



EB-2010-0008

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 Ontario Power Generation Inc. pursuant to section 78.1 of the *Ontario Energy Board Act, 1998* for an Order or Orders determining payment amounts for the output of certain of its generating facilities.

BEFORE: Cynthia Chaplin
Presiding Member & Vice Chair

Marika Hare
Member

Cathy Spoel
Member

DECISION AND ORDER ON COST AWARDS

Background

Ontario Power Generation Inc. ("OPG") filed an application with the Ontario Energy Board (the "Board") on May 26, 2010. The application was filed under section 78.1 of the *Ontario Energy Board Act, 1998*, S.O 1998, c. 15 (Schedule B) (the "Act"), seeking approval for payment amounts for OPG's prescribed generating facilities for the test period January 1, 2011 through December 31, 2012, to be effective March 1, 2011.

The Board issued a Decision with Reasons on March 10, 2011. The Decision made provision for the filing of cost claims, objections and reply. Eight intervenors were deemed eligible for cost awards in this proceeding. They are:

- Association of Major Power Consumers in Ontario (“AMPCO”);
- Canadian Manufacturers & Exporters (“CME”);
- Consumers Council of Canada (“CCC”);
- Energy Probe Research Foundation (“Energy Probe”);
- Green Energy Coalition (“GEC”);
- Pollution Probe;
- School Energy Coalition (“SEC”); and
- Vulnerable Energy Consumers Coalition (“VECC”).

Costs Claims

Cost claims were filed by the eight eligible intervenors, and on April 15, 2011, OPG responded to the cost claims. OPG submitted that the Board should apply the standards set out in the *Travel, Meal and Hospitality Directive* (“Directive”) issued by Management Board of Cabinet when assessing the cost claims. Both OPG and the Board must comply with this directive and OPG submitted that the same standards should apply to cost claims. OPG also commented that the sum of hours claimed by intervenors seemed high as intervenors often relied on Board staff cross-examination and argument.

OPG stated that it had no objections to the claims submitted by CCC, SEC and VECC. OPG’s objections to the other cost claims, and the replies of the parties follow.

AMPCO

OPG noted that the Board’s *Practice Direction on Cost Awards* (“Practice Direction”) states that reasonable meal expenses will be allowed when the claimant’s place of business is at 100 km or more from the site of the process. As the AMPCO claimants do not meet this criterion, OPG submitted that the claim for meal expenses for \$160.57 should be disallowed. AMPCO did not respond to OPG’s objection.

Board Findings

The Board confirms that meals may only be claimed when the claimant’s place of business is located at, or more than, 100 km from the site of the process. The Board

also notes that AMPCO subsequently informed the Board that a claim for \$31.70 for taxi costs was made in error.

The Board has adjusted the AMPCO claim by \$192.27.

CME

OPG estimated that the three lawyers representing CME claimed approximately 666 hours. OPG submitted that the claim is excessive and should be reduced as CME's singular focus was total bill impacts.

In reply, CME indicated that Mr. Thompson acted as lead counsel and was supported by Mr. Hughes and Mr. DeRose. CME has determined that the average hourly rate for the three lawyers was \$260.02. CME submitted that this average rate is well below Mr. Thompson's rate of \$330/hour, and that given the complexity of the application, the cost claim filed is reasonable.

CME noted that, in addition to total bill impact and the tax loss variance account, it was active in cross examination and provided written argument on many other issues, including business planning, production forecasts, payment design, CWIP and compensation.

OPG noted that Mr. Hughes charged a more senior rate of \$230/hour. OPG also submitted that hours claimed for case management by Mr. Sharp should be charged at the rate of \$170/hour as provided in the Practice Direction, and that claims for alcohol should be disallowed.

CME replied that Mr. Hughes is entitled to claim the rate of \$230/hour in 2011, and claimed costs for time incurred after January 1, 2011 at the more senior rate. CME also identified that the hours Mr. Sharp claimed as case management should have been claimed as preparation, and therefore the claim is correct.

Board Findings

The Board finds that the hours claimed by CME are not excessive in the circumstances. CME's contributions on a number of issues were substantive and of value to the Board in its deliberations. The Board also finds that the hours Mr. Sharp originally identified as case management are correctly identified as preparation hours, and the CME claim is

correct in this matter. A charge for alcohol and for a meal on a non-hearing day have been removed from the claim (total \$30.30).

Energy Probe

OPG submitted that the claim for Dr. Schwartz's participation in the settlement conference should be disallowed as OPG sees no reason for the participation by an expert on cost of capital. OPG also submitted that the allowable hours for Dr. Schwartz should be reduced as he did not prepare written evidence and the Board made no reference to his submissions in the decision findings.

Energy Probe replied that responding to OPG's objections on Dr. Schwartz's attendance at the settlement conference would leave it open to sanction in respect of confidentiality. The reply also noted that the Board's *Settlement Conference Guidelines* provide that, "All parties to a proceeding and their representatives are entitled to participate in a settlement process."

Energy Probe stated that Dr. Schwartz was not retained as an expert witness. His role was to provide support as an economic consultant, and Energy Probe noted that Dr. Schwartz was not listed as an expert witness in the Decision.

Board Findings

The Board finds that the costs for Dr. Schwartz are reasonable in the circumstances. The Board notes that Dr. Schwartz had the role of consultant/advisor rather than expert witness in this proceeding.

GEC

OPG submitted that the meal expenses claimed by GEC are unreasonable as they exceed the Directive standards, providing a claim for \$50.00 for dinner on October 31, 2010 and a claim for \$23.11 for lunch on November 25, 2010 as examples. In reply, GEC has determined that the average meal expense claimed was \$17.32 and submitted that the cost is not excessive.

OPG submitted that the claim for GEC's expert witness, Mr. Chernick, should be reduced as his contribution to the proceeding was minimal. OPG submitted that the Board should consider section 5.01(f) when assessing the claim. That section states that the Board may consider whether the party "contributed to a better understanding by the Board of one or more of the issues addressed by the party." OPG noted a reference

to the PWU submission in the Decision which stated that Mr. Chernick's evidence on CWIP was a re-argument of matters previously decided. OPG also noted that the Board's decision on CWIP was based on a finding that CWIP is premature and not on Mr. Chernick's evidence.

GEC replied that Mr. Chernick's report is a detailed rebuttal to the CWIP report filed by OPG's witness, Mr. Luciani. GEC noted that the Decision found the contents of Mr. Luciani's report "created a misleading impression about the level of acceptance of CWIP as a mechanism." GEC submitted that, given the quality of Mr. Luciani's report, "it is vital that the Board ensure that opposing viewpoints are presented."

Board Findings

The Board will adjust the GEC's claim to remove charges for alcohol, charges where there is no receipt, and charges related to a different case. These adjustments total \$812.63. The Board will not be applying the expense Directive to intervenor costs at this time.

The Board will not reduce the claim for Mr. Chernick. The Board finds the claim to be reasonable in the circumstances and notes that Mr. Chernick's and GEC's contributions on the issue of CWIP were of value to the Board.

Pollution Probe

OPG submitted that there should be a reduction in the claim for time of Drs. Kryzanowski and Roberts, Pollution Probe's expert witnesses. OPG stated that the Pollution Probe evidence did not provide a sufficiently robust basis to set technology specific cost of capital and was largely a repeat of evidence from the previous payment amounts case.

In reply, Pollution Probe referred to the decision of the previous payment amounts case, and maintained that there was no issue raised with the underlying methodology used by Drs. Kryzanowski and Roberts. The same methodology was used in the current proceeding. The evidence was updated due to the passage of time, and the experts provided a particular focus on separate costs of capital for each division. Pollution Probe noted that Drs. Kryzanowski and Roberts were accepted as expert witnesses without objection by OPG, and submitted that it is unfair to penalize the experts for the Board deciding not to proceed with separate costs of capital.

OPG also observed that the legal/consultant fees claimed by Pollution Probe are inaccurately tabulated resulting in an overclaim of \$4,675.58. Pollution Probe replied that there is no overclaim, and that the amount of \$4,675.58 is related to Quebec PST, which Dr. Kryzanowski is required to charge. As the cost claim forms do not provide space for PST, Pollution Probe combined the PST with the fees claimed.

Board Findings

The Board will allow the costs for Drs. Kryzanowski and Roberts. Although the Board did not adopt their recommendations, this is not determinative of the issue of whether their costs should be allowed. The Board notes that the contributions of Pollution Probe and its expert witnesses were of value to the Board.

CCC Adjustment

The CCC claim had errors related to data transfer between forms which understated the claim. Accordingly, the Board has increased the CCC claim by \$77.46.

Conclusion

Apart from the adjustments listed above, the eligible parties are awarded 100% of their cost claims.

THE BOARD THEREFORE ORDERS THAT:

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, OPG shall immediately pay:

• Association of Major Power Consumers in Ontario	\$211,139.34;
• Canadian Manufacturers & Exporters	\$216,587.95;
• Consumers Council of Canada	\$202,029.28;
• Energy Probe Research Foundation	\$138,585.87;
• Green Energy Coalition	\$101,933.82;
• Pollution Probe	\$147,671.32;
• School Energy Coalition	\$211,131.12; and
• Vulnerable Energy Consumers Coalition	\$ 78,853.84.

2. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, OPG shall immediately pay the Board's costs of and incidental to, this proceeding immediately upon receipt of the Board's invoice.

DATED at Toronto, May 31, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary