



EB-2011-0011

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 Toronto Hydro-
Electric System Ltd. for an Order or Orders granting
approval of initiatives and amounts related to the
Conservation and Demand Management Code;

AND IN THE MATTER OF a Notice of Motion by Pollution
Probe Research Foundation for review of parts of the
Board's Decision on Issues and Cost Eligibility issued on
March 11, 2011;

AND IN THE MATTER OF Rules 42, 44 and 45 of the
Board's Rules of Practice and Procedure.

BEFORE: Marika Hare
Presiding Member

Paul Sommerville
Member

Karen Taylor
Member

DECISION AND ORDER ON COST AWARDS

Toronto Hydro-Electric System Limited ("Toronto Hydro") filed an application with the Ontario Energy Board (the "Board"), dated January 10, 2011 seeking an order granting approval of funding for nine individual conservation and demand management ("CDM") programs.

The Board issued a Notice of Application and Hearing dated January 24, 2011, with respect to this proceeding.

In Procedural Order No. 1 dated February 18, 2011, the Board approved the following parties as intervenors and eligible for an award of costs in this proceeding:

- Association of Major Power Consumers in Ontario (“AMPCO”);
- Consumers Council of Canada (“CCC”);
- Energy Probe Research Foundation (“Energy Probe”);
- Green Energy Coalition (“GEC”);
- Low-Income Energy Network (“LIEN”);
- Pollution Probe;
- School Energy Coalition (“SEC”); and
- Vulnerable Energy Consumers Coalition (“VECC”).

In the referenced above Procedural Order No. 1 and Cost Eligibility Decision the Board also provided for parties to comment on the draft issues list.

On March 11, 2011, the Board issued its Decision on Issues and Cost Eligibility. The Board found, among other things, that the two new issues proposed by Pollution Probe were outside the scope of the Board’s review in the proceeding and therefore did not accept these suggested additions to the issues list.

On March 22, 2011, Pollution Probe filed a Motion for Review of the Board’s Decision on Issues and Cost Eligibility, specifically with regard to the Board’s decision to not include Pollution Probe’s two proposed issues on the final issues list (the “Motion”).

Following an oral hearing on April 5, 2011, the Board dismissed the Motion. The Board noted in its Decision that intervenors eligible for an award of costs were to file their cost submissions for the Motion within seven days of the date of the hearing. Parties were also invited to comment on whether the cost of the Motion should be allocated in the normal manner, or whether a different approach should be taken.

Board staff submitted that the Board should consider Rule 5.01 of the Board’s Practice Direction on Cost Awards in determining whether Pollution Probe should be eligible to recover its costs for the Motion. Board staff further submitted that the Motion resulted in

additional costs, time and resources for the Board, the applicant and other parties without contributing to a better understanding of the issues or adding value to the application process.

SEC commented on the notion of sanctions against a moving party should a motion be determined to be frivolous, vexatious or irresponsible. SEC submitted the Board can, as is sometimes the case, reduce a party's costs. SEC argued however that to have one intervenor ordered to pay the costs of other parties was not appropriate. SEC also observed that the Motion did assist in clarifying the scope of the issue in the Board's ruling.

On April 15, 2011, Toronto Hydro filed a letter with the Board noting that it supported the submissions of Board staff. Toronto Hydro noted that the Motion brought forward by Pollution Probe was of marginal merit and provided little additional value to the Board or other intervenors in this proceeding. Toronto Hydro further noted that the disposition of costs in this proceeding might differ from that in a distribution rates application. Toronto Hydro noted that it is seeking to recover any regulatory costs associated with its CDM Applications, including intervenor cost claims, not through its distribution rates, but through the Global Adjustment Mechanism. Toronto Hydro submitted that this is consistent with the provisions of the CDM Code, which required that costs related to CDM be excluded from distribution revenue requirements.

The Board received cost claims from LIEN, Pollution Probe and SEC. No cost claims were received from AMPCO, CCC, Energy Probe, GEC and VECC.

Board Findings

The Board has reviewed the cost claims filed by LIEN, Pollution Probe and SEC to ensure they were compliant with the Board's *Practice Direction on Cost Awards*.

The Board found in its decision that the Motion brought by Pollution Probe represented in large part a re-argument of the points that had been urged on the Board in the first instance.

Section 30 of the OEB Act allows the Board broad authority to make orders respecting costs. It is open to the Board in an appropriate case to order any person or party to pay all or part of another person's or party's costs of participating in a proceeding before the

Board. This could include an order requiring a person or party to pay the costs incurred by the Board itself in conducting the proceeding.

Section 5 of the Board's *Practice Direction on Cost Awards* provides a number of factors that the Board may consider in assessing the amount of costs to award a party. Two of the listed factors are whether the party contributed to a better understanding of one or more of the issues addressed by the party, and whether a party engaged in conduct that tended to unnecessarily lengthen the duration of the process.

In the Board's view the Pollution Probe Motion was substantially without merit. In such a case, it would not be unreasonable for the Board to require that Pollution Probe pay the associated costs of other parties or the Board itself. However, it has not been the Board's practice to make such orders, and it will not do so in this case for that reason. However, parties should be aware that where Motions are considered to be without merit, such orders may issue. The Board has also commented on this aspect in EB-2011-0053 (Grey Highlands).

The Board has determined that Pollution Probe will be denied its costs on this Motion. As noted above, the Board found that the Motion largely amounted to a re-argument of matters that had been determined by the Board in the Issues List decision.

With regard to the cost claims filed by LIEN, the Board notes that the application brought forward by Toronto Hydro was for the approval of Board-Approved CDM Programs, none of which were primarily targeted to low-income consumers. LIEN's main thrust as an intervenor is the protection of low-income consumers, and there were no low-income specific programs or issues in the case at all, let alone in the Pollution Probe Motion. The Board noted that there is no justification for the high costs claim made by LIEN. The Board has determined that LIEN's cost claim shall be reduced to approximately \$2,600 to better reflect the role it played in a proceeding that did not contain any elements central to its core objectives.

The Board has determined that the costs as filed by SEC are in accordance with the *Practice Direction on Cost Awards* and was the product of a reasonable amount of preparation and attendance at procedural matters. The Board therefore finds that SEC is entitled to 100% of its reasonably incurred costs of participating in this proceeding.

The Board has determined that Toronto Hydro will pay the costs of SEC and LIEN. The Board will defer on the question as to whether the costs incurred by Toronto Hydro in bringing the application for Board-approved CDM programs should be folded into the Global Adjustment or, on the other hand, handled conventionally through their regulatory affairs allowance already in rates. This issue will be dealt with in the Decision of THESL's application.

THE BOARD ORDERS THAT:

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Toronto Hydro-Electric System Limited shall immediately pay:
 - Low-Income Energy Network \$2,617.00; and
 - School Energy Coalition \$2,617.00.
2. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Toronto Hydro-Electric System Limited shall pay the Board's costs of and incidental to, this proceeding immediately upon receipt of the Board's invoice.

DATED at Toronto, April 27, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary