



**EB-2011-0043**

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

**AND IN THE MATTER OF** motions to review the Board's  
May 4, 2011 Decision on Cost Eligibility pertaining to a  
consultation process to develop a regulatory framework  
for regional planning by electricity transmitters and  
electricity distributors.

**BEFORE:** Ken Quesnelle  
Presiding Member

Paula Conboy  
Member

**DECISION ON MOTIONS TO REVIEW**  
**June 27, 2011**

On April 1, 2011, the Ontario Energy Board issued a letter to interested parties initiating a consultation process to assist the Board in the development of a regulatory framework for regional planning. The letter also notified interested parties 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 the consultation process. The City of Thunder Bay (“Thunder Bay”), the Town of Atikokan (“Atikokan”), the Northwestern Ontario Associated Chambers of Commerce (“NOACC”) and the Northwestern Ontario Municipal Association (“NOMA”) were among the stakeholders that filed a request for cost award eligibility. Each indicated in its filing an intention to cooperate and join with the other three in respect of their participation in this consultation process.

On May 4, 2011, the Board issued its Decision on Cost Eligibility (the “Decision”). In the Decision, the Board determined that Thunder Bay and Atikokan, as the effective owners of electricity distributors, were not eligible for an award of costs. In denying cost eligibility to each of NOMA and NOACC, the Board stated as follows:

The Board notes that NOMA’s members are comprised of municipalities and townships located in the Northwestern region of the Province, some of which own an electricity distributor but most of which do not. NOMA’s letter requesting cost award eligibility indicates that it: (i) represents the municipal communities throughout the Northwest Region; (ii) understands and can speak to the direct interests of the ratepayers in that Region; (iii) is keenly aware of the geographical and technical issues relating to electricity generation and transmission/distribution in the Region; and (iv) will be able to provide valuable insight into not only issues related to energy but also to environmental and other social imperatives, including social imperatives that are geographical, economic and commercial. Based on NOMA’s letter, the Board does not believe that NOMA primarily represents the direct interests of consumers (ratepayers) in relation to regulated services. The Board notes that this consultation is relatively narrow in scope, the focus being on the development of regional planning requirements that will apply in circumstances where a localized geographic issue can be resolved through more than one transmission and/or distribution solution. Based on NOMA’s letter, the Board does not believe that NOMA represents a public interest relevant to the Board’s mandate in the context of the specific scope of this consultation. The Board therefore finds that NOMA is not eligible for an award of costs in this consultation.

NOACC's members are Chambers of Commerce representing the business communities in their respective Northwestern Ontario regions. NOACC's letter requesting cost award eligibility indicates that it: (i) represents the member businesses of its member Chambers of Commerce throughout the Northwest Region; (ii) understands and can speak to the direct business interests of the ratepayers in that Region; (iii) is keenly aware of the geographical and technical issues relating to electricity generation and transmission/distribution in the Region; and (iv) will be able to provide valuable insight into not only issues related to energy but also to environmental and other social imperatives, including social imperatives that are geographical, economic and commercial. Under section 3.03 of the Practice Direction, a participant is eligible to apply for a cost award where, among other things, the participant represents the direct interests of ratepayers, provided that the focus is in relation to regulated services. Based on NOACC's letter, although NOACC may be in a position to speak to the business interests of ratepayers in Northwestern Ontario, it does not appear to the Board that NOACC's participation in this consultation is to primarily represent the direct interests of ratepayers *in relation to regulated services*. Based on NOACC's letter, for the same reasons as those given above in respect of NOMA the Board also does not believe that NOACC represents a public interest relevant to the Board's mandate in relation to the specific scope of this consultation. The Board therefore finds that NOACC is not eligible for an award of costs in this consultation.

Representatives of residential consumers (CCC and VECC) and of large users (AMPCO) have been determined to be eligible for an award of costs in this consultation, and the Board is interested in the unique perspective that might be offered by small commercial or business consumers. If NOACC is in a position to participate in this consultation for the purposes of representing this class of consumers in their capacity as ratepayers (i.e., "in relation to regulated services"), the Board would be prepared to consider a further request for cost award eligibility on that basis.

On May 24, 2011, each of Thunder Bay, Atikokan, NOMA and NOACC filed a Motion seeking a review of the Decision. The Board has determined it appropriate to consider all four Motions together.

The grounds for review raised in the Motions are as follows:

*Motion by Thunder Bay:* In its Motion, Thunder Bay submitted that the Board made an error in fact in that “the Board failed to address a material issue being that [Thunder Bay Hydro] operates under a ‘Rate Minimization’ model and has not paid any dividends or interest on capital to the City of Thunder Bay”. According to Thunder Bay, this is a special circumstance that the Board should have considered under section 3.07 of the Board’s *Practice Direction on Cost Awards* (the “Practice Direction”), and the fact that the Board failed to do so raises a question as to the correctness of the Decision. Thunder Bay also argued that it cannot be said to be primarily representing its own commercial interests in this consultation because it receives no revenue from its ownership of Thunder Bay Hydro. The fact that Thunder Bay mandated the rate minimization model demonstrates, in Thunder Bay’s view, that it primarily represents the interests of ratepayers in relation to their interests in electricity distribution and transmission. Finally, Thunder Bay also submitted that it represents the direct interests of over 40,000 ratepayers in relation to regulated services. In this regard, Thunder Bay cited that it has several renewable generation contracts under the FIT and microFIT programs, and new loads occurring on City-owned real property.

*Motion by Atikokan:* The submissions made by Atikokan in its Motion were similar to those made by Thunder Bay as described above. Atikokan submitted that the Board made an error in fact in that the Board failed to consider that Atikokan has never received dividends or interest on capital from its electricity distributor. According to Atikokan, this is a special circumstance that the Board should have considered under section 3.07 of the Practice Direction, and the fact that the Board failed to do so raises a question as to the correctness of the Decision. Atikokan also argued that, given that it has never mandated the payment of dividends or interest on capital by its electricity distributor, Atikokan cannot be said to be primarily representing its own commercial interests in this consultation but rather it primarily represents the public interest of its constituent ratepayers. Finally, Atikokan also submitted that it represents the direct interests of its ratepayers in relation to regulated services.

*Motion by NOMA:* In its Motion, NOMA submitted that the Board made an error in fact by concluding that NOMA does not primarily represent the direct interests of consumers (ratepayers) in relation to regulated services. According to NOMA, the Board’s failure to consider this fact raises a question as to the correctness of the Decision. NOMA stated that, while not using the words “regulated service”, NOMA did in its request for cost award eligibility advise the Board that it primarily represents the direct interests of

ratepayers in relation to regulated services. Specifically, NOMA pointed to that portion of its request for cost award eligibility in which it referred to the fact that it is, through the Energy Task Force, keenly aware of the “technical issues relating to electricity generation and transmission/distribution in the region”. NOMA noted that the term “regulated services” is not defined, but argued that in its view a reference to technical issues can reasonably be interpreted as dealing with or related to “regulated services”. The Board’s failure to interpret “regulated services” accordingly is cited by NOMA as being in essence the error in fact made by the Board in the Decision. NOMA also submitted that the fact that it “primarily represents the direct interests of consumers (ratepayers)” is demonstrated on the public record. In this regard, NOMA cited: (i) its intervention in the Integrated Power System Plan (“IPSP”) proceeding before the Board; (ii) the fact that it provided comments to the Province on the Proposed Growth Plan for Northern Ontario and identified the need for planned investments in the transmission network in Northwestern Ontario; (iii) provided detailed comments to the Ministry of Energy on the draft Supply Mix Directive; and (iv) met with the Ministry of Energy on several occasions over the past three years to advocate on behalf of the ratepayers it represents, including issues dealing with regulated services.

*Motion by NOACC:* The grounds for review and submissions made by NOACC in its Motion are largely the same as those set out in NOMA’s Motion. Although NOACC did not cite participation in the IPSP proceeding, NOACC did note that at its 2010 annual general meeting it passed resolutions on “Ontario’s Energy Transmission Plan on transmission planning”.

In each of the four Motions, the moving party stated the following in support of its assertion that it represents the direct interests of ratepayers in relation to regulated services: “[T]he regulations with respect to planning and cost responsibility between transmitters, distributors, loads and generators when projects involved multiple connections and service areas is in the public interest of the [moving party] and the ratepayers it represents”.

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 Decision, and in particular the basis on which each of Thunder Bay, Atikokan, NOMA and NOACC was denied cost award eligibility, and the grounds for review identified in each of the four Motions. The Board concludes in each case that the grounds for review identified in the applicable 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.

Prior to turning to the Board’s reasons for this conclusion in each case, the Board considers it useful to reiterate that, as noted in the Decision, this consultation is relatively narrow in scope. The focus of the consultation is the development of regional planning requirements for the purpose of facilitating the determination of optimal electricity infrastructure solutions in circumstances where a localized geographic need can be resolved through more than one transmission and/or distribution solution. The consultation will also focus on developing such regulatory rules as may be required to ensure that cost responsibility associated with such optimized solutions is attributed in an appropriate manner. It is not intended to be a broad integrated regional planning exercise, nor is it intended to address broader economic development or social or environmental imperatives.

With respect to Thunder Bay and Atikokan, the Board notes that neither of these municipalities cited the fact that they receive no dividends or interest on capital from their respective electricity distributor in their requests for cost award eligibility. In each of their Motions, they state that this fact is a matter of public record that has been made known to the Board in earlier submissions. While this fact may have been on the public record in earlier proceedings, it was not on the public record in this consultation. Applicants and persons seeking cost award eligibility bear the onus of including in their submissions all facts that they consider relevant to the relief that they are seeking. The Board panel in any given case should not be expected to delve into the record of earlier proceedings to ascertain whether other relevant facts may be found there. The Board does not consider the failure to consider a fact that was not placed before it in a specific case to constitute an error in fact for the purposes Rule 44.01 of the *Rules of Practice and Procedure*.

Although this would be sufficient to dispense with the grounds for review set out in each of these two Motions, the Board also finds that the fact of the non-receipt of dividends or interest on capital now brought to the Board's attention does 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. Where a municipality is the effective owner of an electricity distributor, the Board likens that municipality to the electricity distributor for cost award purposes, resulting in ineligibility for cost awards absent special circumstances. The Board does not consider the fact of non-receipt of dividends or interest on capital to constitute special circumstances in the context of this consultation.

The Board likens a municipality to the electricity distributor it owns due to the general alignment of interests that is inherent in ownership, irrespective of its profit orientation.

For these reasons, the Board has determined that the threshold test has not been met in the circumstances of the Motions filed by Thunder Bay and Atikokan, and no further review of the Decision will be undertaken in respect of either Thunder Bay or Atikokan.

With respect to NOMA and NOACC, the Board observes that the Decision on its face is clear that the Board panel considered their respective submissions to the effect that they are "keenly aware of the geographical and technical issues relating to electricity generation and transmission/distribution" in Northwestern Ontario. As such, in the

Board's view the Decision is also clear that the Board panel, in the exercise of its discretion, did not consider this to warrant a finding that NOMA primarily represents the direct interests of ratepayers in relation to regulated services.

For these reasons, the Board concludes that the grounds for review cited in the Motions filed by each of NOMA and NOACC do not raise an issue as to the correctness of the Decision such that a review of the Decision would result in it being varied, cancelled or suspended. The Board has therefore determined that the threshold test has not been met in the circumstances of the Motions filed by NOMA and NOACC, and no further review of the Decision will be undertaken in respect of either of NOMA or NOACC.

Each of the four Motions also contains, as an alternative grounds for relief, a request that the Board exercise its discretion under sections 1.03, 5.01(a), 7.01 and 7.02 of the Board's *Rules of Practice and Procedure* and accept into evidence certain additional facts to supplement the moving party's original request for cost award eligibility. The Board understands this to be, in essence, a request for a *de novo* determination of the cost award eligibility of each of the moving parties. As noted above, it is the responsibility of applicants and persons seeking cost award eligibility to include in their submissions all facts that they consider relevant to the relief that they are seeking. It is not, in the Board's view, appropriate to use a Motion to review as a vehicle for also requesting a redetermination based on facts that could have been placed before the Board in earlier submissions. Nonetheless, in this circumstance the Board considers it expedient to address the alternative grounds for relief included in the Motions.

In the case of Atikokan, the additional facts that have been put forward pertain to the history and operation of Atikokan Hydro, including that Atikokan receives no dividends or interest on capital from Atikokan Hydro. In the case of Thunder Bay, the additional facts pertain to: (i) the rate minimization model referred to in the Motion; (ii) the composition of the Board of directors of Thunder Bay Hydro, notably the fact that of the seven City-appointed members of the Board of Directors only one is a member of the elected municipal council and 6 are representatives of the public at large; and (iii) Thunder Bay's status as the largest property owner in the community and the relationship that this has to renewable generation and loads in the City and to the need for coordinated and cost-effective development of electricity infrastructure in the Northwest Region.



The Board has indicated above that it does not consider the fact of the non-receipt of dividends or interest on capital to constitute special circumstances in the context of this consultation. The Board finds the same in respect of the composition of the Board of Directors of Thunder Bay Hydro and in respect of Thunder Bay's status as real property owner in the community. The Board will therefore not extend to either Thunder Bay or Atikokan eligibility to apply for an award of costs in this consultation.

In the case of NOMA, the additional facts that have been put forward pertain to NOMA's history, members and objectives as well as to its activities related to the energy sector, including passing a resolution at its 2010 annual general meeting on "Ontario's Energy Transmission Plans". The Board acknowledges that NOMA has been involved in energy sector-related activities. However, the Board is not persuaded on the basis of the additional facts put forward by NOMA that it primarily represents either the direct interests of ratepayers in relation to regulated services or a public interest relevant to the Board's mandate in the specific context of this consultation.

NOMA's membership is comprised of municipal bodies that are ultimately accountable to their respective electorates. As such, the Board considers that constituent-based funding (taxation revenues) is the appropriate source of funds for participation in this consultation by municipalities, whether individually or as a group. This is consistent with a recent determination by the Board regarding the cost award eligibility of a municipality in a hearing related to gas storage.<sup>1</sup> The Board will therefore not extend to NOMA eligibility to apply for an award of costs in this consultation.

In the case of NOACC, the additional facts pertain to NOACC's history, members and objects as well as to its activities related to the energy sector. As indicated earlier, in the Decision the Board panel indicated a willingness to consider a further request for cost award eligibility from NOACC, if NOACC is in a position to participate in this consultation for the purposes of representing small commercial or business consumers in their capacity as ratepayers (i.e., in relation to regulated services). As stated in the Decision, the Board is interested in the unique perspective that might be offered by this class of consumers. In light of the supplementary information provided by NOACC, the Board is satisfied that NOACC can provide that perspective. The Board will therefore extend cost award eligibility to NOACC in this consultation. The Board cautions,

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<sup>1</sup> See the Board's letter of June 14, 2011 in proceeding EB-2011-0076/EB-2011-0077/EB-2011-0078.

however, that NOACC's cost award eligibility and any costs awarded to it will be limited to participation that is focussed on the interests of small commercial or business consumers in their capacity as ratepayers (for example, in relation to cost responsibility for electricity infrastructure), and not in relation to the broader business interests of this class of consumers in terms of matters such as regional economic development more generally.

**ISSUED** at Toronto, June 27, 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