



EB-2010-0279
EB-2010-0331
EB-2010-0332

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

AND IN THE MATTER OF a Submission by the Ontario
Power Authority to the Ontario Energy Board for the review
of its proposed expenditure and revenue requirements and
the fees which it proposes to charge for the year 2011;

AND IN THE MATTER OF an application by Hydro One
Brampton Networks Inc. for an Order or Orders granting
approval of initiatives and amounts related to the
Conservation and Demand Management Code;

AND IN THE MATTER OF an application by Hydro One
Networks Inc. for an Order or Orders granting approval of
initiatives and amounts related to the Conservation and
Demand Management Code;

AND IN THE MATTER OF a Notice of Motion by the Ontario
Sustainable Energy Association for review of the Board's
Procedural Orders No. 1 and Cost Eligibility Decisions
issued on December 13, 2010 and December 21, 2011;

AND IN THE MATTER OF Rules 42, 44 and 45 of the
Board's *Rules of Practice and Procedure*.

DECISION ON MOTION TO REVIEW

Background

On December 13, 2010, the Board issued its Procedural Order No. 1 and Cost Eligibility Decision (the "OPA Cost Eligibility Decision") in relation to the Ontario Power Authority's ("OPA") 2011 revenue requirement application (EB-2010-0279). Within the OPA Cost Eligibility Decision the Board determined that the Ontario Sustainable Energy

Association (“OSEA”) was not eligible for a cost award because OSEA’s members include generators, a group that is specifically excluded from cost award eligibility, except in special circumstances. The Board also stated that OSEA has not demonstrated that an exception to the Board’s cost award eligibility criteria should be made in this case. Furthermore, OSEA does not represent the direct interests of consumers and does not primarily represent a public interest issue with respect to issues in this case.

On December 21, 2010, the Board issued its Procedural Order No. 1 and Cost Eligibility Decision (the “Hydro One Cost Eligibility Decision”) in relation to the combined proceeding to hear Hydro One Networks Inc. and Hydro One Brampton Networks Inc. Board-Approved CDM Program applications (EB-2010-0331/0332). Within its decision on the Hydro One Cost Eligibility Decision, the Board determined that OSEA was not eligible for a cost award because they are a service provider and do not represent the direct interests of consumers and do not primarily represent a public interest issue with respect to issues in this case.

On January 10, 2011, OSEA filed two notices of motion to review the decisions in which the Board had found that OSEA was not eligible for an award of costs. In its two motions, OSEA argued that the Board did not properly apply its own criteria for cost eligibility from the *Practice Direction on Cost Awards*. OSEA went on to state 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. OSEA further argued that most of its members are not generators.

OSEA requested that the hearings of all motions be combined on the basis that there is a substantial overlap of the grounds in each Motion for Review.

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, and OSEA to file a reply submission by February 22, 2011. None of the applicants filed a submission. Board staff filed a submission on February 11, 2011. OSEA filed a late reply submission on March 2, 2011.

Within Board staff's submission, it noted that it was not clear that OSEA had presented sufficient grounds to be successful with these motions. Board staff submitted that motions to review are not intended to be opportunities for parties to simply re-argue matters before the Board in hopes of a different result and that only where there has been either a clear error or some material change to the record should the Board consider motions to review.

Board staff further noted that the granting of cost eligibility is a matter for the Board's discretion and that the Board has a responsibility to ratepayers to ensure that cost eligibility is granted only in appropriate circumstances.

In response to OSEA's claim that it represents the direct interests of consumers, Board staff noted that within Section 3.03(a) of the Practice Direction it states that the Board may grant cost eligibility where a party primarily represents the interests of consumers, which Board staff noted OSEA does not appear to do.

In its reply submission, OSEA argued that the Board made an error of fact by failing to consider the information before it when deciding to deny OSEA's request for cost eligibility. Specifically, OSEA alleged that the Board erred in classifying OSEA as a generator and/or service provider, and stating that OSEA does not represent the interests of consumers. OSEA also alleged that the Board made inconsistent findings and breached the duty of fairness. OSEA noted that in other proceedings the Board has found that OSEA does represent the public interest and has granted OSEA cost eligibility, which, it argues, is evidence of inconsistent and arbitrary use of discretion by the Board.

Decision

The Practice Direction on Cost Awards provides that a party will generally be eligible for an award of costs where: it primarily represents the direct interests of consumers, primarily represents a public interest relevant to the Board's mandate, or where it is a directly affected landowner.

The Board has issued two recent cost decisions that are relevant to these Motions. In the first decision, the Board stated that it will consider an association's membership when assessing costs eligibility, and not consider the association as a distinct entity that is entirely separate from its members.¹

¹ Decision on Issues and Cost Eligibility issued on March 11, 2011 in the Toronto Hydro CDM

In the second decision², the Board stated that “it has been the Board’s practice that commercial entities such as commercial service providers are ineligible for an award of costs. Commercial entities primarily represent their own commercial interest rather than “primarily representing” a public interest, even if they may be in the business of providing services that can be said to serve a public interest relevant to the Board’s mandate”.

A large number of OSEA’s members, as identified in a list provided for the first time as part of the Motions, are either generators or distributors, which are *prima facie* ineligible under section 3.05 of 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.

OSEA’s membership list indicates that certain members are currently generating electricity, while a significant number of OSEA’s members have plans to generate electricity in the future. At no point within the various pieces of correspondence of this motion proceeding has OSEA denied that it represent generators. However, OSEA has, as Board staff has indicated, provided information to demonstrate that most of its members are not in fact generators. The Board is of the view this fact alone does not raise an issue as to the correctness of the finding that OSEA is *prima facie* ineligible for an award of costs by virtue of its membership.

Moreover, OSEA cannot be said to primarily represent a public interest relevant to the Board’s mandate. OSEA represents a large number of commercial service providers and generators. Although OSEA may advocate with respect to public interest issues, it in large measure represents the commercial interests of its members.

OSEA argues that the Board’s decision to deny it costs eligibility is arbitrary and amounts to a breach of the duty of fairness. In support of this argument, it points to a proceeding in which the Board did grant OSEA costs eligibility on a public interest basis. The Board is not bound by precedent, and considers each matter before it on its own merits. The proceeding referred to by OSEA was a Board initiated consultation on the development of a renewed regulatory framework for electricity. The scope of this

proceeding (EB-2011-0011). Specifically, the Board stated as follows: “To the extent that an entity’s membership is comprised largely of organizations that would themselves be ineligible for cost awards, so too should the entity be considered ineligible absent special circumstances.”

² Decision on Cost Eligibility issued on April 4, 2011 in the consultation process to develop guidance to the electricity industry in relation to establishment, implementation and promotion of a smart grid in Ontario.

proceeding was very broad, and the Board was prepared to grant cost eligibility to a wide variety of parties. Although the Board will consider whether it has granted cost eligibility to a party in a proceeding before, it is not bound by this and its reason for doing so is to determine if the particulars of the prior proceeding were comparable.

OSEA is not a consumer advocate group, and cannot be said to directly represent the interest of consumers. Although its members are all consumers of energy, that can be said of virtually all intervenors in Board proceedings, and does not in itself mean that the party directly represents the interests of consumers.

The Board does have the ability under section 3.07 of the Practice Direction to grant costs eligibility to a party that would otherwise be ineligible where “special circumstances” exist. The Board finds that there are no such special circumstances in this case.

For these reasons, the Board finds that the Practice Direction has been applied appropriately and that the grounds identified in the Motions do not raise a question as to the correctness of the original Decision on cost eligibility. The Motions are therefore denied.

ISSUED at Toronto, April 7, 2011

ONTARIO ENERGY BOARD

Original signed by

Ken Quesnelle
Presiding Member

Original signed by

Karen Taylor
Member