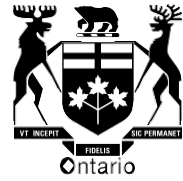


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BY EMAIL

March 6, 2019

Ontario Energy Board
P.O. Box 2319
27th Floor
2300 Yonge Street
Toronto ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: OEB Staff Submission
Association of Major Power Consumers in Ontario
Motion to Review and Vary OEB Decision on Cost Awards EB-2018-0085
OEB File Number: EB-2018-0304**

Pursuant to Procedural Order No. 1, please find attached the submission of OEB staff in the above referenced proceeding.

Yours truly,

Original Signed By

Michael Bell
Project Advisor, Application Policy & Climate Change

cc: Parties to EB-2018-0304/EB-2018-0085/EB-2016-0152



ONTARIO ENERGY BOARD

OEB Staff Submission

Association of Major Power Consumers in Ontario

**Motion to Review and Vary OEB Decision on Cost
Awards EB-2018-0085**

EB-2018-0304

March 6, 2019

INTRODUCTION

On October 25, 2018, the Association of Major Power Consumers in Ontario (AMPCO) filed a Notice of Motion to review and vary the Decision and Order on Cost Awards in relation to a motion to review and vary the Decision and Order on the Ontario Power Generation Inc. (OPG) 2017-2021 payment amounts (OPG Motion)¹. AMPCO requests that the Ontario Energy Board (OEB) amend its Cost Decision and allow recovery by AMPCO of a further 0.6 hours of counsel's time for review of the OPG Motion Decision, which costs (totaling \$223.74, inclusive of HST) were disallowed.

On February 13, 2019, the OEB issued combined Notice of Hearing and Procedural Order No. 1 in which set out dates for AMPCO, OPG, intervenors and OEB staff to file written submissions on the merits of the motion filed by AMPCO.

The following are the submissions of OEB staff.

SUBMISSION

OEB staff submits that the motion should be denied.

Rule 42.01(a) of the OEB's Rules of Practice and Procedure requires anyone bringing a motion to review and vary an OEB order or decision to identify the grounds for the motion:

Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:

- set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
 - error in fact
 - change in circumstances
 - new facts that have arisen
 - facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time

In a motion to review related to the Natural Gas Electricity Interface Review decision, the OEB stated:

Therefore, the grounds must "raise a question as to the correctness of the order or decision". [...]

¹ EB-2016-0152

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.²

In a motion to review related to an OPG decision, the OEB stated: “The OEB has previously applied the reasonableness standard in considering a motion to review, and has said that the original hearing panel is entitled to deference. In this Decision, the OEB continues to apply the reasonableness standard and gives deference to the original hearing panel.”³

A motion to review should only overturn a decision, therefore, where the reviewing panel determines that the original decision was not reasonable. A clear error is grounds for overturning a decision, but choosing one of several supportable outcomes is not.

Although OEB staff recognizes that the OEB has frequently allowed costs for reviewing and reporting on a decision, there is also a case where it has denied these costs. In a previous OPG cost award decision⁴, costs were awarded to AMPCO and Canadian Manufactures and Exports (CME). CME’s costs for reviewing the final decision were denied. The decision stated the following:

CME has claimed 0.2 hours of counsel’s time for reading the final decision in this case. The OEB does not find that the reading of a final decision provides any value to the panel and therefore will disallow the corresponding amount. The OEB will therefore reduce the claim by \$51.98.

² EB-2006-0322/EB-2006-0338/EB-2006-0340, Decision with Reasons, May 22, 2007, p. 18

³ EB-2018-0085, Decision and Order, August 30, 2018, p. 5.

⁴ EB-2015-0374

The granting of cost awards is discretionary. The OEB is not required to make any awards of costs at all, and the fact that it has made certain cost decisions in the past does not bind it to make the same decision in all future cases. The OEB should only overturn the exercise of a discretionary power in the clearest of circumstances. While it is not a typical practice of the OEB, it's not unreasonable to require an intervenor to absorb the costs of reviewing a final decision and report on the outcome from its consultant. OEB staff submits that the decision made by the original panel falls within the realm of reasonable possible outcomes and therefore should not be overturned.

All of which is respectfully submitted