



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 a Motion to Review and Vary by
the Association of Power Producers of Ontario pursuant to
the Ontario Energy Board's *Rules of Practice and Procedure*
for a review of the Board's Decision and Order on Cost
Awards in proceeding EB-2012-0337.

BEFORE: Ken Quesnelle
Presiding Member

Jerry Farrell
Member

Marika Hare
Member

**DECISION AND ORDER ON MOTION TO REVIEW AND VARY
COST AWARD DECISION**

October 29, 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.

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 Association of Power Producers of Ontario ("APPrO") was one of the parties approved for cost award eligibility.

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 denied a portion of APPrO's full cost claim of \$189,546.20. The Board provided APPrO with a cost award of \$117,186.55 (inclusive of HST and disbursements), an amount \$72,359.65 less than that claimed.

On May 21, 2013 APPrO filed a Notice of Motion to Review and Vary the Board's Cost Decision (the "Motion"). 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 that 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 the Motion.

Navigant Survey

On July 24, 2013 Board staff filed a written submission. Board staff submitted that, as per section 30 of the *Ontario Energy Board Act* and the *Practice Direction on Cost Awards*, cost awards are entirely discretionary and that irrespective of a long standing practice of the Board awarding intervenors their reasonably incurred costs, cost awards are entirely discretionary.

Board staff further submitted that 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. Board staff also submitted that even if the original 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 which may or may not result in a different decision.

Board staff submitted that even if the survey APPrO conducted and presented as evidence may not have been intended to establish its position in the proceeding that appeared to be its actual effect.

On August 9, 2013 APPrO filed its reply submission. APPrO argued that alleged errors of fact were critical factors in the Board's decision on cost awards. APPrO submitted that in this particular case, the Board placed significant emphasis on the purpose of the Navigant survey as a reason for reducing APPrO's cost claim. APPrO submitted that the Board cannot get the facts underpinning the Navigant survey incorrect, without necessitating some change to the cost award as the facts surrounding the purpose of the Navigant survey were material to the Board's decision to reduce APPrO's claimed costs.

APPrO submitted that the Navigant survey was not used to determine, establish or confirm its position and played absolutely no role in its decision to participate in the proceeding or the position it took in the proceeding. APPrO noted that it was going to participate in the proceeding and argue for an opt-out regardless of: (a) whether or not a survey was done; and (b) if a survey was done, the results of that survey.

APPrO further stated that in order to bring a credible opt-out proposal forward, it decided to carry out a broader, empirical survey to determine how many large volume customers would opt-out. APPrO argued that the survey was critical to the evidentiary basis of its case and not done to help APPrO figure out the position it was going to take in the proceeding, as highlighted in Union's pre-filed evidence which states that "some customers, such as power producers, have indicated that they would like to opt-out of the Plan."¹

APPrO further submitted that the fact that the Board erred in understanding the purpose of the survey impacts the outcome of the Cost Award Decision, because the Board asserted that the survey "is not something that should be included in a cost claim but funded by APPrO itself", and that the Board's final cost award reflects adjustments to remove costs claimed for "the survey of APPrO members".

¹ EB-2012-0337, Exhibit A, Tab 1, Page 36, Lines 23-24.

Additional Witness Preparation Costs

With respect to the costs of the substitute Navigant witness, Board staff submitted that APPrO was aware of the potential scheduling conflict in advance of the Board's Procedural Order No. 4 being issued. Board staff submitted that APPrO may have been able to avoid some of the costs associated with preparing a new witness.

APPrO submitted that the costs incurred to prepare its additional Navigant witness were unavoidable due to the schedule of the oral hearing. APPrO noted that it had informed Board staff of its conflict well in advance of Procedural Order No. 4 being issued which set out the hearing dates and times. APPrO submitted it has no incentive to spend money preparing extra witnesses and that in this case, it was unavoidable. It was necessary to have an expert witness present at the oral hearing in order to testify to the Navigant survey and an additional witness needed to be prepared late in the proceeding due to the hearing schedule set by the Board.

In summary, APPrO submitted that the Board should vary its cost award decision and grant APPrO 100% of its claimed legal and consultant costs which total \$189,546.20.

Board Findings

Characterization of APPrO's Survey

The Board finds that it erred in its characterization of APPrO's survey of its members in its Decision on Cost Awards issued May 1, 2013. The Board was incorrect in characterizing the survey as "something that APPrO needed to do in order to determine what position it would take in this proceeding." The Board now recognizes APPrO's intent to put forth a credible and convincing argument, based on empirical and impartial evidence for the ability to achieve an opt-out option for DSM programs.

With this error corrected, the Board has considered APPrO's survey-related costs in the context of the principles enumerated in section 5.01 of the *Practice Direction on Cost Awards*, and, in particular, clause (f): "contributed to a better understanding by the Board of one or more of the issues in the process". The Board has previously referred to this principle in other decisions as the "contribution" or the "value" provided by a cost-eligible intervenor to a proceeding. The Board's hearing panel in this case found that APPrO's opt-out proposal was "contrary to the fundamental class rate-making

methodology that all customers in the class pay the same rates". Class rate-making (i.e. customers with similar service characteristics are grouped together) and postage-stamp rates (i.e. uniform rates within individual customer classes) are the accepted norm in Ontario. APPrO was presumably aware, or at least ought to have been aware, of these rate-making principles.

The Board therefore concurs with the hearing panel that APPrO's survey was of "little value" in reaching its decision on the opt-out issue. The Board nevertheless finds that APPrO did provide some contribution, by means of the survey, to the proceeding by presenting empirical evidence in support of its position on the opt-out issue. However, the Board finds that the value of this contribution was not commensurate with the costs that APPrO incurred to obtain the survey and to present it during the oral hearing, and so those costs in total were excessive and, as such, they were not reasonably incurred.

Additional Witness Preparation Costs

The Board finds that no error was made in its original Decision on Cost Awards with respect to the costs associated with preparing an additional expert to appear at the oral hearing. The Board does not accept APPrO's argument that it did not know until Procedural Order No. 4 was issued on January 25, 2013 that there could be a potential scheduling issue with its expert witness. APPrO should have been prepared for the hearing, with its principal expert witness available, because the start date was known as it was communicated to all parties through Procedural Order No. 2 on November 2, 2012.

Varied Cost Award

In accordance with these findings the Board varies the cost award decision by increasing the award by one third of the amount originally disallowed.

THE BOARD THEREFORE ORDERS THAT:

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Union Gas Limited shall immediately pay the Association of Power Producers of Ontario an additional **\$24,119.88**. This amount is in addition to the cost award amount of \$117,186.55 that was granted by the Board through its Decision on Cost Awards, May 1, 2013.

DATED at Toronto, October 29, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary