



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

DECISION ON MOTION TO REVIEW AND VARY COST AWARDS DECISION AND ORDER

EB-2016-0208

SCHOOL ENERGY COALITION

**Notice of Motion to review and vary the Decision and Order on
Cost Awards in relation to EB-2014-0116 which was Toronto
Hydro-Electric System Limited's Custom Incentive Rate
Application**

BEFORE: Ellen Fry
Presiding Member

Christine Long
Vice Chair and Member

Paul Pastirik
Member

November 3, 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). This was the decision of the Ontario Energy Board (OEB) on the custom incentive rate application of Toronto Hydro Electric System Limited (Toronto Hydro). In this motion SEC alleges that the OEB erred in fact and law by not allowing SEC to recover its costs for time spent prior to the filing of the Toronto Hydro rate application.

On August 22, 2016, the OEB issued a Notice of Hearing and Procedural Order No. 1 providing for submissions on the threshold question as contemplated by Rule 43.01 of the OEB's *Rules of Practice and Procedure*. OEB staff made a submission and SEC made a reply submission.

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 (the threshold test).

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 that have arisen; and (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

SEC and OEB staff agreed that the list articulated in Rule 42.01 is not exhaustive.

Positions of the Parties

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 to cause the OEB to consider a material issue. This issue was whether time spent prior to the filing date was "reasonably incurred", provided value to the process, and would be consistent with the OEB's Practice Direction on Cost Awards. SEC argued that this raised a question of the

correctness of the Decision and was an error of law. SEC submitted that the Decision provided no reason for excluding this category of work or for imposing an apparent change in policy without prior warning.

OEB staff submitted that the threshold test had not been met as there is no identifiable error that would give rise to an issue concerning the correctness of the Decision.

OEB staff noted in its submission that SEC had set out five arguments on why, in its submission, the threshold test had been met:

- a. SEC complied in all respects with the *Practice Direction on Cost Awards* (Practice Direction);
- b. The OEB purported to change its policy retroactively;
- c. New policies should be developed in an appropriate manner;
- d. Operative orders must have a reasonable basis; and
- e. Procedural fairness

OEB staff submitted that none of the reasons set out above could be substantiated and accordingly there had been no identifiable error which raised a question as to the correctness of the Decision.

a. ***Compliance with the Practice Direction***

SEC submitted that the OEB did not adequately consider the value of the time spent by parties prior to the application being filed. OEB staff submitted that the OEB had complete discretion in determining the amount of any costs to be awarded. OEB staff argued that section 5 of the Practice Direction, which sets out criteria that the OEB may consider, is permissive but not exhaustive, and expressive of the discretion which resides within the OEB when determining cost claims.

b & c. Change to the OEB's Policy

SEC submitted that the OEB, by denying the costs for time spent prior to the filing of the application, was implementing a new policy. SEC submitted that the Practice Direction does not say that work done prior to the application being filed should be excluded from cost awards. SEC submitted that parties have always understood that all work that assists the OEB in an OEB process is eligible for a cost award.

In its view, the OEB should not have changed its policy retroactively, i.e. by applying it to work done prior to the time the OEB communicated the new policy.

OEB staff submitted that there had been no change in policy. This was because, in OEB staff's view, the criteria listed in section 5.01 of the Practice Direction are criteria that the OEB is permitted to consider, but is not required to consider.

OEB staff also submitted that the Practice Direction is clear that the OEB's policy is to award costs only for work that takes place during a proceeding, in other words, after an application has been filed.

d & e Reasonableness and Procedural Fairness

SEC submitted that the essence of the Decision was that SEC had been penalized for acting in a responsible manner and following the provisions of Section 5.01 of the Practice Direction.

SEC further argued that the OEB had failed to ensure procedural fairness in the making of what it considered to be a new policy, as described above.

OEB staff submitted that the OEB has discretion in making cost awards, given that the Statutory Powers Procedure Act gives the OEB the ability to determine its own procedures and practices, that the Practice Direction gives the OEB discretion in awarding costs and that the OEB, as an administrative tribunal, is not bound by previous OEB decisions.

SEC submitted that although it agrees that the OEB has discretion and is not bound by precedent, it should have provided a prior explanation of the alleged policy change. SEC submitted that the OEB's practice has been to maintain consistency and virtually never to initiate a new policy retroactively.

Findings

The OEB has determined that the motion to review does not pass the threshold test and therefore will not proceed.

As submitted by OEB staff, the Statutory Powers Procedure Act gives the OEB the ability to determine its own procedures and practices, the Practice Direction gives the OEB discretion in awarding costs and the OEB, as an administrative tribunal, is not bound by precedent. Accordingly, when considering cost claims, the OEB has discretion in determining the amount of any costs to be paid¹.

In addition, the OEB agrees with OEB staff that the Practice Direction only contemplates cost awards for work done in proceedings. Work done before the application was filed is not work done in a proceeding. Accordingly to disallow it is not a change in the OEB's policy as articulated in the Practice Direction.

The OEB also notes that in determining the amount of the costs awarded the OEB is permitted to consider the criteria listed in section 5 of the Practice Direction, but is not required to do so or limited by these criteria.

The Decision set out detailed reasons for the assessment of SEC's cost claim. In its reasons, the OEB specifically addresses how it determined the appropriate amount of preparation time. At pages 2- 3 of the Decision the OEB stated:

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 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.

¹ Practice Direction, s. 2.01: "The Board may order any one or more of the following: (b) the amount of any costs to be paid or by whom any costs are to be assessed and allowed"

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.

At page 4 of the Decision, the Panel then noted that:

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.

Accordingly, the OEB finds that SEC has failed to meet the threshold test of whether the matter should be reviewed. The OEB has considered all the arguments put forward by SEC and has determined that the grounds put forward by SEC do not raise a question as to the correctness of the Decision. None of the grounds for a motion to review as set out in Rule 42.01 have been established. The OEB therefore denies SEC's motion. As SEC was unsuccessful on this motion, the OEB will not grant SEC recovery of its costs of the motion.

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. SEC's motion to review and vary is denied on the basis that it does not meet the threshold test.
2. SEC's request for recovery of its costs for the motion is denied.

DATED at Toronto, November 3, 2016

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary