



EB-2014-0154

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 approving a one-time exemption from Union Gas Limited's approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations.

Before: Ken Quesnelle
Presiding Member and Vice Chair

Marika Hare
Member

DECISION AND ORDER
October 9, 2014

Introduction

Union Gas Limited ("Union") filed an application dated April 3, 2014 with the Ontario Energy Board under section 36 of the *Ontario Energy Board Act, 1998, S.O. c.15, Schedule B*, for an order of the Board approving a one-time exemption from its approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations during the months of February and March, 2014.

The major procedural steps of this proceeding are provided in Appendix "A".

Background

In its application, Union requested that, on a one-time basis, the penalty charges applied for Rate T1 / T2 Supplementary Inventory and Rate 25 Unauthorized Overrun Gas Commodity in February and March, 2014 be reduced. In addition,

Union requested that the penalty charge applied to bundled T-Service customers that did not meet their contractual balancing obligations in February 2014 be reduced in the same manner.

To date, customers that were not in compliance with their contractual obligations in February and March, 2014 were applied penalty charges based on the highest daily spot cost of gas at Dawn in the month of or the month following the month in which the gas was sold, all of which is in accordance with Board approved rate schedules.

Union's proposal, as set out in its application, would reduce the noted penalty charges to the second-highest spot cost of gas at Dawn in the month which the gas was sold.

The effect of Union's proposal is to reduce the penalty charges for customers that did not meet their contractual obligations in February 2014 from \$78.73 / GJ to \$50.50 / GJ. For customers that did not meet their contractual obligations in March 2014, Union's proposal would reduce the penalty charges from \$78.73 / GJ to \$52.04 / GJ.¹

Position of Parties

In its argument-in-chief, Union stated that it is proposing to reduce the penalty charges in recognition of the exceptional weather conditions experienced during the winter of 2014. Union noted that the five-month winter period from November 2013 to March 2014 was the coldest in Union's records (which date back to the 1969 / 1970 winter) for its southern service area.²

Union submitted that it applied for the one-time exemption from the Board-approved rate schedule based on feedback from customers most affected by the penalty charge. Union noted that, specifically, the impact is significant for four customers that were facing a charge in excess of \$800,000. Union stated that for these four customers, the impact could result in impairment of their financial viability.³

Board staff, AMCO, APPrO, BOMA, CME, NRG, OGVG, and TCE all submitted that the penalty charges should be reduced in the context of the exceptional weather conditions experienced during the 2014 winter.

¹ Union Application, EB-2014-0154, April 3, 2014.

² Union Argument-in-Chief, EB-2014-0154, September 2, 2014 at p. 2.

³ Ibid at p. 3.

Board staff, BOMA and OGVG agreed with Union's proposed reduction to the penalty charge. Board staff argued that the reduced penalty charges, as proposed by Union, continue to encourage compliance with the contractual obligations applicable to Union's direct purchase customers in the context of the exceptional weather conditions experienced over the 2014 winter.⁴ As such, Board staff submitted that "the reduction to the penalty charges, as proposed by Union, adequately balances the competing issues of the intent of the penalty charges and providing financial relief to customers that are significantly harmed by the application of those charges."⁵

AMCO stated that while Union's proposed reduction of the penalty charge is a positive effort, it requires a further review to ensure that the penalty will not impose extended hardship on Union's customers.⁶

CME argued that the extraordinary circumstances of the 2014 winter justify a reduction to the penalty charges. CME stated that the level of the reduced penalty charges should not be less than the price paid by compliant customers to meet their contractual obligations.⁷

NRG also agreed that a reduction to the penalty charges is warranted given the exceptional weather conditions experienced over the 2014 winter. However, NRG argued for an alternative penalty charge that would only be applicable to NRG, as it is a distributor and unlike the other customers who purchase their own gas. NRG stated that the Board should consider setting a penalty rate for NRG in the range of \$4.87 / GJ to \$7.12 / GJ.^{8 9} NRG stated that the penalty rate should be fixed on the basis of historic norms, Union's actual costs and facts specific to NRG (i.e. that NRG is a distributor and that it did everything it could to meet its contractual obligations).¹⁰

TCE submitted that Union's proposal to reduce the penalty charge to the second highest spot price at Dawn does not address the issue of determining what a reasonable penalty charge would be in light of the weather conditions experienced over the 2014 winter. TCE submitted that setting the penalty rate at the second

⁴ Board Staff Submission, EB-2014-0154, September 12, 2014 at p. 3.

⁵ Ibid at p. 2.

⁶ AMCO Submission, EB-2014-0154, September 12, 2014 at p. 2.

⁷ CME Submission, EB-2014-0154, September 12, 2014 at p. 1.

⁸ NRG also mentioned that the maximum penalty that it should be applied is \$12.31 / GJ.

⁹ NRG Submission, September 12, 2014 at p. 14.

¹⁰ Ibid at pp. 6-8.

highest price at Dawn is arbitrary and continues to result in an unreasonably high penalty charge.¹¹

TCE argued that the penalty charge applicable to T2 customers should be calculated on the basis of Enbridge Gas Distribution's ("Enbridge") methodology for calculating the charges associated with Unauthorized Supply Overrun for Rate 125 customers. TCE stated that its proposed alternative methodology for calculating the penalty charge for T2 customers: (a) fully respects the underlying rationale for the penalty charge (i.e. encouraging contractual compliance); (b) is principled from a rate-making perspective, because it reflects the spot price of gas on the day that the customer exceeded its volumes, thereby strengthening the link between the violation and cost consequences; (c) has been utilized by the Board elsewhere; and (d) results in a penalty charge that is reasonable in magnitude.¹²

APPrO supported TCE's alternative proposal for the calculation of the penalty charge applicable to T2 customers. APPrO also supported Union's proposed reduction to the penalty charges applicable to the other rate classes. In addition, APPrO stated that the penalty mechanism in place did not produce the desired results and that the penalty charges were overly punitive given the circumstances. On that basis, APPrO submitted that the Board may wish to consider directing Union to revisit the penalty provisions in its tariffs in order to assess alternative penalty mechanisms and bring forward its assessment (including any recommended changes) in its next rates proceeding.¹³

IGUA and LPMA submitted that Union's proposal should be rejected and that no reduction to the penalty charges should be approved. Both argued based on the principle that it is wrong to change the "rules" after-the-fact. LPMA argued that if the Board disagrees and does reduce the penalty, it should be in accordance with Union's proposal.

IGUA submitted that it would be inappropriate for a compliant customer to pay more than a non-compliant customer to meet its contractual obligations. IGUA argued that if Union's proposal is approved as filed, it is possible that some compliant customers will have paid more than non-compliant customers to meet their contractual obligations.¹⁴

¹¹ TCE Submission, September 12, 2014 at p. 5.

¹² Ibid at pp. 7-9.

¹³ APPrO Submission, EB-2014-0154, September 12, 2014 at pp. 3-4.

¹⁴ IGUA Amended Submission, EB-2014-0154, September 15, 2014 at p. 2.

LPMA submitted that the intent of the penalty charge may be compromised by the Board approving Union's proposed one-time reduction to the penalty charges. LPMA stated that direct purchase customers may expect, or seek, future one-time reductions if other exceptional circumstances arise. LPMA submitted that "this expectation could result in exactly the type of economic decision making that the Board has indicated needs to be discouraged in order ensure that the utility system is not put at risk."¹⁵

BOMA, CME and OGVG also made submissions regarding the appropriate allocation of the amounts arising from the application of the penalty charges.

In response to the submissions of the intervenors that argued that its proposal should be rejected, Union stated that the benefit arising from reducing the penalty charge is greater than the inequity that could result if a few compliant customers paid more to meet their balancing obligations.¹⁶

Union also submitted that TCE's alternative proposal should be rejected. Union, in agreement with a Board staff argument, stated that TCE's proposal reflects a fundamental change in the manner in which the Supplementary Inventory Charge is calculated and that this type of fundamental change is not appropriate in the context of a request for a one-time reduction of the penalty charge. Union submitted that the type of change proposed by TCE would be best dealt with in a rates proceeding.¹⁷

Finally, Union submitted that the arguments of NRG should be rejected as they are either not accurate or not relevant to the proceeding.¹⁸

Board Findings

The Board approves Union's application, as filed, for a one-time exemption from its approved tariffs with respect to the penalty charges applied to direct purchase customers who did not meet their contractual obligations during the months of February and March, 2014 for the reasons set out below.

The intent of the penalty charges at issue in this proceeding was set out by the Board in the RP-2001-0029 Decision with Reasons.¹⁹ Essentially, the penalty

¹⁵ LPMA Submission, EB-2014-0154, September 12, 2014 at p. 3.

¹⁶ Union Reply Submission, EB-2014-0154, September 19, 2014 at p. 2.

¹⁷ Ibid.

¹⁸ Ibid at p. 3.

¹⁹ Decision with Reasons, RP-2001-0029, September 20, 2002.

charges were designed to encourage direct purchase customers to comply with their contractual obligations in order to ensure the security of Union's system. Specifically, the RP-2001-0029 Decision with Reasons set out the following:

In the Board's view, the penalty must be sufficiently costly to defaulters to strongly discourage strategic non-compliance with balance obligations, and the careless or incompetent acceptance of contractual obligations which are not reasonably achievable. The Board is concerned that parties wishing to engage in the market, either directly or through agents, must be appropriately encouraged to manage their obligations responsibly. The system as a whole requires that.²⁰

The Board is of the view that Union's proposed reduction of the penalty charges to the second-highest spot cost of gas at Dawn in the month which the gas was sold is appropriate considering the exceptional circumstances that affected customers during the winter of 2014. The 2014 winter was extraordinary and it is in the context of this anomalous winter that the Board is granting Union approval to reduce the penalty charges. This is an unprecedented step by the Board, and should not be seen as an invitation to utilities or their customers to seek a reduction in penalty charges in general. The Board finds that in this case, the reduced penalty as proposed by Union continues to achieve the intent of the penalty charges as established by the Board in RP-2001-0029. The penalty charges are designed to encourage compliance with contractual obligations. This can be achieved while at the same time reducing the potential for the penalty to unduly impair the financial viability of those required to pay it. The Board considers Union's proposed penalty to be appropriate in striking this balance.

The Board notes some parties argued that it would be inappropriate for a compliant customer to pay more than a non-compliant customer to meet its contractual obligations. In response to this argument, the Board notes that none of Union's direct purchase customers came forward in this proceeding to claim that they actually bought gas to meet their contractual obligations at a price higher than the reduced penalty charges proposed by Union. While the Board recognizes that it is possible that some direct purchase customers may have paid more than the second-highest spot cost of gas at Dawn for gas purchased in order to meet contractual obligations, the Board is of the view that the number of customers, if any, is likely very small and agrees with Union that the benefit arising from reducing the penalty charges is greater than the inequity that could result if a few compliant customers paid more to

²⁰ Ibid at p. 31.

meet their balancing obligations. In addition, the Board notes that any bundled T-service customer that would have paid \$78.73 / GJ for natural gas to meet its contractual balancing obligations would have waited until the last day of February to purchase the gas (as the spot price of gas at Dawn was at its highest on February 28th). The second-highest spot cost of gas at Dawn (\$50.50) occurred on February 5th and customers received their Direct Purchase Status Reports on February 12th or 13th.²¹ Between the time that customers received their Direct Purchase Status Reports and February 28th, spot prices were below \$50.50. This is indicative of the choices customers had to purchase gas, in order to meet contractual obligations, at prices below \$78.73 / GJ (and, in fact, below \$50.50).

With respect to TCE's proposal that the penalty charge applicable to T2 customers should be calculated on the basis of Enbridge's methodology for calculating the charges associated with Unauthorized Supply Overrun for Rate 125 customers, the Board rejects this proposal on the basis that it reflects a fundamental change in the manner in which the penalty charge is calculated. The Board does not believe that a fundamental change of this nature is appropriate in the context of Union's request for a one-time reduction of the penalty charge.

The Board does not find NRG's arguments concerning a different method to setting the penalty convincing. Neither is the argument concerning NRG's special situation accepted. The Board finds that setting the penalty charge that is to be applied to NRG on the basis of historic norms or Union's gas costs is not appropriate and not consistent with the intent of the penalty. In addition, the Board is of the view that, in this matter, NRG's status as a distributor does not warrant any different treatment. As such, the Board finds that the same reduced penalty, as proposed by Union, which will be applied to all of the non-compliant customers, shall also be applied to NRG.

The Board will not make any findings regarding the appropriate allocation of the excess amounts arising from the application of the penalty charges in this proceeding. The Board notes that this allocation issue is currently before the Board in Union's 2013 Deferral Account Disposition proceeding (EB-2014-0145).

The Board directs Union to implement the outcome of this decision as soon as reasonably possible.

²¹ Union Interrogatory Responses, EB-2014-0154, June 19, 2014 at Exhibit B / Staff IRR #1.

Cost Awards

The Board may grant cost awards to eligible parties pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's *Practice Direction on Cost Awards*. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied. The Board notes that filings related to cost awards shall be made in accordance with the schedule set out below.

THE BOARD ORDERS THAT:

1. Union is granted a one-time exemption from its approved tariffs with respect to the penalty charges applied to direct purchase customers who did not meet their contractual obligations during the months of February and March, 2014.
2. Union shall apply the approved reduced penalties (\$50.50 / GJ for February and \$52.04 / GJ for March) to its customers as soon as reasonably possible.
3. Eligible intervenors shall file with the Board and forward to Union their respective cost claims within 14 days of the date of this Decision and Order.
4. Union shall file with the Board and forward to the intervenors any objections to the claimed costs of the intervenors within 21 days from the date of this Decision and Order.
5. If Union objects to the intervenor costs, intervenors shall file with the Board and forward to Union any responses to any objections for cost claims within 28 days of the date of this Decision and Order.
6. Union shall pay the Board's costs of, and incidental to, this proceeding immediately upon receipt of the Board's invoice.

All filings to the Board must quote file number **EB-2014-0154**, be made through the Board's web portal at <https://www.pes.ontarioenergyboard.ca/eservice>, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at

www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the BoardSec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required.

For all electronic correspondence and materials related to this proceeding, parties must include in their distribution lists the Case Manager, Lawrie Gluck at Lawrie.Gluck@ontarioenergyboard.ca and Counsel, Jennifer Lea at Jennifer.Lea@ontarioenergyboard.ca.

All communications should be directed to the attention of the Board Secretary and be received no later than **4:45 p.m.** on the required date.

ADDRESS

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DATED at Toronto, October 9, 2014

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

TO DECISION AND ORDER

HEARING PROCESS

BOARD FILE NO. EB-2014-0154

DATED: October 9, 2014

Appendix A – Hearing Process

On May 27, 2014 the Board issued Procedural Order No. 1 which provided for the filing of interrogatories and intervenor evidence, among other things. Union filed responses to the interrogatories on June 17, 2014 (and updated responses on June 19, 2014).

On June 20, 2014 the Board received a motion from the intervenor TransAlta Corporation (“TransAlta”) under section 27 of the Board’s *Rules of Practice and Procedure*. The motion sought an order requiring Union to provide full and adequate responses to a number of interrogatories. In its motion, TransAlta also requested a delay in the date for the filing of intervenor evidence.

In Procedural Order No. 2, issued on June 23, 2014, the Board determined that the motion should be heard in writing, and that it would delay the filing of intervenor evidence and subsequent procedural steps until a decision on the motion was rendered. The Board also set out the timeline for the filing of submissions on the motion.

The Board issued its Decision on Motion and Procedural Order No. 3 on July 29, 2014. The decision on the motion dismissed TransAlta’s motion and scheduled dates for the filing intervenor evidence and argument of Union and intervenors.

On August 7, 2014, intervenor evidence was filed by TransCanada Energy Ltd. (“TCE”) and Natural Resource Gas Limited (“NRG”). Board staff filed interrogatories related to TCE’s evidence on August 11, 2014 and TCE provided responses to those interrogatories on August 21, 2014.

Union filed its argument-in-chief with the Board on September 2, 2014. Board staff and intervenors filed their submissions with the Board on September 12, 2014. The Board received submissions from the following parties: Board staff, the AMCO Group (“AMCO”), the Association of Power Producers of Ontario (“APPrO”), the Building Owners and Managers Association (“BOMA”), the Canadian Manufacturers and Exporters (“CME”), the Industrial Gas Users Association (“IGUA”), the London Property Management Association (“LPMA”), NRG, the Ontario Greenhouse Vegetable Growers (“OGVG”), and TCE. Union filed its reply submission on September 19, 2014.