefit to the original panel.

CME’s evidence and submissions were highly relevant to the issues before the Board in EB-2006.0021. Even if the panel did not agree with that evidence, there is no justification to penalize a party because it takes a different view from that of the Board.

If the panel disagreed with CME’s evidence, it had and has a responsibility to say so in a

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<sup>7</sup> CME Submission, Reconsideration of Costs Allowed in EB-2006-0021 – Generic DSM Hearing, November 13, 2006, page 3

<sup>8</sup> Ontario Energy Board, Decision on Motion to Review Cost Awards, November 29, 2007, page 3

<sup>9</sup> OEB, Decision on Motion to Review Cost Awards, November 29, 2007, page 4

responsible and transparent manner. CME is a highly respected trade association and its views should not be dismissed out of hand.

A case in point is the principle of cost causality, which CME proposed should be employed in determining the DSM costs and budgets. The panel in its August 25, 2006 Decision with Reasons implicitly rejected that principle as being relevant in DSM matters, and has refused to state why that principle is not relevant, even though the OEB has endorsed that principle in other proceedings

Rather than stating specific reasons for disallowing a portion of CME's consultants / witnesses costs, the panel has chosen to seek every excuse it can find to avoid revealing why it believes CME provided little benefit to the DSM deliberations.

### **3. Incorrect/Misleading Assertions**

The panel's November 29, 2007 Decision on Motion to Review Cost Awards incorrectly asserts that:

*"None of the grounds raised by CME go to the Board's discretion of what the quantum of costs ought to have been awarded to CME."*<sup>10</sup>

This statement is not correct.<sup>11</sup>

As well, panel asserts that:

*"The original panel was present during the testimony and argument and found that CME's evidence, cross-examination and submission were of little benefit to the original panel"*<sup>12</sup>.

While this is true for the hearing phase of EB-2006-0021, the assertion is misleading since there were two phases of EB-2006-0021, namely the ADR phase and the Technical Conferences. For these phases the original panel was not present but CME was an active participant.

CME's November 13, 2006 submission dealt with its consulting costs related to the Technical Conferences and ADR phases. For these phases, CME contends it should be eligible to 100% recovery of its consulting costs and that to reduce CME's cost award by 50% for all of its participation would be "arbitrary, punitive and without foundation."<sup>13</sup>

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<sup>10</sup> Ibid, page 4

<sup>11</sup> CME Submission, Reconsideration of Costs Allowed in EB-2006-0021 – Generic DSM Hearing, November 13, 2006, pages 2 and 3.

<sup>12</sup> OEB, Decision on Motion to Review Cost Awards, November 29, 2007, page 4

<sup>13</sup> CME Submission, November 13, 2006, pages 2 and 3.

The reviewing panel, without reason, arbitrarily reduced CME's consulting and witness claim for all phases.<sup>14</sup>

The November 29, 2007 decision ignored this fundamental distinction and provided no reasons. Again, this is completely contrary to the Board's October 29, 2007 finding.

**Conclusion**

Based on the above, we respectfully request the Board reject the November 29, 2007 Decision on Motion to Review Cost Awards.

Further, we request that the Board either:

1. Establish an independent review panel to consider CME's November 13, 2006 submission, or,
2. Direct the original panel to provide clear and unambiguous reasons why they believed the CME's evidence and submissions were of little benefit to warrant a reduction of 50% of its consultants / witness costs.

We trust that such a review will be undertaken expeditiously.

Yours truly,

Malcolm Rowan

Enclosures:

Cc

Howard Wetston, Chairman, Ontario Energy Board

Gordon Kaiser, Vice Chair, Ontario Energy Board

Mike Packer, Director, Regulatory Affairs, Union Gas

Patrick Hoey, Director, Regulatory Affairs, Enbridge Gas Distribution

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<sup>14</sup> OEB, Decision on Motion to Review Cost Awards, November 29, 2007, page 6