



# **ONTARIO ENERGY BOARD**

## **STAFF SUBMISSION**

**Achiel Kimpe**

**MOTION TO REVIEW AND VARY**

**EB-2013-0073**

**May 29, 2013**

## Motion to Review and Vary

On March 11, 2013 Mr. Kimpe filed a motion to review and vary the Board's Decision and Order dated February 21, 2013 (EB-2012-0314) (the "Motion"). The Decision and Order subject to the Motion was in respect of Mr. Kimpe's application for compensation for residual gas from a pressure of 50 pounds per square inch absolute ("psia") to 0 psia used in the operation of Union Gas Limited's ("Union") Bentpath Storage Pool ("Decision"). In the Decision the Board denied Mr. Kimpe's application.

On April 9, 2013 the Board issued Notice of Motion to Review and Vary and Procedural Order No. 1 ("Notice and Procedural Order") setting the schedule for the written submissions by Mr. Kimpe, Union and Board staff.

On April 18, 2013 Mr. Kimpe filed a letter informing the Board that the materials he is relying in support of his Motion include everything filed in EB-2012-0314 plus the following filings in support of the Motion: Mr. Kimpe's Head PNG lease; copies of pages 8 to 10 from the Brittain Report EBO 64 (1); copies of pages 2 to 8 out of the Report to the Lieutenant Governor in Council with respect to section 28 (j) of the *Ontario Energy Board Act* (R.S.O. 1960) "Crozier Report"; and copies of page 224 re English Crown Grants by S. L. Mershon.

No other filings were made by any party.

In the Notice and Procedural Order the Board stated that it would consider concurrently: a) the threshold question of whether the matter should be reviewed as contemplated in Rule 44.01(a) in the Board's *Rules of Practice and Procedure* (the "Rules"); and b) the merits of the Motion.

Board staff's position is that the Motion does not meet the threshold test. However, if the Board determines that it does meet the threshold, Board staff's position is that the motion is without merit and should be dismissed.

## Threshold Question

Under Rule 45.01 of 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. The purpose of the threshold question is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the

order or the decision, and whether there is enough substance to the issues raised that a review could result in the Board varying, cancelling, or suspending the decision.

Rule 44.01(a) of the Rules, provides the grounds upon which a motion to review and vary may be made to the Board:

Every notice of motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:

- (a) Set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
  - (i) Error in fact;
  - (ii) Change in circumstances;
  - (iii) New facts that have arisen;
  - (iv) Facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

The threshold test was articulated in the Board's decision on several motions filed in the *Natural Gas Electricity Interface Review Decision* (the "NGEIR Decision").

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".

In demonstrating an error, the moving party must show 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. The review is not an opportunity to reargue the case. A motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and there is no purpose in proceeding with the motion to review.

Board staff submits that Mr. Kimpe has failed to meet the threshold tests.

## **Nature of the Motion**

Mr. Kimpe alleges that the Board erred in its Decision by failing to recognize the value in the residual gas portion from 50 to 0 psia. Further, the Board erred in relying on industry practice to support its finding that there should be no compensation for residual gas between 50 and 0 psia. Lastly, Mr. Kimpe has asked the Board to reconsider or further explain the “justification and purpose” of the \$1000 honourarium that was awarded to him.

## **Alleged Errors made by the Board**

### **Board erred in finding that the Residual gas between 50 and 0 psia has no value**

Mr. Kimpe makes several statements in his submission dated March 11, 2013 alleging that the Board made errors in its Decision. Specifically he alleges that the fact that his residual gas is being used as part of Union’s integrated storage operation demonstrates that it has value. Mr. Kimpe also submitted that the Board’s determination of his compensation for residual gas portion from 50 to 0 psia should account for 30 years of Union’s use of natural gas under his lands in Bentpath Pool.

In support of his Motion to Review, Mr. Kimpe attached an excerpt from the Crozier Report (the Report”) which provides a general review of gas storage and gas storage operations. The Crozier Report also makes reference to cushion gas and notes that cushion gas is gas held in the reservoir to maintain minimum operating pressure for storage purposes. The Crozier Report also states that storage payments should be based on reservoir capacity which is related to the volume of the storage formation.

Board staff submits that the Crozier Report does not discuss compensation for residual gas in terms of pressure. Board staff further submits that Mr. Kimpe made this same argument in his original application and filed similar evidence. In his original application for compensation Mr. Kimpe filed an excerpt from a report prepared by Enbridge Gas Distribution Inc. and Union for the Ministry of Natural Resources (“MNR”) in review of Ontario Regulation 263/02 (the “Excerpt”). The Report was in the context of a potential for storage under Crown lands in the Great Lakes Basin storage marketplace. The Excerpt defines the concept of residual gas and describes approaches to residual gas compensation and related compensation concerns. The Excerpt outlines several approaches to residual gas compensation revenue to be collected by the Crown, from prospective developers of storage under the Crown lands. There is no discussion of compensation for residual gas in terms of pressure.

Board staff submits that a motion to review is not an opportunity for a party to reargue its case. In the *Grey Highlands v. Plateau* decision the Divisional Court stated:

The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.<sup>1</sup>

Mr. Kimpe also filed a copy of his production lease with Union as well as an excerpt from the "Brittain Report", EBO 64 (1) which states, as one of its conclusions, that royalty on residual gas should be paid down to atmospheric pressure. Board staff submits that this information does not meet any of the threshold tests noted above in that it does not establish that the Board made an error in fact, it does not constitute a new fact and is not a change in circumstance.

### **Board erred in relying on Industry Practice**

Mr Kimpe also submits that the Board erred in relying on Industry practice. Mr. Kimpe states at para 4a of his submission that "industry practice" is not a law and or regulation but rather just an opinion which in Mr. Kimpe's view has no bearing on the issue of compensation.

Board staff submits that industry practice is a relevant factor for the Board to consider in its decision making. In its Decision the Board noted that the compensation to 50 psia for residual gas in storage has been a long standing practice endorsed by the Board since the 1960's. The Board also noted in that Decision that the two exceptions where Union paid residual gas compensation to 0 psia in Oil City East Pool and Edys Mills Pool were based on contractual terms of agreements and were negotiated outside the Board's proceedings and required no approval by the Board. Board staff therefore submits that there was no error made on the part of the Board in recognizing that this is a long standing practice.

Board staff position is that the Motion does not meet the threshold test. However, if the Board determines that it does meet the threshold, Board staff's position is that the motion is without merit and should be dismissed.

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<sup>1</sup> *Grey Highlands (Municipality) v. Plateau Wind Inc.* [2012] O.J. No. 847 (Div. Court) ("*Grey Highlands v. Plateau*") paragraph 7

### **Board's award of an Honorarium**

Board staff submits that the Board has the discretion to award an Honorarium in appropriate circumstances. The Practice Direction on Cost Awards provides :

3.08 The Board may, in appropriate circumstances, award an honorarium in such amount as the Board determines appropriate recognizing individual efforts in preparing and presenting an intervention, submission or written comments.

Board staff therefore submits that the decision to award Mr. Kimpe an honorarium was within the Board's discretion as set out in the Board's Practice Direction on Cost Awards.

All of which is respectfully submitted