



EB-2013-0308

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

AND IN THE MATTER OF a Motion by Hydro Ottawa
Limited pursuant to the Ontario Energy Board's *Rules of
Practice and Procedure* for a review by the Board of its
Decision and Order in proceeding EB-2013-0072.

BEFORE:

Ken Quesnelle
Presiding Member

Paula Conboy
Member

Christine Long
Member

**DECISION AND ORDER
ON MOTION TO REVIEW AND VARY
October 10, 2013**

INTRODUCTION

On August 22, 2013, Hydro Ottawa Limited ("Hydro Ottawa") filed with the Ontario Energy Board (the "Board") a Notice of Motion to Review and Vary (the "Motion") the Board's Decision and Order in proceeding EB-2013-0072 denying Hydro Ottawa's application for a permanent exemption from section 6.5.4 of the Distribution System Code (the "DSC"). The Board assigned the Motion file number EB-2013-0308.

Hydro Ottawa brought the Motion under Rule 44 of the Board's *Rules of Practice and Procedure* (the "Rules") and advanced the position that new facts had arisen which should be considered by the Board.

The Board has decided to dismiss the Motion. The Board has made a determination, pursuant, to Section 45.01 of the Rules that the threshold test has not been satisfied. As such, the Board has not proceeded to conduct a further examination on the merits of the evidence supplied by Hydro Ottawa.

BACKGROUND

On March 18, 2013, Hydro Ottawa filed an application under section 74 of the *Ontario Energy Board Act, 1998* for an order of the Board amending Hydro Ottawa's electricity distribution licence to reflect an exemption from the long term load transfer ("LTLT") provisions set out in section 6.5.4 of the DSC in relation to 40 customers of Hydro Ottawa.

LTLTs occur when a customer is located in the licensed service area of one electricity distributor (the "geographic distributor") but is physically connected to another electricity distributor's distribution system (the "physical distributor"). Under the LTLT arrangement, while the customer is connected to the physical distributor's distribution system, that LTLT customer is billed by the geographic distributor and pays the geographic distributor's electricity distribution rates. These rates may be higher or lower than the physical distributor's rates. The physical distributor, in turn, charges the geographic distributor, based on the physical distributor's electricity distribution rates, in accordance with an LTLT agreement.¹

The subject 40 customers are located within Hydro Ottawa's service area but are physically connected to the distribution system of Hydro One Networks Inc. ("Hydro One"). Hydro Ottawa, as the geographic distributor, pays Hydro One, as the physical distributor, based on Hydro One's approved electricity distribution rates, but charges the 40 customers based on Hydro Ottawa's rates, which are presently lower than Hydro One's rates.

In its Decision and Order dated August 2, 2013 (the "Original Decision"), the Board denied Hydro Ottawa's exemption application.

In the Original Decision, the Board indicated that the Board's LTLT elimination policy "addresses the recognition that LTLTs can give rise to cross subsidization between customers. Customers being served under the terms of LTLTs that are paying less than

¹ Decision and Order of the Ontario Energy Board in EB-2013-0072, page 2.

other similar customers who are not being served under the terms of an LTLT agreement are being subsidized". The Board also indicated that "there is nothing in Hydro Ottawa's evidence to justify a departure from the Board's policy on LTLT arrangements" and that "dealing with the issue of cross subsidization remains an objective of the Board and granting the requested relief would not be consistent with this objective".

In this Motion, Hydro Ottawa provided additional analysis to show that maintaining the LTLT arrangement with Hydro One has no rate impact on other customers of Hydro Ottawa. Specifically, Hydro Ottawa indicated that the annual difference between the amount paid to Hydro One for providing distribution services to the 40 customers and the amount collected from the 40 customers is not material and does not affect the rate paid by other Hydro Ottawa customers. With respect to the issue of cross subsidization, Hydro Ottawa noted that the methodology used by the Board in establishing Hydro Ottawa's rates results in within-class customer cross subsidization. Hydro Ottawa also noted that the only LTLT elimination method that does not result in any "intra company" cross subsidization for the geographic distributors is transferring the LTLT customers to the physical distributor.²

THE THRESHOLD TEST

Rule 44.01 of the Board's Rules provides, in part, that every notice of a 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; and...

Under Rule 45.01, 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.

The principles underlying the threshold question were discussed in previous decisions,

² Hydro Ottawa's Motion, pages 2-3.

namely the Board's Decision on a *Motion to Review Natural Gas Electricity Interface Review Decision*³ (the "NGEIR Review Decision") and the Divisional Court's decision *Grey Highlands v. Plateau*⁴ (collectively the "Threshold Decisions"). In the NGEIR Review Decision, the Board indicated that 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 such that a review based on those issues could result in the Board varying, cancelling or suspending the decision. In the NGEIR Review Decision, the Board also indicated that "...the review [sought in a motion to review] is not an opportunity for a party to reargue the case".⁵ In *Grey Highlands v. Plateau*, the Divisional Court agreed with this principle. The Divisional 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. In upholding the Board's 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.⁶

BOARD FINDINGS

The Board has determined the threshold question as provided for in Section 45.01 of the Rules without a hearing. For the reasons set out below, the Board has determined that the matter should not be reviewed on its merits and dismisses the Motion. In reaching this decision, the Board was guided by the Threshold Decisions.

The Board does not find that the information provided in the Motion constitutes new facts. The Board finds that the additional analysis provided by Hydro Ottawa in the Motion is simply a different presentation of the original evidence. Consideration of the information would constitute a re-argument of the original case.

The Board's determination in the Original Decision was based on a finding that "there is nothing in Hydro Ottawa's evidence to justify a departure from the Board's policy on

³ *Motions to Review the Natural Gas Electricity Interface Review Decision* May 22, 2007, EB 2006-0322/0338/0340.

⁴ *Grey Highlands (Municipality) v. Plateau Wind Inc.* [2012] O.J. No. 847 (Div. Court).

⁵ *NGEIR Review Decision*, page 18.

⁶ *Grey Highlands v. Plateau*, para 7.

LTLT arrangements.” The Board’s policy on the elimination of LTLT’s is based on the principle of avoiding cross subsidization between customers. Customers being served under the terms of LTLTs that are paying less than other similar customers who are not being served under the terms of an LTLT agreement are being subsidized. The application of this principle of avoiding cross-subsidization is not triggered by the magnitude of the cross-subsidization. A higher quantum does not trigger the principle, nor does a *de minimis* amount justify not applying the principle. In this light, Hydro Ottawa’s additional analysis of its original evidence as it relates to the individual affected ratepayer is not new evidence in the context of the panel’s Original Decision. The Board finds that a review that would include consideration of the additional analysis would not result in a finding that the Original Decision should be varied, cancelled or suspended.

THE BOARD THEREFORE ORDERS THAT:

1. The Motion is dismissed.

DATED at Toronto, October 10, 2013

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary