Ontario Energy Board

Commission de l'Énergie de l'Ontario

Ontario

EB-2011-0053

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

AND IN THE MATTER OF the *Electricity Act, 1998* S.O. 1998, c. 15 (Sched. A) (the "*Electricity Act*");

AND IN THE MATTER OF an application by Plateau Wind Inc. for an order or orders pursuant to section 41(9) of the *Electricity Act* establishing the location of Plateau Wind Inc.'s distribution facilities within certain road allowances owned by the Municipality of Grey Highlands;

AND IN THE MATTER OF a Motion by the Municipality of Grey Highlands, pursuant to Section 42 of the Board's *Rules of Practice and Procedure*, for a review by the Board of its decision EB-2010-0253 dated January 12, 2011;

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

BEFORE: Karen Taylor
Presiding Member

Paul Sommerville
Member

DECISION AND ORDER ON MOTION TO REVIEW

BACKGROUND

On January 12, 2011, the Board issued its Decision and Order in Board File No. EB-2010-0253 ("Decision"),in relation to an application by Plateau Wind Inc. ("Plateau") under subsection 41(9) of the *Electricity Act, 1998* regarding the location of Plateau Wind Inc.'s distribution facilities within certain road allowances owned by the Municipality of Grey Highlands ("Grey Highlands"). The Board determined the location of Plateau's distribution facilities within certain public rights-of-way, streets and highways owned by Grey Highlands.

On February 16, 2011, Grey Highlands filed a Notice of Motion with the Board seeking an Order of the Board (the "Motion") for the following:

1. To review and overturn the Decision of January 12, 2011 wherein the Board determined that the Applicant was a "distributor" for the purposes of section 41 of the *Electricity Act*.

2. As a result of the foregoing, an Order declaring that the Ontario Energy Board has no jurisdiction to determine the location of Plateau's facilities within the road allowances owned by the Municipality.

3. An Order staying the original decision until such time as a determination on the motion has been issued.

Grey Highlands submitted that the findings of the Board raise a question of the correctness of the Decision on the following grounds:

a. The Board erred in its interpretation and application of Section 4.0.1of Ontario Regulation 161/99, which was an error of law;

b. The Board erred in the determination of its jurisdiction, which was an error of law;

c. The Board erred in the interpretation of the definitions of "renewable energy generation facility", "distribution systems" and "distribute" in the Electricity Act which was an error of law;

d. The Board erred in determining the location of the structures under section 41(9) of the Act based on an erroneous conclusion (at paragraph

> 44 of the Decision that "the two parties [the Municipality and the Applicant] had reached a mutually acceptable agreement with respect to the location, construction, operation and maintenance of the Distribution Facilities within the Road Allowances". The foregoing constitutes a mixed error of fact and law.

In Procedural Order No. 1 issued March 11, 2011 the Board determined that it would proceed with the Motion by way of a written hearing to determine the threshold question of whether the matters should be reviewed before conducting any review on the merits of the Motion. In determining the threshold question the Board noted that it considers the grounds for the motion in relation to the grounds set out in Rule 44.01 (a). In Procedural Order No. 1 the Board stated the following:

> Rule 44.01 of the *Rules of Practice and Procedure* states that a motion for review must set out grounds that raise a question as to the correctness of the order or decision in question, which grounds may include the following: (i) error in fact; (ii) change in circumstances; (iii) new facts have arisen; and (iv) facts that were not placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

The Threshold Issue

Under Rule 45.01 of the Board's *Rules of Practice and Procedure,* 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. Section 45.01 of the Board's Rules of Practice and Procedure (the "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.

The threshold question was articulated in the Board's *Decision on a Motion to Review Natural Gas Electricity Interface Review Decision*[3] (the "NGEIR Decision"). The Board, in the NGEIR Decision, stated that the purpose of the threshold question is to determine whether the grounds put forward by the moving party raised a question as to the

[3] May 22, 2007, EB-2006-0322 / 0388/ 0340, page 18

correctness of the order or the decision, and whether there was enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling or suspending the decision.

Further, in the NGEIR Decision, the Board indicated that in order to meet the threshold question there must be an "identifiable error" in the decision for which review is sought and that "the review is not an opportunity for a party to reargue the case".[4]

In demonstrating an error, the moving party must show that the findings are contrary to the evidence, the panel failed to address a material issue or something of a similar nature. The alleged error must be material and relevant to the outcome of the decision. The review is not an opportunity to reargue the case. A motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and there is no purpose in proceeding with the motion to review.

SUBMISSIONS AND FINDINGS

a) Interpretation and application of Section 4.0.1of Ontario Regulation 161/99

The first ground of the Motion submitted by Grey Highlands is that the Board erred in its interpretation of section 4.0.1 of Ontario Regulation 161/99 which exempts certain distributors from the requirements of the *Ontario Energy Board Act, 1998* including the requirement to obtain a licence. Grey Highlands submitted that the Board, in relying on section 4.0.1 of the Regulation, failed to give consideration to its original submissions on the totality of the statutory and regulatory regime that applies to a "distributor".

Plateau submitted that Grey Highlands has failed to identify any error or change in fact or circumstances that would present sufficient grounds, within the context of Rule 42.01 of the Board's *Rules of Practice and Procedure,* to raise questions as to the correctness of the Board's original Decision. Specifically, Plateau submitted that Grey Highlands not only failed to provide evidence of any error in fact, change in circumstance or new evidence but also, this first ground of review is immaterial to the outcome of the Decision. In addition, Plateau submitted that the Motion makes incorrect, misleading claims that have no bearing on the correctness of the Decision.

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[4] NGEIR Decision, at pages 16 and 18

Board Findings

The Board finds that Grey Highlands' submissions on this ground are a restatement of legal arguments it made in its original submissions in the section 41(9) application and on which the Board ruled in its Decision. As such, it has failed to demonstrate any of the factors or considerations enunciated in Section 42.01 of the Board's Practice Direction, or the NGEIR decision. Motions for Review are not an opportunity to merely re-state the position of the Moving Party. The Moving Party must provide convincing argument that the original Decision was incorrect on grounds that are additional to those urged on the original panel.

b. The Board erred in the determination of its jurisdiction and its interpretation of the definitions of "renewable energy generation facility", "distribution systems" and "distribute" in the *Electricity Act* which was an error of law;

The second and third grounds submitted by Grey Highlands in support of its Motion are interrelated and allege that the Board erred in the determination of its jurisdiction to hear the application and incorrectly interpreted definitions in the *Electricity Act.* Grey Highlands submitted that in the absence of any electricity or any source from which Plateau proposes to "distribute" electricity there can be no "distribution system" and accordingly there can be no matter for resolution pursuant to section 41 of the *Electricity Act*.

Plateau, in its submission, argued that the grounds raised do not pass the threshold test as Grey Highlands is arguing the same position it put forward in the main proceeding and argued that the evidence in the original proceeding ought to have been interpreted differently. In its view Grey Highlands has failed to identify any error or change in the facts or circumstances that could give rise to a different interpretation or any material issue not considered by the Board.

Board Findings

As with the first ground, the Board notes that Grey Highlands' submission in support of these grounds is substantially a restatement of its submissions in the original application. Grey Highlands argues that the evidence in the original application should have been interpreted differently but does not present any error or change in facts or

circumstances indicating that the original application should have been decided differently. At the heart of Grey Highlands' submissions is the notion that the defined terms "distribution system", "generation facility", transmission system" and "renewable energy generation facility" are mutually exclusive such that, if the subject Distribution Facilities are part of a 'renewable generation facility' then they are not also a 'distribution system' and Plateau is not a 'distributor' that can avail itself of section 41(9) of the *Electricity Act.*

The Board finds, as did the panel in the original Decision, that there is nothing in the applicable legislation and regulation that would support such a restrictive, mutually exclusive interpretation of the definitions in the *Electricity Act* or indicate that a "strict construction" of section 41 of that Act is proper, or would yield the interpretation Grey Highlands argues for in its Notice of Motion.

Accordingly, this panel finds that the Decision and Order in the original application did not err in law in its findings with respect to its jurisdiction or interpretation of the definitions considered in the original application.

c. The Board erred in determining that Plateau and Grey Highlands had reached a mutually acceptable agreement

The fourth ground set out in the Notice of Motion is an alleged error of fact arising from paragraph 44 of the Board's Decision of January 12, 2011 which reads as follows:

> [44] *The Board notes Plateau's evidence that,* ***during the course of negotiations between Plateau and the Municipal Staff*** *regarding a road use agreement,* ***the two parties had reached a mutually acceptable agreement with respect to the location, construction, operation and maintenance of the Distribution Facilities within the Road Allowances (the "Proposed Road Use Agreement")*** *and that the Proposed Road Use Agreement was subsequently rejected by the Grey Highlands Council without apparent explanation.* (emphasis added)

Grey Highlands argues that the Board's Decision and Order on the location of Plateau's distribution facilities was based on "an erroneous statement of fact" that "the two parties had reached a mutually acceptable agreement". Grey Highlands essentially argues that the Municipal Staff and the CAO were not authorized by Grey Highlands' Council to enter into a Proposed Road Use Agreement.

Plateau argues that Grey Highland's has taken the above noted paragraph of the Decision and Order out of context. The position of Plateau is that paragraph 44 explicitly

discusses and agreement between Plateau and the Municipal Staff of Grey Highlands and this agreement resulted in the preparation of a proposed road use agreement.

Board Findings

The Board finds that it is clear that the "two parties" referred to in the above-noted paragraph are "Plateau and Municipal Staff" and accordingly the Board does not find that the Decision and Order contained an error of fact. Furthermore, the Board referenced the agreement between Plateau and Municipal Staff, not for the purpose of finding, as a fact, that there was a binding agreement between Plateau and Grey Highlands, but rather that there was consensus as between Plateau and Municipal Staff as to the proposed *location* of the Distribution Facilities. On a section 41(9) application the Board the only issue before the Board is the location of the Distribution Facilities. The only evidence before the Board on that specific issue of location was that presented by Plateau (and which had previously been acceptable to Municipal Staff). Plateau's evidence on this issue was never challenged by Grey Highlands at any time.

The Board has decided to dismiss the Motion without a hearing, pursuant to Section 45.01 of the Board's *Rules of Practice and Procedure*. In the Board's view, for the reasons outlined above, the Motion does not meet the requirements of Rule 42.01 of the *Rules of Practice and Procedure* or the established Threshold Tests required for further consideration of the motion to review. Accordingly, the Board finds that the Motion of Grey Highlands is without merit, and that the Board did not err in its Decision of January 12, 2011.

Grey Highlands Reply Submission

The Board finds it necessary to discuss one other issue raised by Grey Highlands in its Reply Submission. Specifically, Grey Highlands takes issue with the Board's application of the Threshold Question and Test for a Rule 42.01 Motion. Specifically Grey Highlands state that: "If the Threshold Test" referenced by Plateau was intended to apply to this review proceeding, the Board should have indentified and made reference to such test in its procedural order. Procedural Order No 1 dated March 11, 2011 makes no reference to the specific nature or content of the threshold test that it would engage or apply."

The Board notes that, as set out above, Procedural Order No. 1 specifically asked parties for submissions on the threshold question and stated the following: "In

determining the threshold question the Board considers the grounds for the motion in relation to the grounds set out in Rule 44.01 (a)". As such, the Board finds that the threshold test was clearly articulated and, in any event, the Board's findings in this proceeding confirm that there is no reason to doubt the correctness of the Decision and Order.

COST AWARD

Plateau submitted that the Motion is frivolous and vexatious and that, therefore, the Board should make an order requiring that Grey Highlands reimburse Plateau for all of its costs associated with the Motion. including all legal fees and disbursements that Plateau has incurred, and will incur, in responding to the Motion.

Section 30 of the *OEB Act* endows the Board with broad powers to make orders respecting costs. It is open to the Board in an appropriate case to order any person or party to pay all or part of another person's or party's costs of participating in a proceeding before the Board. This would include an order requiring a person or party to pay the costs incurred by the Board itself in conducting the proceeding.

Elsewhere in this Decision the Board has concluded that the Motion brought by Grey Highlands was without merit.

The Board finds that, but for one factor, this is a case where it would be appropriate to require Grey Highlands to pay the costs of the Applicant and the Board associated with this Motion. In the Board's view such an order would be a reasonable one.

However, as noted, there is one factor which operates to make the issuance of such an order in this case unreasonable.

It has not been the Board's practice to make such orders in the past. In the absence of past practice, the Board is not inclined to impose such an order here and now.

Henceforth, however, parties bringing motions should be cognizant of this possibility.

This is not meant in any degree to discourage meritorious motions or motions that while unsuccessful in the result contain substantive legal, policy, regulatory, or factual grounds. Motions are an important regulatory instrument which have not infrequently allowed for the correction of error of whatever kind.

This approach is meant to discourage motions, which represent no reasonably arguable grounds or a substantial re-argument of points rejected by the panel with cogent reasons in the first instance. In appropriate cases the Board may deny a party its own costs, or require it to pay the costs of other parties or the Board, or both. Where the moving party is a regulated entity, the Board may order that the shareholder pay such costs, without recourse to the ratepayer.

The Board expects the incidence of such orders to be infrequent. The standard for qualification is high. But the Board considers the possibility of such orders to be a necessary element of its governance of its own processes.

THE BOARD THEREFORE ORDERS THAT:

1. The motion to review is dismissed and Board Decision EB-2010-0253, dated January 12, 2011 is confirmed.

DATED at Toronto, April 21, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary