File No.: EB-2006-0340

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 refrain 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 THE

SCHOOL ENERGY COALITION

1. In Procedural Order #1 in this proceeding, the Ontario Energy Board (the "Board" or the "OEB") directed the moving parties to file factums "addressing the threshold questions that the Board should apply in determining whether the Board should review the NGEIR Decision and whether the Moving Parties have met the test or tests."

2. As will be explained in greater detail below, the School Energy Coalition ("SEC") submits that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking in any objectively reasonable grounds. This result

is consistent with the wording and intent of the Board's rules and would also contribute to regulatory efficiency and fairness.

Analysis of Statutory References

3. An administrative tribunal is only empowered to continue its proceedings after a final decision has been rendered if its enabling legislation gives it the power to rescind, vary, amend or reconsider its final decision.

4. In this case, the Board is granted further jurisdiction over the proceedings by virtue of Rules 42-44 of the Ontario Energy Board's *Rules of Practice and Procedure*.[1] Rule 44 sets out the requirements for notices of motion for review:

> **44. Motion to Review**
> 44.01 Every notice of a motion made under **Rule 42.01**, in addition to the requirements under **Rule 8.02**, shall:
>
> (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) 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
>
> [emphasis added]

5. The possibility of a threshold test before a review on the merits is set out in Rule 45.01:

[1] The power to make rules governing practice and procedure is a statutory power granted to the Board under s. 25.1 of the *Statutory Powers Procedures Act,* R.S.O. 1990, c. S.22, and s. 4.2(3) of the *Ontario Energy Board Act*, S.O. 1998, c. 15, Schedule B.

> 45.01 In respect of a motion brought under Rule 42.01, the Board may determine, with our without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

6. It instructive to contrast Rule 45.01 with the rule under the Ontario *Rules of Civil Procedure* for granting leave to appeal of an interlocutory order of a Judge:

> Leave to appeal shall not be granted unless,
>
> a.) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
>
> b.) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.[2]

7. In SEC's submission, the latter test is far more restrictive to potential appellants than is Rule 45.01, which does not specify what factors should be used to determine whether or not a party has met the threshold test of whether the matter should be reviewed. In addition, the "threshold" phase of review under the Board's rules is not even mandatory: the Board may elect to skip that phase of the proceeding altogether.

8. Also, the list of possible grounds for review in Rule 44.01 are broad and include "error in fact", which is a broad form of review, and the list itself is not

[2] Ontario Rules of Civil Procedure, Rule 62.02(4).

exhaustive.[3] In SEC's submission, the broad and open ended list of possible grounds for review set out in Rule 44.01 also suggests that a lower threshold test should be adopted before denying an appellant a review on the merits.

9. In SEC's submission, therefore, all of the above suggests that a review on the merits should only be denied in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking in any objectively reasonable grounds.

Regulatory Efficiency and Fairness

10. In SEC's submission, there are also several practical reasons to have a lower threshold test.

11. The practical effect of a threshold test that is too stringent will be an increase in the number of Board decisions appealed to the Ontario Divisional Court. A party that believes it has grounds to seek a review of a Board decision will, all other things being equal, seek a rehearing at the Board if the Board can be counted on to give it a fair second look. The reason for this preference is that a) the process is faster and less expensive, and b) the Board has vastly superior knowledge and expertise relating to the issues in dispute. But if the rehearing process has a much more stringent threshold before granting parties a review on the merits, the

[3] As is illustrated by the use of the words "which grounds *may* include" [emphasis added] in Rule 44.01(a).

balance shifts. In this circumstance, a party seeking a review would be more likely to proceed directly to court, bypassing the rehearing process.[4]

12. In SEC's submission, such a result would be costly and contribute to regulatory delay, as proceedings in the Divisional Court take considerably longer than appeals before the Board.

13. It would also be unfair to consumer groups and other intervenors who rely on cost awards from the Board in order to effectively participate in Board processes and who cannot risk an adverse cost award from the Divisional Court. Utilities, for example, can take the Divisional Court route, because in most cases ratepayers pay the cost thereof, and in any case their shareholders have much deeper pockets than the intervenor groups.

14. Perhaps most important, though, is that erecting substantial barriers to rehearings increases the likelihood that courts will interfere in the Board's decision-making activities. In the current situation, where rehearings are heard by the Board on a regular basis, and the Board continues to have a pattern of taking a thorough second look whenever rehearings arise, the court when it sees an application knows that the experts in the field, the Ontario Energy Board, have looked at the issue not once but twice.

---

[4] In *Ellis-Don* v. *Ontario (Labour Relations Board)*, [2001] 1 S.C.R. 221 at para. 57, the Supreme Court of Canada said that "the principles of judicial review did not require the use or exhaustion of this particular remedy [of reconsideration]. Of course, in some cases, failure to seek reconsideration might be a factor to be weighed by superior courts when determining whether to grant a remedy in an application for judicial review.

The Underlying Principle

15. SEC recognizes the importance of the finality of Board decisions. The reality is, however, that parties with a significant economic interest in the outcome of a proceeding and who disagree strongly with a Board decision will seek an outlet to have that decision reviewed.

16. In that context, therefore, the question is whether that review, at least at the first level, should be by a court that is expert in law but not in energy regulation, or by the Board itself, the experts in this field. It is submitted that the first level of review of any Board decision should (with few exceptions) be consideration of that decision by a differently constituted panel of the Board itself, which can provide a more knowledgeable, less costly and faster review than a review by an appellate court.

Application to Motions for Review

17. In SEC's submission, the Motion for Review filed and the "Consumer Groups" (IGUA, CCC and VECC) cite a number of grounds for review including that the Board erred in its interpretation of s.29 of the OEB Act and that the Board committed an error in fact in its finding that "there was sufficient evidence that there is a competitive market for storage in Ontario." [Consumer Groups' Notice

of Motion filed December 18, 2006, pg. 2] The motion raises reasonable grounds for review and should be heard on its merits.

18. SEC takes no position on the motions for review filed by the City of Kitchener or Association of Power Producers of Ontario (APPrO).

All of which is respectfully submitted this 16th day of February, 2007.

_______________________"John De Vellis"_____________

John De Vellis
Counsel to the School Energy Coalition