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Borden Ladner Gervais

Our File # 339583-000169

By electronic filing

April 7, 2015

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th floor
Toronto, ON M4P 1E4

Dear Ms. Walli

Re: Union Gas Limited ("Union")
2014 Rates Application
Board File #: EB-2013-0365

We are writing to determine whether the Board will be providing a response to our letter of February 18, 2015, seeking a variance to its Decision and Order on Cost Awards dated February 12, 2015 (the "Order"). For ease of reference, a copy of that letter is attached.

Between February 18 and February 20, 2015, Union and several other parties submitted letters and/or email communications supporting the appropriateness of our request that the cost award disallowances be varied so as to increase the fees allowed to Industrial Gas Users Association ("IGUA") and Canadian Manufacturers & Exporters ("CME") by $6,270.00 and $12,540.00 respectively, plus HST.

Can we expect a response to this letter request; or will it be necessary for us to file a formal motion for a Review and Variance?

Yours very truly

Borden Ladner Gervais LLP

Peter C.P. Thompson, Q.C.
PCT\slc
enclosure
c. Mark Kitchen (Union Gas)
Intervenors EB-2013-0365
Paul Clipsham and Ian Shaw (CME)
OTT01: 6816944: v1

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Our File # 339583-000169

By electronic filing

February 18, 2015

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th floor
Toronto, ON M4P 1E4

Dear Ms. Walli

Re: Union Gas Limited ("Union")
2014 Rates Application
Board File #: EB-2013-0365

We are writing with respect to the Board's Decision and Order on Cost Awards dated February 12, 2015. In that Decision, the Board finds that the 109 and 128 hours spent by counsel for Industrial Gas Users Association ("IGUA") and Canadian Manufacturers & Exporters ("CME") in facilitating a resolution of the complicated Parkway Delivery Obligation ("PDO") issue are too high by 19 and 38 hours respectively.

In concluding that 90 hours was the upper limit "for work on the Settlement Agreement" by IGUA and CME, the Board appears to have been under the mistaken belief that a consensus on the PDO issue had been reached many weeks prior to June 2, 2014, and that the effort expended by counsel for IGUA and CME between March 19 and June 3, 2014, was spent in trying to reflect that consensus in a written agreement. We draw that conclusion from the Board's characterization of the work done by these counsel as "work on the settlement agreement" and work "spent entirely on preparation of the settlement agreement, particularly the Parkway issue".[1]

We agree that the Board might reasonably set limits for the time to be taken by counsel in formalizing a consensus which has emerged into a written agreement. However, that is not what happened in this case. In this case, no agreement was reached on the PDO issue until the

[1] See page 2 of Decision and Order on Cost Awards dated February 12, 2015.

beginning of June 2014. Very little, if any, of the time spent by counsel for IGUA and CME over the course of about 2½ months between March 19 and June 3, 2014, was spent working on an agreement with respect to a settled issue. Rather, that time was spent by counsel for IGUA and CME working towards a consensus resolution of the complicated PDO issue.

These counsel facilitated negotiations towards a resolution of that issue by developing a settlement framework which could be adjusted to eventually make its elements palatable to those representing the competing interests of direct purchasers, system gas users, non-obligated generators, and Union. Developing such a framework was a challenging exercise having regard to the array of competing interests with respect to the issue. The settlement framework was used to facilitate some 2½ months of intense negotiations between intervenors and Union with counsel for IGUA and CME acting as the communication link between all intervenors and the utility. The other intervenors remained largely on the sidelines while counsel for IGUA and CME carried the burden of communicating the settlement positions to Union and relaying Union's responses to intervenors.

Counsel for IGUA and CME were attempting to forge a consensus that all of the competing interests could either support or not oppose. Such a "Complete Settlement", rather than a "Partial Settlement", would avoid the need for a full hearing of a difficult issue. As it turned out, considerable time and effort was required to achieve that outcome.

While we agree that the Board can use hindsight to set reasonable upper limits for working on the terms of a formal agreement pertaining to an issue which has been settled, we submit that no one can reasonably set limits, after the fact, on the duration which parties should take in negotiating a resolution of a complicated issue.

For these reasons, we believe that the Board has misapprehended the facts with respect to the tasks performed by counsel for IGUA and CME in connection with the PDO issue. The purpose of this letter is to clarify these facts in the hope that the Board, with a correct understanding of the situation, will reconsider its disallowances of 19 and 38 hours spent by counsel for IGUA and CME.

Our records indicate that the settlement negotiations with respect to the PDO issue, over the period March 19 to June 3, 2014, involved 6 conference calls on April 8, April 24, May 2, May 13, May 15 and May 22, having an average length of almost 3 hours. The total conference call time of about 18 hours is the equivalent of about 3 Settlement Conference days. The lion's share of the preparatory work for each of these conference calls was performed by counsel for IGUA and CME. The purpose of these conference calls was to continue to negotiate towards a resolution of the issue.

The point is that little, if any, time was spent between March 19 and June 3, 2014, for work on the settlement agreement. Rather, most of the time spent was in negotiating a settlement, the terms of which finally emerged in early June 2014. Because of the adjustable settlement framework which had been established at the outset, once the consensus emerged in early June 2014, the reflection of that consensus in a formal agreement did not consume a great deal of additional time.

In the Board's Cost Claim form, we classified the time spent in the further negotiations of the PDO issue between March 19 and June 3, 2014, as "SC Proposal Prep" because of our belief that the "SC Prep" and "SC Attend" categories of costs in that form applied only to the Settlement Conference dates of March 17 to 19, 2014 specified in its Procedural Order. We probably should have classified this time as "SC Prep" and "SC Attend" since it related to the continuation of the Settlement Conference for the purpose of negotiating an eventual resolution to the PDO issue.

The 109 and 128 hours of time spent by counsel for IGUA and CME respectively during the course of the continuance of the mid-March Settlement Conference have fee values of $35,970.00 and $42,240.00 respectively. The total fees amount for these 2 intervenors for the tasks they performed over the course of the 2½ months of further negotiations of the PDO issue are $75,210. This amount is but a small fraction of the total costs that would have been incurred by the Applicant, the Board, its staff, and intervenors to prepare for and conduct a hearing of the PDO issue as a disputed issue.

We accept that the Board should consider "proportionality" when evaluating the reasonableness of the costs claimed by intervenors. However, when considering the value of efforts made to successfully forge a "Complete Settlement" of a complicated issue, the avoided costs of conducting a full hearing of that issue should be included in estimating the value of the settled issue.

On a global basis, the impact of the PDO settlement on ratepayers is essentially neutral. For direct purchasers, the benefits of the settlement are probably in excess of $6 M per year for a total of $30 M over the duration of Union's 5 year Incentive Regulation Mechanism ("IRM") Agreement. These amounts are being absorbed by system gas users in order to make the overall PDO burden more equitable.

When the avoided costs of preparation for hearing and hearing time are brought into account, along with the $30 M cost shift as between direct purchasers and system gas users over 5 years, the total time spent by counsel for IGUA and CME, having a value of $75,210, is a very small proportion of the "value" associated with the Board having to determine a disputed PDO issue.

Based on the foregoing, we respectfully submit that, in concluding that the 109 and 128 hours of time spent by counsel for IGUA and CME to spearhead the successful negotiations of the PDO issue was excessive, the Board failed to appreciate that the time spent between March 19 and June 2, 2014 by these counsel was spent in facilitating intense negotiations towards a consensus resolution of the issue in the context of a framework which could be modified to accommodate such an outcome. We submit that the value of an unresolved PDO issue greatly exceeded the value of time spent by counsel for IGUA and CME to facilitate its resolutions.

For all of these reasons, we respectfully urge the Board to exercise its power under Rule 41.01 of the Board's *Rules of Practice and Procedure* to reconsider the fee disallowances made for IGUA and CME respectfully of $6,270.00 and $12,540, plus HST. We submit that, with an appreciation of the correct facts pertaining to the negotiations of the settlement of the PDO issue, the Board Panel which rendered the February 12, 2015 Cost Award Decision and Order

can conclude, on its own motion, that the disallowances of 19 and 38 hours for IGUA and CME respectively are unwarranted and should be reversed.

Under Rule 41.01, the Board may, at any time, indicate its intention to review all or any part of an Order. We submit that it is appropriate for the Board to consider an exercise of that power in this case for the following reasons:

(a) The Board Panel which made the cost disallowances is in the best position to determine whether it has misapprehended what transpired between March 19 and June 4, 2014, with respect to the tasks performed by counsel for IGUA and CME in negotiating the settlement of the disputed PDO issue; and

(b) The Board Panel should readily adjust its Cost Award disallowances, on its own motion, if it has misapprehended the facts upon which those disallowances were based. A formal motion to vary should not be necessary to apprise the Board of facts which it appears to have misapprehended where these facts are not matters in issue between any particular intervenor and other parties. Rather, the Board should be able to resort to the Rule 41.01 process where misapprehended issues of fact are between particular intervenors and the Board Panel which made the Cost Award disallowances.

For all of these reasons, we urge the Board to reconsider its disallowances and to increase the fees allowed to IGUA by $6,270 plus HST and to CME by $12,540 plus HST.

We have provided a copy of this letter to Mr. Kitchen of Union and to the representatives of the other intervenors who participated in the settlement negotiations related to the PDO issue. We have requested those parties to advise the Board whether, in their view, this letter reasonably describes the role performed by counsel for IGUA and CME in facilitating a resolution of the PDO issue.

Yours very truly

Borden Ladner Gervais LLP

Peter C.P. Thompson, Q.C.

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c. Mark Kitchen (Union Gas)
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