

ONTARIO ENERGY BOARD

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 clearing certain non-commodity related deferral accounts and sharing utility earnings pursuant to a Board approved earnings sharing mechanism.

AND IN THE MATTER OF an Application by Union Gas Limited for an order approving a deferral account to capture variances between earnings sharing, deferral account and other balances approved for disposition and amounts actually refunded/recovered

BOMA's Submissions

Introduction and Characterization of Optimization Amounts

In this case, Union claims the Board would have made a different decision in EB-2012-0087, had Union done a better job of explaining its position, in particular, by explaining that its gas supply plan was "right sized" and not artificially enlarged so as to provide excess transportation capacity that could then be used to generate revenue for shareholders. Union says the decision in this case should be different than in EB-2012-0087, as in this case, Union has more fully explained its position. BOMA does not believe that Union has provided any new evidence that justifies the Board changing its EB-2012-0087 decision in this case. For example, Union agreed that the nature of the transactions, the characterization of which has been, and, Union says, remains in issue, have not changed from 2011 to 2012 (T. V2, p10).

This is Union's third effort within twelve months to advance its characterization of the monies that it has generated from engaging in transactions with marketers using upstream transportation assets that it has contracted for to serve its system gas customers as regulated utility revenues. Since 2012 was an IRM year, if the Board were to agree to characterize such amounts as "utility revenue", such revenue would all accrue to utility shareholders, except to the extent that an earnings sharing mechanism existed, which applied to the revenues in question, and which allocated a portion of the revenue to ratepayers (B, T1, p1).

The Board has decided in three cases in the last twelve months, in its EB-2011-0210 decision on October 25, 2012, its EB-2012-0087 decision on November 19, 2012, and its EB-2012-0055 decision on March 14, 2013, that such amounts, or, in the case of EB-2012-0055, the larger part of them, should be characterized as gas cost reductions, and passed through to ratepayers through the PGVA, in the appropriate QRAM proceedings and treated as Y-factor in an IRM. Moreover, in a Settlement Agreement in its 2014-2018 IRM case, EB-2013-0202, signed on July 31, 2013, and since approved by the Board, Union and the parties agreed in section 6.2 that:

"The parties agree that changes in upstream transportation costs that underpin Union's gas supply plan will be passed through to ratepayers through the gas supply deferral accounts or as otherwise determined by the Board, and through rates during the annual rate setting or the earnings sharing and deferral accounts clearing processes. The upstream transportation costs include the 2013 Board-approved treatment of upstream transportation optimization revenues. Thus, the pass-through of upstream transportation costs will be unchanged in both substance and procedure from the 2013 Board-approved pass-through mechanisms."

A summary of the key reasons the Board decided in these cases that the amounts should be characterized as gas cost reductions can be found in the CME submission in EB-2013-0046 (decision still pending), pp3-5, and also in BOMA's submission to the Board in that case.

The EB-2011-0210 decision was the Union 2013 rebasing case, to set the next Union IRM for the period 2014-2018. The EB-2012-0087 case dealt with, inter alia, the determination of the ratepayer share of Union's earnings in 2011, an IRM year. This case, EB-2013-0109, deals with, inter alia, the determination of the ratepayer's share of Union's earnings in 2012, another IRM year.

Union has stated in this case that it disagrees with the Board's decision in EB-2012-0087, based on a number of considerations, but agreed that it did not seek a rehearing of the EB-2012-0087 case. It refused to explain why (T2, p4), although it would appear that Union must have concluded that it would not be able to obtain leave of the Board to bring a motion for such a rehearing pursuant to the Board's Rules, or, if it obtained leave, would not have the grounds to succeed in such a motion. A party seeking to review and vary a prior Board decision under Rule 44 must set out the grounds for its motion which may include an error in fact, change in circumstances, new facts that have arisen, and facts that were not previously placed in evidence in the proceeding and could not have been disclosed by reasonable diligence at the time. None of these factors would have appeared to have been present then, or be present now, with respect to the Board's EB-2012-0087 decision.

The fact that the Board has made three decisions in the last twelve months, that the amounts in question should be treated as gas cost reductions, coupled with Union's admission that the type of "optimization" transactions they were doing in 2012, were the same as those they did in 2011 (T. V2, p10), and the fact that Union declined to seek a Board rehearing of the EB-2012-0087 decision places a very high onus on the applicant in this case. BOMA believes that the applicant has not met this onus, for the reasons we set out below.

Union's first reason for its proposal was that:

"A key premise of the Board's EB-2012-0087 decision, with respect to the treatment of net FT-RAM revenue is that Union's Gas Supply Plan was driven in part by optimization opportunities (B, T1, p5). As shown in the report at Ex C, T2, the Union Gas Supply Plan is right-sized and does not consider opportunities for optimization. Accordingly, the Board should reinstate the treatment of FT-RAM revenue as part of utility earnings..." (Ex B, T1, p9).

In BOMA's view, in that passage, Union misstates the Board's reasons for its decision in EB-2012-0087. The status of Union's gas supply plan, whether it was right-sized or otherwise, did not enter into the Board's reasons in any material manner for deciding the way it did in EB-2012-0087. The Board had several reasons for its decision, which we will discuss below, but the nature of Union's Gas Supply Plan was not one of them. The Board did not so much as mention the gas supply plan in its reasons for decision in EB-2012-0087. Union has sought to conflate the two issues in this case, and to utilize the evidence of Sussex on its "gas supply plan" as a springboard from which to reargue the EB-2012-0087 decision.

However, Mr. Stephens of Sussex, whom Union hired to do a review of its gas supply plan, pursuant to a directive from the Board in EB-2011-0210, stated that he was not asked to testify as to the characterization of the amounts of money generated by Union's "optimization" transactions, nor as to the amount of the incentive, if any, Union required to conduct such activities. Rather, he was asked to opine on the process used by Union to develop its annual gas supply plans for its North and South regions and the principles which underlay them, as to whether both were reasonable (T2, p94).

Union's argument above is therefore not relevant to the issue at hand, and its use of the Sussex evidence for this purpose is a straw man (our emphasis).

While the Board's decision in EB-2012-0087 speaks for itself, BOMA would summarize its principal findings as follows:

First, the Board was careful to place Union's IRM 2008-2012 in the broader context of ratemaking. It found that Union's IRM framework is a policy, the primary purpose of which is to set just and reasonable rates, and:

"the Board has an ongoing responsibility to determine whether activities undertaken (by Union) during the IRM term are being characterized in accordance with the IRM framework and have been characterized in a manner which results in just and reasonable rates" (EB-2012-0087, p25).

The Board concluded that characterizing the amounts realized by optimization activities as gas cost reductions was consistent with just and reasonable rates.

Treating the cost of gas and upstream transportation costs as pass-through items is a longstanding principle of this Board's ratemaking. Union's 2008-2012 IRM explicitly recognized this principle by making such costs a Y-factor (EB-2012-0087, pp 25-26). These findings negate Union's argument in this case that the Board's EB-2012-0087 decision was somehow inconsistent with the agreed IRM regime in that case.

Second, the Board found that Union used TCPL's FT-RAM program to create a profit from its upstream transportation portfolio and has treated this "profit" as an addition to utility earnings, when it should have been treated as gas cost savings to make it consistent with the regulatory principle outlined above. The key element of the finding is that Union's decisions to release capacity with its attendant RAM credits had the result of lowering upstream transportation costs to ratepayers, who had already paid for that capacity in rates. These decisions were consciously taken by Union, in fact, they were decisions made by the management of Union and they were

not made on the basis of either an unexpected change in weather, or an unexpected change to in-franchise demand. The Board made the characterization largely on the basis of extensive evidence provided by intervenors in the EB-2011-0210 case.

The Board found that the planned optimization of gas supply related assets, including upstream transportation, are not transactional services because they are not assets that are rendered surplus, as a result of factors beyond Union's control, such as weather and demand. The Board cited that Union's evidence in RP-003-0063/EB-2012-0087, in support of that finding, in particular, the statement that:

"with a balanced gas supply portfolio, which meets the forecast in-franchise and ex-franchise firm demands, there will be few, if any, firm assets available to support TS on a future planned basis" (Ibid).

The Board also spoke to the meaning of planned activities versus unplanned activities, in this context, in EB-2012-0055, a case in which it held that the amounts of money realized from Enbridge's FT-RAM driven capacity release/exchange activities should be treated as gas cost reductions.

In that case, the Board acknowledged that there was no evidence that Enbridge's capacity release activities occurred on a "truly planned basis" (EB-2012-0055, p14), in the sense that Enbridge set aside an amount of annual capacity for later assignment at the time they formulated the annual gas supply plan. The Board found that, instead:

"they are a function of circumstance that arise and factors taken into account by Enbridge's Gas Control Group, as the gas supply plan is implemented" (our emphasis).

And further:

"Regardless of the Board's conclusion that Enbridge's capacity releases occur on an unplanned basis, the outcome of these transactions is that gas, which is required by Enbridge's customers, is delivered to those same customers, at a reduced cost" (Ibid, p14) (our emphasis).

Third, the Board dismissed Union's argument that the amounts generated by Union's FT-RAM related activities cannot be considered as gas cost reductions because they did not fit within the wording and historical usage of the gas supply deferral accounts. In the Board's view, that argument put form before substance; the amounts generated were in substance gas cost savings, and the Settlement Agreement required that they be collected in gas supply deferral accounts. Moreover, at the time the accounts were established, the Board and the intervenors did not have the information to judge whether the account descriptions were consistent with the Settlement Agreement.

Fourth, the Board found that:

"Union must be mindful of the information asymmetry that exists between it and its ratepayers. Union has an obligation to disclose departures or potential departures that it intends to make from regulatory principle inherent in the IRM Framework during the term of the IRM. The Board finds that the nature of Union's FT-RAM optimization and its treatment of the resulting revenue is an example of the type of departure that warrants a much higher level of disclosure than was produced in prior proceedings." (EB-2012-0087, p30)

Finally, while the Board did not dwell on this matter in the EB-2012-0087 decision, it was implicit in their analysis, that TCPL's FT-RAM credits, an attribute of the TCPL tariff, FT toll, and STS toll were the drivers that made the capacity release/exchange combined transactions economic, and provided enough profit for both the marketer and the utility to make the transaction attractive to both. This fact was admitted by Union on several occasions in the EB-2011-0210 case.

Incentive for Union

BOMA would support the contribution of a ten percent share of net optimization revenue to Union, as an incentive to induce Union to continue to carry out its optimization activities, including capacity release on behalf of ratepayers. The ten percent is consistent with the decisions in EB-2012-0087, EB-2011-0210, and the NGEIR decision that Union should receive ten percent of the net revenues associated with short term storage and balancing activities (EB-2012-0087, p31).

BOMA agrees with the observation of Board Chair that Union appear to minimize its risk in entering into capacity releases through careful selection of counterparties and contracts, which provided stiff penalties for failing to deliver gas to Union's customers a part of a capacity/exchange or related transaction (T. V2, p64). And Mr. Acker testified that the marketer is the one that took the risk that the transaction it had committed to perform would not be profitable (T. V2, p33). Enbridge does not, and should not, as a regulated utility, take substantial risk in its "optimization" activities, nor should those activities be a source of material increase to its allowed ROE. Those risks are for the BP's of the world, and other similar unregulated entities, which do not have a franchise and a duty to serve, and which require after tax rates of return on equity well in excess of the rates allowed regulated gas utilities.

The Numbers

BOMA agrees that Table 1 (Ex B, T2, p9 of 82) shows the total amount realized from use of upstream transportation services that are not required by Union for a variety of reasons in 2012. BOMA is of the view that, in addition to the sum of lines 1 and 2 (a total of \$7.3 million), the

sum of lines 3, 4, 5, 6, and 7, which is \$51.6 million, which include both "base exchanges" and FT-RAM enhanced transactions should be characterized as gas cost reductions.

