
# ONTARIO ENERGY BOARD

## OEB STAFF SUBMISSION

## October 18, 2016

**Industrial Gas Users Association**

**Motion to Review OEB Decision and Order on Cost Awards (EB-2016-0122)**

**EB-2016-0248**

## Introduction

On August 10, 2016, the Industrial Gas Users Association (IGUA) filed a request that the OEB review its August 9, 2016 Decision and Order on Cost Awards in which it disallowed a portion of the costs claimed by IGUA for intervening in Union Gas Limited's application for leave to construct the 2016 Sudbury Replacement Project (EB-2016-0122).

The only aspect of the cost decision that IGUA challenges is the following:

> *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.*

This disallowance amounted to only $49.50 plus HST. Nevertheless, IGUA takes the position that "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."

IGUA argues that it was unfair for the OEB to disallow these costs without giving it an opportunity to respond, noting that Union did not object to any of IGUA's costs. IGUA further argues that being a responsible and effective intervenor includes reviewing the submissions of other parties, even if they come in after the intervenor's own submission was filed.

For the reasons set out below, OEB staff supports IGUA's motion, and submits that the OEB should reverse the disallowance.

## Process

In the Notice of Hearing and Procedural Order No. 1, issued on October 3, 2016, the OEB directed the parties to make submissions on both the threshold question of whether the OEB should review the cost decision and the ultimate merits of the motion at the same time. Union and OEB staff were deemed to be parties to the motion.

## The Threshold Issue

Under Rule 42.01 of the OEB's Rules of Practice and Procedure, a notice of motion to review must:

> *set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:*
>
> *(i) error in fact;*
> *(ii) change in circumstances;*
> *(iii) new facts that have arisen;*
> *(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.*

The OEB explained in the Natural Gas Electricity Interface Review (NGEIR) case (EB-2006-0322/0338/0340, May 22, 2007), "the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended." The OEB added that "a review is not an opportunity for a party to reargue the case."

The OEB has broad discretion under the OEB Act in awarding costs.[1] The *Practice Direction on Cost Awards* does not speak directly to the question of whether an intervenor can claim costs for time spent after its own submissions have been filed. In one sense, then, it cannot be said that the OEB's decision to disallow IGUA's costs for reviewing another submission was "incorrect". The OEB was not obliged to allow those costs.

Nevertheless, in the circumstances of this case, OEB staff submits that it would be appropriate for the OEB to reconsider its decision. Just as the OEB has broad discretion with respect to awarding costs, it has broad discretion with respect to determining whether to review a decision. Under s. 21.2 of the *Statutory Powers Procedure Act*, "A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order" (emphasis added). In determining whether it is advisable to review a decision, the OEB is not constrained by the factors set out in Rule 42.01. While the concern expressed in the NGEIR case about allowing a party to simply

[1] Subsection 30(1) of the *Ontario Energy Board Act, 1998* provides that "The Board may order a person to pay all or part of a person's costs of participating in a proceeding before the Board". Subsection 30(5) adds that "In awarding costs, the Board is not limited to the considerations that govern awards of costs in any court."

"reargue the case" is understandable, it does not apply here. IGUA did not have an opportunity to argue for the reasonableness of its costs in the first place. It submitted its claim, Union did not object, and OEB staff was not invited to comment.

In OEB staff's view, Rule 42.01 is a guideline for exercising the OEB's discretion as to whether to review a decision, but does not set hard limits on that discretion. In any case, the OEB may, pursuant to Rule 1.03, "dispense with, amend, vary or supplement, with or without a hearing, all or part of any Rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so." Moreover, as IGUA notes in its submission, the OEB has the power to review a decision on its motion under Rule 41.01, in which case the factors listed in Rule 42.01 would not be determinative.

OEB staff submits that, although the amount at issue in this case is insignificant – $49.50 plus tax, for nine minutes of counsel's time – the question raised in IGUA's motion is likely to be of interest to the intervenor community. As IGUA explains, "the principle in issue is important for other cost reliant intervenors and to the integrity of the OEB's processes in general." This is evidenced by the fact that another regular intervenor – the Vulnerable Energy Consumers Council, which did not intervene in the Union leave to construct case – asked for an opportunity to make submissions on this motion.

For these reasons, OEB staff submits that it would be in the public interest for the OEB to review its cost decision on the merits.

OEB staff notes that there is another motion to review a cost decision that is now before the OEB. In EB-2016-0208, the School Energy Coalition (SEC) has challenged the OEB's decision to disallow certain costs for participating in the hearing on Toronto Hydro's custom incentive rate application. In that case, OEB staff filed a submission arguing that SEC had failed to meet the threshold test. A distinguishing feature of that case is that the impugned costs were incurred before Toronto Hydro's application had even been filed, whereas in the matter at hand IGUA's disallowed costs were incurred in the course of an ongoing proceeding.

## The Merits of IGUA's Motion

OEB staff agrees with IGUA that it is reasonable for intervenors to review the submissions of other parties, even if they come in after the intervenor's own submission was filed. As IGUA puts it:

*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.*

OEB staff also notes that the *Practice Direction on Cost Awards* is not clear; it does not specifically stipulate that costs incurred after an intervenor has filed its own submission are not recoverable. Nor has it been the OEB's practice to disallow such costs. Accordingly, in OEB staff's view, it would be reasonable for an intervenor to expect that any time spent reviewing another submission – whether prior to or following the completion of its own submission – would be compensable.

OEB staff also agrees with IGUA's concerns about the implications of the OEB's cost decision. If the OEB were to follow the approach it took in this case, and routinely disallowed any costs incurred after an intervenor had filed its own submission, intervenors might disengage entirely from the proceeding after filing their submissions. The result would be less scrutiny of the subsequent submissions of other parties, including in many cases the reply submission of the applicant. Such scrutiny helps to ensure the OEB's final decisions consider all relevant factors and perspectives, and are in the public interest.

Finally, OEB staff submits that the small amount of time actually claimed by IGUA for counsel's review of the OEB staff submission on Union's application was reasonable.

**All of which is respectfully submitted.**