



EB-2012-0337

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 Union Gas
Limited pursuant to Section 36(1) of the *Ontario Energy
Board Act*, 1998, for an Order or Orders approving the 2012
to 2014 Demand Side Management Plan.

BEFORE: Paula Conboy
Presiding Member

Marika Hare
Member

DECISION AND ORDER ON COST AWARDS

May 1, 2013

Union Gas Limited ("Union Gas") filed an application with the Ontario Energy Board (the "Board") dated August 31, 2012, seeking approval for its 2013-2014 Large Volume Demand Side Management ("DSM") Plan.

The application was filed pursuant to the Board's DSM Guidelines that were issued on June 30, 2011, as well as in accordance with the Union Gas Settlement Agreement, January 31, 2012 (EB-2011-0327) which was accepted by the Board on February 21, 2012.

On September 27, 2012 the Board issued a Notice of Application and Procedural Order No. 1 and granted intervenor and cost award eligibility status to those parties who were approved as intervenors in the EB-2011-0327 proceeding. The Board received and granted one additional request for intervenor and cost award eligibility status to Environmental Defence.

On March 19, 2013 the Board issued its Decision and Order approving Union Gas' Large Volume DSM Program budget of \$4.664M plus inflation for both 2013 and 2014. Within the Board's Decision and Order it outlined the process and timelines for eligible parties to file their cost claims with the Board.

The Board received cost claims from the Association of Power Producers of Ontario ("APPRO"), Building Owners and Managers Association - Toronto ("BOMA"), Canadian Manufacturers & Exporters ("CME"), Consumers Council of Canada ("CCC"), Environmental Defence, Green Energy Coalition ("GEC"), Industrial Gas Users Association ("IGUA"), London Property Management Association ("LPMA"), Low-Income Energy Network ("LIEN"), School Energy Coalition ("SEC") and Vulnerable Energy Consumers Coalition ("VECC").

Board Findings on the Cost Claims of the Eligible Parties

The Board has reviewed the cost claims filed to ensure that they are compliant with the Board's *Practice Direction on Cost Awards*, and reviewed Union Gas' submission on the cost claims and APPRO's reply submission.

APPRO

Union noted that APPRO's cost claim is significantly higher than that of GEC who also used consulting services and was highly engaged in the proceeding. Union also submitted that while a certain amount of overlap between consultants and counsel is necessary and practical when preparing for a proceeding, the amount of overlap claimed by APPRO appears to be unreasonable. Finally, Union objected to APPRO's \$6,199.46 cost claim for hours prior to the Board's Notice of Application and Procedural Order No. 1 (September 27, 2012) and after the close of argument (February 5, 2013).

In response, APPRO argued that unlike GEC's member groups, the direct financial impact of Union's DSM programming on APPRO members is significant. APPRO also pointed out that its customers represent approximately 40% of the volume of T1 and Rate 100 rate categories. APPRO submitted that its incurred costs are justifiably higher than GEC's given the relative number of interrogatories it received. APPRO also pointed out that its witness panel was subject to far lengthier cross examination than GEC's panel.

APPrO argued that its consultant and counsel made every effort to avoid overlap throughout the proceeding. Examples of this included its consultant attending the settlement conference with no legal support, and the fact that he was not involved in the preparation of cross examination/final argument compendiums. APPrO submitted that any overlap between its consultant and counsel was reasonable and necessary in the context of this proceeding.

APPrO accepted a disallowance for hours prior to the Board's Notice of Application and Procedural Order No. 1 (\$4,894.31) but did not accede to Union's objection to the costs claimed after the Board's final decision was rendered (\$1,305.15). APPrO submitted that it needed its consultant to review and analyze the implications of the Board's final decision for the purposes of discussing potential next steps and to advise the client.

In assessing cost awards, the Board has frequently compared a cost claim that is an outlier against other intervenor cost claims to assess its reasonableness. That could be the situation in this proceeding, where APPrO's cost claim is more than three times that of the next highest intervenor's cost claim. However, the Board does not find it appropriate to do so in this case. In this proceeding, APPrO introduced a new issue, one which was of importance to its constituency and relevant to the Board's consideration of the application. It is without dispute that one of the main issues in this proceeding was a result of APPrO's proposing an opt-out option from Union's large volume DSM programs for power producers. Other intervenors in this proceeding, for the most part, participated on the periphery, mainly to ensure that unintended consequences of the Board's decision on this issue didn't result in negative impacts to their constituents. As a result, a direct comparison between APPrO's cost claim to other intervenors is not appropriate.

The Board accepts that the costs incurred by APPrO are higher than those of other intervenors given the number of interrogatories it received. The Board also accepts that APPrO's witness panel was subject to far lengthier cross examination than GEC's panel, the only other intervenor that filed expert evidence in this proceeding. However, the Board finds that APPrO's claim is excessive. APPrO's claim is three times higher than GEC's, which also adduced expert evidence and participated actively. The Board accepts that the survey APPrO conducted of its members to determine whether they were in favour of participating in Union's DSM programs or would prefer the option to opt-out is something APPrO needed to do in order to determine what position it would

take in this proceeding. However, the Board finds that a survey of APPrO members is not something that should be included in a cost claim but funded by APPrO itself, and in the end, was of little value to the Board in arriving at its decision. Secondly, the hours claimed for consultants and legal fees exceeds what might be considered reasonable. While some overlap between consultant and counsel is reasonable, the Board finds the amount claimed here to be excessive. APPrO argued that its consultant needed to properly prepare its expert, Mr. Zarumba on certain technical aspects in this case given that Mr. Zarumba was brought in at the “eleventh hour” because its original consultant was not available. Parties to the proceeding were made aware of the commencement of the hearing in Procedural Order No. 2 issued on November 2, 2012. The Board does not consider it appropriate to fund additional preparation time for APPrO’s substitute expert because its original expert was not available on a date that had been set out in early November.

The Board has determined that a reasonable cost award for APPrO’s contribution to this proceeding is \$100,000 (plus HST and disbursements). This amount is intended to reflect adjustments to remove costs claimed for a number of activities, including the hours of work conducted prior to the Board’s Notice of Application and Procedural Order No. 1, the survey of APPrO members, consultant and legal preparation time and hours claimed after the Board’s decision was rendered. This award exceeds all other cost claims by a significant margin, but recognizes the unique issue brought forward by APPrO. It also takes into perspective the value of the issue being adjudicated, which was a total DSM program budget for large volume customers of \$4.664M.

LIEN

LIEN has claimed 44.55 hours for participating in this proceeding. LIEN’s involvement was limited to ensuring that low-income consumers were not negatively impacted as a result of APPrO’s proposal to allow large volume customers permission to opt-out of Union’s Large Volume DSM Plan. This is a legitimate issue for LIEN. However, the Board finds that the hours claimed are excessive, both on an absolute basis, given LIEN’s limited level of involvement, and relative to the claims of other intervenors who also addressed narrowly focused issues. The Board will reduce LIEN’s award by approximately 10 hours for a cost award of \$10,500 (plus HST and disbursements). The Board is of the view that this is a cost award commensurate to that granted to other intervenors (based on total hours claimed) whose concern was limited to the “slippery

slope" that would be created if the proposal by APPrO was acted upon by the Board. The Board finds that this is appropriate given the level of LIEN's involvement and its contribution to the Board's understanding of the issues.

The Board finds that all remaining parties are eligible for 100% of their reasonably incurred costs of participating in this proceeding. The claims of BOMA, GEC and IGUA have each been subject to minor reductions for one or both of the following reasons: lack of receipts; or failure to comply with the government's *Travel, Meal and Hospitality Expenses Directive*. The Board finds that the cost claims of CME, CCC, Environmental Defence, LPMA, SEC and VECC are reasonable as are the adjusted claims of APPrO, LIEN, BOMA, IGUA and GEC and that each of these cost claims shall be reimbursed by Union Gas.

THE BOARD THEREFORE ORDERS THAT:

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

• Association of Power Producers of Ontario	\$117,186.55;
• Building Owners and Managers Association	\$ 12,694.14;
• Canadian Manufacturers & Exporters	\$ 11,953.32;
• Consumer Council of Canada	\$ 2,983.20;
• Environmental Defence	\$ 14,086.86;
• Green Energy Coalition	\$ 63,234.71;
• Industrial Gas Users Association	\$ 28,355.38;
• London Property Management Association	\$ 2,237.40;
• Low Income Energy Network	\$ 11,941.55;
• School Energy Coalition	\$ 3,135.00; and,
• Vulnerable Energy Consumers Coalition	\$ 741.09.
2. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Union Gas Limited shall pay the Board's costs of and incidental to, this proceeding immediately upon receipt of the Board's invoice.

DATED at Toronto, May 1, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary