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Ontario

BY E-MAIL

September 1, 2016

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: School Energy Coalition
Notice of Motion
Board File Number EB-2016-0208

Please find attached OEB staff's submission on the threshold question.

Original Signed By

Martin Davies
Project Advisor, Rates
Major Applications

NOTICE OF MOTION

School Energy Coalition

EB-2016-0208

ONTARIO ENERGY BOARD

STAFF SUBMISSION ON THRESHOLD QUESTION

September 1, 2016

INTRODUCTION

On June 29, 2016, the School Energy Coalition (SEC) filed a Notice of Motion to review and vary the Decision and Order on Cost Awards in relation to EB-2014-0116 (the Decision), which was Toronto Hydro Electric System Limited's (Toronto Hydro) custom incentive rate application (SEC Motion). SEC argued that the OEB had 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 in EB-2014-0116. SEC requested that the motion be heard orally or in writing as the OEB shall deem appropriate.

On August 22, 2016, the OEB issued Notice of Motion and Procedural Order No. 1, which stated that the OEB had decided to consider the threshold question and to invite submissions from parties before making a determination upon it.

In its written submissions on the threshold question[1] SEC sets out five reasons as to why, in its submission, the threshold test has been met. The reasons are as follows:

a. SEC Complied in all Respects with the Practice Direction;
b. The OEB Purported to Change the Policy Retroactively;
c. New Policies Should be Developed in an Appropriate Manner;
d. Operative Orders Must have a Reasonable Basis; and
e. Procedural Fairness (*Audi Alteram Partem*)

OEB staff submits that none of the reasons set out above can be substantiated and as such there is no identifiable error which raises a question as to the correctness of the Decision.

OEB staff's submission will address each of the grounds noted above as well as setting out an overview of the threshold test.

[1] *Written Submissions of the School Energy Coalition on the Threshold Question,* August 29, 2016

Submission

1. Threshold test

Under Rule 43.01 of the OEB's *Rules of Practice and Procedure*, the OEB may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Rule 42.01 of the *Rules of Practice and Procedure* states that a motion for review must set out grounds that raise a question as to the correctness of the order or decision in question, which grounds may include the following: (i) error in fact; (ii) change in circumstances; (iii) new facts have arisen; and (iv) facts that were not placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

OEB staff agrees with the submission of SEC that the list articulated in Rule 42.01 is not exhaustive.

In the Decision on a Motion to Review the Natural Gas Electricity Interface Review Decision[2] (NGEIR Review Decision), the OEB 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 was enough substance to the issues raised such that a review based on those issues could result in the OEB varying, cancelling or suspending the decision. The OEB stated as follows:

> 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.

In the *Grey Highlands v. Plateau*[3] decision the Divisional Court dismissed an appeal of an OEB decision where the OEB determined that the motion to review did not meet the Threshold Test and the OEB did not proceed to review the earlier decision. In upholding the OEB's decision, the Divisional Court stated:

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[2] *Natural Gas Electricity Interface Review Decision with Reasons*, EB-2006-0322/0338/0340 (May 22, 2007), p. 18.

[3] *Grey Highlands (Municipality) v. Plateau Winds Inc*. [2012] O.J. No. 847 at paragraph 7

> The OEB's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.

SEC submitted that its motion did not seek to re-argue the exercise of the OEB's discretionary powers with respect to costs, but only sought for the OEB to review and vary its Decision so as to require the OEB 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.

SEC submitted that its motion satisfied the threshold test as in the Decision, the OEB had failed to address a material issue, which was 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 OEB's own Practice Direction on Cost Awards. SEC argued that this was the exact type of error that raised a question of the correctness of the decision as well as being an error of law. SEC submitted that this was the case, 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.

OEB staff submits that the threshold test has not been met. There is no identifiable error that would give rise to the correctness of the Decision.

2. No Identifiable Error that Raises a Question of Correctness of Decision

SEC has set out five reasons, as noted above, which in SEC's view meet the threshold test of establishing an identifiable error that raises a question as to the correctness of the Decision.

OEB staff disagrees with SEC and will address each of SEC's arguments below.

a. *Compliance with the Practice Direction on Cost Awards* (Practice Direction)

SEC submits that the OEB failed to provide any meaningful consideration to the time spent by parties prior to the application being filed and the value of that time. SEC submits that the time spent prior to the application being filed was related to matters concerning an upcoming application, co-ordination with other intervenors and with OEB Staff related to sharing of information and responsibilities during the proceeding, attendance at consultation and information sessions hosted by the Applicant as well as informal consultations with the Applicant on the content and direction of the upcoming Application, and co-ordination of the process to aid efficiency.

OEB staff submits that when considering cost claims, the OEB has complete discretion in determining the amount of any costs to be paid: section 2.01(b). In determining the amount of the costs awards the OEB may consider the criteria listed in section 5 of the Practice Direction. OEB staff submits that section 5 of the Practice Direction is permissive, not exhaustive and expressive of the discretion which resides within the OEB when determining cost claims.

In addition section 30 of the *Ontario Energy Board Act, 1998* is clearly permissive/discretionary in that it states “the Board may order a person to pay all or part of a person’s costs of participating in a proceeding before the Board.”

OEB staff submits that the Panel considered this matter in depth in making its Decision on Cost Awards, as evidenced by the level of detail in the Decision itself.

> 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 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

OEB staff further submits that the panel clearly articulated its reasons for disallowing a portion of SEC's claimed costs. Specifically the Panel noted 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 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 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.

OEB staff submits that it is clear that the Panel did consider the time spent by SEC prior to the application being filed and determined that it would be inappropriate to allow any costs claimed related to those activities which occurred prior to the filing of the application.

b. *The Decision is consistent with the Practice Direction on Cost Awards – no change in Policy*

SEC submits that the OEB, by denying the costs for time spent prior to the filing of the application is implementing a new policy, and applying it retroactively to work done prior to the time anyone could have known about such a policy. OEB staff disagrees. OEB staff submits that there has been no change in policy and no retroactive implementation.

OEB staff submits that the criteria listed in section 5.01 of the Practice Direction permit (but do not require) the OEB to consider the nature of the participation by the cost claimant; the quality and relevance of the cost claimant's contribution to the proceeding; and the proportionality of the cost claim to the value of the contribution.

SEC submits that the "misapplication or non-consideration of an existing OEB policy are also grounds for review as they go the correctness of the decision.[4]" OEB staff submits that the OEB's denial to accept SEC's claim for costs in a

[4] *Written Submissions of the School Energy Coalition on the Threshold Question,* August 29, 2016 at para 7

proceeding for time spent prior to the proceeding being commenced, an application being filed and SEC being granted intervenor status, is completely consistent with the OEB's Practice Direction on Cost Awards.

OEB staff submits that the OEB properly applied the policy. First, the Practice Direction sets out the following:

> "intervenor", in respect of a proceeding, means a person who has been granted intervenor status by the OEB and, in respect of a notice and comment process under section 45 or 70.2 of the Act or any other consultation process initiated by the OEB, means a person who is participating in that process, and "intervention" shall be interpreted accordingly;
>
> "party" means an applicant, an intervenor and any other person participating in a OEB process;
>
> "process" means a process to decide a matter brought before the OEB whether commenced by application, reference, Order in Council, notice of appeal or on the OEB's own initiative, and includes a notice and comment process under section 45 or 70.2 of the Act and any other consultation process initiated by the OEB;

OEB staff submits that the time being claimed by SEC relates to activities spent prior to an application being filed and prior to SEC becoming a party to the proceeding. The Practice Direction is clear that cost awards are eligible for activities that take place during the process, in other words after an application has been filed.

OEB staff submits that as there is no change in policy that has been identified or that can be substantiated then it is unnecessary to address the argument put forward by SEC that the OEB has, in the Decision, implemented a new policy with respect to cost awards nor is it necessary to address the argument about operative orders. To the extent that the OEB may have allowed some "pre-filing" intervenor cost awards in the past, this does not amount to a policy.

Procedural Fairness

SEC's final reason that it put forward in support of its position that the threshold test has been met is a claim that the OEB failed to ensure procedural fairness in the making of the "new policy" which will deny costs for time spent for work

completed prior to an application being filed. SEC also argues that the OEB has in the past allowed for costs prior to the application being filed. While this may be true, the OEB has discretion in making an award of costs and is not bound by precedent.

As the OEB set out in its Decision and Order on a Motion to Review Veridian's 2012 IRM decision[5]:

> The OEB concludes that a lack of regulatory consistency cannot be an error, because if it were, then a future panel's discretion would be bound by the prior decision. This is wholly inappropriate. While a panel should endeavour to consider other similar cases and the associated decisions, no prior decision of the OEB can fetter the discretion of a later panel. Further, any enquiry into regulatory consistency would result in a potentially complex analysis. For example, the OEB would need to consider and potentially determine which decision, from amongst a set of decisions, is the "correct" decision which in turn forms the standard against which others are measured for consistency. Does the earliest decision form the standard against which others are measured for regulatory consistency? If there are two or more decisions which appear to be the same, do they form the standard against which other decisions before or after are measured for consistency? The enquiry in any particular review motion would introduce an enquiry into other decisions which had not been the direct subject of the motion.

OEB staff submits that the Practice Direction gives the OEB discretion in awarding costs and the Statutory Powers Procedure Act gives the OEB the ability to make its own procedures.

In any event, OEB staff submits that no breach of procedural fairness has occurred. The OEB has in place in its Practice Direction a process which fairly and transparently assesses the claims of any party which seeks its costs of participating in a OEB proceeding. Section 10.02 requires any party submitting a costs claim to address reasons why costs should be awarded, as well as submitting detailed cost claims in a OEB approved format. In section 5.01 the OEB has clearly indicated that the cost claims will be evaluated using a number of criteria, including the conduct of the party claiming costs and the contribution that the party made. The Practice Direction itself refers to a “party” being entitled to claim costs for participation in the “process” (in other words after an application has been filed).

[5] *Ontario Energy Board v. Veridian Connections* EB-2012-0201 at paragraph 29

Having followed the Practice Direction, and having provided reasons for the reduction in the costs claim, the OEB has satisfied its duty of procedural fairness and the legitimate expectation of a party that it would follow its own procedure. OEB staff submits that as the duty of procedural fairness has been met, SEC's fifth and final reason for the threshold test being met has failed. OEB staff submits that as the threshold test has not been met the motion should be denied.

Conclusion

As stated in the beginning of this submission, the NGEIR Review Decision states 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 OEB varying, cancelling or suspending the decision.

In demonstrating an error, the grounds put forward by the moving party must show that the findings are contrary to the evidence, the panel failed to address a material issue or something of a similar nature. The alleged error must be material and relevant to the outcome of the decision. A motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and there is no purpose in proceeding with the motion to review.

OEB staff submits that the grounds put forward by SEC have failed to demonstrate any errors were made by the OEB in the Decision, and consequently SEC has failed to meet the threshold test by failing to establish there are reasons to doubt the correctness of the Decision.

- All of which is respectfully submitted-