



EB-2010-0374

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

AND IN THE MATTER OF an Application by Natural Resource Gas Limited for an Order or Orders pursuant to Section 90(1) of the *Ontario Energy Board Act 1998*, granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Malahide, Municipality of Thames Centre and the Town of Aylmer.

AND IN THE MATTER OF a hearing on the Board's own motion to review orders made by the Board on June 29, 2007.

DECISION AND ORDER

On December 7, 2010, the Ontario Energy Board (the "Board") issued a Notice of Motion to Review and Procedural Order No. 1 (the "Notice"). The motion to review related to a proceeding (EB-2006-0243) in which the Board had issued two orders against Natural Resource Gas Ltd. ("NRG"): an order requiring the company to execute two contracts related to a natural gas pipeline to serve an ethanol facility operated by the Integrated Grain Processors Cooperative ("IGPC"), and when this order was not complied with, an order that NRG pay an administrative penalty which ultimately totalled \$140,000.

The Board gave file no. EB-2010-0374 to this review.

The Notice indicated that the Board intended to review the extent to which the procedural requirements of Part VII.1 of the *Ontario Energy Board Act, 1998* (the "Act") had been followed with respect to the administrative penalty order, and sought submissions from the parties in this regard. The Notice also indicated that the Board

would not be reviewing its underlying jurisdiction to make the order that NRG execute the two contracts however it would consider the extent to which procedural fairness requirements were met with respect to the order to execute the contracts. The Board specified that the review relates to process issues only.

The Board considered the following two questions in this motion to review:

1. Did the Board follow the procedural requirements of Part VII.1 of the Act in ordering NRG to pay an administrative penalty? If the answer to this question is “no”, what steps, if any, should the Board take to correct this error.
2. Did the Board meet the requirements of procedural fairness in ordering NRG to execute the contracts? If the answer to this questions is “no”, what steps, if any, should the Board take to correct this error?

For the reasons set out below, the Board has determined that it will set aside the Orders made in EB 2006-0243

1. Proceedings Under Part VII.1 of the Act

Board staff submitted that the Board did not follow the procedural requirements of Part VII.1 of the Act in making the administrative penalty Order. Board Staff asserted that despite the requirements of s. 112.2(2), no written notice of an intention to make an order was ever provided to NRG. In addition, NRG was not provided with 15 days to consider its position, nor was it provided with an option to request a hearing, all in apparent contravention of s. 112.2 (2).

In making its order establishing the administrative penalty, the Board acknowledged that the notice provisions of s. 112.2(2) were not followed. The Board purported to act through an interim order pursuant to s. 112.2(6). However, Board staff noted in its submission that s. 112.2(6) does not appear to permit the Board to issue interim orders under s. 112.5.

Board staff also argued that the Board does not have the power to abridge the time limits in s. 112.2(2) through the application of section 7 of its own Rules of Practice and Procedure. Insofar as the time limits are provided for in the Statute, they are beyond the

reach of the Board's own Rules, and cannot be modified by them. The notice requirements under section 112.2(2), therefore, must be followed prior to making an order under section 112.5. These requirements were not met.

NRG submitted that the Board did not comply with the procedural requirements of Part VII.1 of the Act in ordering NRG to pay the administrative penalty. More specifically NRG noted that even if the Board was entitled to make an interim order, pursuant to s. 112.2(6), NRG was still entitled to be heard on the matter, including a full evidentiary hearing, before the interim order became final. Further, NRG noted that under s. 112.2(2), the Board "shall give written notice to a person that it intends to make an order under section 112.3, 112.4 or 112.5". NRG submitted that no such notice was given in this case.

IGPC submitted that Part VII.1 of the Act is not to be read in isolation but must be read with the statutory powers granted by section 125.1 of the Act, the *Statutory Powers Procedure Act, R.S.O. 1990, c. S.22* (the "SPPA") and the inherent powers of a regulatory body such as the Board. When considered together, IGPC submitted that the Board had the authority and, in IGPC's submission, the duty, to hold the hearing, order the execution of the agreements, convene the compliance hearing and, order the administrative penalty.

As such, IGPC submitted that issuance of the order, the compliance hearing and the issuance of the administrative penalty against NRG were appropriate, consistent with the Board's statutory requirements, and were not only in keeping with, but demanded by, the principles of procedural fairness and the public interest.

Did the Board meet the requirements of procedural fairness in ordering NRG to execute the two contracts?

IGPC submitted that the Board met the requirements of procedural fairness and noted that the ability to proceed in the absence of notice in exigent circumstances is provided by section 125.1 of the Act and section 24(1) of the SPPA where the provision of notice is impracticable in the circumstances. As such, IGPC submitted that the Board exercised its discretion properly in finding that it was impracticable to give a lengthy notice of the compliance hearing to NRG.

NRG submitted that the Board did not comply with the fundamental requirements of procedural fairness in ordering NRG to execute the contracts and therefore did not give NRG an opportunity to consider its position; instruct counsel; prepare responding evidence; conduct cross-examinations; and present submissions concerning the abridgement of notice requirements and times for preparing a response to the motion. NRG submitted that the appropriate remedy is for the Board to set aside or vacate that Order and to dismiss the application brought by IGPC.

In considering whether the requirements of procedural fairness were met it is necessary for the Board to consider whether adequate notice was provided to the parties prior to the hearing. Board staff submitted that section 21(2) of the Act states: “[s]ubject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such a manner and to such persons as the Board may direct.”

It was Board staff’s submission that the statute provides limited guidance as to what is required for adequate notice, specifically with respect to fulfilling the requirement of procedural fairness.

Both Board staff and NRG submitted that the Divisional Court has provided guidance respecting the adequacy of notice. In a 2002 case it said: that “...notice must be sufficient to give those whose rights may be affected knowledge of the allegations made against them, the grounds upon which it is relying on its decision, the nature of the evidence in support of the decision, and adequate time to fairness [sic] respond”.¹ The Court continued: “[t]he opportunity to be heard is meaningless unless information is provided upon which a meaningful response can be based. Only then are the applicants afforded a truly meaningful opportunity to respond to ‘the case to be met’.”²

Although Rule 7.01 of the Board's Rules of Practice and Procedure entitles the Board to "extend or abridge a time limit...on such conditions the Board considers appropriate", the Board is still required to give a party reasonable notice. The Board's Rules of Practice and Procedure do not, therefore, permit the Board to abridge the requirements in a way that will result in unreasonable notice.

¹ *Gratton-Masuy Environmental Technologies Inc. v. Building Materials Evaluation Commission* (2002), 60 O.R. (3d) 245

² *Ibid.*, para. 39.

Board Findings

The Board has reviewed the submissions of the Parties and the transcripts of the proceedings giving rise to the Orders which are the subject of this review. The Board has concluded that, in EB 2006-0243 it failed to observe the statutory and common law notice requirements respecting the hearing of June 29, 2007, and with respect to the imposition of the administrative penalty. It is the Board's view that the appropriate course of action in light of this serious deficiency is to vacate the administrative penalty in its entirety, together with the finding of non-compliance giving rise to it, effective immediately.

Similarly, the Board concludes that it failed to meet the requirements of procedural fairness in ordering NRG to execute the contracts with IGPC respecting the pipeline and its supply. In light of the fact that the contracts were in fact entered into, and continue to be in full force and effect, the Board does not need to make provision for any remedy arising from this failure of procedural fairness.

THE BOARD THEREFORE ORDERS THAT:

1. The Orders in EB 2006-0243 are set aside.

All filings to the Board must quote the file number, EB-2010-0374, be made through the Board's web portal at www.errr.oeb.gov.on.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available you may email your document to the address below. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS

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DATED at Toronto, February 11, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary