Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2012-0206

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

AND IN THE MATTER OF an Application by Union Gas Limited for an Order or Orders amending or varying the rate or rates charged to customers as of October 1, 2011;

AND IN THE MATTER OF a proceeding commenced by the Ontario Energy Board on its own motion to determine the accuracy of the calculation of margin sharing related to Deferral Account 179-70 - Short-Term Storage and Other Balancing Services.

DECISION AND ORDER ON BOARD MOTION
JULY 18, 2012

Background

Union Gas Limited ("Union") filed an application dated April 18, 2011 with the Ontario Energy Board (the "Board") under section 36 of the Act, for an order of the Board amending or varying the rate or rates charged to customers as of October 1, 2011 in connection with the sharing of 2010 earnings under the incentive rate mechanism approved by the Board as well as final disposition of 2010 year-end deferral account and other balances (the "Application"). The Board assigned file number EB-2011-0038 to the Application.

On September 19, 20 and 21 2011, the Board held a hearing on all matters in that proceeding and issued its Decision and Order on January 20, 2012. The Board directed Union to file a Draft Rate Order which reflected the Board's findings in its Decision.

The Board received submissions from parties contesting Union's Draft Rate Order with respect to the Short-Term Storage and Other Balancing Services Deferral Account ("Short-Term Storage Account"). The Board issued its Decision and Order on the Draft Rate Order on February 29, 2012, directing Union to file a revised Draft Rate Order reflecting the Board's determination on the matter. The Board noted that it would review the revised Draft Rate Order to confirm that all the necessary changes were made and would subsequently issue a Final Rate Order.

Union filed a revised Draft Rate Order on March 2, 2012. The Board issued its Final Rate Order on March 8, 2012 approving Union's Draft Rate Order as filed.

By letter dated March 27, 2012, Canadian Manufacturers & Exporters ("CME") (an intervenor in the proceeding) noted that an issue had arisen in the EB-2011-0038 proceeding regarding the calculation of margin sharing in the Short-Term Storage Account. CME suggested that the correct amount to be credited to ratepayers should be $3.824 million (as opposed to the $0.831 million credit approved by the Board in the EB-2011-0038 Final Rate Order). CME requested that the Board address this error by making an adjustment to the margin sharing calculation under Rule 43.02 of the Board's *Rules of Practice and Procedure* (the "Rules"). Union filed a letter responding to CME's letter on April 5, 2012. CME filed a subsequent letter on April 16, 2012, and Union filed a final letter on April 19, 2012.

The Board issued a Notice of Motion, Notice of Motion Hearing and Procedural Order No. 1 on May 2, 2012 ("Notice and Procedural Order No. 1"). In the Notice and Procedural Order No.1, the Board determined that the correction requested by CME in regards to the margin sharing calculation in the Short-Term Storage Account would not, if substantiated, be allowable under Rule 43.02 of the Rules. However, the Board noted that the issues that were raised with respect to the calculation of short-term storage margin sharing warranted further review by the Board. The Board determined that it would commence a review proceeding on its own motion, pursuant to Rule 43.01 of the Rules to review its EB-2011-0038 Decision and Rate Order as it relates to the issue of calculating the amount of margin sharing in the Short-Term Storage Account (the "Motion Proceeding"). The Board assigned Board File No. EB-2012-0206 to the Motion Proceeding. The Board adopted the intervenors in the EB-2011-0038 proceeding as intervenors in the Motion Proceeding.

In the Notice and Procedural Order No. 1, the Board noted that it had incorporated the four letters cited above (two from CME and two from Union) as submissions in the Motion Proceeding. The Board also set out a process for intervenors and Union to make additional submissions in the Motion Proceeding.

Union filed a letter on May 14, 2012 requesting that it be granted an extension until May, 23, 2012 to file its submissions in the Motion Proceeding, so that it could reply to all the submissions made by other parties.

The School Energy Coalition ("SEC") and CME filed letters in response to Union's request. Both parties argued that all interested parties to the EB-2012-0206 proceeding should be treated equally, as they can be considered respondents to the Motion Proceeding initiated by the Board, and should be granted the same opportunity to reply as Union.

The Board issued a letter on May 16, 2012 in which it determined that it would grant all parties an opportunity to reply to the submissions filed by other parties.

The Board received submissions in the Motion Proceeding from Board staff, the Consumer Council of Canada ("CCC"), the City of Kitchener ("Kitchener"), CME, the Federation of Rental-housing Providers of Ontario ("FRPO"), the London Property Management Association ("LPMA"), SEC, and Union.

What should be the ratepayer's share of net revenues in the Short-Term Storage Account?

Submissions

In its EB-2011-0038 Decision and Order on Draft Rate Order issued February 29, 2012, the Board noted the following:

> The Board agrees with CME, LPMA, Kitchener, and Board staff that the outcome of the findings in its Decision is the establishment of the ratepayer credit in the Short-term Storage Account of $0.831 million.
>
> The Board's findings in the current proceeding effectively fix 100 PJs as the utility asset.[1] In addition, the Board's findings are informed by

[1] See EB-2011-0038, January 20, 2012 Decision and Order at p.6.

> Union's ability to track what storage assets are being used for each type of storage transaction[2] and state that the entire amount of utility storage above in-franchise requirements is available for sale as short-term storage services (and all costs of this space is to be paid for by in-franchise customers).[3]
>
> Although the Board was not explicit in its findings that $0.831 million is the amount that should be shared with ratepayers, it is a clear outcome of its findings. The Board's findings in this proceeding result in the sharing with ratepayers of all net revenues (minus a 10% incentive payment as set out in the NGEIR Decision[4]) in the Short-term Storage Account as it is a utility asset which is supporting these transactions.[5]

Board staff as well as CCC, Kitchener, CME, FRPO, LPMA and SEC[6] (the "Parties") all submitted that the credit amount to be shared with ratepayers ($0.831 million) related to margin sharing in the Short-Term Storage Account, as set out above, was incorrect. Board staff and the Parties argued that the clear intent of the Board's findings in the EB-2011-0038 proceeding was that all net revenues (minus a 10% incentive payment) in the Short-Term Storage Account should accrue to the benefit of ratepayers.[7] Board staff and the Parties argued that the correct amount to be shared with ratepayers related to margin sharing in the Short-Term Storage Account is $3.824 million.[8]

CME and Board staff noted that in the EB-2011-0038 proceeding the 2010 margin sharing amount in the Short-Term Storage Account was calculated on the basis that $15.829 million was the short-term storage margin already embedded in rates.[9] CME's March 27, 2012 submission noted that the amount actually embedded in rates was revised as a result of the NGEIR Decision. In 2007, the credit amount embedded in rates was $14.246 million being 90% of the Board-approved forecast of $15.829 million. In 2008, after the issuance of the NGEIR Decision, the credit amount was reduced by

[2] Ibid at p. 16.
[3] Ibid at pp. 20-21.
[4] See EB-2005-0551, November 7, 2006 NGEIR Decision with Reasons at p.103.
[5] See EB-2011-0038, February 29, 2012 Decision and Order on Draft Rate Order at pp. 5-6.
[6] Note that CCC, FRPO, and SEC all filed submissions supporting the positions set out by Board staff and CME in their respective submissions.
[7] See EB-2012-0206, Board Staff Submission, May 14, 2012 at p.3 ("Board Staff Submission"); EB-2012-206, CME Submission, March 27, 2012 at p.7 ("CME Submission #1"); EB-2012-0206, Kitchener Submission, May 14, 2012 at p.1 (Kitchener Submission); and EB-2012-0206, LPMA Submission, May 18, 2012 at p.3 ("LPMA Submission").
[8] See Board Staff Submission at p.4; CME Submission at p1; Kitchener Submission at p.2; and LPMA Submission at p.4.
[9] See CME Submission #1 at p.3; and Board Staff Submission at p.4.

21% (which reflects the 79% / 21%, utility / non-utility split[10]) to $11.254 million which continued to be the amount embedded in rates in 2010.[11]

Board staff and the Parties argued that the Board's Decision in EB-2011-0038, in which it found that 100 PJs is the utility storage asset and that Union can track what storage assets are being used for each type of storage transaction, eliminated the need for a 79% / 21% split for the margin sharing calculation related to the Short-Term Storage Account.[12]

Board staff and the Parties argued that the Board's intent in its EB-2011-0038 Decision was to create a situation where all net revenues (minus a 10% incentive payment) accrue to the benefit of ratepayers and therefore the margin sharing calculation for the Short-Term Storage Account should have been done as follows:

2010 Actual Net Revenue	$16,753,000
Less: 10% Incentive Payment	$1,675,000
Actual Adjusted Net Revenue	$15,078,000
Less: Short-Term Margin in Rates	$11,254,000
Deferral Account Balance for Disposition	**$3,824,000**[13]

Board staff and the Parties submitted that when the calculation is made using the $11.254 million amount that is embedded in rates, the ratepayer credit increases from the Board approved amount of $0.831 million to $3.824 million. Overall, the above calculation results in 90% of all short-term storage net revenues streaming to the benefit of ratepayers.

Board staff and the Parties submitted that the Board should direct Union to dispose of an incremental credit balance of $2.992 million ($3.824 million, the corrected ratepayer share of short-term storage margins minus $0.831 million, the amount previously approved in the Board's rate order and disposed of by Union) to ratepayers.[14]

[10] See EB-2005-0551, November 7, 2006 NGEIR Decision with Reasons at pp. 101-102.
[11] See CME Submission #1 at p.3; and Board Staff Submission at p.4.
[12] See Board Staff Submission at p.4; CME Submission #1 at p.7; and LPMA Submission at p.3.
[13] See Kitchener Submission at p.2; and note that CME, Board staff and LPMA all provided calculations that result in the same revised ratepayer credit amount of $3.824 million related to margin sharing in the Short-Term Storage Account.
[14] See Board Staff Submission at p.5; CME Submission #1 at p.11; Kitchener Submission at p.2; and LPMA Submission at pp. 3-4.

Board staff submitted that this incremental credit amount should be disposed as part of Union's first Quarterly Rate Adjustment Mechanism ("QRAM") proceeding that occurs after the issuance of the Final Decision and Order in this review proceeding.[15]

Union submitted that there is no proper basis to vary the Final Rate Order (to correct the ratepayer credit amount) as it reflects the Board's own assessment of the appropriate credit to ratepayers. Union noted that the Board's findings were unequivocal; the Board expressly found that the correct amount to be credited to ratepayers was $0.831 million. Union submitted that the Board further confirmed this understanding through its determination in the Final Rate Order that the updated Draft Rate Order filed by Union accurately reflected the Board's findings in its Decision and Order on Draft Rate Order.[16]

Union submitted that the Board was fully aware, when rendering its decision, that the ratepayer credit amount of $0.831 million did not include the change in the share of forecast short-term margins (in the amount of $2.992 million) which had occurred subsequent to the NGEIR Decision (and was carried forward in each subsequent proceeding).[17]

Union noted that the EB-2011-0038 proceeding concerned 2010 deferral account balances and that it was not seeking to re-set base rates. Union submitted that the methodology used to calculate the amount available for sharing with ratepayers in the Short-Term Storage Account concerned the application of net margin to the Board approved forecast of $15.829 million. Union noted that this is the same methodology used to calculate margin sharing in a number of previous proceedings.[18]

In response to Union's assertion that $15.829 million is the Board approved net revenue forecast to be used in the calculation of margin sharing, LPMA submitted that there is no fixed net revenue forecast included in the deferral account.[19]

Union submitted that correcting the balance at this time is retroactive ratemaking and the Board can not retroactively change approved rates.

[15] See Board Staff Submission at p.5.
[16] EB-2012-0206, Union Submission, May 18, 2012 at pp. 2-3 ("Union Submission #3).
[17] Ibid at p. 4.
[18] Ibid.
[19] See LPMA Submission at p. 3.

Union submitted that the Board does not have the authority to retrospectively change rates. Union submitted that once the Board makes rates final, they are, by definition, just and reasonable in accordance with section 36(2). Union argued that rates cannot be retrospectively reduced to a level which must, by definition, be less than just and reasonable. Union submitted that the relief sought by the correcting parties amounts to clear retroactive ratemaking.[20]

In regards to Union's argument that correcting the ratepayer credit amount constitutes retroactive ratemaking, Board staff submitted that the current motion initiated by the Board is a legitimate and legally permissible review of a Board decision and that as such, the rule against retroactive ratemaking is neither invoked, nor offended.

In particular, Board staff noted that the Board's power of review on its own motion is provided in section 43.01 of its Rules of Practice and Procedure. That power comes ultimately from section 21.2 of the *Statutory Powers Procedure Act* which in addition to empowering the Board to review all or part of its own decision or order and to either confirm, vary, suspend or cancel such decision and order, indicates at subsection 21.2(2) that such review "shall take place within a reasonable time after the decision or order is made".

Board staff argued that the current review motion is properly constituted, that it was brought within a reasonable time and that therefore, the Board is empowered to vary its Decision and Order to address evidentiary discrepancies and to vary the Rate Order issued on March 8, 2012.[21]

Union submitted that a Motion to Review proceeding is not an opportunity to reargue the case, nor is it an appeal.[22]

Union stated that the grounds for a Motion to Review are informed by Rule 44 of the Rules and are limited. Union noted that the grounds are primarily fact driven. As the Board held in *Grey Highlands*:

> Rule 44.01 of the Rules of Practice and Procedure states that a motion for review must set out grounds that raise a question as to the correctness of the order or decision in question, which grounds may

[20] See Union Submission #1 at p. 10-11.
[21] See Board Staff Submission at p.7.
[22] See Union Submission #3 at p. 2.

> include the following: (i) error in fact; (ii) change in circumstances; (iii) new facts have arisen; and (iv) facts that were not placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.[23]

Union stated that, in this case, no new facts have arisen, nor has there been a change in position. The issue therefore is whether the Board erred in fact or whether facts were not placed in evidence that could not have been discovered by reasonable diligence. Union submitted that, in considering these fact driven inquiries, the Board must consider:

(a) That they are objective inquiries. The subjective intentions of the parties, and even the Board itself, are irrelevant.

(b) That the moving party must be able to show that the findings are contrary to the evidence that was before the panel, or could have been before the panel. It is not enough to argue that conflicting evidence should have been interpreted differently.[24]

CME submitted that Union's argument fails to distinguish between the Board's powers under Rule 43.01 of the Rules when it initiates a review of an Order or Decision on its own Motion, and a Motion for Review initiated by a party to a proceeding pursuant to Rule 44.01 of the Rules. CME stated that there is no language in Rule 43.01 that constrains the Board's power to review to factors listed in Rule 44.01. The language under Rule 43.01 is very broad. All that is required is that the Board formulate "… at any time … an intention to review all or part of any order or decision …" and it "may confirm, vary, suspend or cancel the Order or Decision by serving a letter on all parties to the proceeding."[25]

CME submitted that Rule 43.01 of the Rules authorizes the Board to vary the February 29, 2012 Decision and Order and the subsequent Rate Order to reflect what it intended when it rendered its Decision.[26]

[23] See EB-2011-0053, April 21, 2011 Decision and Order on Motion to Review at p.3.
[24] See Union Submission #3 at p.2-3.
[25] See Ontario Energy Board, Rules of Practice and Procedure, Revised January 9, 2012 at section 43.01.
[26] See EB-2012-0206, CME Submission, May 30, 2012 at p. 1 ("CME Submission #4").

In response to Board staff's assertion that the issue of retroactive ratemaking does not arise because the Board has brought a motion under Rule 43, Union submitted that this misses the point that what in fact is being sought is an increase in the credit to ratepayers underpinning 2010 rates. The concern regarding retroactivity relates to the Board's order in EB-2009-0275, which is final.[27]

CME submitted that what is being sought is not an increase in the credit to ratepayers underpinning 2010 in-franchise rates. CME noted that the $11.254M credit embedded in those rates remains unchanged. CME noted that, after deducting the 10% incentive payment payable to Union's shareholder, what is being sought is that all 2010 net revenues in excess of the $11.254M credit embedded in 2010 rates be paid to ratepayers in order to properly implement the intent of the Board's Decision in EB-2011-0038.[28]

Board Findings

The Board finds that the correct amount to be credited to ratepayers related to margin sharing in the Short-Term Storage Account is $3.824 million.

In its February 29, 2012 Decision and Order on Draft Rate Order in the EB-2011-0038 proceeding, the Board stated the following:

> The Board's findings in the current proceeding effectively fix 100 PJs as the utility asset.[29] In addition, the Board's findings are informed by Union's ability to track what storage assets are being used for each type of storage transaction[30] and state that the entire amount of utility storage above in-franchise requirements is available for sale as short-term storage services (and all costs of this space is to be paid for by in-franchise customers).[31]
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> Although the Board was not explicit in its findings that $0.831 million is the amount that should be shared with ratepayers, it is a clear outcome of its findings. The Board's findings in this proceeding result in the sharing with ratepayers of all net revenues (minus a 10% incentive payment as set out

[27] See Union Submission #3 at p.7.
[28] See CME Submission #4 at p.2.
[29] See EB-2011-0038, Decision and Order at p.6.
[30] See EB-2011-0038, Decision and Order at p. 16.
[31] See EB-2011-0038, Decision and Order at pp. 20-21.

> in the NGEIR Decision[32]) in the Short-term Storage Account as it is a utility asset which is supporting these transactions.

The Board's intent in its EB-2011-0038 Decision and Order was that all net revenues (minus a 10% incentive payment) in the Short-Term Storage Account should accrue to the benefit of ratepayers. The Board made an error when it stated that $0.831 million is the amount that should be shared with ratepayers. The Board is of the view that the $0.831 million amount does not flow correctly from the intent of the Board's Decision. The Board calculated the 2010 margin sharing amount for the Short-Term Storage Account on the basis that $15.829 million was the short-term storage margin already embedded in rates. This is an error because in 2008, after the issuance of the NGEIR Decision, the credit amount embedded in rates was changed to $11.254 million which continued to be the amount embedded in rates in 2010. Using $11.254 million as the amount embedded in rates, the correct ratepayer share that flows from the intent of the Board's Decision is $3.824 million. Increasing the ratepayer credit to $3.824 million ensures that ratepayers receive 90% of the net revenues recorded in the Short-Term Storage Account.[33]

The Board disagrees with Union's argument that the only grounds for a Motion to Review are those set out in the Grey Highlands decision. When the Motion to Review is initiated on the Board's own motion, Rule 43.01 sets out the Board's powers. Rule 43.01 states the following:

> The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

The Board's powers are clearly quite broad under Rule 43.01. There is no language in Rule 43.01 which limits the rationale for initiating a Motion to Review on the Board's own motion. In this case, CME raised a potential issue regarding the calculation of margin sharing in the Short-Term Storage Account by filing a letter in the EB-2011-0038 proceeding. The Board reviewed that letter (and the subsequent letters filed by Union and CME) and determined that there could possibly be an error in its EB-2011-0038 Decision and related Rate Order. The Board determined that it would review this

[32] See EB-2005-0551, NGEIR Decision with Reasons at p.103.
[33] The Board notes that the 2010 net revenues recorded in the Short-Term Storage Account are $16.753 million. Overall, ratepayers (through the sharing mechanism in the Short-Term Storage Account and the credit amount embedded in base rates) should receive $15.078 million (or 90% of the net revenues) as this was the Board intent in EB-2011-0038. Given that $11.254 million is the amount embedded in rates; ratepayers are entitled to an additional $3.824 million related to margin sharing in the Short-Term Storage Account.

potential issue and initiated a Motion to Review proceeding. The Board offered all intervenors in the EB-2011-0038 proceeding and Union the opportunity to provide argument on this issue. The Board finds that the current review motion is properly constituted, and that as such the Board is empowered to vary its Decision and Order and vary the Rate Order issued on March 8, 2012 to correct the error in the ratepayer credit amount related to margin sharing in the Short-Term Storage Account.

Implementation

The Board finds that the ratepayers' share of the net short-term revenues should be $3.824 million as opposed to the $0.831 million credit amount approved in the EB-2011-0038 Decision and related Rate Order.

The Board directs Union to dispose of an incremental credit balance of $2.992 million (plus any applicable interest) to ratepayers. Union shall dispose the incremental credit amount of $2.992 million (plus any applicable interest) as part of Union's October 2012 Quarterly Rate Adjustment Mechanism ("QRAM") proceeding. The Board directs that the incremental credit amount should be disposed and allocated in a manner consistent with the way in which the balance in the Short-Term Storage Account has been handled in the past.

Cost Awards

The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's *Practice Direction on Cost Awards*. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

THE BOARD ORDERS THAT

1. Union shall dispose of a credit balance of $2.992 million (plus any applicable interest) related to the correction of the margin sharing amount in the Short-Term Storage Account as part of its October 2012 QRAM proceeding. Union shall file all necessary working papers in that proceeding to satisfy the Board that the correction amount of $2.992 million (plus any applicable interest) has been properly allocated and disposed of.

2. Eligible intervenors shall file with the Board and forward to Union their respective cost claims within 14 days of the date of this Decision.
3. Union shall file with the Board and forward to the intervenors any objections to the claimed costs of the intervenors within 21 days from the date of this Decision.
4. If Union objects to the intervenor costs, intervenors shall file with the Board and forward to Union any responses to any objections for cost claims within 28 days of the date of this Decision.
5. Union shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

All filings to the Board must quote file number **EB-2012-0206**, be made through the Board's web portal at www.errr.ontarioenergyboard.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.ontarioenergyboard.ca. If the web portal is not available you may email your document to the BoardSec@ontarioenergyboard.ca. 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 seven paper copies. If you have submitted through the Board's web portal an e-mail is not required.

All parties must also provide the Case Manager, Lawrie Gluck, Lawrie.gluck@ontarioenergyboard.ca with an electronic copy of all comments and correspondence related to this case.

ISSUED at Toronto, July 18, 2012

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary