



Ontario Energy Board Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2018-0164

On a Motion by the Building Owners and Managers Association to review and vary OEB Cost Awards Decision in relation to the 2017 Compliance Plan applications of:

ENBRIDGE GAS DISTRIBUTION INC. (EB-2016-0300)

EPCOR NATURAL GAS LIMITED PARTNERSHIP (EB-2016-0330)

UNION GAS LIMITED (EB-2016-0296)

BEFORE: Ken Quesnelle
Presiding Member

Cathy Spoel
Member

February 14, 2019

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1 INTRODUCTION AND SUMMARY

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 Partnership¹ (EPCOR Gas) [collectively the Gas Utilities].² Given that the applications were filed and decided prior to the completion of the amalgamation of Enbridge Gas Distribution Inc. and Union Gas Limited, this Decision and Order refers to the names of the predecessor companies for ease of reference.

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 applications³. In the Decision, the OEB found that the Building Owners and Managers Association's (BOMA) cost claim of \$80,845 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)⁴, 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 did 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 which was the mid-point between the approximate average of all other intervenor claims (\$19,000) and the approximate average of the claims of the highest four of the other nine intervenors (\$25,000). The cost claims awarded in the Decision were as follows:

Association of Power Producers of Ontario (APPRO)	\$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

¹ Formerly, Natural Resource Gas Limited

² EB-2016-0296/0300/0330

³ EB-2016-0296/0300/0330

⁴ EB-2015-0363

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

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.⁵

On October 25, 2018, the OEB issued a Notice of Hearing and Procedural Order No.1⁶ that set out dates for BOMA, OEB staff and the Gas Utilities to file written submissions, and that the OEB would consider both the threshold question and the merits of the Motion concurrently.

On November 14, 2018, BOMA filed additional material in support of the Motion, and argued that the Decision contained errors of fact and law, and was contrary to the OEB's *Practice Direction on Cost Awards* (Practice Direction)⁷ and its historical policy on costs.

On November 29, 2018, OEB staff filed its written submission. OEB staff submitted that BOMA has failed to meet the threshold test and that the Motion should be dismissed without further review on the merits. If the OEB determined that the Motion does meet the threshold question, OEB staff also submitted that the Motion should be dismissed as BOMA has failed to demonstrate, on the merits, that the Decision should be reviewed and varied. The Gas Utilities did not file submissions.

On December 12, 2018, BOMA filed its reply submission.

For the reasons that follow, the OEB has made the following determinations:

1. Threshold Question – BOMA's motion to review and vary the Decision is denied on the basis that it does not meet the threshold test.
2. Merits of Motion – The OEB has determined that the Motion does not pass the threshold test and therefore will not proceed on a review of the merits.

⁵ Motion, pp 1-2, para 1

⁶ EB-2018-0164

⁷ https://www.oeb.ca/oeb/Documents/Regulatory/Practice_Direction_on_Cost_Awards.pdf

2 STRUCTURE OF THE DECISION

This Decision and Order is structured into the following sections: Introduction and Summary; Structure; Decision on Threshold Question; Decision on Merits of Motion; and Order.

3 DECISION ON THRESHOLD QUESTION

Under Rule 43.01 of the OEB's Rules of Practice and Procedure⁸, 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.

BOMA and OEB staff agreed that the list articulated 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)⁹. 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 demonstrate 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.¹⁰

⁸ https://www.oeb.ca/oeb/Documents/Regulatory/OEB_Rules_of_Practice_and_Procedure.pdf

⁹ Natural Gas Electricity Interface Review Decision with Reasons, EB-2006-0322/0338/0340 (May 22, 2007) (NGEIR Review Decision), p. 18

¹⁰ Ibid

Submissions

The submissions of BOMA and OEB staff on the threshold question focused on whether the Decision: i) contained errors in fact; and ii) was contrary to the OEB's Practice Direction and its policy on cost awards.

Errors in Fact

BOMA submitted that the OEB erred in asserting that it asked the OEB to approve, or assumed that the OEB would approve, the Gas Utilities' Cap and Trade Compliance Plans. Rather, BOMA addressed whether the cost consequences of the Gas Utilities' Compliance Plans were reasonable, cost-effective, and optimized, given the legislative and policy framework in which the Compliance Plans were formulated. BOMA noted that this is the test that the OEB itself stated on page 1 of the Cap and Trade Framework.¹¹

OEB staff submitted that the Decision did not assert, make factually incorrect statements or any statements to the effect that BOMA's analysis was improperly focused on the approval of the 2017 Compliance Plans. OEB staff further submitted that the Decision is unambiguous and should not be interpreted as implying a conclusion that is contrary to what is clearly stated in the Decision.¹²

BOMA, in its reply submission¹³, disagreed with OEB staff and stated that the OEB made it perfectly clear that it determined that BOMA had analyzed the proposed plans themselves, rather than the reasonableness and cost consequences of the proposed plans. This is outlined by the position of the two (2) sentences, as follows:

"...As per the OEB's Report of the Board – *Regulatory Framework for Assessment of Costs of Natural Gas Utilities' Cap and Trade Activities*, 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."¹⁴

¹¹ Motion, p. 4

¹² OEB staff submission, p.7 and BOMA Additional Material, p. 8

¹³ BOMA Reply Submission, p. 4

¹⁴ Decision, p. 4

BOMA submitted that the OEB also erred when it made a reduction in BOMA's claim from \$80,845 to \$22,000¹⁵ as the OEB did not take into account the breadth and depth of BOMA's submission relative to those of the other nine (9) intervenors.¹⁶ BOMA argued that it made separate arguments for each of Union Gas (30 pages) and Enbridge Gas (28 pages) while the final arguments of the other nine (9) intervenors averaged six or seven pages.¹⁷ BOMA also argued that unlike the other intervenors, BOMA addressed all of the issues and did an in-depth analysis of the legal and regulatory context of Ontario's cap and trade system (which included reviewing studies and 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-effectiveness.¹⁸

OEB staff submitted that the panel acknowledged BOMA's effort in its Decision relative to those of the other nine (9) intervenors.¹⁹ In particular, the panel determined that: i) "BOMA's effort with respect to gaining an understanding of the broad cap and trade framework is not fully eligible for reimbursement"; and ii) "it does not consider BOMA's effort to be commensurate with what would be required to assess the reasonableness of the cost consequences of the proposed plans".²⁰

OEB Policy on Cost Awards and Practice Direction on Cost Awards

BOMA submitted that to disallow seventy-five percent (75%) of a cost claim that substantially exceeded the average or mean cost claim is not consistent with the OEB's policy on cost awards, namely that eligible intervenors are to receive their reasonably incurred costs of participating in the proceeding.²¹ BOMA also argued that the depth and breadth of the submissions of the other nine (9) intervenors were not comparable to BOMA's, therefore, the comparison of BOMA's cost claim to the average claim in this instance is not appropriate. BOMA also submitted that to deny a claim in whole or part using a mid-point or average costs award is not correct and is discriminatory.²²

BOMA also submitted that, the OEB in previous cases²³, approved a wide range of cost claim amounts from different intervenors, based, at least in part, on the depth and

¹⁵ Motion, p. 6

¹⁶ BOMA Additional Material, p. 5

¹⁷ Ibid

¹⁸ BOMA Additional Material, p. 5-6

¹⁹ OEB staff submission, p.6

²⁰ OEB staff submission, p. 7 and Decision, p. 3

²¹ BOMA Additional Material, p. 10 and BOMA Reply Submission, p. 2

²² BOMA Additional Material, p. 10 and BOMA Reply Submission, p. 2

²³ EB-2016-0160

breadth of their participation in the proceeding.²⁴

OEB staff submitted 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 on cost awards.

OEB staff also submitted that the OEB: i) has complete discretion in determining the amount of any costs to be paid; and ii) is permitted to compare the cost claims of all parties and to reduce some intervenor cost claims so that they are within the range of other intervenors' costs.²⁵ In addition, OEB staff stated that to the extent that the OEB may have considered a wide range of costs claim amounts in another proceeding, 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.²⁶

OEB staff's submission on the threshold question concluded that BOMA failed to demonstrate that there is an identifiable error or that there are reasons to doubt the correctness of the Decision and, therefore, the Motion should be dismissed without further review on the merits.

OEB Findings

The OEB has determined that BOMA's Motion to review and vary the Decision does not pass the threshold test and therefore will not be considered on its merits.

The OEB finds that the Decision does not contain any errors in fact. In particular, the OEB does not accept BOMA's argument that the OEB erred in asserting that BOMA asked the OEB to approve, or assumed that the OEB would approve, the Gas Utilities' 2017 Compliance Plans. The OEB also does not accept BOMA's argument that it erred in reducing BOMA's claim because the OEB did not take into account the breadth and depth of BOMA's submission relative to those of the other intervenors.

The Decision states:

“...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

²⁴ BOMA Additional Material, pp. 10-11

²⁵ OEB staff submission, p. 9

²⁶ OEB staff submission, p. 10

effort with respect to gaining its understanding of the broad cap and trade framework is not fully eligible for reimbursement.... 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.”

The Decision clearly took note of BOMA's effort to understand the broad cap and trade framework but found that those efforts were not fully eligible for reimbursement and not commensurate with what would be required to assess the reasonableness of the cost consequences of the proposed plans.

The OEB believes that the number of pages of an intervenor's argument and/or the number of information requests is not an appropriate way of assessing an intervenor's contribution in a proceeding. A concise argument or a few succinct information requests may be more helpful to a panel than voluminous ones.

In setting cost awards, the OEB considers the Practice Direction and the Cost Awards Tariff²⁷ which takes into account the experience and expertise of intervenor counsel and consultants. As the Cost Awards Tariff allows for higher hourly rates for more senior counsel, it is expected that more senior counsel, such as BOMA's, should be able to review material, develop interrogatories and prepare argument in a timely and cost-effective manner that is, on average, comparable to the other similar intervenors.

Furthermore, while the Cost Awards Tariff sets out the hourly rates that intervenor counsel and consultants may claim in a proceeding, the OEB must exercise its discretion and determine a reasonable cost award amount for each intervenor. In this proceeding, the panel examined the cost claim of BOMA and the other intervenors, and noted that BOMA's "cost claim of \$80,845 was unreasonable". The majority of the cost claims of the other intervenors fell within a certain range while BOMA's cost claim amount was an outlier (e.g., Union Gas noted that BOMA's cost claim "appeared to exceed the next highest claim and the approximate average of the other claims by approximately three times"²⁸). Therefore, to bring BOMA's cost claim in line with other intervenors, the panel determined that using the mid point between the average of all the cost claims which was approximately \$19,000 and the approximate amount of the next four highest which was \$25,000 was a reasonable approach. The OEB finds that this approach is not inconsistent with the OEB's Practice Direction and policy on cost awards, and is within the discretion of the panel.

²⁷ OEB Practice Direction on Cost Awards, Appendix B

²⁸ Union Gas letter dated August 30, 2017

The OEB has considered all the arguments put forward by BOMA and finds that the Motion fails to establish an identifiable error in the Decision. Therefore, the OEB finds that the Motion fails to meet the threshold test of whether the Decision should be reviewed on its merits and the Motion is dismissed.

4 DECISION ON MERITS OF MOTION

As the OEB has determined that the Motion does not pass the threshold test it will not proceed on a review of the merits.

5 ORDER

THE OEB ORDERS THAT:

1. BOMA's motion to review and vary the Decision and Order on Cost Awards in relation to the 2017 Cap and Trade Compliance Plan applications is denied on the basis that it does not meet the threshold test.

DATED at Toronto February 14, 2019

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary