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ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

J. WILSON, LEDERMAN AND SWINTON, JJ.

GREAT LAKES POWER LIMITED	)	*Alan H. Mark & Christine Kilby*,
	)	for the Appellant
Appellant	)	
	)	
	)	
	)	
- AND -	)	
	)	
	)	
ONTARIO ENERGY BOARD	)	*Glenn Zacher & Patrick G. Duffy*,
	)	for the Respondent
Respondent	)	
	)	
	)	
	)	
	)	Heard at Toronto: June 2, 2009

LEDERMAN, J.

Nature of the Proceeding

[1] The Appellant, Great Lakes Power Limited ("GLPL"), appeals from the Decision and Order of the Ontario Energy Board (the "OEB"), dated October 30, 2008 (the "Decision"). The Decision was the OEB's ruling on a rate application by GLPL. GLPL contends that the Decision had the effect of denying GLPL recovery of all of its costs of service, including a return on its invested capital, of its electricity distribution business since 2002.

Background

[2] GLPL is a private company that is a licensed distributor, transmitter and generator of electricity. It provides services to a small customer population in an expansive area of Northern

Ontario. The OEB is the regulator of the Ontario electricity sector and has extremely broad authority under s. 78(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Sched. B) ("*OEBA*") to make orders approving or fixing "just and reasonable rates" for the distribution of electricity. As a privately owned utility, GLPL has always been allowed a return on equity ("ROE") and such return is recovered by way of rate treatment.

[3] Prior to May 1, 2002, GLPL's rates were "bundled rates" for transmission, distribution and costs of power. As a result of the legislated restructuring of Ontario's electricity industry in May, 2002, GLPL was no longer able to maintain bundled rates for its distribution customers. As a result, it could no longer pass a portion of distribution costs on to non-distribution customers.

[4] On March 28, 2002, GLPL filed a distribution rate application with the OEB (the "2002 Application") wherein it sought approval of a revenue requirement of $12.7 million. Included in this amount was a ROE of $2,891,600.

[5] The restructuring of the electricity industry then underway in Ontario was going to result in a substantial rate increase for GLPL's distribution customers, if unmitigated.

[6] To avoid the impact of "rate shock" on customers, GLPL voluntarily proposed a rate mitigation plan, which would result in 2002 and 2003 rates being set at levels which would recover revenues of only $9.8 million and defer the recovery of the remainder of the $12.7 million revenue requirement over four years beginning in 2005 (the "Deferral Plan").

[7] To ensure that GLPL would have unbundled distribution rates in place for the electricity market opening on May 1, 2002, as required by legislation, the OEB issued an interim order (the "2002 Interim Order"). The OEB approved the rate proposed by GLPL's 2002 Application necessary to recover $9.8 million annually for its costs, which, according to GLPL, was calculated on the basis of approval and implementation of the Deferral Plan.

[8] Commencing on May 1, 2002, GLPL charged the rates authorized by the 2002 Interim Order and began deferring approximately $2.8 million per year that it alleges that it has foregone as a result of its voluntary rate mitigation plan. It accumulated those amounts in its books in Account 1574 (a deferral account authorized by the *Accounting Procedures Handbook* issued by the OEB) to be collected at some future period.

[9] Prior to the OEB conducting a full hearing in GLPL's 2002 Application, the Ontario Legislature, in December 2002, enacted Bill 210 to implement a "rate freeze" that prohibited the OEB from adjusting distribution rates without approval of the provincial Minister of Energy. Included in the legislation was a provision that deemed all outstanding interim rate orders to be final rate orders, such that the OEB's 2002 Interim Order was made a final Order. Bill 210 also created "Regulatory Assets" in the form of amounts recorded in prescribed accounts to be recovered at a prescribed point in the future. The Regulatory Asset accounts were intended to capture costs incurred by distributors in readying themselves for market opening. By regulation O.Reg. 339/02, Account 1574 was included in such Regulatory Assets.

[10] On December 9, 2004, electricity rates were "unfrozen" by the enactment of Bill 100. As a result, GLPL was permitted to apply to the OEB for the approval of new rates. On January 17, 2005, GLPL applied to the OEB to recover a portion of outstanding balances in its Regulatory Asset accounts. GLPL's application expressly included the recovery of a portion of the outstanding balance in Account 1574. On March 30, 2005, the OEB approved, on an interim basis, recovery of 80% of the amount sought by GLPL. It thereby allowed GLPL to recover $1,265,541 of its Regulatory Asset account balances (including amounts from Account 1574), and adjusted GLPL's rates accordingly, effective April 1, 2005 (the "Recovery Order"). From and after April 1, 2005 until the Decision became effective, GLPL recovered, under the express authorization of the OEB, some of the deferred amounts accumulated in Account 1574.

[11] On August 31, 2007, GLPL applied to the OEB to set new rates. Among other things, the application sought authorization to recover the balance of its Account 1574 in the amount of $14,890,315 and to recover that balance over 11 years through electricity distribution rates.

The OEB Decision

[12] The OEB refused GLPL's request to recover the balance in Account 1574.

[13] In the portion of its Decision addressing the recovery of the Account 1574 balance, the OEB focused on whether it had authorized GLPL's use of Account 1574 and whether such authorization was required. Because the 2002 Interim Order did not explicitly mention the Deferral Plan or the $12.7 million revenue requirement, the OEB found that there was insufficient evidence to demonstrate that the OEB had considered the Deferral Plan in setting rates in the 2002 Interim Order. The OEB concluded that the 2002 Interim Order could not be taken even implicitly as having in any way approved the revenue requirement or the accumulation of the deferred amounts in Account 1574.

[14] The OEB found that the purpose of its 2002 Interim Order was to provide GLPL on an expedient basis with distribution rates in time for the opening of the new electricity market on May 1, 2002, and that the OEB had not considered the merits of, or approved the proposed rate Deferral Plan.

Jurisdiction and Standard of Review

[15] The Divisional Court has jurisdiction to hear this appeal pursuant to section 33 of the *OEBA* which provides that an appeal may be made only on a question of law or jurisdiction.

[16] On a question of law, the courts must consider a number of relevant factors before determining the relevant standard of review:

(i) the presence of absence of a privative clause;
(ii) the purpose of the Tribunal;
(iii) the nature of the question at issue; and
(iv) the expertise of the Tribunal

(See *Dunsmuir v. New Brunswick* (2008), 291 D.L.R. (4th) 577 (S.C.C.) at para. 64.)

[17] GLPL submits that having regard to these factors and in particular, the nature of the question at issue, the standard of review that applies is one of correctness.

[18] The role of the OEB set out in section 78(3) of the *OEBA* is the setting of rates that are "just and reasonable". GLPL contends that it is settled law in Canada that a rate regulated enterprise must be permitted by the regulator to recover its reasonably incurred costs and a reasonable return on invested capital. Any rate order which does not do so is, by definition, not "just and reasonable". Accordingly, GLPL submits that the OEB erred in law in its decision by setting rates for GLPL which denied it any recovery of the amounts deferred under the Deferral Plan and, as a result, was not "just and reasonable" contrary to section 78(3) of the *OEBA*.

[19] GLPL submits that while the OEB has the discretion to determine what costs are reasonable and what ROE is reasonable, and in what manner those costs should be collected from rate payers, the OEB cannot deny recovery altogether. Thus, GLPL submits that the question at issue is purely one of law, that is, can the OEB deny recovery of a utility's reasonable costs and ROE? It submits that this is a discrete question of law independent of the facts. Thus, it argues that the standard of review is correctness.

[20] The OEB is an expert tribunal, given broad authority under the *OEBA* to protect the interests of consumers by, amongst other things, setting "just and reasonable" distribution rates. Moreover, the decision at issue – the fixing of just and reasonable rates – is the OEB's primary function. It has significant expertise and discretion in setting rates and its decisions have been accorded substantial deference in past jurisprudence (see *Graywood Investments Ltd. v. Toronto Hydro Electric System Ltd*. [2006] O.J. No. 2030, at para. 24 (C.A.)).

[21] Counsel for the OEB does not contest the proposition advanced by GLPL that it is settled law that a utility is entitled to recover by way of just and reasonable rates its costs and ROE. That is not the issue. Rather, OEB counsel submits that the issue in this case is whether approximately $15 million in costs that were never subject to scrutiny or review, were properly denied by the OEB pursuant to its rate making authority under section 78(3) of the *OEBA*.

[22] We are of the view that the issue in question is not simply a denial by the OEB of any right of recovery of costs by GLPL. Rather, in issue is the basis upon which such denial was made. In setting "just and reasonable" distribution rates, the OEB was engaged in an exercise of fact finding and, as well, applying law and policy considerations. It was performing its core function. Moreover, the OEB was interpreting the meaning and effect of its own 2002 Interim Order and its own review process. Given these matters, the standard of review is reasonableness.

GLPL's Position

[23] In its Decision, the OEB focused on whether the 2002 Interim Order could be taken to establish that it had approved the Deferral Plan or that it approved the accumulation of $2.8 million per year in Account 1574 for future recovery from rate payers. It concluded that it did not, and stated at page 13 of its Decision as follows:

> In summary, GLPL's position is without foundation. There is simply no basis upon which the Board can conclude that the accumulation in this account was ever explicitly or implicitly approved by the Board, either as to the amounts added to it over the years, or the more basic question as to the appropriateness of the use made of the account by the Applicant at all. Permitting GLPL to dispose of the account as it has requested would not be consistent with reasonable regulatory practice or common sense, and the GLPL's proposal is denied.

[24] GLPL argued that the OEB's conclusion that the 2002 Interim Order and subsequent orders did not implicitly or explicitly approve the establishment of the deferral account is wrong or alternatively unreasonable and contrary to the evidence.

[25] The OEB seized upon the fact that the 2002 Interim Order did not explicitly mention the Deferral Plan or the $12.7 million revenue requirement. As such, the OEB found that there was insufficient evidence to demonstrate that the OEB had considered the Deferral Plan in setting rates in the 2002 Interim Order. The OEB concluded that the 2002 Interim Order could not be taken as having in any way approved the revenue requirement or the accumulation of the deferred amounts in Account 1574.

[26] GLPL submitted that prior OEB approval of the use of Account 1574 was not required for the following reasons:

a) Bill 210 expressly made Account 1574 a Regulatory Asset that would be eligible for recovery through rates at a later date. The Board's approval of the accrual therein of deferred amounts was not required;

b) Pursuant to the description of Account 1574 in the Board's own *Accounting Procedures Handbook,* it is within the discretion of the utility, without Board approval, to defer and record in the Account, amounts equal to rate impacts associated with market-based rate of return or transition costs, or extraordinary costs which the utility has decided to defer to future periods. The decision to defer and accrue amounts in Account 1574 did not require Board approval;

c) GLPL was permitted to make an independent decision to use Account 1574. Another example of a Regulatory Asset account is Account 1508. It was also available to GLPL for recording the deferred portion of its full revenue requirement without Board approval and from which the Board is obliged to

> allow recovery as long as the amounts sought to be recovered are reasonable. Account 1508 does not require Board authorization.

[27] In summary, it is GLPL's position that although it may have been within the scope of the OEB's authority to consider the reasonableness of the costs in the proposed Deferral Plan, the OEB's prior approval to accrue costs in Account 1574 was not required.

[28] GLPL submits that in any event, the 2002 Interim Order permitted accrual and recovery of Account 1574 amounts. It submits that by approving the rates proposed in GLPL's 2002 Application, the OEB necessarily authorized the accrual of the deferred amounts in Account 1574. It submits that the very making of the 2002 Interim Order had to allow for a fair return on GLPL's invested capital. The only way for GLPL to have earned a fair return on capital was if the OEB's 2002 Interim Order approved the Deferral Plan and GLPL's revenue requirement of $12.7 million – that is, $9.8 million received in rates, and $2.9 million per year deferred and subsequently to be recorded in Account 1574.

[29] Moreover, GLPL pointed to the fact that on January 17, 2005, GLPL applied to the OEB to recover a portion of the outstanding balances in its Regulatory Asset accounts. GLPL's application expressly included the recovery of a portion of the outstanding balance in Account 1574 which was in the list of Regulatory Assets for which recovery was sought. Over 80% of the rate increase granted by the OEB in its order dated March 30, 2005 related specifically to Account 1574. In that order, the OEB allowed GLPL to recover $1,265,541 of its Regulatory Asset account balances (including amounts from Account 1574) and adjusted GLPL's rates accordingly, effective April 1, 2005. Although this was an interim order, the decision later issued by the OEB did not change the terms of the order as they related to Account 1574. Therefore, GLPL was allowed to recover under the express authorization of the OEB, some of the deferred amounts accumulated in Account 1574.

Analysis

[30] Whether express OEB prior authorization was required for the opening or establishment of Account 1574, or whether such authorization was implicit in the 2002 Interim Order, or was granted retroactively by the 2005 interim Recovery Order, misses the main point in issue, which is whether the OEB would have approved a revenue requirement of $12.7 million without an appropriate review.

[31] The OEB's Decision denying recovery was a response to the argument advanced by GLPL that the OEB approved the Deferral Plan and that the 2002 Interim Order when made final (by reason of Bill 210) established GLPL's unconditional right to access the deferred amounts in Account 1574. GLPL's position is that once the 2002 Interim Order was finalized by the operation of Bill 210, the OEB could not deny recovery. GLPL argued that its only discretion was to determine how recovery was to be effected in the manner of setting rates over a future period of time.

[32] GLPL acknowledges that had Bill 210 not intervened, there would have been in the normal course, a prudency review that would have taken place after the 2002 Interim Order and before a final order was issued. GLPL, however, takes the position that a prudency review was foreclosed because of Bill 210 converting interim orders into final orders.

[33] The OEB held that its 2002 Interim Order neither authorized nor approved the Deferral Plan and it would not do so without GLPL's costs being subject to scrutiny by a prudency review.

[34] Although deferral plans may be allowed as an exception to the policy against retroactive rate setting, the OEB concluded that to accept GLPL's argument would deprive the OEB of any opportunity to have a review of GLPL's costs. The heart of its Decision in this regard is found at pages 11-12 of its reasons as follows:

> Secondly, GLPL's position ignores the context for the Board's May 13, 2002 interim decision. GLPL's distribution business was not regulated by the Board until 2002. The May 13, 2002 interim decision and order was the first Board order setting rates for GLPL's distribution business. *It is inconceivable that the panel that rendered the May 13, 2002 decision would have approved a $12.7 million revenue requirement (and the rate mitigation plan) without any input from the interested parties. To have done so would have been totally inconsistent with the Board's longstanding practice of ensuring that affected parties have a fair opportunity to be heard*. (Emphasis added)

[35] It was reasonable for the OEB to conclude that before there can be recovery of the amounts in Account 1574, GLPL would be obliged to have its costs undergo a review by the OEB for a reasonableness assessment. The *OEBA* requires that the OEB protect the interests of ratepayers and this includes reviewing a distributor's revenue requirement and ensuring that it is reasonable before passing these costs off to customers through rates. If this is not done, electricity customers are put at risk.

[36] The mere happenstance of Bill 210, that froze rates by deeming interim orders to be final orders, did not relieve GLPL of having its costs undergo appropriate scrutiny for reasonableness before recovery of those costs would be allowed.

[37] It is of significance that the 2002 order was interim in nature and approved the rates proposed by GLPL necessary to recover $9.8 million. The Supreme Court of Canada commented on the nature of interim rate orders in *Bell Canada v. Canada (Canadian Radio-Television & Telecommunications Commission)* (1989), 60 D.L.R. (4th) 682 at pg. 705 as follows:

> Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. *Such decisions are made in an expeditious manner on the basis of*

> *evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order*. [Emphasis added.]

[38] And while acknowledging that rates must be just and reasonable whether approved by interim or final order, the Supreme Court went on to say at page 706:

> However, interim rates must be just and reasonable on the basis of the evidence filed by the applicant at the hearing or otherwise available for interim decision. It would be useless to order a final hearing if the [Board] was bound by the evidence filed at the interim hearing.

[39] The fact remains that the GLPL's full revenue requirement of $12.7 million did not undergo the review process which, in the normal course, would have required notice to interested parties and an opportunity for them to present submissions at a hearing. To this day no prudency review has taken place, nor has one been sought by GLPL.

[40] The costs upon which GLPL's rate Deferral Plan is premised were never reviewed by the OEB and it would violate the OEB's statutory obligation to ratepayers and the "regulatory compact" (as coined by the Supreme Court of Canada in *Atco Gas & Pipelines Ltd. v. Alberta (Energy Utilities Board)* (2006), 263 D.L.R. (4th) 193 at para. 63 (S.C.C.), requiring a balancing of rights and interests of utilities against those of ratepayers) to permit recovery of those costs without this necessary review.

[41] In its Decision, the OEB was engaged in an interpretation of its own 2002 Interim Order and knew full well the limited review of GLPL's costs that had been undertaken at the time that the 2002 Application was made. At p. 13 of its Decision, the OEB stated:

> Thirdly, GLPL is attaching much more significance to an interim order than is warranted. Section 21(7) of the *OEB Act* states: "The Board may make interim orders pending the final disposition of a matter before it." The evidentiary basis for interim rate decisions is almost always less complete than it is for a final decision and the applicant's pre-filed evidence is generally untested.

[42] The OEB should be afforded due deference when it stated that to read its 2002 Interim Order as approving a revenue requirement of $12.7 million was "inconceivable" and " totally inconsistent with the OEB's longstanding practice of ensuring that affected parties have a fair opportunity to be heard".

[43] When viewed in this context, it is clear that the OEB's conclusions regarding the 2002 Interim Order were reasonable. It made no error of law or jurisdiction.

Conclusion

[44] Accordingly, the appeal is dismissed. As agreed by counsel there will be no costs of the appeal.

Lederman J.

J. Wilson J

Swinton J.

Released: JULY 21, 2009

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B E T W E E N:

GREAT LAKES POWER LIMITED

Appellant

- AND -

ONTARIO ENERGY BOARD

Respondent

REASONS FOR JUDGMENT

LEDERMAN J.

Released: JULY 21, 2009