ONTARIO ENERGY BOARD

FILE NO.: **EB-2005-0292**

VOLUME: **Motions Day**

DATE: **June 15, 2005**

BEFORE: **Gordon Kaiser** **Presiding Member and Vice Chair**

EB-2005-0292

THE 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 a Motion by Oakville Hydro Electricity Distribution Inc. under subsection 21(4) of the Ontario Energy Board Act to vary the Board's May 11, 2005 written Reasons for its oral Decision of March 24, 2005.

Hearing held at 2300 Yonge Street,
25th Floor, West Hearing Room,
Toronto, Ontario, on Wednesday,
June 15, 2005, commencing at 9:30 a.m.

Motions Day

B E F O R E :

GORDON KAISER PRESIDING MEMBER AND VICE CHAIR

DECISION ON MOTION:

MR. KAISER: Please be seated.

Mr. Millar, any preliminary matters?

MR. MILLAR: No, Mr. Chair.

MR. KAISER: This Decision relates to an Application filed by Oakville Hydro Distribution Inc. by way of Notice of Motion on May 19th, 2005. The Application was made pursuant to section 21 of the Ontario Energy Board Act.

The Applicant seeks to vary the Board's May 11th written Reasons, which related to an oral Decision this Board made on March 24.

This Application raises serious questions of procedural fairness and the integrity of the administrative process before this Board.

The Applicant has requested the Board to exercise its jurisdiction pursuant to section 21.6 the Statutory Powers Procedure Act, and Rule 62 and 63 of the Board's Rules of Practice and Procedure.

In particular, the Applicant asks the Board to vary the May 11th Decision by deleting the second paragraph of the section of those Reasons entitled "Board Comments," which are found at page 5 of the Reasons. For the purpose of this Record, I'm going to read the particular paragraph that the Applicant seeks to have removed from that Decision.

In the May 11 Decision the Board stated as follows:

> "The Board Panel hearing this case became aware, through normal administrative knowledge, that the Applicant was aware at the time it presented its evidence in the hearing that the information it was attesting to was incorrect. Oakville Hydro and its Counsel chose to withhold that information from this Panel while having many opportunities to correct the evidence prior to and during the oral hearing. While the effect of

> that revised information was considered by another Board Panel immediately after this Decision was rendered, the Board warns the parties to this Application that it's not their prerogative to choose when and if incorrect evidence should be brought to the attention of a Board Panel. There are no circumstances that allow any party to knowingly submit incorrect information to the Board or to choose not to correct erroneous evidence. Such actions will draw serious consequences."

The Applicant bases its Motion on three grounds: First, there is factual error in the Decision; Secondly, that there has been an adverse effect on the reputation of the Applicant, its Officers, its Counsel, and its consultants. Thirdly, that there has been denial of natural justice and a failure to follow fundamental procedural fairness in the proceeding.

Dealing first with error of fact. The May 11th Decision I just read is silent on what the misleading information was alleged to be. It turns out, and there has been evidence before us today, that it related to a finding regarding a so-called large-user adjustment of $1.261 million. This amount was determined in the March 24th hearing and commented on by in the Reasons of the May 11th.

Subsequent to March 24th the Applicant was involved in its 2005 rate application and there was a requirement in

that process to make a similar adjustment. The adjustment made appeared, at least to the previous Panel, to be a different number; namely, $977,000.

Apparently it is this discrepancy that the Panel, in its May 11th Decision, was concerned about. And the withholding of information allegation appears to relate to the failure, at least in the minds of those Panel Members, to make a correction in the earlier proceeding.

The evidence tendered before this Appeal Panel makes it clear that not only was there no attempt to mislead, the information provided in both proceedings was in fact identical. It was, however, presented in a different format because of the different process involved in the two different proceedings.

At page 7 of the Applicant's Factum, a table sets out the differences between the two numbers. The simple explanation is that the 2005 rate application netted out the PILs adjustment and the Regulatory Asset adjustment. When those two amounts were deducted from the 1,261,000, the amount became the $977,000. I'm attaching that table to this Decision as schedule A.

It became apparent that there was a reason why, in the subsequent proceeding, that is to say, the 2005 rate Application, the Applicant had to net out PILs and Regulatory Assets. That was because the procedure there used a mathematical model, called a RAM model, and the RAM model added back in the PILs and Regulatory Assets amounts.

And, as the Applicant's witnesses testified here today, if they had not netted it out, they would have collected it twice.

In fact, the evidence is that they brought this to the attention of the Board. Apparently, they first realized it on March 22nd. But their witnesses, Mr. Sweezie did alert the Board that adjustments would be made. In fact, he said at paragraph 308 of the March 24 transcript:

> "In the course of preparing for this hearing, we determined that an adjustment should be made to the 2005 rate adjustment calculations that would slightly reduce bill impacts to Oakville Hydro customers. The adjustment does not affect the relief being claimed in the application before you today. Oakville Hydro staff will be addressing this with OEB Staff analysts in that application."

And, indeed, this was followed up by a letter from Mr. Sidlofsky, the Counsel for the Applicant in this case, of March 30th which further addressed this matter.

So it can be clearly concluded that the adjustment being made in both Applications was an identical amount. One was a lump sum amount. But in the 2005 rate Application, the mechanics of that process required that the PILs amount and the Regulatory Assets amount be netted out initially, and that led us to the $977,000 figure.

That is clearly set out in the table that's attached

to this Decision as Schedule A.

The Applicant was quite correct in making the adjustment in the subsequent proceeding. As stated, it would have been double-counting had they not done otherwise. And they were quite correct in leaving it in, as far as the March 24th proceeding was concerned, because the PILs adjustment had absolutely no relevance to the number in that proceeding. In fact, there were no questions on it, and quite properly so.

So that then brings us to the next matter that the Applicant raises, which is what they call adverse effect on reputation.

Three witnesses appeared before this Appeal Panel: James Sidlofsky, the Counsel for the Applicant; Bruce Bacon, a consultant; and David Sweezie, who is the Chief Financial Officer. They all testified that they had no intent to give misleading evidence and, in fact, did not give misleading evidence. The discrepancies could be easily explained away. It was simply a procedural difference, as I've mentioned previously.

But they went on to state that the May 11 Decision of the Board and the particular allegations and description of misleading conduct had caused the company damage in reputation and had caused each of them personally damage in reputation.

Their Counsel pointed out that the Board had really found them guilty of contravening section 126 of the

Ontario Energy Board Act, which makes it an offence to “knowingly furnish false or misleading information in any Application, Statement or Return made under this Act or in any circumstances where information is required or authorized to be provided to the Board.”

And as Counsel properly pointed out, they had not only made that finding; they made that finding without even charging the individuals or company involved. This brings us to the last aspect of the argument, which is the administrative fairness or natural justice.

As indicated, this Panel finds there was an error of fact in the Board's previous Decision. They did not understand; for whatever reason, the evidence. They were of the view that there was a discrepancy in the numbers. In fact, there was no discrepancy. But the more alarming aspect to this appeal is the failure of the previous Board Panel to provide these parties an opportunity to explain why the numbers were different.

It's pointed out by the Applicant that section 8 of the Statutory Powers Procedure Act provides that right. Section 8 provides:

> "Where the good character, propriety or conduct or competence of a party is in issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect to that."

This was not done.

This Panel has also been referred to the judgment of Mr. Justice Pigeon in the 1977, Supreme Court of Canada Decision in the Pfizer case. That case involved a situation similar to this one. There, the Tariff Board took into account evidence that wasn't tendered during the hearing, but was gathered by the Board afterwards. Mr. Justice Pigeon concluded:

"It is clearly contrary to fundamental rules to rely on information obtained after the hearing, without disclosing it to the parties and giving them an opportunity to meet it."

There are few that would question this proposition. It is, as I said at the outset, a concern that such a fundamental rule wasn't followed. The Applicant clearly should have been given that opportunity. Had they been given that opportunity, they no doubt would have provided the explanation they provided to this Panel today, which is clear and cogent and ends the matter.

The Order sought is set out at paragraph 40 of the Factum.

Oakville seeks an Order varying the OEB's May 11th written Reasons by deleting the second paragraph of the section of the Reasons entitled "Board Comments". I quoted that paragraph earlier in this Decision.

Secondly, they seek an Order replacing the version of the Reasons currently posted on the Board's web site with the amended or varied Reasons. An Order will go to that

effect.

And, Mr. Millar, I would also ask you to post forthwith the Reasons of the Board in this Decision, in addition to the varied Decision of May 11th.

The Applicant is not seeking costs in this proceeding. Had they sought costs, I would have granted them.

This completes the Board's ruling in this matter.

--- Whereupon the hearing concluded at 12:50 p.m.