EB-2007-0322
EB-2007-0338
EB-2007-0340

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 proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrains from regulating the rates for storage of gas.

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

FACTUM OF BOARD STAFF

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PART I – OVERVIEW

1. This factum is submitted on behalf of Board Staff in response to the Board's Notice of Hearing and Procedural Order No. 1 dated January 27, 2007, wherein the Board requested that the parties make submissions concerning the threshold questions that the Board should apply in determining whether it should, at the request of a party to the proceeding, review the NGEIR Decision (as that term is defined below) and whether the Moving Parties (as that term is defined below) have met the requisite test or tests.

2. Board Staff respectfully submits that, in the circumstances of this case, the test that must be satisfied by the Moving Parties before the Board can or should review the NGEIR Decision (the "Decision") is whether there is an error of fact, change in circumstances, new fact, fact that could not have been discovered by reasonable diligence, or other matter of a similar nature, that raises a question as to the correctness of the Decision and which is sufficiently serious in nature that it is capable of affecting the outcome in this matter (the "Applicable Threshold Test"). It is respectfully submitted that alleged errors of law and/or jurisdiction (including purported breaches of natural justice) are beyond the scope of the Board's review power under Rule 44.01 of the Rules of Practice and Procedure (the "Rules") and instead are matters that must be raised on appeal to the Divisional Court of Ontario pursuant to section 33 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B (the "OEB Act").

3. The Moving Parties have filed factums that do not delineate clearly or with precision those matters that might be capable of satisfying the Applicable Threshold

Test, as defined immediately above. Rather, their factums contain broad-based attacks on the NGEIR Decision, and assert combinations of alleged errors of law, breaches of natural justice, jurisdictional errors, errors of mixed fact and law and errors of fact. To a large extent, one or more of the Moving Parties have attempted to re-argue the case that has already been considered and decided by the Board. This is clearly impermissible in a proceeding of this nature.

4. Moreover, Board Staff submits that there are no errors of fact, new facts or similar matters that raise a question as to the correctness of the Decision or which are capable of affecting the outcome of this matter. Although this is properly a matter for the Divisional Court rather than for the Board on an application of this nature, Board Staff does not accept the jurisdictional complaints made by the Industrial Gas Users Association ("IGUA"). More particularly, IGUA's allegations concerning the conduct of the Board and its Staff relating to, among other things, the retention of an expert by the Board, the participation of BP in the NGEIR Hearing and the position taken by Staff concerning the sufficiency of competition in storage services, are unfounded and without merit.

PART II – FACTS

5. On November 7, 2006, the Board issued its Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision").

6. In December 2006, motions were filed by: (i) the City of Kitchener; (ii) IGUA, the Vulnerable Energy Consumers Coalition and the Consumers Counsel of

Canada; and (iii) the Association of Power Producers of Ontario (collectively, the "Moving Parties") requesting that the Board review the NGEIR Decision on various grounds and seeking various relief.

7. As noted above, by its Notice of Hearing and Procedural Order No. 1 dated January 27, 2007, the Board, *inter alia*, requested submissions concerning the threshold questions that it should apply in determining whether to review the NGEIR Decision and whether the Moving Parties have met the test or tests.

PART III – ISSUES AND THE LAW

8. The only issues before the Board in respect of the hearing to be held on March 5, 2007 are the appropriate test for determining whether, at the request of the Moving Parties, the Board can and should review the NGEIR Decision pursuant to Rule 44.01 of the Rules, and whether the requisite test for review has, in fact, been satisfied.

A. The Power of an Agency to Review or Reconsider Decisions Already Taken: General Principles

9. It is well established that as a general matter, administrative adjudicators have no inherent jurisdiction to review, rehear, reconsider or vary a decision once it has been finalized. Having rendered a final decision, they are generally *functus officio* unless they have been given by their constating legislation, whether expressly or impliedly, the power to review (or otherwise reopen) their own decisions.

> Donald J.M. Brown, Q.C. et al., *Judicial Review of Administrative Action in Canada*, Vol. 3, looseleaf (2004) at 12-109 to 12-110

Robert W. Macaulay, Q.C. et al., *Practice and Procedure Before Administrative Tribunals*, Vol. 3, looseleaf (2004) at 27A-4 to 27A-5

10. The power to reconsider, when present in "public interest" legislation, must be construed liberally and is not to be burdened with overly restrictive interpretations. That said, administrative agencies and tribunals only have the powers which have been conferred upon them by legislation. As a result, when the legislation in question, including the rules of the particular board or agency, provide conditions precedent to review or impose limitations on the power of review, those conditions must be met and limitations respected prior to or in the exercise of that power.

Brown, *supra* at 12-113 and 12-114

Macaulay, *supra* at 27A-9 to 27A-10

Re Scivitarro and Ministry of Human Resources et al. (1982), 134 D.L.R. (3d) 521 at 527 (B.C.S.C.)

See also *Russell v. Toronto (City)* (2000), 52 O.R. (3d) 9 (C.A.)

B. Threshold Test for the Exercise of the Board's Power of Review on a Motion by a Person

11. The Board's power of review on a motion by a person is provided for in section 21.2(1) of the *Statutory Powers Procedure Act* ("SPPA") and Rule 44.01 of the Rules.

12. Section 21.2(1) of the SPPA confers a power of review on tribunals, like the Board, exercising a statutory power of decision. That provision reads as follows:

"Power to review

21.2 (1) A tribunal may, <u>if it considers it advisable and if its rules made under section 25.1 deal with the matter</u>, review all or part of its own

> decision or order, and may confirm, vary, suspend or cancel the decision or order.
>
> Time for review
>
> (2) The review shall take place within a reasonable time after the decision or order is made.
>
> Conflict
>
> (3) In the event of a conflict between this section and any other Act, the other Act prevails". [emphasis added]

13. It is to be noted (as highlighted above) that the power to conduct a review of this nature is inherently discretionary in nature. Moreover, the authority granted by section 21.2 exists only if and to the extent that the administrative body has made rules under section 25.1 of the SPPA respecting such reviews.[1] Stated somewhat differently, by virtue of the words "and if its rules made under section 25.1 deal with the matter", the power of a tribunal subject to the SPPA to review its own decisions is ultimately governed and constrained by the rules it has promulgated.

14. Rule 44.01 of the Rules delineates and circumscribes the Board's power of review of a decision it has made upon motion by a person:

> **"44. Motion to Review**
>
> 44.01 Every notice of motion made under **Rule 42.01**,[2] in addition to the requirements under **Rule 8.02**, shall:

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[1] Section 25.1 of the SPPA provides that "[a] tribunal may make rules governing the practice and procedure before it".

[2] Rule 42.01 states that "Subject to Rule 42.02, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision".

> (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) an 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; and
>
> (b) if required, and subject to **Rule 42**, request a stay of the implementation of the order or decision or any part pending the determination of the motion".

15. It is contended by IGUA at paragraph 12 of its Factum that "[t]he grounds for a motion for review are not limited to those in Rule 44.01(a) and include not only errors in fact, but errors in law, jurisdiction and mixed fact and law". This submission is at odds with and is contradicted by the legislative evolution of the Rules, and in particular of Rule 44.01, which confirms that the Board's power of review at the request of the Moving Parties does not extend to errors of law, mixed fact and law or jurisdiction. The power of review does not encompass the alleged breaches of the rules of natural justice that IGUA now complains of.

16. It is well-established that the legislative evolution of provisions may be relied upon by the courts to assist in the interpretation of those provisions. In tracing the evolution of a provision a court may go back to a prior legislative formulation of the provision to determine the significance of changes over time. It is strongly presumed – because a legislature would not go to the trouble and expense of amending a provision without any reason – that amendments to the wording of a legislative provision are

made for an intelligible purpose, namely to clarify meaning, to correct a mistake or to change the law. It is submitted that this presumption applies *mutatis mutandis* to the Board's Rules of Practice and Procedure, especially in light of the fact they are effectively in the nature of a legislative provision enacted directly by the Board itself for the purpose of governing the conduct of matters of this nature.

> Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (2002) at 471-73

17. Significantly, in 2002, the Board amended its Rules of Practice and Procedure. Prior to those amendments, Rule 63 expressly contemplated motions for rehearing, review or variation, in contrast to the current rule which is confined to motions to review, and expressly authorized reviews in respect of errors of law or jurisdiction (including breaches of natural justice) as well as with respect to "important matters of principle". The unamended Rule stated:

> **"63. Motion for Rehearing, Review or Variation**
>
> 63.01 Every notice of motion made under **Rule 62.01**, in addition to the requirements of **Rule 8.02**, shall:
>
> (a) set out the grounds upon which the motion is made, sufficient to justify a rehearing or review or raise a question as to the correctness of the order or decision, which grounds may include,
>
> (i) error of law or jurisdiction, including a breach of natural justice;
>
> (ii) error in fact;
>
> (iii) a change in circumstances;
>
> (iv) new facts that have arisen;
>
> (v) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;

(v) an important matter of principle that has been raised by the order or decision; ....". [emphasis added]

18. The 2002 amendments to the Board's Rules, however, narrowed dramatically the Board's review power in circumstances such as these by expressly excluding as grounds of review pursuant to Rule 44.01 errors of law, errors of jurisdiction (including alleged denials of natural justice) and "important matters of principle". As such, applying the presumption of purposeful change described above as well as the well-known doctrine of statutory construction of *expressio unius est exclusio alterius*, it is submitted that the Board ceased to have the power to review at the request of a person for errors of law or jurisdiction, including alleged breaches of the rules of natural justice, after October 25, 2002 when these amendments came into effect.

But see *Decision with Reasons*, EB-2005-0188 at 7

19. In the result, and in accordance with the express terms of Rule 44.01, the Board's power of review at the request of a person is confined to errors of fact, changes in circumstances, new facts, facts that could not have been discovered by reasonable diligence before the decision in question was made and, by virtue of the use of the word "may" in Rule 44.01, other matters of a like nature (or similar genus), which raise a question as to the correctness of the impugned order or decision. Additionally, the Board's jurisprudence indicates that the error of fact, change in circumstance or other matter of like nature must also be sufficiently serious that it is capable of affecting the outcome of the decision or order before the power to review can or should be exercised. In *OEB Ruling on Motion By Enbridge Consumers Gas*, the Board stated in relevant part as follows:

> "[t]he Board is of the view that the Board should not rehear matters simply because one of the parties to the original application was dissatisfied with the result or otherwise no matter might ever been finally determined....
>
> . . .
>
> In any case, to be grounds for a review or rehearing, the errors of fact alleged must be errors capable of affecting the outcome of a decision. The Board's comments on the extent of disclosure of the issue in earlier cases was not determinative of the issue of whether or not the Company could obtain the approval it requested to retain the Rental Program is the core utility....".
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> *OEB Ruling on Motion by Enbridge Consumers Gas*, E.B.O. 179-14/179-15 at 3 and 4
>
> OEB Decision in RP-1999-0001 (June 29, 2000), section 4.6
>
> OEB Decision in RP-2003-0063 (March 18, 2005) at 4

20. Contrary to what IGUA now asserts, pursuant to the OEB Act, errors of law and jurisdiction are a matter for the Divisional Court upon appeal, not the Board upon an application for review. Pursuant to section 33 of the OEB Act, an appeal lies as of right to the Divisional Court from an Order of the Board in respect of questions of law or jurisdiction.

21. The interpretation of and approach to the power of review conferred by Rule 44.01, articulated herein, is also supported by considerations of policy and common sense. The Applicable Threshold Test, as articulated above, gives due (and appropriate) weight to the value of finality in decision-making, while permitting correction at the Board level (where its expertise may be brought to bear) in a limited sphere of cases where the parties are able to demonstrate significant factual errors, changes in circumstances or new and previously undiscovered evidence. This Test also properly

leaves to the Divisional Court matters that are squarely within the expertise of that Court, namely matters of law and jurisdiction.

22. It is respectfully submitted that none of the Moving Parties has met the Applicable Threshold Test and that the motions for review that are now pending before the Board should be dismissed. None of the Moving Parties contends that there is a change in circumstances that has arisen in the period since the Decision was rendered. Furthermore, the Moving Parties do not contend that new facts have arisen or that evidence has emerged that could not reasonably have been discovered through the exercise of proper diligence at the time of the hearing of this matter. To the extent that the Moving Parties have purported to identify errors in fact, their contentions are not well-founded. In any event, the alleged factual errors now complained of by one or more of the Moving Parties would not have affected the result in this proceeding.

PART V – RELIEF REQUESTED

23. Board staff respectfully requests that the Board issue an Order:

(a) determining that the threshold test that must be met pursuant to Rule 44.01 of the Rules is the Applicable Threshold Test, as set out above;

(b) determining that the Applicable Threshold Test has not been satisfied by the Moving Parties; and

(c) dismissing the motions for review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 15, 2007

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Of Counsel to the Staff of the Ontario Energy

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, (Schedule B);

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