ONTARIO POWER GENERATION

Brenda MacDonald
VP Regulatory Affairs

700 University Avenue, Toronto, ON M5G 1X6 | 416 592 3603 | brenda.macdonald@opg.com

June 3, 2021

EB-2021-0154

Ontario Energy Board
2300 Yonge Street
Suite 2701
Toronto, ON M4P 1E4

Attention: Christine E. Long, registrar@oeb.ca

Dear Ms. Long:

Pursuant to the OEB's notice to the industry and invitation to comment dated May 13, 2021 regarding proposed amendments to Part VII (rules 40-43) of the OEB's *Rules of Practice and Procedure*, attached are OPG's comments. If there are any questions with respect to these submissions, please do not hesitate to contact me.

Sincerely,

Brenda MacDonald

CC: Aimee Collier, Assistant General Counsel, aimee.collier@opg.com

Evelyn Wong, Director, evelyn.wong@opg.com

IN THE MATTTER OF the Proposed Amendments to Rules 40-43 of the *Rules of Practice and Procedure* Regarding Motions to Review: Invitation to Comment EB-2021-0154

ONTARIO POWER GENERATION'S COMMENTS ON PROPOSED RULE AMENDMENTS

Pursuant to the OEB's notice to the industry and invitation to comment dated May 13, 2021 regarding proposed amendments to Part VII (rules 40-43) of the OEB's *Rules of Practice and Procedure*, these are OPG's comments on these proposed rule amendments.

OPG understands and appreciates the objectives of the proposed amendments. We have comments on a number of aspects of them, with a view to assist in ensuring that: (i) the objectives of efficiency and effectiveness are met; (ii) the amendments result in review motions being handled on a principled basis consistent with the overriding objectives in rule 2.01; and (iii) the amendments result in reasonable predictability for stakeholders.

As the proposed amendments are currently framed, our view is that certain elements will create additional layers of hurdles that are restrictive, may lead to confusion (rather than increased clarity and predictability), and may not support the objectives in rule 2.01 of securing the most just, expeditious and efficient determination on the merits of every proceeding.

Our specific comments are set out below – under each heading we reproduce the proposed rule for ease of reference, followed by our comments on it.

Rule 42.01 (a) (i)

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

(a) set out the grounds for the motion, which grounds must be one or more of the following:

> *(i) the OEB made a material and clearly identifiable error of fact, law or jurisdiction. For this purpose, (i) disagreement as to the weight that the OEB placed on any particular facts does not amount to an error of fact; and (ii) disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction;*
>
> *ii) new facts that have arisen since the decision or order was issued that, had they been available at the time of the proceeding to which the motion relates, could if proven reasonably be expected to have resulted in a material change to the decision or order; or*
>
> *iii)facts which existed prior to the issuance of the decision or order but were unknown during the proceeding and could not have been discovered at the time by exercising reasonable diligence, and could if proven reasonably be expected to result in a material change to the decision or order.*

We have four main comments regarding part (a)(i) of this proposed rule.

First, this subsection requires the alleged error of fact, law or jurisdiction to not only be "material" but to also be "clearly identifiable". As a matter of principle, if a material error exists (for example a material error of law), that should be sufficient grounds for review of the decision. A material error is already an error of significance that should warrant the OEB's consideration and review, regardless of how "clearly" the material error can be identified.

Second, and related to the point above, it is unclear what qualifies as, or meets the standard of, being "clearly identifiable". All of the alleged errors that are the basis of the review motion will presumably derive from the face of the decision itself. Bearing that in mind, it is unclear whether this further "clearly identifiable" requirement is meant to indicate that the error must be able to be quickly seen, or some other standard. We can envision much debate as to whether the alleged material error was sufficiently "clearly identifiable" or not. Regardless, as a matter of principle, the test for whether a decision is reviewable should not hinge on how quickly or easily a material error can be identified, but rather should be focused on whether a material error was made. The moving party will already need to establish such an error in order to make out its grounds of review.

Third, the above qualifying phrase – "material and clearly identifiable" – applies not just to errors of fact or law, but also to errors of jurisdiction. In our view *any* errors of jurisdiction should be subject to review and correction by the OEB. If the OEB exceeded its jurisdiction in its decision (which it is not permitted to do), that should suffice and warrant a remedy. Exceeding jurisdiction is not a matter of degree, and thus a materiality limit should not be sought to be imposed, let alone requiring that this type of error be both material and clearly identifiable.

Fourth, we have a comment regarding part (a)(i)(ii) of this same subrule, i.e. regarding the qualification that "*disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction*". While we appreciate that the objective may be to clarify that the manner in which the OEB balanced various relevant factors in exercising its discretion will not normally amount to a material error reviewable on a motion under this rule, the above wording of this qualification is broader than that, and is unduly restrictive. It is well-established under case law that the manner in which discretion is exercised can amount to an error of law or principle in various circumstances – for example, the failure to take into account a relevant factor in the exercise of discretion, or exercising discretion for an ulterior or improper purpose, or arbitrarily. For this reason, we suggest this qualification should not be included in the rule, and similarly should not be included in rule 43.01(a) referred to below.

We also assume that the qualification regarding not challenging the weight that the OEB placed on particular facts (in (a)(i) above) will not preclude a review when material facts were ignored or disregarded by the OEB in reaching its decision. In our view that type of error should still be subject to review, including because a failure to have regard to relevant facts can amount to an error in principle/law. It may be useful to make this distinction clear in the rule, for example by adding a phrase such as "…as opposed to disregarding or ignoring material facts in reaching its decision".

Rule 42.01 (c)

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

(c) describe how the moving party's interests are materially harmed by the decision or order;

This is not included as an element of the grounds for review under subrule (a), but is listed as something else that must be contained in the notice of motion, and seems to impose a further requirement on the moving party dependent on their particular circumstances. As a matter of principle, if the grounds for review in 42.01 (a) are made out – which already require a material error of fact or law or an error of jurisdiction, or new facts that would reasonably be expected to result in a material change to the decision or order – that should be a sufficient basis for the OEB to review the decision and issue an appropriate remedy.

Entitlement to have the decision or order reviewed and remedied should not also require or be dependent on the level or degree of harm to the particular moving party's own interests (by them having to show "materially harmed" interests). Put differently, adding this additional hurdle, if it is not passed, could allow significant errors of fact or law or errors of jurisdiction to go unremedied, including errors of good ratemaking. As a matter of principle, and in light of the OEB's objectives, this should not be the case.

Further, requiring that the harm to the individual moving party be material may potentially lead to confusion and debate (including regarding what evidence may be required to establish the requisite level of harm), with an element of subjectivity, regarding what type of harm is required in order to meet this standard. If "materially" in this subrule is simply intended to refer to the extent of financial harm, this would impose a different financial threshold depending on the type, size and financial strength of the particular moving party. Whether a decision is ultimately subject to review and correction should not depend on this type of consideration, particularly when decisions can have precedential value in subsequent proceedings. As long as the moving party has sufficient interest in the decision or order, this should suffice to be permitted to bring a review motion.

Rule 43.01

43.01 In addition to its powers under Rule 18.01, prior to proceeding to hear a motion under Rule 40.01 on its merits, the OEB may, with or without a hearing, consider a threshold question of whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits. Considerations may include:

(a) whether any alleged errors are in fact errors (as opposed to a disagreement regarding the weight the OEB applied to particular facts or how it exercised its discretion);

(b) whether any new facts, if proven, could reasonably have been placed on the record in the proceeding to which the motion relates;

(c) whether any new facts relating to a change in circumstances were within the control of the moving party;

(d) whether any alleged errors, or new facts, if proven, could reasonably be expected to result in a material change to the decision or order;

(e) whether the moving party's interests are materially harmed by the decision and order sufficient to warrant a full review on the merits; and

(f) where the grounds of the motion relate to a question of law or jurisdiction that is subject to appeal to the Divisional Court under section 33 of the OEB Act, whether the question of law or jurisdiction was considered and determined in the proceeding to which the motion relates.

We have a number of comments regarding the proposed 'threshold' step of the motion and the specific framing of the listed considerations under it.

Overall Comment on the Proposed Threshold Question – The above proposed rule indicates that the OEB may (or may not) consider a threshold question on the motion, and if it does, the question will be "*whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits*". This framing of the question seems to create an additional and somewhat different test than under 42.01(a). It is not entirely clear what the phrase "relevant issues material enough" is meant to add to the grounds in 42.01(a), or why such an additional requirement would be needed. This could lead to confusion and additional debate, or potentially to inconsistency in respect of how motions are handled and whether an alleged error or issue is material "enough".

To the extent the OEB intends to engage in an initial screening to ensure a motion is appropriately brought, that screening ought to be a relatively high level preliminary or cursory

review of the motion material to ensure that the motion is based on one or more of the permissible grounds in 42.01(a). Otherwise, the threshold question risks resulting in the motion effectively being litigated twice, once at the threshold enquiry stage and then a second time on the merits, which would not achieve the objective of regulatory efficiency.

Listed Considerations (a) to (d) – These considerations seem to essentially be the same as conducting the review on its merits, because they involve assessing whether the grounds in 42.01(a) are actually made out. These listed considerations heighten the above concern that the threshold stage of enquiry may amount to fully litigating the motion – with the same types of submissions being made at the threshold stage as in the second stage of the motion on the merits. Also, if the OEB conducted the threshold assessment of these listed considerations without permitting submissions from the moving party on them, and dismissed the motion for not passing the threshold question, this could potentially raise issues regarding procedural fairness.

The Exclusion Regarding Exercise of Discretion in (a) – As indicated in our comments to rule 42.01(a) above, the manner in which discretion is exercised can amount to an error of law or principle, and thus should not be excluded from the scope of review – it should be removed from the parentheses in (a) for this reason.

Listed Consideration (e) – We reiterate the same comment regarding this consideration as we set out above in respect of subrule 42.01(c).

Listed Consideration (f) – It is unclear why this should be a consideration or whether this consideration would militate in favour of the threshold being passed or not. It is unclear why, as a matter of principle, whether the motion is permitted to proceed should be impacted by whether it raised a question of law or jurisdiction that was determined in the proceeding (as opposed to raising such a question that was not specifically determined at first instance in the decision). Questions of law or jurisdiction can arise just by virtue of the decision, and these types of questions should be properly the subject of review motions.

Rule 43.03

43.03 The OEB will only cancel, suspend or vary a decision when it is clear that a material change to the decision or order is warranted based on one or more of the grounds set out in Rule 42.01(a).

Although we are not sure if this is the OEB's intention or not, adding the word "clear" in this rule may be taken as adding an additional requirement or level of onus in order to succeed on a review motion, beyond or greater than what is required to meet the grounds in 42.01. This risks creating confusion and additional debate as to whether a material change to the decision or order is warranted is sufficiently "clear". As a matter of principle, if the OEB is satisfied that the grounds in 42.01 are made out and that a material change to the decision or order is warranted, the motion should be allowed and the appropriate change or other remedy should be granted. There should be no need for an additional requirement of clarity, and so we would suggest this word be deleted from rule 43.03.

Concluding Comment

As noted at the outset, we provide the above comments to help ensure that the proposed rule amendments result in review motions being handled on a principled basis, and conducted in an efficient and effective manner consistent with the overriding objectives of rule 2.01. It is also important that the rule amendments provide clarity and reasonable predictability to stakeholders, including when and how a review motion can be brought, and the bases upon which a review motion can succeed. We appreciate the opportunity to provide these comments.