



July 30, 2021

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

**Re: Adoption of Amendments to Rules 40-43 of the *Rules of Practice and Procedure* regarding Motions to Review and Minor Administrative Changes
EB-2021-0154**

Today the Ontario Energy Board (OEB) is posting revised versions of its *Rules of Practice and Procedure* (Rules). Most of the revisions are to Part VII (Rules 40-43) dealing with motions to review, which are being made in furtherance of the OEB's goal to improve the efficiency and effectiveness of its regulatory proceedings.

The revisions to the Rules are effective immediately, and an updated version of the Rules is available on the [OEB's website](#).

I. Background

By letter dated May 13, 2021, the OEB invited stakeholder comment on proposed amendments to Rules 40-43 that are designed to:

- 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.

The OEB received comments from three stakeholders: the School Energy Coalition (SEC), Ontario Power Generation Inc. (OPG) and Hydro One Networks Inc. (Hydro One).

Based on the comments received, the OEB is making two changes to the amendments to the Rules relative to the proposed version, as described below. This letter also explains why additional changes have not been made in response to some of the other stakeholder suggestions.

The OEB is also using this opportunity to make a number of minor, administrative changes to other parts of the Rules, as described below.

II. Changes to the Amendments as Originally Proposed

Rule 42.01(a)

The proposed amendments to Rule 42.01(a) set out the permitted grounds for a motion to review. It requires that the moving party clearly identify an error of fact, law or jurisdiction in the decision or order that is sought to be reviewed. The proposed amendments further specify that (1) a disagreement regarding the weight the OEB attached to certain facts does not amount to an error of fact, and (2) a disagreement regarding how the OEB exercised its discretion does not amount to an error of law or jurisdiction.

All three stakeholders commented on the proposed amendments to Rule 42.01(a). OPG commented that the question of the weight attached to evidence might arise in a case where the OEB completely ignored relevant evidence, which itself would be an error of law. SEC expressed concern that virtually all OEB decisions and orders involve some exercise of discretion, and that if interpreted too narrowly, 42.01(a)(i)(2) could eliminate virtually all motions to review. On the assumption that this was not the OEB's intention, SEC suggested that the OEB amend Rule 42.01(a)(i)(2) as follows: "disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction, *unless the exercise of discretion involves an extricable error of law*" (italicized wording added by SEC).

The OEB agrees that the edit proposed by SEC provides greater clarity and Rule 42.01(a)(i)(2) has been amended. The OEB concludes that this change also appropriately addresses OPG's comment.

Rule 43.01(f)

The proposed amendments to Rule 43 deal with the threshold question of whether a motion raises relevant issues material enough to warrant a review of the decision or order on the merits. The proposed Rule 43.01(f) provides that one of the things the OEB can consider in assessing the threshold question is: "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."

All three stakeholders commented on this provision as well, and all three expressed some level of confusion regarding exactly what was intended. The OEB is clarifying that the intention of Rule 43.01(f) is to prevent parties from simply re-arguing questions of law or jurisdiction that were raised before the panel of Commissioners that made the decision or order that is the subject of the motion. The OEB has amended the wording

of Rule 43.01(f) as follows, to provide additional clarity: “whether the question of law or jurisdiction that is raised as a ground for the motion was raised in the proceeding to which the motion relates and was considered in that proceeding.”

III. Other Matters raised in the Letters of Comment

There were several other comments raised by stakeholders that the OEB has decided not to implement or reflect through further amendments to the Rules, for the reasons set out below.

Concerns there may be fewer filed and/or successful motions to review

Both OPG and Hydro One expressed a general concern that the proposed amendments to the Rules may be overly restrictive, and can be expected to result in fewer successful motions to review.

The amendments provide greater clarity on what the OEB considers to be the appropriate grounds for a motion to review, consistent with the OEB’s aim of improving the efficiency and effectiveness of its proceedings. It is not the OEB’s intention to reduce the number of motions to review that are filed (and that may be successful) in the abstract, but rather to ensure that motions to review are appropriately grounded. Motions to review that are not properly framed as set out in the amended Rules can be dismissed either at the threshold stage or after a hearing on the merits. It is possible that the amendments to the Rules will result in fewer filed and/or successful motions to review, but if this is the case, it will be because the amendments will reduce the number of motions that are not properly grounded.

Concerns regarding the threshold question

OPG provided a number of comments on the threshold question under Rule 43.

It noted that a stand-alone consideration of the threshold question could effectively result in the OEB hearing the same motion twice; first through the consideration of the threshold question, and then if the threshold is “passed” again through the hearing on the merits.

The OEB observes that the Rules already make provision for consideration of the threshold question, so the potential for a “double” hearing already exists. However, it is the OEB’s expectation that the additional clarity provided regarding the appropriate grounds for a motion to review, and the requirement under amended Rule 42.01(e) that the moving party identify in its grounds for the motion why the motion should pass the threshold, will result in a more efficient assessment of the motion to review and minimize the likelihood of duplicative processes. Rule 43.01 allows the OEB to dismiss a motion to review at the threshold stage without a hearing in appropriate cases, and the OEB remains of the view that this flexibility is useful, particularly in cases where the

motion is not properly grounded and the moving party has not explained why it should pass the threshold. It is also noted that, as is the case today, Rule 43.01 does not require the OEB to consider the threshold question at all. In cases where a motion to review is properly framed under Rule 42.01, the OEB may proceed directly to a hearing on the merits without consideration of the threshold question.

OPG also expressed a concern that the provision under Rule 43 allowing the OEB to dismiss a proceeding at the threshold stage without a hearing (and thus without submissions from the parties) could raise issues regarding procedural fairness. The OEB notes again that the current version of the Rules allows for dismissal without a hearing at the threshold stage, so this element of amended Rule 43 is not new. The OEB does not believe that having the flexibility to dismiss a motion to review at the threshold stage without a hearing should give rise to procedural fairness issues. As amended, Rules 42.01 and Rule 43.01 allow a motion to review to be dispensed with efficiently if, for example, the motion to review simply seeks to re-argue the same case or raises matters that do not materially impact the moving party. The amendments enhance the predictability and efficiency of the OEB's processes, and do so in a manner that in the OEB's view will not amount to a denial of procedural fairness.

Concerns regarding the meaning of "material"

Hydro One expressed a concern that the words "material" and "materially," which are used throughout the proposed amendments, could greatly increase the OEB's discretion to dismiss or deny motions to review. Hydro One noted that the size and financial strength of a moving party would become relevant to the disposition of a motion. OPG also questioned the requirement for an alleged error to be both "material" and "clearly identifiable." OPG contended that the test for whether a decision is reviewable should not hinge on how quickly or easily a material error can be identified.

The OEB remains of the view that the introduction of materiality in the proposed amendments is appropriate. The OEB recognizes that what is material for a small utility may not be material for a large utility, and the amended Rules provide the OEB with the flexibility to recognize the different circumstances of different moving parties rather than calling for a "one size fits all" approach. The OEB does not consider "clearly identifiable" to be synonymous with "quickly or easily" identified as suggested by OPG. The OEB must be able to identify what error is alleged in order to assess whether a motion will be heard.

IV. Other Matters

Additional minor changes to the Rules

The OEB is using this opportunity to make some additional minor administrative updates to other sections of the Rules beyond those identified in its letter of May 13, 2021. These are (i) clarifying revisions to the definitions of "party" and "proceeding" in

Rule 3.01; and (ii) a new Rule 2.05 that sets out general principles of interpretation to be applied to the Rules and practice directions.

Appeals from decisions under delegation

In its May 13, 2021 letter, the OEB noted that the Part VII Rules (i.e. Rules 40-43) regarding motions to review do not apply to appeals to the OEB from a decision of an employee acting under delegated authority under section 7 of the *Ontario Energy Board Act, 1998* (OEB Act) (Delegated Decision). Those appeals are addressed under Rule 17 of the Rules. The OEB invited preliminary comments from stakeholders regarding any additional guidance that might be useful in respect of Rule 17, and while no comments were received, the OEB remains interested in stakeholders' views of whether amendments to Rule 17 may be appropriate to provide greater clarity in relation to the appeal of Delegated Decisions. The OEB would be assisted by stakeholder perspectives on whether and how the approach to motions to review under Part VII could be adapted for appeals of Delegated Decisions. The OEB is currently consolidating the current delegations and will post an update later this year on what matters have been delegated to an employee.

This is the second amendment to the OEB's Rules this year. The OEB is considering other amendments related to confidentiality requests, and the appeals of Delegated Decisions discussed above. I considered holding all amendments to be issued at the same time, but decided it was more important to implement changes as they are completed. For this reason, a chart of revisions has been added to the front of the Rules for ease of tracking.

I look forward to working with the industry and other stakeholders as we work to further improve the efficiency and effectiveness of our adjudication. Any questions relating to the current amendments to the Rules should be directed to Registrar@oeb.ca. The OEB's toll-free number is 1-888-632-6273.

Yours truly,

Original signed by

Lynne Anderson
Chief Commissioner