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BY EMAIL and RESS

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Our File No. 20090278

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
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Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2009-0278 – Algoma Power 2010 COS

We are counsel for the School Energy Coalition. Pursuant to Procedural Order #3 in this proceeding, these are the submissions of the School Energy Coalition with respect to the RRRP.

In preparing these submissions, we have been assisted greatly by the thorough analysis of the issues in the Board Staff Report dated October 1, 2010, although we don't end up agreeing with all of Board Staff's conclusions in their submissions of the same date.

In these submissions, we will first deal with some general comments, and then with each of the components of the issue in turn. We agree with the five components of the issue identified by Board Staff, i.e. number of years to be included, other distributor classes to be compared, weightings for other distributors, included delivery costs, and volumetric assumptions.

General

1. The essence of this issue is interpretation of Ontario Regulation 442/01, as amended, and in particular section 4(3.2) of that regulation. Tangentially, it also requires consideration and interpretation in the context of the Applicant of Ontario Regulation 445/07.

2. We note that, because this issue is one of interpretation of the Board's statutory mandate, the Board is required as a matter of law to follow the regulation as the Board interprets it, unless the Board determines that the regulation itself stipulates a Board discretion. That is, the Board's only discretion is any discretion expressly granted in the regulation.

3. The regulation states as follows:

“For the purpose of subsection (3.1), the distributor’s forecasted consumer revenues for a year shall be based on the rate classes and on the rates set out for those classes in the most recent rate order made by the Board and shall be adjusted in line with the average, as calculated by the Board, of any adjustment to rates approved by the Board for other distributors for the same rate year.”

4. The phrase “as calculated by the Board” is the only language that would suggest a possible discretion in the Board. In our submission, that discretion is limited to using the Board's understanding of the details of electricity rates to accomplish the required calculation in the manner that is truest to the legislative intent. That is, the Board does not have the discretion to determine the “just and reasonable” result. The legislature has already done that. The Board does have the discretion to determine what constitutes a rate “adjustment”, how they should be “averaged”, etc., in order to ensure that the calculation ends up being faithful to the underlying intent.

5. Using the above tests, we conclude that the recommendations of Board Staff should not be accepted, but rather rates should be set based on the criteria set out below.

Components of the Comparator Delivery Line

6. We agree with Board Staff that, since the rate protection applies to the fixed and volumetric distribution charges of the Applicant, it is “adjustments” to those “rates” for “other distributors” that should be averaged under the regulation.

Weighting of Distributors

7. It is clear from the plain language used that the regulation deals with rate adjustments on a distributor by distributor basis. Therefore, we agree with Board Staff that there should be one percentage increase for each distributor for whom there is a Board-approved adjustment to rates in the year.

8. We note that Board Staff does not deal with how the Board should count distributors who have no rate adjustment in the year. In our submission, the language is clear that the numbers being averaged are rate adjustments by distributor, so a distributor who did not have a rate adjustment in the year would not be included in that calculation.

Applicable Rate Classes

9. Board Staff argues that only rate adjustments for the residential and GS<50 classes for other distributors should be averaged in this calculation. We disagree.

10. In our view, there are only two possible interpretations of this provision:
- a. The rate classes to be compared are the same rate classes to which rate protection is afforded. Under O. Reg. 445/07, that would include residential, GS<50, and GS>50.
 - b. The adjustment to rates should not be by rate classes, but rather on an overall basis by distributor. That is, if the deficiency found in a cost of service application for Utility A is 10% of the revenue for the test period at existing rates, then the weighted average rate increase is clearly 10%, and that is what should apply for that utility. If Utility B is under IRM, and the result of the IRM formula is an overall rate increase of 1.7%, then that is what should apply for that utility.
11. This is a difficult interpretation issue. The first choice above is consistent with our view on the Components of the Delivery Line (see above) that the comparator measurement should be consistent with the use of the information. In short, why include classes such as streetlighting or large users when the Applicant's customers in such classes are not the subject of the rate protection?
12. The second choice above is consistent with our view on the Weighting of Distributors that the regulation speaks on a distributor by distributor basis. There is no reference to adjustments to rates for particular classes. Further, it has the advantage of simplicity.
13. On balance, we believe that the first choice is the better interpretation, but for the reasons above we think that either interpretation is defensible. We do note, however, that for those same reasons we do not believe that limiting the comparators to residential and GS<50 can be made to be consistent with any reasonable interpretation of the regulation.

Volumetric Assumption

14. Under either view above as to the rate classes to be compared, in our view there is no need to make a volumetric assumption.
15. In the case of the interpretation described in 10(b) above, the calculation of adjustments is by definition independent of volume.
16. In the case of the interpretation described in 10(a) above, the proposal of Board Staff would be, not an average of rate adjustments, but an average of bill impacts. It is our submission that the regulation does not refer to bill impacts, and that cannot be read into it. Instead, the more appropriate approach is to calculate, for Utility A, the percentage increase in the residential monthly charge, the percentage increase in the residential volumetric charge, the percentage increase in the GS<50 monthly charge, etc. (for all six components) and average them for that distributor to get that distributor's percentage rate adjustment. Those percentages would be the ones that are averaged across the province.

Applicable Years

17. We have struggled with this component the most. The plain language of the regulation is that the calculation is done by the Board for a particular year. There is no provision for multiple years, and in our submission it is not possible to read the provision to include that by implication. The regulation clearly anticipates an annual adjustment, so that adjustment is for one year only.
18. On the other hand, the regulation in fact mandates (rather than authorizes) an annual calculation, and that has not been done for 2008 or 2009. If the Applicant and the Board had complied with the regulation since 2007, the rate protection and the rates would have been adjusted annually.
19. In order to achieve the stated goal of the regulation, our conclusion is that the Board should calculate the correct rates on the assumption that an adjustment had been made in each of 2008, 2009, and 2010 in compliance with the regulation. For example, if 2007 rates are 100%, and the average adjustment for other distributors in 2008 was 3%, then the 2008 notional rates should have been 103%. If the 2009 average adjustment for other distributors was 9%, then the 2009 notional rates should have been 112.3% (103% plus 9% of that). If the 2010 average adjustment for other distributors was 4%, then the rates in this Application, effective December 31, 2010, should be 116.8% (112.3% plus 4% of that) of the 2007 rates.
20. In theory, the RRRP amount charged to other customers should have been adjusted in each of those prior years, but it is too late to do that, just as it is too late to adjust the rates actually charged to Algoma customers in those years. It is not, however, too late to ensure that the effects today of what should have been done in those prior years are accurately reflected in current rates.

Conclusion

21. Based on the foregoing, we believe that the Board should prepare the calculation it is required to make under O. Reg. 442/01 on the following basis:
 - a. For each distributor that had an adjustment to its rates in 2008, calculate the average percentage increase for each of fixed and volumetric charges for each of the residential, GS<50, and GS>50 classes. Calculate the average of these percentages for all distributors in that year.
 - b. Apply the average percentage calculated in (a) to the rate protected rates of the Applicant for 2007 to get the notional 2008 rates.
 - c. Repeat (a) with respect to 2009, and apply that average to the rates calculated in (b).
 - d. Repeat (a) with respect to 2010, and apply that average to the rates calculated in (c).

- e. The rates calculated in (d) above would be the rates that comply with O. Reg. 442/01, and should apply to the Applicant's customers commencing December 1, 2010.

22. The School Energy Coalition submits that it has participated in this process responsibly and with a view to maximizing its assistance to the Board, and therefore asks that the Board order payment of its reasonably incurred costs of that participation.

All of which is respectfully submitted.

Yours very truly,
JAY SHEPHERD P. C.

Jay Shepherd

cc: Wayne McNally, SEC (email)
Interested parties (email)