



EB-2013-0331

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

AND IN THE MATTER OF an Order by the Ontario Energy Board dated August 28, 2013 which approved rates and other charges to be charged by Hydro One Remote Communities Inc. for electricity (EB-2012-0137)

AND IN THE MATTER OF Rules 8.02, 42, 43, 44, and 45 of the Ontario Energy Board's *Rules of Practice and Procedure*.

BEFORE: Christine Long
Presiding Member

Paula Conboy
Member

Emad Elsayed
Member

DECISION ON MOTION TO REVIEW DECISION AND ORDER

On September 11, 2013, the Nishnawbe Aski Nation ("NAN") filed a Motion to Review and Vary (the "Motion") the Board's Decision in Hydro One Remote Communities Inc. ("Remotes") application for changes to the rates that Remotes charges for electricity, to be effective May 1, 2013 (EB-2012-0137). In the Decision, the Board approved a 3.45% rate increase, based on the average of approved rates for Ontario distributors from 2010 to 2011, in accordance with Regulation 442/01.

The Threshold Question

Under Rule 45.01 of the *Rules of Practice and Procedure*, 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 Board issued Procedural Order No. 1 on October 11, 2013, making provision for submissions on the threshold question. Submissions were received from NAN, Remotes, and Board staff, together with a reply submission from NAN.

In its submission, Board staff noted that the threshold question was first articulated in the Decision on a Motion to Review the Natural Gas Electricity Interface Review Decision (the "NGEIR Decision", EB-2006-0322, -0338, -0340, May 22, 2007). In the NGEIR Decision, the Board stated that the purpose of the threshold question is to determine whether the grounds put forward by a 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. The Board indicated that "the review is not an opportunity for a party to reargue the case", and that "it is not enough to argue that conflicting evidence should have been interpreted differently"¹.

Board staff submitted that, in accordance with the NGEIR Decision, the threshold question requires a motion to review to meet the following tests:

- the grounds must raise a question as to the correctness of the order or decision;
- the issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended;
- there must be an identifiable error in the decision as a review is not an opportunity for a party to reargue the case;
- 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;

¹ *Natural Gas Electricity Interface Review Decision* (the "NGEIR Decision"), EB-2006-0322, -0338, -0340, May 22, 2007) at page 18.

and the alleged error must be material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.²

Board staff submitted that NAN has failed to identify any error or change in the facts or circumstances that could give rise to a different interpretation or any material issue not considered by the Board.³ Board staff submitted, therefore, that the threshold tests have not been met.

NAN submitted that its Motion does not amount to rearguing the case. According to NAN, the Motion does not rely principally on an error in fact, rather on the reasons given by the Board which could not have been anticipated by the parties and therefore could not be addressed adequately in argument. NAN submitted that the alleged error relates to the Board's statement in the Decision that it is bound by Regulation 442/01 (the "Regulation"). NAN submitted that the Board has broad discretion to accept or not accept the amount of rate increase as prescribed in the Regulation. It submitted that the Board erred in concluding that, because of the Regulation, it does not have discretion to consider factors other than the level of increase of other distributors.

In NAN's submission, the Board has to consider additional factors, in particular the ability of Remotes' customers to pay higher electricity rates when setting just and reasonable rates. NAN submitted that the Board erred in concluding that the ability of Remotes' customers to pay for electricity had been taken into account in the Regulation.

Board Findings

The Board finds that NAN's Motion does not pass the threshold test, and shall, therefore, not conduct a review on the merits of the Motion.

The Board's reasons are as follows.

The Board concludes that the statement that it is bound by the Regulation, as set out in the Decision, is not an error in fact or in law. The Board is required to follow the Regulation. However, the Regulation affords discretion in that the language provides

² *Motions to Review, Natural gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007* (EB-2006-0322, EB-2006-0338, EB-2006-0340)

³ P.6

that the amount of rate “shall be adjusted in line with the average...”⁴, and while the Decision does not specifically state whether the Board exercised its discretion in approving the 3.45% rate increase there is no requirement to do so. Furthermore, the Board notes that there was no evidence provided during the original proceeding to substantiate a different outcome such as the 2% proposed by NAN. The fact that the 3.45% increase is equal to the average of the increases approved for the other Ontario distributors does not establish that the Board understood this to be its only option under the Regulation.

Further, the Board is of the view that the “ability to pay” argument raised by NAN was a consideration in the Decision. This issue was raised and canvassed in the original proceeding before the Board. NAN did not present any new facts regarding this issue in its Motion from those raised in the original proceeding. The Motion does not constitute an opportunity to re-argue the same facts.

In conclusion, NAN has not established that the Board erred in its interpretation of the Regulation or of the Act or made any other error that raises a question as to the correctness of the Decision outcome.

THE BOARD ORDERS THAT:

The Motion to Review is hereby dismissed.

⁴ Regulation 442.01:

(3.1) For each year, in respect of the rates for a distributor serving consumers described in paragraph 5 of section 2, the Board shall calculate the amount by which the distributor’s forecasted revenue requirement for the year, as approved by the Board, exceeds the distributor’s forecasted consumer revenues for the year, as approved by the Board. O. Reg. 335/07, s. 1 (2).

(3.2) For the purpose of subsection (3.1), the distributor’s forecasted consumer revenues for a year shall be based on the rate classes and on the rates set out for those classes in the most recent rate order made by the Board and shall be adjusted in line with the average, as calculated by the Board, of any adjustment to rates approved by the Board for other distributors for the same rate year. O. Reg. 335/07, s. 1 (2).

DATED at Toronto, January 16, 2014

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary