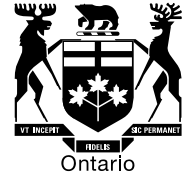


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BY EMAIL

November 29, 2018

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

Dear Ms. Walli:

**Re: Building Owners and Managers Association's Motion to review and vary
OEB Cost Awards Decision EB-2016-0296/0300/0330
OEB Staff Submission
OEB File Number EB-2018-0164**

Please find attached OEB staff's submission on the above noted proceeding.

Enbridge Gas Distribution Inc., Union Gas Limited, EPCOR Natural Gas Limited Partnership and the intervenors from the 2017 Cap and Trade Compliance Plans (EB-2016-0296/0300/0330) have been copied on this filing.

Sincerely,

Original Signed By

Laurie Klein

Attachment



ONTARIO ENERGY BOARD

OEB STAFF SUBMISSION November 29, 2018

Building Owners and Managers Association's Motion to review and vary OEB Cost Awards Decision EB-2016-0296/0300/0330

EB-2018-0164

Introduction

On September 21, 2017, the Ontario Energy Board (OEB) issued its Decisions and Orders in relation to the 2017 Cap and Trade Compliance Plan applications of Enbridge Gas Distribution Inc. (Enbridge Gas), Union Gas Limited (Union Gas) and EPCOR Natural Gas Limited Partnership (EPCOR Gas) [collectively the Gas Utilities].¹

On March 28, 2018, the OEB issued its Decision and Order on Cost Awards (Decision) in relation to the 2017 Cap and Trade Compliance Plan applications². In the Decision, the OEB found that Building Owners and Managers Association's (BOMA) cost claim of \$80,845.00 was unreasonable. The OEB stated that the level of BOMA's effort with respect to gaining an understanding of the broad cap and trade framework is not fully eligible for reimbursement. As per the OEB's *Report of the Board – Regulatory Framework for Assessment of Costs of Natural Gas Utilities' Cap and Trade Activities* (Cap and Trade Framework)³, the OEB's role is not to approve the Compliance Plans but to assess these plans for cost-effectiveness and reasonableness. The OEB found that it does not consider BOMA's efforts to be commensurate with what would be required to assess the reasonableness of the cost consequences of the proposed Compliance Plans. In the Decision, BOMA was awarded \$22,000.00 which was the mid point between the approximate average of all other intervenor claims (\$19,000) and \$25,000 which was the approximate claim of each of the highest four of the other nine intervenors. The cost claims awarded in the Decision were as follows:

Association of Power Producers of Ontario (APPo)	\$24,878.69
Building Owners and Managers Association (BOMA)	\$22,000.00 (original cost claim was \$80,845)
Canadian Manufacturers & Exporters (CME)	\$25,451.84
Consumer Council of Canada (CCC)	\$18,272.10
Environmental Defence (ED)	\$18,845.27
Federation of Rental-housing Providers of Ontario (FRPO)	\$24,953.02
Industrial Gas Users' Association (IGUA)	\$25,532.86
London Property Management Association (LPMA)	\$15,139.74
Low-income Energy Network (LIEN)	\$10,906.79
Ontario Sustainable Energy Association (OSEA)	\$22,000.00 (original cost claim was \$28,275)
School Energy Coalition (SEC)	\$13,740.80

¹ EB-2016-0296/0300/0330

² EB-2016-0296/0300/0330

³ EB-2015-0363

On April 17, 2018, BOMA filed a Notice of Motion to review and vary the Decision (Motion). BOMA argued that the grounds for the Motion are that the Decision contains errors of fact and that the reduction of seventy five percent (75%) of BOMA's costs claim is unjustified, unfair, and punitive.⁴ The Motion also made the following arguments:

- Neither Enbridge Gas nor EPCOR Gas raised the issue of the amount of BOMA's claim; Union Gas was the sole complainant, and solely on the basis that BOMA's claim was substantially higher than the next highest⁵
- BOMA needed to understand the legal and regulatory context in which the 2017 Compliance Plans were developed and this required extensive review of the legal, regulatory and economic context of Ontario's cap and trade system including other jurisdictions⁶
- BOMA was one of the very few intervenors that addressed all of the issues⁷

On October 25, 2018, the OEB issued a Notice of Hearing and Procedural Order No.1⁸ that set out dates for BOMA, OEB staff and the Gas Utilities to file written submissions. Also, the OEB stated that it will consider both the threshold question and the merits of the Motion concurrently.

On November 14, 2018, BOMA filed additional material (the submission) in support of the Motion⁹ and asserted that the Decision contained errors of fact and law, and was contrary to the OEB's *Practice Direction on Cost Awards* (Practice Direction)¹⁰ and its historical policy on costs. The submission also made the following arguments:

- The OEB did not take into account the breadth and depth of BOMA's final arguments relative to those of the other nine (9) intervenors as BOMA made separate arguments for each of Union Gas (30 pages) and Enbridge Gas (28 pages) while the final arguments of the other intervenors averaged six or seven pages¹¹

⁴ Motion, pp 1-2, para 1

⁵ Motion, p. 2

⁶ Ibid, pp 2-3

⁷ Motion, p. 5

⁸ EB-2018-0164

⁹ BOMA Additional Material

¹⁰ https://www.oeb.ca/oeb/Documents/Regulatory/Practice_Direction_on_Cost_Awards.pdf

¹¹ BOMA Additional Material, p. 5

- Unlike the other intervenors, BOMA did an in-depth analysis of the legal and regulatory context of Ontario's cap and trade system (which included reviewing studies, other jurisdictions), from which it was able to infer the broad contours of the Gas Utilities' 2017 Compliances Plans and hence to determine their overall reasonableness and cost-effectiveness¹²
- BOMA's final arguments included analysis on prudence, risk, enhanced DSM, reporting requirements, longer investment proposals and made suggestions to increase transparency¹³
- OEB's use of average cost claims in reducing BOMA's claim was "not correct, discriminatory and likely an error of law"¹⁴

¹² BOMA Additional Material, p. 5

¹³ BOMA Additional Material, pp. 7-8

¹⁴ BOMA Additional Material, p.10, para 5

OEB Staff Submission

Threshold Question

In its submission, BOMA argued that the Decision: i) contained errors of fact and law; and ii) was contrary to the OEB's Practice Direction and its historic policy on costs.¹⁵

OEB staff submits that the grounds for review asserted in the Motion and submission are not substantiated such that there is no identifiable error which raises a question as to the correctness of the Decision. OEB staff submits that therefore the Motion has not met the threshold test for review and should be dismissed without further review on merits. OEB staff's submission will set out an overview of the threshold test and address the alleged grounds for review noted above.

A) The Threshold Test

Under Rule 43.01 of the OEB's Rules of Practice and Procedure¹⁶, the OEB may determine, with or without a hearing, a threshold question of whether a matter should be reviewed before conducting any review on the merits.

Rule 42.01 of the Rules of Practice and Procedure states that a motion for review must set out grounds that raise a question as to the correctness of the order or decision in question, which grounds may include the following: (i) error in fact; (ii) change in circumstances; (iii) new facts have arisen; and (iv) facts that were not placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

OEB staff agrees with the submission of BOMA that the list set out in Rule 42.01 is not exhaustive but illustrative.

The purpose of the threshold test was articulated by the OEB in its decision on a Motion to Review the Natural Gas Electricity Interface Review Decision (NGEIR Review Decision)¹⁷. In the NGEIR Review Decision, the OEB stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision. In order to proceed

¹⁵ BOMA Additional Material, pp. 3-4

¹⁶ https://www.oeb.ca/oeb/Documents/Regulatory/OEB_Rules_of_Practice_and_Procedure.pdf

¹⁷ Natural Gas Electricity Interface Review Decision with Reasons, EB-2006-0322/0338/0340 (May 22, 2007) (NGEIR Review Decision), p. 18

with a review on the merits of a motion to review, the OEB had to determine that there was enough substance to the issues raised such that a review based on those issues could result in the OEB varying, cancelling or suspending the decision.

The OEB stated as follows:

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.¹⁸ (emphasis added)

In *Grey Highlands v. Plateau*¹⁹ the Divisional Court dismissed an appeal of an OEB decision where the OEB had determined that the motion to review did not meet the threshold test and the OEB did not proceed to review the earlier decision. In upholding the OEB's decision, the Divisional Court stated:

The OEB's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.²⁰ (emphasis added)

Having set out the principles of the threshold test articulated in the OEB's Practice Direction and case law, OEB staff's submission will now address the alleged grounds for review raised in the Motion and submission.

B) No Identifiable Error that Raises a Question of Correctness of Decision

i. OEB Panel Properly Considered Evidence in its Findings

In its submission BOMA asserted that, in making its findings, the OEB did not take into account the breadth and depth of BOMA's participation and arguments in the proceeding relative to those of the other nine (9) intervenors.²¹

OEB staff disagrees and submits that the panel did consider all of the evidence before it, including BOMA's and other intervenors' cost submissions, Union Gas' objections to

¹⁸ NGEIR Review Decision, p. 18

¹⁹ *Grey Highlands (Municipality) v. Plateau Winds Inc.* [2012] O.J. No. 847 (*Grey Highlands v. Plateau*) at para 7

²⁰ *Grey Highlands v. Plateau* at paragraph 7

²¹ BOMA Additional Material, pp. 4-5, para 3 and p. 9

BOMA's costs submission, and BOMA's December 7, 2017 reply submission. The OEB acknowledged the level of BOMA's effort and stated:

“... BOMA has defended its claim on the basis that **it had to complete extensive research and analysis on the regulatory framework in Ontario and on the broader anticipated cap and trade market.** The OEB finds that the level of BOMA's effort with respect to gaining its understanding of the broad cap and trade framework is not fully eligible for reimbursement.”²² (emphasis added)

OEB staff submits that it is clear that the panel did consider the evidence with respect to the time and effort spent by BOMA but determined that not all of the effort expended was eligible for reimbursement. BOMA has not demonstrated that the panel misapprehended or failed to consider evidence submitted by BOMA in support of its cost claims.

As the OEB decided in the NGEIR Review Decision, in order to demonstrate that there is an error, the applicant must be able to show that the findings in the Decision are *contrary to the evidence* that was before the panel, that the panel failed to address a material issue, that the panel made *inconsistent findings*, or something of a similar nature. It is not enough to argue that the panel should have reached a different conclusion on the evidence.²³

ii. No “Factually Incorrect” Statements or Findings by OEB Panel

BOMA's Motion also stated that the OEB “erred in *asserting* that BOMA asked the Board to approve, or assumed that the Board would approve, the utilities' Cap and Trade programs.”²⁴ In its submission BOMA stated that the OEB “*implied* that BOMA's analysis was directed at the approval of the plan”²⁵ and that this was a “factually incorrect” statement in the Decision.²⁶

OEB staff notes that the Decision did not “assert”, make “factually incorrect” statements or any statements to the effect that BOMA's analysis was improperly focused on approval of the 2017 Compliance Plans.

²² Cost Awards Decision, p. 3

²³ NGEIR Review Decision, p. 18

²⁴ Motion, p. 6, para 4

²⁵ BOMA Additional Material, pp. 8-9 states, “...the **Board implied** that BOMA's analysis was directed at the approval of the plan itself rather than the assessment of the plans for cost-effectiveness and reasonableness. But that is not the case. **The statement is factually incorrect...**” (emphasis added)

²⁶ Ibid

The Decision stated:

“...As per the OEB’s *Report of the Board – Regulatory Framework for Assessment of Costs of Natural Gas Utilities’ Cap and Trade Activities* (Cap and Trade Framework)²⁷, the OEB’s role is not to approve the Compliance Plans but to assess these plans for cost-effectiveness and reasonableness. **The OEB does not consider BOMA’s efforts to be commensurate with what would be required to assess the reasonableness of the cost consequences of the proposed plans**”²⁸ (emphasis added)

BOMA may have “read between the lines” of this statement in the Decision and speculated that the panel disallowed most of BOMA’s costs because it assumed or implied that BOMA’s efforts were focused on approval of the 2017 Compliance Plans. In OEB staff’s view, the above-noted statement in the Decision is unambiguous and should not be interpreted as “implying” a conclusion that is contrary to what is clearly stated in the Decision.²⁹

All parties in the applications, including BOMA, were aware of the OEB’s role in the applications: to assess the 2017 Compliance Plans for cost-effectiveness and reasonableness. At the conclusion of the proceedings, the panel assessed BOMA’s (and other intervenors’) cost claims in relation to their efforts in that context, i.e., assessing the reasonableness of the cost consequences of the proposed plans. The panel concluded that BOMA’s efforts in that context were excessive or disproportionate, i.e., “not commensurate with what would be required to assess the reasonableness of the cost consequences of the proposed plans”.³⁰

OEB staff submits that BOMA has failed to substantiate that there is an *identifiable error* in the Decision either on the basis of: i) the panel not considering BOMA’s evidence as to why its cost claims were significantly higher than other intervenors’ costs; or ii) assuming or making factually incorrect statements in the Decision that BOMA’s efforts had been improperly focused on ‘approval of the Compliance Plans’.

²⁷ Cap and Trade Framework EB-2015-0363

²⁸ Cost Awards Decision, p. 7

²⁹ BOMA Additional Material, p. 8 states, “...the **Board implied** that BOMA’s analysis was directed at the approval of the plan itself.” (emphasis added)

³⁰ Cost Awards Decision, p. 7

C) Compliance with OEB Policy and Practice Direction on Cost Awards

BOMA's submission asserts that the reduction of the portion of its costs claim that significantly exceeded the average intervenor cost claim was not consistent with the OEB's policy on costs that eligible intervenors should receive their "reasonably incurred costs of participating in the proceeding".³¹ BOMA also asserted that the denial of a claim that is substantially in excess of the average claim is "discriminatory and likely an error of law".³²

i) OEB Panel Determined "Reasonable Costs" of Intervenor Participation

OEB staff submits that intervenors are not automatically entitled to recover whatever costs they incur to participate in a proceeding, but only reasonable costs as determined by the OEB in a cost award decision.

When considering cost claims, the OEB has complete discretion in determining the amount of any costs to be paid. Section 2.01 of the Practice Direction and section 30 of the *Ontario Energy Board Act, 1998* (OEB Act)³³ are clearly permissive / discretionary in that they state "the Board may order a person to pay all or part of a person's costs of participating in a proceeding before the Board".

In determining the amount of the cost awards, the OEB may consider the criteria listed in section 5 of the Practice Direction which permits (but does not require) the OEB to consider the nature of the participation by the cost claimant; the quality and relevance of the cost claimant's contribution to the proceeding; and the proportionality of the cost claim to the value of the contribution.

ii) Consideration of Average Cost Claim is not a Reviewable Error

OEB staff submits that, in determining "reasonable" costs, the OEB is permitted to consider the cost claims of all participants and, where the scope of participation of all intervenors (or groups of intervenors) is comparable, then comparison of cost claims is appropriate. Furthermore, when the majority of cost claims of comparable participants fall within a relatively narrow range and, all other things equal, there is an outlier cost claim amount, then it may be necessary and appropriate to bring the outlier within the range of the majority.

³¹ BOMA Additional Material, p. 10, para 5

³² *Ibid*

³³ *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B

To the extent that the OEB may have considered “a wide range of costs claim amounts” in another proceeding, as argued in BOMA’s submission,³⁴ such an analysis does not amount to a policy that precludes panels in other cases from considering a cost claim in relation to other intervenors’ claims. In addition, a wide range of cost claim amounts may have been appropriate due to the quality and relevance of the cost claimant’s contribution to the proceeding; and the proportionality of the cost claim to the value of the contribution. As stated in several decisions on cost awards, as an administrative tribunal the OEB is not bound by precedent and has discretion in determining the amount of any costs to be paid.³⁵

In other cost award decisions, the OEB has considered cost claims that were considerably higher than the average amount claimed by other intervenors, and determined that not all of the costs were reasonable and disallowed a substantial portion of the costs claimed that were greater than the average of other intervenors.³⁶

OEB staff submits that considering an intervenor’s costs claim in relation to other intervenors’ cost claims is consistent with the Practice Direction, and OEB policy and practice, such that the Decision does not contain an error of fact or law that demonstrates a need for a review on the merits.

³⁴ BOMA Additional Material, p. 11, para 5, referring to EB-2016-0160, Hydro One Transmission

³⁵ See for example, EB-2016-0208, Decision on Motion to Review and Vary Cost Awards Decision, November 3, 2016, p. 5

³⁶ See for example, EB-2008-0272, Decision and Order in Hydro One Networks Inc. Application for Transmission Rates, September 24, 2009 page 3 which states: “.... The amount of \$87,500, being half the amount claimed, is **considerably higher than the average amount claimed by the other intervenors** (\$56,000)... The Board is not satisfied that all of AMPCO’s costs in this proceeding were reasonable. The Board will allow ...**an amount slightly less than the average cost claim of the other intervenors...**” (emphasis added)

Merits of the Motion

If the OEB determines that the Motion does meet the threshold question, OEB staff's submission on the merits of the Motion is outlined below.

A) Considerations in Awarding Costs

BOMA, in its submission, stated that it took a different approach to its analysis compared to the other nine (9) intervenors by: i) addressing all the issues³⁷ and ii) conducting an in-depth research and based on this research BOMA could infer the broad contours of the Gas Utilities' 2017 compliance strategies.³⁸

As per the OEB's Cap and Trade Framework³⁹ a significant portion of the Gas Utilities' 2017 Compliance Plan applications were treated as strictly confidential and only accessible to OEB staff and the decision-making panel assigned to the applications.⁴⁰ As a result, some of the issues on the Issue Lists could not be addressed by the intervenors.⁴¹ Consequently, the intervenors⁴² focused their final arguments on specific areas pertaining to the non-confidential evidence.

OEB staff suggests that BOMA's in-depth research resulted in BOMA speculating that the Gas Utilities' 2017 compliance strategies would consist of allowances purchased in the primary and secondary markets.⁴³ BOMA's speculations (or inferences) about the Gas Utilities' 2017 compliance strategies was not based on the non-confidential evidence but on the strictly confidential evidence that none of the intervenors had access to. Therefore, OEB staff suggests that BOMA's inferences or speculation about the possible makeup of the Gas Utilities' 2017 compliance strategies would most likely not have assisted the panel in its review of the cost effectiveness of the 2017 Compliance Plans as the panel already had access to the strictly confidential evidence.

OEB staff notes that the Gas Utilities in their 2017 Compliance Plans did not include any abatement activities.⁴⁴ As a result, all the intervenors could have inferred that the Gas

³⁷ Motion, p. 5 and Additional Material, p. 6

³⁸ BOMA Additional Material, pp. 5-6

³⁹ EB-2015-0363

⁴⁰ OEB's Cap and Trade Framework and the *Climate Change Mitigation and Low-carbon Economy Act, 2016*, S.O. 2016, c.7 (Climate Change Act) sections 28 and 32

⁴¹ CCC, CME, FRPO, IGUA, LPMA and SEC noted the lack of access to the specifics of how the Gas Utilities would meet their compliance obligations

⁴² APPrO, CCC, CME, FRPO, IGUA, LPMA and SEC

⁴³ BOMA Additional Material, p. 8

⁴⁴ OEB Decision EB-2016-0296/0300/0330, p. 25

Utilities would most likely rely on compliance instruments to meet their compliance obligations.

While OEB staff supports the OEB's objective of transparency in its proceedings, the nascence of the cap and trade program and the statutory prohibition on disclosure of auction and market sensitive information⁴⁵ did not allow the OEB to make all of the information available to intervenors for discovery, hearing and final arguments.

B) Level of Effort

BOMA argued that one of the main reasons its cost claim was so high was its major effort to understand the legislation, the regulations, and the policy background.⁴⁶ OEB staff does not support BOMA's argument.

The starting point for the 2017 Cap and Trade Compliance Plan applications was the OEB's Cap and Trade Framework which set out the parameters of the OEB's review of the Compliance Plans.⁴⁷ The Cap and Trade Framework outlined the fundamentals of a cap and trade system, the Western Climate Initiative (WCI), the OEB's role in assessing the proposed Compliance Plans and the delineation of the public and strictly confidential aspects of the applications. This material was posted on the OEB's website.⁴⁸ OEB staff notes that BOMA was a participant in this policy initiative and therefore, should have been aware that certain aspects of the Gas Utilities' 2017 Compliance Plans would not be considered by the panel in the public portion of the proceeding.

⁴⁵ Climate Change Act, sections 28 and 32

⁴⁶ Motion, p. 6 and BOMA Additional Material, p. 6

⁴⁷ EB-2015-0363

⁴⁸ OEB Staff Stakeholder Presentation and OEB Staff Discussion Paper issued on May 25, 2016, <https://www.oeb.ca/industry/policy-initiatives-and-consultations/consultation-develop-regulatory-framework-natural-gas>

Conclusion

OEB staff submits that the grounds put forward by BOMA have failed to demonstrate that the panel made any identifiable error in the Decision, or that the Decision is contrary to the OEB's Practice Direction or policy with respect to cost claims. Consequently, BOMA has failed to meet the threshold test by failing to establish that there is an identifiable error or that there are reasons to doubt the correctness of the Decision and the Motion should be dismissed without further review on the merits.

OEB staff also submits that the Motion should be dismissed as BOMA has failed to demonstrate, on the merits, that the Decision should be reviewed and varied.

- All of which is respectfully submitted -