

August 24, 2012

VIA RESS AND COURIER

Ms. Kirsten Walli
ONTARIO ENERGY BOARD
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Dear Ms. Walli:

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Re: EB-2012-0226 – Union Gas Limited (Union) Application for Leave to Construct.

Thunder Bay Terminals Limited (TBTL) Response to Union's Objection to Cost Eligibility Determination.

In Procedural Order No. 1 issued herein on August 9, 2012, the Board granted TBTL's request for intervenor status. The Board also granted to TBTL cost award eligibility status, subject to Union's right to object within 14 calendar days.

By letter dated August 22nd Union states:

Union does not object to TBTL having intervenor status in the proceeding as TBTL is a person with an interest in land that is affected by the process.... Union does however object to TBTL being eligible for a cost award." [Emphasis Added]

Union goes on in its letter to quote section 3.04 of the Board's *Practice Direction on Cost Awards* in support of Union's objection to the determination that TBTL is eligible for an award of costs.

Paragraph 3.04 (b) does not qualify eligibility for costs determined based on a party's interest in land affected by a process.

Section 3.04 of the practice direction must be read in context of the sections surrounding it:

- 3.01 *The Board may determine whether a party is eligible or ineligible for a cost award.*
- 3.02 *The burden of establishing eligibility for a cost award is on the party applying for a cost award.*
- 3.03 *A party in a Board process is eligible to apply for a cost award where the party:*
 - (a) *primarily represents the direct interests of consumers (e.g. ratepayers) in relation to services that are regulated by the Board;*
 - (b) *primarily represents a public interest relevant to the Board's mandate; or*
 - (c) *is a person with an interest in land that is affected by the process.*
- 3.04 *In making a determination whether a party is eligible or ineligible, the Board may:...*
 - (b) *in the case of a party that is a commercial entity, have regard to whether the entity primarily represents its own commercial interest (other than as a ratepayer) rather than the public interest, even if the entity may be in the business of providing services that can be said to serve a public interest relevant to the Board's mandate. [Emphasis added]*

....

Read in context, paragraph 3.04 (b) indicates that where a party is in the business of providing services related to a relevant public interest, it is that party's business interest that determines eligibility for a cost award, and the determination will generally be that the party is not eligible, and will have to pay its own way. Paragraph 3.04 (b) does not qualify eligibility for costs determined based on a party's interest in land affected by a process, just as it does not qualify a party's eligibility for costs based on a party being an affected ratepayer.

Rates and construction permissions are two areas central to the Board's regulatory authority. Those affected by either rates or construction permissions present an interest squarely within the Board's core authorities. The cost award eligibility of those with such

interests is qualified only by section 3.05 of the practice direction, no provision of which applies to TBTL.

To determine otherwise would mean that only individuals with an interest in land affected by an application would qualify for cost eligibility under paragraph 3.03 (c). If that were the case, paragraph 3.03 (c) would have used the term "individual" in place of the term "person". The term "*person*" is defined within the practice direction [section 1.01] to expressly include a company.

Union concedes that TBTL is a person with an interest in land that is affected by the process. Paragraph 3.03 (c) provides the Board's guideline that persons with an interest in land affected are eligible to apply for a cost award. That eligibility is not, as Union asserts, addressed or qualified by paragraph 3.04 (b). While the Board retains discretion in respect of cost eligibility determinations, the Board has exercised that discretion to grant TBTL eligibility for an award of costs, subject to Union's objections. It is submitted that Union has not submitted valid objection to the Board's determination.

Yours truly,



Ian A. Mondrow

- c. John Kepes, TBTL
Mark Murray, Union
Dan Jones, Union Counsel
Zora Crnojacki, OEB Staff

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