



EB-2010-0175

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

AND IN THE MATTER OF a motion by Toronto and Region
Conservation Authority to review the Board's cost eligibility
decision in Procedural Order No. 1 dated July 16, 2010,
relating to an application by Enbridge Gas Distribution Inc.
for approval of its 2011 Natural Gas Demand Side
Management Plan.

BEFORE: Paul Sommerville
Presiding Member

Paula Conboy
Member

DECISION AND ORDER ON THE MOTION TO REVIEW

Enbridge Gas Distribution Inc. ("Enbridge") filed an application with the Ontario Energy Board (the "Board"), received on May 28, 2010, under the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B) for an order granting approval of its 2011 Natural Gas Demand Side Management ("DSM") Plan.

On June 21, 2010, the Board directed Enbridge to serve the Notice of Application on all intervenors in Enbridge's 2010 DSM Plan proceeding (EB-2009-0154), and to all of the parties in the DSM Guidelines Proceeding (EB-2008-0346). In response to the Notice of Application, Toronto and Region Conservation Authority ("TRCA") filed a request for cost award eligibility on June 29, 2010. According to TRCA's request, TRCA primarily represents the direct interests of consumers (e.g. ratepayers) in relation to regulated services and also represents a public interest relevant to conservation in the built environment.

In Procedural Order No. 1 (the “Procedural Order”) dated July 16, 2010, the Board found that TRCA was not eligible for an award of costs. The Board determined that TRCA did not meet the eligibility requirements under section 3 of the Board’s *Practice Direction on Cost Awards*. In making this finding, the Board noted that TRCA’s mandate does not include the representation of the direct interest of consumers (e.g. ratepayers). The Board also noted that TRCA had not demonstrated that it primarily represents a public interest issue with respect to issues in this process.

TRCA filed a motion to review the cost eligibility decision in the Procedural Order. The motion to review was dated August 4, 2010, however, the Board only received the motion by e-mail on October 22, 2010. Under Rule 42 of the Board’s *Rules of Practice and Procedure*, a motion shall be filed and served within 20 calendar days of the date of the order or decision. On November 3, 2010, the Board requested TRCA provide an explanation as to why the motion to review was filed late. On November 11, 2010, TRCA responded that their internal communication records indicate that the motion was mailed on August 4, 2010 within the appropriate timelines. It was not until October 22, 2010, that TRCA noticed that the motion was not posted on the Board’s website. Further inquiries revealed that in fact the Board had not received the letter filed by TRCA.

The Board notes that a party who makes a filing should make an effort to ensure, within reasonable time, the filing has been received. This is especially important when a filing is not made electronically. Because the motion to review was mailed within the applicable timeframe to file a motion, the Board has decided to proceed as it would if the motion had been received within the applicable timeframe.

Under Rule 45.01 of the Board’s *Rules of Practice and Procedure*, when the Board receives a motion to review the Board may determine, with or without a hearing, whether the matter should be reviewed before conducting any review on the merits. Thus, when a motion to review is brought, the Board, as a first step, often determines whether or not the matter should be reviewed. This is considered the “threshold test”. A number of past Board decisions have discussed the intent of the threshold test. For example, in one past decision, the Board stated:

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that: “Every notice of motion...shall set out the grounds for the motion that raise a question as to the correctness of the order or decision...”

Therefore, the grounds must “raise a question as to the correctness of the order or decision.” In the panel’s view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.¹

In its motion to review, TRCA stated that it has been pursuing energy conservation and renewable energy efforts with consumers through education and advocacy programs since approximately 1975. Furthermore, TRCA submitted that it “directly represents the interests of a large and growing number of ratepayers responsible for several hundred buildings across municipal sectors (hospitals, municipalities, offices, retail and schools) in Ontario”.

TRCA also submitted that they represent a vital public interest and “namely the next level of conservation practice”, and that this new approach may be important in achieving conservation targets and building the new green economy.

The Board has reviewed the motion to review as well as the cost eligibility decision in the Procedural Order, and in particular, the basis on which TRCA was not granted cost eligibility. The Board notes that included in TRCA’s membership are several municipalities.

The Board concludes that the grounds identified by TRCA in its motion to review do not raise a question as to the correctness of the cost eligibility decision in the Procedural Order such that a review of the decision would result in it being varied, cancelled or suspended.

Although the Board acknowledges the role of TRCA in relation to CDM and DSM programs, in reviewing information supplied by TRCA in its motion the Board finds that there was no new information provided that would lead the Board to conclude that an error was made in the cost eligibility decision in the Procedural Order.

Instructing ratepayers in energy conservation planning, action, and verification, and representing the interests of these ratepayers who TRCA has contracted with, does not necessarily mean that TRCA is representing the direct interest of consumers (e.g. ratepayers). The Board also notes that with the new approach towards conservation

¹ *Motions to Review the Natural Gas Electricity Interface Review Decision, Decision with Reasons*, EB-2006-0322, EB-2006-0338, EB-2006-0340, May 22, 2007, pp. 17-18.

outlined by TRCA in its motion, TRCA has not demonstrated how this approach relates to representing the public interest as it pertains to this proceeding.

The Board acknowledges that TRCA has participated in a previous Board proceeding and was granted eligibility for an award of costs. The Board notes that decisions regarding cost award eligibility are done on a case by case basis and the fact that a stakeholder has been granted cost award eligibility in a past Board proceeding or process, does not necessarily mean that the stakeholder will be granted cost award eligibility in a future proceeding or process.

For these reasons, the Board finds that the grounds identified by TRCA do not raise a question as to the correctness of the cost eligibility decision in the Procedural Order such that a review of the decision would result in it being varied, cancelled or suspended. The threshold test has therefore not been met in the circumstances of this case and no further review of the cost eligibility decision in the Procedural Order will be undertaken.

THE BOARD THEREFORE ORDERS THAT:

1. TRCA's motion to review the cost eligibility decision in the Procedural Order is dismissed.

ISSUED at Toronto, November 22, 2010

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary