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BY EMAIL and RESS

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Our File No. 20100354

Ontario Energy Board
2300 Yonge Street
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2010-0354 – Toronto CV Amounts – Motion for Review

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #1 in this matter, these are SEC's written submissions on both the threshold issue and the merits of this motion. It is SEC's intention to appear on March 10, 2011 for the oral hearing on this matter.

Threshold Issue

1. ***Position.*** SEC agrees that this motion meets the threshold test, but it does so with considerable reluctance.

2. ***Rearguing the Case.*** The EB-2010-0193 proceeding was one with a single issue but relatively complicated facts, made more complicated by the fact that the original Application had a number of errors and deficiencies, leading to the September 10, 2010 Supplementary Evidence [Ex. C to the Affidavit of J-S Coulliard]. Even that additional evidence did not make things simpler. At least arguably it in fact made the issue more complicated.

3. What is clear, however, is that the case was fully argued, with all parties having full opportunity to put forward the facts and their positions. The Board had the full assistance of all parties in reaching its decision.

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4. SEC did not agree with the decision, as can be seen by the extent to which it is very different from the decision we proposed in our Final Argument. Notwithstanding that disagreement, we "had our day in court", and the fact that we disagree with the result has become irrelevant. The Board makes the decisions, not the parties, and most of the parties will disagree with at least some parts of every decision.

5. Like us, the Applicant "had their day in court", but appears not to have accepted the result. The essence of this Motion is nothing more than rearguing the issues. Nothing in this Motion is new. All of it has been put to the Board already, but the Board reached a different conclusion.

6. We are therefore concerned that, while - based on the Board's various precedents - this Motion probably meets the threshold test, Rule 42 should not devolve into a forum for rearguing decisions that a party doesn't like.

7. In our view, and contrary to the Board's practice in other motions for review, if all facts were properly before the Board panel, and it reached a conclusion based on those facts, then the fact that a party doesn't agree with that conclusion is not (absent specific grounds under Rule 44.01(a)(ii) to (iv)) grounds for a motion for review. The only exception to this should be a situation in which the decision of the Board panel is patently or obviously wrong.

8. In this respect, we believe the Board should consider applying, to these situations, the test of "reasonableness" that is used in the Divisional Court to consider appeals from Board decisions. This test balances deference to the original decision maker with the need to ensure that obviously incorrect decisions can be reversed or varied. If the general approach to Rule 42 motions followed that line, in our view the tendency of parties, particularly regulated entities, to seek to reargue their cases in motions for review would be reduced.

9. ***Implications.*** This is a somewhat unusual case in that the decision is on a single discrete issue, with a number of subcomponents. Proposed conclusions on the same issue, made by the Applicant, Board Staff, SEC, and others, were rejected by the Board in rendering the decision.

10. For example, Board Staff proposed that not only the $2.5 million of overtime, but also the $2.41 of continued scanning costs, should be excluded from controllable expenses for the purposes of calculating the Z factor amount. The Board did not accept the latter reduction, but did accept the former.

11. Similarly, SEC argued that an unexplained up-tick in spending after the EB-2009-0243 Decision should be excluded from the actual controllable expenses for the 2009 year, on the ground that the Board did not intend for the Applicant to be able to go out and spend more before the end of the year on discretionary expenses, knowing that it would increase the CV recovery amount dollar for dollar. The Board did not accept that argument either.

12. In our submission, if the Applicant is successful in re-opening the decision, that does not just bring the $2.5 million disallowance into play, as proposed by the Applicant. What the Board panel did in the decision is to come up with a number. If the Applicant is challenging that number, and has met the threshold, then this Board panel in considering the motion must, if it changes the number, come up with the correct number. This Board panel cannot assume that the issue of the $2.5 million disallowance can be seen in isolation. The decision considered a number of factors in coming up with a number. The interactions between those factors cannot be determined. This Board panel, in our view, must consider the same factors, since the Board's mandate still imports the "just and reasonable" standard as much in this decision as in the one under review.

13. We note that this has the added benefit that, where a party like the Applicant seeks what is essentially a rearguing of the original case, it cannot cherry pick the factors that are reargued. If they want to reargue the case, let it be reargued. Everything that relates to the issue in dispute must be properly considered if the issue is to be decided anew.

Merits

14. ***Scope of the Proceeding.*** The Applicant alleges that the Board panel got it wrong when it determined the scope of the EB-2010-0193 proceeding [para. 27 of the Notice of Motion]. With respect, that position is unsustainable.

15. In the EB-2010-0193 proceeding, the Applicant took the position that the Board's role was limited to, in effect, assessing the prudence of the contact voltage expenses, and in fact the Applicant has carried forward that characterization to this proceeding, calling the EB-2010-0193 decision the Prudence Decision. After the finding of prudence, the Applicant believed that the rest of the Board's responsibility was, essentially, just arithmetic.

16. In our view, the Board got it right when it said:

    "The Board does not agree with THESL's submission that this question is not within the scope of this proceeding. The Board finds that the scope of this proceeding is to determine the appropriate recovery amount of contact voltage costs in the context of the [EB-2009-0243] Decision…" [page 8]

17. This is consistent with the Board's longstanding practice, i.e. Board decisions deal with the substance of a matter, and seek to avoid overly formalistic approaches. In this case, the Board panel instructed itself that it had to ensure that the spirit and intent of the EB-2009-0243 Decision is carried out. That meant that they legitimately asked questions like "Did the Board panel intend result a, or result b?"

18. ***Overtime Costs.*** The Applicant argues that $2.5 million of overtime costs, which were deducted from the recoverable Z factor amount, should have been included in the actual controllable expenses for 2009, and that the decision is in error in deducting that amount from the controllable expenses.

19. The Applicant's argument on this appears to arise out of a particular characterization of the EB-2009-0243 Decision, i.e. that the disallowance was because this $2.5 million of expenses should be part of the normal OM&A spending for the year. In their submissions, the Applicant quotes part of the paragraph in that Decision to that effect.

20. However, that is not the primary basis of the EB-2009-0243 Decision on this point. The actual rationale is contained in the earlier part of the same paragraph, as follows:

    "The Panel is of the view that THESL would not have incurred overtime maintenance costs had the necessary secondary system maintenance been undertaken as part of its ongoing maintenance program. The lack of maintenance by THESI on its streetlighting assets was a major contributing cause of the contact voltage emergency and as such it is a contributing factor to these overtime costs." [page 11]

21. Thus, the primary reason for the disallowance of the $2.5 million was lack of proper maintenance, both on the part of the utility THESL (for the handwells and related assets) and on the part of the unregulated affiliate THESI (on the streetlighting assets).

22. If the Board accepts the submission of the Applicant on this $2.5 million, the effect is to increase the recovery by that amount, thus allowing the Applicant to recover indirectly this $2.5 million of costs the Board has already found to be caused by improper maintenance practices by the Applicant and its affiliate.

23. This can be contrasted with the $2.41 million of ongoing scanning costs. The Board in the EB-2009-0243 disallowed these costs because:

    "Once the emergency was resolved and THESL made a decision to change its operating parameters of the secondary system to an inspect and maintain model, these costs were part of the normal budgetary pressures that are subject to budgetary alignments." [page 11]

24. We note that the Board panel even considered the possibility that some of the $2.5 million of overtime might have been a "budgetary alignment". It said that, while some part of that spending might have come within that category, some part of the $2.41 million in ongoing scanning costs might have been higher than "normal" because of the fact that they arose in an emergency situation (i.e. the result of past lack of maintenance, like most of the overtime costs). Both of these possibilities are referred to in the EB-2009-0243 Decision at page 11. Rather than try to parse each amount, the Board concluded [at page 9 of the EB-2010-0193 Decision] that the two should be treated as offsetting each other.

25. Therefore, it is submitted that the Board produced a decision on the $2.5 million deduction that is precisely in line with the reasoning in the EB-2009-0243 Decision, and balanced with considerable subtlety the various factors that needed to be considered.

26. ***The $0.79 Million "Math Error".*** SEC has gone back through the evidence in the EB-2010-0193 proceeding, trying to reconcile the numbers proposed by the Applicant and the numbers in the decision.

27. The evidence in the proceeding is quite difficult to understand, as noted earlier, largely because of deficiencies in the original Application. We are thus not able to come to a definitive view as to the basis of this $0.79 million discrepancy. What appears to us is that the Board has adjusted controllable expenses, not only for the claimed and certain of the disallowed contact voltage expenses, but also for the overspending on contact voltage expenses. This amount of $0.79 million appears to be that overspending (i.e. $15.14 million actual spending less $14.35 million in the EB-2009-0243 Decision).

28. If that is the case, the deduction of the additional $0.79 million makes good sense. The maximum allowable claim for contact voltage expenses was calculated at $9.44 million. The Applicant in fact overspent by $0.79 million. If that amount was allowed to be included in the actual controllable expenses, the result would be that the overspending would be indirectly added to the claim and recovered, notwithstanding that it was actually incremental to the maximum amount allowed.

29. Therefore, as best we can determine this is not a "math error" at all, but a correct way to account for the fact that the Applicant's actual contact voltage expenses were higher than originally approved.

30. ***December 2009 Overspending.*** As noted in SEC's submissions in the EB-2010-0193 proceeding, it would appear that spending on controllable expenses in December 2009 was $8.0 million (47%) higher than the average of spending on controllable expenses in all other months.

31. It is, of course, possible that December is a month in which spending is higher than other months. However, the Applicant was asked for that information by Board Staff in an interrogatory, and the Board also ordered the Applicant to provide that information in Procedural Order #2. The Applicant did not provide the information. SEC also sought to pursue similar information in an interrogatory, and the Applicant declined to provide it.

32. SEC therefore argued that the Board should either a) decline the Application for recovery entirely on the basis that the Applicant failed to provide requested and ordered information, or b) draw the only available inference, i.e. that the $8.0 million up-tick in December 2009

was anomalous. In the latter case, it was submitted that the actual controllable expenses for 2009 should be reduced by that amount.

33. The Board did not agree with that conclusion, finding [at page 5 of the EB-2010-0193 Decision] that to so find would go beyond the EB-2009-0243 Decision.

34. In our submission, once the question of the appropriate amount is opened up by the Applicant, the question arises whether the Applicant's refusal to provide necessary evidence should lead to the conclusion SEC proposed.

35. It is submitted that the issue here is one of the intent of the EB-2009-0243 Decision. SEC essentially asked the question "Did the Board in EB-2009-0243 intend that THESL would be free to increase December 2009 discretionary spending in order to increase, dollar for dollar, its contact voltage recovery amount?" For example (and this is entirely a hypothetical), did the Board intend that THESL could pay a $1 million bonus to its CEO on December 31, 2009, knowing that the bonus would cost THESL absolutely nothing because its contact voltage recovery would be increased by the same amount?

36. SEC believes that is not what the Board intended. While the Board did not intend that a subsequent Board panel "test the validity" of the audited financial statements, we believe the Board did intend the subsequent Board panel to investigate any allegations that the Applicant had sought to subvert the intent of the Board's decision.

37. Of course, undoubtedly the Applicant could have provided evidence to show that its December 2009 spending was normal, or if abnormal, that nothing untoward happened. In short, the Applicant was free to defend itself fully against any allegations that it manipulated its controllable expenses to "get around" the Board's intent in EB-2009-0243.

38. But the Applicant, despite having multiple opportunities to provide that evidence in more than one way, and despite having been ordered by the Board to provide it, kept it firmly hidden.

39. In our submission, faced with a prima facie case that controllable expenses were unusually high, the Board should have either pursued the evidence that it originally ordered, or made an adverse inference from the Applicant's refusal to provide that evidence.

40. As a result, it is submitted that the contact voltage expenses should be reduced by $8.0 million, reflecting apparently higher than expected spending after the EB-2009-0243 Decision.

Conclusion

41. SEC therefore concludes as follows:

    a. Based on past Board decisions on threshold, the threshold has been met. However, the Board should comment on the extent to which this Motion for Review is essentially an attempt to reargue the case, and therefore is inconsistent with the overall intent of Rule 42.

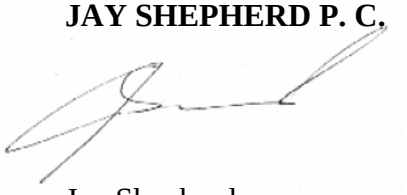
    b. The two adjustments proposed by the Applicant to the amount recoverable, $2.5 million and $0.79 million, should not be made, as the Board reached the correct conclusion on both in its decision.

    c. In the event that the amount to be recovered is to be varied by this Board panel, the amount should be further reduced by $8.0 million to reflect apparently higher than expected spending in December 2009, after the EB-2009-0243 Decision.

42. SEC submits that it has participated responsibly in this proceeding with a view to assisting the Board, and therefore asks that the Board order payment of its reasonably incurred costs for that participation.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.



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Interested Parties