



EB-2009-0187

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 Enbridge Gas
Distribution Inc. for an Order pursuant to Section 90(1) of
the Ontario Energy Board Act, 1998, granting leave to
construct a natural gas pipeline in the Region of York.

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Paul Sommerville
Member

Ken Quesnelle
Member

DECISION AND ORDER ON COST AWARDS

Enbridge Gas Distribution Inc. ("Enbridge") filed an application with the Ontario Energy Board on September 3, 2009, under section 90 of *the Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, for an order granting leave to construct approximately 16.7 kilometres of 406 millimetre diameter Extra High Pressure steel pipeline to deliver natural gas to the York Energy Centre LP, a proposed natural gas generating facility. The Board proceeded by way of written hearing and issued a decision approving the application on April 5, 2010.

The York Region District School Board ("YRDSB") on behalf of Kettleby Public School, York Energy Centre LP ("YEC"), a customer supporting the pipeline approval, and Hunter's Green Rate Payers Association ("HGPA"), represented by Harten a Division of Harten Group ("Harten") were all granted intervenor status.

The HGRA was the only intervenor who requested cost award eligibility status. The Board determined that the HGRA was eligible to apply for an award of costs under the Board's Practice Direction on Cost Awards. Mr. Harvey Tenenbaum, the principal of Harten represented the HGRA.

On March 2, 2010, Harten submitted a cost claim in the amount of \$48,444.90. That costs claim was made by Harten who asserted that it "represented private parties and a ratepayer group, all residents in the Township of King."

On March 12, 2010 Enbridge filed written submissions objecting to the costs claimed by HGRA on the following basis:

- Harten has not discharged the onus to demonstrate the required factors as set out Section 6.03 in the Board's Practice Direction on Cost Awards;
- Harten did not provide sufficient information regarding the time spent and manner of participating in respect of relevant issues;
- the contribution of Harten was primarily focused on a single issue i.e. the environmental impacts associated with construction of the proposed pipeline;
- Harten's participation was at times irrelevant and did not contribute to a better understanding of the issues before the Board.

In addition, Enbridge raised concerns that the claim of 139 hours was unsubstantiated and appeared excessive. Enbridge indicated it would support a cost award for approximately 50 to 60 hours. Enbridge also asserted that Harten in its filing had not demonstrated that the maximum rate of \$330/hour was appropriate.

On March 15, 2010 Harten replied to Enbridge's objections to the costs claimed. Harten submitted that the hourly rate claimed is in accordance with the Board's tariff for consultants with over 20 years of experience. Harten further submitted that it has participated in the process in a manner that focused on the issues relevant to the leave to construct application, and not on any aspects of the proposed generation.

In response to Enbridge's objection that Harten should "ensure the statements, interrogatories and submissions were relevant to the issues and to demonstrate such in the claim for costs." Harten stated that its cost claims have "... no details of the tasks performed because the work has been done in an overlapping and interconnected manner, which would be impossible to accurately assess as fragmented components".

In reply to the question on environmental impacts associated with the proposed pipeline, Harten stated that it examined this question in considerable detail, however Harten stated that environmental impacts included related health and safety issues.

On June 9, 2010 Board Staff requested from the HGRA additional information describing the mission of the HGRA and the retainer and invoices for work that Mr. Tenenbaum completed for the HGRA for the EB-2009-0187 proceeding . In response to this request, on June 21, 2010 the HGRA filed the Constitution of the HGRA adopted November 30, 2009 and Contract for Services between the HGRA and Harten dated September 23, 2009. The HGRA Constitution was signed by Mr. Harvey Tenenbaum, Ms. Sheila Comisso and Ms. Judith Tenenbaum. The Contract for Services was signed by Mr. Harvey Tenenbaum on behalf of Harten, and Ms. Sheila Comisso on behalf of the HGRA.

Harten submitted that it has met the onus for cost awards in all respects.

Board Findings

The Board has reviewed Harten's cost claims as well as the documentation and submissions related to the cost claims and has determined that the costs claim should be disallowed in its entirety.

Section 6.05 of the Board's Practice Direction on Costs states that parties will not be compensated for time spent by an employee or officer of the organization seeking costs for preparation or attendances respecting Board proceedings, a principle the Board recently applied¹. The materials filed by HGRA demonstrate that Mr. Tenenbaum is a founder and Chair of the HGRA. In the Board's view the relationship between Mr. Tenenbaum and HGRA, given that he is the Chair of HGRA and principal of Harten places this cost claim within the prohibition in Section 6.05. Accordingly, his "retention" by HGRA to conduct research and consulting services for the HGRA in the EB-2009-0187 proceeding can not be compensated through the Board's costs process. It is significant that Harten not HGRA filed the costs claim on March 2, 2010. That initial costs claim specifically stated that Harten had represented "private parties" and a ratepayer group. HGRA was not identified in that costs claim, even though it was the Party that actually qualified for costs recovery. Neither Harten itself, nor any "private

¹ *Re Ontario Power Authority, Cost Awards for the IPSP Proceeding EB-2007-0707* (November 28, 2008) at p. 7

parties” had, or have, any standing whatsoever to make any claim for costs. A similar tone appears in Harten’s response to Enbridge’s objection to the Harten costs claim, where Mr. Tenenbaum refers to “our intervention”. Again, there is no reference in that letter to HGRA.

Not only does the relationship between Mr. Tenenbaum, Harten and the HGRA fall within the prohibition in Section 6.05, it is apparent that Mr. Tenenbaum’s activities with Harten overlapped with his role with HGRA.

These finding is sufficient to dispose of the HGRA costs claim. However, the Board has other concerns with the claim.

The Board notes that some of the submissions by the HGRA were beyond the defined scope of the proceeding and were not directly relevant to matters related to the construction and operation of Enbridge’s proposed pipeline. The Board made it very clear at the outset of this proceeding that its jurisdiction in this case is restricted to the review of matters related to the construction and operation of Enbridge’s proposed pipelines. Matters related to the location, construction, operation or impacts of the generating station are not within the scope of the Board review. On this basis the Board would also disallow the costs claimed by HGRA.

Mr. Tenenbaum also argued that the Board’s maximum hourly rate was appropriate given the time he had been a consultant. The Board however notes that his experience as a consultant in the areas relevant to this proceeding involved a much shorter period of time. Were the Board to accept the costs claim (which it is not prepared to do) it would reduce the claim to reflect the lowest hourly rate.

The Board therefore finds that HGRA’s cost claim is disallowed and no costs shall be awarded to the HGRA for participation in this proceeding.

DATED at Toronto, August 27, 2010.

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary