



PUBLIC INTEREST ADVOCACY CENTRE
LE CENTRE POUR LA DÉFENSE DE L'INTÉRÊT PUBLIC

**Niagara-on-the-Lake (NOTL)
EB-2019-0143
Motion to Review and Vary Decision EB-2018-0056**

Submission
of the
Vulnerable Energy Consumers Coalition
(VECC)

July 11, 2019

**John Lawford
Vulnerable Energy Consumers Coalition**

Public Interest Advocacy Centre
613-562-4002
piac@piac.ca

1.0 Submissions

1. On April 29, 2019 Niagara-on-the-Lake (NOTL) filed a notice of motion to review and vary the Decision and Order of the Ontario Energy Board EB-2018-0056. That Decision established electricity distribution rates for NOTL effective May 1, 2019 and established the (OEB).
2. The Board's Rules of Practice and Procedure require the grounds for a motion be provided which:
 - (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;
3. However, NOTL relies on none of these clearly articulated grounds. NOTL instead cites and relies upon the Board's inherent discretion to reverse an incorrect decision outside of these grounds.¹ However, the Applicant in this case must "raise a question as to the correctness of the order or decision."²
4. To assist the Board in reviewing in this exceptional circumstance, the Rules provide in s. 43.01 for a "threshold" inquiry by the Board (with or without a hearing) into whether to review the decision on the merits. To satisfy this threshold test, which the Board has called for comments upon, the moving party must both raise a question as to the correctness of the order or decision and demonstrate that there is enough substance to the issues raised that a review could result in the OEB varying, cancelling, or suspending the decision. In effect, the Board in a threshold review is seeking to separate out cases "when a party simply seeks to reargue the case."³
5. NOTL is simply seeking to reargue its case. NOTL can provide no specific detail as to what error was made by the Board. Instead, NOTL proffers a litany of speculation as to how the Board came to its decision without an articulation of the material errors. Each ground raised by NOTL supports the decision. They read:
 - i. The Decision failed to take account of NOTL Hydro's detailed evidence about its forecast OM&A costs for 2019, and about the actual costs required to run the utility in 2018.

¹ See EB-2006-0003, City of Hamilton, Decision on Motion to Review and Vary (March 3, 2016) at p. 4.

² *Ibid.*

³ *Ibid.*, at p. 5.

ii. Despite contrary direction from the Pacific Economics Group Research, LLC (PEG) reports to the OEB, the Decision in this case failed to include the impact of the growth in NOTL Hydro's kWh delivered and system peak capacity over the years from 2014 to 2019 when determining a reasonable level of OM&A costs for the Test Year.

iii. While the Decision properly recognized that NOTL Hydro faces extraordinary costs that will not be accommodated in an OM&A budget that is increased only by inflation and growth, the Decision fails to recognize all such extraordinary cost items and provides no explanation as to the items and amounts excluded.

iv. While the Decision properly determined that NOTL Hydro should be permitted to include in the Test Year budget certain previously capitalized OM&A costs that were not included in the base 2014 OM&A budget, it is inconsistent to exclude those costs from the base costs that are adjusted to arrive at the 2019 Test Year budget.

6. As regards point (i), the allegation itself admits that the Board considered this evidence but simply did not accept NOTL's argument that the result of the evidence should be the accounting standard changes entitled NOTL to recover these amounts in rates. The Board summarized the NOTL evidence and argument in detail at p. 7 of the Decision and Order when it stated:

NOTL Hydro stated that a discrete and significant contributor to the OM&A increase is the \$130,784 adjustment due to the accounting standard changes. This adjustment is related to the costs of senior management's time that were capitalized under Canadian General Accounting Principles (CGAAP) in the 2014 cost of service application and that are now expensed and included within the 2019 OM&A budget under International Financial Reporting Standards (IFRS). NOTL Hydro stated that the adjustment is needed for an "apples-to-apples" comparison and it was not a new cost in the OM&A budget for the test year.

7. The Board could not, *ipso facto*, have "failed to take account of" this evidence that it cited. Instead, the decision does not state that it refused or failed to consider this evidence and argument. NOTL's argument on this point assumes that any presiding member who had considered their evidence on this point *would have accepted* NOTL's proposed OM&A costs submission. However, the decision, on its face, is also consistent with the determination that the Board simply considered NOTL's evidence but rejected NOTL's argument on this point.
8. As regards point (ii), the Board again recites and considers NOTL's "PEG" research reports but simply concludes that NOTL's argument that these factors should allow it to increase its OM&A expenses in rates:

NOTL Hydro used three of the growth factors out of the five used by Pacific Economics Group (PEG) in the total cost benchmarking to measure the impact of

growth on the OM&A expense. These three factors are customer growth, load growth and system peak growth. NOTL Hydro stated that the other two factors (increase in distribution lines and acceleration in customer growth) are not used because NOTL Hydro has seen no noticeable change for these two factors.

9. In other words, the Board received and considered the evidence in light of NOTL's argument and simply did not accept the argued outcome.
10. As regards point (iii), NOTL's issue statement that "the Decision fails to recognize all such extraordinary cost items and provides no explanation as to the items and amounts excluded" assumes that all extraordinary cost items should go into rates. However, there is no such principle. Instead, the utility must justify "extraordinary" costs to add to rates precisely because they are not ordinary.
11. Further, the Board does give detailed explanations of the rejection of these extraordinary items and amounts excluded in three written pages headed "Findings" (from p. 10 to p. 12). The gist of these findings is that although NOTL would prefer that their 2014 OM&A expenses not be considered relevant to setting their present OM&A expenses, that the Board did find the 2014 OM&A to be both a necessary starting point and "yardstick" to judge the need for, and reasonableness of, NOTL's requested major OM&A increase (at p. 10):

The fixing of the OM&A budget, however, is assisted by reference to accepted parameters measuring sources of cost increases to utility expenses including inflation and customer growth. The development of a guide in the form of an envelope approach to the budget helps provide a yardstick that avoids micromanagement of the regulated utility and helps the regulator cope with any asymmetries of information that can be present. In this application, the OEB has determined to use this guide to assist in evaluating the reasonableness of the NOTL Hydro's request for a 38% increase in OM&A.

12. As regards point (iv), in its argument-in-chief, NOTL Hydro itself used a higher-level approach to evaluate the 2019 OM&A budget. The high-level approach suggested started with the 2014 approved OM&A budget adjusted for an accounting standard change of \$130,784, applying the inflation and growth factors and adding the costs related to the new and increased services to determine the 2019 OM&A budget. NOTL Hydro stated that this approach was used by the OEB in its decision on Thunder Bay Hydro's 2017 rates.
13. It therefore lies ill in the mouth of NOTL to complain that this approach is an impermissible rate-setting approach. Instead, NOTL seeks to hair-split regarding certain costs in OM&A that, under its first three points above, it convinced itself, but not the Board, were required to be added to the OM&A costs. This is simply an exercise in gainsaying and rearguing, therefore and not an allegation of an error that systematically would lead to an incorrect decision.
14. A review of the Supplementary Written Submissions of NOTL shows it is nothing more than a 600 page refiling and re-argument of the Application. It extracts evidence favourable to the

position put forward and ignores any countervailing evidence or arguments. The very small amount of new evidence, such as the table of Projected NOTL Hydro OM&A Costs based on PEG Model is simply indecipherable without the benefit of further discovery⁴.

15. Contrary to the Board's decision the Applicant makes claims and appeals that are patently unreasonable. Take the following suggestion by the Applicant:⁵

NOTL Hydro submits that the Board's failure to take account of the fact that NOTL Hydro strives to control costs, and has maintained low, predictable overall rates demonstrates the error in the Decision about OM&A budget. It is not sufficient or appropriate to look only at NOTL Hydro's 2019 OM&A forecast in comparison to 2014 Board-approved, as was done in the Decision. The actual components of the budget must be considered (including recent actual spending, as detailed below), and the impacts on overall rates should also be taken into account. Failure to explicitly consider these items results in a Decision that includes material errors, and that should be corrected

16. If this statement is true then the entire underlying premise of the Board IRM and other incentive rate setting mechanisms must be incorrect. IRM or any X-I type of ratemaking relies on prior years to make rate adjustments without looking at cost details. This is precisely what the Applicant is saying is incorrect in this instance. The fact that the Board adopts the same logic used in other rate setting methodologies is a sign of internal consistency - not unreasonableness. In fact, it can be essential to consider this form of analysis when, as is the case for NOTL, a utility has previously been on an IRM rate setting scheme. Otherwise, the efficiency gains made during the incentive rate period can be completely lost (or worse, regressed) when establishing new cost of service rates.
17. In any event, the test for reasonableness does not require that the Ontario Energy Board enter into a line by line debate with the Applicant. When the Board chooses to comment on detailed and specific aspects of the application, disagreeing with the Applicant's argument does not make it *per se* unreasonable. For example, it is perfectly reasonable for the Board to say to a utility that seeks to incorporate into rates 100 employees should only have compensated in rates the cost of 99 employees. If this were not so, then the Board would be obliged to simply adopt the application as filed. Again, the setting of rates can (and we would argue should) consider how to create incentives which improve service and lower costs to ratepayers. That is not unreasonable – in fact it is the *raison d'être* of IRM regulation. Monopolies are spared the more severe consequence of operating in markets with robust competition and instead face the regulator whose role is both to set reasonable rates and induce reasonable incentives to keep costs in line with those consumers face in other markets.
18. The Board is not obligated to find specific arguments of the Applicant persuasive or that they be given the greatest weight. This motion is essentially a refiling and re-argument of specific issues to exactly this end. For example, numerous references are made to NOTL's cost/rate performance as compared to other utilities. The implication is that NOTL is more cost

⁴ NOTL _Notice of Motion, Webdrawer: SUB-2015 Cost of Service_20190620, page 9.

⁵ NOTL Hydro Motion for Review and Variance Supplementary Written Submissions, page 4.

efficient than some other utilities and that therefore this relative efficiency entitles NOTL to obtain all costs their application sought. This is not new evidence nor even persuasive argument; there is no reason to believe the Board has not considered the position put forward by the Utility. Certainly it is possible for the Board to find that a utility is cost efficient but it can always be more efficient. If it were not so, then the entire regulatory model would distill down to setting rates to that of the least efficient utility in the Province.

19. In this Application, VECC argued against inclusion of existing and continued high cost undergrounding of physical plant in the NOTL service areas. We put forward, we hoped, persuasive arguments to the Board. The Board declined to adopt the entirety of our argument on these matters. The reasons set out in its decision are no different in their nature and kind that those it provided when declining to adopt in whole the Applicant's proposed OM&A costs.
20. The Applicant also speculates that the Board's failed to consider NOTL Hydro's most recent actual OM&A expenditures. They argue that an approved 2019 OM&A budget that is \$168,000 lower than NOTL Hydro's actual OM&A expenditures for 2018 is a material error.⁶ This is not so. The Board clearly did not fail to consider actual and forecast OM&A figures – these are clear in the Decision and on the record of the proceeding. What the Board did not do, to the chagrin of the Applicant, is to assume that 2018 costs must form the basis of 2019 costs. If the premise of the Applicant's grievance is correct then again it would be a simple matter for any utility to inflate its actual operating costs in the year before its rebasing to embed a higher ongoing cost.
21. Furthermore, NOTL raises menacing but false alarms by stating that the decision failure to adopt the Applicants proposal use actual OM&A expenditures as the basis for future OM&A will have negative impact on customer service. If the Utility does not find meaningful savings it is still obligated to properly serve its customers. Assuming the forecasts of the Utility in the event match actual results then what might suffer, if efficiencies are not found, are returns to NOTL's shareholders. It is the very nature of efficiencies that they arise out of the shareholder's attempt to maintain or improve financial returns on invested capital.
22. A review panel is not in as good a position as the original panel was to assess the facts on which the decision is to be based. The original panel sees the witnesses, and has a chance to question them and listen to the cross-examination of opposing views and positions. The original panel also sees the totality of the evidence, not just the narrow subset put before the review panel. These advantages mean that the original panel is in the best position to position to determine the facts in their entirety. The decision of the Board for those findings favourable to the Applicant are no different in kind to those that are less favourable. It follows then that a rehearing of the matters put forward in the motion should be considered in light of the entire application.
23. VECC therefore submits that the Applicants, NOTL, have not satisfied the threshold for reconsideration and if this threshold has been met that the decision is not incorrect.

⁶ NOTL Submission Motion Review, page 4.

24. In summary our submissions are:
- a) The motion should be denied on the basis that it fails to meet the threshold test.
 - b) In the alternative, the motion should be denied on the merits because no demonstrably unreasonable error of fact exists in the Decision.
 - c) In the further alternative, the motion should be denied on the merits because the facts determined by the Board panel in the Decision are not incorrect.
25. VECC respectfully submits that it has acted responsibly and efficiently during the course of this proceeding and requests that it be allowed to recover 100% of its reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED