Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto ON M4P 1E4
Telephone: 416- 481-1967
Facsimile: 416- 440-7656
Toll free: 1-888-632-6273

Commission de l'énergie de l'Ontario
C.P. 2319
27e étage
2300, rue Yonge
Toronto ON M4P 1E4
Téléphone; 416- 481-1967
Télécopieur: 416- 440-7656
Numéro sans frais: 1-888-632-6273

Ontario

BY EMAIL

June 15, 2011

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto ON M4P 1E4

Dear Ms. Walli:

Re: Motion by the Ontario Waterpower Association to Rview and Vary the Decision of the Board in EB-2011-0067 dated May 5, 2011.
EB-2011-0212

Please find attached Board staff's submission in the above referenced proceeding. Please forward the attached to the Ontario Waterpower Association, its counsel and all intervenors in proceeding EB-2011-0067.

Yours truly,

Original signed by

Gona Jaff
Project Advisor, Applications and Regulatory Audit

Attachment

ONTARIO ENERGY BOARD

STAFF SUBMISSION

Motion by the Ontario Waterpower Association for a Review by the Board of its Decision in EB-2011-0067

EB-2011-0212

June 15, 2011

BACKGROUND

The Ontario Waterpower Association (the "OWA") filed an application with the Board on March 11, 2011 under section 74(1)(b) of the *Ontario Energy Board Act, 1998* (the "Act") to amend the distribution licence of Hydro One Networks Inc. ("Hydro One") to exempt Hydro One from sections 6.2.4.1(e)(i) and 6.2.18(a) of the Distribution System Code (the "DSC") for waterpower generation facilities and to substitute a special rule for waterpower generation facilities. Section 6.2.4.1(e)(i) of the DSC states that a distributor's capacity allocation process must include a requirement that a generator have its capacity allocation removed if the generator does not sign a connection cost agreement with the distributor within 6 months of the date on which the generator received a capacity allocation. Section 6.2.18(a) of the DSC states that the connection cost agreement must include a requirement that the generator pay a connection cost deposit equal to 100% of the total estimated allocated cost of connection at the time the connection cost agreement is executed. The application was assigned file number EB 2011-0067 and an oral hearing was held on May 4 & 5, 2011.

On May 5, 2011, after hearing oral arguments from OWA and Board staff, the Board rendered an oral decision exempting Hydro One from section 6.2.18(a) of the DSC with respect to hydroelectric projects with a nameplate capacity of 10 megawatts or less, that are located on provincial, Crown or federally-regulated lands, and which are connected to Hydro One's distribution system. For those projects that met the criteria set by the Board, the Board accepted a connection cost agreement payment schedule agreed to between OWA and Hydro One filed as Exhibit K2.1 in the proceeding. Exhibit K2.1 consisted of six paragraphs. The Board requested that the Applicant update Exhibit K2.1 to reflect the Board's decision and file it with the Board.

On May 6, 2011, the Applicant filed a letter with the Board along with the updated version of Exhibit K2.1. An additional paragraph, paragraph 7, was added to the updated version of Exhibit K2.1 which provided:

> Proponents shown on Undertaking Response J1.2 who already paid a 100 per cent deposit prior to May 5, 2011, as required by their Connection Cost Agreement entered into with Hydro One, shall receive a refund from Hydro One in the amount that exceeds the amounts required in paragraphs I through 5 above. Hydro One shall pay the said refund to each of the said proponents no later than 30

> days after the applicable proponent has entered into a revised Connection Cost Agreement with Hydro One, setting out the payment schedule required herein.

On May 10, 2011, the Board issued a letter indicating that "Except for paragraph 7, the Board accepts the updated version of Exhibit K2.1." The Board stated that: "The effect of the Board's Decision and Order was not meant to be extended to those waterpower projects that had paid the full 100% deposit."

STAFF SUBMISSION

This submission is intended to provide an overview of the applicable Rules of Practice and Procedure and the arguments supporting Board staff's position that the OWA Motion ought to be dismissed.

On May 25, 2011, the OWA filed a Notice of Motion (the "Motion") with the Board to review and vary the Decision of the Board in EB-2011-0067 dated May 5, 2011. Specifically, the Motion is a request for re-inserting paragraph 7 of Exhibit K2.1 filed in proceeding EB-2011-0067 into the exemption granted by the Board as part of the Decision. By way of Notice of Motion and Procedural Order No. 1 dated June 1, 2011, the Board directed that the parties, if they choose to do so, file submissions with the Board and further stated that the Board will hear oral submissions on the Motion on June 28, 2011. The Board adopted the intervenors of record from the EB 2011-0067 proceeding.

The OWA argues, in its Motion, that paragraph 7 of Exhibit K2.1 would give four projects that have paid the connection cost deposit in full the same relief as the other remaining 24 projects which were the subject matter of the application with respect to benefiting from a revised payment schedule. OWA argues that these four projects were subjected to the same development process as the other 24 projects in the application, are located on Crown land and are not greater that 10MW in capacity.

Information relating to these four projects, including the fact that they had already paid the full 100% connection cost deposit amounts before the date of the hearing was before the Panel and was set out in Exhibit K1.2.

Board staff submits that in considering the Motion the Board can first consider whether the OWA has met the threshold tests before considering the OWA Motion on its merits.

Threshold Test

Under Rule 45.01 of the Board's Rules of Practice and Procedure (the "Rules"), 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 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 has been discussed in the Board's Decision with Reasons in the *Natural Gas Electricity Interface Review Decision* ("NGEIR Decision").[1] In the NGEIR Decision the Board determined that the threshold question requires the motion to review to meet the following tests:

- The grounds must raise a question as to the correctness of the order or decision;
- The issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended;
- There must be an identifiable error in the decision as a review is not an opportunity for a party to reargue the case;
- 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 of a similar nature; it is not enough to argue that conflicting evidence should have been interpreted differently;
- The alleged error must be material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.[2]

---

[1] *Motions to Review the Natural Gas Electricity Interface Review Decision*, May 22, 2007, EB 2006-0322/0338/0340
[2] *Ibid*, pp 17-18

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 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".[3]

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.

One argument raised by the OWA in its Motion is that the "ability to pay was not the defining criteria upon which the Board made its Decision. Board staff submits that the issue of the ability of waterpower developers to obtain debt financing and therefore the ability to pay the 100% connection cost deposit was an issue before the Panel.

> MR. STOLL: All right. Basically what we continued on with was the principle that we -- Hydro One should not be expending resources prior to receiving payment.
> But we wanted to come up with a payment schedule that reflected the permitting and approval process from other bodies for waterpower that are unique to waterpower in this payment schedule, ***and the ability of waterpower developers to obtain debt financing relative to the project***.[Emphasis added]

In an exchange with Board counsel, one of the OWA witnesses confirmed that debt financing was directly related to the issue of ability to pay:

> MS. HELT: I just have one final question with respect to these particular projects.
> And given that there are -- your approvals essentially are in place and you are very close to securing your

[3] *Ibid*, at pp 16 and 18

> financing, why, then, is it necessary for you to have an exemption with respect to these particular projects?
>
> MR. LAWEE: We received one connection cost assessment for the first two projects; I believe it was back in January, with a two-week deadline.
>
> We made a payment for that, and I'm guessing it was in February, with a signed CCA. That was retained by Hydro One for several weeks, and then returned to us, along with our certified cheque, because Hydro One indicated that there were reviews of costing estimates that needed to be done on our project, as well as all of the other projects that were -- that were being assessed.
>
> And a second connection cost assessment came through, I believe it was end of March/early April, again, with the two-week deadline to make full payment.
>
> And in order to make that payment, the latest connection cost amounts -- deposits for the four Kapuskasing projects were approximately $5.1 million, tax included. For us to be able to put that money in place and source that money without having our permanent financing in place would be very, very onerous.
>
> We are not a public company. **We do not have any access to public capital, and for that very reason we don't have the ability to fund these costs prior to our getting our permanent financing.**
>
> Once the permanent financing is in place, you know, this is a cost component that a lender would fund based on a draw request that we would make to the lender.
>
> MS. HELT: So just to confirm, then, **once you have your financing secured and it is in place, you will be able to pay 100 percent of the cost connection deposit?**
>
> **MR. LAWEE: We would be in a position to do that.** [Emphasis added][4]

Board staff submits that the OWA has not demonstrated that the findings of the Board 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 of a similar nature, or that the alleged error would change the outcome of the Decision.

[4] Transcript of Proceedings, EB 2011-0067, Volume 1, May 4, 2011

Board staff submits that the OWA has not satisfied any of the threshold tests articulated in the NGEIR Decision and as such there is no purpose in proceeding with the motion to review.

However, should the Board decide that the threshold tests have been met, it is Board staff's submission that the Motion ought to be dismissed.

MOTION FOR REVIEW

Rule 44.01 of the Rules 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.

Board staff submits that the facts now sought to be brought forward by the OWA are not new facts, there is no change in circumstance, are not facts that were not placed in evidence at the hearing and there was no error in fact.

In its Motion the OWA argues that the Board erred in that the Decision "effectively precludes four of the 28 projects that had comprised the Application form the benefit of the Decision."[5]

It is clear from the evidence that these four waterpower proponents had paid the full connection cost deposit prior to the hearing and prior to the Decision being issued. The Board was well aware that these four proponents had already paid when issuing its Decision.

Board staff submits that Exhibit K2.1, which was approved by the Board in its Decision, did not include a provision for relief for the four waterpower proponents who had already paid the connection cost deposit. In fact, Exhibit K2.1 provides for a payment schedule for those hydropower projects where the proponent has not yet paid. In the preamble to the proposed payment schedule, Exhibit K2.1, the purpose of the document is to exempt Hydro One from the current connection cost deposit stipulated in s.6.2.18(a) of the DSC is confirmed. This section of the DSC provides:

[5] Notice of Motion of the Applicant, May 25, 2011 at para 3

> A distributor shall enter into a connection cost agreement with an applicant in relation to a small embedded generation facility, a mid-sized embedded generation facility or a large embedded generation facility. The connection cost agreement shall include the following:
>
> > a. a requirement that the applicant pay a connection cost deposit equal to 100% of the total estimated allocated cost of connection at the time the connection cost agreement is executed;

Board staff submits that for these four waterpower projects capacity allocation has not been lost, the connection cost deposit has been paid in full and as such, there is no question with respect to the correctness of the Decision.

Further, the Board made this clear in its Decision by confirming that the effective date of the Decision is May 5, 2011. As such, it is Board staff's position that the proposed payment schedule takes effect as of the date of the Decision and only applies to those applicants that meet the criteria set out by the Board and that have not yet paid the connection cost deposit equal to 100% of the total estimated allocated cost of connection.

In summary, Board staff submits that the OWA has failed to meet any of the tests or criteria set out in the threshold tests or for a motion to review. There has been no evidence put forward or argument made that would raise a question as to the correctness of the Board's Decision in EB 2011-0067. Furthermore, Board staff submits that finality in decision making is important and that this review proceeding should not become a forum for the OWA to reargue its case.

All of which is respectfully submitted.