Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2013-0073

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

AND IN THE MATTER OF a Motion to Review and Vary by Achiel Kimpe pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review of the Board's Decision and Order in proceeding EB-2012-0314.

BEFORE: Marika Hare
Presiding Member

Peter Noonan
Member

Cathy Spoel
Member

DECISION
ON MOTION TO REVIEW
July 18, 2013

INTRODUCTION

On March 11, 2013, Mr. Kimpe filed with the Board a motion to review and vary the Ontario Energy Board's ("Board") Decision and Order in EB-2012-0314 dated February 21, 2013 (the "Motion"). The Decision and Order EB-2012-0314 denied 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 (the "Decision").

BACKGROUND

On July 9, 2012 Mr. Kimpe filed an application EB-2012-0314 with the Board under section 38(3) of the *Ontario Energy Board Act* ("Act"). Mr. Kimpe identified Union as the respondent in the application. Mr. Kimpe requested an Order of the Board for compensation for residual gas and use of residual gas from a pressure of 50 psia to 0 psia used in the operation of Union's Bentpath Storage Pool (the "Pool"). Mr. Kimpe sought compensation for the period of time from the designation of the Pool to present.

Mr. Kimpe is a landowner in the Pool which was designated as a storage area through O. Reg. 585/74 on August 7, 1974. The Board granted Union the authorization to operate the Pool by way of Board Order E.B.O. 64, dated August 19, 1974. Since 1974 the Pool has been operated by Union. Mr. Kimpe does not have a valid storage rights agreement with Union so there is no legal instrument which provides for compensation. The absence of a valid storage rights agreement permitted Mr. Kimpe to apply to the Board, pursuant to section 38(3) of the Act, for a determination of compensation.

In the Motion Mr. Kimpe has alleged the Board made errors in its Decision. Mr. Kimpe's submission raised a question as to the correctness of the Decision. Mr. Kimpe submitted that where no definite pressure is mentioned the assumption should be that all residual gas to 0 psia will be compensated for. He also noted that the effect of Union's use of residual gas is tantamount to an expropriation of his interests in the resource.

Mr. Kimpe noted in his submission that Union has admitted that residual gas has value as set out in a report to the Ministry of Natural Resources and further Mr. Kimpe stated that his gas is being used as part of Union's integrated storage and as such Union has the use of his gas without having to pay compensation.

With respect to the Crozier Report, referenced in the original Decision, Mr. Kimpe submitted that the fifty-year old report was outdated. What the Board decided 31 years ago in 1982 in Bentpath proceeding, may well have been the accepted industry practice at the time, but circumstances have changed since the date of that decision. By comparison, Mr. Kimpe stated that the Jacob pool is being produced below 50 psia unlike the Bentpath pool. Furthermore, Mr. Kimpe maintained that the Brittain Report, which was submitted in the Bentpath case, supports the view that arbitrary cut-offs for cushion gas are inappropriate.

Other errors alleged by Mr. Kimpe include the fact that the Board accepted a photocopy of the Crozier Report and not the original document, and therefore that evidence ought

not to have been considered. Lastly, Mr. Kimpe believes that the 1982 Bentpath decision relied on Michigan law rather than Ontario law, and is therefore not a suitable precedent for the current circumstances.

THE THRESHOLD TEST

The Board may review its decisions pursuant to s. 21.1(1) of the *Statutory Powers Procedure Act* which states:

> "A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order."

The Board implemented that power by enacting Rule 42.01 of its Rules of Practice and Procedure (the "Rules") which provides that any person may request a motion requesting the Board review all or part of a final order or decision, and to vary suspend or cancel the order or decision.

In respect of a motion brought under Rule 42.01, 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 (Rule 45.01).

Rule 44.01 reads:

"Every notice of motion made under Rule 44.01, in addition to the requirements of 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; and

(b) If required, and subject to Rule 42, request a stay of the implementation of the order or decision, or any part pending the determination of the motion."

The Board has previously articulated a two-part test when administering this power. An applicant must meet a threshold test of reviewability before the Board will permit a review of one of its decisions to occur. As set out by Union in its submission, the threshold test was articulated in the case of Natural Gas Electricity Interface Review Motions to Review Decision ("NGEIR Motions Decision"[1]) as follows:

> "Therefore, the grounds must 'raise a question as to the correctness of the order or decision … 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." (p.18)

The Board agrees that this is the appropriate test and further notes the use of a threshold test is often employed by administrative agencies which possess a power of administrative review. For example, in *Amoco Canada Petroleum Co. v Canadian Pacific Ltd*., [1974] CTC 300, the Canadian Transport Commission Review Committee ("CTC Review Committee") in reviewing a decision of the Commission's Commodity Pipeline Transport Committee stated:

> "The Committee must be satisfied that the matter is reviewable before a review is carried out and where an application for review is made, the burden of satisfying that the matter is reviewable rests upon the applicant." (p.315)

A threshold test is appropriate because as the CTC Review Committee explained subsequently in its decision "… the power to review must be exercised sparingly and circumspectly if the finality of a decision is to remain meaningful, - more particularly when the finding or determination of the Commission was upon a question of fact." (p.325)

The Board also is of the view that an element of a motion to review that is relevant to this case is a policy against allowing parties to re-argue the original case in the guise of a review. In the NGEIR Motions Decision the Board stated:

> "With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case."(p. 18)

[1] *OEB 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*

The CTC Review Committee expressed a like view in the Amoco Canada case, stating:

> "It is for pragmatic reasons that the power to review has been given to the Commission. We are firmly of the opinion that the power was not intended to be used as a means to 'impeach' the finality of quasi-judicial decisions, through a process of re-examination by another group of Commissioners where a first panel has reached a value judgment by drawing inferences from a given body of facts." (p. 324)

As both the Board staff and Union in their respective submissions acknowledged, the Divisional Court agreed with this principle in the case of *Corporation of the Municipality of Grey Highlands v. Plateau*. In that case, the Court dismissed an appeal of the Board decision in EB-2011-0053 where the Board determined that the motion to review did not meet the threshold test. 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."[2]

BOARD FINDINGS

Pursuant to Rule 45.01, the Board has determined, without a hearing, the threshold question of whether the matter in this Motion should be reviewed. For the reasons below, the Board has determined that the matter raised in the Motion should not be reviewed.

The Threshold question can be stated as follows:

Has Mr. Kimpe presented sufficient grounds that raise a doubt about the correctness of Decision EB-2012-0314?

The Board finds the answer to the threshold question in the negative as Mr. Kimpe has failed to present sufficient grounds. Specifically, no new facts have been presented by Mr. Kimpe in this Motion to Review application. Mr. Kimpe has not shown that the factual findings of Decision EB-2012-0314 contain errors. With respect to the use of a photocopy of the Crozier Report the Board has the authority to receive photocopied

[2] *Grey Highlands (Municipality) v. Plateau Wind Inc*. [2012] O.J. No. 847 (Div. Court) (*"Grey Highlands v. Plateau"*) at para.7.

documents in its proceedings and therefore no error occurred with respect to that matter.

Mr. Kimpe has not demonstrated 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, that there has been a change in circumstance or that new facts have arisen.

The Board has determined that this Motion is an attempt by Mr. Kimpe to reargue the issue put forward in his original application; namely his request for compensation for residual gas and use of residual gas from 50 to 0 psia. Therefore, the Board, in considering the threshold question provided for in section 45.01 of the Rules, has determined that the matter in the Motion should not be reviewed on its merits, and dismisses the Motion.

DATED at Toronto, July 18, 2013

ONTARIO ENERGY BOARD

Original Signed By

Marika Hare
Presiding Member

Original Signed By

Peter Noonan
Member

Original Signed By

Cathy Spoel
Member