EB-2010-0003

IN THE MATTER OF Section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF a review of an application filed by Hydro One Networks Inc. under section 78 of the *Ontario Energy Board Act, 1998* seeking changes to the uniform provincial transmission rates;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

SUBMISSIONS OF THE ASSOCIATION OF MAJOR POWER CONSUMERS IN ONTARIO (AMPCO)

PART I - INTRODUCTION

1. On January 5, 2010 Hydro One Networks Inc. ("Hydro One") served a Notice of Motion on the Ontario Energy Board (the "Board) requiring the Board, *inter alia*, to review and vary its decision of December 16, 2009 in EB-2008-0272 (the "Decision"). Hydro One is asking in its Motion that the Board allow Hydro One to calculate its 2010 transmission revenue requirements using a return on equity of 9.75 per cent rather than 8.39 per cent and calculate its short-term debt rate at 1.93 per cent instead of .55 per cent. Hydro One is, in effect, asking the Board to apply the Report of the Board on the Cost of Capital for Ontario's Regulated Utilities which was released December 11, 2009 (the "Cost of Capital Report") to this application.

2. AMPCO wrote to the Board on January 12, 2010 in support of a letter written to the Board by J. Shepherd on behalf of School Energy Coalition on January 8, 2010 requesting that the Board entertain submissions before hearing the merits of Hydro One's motion. Those submissions were to be directed at whether the threshold test required of Hydro One to allow a review and/or variance of a decision of the Board had been satisfied.

3. The Board then issued Procedural Order No. 1 on January 15, 2010 establishing a schedule for the exchange of submissions and the date of the oral hearing of the Motion. The

Procedural Order also indicated that the Board would determine the threshold question at the same time as it considered the merits of the Motion.

4. Included below are the submissions of AMPCO on both the threshold issue and the merits of the Hydro One Motion.

PART II - THE FACTS

5. On May 28, 2009 the Board released its decision on Hydro One's application for approval of revenue requirements for 2009 and 2010 for its transmission rates. This decision did not include revenue requirements for four specific capital projects.

6. The application remained open only to allow Hydro One to resubmit the four projects with improved justification.

7. On September 4, 2009 Hydro One filed supplementary evidence with the Board with respect to two of those projects with planned in-service dates in 2010. Hydro One advised that the other two projects should not be considered as part of its revenue requirements for 2010.

8. On November 5, 2009 and in accordance with its May 28, 2009 decision, the Board sent a letter to Hydro One setting out Hydro One's rates of return on equity and cost of short-term debt; namely 8.39 per cent and .55 per cent respectively.

9. On December 16, 2009 the Board released the Decision. Hydro One was once again directed to calculate its revenue requirement based on the letter of November 5, 2009.

10. On March 26, 2009 the Board began stakeholder consultation concerning issues related to cost of capital.

11. The Cost of Capital Report was released on December 11, 2009.

PART III - ISSUES TO BE ARGUED

12. Has Hydro One satisfied the threshold test for determining whether decisions of the Board can be reviewed?

13. Is the Decision of the Board correct?

14. Has Hydro One considered the customer impact of the new revenue requirements it seeks in the Motion? Do those customer impacts mitigate against the Board granting the Motion?

PART IV - ARGUMENT

Threshold Issues

15. Part VII of the Board's Rules of Practice and Procedure (the "Rules") deal with reviews; Rule 44 deals with motions to review. It provides an inclusive list of grounds for such a motion.

16. Hydro One's Motion appears to be based on the company's allegation that there has been a change of circumstances since the decision of May 28, 2009 and that the Decision contains errors.

17. Rule 45 of the Rules provides the Board with the jurisdiction to determine the threshold question.

18. It is submitted on behalf of AMPCO that on the basis of the Decision of the Board in Natural Gas Electricity Interface Review Decision, EB-2006-0322/EB-2006-0338/EB-2006-0340 (the "NGEIR Decision"), Hydro One has not satisfied the threshold test.

19. In the NGEIR Decision the Board found that, "The grounds must raise a question as to the correctness of the order or decision. In the panel's review, the purpose of the threshold test is to determine whether the grounds raise such a question…With respect to the question of the correctness of the Decision…there must be an identifiable error in the Decision and that a review is not an opportunity for a party to re-argue the case. In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the

panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature."

20. AMPCO submits that there was no "evidence" before this panel of the Board that the Cost of Capital Report should form the basis of the Decision. As such, the Board in applying the pre-existing cost of capital policy made no findings that were contrary to the evidence.

21. AMPCO submits that there is no indication that the panel failed to address a material issue.

22. AMPCO submits that by following the principles it established in its decision of May 28, 2009, the panel made consistent findings, not inconsistent ones.

23. In its Notice of Motion, Hydro One does not allege that the findings of the Board are contrary to the evidence that was before the panel or that the panel failed to address a material issue.

24. AMPCO submits, therefore, even on the basis of the NGEIR Decision cited by Hydro One, the threshold test as to the "correctness" of the Decision has not been met.

25. Merely on the basis of timing it appears that the Board made no error in its Decision. The Decision followed the Cost of Capital Report. The only conclusion that can logically be drawn is that the Board consciously chose to be consistent in the Decision with its earlier decision of May 28, 2009 and not to apply the Cost of Capital Report. That judgement of the Board is not an error of fact or law.

26. In any event, whether or not to apply the previous cost of capital figures rather than those set out in the Cost of Capital Report was a matter of the discretion of the Board. The only error a panel can make when exercising its discretion occurs if that exercise of discretion is beyond the jurisdiction of the Board. AMPCO submits that the exercise of the panel's discretion in this matter was not beyond its jurisdiction. Hydro One's Notice of Motion does not allege that the panel acted beyond its jurisdiction.

27. In the Board decision in EB-2006-0302, a decision of the Board on a motion by the Low Income Energy Network to review its award of costs in EB-2006-0021, the Board found as follows:

> "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 circumstances nor any new facts. None of the grounds in Rule 44.01 of the Board's Rules of Practice and Procedure have been met." With respect to its exercise of discretion: "It cannot be said that there was an error in fact in the … decisions since it is a discretionary matter."

28. AMPCO submits that the decision of the Board to remain consistent and not apply the Cost of Capital Report was an exercise of discretion which is not a reviewable error pursuant to the Rules.

29. It is submitted, therefore, that Hydro One has not satisfied the threshold test contained in the Rules and, therefore, that the Board should not hear the Motion.

Is the Decision of the Board Correct?

30. In the alternative, if the Board believes that Hydro One has satisfied the threshold test, AMPCO submits that the Decision is correct. It does not contain any errors in fact or law. There are no changed circumstances which it need reflect.

31. Rule 44.1 of the Rules provides an inclusive list of factors which may be considered in determining whether the Decision of the Board is correct. It appears from a review of the grounds on which Hydro One relies that the following are alleged as factors to be considered in determining whether the Decision is correct:

(a) There has been a change of circumstances and the Board's Decision is inconsistent with the Cost of Capital Report;

(b) It is an error in law for the Board to direct Hydro One to use the cost of capital which existed when the application in this matter was made and when the decision of May 28, 2009 was handed down.

32. It is submitted by AMPCO that there has not been a change of circumstances which would require the Board to apply the Cost of Capital Report.

33. This matter remained open after May 28, 2009 only for the purposes of allowing Hydro One to submit additional evidence in support of the revenue requirements for the four specific capital projects not fully dealt with at that time. The Decision, therefore, merely extended that of May 28, 2009 to include the two of those projects for which Hydro One submitted additional evidence.

34. It is submitted by AMPCO that by all appearances it was the intent of the Board throughout these proceedings, which includes the Decision, to determine Hydro One's transmission's cost of capital for 2009 on the basis of the formula which existed when the decision of May 28, 2009 was rendered.

35. The Board was correct in its decision of May 28, 2009. There is no reason to doubt that decision. Hydro One does not suggest that this decision was in any way incorrect.

36. The direction to Hydro One by the Board of November 5, 2009 is also correct. Hydro One does not suggest otherwise. It was based on the decision of May 28, 2009. The circumstances throughout that period of time did not change.

37. The Board's consultation on cost of capital began on March 26, 2009, before the decision of May 28, 2009. There is no reason to suggest that the panel which decided this application was not aware of that consultation.

38. One would presume because of its complexity and significance that the Cost of Capital Report was in preparation on November 5, 2009 when the Board issued its letter of direction to

Hydro One. If the Board had wished, AMPCO submits, it could have provided a different letter of direction. It was within the Board's discretion to do as it chose to do.

39. The Decision followed the Cost of Capital Report. One presumes that the panel which made the Decision was aware of the Cost of Capital Report and chose not to have it reflected in the Decision but rather to maintain consistency through this matter from May 28, 2009 going forward. It is submitted by AMPCO that it was within the discretion of the Board to proceed in that way. Circumstances had not changed with respect to this application as is indicated above, the Board's exercise of discretion in this matter does not reflect any error of law or fact.

40. It is submitted by AMPCO that this approach does not create inconsistencies since the Cost of Capital Report envisages that the new policy should be applied through cost of service applications. This motion by Hydro One is not such an application. The Board states its position at several points in the Cost of Capital Report;

> "The Board will apply the methods set out in this report annually to derive the values for the return on equity and deemed long-term and short-term debt rates for use in cost of service applications."
>
> (at page iii of the Executive Summary)
>
> "First, that the consultation would deal only with the means by which the Board determines the cost of capital. The actual effect, if any, on specific utility's revenue requirements as a result of any updated policies arising from this consultation and the determination of just and reasonable rates would not be addressed in this process, but in future rate proceedings."
>
> (at page 8 of the Cost of Capital Report)
>
> "The Board wishes to reiterate that the onus is on the distributor that is making an application for rates to document the actual amount and cost of embedded long-term debt and, in a forward test year, forecast the amount and cost of new long-term debt to be obtained during the test year to support the reasonableness of the respective debt rates and terms."
>
> (at page 53 of the Cost of Capital Report)

41. AMPCO submits that the Cost of Capital Report is forward looking not retrospective as Hydro One would have the Board find. AMPCO also submits that by reflecting the May 28, 2009 decision, the Decision is consistent rather than inconsistent.

42. AMPCO submits, once again, that the Decision is correct and that it need not reflect the Cost of Capital Report.

Customer Impact

43. AMPCO submits that if the Board were to grant this motion the customer impact would be significant. AMPCO submits, as well, that Hydro One has not considered the customer impact of applying the new cost of capital policy and should not be permitted to apply that policy until that customer impact is reviewed internally in the normal way and shared with customers.

44. It is submitted by AMPCO that the following describes the Return On Equity ("ROE") impact of applying the Cost of Capital Report to this application:

(a) The Board allowed Hydro One an 8.39% ROE. That ROE can be calculated roughly as,

  (i) Hydro One approved 2010 common equity: $3054.4M

  (ii) Approved ROE @ 8.39%: $256.3M

(b) Hydro One is proposing an ROE of 9.75%. That ROE can be calculated roughly as,

  (i) Hydro One approved 2010 common equity: $3054.4M

  (ii) Hydro One proposed ROE @ 9.75% = $297.8M (calculated)

(c) The impact of the increased ROE on the transmission revenue requirements is $297.8M - $256.3M or $41.5M.

(d) The $41.5M increase in revenue requirement would translate into a percentage rate increase as follows:

(i) Approved Uniform Transmission Rates ("UTR") Pool Revenue requirement: $1217.7M

(ii) Percentage increase = (41.5/1217.7) x 100= 3.4% (calculated)

(e) This 3.4% increase would be on top of the increase in revenue requirement approved for 2010. The revenue requirement approved for 2010 is more than 7% above 2009, so the effect would be a double digit increase.

(f) The above calculations are rough first order calculations which can be more precisely determined by Hydro One.

(g) Transmission charges are recovered from distribution customers via Retail Transmission Service Rates (RTSR), which are flowed through by distributors. The effect on the distribution rates proposed by Hydro One in EB-2009-0096 would be about $12M, in addition to the increase from the recent transmission rate order for 2010, which itself has not yet been factored into Hydro One's proposed distribution rates. Roughly, this $12M translates to an additional 1% increase for all distribution customers of Hydro One and will have a similar effect on other LDC customers.

45. AMPCO submits, therefore, if this motion were successful the total impact on Hydro One customers would be significant, double digit and virtually unprecedented.

46. AMPCO submits that such an impact should not be even a partial result of a motion such as this. If such an impact is to result it should follow a formal, new rate application with an opportunity for full intervention.

PART V - CONSEQUENCES (other LDC's)

47. AMPCO submits that if this motion were successful, every LDC in the province would have the opportunity to bring a similar motion to have the Cost of Capital Report apply to their situation, particularly if their applications were open to the extent that a decision had been made by the Board but their rates had not been finalized.

PART VI - ORDER REQUESTED

48. AMPCO submits, therefore, that the Motion of Hydro One should be dismissed.

PART V - COSTS

49. AMPCO respectfully requests that it be awarded 100 per cent of its reasonably incurred costs of participating in these proceedings.

ALL OF WHICH IS RESPECTFULLY submitted this 10th day of February, 2010.

David Crocker
DAVIS LLP
Counsel to AMPCO

Davis:6300652.1

EB-2010-0003

IN THE MATTER OF Section 78 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF a review of an application filed by Hydro One Networks Inc. under section 78 of the *Ontario Energy Board Act, 1998* seeking changes to the uniform provincial transmission rates;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

BOOK OF AUTHORITIES OF AMPCO

February 10, 2010

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MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

EB-2006-0322
EB-2006-0338
EB-2006-0340

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

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

DECISION WITH REASONS

May 22, 2007

EXECUTIVE SUMMARY

In November of 2006 the Board issued a Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The NGEIR Decision addressed the key issues of natural gas storage rates and services for gas-fired generators, and storage regulation.

In the NGEIR Decision, the Board determined that it would cease regulating the prices charged for certain storage services but that the rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The Board received three Notices of Motion for review of certain parts of the NGEIR Decision. The Board held an oral hearing to consider the threshold questions that the Board should apply in determining whether the Board should review those parts of the NGEIR Decision and whether the moving parties met the test or tests.

The Board finds that the motions do not pass the threshold tests applied by the Board, except in two areas.

First, the Board finds that the decision to cap the storage available to Union Gas Limited's in-franchise customers at regulated rates to 100 PJ is reviewable.

Second, the Board finds that the decisions regarding additional storage requirements for Union Gas Limited's in-franchise gas-fired generator customers and Enbridge's Rate 316 are reviewable.

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Section A: Introduction

The Board received three Notices of Motion for review of its Decision in the Natural Gas Electricity Interface Review proceeding[1] ("NGEIR"). Motions were filed by the City of Kitchener ("Kitchener") and the Association of Power Producers of Ontario ("APPrO"). There was also a joint notice by the Industrial Gas Users' Association ("IGUA"), the Vulnerable Energy Consumers Coalition ("VECC") and the Consumers Council of Canada ("CCC")

On January 25, 2007, the Board issued a Notice of Hearing and Procedural Order which established a schedule for the filing of factums by the moving parties, any responding parties' factums, and an oral hearing date for hearing the threshold question. On February 8, 2007, factums were filed by Kitchener, APPrO, IGUA, and jointly by CCC and VECC.

Responding factums were filed on February 15, 2007 by Board Staff, Union Gas Limited, Enbridge Gas Distribution Inc., Market Hub Partners Canada Ltd., School Energy Coalition, The Independent Electricity System Operator and BP Canada Energy Company.

In its Procedural Order No.2, the Board indicated that, at the upcoming oral hearing, parties should confine their submissions to the material in their factums and to responding to the factums of other parties. The Board also stated that parties should address only the issues set out in the Board's Procedural Order No. 1, namely:

1) What are the threshold questions that the Board should apply in determining whether the Board should review the NGEIR Decision? and

2) Have the Moving Parties met the test or tests?

[1] EB-2008-0551 (November 7, 2006)

On March 5 and 6, 2007, the Board heard the oral submissions of all the parties with the exception of the Independent System Operator and BP Canada who had advised the Board that they would not be appearing at the oral hearing.

The NGEIR Decision

On November 7, 2006 the Board issued its Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The 123-page NGEIR Decision addressed the key issues of:

1) Rates and services for gas-fired generators, and

2) Storage regulation.

The parties reached settlements with Enbridge and Union on most of the issues related to rates and services for gas-fired generators. These settlements were approved by the Board. The oral hearing and the NGEIR Decision addressed the broad issue of storage regulation and any issues that were not settled in the settlement negotiations.

The issue concerning storage regulation was whether the Board should refrain from regulating the prices charged for storage services under section 29 (1) of the Ontario Energy Board Act, 1998. The Board found that the storage market is workably competitive and that neither Union nor Enbridge have market power in the storage market. The Board determined that it would cease regulating the prices charged for certain storage services; however, the Board found that rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The motions requested the following decisions made in the NGEIR Decision be either reviewed and changed; cancelled, or clarified, in a new Board proceeding:

Kitchener

- The aggregate excess methodology for allocating storage space
- The 100 PJ cap on Union's regulated storage

APPrO

- Whether short notice balancing service should be included on the tariffs of Union and Enbridge

IGUA/CCC/VECC

- Parts of the NGEIR Decision pertaining to storage, storage regulation and storage allocation be cancelled
- Review to be heard by a different Board panel

The parties outlined the grounds for the motions which included allegations of errors of fact and in some cases, errors of law.

Organization of the Decision

In this Decision, the Board organized the issues raised by the parties into sections that cover the same or similar topics. In each section following the section on the threshold test, the Board identifies the issue or issues raised, and makes a finding whether the issues are reviewable by applying the threshold test.

The sections of this Decision are:

A. Introduction (this section)
B. Board Jurisdiction to Hear Motions
C. Threshold Test
D. Board Process

E. Board Jurisdiction under Section 29
F. Status Quo
G. Onus
H. Competition in the Secondary Market
I. Harm to Ratepayers
J. Union's 100 PJ Cap
K. Earnings Sharing
L. Additional Deliverability for Generators and Enbridge's Rate 316
M. Aggregate Excess Method of Allocating Storage
N. Orders
O. Cost Awards

The Board has reviewed the factums and arguments of all parties but has chosen to set out or summarize the factums or arguments by parties only to the extent necessary to provide context to its findings.

Section B: Board Jurisdiction to Hear the Motions

Under Rule 45.01, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

In the case of IGUA's motion, which raises questions of law and jurisdiction, counsel for Board Staff argued that the Board should not, and indeed could not, review the NGEIR Decision as these grounds are not specifically enumerated in Rule 44.01 as possible grounds for review. Counsel for Board Staff argued that the Board has no inherent power to review its decisions and the manner in which it exercises such power must fall narrowly within the scope of the *Statutory Powers Procedure Act* (SPPA), which grants the Board this power.

The Board's power to review its decisions arises from Section 21.1(1) of the SPPA which provides that:

> A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

Part VII (sections 42 to 45) of the Board's Rules of Practice and Procedure deal with the review of decisions of the Board. Rule 42.01 provides that "any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision". Rule 42.03 requires that the notice of motion for a motion under 42.01 shall include the information required under Rule 44. Rule 44.01 provides as follows:

> Every notice of motion made under Rule 42.01, in addition to the requirements of Rule 8.02, shall:
>
> > (a) 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; and

(b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision, or any part pending the determination of the motion.

Counsel for Board Staff argued that while the grounds for review do not have to be exactly as those described, they must be of the same nature, and that to the extent the grounds for review include other factors such as error of law, mixed error of fact and law, breach of natural justice, or lack of procedural fairness, they are not within the Board's jurisdiction. He argued that Rule 44 should be interpreted as an exhaustive list, and that as section 21.1(1) of the SPPA requires that the tribunal's rules deal with the matter of motions for review, the Board's jurisdiction is limited to the matters specifically set out in its Rules.

In support of this interpretation of the Rule 44.01, Counsel relied on the fact that an earlier version of the Board's rules specifically allowed grounds which no longer appear in Rule 44.01. Therefore, it must be assumed that the current Rules are not intended to allow motions for review based on those grounds. The relevant section of the earlier version of the Rules read as follows:

63.01 Every notice of motion made under Rule 62.01, in addition to the requirements of Rule 8.02, shall:

(a) 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 of law or jurisdiction, including a breach of natural justice;

(ii) error in fact;

(iii) a change in circumstances;

(iv) new facts that have arisen;

(v) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;

(vi) an important matter of principle that has been raised by the order or decision;

(b) request a delay in the implementation of the order or decision, or any part pending the determination of the motion, if required, ...

Counsel for Board Staff argued that the "presumption of purposeful change" rule of statutory interpretation should be applied to the Board's Rules. This rule applies generally to legislative instruments and is based on the presumption that legislative bodies do not go to the bother and expense of making changes to legislative instruments unless there is a specific reason to do so. Applied to Rule 44, this means that the Board should be presumed to have intended to eliminate the possibility of motions for review based on grounds which are no longer enumerated. He further argued that because the SPPA requires the Board's Rules "to deal with the matter", the

Board can only deal with them in the manner allowed for by its Rules, and any deviation from the Rules will cause the Board to go beyond its power to review granted by Section 21.1(1) of the SPPA.

In general Union and Enbridge supported the argument made by counsel for Board Staff.

Other parties made several arguments to counter those put forward by counsel for Board Staff. These included:

- as the Board's rules are not statutes or regulations but deal with procedural matters the rules of statutory interpretation such as the presumption of purposeful change have little if any application

- to the extent rules of statutory interpretation apply, section 2 of the SPPA specifically requires that the Act and any rules made under it be liberally construed:

  > This Act, and any rule made by a tribunal under subsection 17.1(4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits

- that the *Interpretation Act* requires that the word "may" be construed as permissive, whereas "shall" is imperative, so the list of grounds in Rule 44 should be considered as examples. In support of this argument, counsel for CCC referred to Sullivan and Dreiger on the Construction of Statutes, Fourth Edition, Butterworths, pp 175*ff* which cites the Supreme Court of Canada decision in *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 D.L.R. (4^{th}) 197

- that the Ontario Court of Appeal decision in *Russell v. Toronto(City)* (2000), 52 O.R. (3d) 9 provides that a tribunal (in that case the Ontario Municipal Board) cannot use its own policy or practice to restrict the range of matters which it will consider on a motion to review

- that the *Russell* decision gives tribunals a broad jurisdiction to review in contradistinction to the narrow right of appeal to the Divisional Court.

Findings

In the Board's view, in addition to the specific sections of the SPPA and the Board's Rules dealing with motions to review, it is helpful to look at the overall scheme of the SPPA and the Rules to determine the scope of the Board's jurisdiction to review a decision.

Originally, the SPPA was enacted to ensure that decision making bodies such as the Board provided certain procedural rights to parties that were affected by those decisions. These basic requirements apply regardless of whether a tribunal has enacted rules of practice and procedure. They include such requirements as:

- Parties must be given reasonable notice of the hearing (s 6)

- Hearings must be open to the public, except where intimate personal or financial matters may be disclosed (s 9)

- The right to counsel (s 10)

- The right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

- That decisions be given in writing with reasons if requested by a party (s 17 (1))

- That parties receive notice of the decision (s 18)

- That the tribunal compile a record of the proceeding (s 20).

In addition to these requirements there are several practices and procedures that tribunals are allowed to adopt, if provision is made for them in an individual tribunal's rules. These include:

- Alternative dispute resolution. Section 4.8 provides that a tribunal may direct parties to participate in ADR if "it has made rules under section 25.1 respecting the use of ADR mechanisms..."

- Prehearing conferences. Section 5.3 provides that "if the tribunal's rules under section 25.1 deal with prehearing conferences, the tribunal may direct parties to participate in a pre-hearing conference..."

- Disclosure of documents. Section 5.4 provides that "if the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may,..., make orders for (a) the exchange of documents, ..."

- Written hearings. Section 5.1 (1) provides that "a tribunal whose rules made under section 25.1 deal with written hearings may hold a written hearing in a proceeding."

- Electronic hearings. Section 5.2 provides that "a tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding."

- Motions to review. Section 21.1(1) provides that "a tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order."

Beyond stating that a tribunal's rules have to "deal with" each of these procedures in order for the tribunal to avail itself of them, there are no restrictions on the way in which they do so. In this regard nothing distinguishes motions to review from the other "optional" procedural matters listed above. A tribunal is free to create whatever procedures it thinks appropriate to handle them, provided they are consistent with the SPPA.

The Board notes that there are situations where the SPPA does not give tribunals full discretion in developing their rules to deal with "optional" procedural powers. For example, section 4.5(3) allows tribunals or their staff to make a decision not to process a document relating to the commencement of a proceeding. This section not only requires a tribunal to have "made rules under section 25.1 respecting the making of such decisions" but also requires that "those rules shall set out ... any of the grounds referred to in subsection 1 upon which the tribunal or its administrative staff may decide not to process the documents relating to the commencement of the proceeding;..." While a tribunal can prescribe the grounds for such a decision in its rules, the grounds must come from a predetermined list found in the SPPA. In that case, it is clear that only certain grounds are permitted, and a tribunal must restrict itself to those grounds enumerated in its rules.

The SPPA could put similar restrictions on the development of a tribunal's rules dealing with motions to review, but it does not.

While the Court of Appeal's decision in *Russell v. Toronto* dealt with motions to review under the *Ontario Municipal Board Act* rather than under the SPPA, the power granted to review decisions is effectively the same, so the principles enunciated in the *Russell* decision are applicable to the Board. The Court of Appeal found that the OMB could not

use its own policies and guidelines to restrict the scope of the power to review which was granted to it by statute. The Board therefore finds that it cannot use its Rules to limit the scope of the authority given to it by the SPPA.

The SPPA allows each tribunal to make its own Rules, so as to allow it to deal more effectively with the specific needs of its proceedings. The SPPA does not give the Board the authority to limit the substantive matters within the Board's purview.

The provisions of the SPPA dealing with the making of rules, give tribunals a very wide latitude to meet their own needs, both in the context of creating rules and in each individual proceeding:

> 25.0.1 A tribunal has the power to determine its own procedure and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1
>
> 25.1 (1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.
>
> (4) The tribunal shall make the rules available to the public in English and in French.
>
> (5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.
>
> (6) The power conferred by this section is in addition to any other power to adopt rules that the tribunal may have under another Act.

In the Board's view these sections of the SPPA give the Board very broad latitude to determine the procedure best suited to it from time to time. While consistency with the Act is required, the Rules are not regulations, and can be amended from time to time by the Board to suit its evolving needs.

The Board finds that there is nothing in the SPPA to suggest that rules dealing with motions to review should be interpreted or applied any differently from other provisions of the Board's Rules.

The Board's Rules

In addition to Section 2 of the SPPA which provides for a liberal interpretation of the Act and the Rules, the Board's Rules include the following provisions as a guide to their interpretation.

> 1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or any part of any rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.
>
> 2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious and cost-effective determination of every proceeding before the Board.
>
> 2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

As these provisions are of general application to all of the Board's Rules of Practice and Procedure, the Board finds that each of its individual rules should be read as if the above rules 1.03, 2.01 were part of them, except of course where restricted by the SPPA or another Act. Therefore, the Rules which "deal with the matter" of motions to

review, i.e. Rules 42 to 45, should be read in conjunction with Rules 1.03 and 2.01. Similarly, the rules dealing with alternative dispute resolution, written hearings and so on include Rules 1.03 and 2.01.

The Board finds that it should interpret the words "may include" in Rule 44.01 as giving a list of examples of grounds for review for the following reasons:

- It is the usual interpretation of the phrase;
- It is consistent with section 2 of the SPPA which requires a liberal interpretation of the Rules;
- It is consistent with Rule 1.03 of the Board's rules which allows the Board to amend, vary or supplement the rules in an appropriate case; and
- If the SPPA had intended to require that the power to review be restricted to specific grounds it would have required the rules to include those grounds and would have required the use of the word "shall".

With respect to the application of the principle of presumption of purposeful change urged by counsel for Board Staff, the Board notes that at the same time that its rules were amended to remove certain grounds of appeal from Rule 44.01, Rule 1.03 was also amended. The previous version of Rule 1.03 (then 4.04) read as follows:

> The Board may dispense with, amend, vary, or supplement, with or without a hearing, all or any part of any Rule, at any time by making a procedural order, if it is satisfied that the special circumstances of the proceeding so require, or it is in the public interest to do so.

When compared with the current Rule 1.03, it is apparent that the old rule was more restrictive – amendments had to be made by procedural order, and the circumstances of the proceeding had to be "special". Given the need for a procedural order, it is reasonable to interpret the old rule as applying only to the sorts of matters dealt with in procedural orders, the conduct of the proceeding and not to other provisions of the rules. No such restriction applies in the current Rule 1.03.

The Board finds that to the extent the Rules were amended to remove specific grounds from the list for motions to review, the contemporaneous amendments to Rule 1.03 give the Board the necessary discretion to supplement this list in an appropriate case. The Board presumably was aware of that at the time of the amendments.

The Board therefore finds that it has the jurisdiction to consider the IGUA motion to review even though the grounds are errors of mixed fact and law which do not fall squarely within the list of enumerated grounds in Rule 44.01.

Even if this interpretation of Rule 44.01 is incorrect, the Board can apply Rule 1.03 to supplement Rule 44.01 to allow the grounds specified by IGUA. Given the number of motions for review, the timing involved, the nature of the hearing and the nature of the alleged errors, the Board concludes that it is in the public interest to avoid splitting this case into Motions reviewed by some parties and appealed by others.

This panel is also aware that Appeals to the Divisional Court can only be based on matters of law including jurisdiction. If the position advanced by counsel for the Board staff was accepted, errors of mixed fact and law could not be effectively reviewed or appealed by any body. This, the Board believes is not consistent with Section 2 of the SPPA.

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

> In respect of a motion brought under Rule 42.01, 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.

Parties were asked by the panel to provide submissions on the appropriate test for the Board to apply in making a determination under Rule 45.01.

Board Staff argued that the issue raised by a moving party had to raise a question as to the correctness of the decision and had to be sufficiently serious in nature that it is capable of affecting the outcome. Board Staff argued that to qualify, the error must be clearly extricable from the record, and cannot turn on an interpretation of conflicting evidence. They also argued that it's not sufficient for the applicants to say they disagree with the Board's decision and that, in their view, the Board got it wrong and that the applicants have an argument that should be reheard.

Enbridge submitted that the threshold test is not met when a party simply seeks to reargue the case that the already been determined by the Board. Enbridge argued that something new is required before the Board will exercise its discretion and allow a review motion to proceed.

Union agreed with Board Staff counsel's analysis of the scope and grounds for review.

IGUA argued that to succeed on the threshold issue, the moving parties must identify arguable errors in the decision which, if ultimately found to be errors at the hearing on the merits will affect the result of the decision. IGUA argued that the phrase "arguable errors" meant that the onus is on the moving parties to demonstrate that there is some reasonable prospect of success on the errors that are alleged.

CCC and VECC argued that the moving parties are required to demonstrate, first, that the issues are serious and go to the correctness of the NGEIR decision, and , second, that they have an arguable case on one or more of these issues. They argued that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all the issues.

MHP argued that the threshold question relates to whether there are identifiable errors of fact or law on the face of the decision, which give rise to a substantial doubt as to the correctness of the decision, and that the issue is not whether a different panel might arrive at a different decision, but whether the hearing panel itself committed serious errors that cast doubt on the correctness of the decision. MHP submitted that a review panel should be loathe to interfere with the hearing panel's findings of fact and the conclusions drawn there from except in the clearest possible circumstances.

Kitchener argued that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

School Energy Coalition argued that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking objectively reasonable grounds.

Findings

It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

> Every notice of motion... shall set out the grounds for the motion that raise a question as to the correctness of the order or decision...

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

Ontario Energy Board

Commission de l'énergie de l'Ontario

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

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

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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.
>
> LIEN's written "mission statement" is itself a statement of its interest in DSM, whether for electricity or for gas:
>
> "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.