Such a decision would be consistent with the Board's EB-2012-0087 decision to include the revenue from activities which Union describes in Table 1 as Base Exchanges, which did not make use of FT-RAM credits, but did utilize utility assets to produce revenues. The Board reached a similar conclusion in the EB-2011-0210 rebasing case. In that case, the Board defined optimization as:

"any market based opportunity to extract value from the upstream supply portfolio held by Union to serve in-franchise bundled customers, including, but not limited to, all FT-RAM activities and exchanges" (EB-2011-0210, p39).

This definition and the decisions recognize that the monies are realized through the use of assets for which Union's ratepayers have paid. The presence of the RAM credits enhanced the amount of the revenues realized, but the basic principle is that utility assets are being used.

In the EB-2012-0055 decision, the Board made a distinction between "base exchanges", which did not employ RAM credits, and capacity released exchanges (combined transactions) and treated the former as utility revenue and the latter as gas cost reduction. BOMA suggests that the Board's EB-2012-0087 and EB-2011-0210 decisions are more consistent with the fundamental principle that any revenue earned from the redeployment of upstream assets acquired by the Company for the use of its ratepayers, and paid for by the ratepayers in rates, should be directly returned to the ratepayers as gas cost reductions (emphasis added).

Clearance of DSM-Related Deferral Accounts

On Thursday, October 24th, 2013, EB-2013-0109 focused entirely on the verification and audit processes for Union's DSM programs. While BOMA Toronto was unable to be in attendance on that day, a careful reading of the redacted transcript has raised concerns that BOMA wishes to put on the record:

1. When is enough, enough?
2. Added costs versus added value
3. Potential breaches of customer confidentiality
4. Monopolization of intervenor positions on audit committees and the Technical Evaluation Committee by a small group of intervenors.
5. Fundamental issues with respect to the Current DSM Guidelines.

Each will be addressed in turn.

1. When is enough, enough?

Union Gas has clearly followed all of the DSM guidelines in terms of planning, delivering, verifying and auditing the company's DSM results. The two company witnesses were professional and forthcoming in their evidence both about how they follow the guidelines and how they work conscientiously to achieve consensus both with the Audit Committee (AC) and the Technical Evaluation Committee (TEC).

By the time the company reaches the final audit stage, consideration of individual projects must give way to the analysis of the portfolio as a whole. Matters such as free riders and persistence,

sampling procedures for verification and adjustments are all concepts that are applied at the portfolio level. BOMA believes that it is important not to confuse the establishment of a base line with the notion of free riders and speculation about who might have done something anyway in the absence of a DSM program. As Mr. Clarke, one of Union's verifiers, and a recognized expert in high pressure steam systems, noted, attempting to decide in any particular case when and whether a company would take action in the future to repair or replace a leaking steam trap or pipe or any piece of equipment depends on a number of factors, and is, for an outside third party, pure speculation (T. V3, p101).

As the major representative of professional commercial building owners and managers, BOMA strongly believes that members benefit from training, which we offer or from programs delivered by utilities. The following is an excerpt from a recent BOMA press release:

"BOMA Toronto is the first and only association in Ontario to have delivered a CDM program directly to end users. BOMA Toronto stepped up to Ontario's electricity challenge by delivering a unique CDM program that not only served its membership but also served the commercial real-estate industry at large. Funded by the Ontario Power Authority (OPA), the BOMA CDM Program accepted applications between March 2007 and December 2010 and officially wrapped up in 2012. The BOMA model for CDM was simple and effective, was able to effectively engage and motivate the large commercial real estate sector to implement energy efficiency projects. By the end of 2010, the BOMA CDM Program successfully delivered over 50 MW of conservation, making it one of the best performing CDM programs ever delivered to the Ontario market. The success of this program provided the foundation on which the current province-wide program is built. BOMA Toronto accepted the award in a ceremony in late September at the 36th World Energy Engineering Congress in Washington, D.C. Last year BOMA Toronto received a national recognition from the Canadian Society of Association Executives for the same program."

In other words, no matter how many times our members discuss best practices, when it comes to conservation, there are always new ways to save more energy. We cannot assume all companies or all energy managers are always deploying best practices when it comes to energy conservation. This is why utility programs like Union's are so valuable: they get our members

to step out of their day to day operational concerns and focus on conservation. In fact, the concept of “free riders” is insulting to any group of customers. In traditionally marketing, it is a commonly accepted rule of thumb that 50 % of any market budget is wasted, but that it is impossible to tell which half. Union uses a 54% rate. The real issues relate to the DSM Guidelines which are based on an outdated approach to DSM dating back to the 1980s in California, and require updating. This is further addressed in section 5 below.

2. Added Costs Versus Added Value

By BOMA’s count any given custom project would have had many engineers and/or technical experts playing at least 6 different roles. First the customer will likely have an engineer on site, plus the customer may have external resources such as engineering firms, product suppliers with technical support personnel, an energy service company or other channel partners, plus Union’s project engineers who have developed ongoing relationships with the customer and those aforementioned resources. In addition, there are the custom program savings verification professionals who subject their analysis to a third party review by an engineer certified in Ontario. Finally, the audit firm comes into the picture, and in this case supported by an expert in actually delivering similar savings projects to customers. Added to this scrutiny at the project level is the portfolio based analytics described in section 1. Perhaps we should start to worry when adding costs no longer adds value.

3. Potential Breaches of Customer Confidentiality

BOMA is particularly concerned about the potential for breaches of confidentiality and in this case the actual breach of confidentiality, even if unintentional, by counsel for the Schools Energy Coalition. Our members are pleased to have the support of utility DSM programs, but the idea that specific projects can be included in reports that are used beyond their intended use is unsettling. While BOMA's members are concerned, I should think that the industrial customers would be even more concerned given the competitive advantages associated with larger process-related projects.

4. Monopolization of Intervenor Positions on Audit Committees and the Technical Evaluation Committee by a Small Group of Intervenors

In each of the last two years, BOMA has volunteered to be on all four Audit Committees as well as on the TEC. However, it appears that the same individuals are re-elected with minor switches between audit committees of the two companies with the overall result a continuation of the practice of DSM being based on outdated views on DSM, that savings come only from replacing equipment, and how customers make decisions. More generally, in BOMA's view, individuals that serve on the DSM audit committees should have demonstrated expertise in DSM, not only in rates analysis. Counsel for intervenors should not, as a rule, serve on audit committees. They do not have the required depth of knowledge in CDM.

5. Fundamental Issues With Respect to the Current DSM Guidelines

BOMA has expressed concerns with the current framework in the past. In particular, BOMA would like to remind the Board of an excerpt from its submission in EB-2008-0346 - Demand

Side Management (“DSM”) Guidelines for Natural Gas Utilities – Stakeholder Comment on April 19, 2011.

“Should there be a focus on monitoring consumption, data analysis or benchmarking energy use in buildings and industrial processes?”

It is impossible to benchmark without proper data analysis, and it is impossible to perform data analysis without data (which can only be acquired by monitoring consumption).

Benchmarking provides an essential frame of reference for properties to assess their energy performance at a high level. Since such an assessment is, in our experience, a necessary step in motivating action. It is necessary that a holistic approach be taken, incorporating, and recognizing the interconnection between (a) monitoring consumption, (b) data analysis, AND (c) benchmarking energy use in buildings and industrial processes. Such a holistic approach was essential to the success of the project documented in the BOMA / OPA case study: “New Cooling System Delivers Energy Savings, Enhanced Comfort and Reduced Costs.

The motivating power of benchmarking has been widely studied and documented. For additional information, we would recommend consulting the following:

- The benchmarking in BOMA’s 2009 “BOMA BESt Energy and Environmental Report” has been a major motivator for our members to really compete to be more energy efficient. The report is available through our homepage.
- REALpac’s “2010 Energy Benchmarking Report: Performance of the Canadian Office Sector”.

Another excellent source of information is the evidence filed by Enerlife, a Toronto consulting firm, on behalf of Environmental Defence in EB-2012-0451.

Moving to the use of real data would avoid many of the issues raised on October 23, 2013 in EB-2013-0109 which are all concerns about estimates, assumptions and base cases.

The natural gas utilities could be an invaluable resource by accessing data to generate reliable indices and best practice benchmarking tools, as well as by facilitating a property’s year-over-year benchmarking by making richer data more easily available to them.