GOWLING WLG

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VIA RESS AND COURIER

Ms. Kirsten Walli
ONTARIO ENERGY BOARD
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, Ontario
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Dear Ms. Walli:

Re: EB-2016-0122: Union Gas Limited (Union) 2016 Sudbury Replacement Project.

Decision and Order on Cost Awards (August 9, 2016).

We write as counsel to the Industrial Gas Users Association (IGUA) to ask that the Board reconsider an aspect of the captioned decision on IGUA's cost claim herein.

We submit that as the nature of the Board's concern with IGUA's cost claim was not mechanical (like a calculation error) or procedural (like the lack of appropriate expenditure receipts or documentation), but rather was substantive, that procedural fairness requires that IGUA be provided with an opportunity to respond to the Board's concerns. We provide IGUA's response through this letter, and ask that the Board consider this response and reconsider the disallowance directed in its August 9th Decision and Order on Cost Awards.

In its August 9th costs decision, the Board directed two disallowances. One of the two disallowances was directed as follows:

> *The OEB will disallow 50% of the 0.30 hour that Mr. Ian Mondrow claimed for work on June 14, 2016 to "Review and finalize submissions; review OEB Staff submissions". The OEB finds it not appropriate for an intervenor to charge for time to review the OEB Staff submission given it was circulated and filed after IGUA had filed its own submissions.*

We raise two objections to the noted finding:

1. No notice was provided to IGUA that this aspect of its claim would be in issue, and thus IGUA has had no opportunity to respond to the issue that has been raised.

   Union, the only party to submit any comments on IGUA's cost claim, did not object to any aspect of that claim. In the result, the Board has made a final determination on IGUA's cost claim without IGUA having been given any notice of, or opportunity to respond to, an issue dispositive of an aspect of that claim but raised for the first time in the decision itself.

   The basis for the Board's disallowance determination in this instance is not one related to a lack of supporting documentation, a calculation error, or a similar mechanical or procedural issue which IGUA would be expected to be aware of and in respect of which further explanation would not be required or of potential assistance to the decision maker. Rather the basis for the Board's disallowance determination is a substantive finding on a matter within the exercise of the Board's quasi-judicial discretion.

   Given that the finding objected to is a substantive one (as distinct from a mechanical or procedural one), and is a final determination in respect of IGUA's entitlement to recover its reasonably incurred costs in accord with the Board's *Rules of Practice and Procedure*, IGUA has a right to; i) know the case it has to meet in this respect; and ii) be given a fair opportunity to respond.

   Now that IGUA is aware of the case that it has to meet in this respect (given the Board's decision), this letter constitutes IGUA's response. Accordingly, the Board should, both as a matter of good practice and as a matter of law, receive this objection and reconsider its determination in light of this objection.

2. ***With respect, the basis for the Board's determination on this issue is inappropriate.***

   The conclusion begged by the rationale provided by the Board for disallowance of 0.15 hours of time claimed (which translates into legal fees of $49.50) is that it is not reasonable for intervenors to review the final submissions of Board Staff once their own final submissions have been filed. This is, to our knowledge, a novel suggestion.

   Effective and reasoned participation in a proceeding, which is the type of participation that an intervenor is obligated to engage in, requires that the intervenor; i) properly monitor the participation of other interested and active parties, and in particular OEB Staff; and ii) remain informed of the positions being taken by other interested parties, and in particular OEB Staff, on issues of reasonable and legitimate concern to the intervenor.

For example, what if Staff had mischaracterized or misinterpreted IGUA's interest in, or position on, the application? What if Staff had raised a new issue in respect of the application which new issue IGUA was legitimately concerned about and appropriately placed to respond to? The cost determination in issue would, if extrapolated to its logical conclusion, dictate that IGUA would have no notice of such a development and would thus be wholly unable to protect its interests in the proceeding and/or respond in order to provide the Board with an appropriate alternative perspective.

Stated another way, there is a reason that final submissions are publically filed. We find it a novel proposition that intervenors – who have both the privilege and the obligation for full and informed participation in a proceeding – need not and should not inform themselves of the substance of the filings of other parties to the proceeding.

Further, proper discharge of counsel's obligation to inform our client of the Board's ultimate decision on the application and the issues raised by participants (in this instance Board Staff) and addressed (or not) in the Board's decision, requires at least a rudimentary awareness and consideration of the issues addressed by other parties. This is a standard feature of legitimate, responsible, and consistently sanctioned (through hundreds of cost decisions) intervention conduct, within reasonable time allowance bounds.

Accepting that review of the filings of Board Staff for issues/positions of concern to our client is an appropriate activity in furtherance of the privileges and obligations of intervention, disallowance of reasonable costs associated with this activity is, with respect, arbitrary and unwarranted, as well as a departure from long-standing Board sanctioned practice.

In respect of the rationale provided for the Board's departure from long-standing practice, the fact that IGUA could not, absent an atypical (though not unprecedented) procedural indulgence, provide further submissions does not vitiate the appropriateness of counsel considering the positions of Board Staff and their (eventual) influence on the outcome of the proceeding. That is, it is entirely reasonable that IGUA's counsel spent $49.50 worth of time to review OEB Staff's 9 page submission on the merits of Union's application, as part and parcel of responsibly participating in the proceeding, and our ultimate review of the Board's decision and concluding advice to our client.

It is respectfully submitted that none of the interests of Union's ratepayers, Union's own interests, or the broader public interest, have in any way been compromised by the extremely modest, and completely responsible, expenditure of time by counsel to quickly review the nature of Board Staff's final submissions herein.

In contrast, the narrow approach to cost award considerations reflected in the cost determination in question has the potential to significantly, and inappropriately, constrain future responsible intervenor conduct, to the prejudice of both cost eligible intervenors and the Board's own processes.

We do not believe that such a result is intended by the decision maker in this instance, which is another reason that we respectfully suggest that further consideration of the determination in question is appropriate.

For the foregoing reasons, we respectfully request that the Board reconsider the disallowance noted above.

Yours truly,

Ian A. Mondrow

c. W.T. Wachsmuth (Union)
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