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March 22, 2013

VIA RESS AND COURIER

Ontario Energy Board
2300 Yonge Street
P.O. Box 2319
Suite 2700
Toronto, ON M4P 1E4

Attention: Ms Kirsten Walli
Board Secretary

Dear Ms. Walli:

Re: Hydro One Networks Inc.
Electricity Transmission Revenue Requirement and Rates – ETS Issue
HQ Energy Marketing Inc. ("HQEM")
Board File No: EB-2012-0031

Please find attached the reply submissions of HQEM in the above-noted proceeding.

Sincerely,

signed in the original

George Vegh

c. All parties

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF a review of an application filed by Hydro One Networks Inc. for an order or orders approving a transmission revenue requirement and rates and other charges for the transmission of electricity for 2013 and 2014.

REPLY SUBMISSIONS OF HQ ENERGY MARKETING INC.

I. Introduction and Summary

1. These submissions are made by HQ Energy Marketing Inc. ("HQEM") to address issue 23, i.e., "What is the appropriate level for Export Transmission Rates in Ontario?"

2. Because this proceeding is a rate setting exercise, the "appropriate" rate is one that complies with the statutory criteria of "just and reasonable" rates in accordance with s. 78(3) of the *Ontario Energy Board Act, 1998* (the "*Act*"). The burden of proof for demonstrating the justness and reasonableness of the rate for export transmission service ("ETS") is on the applicant, Hydro One.[1] If – as HQEM submits - Hydro One has not met its burden of showing that any proposed rate change is just and reasonable, then the Board has no legal basis for changing the rate.[2]

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1 *Ontario Energy Board Act, 1998,* ss. 78(8) (see Schedule A).

2 In its Decision with Reasons of December 23, 2010 (EB-2010-0002) at pg. 75, the Board described the current ETS rate as having no precedential value (see Schedule B). Nevertheless, the rate has been in place since the beginning of 2011 and is based on a final, not interim, order. As a result, that rate must stay in place until a

3. It is HQEM's submission that there is no basis in this proceeding for the Board to conclude that any increase in the ETS rate is just and reasonable. If anything, the evidence indicates that the application of Generally Accepted Regulatory Principles ("GARP"), in particular the principle of cost causality in setting rates, strongly suggests that the current ETS rate is already too high.

4. As a result, HQEM's submission is that the Board should not approve any rate change and that, if, in the future, Hydro One seeks to change the ETS rate, it should prepare a cost allocation study that provides an evidentiary basis for a new rate in accordance with the legal requirements that apply to setting just and reasonable rates. Unless and until the Board has a basis for making such a change, the ETS rate should stay as it is.

5. In the alternative, if the Board believes that the rate should be adjusted, then, in HQEM's submission, the only reasonable adjustment based on the evidence would be a reduction in the rate, either in all periods or during off peak periods.

II. The Board's Practice in Setting Just and Reasonable Rates: Use of Fundamental Principles of Ratemaking, Including Cost Allocation as A Critical First Step

6. The Board has addressed the basic principles of rate making on several occasions. The Board's principled approach was summarized in the Board Staff Discussion Paper for Rate Design for Recovery of Electricity Distribution Costs as follows:

> *The Board identified three rate design principles for the purposes of this process. These principles encompass all of the "Bonbright attributes of a sound rate structure" identified in the March 2007 Staff Discussion Paper:*
>
> *1. full cost recovery;*

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subsequent order replaces it with a new rate: See *City of Calgary and Home Oil Co.* v. *Madison Natural Gas Co*. (1959), 19 D.L.R. (2d) 655 (see Schedule C).

2. fairness; and

3. efficiency.

7. The application of these "Bonbright Principles" was addressed by the expert evidence of John Todd and Michael Roger. Messer's Todd and Roger were the only experts who addressed GARP. The other experts in this proceeding did not purport to have any expertise in the regulation of rates.[3] According to Todd and Roger:[4]

> Cost allocation is an important step in the overall rate making process and it is guided by the aforementioned Bonbright Principles. The most essential element of these principles is that costs should be allocated to customer classes in a manner that reflects cost causality. The importance of this approach within the OEB's regulatory regime was clearly stated in the Report of the Board EB-2007-0667.
>
> > *The establishment of specific revenue requirements through cost causality determinations is a fundamental rate-making principle. Cost allocation is key to implementing that principle. Cost allocation policies reasonably allocate the costs of providing service to various classes of consumers and, as such, provide an important reference for establishing rates that are just and reasonable.*

8. The Board emphasized the importance of cost allocation when it considered a proposal on the part of the OPA to recover a usage fee from export customers.[5] The Board disallowed the OPA's request, finding that *inter alia,* the proposed fee had "not been supported by empirical evidence" and that

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[3] Although the CRA Study filed by the IESO used the term "generally accepted rate making principles", it used that term loosely. The authors of the study agreed that they had no expertise in rate making and that the principles considered were taken directly from the IESO's RFP which led to the CRA Study. See Interrogatory Response 6.04 HQ 4, pg. 1, response ii. Indeed, the IESO term is clearly not consistent with GARP (properly used). For example, while the IESO definition included consistency with neighbouring jurisdictions, HQEM is not aware of any OEB decision that took this criterion into account when setting rates. One reason for this is that each jurisdiction has a unique context and law respecting rate setting.

[4] Expert Report Prepared by Elenchus Research Associates Inc. dated October 1, 2012, Exhibit No. K 2.2, p. 4, citing OEB, Report of the Board, Application of Cost Allocation for Electricity Distributors, EB-2007-0667, November 28, 2007.

[5] This proposal was made as part of the OPA's application to the OEB for the review of its proposed expenditure and revenue requirement for 2011. See EB-2010-0279, Decision and Order dated July 8, 2011, pp. 16-17 (see Schedule D).

should the OPA make a similar request in the future, "it should be prepared to demonstrate a coherent rationale, quite possibly based on an allocation study"[6]. The importance of cost allocation is even stronger here given that when it comes to OPA fees, the Board is not legally required to apply a just and reasonable standard,[7] unlike in the present case.

9. Moreover, the Board has recognized the fundamental importance of cost causality as a rate making principle in countless cases. Some examples should suffice:

> RP-2003-0063 (2005), p. 5:
>
> Principled ratemaking involves the creation of a unified and theoretically consistent set of rates for all participants within the system. It begins with the establishment of a revenue requirement for the regulated utility and proceeds to design rates for the respective classes according to well-recognized and consistent theory respecting such elements as cost allocation. This is an objective and dispassionate process, which is driven by system integrity and consistent treatment between consumers on the system. Principled ratemaking typically does not involve a ranking of interests according to a subjective view of the societal value of any given participant or group of participants. This approach is not unique to Ontario. A departure from these principles should only be undertaken where the evidence and all other circumstances outweigh the inherent virtue of an objective process. (Emphasis added).
>
> EBRO 493 (1997), p. 312:
>
> The Board is required by its legislation to 'fix just and reasonable rates', and in doing so it attempts to ensure that no undue discrimination occurs between rate classes, and that the principles of cost causality are followed in allocating the underlying rates. (Emphasis added).

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6 EB-2010-0279, Decision and Order dated July 8, 2011, p. 17 (see Schedule D).

7 *Electricity Act, 1998,* ss. 25.21 (see Schedule E).

> RP- 1999-0017, paragraph 2.457 (2001):
>
> The Board is also not prepared to accept the argument that there is no need to provide revenue and cost information on a rate class basis. The Board has generally relied on the revenue-to-cost ratio in determining that there is no unfair assignment of cost responsibility among rate classes." (Emphasis added).

10. The Divisional Court has endorsed this approach. While the Court held that the Board had authority to depart from cost causality in specific cases where there are good grounds to do so, it held that imposing cost on customers based on the cost of serving them is "necessarily an underlying fundamental factor and starting point to determining rates."[8] Once this step has been undertaken, the Board has some discretion to take other factors into account in its determination of just and reasonable rates.

11. In other words, while it is open to the Board, after due deliberation, to make specific and informed departures from cost causality; it cannot do so in the absence of evidence on the quantum of the resulting cross-subsidy and a determination that the subsidy is based on GARP. It is this quantification and rationale that may justify such a departure. In their absence, the discrimination resulting from a cross-subsidy is "undue". As discussed immediately below, there is no basis in this case for the Board to determine that any increase to the ETS is anything but unduly discriminatory.

III. The Cost of Export Service in Ontario – the Evidence on the Record in this Proceeding

12. There is no clear evidence in this proceeding as to the cost caused by export customers in Ontario. However, the evidence on the record indicates that these costs are low. Interrogatory responses demonstrate that Ontario's

[8] See *Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board)*, [2008] O.J. No. 1970, paras. 52-57 (see Schedule I).

transmission system is designed and built to serve domestic load;[9] as a result, exporters only use excess capacity. Thus, from a cost causality perspective, there is no evidentiary basis for concluding that the current ETS should increase; on the contrary, if anything, it is already too high.[10]

13. The IESO notes that the efficient use of an asset requires that it not be charged a rate above its marginal cost. HQEM agrees with the IESO[11] that export tariff rates exceeding the low marginal cost of exporting electricity from Ontario leads to inefficient use of intertie assets and that consequently, the elimination of the tariff or a lower ETS rate will result in more efficient use of intertie assets.

IV. Other Relevant Factors

14. Other factors which the Board should consider in making its determination include the interruptible nature of the export service, rate shock and the uncertainty surrounding the impact of a change in the tariff. These are discussed below.

Interruptible Rates and Ratemaking Principles

15. As confirmed in the oral evidence of Mr. Finkbeiner of the IESO, domestic loads receive a priority of service over exporters. Although the IESO makes a distinction between curtailments originating from "generation" issues, as opposed to "transmission" issues (which the IESO seems to link to its NERC TLR obligations[12]), those distinctions are irrelevant to customers who pay the ETS. Those customers pay for an export service that is subject to

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9 See IESO response to interrogatories Exhibit I, Tab 23, Schedule 6.01 HQ 1 i and ii and 6.02 HQ 2 i and ii.

10 This is supported by the IESO's description of the marginal cost of exporting electricity as "low" and even close to the "unilateral elimination" option (see submissions of the IESO dated March 8, 2013, paragraphs 28 and 33).

11 Submissions of the IESO dated March 8, 2013, pg. 8.

12 At the oral hearing, the IESO referred to prorata load curtailments as extreme cases that never occurred (Export Transmission Service Hearing Transcript, Volume 3, pg. 15).

curtailment while load customers pay for firm service and receive firm service.

16. The fact is, and evidence shows, the IESO largely operates the Ontario transmission grid in a way that benefits domestic loads over exports. One consequence of this is that an exporter from Ontario cannot participate in capacity markets of neighbouring jurisdictions.[13] By contrast, exports from other jurisdictions can receive the same priority as domestic load and as a result can participate in capacity markets in neighbouring jurisdictions.[14]

17. Charging lower rates for interruptible customers is consistent with GARP. In *The Economics of Regulation: Principles and Institutions,* Alfred Khan describes the appropriate rate treatment of interruptible service as follows:[15]

> "[i]n the presence of excess capacity, utility companies ought to make every effort to design rates, down to SRMC (Short Run Marginal Costs), to put to use."

18. Similarly, in James C. Bonbright's *Principles of Public Utility Rates,*[16] the authors state that "…interruptible power may be curtailed or interrupted if conditions arise that are burdensome to the supplier"; "[i]n short, the interruptible customer is buying lower quality service that a cost incurrence philosophy would deem appropriate for a lower rate." They conclude that "[i]nterruptible customers are charged lower rates since they do not have any demand or capacity costs."

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13 Export Transmission Service Hearing Transcript Volume 3, pg. 7 and APPrO's interrogatory response to VECC IR 7b, Exhibit L-I, Tab 23, Schedule 11.

14 Export Transmission Service Hearing Transcript Volume 3, pg. 6-7.

15 Alfred Khan, *The Economics of Regulation: Principles and Institutions*, Volume 1, pg. 106, as cited in the Expert Report Prepared by Elenchus Research Associates Inc. dated October 1, 2012, Exhibit No. K 2.2 and cited by the IESO in its submissions at para. 27.

16 James C. Bonbright, Albert L. Danielson and David R. Kamerschen, (1988), *Principles of Public Utility Rates* (2nd ed.), Public Utilities Reports, Inc., pages 383-384, as cited in the Expert Report Prepared by Elenchus Research Associates Inc. dated October 1, 2012, Exhibit No. K 2.2.

19. As discussed above, the evidence on the record clearly demonstrates that exporters in Ontario are interruptible customers receiving a lower level of service than that enjoyed by load customers. It is, therefore, HQEM's submission that should the Board determine that the ETS rate be adjusted, the only adjustment which can be made based on the evidence and in a manner consistent with GARP is a reduction in the rate, either in all periods or during off peak periods.

Rate Shock

20. The Board has observed that the avoidance of rate shock is a principle of rate design,[17] and that the potential for rate shock should be anticipated and avoided whenever possible.[18]

21. An increase in the ETS rate from $2 to $5.80 – which is one of the options considered by the IESO – would be an almost 200% increase in the rate paid by exporters. Such an increase would lead to a monthly bill impact of 12% for those customers.[19]

22. Such a result on any customer would be unprecedented and clearly qualifies as a "rate shock" by any standard.

23. In comparison to the above, the IESO's submission indicates that the impact of the unilateral elimination of the ETS is in the range of 9 to 17 cents a month for a typical residential customer over the period 2013 to 2017.[20]

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17 Report of the Board in *Consumers' Gas Co (Re),* 1993 LNONOEB 1 at para. 368 (see Schedule J). On the importance of avoiding rate shock, see also *Hydro One Networks Inc. (Re),* 2009 LNONOEB 8 at para 20 (see Schedule K).

18 Report of the Board in *Consumers' Gas Co (Re),* 1993 LNONOEB at para. 471 (see Schedule J). On the Board's insistence that "any potential for rate shock" must be considered, see *Enbridge Gas Distribution Inc. (Re),* 2003 LNONOEB 6 at para. 45 (see Schedule L).

19 Undertaking response of APPrO dated March 4, 2013 (Exhibit J3.1), p. 1.

20 This assessment is before any allocation of ICR revenues. Submissions of the IESO dated March 8, 2013, Table 2, paragraph 33.

Uncertainty

24. One of the advantages of applying GARP is that it applies a principled approach to setting rates on a sustainable basis. Applying GARP does not involve speculation of how rate payers may change their behaviour as a result of rate changes. Instead, it internalizes the economic cost of service to rate payers and thus creates incentives for economic decision making, without having to model just what that decision making will result in.

25. By contrast, departing from GARP invites decision making based on speculative and uncertain predictions. The evidence in this proceeding demonstrates that there is a high level of uncertainty regarding the impact of a change in the ETS rate in Ontario. In particular, the disagreement regarding the impact of a change in the ETS rate appears to turn on the elasticity of demand in the export market. Although the CRA experts stated that demand in the export market was relatively inelastic with respect to a change in the ETS rate, Mr. Cliff Hamal of Navigant Economics indicated that for various reasons this position on elasticity was unlikely to be an accurate portrayal of the impact of changes in the ETS rate on demand for exports.[21]

26. Moreover, the difficulty in assessing the impact of a change in the ETS rate is compounded by other related uncertainties, such as estimates of amounts of surplus baseload generation which Ontario will experience in the future and the future forecast demand in Ontario. Taken together, these three matters with respect to which significant uncertainty exists make it extremely difficult to predict the future impact of a change in the ETS rate.

27. Also, the lengthy discussion between CRA and Navigant on congestion rents and to whom the rents ultimately accrue is another area of uncertainty. In

[21] See, *inter alia,* section V of "Evaluation of the Export Tariff" by Cliff W. Hamal, October 1, 2012.

this regard, it should be noted that the Market Surveillance Panel has recommended that the IESO undertake a review of the transmission rights market, and the IESO has indicated that it will be starting the consultation for this review shortly.[22] This review will inject another element of uncertainty in understanding the future impact of a change in the current ETS rate.

28. With this level of uncertainty, the Board simply cannot predict the impact of a change in the ETS rate. By applying GARP, the Board does not have to engage in this speculation. Under GARP, a rate is just and reasonable regardless of how uncertain and exogenous economic factors play out.

29. The Board should, therefore, not engage in speculation as to how the above uncertainties will unfold in the future. To do so would be an unnecessary departure from the Board's practice. Instead, the Board should adhere to the enduring ratemaking principles which it has always used in setting just and reasonable rates.

V. Conclusion

30. HQEM submits that there is no basis in this proceeding for the Board to conclude that any increase in the ETS rate is just and reasonable. If anything, the evidence indicates that the application of GARP, in particular the principle of cost causality in setting rates, strongly suggests that the current ETS rate is already too high.

31. As a result, HQEM's submission is that the Board should not approve any rate change and that, if, in the future, Hydro One seeks to change the ETS rate, then it should prepare a cost allocation study that provides an evidentiary basis for a new rate in accordance with the legal requirements that apply to

[22] See letter Re: Market Surveillance Panel Monitoring Report from Paul Murphy, President and CEO, IESO, to Ms. Rosemarie Leclair, Chair & CEO, Ontario Energy Board; see also Export Transmission Service Hearing Transcript, Volume 2, pgs. 105-108.

setting just and reasonable rates in Ontario. Unless and until the Board has a basis for making such a change, the ETS rate should stay as it is.

32. In the alternative, if the Board believes that the rate should be adjusted, then, in HQEM's submission, the only reasonable adjustment based on the evidence would be a reduction in the rate, either in all periods or during off peak periods.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated: March 22, 2013

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SCHEDULE LIST

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D	EB-2010-0279, Decision and Order dated July 8, 2011, pp. 16-17.
E	*Electricity Act, 1998*, ss. 25.21.
F	RP-2003-0063, Decision with Reasons dated May 19, 2005, pg. 5.
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I	*Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board)*, [2008] O.J. No. 1970, paras. 52-57.
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K	*Hydro One Networks Inc. (Re)*, 2009 LNONOEB 8, para 20.
L	*Enbridge Gas Distribution Inc. (Re)*, 2003 LNONOEB 6, para. 45.

Schedule A

Français

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
Schedule B

Consolidation Period: From December 31, 2012 to the e-Laws currency date.

Last amendment: See Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* – December 31, 2011.

PART I
GENERAL

Board objectives, electricity

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.

Facilitation of integrated power system plans

(2) In exercising its powers and performing its duties under this or any other Act in relation to electricity, the Board shall facilitate the implementation of all integrated power system plans approved under the *Electricity Act, 1998*. 2004, c. 23, Sched. B, s. 1.

Board objectives, gas

2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.
2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
3. To facilitate rational expansion of transmission and distribution systems.
4. To facilitate rational development and safe operation of gas storage.
5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

6. To promote communication within the gas industry and the education of consumers. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4 (2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2; 2009, c. 12, Sched. D, s. 2.

Definitions

Cancellation of licence

(5) The Board may cancel a licence upon the request in writing of the licence holder. 1998, c. 15, Sched. B, s. 77 (5); 2003, c. 3, s. 51 (2).

(6) REPEALED: 2000, c. 26, Sched. D, s. 2 (6).

Orders by Board, electricity rates

Order re: transmission of electricity

78. (1) No transmitter shall charge for the transmission of electricity except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re: distribution of electricity

(2) No distributor shall charge for the distribution of electricity or for meeting its obligations under section 29 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract. 2000, c. 26, Sched. D, s. 2 (7).

Order re the Smart Metering Entity

(2.1) The Smart Metering Entity shall not charge for meeting its obligations under Part IV.2 of the *Electricity Act, 1998* except in accordance with an order of the Board, which is not bound by the terms of any contract. 2006, c. 3, Sched. C, s. 5 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, section 78 is amended by adding the following subsection:

Order re unit smart meter provider

(2.2) No unit smart meter provider shall charge for unit smart metering except in accordance with an order of the Board, which is not bound by the terms of any contract. 2010, c. 8, s. 38 (12).

See: 2010, c. 8, ss. 38 (12), 40.

Note: On a day to be named by proclamation of the Lieutenant Governor, section 78 is amended by adding the following subsection:

Order re unit sub-meter provider

(2.3) No unit sub-meter provider shall charge for unit sub-metering except in accordance with an order of the Board, which is not bound by the terms of any contract. 2010, c. 8, s. 38 (13).

See: 2010, c. 8, ss. 38 (13), 40.

Rates

(3) The Board may make orders approving or fixing just and reasonable rates for the transmitting or distributing of electricity or such other activity as may be prescribed and for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*. 2009, c. 12, Sched. D, s. 12 (1).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (3) is amended by striking out "electricity or such other activity" and substituting "electricity, unit sub-metering or unit smart metering or such other activity". See: 2010, c. 8, ss. 38 (14), 40.

Note: On a day to be named by proclamation of the Lieutenant Governor, section 78 is amended by adding the following subsection:

Rates, unit sub-metering and unit smart-metering

(3.0.0.1) The Board shall, in accordance with rules prescribed by the regulations, make orders approving or fixing separate rates for unit sub-metering and for unit smart metering,

(a) for classes of consumers, as may be prescribed by regulation; and

(b) for different circumstances, as may be prescribed by regulation. 2010, c. 8, s. 38 (15).

See: 2010, c. 8, ss. 38 (15), 40.

Rates

(3.0.1) The Board may make orders approving or fixing just and reasonable rates for the Smart Metering Entity in order for it to meet its obligations under this Act or under Part IV.2 of the *Electricity Act, 1998*. 2006, c. 3, Sched. C, s. 5 (1).

Orders re deferral or variance accounts

(3.0.2) The Board may make orders permitting the Smart Metering Entity or distributors to establish one or more deferral or variance accounts related to costs associated with the smart metering initiative, in the circumstances prescribed in the regulations. 2006, c. 3, Sched. C, s. 5 (1).

Orders re recovery of smart metering initiative costs

(3.0.3) The Board may make orders relating to the ability of the Smart Metering Entity, distributors, retailers and other persons to recover costs associated with the smart metering initiative, in the situations or circumstances prescribed by regulation and the orders may require them to meet such conditions or requirements as may be prescribed, including providing for the time over which costs may be recovered. 2006, c. 3, Sched. C, s. 5 (1).

Orders re deferral or variance accounts, s. 27.2

(3.0.4) The Board may make orders permitting the OPA, distributors or other licensees to establish one or more deferral or variance accounts related to costs associated with complying with a directive issued under section 27.2. 2009, c. 12, Sched. D, s. 12 (2).

Methods re incentives or recovery of costs

(3.0.5) The Board may, in approving or fixing just and reasonable rates or in exercising the power set out in clause 70 (2) (e), adopt methods that provide,

(a) incentives to a transmitter or a distributor in relation to the siting, design and construction of an expansion, reinforcement or other upgrade to the transmitter's transmission system or the distributor's distribution system; or

(b) for the recovery of costs incurred or to be incurred by a transmitter or distributor in relation to the activities referred to in clause (a). 2009, c. 12, Sched. D, s. 12 (2).

Annual rate plan and separate rates for situations prescribed by regulation

(3.1) The Board shall, in accordance with rules prescribed by the regulations, approve or fix separate rates for the retailing of electricity,

(a) to such different classes of consumers as may be prescribed by the regulations; and

(b) for such different situations as may be prescribed by the regulations. 2004, c. 23, Sched. B, s. 14 (1).

Same

(3.2) The first rates approved or fixed by the Board under subsection (3.1) shall remain in effect for not less than 12 months and the Board shall approve or fix separate rates under subsection (3.1) after that time for periods of not more than 12 months each or for such shorter time periods as the Minister may direct. 2004, c. 23, Sched. B, s. 14 (1).

Rates to reflect cost of electricity

(3.3) In approving or fixing rates under subsection (3.1),

(a) the Board shall forecast the cost of electricity to be consumed by the consumers to whom the rates apply, taking into consideration the adjustments required under section 25.33 of the *Electricity Act, 1998* and shall ensure that the rates reflect these costs; and

(b) the Board shall take into account balances in the OPA's variance accounts established under section 25.33 of the *Electricity Act, 1998* and shall make adjustments with a view to eliminating those balances within 12 months or such shorter time periods as the Minister may direct. 2004, c. 23, Sched. B, s. 14 (1).

Forecasting cost of electricity

(3.4) In forecasting the cost of electricity for the purposes of subsection (3.3), the Board shall have regard to such matters as may be prescribed by the regulations. 2004, c. 23, Sched. B, s. 14 (1).

Imposition of conditions on consumer who enters into retail contract

(3.5) A consumer who enters into or renews a retail contract for electricity after the day he or she becomes subject to a rate approved or fixed under subsection (3.1) is subject to such conditions as may be determined by the Board. 2004, c. 23, Sched. B, 14 (1).

Rates

(4) The Board may make an order under subsection (3) with respect to the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998* even if the distributor is meeting its obligations through an affiliate or through another person with whom the distributor or an affiliate of the distributor has a contract. 1998, c. 15, Sched. B, s. 78 (4).

(5) REPEALED: 2004, c. 23, Sched. B, s. 14 (2).

Same, obligations under s. 29 of *Electricity Act, 1998*

(5.0.1) In approving or fixing just and reasonable rates for the retailing of electricity in order to meet a distributor's obligations under section 29 of the *Electricity Act, 1998*, the Board shall comply with the regulations made under clause 88 (1) (g.5). 2003, c. 8, s. 1.

Same, Hydro One Inc. and subsidiaries

(5.1) In approving or fixing just and reasonable rates for Hydro One Inc. or a subsidiary of Hydro One Inc., the Board shall apply a method or technique prescribed by regulation for the calculation and treatment of transfers made by Hydro One Inc. or its subsidiary, as the case may be, that are authorized by section 50.1 of the *Electricity Act, 1998*. 2002, c. 1, Sched. B, s. 8; 2003, c. 3, s. 52 (2).

Same, statutory right to use corridor land

(5.2) In approving or fixing just and reasonable rates for a transmitter who has a statutory right to use corridor land (as defined in section 114.1 of the *Electricity Act, 1998*), the Board shall apply a method or technique prescribed by regulation for the treatment of the statutory right. 2002, c. 1, Sched. B, s. 8; 2003, c. 3, s. 52 (3).

Conditions, etc.

(6) An order under this section may include conditions, classifications or practices, including rules respecting the calculation of rates, applicable,

(a) to the Smart Metering Entity in respect of meeting its obligations;

(b) to an activity prescribed for the purposes of subsection (3); and

(c) to the transmission, distribution or retailing of electricity. 2009, c. 12, Sched. D, s. 12 (3).

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (c) is repealed and the following substituted:

(c) to the transmission, distribution or retailing of electricity or unit sub-metering or unit smart metering.

See: 2010, c. 8, ss. 38 (16), 40.

Deferral or variance accounts

(6.1) If a distributor has a deferral or variance account that relates to the commodity of electricity, the Board shall, at least once every three months, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2003, c. 3, s. 52 (4).

Same

(6.2) If a distributor has a deferral or variance account that does not relate to the commodity of electricity, the Board shall, at least once every 12 months, or such shorter period as is prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2003, c. 3, s. 52 (4).

Same

(6.3) An order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates shall be made in accordance with the regulations. 2003, c. 3, s. 52 (4).

Same

(6.4) If an order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates is made after the time required by subsection (6.1) or (6.2) and the delay is due in whole or in part to the conduct of a distributor, the Board may reduce the amount that is reflected in rates. 2003, c. 3, s. 52 (4).

Same

(6.5) If an amount recorded in a deferral or variance account of a distributor is reflected in rates, the Board shall consider the appropriate number of billing periods over which the amount shall be divided in order to mitigate the impact on consumers. 2003, c. 3, s. 52 (4).

Same

(6.6) Subsections (6.1), (6.2) and (6.4) do not apply unless section 79.6 has been repealed under section 79.11. 2003, c. 3, s. 52 (4).

Fixing other rates

(7) Upon an application for an order approving or fixing rates, the Board may, if it is not satisfied that the rates applied for are just and reasonable, fix such other rates as it finds to be just and reasonable. 1998, c. 15, Sched. B, s. 78 (7).

Burden of proof

(8) Subject to subsection (9), in an application made under this section, the burden of proof is on the applicant. 1998, c. 15, Sched. B, s. 78 (8).

Order

(9) If the Board of its own motion, or upon the request of the Minister, commences a proceeding to determine whether any of the rates that the Board may approve or fix under this section are just and reasonable, the Board shall make an order under subsection (3) and the burden of establishing that the rates are just and reasonable is on the transmitter or distributor, as the case may be. 1998, c. 15, Sched. B, s. 78 (9).

Note: On a day to be named by proclamation of the Lieutenant Governor, subsection (9) is repealed and the following substituted:

Order

(9) If the Board of its own motion, or upon the request of the Minister, commences a proceeding to determine whether any of the rates that the Board may approve or fix under this section are just and reasonable, the Board shall make an order under subsection (3) and the burden of establishing that the rates are just and reasonable is on the transmitter, distributor or unit sub-meter provider, as the case may be. 2010, c. 8, s. 38 (17).

See: 2010, c. 8, ss. 38 (17), 40.

Payments to prescribed generator

78.1 (1) The IESO shall make payments to a generator prescribed by the regulations, or to the OPA on behalf of a generator prescribed by the regulations, with respect to output that is generated by a unit at a generation facility prescribed by the regulations. 2004, c. 23, Sched. B, s. 15.

Payment amount

(2) Each payment referred to in subsection (1) shall be the amount determined,

(a) in accordance with the regulations to the extent the payment relates to a period that is on or after the day this section comes into force and before the later of,

(i) the day prescribed for the purposes of this subsection, and

(ii) the effective date of the Board's first order in respect of the generator; and

(b) in accordance with the order of the Board then in effect to the extent the payment relates to a period that is on or after the later of,

(i) the day prescribed for the purposes of this subsection, and

(ii) the effective date of the Board's first order under this section in respect of the generator. 2004, c. 23, Sched. B, s. 15.

OPA may act as settlement agent

(3) The OPA may act as a settlement agent to settle amounts payable to a generator under this section. 2004, c. 23, Sched. B, s. 15.

Board orders

(4) The Board shall make an order under this section in accordance with the rules prescribed by the regulations and may include in the order conditions, classifications or practices, including rules respecting the calculation of the amount of the payment. 2004, c. 23, Sched. B, s. 15.

Fixing other prices

(5) The Board may fix such other payment amounts as it finds to be just and reasonable,

(a) on an application for an order under this section, if the Board is not satisfied that the amount applied for is just and reasonable; or

(b) at any other time, if the Board is not satisfied that the current payment amount is just and reasonable. 2004, c. 23, Sched. B, s. 15.

Burden of proof

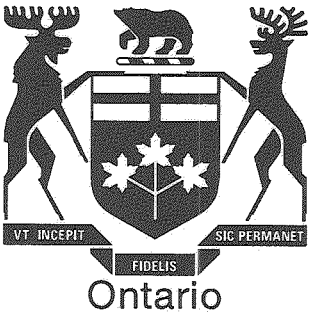
(6) Subject to subsection (7), the burden of proof is on the applicant in an application made under this section. 2004, c. 23, Sched. B, s. 15.

Order

Schedule B

Ontario Energy Board

Commission de l'énergie de l'Ontario



EB-2010-0002

IN THE MATTER OF AN APPLICATION BY

HYDRO ONE NETWORKS INC.

2011 and 2012 TRANSMISSION REVENUE REQUIREMENT AND RATES

DECISION WITH REASONS

December 23, 2010

The Board concludes therefore that the most pressing requirement is that a genuinely comprehensive study be undertaken to identify a range of proposed rates and the pros and cons associated with each proposed rate in time for the next transmission rate application. In the Board's view, the most appropriate party to undertake this study is the IESO. In procuring the study, the IESO should circulate the terms of reference to the Applicant and the intervenors of record in this case with a view to ensuring that the resulting study will provide detailed analysis on the issues.

This review of the terms of reference is not intended to be a strategic negotiation, but rather a technical exercise to ensure that the scope of the project is sufficiently broad and well-defined to ensure a useful and appropriate outcome. Work on this study should begin soon, to ensure completion well in advance of the time for the filing of the next transmission rates application by Hydro One.

In the interim, the Board must consider whether continuation of the one dollar placeholder is appropriate or whether some interim change to the approved rate should be made pending the development of a principle-based new rate.

The CRA study did not examine any of the rate level options falling between the one dollar placeholder and the five dollar rate recommendation which was ultimately abandoned by IESO for the reasons cited above.

It is the Board's view that the CRA study is informative to the extent that it considered the higher rate to result in a higher net Ontario benefit. While the Board respects IESO's reticence to advocate the higher rate, it does appear as though some level between one dollar and five dollars is directionally advisable.

Accordingly, the Board will direct that a change be made to the ETS rate for 2011 and 2012, increasing the rate to two dollars per MWh. In making this change the Board seeks to recognize the directional preference of the CRA study, and the absence of any particular analytical underpinning for the current rate. Subsequent panels assessing the level of this rate should not, however regard this new rate as having any particular precedential value. It is the Board's view that the new rate has more analytical support than the status quo, but that in order to arrive at a genuinely robust and valid rate, more study is required.

Schedule C

Case Name:

CITY OF CALGARY AND HOME OIL CO. LTD. v. MADISON NATURAL GAS CO. LTD. AND BRITISH AMERICAN UTILITIES LTD.

[1959] A.J. No. 56

19 D.L.R. (2d) 655

Alberta Supreme Court, Appellate Division

Clinton J. Ford C.J.A., Egbert J., Boyd McBride, Porter, Johnson JJ.A.

Judgment: April 29, 1959

(12 paras.)

Counsel:

S. J. Helman, Q.C., and *R. R. Neeve*, for Calgary (City), appellant

J. R. McColough, for Home Oil Co., appellant by order

J. V. H. Milvain, Q.C., and *J. H. Laycroft*, for Madison Natural Gas Co., respondent

R. L. Fenerty, Q.C., for Br. American Utilities Ltd., respondent.

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1 **CLINTON J. FORD C.J.A.**:--I concur in the judgment of my brother H. G. Johnson, and in his reasons. I add a few words merely to guard against any inference that we have been concerned in this appeal with what the Board of Public Utility Commissioners may take into consideration in arriving at or fixing prices to be paid for gas on an application to it for such purpose.

2 The question before us has been that of the authority or jurisdiction of the Board to deal with cls. (a) and (b) of the application in the sense in which they must be interpreted, rather than that of the elements or factors that enter into the problem of fixing prices. We have held that the Board has no power to entertain these portions of the application for the reasons given in our judgment.

3 The decision of this Division in *Wainwright Gas Co. v. Wainwright & Bd. Public Utility Com'rs*, [1930] 4 D.L.R., 1000, 25 A.L.R. 181; affd [1931] 4 D.L.R. 80, dealt entirely with whether there was a question of law or jurisdiction involved so as to give a right of appeal from the decision of the Board in respect of the prices it had fixed for gas on the ground that it had exceeded its jurisdiction. The majority held that there had been no violation of any legal provision. An attempted appeal by the Gas company to the Supreme Court of Canada was quashed for want of jurisdiction in that Court to hear the appeal.

4 It is quite clear that the *Wainwright* decision as well as the decision in *Northwestern Utilities Ltd. v. Edmonton*, [1929], 2 D.L.R. 4, S.C.R. 186 referred to therein, were both dealing with the question of what may be considered in the fixing of prices, as to which, as I have said, we have not been concerned in this appeal.

> "(a) The disposition of surpluses earned by Madison Natural Gas Co. Ltd. and/or British American Utilities Ltd. over the rate of return allowed the said utilities by the said Board;
>
> "(b) The future rate of return to be allowed the said Madison Natural Gas Co. Ltd. and/or the said British American Utilities Ltd."
>
> (c), (d) and (e) asked for decreases in the price of gas charged by the respondents but that part of the application is not before us.

13 When the application was made with respect to (a) and (b), objection was taken that the Board had no authority to entertain the application or grant the orders asked for. The Board gave effect to this objection and it is that decision which is the subject-matter of this appeal.

14 To understand the problem that is raised by this appeal, it is necessary to refer to the problem these orders dealt with, some of the decisions and orders made by the Natural Gas Utility Board and the legislation under which they were made. The following is taken from O. 34 of the Natural Gas Utilities Board issued in 1947:

> "Turner Valley Oil and Gas Field is situate approximately thirty miles south-west from the City of Calgary. Drilling for oil began in this field in the year 1914 but it was not until 1924 that Royalite Oil Company Limited brought in a well ... known as Royalite No. 4, which had an initial gas flow of approximately 22,000,000 cubic feet per day. The gas produced was saturated with naphtha and as a result development followed rapidly and many wells were drilled, to secure the naphtha production. In the meantime, The Canadian Western Natural Gas, Light, Heat and Power Company Limited, which furnished natural gas to consumers through a distribution system which extended from Calgary to Lethbridge and thence to communities on the Crows Nest Line of the Canadian Pacific Railway Company, required additional supplies for its market and negotiated an agreement with Royalite, whereby the latter secured the exclusive right to supply natural gas from Turner Valley to Canadian Western for the needs of its customers.
>
> "In course of time, crude oil was discovered in the westerly part of the field and again intensive development took place, until a time came when the limits of the field became reasonably well defined. The known productive area of Turner Valley is about twenty miles long and varies in width from one to two miles. It is divided longitudinally into two areas known respectively as 'the gas cap' on the east flank and 'the crude oil zone' on the west flank, the former of which produces natural gas containing natural gasoline and naphtha, while the latter zone produces crude oil under the lifting power of connate natural gas, which also contains natural gasoline. The northern area of the gas cap formerly was largely and now is controlled by Royalite which, in course of time, constructed two absorption plants for the recovery of natural gasoline. The natural gas in both areas of the field contains sulphuretted hydrogen in noxious quantities and a scrubbing plant was built for the removal of this dangerous substance. In the central portion of the field, Gas and Oil Products Limited established an absorption plant for the recovery of natural gasoline.
>
> "British American Oil Company Limited established an absorption plant in the southern portion of the field for the recovery of natural gasoline. The result was that natural gas was being produced from the gas cap in tremendous quantities, primarily for the recovery of its naphtha and natural gasoline content, while natural gas -- the lifting power -- was produced in the crude oil zone. In the case of Gas and Oil Products Limited and the British American Oil Company Limited, gas from which natural gasoline had been recovered was used in relatively small quantities for field purposes and the balance was burned in flares. Royalite used its gas after absorption, to some extent, for use in the field for drilling fuel, for plant fuel, and for sale to Canadian Western to the extent of the latter's demand, and some was stored in the Bow Island field. Up until 1938 the balance was flared. ... In the crude oil zone, gas produced from wells not connected to absorp-

> tion plants and not required for field purposes or drilling fuel was wasted. Between the year 1924 and the present time literally billions of cubic feet of natural gas were wasted either by being burned in flares or by being dissipated in the air."
>
> "This Board was then constituted under and its powers defined by The Natural Gas Utilities Act. Pipe lines, scrubbing plants, wells, systems, plant and equipment, for the production of natural gas were declared to be public utilities. Any exclusive feature in a contract such as that contained in the agreement between Royalite and Canadian Western was declared to be null and void and the Board was given wide powers respecting the sale of natural gas, the prices to be paid to producers, the production from wells, the return to the underground formation of gas not required for the market, and the retention of natural gas in the ground by the restriction of production."

15 Among the very wide powers given to the Board, was the power to fix and determine (again quoting from O. 34):

> "(a) the just and reasonable price to be paid to producers for natural gas, ...
>
> "(b) the just and reasonable price for gas which has been delivered to an absorption plant ...
>
> "(c) the just and reasonable price for gas after it has been purified, ...
>
> "(d) the just and reasonable price to be paid for gas which is returned to the underground formation;
>
> "(e) a price to be paid for gas retained in the underground formation;
>
> "(f) the proportions in which the proceeds from the sale of absorption plant products shall be divided between producers and the owners of absorption plants."

16 The respondent British American Gas Utilities Ltd. is a subsidiary of British American Oil Co., and the respondent Madison Natural Gas Co., is a wholly-owned subsidiary of Royalite.

17 The purpose of the Act, as understood by the Board, was "to effect conservation of natural gas and to secure to producers, as far as it is possible to do so, a share in any market which can utilize natural gas" (O. 34). The Board commenced the hearing in 1945 and rendered its decision in 1947. Several interim orders were made while the hearings were in progress. Order 41 which implements the Board's decision (O. 34) was issued January 28, 1948. In its decision the Board considered that the rate of return should be 7% per annum and fixed 9c per mcf. as the "just and reasonable price" to be paid to the respondents. In arriving at this figure of 9c the Board had no previous experience to guide it. By experience I mean years of previous operation under controlled prices. In fixing its rates, the Board acted upon evidence of experts and the limited information which was obtained while the interim orders were in effect. In their decision (O. 34) they said: "A price of Nine (9) cents will afford what the Board hopes to be a margin of safety so that a deficit for the period will be avoided and if it should turn out that there is a surplus, it can be dealt with when the time arrives."

18 Order 41, which I have said implements their decision, contained the following: "(3)(d) At any period when Madison's operations are under review, any excess or deficiency of earnings over or under the prescribed rate of return shall be dealt with and disposed of as the Board may direct." A similar provision deals with British American Utilities.

19 It is the contention of the appellants that both respondents have received monies in excess of the rate of return fixed by the Board and its application is to dispose of these surpluses. While the respondents do not admit that they have received such surpluses, the appeal has been argued on the basis that a surplus exists.

20 There was discussion before us as to what was meant by "shall be dealt with and disposed of" in the portion of O. 41 which I have quoted. Does it mean that these companies shall be required to pay out or "disgorge" monies received in excess of the rate of return, or does it contemplate an application of these monies within the company so as to reduce the rate base or otherwise affect the future earning of the company? As will be pointed out later, the latter disposition is not before us, so it can only be a disposition which would require these respondents to disgorge these excess monies that will be considered.

21 In my opinion, the decision of the Board under appeal is correct for the reasons set forth therein. The Board has held that it has no jurisdiction to deal with or dispose of this surplus.

22 The powers of the Natural Gas Utilities Board have been quoted above and the Board's function was to determine "the just and reasonable price" or prices to be paid. It was to deal with rates prospectively and having done so, so far as that particular application is concerned, it ceased to have any further control. To give the Board retrospective control would require clear language and there is here a complete absence of any intention to so empower the Board.

23 It is argued that O. 41 has not been appealed and that by s. 44(8) of the *Natural Gas Utilities Act*, 1944 (Alta.), c. 4, every decision of the Board not appealed is final and may not "be questioned or reviewed, restrained or removed by prohibition, injunction, *certiorari* or any other process or proceeding in any Court". If it is sought to enforce orders which are beyond the power given by the Legislature, it is settled law that Courts can declare such orders bad, notwithstanding provisions such as are contained in s. 44(8).

24 It was submitted that the respondents, having for over 10 years accepted money under the terms of O. 41, one of which was that the Board was reserving the right to deal with and dispose of any surplus earned above the rate of return set by the Board, they cannot now be heard to say that it is invalid. This can only be so if these facts establish estoppel. The essential elements to create estoppel are missing, and, in any case, a decision, invalid for lack of jurisdiction, cannot be a foundation for estoppel: *Toronto R. Co. v. Toronto*, [1904] A.C. 809 at p. 815.

25 Section 35*a* [enacted 1945 (Alta.), c. 31, s. 2] of the *Natural Gas Utilities Act* provided:

> "35*a*(1) In addition to, and without limiting or restricting any other powers or jurisdiction conferred on it by the provisions of this Act, in any case where notice has been given by the Board of any hearing or investigation (in this section referred to as 'the final hearing') to be held or conducted by it for the determination or fixing of rates, prices, charges or any other matter or thing within its jurisdiction, the Board, --
>
> > "(*a*) if it be of the opinion that the public interest or the interest of any proprietor or of any person affected by the operations of a public utility so requires; and
> >
> > "(*b*) after notice to, and hearing any oral or written representations that may be made by any person interested in or to be affected thereby, --
>
> may make such interim or temporary order or orders relative to the matters with respect to which notice of a final hearing has been given, as it may deem just and reasonable, to be effective until the determination of the final hearing and the making of the Board's decision or order giving effect thereto (in this section referred to as 'the final order').
>
> "(3) The Board is hereby authorized, empowered and directed, on the final hearing, to give consideration to the effect of the operation of such interim or temporary order and in the final order to make, allow or provide for such adjustments, allowances or other factors, as to the Board may seem just and reasonable."

26 It is the submission of the appellants that O. 34 and O. 41 are interim or temporary orders and the Board can now deal with these surpluses in accordance with s-s (3). As I have mentioned, orders fixing interim prices were made while the Board was hearing the application and considering its report. These, of course, were superseded by the order now under consideration. Orders 34 and 41 are, of course, not final orders in the sense that judgments are final. The Act contemplates that subsequent applications will be made to change the price fixed by these orders. They are nonetheless final so far as each application is concerned.

27 In 1949 (Alta. 2nd Sess.), c. 4, s. 2, the *Natural Gas Utilities Act* was repealed, and the functions previously exercised by the Board under that Act were distributed between the Public Utilities Board and the Conservation Board created by the *Oil and Gas Resources Conservation Act* [now R.S.A. 1955, c. 227]. Section 2 of this repealing Act provided: "Notwithstanding the repeal of this Act all orders made by the Board shall be valid and remain in full force and effect until they are annulled or expire, or until others are made in their stead by the Board of Public Utility Commissioners or by The Petroleum and Natural Gas Conservation Board." It is the argument of the appellants that by this section, the Legislature intended to validate all orders of the Board including orders which went beyond the jurisdiction of

the Board to make. Great stress was placed on the words "shall be valid". It is argued that these words would be surplusage unless such an interpretation was placed upon them. There are other expressions in the section which to mo indicate a contrary intention. "Notwithstanding the repeal of this Act" appears to limit the orders which are validated to those orders which, upon the repeal of the Act, would otherwise become invalid. The words "remain in full force and effect" certainly could not apply to an order or a portion of an order which was invalid at the date of repeal and which could not be said to have "force and effect" at that time.

28 In *Minister of Health v. The King*, [1931] A.C. 494, the House of Lords was considering a provision in the *Housing Act* of 1925 which gave the Minister power to confirm by order an improvement scheme made under the Act, and the Act went on to provide that "the order of the Minister when made shall have effect as if enacted in this Act". The scheme submitted to the Minister was inconsistent with the provisions of the Act, and the effect of the order of the Minister which confirmed the scheme, with modifications, had to be considered. Viscount Dunedin at pp. 501-2 says: "It is evident that it is inconceivable that the protection should extend without limit. If the Minister went out of his province altogether, if, for example, he proposed to confirm a scheme which said that all the proprietors in a scheduled area should make a per capita contribution of 5*l.* to the municipal authority to be applied by them for the building of a hall, it is repugnant to common sense that the order would be protected, although, if there were an Act of Parliament to that effect, it could not be touched." Lord Tomlin at p. 520: "The Minister's jurisdiction to make an order is under the Act strictly conditioned, and it is only when what is done falls within the limits of the conditions imposed that the order receives the force conferred by the sub-section in question."

29 Although the legislation here considered is retrospective in that it confirms orders already made, it is equally inconceivable that the Legislature would be giving vitality to orders or parts of orders which were invalid before the repealing Act was passed.

30 If the Legislature had intended specifically to validate orders that were of questionable validity, one would have expected that it would have followed the usual procedure of naming the orders in the Act.

31 The portion of O. 41 which is in question is severable from the other portions of the order and a declaration that it was beyond the power of the Board which made it will not otherwise affect O. 41.

32 There remains that portion of the motion which asks the Board to fix "a future rate of return to be allowed" to the respondents. As I have pointed out, the Board is required to fix "the price to be paid". In determining this, rate of return is one of several elements which have to be established when a price is being fixed. An application to fix a rate of return divorced from the application to fix rates is not authorized by the Act by which the Board operates.

33 I have mentioned previously that other ways by which these surpluses could be "dealt with and disposed of" were discussed during the hearing of the appeal. We were asked to consider dispositions of the accumulated surpluses which would not require the company to pay out these funds -- crediting these monies against amortization reserve was one such method. It is clear, I think, that all the methods suggested would have the effect of altering the rate base. Like rate of return, rate base can only be considered as a part of the process by which "the just and reasonable price" is to be arrived at, and cannot be considered except on and as part of an application to fix prices.

34 A judgment of this Division, *Wainwright Gas Co. v. Wainwright & Bd. Public Utility Com'rs*, [1930] 4 D.L.R. 1000, 25 A.L.R. 181 [affd [1931] 4 D.L.R. 80] was relied upon by the appellants. Mitchell J.A. in delivering the majority judgment, appears to have approved procedures which took into account prior profits to the company in fixing future rates. Hyndman J.A., dissenting took the opposite view. The only question before the Court on that appeal was whether there was a matter of law to give the Court jurisdiction to hear the appeal. It was held that there was not; a consideration of the correctness of the Board's procedure was not before the Court and any comments concerning it were clearly *obiter dicta.*

35 The appeal is dismissed with costs to be taxed on col. 5.

5 EGBERT J. and BOYD MCBRIDE J.A. concur with JOHNSON J.A.

6 PORTER J.A.:--The scheme of the Act, [*Public Utilities Act*, R.S.A. 1955, c. 267], and the powers given to the Board, require it to fix the price of gas at the well-head, to fix the buying and selling price at each step of the process of making the gas merchantable, so that the spread between the buying price and the selling price will yield to the operators a gain that will make a return that is just and reasonable, having regard to the fact that the operators are declared to be and intended to function as public utilities. As a condition precedent to its ability to determine a just and reasonable rate, the Board of necessity had to determine the amount of capital employed in giving services by each of the respond-

ent companies, and then to decide what rate of return upon the capital so found is proper. It will thus be seen that the just and reasonable price which the Board is to fix for the commodity in its different stages of treatment is the product of a number of things, no one of which by itself could effect the purpose of the Act.

7 What has been said with respect to the nature of the Board's duties under the statute affects as well the city's application to fix the future rate of return, as set out in cl. (b) thereof. In order to alter the rate of return the Board would have to reconsider the just and reasonable price to be paid to the respondents for the gas they handled. It seems apparent therefore, that the Board could not deal with the rate of return separately as requested by the city, but would be bound in dealing with the rate of return to resort to the process directed by the Act for fixing just and reasonable prices for the gas in its several states of treatment.

8 The City of Calgary and the Home Oil Co. contended that O. 41 of the Board was validated by a provision of the Act repealing the *Natural Gas Utilities Act*, 1944 (Alta.), c. 4, and therefore the Board had statutory authority to dispose of the earned surpluses under the provisions contained in that order, in terms as follows: "(3) (d) At any period when Madison's operations are under review, any excess or deficiency of earnings over or under the prescribed rate of return shall be dealt with and disposed of as the Board may direct." For this the city and the Home Oil Co. relied on s. 2 of 1949 (Alta. 2nd Sess.), c. 4, reading as follows: "Notwithstanding the repeal of this Act, all orders made by the Board shall be valid and remain in full force and effect until they are annulled or expire."

9 Whether the provisions of (3) (d) are within the Board's powers need not here be decided because they do not relieve the Board from the duty of following the methods directed by the statute in altering or fixing prices and rates.

10 In my opinion therefore the Board is without jurisdiction to hear the city's application to dispose of the surpluses earned by the respondents over the rate of return by causing them to be disgorged or paid out, and the Board cannot under its powers fix a future rate of return for the respondents as requested by the city's application cl. (b) without reconsidering a just and reasonable price to be paid by and to the respondents for the gas received in and delivered out of their plants, involving of course a consideration of all the elements that properly make a rate base and fix the rate of return. What elements the Board may take into consideration in carrying out its statutory duties is a question which is not before us on the issues raised in this appeal.

11 It follows that the decision of this Division in *Wainwright Gas Co. v. Wainwright & Bd. Public Utility Com'rs*, [1930] 4 D.L.R. 1000, 25 A.L.R. 181; affd [1931] 4 D.L.R. 80, which was much relied on in argument, has no application to the matters here involved. It may be that at another time and on different facts, the real meaning of that decision will fall to be considered by this Division. I would prefer to reserve until that time, a consideration of such questions as then may appropriately arise.

12 JOHNSON J.A.:--This is an appeal, by leave, from the decision of the Board of Public Utility Commissioners which dismissed in part an application by the City of Calgary. This application as amended asked for an order or orders fixing and determining:

Schedule D

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2010-0279

IN THE MATTER OF sections 25.20 and 25.21 of *the Electricity Act, 1998*;

AND IN THE MATTER OF a Submission by the Ontario Power Authority to the Ontario Energy Board for the review of its proposed expenditure and revenue requirement for the year 2011.

BEFORE: Paul Sommerville
Presiding Member

Karen Taylor
Member

DECISION AND ORDER

Application

On November 2, 2010, the Ontario Power Authority (the "OPA") filed with the Ontario Energy Board (the "Board") its proposed 2011 expenditure and revenue requirement and fees for review pursuant to subsection 25.21(1) of the *Electricity Act, 1998* (the "Electricity Act"). Pursuant to subsection 25.21(2) of the Act, the OPA is seeking the following approvals from the Board:

- approval of a net revenue requirement comprised of the proposed 2011 operating budget of $64.1 million and a number of adjustments that result in a net amount of $79.861 million;

- approval of a $0.523/MWh usage fee, which is a decrease from the approved usage fee of $0.551/MWh for 2010 and to recover its usage fees from export customers, in addition to Ontario customers;

undertaken and the study should be filed at the OPA's next fees case. Elenchus Research Associates Inc. ("Elenchus") prepared evidence on behalf of HQEM. The evidence indicated that costs should be recovered from customers in a manner consistent with Generally Accepted Regulatory Principles which include the principle of cost causality and that a cost allocation study is required.

APPrO submitted that the Board should not approve the usage fee as proposed and to refer the submission back to the OPA and recommend that the 2011 usage fee exclude export volumes. APPrO also recommended a study should be conducted if the Board is of the view that exporters should pay a portion of the fee or if the Board is not clear if the fee should be extended to exporters. Manitoba Hydro submitted that it also did not support the OPA's proposal and that the OPA failed to show how its activities benefit exporters.

Board Findings

The Board will not approve the OPA's proposal to recover the 2011 usage fee from export customers for a number of reasons.

First, the Board is of the view that the mandate of the OPA is not comparable to that of the IESO. Even the most cursory examination of the relevant sections of the Electricity Act is illustrative of the distinct nature of the two organizations. Section 5(1)(e) of the Electricity Act, which sets out the objects of the IESO, clearly states that the IESO is to work with the responsible authorities outside Ontario to co-ordinate the IESO's activities with their activities. In contrast, section 25.2(1) which is the section of the Electricity Act that describes the objects of the OPA, expresses the OPA's fundamental responsibilities as being "for Ontario" and "in Ontario".

Second, the Board is not convinced that, in executing its objectives pursuant to the Electricity Act that the OPA creates benefits for export customers in the manner asserted by the parties supporting the extension of the fee to exporters. In particular, by engaging in power system planning that meets the reliability and self-sufficiency goals of the government of Ontario, the OPA's activities have the consequence of creating potential export capability. It does not necessarily follow that this "unintended" consequence is a benefit for which exporters should pay. The Board is also reticent to create the linkage that necessarily follows this argument, which is because exporters

"pay for this benefit" the OPA is obligated to engage in system planning in a manner that ensures export capability exists.

Third, the Board agrees with the submissions of parties that the proposed fee has not been supported by empirical evidence. The OPA proposal rests primarily on the IESO example, and a rather cursory benefits analysis. The extension of fees to market participants should generally be conducted on a firm empirical and principled basis. There is no such basis in the evidence before the Board. In this case, if the OPA intends to reintroduce this approach in this or a future expenditure and revenue requirement and fees case, it should be prepared to demonstrate a coherent rationale, quite possibly based on an allocation study, as suggested by Mr. Todd from Elenchus.

Finally, the Board notes that the OPA did not undertake any meaningful or substantive consultation with stakeholders regarding this proposal. Should the OPA choose to re-introduce this approach now or in the future, the Board expects the OPA to have engaged the stakeholder community in a relevant and substantive manner and will require that evidence of this consultation be filed in conjunction with the associated revenue requirement and fees application.

For these reasons, the Board is referring the calculation of the usage fee back to the OPA for reconsideration. The Board recommends that the OPA choose one of the following three alternatives.

First, the OPA may apply to the Board for approval of the Usage Fee based on the approved Net Revenue Requirement and a Total IESO Energy Forecast that is exclusive of exports. As per Table 1, the resulting Usage Fee is $0.563/MWh. Should the OPA pursue this approach, the Board is prepared to approve it pursuant to an expedited and administrative process.

Second, the OPA may choose to re-apply to the Board to recover the 2011 Usage Fee from export customers in addition to Ontario customers, provided that application is accompanied by an appropriate evidentiary foundation as discussed above and evidence of stakeholder consultation.

Third, the OPA may choose to continue with the current Usage Fee of $0.551/MWh which was set for fiscal 2010 and declared interim by the Board for fiscal 2011 on December 17, 2010. In this alternative, the Board would make the current interim rate

Schedule E

Français

Electricity Act, 1998

S.O. 1998, CHAPTER 15
Schedule A

Consolidation Period: From December 31, 2012 to the e-Laws currency date.

Last amendment: See Table of Public Statute Provisions Repealed Under Section 10.1 of the *Legislation Act, 2006* – December 31, 2012.

PART I
GENERAL

Purposes

1. The purposes of this Act are,

(a) to ensure the adequacy, safety, sustainability and reliability of electricity supply in Ontario through responsible planning and management of electricity resources, supply and demand;

(b) to encourage electricity conservation and the efficient use of electricity in a manner consistent with the policies of the Government of Ontario;

(c) to facilitate load management in a manner consistent with the policies of the Government of Ontario;

(d) to promote the use of cleaner energy sources and technologies, including alternative energy sources and renewable energy sources, in a manner consistent with the policies of the Government of Ontario;

(e) to provide generators, retailers and consumers with non-discriminatory access to transmission and distribution systems in Ontario;

(f) to protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service;

(g) to promote economic efficiency and sustainability in the generation, transmission, distribution and sale of electricity;

(h) to ensure that Ontario Hydro's debt is repaid in a prudent manner and that the burden of debt repayment is fairly distributed;

(i) to facilitate the maintenance of a financially viable electricity industry; and

(j) to protect corridor land so that it remains available for uses that benefit the public, while recognizing the primacy of transmission uses. 2004, c. 23, Sched. A, s. 1.

Interpretation

2. (1) In this Act,

"affiliate", with respect to a corporation, has the same meaning as in the *Business Corporations Act*; ("membre du même groupe")

"alternative energy source" means a source of energy,

(a) that is prescribed by the regulations or that satisfies criteria prescribed by the regulations, and

(b) that can be used to generate electricity through a process that is cleaner than certain other generation technologies in use in Ontario before June 1, 2004; ("source d'énergie de remplacement")

"ancillary services" means services necessary to maintain the reliability of the IESO-controlled grid, including frequency control, voltage control, reactive power and operating reserve services; ("services accessoires")

"Board" means the Ontario Energy Board; ("Commission")

(a) the costs of doing anything the OPA is required or permitted to do under this or any other Act; and

(b) any other type of expenditure the recovery of which is permitted by the regulations, subject to any limitations and restrictions set out in the regulations. 2004, c. 23, Sched. A, s. 31 (1).

Collection

(2) The IESO shall, in accordance with the regulations, collect and pay to the OPA all fees and charges payable to the OPA. 2004, c. 23, Sched. A, s. 31 (1).

May recover costs of procurement contracts

(3) For greater certainty, the OPA may, subject to the regulations, establish and impose charges to recover from consumers its costs and payments under procurement contracts. 2004, c. 23, Sched. A, s. 31 (2).

Board deemed to approve recovery

(4) The OPA's recovery of its costs and payments related to procurement contracts shall be deemed to be approved by the Board. 2004, c. 23, Sched. A, s. 31 (2).

Review of requirements and fees

25.21 (1) The OPA shall, at least 60 days before the beginning of each fiscal year, submit its proposed expenditure and revenue requirements for the fiscal year and the fees it proposes to charge during the fiscal year to the Board for review, but shall not do so until after the Minister approves or is deemed to approve the OPA's proposed business plan for the fiscal year under section 25.22. 2004, c. 23, Sched. A, s. 32.

Board's powers

(2) The Board may approve the proposed requirements and the proposed fees or may refer them back to the OPA for further consideration with the Board's recommendations. 2004, c. 23, Sched. A, s. 32.

Same

(3) In reviewing the OPA's proposed requirements and proposed fees, the Board shall not take into consideration the remuneration and benefits of the chair and other members of the board of directors of the OPA. 2004, c. 23, Sched. A, s. 32.

Changes in fees

(4) The OPA shall not establish, eliminate or change any fees without the approval of the Board. 2004, c. 23, Sched. A, s. 32.

Hearing

(5) The Board may hold a hearing before exercising its powers under this section, but it is not required to do so. 2004, c. 23, Sched. A, s. 32.

(6), (7) REPEALED: 2009, c. 33, Sched. 14, s. 2 (3).

Business plan

25.22 (1) At least 90 days before the beginning of its 2006 and each subsequent fiscal year, the OPA shall submit its proposed business plan for the fiscal year to the Minister for approval. 2004, c. 23, Sched. A, s. 32.

Minister's approval

(2) The Minister may approve the proposed business plan or refer it back to the OPA for further consideration. 2004, c. 23, Sched. A, s. 32.

Deemed approval

(3) If the Minister does not approve the proposed business plan and does not refer it back to the OPA for further consideration at least 70 days before the beginning of the fiscal year to which it relates, the Minister shall be deemed to have approved the OPA's proposed business plan for the fiscal year. 2004, c. 23, Sched. A, s. 32.

(4) REPEALED: 2009, c. 33, Sched. 14, s. 2 (4).

Auditor

25.23 The board of directors of the OPA shall appoint one or more auditors licensed under the *Public Accountancy Act* to audit annually the accounts and transactions of the OPA. 2004, c. 23, Sched. A, s. 32.

Auditor General

Schedule F

RP-2003-0063
EB-2004-0542

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 under the M16 rate schedule.

BEFORE: Paul Vlahos
Presiding Member

Paul Sommerville
Member

Pamela Nowina
Member

DECISION WITH REASONS

May 19, 2005

focused on the firm transportation component east of Dawn, as Tribute's prospective Tipperary storage pool would be served under this part of the proposed revised M16 rate schedule.

The thrust of the evidence of Messrs. Knecht and Fisher sponsored by Tribute and Tribute's submissions is that independent embedded storage is the new frontier in the natural gas market in Ontario and, as such, it should be supported by cost allocation and rate setting principles or arrangements that may depart from those applicable to other users of Union's transmission system. According to Tribute, independent embedded storage providers should not be viewed in the same manner as any other customer classification; rather they should be viewed and treated as competitors to Union's own storage activities and as an enterprise that enhances the reliability of the natural gas system in Ontario. Tribute also grounds its position on the Board's recently released report entitled *Natural Gas Regulation in Ontario: A Renewed Policy Framework* resulting from the Natural Gas Forum.

What Tribute in effect is seeking from this Panel is special status. Union and other Intervenors opposed such treatment for Tribute. True Oil, a potential storage developer, adopted Tribute's position.

Over the years, the Board has had many requests for special status for a customer group or a customer. The Board has been consistent in its response to such requests by adhering to its established principles in dealing with cost allocation and rate setting. Principled ratemaking involves the creation of a unified and theoretically consistent set of rates for all participants within the system. It begins with the establishment of a revenue requirement for the regulated utility and proceeds to design rates for the respective classes according to well-recognized and consistent theory respecting such elements as cost allocation. This is an objective and dispassionate process, which is driven by system integrity and consistent treatment between consumers on the system. Principled ratemaking typically does not involve a ranking of interests according to a subjective view of the societal value of any given participant or group of participants. This approach is not unique to Ontario. A departure from these principles should only be undertaken where the evidence and all other circumstances outweigh the inherent virtue of an objective process.

In the above referenced report resulting from the Natural Gas Forum, the Board raises a number of matters regarding storage. The Board intends to proceed to explore the

Schedule G

E.B.R.O. 493
E.B.R.O. 494
E.B.O. 177-09
E.B.R.L.G. 34-19

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1990, c. O.13;

AND IN THE MATTER OF an Application by Centra Gas Ontario Inc. for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas as of January 1, 1997;

AND IN THE MATTER OF an Application by Union Gas Limited for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas as of January 1, 1997;

AND IN THE MATTER OF Applications by Centra Gas Ontario Inc. and Union Gas Limited for Board approval of an affiliate transaction in excess of $100,000 and dispensation from compliance with certain undertakings for the payment of charges to Westcoast Energy Inc. related to the provision of services to Centra Gas Ontario Inc. and Union Gas Limited during the calendar year 1996.

BEFORE: G.A. Dominy
Vice-Chair and Presiding Member

P.W. Hardie
Member

H.G. Morrison
Member

R.M.R. Higgin
Member

DECISION WITH REASONS

March 20, 1997

Board Findings

Load Balancing, Peak and Off-Peak Storage Services

10.9.3 The Board finds it appropriate that Centra should offer load balancing, off-peak storage and peak storage services to industrial customers on terms similar to those pertaining to Union's industrial customers. In this connection, the Board's findings respecting these services applicable to Union and made elsewhere in this Decision shall apply equally to Centra in the test year.

Fort Frances Rates

10.9.4 The Board finds it appropriate to defer implementation of the next step in harmonizing the Fort Frances rates with other zones given the significant general increase in delivery charges embodied in the 1997 rate proposals. In the event that the proposed amalgamation of the Companies is approved by the LGIC, the Board expects that the issue of harmonization of Fort Frances rates will be revisited.

Alternative Rate for Power Generating Stations

10.9.5 The Board finds no new evidence which warrants a reconsideration of the rate design for Rate 100. Accordingly all large volume/high load factor customers, including power generation stations, will continue to receive service under the current Rate 100 in the test year.

Proposed Special Rate Class for Aboriginal Peoples

10.9.6 The Board is required by its legislation to "fix just and reasonable rates", and in doing so it attempts to ensure that no undue discrimination occurs between rate classes, and that the principles of cost causality are followed in allocating costs underlying the rates. While the Board recognizes ONA's concerns, the Board finds that the establishment of a special rate class to provide redress for aboriginal consumers of Centra does not meet the above criteria and is not prepared to order the studies requested by ONA.

Schedule H

Was preliminary page 1 1

RP-1999-0017

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IN THE MATTER OF the *Ontario Energy Board Act*[12JF7-0:1], 1998,

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AND IN THE MATTER OF an Application by Union Gas Limited for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas in accordance with a performance based rate mechanism commencing January 1, 2000;

4

AND IN THE MATTER OF an Application by Union Gas Limited for an order approving the unbundling of certain rates charged for the sale, distribution, transmission and storage of gas.

5

BEFORE: George Dominy
Presiding Member and Vice Chair
Malcolm Jackson
Member

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DECISION WITH REASONS

7

July 21, 2001

Was preliminary page 2 8

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2.455 With respect to Union's objective of creating and maintaining reasonable price relationships among rate classes and equivalency amongcomparable service options, the Board would be concerned if existing rates do not reflect such relationships. The Board expects Union to identify any relationships which are inappropriate and bring forward proposals on a timely basis to correct any deficiencies.

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2.456 Accordingly, the Board does not approve Union's proposed pricing flexibility scheme.

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2.457 The Board is also not prepared to accept the argument that there is no need to provide revenue and cost information on a rate class basis. The Board has generally relied on the revenue-to-cost ratio in determining that there is no unfair assignment of cost responsibility among rate classes. Evidence in this proceeding established no other basis upon which to check for cross-subsidization other than to use cost information.

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2.458 TheBoard does not acceptUnion's arguments that "using a cost basedmeasure, such as cross-subsidy is not meaningful in PBR because rates are judged just and reasonable by not being escalated beyond the restrictions approved by theBoard" nor that "the approval by the Board of a level of pricing flexibility means that if Union makes rate changes anywhere within the boundaries of the flexibility constraints approved by the Board, then the result will be just and reasonable rates". The Board can not automatically assume that the resulting rates will remain just and reasonable among classes.

Was page 131 691

2.459 In the Board's view there will be a continuing need to monitor changes in rate relationships to ensure that rates continue to be just and reasonable. The Board therefore directs Union to file with the Board and provide in the customer review process appropriate cost information, including rate class revenue-to-cost impacts.

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2.7.2 Treatment of Long-term Fixed Prices / Negotiated Rates

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2.460 Union proposed that customers, such as large industrials, retail marketers, and exfranchise customers, as an alternative to receiving service under a rate schedule, should have the option of negotiating fixed rates for periods in excess of one year. Union's billing system is not currently capable of billing residential customers at rates other than by class rate; therefore, the option of negotiated long-term fixed prices would be available from the Company only "to large industrial customers, retail energy marketers, and ex-franchise storage and transmission customers." Union noted that residential customers "could access [longer term fixed prices] through a retail energy marketer."

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2.461 The Company proposed to deem all volumes sold at negotiated prices to be billed at the posted rate for the purpose of proving that the annual rate changes comply with the price cap constraints. Any variance in the revenues from differences between negotiated rates and posted rates would be "managed" by the Company. Unless specifically excluded in the negotiated terms, the negotiated prices would be subject to pass-throughs and non-routine adjustments.

Was page 132 695

Positions of the Intervenors - Treatment of Long-term Fixed Prices / Negotiated Rates

Schedule I

Case Name:

Advocacy Centre for Tenants-Ontario v. Ontario (Energy Board)

Between
Advocacy Centre for Tenants-Ontario and Income Security Advocacy Centre on behalf of Low-Income Energy Network, Appellant, and
Ontario Energy Board, Respondent

[2008] O.J. No. 1970

293 D.L.R. (4th) 684

166 A.C.W.S. (3d) 384

238 O.A.C. 343

Court File No.: 273/07

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

F.P. Kiteley, P.A. Cumming and K.E. Swinton JJ.

Heard: February 25, 2008.
Judgment: May 16, 2008.

(111 paras.)

Natural resources law -- Public utilities -- Operation of utility -- Terms and conditions of service -- Collection or rates and charges -- Toll methodology -- Just and reasonable tolls -- Rates -- Regulation rationale -- Appeal of Ontario Energy Board's decision that it had no jurisdiction to order a "rate affordability assistance program" under the Ontario Energy Board Act allowed with dissent -- The board had the jurisdiction to take into account the ability to pay in setting rates given the expansive wording of s. 36(2) and (3) having considered the purpose of the legislation within the context of the statutory objectives for the board seen in s. 2, and being mindful of the history of rate setting to date in giving efficacy to the promotion of the legislative purpose -- Ontario Energy Board Act, s. 2, s. 36(2), s. 36(3).

Appeal under s. 33 of the Ontario Energy Board Act seeking a declaration that the board had the jurisdiction to order a "rate affordability assistance program" for low income consumers of the utility, Enbridge Gas Distribution Inc., within its franchise areas as the distributor of natural gas. By a majority decision of April 26, 2007, the board determined that the Act did not explicitly grant the board jurisdiction to order the implementation of a low income affordability program. The board also found it did not gain the requisite jurisdiction through the doctrine of necessary implication. Pres-

Conclusions on the Board's Jurisdiction

52 We agree that the traditional approach of "cost of service" is the root principle underlying the determination of rates by the Board because that is necessary to meet the fundamental, core objective of balancing the interests of all consumers and the natural monopoly utility in rate/price setting.

53 However, the Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates." Although "cost of service" is necessarily an underlying fundamental factor and starting point to determining rates, the Board must determine what are "just and reasonable rates" within the context of the objectives set forth in s. 2 of the *Act*. Objective #2 therein speaks to protecting "the interests of consumers with respect to prices."

54 The "cost of service" determination will establish a benchmark global amount of revenues resulting from an estimated quantity of units of natural gas or electricity distributed. The Board could use this determination to fix rates on a cost causality basis. This has been the traditional approach.

55 However, in our view, the Board need not stop there. Rather, the Board in the consideration of its statutory objectives might consider it appropriate to use a specific "method or technique" in the implementation of its basic "cost of service" calculation to arrive at a final fixing of rates that are considered "just and reasonable rates." This could mean, for example, to further the objective of "energy conservation", the use of incentive rates or differential pricing dependent upon the quantity of energy consumed. As well, to further the objective of protecting "the interests of consumers" this could mean taking into account income levels in pricing to achieve the delivery of affordable energy to low income consumers on the basis that this meets the objective of protecting "the interests of consumers with respect to prices."

56 The Board is engaged in rate-setting within the context of the interpretation of its statute in a fair, large and liberal manner. It is not engaged in setting social policy.

57 This is not, of course, to imply any preferred course of action in rate setting by the Board. The Board in its discretion may determine that "just and reasonable rates" are those that follow from the approach of "cost causality" once the "cost of service" amount is determined. That is, the principle of equality of rates for consumers within a given class (e.g., residential consumers) may be viewed as the most just and reasonable approach. A determination by the Board that all residential gas consumers (with relatively minor deviations through such programs as the "Winter Warmth Program") pay the same distribution rates is not in itself discriminatory on a prohibited ground. Indeed, it can be seen as a non-discriminatory policy in terms of prices paid.

58 Nor is it to suggest that as a matter of public policy, objectives of distributive justice or conservation in respect of energy consumption are best achieved by rate setting as compared to, for instance, tax expenditures or social assistance devised and implemented by the Legislature through mechanisms independent of the operation of the *Act*. It is noted that the Minister is given the authority in s. 27 of the *Act* to issue policy statements as to matters that the Board must pursue; however, the Minister has not issued any policy statement directing the board to base rates on considerations of the ability to pay. Moreover, the power granted to a regulatory authority "must be exercised reasonably and according to the law, and cannot be exercised for a collateral object or an extraneous and irrelevant purpose, however commendable." *Re Multi Malls Inc. et al. and Minister of Transportation and Communications et al.* (1977), 14 O.R. (2d) 49 at 55 (C.A.). As we have said, cost of service is the starting point building block in rate setting, to meet the fundamental concern of balancing the interests of all consumers with the interests of the natural monopoly utility.

59 Nor does our conclusion presume as to what methods or techniques may be available in determining "just and reasonable rates." Efficiency and equity considerations must be made. Rather, this is to say only that so long as the global amount of return to the utility based upon a "cost of service" analysis is achievable, then the rates/prices (and the methods and techniques to determine those rates/prices) to generate that global amount is a matter for the Board's discretion in its ultimate goal and responsibility of approving and fixing "just and reasonable rates."

60 The issue before the Court is that of jurisdiction, not how and the manner by which the Board should exercise the jurisdiction conferred upon it.

61 In our view, and we so find, the Board has the jurisdiction to take into account the ability to pay in setting rates. We so find having taken into account the expansive wording of s. 36(2) and (3) of the statute and giving that wording its ordinary meaning, having considered the purpose of the legislation within the context of the statutory objectives for the Board seen in s. 2, and being mindful of the history of rate setting to date in giving efficacy to the promotion of the legislative purpose.

Schedule J

Case Name:

Consumers' Gas Co. (Re)

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1990, c. O.13; AND IN THE MATTER OF section 13(5) of the said Act; AND IN THE MATTER OF a hearing to inquire into, hear and determine certain matters relating to Integrated Resource Planning on the distribution systems of the Consumers' Gas Company Ltd., Union Gas Limited and Centra Gas Ontario Inc.

1993 LNONOEB 1

No. E.B.O. 169-III

Ontario Energy Board

Panel: Marie C. Rounding, Chair and Presiding Member; Carl A. Wolf Jr., Member; Judith C. Allan, Member; Judith B. Simon, Member

Decision: July 23, 1993.

(497 paras.)

Tribunal Summary:

During November and December of 1992, the Ontario Energy Board ("the Board") held an oral hearing on the generic issues involved in the demand-side management ("DSM") aspects of integrated resource planning ("IRP"). After evaluating the evidence and arguments submitted by the parties, the Board endorsed the need for formalized DSM planning by each of the three major gas utilities in Ontario, and concluded that these companies should implement their DSM plans as soon as possible. The Board's Report is attached.

Background

In its 1990 Decision in E.B.R.O. 462, the Board decided to call a generic hearing into Least Cost Planning or IRP. In preparation for the hearing, the Board's Technical Staff ("Board Staff") developed a draft list of issues in consultation with the three major gas utilities in Ontario, and comments on these issues were solicited from a broad range of interested parties. After reviewing the responses and consulting with the utilities, the Board determined that a discussion paper should be produced. Accordingly Board Staff, with the assistance of a consultant, prepared a draft report which was also circulated for comment. A final document, entitled "Report on Gas Integrated Resource Planning" ("the Discussion Paper"), was released by the Board in September, 1991.

361 12.0.8 Board Staff also recommended that the Board should direct the utilities to examine their existing rate structures now to see if they can be further enhanced to improve the efficiency of gas use.

362 12.0.9 Centra rejected Board Staff's submission on the review of existing rate structures as being premature and recommended that more complete reviews be undertaken as and when rate design alternatives are advanced.

363 12.0.10 experiments is not a significant current concern to most of the active parties in the hearing. It submitted that existing rate design alternatives adequately provide for an enhanced and expanded DSM effort and, therefore, there is no need to alter existing rate structures. Consumers Gas further submitted that it would be imprudent to institute novel rate design alternatives before gaining substantially more experience, both directly and through the monitoring of developments in other jurisdictions.

364 12.0.11 Energy Probe did not support the Consensus Statement. It submitted that this most efficient demand management will result from a rate design that adheres to the principles of unbundling (i.e. disaggregation of services) and cost-based rates. Rate design should not, in Energy Probe's view, be used as a policy tool for achieving gas conservation. However, to the degree possible, rates should reflect the marginal financial cost of gas and gas services.

365 12.0.12 Energy Probe argued that rate design options such as inverted block rates ignore the real environmental risks that would result if they cause customers to switch away from natural gas to more environmentally harmful fuels. Energy Probe reiterated its view that instituting surcharges on natural gas rates to fund subsidized DSM is a move away from both the proper role of rate design and the Board's recent laudable tendency to remove from regulated control those aspects of a gas utility's business that are not natural monopolies and can be provided by competitive enterprises.

366 12.0.13 Union submitted that rate design is a relatively weak tool for promoting conservation, and that it is more important and productive to address the market barriers to wise energy use. Union indicated that it considered its existing rate structure for residential consumers to represent an appropriate balance between competing rate design objectives. Union agreed that it was important to provide customers with information concerning their consumption patterns and the attendant cost consequences.

12.1 BOARD FINDINGS

367 12.1.1 The Board agrees that accepted rate design principles of fairness, stability and cost recovery should be maintained and that rates must continue to be cost-related. The Board endorses the general consensus of the parties on these issues.

368 12.1.2 The Board also concurs with the comment in the Consensus Statement that the avoidance of rate shock is a principle of rate design. In addition, the Board notes its acceptance of cross-subsidization (Issue 2) as long as it is not undue, either among customers within a rate class or among rate classes.

369 12.1.3 With regard to inverted rates, the Board notes that, although this issue was not the subject of a specific proposal, the parties were generally in agreement that inverted rates are unfair in that they do not distinguish; between efficient consumption of natural gas and low consumption of natural gas. The Board concurs, and considers inverted rates to be impractical unless there is greater homogeneity within the rate classes.

370 12.1.4 The Board notes that there is no evidence to suggest that, at present, rate structures are acting as a disincentive to the efficient consumption of natural gas. The Board is of the view that a review of rate structures is not required at this time. However, the Board would encourage the explicit consideration of energy efficiency impacts resulting from rates and rate structures in any future review of rate design. Furthermore, this review should be sensitive to how rate structures might enhance energy efficiency. The Board notes that, for example, seasonal or time-of-use rates have been implemented in other jurisdictions in support of DSM initiatives. Rate design and rate structures must not act as a barrier to energy efficiency measures.

371 12.1.5 The Board notes that it will be necessary to have information on the use of alternative fuels by interruptible customers in order to estimate the environmental impacts of interruptions. Since alternative fuel consumption may change over time, estimates will need to be updated periodically. In its comments on Issue 7, the Board has requested that this information be provided.

372 12.1.6 The Board is of the view that customers may be able to make better decisions regarding their energy consumption if they are provided with additional information on their energy use. The Board supports the provision of such information. Among the issues to be investigated are how billing information can be augmented by providing de-

* Initially, the base case forecast should include the impacts of NGV programs and of DSM programs initiated prior to fiscal 1995, together with the assumptions and price expectations underlying the forecast.

* The DSM plan and program forecasts should be based on achievable potential, derived to the extent possible from end-use models.

* The utilities should report on the degree to which end-use models *cm* be integrated into their forecasts, at the rates case when they file their first DSM plans. The reports should also include the cost, data and time requirements for the implementation of end-use forecasting.

* Forecasts of the costs of programs and plans should be provided on both a total cost and unit cost (per unit of demand and/or savings) basis.

* For each program and for the overall portfolio, forecasts of the pessimistic, optimistic and most likely impacts on the base case forecast should be presented, along with a description of the major assumptions employed.

* Program performance forecasts should describe expected results in each of the first five years of the program and at five-year increments thereafter to the twentieth year of the plan, or the life of the program

* Each utility should submit an overview of its DSM plan that describes:

  - the goals of its DSM portfolio and how these will be achieved;

  - the objectives for resource planning and customer service;

  - specific DSM savings objectives by class of customer; and

  - a discussion of the alternative implementation strategies considered.

* The utilities should cooperate in their use of pilot programs and in the development of standard monitoring and evaluation techniques.

471 15.1.12 Rate Design and DSM

* When developing DSM plans, the need for just, reasonable, stable, cost-related rates should be recognized.

* The potential for rate shock should be anticipated and avoided whenever possible.

* While there appears to be little current justification for revising rate structures, the utilities should explicitly consider energy efficiency impacts resulting from rates and rate structures in any future review of rate design.

* The utilities should undertake, and periodically update, assessments of the impacts of interruptible rates, since in addition to constraining system costs, such rates can affect the use of alternate fuels.

* More explicit billing information (e.g. displays of consumption patterns, as well as capacity, customer and commodity charges) should be provided to customers.

Schedule K

Case Name:

Hydro One Networks Inc. (Re)

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 Hydro One Networks Inc. for an order or orders approving or fixing just and reasonable distribution rates and other charges, to be effective May 1, 2009.

2009 LNONOEB 86

No. EB-2008-0187

Ontario Energy Board

Panel: Paul Vlahos, Presiding Member; Paul Sommerville, Member; Ken Quesnelle, Member

Decision: May 13, 2009.

(48 paras.)

DECISION

Introduction

1 Hydro One Networks Inc. ("Hydro One") is a licensed distributor of electricity providing service to consumers within its licensed service area. Hydro One 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 charges, to be effective May 1, 2009.

2 Hydro One is one of about 80 electricity distributors in Ontario that are regulated by the Board. In 2008, the Board announced the establishment of a new multi-year electricity distribution rate-setting plan, the 3rd Generation Incentive Rate Mechanism ("3GIRM") process, that would be used to adjust electricity distribution rates starting in 2009 for those distributors whose 2008 rates were rebased through a cost of service review. Building incrementally on the previous plan, the 3GIRM is more specifically grounded in empirical analysis and takes the differences in the operations of distributors into account. The Board's policy approach is set out in the Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Distributors dated July 14, 2008. A Supplemental Report of the Board setting out the Board's determination of the values for the productivity factor, the stretch factors, and the capital module materiality threshold for use in the plan was issued on September 17, 2008. On January 29, 2009, the Board issued its Addendum to the Supplemental Report of the Board on 3rd Generation Incentive Regulation for Ontario's Electricity Dis-

relief amount is 12.3% of the requested capital relief. During the hearing, there was general acceptance that the 12.3% factor would apply for making adjustments to the revenue requirement if there were any adjustments to the requested capital amounts.

14 No party took issue with Hydro One's calculation of the materiality threshold. However, as parties pointed out, and the Applicant agreed, the inflation escalator (X factor) determined by the Board is 1.18%, not 0.98% used by the Applicant. This raises the threshold to $296 million and, correspondingly, lowers the proposed incremental capital requirement to $165 million. Using the 12.3% factor, the starting revenue requirement relief is reduced to $20.3 million.

15 As described in detail below, the Supplemental Report of the Board indicated that the Incremental Capital Module was meant to be reserved for unusual circumstances. In the Applicant's view, the fact that the threshold has been exceeded meets the unusual circumstances test adopted by the Board for triggering the use of the ICM mechanism. Hydro One argued that the ICM mechanism was meant to address any funding gap that may exist after applying the price cap formula. The Applicant noted specifically that its increasing capital expenditure requirements since 2002 are the unusual circumstances that the Board contemplated by instituting the ICM mechanism.

16 Hydro One's rates were rebased for the 2008 rate year. The 3GIRM plan term is for three years. Hydro One's rates were therefore not expected to be rebased until the rate year 2012. Prior to the hearing, Hydro One announced that it will in fact be filing for a cost of service review for the 2010 and 2011 rate years, which would effectively end the IRM term after the 2009 rate year. The Board has since scheduled Hydro One as one of the distributors to apply under cost of service.

17 All intervenors except PWU and SEP argued that the ICM application should be dismissed as it does not meet the criteria for ICM approval established by the Board. Should the Board not reject the application on that basis, these intervenors argued for various reductions on the requested relief. They suggested that the revenue deficiency claimed by Hydro One is substantially lower than proposed, non-existent or that there may even be a revenue sufficiency. They also pointed out that Hydro One's own management had advised its board of directors in November 2008 that ICM relief was not needed and that Hydro One stated that it will proceed with its capital plan irrespective of the Board's decision in this proceeding. Certain intervenors also grounded their objection on the current economic climate facing energy consumers.

Board Findings

18 Before we deal with the specifics of the ICM application, we address the last two issues raised by certain intervenors. Those are:

* Whether the Board should reject the application because Hydro One management had advised their board of directors in November 2008 that ICM relief is not needed and that Hydro One stated that it will proceed with its capital plan irrespective of the Board's decision in this proceeding.

* Whether the Board should reject the application on the basis of the current economic climate facing energy consumers.

19 While the genesis of an application is of general interest to the Board, it is not determinative of the substantive aspects of the application. Once filed in accordance with the provisions of the legislation, applications are reviewed on their merit. The particulars surrounding the levels of approvals before a distributor makes an application, is a matter that is internal to the company itself.

20 We agree with intervenors' assertions that in periods of economic downturn increased electricity rates may compound the financial stress being felt by customers. However, the Board does not consider it appropriate to unduly constrain the relief sought by applicants of regulated entities due to current economic conditions. Capital projects are long-term in nature and planning for their execution should not be dependent on economic cycles. In reviewing applications for rate adjustments, the Board considers the impacts of those rates on customers. For example, the Board is mindful in avoiding rate shock through the smoothing out of an applicant's spending program. This is not the case here. The increase resulting from Hydro One's application is 2.1% to its revenue requirement resulting in a 4.28% increase when combined with the price adjustment mechanism. The percentage increase is even smaller on a customer's total bill as distribution is only a component of the total bill, and not the largest component.

Schedule L

Case Name:

Enbridge Gas Distribution Inc. (Re)

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 Enbridge Gas Distribution Inc., formerly The Consumers' Gas Company Ltd., for an order or orders approving or fixing rates for the sale, distribution, transmission and storage of gas for its 2002 fiscal year; AND IN THE MATTER OF a proposal by Enbridge Gas Distribution Inc., formerly The Consumers' Gas Company Ltd., to establish a Deferred Income Tax Deferral Account and other related matters.

2003 LNONOEB 6

No. RP-2002-0135

Ontario Energy Board

Panel: Howard Wetston, Q.C., Chair and Presiding Member; Paul Vlahos, Member

Decision: December 3, 2003.

(46 paras.)

DECISION AND ORDER

1 In the E.B.O. 179-14/15, 1999 LNONOEB 4, proceeding, Enbridge Gas Distribution Inc. (EGDI) sought Board approval to include its water heater rental program as part of the core utility. EGDI intended to wind down the rental program which would trigger a requirement to pay taxes that had been previously deferred. EGDI proposed to recover those taxes from ratepayers, to the extent that they could not be recovered from rental customers.

2 In its decision, dated March 31, 1999, the Board rejected EGDI's request, on the basis that the rental program was an ancillary program that was not regulated by the Board. The Board's treatment of the rental program had focused on ensuring that it was not subsidized by ratepayers. The Board determined that any deferred taxes associated with the

40 EGDI first sought to draw against the notional account in RP-1999-0001. In paragraph 3.1.6 of its RP-1999-0001 decision, the Board stated:

> Payment of the deferred taxes associated with the rental program arises according to the Company from a wind down mode. However, the testimony by the Company's witness is neither definitive that the rental program will be "wound down" nor clear as to how it will be "wound down" thereby triggering incremental taxes payable within the affiliate. The Board is not prepared to consider the other arguments by the parties unless there is a better understanding on these issues, which must come from a more complete and clear record. The Board therefore denies the Company's request to recover the requested amount for deferred taxes in the test year.

41 The above excerpts represent the core of the Board's decisions in this matter. We are of the opinion that these reasons do not support EGDI's view that the Board's decision in EBO 179-14/15 represents an unconditional obligation for the ratepayers to pay $50 million, after tax. The Board clearly intended that EGDI would be able to recover from the notional account only as deferred taxes became payable, and only up to $50 million, after tax.

42 The Board therefore confirms that draws against the notional account are limited to $50 million, after tax, and are conditional upon deferred taxes associated with the rental program becoming payable.

43 The Intervenors argued that EGDI's ability to draw on the notional utility should be limited to the amount which would have been payable in taxes, had the assets been kept within the first affiliate and operated on an ongoing basis, rather than transferred to a second affiliate and operated on a wind down basis. In our view, the language in the Board's EBO 179-14/15 decision does not support this interpretation. This interpretation would preclude, in effect, EGDI and its affiliates from engaging in normal tax planning in order to optimize exposure to deferred tax liability. In fact, one of the options identified by the Board in the EBO 179-14/15 decision specifically contemplates transferring the rental program assets to an affiliate or selling to a third party.

44 The rental program assets have been sold to a third party. As such, neither EGDI nor its affiliates bear any further tax liability post the date of the sale in relation to those assets.

45 The Board finds and orders that EGDI is entitled to recover from the notional utility account an amount, after taxes, equal to the deferred taxes that became payable between October 7, 1999 (the date in which the assets were transferred out of EGDI to an affiliate) and May 7, 2002 (the date of the sale of the rental assets to a third party). EGDI may seek to recover such amount, appropriately verified, in its next rates application. The Board expects EGDI to ensure that its request for recovery includes consideration of any potential for rate shock.

46 The Board will issue its decision on costs at a later time.

DATED at Toronto, December 3, 2003

Howard Wetston, Q.C.
Chair and Presiding Member

Paul Vlahos
Member

qp/e/qlspi