



February 7, 2012

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

Dear Ms. Walli:

Re: Applicant Submission on Preliminary Issues (EB-2012-0006)

This proceeding was initiated by Mr. R. J. Potomski by way of materials filed with the Ontario Energy Board (the "Board") on December 27, 2011 and January 4, 2012. Mr. Potomski is seeking to appeal a Decision and Order of the Board dated December 12, 2011 ("Original Decision").

On January 24, 2012, the Board issued Procedural Order 1, inviting Mr. Potomski and EnWin to file submissions in respect of several preliminary matters. Mr. Potomski filed submissions on January 31, 2012. Enclosed are EnWin's submissions.

EnWin's Position in Brief

Respectfully, EnWin submits that the Board should dismiss this proceeding without a hearing under section 18 of the Board's Rules of Practice and Procedure ("Procedure Rules"). Alternatively, EnWin submits that the Board should issue a decision to not proceed under section 19 of the Procedure Rules. There are a number of bases for the Board to take one of these actions:

- Mr. Potomski's request has not satisfied the statutory requirements or the Procedure Rules;
- Mr. Potomski's request is frivolous and vexatious;
- the Notice of Appeal contains no grounds for appeal;
- the Supplemental Notice of Appeal was filed after the prescribed time; and
- the Supplemental Notice of Appeal contains insufficient grounds for appeal.

EnWin is requesting a Cost Award pursuant to s. 3.07 of the Board's Practice Direction on Cost Awards ("Cost Award Rules"). EnWin is also requesting that the Board recover its costs from the Appellant.

Dismissing or Not Proceeding with the Appeal

There are a number of reasons why this Notice of Appeal ought to be dismissed. These reasons are offered as a series of reasons, any one of which is a sufficient basis to dismiss the appeal. Before addressing those reasons for dismissal, in balancing the public interest, the Board may wish to have regard for the nature of the Appellant.

Appellant

This is not a situation where a lay person is clumsily attempting to put a genuine issue before the Board. If that had been the case, the Board might have felt compelled to extend a measure of leniency to an Appellant who has presented an insufficient Notice of Appeal for want of training and knowledge of legislation and legal principles. While EnWin does not concede that such an approach would be appropriate, the Board might have been inclined toward such an approach. However, the Board should not feel so inclined in this case. Despite Mr. Potomski's current status as a paralegal under suspension by the Law Society of Upper Canada, he is nonetheless a paralegal by training and should be expected to adhere to the Act and the Board's Rules in making his appeal.¹

Dismissing the Notice of Appeal

The first reason for dismissal is the absence of grounds for appeal.² Mr. Potomski has been very specific and forceful in asserting that his Appeal is filed pursuant to section 7 of the *Ontario Energy Board Act, 1998* (the "Act"). According to s. 7, the Notice of Appeal must be filed within 15 calendar days of the Decision or Order being appealed. EnWin submits that Mr. Potomski filed his Notice of Appeal on December 27, 2011 for the purpose of asserting that right in respect of the Board's December 12, 2011 Decision.³ That Notice of Appeal asserted no grounds for appeal. Without any grounds, there is no basis for the Board to entertain an appeal.

The second reason for dismissal is that the 15 calendar day Notice of Appeal period was not extended. In fact, there is no provision in the Act to extend the statutory timeline. Regardless, no such request was made by Mr. Potomski prior to the expiry of the 15 day period on December 27, 2011. Neither was any request made prior to the Board agreeing to consider these preliminary matters. Any grounds raised after December 27, 2011 should not be considered by the Board.

The third reason for dismissal is that even if the Board considers the grounds set out in the January 4, 2012 "Supplemental Notice of Appeal", those grounds are insufficient to overturn the December 12, 2011 Decision. The Appellant's 17 grounds are addressed in turn. They are all irrelevant, immaterial or both. None of the alleged grounds provides any reasoned (let alone legal) basis to find that the Original

¹ A printout of The Law Society of Upper Canada's Lawyer and Paralegal Directory is enclosed as Attachment A.

² See, for example, Submissions of the Appellant para 1(a).

³ Affirmed in the Submissions of the Appellant paras 2(b), 3(b),3(c).

Decision made a fatal error in respect of relevant and material facts. Many of the grounds simply seek to reargue the proceeding that led to the Original Decision.

- 1) Merely an articulation of alleged statutory framework.
- 2) See #1.
- 3) Argument on location of hearing, not the need for one.
- 4) Stating that the Board adjudicator erred in law is simply that, a statement; it does not identify what the error was; it is not a reasoned argument; it does not cite why the Board may grant the appeal if there was an error in law.
- 5) Repetition of an argument made by the Appellant leading up to the Original Decision; legal argument considered by the Board in coming to the Original Decision; it does not cite the law on which the statement is based.
- 6) Same deficiencies as #5.
- 7) Same deficiencies as #5.
- 8) Argument that something can be done; however, even if true, simply because something can be done does not mean it must be done or that it should be done; in this case, nothing turns on whether this action can be done.
- 9) See #8.
- 10) Explicit attempt to reargue the original case leading to the Original Decision.
- 11) Explicit attempt to reargue the original case leading to the Original Decision.
- 12) Identification of a set of rules, no application of them to this case.
- 13) Identification of a statute, no application of it to this case.
- 14) Identification of a statute, no application of it to this case.
- 15) Identification of a statute, no application of it to this case.
- 16) Identification of a court case, no application of it to this case.

It must not be forgotten that, if anything, the Board has already extended a significant measure of flexibility with Mr. Potomski in coming to its Original Decision. Mr. Potomski made final submissions that were not only after the Board's deadline, but that were after the final submissions of the Applicant. This was a significant procedural irregularity that was clearly to the benefit of Mr. Potomski. In the Original Decision, the Board noted that it took into consideration Mr. Potomski's submissions, including those that were filed after undue delay.

The grounds that have been advanced by Mr. Potomski are frivolous in that they are "lacking a legal basis or legal merit; not serious; not reasonably purposeful".⁴ Neither individually, nor taken as a collective, do the grounds present a basis for the Board to examine the Original Decision let alone overturn it.

⁴ Black's Law Dictionary, Seventh Edition

The grounds that have been advanced by Mr. Potomski are vexatious in that they are “without reasonable or probable cause or excuse; harassing; annoying”.⁵ Mr. Potomski has not articulated a reasonable cause or excuse for the Notice of Appeal. Based on the alleged grounds and the plethora of superfluous filings, it appears that Mr. Potomski hopes to harass or annoy the Board into seeing things his way irrespective of due process or reasonable argument.

Appeal not Aligned with the Public Interest

The Board has invited submissions on why an insufficient Notice of Appeal might be heard. EnWin cannot think of any good reasons to do so.

While sometimes it may be in the public interest to be flexible with the rules in order to deal with a substantive issue that ought to be before the Board, this is not one of those cases.

This is not a case of an Appellant ignorant of the basic requirements for a Notice of Appeal. The Appellant has clearly turned his mind and writings to section 7 of the Act; the Appellant has a professional legal background; and the Appellant has shown through his many correspondences with the Board that he is well aware of how to contact the Board from which guidance might have been sought on how to properly prepare and file a Notice of Appeal. Nevertheless, the Notice of Appeal was lacking in substance and the grounds offered were insufficient and delayed beyond the statutory timeframe.

The burden of proof is with the Appellant. Yet, in neither the Notice of Appeal nor any of the documents filed since that time has the Appellant raised one substantiated basis to overturn the Original Decision. This is a situation where it is in the public interest to stay true to the letter and spirit of the rules so as to keep the Board and EnWin focused on legitimately pressing priorities.

It is in the public interest to discontinue this proceeding as soon as possible. The efforts of the Board and EnWin should be turned away from this procedurally and substantively defective, costly, frivolous, and vexatious proceeding.

Not to Stay the Order

The default Distribution System Code (“DSC”) provisions would have required EnWin to engage in a costly overhaul of its Customer Information System (“CIS”). Avoiding that unnecessary cost was the primary reason for seeking the temporary exemption until January 2013. The Board’s Decision and Order that is under appeal seemed to support the idea that avoiding unnecessary costs is preferable to the alternative.

⁵ *Ibid.*

The purpose of a stay order or injunction is to restrain an action because, if the action proceeds, it would circumvent the adjudicative body's treatment of the issue at hand. That is the opposite of the effect of a stay in this case.

The status quo is that EnWin is in compliance with the DSC and is not incurring unnecessary CIS costs. If in this proceeding the Board grants Mr. Potomski's request to stay the Order, it will have the effect of putting EnWin into a state of non-compliance. EnWin would be compelled to pursue the unnecessary costs prior to resolution of this proceeding. Those unnecessary costs would result in investments in the CIS that, if completed, would render this proceeding moot.

EnWin submits that the Appellant's request to stay the Order is frivolous and vexatious. It is an obvious ploy intended to produce an outcome that was rejected by the Board in its original Decision and Order. The request is not only contrary to the public interest but an attempt to abuse the process. That this stay has been proposed by a legal professional only adds to the inappropriateness of the request.

As for the Appellant's submissions on this point, they are incorrect. Section 17.07 of the Procedure Rules does not provide for an automatic stay, it makes a stay order available to the Board. The Procedures Rules are in keeping with section 7(5) of the Act. That explicit section in the Act supersedes the *Statutory Powers and Procedures Act* ("SPPA"), per section 25(1)(a) of the SPPA.

No Hearing / Hearing the Appeal in Writing

For the reasons set out above, EnWin submits that there is no basis for this case to proceed beyond the hearing of this preliminary matter. As such, submissions on this point should be moot.

However, in the event that the Board chooses to hear the appeal, EnWin submits that it ought to be heard in writing. As will be discussed below, EnWin submits that this appeal has already resulted in unfortunate costs. Attending a proceeding at the Board's hearing room would only add to those costs. In an era where the Board and EnWin are seeking to contain costs amid considerable public and political angst, it is unfortunate that Mr. Potomski is advocating for solutions that would increase costs with no identified benefit. The Appellant's submission that it would be cost effective to hold the proceeding in Windsor is no better. The Board and Board staff would incur the costs of travel and accommodations and costs for hosting the proceeding without the benefit of the existing infrastructure.

Indeed, Mr. Potomski did not substantiate his request for an oral hearing in the Notice of Appeal and, absent a compelling reason to proceed in that manner, the Board ought to default to the more cost-effective option of a written hearing. Mr. Potomski's argument for an oral hearing in Windsor misses the point of an appeal

and is instead a clear demonstration of his attempt to have the original case reargued.

This appeal turns on whether or not the Board made an error of fact in its original Decision or whether a different fact pattern ought to be considered by the Board. Submissions on those topics can be suitably presented in writing. In fact, such submissions are probably better expressed and detailed in writing as compared to oral testimony. Also, this case does not turn on credibility. That is an element that is generally tested through examinations. If it were an issue, it might lead the Board to choose an oral hearing. However, the Original Decision is what it is and whether any party is more or less credible than any other will not provide a basis to overturn that Decision.

Order of Costs

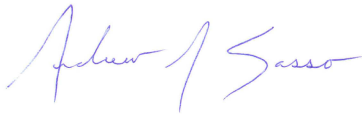
EnWin submits that the reasonably incurred costs of EnWin and the Board ought to be recovered from Mr. Potomski. The alleged grounds for this appeal of the Original Decision are frivolous and vexatious. Notwithstanding his current licence suspension by the Law Society of Upper Canada, Mr. Potomski is a paralegal by training and the Board ought to have regard for the sophistication of the Appellant in considering the basis for this appeal.

Under section 3.07 of the Cost Award Rules, the Board may grant costs in favour of a distributor. In this particular process, EnWin is taking the public interest position in lieu of Board Staff or ratepayer groups. Given the frivolous and vexatious nature of the request for an appeal, EnWin's shareholder (and through that shareholder the Windsor public) should be held whole. A Board Order requiring the Appellant to cover EnWin's costs and the Board's costs would also be a meaningful deterrent against future frivolous and vexatious filings.

To date, EnWin has relied upon its internal staff to address these matters. In the event that the Board decides to hear the appeal, EnWin will almost certainly retain expert outside counsel. EnWin is cognizant of the limitations of the Cost Award Rules under section 6 and requests that the Board permit EnWin to recover its internal costs in light of the circumstances unique to this request for appeal.

Respectfully,

EnWin Utilities Ltd.



Per: Andrew J. Sasso
Director, Regulatory Affairs

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Attachment A



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Contact Information

Full Name	Robert Joseph Potomski
Licence Type	Paralegal (P1)
Status Status definitions	Suspended
City	Windsor

Contact information withheld.

Contact the Law Society's Resource Centre by email at lawsociety@lsuc.on.ca or call 416-947-3315 (1-800-668-7380 ext. 3315).

Trusteeships	None
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