EB-2016-0208

ONTARIO ENERGY BOARD

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 or 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.

BOOK OF AUTHORITIES OF THE SCHOOL ENERGY COALITION

August 29, 2016

Jay Shepherd P.C.
2300 Yonge Street, Suite 806
Toronto, Ontario M4P 1E4

Jay Shepherd
Tel: 416-483-3300
Fax: 416-483-3305

Counsel to the School Energy Coalition

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Ontario Energy Board
Commission de l'énergie de l'Ontario

DECISION AND ORDER ON COST AWARDS

EB-2014-0116

TORONTO HYDRO-ELECTRIC SYSTEM LIMITED

Application for electricity distribution rates effective from May 1, 2015 and for each following year effective January 1 through to December 31, 2019

BEFORE: Christine Long
Vice Chair and Presiding Member

Ken Quesnelle
Vice Chair and Member

Cathy Spoel
Member

June 9, 2016

INTRODUCTION AND SUMMARY

Toronto Hydro-Electric System Limited (Toronto Hydro) filed a Custom Incentive Rate (CIR) application (the Application) with the Ontario Energy Board (the OEB) on July 31, 2014 under section 78 of the Ontario Energy Board Act, 1998, S.O. 1998 seeking approval for changes to the rates that Toronto Hydro charges for electricity distribution, to be effective May 1, 2015 and each year until December 31, 2019.

The OEB granted the Association of Major Power Consumers of Ontario (AMPCO); Building Owners and Managers Association Greater Toronto (BOMA); Consumers Council of Canada (CCC), Energy Probe Research Foundation (Energy Probe); School Energy Coalition (SEC); Sustainable Infrastructure Alliance of Ontario (SIA) and Vulnerable Energy Consumers Coalition (VECC) intervenor status and cost award eligibility.

On March 1, 2016, the OEB issued its Decision and Rate Order, in which it set out the process for intervenors to file their cost claims, for Toronto Hydro to object to the claims and for intervenors to respond to any objections raised by Toronto Hydro.

The OEB received cost claims from AMPCO, BOMA, CCC, Energy Probe, SEC, SIA and VECC. No objections were received from Toronto Hydro.

Findings

The OEB has reviewed the claims filed by AMPCO, BOMA, CCC, Energy Probe, SEC, SIA and VECC to ensure that they are compliant with the OEB's *Practice Direction on Cost Awards*.

While the OEB requires that intervenors submit cost claim forms using prescribed forms, there is nothing preventing intervenors from supplying additional information to the OEB in order to assist in evaluating the cost claims submitted. Examples include docket entries that outline participation in interlocutory motions or grouping of activities where multiple persons are submitting claims on behalf on an intervenor group.

Some intervenors did provide additional information which was helpful to the OEB in understanding where time was spent. Others did not. The OEB can only use the information provided to it as the basis for making cost claim assessments.

The OEB notes that the hours of attendance in this proceeding amount to 93 hours. This includes the Technical Conference, Issues Conference, ADR Settlement Conference and the Oral Hearing. For simplicity, the OEB has rounded attendance hours to 100 hours. For each party, the OEB will allow up to 100 hours for

attendance. For preparation time, the OEB has applied a factor of 2 and therefore considers 200 hours of preparation time appropriate. This calculation results in a total allowance of 300 hours for preparation and attendance for the procedural steps listed above including the preparation of interrogatories and review of the draft rate order.

The OEB has not included in the 300 hours, the amount of hours claimed for preparation of final argument. These hours will be assessed separately.

The 300 hours also does not include any additional hours identified as being spent on interlocutory matters or the pole rate attachment issue.

In making its assessment of what amount of time spent in preparation is reasonable, the OEB understands that parties will spend different amounts of time on different steps within the proceeding. The OEB has established an envelope of hours to account for this fact.

The panel has considered the nature of the issues in this proceeding and has determined that two hours of preparation time for each hour of attendance is appropriate in this case. The panel also considered in coming to an assessment regarding attendance and preparation time the criteria for cost awards set out in the Practice Direction[1] to determine the appropriate costs for each intervenor. For example, the panel considered whether questions asked in cross-examination were unduly repetitive of questions previously asked and whether parties made reasonable efforts to ensure that areas covered were not duplicated.

The OEB has chosen a factor of two for preparation time to attendance time because the OEB is of the view that this should be a sufficient amount of time for each intervenor to address the issues that are specific to the interest that it represents in this case. Intervenors are awarded funding to allow for issues specific to each intervenor class to be raised before the OEB. The OEB also expects that for any common issues, intervenors will co-ordinate their efforts in order to ensure efficiency. This ratio of preparation time to attendance time may differ as between different applications. Based on the issues involved in Toronto Hydro's application, the OEB deems the ratio selected to be appropriate. The 300 hour amount will serve as a guide for the OEB in assessing each intervenor's cost claim.

The OEB will not allow attendance hours beyond 100 hours. Simply put, there were a limited amount of attendance hours in this proceeding. The OEB will not generally allow the recovery of costs for the attendance of more than one representative of any party, unless a compelling reason is provided when cost claims are filed.

[1] Ontario Energy Board *Practice Direction On Cost Awards* Revised April 24, 2014

Where preparation hours exceeded the 200 allotted hours, the OEB considered the value of those hours to the proceeding and determined whether the extra time was justified given the participation of the specific intervenor. In instances where the intervenor has not claimed 300 hours for attendance and preparation, the OEB has still reviewed the cost claim in order to ensure that the hours claimed were justified based on the value the intervenor brought to the proceeding.

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. The OEB is making the modifications listed below.

AMPCO

AMPCO claimed 499.85 hours in total. AMPCO claimed 120.75 hours for preparation of final argument which the OEB will allow. AMPCO's claimed time relating to its participation in the Canadian Electricity Association (CEA) interlocutory motion and reviewing evidence related to the wireline attachment issue is 48.4 hours. The OEB will allow this amount to be recovered. AMPCO claimed 41.75 hours for other conference preparation and attendance and 288.95 for attendance and preparation time.

It is not clear to the OEB that the other conference preparation and attendance time is related to an interlocutory motion. Therefore the OEB has considered the 41.75 as part of the general preparation and attendance time resulting in preparation and attendance time of 330.7 hours. The OEB is not satisfied that AMPCO's participation warrants the additional amount of time claimed, above the guide of 300 hours. When comparing the time claimed by AMPCO to the other intervenors participating in the process, the OEB is not satisfied that additional preparation hours are warranted based on the role played by AMPCO. The OEB notes that four hours of attendance were for two representatives to attend the Technical Conference. The OEB will only allow a claim for the attendance of one. The OEB will reduce the AMPCO claim by 30.7 hours for a reduction of $7,859.20 at a blended rate of $256[2].

The OEB further notes that AMPCO has claimed $28.82 for a working lunch. The OEB will not allow this claim as it does not comply with the government's *Travel, Meal and Hospitality Expenses Directive*.

[2] The blended rate is calculated based on the rate and preparation, attendance and response hours of three consultants working on the file.

BOMA

BOMA claimed a total of 524.4 hours of which 424.80 hours were for preparation and attendance and 99.6 hours for argument preparation. The OEB will reduce BOMA's preparation and attendance time by 124.8 hours ($41,184). The OEB finds that the amount of time claimed for preparation is too high given BOMA's level of participation when compared to other intervenors with lower cost claims. BOMA claimed 130.3 hours for preparation of interrogatories. The next highest claim for this step was 88.2 hours. The average amount of time spent on interrogatories by the five other intervenors was 45 hours. The OEB has reviewed the interrogatories asked by BOMA and does not find that the extra hours are warranted. Time claimed for settlement conference preparation was 44 hours higher than the time which was claimed by the next highest intervenor.

BOMA claimed 99.6 hours for preparation of its final argument. The OEB notes that four main areas were covered. The OEB finds that the amount of time claimed for the final argument is too high. The OEB will reduce the argument preparation amount allowed to $28,000 for a reduction of $4,868. This amount is more in line with other intervenors who pursued a similar amount of issues with a similar level of analysis.

Based on the above reasons BOMA's claim for fees will be reduced by $46,052.00 before tax.

CCC

CCC claimed a total of 360.5 hours of which 289.5 hours is preparation and attendance time and 71 hours for final argument preparation. The OEB has determined that CCC's total claim of 289.5 hours for preparation and attendance hours is reasonable and therefore no reduction is required.

The OEB is reducing the amount claimed for preparation of final argument from $23,010 to $20,000. This amount is more aligned to other intervenors who filed arguments that were similar in analysis and issues covered.

Energy Probe

Energy Probe claimed a total of 231 hours of which 184.5 hours was for preparation and attendance and 46.5 hours for argument preparation. The OEB will disallow 11.75 hours for preparation time that occurred prior to the rate application being filed for the reasons outlined above resulting in a reduction of $3,617.50. The OEB will allow the remaining 172.75 hours for preparation and attendance. The OEB will also allow the 46.5 hours claimed for preparation of the final argument.

SEC

SEC claimed a total of 706.1 hours of which 466.5 hours were for preparation and attendance, 148.5 hours for argument preparation and 91.1 hours for other conference preparation and attendance, which was for time spent on the interlocutory motion.

The OEB will allow the 148.5 hours claimed for preparation of the final argument. While SEC's claim for final argument was much higher than other intervenors, the final argument was comprehensive and provided detailed analysis of a large number of areas, which was of considerable assistance to the OEB.

The OEB will also allow the 91.1 hours claimed for the interlocutory motion related to the production of the benchmarking reports which was opposed by the CEA. While the amount of time docketed for this one motion is substantial, the OEB notes that SEC played a major role in the hearing of this motion.

The OEB notes that of the remaining 466.4 hours for preparation and attendance, 35.7 hours were claimed for time spent prior to the filing of the application (18.5 specifically identified as pre-filing hours and an additional 17.2 not specifically identified as such but docketed prior to the July 31, 2014 filing of the rate application). For the reasons stated above, the OEB will disallow the 35.7 hours which were docketed prior to the filing of the rate application.

The OEB finds that SEC took a major role in the pole attachment issue and the interlocutory motion on benchmarking. The OEB will approve SEC's cost claim related to these steps even though SEC's claims are much higher than the other intervenors. In these areas, it is clear to the OEB that the hours of time spent by SEC is distinguishable from the other intervenors. The OEB will allow 55 hours which SEC states were attributable to the pole attachment issue.

The OEB is left to consider the 375.8 remaining hours claimed for preparation and attendance time. SEC's claim is 75.8 hours above the OEB's guideline in this case for attendance and preparation. The OEB will not approve the claim for this additional preparation time. In coming to its conclusion, the OEB considered whether an additional 75.8 hours of preparation time was justified based on SEC's participation in the proceeding. The OEB does not find that SEC's claim for substantially more preparation time than the other intervenors is justified given the nature of the participation of SEC.

The OEB will reduce SEC's attendance and preparation time by 75.8 hours using a blended rate of $266[3] per hour. This amounts to a reduction of $20,162.80. As

[3] The blended rate is calculated based on the weighted average of preparation, attendance and responses hours and rate of two counsels.

indicated above, the OEB has disallowed 35.7 hours docketed prior to the filing of the rate application. Therefore the total reduction for SEC is $31,063.80.

SIA

SIA claimed a total of 183 hours of which 112.75 were for preparation and attendance, 40.75 hours for argument preparation and 29.5 hours for other conference preparation and attendance. The OEB has determined that SIA's total claim of 112.75 hours for preparation and attendance is reasonable. SIA claimed 29.5 hours for "other conferences." A review of the dockets show that these hours were related to preparation and commenting on the draft rate order and 16.5 hours was attributable to participation in the CEA benchmarking motion. The OEB has determined that the time claimed was appropriate given the issues raised by SIA. The OEB approves the amount claimed for final argument.

VECC

VECC claimed a total of 345.05 hours of which 248.2 hours were for preparation and attendance, 60.95 hours for argument preparation and 35.9 hours for other conference preparation and attendance. The OEB has determined that VECC's total claim of 248.2 hours for preparation and attendance hours is reasonable and therefore no reduction is required. VECC claimed 35.9 hours for **"**other conference preparation and attendance". The OEB will approve this amount which includes the retaining of an expert to assist with interrogatories on the pole attachment issue. The OEB will approve all hours claimed for preparation of the final argument.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Toronto Hydro shall immediately pay the following amounts to the intervenors for their costs:

• Association of Major Power Consumers of Ontario	$140,159.38
• Building Owners and Managers Association; Greater Toronto	$143,634.18
• Consumers Council of Canada	$126,944.20
• Energy Probe Research Foundation	$75,085.15
• School Energy Coalition	$173,076.68
• Sustainable Infrastructure Alliance of Ontario	$59,969.10
• Vulnerable Energy Consumers Coalition	$118,207.58

2. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Toronto Hydro shall pay the OEB's costs of, and incidental to, this proceeding immediately upon receipt of the OEB's invoice.

