



EB 2011-0256

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an Application by Tribute Resources Inc. and Bayfield Pipeline Corp. (the “Applicants”) for an Order or Orders granting leave to construct a natural gas transmission pipeline in the County of Huron and in the County of Middlesex;

AND IN THE MATTER OF an Application by the Applicants for an Order designating the area known as the Bayfield Pool and the Stanley 4-7-XI Pool, in the Geographic Township of Stanley, Municipality of Bluewater, County of Huron, as a gas storage area;

AND IN THE MATTER OF an Application by the Applicants for authority to inject gas into, store gas, and remove gas from the areas designated as the Bayfield Pool and the Stanley 4-7-XI Pool;

AND IN THE MATTER OF an Application by the Applicants for a license to drill wells in the Designated Storage Areas;

AND IN THE MATTER OF an Application by the Applicants for a determination in respect of compensation payable under Section 38 of the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF a Motion by the Corporation of the Municipality of Bluewater for review of the Board’s June 14, 2011 Decision on Cost Award Eligibility.

BEFORE: Marika Hare
Presiding Member

Paul Sommerville
Board Member

DECISION ON MOTION TO REVIEW

Background

Tribute Resources Inc. and Bayfield Resources Inc., on behalf of Huron Bayfield Limited Partnership and Bayfield Pipeline Corp. (the “Applicants”) filed applications with the Ontario Energy Board (the “Board”), dated April 20, 2011 (the “2011 Applications”). The 2011 Applications were filed under sections 36.1(1), 38(1), 38(3), 40(1) and 90(1) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B (the “Act”). By letter dated May 4, 2011, the Ministry of Natural Resources, Petroleum Resources Centre, referred to the Board, pursuant to section 40 of the Act, an application by Bayfield Resources Inc. for licences to drill injection/withdrawal wells within the proposed gas storage areas.

The 2011 Applications, if granted, would allow the Applicants to develop natural gas storage pools located in the geographic area of the County of Huron and in the County of Middlesex Ontario (the “Project”). The Project includes the designation and development of two proposed gas storage pools in Huron County, the Bayfield Pool and Stanley 4-7-XI (“Stanley”) Pool and the construction and operation of a transmission pipeline to connect these proposed storage pools with Union Gas Limited’s pipeline system. The Board assigned Board File Nos. EB-2011-0076, EB-2011-0077, and EB-2011-0078 to the 2011 Applications.

The Board issued a single Notice of Application on May 10, 2011. The Notice of Application was revised and re-issued on June 6, 2011.

The Corporation of the Municipality of Bluewater (“Bluewater” or the “Municipality”) requested intervenor status and cost eligibility in the above noted proceedings by letter dated June 1, 2011.

Bluewater requested intervenor status on the basis that it will be directly affected by the 2011 Applications. Bluewater noted that it is the municipality in which many of the works contemplated by the 2011 Applications will be located and constructed, and it has an ongoing municipal public interest in the 2011 Applications. Bluewater also stated that it has an ownership interest in lands and/or lands adjacent to the lands which form the subject matter of the 2011 Applications.

Bluewater requested costs pursuant to sections 3.03(b) and (c), respectively, of the Board's Practice Direction on Costs Awards (the "Practice Direction").

The Board issued its Decision on intervenor status and cost eligibility by letter dated June 14, 2011 (the "2011 Cost Award Eligibility Decision"). The Board granted the Municipality intervenor status in the proceedings, however, the Board denied Bluewater's request for cost award eligibility. The Board noted that although Bluewater represents its constituents, the Board does not agree that this constitutes a public interest which should be funded by ratepayers. The Board stated that to the extent that the Municipality has a direct interest in lands affected by the 2011 Applications, the use of municipal land is subject to various requirements which are largely within the control of the Municipality directly. The Board concluded that it would not be appropriate for ratepayers to fund Bluewater's participation in this proceeding and that Bluewater has access to funds through the collection of taxes and that this constituent-based funding is the appropriate source of funds for participation in this proceeding.

Motion to Review

Bluewater filed a Motion for Review (the "Motion") with the Board on July 4, 2011 regarding the 2011 Cost Award Eligibility Decision. The Motion was filed pursuant to Rules 1.03, 7.01, 7.02, 8.01, 8.02, 42.01, 42.03, 43.01, and 44.01 of the Board's *Rules of Practice and Procedure*.

In its Motion, Bluewater requested that the Board review and vary the 2011 Cost Award Eligibility Decision to grant Bluewater cost award eligibility.

The Board assigned Board File No. EB-2011-0256 to the Motion and issued a Notice of Motion for Review on July 11, 2011.

Pursuant to Rule 44.01 of the Board's Rules of Practice and Procedure Bluewater filed its Motion setting out grounds which, in Bluewater's submission, raise a question as to the correctness of 2011 Cost Award Eligibility Decision which did not award Bluewater cost eligibility.

The grounds set out in Bluewater's Motion include the following:

- a) The 2011 Cost Award Eligibility Decision in relation to the Applicant's 2011 Applications is contradictory to the Board's cost award decision in relation to the Applicant's 2009 Applications (EB-2009-0338/0339/0340) despite the existence of the same parties (being the Applicants and Bluewater) and the same subject matter (the 2011 Applications currently before the Board are fundamentally the same as the 2009 Applications). Bluewater submitted that the rule of law demands consistency of decisions.
- b) The 2011 Cost Award Eligibility Decision fails to recognize that Bluewater, as a body corporate, is a landowner directly affected by the Applicant's 2011 Applications.
- c) The 2011 Cost Award Eligibility Decision misapprehends the role of Bluewater as the municipal representative of the public interest and erroneously requires the local taxpayers, not ratepayers, to bear the cost of Bluewater's participation in this proceeding.

The Applicants filed a letter dated July 5, 2011 stating that they were taking no position on the Motion filed by Bluewater. No other submissions or comments were received.

BOARD FINDINGS

The Board finds that the 2011 Cost Award Eligibility Decision is clear and that Bluewater has not raised any grounds in its Motion that raise an issue as to the correctness of the Decision that would result in the 2011 Cost Award Eligibility Decision being varied, suspended or cancelled. The Board's findings with respect to the grounds of the Motion raised by Bluewater are set out below.

In this Motion, the Municipality rests its claim for cost eligibility on three primary grounds.

First, it suggests that because the Bluewater was granted cost eligibility in a previous proceeding, which was virtually identical to the instant case it is entitled to similar treatment here.

Second, the Municipality asserts that it is a landowner and therefore qualifies pursuant to the Practice Direction for eligibility in that capacity.

Finally, the Municipality asserts that it represents a public interest and that therefore it qualifies pursuant to the Practice Direction.

With respect to the first ground advanced by the Municipality, the Board recognizes the value of consistency in decision-making. Departures from established decisions should only be made on the basis of reasoned principle. However, panels of the Board are not and cannot be thought to be bound to the decisions of proceeding panels. Each panel must make its decision on the basis of the facts before it and the relevant policies and principles affecting the decision.

Granting cost eligibility to municipalities has been handled by successive Board panels on a case-by-case basis. In some instances municipalities or agencies of municipalities have been granted eligibility for cost awards. In other cases they have been denied.

In this decision, the Board hopes to enable those applying for cost eligibility to have a better idea as to the Board's expectations and what the prospects are for being granted such eligibility.

In doing so, the Board does not perceive that it is either contradicting or adopting decisions made by previous panels on the subject matter. The Board is refining its consideration of these issues on a principled basis, which it is hoped will have the effect of providing enhanced consistency on the subject matter.

In dealing with the second and third grounds advanced by the Municipality in this Motion to review, the Board will have regard to the provisions of the Practice Direction and the underlying rationale for the granting of cost eligibility to intervenors.

The Practice Direction gives the Board a great deal of discretion in the determination of cost eligibility. Paragraph 2.01 of the Practice Direction stipulates that the Board may order "by whom and to whom any costs are to be paid" as well as the amount of any costs to be paid.

Paragraph 3.01 stipulates that "The Board may determine whether a party is eligible or ineligible for a cost award."

Paragraph 3.04 of the Practice Direction authorizes the Board to consider any other factor the Board considers to be relevant in making a determination as to whether a party should be eligible for costs in a given proceeding. It is clear from these various provisions that the Board has fairly broad discretion in the determinations of costs eligibility.

It is the Board's view that the application for eligibility made by the Municipality in this case fails.

First, the Municipality has an enforceable revenue stream. The Municipality as a creature of the provincial government has statutory access to a significant revenue stream through taxation and fees, penalties, and grants. This revenue stream is intended to finance all of Bluewater's activities. The Municipality is accountable to its taxpayers and the provincial government for how it uses its resources and discharges the variety of activities it takes on.

There is certainly no suggestion by the Municipality that its participation in this case is in any way dependent on receipt of cost recovery through the Board's cost eligibility process.

Whatever point of view, or points of view, Bluewater chooses to take in this proceeding in its role as an intervenor, it is considered by the Board to be part of the Municipality's normal undertaking, and as such is fully funded by its existing sources of revenue. It is accountable to its constituents for whatever points of view it takes in the proceeding, and has already been funded to pursue whatever it perceives its interest to be.

This extends to whatever interests it may be considered to have in its capacity as a landowner. The constituents of Bluewater have a reasonable expectation that the Municipality will use its resources in its role as a landowner to advance whatever point of view it chooses to advance in the course of the proceeding. It would be inappropriate for the Board to make provision for an additional revenue stream, that is, through cost recovery. Not only would such a finding amount to a kind of double-recovery where Bluewater receives funding from its constituents, as well as from the applicant for undertaking its role as a municipality. In addition, such additional funding compromises the accountability of the Municipality to its taxpayers.

In the Board's view, the linkage between funding and accountability is an important consideration in determining whether a Municipality should be granted eligibility for costs. When considered in connection with the observation that Bluewater has a secure revenue stream, the Board concludes that Bluewater ought not to be eligible for an award of costs in this case.

Dated at Toronto, August 29, 2011

ONTARIO ENERGY BOARD

Original signed by

Marika Hare
Presiding Member

Original signed by

Paul Sommerville
Board Member