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.

REPLY SUBMISSIONS OF THE SCHOOL ENERGY COALITION ON THE THRESHOLD QUESTION

A. OVERVIEW

1. The School Energy Coalition ("SEC") brought this motion to review the Decision and Order 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 Procedural Order #1 dated August 22, 2016, the Board ordered separate consideration of the threshold question.

2. SEC filed its written submissions on the threshold question on August 29, 2016. OEB Staff filed its written submissions on September 1, 2016.

3. SEC notes that Toronto Hydro did not file any submissions on this Motion. SEC does not suggest that the Board should draw any inference from that fact[1]. The Applicant simply chose not to participate in this Motion.

4. As a result, these Reply submissions respond only to the submissions of OEB Staff.

[1] Conversely, the fact that Toronto Hydro did not object to the original cost claim by SEC implies, in our submission, that Toronto Hydro did not have the same concerns about the SEC claim as the Board expressed in the Decision.

B. REPLY

5. OEB Staff has made three arguments in its submissions:

a) The Board panel properly and fully considered the time spent by SEC, and made a determination that the cost of certain pre-filing hours should not be reimbursed[2].
b) The Practice Direction explicitly limits cost claims to time spent by persons after they become parties to a proceeding, and the Board panel complied with that requirement[3].
c) In exercising its absolute discretion with respect to cost claims, there is no expectation that the Board act consistently, and failure to do so does not call into question the correctness of a decision[4].

These Reply Submissions deal with each of these arguments in turn.

6. ***The Board Panel Properly Considered the Subject Time.*** The portions of the Decision quoted by OEB Staff themselves demonstrate that the argument is not correct.

7. OEB Staff includes three quotes from the Decision. The first quote[5] deals only with the higher level determination of the appropriate effort for the proceeding. The Board was clear that, after that basis was determined, some other factors had to be taken into account. Therefore, this was not relevant to the recoverability of the pre-filing time.

8. The second quote[6] deals with the pre-filing time, but does not provide any rationale for its disallowance. It just says it "will not be recoverable". This does not engage the issue, and does not bring into consideration any of the items listed in Section 5.01 of the Practice Direction.

9. The third quote[7] deals with the pre-filing time, but also does not provide any rationale. It simply refers to "the reasons stated above" but, as noted, there were in fact no reasons stated above.

[2] OEB Staff submissions, p. 6.
[3] p. 7.
[4] p. 8.
[5] p. 5.
[6] p. 6.
[7] p. 6.

10. Thus, it is clear on the face of the record that the only determination that the Board made with respect to the pre-filing time was that, because it was incurred prior to the filing date, it would not be recoverable. No attempt was made to determine whether, in substance, it was responsible participation, or contributed to the process in any way. It was disallowed because the Board applied a "rule" or policy that has never before been communicated by the Board to parties, and a policy the rationale for which has still not been communicated to parties.

11. ***The Practice Direction Prohibits Recovery for Time Prior to Becoming a Party.*** OEB Staff argues that a process starts when an application is filed, and an entity is not an intervenor, and therefore a party eligible for costs, until they have been accepted by the Board as an intervenor in the proceeding.

12. This argument fails for three reasons.

13. First, OEB Staff make an argument that would prohibit costs prior to becoming a party to the proceeding, but then argue that the Board panel applied that requirement in deciding to disallow time spent prior to filing. These are not the same thing. The Board panel, in the Decision, was clear that they were disallowing time spent prior to the filing of the Application, not prior to the time when SEC became a party to the proceeding. The argument presented by OEB Staff necessarily implies that the Board panel's decision was not correct, but in a different way from SEC's position. If OEB Staff is right, then the Board panel erred in allowing time spent prior to Procedural Order #1, when all parties were accepted by the Board.

14. Second, the attempt to limit costs to persons who are, at that time, parties to the proceeding, would mean that intervenors could not spend any recoverable time on a matter until Procedural Order #1. For example, in deciding whether to intervene, including reviewing the application and discussing the issues with clients, intervenors would not be able to include that time spent by their counsel or consultants. Intervenors would, in effect, be dis-incented from acting responsibly in reviewing whether, and how, to intervene in proceedings, and dis-incented from reacting quickly and thoroughly to the filing of the Notice of Application.

15. As a practical matter, the Board's practice of setting the deadline for interrogatories at a time shortly after PO#1 would have to change. Right now, little time is provided after that, typically a week or two, despite the often two or three thousand pages of application material to be reviewed.

The reason this works is that parties should already be well advanced in their review of the evidence by the time PO#1 is issued, and should not have to start from scratch when they see PO#1. If the OEB Staff interpretation of the Practice Direction is correct, that would not be sensible any more. The Board would have to assume that intervenors and their counsel and consultants would only start looking at the application once they have received PO#1.

16. Third, this interpretation of the Practice Direction is entirely new, and not an appropriate reading of the Practice Direction. It is not just inconsistent with what the Board panel said in the Decision. It is also inconsistent with every other costs decision the Board has ever made, since pretty well all costs orders include time spent for at least some parties prior to PO#1.

17. The reason for the inappropriate interpretation is that OEB Staff is seeking to read into the definitions section of the Practice Direction a requirement that someone already be a party before they can spend time on a case. This is a tortured reading. The Board could indeed have had such a policy (although it would likely have been inefficient), but if the intent was to have such a blanket prohibition, it would have said so directly. Section 6 of the Practice Direction contains detailed prohibitions and restrictions on cost claims. Nowhere does Section 6 say "time spent prior to becoming a party" or "time spent prior to the application being filed" shall not be included.

18. The Board, and all parties, have always understood that all work that legitimately helps the Board in a Board process is eligible for costs. OEB Staff is seeking, after the fact, to propose a new interpretation of the Practice Direction, and one that quite clearly was never intended by the Board.

19. ***The Board is Not Required to be Consistent.*** SEC agrees that the Board is not required to exercise its discretion in a consistent manner, and notes that it did not make this argument in its submissions. In fact, SEC quite deliberately stated that it was <u>not</u> making any submissions on whether there is a legal requirement to be consistent, and if so in what circumstances.

20. What the Board is required to do is act in a rational manner, without any arbitrary, capricious, or illogical determinations. The Board is perfectly free to take a new approach to issues, even if that approach is inconsistent with the Board's past approach to those same issues. However, in our submission if the Board does so, it has two responsibilities:

a) Provide an explanation for the change in approach, and a rationale for why the new approach is better than the old.

b) Explain how the Board is ensuring that the change of approach is not prejudicing parties – whether applicants or intervenors – who have relied on a consistent past approach to the same issue.

The Board did neither here.

21. SEC also notes that, in the real world, the Board does seek to maintain consistency. That is just good regulatory practice. The initiation of a new policy is virtually never done after the fact.

CONCLUSION

22. SEC reiterates its more general comments in its initial submissions, especially as they relate to the efficiency of Board processes, and responsible participation by parties. The essence of the Decision was that SEC was penalized for acting in a responsible manner, and following the provisions of Section 5.01 of the Practice Direction fully, i.e. not just technically, but in spirit as well. For going the extra mile to be as helpful as possible to the Board, SEC had recovery of reasonably incurred costs denied. This should not be the outcome of the application of the Practice Direction by the Board, or indeed of any of the Board's policies. The submissions of OEB Staff do not deal with this, the most substantive of SEC's concerns.

23. SEC submits, based on the detailed analysis in this Reply, that the arguments made by OEB Staff cannot stand, and the threshold test is met.

All of which is respectfully submitted.

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