



EB-2007-0771

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

AND IN THE MATTER OF an application by Milton Hydro Distribution Inc. for an Order or Orders approving and fixing just and reasonable distribution rates and other charges effective May1, 2006;

AND IN THE MATTER OF a Notice of Motion by Milton Hydro Distribution Inc. seeking an Order Varying the Decision and Order of the Board in RP-2005-0020 / EB-2005-0391;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

BEFORE: Paul Sommerville
Presiding Member

Cynthia Chaplin
Member

DECISION AND ORDER

Milton Hydro Distribution Inc. ("Milton Hydro") is a licensed distributor providing electrical service to consumers within its defined service area. Milton Hydro filed an application with the Ontario Energy Board (the "Board") for an order or orders approving or fixing just and reasonable rates for the distribution of electricity and other matters, to be effective May 1, 2006. On April 12, 2006 the Board issued its RP-2005-0020/EB-2005-0391 Decision and Order (the "2006 Rates Decision") in connection with Milton's Hydro's application.

Among other things, the 2006 Rates Decision denied the recovery of revenue lost due to the bankruptcy of a large volume customer and a subsequent reduction of electricity consumption of a large volume customer due to a change in the nature of its business (the “lost revenues”). As well, the Board disallowed Milton Hydro’s proposal to include in its 2006 distribution revenue requirement an amount of \$360,000 related to Conservation and Demand management (CDM) activities.

On April 28, 2006 Milton Hydro filed a Notice of Motion with the Board requesting a review of the 2006 Rates Decision and the establishment of a deferral account to record the CDM spending. In its Decision of July 5, 2006, the Board authorized the establishment of the deferral account.

On February 9, 2007, the Board received an application from Milton Hydro to change its distribution rates effective May 1, 2007. On April 12, 2007 the Board issued its EB-2007-0555 Decision and Order, setting new distribution rates (the “2007 Rates Decision”).

On September 19, 2007 Milton Hydro filed this Motion to Review the 2006 Rates Decision. The motion seeks the review of that part of the 2006 Rates Decision in which the Board denied the recovery of lost revenues due to the bankruptcy of a large volume customer and a subsequent reduction of electricity consumption of a large volume customer due to a change in the nature of its business. Milton Hydro further seeks an order varying the 2006 Rates Decision to allow Milton Hydro to recover the lost revenues by way of a rate rider to rates effective to May 1, 2008.

In its Notice of Motion Milton Hydro alleged that errors in fact and in law were made by the panel in the 2006 Rates Decision:

- a. when it stated that to grant the requested relief would constitute retroactive ratemaking;
- b. when it stated that to grant the relief would allow the utility to recover “out of period” costs;
- c. when it neglected to take into account the procedural history of Milton Hydro’s claim for relief.

By way of Notice of Hearing and Procedural Order No. 1, dated October 29, 2007 the Board determined that it would proceed by written hearing to determine the following three preliminary issues arising from Milton Hydro's Notice of Motion:

- (i) the late filing of the Motion, after the deadline set out in Rule 42.03 of the Board's *Rules of Practice and Procedure* (the "Rules");
- (ii) the threshold question, under Rule 45.01 of the Rules, of whether the 2006 Rates Decision should be reviewed; and
- (iii) the impact of the fact that the 2006 Rates Decision has been superseded by the 2007 Rates Decision.

Late Filing of the Motion

Rule of 42.03 provides that a motion for review shall be filed and served within twenty calendar days of the date of the order or decision. Rule 7.03 requires that if a party is unable to meet the timelines as set out by the Rules, the party shall notify the Board Secretary as soon as possible before the time limit has expired. In this case Milton Hydro failed to give any such notice.

The Rules allow the Board to extend a time limit directed by the Rules on such conditions the Board considers appropriate.

The Decision which Milton Hydro seeks to review is dated April 12, 2006, and the Notice of Motion was filed on September 19 2007. In its submission Milton Hydro provided several reasons for the delay in filing including;

- a. it did not have the resources to prepare two review motions in twenty days and it opted to focus on the CDM-related review;
- b. it included a review request in its 2007 rates case which was filed on January 27, 2007. In February 2007 Board staff suggested that Milton Hydro submit a separate motion to review;
- c. from May 2, 2007 until the time of filing, Milton Hydro was involved with the smart meter cost recovery combined proceeding;

- d. since the losses, which occurred in 2002 (bankruptcy) and 2003 (restructuring) respectively, Milton Hydro has tried on many occasions to bring the matter before the Board; and,
- e. it was involved in a number of complex Board proceedings in 2006 and 2007.

Milton Hydro also submitted that there are precedents for the Board's acceptance of a motion to review outside the 20 day period.

School Energy Coalition ("SEC"), the only intervenor in this proceeding, submitted that the Board has already considered and rejected Milton Hydro's proposal twice – first in the 2005 rate application and then again in the 2006 rate application. Further, SEC pointed out that although part of the delay in bringing this motion may perhaps be attributed to advice from Board Staff along the way, there appear to be several large and unexplained gaps in time that should give the Board reason to dismiss this motion for being out of time.

Decision on Motion

While the Board is mindful of the fact that there are times when parties are involved with several different Board proceedings at the same time, the Board is also very concerned that parties conform to the timelines set out in the Rules, unless there are compelling reasons justifying any deviation.

When considering whether or not to extend timelines which are stipulated in the Rules, the Board must be satisfied that the circumstances underpinning the request justify the exercise of the Board's discretion to do so, or that it is otherwise in the public interest to do so.

The Panel does not find that the circumstances in this proceeding warrant an extension for time for filing, nor is there is any public interest element that justifies Milton Hydro's late filing.

The 2006 Rates Decision is dated April 12, 2006 and this Notice of Motion was not filed until September 19, 2007. Put simply, Milton Hydro's claim rests on two assertions.

First, it suggests that it simply did not have adequate resources to commence its Notice of Motion in a timely fashion. The Board notes that it did prosecute its Motion for review of the 2006 Rates Decision respecting CDM matters on time, and within the Rules. Its decision to defer the instant motion, dealing as it does with the same 2006 Rates Decision is hard to comprehend. Clearly, the utility placed greater importance on the CDM review than it did on the subject matter of this Motion. It is fundamentally inefficient to prosecute these Motions serially, when they should have been dealt with at the same time, in April, 2006.

The utility goes on to suggest that the heavy volume of matters coming before the Board in the relevant period, and its engagement in them, left it unable to formulate this Motion. The Board recognizes that there has been very significant regulatory activity over the period, but this is no excuse for a failure to meet the stipulated timeline, as well as the requirement under Rule 7.03 referenced above.

The second thread of the utility's claim concerns the advice it received from Board Staff to pursue the recognition of the lost revenue attributable to the lost customer by way of motion, and not through its application for 2007 rates.

First, the Board considers the advice given by Board staff to have been appropriate. The most apt means to deal with the Board's denial of the lost revenue claim is by way of motion to review, and not through the 2007 rates application. Second, by the time Board staff had offered that advice, months had passed. More months passed before this application was brought. There is simply no credible basis upon which the failure to meet the deadline can be attributed to Board staff.

The Board therefore finds that it is not necessary to deal with the other preliminary issues set out in Procedural Order No. 1 with respect to the threshold issue and the impact of the 2006 Rates Decision being superseded by the 2007 Rates Decision.

THE BOARD ORDERS THAT:

1. Milton Hydro's motion to review the 2006 Rates Decision is dismissed.
2. SEC shall submit its cost claim by **January 22nd, 2008**. A copy of the cost claim must be filed with the Board and one copy is to be served on Milton

Hydro. The cost claim must be completed in accordance with section 10 of the Board's *Practice Direction on Cost Awards*.

3. Milton Hydro will have until **January 29th, 2008** to object to any aspect of the costs claimed by SEC. A copy of the objection must be filed with the Board and one copy must be served on SEC.
4. SEC will have until **February 5th, 2008** to make a reply submission as to why the cost claim should be allowed. A copy of the reply submission must be filed with the Board and one copy is to be served on Milton Hydro.

The Board will then issue its decision on cost awards. Service of cost claims, objections and reply submissions on parties may be affected by courier, registered mail, facsimile or email.

DATED at Toronto, January 8, 2008

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary