



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.

BEFORE: Paul Sommerville
Presiding Member

Paula Conboy
Member

DECISION AND ORDER ON APPEAL

April 26, 2012

Background

On August 8, 2011, EnWin Utilities Ltd. ("EnWin") filed an application with the Ontario Energy Board ("Board") seeking an amendment to its electricity distribution licence (ED-2002-0527), to exempt it from sections 2.6.6 and 2.6.6.3 of the Board's Distribution System Code ("DSC") until January 1, 2013. The application was made under section 74 of the *Ontario Energy Board Act, 1998* (the "Act") and assigned file number EB-2011-0291.

On December 12, 2011, the Board issued its decision and order in the matter of the EB-2011-0291 proceeding (the "Decision and Order"), granting EnWin its requested relief. The Decision and Order was made by an employee of the Board with delegated authority, pursuant to section 6(1) of the Act.

On December 27, 2011, Mr. R.J. Potomski, an interested party in the EB-2011-0291 proceeding, appealed the Decision and Order pursuant to section 7 of the Act. Mr. Potomski filed additional submissions with the Board relating to this appeal on January 4, 2012 (Supplementary Notice of Appeal), January 5, 2012 (Letter Requesting Expedited Process), January 19, 2012 (Letter Requesting that Minister of Energy Force the Board to Hear the Appeal), January 27, 2012 (Request for Reasons), January 31, 2012 (Submissions on Preliminary Issues), February 15, 2012 (Letter Requesting Extension to File Reply), February 16, 2012 (Reply Submissions on the Preliminary Issues), and March 19, 2012 (Supplementary Submissions).

EnWin filed submissions on January 4, 2012 (Letter Seeking Procedural Direction), February 5, 2012 (Submissions on Preliminary Issues), March 26, 2012 (Reply Submissions).

Neither Board staff nor the delegated decision maker in the EB-2011-0291 proceeding filed any submissions in this appeal.

Interim Proceeding on Preliminary Issues

Prior to hearing the merits of the appeal, the Board considered the submissions made by Mr. Potomski and EnWin with respect to several preliminary matters, including EnWin's contention that the applicant did not have standing to bring the appeal, and Mr. Potomski's motion for an automatic interim stay of the Decision and Order pending the disposition of the appeal.

On March 6, 2012, the Board issued its Decision and Procedural Order No. 2, whereby it ruled on the preliminary matters. In particular, the Board found that: (i) Mr. Potomski did have standing to appeal the Decision and Order; (ii) the appeal was brought in accordance with the requirements of the Act; (iii) the appeal would be heard in writing; and, (iv) an interim order staying the Decision and Order until the final disposition of the appeal was unwarranted.

The Appeal

EnWin is an electricity distributor licensed by the Board. EnWin is also the billing contractor for the Windsor Utilities Commission in respect of water and waste water billing. As such, EnWin's customer bills typically include charges for water and waste

water services in addition to charges relating to electricity services. EnWin performs its billing function through a customer information system ("CIS").

Mr. Potomski is a customer of EnWin and the Windsor Utilities Commission.

Through its EB-2011-0291 application, EnWin sought to amend its electricity distribution licence to reflect an exemption from sections 2.6.6 to 2.6.6.3 of the DSC until January 1, 2013. Essentially, these sections of the DSC direct electricity distributors issuing customer bills that include charges other than electricity to: (a) allocate partial payments received from a customer, first to electricity charges and then to non-electricity charges; and (b) refrain from imposing late payment charges, issuing a disconnection notice or disconnecting electricity supply, where the payment received from the customer is sufficient to cover electricity charges, security deposits and billing adjustments.

Mr. Potomski intervened in the EB-2011-0291 proceeding and opposed EnWin's application. Mr. Potomski submitted that the application should be denied by the Board because EnWin did not have the statutory authority to collect money owed to the Windsor Utilities Commission or the City of Windsor, and because Enwin was not in compliance with the *Collection Agencies Act*, R.S.O. 1990 c. C.14. He further submitted that the Board did not, under the Act, have the jurisdiction to grant the relief sought by Enwin, nor to give Enwin the authority to collect money for a third party.

The EB-2011-0291 proceeding was heard by an employee of the Board with delegated authority under section 6 of the Act. Section 6 of the Act states that the "Board's management committee may in writing delegate any power or duty of the Board to an employee of the Board," and that the delegation is "subject to such conditions and restrictions as the management committee may specify in writing." The delegated decision maker may determine the matter without a hearing but if the delegated decision maker decides to hold a hearing, the *Statutory Powers Procedure Act* applies to the same extent as if members of the Board were holding the hearing." Furthermore, any matter determined by the delegated decision maker is deemed to have been done by the Board.

The delegated decision maker granted EnWin the relief it sought in its application. It is the Decision and Order of the delegated decision maker that is the subject of this appeal.

The Decision and Order makes it clear that the delegated decision maker found that the relief requested by EnWin was reasonable, and that the evidence presented in support of it was sufficient:

The utility explained in some detail the difficulties it presently faces in complying with the relevant provisions of the DSC, and its plan for bringing its CIS into compliance with those provisions. A factor in this decision was the delay permitted by the Board under section 2.6.6.1 of the DSC, which exempts distributors operating under certain renewable billing agreements from applying the new allocation rules until the earlier of Ontario Energy the renewal date or two years. The period for which the exemption is sought by Enwin is not excessive. It was Enwin's evidence that it had anticipated being covered by section 2.6.6.1, but found that the renewal date of its services agreement was a year earlier than anticipated. The exemption sought by Enwin does not appear to be inconsistent with the Board's policy, provided that it indeed comes into compliance on or before January 1, 2013.

The Decision and Order also makes it clear that the delegated decision maker gave explicit consideration to the submissions made by Mr. Potomski in opposition to the application:

In making findings on jurisdiction and the merits of the application, I have considered both letters from Mr. Potomski, dated October 4, 2011 and November 2, 2011. Enwin, by letter dated November 4, 2011 urged the Board not to consider the November 2, 2011 letter, as it was filed late and received after Enwin's reply submission, creating a situation prejudicial to Enwin. However, given my findings in regard to the issues put forward by Mr. Potomski, no harm to Enwin has resulted from the Board's consideration of the late filing.

More specifically, in considering the evidence before her, the delegated decision maker found that EnWin's relationship and arrangements with the City of Windsor and the Windsor Utilities Commission, with respect to its activities related to water and sewage services, are permitted under the Act and its Regulations. On this point, she stated:

It is a general principle of statutory interpretation that legislation that deals specifically with a topic prevails over legislation that is more general. There are specific provisions in the OEB Act relating to the licensing of distributors and conditions that may be imposed in those licences that, in my view, prevail over the provisions of the *Collection Agencies Act*. Of particular relevance in this case are the provisions in section 70(2)(d)(ii.1) of the OEB Act...These sections give the Board the ability to impose very specific conditions on distributors dealing with customer service and disconnection. Similarly, section 5(2) of Ontario Regulation 161/99 deals specifically with the provision of water and sewage services by electricity distributors for their shareholder municipalities. I find that the specific provisions of the OEB Act and Ontario Regulation 161/99 prevail over the more general provisions of the *Collection Agencies Act*, and it is under the OEB Act, *the Electricity Act*, 1998, S.O. 1998 c. 15, Sched A (the "Electricity Act"), and the regulations under those Acts that the Board can prescribe codes, and grant exemptions to those codes, relating to billing and collection by distributors for services other than electricity.

Board Findings

The appellant brings the appeal pursuant to section 7 of the Act. Section 7 states, in part, as follows:

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.

Powers of Board

(4) The Board may confirm, vary or cancel the order. 2003, c. 3, s.13.

The Board notes that a motion to review, determined in accordance with Part VII of the Board's *Rules of Practice and Procedure*, must point to some clear grounds to be successful, and cannot be viewed as simply an opportunity to re-argue an issue in the

hope of achieving a different result. This issue was addressed in the Board's decision on several review motions in the *Natural Gas Electricity Interface Review*. In that decision, the Board held that:

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.

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.

Although these comments were made in a decision relating to the Rule 45 "threshold" issue that must be determined on a Motion to Review, the Board finds that they apply equally on an appeal made under section 7 of the Act, of an order made by an employee of the Board pursuant to section 6 of the Act.

The Board finds the submissions filed by Mr. Potomski in this appeal lengthy, unnecessarily repetitive, in some circumstances contradictory and, on the whole, quite difficult to penetrate. The Board notes that the appellant was a self-represented intervenor during the hearing of the application and throughout this appeal process. While that does not by any means excuse him from compliance with the rules of the Board, it is a contributing factor in providing an explanation as to why some leniency was extended to him in the Board's acceptance of late submissions and why some steps in this appeal process may have taken a little longer to complete than might otherwise have been the case.

The Board finds that the appellant's submissions do not allege any specific error in fact, change in circumstances, new facts that have arisen, or facts that were not previously placed in evidence in the EB-2011-0291 proceeding and could have been discovered by reasonable diligence. Moreover, the Board finds that Mr. Potomski has not raised any grounds that properly challenge the correctness of the Decision and Order. Much of the grounds in the appellant's submission were either made in his original submissions in the EB-2011-0291 proceeding, or could have been. Mr. Potomski may disagree with

the findings of the delegated decision maker, but this alone is not sufficient grounds for a successful appeal.

For these reasons, the Board finds that the grounds submitted in the appeal do not raise a question as to the correctness of the Decision and Order such that a review of the Decision and Order would result in it being varied, cancelled or suspended.

The Board finds that the delegated decision maker did not commit a reversible error by granting EnWin the amendment to its electricity distribution licence. The Board dismisses the appeal and confirms the Decision and Order.

THE BOARD ORDERS THAT:

1. The appeal is dismissed and the Decision and Order dated December 12, 2011 in the EB-2011-0292 proceeding is confirmed.

DATED at Toronto, April 26, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary