

THE ONTARIO ENERGY BOARD

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 Great
Lakes Power Limited for an Order or Orders approving just
and reasonable rates for the distribution of electricity.

Staff Submission on Motion by GLPL

Background

1. On January 9, 2008, Great Lakes Power Limited (“GLPL”) filed a Notice of Motion with the Ontario Energy Board (the “Board”) seeking a review and variance of the Board’s Decision and Order on Interim Rates (the “Decision”) dated December 20, 2007.
2. By Procedural Order dated January 29, 2008, the Board indicated that it would hear part of the motion. Specifically, it determined it would hear the request for relief with relation to GLPL’s request that rates be declared interim as of September 1, 2007. The Board required interested parties, including Board staff, to file any submissions on this issue by February 15, 2008. What follows is the submission of Board staff.
3. To assist the Board in its determination of whether the Board has the legal jurisdiction to grant the relief requested, Board staff makes the following submissions.

The Nature of Interim Rate Orders Vis a Vis Final Rate Orders

4. Section 21(7) of the Ontario Energy Board Act, 1998 (the “Act”) permits the Board to make interim orders: “The Board may make interim orders pending the final disposition of a matter before it.”
5. The leading case on the nature and use of interim rates is the Supreme Court decision *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*¹ (“Bell”).
6. By declaring rates interim under section 21(7), the Board gives itself the option to retroactively adjust the rate back to the date of the interim decision at the time a final rate order is made. For example, if a utility’s existing rates are declared interim on January 1 of year 1, and a final rate order is issued on July 1 of year 1, the Board has the power (though not the obligation) to apply the rates in the final rate order retroactive to January 1.
7. Although the Board has the power to adjust interim rates retroactively, it has no power to adjust a final rate order retroactively. In *Bell* the Supreme Court noted:

[a] consideration of the nature of interim orders and the circumstances under which they are granted further explains and justifies their being, **unlike a final decision**, subject to retrospective review and remedial orders. [para. 45, Emphasis added]

8. The Supreme Court again addressed the nature of final rate orders in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy and Utilities Board)*²:

[i]t is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates.

¹ [1989] 1 S.C.R. 1722.

² [2006] S.C.C. No. 4, para. 71

9. In *Beau Canada Exploration Ltd. v. Alberta (Energy & Utilities Board)*³, the Alberta Court of Appeal also held that final orders cannot be adjusted retroactively:

A fundamental principle of statutory interpretation is that retrospective power can only be granted through clear legislative language. The principle is based on notions of fairness and the reliability of expectations.

10. The Ontario Energy Board has also addressed this issue directly. In RP-2005-0013/EB-2005-0031, the majority decision stated: “The *Ontario Energy Board Act, 1998* does not contain any provisions that deal specifically with retroactive ratemaking, and the Board is therefore not empowered to alter a final rate retroactively.”⁴
11. In fact, in the case cited above, counsel for GLPL argued that the Board has no jurisdiction to alter a final rate order. In his submissions to the Board on November 8, 2005, counsel for GLPL stated:

Great Lakes’ rates were made interim as of April 1, 2005. So there is a question out there as to whether or not the Board does have the jurisdiction to amend rates during a period in which they were final.

It's my position that the law is clear, that the Board does not have the jurisdiction to amend a final rate, only an interim rate. That's why rates are made interim.⁵

12. In Board staff’s view the law is very clear that the Board does not have the jurisdiction to amend a final rate order retroactively.

³ [2000] A.J. No. 507 (C.A.), para. 28

⁴ Decision and Order, RP-2005-0013/EB-2005-0031, February 24, 2006, p. 8.

⁵ Transcript, RP-2005-0013/EB-2005-0031, November 8, 2005, p. 33.

The Relief GLPL seeks would have the effect of retroactively adjusting a final rate order

13. The Board's Decision that is the subject of this motion was issued December 20, 2007. The Decision made GLPL's rates from its then current final rate order interim effective January 1, 2008.
14. Prior to the issuance of the Decision, GLPL's rates were set by the decision in RP-2005-0013/EB-2005-0031, which became a final rate order with the Board's decision and order on February 24, 2006. Therefore, from February 24, 2006 until January 1, 2008, GLPL's rates were set by a final rate order.
15. As discussed above, the law is clear that the Board has no jurisdiction to retrospectively alter a final rate order. The final rate order that was in effect from February 24, 2006 until January 1, 2008 cannot be altered. The Board can only declare rates interim going forward (i.e. on or after the date it decides rates shall be declared interim); it does not have the jurisdiction to declare rates interim retroactively. To do so would have the effect of retroactively adjusting a final rate order.
16. The fact that GLPL is seeking only to maintain existing rates (i.e. the final rates from the RP-2005-0013/EB-2005-0031 decision) through an interim order is not relevant. The point in declaring rates interim is that it provides the Board with the option of retroactively adjusting these interim rates when it issues its final decision. However, since a final rate order (i.e. the RP-2005-0013/EB-2005-0031 decision) was in effect until January 1, 2008, any decision by the Board to declare interim rates effective prior to this date would be meaningless. The Board simply does not have the jurisdiction to alter rates that were covered chronologically by a final rate order. Put another way, interim rates cannot be declared effective on a date that is prior to the date of the decision declaring them interim.

Response to certain issues raised in GLPL's Notice of Motion

Pre-judgment

17. Starting at paragraph 9 of its Notice of Motion, GLPL makes several arguments regarding what it views as “pre-judgment” by the Board of the effective date for final rates. GLPL argues that by setting January 1, 2008 as the date interim rates take effect, the Board is pre-judging any arguments by parties who may support a date prior to January 1 as the date final rates ultimately take effect.
18. Board staff submits that by the same logic, if the Board were to accept GLPL’s proposed interim rates date of September 1, 2007, it would be pre-judging any arguments by parties that support a date prior to September 1 as the date final rates ultimately take effect. In any event, the issue is not pre-judgment; as discussed above, the Board simply does not have the jurisdiction to make the order GLPL seeks.
19. GLPL further submits that the Board should have entertained submissions from parties on the date that interim rates take effect prior to issuing the Decision. It has not been the Board’s practice to seek submissions from parties prior to declaring existing rates interim; rather, it allows parties to make submissions on the appropriate effective date of the final rate order at the end of the proceeding. Although the Board could have sought submissions from parties on the appropriate date interim rates were to take effect, this would have added more time to the process, and likely would have meant that the Board could not have declared rates interim as early as January 1, 2008.

The interests of consumers with respect to price

20. Starting at paragraph 31 of its Notice of Motion, GLPL cites the Board’s objectives under section 1 of the Act, in particular the Board’s objective to “protect the interests of consumers with respect to prices...” It then states that the Board’s decision to make rates interim effective January 1, 2008 instead of September 1, 2007 will result in one of its large customers having to pay an additional \$124,000.
21. Leaving aside GLPL’s presumption that the Board would ultimately declare final rates effective September 1, 2007, Board staff submit that the Board’s objectives

do not require, or even suggest, that rates should be declared interim effective September 1, 2007 in this case. The purpose of objective 1 is not to protect the interests of any one particular consumer or subset of consumers – it is to protect the interests of consumers as a whole. The reduced rates that some GLPL customers will enjoy if the Board ultimately approves GLPL’s application will result from the implementation of a combination of the re-classification of its customers as directed by O. Reg. 445/07 and the subsequent cost allocation and rate design, and the application of O. Reg. 335/07 and O. Reg. 446/07 relating to the determination of the amount the distributor will receive through the Rural or Remote Rate Protection (“RRRP”) process to close to the distributor’s forecasted revenue requirement for the year. The amount of money available for the RRRP process is provided by all ratepayers in the province of Ontario through a charge of \$0.001/kWh. The added amount of money received by GLPL through the RRRP process is paid for by all of the province’s ratepayers (including GLPL’s customers) at the currently approved level and therefore provides no net benefit to consumers with respect to prices.

Natural justice

22. Starting at paragraph 34, GLPL makes certain arguments stating that its natural justice rights have been violated. The argument is that GLPL filed a “2007 forward test year” application, and that the effect of the Board’s decision is to unilaterally change the application from a forward test year to a historic test year. In GLPL’s view this denies GLPL the opportunity to recover its 2007 revenue requirement, and violates the rules of natural justice.
23. It is the submission of Board staff that GLPL’s natural justice rights have not been violated. Although the application is labelled by GLPL as a forward test year application for 2007, it was not filed until August 31, 2007. Irrespective of the date on which rates were declared interim, it would not be reasonable to assume that the Board would reach a final decision on the application until sometime in 2008 (the Board’s metrics allow 280 days from the date of filing to a final

decision, which would mean a decision could be expected by June 6, 2008).

Given these timelines, by the time the Board actually considered the full record of the application, the 2007 costs data in the application would not be “forward” costs – they would be historic. There was never a realistic chance that the Board would issue a final decision in this case in 2007.

24. In any event, there is no requirement that the test year (in this case 2007) and the rate period match. In a cost of service case the Board sets rates by examining a utility’s costs over the course of a test year, typically the calendar period of January 1 to December 31. Rates are set to allow recovery for the costs of this test year, and these rates are in effect until replaced by the next rate order. Rates set based on the costs of the test year are not necessarily in effect for the test year itself. In fact for electricity distributors the Board uses test years based on the January 1 to December 31 period but allows for collection of those costs over a rate year of May 1 to April 30. Similarly, rates set using the test year costs do not become invalid once the test year ends. The rates GLPL charged in 2006, for example, were not based on a 2006 test year. Natural justice rights are not violated when the test year and the rate period do not match.

25. All of which is respectfully submitted on the 15th day of February, 2008.