Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2012-0360

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

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 in the Short-Term Storage Account;

AND IN THE MATTER OF a Motion initiated by Union Gas Limited to review and vary the Ontario Energy Board's Decision and Order dated July 18, 2012 in EB-2012-0206 in which the Ontario Energy Board, proceeding on its own motion, reviewed and varied its EB-2011-0038 Decision and Rate Order (as it related to the issue of calculating the amount of margin sharing in the Short-Term Storage Account).

BEFORE: Marika Hare
Presiding Member

Ken Quesnelle
Member

Jerry Farrell
Member

DECISION AND ORDER
ON MOTION TO REVIEW AND VARY
October 18, 2012

Introduction

Union Gas Limited ("Union") filed a Notice of Motion to Review and Vary (the "Motion") dated August 24, 2012 with the Ontario Energy Board (the "Board") under Rule 42 of the Board's *Rules of Practice and Procedure* (the "Rules") requesting that the Board review and vary its Decision and Order dated July 18, 2012 in the EB-2012-0206 proceeding as it relates to the amount of margin sharing in the Short-Term Storage and Other Balancing Services Deferral Account (the "Short-Term Storage Account"). The Board assigned Board File No. EB-2012-0360 to Union's Motion.

The Board has considered the Motion, and applied the threshold test as contemplated under Rule 45.01 to determine whether the matter should be reviewed on the merits.

The 2010 Earnings Sharing and Deferral Account Disposition Proceeding (EB-2011-0038)

Union filed an application dated April 18, 2011 with the Board under section 36 of the *Ontario Energy Board Act, 1998*, S.O. c.15, Schedule B, 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 accounts and other balances (the "Application"). The Board assigned file number EB-2011-0038 to the Application.

On September 19th to the 21st 2011, the Board held a hearing on all matters in that proceeding and the Board 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 Account.[1]

[1] The following parties filed submissions contesting the Draft Rate Order with respect to the Short-Term Storage Account: Board staff, Canadian Manufacturers and Exporters ("CME"), London Property Management Association ("LPMA"), Federation of Rental-housing Providers of Ontario ("FRPO"), and the City of Kitchener ("Kitchener").

The Board issued its Decision and Order on the Draft Rate Order on February 29, 2012. In that Decision, the Board made the following findings:

> The Board finds that the ratepayers' share of 2012 net short-term revenues should be $0.831 million. 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.
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> The Board's findings in the current proceeding effectively fix 100 PJs as the utility asset. 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 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).
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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 in the NGEIR Decision) in the Short-term Storage Account as it is a utility asset which is supporting these transactions.[2]

The Board also directed Union to file a revised Draft Rate Order reflecting the Board's determination on the matter (as discussed above). 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, CME informed the Board that there may have been an error in the calculation of margin sharing in the Short-Term Storage Account in the EB-2011-0038 proceeding. CME asserted 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. Union filed a letter responding to CME's letter on April 5, 2012, which attempted to refute CME's assertion that there was an error in the calculation of margin sharing in the Short-Term Storage Account and requested that the

[2] EB-2011-0038, Decision and Order, February 29, 2012 at p. 5.

Board deny the relief requested in CME's letter. CME filed a subsequent letter on April 16, 2012, which reiterated its position that the Board should order Union to increase the credit amount for ratepayers in the Short-Term Storage Account to $3.824 million. Union filed a final letter on April 19, 2012, in which Union again argued against the correction requested by CME in its letters.

The Board's Motion to Review the 2010 Earnings Sharing and Deferral Account Disposition Decision (EB-2012-0206)

On May 2, 2012, the Board issued a Notice of Motion to Review, Notice of Motion Hearing and Procedural Order No.1 ("Procedural Order No. 1"). In Procedural Order No. 1, the Board stated the following:

> 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 Board's *Rules of Practice and Procedure* (the "Rules"). The Board is, however, of the view that issues have been raised with respect to the calculation of short-term storage margin sharing which warrant further review by the Board. The Board has therefore determined that it will 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 Board assigned Board File No. EB-2012-0206 to this proceeding.[3]

The Board also provided all intervenors and Union an opportunity to make additional submissions on the issue of margin sharing in the Short-Term Storage Account.[4]

After the filing of additional submissions[5], the Board issued a Decision and Order on the Board Motion on July 18, 2012. In that Decision, the Board made the following 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.
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> In its February 29, 2012 Decision and Order on Draft Rate Order in the EB-2011-0038 proceeding, the Board stated the following:

[3] EB-2012-0206, Notice of Motion to Review, Notice of Motion Hearing and Procedural Order No.1, May 2, 2012 at p. 2.
[4] *Ibid.* at p. 3.
[5] The following parties made additional submissions on the noted issue: Board staff, CME, LPMA, FRPO, Kitchener, Consumers Council of Canada ("CCC"), and the School Energy Coalition ("SEC").

> The Board's findings in the current proceeding effectively fix 100 PJs as the utility asset. 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 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).
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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 in the NGEIR Decision) in the Short-term Storage Account as it is a utility asset which is supporting these transactions.[6]

The Board continued on page 10 of its Decision and Order on Board Motion dated July 18, 2012, noting:

> 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 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 in the Short-Term Storage Account.[7]

The Union Motion

Union specifically requested the following in its Notice of Motion to Review and Vary:

[6] EB-2012-0206, Decision and Order on Board Motion, July 18, 2012 at pp. 9-10.
[7] *Ibid.* at p. 10.

1) An Order exercising the Board's discretion to set aside the timeframe under Rule 42.03 of the Rules for filing a motion for review and variance of an order or decision;

2) An Order that Union satisfies the threshold test in Rule 45.01 of the Rules; and

3) An Order varying the Board's finding at page 10 of the Decision that the 2010 margin sharing amount for the Short-Term Storage Account is the actual adjusted net revenue of $15.078 million less the credit amount embedded in rates (which the Board found was $11.254 million), as this finding:

    a) Is contrary to the methodology ordered by the Board in its Accounting Order for the Short-Term Storage Account (the "Accounting Order"); and

    b) Has the effect of introducing a change to the incentive regulation framework that is adverse to Union in that it will require Union to accrue in 2012 an amount of approximately $9 million to reflect the adjustment for 2010, 2011 and 2012, thereby materially impacting Union's financial position, which is contrary to Union's reasonable expectations in participating in the incentive regulation framework ("IRM Framework") and undermines the integrity of the IRM Framework.

Union noted that its Motion satisfies the threshold test as the error identified by Union in its Motion is contrary to the Accounting Order and raises material questions as to the correctness of the Board's Decision and Order on Board Motion. Union noted that once the error identified is corrected, the Board's ultimate decision will be materially different than the Decision and Order on Board Motion.

Union noted that it was unable to submit its Notice of Motion to Review and Vary within the time prescribed by Rule 42.03 because it had been in the midst of a major rate hearing and engaging in that process had taken up all of Union's regulatory capacity. In response to Union's request, the Board will set aside the timeframe for the filing of a Motion under Rule 42.03 of the Rules. The Board accepts Union's justification for filing its Motion late.

The Threshold Test

Rule 44.01 of the Board's Rules provides that every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:

> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
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> i. error in fact;
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> ii. change in circumstances;
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> iii. new facts that have arisen;
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> iv. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time...

Rule 45.01 of the Board's Rules provides that:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Board Findings

The application of the threshold test was considered by the Board in the Board's Decision on a Motion to Review the Natural Gas Electricity Interface Review Decision (the "NGEIR Review Decision") and most recently in the Divisional Court's decision in the *Grey Highlands v. Plateau* case in which the court dismissed an appeal of the Board's decision in EB-2011-0053.[8]

In the NGEIR Review Decision, the Board stated that the purpose of the threshold test is to determine whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and whether there is enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling or suspending the decision. The Board also indicated that in order to meet the threshold test there must be an "identifiable error" in the decision for which

[8] EB-2006-0322/0388/0340, May 22, 2007 ("NGEIR Decision") p. 18; and EB-2011-0053, April 21, 2011 ("Grey Highlands Decision"), appeal dismissed by Divisional Court (February 23, 2012).

review is sought and that "the review is not an opportunity for a party to reargue the case."[9] The Board stated as follows:

> In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.[10]

In the *Grey Highlands v. Plateau* decision the Divisional Court dismissed an appeal of a Board decision where the Board determined that the Motion to Review did not meet the threshold test and the Board did not proceed to review the earlier decision. In upholding the Board's decision, the Divisional Court stated:

> The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.[11]

The Board notes that it initiated its own motion to hear the same issue that is raised in Union's Notice of Motion. Having reviewed Union's Motion material, and for the reasons provided below, the Board finds that there is no argument raised in Union's Motion that leads to the conclusion that the Board erred in its Decision and Order on the Board Motion. Union did not raise any errors in fact; changes in circumstances; new facts; or facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time. Therefore, the Board finds that Union's Motion does not meet the threshold test and therefore denies the Motion at the threshold stage.

The Board notes that Union has argued, in its Motion, that the Board's finding in EB-2012-0206 is contrary to the methodology ordered by the Board in its Accounting Order for the Short-Term Storage Account and that it has the effect of introducing a change to the IRM Framework that is adverse to Union.

[9] EB-2006-0322/0388/0340, May 22, 2007 ("NGEIR Decision") at pp.16 and 18.

[10] *Ibid*. at p. 18.
[11] Grey Highlands (Municipality) v. Plateau Wind Inc., [2012] O.J. No. 847 (Div. Court) ("Grey Highlands v. Plateau") at para. 7.

In regard to the first argument, the Board notes that Union highlighted the alleged disconnect between the Board's Decision and the Accounting Order in its submissions on the Board's Motion. In CME's letter to the Board dated March 27, 2012, CME included an email from Union's counsel to CME's counsel, which stated the following:

> There is no error in Union's calculation of the margin in the short term deferral account. Contrary to your note, the deferral account balance is calculated not based on what is in rates but rather on the Board Approved 2007 forecast margin of $15.289 million. The sharing percentages are applied to the difference between the actual margin and the Board approved forecast. This methodology has been used since 2008, accepted by parties and, through the Rate Order, approved by the Board.[12]

In addition, in Union's May 30, 2012 reply submission, Union stated the following:

> The accounting definition confirms Union's submissions. It provides as follows:
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> > To record, as a debit (credit) in Deferral Account No. 179-70 the difference between actual net revenues for Short-term Storage and Other Balancing Services including: C1 Off-Peak Storage, Gas Loans, Consumers' LBA, Supplemental Balancing Services, C1 Firm Peak Storage, C1 Firm Short-term deliverability and M12 Interruptible deliverability and the net revenue forecast for these services as approved by the Board for ratemaking purposes.
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> The accounting definition confirms that the relevant comparator — the one used by Union — is the revenue forecast for short term services approved by the Board for ratemaking purposes.[13]

The Board reiterates that Union's first argument had formed part of the record in the EB-2012-0206 proceeding. As such, the Board finds that it is clearly not a new argument and was part of the record upon which the Board deliberated in the EB-2012-0206 proceeding. In this context, the Board notes that the language in the Accounting Order for the Short-Term Storage Account was developed prior to the Board's Decisions in EB-2011-0038 and EB-2012-0206. These Decisions govern the operation of the account.

[12] EB-2012-0206, CME Letter, March 27, 2012 at Tab 12, p. 3.
[13] EB-2012-0206, Union Reply Submission, May 30, 2012 at p. 2.

With respect to Union's argument that the Board's findings in the EB-2012-0206 proceeding have the effect of introducing a change to the IRM Framework that is adverse to Union, the Board is of the view that this submission could have reasonably been brought forth during the Board's Motion proceeding. Union had ample opportunity to make this submission during that proceeding and it did not.

THE BOARD ORDERS THAT:

1. The Motion is dismissed without a hearing.

ISSUED at Toronto, October 18, 2012

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary