



By EMAIL and WEB POSTING

May 13, 2021

**To: All Regulated Entities
All Other Interested Stakeholders**

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

The Ontario Energy Board (OEB) is evaluating the efficiency and effectiveness of its regulatory proceedings. As part of this initiative, the OEB is proposing amendments to its *Rules of Practice and Procedure* (Rules) related to motions to review. Motions to review are a process whereby an interested party can ask that the OEB review and reconsider one of its final orders or decisions. As discussed in further detail below, the proposed amendments seek to achieve the following three objectives:

- Clearly set out the purpose and proper basis – or grounds – for a motion to review,
- Clarify the purpose of the “threshold” consideration, and
- Clarify the circumstances under which the OEB will consider changing its decision or order.

Stakeholders are invited to comment on the proposed amendments to Part VII (Rules 40-43) of its Rules. Under the OEB’s new governance structure, any changes to the Rules are approved by the Chief Commissioner.

Background

Part VII of the Rules sets the framework for the OEB’s review of its own decisions and orders, whether on its own motion or as brought forward by a third party. The OEB’s authority to review its own decisions and orders comes from section 21.2 of the *Statutory Powers Procedure Act*, which permits a tribunal to create rules allowing it to review its decisions or orders, and to confirm, vary, suspend, or cancel a decision or order. In a letter to stakeholders dated March 9, 2021, the OEB indicated that it had identified Part VII of the Rules as one of the areas of the Rules where it would look to make improvements. The OEB has already introduced new performance standards for

motions to review through a letter dated March 29, 2021, which are available on the OEB's [website](#).

Proposed Amendments

There are three main objectives of the proposed amendments. First, the OEB wishes to reinforce through the Rules that the purpose of a review is not simply to reargue a case that was already presented to the original panel of Commissioners. Motions to review should be limited to instances where a party can clearly identify a material error of fact, law or jurisdiction in the decision or order, or if there is a change in circumstances or new facts that would have a material effect on the decision or order. The proposed amendments also clarify that for the purposes of the Rules, a disagreement about how the OEB exercised its discretion or the weight that it placed on particular facts are not a basis for a motion to review. The proposed amendments to Rule 42.01 (a) are intended to provide further guidance to parties on these and other issues relating to the types of matters that are appropriate subjects for a motion to review, including new requirements that must be met by notices of motion to review.

The OEB is proposing to delete the word “correctness” from Rule 42.01 (a) because it may cause confusion between the OEB’s grounds for assessing a motion to review, and the standard of review applied by the courts when hearing an appeal under section 33 of the *Ontario Energy Board Act, 1998*. The OEB is also proposing to remove “change in circumstances” as a ground for a motion on the basis that this would be encompassed by the ground for “new facts”.

Second, the proposed amendments are intended to clarify the nature and purpose of the “threshold” question contained in Rule 43.01. Rule 43.01 is meant to be a tool that the OEB can use to assess motions to review at the outset (with or without a hearing), with a view to ensuring that only motions that have a proper basis will proceed to a review on the merits. The OEB is not required to hear submissions from parties on the threshold question (though it may choose to do so), and under proposed Rule 42.01(d), notices of motion to review will be required to clearly state why the motion passes the threshold and should be heard on its merits.

Third, the proposed amendments clarify (in Rule 43.03) that the OEB will only alter a decision or order when it is clear that the motion raises one of the permitted grounds and a material change is called for.

There are several other minor proposed amendments that are intended to make the Rules clearer.

The proposed revised Rules 40-43 are attached as Appendix A to this letter.

These Rules do not apply to an appeal to the OEB from an order made by an employee acting under delegated authority, which is addressed under Rule 17. The OEB is considering amendments to the Rules related to appeals of orders by an employee, and would welcome any preliminary views on additional guidance that would be useful in respect of such appeals.

Invitation to Comment and Filing Instructions

Interested parties are invited to file any comments they have on the proposed amendments to Part VII of the Rules, and to provide any preliminary views with respect to guidance related to Rule 17, by **June 3, 2021**. The Chief Commissioner will consider any comments that are received before issuing final amendments to the Rules.

Stakeholders are responsible for ensuring that any documents they file with the OEB **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with Rule 9A of the Rules.

Please quote file number, **EB-2021-0154** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the OEB's web portal at <https://p-pes.ontarioenergyboard.ca/PivotalUX/>.

- Filings should clearly state the sender's name, postal address, telephone number, fax number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at www.oeb.ca/industry.
- Parties are encouraged to use RESS. Those who have not yet [set up an account](#), or require assistance using the web portal can contact registrar@oeb.ca for assistance.

All communications should be directed to the attention of the Registrar at the email address below and be received by end of business, 4:45 p.m., on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this consultation, interested parties must include the Case Manager, Georgette Vlahos at georgette.vlahos@oeb.ca and OEB Counsel, Michael Millar at michael.millar@oeb.ca.

Email: registrar@oeb.ca

Tel: 1-877-632-2727 (Toll free)

Yours truly,

Original signed by

Christine E. Long
Registrar

Appendix A – Proposed Amended Rules 40-43

PART VII - REVIEW

40. Request

- 40.01 Subject to Rule 40.02, any person may bring a motion requesting the OEB to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.
- 40.02 A person who was not a party to the proceeding to which the motion relates must first obtain the leave of the OEB by way of a motion before it may bring a motion under Rule 40.01.
- 40.03 The notice of motion for a motion under Rule 40.01 shall include the information required under Rule 42, and shall be filed and served on all parties to the proceeding to which the motion relates within 20 calendar days of the date of the order or decision that is the subject of the motion.
- 40.04 Subject to Rule 40.05, a motion brought under Rule 40.01 may also include a request to stay the implementation of the order or decision pending the determination of the motion.
- 40.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.
- 40.06 In respect of a request to stay made in accordance with Rule 40.04, the OEB may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

41. Powers of the OEB

- 41.01 The OEB may at any time initiate a review of one of its decisions or orders, and may confirm, vary, suspend or cancel the order or decision.
- 41.02 The OEB may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in one of its orders or decisions.

42. Motion to Review

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;
- (b) if sought, and subject to Rule 40, request a stay of the implementation of the order or decision or any part pending the determination of the motion;
- (c) describe how the moving party's interests are materially harmed by the decision or order;
- (d) where the grounds include new facts and the new facts relate to a change in circumstances, explain whether the change in circumstances was within the control of the moving party;
- (e) provide a clear explanation of why the motion should pass the threshold described in Rule 43.01; and
- (f) set out the specific relief requested.

43. The Threshold Question and Determinations

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.

43.02 Where the OEB determines that the threshold in Rule 43.01 has been passed, or where it has chosen not to consider the threshold, or where it is conducting a review on its own motion, it will hear the motion on its merits and decide whether to confirm, cancel, suspend or vary the decision or order.

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).