DATED at Toronto June 9, 2016

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

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PART VII - REVIEW

40. Request

40.01 Subject to **Rule 40.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

40.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 40.01**.

40.03 The notice of motion for a motion under **Rule 40.01** shall include the information required under **Rule 42**, and shall be filed and served within 20 calendar days of the date of the order or decision.

40.04 Subject to **Rule 40.05**, a motion brought under **Rule 40.01** may also include a request to stay the order or decision pending the determination of the motion.

40.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

40.06 In respect of a request to stay made in accordance with **Rule 40.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

41. Board Powers

41.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

41.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

42. Motion to Review

42.01 Every notice of a motion made under **Rule 40.01**, 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

(b) if required, and subject to **Rule 40**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

43. Determinations

43.01 In respect of a motion brought under **Rule 40.01**, 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.

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ONTARIO ENERGY BOARD

Practice Direction

On

Cost Awards

Revised April 24, 2014

has a controlling interest in another person listed in (a), (b) or (c) that is a corporation if the person controls the corporation or controls a corporation that holds 100 percent of the voting securities of the first-mentioned corporation, control having the same meaning as in the *Business Corporations Act* (Ontario).

3.06 Notwithstanding section 3.05, a party which falls into one of the categories listed in section 3.05 may be eligible for a cost award if it is a customer of the applicant.

3.07 Also notwithstanding section 3.05, the Board may, in special circumstances, find that a party which falls into one of the categories listed in section 3.05 is eligible for a cost award in a particular process.

3.08 The Board may, in appropriate circumstances, award an honorarium in such amount as the Board determines appropriate recognizing individual efforts in preparing and presenting an intervention, submission or written comments.

4. COST ELIGIBILITY PROCESS

4.01 A party that will be requesting costs must make a request for cost eligibility that includes the reasons as to why the party believes that it is eligible for an award of costs, addressing the Board's cost eligibility criteria (see section 3). The request for cost eligibility shall be filed as part of the party's letter of intervention or, in the case of a notice and comment process under section 45 or 70.2 of the Act or any other consultation process initiated by the Board, shall be filed by the date specified by the Board for that purpose. For information on filing and serving a letter of intervention, refer to the Board's Rules of Practice and Procedure.

4.02 An applicant in a process will have 10 calendar days from the filing of the letter of intervention or request for cost eligibility, as applicable, to submit its objections to the Board, after which time the Board will rule on the request for eligibility.

4.03 The Board may at any time seek further information and clarification from any party that has filed a request for cost eligibility or objected to such a request, and may provide direction in respect of any matter that the Board may consider in determining the amount of a cost award, and, in particular, combining interventions and avoiding duplication of evidence or interventions.

4.04 A direction mentioned in section 4.03 may be taken into account in determining the amount of a cost award under section 5.01.

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.

6. COSTS THAT MAY BE CLAIMED

6.01 Reference should be made to the Board's Tariff.

6.02 Cost claims shall be prepared using the applicable Board-approved form attached to this Practice Direction as Appendix "B".

6.03 The burden of establishing that the costs claimed were incurred directly and necessarily for the party's participation in the process is on the party claiming costs.

6.04 A party that is a natural person who has incurred a wage or salary loss as a result of participating in a hearing may recover all or part of such wage or salary loss, in an amount determined appropriate by the Board.

6.05 A party will not be compensated for time spent by its employees or officers in preparing for or attending at Board processes. When determining whether an individual is an officer or employee of the party, the Board will look at the true nature of the relationship between the individual and the party and the role the individual performs for the party. The Board may deem the individual to be an officer or employee of the party regardless of the individual's title, position, or contractual status with the party. Furthermore, an employee or officer of a company or organization that is affiliated with or related to the party that is eligible for an award of costs will be deemed to be an employee or officer of the party.

6.06 Counsel fees will be accepted in accordance with the Board's Tariff.

6.07 Paralegal fees will be accepted in accordance with the Board's Tariff. To qualify for consideration as a paralegal service, a paralegal must have undertaken services normally or traditionally performed by legal counsel, thereby reducing the counsel's time spent on client affairs.

6.08 Where appropriate, fees for articling students may be accepted in accordance with the Board's Tariff.

6.09 Cost awards will not be available in respect of services provided by in-house

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Ontario Energy Board
Commission de l'énergie de l'Ontario

DECISION AND ORDER ON COST AWARDS

EB-2015-0061

ENTEGRUS POWERLINES INC.

Application for electricity distribution rates and other charges beginning May 1, 2016.

BEFORE: Cathy Spoel
Presiding Member

Victoria Christie
Member

Susan Frank
Member

May 9, 2016

INTRODUCTION AND SUMMARY

Entegrus Powerlines Inc. (Entegrus Powerlines) filed a complete cost of service application with the Ontario Energy Board (OEB) on August 28, 2015 under section 78 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, (Schedule B), seeking approval for changes to the rates that Entegrus Powerlines charges for electricity distribution, to be effective May 1, 2016.

The OEB granted Energy Probe Research Foundation (Energy Probe), School Energy Coalition (SEC) and Vulnerable Energy Consumers Coalition (VECC) intervenor status and cost award eligibility.

On March 17, 2016, the OEB issued its Decision and Rate Order, in which it set out the process for intervenors to file their cost claims, for Entegrus Powerlines to object to the claims and for intervenors to respond to any objections raised by Entegrus Powerlines.

The OEB received cost claims from Energy Probe, SEC and VECC. No objections were received from Entegrus Powerlines.

OEB Findings

The OEB has reviewed the claims filed by Energy Probe, SEC and VECC to ensure that they are compliant with the OEB's *Practice Direction on Cost Awards*.

The OEB notes that Energy Probe, SEC and VECC claimed time that took place before the application was filed with the OEB on August 28, 2015. As those times predate the application filing date, the OEB will disallow 2.5 hours claimed by Energy Probe, 14.3 hours claimed by SEC and 1.7 hours claimed by VECC.

The OEB finds that the adjusted claims of Energy Probe, SEC and VECC are reasonable and Entegrus Powerlines shall reimburse Energy Probe, SEC and VECC for their costs.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Entegrus Powerlines shall immediately pay:
    - Energy Probe Research Foundation $19,750.29
    - School Energy Coalition $14,521.63
    - Vulnerable Energy Consumers Coalition $19,885.18

2. Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Entegrus Powerlines shall pay the OEB's costs of, and incidental to, this proceeding immediately upon receipt of the OEB's invoice.

DATED at Toronto May 9, 2016

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

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Ontario Energy Board
Commission de l'énergie de l'Ontario

DECISION AND ORDER ON COST AWARDS

EB-2013-0416/EB-2015-0079

HYDRO ONE NETWORKS INC.

Application for electricity distribution rates and other charges beginning January 1, 2016.

BEFORE: **Allison Duff**
Presiding Member

Ken Quesnelle
Member

March 8, 2016

INTRODUCTION AND SUMMARY

On September 30, 2015, Hydro One Networks Inc. (Hydro One) filed an application for electricity distribution rates effective January 1, 2016. Hydro One also applied to begin its transition to fully fixed residential rates, as directed in the OEB's April 2, 2016 report: *A New Distribution Rate Design for Residential Electricity Customers (EB-2012-0410).* The application was made under section 78 of the *Ontario Energy Board Act*, *1998*, S.O. 1998, c. 15, (Schedule B).

The OEB granted intervenor status and cost award eligibility to the Balsam Lake Coalition (BLC), Canadian Manufacturers & Exporters (CME), Consumers Council of Canada (CCC), Energy Probe Research Foundation (Energy Probe), Federation of Ontario Cottagers' Associations (FOCA), School Energy Coalition (SEC) and Vulnerable Energy Consumers Coalition (VECC).

On December 22, 2015, the OEB issued its Decision & Order which also established the process for intervenors to file their cost claims, for Hydro One to object to the claims and for intervenors to respond to any objections raised by Hydro One. On January 14, 2016, the Board issued its Rate Order.

The OEB received cost claims from BLC, CME, CCC, Energy Probe, SEC and VECC. By an email dated February 2, 2016, FOCA stated that it would not file a cost claim.

On January 14, 2016, Hydro One filed a response to the cost claims and stated that it had no concerns with the cost claims of BLC and CCC. Hydro One did not address CME's and VECC's cost claims. Hydro One requested the OEB ensure that SEC's claim was just and appropriate as the timeframe for the work charged for their student preceded the filing of the Draft Rate Order (DRO) on September 30, 2015. Hydro One further requested the OEB to ensure that Energy Probe's claim was just and appropriate given their claim for the costs of three consultants and the large dollars and hours being claimed.

On January 20, 2016, Energy Probe responded to Hydro One's letter indicating that not all parties that applied for intervenor status took part in the proceeding and some parties expressed the opinion that the proceeding appeared not to be in an area of prime concern. Energy Probe pointed out that only OEB staff and Energy Probe were very active at the non-transcribed Technical Conference and filed written submissions covering all the major issues in the proceeding.

Energy Probe further submitted that a review of its argument would reveal an effort to fully portray its concerns to the OEB. Energy Probe stated that it provided charts, as

well as focused written material, to substantiate its concerns in a straight-forward submission. Energy Probe submitted that it was acting in a reasonable manner in utilizing three consultants and requested that it be found to be eligible to receive 100% of its reasonably incurred costs of participating in the proceeding.

OEB Findings

The OEB has reviewed the claims filed by BLC, CME, CCC and VECC to ensure that they are compliant with the OEB's *Practice Direction on Cost Awards*. The OEB approves these cost claims as filed.

The OEB will reduce Energy Probe's cost claim by 20%. The OEB finds the claim excessive given the relatively narrow scope of the application and in comparison to other intervenors' cost claims. In addition, the OEB found Energy Probe's submission extended beyond the scope of the application with respect to the total bill impact analysis and submission. Changes to the bill resulting from the provincial government's decision to phase out the Ontario Clean Energy Benefit and the Debt Retirement Charge are not within the scope of the evaluation relavant to an OEB Decision.

The OEB will disallow 2.8 hours in SEC's claim for Chris Avetikyan. These hours were incurred in June and August, before the DRO was filed on September 30, 2015 and no explanation or justification was provided by SEC.

THE ONTARIO ENERGY BOARD ORDERS THAT:

Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Hydro One shall immediately pay the following amounts to the intervenors for their costs:

Balsam Lake Coalition	$3,932.40
Canadian Manufacturers & Exporters	$4,578.76
Consumers Council of Canada	$2,610.30
Energy Probe Research Foundation	$8,226.06
School Energy Coalition	$1,440.75
Vulnerable Energy Consumers Coalition	$3,024.65

Pursuant to section 30 of the *Ontario Energy Board Act, 1998*, Hydro One shall pay the OEB's costs of, and incidental to, this proceeding immediately upon receipt of the OEB's invoice.

DATED at Toronto March 8, 2016

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

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Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2012-0365

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 Dufferin Wind Power Inc. for an Order granting leave to construct a new transmission line and associated facilities.

BEFORE: Cynthia Chaplin
Presiding Member and Vice-Chair

Peter Noonan
Member

DECISION AND ORDER ON COST AWARDS

September 13, 2013

BACKGROUND

On September 21, 2012, Dufferin Wind Power Inc., ("DWPI") applied under sections 92, 96(2), 97 and 101 of the *Ontario Energy Board Act, 1998* (the "Act") seeking an order of the Board for leave to construct approximately 47 km of single circuit 230 kilovolt ("kV") electricity transmission line and associated facilities (the "Project"). DWPI also applied for an order approving the forms of easement agreements, and an order approving the construction of certain transmission facilities upon, under, or over a highway, utility line, or ditch.

On December 4, 2012, the Board issued Procedural Order No. 1, granting Harvey J. Lyon, The Highland Companies, and Lori Bryenton intervenor status and cost award eligibility. On February 5, 2013, the Board issued Procedural Order No. 3 granting Conserve our Rural Environment (CORE) intervenor status and cost award eligibility.

On July 5, 2013, the Board issued its Decision and Order, in which it set out the process for intervenors to file their cost claims and respond to any objections raised by DWPI.

CORE submitted its cost claim by the July 15, 2013 deadline. Ms. Bryenton submitted her cost claim late on August 1, 2013.

CORE's Cost Claim

CORE claimed total costs of $57,787.49, including $50,011.00 in fees, $1,128.38 in disbursements, and $6,648.11 in HST.

DWPI objected to all of CORE's claimed disbursements on the basis that CORE did not provide the relevant itemized receipts in accordance with Section 7.03 of the *Practice Direction on Cost Awards* ("Practice Direction"). DWPI submitted that CORE's claim for disbursements should be reduced by $1,029.88 and $146.70 for HST, for a total reduction of $1,176.58.

DWPI further objected to CORE's claim for legal fees incurred prior to the proceeding and for other fees which were not related to matters directly within the scope of the proceeding or were related to conduct that tended to unnecessarily lengthen the process.

Specifically, DWPI noted that a number of the invoices pre-date the filing of the application (September 12, 2012). These include all of the legal services listed on the invoices dated May 30, 2012, August 20, 2012, and August 28, 2012 and those items on the invoice dated November 9, 2012 which relate to services provided before the application filing date. DWPI submitted that CORE's claim should be reduced for out-of-period costs by $11,793.00 in legal fees, plus $1,533.09 in HST, for a total reduction of $13,326.09. In addition, DWPI submitted that CORE's claim should be further reduced by $11,688.50 in legal fees, plus $1,519.51 in HST, for a total of $13,208.01 for costs related to the introduction of irrelevant material into the proceeding.

Lori Bryenton's Cost Claim

Ms. Bryenton filed a total claim of $5,978.12, including $5,248.00 in fees, $32.37 in disbursements, and $687.75 in HST.

DWPI submitted that Ms. Bryenton's cost claim should be denied on the basis of it being filed after the prescribed deadline. However, DWPI submitted that if the Board were to accept the late filing, then some adjustments should be made to the claim.

DWPI objected to Ms. Bryenton's claim for disbursements on the basis that Ms. Bryenton had not provided the relevant itemized receipts in accordance with Section 7.03 of the Practice Direction. DWPI submitted that the claim should be reduced by $32.37 plus $4.21 of HST for a reduction of $36.58.

DWPI further objected to Ms. Bryenton's costs for the activities undertaken on July 31, 2013. DWPI submitted that these activities were undertaken subsequent to the issuance of the Board's Decision and Order and consisted of communications with the Board and Ms. Bryenton regarding the late filing of cost submissions. DWPI noted that these activities were outside the scope of the intervenor's cost eligibility and consequently the claim should be reduced by $68.00 plus $8.84 of HST for a total reduction of $76.84.

Neither CORE nor Ms. Bryenton replied to DWPI's objection letter of July 22, 2013.

BOARD FINDINGS

The Board has reviewed the cost claims of CORE and Ms. Bryenton and has considered the contributions of CORE and Ms. Bryenton in this proceeding.

The Board will accept the cost claim filed by Ms. Bryenton notwithstanding the late filing, including time related to the filing of the claim. The amount claimed for July 31, 2013 is small and reasonable in the circumstances.

In reviewing CORE's cost claim, the Board notes that counsel for CORE was working on a number of other matters beyond the leave to construct application. The onus is on CORE to ensure that the costs claimed relate only to work conducted within the scope

of this proceeding. Although CORE removed from its claim some parts of the various invoices, the Board concludes that a substantial portion of the claim does not directly relate to the leave to construct proceeding.

First, the Board notes that the hours claimed are not fully supported by dockets. Of the total hours claimed (222.2 hours), the dockets submitted contain 191.05 hours. The Board will allow no costs for the un-docketed hours.

Second, the Board finds that any legal costs or disbursements which pre-date the Notice of Application issued on October 16, 2012 are not recoverable because they do not pertain directly to the proceeding before the Board. The Board also finds that legal costs or disbursements incurred after the close of the record on May 2, 2013 are not recoverable, with the exception of counsels' time to review the reply submission, namely 1.4 hours for Laura Bisset and 0.5 hours for David Crocker. The costs after May 2, 2013 largely relate to additional material which CORE attempted to file, but which the Board ruled would not be placed on the public record. These costs are therefore not recoverable. The total reduction for this category is $20,373.90.

Third, for the hours claimed between October 16, 2012 and May 2, 2013, the Board has reviewed DWPI's objections and accepts each of them. Some of the time claimed, and to which DWPI objects, is for activities which are clearly beyond the scope of the proceeding. For example, CORE claimed costs for work done between December 12 and December 15, related to comments provided to the Ministry of the Environment on the Renewable Energy Approval process. In other instances, the specific purpose is not sufficiently clear for the Board to be satisfied that the time was spent on activities within the scope of the leave to construct proceeding and not on the other matters related to DWPI in which CORE is involved. The onus is on CORE to support its claim with sufficient detail to satisfy the Board that the costs are reasonable. This onus is particularly important in this case because counsel is clearly acting for CORE in a number of matters and not just the leave to construct proceeding. CORE has not adequately supported its claim, and notably has not responded to the objections made by DWPI. The total reduction for counsel time between October 16, 2012 and May 2, 2013 is $5,538.70.

Fourth, the Board will also disallow the costs claimed for work performed by two students. The Practice Direction provides for claims by counsel and consultants only

and no compelling explanation was provided for why the Board should depart from the Practice Direction in this instance. The total reduction for this category is $2,226.10.

In accordance with Section 7.03 of the Practice Direction, the only disbursements that the Board has allowed for either claim are those which are supported by the relevant itemized receipts.

As a result, the Board will allow Ms. Bryenton's total claim for disbursements of $36.58.

The Board will reduce CORE's claim for disbursements by $797.56 plus $119.17 of HST for a total reduction of $916.73. The associated disbursements were either not supported by relevant itemized receipts or the expenditures were incurred outside the relevant timeframe for the proceeding. CORE's approved disbursements therefore amount to $358.35.

The following summary provides an overview of the impact of the Board's Decision on CORE's total cost claim in this matter:

	ORIGINAL CLAIM (A) (hours)	ITEMIZED ENTRIES (B) (hours)	DEVIATION (A-B) (hours)	DISALLOWED (C) (hours)	AWARDED (B-C) (hours)	ORIGINAL AMOUNT CLAIMED	AMOUNT AWARDED
Total Legal Costs	222.2	191.05	31.15	113.70	77.35	$ 50,011	$ 19,620
HST						$ 6,501	$ 2,551
Sub Total						$ 56,512	$ 22,170
Total Disbursements						$ 1,275	$ 358
Total						$ 57,787	**$ 22,528**

Further details with respect to the reductions to CORE's cost claim are provided in Appendix A to this Decision.

THE BOARD THEREFORE ORDERS THAT:

1. Pursuant to section 30 of the Ontario *Energy Board Act, 1998*, DWPI shall immediately pay the following amounts to the intervenors for their costs:

    - Conserve our Rural Environment $22,528.39; and

- Lori Bryenton $5,978.12.

2. Pursuant to section 30 of the Ontario *Energy Board Act, 1998*, DWPI shall pay the Board's costs of and incidental to, this proceeding immediately upon receipt of the Board's invoice.

DATED at Toronto, September 13, 2013

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

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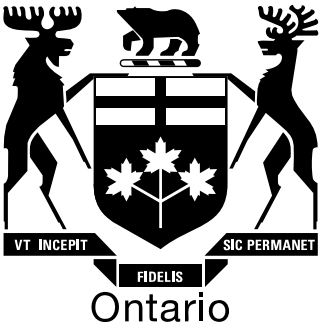
Ontario Energy Board

Commission de l'Énergie de l'Ontario



EB-2006-0322
EB-2006-0338
EB-2006-0340

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

review, i.e. Rules 42 to 45, should be read in conjunction with Rules 1.03 and 2.01. Similarly, the rules dealing with alternative dispute resolution, written hearings and so on include Rules 1.03 and 2.01.

The Board finds that it should interpret the words “may include” in Rule 44.01 as giving a list of examples of grounds for review for the following reasons:

- It is the usual interpretation of the phrase;
- It is consistent with section 2 of the SPPA which requires a liberal interpretation of the Rules;
- It is consistent with Rule 1.03 of the Board’s rules which allows the Board to amend, vary or supplement the rules in an appropriate case; and
- If the SPPA had intended to require that the power to review be restricted to specific grounds it would have required the rules to include those grounds and would have required the use of the word “shall”.

With respect to the application of the principle of presumption of purposeful change urged by counsel for Board Staff, the Board notes that at the same time that its rules were amended to remove certain grounds of appeal from Rule 44.01, Rule 1.03 was also amended. The previous version of Rule 1.03 (then 4.04) read as follows:

> The Board may dispense with, amend, vary, or supplement, with or without a hearing, all or any part of any Rule, at any time by making a procedural order, if it is satisfied that the special circumstances of the proceeding so require, or it is in the public interest to do so.

When compared with the current Rule 1.03, it is apparent that the old rule was more restrictive – amendments had to be made by procedural order, and the circumstances of the proceeding had to be “special”. Given the need for a procedural order, it is reasonable to interpret the old rule as applying only to the sorts of matters dealt with in procedural orders, the conduct of the proceeding and not to other provisions of the rules. No such restriction applies in the current Rule 1.03.

The Board finds that to the extent the Rules were amended to remove specific grounds from the list for motions to review, the contemporaneous amendments to Rule 1.03 give the Board the necessary discretion to supplement this list in an appropriate case. The Board presumably was aware of that at the time of the amendments.

The Board therefore finds that it has the jurisdiction to consider the IGUA motion to review even though the grounds are errors of mixed fact and law which do not fall squarely within the list of enumerated grounds in Rule 44.01.

Even if this interpretation of Rule 44.01 is incorrect, the Board can apply Rule 1.03 to supplement Rule 44.01 to allow the grounds specified by IGUA. Given the number of motions for review, the timing involved, the nature of the hearing and the nature of the alleged errors, the Board concludes that it is in the public interest to avoid splitting this case into Motions reviewed by some parties and appealed by others.

This panel is also aware that Appeals to the Divisional Court can only be based on matters of law including jurisdiction. If the position advanced by counsel for the Board staff was accepted, errors of mixed fact and law could not be effectively reviewed or appealed by any body. This, the Board believes is not consistent with Section 2 of the SPPA.

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

> 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.

Parties were asked by the panel to provide submissions on the appropriate test for the Board to apply in making a determination under Rule 45.01.

Board Staff argued that the issue raised by a moving party had to raise a question as to the correctness of the decision and had to be sufficiently serious in nature that it is capable of affecting the outcome. Board Staff argued that to qualify, the error must be clearly extricable from the record, and cannot turn on an interpretation of conflicting evidence. They also argued that it's not sufficient for the applicants to say they disagree with the Board's decision and that, in their view, the Board got it wrong and that the applicants have an argument that should be reheard.

Enbridge submitted that the threshold test is not met when a party simply seeks to reargue the case that the already been determined by the Board. Enbridge argued that something new is required before the Board will exercise its discretion and allow a review motion to proceed.

Union agreed with Board Staff counsel's analysis of the scope and grounds for review.

IGUA argued that to succeed on the threshold issue, the moving parties must identify arguable errors in the decision which, if ultimately found to be errors at the hearing on the merits will affect the result of the decision. IGUA argued that the phrase "arguable errors" meant that the onus is on the moving parties to demonstrate that there is some reasonable prospect of success on the errors that are alleged.

CCC and VECC argued that the moving parties are required to demonstrate, first, that the issues are serious and go to the correctness of the NGEIR decision, and , second, that they have an arguable case on one or more of these issues. They argued that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all the issues.

MHP argued that the threshold question relates to whether there are identifiable errors of fact or law on the face of the decision, which give rise to a substantial doubt as to the correctness of the decision, and that the issue is not whether a different panel might arrive at a different decision, but whether the hearing panel itself committed serious errors that cast doubt on the correctness of the decision. MHP submitted that a review panel should be loathe to interfere with the hearing panel's findings of fact and the conclusions drawn there from except in the clearest possible circumstances.

Kitchener argued that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

School Energy Coalition argued that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking objectively reasonable grounds.

Findings

It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

> Every notice of motion… shall set out the grounds for the motion that raise a question as to the correctness of the order or decision…

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, 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.

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.

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.

The applicant must also be able to demonstrate that the alleged error is 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.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

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Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2014-0155

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 Kitchener Wilmot Hydro Inc. for an order approving or fixing just and reasonable distribution rates effective January 1, 2014;

AND IN THE MATTER OF a Motion to Review and Vary by School Energy Coalition 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-2013-0147.

BEFORE: Christine Long
Presiding Member

Ken Quenelle
Vice Chair

Allison Duff
Board Member

DECISION AND ORDER
ON NOTICE OF MOTION TO REVIEW AND VARY

July 31, 2014

On April 3, 2014, the School Energy Coalition ("SEC") filed a Motion for a Request to Review and Vary (the "Motion") the Board's Decision and Order dated March 20, 2014 in EB-2013-0147 (the "Decision") in respect of Kitchener-Wilmot Hydro Inc.'s ("KWHI's") cost of service application for rates to be effective January 1, 2014 (the "Application"). The Board has assigned the Motion file number EB-2014-0155.

In the Motion SEC asks the Board to make an Order:

a) to make revised findings on the appropriate test year Working Capital Allowance ("WCA") percentage by relying on the existing record in EB-2013-0147, including all pre-filed evidence, interrogatory responses, hearings transcripts, and final arguments; or

b) remitting the issue of the appropriate test year WCA percentage back to the Board panel in EB-2013-0147, so that they may make revised findings on the issue, relying on the existing record in EB-2013-0147, including all pre-filed evidence, interrogatory responses, hearings transcripts, and final arguments.

SEC is also asking the Board to find that its Motion satisfies the "threshold test" in Rule 45.01 of the OEB's *Rules of Practice and Procedure* (the "Rules").[1]

The Board, as set out in its Notice of Motion and Procedural Order No. 1, determined that the most expeditious way of dealing with the Motion is to consider concurrently the threshold question of whether the matter should be reviewed, as contemplated in the Board's *Rules of Practice and Procedure*, and the merits of the Motion.

BACKGROUND

The Motion seeks a review and variance of the Decision in KWHI's cost of service proceeding in which the Board determined that "in the absence of previous direction by the Board to undertake a lead/lag study; the Board does not find it necessary to consider whether any WCA other than the default 13% used by KWHI is more appropriate in this Application."

In the Application, KWHI proposed a WCA percentage of 13%, relying on the Board's letter of April 12, 2012 ("Board Letter").[2] The Board Letter provided the Board's rationale for changes to the 2013 Filing Guidelines for electricity and transmission distribution applications. The Board Letter stated that a distributor had two approaches available to calculating its WCA: filing a lead-lag study, or using a 13% default value. The 13% default WCA percentage was incorporated into section 2.5.1.3 of the *Filing Requirements for Electricity Distributors* (the "Filing Requirements"). A distributor who had been directed by the Board to carry out a lead-lag study, or had voluntarily carried out a lead-lag study, was not allowed to use the default percentage.

[1] SEC's Motion was filed on April 3, 2014 and references Rules 44 and 45 of the *Rules of Practice and Procedure*, updated on January 17, 2013. The Board issued updated *Rules of Practice and Procedure* on April 24, 2014. Rules 43 and 45 have been renumbered as, respectively, Rules 42 and 43 but are otherwise unchanged. In this *Decision on Notice of Motion to Review and Vary*, references are to the Rules as documented in the January 17, 2013 version of the *Rules of Practice and Procedure*.

[2] Letter of Ontario Energy Board, *Re: Update to Chapter 2 of the Filing Requirements for Transmission and Distribution Applications – Allowance for Working Capital,* dated April 12. 2012

The intervenors disputed whether KWHI had responded appropriately to previous Board directions, alleging that the Board Letter did not amount to a "Board led process". Thus, their argument was that KWHI was required to file a lead-lag study to support its WCA. They also argued that regardless of the previous Board decision, the KWHI WCA should be less than 13%, to account for KWHI's intention to move its remaining (i.e., Residential and General Service < 50 kW) customers from bi-monthly to monthly billing.[3]

Intervenors provided detailed submissions and calculations on the WCA percentage for KWHI, including why the 13% default factor set out in the Board's Letter and Filing Requirements is not appropriate for a distributor on or moving to monthly billing for all customers.[4]

Energy Probe's submission was that the default 13% WCA set out in the Board's Letter and Filing Requirements was based on lead-lag studies done by distributors who billed bi-monthly. Energy Probe explained in detail why it was not appropriate for a distributor like KWHI who was moving to monthly billing to rely on the WCA percentage of 13%. SEC and VECC made similar submissions.[5]

In this Motion, SEC submitted that the Board's reliance on the 13% default WCA, combined with the Board's apparent failure to consider the evidence put forward by the intervenors with respect to an alternative WCA, leaves a question for this reviewing Panel as to whether or not the Board, in reaching its Decision, felt bound to apply the 13% default value. In reaching a determination on this matter, this reviewing Panel has considered the submissions of the parties (intervenors and KWHI) as well as those of Board staff.

ISSUES

There are two issues in this Motion:

1. Has the threshold test been met?
2. If the answer to the above is yes, did the Board fetter its discretion in the Decision with respect to determining the WCA thereby making an error in law?

[3] Written Submissions of School Energy Coalition, para. 12
[4] *Ibid.*, para. 13
[5] *Ibid.*, paras. 13 and 14

THRESHOLD TEST

Section 44.01 of the Rules provides 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[.]

Under section 45.01 of the Rules, 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. Section 45.01 of the Rules provides that:

> 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 Board has considered previous decisions of the Board in which the principles underlying the "threshold question" were discussed, namely in the Board's *Decision on a Motion to Review Natural Gas Electricity Interface Review Decision* (the "NGEIR Review Decision").[6] In the NGEIR Review Decision, the Board stated 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.

SEC, VECC and Energy Probe all argued that the Board fettered its discretion in its decision making thereby committing an error of law which would raise a question as to

[6] *Motion to Review Natural Gas Electricity Interface Review Decision (EB-2006-322/0338/0340) , Decision with Reasons*

the correctness of the Decision. Board staff agrees with SEC that the grounds for review listed in Rule 42.01 (a) are not exhaustive, and that an error of law is a proper ground for review. However, Board staff disagreed with SEC in the latter's allegation that the Board had fettered its discretion in its decision making and thereby had committed an error of law.

The Board agrees with the submission of SEC that an error in law raises a material question as to the correctness of the Board's Decision. Such an error, could result in the varying of the Decision. As a result, the Board finds that the threshold test has been met in this case given the potential for an error in law. The Board will proceed to consider the merits of the motion.

MERITS OF THE MOTION

Submissions of the Parties

In its submission, KWHI set out some of the background with respect to its decision to apply a 13% WCA. Section 2.5.1.4 of the Filing Requirements issued June 28, 2012 (Allowance for Working Capital) – corresponding to section 2.5.1.3 of the July 17, 2013 version of the Filing Requirements – states, in part:

> In a letter dated April 12, 2012, the Board provided an update to electricity distributors and transmitters on the options established in the June 22, 2011 cost of service filing requirements for the calculation of the allowance for working capital for the 2013 rate year. The applicant may take one of two approaches for the calculation of its allowance for working capital: (1) the 13% allowance approach; or (2) the filing of a lead/lag study.

The only exception to the above requirement is if the applicant has been previously directed by the Board to undertake a lead/lag study on which its current working capital allowance is based. Since KWHI was not directed to do a lead/lag study, KWHI had the choice of option (1) or option (2), and chose option (1); KWHI chose to rely on the 13% WCA approach.

While the Board may consider the Filing Requirements in determining the appropriate WCA percentage for setting rates in the test year, SEC argued that the Board erred in failing to consider the specific facts presented and arguments made in the proceeding by all parties.

SEC submitted that the Board committed an error of law by fettering its discretion in stating that it did "not find it necessary to consider whether any WCA other than the default 13% used by KWHI is more appropriate in this Application".

SEC argued that the Board erred by relying solely on section 2.5.1.3 of the Filing Requirements as binding its ability to determine an appropriate WCA percentage of any number but 13% in absence of a lead/lag study, which the Board found that KWHI was not required to perform. SEC noted that the Board's Filing Requirements are akin to Board policies or guidelines. While the Board has the authority to issue non-statutory instruments such as the Filing Requirements, they cannot be applied as if they were mandatory.

Energy Probe submitted that it may have been acceptable for KWHI to rely on the Filing Requirements for the purpose of the WCA applied for in its Application. However, once intervenors, including Energy Probe, raised specific issues with the percentage during the proceeding, the Board was required to consider those arguments in determining the appropriate WCA percentage. Energy Probe made a number of arguments, citing the record and evidence in the proceeding, concluding that the Board's default 13% WCA percentage is not appropriate for a distributor such as KWHI that bills its customers on a monthly basis.

VECC adopted SEC's argument with respect to an error of law providing the basis for the motion to review and establishing the threshold test alleging that the Board chose automatically to adopt the 13% default value for the WCA.

Board staff submitted that the Board did not fetter its discretion. Board staff further submitted that guidelines may validly influence a decision maker's conduct. The use of guidelines to achieve an acceptable level of consistency in administrative decisions is particularly important for tribunals exercising discretion, whether on procedural, evidential or substantive issues, in the performance of adjudicative functions.[7]

Board staff submitted that the statement by the Board in the Decision that it "does not find it necessary to consider whether any WCA other that the default 13% used by KWHI is more appropriate" is very different from SEC's submission that the Board

[7] *See, for example: Maple Lodge Farms v. Canada, [1982] 2 S.C.R. 2 and Dorothea Knitting Mills Ltd. v. Canada (Minister of National Revenue -- M.N.R.), [2005] F.C.J. No. 394, 295 F.T.R. 314 (F.C.T.D.)*

fettered its discretion by noting that it "does not need to consider any WCA percentage beside the 13% set out in the Filing Requirements." Board staff submitted that this is not what the Board stated. Further, Board staff submitted that SEC has failed to put forward any evidence that suggests the Board failed to keep an open mind when hearing arguments, as provided in the submissions of KWHI, registered intervenors and Board staff, as filed in EB-2013-0147, that the 13% default should not be applied in this case. Nowhere in the Decision did the Board state that it was bound by the 13% set out in the Filing Requirements.

BOARD FINDINGS

The Board has considered all of the submissions and agrees with the parties on the principal point that it can establish guidelines, policies and other non-binding instruments and that it can utilize those instruments to inform its decision-making. However, those instruments cannot be treated as binding.

As the Federal Court of Appeal stated in *Thamotharem v. Canada (Minister of Citizenship and Immigration)*:

> Nonetheless while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the grounds that the decision maker's exercise of discretion was unlawfully fettered[.][8]

While it is clear from the record that the intervenors made significant arguments about alternative appropriate WCA values during the original proceeding, it is not clear from the Decision that the original panel took these arguments into consideration in rendering the Decision. It is also not clear whether the original panel felt bound to apply the 13% set out in the Filing Requirements. The Board acknowledges and accepts Board staff's statement that nowhere in the Decision does the original panel explicitly state that it was bound by the Filing Requirements. However, it is also not clear whether the Board considered the detailed submissions regarding alternative WCA values in coming to the Decision.

[8] Federal Court of Appeal Decision in *Thamotharem v. Canada (Minister of Citizenship and Immigration),* 20007 FCA 198 at para 66, quoted in SEC Submission, May 12, 2014, page 7

The submissions put forward by the intervenors in respect of an alternative WCA must be considered by the Board, and it must be clear that the Board has done so. Having heard the evidence in question, the original Panel is in the best position to make a finding in concordance with the findings in this Decision. As such, the Board will remit this matter back to the original panel. The Board will issue a Decision as to the appropriate value for KWHI's WCA.

COSTS

In its Motion, and subsequent filings, SEC sought approval for recovery of eligible costs. Energy Probe and VECC also claimed eligibility for cost recovery in their submissions. KWHI requested an opportunity to make submissions on claimed costs once the amounts were known.

The Board finds that the intervenors are entitiled to their reasonable costs incurred for participation in the hearing of the Motion. Claims for costs and submissions on cost claims should be filed as ordered below. A decision regarding the amount of the cost awards approved will be issued subsequently. KWHI shall pay any Board costs of and incidental to this proceeding upon receipt of the Board's invoice.

THE BOARD THEREFORE ORDERS THAT:

1. The proceeding will be remitted back to the original panel.

COST AWARDS

1. Intervenors shall file with the Board and forward to Kitchener-Wilmot Hydro Inc. their respective cost claims by **August 14, 2014**.

2. Kitchener-Wilmot Hydro Inc. shall file with the Board and forward to intervenors any objections to the claimed costs by **August 28, 2014**.

3. Intervenors shall file with the Board and forward to Kitchener-Wilmot Hydro Inc. any responses to any objections for cost claims within by **September 4, 2014**.

4. Kitchener-Wilmot Hydro Inc. shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number EB-2014-0155, be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice/, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties shall use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available, parties may email their documents to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies. All communications should be directed to the attention of the Board Secretary, and be received no later than 4:45 p.m. on the required date.

ISSUED at Toronto, July 31, 2014

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary