

MANITOBA ) Order No. 162/07  
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THE PUBLIC UTILITIES BOARD ACT ) December 19, 2007

BEFORE: Graham F. J. Lane, CA, Chairman  
Leonard Evans, LLD, Member  
Eric Jorgensen, Member

DIRECT ENERGY MARKETING LIMITED/ENERGY SAVINGS (MANITOBA) L.P.;  
APPLICATION FOR AN AWARD OF COSTS FOR THEIR  
INTERVENTION IN THE  
NATURAL GAS LANDSCAPE PROCEEDING

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## **Summary**

Direct Energy Marketing Limited and Energy Savings (Manitoba) L.P. (collectively the "Retailers" or DEML/ESMLP) participated jointly as an intervener in The Public Utilities Board's (Board) 2007 hearing into the competitive Natural Gas Landscape in Manitoba. Subsequent to the hearing, DEML/ESMLP applied to the Board for an award of costs.

By this Order, the Board denies the application for costs on the grounds that DEML/ESMLP has not satisfied the Board's criteria of financial need.

The public hearing was held in September and October 2007.

## **Introduction**

In early 2007, the Board caused to be published a public notice related to its review of the competitive natural gas landscape in Manitoba. The public notice also invited applications for intervener status, and indicated that some interveners may be eligible for an award of costs in accordance with the Board's Rules of Practice and Procedure.

Pursuant to Section 56 of *The Public Utilities Board Act*, costs of, and incidental to, any hearing before the Board are in the discretion of the Board.

The Board's Rules of Practice and Procedure (Rules) indicate four main criteria which are considered by the Board in determining whether costs are to be awarded to an intervener. These criteria include consideration of whether the specific intervener has:

- made a significant contribution that is relevant to the proceeding and contributed to a better understanding, by all

parties, of the issues before the Board;

- participated in the hearing in a responsible manner and cooperated with other interveners who have common objectives in the outcome of the proceedings in order to avoid duplication;
- insufficient financial resources to present the case adequately without an award of costs; and
- a substantial interest in the outcome of the proceeding and represents the interests of a substantial number of the ratepayers:

While the Board is not bound to the test of satisfaction of the criteria, it generally abides by them.

At the Pre-Hearing Conference, in February 2007, DEML/ESMLP indicated it would not be seeking an award of costs following the public hearing. In Order 14/07, dated February 20, 2007, following the Pre-Hearing Conference, DEML/ESMLP was granted Intervener status.

Through a subsequent letter, dated July 3, 2007, DEML/ESMLP indicated that it had reconsidered its position and indicated an intention to apply for an award of costs after the public hearing. Without providing specific details, DEML/ESMLP estimated they would seek recovery of approximately \$100,000 of costs for their intervention. By a letter dated November 7, 2007, DEML/ESMLP requested that the Board rule them eligible for a cost award, while confirming its estimated recoverable costs were in the range of \$100,000, with details to be submitted subsequent to the Board's ruling on the issue of eligibility.

**DEML/ESMLP's Application**

DEML/ESMLP submitted that while they *"had a significant business interest in the outcome ... their participation was necessary to protect the interests of their customers and to preserve customer choice and competition for the benefit of all gas consumers in Manitoba"*.

DEML/ESMLP noted that both companies, *"despite being fierce competitors"*, worked together, to avoid duplication in presenting evidence, preparing interrogatories, engaging in cross-examination, and cooperating with the other participants. The Retailers stated that they had made a significant contribution to the hearing, to provide a better understanding of the issues and in assisting the Board with its decision-making process.

*"Without the contribution of Retailers, the Board would have had a one-sided view of the market which would not have served the interest of the public very well at all."*

DEML/ESMLP submitted that since Centra Gas Manitoba Inc. will recover its costs related to the hearing, both from system and retailer customers, through the distribution rate, that DEML/ESMLP's costs should be recovered in like manner.

As to the Board's criteria for cost awards, DEML/ESMLP submitted that they are guidelines only, and do not impair or restrict the Board's ability to award costs pursuant to section 56 of its Act.

**Centra's Perspective**

Centra opposed the cost award application made by DEML/ESMLP, submitting that the Retailers had not met the four criteria outlined in the Board's Rules, most notably that of having insufficient financial resources to present its case adequately.

Further, Centra contended that DEML/ESMLP had not represented the interests of "a substantial number of the ratepayers", that DEML/ESMLP's participation was primarily to protect its own market interests and that DEML/ESMLP were incorrect in their suggestion that it had protected all consumers, as that was a role provided by CAC/MSOS, not by DEML/ESMLP.

Centra also expressed concern over the fact that DEML/ESMLP did not indicate any intent to apply for costs until after the pre-hearing conference, which was held in January 2007.

Centra noted that the brokers/retailers, that participated in the 1996 Board proceeding that provided for the current natural gas landscape, did not apply for costs, and that retailers took the same approach to costs in a similar proceeding in Ontario. Centra also cited precedent for the retailers not obtaining a cost award, in a decision of the British Columbia Utilities Commission which denied an intervener an award of costs in a 2006 proceeding related to retail unbundling.

#### **DEML/ESMLP's Response**

DEML/ESMLP submitted that Centra's interpretation of the Rules was too narrow, and restated the position that the Board has the broad discretion necessary to allow for an award of cost to the Retailers, notwithstanding the Board's four criteria were not fully met.

DEML/ESMLP referenced two occasions wherein the Board did award costs to interveners representing commercial interests - once in June 2001 with Municipal Gas, and in 2002 in the case of Manitoba Industrial Power Users Group.

**Board Findings**

The Board acknowledges the significant contribution of DEML/ESMLP to the proceeding, though notes that the Retailers have not suggested they lack financial resources to present their case, but request the Board award them certain costs in any event.

Cost awards are not generally made to parties deemed capable of funding their own participation, and particularly not to commercial interests. The members of DEML/ESMLP are commercial entities with sufficient financial resources to fund their intervention, which was oriented towards protecting and enhancing their position in the Manitoba marketplace.

Because the Board is not convinced it should depart from its general practice in awarding costs, and because the Board is not satisfied DEML/ESMLP meets the criteria of financial need, the Board will deny DEML/ESMLP's application for an award of costs.

**IT IS THEREFORE ORDERED THAT:**

The Application of Direct Energy Marketing Limited and Energy Savings (Manitoba) L.P., for entitlement to an award of costs, in relation to their intervention in the 2007 Competitive Natural Gas Landscape Proceeding BE AND IS HEREBY DENIED.

THE PUBLIC UTILITIES BOARD

"GRAHAM F. J. LANE, CA"  
Chairman

"GERRY GAUDREAU, CMA"  
Secretary

Certified a true copy of  
Order No. 162/07 issued  
by The Public Utilities  
Board

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Secretary