



STAFF SUBMISSION

Board Staff Submission

Ontario Sustainable Energy Association
Board File Number EB-2010-0331/0332 and EB-2010-0279

February 11, 2011

Background

On January 10, 2011, Ontario Sustainable Energy Association (“OSEA”) filed two notices of motion to review Board decisions in which the Board had found that OSEA was not eligible for an award of costs in two separate proceedings: the EB-2010-0331/0332 (the “Hydro One CDM applications”) and EB-2010-0279 (the “OPA 2011 fees case”) proceedings. On January 20, 2011, the Board issued Procedural Order No. 2, in which it determined that it would hear the motions together. Procedural Order No. 2 allowed OSEA to file, at its discretion, any materials in addition to those it filed with the notices of motion by January 28, 2011. OSEA did not avail itself of this opportunity. Procedural Order No. 2 also allowed the applicants and Board staff to file submissions by February 11, 2011. What follows are the submissions of Board staff.

The Practice Direction on Cost Awards

The following sections of the *Practice Direction on Cost Awards* (the “Practice Direction”) are relevant to this discussion:

3. COST ELIGIBILITY

3.01 The Board may determine whether a party is eligible or ineligible for a cost award.

3.02 The burden of establishing eligibility for a cost award is on the party applying for a cost award.

3.03 A party in a Board process is eligible to apply for a cost award where the party:

- (a) primarily represents the direct interests of consumers (e.g. ratepayers) in relation to regulated services;
- (b) primarily represents a public interest relevant to the Board's mandate; or
- (c) is a person with an interest in land that is affected by the process.

3.04 In making a determination whether a party is eligible or ineligible, the Board may also consider any other factor the Board considers to be relevant to the public interest.

3.05 Despite section 3.03, the following parties are not eligible for a cost award:

- (a) applicants before the Board;
- (b) transmitters, wholesalers, generators, distributors, and retailers of electricity, either individually or in a group;
- (c) transmitters, distributors, and marketers of natural gas, and gas storage companies, either individually or in a group;
- (d) the IESO; and
- (e) the Ontario Power Authority.

3.06 Notwithstanding section 3.05, a party which falls into one of the categories listed in section 3.05 may be eligible for a cost award if it is a customer of the applicant.

3.07 Also notwithstanding section 3.05, the Board may, in special circumstances, find that a party which falls into one of the categories listed in section 3.05 is eligible for a cost award in a particular process.

Grounds for the Motion

OSEA's basic argument is that the Board did not properly apply its own criteria for cost eligibility from the Practice Direction. It further alleges that the Board improperly classified OSEA as a "service provider" or a group of generators, and that OSEA had a legitimate expectation that the Board would comply with its own rules and principles concerning cost awards. OSEA argues that it directly represents the interests of consumers, and that it uniquely represents the public interest with respect to renewable energy. It further argues that most of its members are not generators.

Submission

I. Motions to Review

Motions to review are permitted pursuant to Rules 42-45 of the Board's *Rules of Practice and Procedure* (the "Rules"). Although OSEA cites Rules 42 and 44 at the beginning of its notices of motion, the Rules are not otherwise directly discussed.

Rule 44 states as follows:

44.01 Every notice of a motion made under **Rule 42.01**, in addition to the requirements under **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.

Despite Rule 44.01(a), OSEA does not appear to directly allege an error in fact in the Board decisions, it does not allege there has been any change in circumstances, it does not suggest that any new facts have arisen, and it does not directly state that there are facts that were not previously placed in evidence that could not have been discovered by reasonable diligence at the time.

OSEA does suggest that there has been an error in fact, in that in OSEA's view the Board made an improper finding that OSEA represents a group of generators. OSEA also states that the Board exceeded its jurisdiction by denying cost eligibility by breaching the duty of fairness and denying OSEA's legitimate expectations. An allegation that the Board exceeded its jurisdiction, and in particular breached the duty of fairness, is a serious matter. However, this line of argument is not explained or otherwise pursued throughout the submissions.

Otherwise, OSEA's position essentially appears to be that the Board simply made the wrong decisions.

The Board explored the appropriate grounds for a motion to review in EB-2006-0322/0338/0340 (the "NGEIR decision")¹. The Board held that: "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

¹ Decision with Reasons dated May 22, 2007.

of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.²”

Although the list of potential grounds set out in Rule 44 is not exhaustive, it is not clear to Board staff that OSEA has presented sufficient grounds to be successful with these motions. Motions to review are not intended to be opportunities for parties to simply re-argue matters before the Board and hope for a different result. Only where there has been either a clear error or some material change to the record should the Board consider motions to review.

II. The Practice Direction on Cost Awards

The granting of costs eligibility (and cost awards) is a matter for the Board's discretion. Neither the *Ontario Energy Board Act*³, the *Statutory Powers Procedure Act*⁴, nor the Practice Direction require the Board to grant cost eligibility to anyone. In fact, section 3.01 of the Practice Direction clearly states that the Board may consider a party eligible for a cost award. The Board has a responsibility to ratepayers (who ultimately pay for cost awards) to ensure that cost eligibility is granted only in appropriate circumstances.

Section 3.02 of the Practice Direction clearly places the onus of demonstrating costs eligibility with the party seeking costs eligibility.

OSEA states that it represents the direct interests of consumers (i.e. ratepayers). Its list of members include a number of parties that OSEA describes as “consumers of energy”. Section 3.03(a) of the Practice Direction, however, states that the Board may grant cost eligibility where a party primarily represents the interests of consumers. Virtually all intervenor groups to some extent

² *Ibid.*, p. 18. The Board's discussion took place in the context of determining whether the motions met the “threshold” test in Rule 45. However, in Board's staff submission this point holds equally true where a motion is being considered on its merits.

³ See s. 30.

⁴ See s. 17.1.

technically represent consumers in that their members presumably consume electricity. These are not the types of intervenors section 3.03(a) is intended to capture. Nor is it enough that some members the intervenor represents may have some consumer interest role: the test is whether the intervenor primarily represents the interests of consumers. In the current case, the answer appears to be that OSEA does not primarily represent the interests of consumers.

OSEA states that it primarily represents the public interest of renewable energy. Although Board staff accepts that OSEA is a supporter of renewable energy, it is not entirely clear how this public interest relates directly to the two proceedings before the Board. The Hydro One CDM applications are applications for approval of certain conservation and demand management programs. The real issue before the Board in these proceedings is whether Hydro One's programs are eligible for approval pursuant to the Board's CDM Code. The CDM targets imposed on distributors by the *Green Energy and Green Economy Act* are not at issue in this proceeding, nor are the province's renewable energy policies at issue. In the absence of any greater policy issues, and the absence of any renewable energy issues at all (although Board staff accepts that CDM is related to renewable energy), it is not clear how the public interest represented by OSEA will assist the Board in this case.

Similarly, the OPA 2011 fees case, as framed by the issues decision, will not involve a detailed discussion of provincial energy policy, whether renewable or otherwise. These types of issues are simply outside the scope of the proceeding. The primary focus of the OPA 2011 fees case will be on the OPA's fees and its management of its objectives; the area of the OPA's business that is directly linked to the fees it is seeking to collect.

OSEA has also provided information to demonstrate that most of its members are not generators. Although this may be true, the onus remains on OSEA to demonstrate that it is eligible for an award of costs pursuant to section 3.03 of the

Practice Direction. Simply not being a generator does not entitle an intervenor to costs eligibility.

Conclusion

Board staff notes that OSEA has been found ineligible for costs in similar proceedings, specifically the CDM Code proceeding (EB-2010-0215). In the Board's decision on cost eligibility in that proceeding, the Board noted in regards to OSEA that:

“OSEA has not demonstrated that an exception to the Board's cost award eligibility criteria should be made in this proceeding. OSEA does not represent the direct interests of consumers and does not primarily represent a public interest issue with respect to issues in this proceeding. The Board therefore does not find OSEA to be eligible for cost awards.”

Board staff questions both whether the decisions are the proper subject of a motion to review, and whether OSEA has provided a compelling argument as to why it should be eligible for an award of costs.

All of which is respectfully submitted.