



EB-2012-0064

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 Toronto
Hydro-Electric System Limited for an order approving
just and reasonable rates and other charges for
electricity distribution to be effective June 1, 2012,
May 1, 2013 and May 1, 2014.

BEFORE: Marika Hare
Presiding Member

Cathy Spoel
Member

DECISION AND ORDER ON COST AWARDS
(Originally issued on July 5, 2013, corrected on July 19, 2013)

Background

Toronto Hydro-Electric System Limited ("THESL") filed an application with the Ontario Energy Board on May 10, 2012, under section 78 of the *Ontario Energy Board Act*, 1998, and the Board's Incentive Regulation Mechanism ("IRM") framework seeking approval for changes to the rates that THESL charges for electricity distribution, to be effective June 1, 2012, May 1, 2013 and May 1, 2014.

On July 31, 2012, the Board issued its Procedural Order No. 1, granting the Association of Major Power Consumers in Ontario ("AMPCO"), Building Owners and Managers Association of the Greater Toronto Area ("BOMA"), Consumers Council of Canada ("CCC"), Energy Probe Research Foundation ("Energy Probe"), Pollution Probe, School Energy Coalition ("SEC") and Vulnerable Energy Consumers Coalition ("VECC") intervenor status and cost award eligibility.

On October 23, 2012, the Board received a letter from Pollution Probe advising that it was withdrawing from this proceeding and on October 26, 2012, the Board accepted Pollution Probe's notice of withdrawal.

On October 26, 2012, the Board received a late intervention request from Environmental Defence ("ED") which also requested eligibility for cost awards.

On October 30, 2012, the Board received a letter from Pollution Probe requesting reinstatement of its intervention.

On November 8, 2012, the Board issued Procedural Order No. 3 granting Pollution Probe and ED intervention status and cost award eligibility.

A Settlement Conference was held on November 28, 29 and 30th, but no settlement was reached.

The oral hearing was held from December 10 – 14 for all aspects of the 2012 and 2013 components of this application, except for those related to the Bremner Transformer Station project.

The oral hearing on the Bremner Transformer Station was held on February 19 – 20, 2013.

On April 2, 2013, the Board issued its Partial Decision and Order, in which it set out the process for intervenors to file their cost claims and to respond to any objections raised by THESL.

Cost claims were submitted by AMPCO, BOMA, CCC, Energy Probe, ED, SEC and VECC. Pollution Probe did not submit a cost claim.

On May 23, 2013, THESL filed a submission with the Board concerning the cost claims. THESL objected to the cost claim of ED arguing that the Board should reject it for several reasons:

The first was that ED's evidence had not been found helpful by the Board with the Board making an explicit finding that this evidence had been of little assistance to it in assessing the need for the Bremner Station.

The second was that ED's evidence was being used for public advocacy purposes extraneous to the proceeding and the power of an administrative tribunal to award costs does not authorize funding of activities that are aimed at purposes outside the tribunal's process.

The third was that ED did not participate responsibly in the hearing. THESL argued the hearing with respect to the Bremner project was delayed beyond the hearing of other issues in the initial phase of the proceeding because of an expectation that ED would produce evidence of value to the Board which THESL submitted ED did not do.

THESL further submitted that while ED had emphasized in its request for late intervention status that it was not seeking special indulgences or extended timelines, it had subsequently requested that the Bremner Station hearing be scheduled to suit the convenience of its counsel and witness, when no other party requested or was granted such scheduling accommodation.

THESL argued that given such circumstances the reasonable outcome would be that ED should bear responsibility for the costs of other parties and of the Board associated with the process that was established when ED had said that it intended to file evidence. THESL submitted that at the very least there should be no cost award of any amount in favour of ED.

THESL made no objections to the other cost claims filed.

In its reply submission of May 30, 2013, ED responded to THESL's arguments regarding its cost claim. ED submitted that it should be awarded its full costs as it had acted responsibly and had raised an important issue, and that THESL should be required to pay the costs which ED had incurred in responding to THESL's objection and that these costs not be recoverable by THESL from its ratepayers.

ED argued that it had been reasonable for it to believe that Mr. Bach's evidence would be of assistance to the Board as it was relevant, dealt with significant and legitimate issues, was intended to play a role in its overall case and was produced in good faith. While acknowledging that an error had been made in the terms of reference provided to Mr. Bach, ED submitted that this did not undermine the thrust of Mr. Bach's evidence that there was significant CDM potential not accounted for by THESL.

ED submitted that while the Board had not accepted its evidence, all but one of the ratepayer intervenors supported ED's position and other intervenors expressly relied on this evidence. ED thus argued that it was reasonable for it to submit the evidence and that it had sufficient merit to warrant a cost award. ED concluded that its evidence had contributed to a better understanding by the Board of one or more issues in the proceeding.

ED submitted that THESL's assertion that the purpose of the submission was to create a platform for public advocacy was false as there was nothing to indicate that it had had any intentions or ulterior motives other than to convince the Board that the Bremner Station should not be approved because of THESL's failure to consider conservation and local generation as alternatives. While acknowledging that Mr. Gibbons had discussed the proceeding with the media, ED argued that THESL also discussed Board proceedings with the media and cited several examples of this in its evidence.

ED submitted that it had not sought special indulgences as alleged by THESL and that it was THESL that had sought an indulgence by way of an expedited hearing. It was this need that led to the bifurcated process and to the urgent and abridged timelines requested by THESL. ED further submitted that there was nothing to suggest that the hearing was delayed due to its scheduling constraints referenced by THESL and that the hearing had been scheduled within a normal timeframe.

ED argued that the Board should express its disapproval of THESL's request for costs against it by ordering that THESL pay ED's costs in preparing its reply submission or by making a statement that costs against public interest intervenors will only be made in the rarest of cases.

Board Findings

The Board has reviewed all cost claims and has considered the objection filed by THESL regarding ED's cost claim.

The Board agrees with ED that the bifurcated hearing was a result of THESL's request for an expedited hearing and decision. It was ED's right to file evidence, which could not be accommodated within the timelines requested by THESL. The Board therefore dismisses THESL's submissions that ED should be held responsible for the two phase hearing and the additional time taken to hear all of the issues.

The Board notes, however, that ED claimed hours for attendance at the oral hearing by two consultants in addition to counsel. The Board does not see the need to have had two consultants present. As Mr. Bach was the consultant providing expert testimony, the Board finds that the 13.2 hearing hours claimed by Mr. Gibbons shall be disallowed for recovery.

The Board further notes that ED only participated in the second phase of the hearing (the Bremner Transformer Station). The Board finds that the hours claimed by ED for preparation are excessive (189 hours) as compared to intervenors who participated in both phases (e.g. SEC with a total of 208 hours or Energy Probe with 127 hours).

While Mr. Elson's hours for preparation are relatively high, it is recognized that he is a more junior counsel than some of the other participants and that ED led evidence and therefore, additional hours might be justified.

However, given that ED only participated in the second phase of the hearing, the Board finds that Mr. Gibbons' preparation time is excessive and should be reduced to 10 hours rather than 49.53 hours. The Board notes in this context that in addition to the total number of hours being excessive, it was Mr. Gibbons who had provided Mr. Bach with the wrong instructions with respect to his report on CDM potential, which resulted in that report being of limited value to the Board.

The Board considers that the applicant should generally only be responsible for paying the costs of one representative at the Settlement Conference. Accordingly, the Board will reduce the recoverable hours for settlement conference attendance by AMPCO, Energy Probe and VECC as cost recovery for the attendance of more than one representative are included in the cost claims of these intervenors.

AMPCO's claim in this area will be reduced from 39.25 hours to 25.6 hours. For the purpose of calculating the allowed cost claim, the Board has split this reduction equally between Shelley Grice (\$190 per hour) and David Crocker (\$330 per hour).

For Energy Probe, the Board will reduce the hours from 41 hours to 25.6 hours. This reduction will be split between Roger Higgin (\$330 per hour), Peter Faye (\$230 per hour) and David MacIntosh (\$290 per hour) and will be effected by eliminating the 3.5 hours claimed for David MacIntosh and dividing the remainder equally between Roger Higgin and Peter Faye.

For VECC, the Board will reduce the hours from 34.85 hours to 25.6 hours.

The Board considers BOMA's preparation time excessive, as compared to the other intervenors with the highest claims in this area (243 hours versus approximately 208 hours claimed by SEC, or 127 hours claimed by Energy Probe). These other intervenors also participated in all aspects of the proceeding. The Board notes that BOMA's counsel is at a senior level, while in comparison, SEC used a more junior counsel and thus a higher number of hours for preparation by SEC is reasonable. In consideration of these factors and the comparators, the Board finds that BOMA's hours are reduced from 243 to 175. The Board finds that BOMA's level of assistance provided to the Board, and its level of participation was not greater than the other intervenors who claimed a lesser number of hours or who with a combination of senior and junior counsel, filed a lesser cost claim.

Similarly, the Board finds that the number of hours claimed for preparation by AMPCO is excessive, for the same reasons as found for BOMA. AMPCO used senior counsel and the expectation is that this would take less hours for preparation than counsel such as for Energy Probe, or more junior counsel used by SEC. For these reasons the Board reduces the number of hours from 205.35 to 175.

The claims of AMPCO, BOMA, Energy Probe and VECC also require minor reductions for one of the following reasons: lack of receipt; calculation error and failure to comply with the government's *Travel, Meal and Hospitality Expenses Directive*.

The Board finds that the cost claims of CCC and SEC are reasonable as are the adjusted claims of AMPCO, BOMA, Energy Probe, ED and VECC and each of these cost claims shall be reimbursed by THESL.

THE BOARD THEREFORE ORDERS THAT:

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, THESL shall immediately pay the following amounts to the intervenors for their costs:

- Association of Major Power Consumers in Ontario \$123,650.10;
- Building Owners and Managers Association of the Greater Toronto Area \$98,994.35;
- Consumers Council of Canada \$54,816.30;

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- Energy Probe Research Foundation \$83,555.98;
 - Environmental Defence \$37,837.07;
 - School Energy Coalition \$105,665.00; and
 - Vulnerable Energy Consumers Coalition \$90,818.44.

2. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, THESL shall pay the Board's costs of, and incidental to, this proceeding immediately upon receipt of the Board's invoice.

DATED at Toronto, July 19, 2013

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary