



**EB-2010-0377**  
**EB-2010-0378**  
**EB-2010-0379**

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

**AND IN THE MATTER OF** a motion to review the Board's  
February 1, 2011 Decision on Cost Eligibility pertaining to  
consultation processes on the development of a Renewed  
Regulatory Framework for Electricity.

**BEFORE:** Ken Quesnelle  
Presiding Member

Paula Conboy  
Member

## **DECISION ON MOTION TO REVIEW**

By letter dated December 17, 2010, the Board initiated a coordinated consultation to develop three related elements of a Renewed Regulatory Framework for Electricity (distribution network investment planning, rate mitigation and defining and measuring utility performance). The letter also indicated that cost awards would be available to eligible persons under section 30 of the *Ontario Energy Board Act, 1998* in relation to their participation in one or more of the three elements of the consultation. The Canadian Energy Efficiency Alliance ("CEEA") was among the stakeholders that filed a request for cost award eligibility, and this in respect of all three elements comprising the coordinated consultation. On February 1, 2011, the Board issued its Decision on Cost Eligibility (the "Decision"). In the Decision, the Board determined that CEEA was not eligible for an award of costs. The Board's reasons were as follows:

*CEEA's request for cost eligibility noted that CEEA's mission is to be "the leading independent voice in Canada to promote and advance energy efficiency and its related benefits to the economy and the environment". The Board notes that CEEA's membership "consists mainly of investor owned companies, utilities owned by local or provincial governments, and Associations focused on energy efficiency". Among CEEA's members are Enbridge, Union Gas, Ontario Power Generation, Hydro One and other entities regulated by the Board, which either as a group or individually are usually ineligible for a cost award under section 3.05 of the Practice Direction. The other members of CEEA are commercial entities which, as noted above, are also not usually eligible for an award of costs. Most of the members identified by CEEA already pursue energy efficiency programs through regulated rates. The Board therefore finds that CEEA's focus on and dedication to energy efficiency does not, in the context of these consultations, represent special circumstances which would render the CEEA eligible for an award of costs. The Board therefore finds that CEEA is not eligible for an award of costs in these consultations.*

On February 16, 2011, CEEA filed a Motion to Review (the "Motion") requesting that the Board review that part of the Decision, in which the Board determined that CEEA was not eligible for costs in relation to the three elements of the coordinated consultation, and vary that part of its Decision in order to make CEEA eligible for an award of costs.

In its Motion, while acknowledging the discretionary nature of cost awards CEEA states that it "believes the Board made errors in fact, or failed to follow its own cost guidelines, or failed to consider a material issue..." in relation to the Decision, identifying more specifically the following:

- the Board concluded that the membership of CEEA consisted entirely of regulated utilities and commercial interests,
- the Board did not recognize that CEEA primarily represents a public interest, energy efficiency, which is relevant to the Board's mandate,
- the Board did not recognize or acknowledge that the [sic] energy efficiency was a public interest relevant not only to the Board's mandate, but also to the three proceedings in which CEEA has intervened. ...,
- the Board conflated the identity and interests of CEEA with that of some of its members, and, in so doing, contravened its own guidelines and disregarded the definition of "party" contained in the guidelines, and improperly tainted CEEA's eligibility status with the fact that some of its members were regulated utilities and some other members were commercial interests,

- the Board mistakenly concluded that CEEA was a group of distributors, and therefore, not eligible for costs, and finally
- the Board concluded that the fact that some of CEEA's members were investor owned companies, or "commercial interests", disqualified CEEA from being considered a party that primarily represents a public interest relevant to the Board's mandate.

Under Rule 45.01 of the Board's *Rules of Practice and Procedure*, when the Board receives a motion to review the Board may determine, with or without a hearing, whether the matter should be reviewed before conducting any review on the merits. Thus, when a motion to review is brought, the Board often as a first step referred to as the "threshold test", determines whether the matter should be reviewed. The intent of the threshold test has been addressed in a number of Board decisions. For example, in one decision, the Board stated:

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.

*Motions to Review the Natural Gas Electricity  
Interface Review Decision, Decision with Reasons  
(EB-2006-0322, EB-2006-0338, EB-2006-0340);  
May 22, 2007; pp. 17-18*

The Board has considered the grounds for the Motion in the context of the relevant portion of the Decision cited above.

It is clear from the Decision that the Board panel considered the diverse nature of CEEA's membership, and contrary to the statement made in the Motion the Board did not "mistakenly conclude that CEEA was a group of distributors". Most of CEEA's members, as identified in a list provided for the first time in this consultation as part of the Motion, are either regulated entities, which are *prima facie* ineligible under section 3.05 of the Board's *Practice Direction on Cost Awards* (the "Practice Direction"), or commercial entities which based on the Board's practice are not themselves *prima facie* eligible to apply for an award of costs.

CEEA's membership list does indicate that certain members are "non-profit" members as opposed to "corporate" members (principally regulated entities and commercial entities). However, this fact alone does not in the Board's view raise an issue as to the correctness of the finding that CEEA is *prima facie* ineligible for an award of costs by virtue of its membership.

The Decision on its face is also clear that the Board panel was aware of CEEA's energy efficiency mission. The Board panel specifically considered whether CEEA's "focus on and dedication to energy efficiency" could justify granting eligibility to CEEA notwithstanding that it was *prima facie* ineligible based on its membership. The Board panel exercised its discretion against granting eligibility in the context of this particular consultation. This, in the Board's view, is also in keeping with the framework established by the Practice Direction.

For these reasons, the Board finds that the grounds identified in the Motion do not raise a question as to the correctness of the Decision such that a review of the Decision would result in it being varied, cancelled or suspended. The threshold test has therefore not been met in the circumstances of this case, and no further review of the Decision will be undertaken.

**ISSUED** at Toronto, April 7, 2011

**ONTARIO ENERGY BOARD**

*Original Signed By*

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Ken Quesnelle  
Presiding Member

*Original Signed By*

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Paula Conboy  
Member