

DECISION ON MOTION TO REVIEW

EB-2020-0158

HYDRO ONE INC., HYDRO ONE NETWORKS INC., AND ORILLIA POWER DISTRIBUTION CORPORATION

Motion to Review OEB Decision and Order by Frank Kehoe

BEFORE: Emad Elsayed
Presiding Member

Cathy Spoel
Member

Michael Janigan
Member

June 11, 2020

TABLE OF CONTENTS

1	INTRODUCTION AND SUMMARY.....	1
2	DECISION ON MOTION TO REVIEW	3
2.1	OVERVIEW	3
2.2	MOTION TO REVIEW AND THE THRESHOLD QUESTION	4
2.3	DECISION ON THE THRESHOLD QUESTION	5
2.4	FINDINGS	6

1 INTRODUCTION AND SUMMARY

Hydro One Networks Inc. (Hydro One) and Orillia Power Distribution Corporation (OPDC) (collectively, the Applicants) filed an application with the Ontario Energy Board (OEB) on September 26, 2018, under section 86(2)(b) of the *Ontario Energy Board Act, 1998* (the Application). The Application requested approval for Hydro One Inc. (HOI), the parent company of Hydro One, to purchase all of the issued and outstanding shares of OPDC. Following the share purchase, HOI would transfer the assets and liabilities of the electricity distribution business from OPDC to Hydro One.

On April 30, 2020, the OEB Panel assigned to the Application issued its Decision and Order (the Decision). In it, the OEB Panel approved the Application subject to a number of conditions.¹

Mr. Frank Kehoe was a registered intervenor in the proceeding and a customer of OPDC. During the course of the proceeding, he filed with the OEB a letter he had sent to the Attorney General of Ontario (AG) on June 10, 2019 (the AG Letter), which outlined certain concerns he had with amendments to the *Public Utilities Act* and the *Electricity Act, 1998*. Following the issuance of the Decision, Mr. Frank Kehoe filed a formal objection to the Decision with the OEB on May 4, 2020 (Objection Letter). Amongst other matters, the May 4, 2020 letter stated that:

It is the writer's opinion, in order to conform to the rule of law, the Ontario Energy Board should stay their April 30th 2020 order until there is a direct response to my letter from the Attorney General Ministry. This letter has been a part of my intervenor material that will clarify the legality of the Orillia City council's authority to sell the distribution arm of the utility in opposition to its own electorate.

Mr. Kehoe filed a second letter with the OEB on May 21, 2020, attaching the same AG Letter.

On May 25, 2020, Mr. Kehoe filed a third letter with the OEB. The May 25, 2020 letter emphasized Mr. Kehoe's opinion that it is necessary for the OEB to read and comprehend his AG Letter as well as its attachments, before making a determination on the Application.

¹ The Decision provides a summary of the proceeding's procedural steps and details the approval conditions.

On June 8, 2020, Mr. Kehoe filed a fourth letter with the OEB that, amongst other things, again requested that the OEB stay its Decision until a response to the AG Letter had been received.

As discussed in further detail below, the OEB will treat Mr. Kehoe's Objection Letter as a motion to review and vary (Motion) under Rule 40 of the OEB's Rules of Practice and Procedure. Although Mr. Kehoe did not specifically label the Objection Letter as a motion to review under Rule 40, it is clear that Mr. Kehoe objects to, and is seeking a variance or stay of, the Decision.

For the reasons set out below, the Motion is dismissed.

2 DECISION ON MOTION TO REVIEW

2.1 Overview

Mr. Kehoe was an active participant in the proceeding. As part of his final argument (filed with the OEB on December 23, 2019), Mr. Kehoe referenced a seven-page letter that he had sent to the AG on June 10, 2019 (the AG Letter). Mr. Kehoe had also filed a copy of the AG Letter earlier in the proceeding. The AG Letter detailed a number of concerns Mr. Kehoe had in relation to certain legislative amendments that had been made to both the *Public Utilities Act* and the *Electricity Act, 1998*, in the late 1990s. One of these amendments permitted a municipal corporation to pass a by-law dispensing with the need to obtain the assent of the municipal electors before exercising its powers under the *Public Utilities Act*. This appears to have allowed the City of Orillia to transfer the electricity distribution system from the Orillia Water, Light and Power Commission to OPDC in the year 2000, without first holding a referendum. The AG Letter alleges, amongst other things, that the legislative amendment allowing the City of Orillia to dispense with a referendum before transferring the distribution system to OPDC was “in conflict with our Canadian democracy” and a “slap in the face of our Canadian Constitution”. To date, Mr. Kehoe has not received any response from the AG.

In the Objection Letter, Mr. Kehoe states:

In at least three occasions as an intervenor, I have copied the Energy Board with my letter addressed to the Provincial Attorney General Ministry. As of this dated [sic] I have yet to receive a reply. The main segment of my letter relates to section 67(3) inserted into the Public Utilities Act. The insertion of this removed all rights of the electorate who cast their ballot in a legally called referendum. These rights are guaranteed by Federal law being part of our Canadian Constitution, Bill of Rights and our Charter of Rights and Freedoms. This single piece of legislation has denied the rights of the voting electorate.

The Objection Letter goes on to request the following relief:

It is the writer's opinion, in order to conform to the rule of law, the Ontario Energy Board should stay their April 30th 2020 order until there is a direct response to my letter from the Attorney General Ministry. This letter has been a part of my intervenor material that will clarify the legality of the Orillia City council's authority to sell the distribution arm of the utility in opposition to its own electorate.

2.2 Motion to Review and the Threshold Question

The OEB will treat the Objection Letter, and subsequent follow-up letters dated May 21, 2020, May 25, 2020 and June 8, 2020, as a Motion to Review the Decision (Motion) in accordance with Rules 40.01 and 40.05 of the OEB's Rules of Practice and Procedure. Although Mr. Kehoe does not call the Objection Letter a motion, he is clearly asking the OEB to review and vary (or at least stay) the Decision. The OEB's only mechanism for considering these types of requests is through a motion to review, and the OEB will treat the Objection Letter as such.

Rule 43.01 allows the OEB to determine, with or without a hearing, a threshold question of whether or not the matter raised in the motion should be reviewed before conducting any review on the merits of the motion.

In considering Mr. Kehoe's Motion and the threshold test, the OEB is guided by its findings on a Motion to Review the Natural Gas Electricity Interface Review Decision², where the OEB found:

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. 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.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

² EB-2006-0322/0338/0340, May 22, 2007

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

2.3 Decision on the Threshold Question

The Motion alleges that, since the OEB failed to wait for a response from the AG to the AG Letter prior to issuing its Decision, the Decision does not conform to the rule of law.

The Decision was issued pursuant to the OEB's powers under the *Ontario Energy Board Act, 1998* (OEB Act). Decisions regarding applications for mergers, acquisitions, amalgamations and divestitures (MAADs) under section 86 of the OEB Act are based on a "no harm" test as established in prior OEB proceedings and confirmed in the OEB's *Handbook to Electricity Distributor and Transmitter Consolidations* (MAADs Handbook). While the OEB's process for applying the "no harm" test makes provision for public input through formal interventions and letters of comment, it does not include requirements for public referenda; nor is there any requirement in the OEB's enabling legislation for a delay in carrying out the OEB's responsibilities based on a citizen's request to the AG for intercession in a proceeding. Indeed, although Mr. Kehoe's final argument in the EB-2018-0270 proceeding references the AG Letter, his final argument did not specifically request that the OEB wait for a response to the AG Letter before issuing its decision.

The OEB finds that the Decision was based on the current MAADs criteria for such applications, and was consistent with the requirements of the OEB Act. Mr. Kehoe's June 10, 2019 letter to the AG mainly addressed legislative amendments that were made more than 20 years ago. The OEB understands that Mr. Kehoe does not support the legislative amendments that permitted, amongst other things, the transfer of a municipal utility without a public referendum. However, the OEB has no reason to believe these amendments were unconstitutional or otherwise invalid. The OEB also has no reason to believe that the transfer of the distribution system from the Orillia Water, Light and Power Commission to OPDC in the year 2000 was invalid. There is nothing in the Objection Letter or the AG Letter that reveals any error in the Decision.

The OEB further concludes that waiting for the AG's response to Mr. Kehoe's letter would have had no impact on the Decision as the subjects raised in that letter dealt with an old legislative framework that is not relevant to this proceeding and to the OEB's current mandate.

For these reasons, the OEB finds that there is no basis to the claim that the Decision failed to follow the rule of law. The Motion does not raise any legitimate question regarding the correctness of the Decision.

2.4 Findings

The OEB concludes that Mr. Kehoe has not identified any errors in the Decision that would raise grounds to question the correctness of the Decision.

Accordingly, Mr. Kehoe's motion does not pass the threshold test and is dismissed without a hearing pursuant to Rule 43.01.

DATED at Toronto June 11, 2020

ONTARIO ENERGY BOARD

Original Signed By

Christine E. Long
Registrar and Board Secretary