Ontario Energy Board | Commission de l'énergie de l'Ontario

DECISION ON APPEAL

EB-2018-0205

Enbridge Gas Inc.

Appeal of Procedural Order No. 1

BEFORE: **Susan Frank**
Presiding Member

Michael Janigan
Member

Emad Elsayed
Member

April 30, 2019

1 INTRODUCTION

Enbridge Gas Inc. (Enbridge Gas) has applied to the Ontario Energy Board (OEB) for approval under section 36(1) of the *Ontario Energy Board Act*, *1998* (the Act) to increase rates to recover costs associated with meeting its obligations under the Federal *Greenhouse Gas Pollution Pricing Act*.

W. Shawn Davitt (Appellant) sought intervenor status in this proceeding. By way of procedural order, the OEB Registrar refused the Appellant's request for intervenor status. The Appellant appeals that order to the OEB.

For the reasons set out below, the OEB dismisses the appeal and declines to grant the Appellant intervenor status in this proceeding.

2 PROCESS

The OEB issued a Notice of Hearing for this proceeding on February 13, 2019. A number of parties applied for intervenor status including the Appellant. In his intervention request, the Appellant stated that he was intervening to ensure that the OEB complies with its governing statute and acts in a transparent manner. The Appellant further argued that the OEB has "frequently failed to comply with its governing statute and failed to act in a transparent manner." The Appellant cited, as an example, the OEB's December 14, 2018 Interim Decision and Accounting Order in this proceeding.[1] The Appellant further stated that the OEB failed to specify the legislative provisions which grant the OEB the authority to make such an Order.

In Procedural Order No. 1, the OEB Registrar denied the Appellant's request for intervenor status, finding that the Appellant did not have a substantial interest in the proceeding. The Registrar noted that the authority to create deferral accounts and issue accounting orders arises from the broad just and reasonable rate making powers under section 36 of the Act.

The Appellant appeals the Registrar's decision denying him intervenor status.[2] In doing so, he makes various allegations of unlawful actions, lack of impartiality, denial of natural justice and failure to observe the Appellant's rights under the Canadian *Charter of Rights and Freedoms* on the part of the OEB.

[1] In that Order, the OEB established the Federal Carbon Charge –Facility Deferral Accounts to record Enbridge Gas' facility related costs arising from the Federal *Greenhouse Gas Pollution Pricing Act.*
[2] The appeal is made pursuant to section 7 of the Act, which allows for the appeal from a delegated decision to the OEB.

3 DECISION

Rule 22 of the OEB's Rules of Practice and Procedure (Rules) provides that an intervenor must satisfy the OEB that he or she has a substantial interest in the proceeding and intends to participate actively and responsibly.

The OEB finds that the Appellant has not established a substantial interest in the proceeding. Proposed intervenors are required to demonstrate a *substantial* interest in the proceeding that should be distinct from a general public interest. In this case, the lawful and impartial execution of its statutory mandate is the concern of all citizens and self-appointment to pursue such principles does not, by itself, create a substantial interest within the scope of any OEB proceeding and the meaning of the Rules. The OEB, therefore, confirms the Registrar's decision denying the Appellant's intervention request.

In this decision, the OEB also wants to address the Appellant's concerns about the use of deferral and variance accounts that were raised in his original intervention request and more extensively in his appeal materials. Central to the Appellant's allegations of an error of law and subsequent misconduct by the OEB is his submission that the creation of deferral accounts by the order of the OEB on December 14, 2018 was done without legislative authority.

The Appellant submits that section 36 of the Act does not empower the OEB to create these accounts on the plain wording of the section. In addition, he notes that sections 78(3.02) and 78(3.04) of the Act specifically provide that the OEB has the power to create deferral or variance accounts for the smart meter initiative and costs associated with complying with Ministerial directives that require the establishment of conservation and demand management targets. The Appellant argues that if the OEB already had power to approve the creation of such deferral and variance accounts pursuant to section 36 of the Act, the inclusion of specific language in the referenced subsections of section 78 would not be necessary. In his view, the requirement to maintain internal coherence when interpreting a statute supported his conclusion. The Appellant also argued that as the language of section 36 is non-specific in contrast to those subsections of section 78, the inference that similar powers exist cannot be sustained.

The OEB notes that the creation and operation of deferral and variance accounts is a standard practice for regulated utilities in Ontario. They enable the correct accounting of future costs that are uncertain and difficult to predict. They are essential to prevent misallocation and/or avoid impermissible retroactive ratemaking.

The Ontario Court of Appeal in *Union Gas Limited v. Ontario Energy Board* (Union Gas Decision)[3] dealt with a disputed allocation of revenues to a deferral account associated with the sale of the commodity of natural gas. Those accounts were established and maintained under the OEB's general section 36 authority. In the Union Gas Decision, the Court of Appeal explained that:

> Deferral accounts allow a regulator to separately accumulate certain amounts (costs or revenues) before deciding by order, at specified intervals, to what extent, if at all, such costs or revenues will be charged to ratepayers as part of rates. Because it is contemplated from the outset that amounts in deferral accounts will be disposed of in a manner that affects rates, deferral accounts do not offend the principle against retroactive ratemaking. [4]

The importance of deferral accounts in regulation was also noted in the Union Gas Decision by reference to the Supreme Court of Canada Decision in *Bell Canada et al*:

> In *Bell Canada v. Bell Alliant Regional Communications*, 2009 SCC 40, [2009] 2 S.C.R. 764, ("*Bell Alliant*"), the Supreme Court noted, at para. 54, that deferral accounts are "accepted regulatory tools" that "'enabl[e] a regulator to defer consideration of a particular item of expense or revenue that is incapable of being forecast with certainty for the test year'". [5]

The Court of Appeal in the Union Gas Decision reviewed the relevant statutory provisions including the authority for deferral and variance accounts pursuant to section 36:

> Under s. 36(3) of the Act, "[i]n approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate."
>
> Deferral accounts are not defined in the Act. However, under ss. 36(4.1) and (4.2), the Board must dispose of the balances in deferral accounts at

[3] *Union Gas Limited v. Ontario Energy Board,* 2015 ONCA 453.
[4] *Ibid.* at para. 5.
[5] *Ibid.* at para. 89.

> specified intervals. Deferral accounts relating to the commodity of natural gas are to be reflected in rates within a maximum of three months, and deferral accounts relating to other items, including transportation costs, are to be reflected in rates within a maximum of 12 months. [6]

Sections 36(4.1),(4.2), (4.3), (4.4), (4.5) of the Act set out the following :

> Deferral or variance accounts
> (4.1) If a gas distributor has a deferral or variance account that relates to the commodity of gas, the Board shall, from time to time, or as prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates.
>
> (4.2) If a gas distributor has a deferral or variance account that does not relate to the commodity of gas, the Board shall, from time to time, or as prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates.
>
> (4.3) An order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates shall be made in accordance with the regulations.
>
> (4.4) If an order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates is made after the time required by subsection (4.1) or (4.2) and the delay is due in whole or in part to the conduct of a gas distributor, the Board may reduce the amount that is reflected in rates.
>
> (4.5) If an amount recorded in a deferral or variance account of a gas distributor is reflected in rates, the Board shall consider the appropriate number of billing periods over which the amount shall be divided in order to mitigate the impact on consumers.

[6] *Ibid.* at paras. 26-27.

If the powers of the OEB to create deferral and variance accounts are limited to the subsections of section 78 of the Act, as argued by the Appellant, it is difficult to explain the reason for these provisions for other types of deferral and variance accounts. This is particularly the case where these subsections of section 36, in one form or another, predate the effective date of sections 78(3.02) and 78(3.04).[7]

Finally, the Appellant's suggested remedy for abjuring deferral accounts is for Enbridge Gas to increase rates, presumably on a forecast basis. Such an approach recreates the problems of uncertainty and misallocation that deferral and variance accounts were meant to solve.

The OEB affirms the use of deferral and variance accounts as important regulatory tools to fix or approve just and reasonable rates in accordance with section 36(3) of the Act.

The OEB dismisses the Appeal of the Appellant and declines to grant intervenor status pursuant to Rule 22 of the Rules.

DATED at Toronto April 30, 2019

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

[7] The OEB notes that in December 2003, sections 36 (4.3), (4.4) and (4.5) remained the same as they are currently and sections 36(4.1) and (4.2) stated as follows:
(4.1) If a gas distributor has a deferral or variance account that relates to the commodity of gas, the Board shall, at least once every three months, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates.
(4.2) If a gas distributor has a deferral or variance account that does not relate to the commodity of gas, the Board shall, at least once every 12 months, or such shorter period as is prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates.
The 2017 revisions to section 36(4.1) and (4.2) provided for increased flexibility on the timing of orders to determine whether and how amounts in the accounts were to be reflected in rates. There was no change to the expected use of variance or deferral accounts.