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Ontario

BY EMAIL

November 3, 2014

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Algoma Power Inc. ("API")
2015 Electricity Distribution Rates
Board Staff Submission – Unsettled Issues
Board File No. EB-2014-0055

In accordance with the Board's instructions provided at API's oral hearing convened on October 20, 2014, please find attached Board Staff's submission in the above noted proceeding. API and the intervenors have been copied on this filing.

Yours truly,

Original Signed By

Suresh Advani

Encl.

ONTARIO ENERGY BOARD

BOARD STAFF SUBMISSION (Unsettled Issues)

2015 ELECTRICITY DISTRIBUTION RATES

Algoma Power Inc.

EB-2014-0055

November 3, 2014

Board Staff Submission (Unsettled Issues)
Algoma Power Inc.
2014 Electricity Distribution Rates
EB-2014-0055

Introduction

Algoma Power Inc. ("API") filed an application on May 12, 2014 with the Ontario Energy Board seeking approval for an order approving just and reasonable rates and other charges for electricity distribution to be effective January 1, 2015. On October 10, 2014 API filed a Settlement Proposal with respect to its application.

The parties to the Settlement Proposal are API and all the Board-approved intervenors in the EB-2014-0055 proceeding: the Vulnerable Energy Consumers Coalition, Energy Probe Research Foundation and the Algoma Coalition.

The Settlement Proposal represents a complete settlement of all issues except the unsettled issues outlined below.

- Is the applicant's proposal to seek recovery of the RRRP funding variance from the 2002 to 2007 period appropriate?
- Are the proposed revenue-to-cost ("R/C") ratios appropriate?
- Are the proposed fixed/variable splits appropriate?

The parties proposed that the three unsettled issues be addressed by way of an oral hearing for determination by the Board. The Board granted this request, and an oral hearing was convened on October 20, 2014.

This submission reflects observations which arise from Board staff's review of the evidence provided prior to and during the oral hearing, and is intended to assist the Board in deciding upon API's Application with respect to the unsettled issues referred to above and in setting just and reasonable rates.

Board staff notes that there have been a number of updates to the evidence in the course of this proceeding. This submission is based on the status of the record as of API's oral hearing.

RRRP Funding Variance

Introduction

The Applicant in this proceeding, Algoma Power Inc. ("API" or the "Applicant") seeks, among other things, to recover a 'variance' in the amount of Rural and Remote Rate Protection ("RRRP") funding received by its predecessor, Great Lakes Power Limited (GLPL), from the provincial RRRP pool administered by Hydro One Networks Inc. ("Hydro One"). The variance arises mainly as a result of billing system procedures which resulted in GLPL crediting customers $173,534 more than it received in RRRP funding during the 2002-2007 time period.

Issues

1. Whether the Applicant is entitled to be compensated, pursuant to section 79(3) of the Ontario Energy Board Act, 1998 (the "Act") for the overpayment of RRRP discounts that GLPL extended to its customers. Section 79(3) of the Act provides that a distributor is entitled to be compensated for lost revenue resulting from the rate reduction it provides to rural and remote customers in accordance with the RRRP regime.

2. Whether allowing the Applicant to recover historic overpayments will result in retroactive or retrospective rate-making.

3. Whether there is sufficient evidence on the record for the Board to determine whether there is a variance or balance in the RRRP pool administered by Hydro One and to make an order requiring Hydro One to make a payment to API from the RRRP pool.

Board Staff Position

1. The Applicant was not the 'distributor' during the period of time when the overpayment occurred and did not sustain 'lost revenue' such that the Applicant cannot avail itself of section 79(3) of the Act for the period in question. In any event, a distributor is only entitled to compensation for the rate protection discount that is authorized by the Board pursuant to section 79(1) and not the actual discount that a distributor may have given to customers, whether it did so intentionally or inadvertently.

2. The applicant seeks to recover an out-of-period discount that GLPL had given to its customers and for which there was no deferral or variance account. Furthermore, all the rate orders during the subject time period were final (rather than interim). In the absence of a Board authorized deferral / variance account or an interim order, the Board cannot revisit and revise the amount of RRRP benefit that it had previously authorized in final rate orders as the effect would likely be retroactive or retrospective rate-making which is contrary to established rate-making principles.

3. Even if the applicant was entitled to compensation under s.79 of the Act, which Board staff denies, there is insufficient evidence on the record to indicate that there is a balance in the RRRP pool from which Hydro One could pay the Applicant. Alternatively, the Board would need to direct the IESO and distributors to recover in future rates an additional amount to retrospectively compensate the Applicant, which would be contrary to established rate-making principles.

Background

The Applicant acquired a distribution company pursuant to a Share Purchase Agreement executed by its parent company, FortisOntario and Fortis Inc. (as guarantor) and Brookfield Renewable Power Inc. (BRPI) on June 23, 2009 (the "Transaction"). Pursuant to this agreement FortisOntario purchased from BRPI all of the shares of Great Lakes Power Distribution Inc. (GLPD), a wholly-owned subsidiary of BRPI.

GLPD was established in 2009 to hold the distribution assets of Great Lakes Power Limited ("GLPL"), which had been a vertically integrated utility that owned and operated generation and distribution, and was licensed to operate the transmission system of

Great Lakes Power Transmission LP ("GLPTLP"). The Board approved the transfer of GLPL's distribution assets into GLPD (to create a stand-alone distribution company) on May 5, 2009.[1]

The Board approved the Transaction on September 1, 2009 and FortisOntario became the sole shareholder of GLPD, with 100% shareholdings.[2]

In the original s.86 application, FortisOntario indicated that the proposed Share Purchase Transaction would not trigger the need for a new or amended Electricity Distribution Licence and stated that, "GLPD will continue to own or operate the distribution system pursuant to Electricity Distribution Licence ED-2009-0072". However, a search of the Board's licencing records indicates that the legal name on the licence ED-2009-0072 was changed from GLPD to "Algoma Power Inc". on January 11, 2010.[3]

In the present application API seeks to recover a net variance of $173,540 between the amount of RRRP funding received by GLPL from the provincial RRRP pool administered by Hydro One and the amount of the discount that GLPL gave to its customers between 2002 and 2007. API indicated that the variance arose because GLPL's billing system, which billed customers every 60 days, allocated the monthly RRRP credit of $28.50 per customer on a 30 day basis, so that the billing system allocated a benefit of $29.45 per customer for any 31 day billing period (31/30 * $28.50 = $29.45). This resulted in a total overpayment of $188,001 over the period. This amount was slightly offset by the fact that GLPL's eligible customer base declined over time even though its RRRP funding in these years was based on a static customer count.[4] In sum, over the total 2002-2007 period the total of RRRP discount overpaid to customers from 2002 to 2007 amounted to a net of $173,540.

API's position is that it is entitled to be compensated for the variance from the RRRP pool administered by Hydro One. In its Argument in Chief, API has simply stated that it is entitled to compensation on the basis of s.79 of the Act.

[1] EB-2009-0073
[2] EB-2009-0282
[3] EB-2009-0403
[4] Undertaking J 1.4 In its IRR and on cross-examination at the oral hearing, the Applicant indicated that the majority of the variability was due to billing system mechanics and out of the $173,540 only about $10K was attributable to changes in customer count. Insert IRR and transcript references.

1. Compensation for 'lost revenue' under s.79 of the Act

Applicable legislation and regulation

The Act provides for 'rate protection' for rural or remote consumers by reducing the rates that a distributor would otherwise collect from such consumers. However, the distributor is entitled to 'compensation' for 'lost revenue' from the resulting rate reduction. The relevant sections of the Act state:

Rural or remote consumers
79. (1) The Board, in approving just and reasonable rates for a distributor who delivers electricity to rural or remote consumers, shall provide rate protection for those consumers or prescribed classes of those consumers by reducing the rates that would otherwise apply in accordance with the prescribed rules. 1998, c. 15, Sched. B, s. 79 (1).

Compensation
(3) A distributor is entitled to be compensated for lost revenue resulting from the rate reduction provided under subsection (1). 1998, c. 15, Sched. B, s. 79 (3).

Liability for compensation
(4) All consumers are required to contribute towards the amount of any compensation required under subsection (3) in accordance with the regulations. 1998, c. 15, Sched. B, s. 79 (4).

The Applicant's evidence confirmed that the Applicant was not the 'distributor' at the time of the over-payment to customers of its predecessor, GLPL.[5] The RRRP overpayment was recorded as a receivable by GLPL, and when API (Fortis) acquired the distribution business it was "well aware" of the overpayment that GLPL made to its customers and API continues to treat it as a receivable.[6]

Pursuant to s. 79 of the Act and O.Reg. 442/01 (the "Regulation") the Board sets the RRRP amounts that are to be collected by the IESO, distributors and retailers and ultimately paid by all Ontario consumers. For the relevant time period (2002-2007) the amount was fixed by the Board, in accordance with the Regulation, at $28.50 / month per eligible customer.

[5] Transcript Oral Hearing, page 99, lines 16-28
[6] Transcript Oral Hearing, page 100 line 14 – page 101 line 20

Submission

In Board staff's view, the Applicant cannot rely on s. 79(3) of the Act because it was not the 'distributor' at the time that GLPL overpaid a RRRP credit to its customers and, as such, API has not sustained 'lost revenue' for which it is entitled to be compensated. API acquired a receivable from GLPL, which it considered an asset and assumed the risk in acquiring. However, there is no legislative authority for payments out of RRRP funds for historic or 'crystallized' losses incurred by a predecessor several years earlier.

The Supreme Court of Canada, in referring to the Alberta *Gas Utilities Act,* stated:

> "[5] While the Statute does not precisely so state, *the general pattern of its directing and empowering provisions is phrased in prospective terms…. (T)here is nothing in the Act to indicate any power in the Board to establish rates retrospectively in the sense of enabling the utility to recover a loss of any kind which crystallized prior to the date of the application* ..."
>
> [22] It is conceded of course that the Act does not prevent the Board from taking into account past experience in order to forecast more accurately future revenues and expenses of a utility. *It is quite a different thing to design a future rate to recover for the utility a 'loss' incurred or a revenue deficiency suffered in a period preceding the date of a current application. A crystallized or capitalized loss is, in any case, to be excluded from inclusion in the rate base and therefore may not be reflected in rates to be established for future periods.* (emphasis added) [7]

As was the case with the Alberta statute considered in the NWUL v. Edmonton case, the Ontario legislation also does not explicitly authorize the Board to establish rates retrospectively "in the sense of enabling the utility to recover a loss which had crystallized prior to the date of the application."[8]

Board staff further submits that the Applicant is not entitled to recover any amount in excess of the $28.50 / month per customer, which is the amount that the Board authorized. Section 79(3) of the Act provides that a distributor is entitled to be compensated for lost revenue resulting from the rate reduction provided under section 79(1). The amount of rate reduction provided under section 79(1) is the $28.50 / month, fixed by the Board. Accordingly, GLPL was not authorized to credit customers any

[7] *Northwestern Utilities Limited v. Edmonton (City),* [1979] 1 S.C.R. 684, 12 A.R. 449 at paras. 5 and 22 (*NWUL v. Edmonton 1979")* and *City of Edmonton et al. v. Northwestern Utilities Limited,* [1961] S.C.R. 392 ("*NWUL v. Edmonton 1961")*at 401, 402
[8] *NWUL v. Edmonton* at para 5

amounts in excess of the $28.50 charge set by the Board nor is API entitled to be compensated for GLPL's unauthorized credit in some months that was in excess of $28.50.

2. Board cannot set Rates with Retroactive or Retrospective Effect

Introduction

It is a general principle of statutory interpretation that absent clear language to the contrary, legislation is not to be interpreted so as to function retroactively. In regulatory law, the effect of this principle, which was been established by the Supreme Court of Canada, is that ratemaking and rates must be prospective.[9] The corollary to this principle is the rule against retroactive ratemaking. Rates must be set to cover future costs, not to recover past costs.

The Board's rate-making authority under sections 36(2) and 78(3) of the Act is a "positive approval scheme" under which a utility's rates are fixed prospectively based on a forecast of the utility's revenue requirement for a future year.[10]

Once a rate is set on a final (as opposed to an interim) basis, the rate order is legally binding on both the utility and its ratepayers and the utility and its ratepayers are entitled to rely on the rate order. Consumers are entitled to expect certainty in the rates that they pay and utilities expect finality with respect to the rates they are permitted to charge and the revenues that they are able to earn.[11]

Board staff submits that in the present case, GLPL's rates, which included RRRP benefits, were made final, either by Board order, legislation or Ministerial Directive for the 2002-2007 time period and therefore cannot be revised retroactively or retrospectively.

[9] *NWUL v. Edmonton* at para. 7 and *Bell Canada v. Canada (CRTC)*, 1989 S.C.J. No. 68 ("*Bell Canada v. CRTC*")

[10] Section 36(2) refers to the Board's authority to set rates with respect to gas transmission, distribution, storage. Section 78(3) authorizes the Board to set rates for the transmission and distribution of electricity.

[11] *Re: Board of Commissioner of Public Utilities* [1998] N.J. No. 168 (Nfld. S.C.C.A).

In seeking additional compensation for amounts that GLPL credited to its customers during the subject time period API is effectively seeking that the Board revisit and revise several final orders made during that time. Final orders had been made affecting the IESO, all distribution companies (and their customers) and GLPL. API's request to recover additional compensation in excess of the RRRP credit and charges authorized in those final orders effectively involves the Board revisiting those final orders in a manner proscribed by regulatory principles and precedent.

Applicable Legislation, Regulation and Caselaw

Ontario Regulation 442/01 ("Regulation") requires that the Board determine the Rural or Remote Electricity Rate Protection ("RRRP") benefit for eligible consumers and charges to be collected by the IESO for any given year. The Regulation also prescribes the methodology for calculating the RRRP amount, which is a fixed amount for each year.[12]

[12] Section 5(1) of O.Reg. 442/01 states:

Compensation for distributors

5. (1) With respect to rate protection provided after subsection 26 (1) of the *Electricity Act, 1998* comes into force, the Board shall calculate the amount of the charge to be collected by the IMO under subsection (5) for each kilowatt hour of electricity that is withdrawn from the IMO-controlled grid, as determined in accordance with the market rules, for use by consumers in Ontario, so that the total amount forecast to be collected is equal to the total amount of rate protection to be provided. (emphasis added)

Amount of rate protection: 2003 and 2004

4. (1) The total amount of rate protection available for eligible consumers in each of the years 2003 and 2004 is ***$127 million, plus the amount calculated under subsection (2) for the year.***

(2) For each of the years 2003 and 2004, the Board shall calculate the amount by which Hydro One Remote Communities Inc.'s forecasted revenue requirement for the year, as approved by the Board, exceeds Hydro One Remote Communities Inc.'s forecasted consumer revenues for the year, as approved by the Board.

Section 4 of O.Reg. 442/01, as amended by O.Reg. 335/07 states:

Amount of rate protection: 2004 and 2005

4. (1) The total amount of rate protection available for eligible consumers in each of the years 2004 and 2005 ***is $127 million, plus the amount calculated under subsection (2) for the year***. O. Reg. 442/01, s. 4 (1); O. Reg. 383/04, s. 4 (1).

(1.1) The total amount of rate protection for eligible consumers in each year after 2005 ***shall not exceed $127 million plus the amount calculated under subsections (2) and (3.1) and shall be based on the amount of rate protection provided by the distributor to eligible consumers for the previous year***. O. Reg. 335/07, s. 1 (1).

(2) For each year, the Board shall calculate the amount by which Hydro One Remote Communities Inc.'s forecasted revenue requirement for the year, as approved by the Board, exceeds Hydro One Remote Communities Inc.'s forecasted consumer revenues for the year, as approved by the Board. O. Reg. 442/01, s. 4 (2); O. Reg. 383/04, s. 4 (3).

…

The Board then directs the IESO to collect the appropriate charge from all rate-regulated distributors who in turn bill their customers a corresponding unit rate. Upon issuance of the RRRP Order the Board also notifies distributors and retailers of the amount that they must charge their customers with respect to RRRP.[13]

The Board's activities to recover the prescribed RRRP amount result in a specific charge for the IESO and distributors to collect from consumers through rates. In other words, the Board's fixing of the RRRP amount is a rate-making exercise, however mechanistic, which can only be done on a prospective and not a retrospective basis.

As indicated above, the Board's authority to set rates is on a prospective basis. As the Supreme Court of Canada stated in the Bell Canada v. CRTC case, "positive approval schemes have been found to be exclusively prospective in nature and not to allow orders applicable to a period prior to the final decision itself" such that a regulator in a positive approval scheme does not have authority to set rates retroactively (i.e. adjusting past rates) or retrospectively (ie. adjusting future rates to account for past losses / gains).[14]

GLPL's RRRP Benefit was set by Final Orders

The first matter at issue is whether GLPL's rates during the period under consideration had been set on a final basis. While legislative changes during the period complicated

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(3.1) For each year, in respect of the rates for a distributor serving consumers described in paragraph 5 of section 2, the Board shall calculate the amount by which the distributor's forecasted revenue requirement for the year, as approved by the Board, exceeds the distributor's forecasted consumer revenues for the year, as approved by the Board. O. Reg. 335/07, s. 1 (2).

(3.2) For the purpose of subsection (3.1), the distributor's forecasted consumer revenues for a year shall be based on the rate classes and on the rates set out for those classes in the most recent rate order made by the Board and shall be adjusted in line with the average, as calculated by the Board, of any adjustment to rates approved by the Board for other distributors for the same rate year. O. Reg. 335/07, s. 1 (2).

(4) For each year, the Board shall calculate the amount of rate protection for individual consumers referred to in subsection 79 (2) of the Act and in section 2 of this Regulation in a manner that ensures that the total amount of rate protection for those consumers is equal to the total amount of rate protection available for the year under subsection (1) or (1.1), according to the following rules….

[13] See for example the Board's most recent Decision and Order (EB-2013-0396) setting the RRRP benefit and charge for 2014.

[14] *Bell Canada v. CRTC* at para [1989] S.C.J. No. 68 ("*Bell Canada v. CRTC*") at para 54 **

the rate-setting process to some degree, Board staff submits that the Applicant's rates had indeed been set on a final basis between 2002 and 2007.

GLPL had filed a Cost of Service application in 2002 and the Board approved GLPL's rates on May 13, 2002 on an *interim* basis.[15] On December 9, 2002, the *Electricity Pricing, Conservation and Supply Act*, 2002 (Bill 210) received Royal Assent and made all interim rates final. Accordingly, the Board never completed a proceeding to review GLPL's 2002 application or set a revenue requirement. Nevertheless, as a result of Bill 210, the Board's interim order of May 2002 was made final.

On June 27, 2003, the Minister of Energy issued a directive to the Board ordering new rates for GLPL.[16] According to the Directive, the rates were based on a revenue requirement of $9.8 million, retroactive to May 1, 2002 and included Rural and Remote Rate Protection (RRRP) of $2.3 million.

Despite subsequent changes in legislation that may have enabled it to do so, GLPL did not make a cost of service application between 2003 and 2007. As a consequence, the Board was unable to determine GLPL's revenue requirement or calculate the shortfall between GLPL's revenue requirement and forecasted revenues, in accordance with the Regulation during this period.[17]

The 2007 Cost of Service application was the first opportunity for the Board to determine GLPL's revenue requirement and RRRP benefit.[18] After the hearing of the 2007 COS application the Board issued a Rate Order on December 24, 2008 in which it determined the 2007 RRRP funding of $8.8M. [19]The Board also ordered GLPL to make

[15] Board File No. EB-2002-0249 and EB-2002-0277 / RP-2002-0109). The rates approved on an interim basis on May 13, 2002 were the rates that GLPL had proposed in its application.
[16] RP-2003-0149
[17] (3.1) For each year, in respect of the rates for a distributor serving consumers described in paragraph 5 of section 2, the Board shall calculate the amount by which the distributor's forecasted revenue requirement for the year, as approved by the Board, exceeds the distributor's forecasted consumer revenues for the year, as approved by the Board. O. Reg. 335/07, s. 1 (2).

[18] EB-2007-0744 is the first Cost of Service application that GLPL had filed since 2002. In that Decision & Order the Board set the RRRP benefit for GLPL at $8.8M (effective as of September 1, 2007 since the Application was filed on August 31, 2007 and the revenue requirement and RRRP benefit set by Ministerial Directive were still in effect until the 2007 application was filed).

[19] EB-2007-0044 Rate Order at pages 2-3. In that Rate Order the Board confirmed the RRRP benefit for GLPL at $8.8M (effective as of September 1, 2007 since the Application was filed on August 31, 2007 and the revenue requirement and RRRP benefit set by Ministerial Directive were still in effect until the 2007 application was filed).

its requests for RRRP funds annually by letter. GLPL did not make a new application in 2008 and therefore the revenue requirement and RRRP benefit set for 2007 remained in effect in 2008. In April and June 2009, GLPL requested continuation of the same level of RRRP funding that it had received in 2007-2008 and the Board approved the request on June 2, 2009.[20] Neither of these applications in 2007 or 2009 mentioned the issue of an excessive RRRP credit to customers between 2002 and 2007.

Interim Orders as an Exception to the Rule against Retroactivity

Staff acknowledges that rates may be subject to retrospective adjustments provided that they are included in an interim, not a final, order. However, GLPL's rates between 2002 and 2007 were set on a final basis and cannot now be adjusted to compensate API for GLPL issuing an excessive credit to its customers.

The leading articulation of this principle comes from the Supreme Court decision in Bell Canada where the Court held that, while interim orders may be reviewed and remedied by a final order, a final order is not subject to retrospective review and remedial orders.[21]

Board staff submits that as a result of Bill 210 and GLP's inactivity following the establishment of its 2003 rates, GLPL's rates between 2002 and 2007 were final, and that no further order could be implemented to adjust GLPL's rates without violating generally accepted rules prohibiting retroactive rate-making.

Deferral / Variance Account as an Exception to the Rule against Retroactivity

Another exception to the rule against retroactivity is where amounts are recorded in deferral or variance accounts identified by the Board on a prospective basis for future disposition. Although the exact amounts ultimately held in the deferral / variance accounts are not known prospectively, the Board identifies up-front that the revenues / costs that enter these accounts are "encumbered", and subject to future disposition.

[20] EB-2009-0153

[21] *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission*) [1989] S.C.J. No. 68 ("*Bell Canada v. CRTC*") at para 54 where the Court upheld a decision by the CRTC to order Bell Canada to pay back to customers revenues collected under an interim rate structure that had been in place from 1985-1986. Although the decision did not retroactively alter the interim rate, it retrospectively operated to correct what the tribunal found to be excessive rates.

Deferral accounts are regarded as "accepted regulatory tools" to be operated as part of rate-setting powers.[22]

Board staff submits that this exception also does not apply to API's request. In the present case, Board staff submits that there was no deferral or variance account established for GLPL with respect to the RRRP funds such that those funds were never identified by the Board as 'encumbered' nor was Hydro One made aware that GLPL (now API) wanted to have those amounts reviewed and 'trued up' at some point.

Absence of Notice is "critical" in determining whether rates are retroactive

The fact that there is no record to demonstrate that any affected party or the Board was aware of the applicant's interest in 'truing up' an encumbered amount is an important basis for denying API's request, since notice is a key element of establishing the eligibility for making after-the-fact yet fair adjustments to rates.

Recent case law supports this position. In two Alberta Court of Appeal decisions, the Court noted the significance of the lack of notice to parties when a utility seeks an out of period adjustment.

In one case the Alberta Court of Appeal reviewed a decision of the Alberta Energy Utilities Board ("AEUB") with respect to an application by ATCO for out of period adjustments.[23]

The *Calgary v. Alberta* case was referred to by the Alberta Court of Appeal in a recent decision issued in January 2014. While the subject matter of the case is distinguishable the Court of Appeal did make comment on retroactive ratemaking:

> "Simply because a ratemaking decision has an impact on a past rate does not mean it is an impermissible retroactive decision. *The critical factor for determining whether the regulator is engaging in retroactive ratemaking is the parties' knowledge,* Hunt JA stated at para 57:
>
> …Both *Bell Canada v. CRTC* and *Bell v. Aliant …*illustrate the same preoccupation: were the affected parties aware that the rates were subject to

[22] *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, [2009] 2 SCR 764 (*Bell v. Aliant)*
[23] *Calgary (City) v. Alberta (Energy and Utilities Board),* [2010] A.J. No. 449 Alberta Court of Alberta ("*Calgary v. Alberta")* at paras 50-51; appeal from EUB Decision 2006-042

> change? If so, the concerns about predictability and unfairness that underlie the prohibitions against retroactive and retrospective ratemaking become less significant."[24] (emphasis added)

Board staff submits that neither the Board nor Hydro One (as far as the Board is aware) was informed of the variance in GLPL's RRRP funding at any time proximate to the period of over-disposition of the RRRP funding. According to Board staff's records, the matter was first referenced in API's last 2011 COS application. [25] Even then, the issue was not pursued by the Applicant.

Board staff submits that API has not satisfied any of the conditions that would permit a fair and retrospective adjustment to its rates. All rate orders were final or if initially interim they were made final by operation of Bill 210; no variance account was requested or authorized by the Board; no interested parties were notified that GLPL considered the amounts 'encumbered' and subject to a future true-up; and the Board made no order identifying the RRRP amounts as encumbered. API, like all other Ontario distributors, is aware of the requirements for establishing and administering variance accounts. However, in this instance, no variance account was established. Accordingly, in Board staff's view, no adjustment to past and final rates may be permitted.

Variance is a Result of an Error for which Distributor should not be reimbursed

While API denies that the excessive credit given to GLPL customers from 2002 to 2007 was the result of a billing error the fact is that GLPL did not adjust its billing system to accurately include the $28.50 / month credit to its customers. API witnesses were queried about modifications that could have been made to the billing system that would result in a more accurate RRRP credit to customers, for example by deriving a daily credit and using that in its bimonthly billing process.[26]

The Board has considered a number of similar situations. For example, in a case where an applicant utility had made certain historic errors in recording amounts into its retail settlement variance account ("RSVA") the Board noted that a utility has control of its books and records and has the responsibility to ensure mistakes do not occur.[27]

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[24] *ATCO Gas and Pipelines v. Alberta (Utilities Commission)* 2014 ABCA 28 at paras 56-57
[25] EB-2009-0278
[26] Transcript Oral Hearing, pages 53-55
[27] EB-2009-0113 ("North Bay")

The Calgary v. Alberta case discussed above is also informative on the issue of errors. The Court found that there had been a long history of human error; that ATCO had an onus to ensure that its system was working properly and providing correct data; that adequate processes were not in place to capture and correct the problem at an early stage and that accounting errors should typically be absorbed by a utility's shareholders. [28]

Another Supreme Court decision held that the risk of losses or low returns on investments rests with the equity holders, the utility shareholders:

> "Despite the consideration of utility assets in the rate-setting process, *shareholders are the ones solely affected* when the actual profits or losses of such a sale are realized; the *utility absorbs losses and gains*, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality.[29] (emphasis added)

The *Stores Block* case referenced above also stated the utility is not 'guaranteed a profit, nor a return on its assets, and is merely given a chance to earn them; the utility company owns the assets, and profits or losses accrue to the company (shareholders) and not to consumers."[30]

> "Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only 'the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator'. [31]

In Board staff's view, the excessive credit was the result of an error, however mechanistic. The caselaw discussed above supports a finding that a distributor has responsibility for ensuring its accounts and processes are accurately followed and it should not be reimbursed for any financial consequences of its errors or omissions. Any losses resulting from errors within the control of the utility should remain with the GLPL's or API's shareholders and not with consumers who ultimately pay into the RRRP pool.

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[28] *Calgary v. Alberta,* at paras 81-82 and 140-44
[29] *ATCO Gas and Pipelines v. E.U.B.* [2006] SCC 4 ("*Stores Block*") at para 69
[30] *Stores Block* at para 67
[31] *Stores Block* at para 68

3. Absence of evidence indicating a balance in the RRRP pool for distribution

The final issue to be considered is an evidentiary omission by the Applicant to demonstrate that there is a balance in the RRRP pool from which it should be compensated. Although the Applicant believes that there may be 'variability' in the Hydro One administered RRRP pool that would need to be 'trued up' at some point, its witnesses acknowledge that this is just a 'presumption' and no evidence was presented to support the presumption.32 While Hydro One does maintain a variance account to track the amounts it receives from the IESO and the amounts it pays in RRRP benefits, there was no evidence on the record that Hydro One had experienced the type of variance that GLPL had, that is, that it had been giving customers a larger discount than the amounts it received from the IESO or that Hydro One had used money from the RRRP pool to compensate itself for any possible shortfall.[33]

In summary, there is no evidence that Hydro One's RRRP variance account had variability such as GLPL experienced due to its billing system and, if Hydro One did have a shortfall, that it used the RRRP funds to compensate itself. Nor is there any evidence that there is an excess in the RRRP pool at this point of time that may be disbursed to API, even if it was entitled under s.79 (3), and Board staff does not believe that API is entitled. In the absence of evidence that there is a surplus in the RRRP pool, if the Board made an order that API should be compensated for overpayments made by GLPL from 2002-2007 then the Board may have to take into account that historic under-recovery in setting a future RRRP benefit which would be paid by all Ontario consumers.[34] In Board staff's view, that would amount to retrospective rate-making which is contrary to well-established rate-making principles.

Conclusion

In the present application API is raising a variance issue, many years after the variance occurred, which suggests that it is requesting to adjust amounts already considered

[32] Transcript Technical Conference, page 55, line 23 and Transcript Oral Hearing, page 106-107
[33] Transcript Oral hearing, page 107, lines-10-24:

[3434] On cross-examination neither the witness nor counsel could provide any supporting evidence that there is a surplus in the RRRP pool or how the amount claimed by API would be recovered from ratepayers. Transcript Oral Hearing, pages 106-107

through previous final rate orders which may not be varied. In Board staff's view, API's request could result in the retroactive or retrospective rates that would be imposed by the IESO on distributors to collect from all ratepayers.

There was no deferral or variance account established for RRRP funds granted to GLPL and in each year from 2002-2007 GLPL was operating under final, and not interim rate orders which incorporated a fixed amount of RRRP funding.

In seeking to recover the 'variance' between the amount that GLPL received from RRRP funding and the credit that it gave its customers, it is effectively seeking to retroactively or retrospectively adjust the $28.50 / month credit so that, in some months it is $29.45. The credit of $28.50 was recovered through charges collected by the IESO and collected by distributors from consumers. Hence, awarding additional compensation to API payable by Hydro One will likely result in the IESO and distributors prospectively charging consumers more for RRRP funding than would otherwise be the case.

Revenue to Cost ratios

Unsettled issue: Are the proposed revenue-to-cost ("R/C") ratios appropriate?

Background

API has proposed[35] R/C ratios for each of its classes as follows:

Table 1

Class	Proposed R/C Ratios (%) - 2015	Previously Approved R/C Ratios (%) - 2011	Policy Range (%)
Residential – R1	111.63	114.10	85 - 115
Residential - R2	111.71	59.80	80 - 120
Seasonal	54.97	115.00	85 - 115
Street Lighting	25.04	43.00	70 - 120

As Table 1 shows, API is proposing R/C ratios of approximately 55% and 25% respectively for the seasonal and street lighting classes. For its seasonal class, API has assumed the same Board policy range as the Residential – R1 class, i.e. 85% to 115%, since it reports it is not aware of a class-specific range that would apply[36]. The Board's policy range for the street lighting class is 70% to 120%. The R/C ratios for the seasonal and street lighting classes were approved in API's 2011 cost of service application at 115% and 43% respectively.

The issue of R/C ratios for Algoma differs in scope from those of other distributors as a consequence of its eligibility for rural and remote rate protection (RRRP). Unlike other distributors, any distribution rate increase for API's Residential-R1 ("R1") and Residential-R2 (R2") classes is capped by regulation at the provincial average rate increase. Any remaining cost that is to be recovered from those rate classes is collected through RRRP. Therefore, whenever API street lighting and seasonal rate classes, which are ineligible for RRRP, have an R/C ratio that is set to recover revenues below their allocated costs, the difference will not be collected from R1 and R2

[35] API_Settlement_Appendices_xlsx_20141010 (App 2P – Cost Allocation)
[36] Application: Exhibit 7/Tab 1/Schedule 2/page 9

customers[37], as would typically be the case in any other service territory, but rather would ultimately be collected from all Ontario electricity customers who fund RRRP.

In this proceeding, API reported several issues with the R/C ratio model. API reported at the oral hearing that its staff had discovered that the R/C ratio model from the previous rate application did not adequately account for API's unique customer density and system configuration, which it had also questioned previously [38,39]. [40]. In its Argument-in-Chief[41] ("AIC"), API noted that the density factor has not been properly addressed in its previous cost-of-service application (EB-2009-0278). API further noted that this significantly impacts customer class allocation. API also noted that "the individual rate classes may not have been allocated the appropriate costs".

In the oral hearing, API clarified that it is seeking the Board's approval for R/C ratios as proposed and is asking the Board for "one year's grace" to allow API to reconfigure its cost allocation methodology. API also stated that "to use the 2011 cost allocation as the underpinning revenue-to-cost ratios is somewhat misleading"[42].

At the oral hearing and in its AIC, API proposed that as part of its upcoming 2016 IRM rate application, it would work with Board staff and intervenors to produce an appropriate cost allocation study for API.

Discussion and Submission

Board staff notes that a cost-of-service rate application provides an applicant with the opportunity to address issues associated with its cost allocation methodology. API has known that it would be filing a COS for 2015 rates since the Board issued its "2015 Rebasing List" on February 20, 2014, and Board staff submits that an applicant has the obligation to ensure the best information and analysis is included in its application.

Board staff also finds API's proposed solution problematic. While an IRM rate application process can permit implementation of adjustments to R/C ratios that have been approved in a cost-of-service proceeding, it is not designed to accommodate the

[37] As long as their rates are increasing to the point where they have reached the cap.
[38] Oral Hearing transcript pages 32-42
[39] Oral Hearing Transcript page 118
[40] Board staff interrogatory #7Staff32a
[41] Argument-in-Chief pages 5-6
[42] Oral Hearing Transcript page 118

updating of underlying cost allocation and rate design issues. On this basis, Board staff submits the current application is the appropriate place for API to establish R/C ratios that will apply.

Board staff notes that the persistence of questions regarding the applicability of the cost allocation model for API's circumstances complicates the matter of what remedies should be proposed in the absence of more information. Nevertheless, Board policy clearly states that distributors must ensure that their cost allocation proposals include adjustments to bring R/C ratios into the Board-approved ranges[43]. Accordingly, Board staff notes that API's proposal to move the R/C ratios for the seasonal and street lighting classes away from the Board's policy range is not supportable, even if there remains uncertainty about the precise cost basis of the ratio in the first place. Staff submits that R/C ratios should be gradually raised to the edge of the prescribed ranges over the course of the IRM period, using data as filed. A gradual move would help to smooth the rates for these classes over time. Further, in staff's view, even in the absence of precise information on the extent of the inapplicability of the cost allocation model to API, this alteration to R/C ratios is more likely to be directionally consistent with Board policy than the applicant's proposal, which is both too low for the test year and cannot be accommodated within the subsequent years of Price Cap IR regime.

Furthermore, Board staff is also reluctant to support ongoing low R/C ratios for these classes given that it would affect all Ontario customers, as discussed in the background. API's street lighting and seasonal classes are not eligible for rate protection, and Board staff does not support an R/C range which is tantamount to such a policy outcome.

Finally, Board staff notes that during the oral hearing, in response to questions from and discussions with Energy Probe and VECC, on matters concerning API's R/C ratios, API made repeated reference to the apparent direction it received from the Board in its decision on API's 2014 IRM rate application. Specifically, an API witness suggested that the Board had indicated that its first IRM year following its cost of service would be an opportunity to "come back with a more enduring policy… for 2016 rates"[44].

Staff does not agree with this interpretation and wishes to provide further background as context. The discussion to which API's witness referred arises in the Board's decision

[43] Board filing requirements, dated July 18, 2014, chapter 2, page 52
[44] Oral Hearing Transcript page 38

on API's 2014 rates[45], in a section focussing on which stretch factor should apply to the utility. Despite total cost benchmarking results that resulted in an assignment into the highest stretch factor group, the Board allowed API to use a stretch factor of 0.3%, but made it clear it should apply for only one year.

Board staff notes that the Board clearly statedthat its decision is not intended to "set a precedent by which Algoma can rely upon in future applications". The Board noted that it "is providing Algoma with sufficient time to decide on the appropriate course of action for future incentive rate setting". The decision went on to state that:

> "As Algoma is scheduled to file a cost of service application in 2015 (or a 5-year custom incentive regulation plan), Algoma could avail itself of other rate making options with the expiry of its current Settlement Agreement. Algoma could file a different plan for 2015 or select the Price Cap IR option and accept the PEG model's updated stretch factor assignment. In general, if the PEG model does not apply to a distributor's circumstances, the Price Cap IR option is probably not a viable option".

Board staff notes that not only does the foregoing bear no relation to the R/C ratio discussion, but also submits that API's witness has, in fact, mischaracterized the Board's findings. The Board's decision indicates that the time for API to select its rate-setting option was prior to the current proceeding, at a point where it could have elected to apply on a custom basis (or, for that matter, Annual IR). Board staff submits that there is no special provision relevant for the setting of 2016 rates contained in the EB-2013-0110 decision and that further requests by API for special treatment for the utility for 2016 or other IRM years should neither be invited nor accommodated. In Board staff's view, API's rebasing is consistent with the first year of a Price Cap IR regime; should API elect to remain on Price Cap IR for 2016 and onward, API should be prepared to accept the stretch factor assignment into which it is assigned or provide detailed evidence to the contrary. Furthermore, no special opportunity for review of revenue to cost ratios or other matters should be permitted beyond those provided for in the Board's filing requirements as updated from year to year.

All of which is respectfully submitted

[45] See p. 8, Decision and Order, Eb-2013-0110, February 20, 2014