Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2006-0302

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

AND IN THE MATTER OF a generic proceeding initiated by the Ontario Energy Board to address a number of current and common issues related to demand side management activities for natural gas utilities;

AND IN THE MATTER OF a motion by the Low Income Energy Network to review and vary certain aspects of the Ontario Energy Board's Decision on Cost Awards EB-2006-0021 dated November 6, 2006.

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Pamela Nowina
Member and Vice Chair

Cathy Spoel
Member

DECISION AND ORDER ON MOTION TO REVIEW COST AWARDS

October 29, 2007

This is the decision of Vice-Chair Nowina and Board Member Spoel. The dissenting opinion of Vice-Chair Kaiser follows the majority decision.

On August 25, 2006, the Ontario Energy Board (the "Board") issued its Decision with Reasons in relation to a generic proceeding that addressed a number of current and common demand side management issues for natural gas utilities.

The Low Income Energy Network ("LIEN") requested and received intervenor status in that proceeding. LIEN was also found eligible for an award of costs.

In its August 25, 2006 Decision with Reasons, the Board stated that Enbridge Gas Distribution Inc. ("EGDI") and Union Gas Limited ("Union") were to pay, in equal amounts, the intervenor costs that would be awarded by the Board.

On November 6, 2006, the Board issued its Decision on Cost Awards in which LIEN's legal and consultants/witnesses costs were awarded at a level of two thirds of the amount submitted for recovery. LIEN's disbursement costs were awarded in full for the amount submitted.

On November 27, 2006, LIEN filed a motion and requested that the Board review the November 6, 2006 Decision on Cost Awards.

Rule 44.01 of the Board's Rules of Practice and Procedure state that every motion made shall:

> 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.

Rule 45.01 of the Board's Rules of Practice and Procedure state that in respect of a motion, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

In the matter at hand, the Board determined the threshold question without holding a hearing. The Board has decided that the motion to review does not pass the threshold question for the reasons set out below.

The decision regarding the quantum of cost awards is a discretionary matter for the panel presiding over the specific process. In the November 6, 2006 Decision on Cost Awards, the panel decided that:

> LIEN's evidence and participation was limited to a few issues pertaining to its constituency. LIEN's cost claim does not reasonably correlate to what would be expected for such focused intervention relative to other intervenor claims whose participation covered either all issues or was much broader. This is not an implication that the issues LIEN focused on are not important or that the Board was not assisted by its evidence. This partial award is simply a reflection of what the Board considers reasonable for the relatively limited scope of LIEN's participation and contribution to the issues the Board needed to decide in this proceeding.

Board Finding:

It is within the original panel's decision as to what factors it will take into account when determining the amount of the cost awards. The reviewing panel has no basis for determining whether the statements above are correct or not because this reviewing panel was not presiding over the process that led to the cost awards decision.

LIEN's motion to review did not raise grounds that would lead this reviewing panel to question the correctness of the original panel's decision on a discretionary, matter such as cost awards. It cannot be said that there was an error in fact in the original panels' decision since it is a discretionary matter. Also, there is no change in circumstance nor any new facts. None of the grounds in Rule 44.01 of the Board's Rules of Practice and Procedure have been met.

Since the original panel clearly articulated its reasons for disallowing a portion of LIEN's claimed costs and since none of the appropriate grounds were met, this reviewing panel is dismissing the motion at the threshold question.

LIEN has asked for cost eligibility in this motion to review proceeding. The Board grants LIEN's cost eligibility request on the basis that LIEN was eligible for cost awards in the original proceeding and will therefore be eligible for cost awards in this motion to review proceeding. The process for the cost awards for the motion to review proceeding is set out below.

THE BOARD THEREFORE ORDERS THAT:

1. This motion to review is dismissed at the threshold question. No adjustment will be made to the level of costs awarded to LIEN as specified in the November 6, 2006 Decision.

2. LIEN shall submit its cost claim for the motion to review proceeding by November 12, 2007. A copy of the cost claim must be filed with the Board and one copy is to be served on each of Union and Enbridge. The cost claims must be done in accordance with section 10 of the Board's Practice Direction on Cost Awards.

3. Union and Enbridge will have until November 26, 2007 to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on LIEN.

4. LIEN will have until December 3, 2007 to make a reply submission as to why its cost claim should be allowed. Again, a copy of the submission must be filed with the Board and one copy is to be served on each of Union and Enbridge.

DATED at Toronto, October 29, 2007.

Original signed by

Pamela Nowina
Member and Vice-Chair

Original signed by

Cathy Spoel
Member

DISSENTING DECISION

I am unable to agree with the majority that the applicant's motion should be dismissed because it does meet the threshold test. However, for the reasons stated, I would dismiss the application on its merits.

This motion concerns an application by the Low Income Energy Network (LIEN) requesting the Board to review a decision of an earlier panel that disallowed certain costs claimed by LIEN. The motion was filed in response to the Board's decision of November 6, 2006 which reduced LIEN's legal and witness costs to 2/3 of the amount submitted for recovery. For the reasons set out below, I would dismiss the application.

The Hearing

This proceeding concerned an application by two utilities, Enbridge and Union for approval of certain demand management and conservation activities. The hearing involved 12 hearing days with 11 witnesses, the names of the intervenor witnesses are set out in Schedule A.

In its August 25, 2006 Decision, the Board set out the process for dealing with cost awards stating:

> Intervenors eligible for cost awards shall file their cost claims by September 15, 2006. The utilities may comment on these claims by September 22, 2006. The cost award applicants may respond to the utilities' comments by September 29, 2006. Union and Enbridge shall pay in equal amounts the interevenor costs to be awarded by the Board in a subsequent decision, as well any incidental Board costs.

Ten Intervenors were found to be eligible for cost awards in this proceeding, and requested 100% recovery of costs. Energy Probe Research Foundation ("Energy Probe"), Canadian Manufacturers & Exporters ("CME"), Pollution Probe, the Vulnerable Energy Consumers Coalition ("VECC"), the Green Energy Coalition ("GEC"), the Consumers Council of Canada ("CCC"), the Industrial Gas Users Association ("IGUA"), the School Energy Coalition ("SEC"), the London Property Management Association

("LPMA"), and the Low Income Energy Network ("LIEN"). The cost claims filed by the parties are set out in Schedule B.

Enbridge replied that it had no objection to the amounts claimed by the parties, while Union did not comment on the claims. Subsequently, the Board awarded Energy Probe, Pollution Probe, VECC, GEC, CCC, IGUA, SEC, and LPMA, 100% of their costs but disallowed certain costs for LIEN and CME. With respect to LIEN, the Board stated:

> *LIEN's evidence and participation was limited to a few issues pertaining to its constituency. LIEN's cost claim does not reasonably correlate to what would be expected for such focused intervention relative to other intervenor claims whose participation covered either all issues or was much broader. This is not an implication that the issues LIEN focused on are not important or that the Board was not assisted by its evidence. This partial award is simply a reflection of what the Board considers reasonable for the relatively limited scope of LIEN's participation and contribution to the issues the Board needed to decide in this proceeding. LIEN's legal and consultants/witnesses costs are awarded at a level of two thirds of the amount submitted for recovery. LIEN's disbursement costs are awarded in full for the amount submitted.*

The Threshold Test

In considering a motion to vary a decision under Rule 45 of the Board's Rules of Practice, the Board must first determine (with or without a hearing) the threshold question; should the matter be reviewed? The second step is a review on the merits.

Rule 44.01 of the Board's Rules of Practice states that the Notice of Motion shall set out grounds for the motion that raise a question as to the correctness of the decision. Those grounds may include (i) error in fact; (ii) change in circumstances; or (iii) new facts.

The first issue in this application is whether as Rule 44 states, the applicant has raised a question as to the correctness of the decision. Lien says the Board has made the following two errors of fact in its decision:

1 The Board erred in concluding that LIEN's evidence and participation was limited to a few issues pertaining to its constituency, and

2 The Board erred in concluding that LIEN's cost claim does not reasonably correlate to what would be expected for such focused intervention relative to other intervenor claims whose participation covered either all issues or was much broader.

It is not enough that an applicant merely allege an error of fact. There must be some reason to believe based on a review of the motion material that there was an error of fact. That is, has the applicant established a prima facie case?

LIEN filed a detailed factum containing an Affidavit of Tracy Hewitt sworn November 27, 2006 which supported various arguments that an error of fact had been made. I accept that LIEN has met the threshold test. I also accept that an applicant cannot simply re-argue a case and there must be something beyond bare assertion of factual error.

The Board has considerable discretion regarding the threshold test. This discretion has been supported by the courts which have concluded that a tribunal can review a decision even when no new facts are presented.[1] In fact, the Board has granted a review on a number of occasions simply on the basis of fairness.[2]

Fairness is relevant here. It is important to remember that LIEN did not have an opportunity to make submissions on its cost claim. The opportunity to make submissions is a substantive right[3]. The procedure adopted by the Board provided an opportunity for LIEN to make submissions, but only if there was an objection to the cost award. Here there was no objection and the Board proceeded to reduce the costs without hearing submissions. It seems strange that an intervenor would have more rights when someone objects to the cost award.

The majority would dismiss this application at the threshold level. In the result the applicant has no opportunity to argue the merits before or after the decision. This in my view fails to meet the required standard for fairness and transparency.

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1 Commercial Union Assurance v. Ontario (Human Rights commission) (1988) 47 DLR (4th) 477 (Ont C.A.) Hall v Ontario (Ministry of Community Services) (1997) 154 DLR (4th) 696

2 RP-2003-0180/EB-2003-0222 (Re St. Catherines Hydro Utility Service Inc. RP-2001-0033/EB-2003-0268, Re Sithe Energy's Canadian Development

3 Lader vs Moore (1984) 46 OR (2nd) 586 (Div. Ct), Sussman Mortage Funding Inc vs Ontario (2004) Carswell Ont 4567 (Div.Ct)

On a review of the motion material including the Affidavit sworn on November 27th, it is clear that LIEN at least has an arguable case that the Board erred in concluding that LIEN's evidence and participation was limited to a few issues related to its constituency and that the Board erred in concluding that LIEN's cost claim did not reasonably relate to such a focused intervention. Accordingly I would hear the motion on its merits.

The Lien Interests

The motion filed by LIEN in this matter is supported by an Affidavit of Tracy Hewitt. Exhibit "A" of that Affidavit is LIEN'S Intervention Statement filed on April 18, 2006. That statement provides a lengthy summary of LIEN's interest in this proceeding and its grounds for intervention:

> LIEN is an organization of more than 50 member organizations from across Ontario including: energy, public, health, legal, tenant housing, education and social and community organizations. LIEN is managed by a Steering Committee, having as members: Advocacy Centre for Tenants, Ontario's Canadian Environmental Law Association, Centre for Equal Rights in Accommodation, Income Security Advocacy Centre, Share the Warmth, Toronto Disaster Relief Committee, and Toronto Environmental Alliance. As an umbrella organization, LIEN offers the opportunity for one entity to represent the similar interest of many organizations that have come together under LIEN. A description of its organization in greater detail can be found on its web site (www.lowincomenergyu.ca) and in previous submissions to the Board. LIEN has been a recognized intervenor in other proceedings before the Board, in particular concerning the issue of DSM.
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> LIEN's written "mission statement" is itself a statement of its interest in DSM, whether for electricity or for gas:
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> "The Low-Income Energy Network aims to ensure universal access to adequate, affordable energy as a basic necessity, while minimizing the impacts of health and on the local and global environment of meeting the essential energy and conservation needs of all Ontarians. LIEN promotes programs and policies which tackle the problems of energy poverty and homelessness, reduce Ontario's contribution to smog and climate change, and promote a health economy through the more efficient use of energy, a transition to renewal sources of energy, education and consumer protection."
>
> LIEN seeks to ensure universal access to adequate levels of affordable energy – for all, not only for those who can afford it. In doing so, LIEN also

> seeks to minimize impacts on health and environment that result from all Ontarians seeking to meet energy needs. LIEN advocates and supports programs and policies that address poverty and homelessness, that reduce environmental degradation and climate change, and that promote a healthy economy through energy efficiency, through transition to renewal sources of energy, through education and through consumer protection.
>
> Together with the interest of its numerous individual members and supporting organizations, in our submission, LIEN has a clear and significant interesting Demand Side Management ("DSM") for natural gas markets in Ontario and, hence, within the meaning of Rule 23.02, a substantial interest in the issues in EB-2006-0021. In LIEN's view, its grounds for participating, referenced in the same Rule, are to advance its views, to protect its interests and to bring knowledge and experience to the making of better decisions.
>
> LIEN intends to participate actively and responsibly in the proceeding by submitting interrogatories, evidence and argument as it appears appropriate to LIEN to do so, and so too to cross-examine witnesses and to submit argument (ref. Rules 23.02 and 23.03(b)).

LIEN was accepted as an intervenor. There were no restrictions on its participation. The Board's order with respect to LIEN was identical to that issued to the other intervenors.

It is not clear from the Board's decision exactly what issues LIEN's participation was limited to, but LIEN's intervention statement suggests that it did have a specific constituency namely low income individuals whose principal concern was matters of energy poverty and homelessness and more generally universal access to adequate levels of affordable energy.

The LIEN Submissions:

LIEN makes a number of arguments regarding the scope of its participation. First, LIEN claims it participated on a "broad range of issues, but in accordance with Board's Practice Direction on Cost Awards, co-operated with other intervenors with similar issues to avoid duplication". LIEN then argued that such compliance with the Board's practice direction was the reason that the panel did not see LIEN's participation in this proceeding as broadly focused.

Put simply, LIEN claims that its intervention was not limited in scope as was evidenced by its letter of intervention, its interrogatories, and its participation in the settlement discussions. LIEN further claims that its intervention letter filed April 18, 2006 identified a broad range of interests. LIEN claims that it raised interrogatories at the technical conference on broad DSM issues including credit for DSM savings, length of DSM plans, and societal and energy consumption benefits of DSM plans, as well as the utilities' low income DSM programs.

LIEN also raised the issue of their participation in the settlement conference. LIEN argued that without having considered all of the issues, it could not have agreed on a partial settlement. The Board does not agree with this submission. LIEN's position, if correct, would dictate that all parties to any portion of a settlement would need to engage on discussions on all issues discussed in the entire settlement process. Parties with discrete interests in a proceeding can, and should, take no position on certain aspects of a settlement that does not concern their interests.

LIEN then argues that because discussions during the settlement conference were confidential, the Board has not been able to ascertain the extent of their interest. That is certainly true but it is reasonable for the Board (as this panel did) to assume that an intervenor's interest in a settlement conference would be consistent with the objectives stated in its intervention statement, and its subsequent participation in the hearing.

LIEN also argued that its cross examination and participation at the hearing, while focused, was broader than low income programs. LIEN also cross examined and presented argument on total DSM budget and proportionality across rate classes. This panel accepts that submission but this does not necessarily mean that costs above the two thirds allocation are warranted. The issue for a panel to consider in assessing an application for costs is not the actual level of participation of the applicant intervenor, but rather the appropriate scope of participation, given the intervenor's demonstrable interests in the proceeding and the level of assistance to the Board provided through its participation. The Board relies upon intervenors to exercise appropriate discipline in determining where their participation is; a) required in order to properly represent their constituency; and b) likely to be of assistance to the Board.

LIEN also argued that non duplication in the hearing room does not mean lack of interest or lack of necessary preparation by an intervenor. LIEN argued that the Board cannot assume that by not cross-examining on an issue an intervenor lacks interest, or

that it has not prepared in respect of the issue. The Board does not question that proposition. The Board is entitled however in determining cost awards to take notice of the scope of interest that a party declared in its original intervention statement. In this proceeding a number of parties promoted DSM activities. It was represented in LIEN's intervention statement at the beginning of this proceeding that LIEN's interest was somewhat narrower than others because it related to DSM activities for low income consumers as opposed to DSM generally. That was the basis upon which the Board allowed LIEN as an intervenor and granted it eligibility for costs. Had LIEN's declared interests been duplicative of those of other intervenor groups advocating DSM programs, the Board's determination of LIEN's intervenor and cost eligibility might have been different.

The Standard of Review:

Absent constitutional questions or issues of procedural fairness, the courts for the last 25 years have been reluctant to interfere with the factual findings of administrative tribunals[4] unless the factual findings are patently unreasonable. This level of deference has continued in recent decisions with the most recent Supreme Court of Canada decision in *Via Rail* introducing the concept that the factual findings must be "demonstrably unreasonable".[5] This deference is founded on the premise that administrative tribunals exist because specialized fact-finding expertise is often required.

Appellant courts are also reluctant to interfere with findings of fact by trial courts unless there is clear error. This is based on the premise that the trial judge heard the evidence and saw the witnesses. I believe the same principle applies to a review under Rule 45. The reviewing panel should not reverse the findings of the original panel unless they are clearly wrong. This is particularly true in cost cases. Appellate courts are very reluctant to interfere with cost awards by trial judges.[6] That is because a cost award often depends on the conduct of a case by counsel. I believe that principle should also apply to reviews by Ontario Energy Board panels under Rule 45.

A reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and is clearly wrong. A decision would be

[4] Canadian Union of Public Employees, Local 963 v. New Brunswick (Liquor Corp.) [1979] 2 S.C.R. 227
[5] Council of Canadians with Disabilities v. Via Rail Canada Inc. [2007] S.C.J. No. 15 (hereinafter called *Via Rail*)
[6] Hamilton v. Open Window Bakery Ltd., [2004] S.C.J. No. 72, 2004 SCC 9, at para. 27

clearly wrong if it was arbitrary or was made for an improper purpose or was based on irrelevant facts or failed to take the statutory requirements into account. That is not the situation here.

While the decision by the original panel could have been more explicit, the Board's concerns in this cost award are clear. There were ten intervenor groups with a substantial potential for overlapping interests. While these costs are paid by the utility applicants, those costs find their way into rates paid by all consumers. The Board has an obligation to make sure there are not duplicate interests represented. Virtually all of these intervenors represent consumer groups of some description. IGUA represents industrial users. CME represents the commercial users. The School and Energy Coalition represents schools. But a number represent either environmental concerns or low income groups. Environmental interests are represented by Pollution Probe and the Green Energy Coalition and Energy Probe Research Foundation. Low Income residential consumers are represented by the Vulnerable Energy Consumers Coalition, the Consumers Council of Canada and the Low Income Energy Network. The Board came to the conclusion that the interests of the residential consumers were well represented but multiple representation was justified because some of them such as LIEN represented important sub-groups such as low income consumers.

The legitimate concern the Board has with intervenor costs is best seen in Schedule "B" of this Decision which records total costs of some $764,000. LIEN recorded total costs of $109,000 which was reduced by the Board to approximately $76,000. Even at the reduced level, the LIEN costs were significantly higher than a number of other intervenors and substantially higher than the Vulnerable Energy Consumers Coalition which represented a similar constituency of low income consumers. In the circumstances, the disallowance of some of LIEN's costs has merit.

There must be clear evidence that the factual finding was clearly wrong. I am unable to conclude that that is the case in this situation. It may be that I would have decided the case differently, but that is not the test. The test is whether the decision was clearly wrong. For the reasons set out above, I would dismiss the motion. I would award the applicant its costs for this motion.

I would also add that this case demonstrates the need to more clearly define an intervenor's scope of participation in advance of the hearing when the Board considers cost eligibility.

DATED at Toronto, October 29, 2007.

Original signed by

Gordon Kaiser
Member and Vice-Chair

Schedule A

Witnesses called by the intervenors at the oral hearing or participated at the technical conference:

Green Energy Coalition

Chris Neme	Director of Planning and Evaluation, Vermont Energy Investment Corporation

Canadian Manufacturers & Exporters

Malcolm Rowan	President, Rowan and Associates Inc.
Anthony A. Atkinson	School of Accountancy, University of Waterloo

Low Income Energy Network

Roger D. Colton	Consultant, Fisher, Sheehan & Colt

School Energy Coalition – Technical Conference only

Paul Chernick	Resource Insight Inc.

Schedule B

EB-2006-0021
GENERIC DSM - UNION / ENBRIDGE
INTERVENOR COSTS CLAIMS - Phase I

INTERVENOR	Legal Fees	Total Claim[1]	Revised Award[2]
CONSUMERS COUNCIL OF CANADA	$27,446.58	$72,978.64	$72,978.64
INDUSTRIAL GAS USERS ASSOCIATION	$37,373.00	$47,091.24	$47,091.24
ENERGY PROBE	$0.00	$58,759.91	$58,759.91
GREEN ENERGY COALITION	$81,204.48	$185,271.45	$185,271.45
POLLUTION PROBE	$16,578.84	$44,571.00	$44,571.00
CANADIAN MAUFACTURERS & EXPORTERS	$19,320.00	$93,985.82	$44,009.32
VULNERABLE ENERGY CONSUMERS COALITION	$28,132.39	$38,731.09	$38,731.09
LOW INCOME ENERGY NETWORK	$63,834.26	$109,070.32	$76,405.56
LONDON PROPERTY MANAGEMENT ASSOC.		$33,587.37	$33,587.37
SCHOOL ENERGY COALITION	$67,461.00	$80,438.50	$80,438.50
TOTALS	**$341,350.55**	**$764,485.34**	**$681,844.08**

[1] Includes disbursements, Consultant and Witness fees
[2] Costs awards dated December 28, 2006. The cost direction was dated November 6, 2006.