**Ontario Energy Board**

**Commission de l'énergie de l'Ontario**

**EB-2009-0063**

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

**AND IN THE MATTER OF** an Application by Brantford Power Inc. to the Ontario Energy Board for an Order or Orders approving or fixing just and reasonable rates and other service charges for the distribution of electricity as of May 1, 2008.

**AND IN THE MATTER OF** a Motion being brought by Brant County Power Inc. to review and vary the implementation of the Board's Interim Order Dated April 21, 2008 in this proceeding; and the Board's Decision dated July 18th, 2008;

BEFORE: Gordon Kaiser
Vice-Chair and Presiding Member

Ken Quesnelle
Member

# DECISION AND ORDER

[1] This is an appeal by Brant County Power Inc. (“Brant County”) of the Board’s Decision of July 18, 2008[1] regarding the distribution rates to be charged by Brantford Power Inc. (“Brantford”). For the reasons set out below, the Board is granting a variance of this Decision.

[2] The heart of this motion concerns a billing dispute between Brantford and Brant County concerning the rates that Brantford charges Brant County for electricity. There are two rates at issue, the rate for distribution services and the rate for retail transmission services (“RTS”). Aside from the actual rate, there is a question as to when Brantford is entitled to start charging for these services. The School Energy Coalition intervened in this Motion but did not present argument. Board Counsel participated and presented detailed argument.

**Background**

[3] Brantford Power Inc. is a licensed distributor of electricity providing service to 35,000 consumers within the City of Brantford. Brantford supplies electricity to Brant County, an embedded distributor.

[4] Brant County is a licensed distributor, providing distribution service to approximately 9,500 customers, in the Municipality of Brant County. The Brant County service area completely surrounds the service area of Brantford. Part of the Brant County distribution system is embedded within the Brantford distribution system. Brantford delivers power to Brant County through three transformer stations; Colborne East, Colborne West and Powerline Road.

[5] The Decision that Brant County is appealing is the Board’s Decision of July 18, 2008 which, for the first time, set the rates that Brantford should charge Brant County. Those rates, the Board determined, should be set at the rate that Brantford was currently charging the GS > 50 kW class of customers.

[6] The rates that the Board set in the Decision of July 18, 2008 were effective September 1, 2008. Notwithstanding that, Brantford apparently issued its first bill to Brant County on June 15, 2008. That bill was paid by Brant County on July 7, 2008 but Brant County refused to pay any subsequent bills. On February 25, 2009, Brant County

[1] *Re: Brantford Power Inc.,* EB-2007-0698, (July 18, 2008).

filed this Motion asking the Board to alter the distribution rate that the Board had established for Brant County.

[7] Brantford is also is seeking payment of $2.1 million for unbilled RTS charges. These relate to the acquisition by Brantford of certain assets from Hydro One on October 15, 2005 at two transaction sites, Colborne East and Colborne West. Apparently, Brantford did not start billing Brant County for RTS at that time. This mistake was discovered in these proceedings. This Motion was then amended seeking recovery of these costs.

[8] There are also unbilled RTS charges relating to the Powerline Road transformer station which is jointly owned by Brant County and Brantford. Those charges date back to July, 2008.

[9] There are eight issues in this motion:

i. Should the Board hear the Motion and review the July 18, 2008 Decision
ii. Was the notice provided by Brantford sufficient?
iii. What is the Standard of Review?
iv. Is the distribution rate charged by Brantford to Brant County just and reasonable? If not, what rate should be charged by Brantford?
v. At what date should Brantford be permitted to commence charging Brant County for distribution services?
vi. At what date should Brantford be permitted to charge Brant County for RTS Network and Connection Charges for Colborne East and Colborne West?
vii. What interest should be paid on the monies owed? and
viii. What time period should be allowed for payment?

**Should the Board Review the July 18, 2008 Decision?**

[10] Rule 42.01 permits any person to bring a motion to the Ontario Energy Board requesting a review and variance of a Board's decision. Rule 44 provides:

> 44.01 Every notice of motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question regarding the correctness of the order or decision, which grounds may include:

(i) Error in fact;

(ii) Change in circumstances;

(iii) New facts have arisen;

(iv) Facts that were not previously placed into evidence in the proceeding and could not have been discovered by the reasonable diligence at the time.

[11] Brant County relies on subsections (a)(i), (iii) and (iv), and states:

i. The Decision was based upon Brantford evidence that underforecasts the demand for the General Service Greater than 50 kW ("GS > 50kW") rate classification.

ii. Brantford did not inform the Board of its discussions with Brant County regarding a separate rate classification for Brant County.

iii. Brantford has not been charging Brant County Retail Transmission Services at Colborne East and Colborne West and therefore the cumulative impact on Brant County of both distribution and RTS charges was not put before the Board at the time of the Decision.

iv. The distribution revenue claimed by Brantford far exceeds the proposed allocated costs to Brant County. Brantford included Brant County in a rate classification that has a revenue to cost ratio of at least 1.39:1. With the 2008 approved rates, Brant County would be subsidizing Brantford ratepayers by more than $120,000 each and every year.

v. The distribution charge by Brantford represents approximately 8% of Brant County's revenue requirement.

[12] Brant County also argues that Board staff raised the issue of a separate rate classification during the proceeding and the Board accepted, based upon the evidence before it at that time, that using the GS > 50kW classification was acceptable. Brant County submits that had all the facts been available during the original hearing, a different decision would have resulted.

[13] Before the Board will hear a Motion to vary a previous Decision it must be satisfied that the review raises a question as to the correctness of the Decision. The test was clearly stated by the Board in the *Connection Procedures* Decision[2];

[2] *Re Hydro One Networks Connection Procedures*, EB-2007-0797 (November 26, 2007) at paragraph 20.

The moving party must also satisfy the Board of the following:

To the extent that an error in the *Connection Procedures* Decision is alleged:

- that the error is identifiable, material and relevant to the outcome of the *Connection Procedures* Decision and that, if the error is corrected, the reviewing panel could change the outcome of the Connection Procedures Decision (in other words, there is enough substance to the issues raised that a review based on those issues could result in the reviewing panel deciding that the *Connection Procedures* Decision should be varied, cancelled or suspended); and

- that the findings of the *Connection Procedures* panel are contrary to the evidence that was before that panel, the panel failed to address a material issue, the panel made inconsistent findings, or another error of a similar nature was made by the panel.

To the extent that the incompleteness of evidence is raised as a ground for review:

- that the facts now sought to be brought to the attention of the Board could not have been discovered by reasonable diligence at the time; and

- that those facts are material and relevant to the outcome of the *Connection Procedures* Decision and that, if considered by the reviewing panel, could change the outcome of the *Connection Procedures* Decision (in other words, the facts are such that a review based on a consideration of those facts could result in the reviewing panel deciding that the *Connection Procedures* Decision should be varied, cancelled or suspended).

**Board Findings – Grounds for Review**

[14] Applying the *Connections Procedures* test we find that Brant County has met the threshold for review. There is no question that there is new evidence. The issue of the RTS charges was not even before the panel in the 2008 hearing. Not only was Brant County not aware of it but even Brantford was apparently not aware of until it was discovered in the course of these proceedings. This is an important issue with significant consequences. The Board believes it should be determined as soon as possible.

[15] Having decided to consider the billing dispute regarding RTS it is also important to consider billing dispute regarding the distribution rate. While the question of whether the GS > 50 kW rate was the proper rate for Brant County was before the original panel,

there was very limited discussion of the issue and very little evidence. That was driven, in large part, by the fact that Brant County did not participate in the hearing.

[16] It is also significant that the original panel's Decision was driven in part by an understanding that the Board would be studying the question of embedded distributor charges in an upcoming proceeding[3]. It now turns out that this proceeding no longer exists and has been substituted by another, more distant, proceeding[4].

[17] This is an important issue. It is in the interest of all parties to have the distribution rate, like the RTS charges, resolved. We find that the Applicant has met the threshold test and are prepared to review the Decision with respect to the billing disputes in question. In addition, we face two issues that were not before the original panel which is the proper start date for billing each of the services.

**Was Proper Notice Given?**

[18] Brant County also argues that the Board should review the July 18 Decision because Brant County did not receive effective notice of Brantford's Application for 2008 rates. Brant County goes so far as to say that because effective notice was not given, the Board lacked jurisdiction and the Decision of July 18 should be set aside.

[19] Brant County claims that the Notice was deficient in terms of both delivery and content. With respect to delivery, Brant County says that they have no record of receiving the Notice. Brantford, however, claims they delivered the Notice to Brant County. Regardless of whether the Notice was physically received by Brant County, there is evidence that Brantford published the Notice, as approved by the Board, in the local newspaper.

[20] As to content, Brant County says the Notice did not indicate that Brantford had decided not to create a special embedded distributor charge for Brant County (as Brant County believed they would) but instead proposed to bill Brant County as a GS > 50kW customer. Nor, they argue, was there any indication what impact the rate would have on Brant County. Brant County argues that the impact will be approximately $425,000 a

[3] *Review of Electricity Distribution Rate Design*, EB-2007-0031

[4] *Review of Electricity Distribution Cost Allocation Policy*, EB-2010-0219

year which they claim is a material amount that should have been disclosed in the Notice.

**Board Findings – Notice**

[21] In reviewing the legal standards with respect to Notice it is useful to consider the remarks of the panel in the recent *Hydro One Networks* case[5]. In that case the intervenors claimed insufficient notice because the Notice made no reference to the Board's Cost of Capital Report which had the effect of increasing the Return on Equity for the Applicant. The reason was that the Report was issued by the Board after the date of the Notice but nonetheless had an impact on the decision.

[22] The Board's remarks in the *Hydro One Networks* case go to the question of the how detailed the Notice can be from a practical point of view.

> Drafting a notice for a complex hearing is an important responsibility of the Board. The Board discharges its responsibility by converting a highly technical application of several thousand pages into a two- to three-page summary.
>
> It must be able to be published in a newspaper, and to be read quickly and easily. It must accurately summarize the general potential impacts of the application. It must use language that can be understood by a person who has no background whatever in the complex field of utility rate setting.
>
> It must find a balance between including too much information, which could be confusing in addition to being impractical, and including too little information such that the reader is unable to understand how the application may impact him or her.
>
> Due to the length and the complexity of the hearing process, a number of changes may occur to the application after the notice is issued. There may also be other factors external to the application itself that have an impact on rates.
>
> The Board notes that the notice also provides information on how the application itself can be accessed through both the Board's and Hydro One's websites. In this way, an interested person is invited to supplement the information imparted by the notice by reading as much of the detail of the application as he or she may wish.

[5] *Re Hydro One Networks Inc*, EB-2009-0096 (January 19, 2010).

> The Board is satisfied that the notice in this case strikes an appropriate balance and provided readers with the necessary information for them to determine if they wanted to participate further.

[23] As indicated in the *Hydro One Networks* Decision adequate Notice is always a balancing act and often turns on the sophistication of the party questioning the Notice. The *Hydro One Networks* Decision referenced the *Nolan* case[6], where the Ontario Court of Appeal stated;

> When determining whether adequate notice has been given, two questions must be asked: (1) was the content of the notice accurate and sufficient? And (2) were all affected parties given notice?

[24] In the *Central Ontario Coalition*[7] case, the Ontario Divisional Court stated;

> In any event, it is well established that where the form or content of notice is not laid down it must be reasonable in the sense that it conveys the real intentions of the giver and enables the person to whom it is directed to know what he must meet.

[25] It is also accepted as the Ontario Court of Appeal said in *Ontario Racing*[8] that the adequacy of Notice will often turn on the circumstances of the case;

> I now turn to the other issue as to whether or not the Respondent was denied natural justice by the action of the Board. The cases establish beyond peradventure that whether a notice given in any particular case is sufficient depend entirely upon the circumstances of the case.

[26] And as the Court said in *Wilson*[9], it is also important to consider who was the party reviewing the Notice;

> I, therefore, now consider the contents of the notice. In my view the principle is that the notice must be in such terms as are fairly and reasonably necessary to enable members of the public in the area of the land affected to appreciate that they are interested and to make representations or objections

---

[6] *Nolan v. Ontario (Superintendent of Financial Services)*, [2007] OJ. No. 2176, 86 O.R. (3d) 1 (C.A.) (QL).

[7] *Central Ontario Coalition Concerning Hydro Transmission Systems and Ontario Hydro* (1984) 46 OR (2d) 715, 10 DLR (4th) 341 (Div. Crt.)

[8] *R. v. Ontario Racing Commission*, (1971), 1 O.R. 400, 15 D.L.R. (3d) 430.

[9] *Wilson v. Secretary of State for the Environment* [1973] 1 WLR 1083

> if they think fit. In deciding whether the notice would give the necessary information, one must, in my view, assume an imaginary member of the public familiar with Aldridge. One must not assume a trained lawyer nor someone experienced in local government, whether a councilor or an officer. On the other hand, one must not assume someone unusually stupid or unusually careless.

[27] Brant County in alleging inadequate Notice relies on the *Conception Bay*[10] case. There, the Court found that the Nova Scotia Public Utilities Board failed to give adequate notice to a number of municipalities of a new charge to the municipalities that was not disclosed in the Notice. We do not believe that *Conception Bay* applies here. In *Conception Bay,* the municipalities were not familiar with the Board's process. Here, the customer is a utility not an ordinary consumer.

[28] It is significant that prior to filing this Notice of Application, the two parties, Brant County and Brantford, through senior officers, had been negotiating a special rate for Brant County. And the discussion was whether it would be the GS > 50 kW rate or some special rate. Brant County states that they believed they would get a special rate and were "shocked" to find that Brantford unilaterally decided to change its approach and took no steps to inform Brant County. The first indication of the new approach, they claim, was an email after the first invoice was issued.

[29] That, however, is not the issue. This Notice was published on January 18, 2008 in the Brantford Expositor which had the highest circulation rate in the Brantford service area. The Notice of Application, which was issued by the Board on January 9, 2008, allowed any interested party to request intervenor status no later than 10 days after the publication date.

[30] It is highly improbable that someone in authority at Brant County was not aware of the Notice. It is also highly improbable that they would not have a passing interest in knowing what Brantford had decided regarding the rate under negotiation. The Board believes that Brant County, in these circumstances, had an obligation to take reasonable steps to determine what rate would apply to them and whether they should participate in the hearing.

[31] Instead, they took no steps and now complain that the utility did not inform them. There is no question that Brantford could have been more responsive. But in our view

[10] *Conception Bay v. Newfoundland Public Utilities Board*, (1991) Admin L.R. (2d) 287.

the Notice was sufficient. It may not have detailed the specific rate but as the Board found in *Hydro One Networks* it is impossible to detail every specific rate change.

[32] In the end this was a sophisticated customer. Not only was it the largest customer, it was also a utility that had recently been negotiating the rate at issue. It is difficult to believe that they would not have reviewed the evidence. The Notices often state, as this one did, that the evidence can be easily found on the utility's website or the Board's website. That is the logical step that those receiving the Notice should take to determine if their interests will be impacted. It is impossible to detail every change in rates in a Notice published in a newspaper.

[33] These Notices have to be prepared so that they can be read by the common person. Brant County was certainly not the common man. Rather they were a large and sophisticated customer that apparently they did not review any of the evidence. While there was only one line in the evidence identifying the rate it did indentify the rate. That rate turned out to be the GS > 50kW rate.

**The Standard of Review**

[34] Counsel for Brant County also made submissions regarding the standard of review to be used by the Board in reviewing this Decision. Counsel argues that if the reviewing tribunal does not reach the same Decision, the reviewing tribunal must consider the Motion as if it were hearing the matter for the first time. Specifically Counsel argued;

> A tribunal must determine the appropriate standard – that of reasonableness or correctness – upon which to consider the prior decision. BCP submits that the Board, in conducting a motion to review and vary a decision, must consider whether the original decision on a correctness standard and not defer to the prior panel. Would the current panel have reached the same decision? If not, then the reviewing tribunal panel must replace the prior decision.
>
> The Board's Rules provide that the threshold for such a review is grounds "that raise a question regarding the correctness of the order or decision". Therefore, the appropriate standard of review to be applied in the consideration of such a motion is correctness. This is the most stringent standard of review required by law. The reviewer must insert themselves in the original tribunal's place and determine whether it would have reached the identical result as the original tribunal. It is insufficient for the reviewer to state

> that the original decision was reasonable or that it was not unreasonable – the decision **must** be correct[11].

**Board Findings – Standard of Review**

[35] With respect we disagree. A reviewing panel should not set aside a finding of fact by the original panel unless there is no evidence to support the decision and is clearly wrong. A decision would be clearly wrong if it was arbitrary or was made for an improper purpose or was based on irrelevant facts or failed to take the statutory requirements into account. That is not the situation here.

[36] The standard of review with respect to Decisions of the Ontario Energy Board was most recently canvassed by the Ontario Court of Appeal in the *Toronto Hydro Dividend*[12] case. There, the Court of Appeal upheld the Board's Decision that required any future dividends to be approved by the majority of the independent directors. The Court noted that "in judicial review reasonableness is concerned mostly with the existence of justification, transparency, and intelligibility within the decision-making process. But it also concerned with whether the Decision falls within a range of possible acceptable outcomes which are defensible in respect of facts and law".

[37] In finding that the Decision was justified, the Court referred to the often cited passage from *Law Society of New Brunswick vs. Ryan*[13] where Iacobucci, J. articulated the relationship between the reasons of the tribunal and the reasonableness of its Decision.

> A decision will be unreasonable only if there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived. If any of the reasons that are sufficient to support the conclusion are tenable in the sense that they can stand up to a somewhat probing examination, then the decision will not be unreasonable and a reviewing court must not interfere. *This means that a decision may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that the reviewing court finds compelling.*

[11] Brant County Power Inc. Argument-In-Chief, page 6, para. 10 - 11

[12] *Toronto Hydro-Electric System Ltd v. Ontario Energy Board* [2010] OJ No. 1594

[13] [2003] 1 SCR 247 at para 55.

[38] We believe that the standards that a court would use in reviewing a Board Decision are no different than those this panel should use in reviewing a prior Board Decision.

**What is the Correct Distribution Rate?**

[39] The Board in its Decision of July 18, 2008 regarding the Brant County rate stated at page 16;

> **Rate Classes**
>
> The Company is a host to one embedded distributor, Brant County Power, and also serves one large customer with demand greater than 5000 kW.
>
> Board staff noted that the Company did not propose separate rate classifications for these loads; rather, they are being served within the GS>50 kW rate class.
>
> With respect to the large customer, the Company noted that the customer is new in this size range and the Company did not want to jeopardize the timing of its application for 2008 rates by designing and implementing a new rate class. The Company proposed that it would undertake a cost allocation study to support the establishment of a large user rate class for its next rate rebasing.
>
> With respect to the embedded distributor, Brantford clarified in response to an interrogatory that it intends to begin billing the embedded distributor in the 2008 rate year, and will do so by using the GS>50 kW rate classification. Board staff submitted that host distributors should be proposing a rate for embedded distributors, but noted that the practice of using the General Service rate is not unusual.
>
> **Board Findings**
>
> The Board accepts as reasonable the Company's proposal to defer the rate classification matter for the time of its next rebasing application. The Board notes that the issue of rates for embedded distributors is in the scope of a study currently underway at the Board (EB-2007-0031), the Rate Design study. The Board expects Brantford to keep itself informed as to potential developments through that process.

[40] Brant County argues that the GS > 50kW rate which Brantford used to charge Brant County is not just and reasonable because it over-recovers from Brant County. They say that the charges are not based on a proper cost allocation, that the services

being charged to Brant County are different than other customers in the GS > 50kW rate classification, that the rate does not include a proper loss factor for Brant County and the rate is based on an under forecast of demand.

[41] Brantford's response is that the Board should reject Brant County's Motion and confirm that Brant County must pay Brantford for all distribution services from May 1, 2008 at the GS > 50kW rate.

[42] Board staff presented a detailed submission regarding the proper rate that Brant County should be paying to Brantford. They argue that Brant County's consumption was greater than GS > 50kW category and that the services being provided to Brant County are different than those provided to the other customers in the GS > 50kW classification.

[43] Board staff examined the volume characteristics of the customers in the GS > 50 kW class and found that Brant County's energy and demand volumes were much greater than the average for customers in this class. For example at one delivery point (Colborne East) monthly demand for Brant County was 8500 kW. The response to Board Staff Interrogatory No. 9 indicated that the average demand for customers in the GS > 50 kW class, without Brant County, is 271 kW per month. This compares to an average monthly demand for Brant County of 4700 kW. In the case of energy, the average annual consumption for the members of the class, without Brant County, is 1.3 million kWh compared to 25.7 million kWh for Brant County.

[44] The cost differences of serving Brant County and the GS > 50 kW rate class are set out at Page 6 of the Board Staff submission. The relative costs which are reproduced in the table below are based on information provided by Brantford in response to Board Staff Interrogatory No. 9. It indicates that the average cost per kWh of serving Brant County is 40% less than for the GS > 50 kW class. This suggests that the rate should be 40% less for Brant County than for the rate to serve the GS > 50 kW class.

| | **GS > 50 kW** | **Brant County** |
|---|---|---|
| **Revenue Requirement ($)** | 3,295,266 | 303,456 |
| **kWh** | 513,051,214 | 77,273,702 |
| **¢/kWh** | 0.6423 | 0.3927 |

[45] Board staff also argues that the costs associated with Brant County are different than other customers in that class. They argue that Brant County should not be responsible for the cost of transformers, distribution lines, poles and related equipment which do not apply to Brant County.

[46] There is also a difference in the distribution loss factor. The factor applied to Brant County customers was 4.2% which represents the total distribution system. In response to Board Staff Interrogatory No. 11, Brant County estimated the loss on its system at approximately 1% for the main feed and approximately 2% for the alternative feed.

[47] In the end, Board staff argues that the Board should direct that a separate rate be set for Brant County. They argue that rate should reflect the following principles;

(a) The revenue-to-cost ratio for any specific rate for Brant County should fall with in the range for the Large User class, that is 85% - 115%,

(b) The GS 50 – 4,999 kW class' revenue-to-cost ratio remain at the approved EB-2007-0698 ratio of 140%, and

(c) Any additional revenue is to be recovered from those classes that have revenue-to-cost ratios below 100%.

**Board Findings – The Distribution Rate**

[48] We agree with Board staff that a separate rate should be set for Brant County. We also agree that rate should be set based on the principles set out above by Board staff. We are also of the view that further delay is no longer warranted. This issue first arose in Brantford's Application for 2008 rates. It remains unresolved and no payments are being made by Brant County.

[49] The Board directs Brantford to design a rate in compliance with principles set out by Board staff and to file that rate within 10 days of receipt of this Decision. Brant County will have an opportunity to comment on the proposed rate within 5 days of receipt. The Board expects to be in a position to issue a written decision following these submissions.

[50] If the new rate is less than the existing rate there may be an under-recovery by Brantford. That is, the utility would not be able to achieve its revenue requirement.

Accordingly, the difference between the existing approved GS > 50 kW rate and the new Brant County rate times the Brant County volumes for the relevant period should be tracked in a variance account for recovery at Brantford's next rebasing. The Board notes that Brant County has no objection.

**The Retail Transmission Rate**

[51] Brant County has paid RTS charges for Power Line Road at the GS > 50 kW rate for the period commencing December 2005 until August 2008 and these amounts are not in dispute. The RTS charges for Colborne Street East and Colborne Street West have not been paid but Brant County does not dispute the quantity of electricity or the rate. The parties agree that the $2.1 million is owing.

[52] What Brant County disputes is the period for which it is responsible for the costs. Brant County, in this Motion, asked the Board for an Order specifying the date at which Brantford is entitled to charge Brant County for retail transmission, network and connection charges for Colborne Street East and Colborne Street West. Brantford seeks an Order that Brant County must pay Brantford, in full, for all retail transmission service since Brantford acquired Colborne Street East and Colborne Street West from Hydro One in October, 2005.

[53] Board staff agrees that there is no dispute between the parties as to the rate and the volumes and agrees that this is an obligation of Brant County. However, Board staff takes the position that the RTS arrears should be limited to two years based on the *Limitations Act*[14].

[54] Board staff submits that Brantford's claim against Brant County is in the nature of a debt and that there is a claim of money owed to Brantford which is governed by the *Limitations Act*. They argue that the limitation period is two years from the date that the claim arises or the date the claiming party discovered the claim or should have discovered the claim. Board staff states that Brantford's claim arose on the day it acquired the Colborne assets (October 2005) and Brantford therefore has two years from that date to commence an action for payment.

[14] SO 2002 Ch.35

[55] Board staff argues that a claimant is not entitled to a longer limitation period because it did not discover its right to make a claim until some later date unless the delayed discovery was reasonable. Section 5 of the Act provides that the discovery of the claim occurs on the day on which a reasonable person in the circumstances ought to have known of the claim.

[56] Board staff argues that Brantford is a sophisticated commercial entity and should have exercised greater diligence in exercising its right to charge the RTS upon acquiring the two Colborne assets. The utility failed to invoice Brant County within the two year limitation period, that is by October 2007.

[57] Board staff also argue that Brantford's claim for the RTS is not completely prescribed by the *Limitations Act* since the claim has been ongoing. Accordingly, Board staff submits any amounts owing by Brant County for the two years prior to the date that Brantford made its claim (December 11, 2009) are outside the limitation period and Brantford should only be entitled to recover amounts from and after December 10, 2007.

**Board Findings – Retail Transmission Rates**

[58] Brantford acquired transmission assets at Colborne Street East and Colborne Street West from Hydro One on October 2005. Brantford began billing Brant County for RTS service for Powerline Road in 2005. For some reason, Brantford failed to bill Brant County for RTS services at Colborne Street East and Colborne Street West until much later.

[59] There is no question that Brantford provided Brant County RTS services at Colborne Street East and Colborne Street West facilities. The question is, when should the payments start? Brant County states that the payments should start September 1, 2008, when the Brant County rate first became effective. Brantford responds that the payments should start when the services first started (October 2005). Board staff submits that the payments should be governed by the *Limitations Act, 2002* and payments therefore should start December 10, 2007.

