EB-2014-0116

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

AND IN THE MATTER OF an application by Toronto Hydro-Electric System Limited for an Order of Orders determining rates for the distribution of electricity for the period commencing May 1, 2015.

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

NOTICE OF MOTION

The School Energy Coalition ("SEC") will make a motion to the Ontario Energy Board (the "Board") at its offices at 2300 Yonge Street, Toronto on a date and time to fixed by the Board.

THE MOTION IS FOR:

1) A review and variance, pursuant to Rule 42 of the Board's Rules of Practice and Procedure, of the Board's Decision and Order on Cost Awards of June 9, 2016 in EB-2014-0116 (the "Decision") in which the Board erred in fact and law by not allowing recovery in respect of work done and time spent on behalf of SEC prior to the filing of the Application on July 31, 2014.

2) An Order that this Motion satisfies the threshold test in Rule 43.01 of the Board's Rules of Practice and Procedure.

3) An Order for an oral or written hearing, as the Board shall deem appropriate, of the Motion on the merits.

4) An Order that the cost award for SEC in this matter be increased by $10,901.00, plus HST, to reflect work done and costs reasonably incurred by SEC prior to July 31, 2014 related to the Application.

5) An Order for recovery by SEC of its costs reasonably incurred with respect to this Motion for Review.

THE GROUNDS FOR THE MOTION ARE:

Background

6) Toronto Hydro-Electric System Limited (the "Applicant" or "Toronto Hydro") filed an application (the "Application") on July 31, 2014 for an order or orders approving just and reasonable rates for the five year period commencing May 1, 2015. Pursuant to Procedural Order #1 dated September 17, 2014, SEC was accepted as an intervenor and found eligible to seek an award of costs for its participation.

7) On March 8, 2016, after the conclusion of the proceeding and the rendering of the Board's decision on the merits, SEC filed a cost claim (the "Cost Claim") for its costs reasonably incurred in its intervention on the Application. The Cost Claim totaled $184,229.00 for fees paid to counsel, plus $23,949.77 for HST. There were no disbursements claimed.

8) In the Decision, the Board disallowed recovery of costs for SEC under two headings:

    a) Time spent in excess of a Preparation and Attendance standard of 300 hours, adjusted for certain collateral activities during the proceeding. This disallowance was 75.8 hours, a total of $20,162.80 plus HST. This Motion for Review does not question that disallowance.

    b) Time spent prior to the filing date of the Application, July 31, 2014. This disallowance was 35.7 hours, a total of $10,901.00 plus HST.

9) SEC provided detailed dockets in the Cost Claim, showing that prior to the filing date SEC's counsel spent 35.2 hours specifically relating to the Application: 5.0 hours for Mark Rubenstein, and 30.2 hours for Jay Shepherd. As set forth in the detailed dockets, this time can be characterized as time spent on the following activities directly related to the Application:

a) Client consultations and both formal and informal reporting on the upcoming Application. This included specific meetings with the affected school boards.

b) Co-ordination with other intervenors and with OEB Staff related to sharing of information and responsibilities during the proceeding. Most of this time was spent identifying and pursuing the question of two types of expert evidence on behalf of ratepayer groups: productivity and benchmarking, and engineering. Ultimately, the productivity and benchmarking expert was retained by OEB Staff after discussions with SEC, and SEC and others were not able to find an appropriate engineering expert who was not conflicted.

c) Attendance at two formal consultation and information sessions hosted by the Applicant.

d) Informal consultations with the Applicant on the content and direction of the upcoming Application, and co-ordination of the process to aid efficiency.

Threshold Test Has Been Met

10) Pursuant to Rule 43.01 of the Board's *Rules of Practice and Procedure*, the Board conducts a threshold inquiry before conducting any review on the merits.

11) The threshold test was articulated by the Board in the Natural Gas Electricity Interface Review ("*NGEIR*") motion to review decision. The Board stated that the purpose of the threshold test is to determine whether the grounds relied upon by the moving party raise a question as to the correctness of the decision, and whether there is enough substance to the issues raised, that the review based on those issues could result in the varying, cancelling or suspension of that decision. There must be an "identifiable error", as a motion to review "is not an opportunity for a party to reargue the case".

12) This motion does not seek to re-argue the exercise of the Board's discretionary with respect to costs. It only seeks for the Board to review and vary its Decision so as to require the Board to consider an issue, which it appears it may not have done originally, and make the appropriate findings based on the evidence and the law.

13) The Board has also stated that the grounds listed in Rule 42.01(a) are not exhaustive, and an error of law is a proper ground for review.

14) This motion satisfies the threshold test. In the Decision, the Board failed to address a material issue: whether work done and time spent prior to the filing date was "reasonably incurred" and provided value to the process, and whether including it in the cost award would or would not be consistent with the Board's own Practice Direction on Cost Awards. This is the exact type of error that raises a question of the correctness of the decision. It is also an error of law, as the Decision provides no rationale for excluding this category of work, nor any reason why this apparent change in policy would be imposed without consultation, and without warning, after the fact.

Disallowance of Time Prior to the Filing Date

15) The primary errors in the Decision are that the Board did not consider:

a) Whether the time spent by SEC prior to the filing date was of value to the Board and was consistent with the Board's relevant policies relating to cost awards;

b) Whether SEC or any other party could have been aware, at the time the work was being done, that the Board would not allow recovery for that work; and

c) What reasoning or rationale should be considered in determining if a particular category of work should, as a category, be excluded from eligibility for cost recovery.

These are errors that go to the correctness of the Decision.

16) SEC submits that it is inconsistent with the words and spirit of the Board's Practice Direction on Cost Awards, and it is contrary to the interest of the Board in achieving efficient and timely results in proceedings before the Board, to disallow time spent prior to the filing of an application if that time was specific to, and directed at, the application that was ultimately filed.

17) SEC has regularly, for at least the last ten years, started work on the more complex applications prior to the filing date. This is true when, for example, a specific issue that we know will arise requires detailed background research or analysis, or an expert needs to be retained, or SEC's member school boards have specific issues that cannot be addressed in the normal timeframes, or there is a new approach or complexity in the case that requires more time than is expected to be available in a proceeding.

18) The advent of the Renewed Regulatory Framework for Electricity has caused SEC to expand its application-specific pre-filing activities. SEC now more often meets with affected school boards prior to the filing date, and in fact so advised the Board of its decision to increase this practice in its Annual Intervenor Filings, starting with its first filing on June 2, 2014, and in subsequent filings. The Board has at all times been aware that SEC takes the initiative in starting work on major applications early.

19) In this particular matter, SEC representatives and counsel met with the Toronto-area school boards prior to the filing date, in order to ensure that they were aware of the fundamentals of the upcoming Application, and to ensure in turn that counsel were aware of any specific issues that the school boards thought should be addressed. It is in the interests of all parties, and the Board, that intervenors take steps such as these to ensure customer expectations and concerns are identified as early and completely as possible.

20) SEC also met with other intervenors, and with OEB Staff, in order to ensure that the extensive work required for this substantial Application could be done efficiently and with maximum co-ordination. Recent applications, such as those using Custom IR, have resulted in much more complex and substantial workloads for both OEB Staff and intervenors. Without prior planning and co-ordination by the parties, it would be difficult for the Board to maintain a reasonable pace of these proceedings without running afoul of the rules of natural justice. Actions by intervenors (and OEB Staff, for that matter) to get a "head start" on the process are intended to be, and are, of assistance to the Board.

21) A case in point was the clear need for a productivity and benchmarking expert in this proceeding. Hiring experts can be a lengthy process, and could delay a proceeding if not started in advance.

Since it was clear that experts would be required in this case, SEC took the initiative on behalf of all ratepayer groups to find the appropriate firm, then to approach OEB Staff to ensure that there was no conflict or overlap. In the end, after constructive discussions between the intervenors and OEB Staff, OEB Staff retained the same expert that SEC was seeking to retain, and the Board received valuable evidence in the proceeding from that expert.

22) SEC's practice of engaging in activities such as these prior to the filing data has expanded, and continues today with an even more extensive workload prior to the filing of OPG's EB-2016-0152 application. This has included meetings between intervenors, meetings with OEB Staff, and meetings with affected client school organizations. It has also included detailed hearing planning and co-ordination. As applications deal with larger amounts, and the expectations placed on utilities by the Board and customers are increased, SEC's pre-filing planning is becoming even more valuable to the Board and other parties.

23) The Decision implicitly states that such initiatives should be stopped. This would be contrary to the interests of the Board, the parties, and the process.

24) The Decision provides no rationale for disallowance of time spent prior to the filing date. The complete Decision on this point is the following, from page 4 of the Decision:

> *"Time docketed prior to the filing of the rate application (July 31, 2014) will not be recoverable as part of this OEB cost claim process. Parties are free to consult with applicants prior to rate applications being filed, but the OEB will not approve cost claims for time spent prior to an application being filed."*

25) This statement does not reflect anything contained in the Practice Direction on Cost Awards, nor the Rules of Practice. It also does not reflect any policy statement or other guidance by the Board issued prior to the time spent by SEC in this case. If this is a new Board policy, it is a policy delivered with no supporting rationale, no warning, and no consultation, and is inconsistent with many past Board decisions.

26) SEC has claimed time spent prior to the filing date in many cases, dating back at least ten years. To the best of SEC's knowledge, there have only been two prior disallowances of time spent prior to a filing date. Those decisions were dated May 9, 2016 (EB-2015-0061) and March 8,

2016 (EB-2013-0416/EB-2015-0079). In neither case is any rationale for disallowing pre-filing time provided, and in neither case does the Board state that they are promulgating a new cost award policy. Both decisions were after the time spent in the Toronto Hydro case, in 2014.

27) SEC therefore submits that the Decision should be modified to allow 35.7 hours of pre-filing time disallowed for SEC, in aggregate $10,901.00 plus HST, for the following reasons:

a) The Board panel did not put its mind to whether the time spent and work done was reasonably incurred to further the thorough, efficient and timely consideration of the Application, and had it done so it would have determined that the time was reasonably incurred for that purpose;

b) The Board panel did not put its mind to whether the disallowance of time spent prior to the Application was consistent with the Practice Direction on Cost Awards, or the past practice of the Board, and thus the Decision was arbitrary;

c) SEC was acting responsibly in seeking to be efficient, and to assist the Board, and had no way of knowing that the Board would establish a retroactive rule, without consultation or rationale, that the time spent and work done prior to the filing date would not be eligible for costs;

d) Disallowance of time spent prior to a filing date is contrary to the interests of the Board in promoting efficient and timely decision-making, and would, if implemented as a general policy, necessarily result in most complex proceedings taking longer than is currently the case;

e) The appropriate way of initiating a material change to the Practice Direction on Cost Awards is through a policy process, with notice and consultation; failure to do so would reduce the integrity and effectiveness of the Board's procedural policies, and increase the likelihood that the Board's procedural policies will be unfair, inefficient, or otherwise inappropriate.

28) As this Motion for Review raises a principle of general application, SEC submits that it would be appropriate for the Board to order recovery of SEC's reasonably incurred costs in initiating and proceeding with this motion.

DOCUMENTARY SUPPORT TO BE RELIED ON:

29) Material from the record in EB-2014-0116, including without limitation the Cost Claim, which SEC will prepare in a compendium and file at the time it files its written submissions on the Motion, or at such other time as the Board may direct

30) The Decision.

31) SEC's submissions on this Motion, to be delivered pursuant to the Board's procedural orders in this matter.

32) Such other material as counsel may advise and the Board permits.

June 29, 2016

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