



EB-2012-0006

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

**AND IN THE MATTER OF** an appeal under section 7 of the *Ontario Energy Board Act, 1998* of a Decision and Order of the Board in EB-2011-0291, regarding an application by EnWin Utilities Ltd. to amend its Electricity Distribution Licence.

## **DECISION AND PROCEDURAL ORDER NO. 2**

On December 12, 2011, the Board issued a decision and order in EB-2011-0291 (the “Order”) amending EnWin Utilities Ltd.’s (“EnWin”) electricity distribution licence, ED-2002-0527, to exempt EnWin from sections 2.6.6 and 2.6.6.3 of the Distribution System Code until January 1, 2013. The Order was made by an employee of the Board pursuant to section 6(1) of the *Ontario Energy Board Act, 1998* (the “Act”).

On December 27, 2011 Mr. Potomski, an interested party in the proceeding, filed a notice with the Board, advising of his intention to appeal the Order under section 7 of the Act. On January 4, 2012, Mr. Potomski filed a supplementary notice of appeal, describing the nature of the relief sought, and the grounds relied upon.

On January 5, 2012 EnWin responded to the notice of appeal by seeking procedural direction from the Board in respect of whether the materials filed by Mr. Potomski would be considered by Board staff or the Board itself in any fashion. EnWin reserved the right to raise preliminary procedural issues, including whether Mr. Potomski has standing to appeal the Order.

On January 16, 2012 Mr. Potomski filed a response to EnWin's submission with the Board, requesting that the matter be heard by a panel of the Board and not by an employee of the Board delegated that authority by section 6(1) of the Act. Mr. Potomski is seeking an interim stay of the Order, pending a final disposition of the appeal, and requests that an oral hearing take place in the City of Windsor.

On January 24, 2012, the Board issued Procedural Order #1, setting out the dates for submissions to determine the following preliminary issues:

- i) Whether Mr. Potomski has standing to appeal the Order;
- ii) Whether the appeal was made in accordance with the requirements of the Act and the Board's Rules of Practice and Procedure and, if not, whether the Board should still review the Order;
- iii) Whether to issue an interim order staying the Order until the appeal is disposed of; and
- iv) Whether to hear the appeal in writing or orally.

In accordance with the dates set out in Procedural Order #1, Mr. Potomski filed a submission on the preliminary issues on January 31, 2012 and EnWin filed a reply on February 7, 2012. Mr. Potomski filed a late reply to EnWin's submission, on February 16, 2012.

## **BOARD FINDINGS**

The Board has considered the submissions of the parties with regard to the preliminary issues, and presents its findings as follows.

### ***(i) Does Mr. Potomski have standing to appeal the Order?***

A person will have standing to appeal an order made by an employee of the Board pursuant to section 6 of the Act if the person satisfies the two criteria set out in section 7(1) of the Act and does not otherwise fall under one of the exceptions listed in section 7(2) of the Act. Those sections provide as follows:

**Appeal from delegated function**

7. (1) A person directly affected by an order made by an employee of the Board pursuant to section 6 may, within 15 days after receiving notice of the order, appeal the order to the Board. 2003, c. 3, s. 13.

**Exception**

- (2) Subsection (1) does not apply to,
  - (a) a person who did not make submissions to the employee after being given notice of the opportunity to do so; or
  - (b) a person who did not give notice requiring the Board to hold a hearing under section 112.2, in the case of an order made by the employee under section 112.3, 112.4 or 112.5. 2003, c. 3, s. 13.

Being a ratepayer of EnWin, Mr. Potomski is a person directly affected by the Order and thus meets the first of the criteria under section 7(1) of the Act.

On December 27, 2011 – within 15 days of receiving notice of the Order – Mr. Potomski filed a document with the Board entitled “Notice of Appeal”, advising of his intention to appeal the Order under section 7 of the Act and stating “the appellant’s requests will follow” and “the appellant’s grounds will follow”. The appellant’s requests and grounds were subsequently received by the Board under cover of a document entitled “Supplementary Notice of Appeal” on January 4, 2012.

In its letter of January 5, 2012, EnWin submits that Mr. Potomski merely filed correspondence on December 27, 2011 stating an intention to appeal the Board’s Decision and that it was not until January 4, 2012 (i.e. outside the 15-day appeal window) that Mr. Potomski actually filed that appeal. In its February 7, 2012 submission on the preliminary issues, EnWin states three reasons why the appeal should be dismissed, namely that: (i) the appeal must be filed within 15 calendar days of the order being appealed, and thus any grounds raised after December 27, 2011 should not be considered by the Board; (ii) the notice of appeal asserted no grounds for appeal and, without any grounds, there is no basis for the Board to entertain the appeal; and (iii) in any event, the grounds of appeal are insufficient to overturn the Order because they are “irrelevant, immaterial or both”.

It is clear that section 7(1) of the Act requires that a person wishing to appeal an order of an employee of the Board must do so within 15 days after receiving notice of the order. It is Rule 17 of the Board's *Rules of Practice and Procedure*, however, which sets out the procedures to be followed by a person in making an appeal (sub-rule 17.02, for example, lists each of the specific items that a notice of appeal shall contain). The Board agrees with EnWin that the December 27, 2011 filing by Mr. Potomski does not meet all of the requirements of Rule 17. That said, the Board can, in accordance with Rule 1.03, dispense with, amend, vary or supplement, with or without a hearing, all or part of any Rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so. The Board notes that Mr. Potomski, although he may have paralegal training, is acting on his personal behalf as an EnWin ratepayer in appealing the Order. Mr. Potomski gave notice to the Board of his intention to appeal within 15 days of having received the Order. Moreover, the grounds in support of the Notice of Appeal were filed very shortly thereafter, on January 4, 2012. Finally, Mr. Potomski submits that he has never appeared before this tribunal in the past.

In light of these circumstances, the Board finds that it is appropriate to exercise the discretion afforded it by Section 1.03 to amend the requirements of Rule 17.02 so as to make Mr. Potomski's appeal compliant. Mr. Potomski sufficiently satisfied the second criteria of section 7(1) (i.e. within 15 days after receiving notice of the order, Mr. Potomski did appeal the Order to the Board).

Subsection 7(2)(a) limits those persons who might otherwise have standing under subsection 7(1) to those who made submissions to the employee after being given notice of the opportunity to do so (and subsection 7(2)(b) is not applicable to this appeal). Despite the lateness of Mr. Potomski's submissions to the employee in the EB-2011-0291 proceeding (as correctly pointed out by EnWin), those submissions were received and considered by the employee in making her decision. Mr. Potomski does not fall within an exception under section 7(2) of the Act.

For these reasons, the Board finds that Mr. Potomski does have standing to appeal the Order.

***(ii) Was the appeal made in accordance with the requirements of the Act and the Board's Rules of Practice and Procedure and, if not, should the Board still review the Order;***

EnWin submits that the Board should dismiss the notice of appeal, based on three main reasons. The Board addressed the first and second of those reasons in section (i) above. The third reason, in EnWin's submission, 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 Order because "they are irrelevant, immaterial or both"; and, because they are "frivolous".

The Board finds that there is sufficient information and detail in the grounds such that the appeal should be heard. In the specific circumstances of this case, the Board accepts the notice of appeal as having satisfied the requirements of the Act and the Rules, and the Board will review the Order.

***(iii) Is an interim order staying the Order until the appeal is disposed of necessary?***

Mr. Potomski is requesting that an interim stay order be issued "forthwith", pending the disposition of his appeal. The Board issued its Procedural Order #1 primarily to expedite its determination of this summary request for an interim stay of the Order. The Board notes that each of the other preliminary issues raised in Procedural Order #1 could satisfactorily have been dealt with together with the hearing of the merits of the appeal, without prejudice to either EnWin or Mr. Potomski.

In his submission on the preliminary issues, Mr. Potomski cites section 25(1) of the *Statutory Powers Procedures Act* ("SPPA") as the basis for a stay, stating "the stay of the Decision is automatic on the filing of the Notice of Appeal of R. J. Potomski, dated December 27, 2012." Mr. Potomski's submission on this point disregards the remainder of section 25(1), which clearly provides that an appeal does not act as an automatic stay if another Act that applies to the proceeding expressly provides to the contrary. The Act provides an expression to the contrary at section 7(5).

Under section 7(5) of the Act, an appeal does not automatically stay an order of an employee of the Board. In this light, EnWin submits that the appellant's request for an interim stay is "frivolous and vexatious" and that the grounds for the interim stay are based on an incorrect interpretation of the Board's Rules of Practice and Procedure, and the SPPA.

The Board has provided Mr. Potomski with an opportunity to submit reasons in support of his request for an interim stay of the Order. The Board finds that Mr. Potomski has not provided any rationale for his request for a stay other than to submit that a stay is warranted because "jurisdictional issues" have been raised.

The Board finds that a stay of the Order is not "automatic" upon appeal, as submitted by Mr. Potomski. Further, the Board concludes that it will not stay the Order because it is not satisfied that a stay would be in the public interest. There is nothing compelling in Mr. Potomski's submissions to support his assertion that the ratepayers of EnWin will be at risk in the absence of a stay. Moreover, the fact that jurisdictional issues may have been raised in an appeal is not, in and of itself, sufficient grounds for the granting an interim stay of a Board order. The Board also notes that a request for a stay should not be turned into a full review of the merits of the appeal (which Mr. Potomski's submissions on the preliminary issues appear to attempt to provide).

Finally, the Board notes that the granting of a stay would result in EnWin falling into non-compliance with the Distribution System Code, and would thus require EnWin to immediately undertake work and incur expense to upgrade its existing Customer Information System to bring it into compliance forthwith. Under these circumstances, and in the absence of any compelling submission from Mr. Potomski in support of his request, the Board will not grant an interim stay of the Order.

The Board will however endeavour to expedite the hearing of the Appeal.

***(iv) Should the Board hear the appeal in writing or orally?***

Mr. Potomski submits that the appeal of the Order should be heard orally in Windsor, Ontario. Mr. Potomski also submits that because statements made by EnWin are not based in fact, they should be open to cross-examination. EnWin

has responded by submitting that an oral hearing, let alone an oral hearing in Windsor, is more costly than a written proceeding, and that the submissions on the subject matter of the appeal could more accurately and effectively be expressed in writing. EnWin argues that this case does not turn on credibility and that whether any party is more or less credible than any other will not provide a basis to overturn the Order.

The Board finds that the issues under appeal are discrete legal questions; namely, they relate to questions of jurisdiction and legal interpretation raised by Mr. Potomski. The facts are generally not in dispute, and the Board does not find that an assessment of credibility will be helpful in making its determination of the merits of the appeal. The Board is also not persuaded that this appeal contains any elements that cannot adequately be dealt with in the context of a written hearing.

In light of the submissions of the parties, and the aforementioned considerations, the Board finds that a written process is sufficient to provide fair and reasonable opportunity for the parties to be heard and for the Board to consider the merits of the appeal.

For all of the reasons stated above, the Board finds that the need for an oral hearing has not been demonstrated.

## **COST AWARDS**

EnWin is requesting that the reasonably incurred costs of EnWin and the Board be recovered from Mr. Potomski. Pursuant to section 2.01 of the Board's *Practice Direction on Cost Awards*, the Board does have the power, among others, to order by whom and to whom any costs are to be paid, including the Board's own costs.

In normal circumstances, EnWin would be precluded from cost eligibility because it is a distributor. In this case, however, EnWin submits that there are special circumstances pursuant to which section 3.07 of the *Practice Direction on Cost Awards* would permit EnWin to be awarded costs, payable by Mr. Potomski. The Board does not agree. While it may be that EnWin is putting forth public interest submissions in lieu of Board staff or ratepayer groups, the Board does not view this alone to constitute "special circumstances" as contemplated by section 3.07.

If the parties wish to make further submissions regarding the merits of the appeal, the Board considers it necessary to make provisions for the following procedural matters.

Please note that this Procedural Order #2 may be amended, and further procedural orders may be issued from time to time.

**THE BOARD ORDERS THAT:**

1. Mr. Potomski shall file any further submission on the merits of the appeal of the Order with the Board and deliver it to EnWin by **March 13, 2012**
2. EnWin shall file any reply to Mr. Potomski's submission with the Board and deliver it to Mr. Potomski by **March 20, 2012**.

All filings to the Board must quote the file number EB-2012-0006, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format made through the Board's web portal at [www.errr.ontarioenergyboard.ca](http://www.errr.ontarioenergyboard.ca). Filings must clearly state the sender's name, postal address and telephone number and e-mail address. Parties should use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at [www.ontarioenergyboard.ca](http://www.ontarioenergyboard.ca). If the web portal is not available parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

**All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.**



## Addresses

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### The Appellant

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### The Applicant

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**DATED** at Toronto, March 6, 2012

**ONTARIO ENERGY BOARD**

*Original signed by*

Kirsten Walli  
Board Secretary