EB-2016-0208

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.

WRITTEN SUBMISSIONS OF THE SCHOOL ENERGY COALITION ON THE THRESHOLD QUESTION

A. OVERVIEW

1. The School Energy Coalition ("SEC") brings this motion to review the Decision and Order on Cost Awards of the Ontario Energy Board (the "Board"), dated June 9, 2016 in EB-2014-0116 (the "Decision") in the matter of the cost awards for that proceeding under the Board's Practice Direction on Cost Awards (the "Practice Direction"). In the Decision, the Board disallowed 35.7 hours of time spent by SEC prior to the date the application by Toronto Hydro in EB-2014-0116 (the "Application") was filed. No reasons were given for disallowing the time spent, and neither the Applicant Toronto Hydro, OEB Staff, nor the Board panel adjudicating the case made any suggestion that the time was not spent efficiently and reasonably for the assistance of the Board in the proceeding. Thus, it is an error that goes to the correctness of the Decision. The Board is required under the Practice Direction to consider the value of the time spent, determine whether the costs incurred should be reimbursed on that basis, and provide reasons for so concluding (or not). Further, if the Board intended to add additional considerations for cost awards, other than those set forth in the Practice Direction, it was required to provide timely notice to parties that it intended to change its practice, and hear submissions from affected parties as to the appropriateness of any change in such practice. These are also errors that go to the correctness of the Decision.

B. BACKGROUND

2. On July 31, 2014 (the "Filing Date"), Toronto Hydro filed the Application, seeking increases to its distribution rates for the period May 1, 2015 to December 31, 2019. SEC applied for and was

granted intervenor status, and the Board determined that SEC was eligible to apply pursuant to the Practice Direction for reimbursement of its reasonably incurred costs. The Board issued its decision on the merits of the case on December 29, 2015, and SEC filed its cost claim (the "Claim") in accordance with the Board's instructions on March 8, 2016. The Claim seeks reimbursement for 35.7 hours (the "Disputed Hours") spent prior to the Filing Date, in aggregate $10,901.00 plus HST. The Applicant had an opportunity to review the cost claims, and object to anything that they did not feel was appropriate, but they made no objection to the Claim by SEC.

3. In disallowing recovery of the Disputed Hours, the Board said the following:

> *"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 applications prior to rate application being filed, but the OEB will not approve cost claims for time spent prior to an application being filed."*[1]

No other explanation for the disallowance was provided.

4. The Board describes the factors taken into consideration by Board panels in determining cost claims in the Practice Direction, as follows[2]:

> ***"5. CONSIDERATIONS IN AWARDING COSTS***
> *5.01 In determining the amount of a cost award to a party, the Board may consider, amongst other things, whether the party has demonstrated through its participation and documented in its cost claim that it has:*
>
> *(a) participated responsibly in the process;*
> *(b) contributed to a better understanding by the Board of one or more of the issues in the process;*
> *(c) complied with the Board's orders, rules, codes, guidelines, filing requirements and section 3.03.1 of this Practice Direction with respect to frequent intervenors, and any directions of the Board;*
> *(d) made reasonable efforts to combine its intervention with that of one or more similarly interested parties, and to co-operate with all other parties;*
> *(e) made reasonable efforts to ensure that its participation in the process, including its evidence, interrogatories and cross-examination, was not unduly repetitive and was focused on relevant and material issues;*
> *(f) engaged in any conduct that tended to lengthen the process unnecessarily; or*
> *(g) engaged in any conduct which the Board considers inappropriate or irresponsible."*

[1] *Decision and Order on Cost Awards* (EB-2014-0116), June 9 2016 ["*Decision*"], p. 4
[2] Ontario Energy Board, *Practice Direction On Cost Awards* (Revised April 24, 2014), [*Practice Direction*"] p. 6.

5. The Practice Direction contains no reference to time being spent on or after the date an application is filed, or any other restrictions related to time. No Board announcements, policy statements or other similar communications have made any such reference. The statement by the Board panel appears to be a new policy. While similar statements have been made in two other proceedings (EB-2015-0061[3] and EB-2013-0416/EB-2015-0079[4]), both are decisions in 2016, and thus well after the time spent by SEC in this proceeding[5].

C. THE THRESHOLD TEST

6. 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.

7. The threshold test was articulated by the Board in the Natural Gas Electricity Interface Review ("NGEIR") motion to review decision[6]. 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". The grounds set out in 42.01(a) are not exhaustive.[7] An error of law is a proper ground for a review[8], and similarly misapplication or non-consideration of an existing Board policy are also grounds for review as they go to the correctness of the decision.

8. The threshold test is met in this case for at least five reasons, as set forth below.

9. ***SEC Complied in all Respects with the Practice Direction.*** The work done and time spent prior to the Filing Date was specifically intended to meet the first and primary requirement,

[3] *Decision and Order on Cost Awards* (EB-2015-0061), May 9, 2016
[4] *Decision and Order on Cost Awards* (EB-2013-0416/2015-0079), March 8 2016
[5] A third case, *Decision and Order on Cost Awards* (EB-2012-0365), September 13, 2013, is a good example of the prior policy. There, an applicant objected to recovery of time spent prior to the filing of the application. The Board instead denied recovery of those hours "because they do not pertain directly to the proceeding before the Board". The timing wasn't the issue. It was only whether the work related to the application. That is not an issue in this case.
[6] *Decision with Reasons, Motion to Review Natural Gas Electricity Interface Review Decision* (EB-2006-0322/338/340, May 22 2007 ["*NGEIR*"], p.16-18
[7] *NGEIR* at p.14. *Decision and Order on Notice of Motion to Review and Vary* (EB-2014-0155), July 31 2014, p.5
[8] *Ibid*

responsible participation in the process, and did in fact meet that requirement. This occurred in at least three ways:

a. Meetings with directly-affected school boards ensured that SEC had the specific concerns of school boards top of mind and was able to focus on those concerns in the proceeding.

b. Work done with respect to identifying necessary experts, and co-ordinating with other intervenors and with OEB Staff on the hiring of those experts, was done early to ensure that the experts could participate and would be available. Where intervenors do not start the process of expert identification and selection early, it can become impractical for the experts to be retained in a timely manner once the application has been filed. This work also met the second requirement, actions to assist the Board on specific issues, in this case benchmarking.

c. SEC took a leadership role in co-ordinating with other intervenors on responsibilities and focus in the proceeding. Once an application is filed, there is much less time to do that, and that is especially true when the application is filed in the middle of the summer, as here. This initiative also supported requirement (d) of the Practice Direction.

10. Notwithstanding that the work done by SEC complied with the Practice Direction, the Board did not consider any of the criteria in the Practice Direction in disallowing recovery for this work. While SEC agrees that the Board has a discretion to determine the amounts to be recovered in costs, in our submission it is an error for the Board to disallow recovery for work done without any consideration of the criteria set out in the Practice Direction. The Board is not required to follow each of those criteria slavishly, as if writ in stone. It is required to have regard to those criteria, and if rejecting their application to do so in a reasoned manner, explaining why they should not be applicable in this case.

11. ***The Board Purported to Change the Policy Retroactively.*** SEC caused its counsel to carry out work prior to the Filing Date in good faith, relying on the fact that for many years the Board has approved cost claims with time spent prior to the date an application was filed.

12. In the Decision, the Board appears to say that it is implementing a new policy, and applying it retroactively to work done prior to the time anyone could have known about such a policy. There may be an open question whether that is contrary to law, but that question need not be answered in this case. It is not the Board's practice to change its policies retroactively, and in the face of parties who have relied in good faith on those policies. Even if the Board is legally allowed to do so, it should have done so overtly, acknowledging the unfairness of the Decision, and explaining why it was appropriate. Failure to do so raises the perception that the Board exercises its discretion arbitrarily, and without regard to fairness. For this reason alone, the Board panel should be required to reconsider the Decision and deal specifically with the issue of fairness and retroactivity.

13. ***New Policies Should be Developed in an Appropriate Manner.*** The Board develops policies to assist in making decisions on individual cases. In virtually every case, the Board first socializes a proposed policy to those whose interests might be affected, listens to their input on the policy, and then establishes the proposed or modified policy for future application, with reasons for doing so. Policies themselves do not decide cases, however. Policies merely assist Board panels in adjudicating the specific matters before them, by providing an analysis of the issues on a generic basis. The policy is, in effect, a way of ensuring that each Board panel does not have to go back to square one for every single issue. Where a policy is relevant to an instant case, and where the rationale behind the policy is applicable to that case, the Board panel can apply the policy to the facts of that case. It saves time, adds consistency, and provides all parties with visibility as to the likely determination of any given set of facts.

14. What the Board does not do is establish a new policy within a proceeding, and then apply it without reasons or rationale to the facts of that case. For example, if the Board were to conclude that each electricity distributor should have a head office that contained no more than 150 square feet per office employee, in the middle of a rate case, the applicant in the case (and likely all other parties) would feel that was improper. In part, that is because of retroactivity. However, it is also improper because the policy is not developed in an appropriate manner, with an appropriate rationale and opportunity for affected parties to have input.

15. ***Operative Orders Must Have A Reasonable Basis.*** A policy cannot, by itself, be the basis for a decision by the Board. As an independent adjudicative body, the Board is required to decide things based on evidence, analysis, and reason. Most issues in most cases are decided by the

application of legislation, well-known regulatory principles, and good judgment, to the facts before the Board in evidence.

16. What the Board can do, and often does, is develop policies that build in the reasoning for a particular class of cases. Where a policy has been developed in a proper manner, with evidence, input, and a rationale for its application, then the job of the individual Board panel is made more simple. The Board panel can determine whether the policy, and the reasons behind it, are reasonably applicable to the facts of the instant case. If they are, the Board panel does not have to re-invent that wheel.

17. The key element of the use of policies is that the Board is still applying reasoned analysis to the evidence before it. The Board is merely doing so in an efficient manner, by concluding that the facts before it are *sui generis* with a class of fact situations that the Board has already analyzed in detail, and on which it has reached a consistent set of conclusions. It is that past application of reasoning and analysis that makes policies useful. Where, as here, a policy with no analytical basis is applied without any reasons, it is submitted that the Decision is not correct, and the decision must be reviewed and varied.

18. ***Procedural Fairness (Audi Alteram Partem).*** It is improper for the Board to deny recovery, whether to a regulated utility in rates, or to an intervenor in a cost claim, without giving the party an opportunity to be heard. Failure to do so goes to the correctness of a decision as it is an error of law

19. In most cases, the parties know the issues that have to be addressed, and in many cases will have an onus to speak to those issues at pre-determined stages of the process. For example, intervenors in their claims for cost recovery are expected to deal with any unusual aspects of their cost claim, relative to the Practice Direction, and to do so up front. If an intervenor sent two counsel to a hearing, and is claiming for both, it is incumbent on the intervenor to provide information and submissions on why that should be recoverable. If work done by two intervenors was duplicative, the intervenors are expected to provide submissions and reasoning supporting recovery, and cannot complain if they fail to do so, and recovery is denied.

20. In this case, however, SEC had no way of knowing that the Board would even consider disallowing time spent prior to the Filing Date. It is not in the Practice Direction, and the Applicant did not object to the cost claim. Parties are not expected to anticipate all novel objections to their

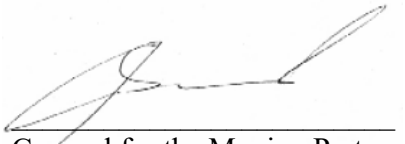
claim in advance. They are expected to provide reasonable support for their claim, and SEC did so in this case.

21. It is therefore submitted that failure to give SEC an opportunity to respond to the proposed new policy, and denial of recovery, was an error, and goes to the correctness of the Decision.

22. In addition, because SEC was not given an opportunity to deal with this denial of recovery, this motion cannot in any way be an attempt to re-argue the case. There was no argument in the first place.

23. ***Conclusion.*** SEC therefore submits that, for at least these five reasons, the Decision is in error, and the threshold test is thus met.

All of which is respectfully submitted his 29th day of August, 2016.



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