



EB-2006-0301

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 Canadian
Manufacturers & Exporters to review and vary certain
aspects of the Ontario Energy Board's Decision on Cost
Awards EB-2006-0021 dated November 6, 2006.

BEFORE: Paul Vlahos
Presiding Member

Ken Quesnelle
Member

DECISION ON MOTION TO REVIEW COST AWARDS

November 29, 2007

Background

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 Canadian Manufacturers & Exporters ("CME") requested and received intervenor status in that proceeding. CME was also found eligible for an award of costs.

On November 6, 2006, the Board issued its Decision on Cost Awards in which CME's legal costs were awarded at a level of one third of the amount submitted for recovery and the consultants'/witnesses' costs were awarded at a level of one half of the amount submitted for recovery. CME's disbursement costs were awarded in full for the amount submitted. Specifically, the decision stated:

The Board finds that CME's contribution provided little benefit to the Board in its consideration of the issues, both in terms of how CME's evidence was led as well as its content. CME's cross-examination and its submissions were of little assistance to the Board. A partial award is commensurate with this assessment.

On November 13, 2006, CME requested that the Board reconsider its decision to reduce CME's consultants/witnesses costs at a level of one half of the amount submitted for recovery. CME did not request a reconsideration of the Board's decision to reduce legal costs to one third.

On October 29, 2007, the Board issued its decision on CME's motion to review the Board's November 6, 2006 Decision on Cost Awards (the "Motion Decision").

In the Motion Decision, the reviewing panel stated that the motion did pass the threshold question and that:

Upon review of the November 6, 2006 Decision on Cost Awards, the Board finds that there were insufficient reasons to disallow a portion of CME's consultants/witnesses costs. Because this panel was not present during the generic proceeding, it is not possible for this panel to determine whether or not CME's contribution was useful to the Board. The Board allows the review of the cost award and recommends that the issue of costs be determined by the original panel. This will give the original panel the opportunity to provide reasons and to reconsider the award of costs

should the panel choose to do so in light of CME's submissions in this motion.

CME's motion to review the November 6, 2006 Decision on Cost Awards was then returned to two members of the original panel to determine the matter. The findings of this panel are set out below.

Decision and Reasons

The core of CME's argument is that it disagrees with the original panel's finding that CME's contribution provided little benefit to the Board and that CME believes that it should be awarded 100% of its consulting and witness costs for all phases of the proceeding.

The original panel is indeed in a better position than the reviewing panel to respond to the specific complaints raised by CME and the original panel will take the opportunity do so.

The core of CME's argument is that:

[T]he Board Panel had a duty to undertake a fundamental review of the issues that were contested. In CME's view, the Panel did not do so....

the Panel chose to disregard CME's evidence paper as to what constitutes a financial budget, including DSM costs....

In its final argument, CME stated the Panel should reject the partial settlement agreement's approach for four reasons...[h]owever, the Panel did not respond to any of them.

If the Panel disagreed with CME's position and evidence, it had an obligation to state why it disagreed...

As well, CME submits that...the Panel should have enabled CME's expert witness...to provide his views on what constitutes a financial budget, and not limit his participation to cross-examination.

These are complaints that the original panel did not make proper findings in the generic proceeding or that it did not provide specific reasons for not following all the positions that CME advanced. CME could have requested a review of the substantive parts of the decision when the decision was issued. It did not. As to the reasons provided by the

panel, the Board does not make it a practice to decide or comment on each and every issue raised by intervenors that does not have an effect on the outcome of the proceeding.

CME also notes that neither Enbridge nor Union objected to CME's cost claim. The absence of an objection was not a determinative factor in the Board's consideration of what it found useful. Cost awards in proceedings of this nature ultimately affect the rates paid by ratepayers whom the Board has a duty to protect.

None of the grounds raised by CME go to the Board's discretion of what quantum of costs ought to have been awarded to CME.

The original panel's reasons for awarding partial costs were:

The Board finds that CME's contribution provided little benefit to the Board in its consideration of the issues, both in terms of how CME's evidence was led as well as its content. CME's cross-examination and its submissions were of little assistance to the Board. A partial award is commensurate with this assessment.

These reasons follow the factors enumerated in section 5.01 of the Board's Practice Direction on Cost Awards (the "Practice Direction") which states that in "determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party...contributed to a better understanding by the Board of one or more of the issues addressed by the party," and "addressed issues in its written or oral evidence or in its questions on cross-examination or in its argument which were not relevant to the issues determined by the Board in the process."

The original panel was present during the testimony and argument and found that CME's evidence, cross-examination and submission were of little benefit to the original panel. CME's arguments have not altered the original panel's view in that regard.

The preceding expansion and contextualization of the original reasons is provided in observance of the review panel's finding. The following comments are provided in order to further illuminate what guided the original panel in its consideration of the appropriate level of detail to include in its original decision.

Section 30 of the *Ontario Energy Board Act, 1998* (the "Act") authorizes the Board to

provide for cost awards. Section 30(1) of the Act states 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, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board.

The use of "may" indicates the Board's award of costs is not mandatory, that is, the Board is not required to award costs but may, as an exercise of its discretion, award all, some, or none of a person's costs. Nothing in the Act or the Practice Direction requires the Board to award costs, and if the Board does decide to award costs, there is nothing in the Act or the Practice Direction which requires the Board to award 100% of a person's costs. In the subject proceeding, the original panel also reduced another party's cost award to less than 100% of the costs claimed.

A recent decision of the Alberta Court of Appeal in relation to an appeal of a cost award decision of the Alberta Energy and Utilities Board (the "AEUB") provides a basis on which to measure the Board's obligation to provide reasons in the exercise of its discretion.

In dismissing the applications for leave to appeal the AEUB's decision to deny costs to the applicants (also a discretionary power for the AEUB), the court stated that:

Giving "inadequate reasons" [for denying cost awards] will generally not be a basis for granting leave....The failure of the Board to explain how or why it exercised its discretion to award costs in a particular case does not turn that exercise of discretion into question of law.¹

The original panel provided its original reasons with the intent to inform the party as to why its costs were being reduced. The panel determined that no useful purpose would be served, and unintentional negative consequences may sometimes result, by providing a detailed and specific analysis of how counsel, consultants, and witnesses were unhelpful to the Board.

For decisions that are made regarding substantive issues that have been the subject of evidence, interrogatories, testimony, and submissions, reasons may need to be more expansive. However, for the discretionary matter of cost awards, it was the original panel's belief that adequate reasons may be quite brief and more general.

¹ *Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board)*, [2007] A.J. No. 819 at para. 10.

The original panel's consideration that the level of detail must be balanced against the possible negative and unintended consequences to the reputations of those appearing before the Board was not set out explicitly in the original decision.

The reviewing panel stated that its decision will give the original panel the opportunity to provide reasons and to reconsider the award of costs should the panel choose to do so in light of CME's submissions in this motion.

This panel has responded to the reviewing panel's findings by providing an expansion of its original reasons and insight into why the original panel gave the reasons it did.

Having reconsidered the award of costs to CME claimed for its consultants/witnesses in the Board's November 6, 2006 Decision on Cost Awards, and for the reasons provided in the November 6, 2006 Decision on Cost Awards as well as the reasons provided above, the Board has decided not to alter CME's cost award.

CME asked that the Board clarify whether the reduction applies to all phases of the proceeding. The Board confirms that the reduction applies to the total CME Consultants'/Witnesses' cost claim of \$74,193. The cost award is \$37,096.50.

DATED at Toronto, November 29, 2007.

Ontario Energy Board

Original signed by

Paul Vlahos
Presiding Member

Original signed by

Ken Quesnelle
Member