[60] It is significant that there will be no harm to Brant County customers if Brant County pays the full amount to Brantford. Brant County has continued to collect for RTS service in its rates and has approximately $4.2 million in reserve accounts. Brantford

submits, and Brant County agrees, that approximately $2.1 million is owed to Brantford for RTS service. Brantford argues that there is no good reason why Brant County should not pay the entire amount owing. Brant County does not risk under recovery from its customers because the entire amount can be paid from these reserve accounts.

[61] The Board is not persuaded that the *Limitations Act, 2002* constrains the Board's jurisdiction to order full recovery. This is not a claim being pursued in a court. It is not clear that the *Limitations Act* applies.

[62] In any event, the Board has the exclusive jurisdiction to set just and reasonable rates and that includes not only the rate, but the time period in which the rate should be paid. Section 19(6) of the *Ontario Energy Board Act, 1998* gives the Board exclusive jurisdiction in all areas where the Act confers jurisdiction. Where there is a conflict between the OEB Act and any other Act the OEB Act prevails[15]. Special legislation like the Ontario Energy Board Act takes precedence over general legislation like the *Limitations Act*[16]*.* The Board has exercised jurisdiction in this area in enacting Section 7.7 of the *Retail Settlement Code* with respect to residential and non-residential customers.

[63] We conclude that the full amount is owing and should be paid by Brant County. However, Brantford will not be entitled to any interest payable on the outstanding amounts for Colborne East and Colborne West. There is no good reason why Brantford failed to bill for RTS service at the two assets. It was an error on the utility's part. Under those circumstances interest is disallowed.

[64] Where there is a billing error, the Board will allow a utility to correct that error and bill (or credit) customers going forward. There can, however, be a penalty in terms of loss of interest if there is an element of negligence on the part of the utility. This was the situation in the *NRG Gas Cost* case[17]. There, NRG, due to an accounting error failed to collect over $500,000 in gas costs that incurred over a period of 15 months between October, 2002 and December, 2003. The Board, in setting 2004 rates, allowed NRG to recover these costs through rates going forward but refused the utility's request for

---

[15] *Kingston vs. Ontario Energy Board* [2001] OJ No. 3485

[16] *Union Gas v. Dawn* (1977) 15 OR (2d) 722, 76 DLR (3d) 613

[17] *Re Natural Resource Gas Ltd*, Board Review Decision, April 19, 2004. *Natural Resource Gas Ltd. v. Ontario Energy Board* [2005] OJ No. 1520 (Div Ct.)

interest and the recovery of the regulatory costs involved in bringing forth the Application.

[65] The remaining issue is the time period over which the unpaid RTS is to be paid. There appears to be no dispute that Brant County has collected these amounts from its customers and is holding funds in a reserve account. In the circumstances, RTS amounts should be repaid within 30 days of the Board's Order in this proceeding.

**Retroactivity – Distribution Rates**

[66] If a new rate is set for Brant County, is it effective at the date of this Decision or September 1, 2008? Or May 1, 2008? Brant County argues that it should become effective, September 1. 2008. Brantford and Board staff argue that it should become effective on the date of this Decision. The reason for that position, they claim, is the rule against retroactivity prevents back dating to September 1, 2008.

[67] No one disputes that retroactive rate making is not proper. This was most recently recognized by the Supreme Court of Canada in the *ATCO* Decision[18] and a number of decisions before[19].

[68] Board staff relies upon the Supreme Court of Canada decision in *Bell Canada vs. CRTC*[20] where the court distinguished between Interim Rate and Final Rate noting that if the rates are interim the Board could backdate the effective date to the date of the interim order which is not possible in the case of a Final Order. We do not agree that this principle applies to the present case. This is not a case where the Board is varying the rate for the GS > 50 kW class. This is the case of a billing dispute. In particular, a dispute related to a rate classification. To say that a utility could hide behind the retroactivity principle and never address billing disputes would be contrary to the Board's policy objectives.

---

[18] *ATCO Gas & Pipelines Ltd. v. Alberta Energy & Utilities Board* [2006] 1 SCR 140, 263 D.L.R. (4th) 193

[19] *Northwestern Utilities Ltd. v. City of Edmonton*, [1979], 1 S.C.R. 684; *Re Coseka Resources Ltd. And Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical Canada Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731.

[20] *Bell Canada v. Canada Radio-Television and Telecommunications Commission,* (1989) S.C.J. No. 68 at 708.

[69] The overriding responsibility of the Board is to set just and reasonable rates. That principle applies to the actual level of the rates as well as the time period during which the rates are in effect. It is also important to understand the fundamental principle behind the retroactivity principle in public utility law. This is not a mechanical rule of statutory interpretation. The rule is based on two fundamental principles.

[70] The first principle is that a utility must be able to rely on Decisions to have revenue certainty in order to be able to plan its investments. If the revenue requirement is subject to change this is impossible. In other words, a utility must be able to rely on a Final Order and the revenues that flow from the Final Order unless there is clear notice that this is not the case. That's why this Board will often convert a Final Order to an Interim Order and then proceed with the next rate case. The magic of that conversion is that the utility has notice that it can no longer rely upon that revenue stream. It may go up or it may go down, depending on the result of the next rates case. And that rate decision can then be back dated to the date of the Interim Order.

[71] The utility also has notice where there is a billing dispute with a customer. In this case there was a period of time when there was no rate. Then the Board applied a rate to this particular customer that was admittedly incorporated in a Final Order. The matter did not end there. The customer refused to pay and launched this appeal. There has been an ongoing dispute and the utility was well aware that this matter would likely be subject to adjustment in a subsequent proceeding.

[72] The other principle behind the retroactivity rule is that future customers should not pay for electricity consumed by past customers. This is also known as the intergenerational equity problem. Broadly speaking, that means that today's customers should not be responsible for the expenses associated with the services provided to yesterday's customers.

[73] The principles behind the retroactivity rule were set out by the Newfoundland Court of Appeal in *Re: Board of Commissioner of Public Utilities*[21] at Page 25.

> Doctrinally, in the context of utility rate regulation, the retroactivity principle is described by Penning in this way:

[21] *Re Section 101 of the Public Utilities Act* (1998) CanLII 18064 (NL C.A.)

> …the rule is concerned more with issues of fairness, both to customers and to the utility shareholders. The customer-related fairness issue is often referred to as the "inter-generational equity" problem, which, broadly stated, means that today's customers ought not to be held responsible for expenses associated with services provided to yesterday's customers. The fairness concern in terms of utility shareholders arises because to attract and maintain reasonably-priced equity investment in a utility, shareholders require some certainty that matters already dealt with by the regulator have some degree of finality associated with them.

[74] The *Newfoundland* case questioned the importance of intergenerational equity at Page 28.

> While it is true that any rebate would not, because of the fluid nature of the customer base, result in a return to exactly the same body of consumers who had paid the original rates, this is not an insuperable objection to using this type of mechanism. Penning observes:
>
> As a practical matter, however, at least some of this concern appears misplaced. By far the majority of today's rate payers for the majority of regulated public service utilities were also yesterday's rate payers – especially since the time frames at issue are typically not more than a year or two. So the unfairness argument about cost allocation loses some of its force.

The Supreme Court of Canada in the *Bell Rebate* case[22] made the same point;

> ….it is true that the one time credit ordered by the appellant will not necessarily benefit the customers who are actually billed excessive rates. However, once it is found that the appellant does have the power to make remedial order, the nature and extent of this order remain within its jurisdiction in the absence of any specific statutory provision on this issue. The appellant admits that the use of a one-time credit is not the perfect way of reimbursing excess revenues. However, in the view of the cost and the complexity of finding who actually paid excessive rates, where these persons reside and of quantifying the amount of excessive payments made by each, and having regard to the appellant's broad jurisdiction in weighing the many factors involved in apportioning respondent's revenue requirement among its several classes of customers to determine just and reasonable rates, the appellant's decision was imminently reasonable…

[22] *Bell Canada v. Canadian Radio-Television & Telecommunication Commission* [1989] 1 SCR 1722 at 1762-3.

[75] The rule against retroactivity was first established by the Supreme Court of Canada in 1961[23]. That Court established an important qualification 20 years later in Nova V. Amoco[24]. There, the court was dealing with a regulatory scheme that provided that the utility could set a rate that would be in effect until such time that any interested party or the Public Utilities Board complained that the rate was not just and reasonable. At that point the Public Utilities Board would hold a hearing and make a decision.

[76] The question in *Nova* was, having made a decision to change the rate, was the new rate effective the date of the decision or at the date of the complaint. Mr. Justice Estey speaking for the Court held that it was permissible to issue a retroactive order and that the new rate could become effective at the date of the complaint because at that point the utility had notice.

[77] The British Columbia Court of Appeal in *EuroCan Pulp and Paper vs. British Columbia Energy Commission*[25] came to the same conclusion stating at Page 731;

> Under either section it is contemplated that the Commission may consider rates established and collected in the past, or the rates to be collected or enforced by it in the future. In the former case there would be a retroactive aspect to any consequent order made by the Commission. Under s. 38 it seems clear that the Commission would have jurisdiction to entertain a complaint that existing rates in effect and collected are unjust or insufficient. In that event it would clearly have the jurisdiction to correct the injustice or the insufficiency. There is nothing to lead one to the conclusion that the Legislature intended that the Commission could only act in this respect prospectively.
>
> Reading the Act as a whole, it is my opinion that the Commission has been empowered to make rates effective to the date of the application, even though there is no specific language in the Act to that effect.

[78] In summary, this is a billing dispute that relates to one particular customer not all customers in the rate class. That customer never accepted the rate, never paid the rate and gave clear notice to the utility.

---

[23] *Edmonton v. Northwestern Utilities Ltd.* [1961] SCR 392.

[24] *Nova v. Amoco Canada Petroleum Co.,* (1981) 2 SCR 437.

[25] (1978) 87 DLR (3d) 727.

[79] This is no different than correcting a utility error as this Board did in the *NRG Gas Cost* case[26]. Natural Resource Gas, like Brant County, was an embedded distributor. NRG discovered in October 2003 that its gas costs for 15 months were under-collected by over $500,000 due to a flaw in its accounting methodology. The Board allowed the utility to recover these costs in a subsequent rate case. The Board recognized that there was a retroactivity issue but at the same time was satisfied there was an under-recovery of costs due to a faulty accounting method. The Board, however, stated;

> In light of the above, while we accept that NRG's customers have underpaid by $531,794 and the 2003 PGCVA balances have not been finalized by the Board, we find that NRG's error has resulted in a substantial and avoidable accumulation of potential customers' charges, through no fault of the customer.
>
> We must therefore look for a balance.
>
> It would not be reasonable in our view to deny NRG recovery of reasonably incurred gas costs of a magnitude of $541,794 because of an accounting error. These are legitimate costs incurred prudently on behalf of the customers, and are of material consequence to the utility.
> Considering the need for NRG to recover its prudently incurred unrecorded gas costs and mitigating the impact on customers, as well as not creating undue inter-generational inequity, we find that the reasonable balance is recovery of the $531,794 amount over a three year period, in equal portions, without interest.
>
> Further, NRG shall not include the regulatory costs it incurred in this proceeding in estimating the regulatory costs for future test years.

[80] In summary, the Board in *NRG* allowed past costs to be recovered in future rates. However, the Board imposed a penalty and disallowed the interest claimed by NRG as well as the regulatory costs incurred to recover the missing gas costs and the legal costs associated with proceeding. The Board could have disallowed all recovery on a broad interpretation of the retroactivity rule. However, there as here, the Board must consider what constitutes just and reasonable rates. If by error there is an under-collection or over-collection it should be remedied going forward. The NRG decision was upheld by the Divisional Court[27] and the Court of Appeal[28].

---

[26] *Re Natural Resource Gas Ltd*, Board Review Decision, April 19, 2004.
[27] *Natural Resource Gas Ltd. v. Ontario Energy Board* [2005] OJ No. 1520 (Div. Crt.)

[28] *Natural Resource Gas Ltd. v. Ontario Energy Board* [2006] OJ No. 2961 (CA)

[81] It is also helpful to refer to Section 7.7 of the Retail Settlement Code. The Code provides that where there is a billing error from any cause that results in a consumer being overbilled, the distributor should credit the consumer the amount erroneously billed for a period of up to 6 years. In the case where the billing error causes the consumer to be under-billed, the distributor can charge the consumer the amount not previously billed. The time limit, however, varies depending on whether the customer is a residential or a non-residential customer. In the case of an individual residential customer, who is not responsible for the error, the maximum period for which the consumer may be charged is two years. However, in the case of a non-residential consumer, the consumer can be charged for the entire period.

[82] It is unlikely that Section 7.7 of the Retail Settlement Code applies to the case at hand. That is because the definition of a “consumer” in the Code is a person who uses electricity “for his own consumption”. While Brant County may not be a consumer within that definition, the section does indicate the Board’s policy with respect to billing errors – the rule against retroactivity does not apply.

**Board Findings – Retroactivity**

[83] For the reasons indicated above, the Board does not believe that the rule against retroactivity prevents the Board from correcting certain billing errors. It would appear that the rate should be significantly less than the rate used which means we have a case of overbilling for distribution services. And in the case of RTS, there has been a period when there was no billing and therefore under-collection.

[84] This leaves open the question regarding the date which billing should begin. The Board in the previous Decision set the Brant County rate (and the rates for other customers) effective September 1, 2008. The rates could have been made effective on April 21, which is the date of the Interim Order. The Board chose not to go back to April 21st because they felt that Brantford had been late in filing and penalized the utility by making the rates effective September 1. That Decision, however, had an unintended consequence. Brant County can argue that any distribution charges levied by Brantford beginning May 1, 2008 to September 1, 2008 had no force or effect. That is based on the argument that the Interim Order did not have a Brant County rate component because all it did was convert the 2007 rates from a Final Order to an Interim Order. The 2007 Rates Decision did not have a Brantford County rate.

[85] This clearly was not a matter addressed by the Panel in the July 18, 2008 Decision. Brant County does have an argument but it is a technical argument. The fact of the matter is that the utility provided service for the period of May 1, 2008 to September 1, 2008, and billed Brant County. In fact, Brant County paid one invoice. Having received service from the utility we believe that Brant County should pay for the service. But it should do so at the correct rate. Accordingly, Brantford is entitled to be paid distribution charges beginning as of May 1, 2008[29]. The rate to be used is the new rate to be set pursuant to this proceeding.

[86] The other question left open is whether Brant County should have time to pay. We believe that it is appropriate to allow Brant County 24 months to pay the distribution charges. Unlike the situation with RTS rates, there is no failure to bill by Brantford and accordingly interest shall be allowed on any outstanding balances.

**THE BOARD THEREFORE ORDERS THAT:**

1. Brantford shall file a proposed new distribution rate for Brant County within 10 days of this Decision. Brant County and Board staff will have 5 days, after receiving the proposed new rate, to file written comments on the proposed new rate.

2. Brant County shall pay the outstanding RTS charges within 30 days of the date of the Board's Order in this proceeding. The charges outstanding for Powerline Road date from July, 2008 while the charges outstanding for Colborne Street East and Colborne Street West date from October, 2005. No interest charges will be included in the Colborne Street East and Colborne Street West amounts. Interest will be allowed on the Powerline Road amounts.

3. The new distribution rate for Brant County shall be effective May 1, 2008. Brantford is entitled to interest on all outstanding amounts at the interest rate the Board currently allows for deferral accounts. The amount outstanding will be paid in 24 equal instalments commencing 30 days after the date of the Rate Order.

4. Brantford will track the amount of any revenue deficiency that may result from the differences in the GS > 50 kW rate and the new rate in a tracking account which will be considered for disposition by the Panel in Brantford's next rate case.

[29] Brantford does not seek payment for service prior to May 1, 2008. Brantford Power Inc. Final Argument paragraph 80.

**DATED** at Toronto, August 10, 2010

**ONTARIO ENERGY BOARD**

*Original Signed By*

_____
Gordon Kaiser
Vice-Chair

*Original Signed By*

_____
Ken Quesnelle
Board Member