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BY E-MAIL

July 24, 2013

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
P.O. Box 2319
Toronto, Ontario
M4P 1E4

Dear Ms. Walli,

Re: Union Gas Limited – 2013-2014 Large Volume DSM Plan
APPrO Motion to Review and Vary Cost Decision
EB-2012-0337

In accordance with the Notice of Motion and Procedural Order No. 1, please find attached Board Staff's submission on the Motion filed on behalf of the Association of Power Producers of Ontario.

Yours truly,

Original signed by

Josh Wasylyk
Advisor, Applications & Regulatory Audit

c. All Parties

Encl.

Background

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.

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.

On May 1, 2013 the Board issued its Decision and Order on Cost Awards (the "Cost Decision"). Within the Board's Cost Decision it reduced the Association of Power Producers of Ontario's ("APPrO") cost award from APPrO's claimed amount of $189,546.20 to $117,186.55, for a total reduction of $72,359.65.

On May 21, 2013 APPrO filed a Notice of Motion to Review and Vary (the "Motion") the Board's Cost Decision. The Motion seeks to vary the Board's Cost Decision to permit APPrO to recover its full cost claim amount of $189,546.20 for its participation in the proceeding. The grounds for the Motion are that the Board made two errors of fact in its Cost Decision, which call into question the correctness of the Board's Cost Decision. The Motion alleges that the Board made factual errors when interpreting two elements of APPrO's participation, namely: with respect to the survey that was conducted of APPrO members; and, with respect to the consultant and legal costs APPrO incurred in preparation for the Oral Hearing.

On June 27, 2013 the Board issued a Procedural Order which set out the dates for parties to file submissions on APPrO's Motion.

The following are the submissions of Board staff on APPrO's Motion to Vary the Board's Cost Decision.

Cost Awards

The Board's power to make cost awards arises from section 30 of the Act: "The Board may order a person to pay all or part of a person's costs for participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board." The *Practice Direction on Cost Awards* (the "Practice Direction") uses similar permissive, but not mandatory, language. Section

2.01 states: “The Board may order any one or all of the following: (a) by whom and to whom costs are to be paid; […]”. Section 3.01 states: “The Board may determine whether a party is eligible or ineligible for a cost award.”

Cost awards, as evidenced by the word “may” in both the Act and the Practice Direction, are entirely discretionary. Although there is a long standing practice at the Board of awarding intervenors their reasonably incurred costs, the Board is not required to make any cost awards at all.

As there is no legal requirement to make any awards of costs, absent extraordinary circumstances the Board cannot make a legal error by declining to make such an order. Indeed, APPrO is not alleging an error of law.

Costs awards are ultimately (albeit indirectly) paid by ratepayers. In exercising its discretion to make cost awards, the Board should ensure that the party requesting costs acted appropriately and provided value to the process. The Board’s role is not simply to add up the hours submitted by parties and ensure that the appropriate rates were applied. In order to ensure that cost awards are reasonable, the Board must assess the value of the contribution of the party to the process.

It is not always easy to assess and assign the specific dollar value that a party provides to a process. The Board Panel is not privy to all of the activities that a party may undertake: for example a party’s participation in a settlement conference. It would also not be efficient or practical to do a line by line review of all docket entries to assess the merit of each individual entry. For these reasons, it is not uncommon for the Board to compare the cost claims of parties that engaged in similar levels of participation in a process. Where one party’s claimed costs are significantly in excess of other parties’, it is reasonable for the Board to make disallowances without any specific finding of misconduct.[1] Similarly, it is not wrong for the Board to make disallowances if the claimed costs are simply “too high”; in other words if the value of a party’s participation does not match the level of costs requested. Board staff notes that APPrO’s updated cost claim of $189,546.20 represents approximately 2% of the total cost of Union’s Large Volume DSM Plan for 2013 and 2014 ($4.769M in 2013 and $4.876M in 2014) and therefore is very significant.

In its Motion to Review, APPrO alleges errors of fact. Board staff discuss these alleged errors in further detail below. Board staff submits, however, that even if the original

[1] See, for example EB-2011-0011, Decision and Order on Cost Awards, pp. 2-3.

decision was based in part on erroneous facts, this does not automatically mean that the Board should reverse its decision. To the extent that the Board determines it did make errors of fact in the original decision, it should consider APPrO's cost claim in light of the "corrected" facts. This may or may not result in a different decision. Ultimately the Board must make a determination on the value of APPrO's contribution measured against the claimed costs.

Survey of APPrO Members

APPrO contends that the Board incorrectly interpreted the basis for undertaking the survey of APPrO members. At pages 3-4 of the Board's Cost Decision, the Board noted:

> "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."

APPrO has stated that its decision to carry out a survey was made in the context of determining how best to make the case for an opt-out proposal and not in an effort to determine its position in this proceeding. APPrO argued that in order to bring a credible opt-out proposal forward, it needed to address whether there were other jurisdictions that had opt-out provisions and provide empirical data to demonstrate that if an opt-out proposal was approved, Union's customers would actually use it.

It appears to Board staff that although APPrO argues it did not conduct the survey to establish its position in this proceeding, the survey's results have been used to confirm APPrO's position that an opt-out provision would be used by its members.

APPrO argued that in order to bring a credible opt-out proposal forward, it needed to include empirical evidence demonstrating Union's customers would use the opt-out provision. To show this, APPrO conducted a survey of its members that are Union customers. It appears to Board staff that if the survey results showed that none or few of the APPrO members would have used the opt-out provision, APPrO's proposal would have likely had very little traction with the Board. APPrO says as much at point #14 of the Motion on page 4, where it states:

> "It is difficult to understand how APPrO could have brought forward a proposal based on allowing customers to opt-out of a program without any empirical evidence brought forward to inform the Board about whether customers would in fact opt-out (and why). To omit this type of evidence could have, and most certainly would have, let the Board dismiss the opt-out proposal simply on the basis of having no evidence as to its need or support."

It seems from APPrO's statement above, that even if APPrO had already established its position regarding an opt-out provision prior to conducting the survey, the survey results seem to mainly provide confirmation of this position from APPrO's members. Board staff submits that although APPrO's primary purpose for the survey may not have been to establish its position in this proceeding, in essence, that is the result of the survey.

Unnecessary Costs for Substitute Navigant Witness

In the Board's Cost Decision it found that the hours claimed for consultants and legal fees exceed what might be considered reasonable.

APPrO argued that the costs incurred to have an alternate consultant with knowledge of the Navigant Report attend the oral hearing is reasonable. APPrO argued that it was forced to find a replacement after the Board's oral hearing schedule called for APPrO's witness to testify during the one time slot its primary consultant was unavailable, in light of APPrO informing Board staff of the conflict prior to the hearing schedule being released.

Board staff submits that although the exact hearing schedule was not confirmed until the Board issued Procedural Order No. 4 on January 25th, APPrO was aware of the potential conflict well in advance of January 25th and may have been able to avoid some of the costs associated with preparing a new witness.

All of which is respectfully submitted.