



BY EMAIL and RESS

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2300 Yonge Street
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July 11, 2019
Our File: EB20190143

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2019-0143 – NOTL Motion to Review – SEC Submissions

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order No. 1, please find the submissions of SEC on the motion to review

Yours very truly,
Shepherd Rubenstein P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and interested parties (by email)

ONTARIO ENERGY BOARD

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 Niagara-on-the-Lake Hydro Inc. for an Order or Orders approving or fixing just and reasonable distribution rates effective May 1, 2019.

AND IN THE MATTER OF the Board's Decision and Order dated April 11, 2019 (updated April 23, 2019).

AND IN THE MATTER OF Rules 8 and 40, 42 and 43 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

**SUBMISSIONS OF THE
SCHOOL ENERGY COALITION**

1. Niagara-on-the-Lake Hydro Inc. ("NOTL") has brought a motion to review and vary a Decision and Order dated April 11, 2019 (the "Decision") in which the Ontario Energy Board (the "Board") determined a reasonable Operation, Maintenance, and Administration ("OM&A") budget for its 2019 test year.

2. Pursuant to Procedural Order No. 1, these are School Energy Coalition's ("SEC") submissions on the threshold question and merits of the motion. SEC submits NOTL's motion to review is no more than an attempt to re-argue the issue. It has identified no real errors, and certainly none that would materially affect the outcome of the Decision. The Board should dismiss the motion at the threshold stage, and if not, on the merits.

Decision

3. NOTL applied pursuant to section 78 for approval of its proposed rates for 2019. Most items were settled, but certain unsettled items, including OM&A costs, proceeded to a contested hearing before the Board.

4. NOTL had proposed a 2019 test OM&A budget of \$2,964,765 which would represent a 38% increase over its previously approved 2014 OM&A budget. In its Decision, the Board approved a

2019 OM&A budget of \$2,671,368, which still represented a significant 24%¹ increase over previous Board-approved amounts.²

5. In determining the appropriate 2019 OM&A budget, the Board used a framework which mirrored the broad approach that was proposed by NOTL in its evidence and Argument-in-Chief, which was generally adopted by all the other parties in their submissions.

6. First, the Board set an envelope amount by escalating annually the previously approved OM&A budget by the Board's inflation factor for that year, minus NOTL's specific productivity and stretch factor, and an additional amount for NOTL's actual annual customer growth.³ It did not accept that either load or system peak should be included in the adjustment factor as proposed by NOTL.⁴

7. Second, it provided an additional \$98,435 to reflect a reasonable amount for new requirements that had arisen since 2014, but that would not be captured within the envelope amount.⁵

8. Lastly, it provided NOTL a further \$130,874 to reflect the impact of accounting rules that changed since 2014, in which certain costs that were previously capitalized would now be included within the OM&A budget.⁶

Threshold Test

9. SEC submits that NOTL has not met the threshold test.

10. Pursuant to *Rule 43.01* of the Board's Rules of Practice and Procedure, the Board conducts a threshold inquiry to determine whether the matter should be reviewed on the merits. The threshold test was articulated by the Board in the Motion to Review Natural Gas Electricity Interface Review

¹ A 4.4% compound annual growth rate instead of the 6.6% applied for.

² *Decision and Order* (EB-2018-0056 – NOTL), April 11 201 [“Decision”], p.12

³ Decision, p.10-11, Table 2

⁴ Decision, p.10-11

⁵ Decision, p.12

⁶ Decision, p.12

(“NGEIR”) Decision.⁷ The Board stated that the purpose of the threshold test is to determine whether the grounds relied upon by the moving party raise a question as to the correctness of the decision, and whether there is enough substance to the issues raised that a review based on those issues could result in the Board varying, cancelling or suspending that decision.⁸ While the grounds listed in Rule 42.01(a) are not exhaustive, in order for the threshold test to be met, there must be an “identifiable error”⁹ and the “review is not an opportunity for a party to re-argue the case”.¹⁰ The Divisional Court has confirmed the Board’s principle that re-argument of issues is not an appropriate ground for review.¹¹

11. A review of the submissions made before the hearing panel by all parties, and a review of the alleged errors, demonstrates that NOTL has not met the threshold test. For each of its alleged errors, it is either impermissibly re-arguing the issue, it has not raised a question as to the correctness of the decision, or it has not shown that there is enough substance to the issues raised that a review would result in the Board changing its decision.

12. Simply put, NOTL is just not happy with the result. That is not an appropriate basis for another panel of the Board to review the matter on the merits.

Standard of Review

13. A motion to review is not a hearing de novo.¹² The original hearing panel, which had the benefit of considering the evidence first hand, is entitled to deference by a reviewing panel. The Board has previously said that “[a] reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and [it] is clearly wrong [emphasis added].”¹³

⁷ *Decision with Reasons* (EB-2006-0322/338/340 - NGEIR Motion to Review), May 22 2007 [“NGEIR”]; Also see *Decision and Order on Motion to Review* (EB-2013-0193 - Milton Hydro Motion to Review), July 4 2013, p.4; *Decision on Motion to Review Decision and Order* (EB-2013-0331 - NAN), January 16 2014), p.6

⁸ NGEIR, p.18

⁹ NGEIR, p.14

¹⁰ NGEIR, p.18

¹¹ *Grey Highlands (Municipality) v. Plateau Wind Inc.*, 2012 ONSC 1001, para. 7

¹² *Decision with Reasons* (RP-2004-0167/EB-2005-0188 - Natural Resource Gas Ltd. Motion to Review), October 6 2005, p.7

¹³ *Decision and Order* (EB-2009-0063 - Brant County Power Inc. Motion to Review), August 10 2010, para. 38

14. A reviewing panel is not tasked with re-considering afresh the evidence and arguments to determine what decision they would have reached. Rather, it is tasked with reviewing the decision to determine if it was unreasonable or there was a clear error.

15. The Board has consistently found that the standard of review of a reviewing panel is that of reasonableness, which requires “deference to the original hearing panel.”¹⁴ Giving deference to the findings and conclusions of the original hearing panel is especially important in the rate-setting context, where there is almost never a clear ‘right’ or ‘wrong’ answer. Most decisions the Board makes when determining forecast budgets are ones that require judgment and balancing of various considerations.

Alleged Errors

16. ***Envelope Argument.*** NOTL argues that the Board erred by resorting to an envelope approach with a number of specific adjustments, instead of presumably a line-by-line analysis of its proposed OM&A budget.¹⁵ In NOTL’s view this is inappropriate for a cost of service application¹⁶ and that the Board is required to provide an “explanation.....as to what, if any, items in the detailed OM&A budget are unreasonable”.¹⁷

17. What is most astounding about this argument is not that it goes directly against the Board’s longstanding practices in cost of service proceedings, or its stated outcomes-based ratemaking policies and the market proxy paradigm. No, what is most astounding is that NOTL is the party who introduced the specific approach the Board adopted in its Decision. NOTL is simply upset that the Board did not accept every element of NOTL’s approach, so it seeks a different outcome before this review panel.

18. It was NOTL that filed, unprompted, supplementary OM&A evidence in which it sets out an explanation of its proposed increase in OM&A spending, as compared to its 2014 Board-approved amounts. The supplementary evidence provided that the main cost drivers in the OM&A budget increase were inflation, growth, accounting standards, and certain new or increased services. The

¹⁴ *Decision and Order* (EB-2018-0085 - OPG Motion to Review), August 30 2018, p.5; Also see: *Decision and Order* (Hydro One Networks Inc), March 7 2019, p.5; *Decision and Order* (EB-2016-0225 - Milton Hydro Motion to Review), February 22 2018, p.10

¹⁵ Notice of Motion, para 18-24

¹⁶ Notice of Motion, para. 22

¹⁷ Notice of Motion, para. 23

inflation and growth amount was demonstrated through a formulaic annual increase, based on the Board's IRM formula and growth derived from the annual benchmarking information conducted by Pacific Economic Group ("PEG").¹⁸ This is the very same approach NOTL now appears to argue is, if adopted, an error. A significant portion of its Argument-in-Chief supporting its proposed OM&A budget was based on this supplementary evidence¹⁹, which it described as a "a higher-level approach" to justifying the increased amounts.²⁰ The Board used that approach, but more appropriately came to a lower number.

19. There are many approaches the Board can take to determine a reasonable test year budget, including an envelope approach. This is not new. The Board recognized this in its Decision and Order in EB-2009-0096:

In the past, the Board has used different techniques to determine the allowed OM&A. In some cases a detailed line by line examination has resulted in an equally detailed funding prescription from the Board. In other cases the Board has provided the applicant with an overall envelope of funding. In such cases the Board does not stipulate an approved amount of spending for any particular category of spending, but rather leaves to the applicant the freedom to apply that spending according to its own prioritization.²¹

20. This is all consistent with the Board's decision that "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."²² While NOTL appears to take issue with the fact that the Board did not identify any asymmetries, SEC submits it is inherent in the regulatory process that there are natural asymmetries of information between the utility, and the Board.²³ The fact that intervenors did not request an oral hearing is not evidence, as NOTL suggests, that parties did not believe that any asymmetry of information exists.

21. While NOTL claims that such an approach "is contrary to policy and previous Decisions of the OEB", it has not provided a single citation to support such a position. In fact, Board policy and

¹⁸ Additional OM&A Evidence, p.8-13

¹⁹ Argument-in-Chief, para 49-58

²⁰ Argument-in-Chief, para 49

²¹ Decision and Order (EB-2009-0096 – Hydro One Dx), April 9 2010, p.12

²² Decision, p.10

²³ Notice of Motion, para. 20

decisions demonstrate the exact opposite. The Board has often used the envelope approach to setting appropriate OM&A budgets.

22. With respect to OM&A specifically, the Board has in previous cases commented that it often uses the envelope approach which looks at an appropriate increase based on the previous approved amounts, and factors such as inflation, and productivity and efficiency improvements. For example in EB-2014-0073, the Board commented:

In its evaluation of OM&A budgets, the OEB has often used what has come to be known as an ‘envelope’ approach to determine the appropriateness of an applicant’s proposal. Rather than examine all components of OM&A costs line by line, an envelope approach assesses the reasonableness of the overall request, by reference to factors that include any increase from past periods, inflation and expectations regarding productivity and efficiency improvement.²⁴

23. NOTL’s view appears to be that setting an OM&A budget through a benchmarking exercise as opposed to a line-by-line analysis²⁵ ignores the Board’s statutory mandate to act as a market proxy.²⁶ Not only is using benchmarking to set rates permissible as one of the “variety of analytical tools” that the Supreme Court has said is available to the Board.²⁷ It is also a true outcomes-based approach, consistent with the Renewed Regulatory Framework,²⁸ and reflective of how the market normally works. The whole concept of a market proxy is that the competitive markets set external limits on the prices charged by companies, and those external limits are expressly not tied to the costs actually incurred by those companies. The regulator acts to set prices that reflect the costs of an efficiently run competitive company.²⁹

24. This outcomes based approach which looks at the costs in aggregate is especially useful when the proposed budget increase is as significant as that proposed by NOTL. As SEC noted in its Final Argument, the problem with taking the approach that one must dissect each individual line item when the proposed increase is so large, is that while that any given item on its own may be reasonable, added together they are not.³⁰ Companies cannot just spend on everything that they

²⁴ *Decision and Order* (EB-2014-0073– Festival Hydro), April 30 2015, p.8

²⁵ Notice of Motion, para 22

²⁶ *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, para.11

²⁷ *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, para.103; *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 293 DLR (4th) 684, para. 24

²⁸ *Decision and Order* (EB-2014-0073– Festival Hydro), April 30 2015, p.8

²⁹ *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, para.120.

³⁰ SEC Argument, para. 17

believe is a good idea. They must prioritize. It is for that reason that setting an OM&A envelope was not just a reasonable approach, but in the circumstance of the proceeding, the correct one.

25. Ultimately, the Board did not even rely exclusively on an envelope approach. It considered NOTL's evidence, and provided some additional funding to "recognize new requirements that must be met by the utility that have arisen since 2014" that are "not simply improvements, updates, or changes to operations driven by management operational decisions or directions."³¹ This is an approach that is to the benefit of NOTL, and is not something that other Board panels have always done.³²

26. ***Growth Factors.*** NOTL argues that the Board made a reviewable error in the Decision by declining to adjust the 2014 approved amounts for the two factors that it proposed – load and system peak growth. SEC submits the Board made no such error, and not only was it reasonable to exclude those proposed factors, but based on the evidence in the proceeding, it was correct to do so.

27. NOTL's entire argument is based on the PEG benchmarking model which includes not just customer growth, which the Board adopted, but also four other variables, kWh delivered (load growth), system peak capacity, and two others which NOTL itself noted "[t]here has been no noticeable change in" and so were not proposed to be included.³³ NOTL argues the Board erred by not using all three factors it argued were relevant.

28. NOTL made these arguments before the hearing panel, and the Board did not agree with them. As SEC noted in its submissions before the hearing panel, the PEG benchmarking model is based on total costs, not just OM&A costs. While load and system peak growth do impact costs, there is no evidence that they materially impacts the OM&A as opposed to the capital portion of total costs.

29. In fact, the evidence before the Board showed that, with respect to NOTL, they did not. First, when asked in an interrogatory to point to actual OM&A costs that have increased due to kWh and

³¹ Decision, p.11-12

³² *Decision and Order* (CNPI 2017 - EB-2016-0061), December 9 2017, p.5

³³ Additional Evidence, p.9; Those two others are km of distribution line, and rate of customer growth in last 10 years.

system peak growth, NOTL was unable to do so.³⁴ Second, the only evidence that showed any NOTL costs had increased due to load and system peak growth were capital investments that it had made or was planning to make.³⁵ Third, if load and system peak growth were the drivers in NOTL's OM&A costs, then one would expect to see it in the operations and maintenance categories, as it would involve increased work on new assets to service the load and system peak growth. But the evidence before the hearing panel showed that the increase in OM&A costs since its last Board-approved amount in 2014 occurred primarily in the administrative and general category.³⁶ Those categories should not be impacted by an increase in kWh or system peak growth, but could be impacted by increased customer growth.

30. As the Board noted, it was "assisted by reference to accepted parameters measuring sources of cost increases to utility expenses including inflation and customer growth [emphasis added]."³⁷ Load and system peak are not accepted parameters for such an exercise, and are inconsistent with the approach the Board has taken in previous decisions.³⁸

31. Even in its attempt to re-argue the issue in this Motion to Review, NOTL has not pointed to any evidence that demonstrates that NOTL's proposed OM&A cost increase was impacted by load and system growth.

32. The only new argument NOTL has made is not even an argument. In its Notice of Motion for review, it provided a new analysis in the form of a table that attempts to draw some conclusion regarding the use of all the PEG growth factors and their impact on other distributors' OM&A.³⁹ This analysis is new evidence, not argument, and in any case is not helpful to the Board.

33. SEC requested and was provided a copy of the underlying spreadsheet. To put it most charitably to NOTL, the underlying calculations and what they attempt to demonstrate are entirely unclear. What is clear is what the table does NOT show: i.e. that, for other distributors, increasing

³⁴ Interrogatory Response SEC-Supp-41

³⁵ For example, since the last rebasing NOTL has added a new transformer at its transformer station which was substantial enough in cost that it required an ICM (Exhibit 2, p.51). In addition, NOTL will be installing another 83 MVA transformer (See, Exhibit 2, p.52).

³⁶ Exhibit 4, p.5

³⁷ Decision, p.10

³⁸ *Decision and Order* (CNPI 2017 - EB-2016-0061), December 9 2017, p.5

³⁹ Notice of Motion, para. 33-34

their 2014 OM&A costs by all the growth factors that NOTL says should be applied, would result in a close approximation of their 2019 OM&A costs.

34. Regardless of what the table attempts to show,, it is clearly new evidence, and NOTL has not even claimed that this “new information” was permissible grounds for review pursuant to Rules 42.01(a)(iii) or (iv) as being new facts or those not evidence and could not have been discovered by reasonable diligence.⁴⁰

35. ***New Requirements.*** NOTL argues the Board erred by allowing only some but not all of the proposed additional costs over and above the envelope amount for new and increased services. SEC disagrees. It was entirely open to the Board, as it did in the Decision, to allow recovery of only some of the proposed costs for new and increased services that in its view would not be covered by the envelope amount.

36. Moreover, while NOTL sought additional amounts for what it categorized as new and increased services, the Board only found it reasonable to allow for additional amounts over and above the envelope amount for “new requirements”, a subset of NOTL’s proposed category of costs. These were not costs for things such as “improvements, updates, or changes to operations driven by management operational decisions or directions”.⁴¹ The Board found that the envelope should accommodate the costs of such changes.⁴²

37. It is for that reason that the Board provided full funding for the ole rentals (external regulatory costs imposed by Bell), and locates (caused by the Province-wide required program), which are entirely caused by new requirements.⁴³ It also provided a portion of the requested IT and cyber security costs and regulatory and survey costs, reflecting that some of those costs are based on new requirements, and some are changes driven by managerial and operational decisions.⁴⁴ It rightly determined that the additional amounts for the Health and Safety Consultant and Utilismart costs are not caused by a new requirement, and should be accommodated within the envelope budget.⁴⁵

⁴⁰ *Ontario Energy Board*, Rules of Practice and Procedure, Rules 42.01(a)(iii), (i)

⁴¹ Decision, p.12

⁴² Decision, p.11

⁴³ Notion of Motion, para 34; Decision, p.11-12

⁴⁴ Notion of Motion, para 34; Decision, p.11-12

⁴⁵ Notion of Motion, para. 34; Decision, p.11-12

38. ***Accounting Change in Base OM&A Costs.*** NOTL argues that while the Board accepted its argument that it should be permitted to include in its 2019 test year budget, an amount for costs that it had previously been capitalized under previous accounting rules, it erred by making the adjustment to its 2019 test year budget and not as part of an adjustment to its base OM&A (2014 Board-approved amount) that was escalated as part of the “envelope” amount.

39. In its Decision, the Board provided NOTL an additional \$130,704 for this accounting adjustment. While SEC did argue that in setting an appropriate envelope amount, the amount for the accounting adjustment should be included in the base OM&A in which the annual escalator is applied to, the Board’s approach is one of a number of reasonable approaches to making an adjustment to an envelope amount to deal with changes to accounting policy.

40. Regardless, even if this could be said to be an error, it does not meet the requirement of being material.⁴⁶ Even using NOTL’s proposed approach (including load and system peak) the amount of \$25,269 is below NOTL’s materiality threshold of \$50,000.⁴⁷ Using the approach the Board adopted, it would be less than half of NOTL’s materiality threshold.

41. ***Supplementary Submissions.*** The Board should look no further than NOTL’s Supplementary Written Submissions as evidence that NOTL is simply seeking a second opportunity to argue its case. These “contextual items” have nothing to do with the alleged errors before the Board, but are simply a further chance to make the same submissions NOTL made before the original panel.

42. First, NOTL attempts to justify its requested relief by reference to its relatively low rates as compared to other Ontario distributors. That is not a reason for the Board to approve an increase in OM&A expenses over previous Board approved amount by 38%, more than triple the rate of inflation. As SEC noted in its Final Argument, it is not a surprise that it has low rates. In fact it should be expected. Unlike most distributors, who have seen stagnant or declining customer and load growth, NOTL has seen a brisk increase in both. This has allowed it to keep rates low.

⁴⁶ *Decision with Reasons* (EB-2006-0322/338/340 - NGEIR Motion to Review), May 22 2007, p.17-18

⁴⁷ Exhibit 1, p.5

43. Its cost performance on the other hand, has been average at best. The PEG total cost benchmarking evidence shows that NOTL is far from a top performer. Its costs are only slightly better than the model would have expected a utility with its characteristics (including growth) to have, and forecasts NOTL to remain in cohort 3 (of five).⁴⁸ Further, the evidence also shows that its OM&A costs per customer were trending above the industry average, and that differential is increasing.⁴⁹

44. Second, NOTL argues that it was an error to approve a 2019 OM&A budget that was below its 2018 actuals. It claims that “[t]his of course, is the best evidence of what NOTL Hydro requires running its business”. The only thing NOTL’s 2018 actuals are “the best evidence of”, is what NOTL spent in 2018. It is not evidence of what a reasonable OM&A budget would have been for 2018, let alone a “starting off” point for 2019. This is especially true for NOTL, where it spent a staggering 11.2% more in 2018 than it did in 2017. While NOTL is free to spend whatever it deems appropriate in 2018 when it is under IRM, those management decisions do not mean those costs are reasonable or prudent.

Relief

45. SEC submits the Board should deny NOTL’s motion to review and vary.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

July 11, 2019

Original signed by

Mark Rubenstein
Counsel to the School Energy
Coalition

⁴⁸ Exhibit 3, p.9

⁴⁹ Interrogatory Response SEC-Sup-37