



Ontario
Energy
Board

Commission
de l'énergie
de l'Ontario

DECISION ON MOTION

EB-2020-0156

MOTION BY INDUSTRIAL GAS USERS ASSOCIATION TO REVIEW AND VARY THE ONTARIO ENERGY BOARD'S DECISION IN EB-2019-0194

BEFORE: Michael Janigan
Presiding Member

Emad Elsayed
Member

Cathy Spoel
Member

September 24, 2020

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1 INTRODUCTION AND SUMMARY

Enbridge Gas Inc. (Enbridge Gas) filed an incentive rate-setting mechanism (IRM) application with the Ontario Energy Board (OEB) on October 8, 2019, seeking approval for changes to its natural gas distribution rates to be effective January 1, 2020 (2020 Rates Proceeding).¹ Phase 1 of the proceeding addressed the IRM related elements and certain deferral and variance accounts. In a decision issued on December 5, 2019, the Hearing Panel accepted a settlement between the applicant and intervenors on all issues in Phase 1 of the proceeding. Phase 2 of the proceeding addressed the remaining matters including Incremental Capital Module Funding, Cost Allocation, Unaccounted for Gas and E-billing. The Hearing Panel issued a decision and order on May 14, 2020 on all outstanding matters in Phase 2 of the proceeding (Decision). With respect to cost allocation, the Hearing Panel determined that changes to the methodology and implementation should be examined as part of Enbridge Gas's 2024 rebasing application. While the Hearing Panel acknowledged in its Decision that the current cost allocation methodology for the Union Gas rate zone was outdated, the Hearing Panel determined that cost allocation changes are more appropriate at rebasing.

On June 3, 2020, an intervenor in that proceeding, the Industrial Gas Users Association (IGUA), filed a motion pursuant to Rule 40.01 of the OEB's *Rules of Practice and Procedure*. IGUA asked the OEB to review and vary that part of the Decision which deferred the reallocation of the Panhandle System costs until Enbridge Gas's next rebasing in 2024. In the Notice of Hearing and Procedural Order No. 1 dated June 17, 2020, the OEB invited written submissions on both the threshold question of whether the matter should be reviewed and the merits of IGUA's motion.

Most intervenors, Enbridge Gas and OEB staff opposed the motion. For reasons that follow, the Review Panel dismisses the motion.

¹ EB-2019-0194.

2 THE PROCESS

On June 3, 2020, IGUA filed a motion to review and vary the Hearing Panel's Decision pertaining to the allocation of Panhandle Reinforcement Project costs (Panhandle System costs). In the Notice of Hearing and Procedural Order No. 1 issued on June 17, 2020, the OEB determined that it would consider the threshold question of whether the matter should be reviewed at the same time it would hear submissions on the merits of the motion. The OEB adopted as intervenors in this proceeding the intervenors from the 2020 Rates Proceeding. The OEB set procedural timelines for IGUA to file additional submissions in support of its motion, other parties and OEB staff to file written submissions, and IGUA to file a reply submission.

IGUA filed additional submissions on June 30, 2020. Intervenors, Enbridge Gas and OEB staff filed written submissions on July 17, 2020 and IGUA filed its reply submission on August 3, 2020. The following intervenors filed submissions in this proceeding:

- Building Owners and Managers Association (BOMA)
- Canadian Manufacturers and Exporters (CME)
- Consumers Council of Canada (CCC)
- Ontario Greenhouse Vegetable Growers (OGVG)
- Pollution Probe
- School Energy Coalition (SEC)
- Vulnerable Energy Consumers Coalition (VECC)

3 DECISION

3.1 History of Panhandle System Costs

In June 2016, the former Union Gas Limited (Union Gas) applied to the OEB to reinforce the Panhandle System by constructing approximately 40 kilometres of pipeline in the Municipality of Chatham-Kent.² The Panhandle System is a primary transmission pipeline used to transport natural gas from Dawn and the Ojibway Valve Site in Windsor to high pressure distribution lines serving customers in southern Ontario. The need to reinforce the Panhandle System was largely driven by growth in the greenhouse market.

In the Panhandle Reinforcement leave to construct proceeding, Union Gas proposed a cost allocation methodology for the project that was different from the OEB's approved cost allocation methodology.³ The Panhandle System and the St. Clair System had been combined for cost allocation purposes since Union Gas's Rate C1 was first introduced in Union Gas's cost allocation study in 1999. The main reason for combining the two systems was that both systems provide transportation service between the river crossings west of Dawn and the Dawn Compressor Station.⁴ However, with the addition of significant project costs related only to the Panhandle System (resulting from the reinforcement) and no change to the cost of the St. Clair System, the use of the combined system for cost allocation purposes no longer reflected the costs to serve the customers using each respective transmission system.⁵ IGUA supported the proposed change in cost allocation of Panhandle System costs noting that it was in accordance with the principle of cost causation (costs in line with benefits).⁶ However, in the leave to construct decision the OEB determined that Union Gas's proposed change to the cost allocation methodology should be reviewed at Union Gas's next cost of service application which at that time was expected to be for 2019 rates.

IGUA raised the issue of Panhandle System cost allocation in Union Gas's 2018 rates proceeding.⁷ In a Procedural Order in that proceeding, the OEB determined that cost allocation issues would be better addressed prior to Union Gas entering another price

² EB-2016-0186.

³ EB-2016-0186, Exhibit A, Tab 8, p. 7.

⁴ EB-2016-0186, Exhibit J1.2, Attachment 2, p. 1.

⁵ EB-2016-0186, Exhibit A, Tab 8, p. 7.

⁶ EB-2016-0186, IGUA Submission, p. 8.

⁷ EB-2017-0087.

cap rate mechanism framework.⁸ The OEB noted that it would not be appropriate to address cost allocation changes in the last year of the existing IRM framework (2014 to 2018 IRM framework). Prior to the issuance of the procedural order in the 2018 rates proceeding, Union Gas and Enbridge Gas Distribution filed a separate application to amalgamate (the MAADs proceeding) and sought approval of a rate setting mechanism and associated parameters, to be effective January 1, 2019.⁹

In a decision issued on August 30, 2018, the OEB approved the amalgamation of Union Gas and Enbridge Gas Distribution. In response to concerns raised by IGUA and some other intervenors regarding inequities in cost allocation and the over-allocation of costs for some rate classes, the OEB noted:

However, the OEB is concerned about the cost allocation issues raised by parties for Union Gas' Panhandle and St. Clair systems. The OEB therefore requires Amalco [Enbridge Gas] to file a cost allocation study in 2019 for consideration in the proceeding for 2020 rates that proposes an update to the cost allocation to take into account the following projects: Panhandle Reinforcement, Dawn-Parkway expansion including Parkway West, Brantford-Kirkwall/Parkway D and the Hagar Liquefaction Plant. This should also include a proposal for addressing TransCanada's C1 Dawn to Dawn TCPL service. The OEB accepts that this proposal will not be perfect, but is intended to address the cost allocation implications of certain large projects undertaken by Union Gas that have already come into service.¹⁰

As directed, Enbridge Gas filed a cost allocation study for the legacy Union Gas rate zones in the 2020 Rates Proceeding. Enbridge Gas requested that changes resulting from the cost allocation study be implemented at the next rebasing. In the event the Hearing Panel disagreed and decided that the changes should be implemented prior to rebasing, Enbridge Gas indicated that it would only be able to implement the changes in the 2021 rates application.¹¹

The Association of Power Producers of Ontario (APPrO) and IGUA argued that if the implementation of the cost allocation study were delayed until 2024, the existing inequity would continue for another four years and large customers would continue to

⁸ EB-2017-0087, Procedural Order No. 3, November 29, 2017.

⁹ EB-2017-0306/0307 – Approval to amalgamate under the OEB's policy of mergers, acquisitions, amalgamations and divestitures (MAADs).

¹⁰ EB-2017-0306/0307, Decision and Order (MAADs Decision), August 30, 2018, p. 41.

¹¹ EB-2019-0194, Cost Allocation Evidence, November 27, 2019.

overpay. They urged the Hearing Panel to implement the changes in 2021. On the other hand, most intervenors, OEB staff and Enbridge Gas supported the deferral of cost allocation changes to the next rebasing. Intervenors and OEB staff submitted that significant rate increases as a result of cost allocation changes during an IRM regime were not appropriate as customers expect a certain amount of rate stability and predictability during IRM. Intervenors and OEB staff argued that the proposed changes were isolated in nature and did not present a complete picture of the costs and revenues that is common in a cost allocation study done at rebasing.

In its Decision in the 2020 Rates Proceeding, the Hearing Panel acknowledged that the current cost allocation is outdated but determined that it was better to wait until rebasing to make cost allocation changes on a holistic basis than to make selective updates in the interim:

The OEB acknowledges that the existing cost allocation over time has resulted in changes to the costs and benefits to certain parties since the OEB approved Union Gas's 2013 cost allocation study. Accordingly, Enbridge Gas responded to the OEB's direction in the MAADs Decision to undertake a new cost allocation study. However, the OEB notes that, consistent with the approved rate setting mechanism, the rates for 2020 continue to be decoupled from costs. Rate stability and predictability offered through incentive regulation also rely on the decoupling of rates from the allocating utilities' costs among different customer classes. At the next rebasing, potential changes to the comprehensive cost allowance are anticipated including other adjustments to rate base, possible rate harmonization proposals and rate design changes.¹²

IGUA then filed this motion to review and vary the Hearing Panel's Decision insofar as it dealt with the allocation of Panhandle System costs.

3.2 Position of Parties

Summary of Motion Grounds

IGUA argued that the Hearing Panel's May 14, 2020 Decision failed to provide sufficient reasons for deferring the Panhandle System cost allocation issue to rebasing in 2024. IGUA asserted that the Hearing Panel's findings on that issue "consisted of perfunctory

¹² EB-2019-0194, Decision and Order, May 14, 2020, p. 17 (internal footnotes omitted).

statements of broad principle without any substantive analysis of the application of those principles in light of previous Board decisions and the record, and did not meaningfully grapple with key issues and central arguments raised by the parties”. Referencing the Supreme Court of Canada’s decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*,¹³ IGUA argued that the Hearing Panel’s reasons did not meet the legal requirement to demonstrate justification, transparency and intelligibility, and that “IGUA and its affected members have been unable to conclude that they have actually been listened to.”

In particular, IGUA submitted that the Hearing Panel’s reasons did not adequately explain why the cost allocation issue should be deferred even though the OEB had expressed concern about it in previous cases going back to the leave to construct proceeding, and in fact had specifically directed Enbridge Gas in the MAADs case to prepare a cost allocation study for consideration in the 2020 Rates Proceeding. IGUA maintained that “there is no dispute that ... the Panhandle System costs are currently inequitably allocated” and that the 2020 rates panel “completely ignore[d] a line of previous Board decisions on this very issue”. According to IGUA, as a result of the Hearing Panel’s Decision, addressing the known allocation inequity which was initially expected to happen in 2019, will now have to wait until 2024. Until then, some customers “who do not in any way rely on or utilize the Panhandle System” will continue paying for it. IGUA noted that implementing the cost allocation changes in accordance with the cost allocation study filed by Enbridge Gas in the 2020 Rates Proceeding would “remove from rates T2, M16 and C1, \$12.6 million dollars of revenue requirement that is being inappropriately and inequitably recovered from these customers for the Panhandle System in 2019, and reallocate that revenue requirement to those customers who are relying on the Panhandle System.”

IGUA also alleged that the May 14, 2020 Decision contained a factual error. IGUA pointed to the statement that “The OEB acknowledges that the current cost allocations are outdated; however, attempting to make selected changes at this time will be disruptive to the predictability of rates and result in more changes in 2024.” It argued that there was no evidence to substantiate the conclusion that making selected changes to the Panhandle System cost allocation now would result in more changes when a comprehensive cost allocation is considered at rebasing.

IGUA maintained that the shortcomings of the 2020 Rates Hearing Panel’s reasoning in the Decision render the cost allocation determination legally deficient, and thus merit a

¹³ 2019 SCC 65.

review by the Review Panel considering this motion. IGUA submitted that the Review Panel should consider the matter “duly informed, but not wholly constrained” by the IRM objective of rate stability and predictability. IGUA noted that it had been “patient and respectful of the Board’s process for almost 4 years now, through 4 proceedings and 5 decisions which consistently accepted deferral of rectification of a clear and acknowledged inequity in the allocation of Panhandle System costs for a short period of time pending imminent rebasing or, as determined in the Merger Decision, to be addressed now as part of establishing EGI’s [Enbridge Gas] current IRM rate plan. The cross-subsidy of millions of dollars annually which first appeared in 2018 rates has continued throughout this period.”¹⁴

Relief Requested

In this motion, IGUA asks the Review Panel to vacate the May 14, 2020 finding on the Panhandle Cost allocation issue, and to direct Enbridge Gas “to file a rate design proposal for adjustment of rates either in accord with the cost allocation study filed in the 2020 Rates Application or, in the alternative, in accord with the methodology for allocation of incremental Panhandle System Reinforcement Project costs proposed by (then) Union Gas in its application for leave to construct the Panhandle Reinforcement, but in either case for implementation in 2021 rates.”¹⁵

Threshold Question

Rule 43.01 of the OEB’s *Rules of Practice and Procedure* states that, where a motion to review is filed, “the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.”

In the Natural Gas Electricity Interface Review (NGEIR) case – in a passage that has since been cited several times – the OEB explained the threshold test as follows:

Therefore, the grounds must “raise a question as to the correctness of the order or decision”. In the panel’s view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

¹⁴ IGUA Reply Submission, p. 15, para. 62.

¹⁵ *ibid*, para. 69.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.¹⁶

IGUA maintained that, as required by the threshold criteria set forth in the NGEIR decision, there were identifiable errors in the Hearing Panel Decision, that, if corrected, would change the outcome of the decision. These included:

1. Error of fact: The Hearing Panel's conclusion that the making of the cost allocation changes to Panhandle System costs now would necessitate further changes in the 2024 rebasing.
2. Errors that are "something of a similar nature": The Hearing Panel did not meet the requirements of reasonable decision-making by failing to consider evidence, failing to address material issues, and the making of findings inconsistent with previous OEB decisions.

BOMA submitted that IGUA did not raise any new issues in its motion that it had not already raised in its several submissions on cost allocation over the last four years. Similarly, some intervenors suggested that the motion was simply an attempt by IGUA to re-argue its position before another hearing panel of the OEB, after it had been fully argued in the 2020 Rates Proceeding.

¹⁶ Decision with Reasons, May 22, 2007 (EB-2006-0322/EB-2006-0338/EB-2006-0340), p. 18.

OEB staff, while opposing the motion on the merits, argued that it met the threshold test and should be heard. OEB staff submitted that IGUA's contention that the Hearing Panel's reasons were inadequate warrants consideration on the merits by the Review Panel. If IGUA was right, and the reasons were insufficient, that would cast the "correctness" of the Decision in doubt. OEB staff argued that, although the reasons in this case withstand scrutiny, the Review Panel should not simply decide at the threshold stage not to scrutinize them.

Adequacy of Hearing Panel Reasons

IGUA maintained that the Hearing Panel failed to provide reasons that satisfy the requirements of administrative tribunal decision-making set out in *Vavilov*. Applying the *Vavilov* requirements, IGUA argued that the reasons were deficient because they failed to explain how and why a decision was made and show that its arguments were considered.¹⁷ IGUA further submitted that based on the *Vavilov* decision, "The reasonableness of a decision may be jeopardized where the decision maker has failed to account for the evidence before it."¹⁸

In response, SEC argued that the Hearing Panel did exactly what was required by administrative decision-makers as per the *Vavilov* ruling, which was to "meaningfully grapple with key issues or central arguments raised by the parties".¹⁹ SEC stated that the Hearing Panel agreed that the current allocation of Panhandle System costs was unfair to certain large volume customers but on balance decided that it was not appropriate to implement changes during an IRM. SEC submitted that the absence of a regurgitation of the history of the issue and a discussion of every argument does not render the Hearing Panel's Decision unreasonable. As the *Vavilov* case stated, "written reasons given by an administrative body must not be assessed against a standard of perfection".²⁰ SEC argued that while the OEB should strive for perfection, it is not a standard that it has to meet. SEC submitted that *Vavilov* provides a useful guide to administrative decision-makers, including the OEB, on the importance of reasons, but it is not a sufficient basis to grant the motion to review. SEC argued that insufficiency or inadequacy of reasons are not themselves a standalone ground for review. To be reviewable, defects in the reasons must undermine or raise questions as to the

¹⁷ IGUA Motion submissions para. 28.

¹⁸ IGUA Motion submissions para. 34.

¹⁹ *Vavilov*, para. 128.

²⁰ *Vavilov*, para. 91.

reasonableness of the decision. SEC added that the Hearing Panel exercised its discretion reasonably, and on that basis, IGUA's motion should be dismissed.

CME disagreed with IGUA's characterization of the Decision as "unreasonable". CME noted that courts have regularly found that the OEB has a "wide ambit of power in its rate setting function".²¹ CME argued that decisions of the OEB are entitled to substantial deference and should be reviewed on the "reasonableness" standard. CME further cited *Vavilov* for the proposition that reasonableness review is not a "line-by-line treasure hunt for error".²² CME submitted that the reasons regarding cost allocation in the 2020 rates Decision allow a reviewing body to identify a rational chain of analysis which leads from the evidence on the record to the ultimate decision.

OEB staff acknowledged that the reasons in this case on the cost allocation issue could have been more detailed. Nevertheless, although brief, the reasons fulfilled their fundamental purpose: to "explain how and why [the] decision was made".²³

IGUA in reply argued that the Hearing Panel's Decision on Panhandle System costs allocation presents no analysis, does not provide assistance in understanding the rationale for the departure from four previous decisions of the OEB regarding the appropriate time to address the issue, does not consider any facts and is not reasonable.

Reasonableness of the Hearing Panel Deferral Decision

Contrary to IGUA's suggestion, OGVG submitted that the Hearing Panel in the 2020 Rates Proceeding was "alert and sensitive to the matters before it", and the Hearing Panel expressly acknowledged in its Decision that the cost allocation of the Union Gas rate zone underpinning 2013 rates had changed.

OEB staff submitted that there were countervailing factors identified by Enbridge Gas and others, in particular, the importance of rate stability and predictability during the period between rebasing that were given greater weight by the 2020 Rates Proceeding Hearing Panel in the deferral of cost allocation changes for the Panhandle system to the 2024 rebasing. Moreover, although IGUA's argument is grounded in a concern about fairness, the Hearing Panel recognized that it can also be unfair to make changes to cost allocation on a piecemeal basis.

²¹ *Toronto Hydro-Electric Systems Ltd. v. Ontario Energy Board*, 2010 ONCA 284, paras. 25-28.

²² *Vavilov*, para. 102.

²³ OEB Staff submission, p. 8.

SEC argued that in the rate-setting context, there is almost never a clear right or wrong answer. Most OEB decisions require the balancing of various competing considerations. Sometimes different hearing panels looking at similar evidence will reach different outcomes, each of which can be reasonable. SEC further added that the Hearing Panel in its Decision took into account the reasonable balancing of competing interests between customer classes in setting just and reasonable rates.

VECC disagreed with the claims of IGUA that the 2020 Rates Decision on cost allocation contains insufficient explanation to meet the test of reasonableness. VECC referred to the Decision wherein the Hearing Panel noted that the IRM framework requires decoupling of costs from rates and selective changes were disruptive to rate stability.

IGUA in reply argued that there was no such balancing of competing considerations and interests or weighing or reviewing of evidence or costs vs. benefits reflected in the Hearing Panel's Decision. IGUA also noted that the decoupling of costs during an IRM was not limitless, either in time (as indicated by the OEB's clear expectations in previous decisions that the misallocation of Panhandle System costs would be imminently addressed) or scope (as evidenced by the capital pass-through treatment of Panhandle System costs to rates during Union Gas's IRM).

Consistency with Previous OEB Decisions

IGUA submitted that while the Hearing Panel stated the principles of rate stability and predictability, and it referred to the position of the parties, it did not engage with the issues, the evidence, the positions, or the expectations of the previous OEB panels that dealt with the Panhandle System cost allocation question. IGUA argued that the Hearing Panel completely ignored the previous OEB decisions on the issue:

The 2020 Rates Application Hearing Panel did not, despite the legitimate expectations of IGUA and its affected members based on 4 Board rulings over the prior 3 years, address the current and continuing misallocation of Panhandle System costs as expected by the Cost Allocation Directive, or reasonably explain why it was not now prepared to do so and thus why it effectively reversed the Board's recent Cost Allocation Directive despite no material change in circumstances.²⁴

VECC noted that IGUA was essentially emphasizing the last sentence of the OEB's finding in the MAADs Decision, "The OEB accepts that this proposal will not be perfect,

²⁴ IGUA Submissions on Motion, June 30, 2020, para 47.

but is intended to address the cost allocation implications of certain large projects undertaken by Union Gas that have already come into service.”²⁵ VECC submitted that IGUA assumed that the MAADs panel’s direction of requiring a cost allocation proposal and recognizing that any proposal would likely be imperfect, implies that a new cost allocation is required to be implemented prior to rebasing. VECC disagreed with the assumed connection. VECC noted that the panel in the MAADs proceeding did not have detailed evidence on the impact of the cost allocation update on the various rate classes; it merely directed Enbridge Gas to file a cost allocation proposal.

OEB staff, CME, OGVG and SEC made a similar observation noting that the MAADs Decision merely required Enbridge Gas to file a cost allocation proposal; it was up to the Hearing Panel in the 2020 Rates Proceeding to determine what to do about that proposal. Had the MAADs panel intended for cost allocation changes to be implemented in 2020, regardless of the results of the study, it would have said so expressly.

OEB staff referenced other OEB decisions where the OEB rejected selective changes to cost allocation. OEB staff referred to a decision where the OEB denied a proposal by Horizon Utilities Corporation (Horizon) to update the load profile for the street lighting class in the absence of new load profile data for other classes, stating that: “there is no advantage to selective updating. Until data that is more accurate is available for all classes, Horizon must continue to use the existing load profiles for the purpose of its cost allocation model.”²⁶ That decision was upheld on appeal by the Divisional Court, which observed that “the Board’s concern with selectively updating load profiles based on partial load data is one of fairness.”²⁷

In response, IGUA argued that the determination provided little guidance in respect of Panhandle System costs for which Enbridge Gas has provided (in the 2020 Rates Proceeding and other referenced proceedings) better information on allocation of these costs to all rate classes.

The Alleged Factual Error

IGUA maintained that “rectification of the discrete inequity resulting from the legacy approach to allocating Panhandle System costs can and should be addressed now.”²⁸ IGUA argued that the Hearing Panel was in error in concluding that making selected

²⁵ EB-2017-0306/0307, Decision and Order, August 30, 2018, pg. 41.

²⁶ Decision and Order, December 10, 2015 (EB-2015-0075), pp. 6-7.

²⁷ *Hamilton (City) v. The Ontario Energy Board*, 2016 ONSC 6447, para. 10.

²⁸ IGUA Submissions on Motion para. 69.

changes to Panhandle System cost allocations now will result in more changes when a comprehensive cost allocation is considered at rebasing.

SEC submitted that a cost allocation adjustment based only on a subset of costs is rarely a good idea and generally avoided by the OEB. Implementation of the partial review would have seen significant rate increases in 2020 and further adjustments in 2024 upon rebasing. The Hearing Panel in the 2020 Rates Decision noted that implementing cost allocation changes now would be disruptive to the predictability of rates and result in more changes in 2024.

OEB staff disagreed with IGUA's interpretation of the Hearing Panel's Decision and contended that there was no factual error. OEB staff submitted that all the Hearing Panel had meant was that "the specific allocation issues addressed in the study would still need to be re-evaluated as part of a comprehensive review of costs, cost allocation and rate design in the next rebasing proceeding as is typically the case in a cost based application. Adjusting rates now (beyond the routine annual adjustments contemplated under incentive regulation) would cause ratepayers to experience more rate volatility than they would normally expect during the IRM term."²⁹

CME also noted that nothing about IGUA's argument invalidates or negates the existence of Enbridge Gas's evidence that other adjustments are likely needed at rebasing if IGUA's proposal for cost allocation changes were implemented now.

In reply, IGUA noted that although cost allocation changes would occur in 2024, there was no evidence on the record that addressing the Panhandle System cost allocation now would result in further changes in 2024, or that further changes in 2024 would in any way undermine or negate the rectifications made now to Panhandle System cost misallocations. IGUA maintained that if the Hearing Panel in the 2020 Rates Proceeding based its determination on this assumption, it did so without any supporting evidence or explanation and in fact, as a "bald" conclusion.³⁰

OEB Policy on Revenue to Cost Ratios

OEB staff further noted that there are additional reasons that support the Hearing Panel's 2020 Rates Decision. OEB staff referred to the arguments of OGVG in its original submission regarding the revenue to cost (RTC) ratios.³¹ OEB staff referenced the OEB policy where it has indicated that a perfect match between revenues and

²⁹ OEB Staff Submissions, p.9

³⁰ IGUA Submissions, para 43

³¹ [OGVG submission](#), pp. 3-7.

allocated costs is not always achievable or in some cases even desirable.³² Currently, the target range for both the large user class and the residential class in the electricity sector is 0.85 to 1.15 (sometimes expressed as 85% to 115%), and for the GS < 50 kW and GS 50 to 4,999 kW classes, it is 0.80 to 1.20 (or 80% to 120%).³³ An RTC ratio of 1.0 means that the rate class is paying its full share of the allocated costs. OEB staff noted that the OEB has also tolerated a departure from 1.0 or “unity” in gas cases. For instance, in the recent EPCOR Southern Bruce decision, the OEB approved an RTC ratio of 0.78 for one class and 1.37 for another.³⁴

The current RTC ratio which includes the allocation of the costs of the Panhandle System and other capital pass-through projects (under the existing cost allocation methodology) is 1.148 for the T2 class (IGUA’s constituents).³⁵ The RTC ratio for the T2 class as approved in Union Gas’s 2013 cost of service proceeding was 1.0. Although an RTC ratio of 1.148 indicates that there is some cross-subsidization of other rate classes by the T2 class, OEB staff and OGVG submitted that it is within a reasonable range that should be tolerated within an IRM period.

OEB staff also agreed with OGVG’s submission in the 2020 Rates Proceeding that the threshold for making changes to cost allocation should be relatively high, given the fundamental decoupling of rates from costs during an IRM period.³⁶ OGVG had further added that it is inevitable that RTC ratios will shift over the course of an IRM period, and that such shifting should largely be tolerated as a necessary consequence of an IRM framework where costs are likely to shift amongst rate classes over time.

OEB staff further noted that if the cost allocation changes pertaining to Panhandle System costs are implemented, it would result in a rate reduction of \$4.9 million for the T2 class.³⁷ That works out to an average of a little more than \$200,000 for each of the 23 customers in the class that are large users of gas. OEB staff noted that the resulting bill impact for the average T2 customer in the Union South rate zone would be a reduction of less than 1% on the total bill. IGUA disagreed with the continuing cross-subsidies of several million dollars and maintained that these amounts do not represent a “modest benefit” as claimed by OEB staff. OEB staff further noted that implementing the cost allocation changes would result in significant rate increases for other ratepayer

³² [Report of the Board: Review of Electricity Distribution Cost Allocation Policy](#), March 31, 2011 (EB-2010-0219); [Report of the Board: Application of Cost Allocation for Electricity Distributors](#), November 28, 2007 (EB-2007-0667).

³³ *Ibid.*

³⁴ [Decision and Order](#), November 28, 2019 (EB-2018-0264), p. 17.

³⁵ [Cost Allocation Study](#), Tables 1 and 3, and Working Papers Schedule 4, p. 1.

³⁶ [OGVG submission](#), p. 4.

³⁷ IGUA submission, para. 34; *ibid.*, Table 2.

classes: 7% for Rate 10, 15% for Rate 25, 10% for each of Rate M4 (small) and Rate M7 (large).³⁸

With respect to RTC ratios, IGUA in reply referenced the OEB's policy which requires that "distributors should endeavor to move their revenue-to-cost ratios closer to one if this is supported by improved allocations".³⁹ Pursuant to the MAADs direction on cost allocation, IGUA argued that there was now an improved allocation for Panhandle System costs; i.e. the improved allocations contemplated by the referenced OEB policy. IGUA submitted that the OEB policy does not support an RTC ratio for T2 customers that has now moved significantly away from unity. IGUA further argued that the movement in the RTC ratio was not the result of cost efficiencies during an IRM (where costs are changing but rates are not increasing), but it was largely due to the result of passing through, to the wrong customers, the revenue requirement impact of \$264.5 million in Panhandle System expansion costs. IGUA submitted that the reasons in the 2020 Rates Decision reflected no such deliberations.

IGUA also noted that to the extent that the Hearing Panel was concerned about rate impacts for certain rate classes, it could direct Enbridge Gas to provide an appropriate rate mitigation proposal.

Other Submissions

The only intervenor to express support for IGUA's motion was Pollution Probe. In a short submission, Pollution Probe said, "it supports the timely resolution of cost allocation issues unless there is a specific reason for delaying the review to 2024."

For its part, Enbridge Gas opposed the motion. While taking no position on whether the motion met the threshold test, Enbridge Gas submitted that, if the Review Panel determines the test has been met, the motion should be dismissed on the merits, and referred the Review Panel to the evidence and arguments presented by Enbridge Gas in the 2020 Rates Proceeding.

³⁸ [OEB staff submission](#), p. 11; [Exhibit I.Staff.4](#).

³⁹ [Report of the Board: Review of Electricity Distribution Cost Allocation Policy](#), March 31, 2011 (EB-2010-0219); p. iii and p. 36.

3.3 Findings

General

The Review Panel finds that there was no error made by the Hearing Panel in its Decision to defer consideration of the allocation of Panhandle System costs until the rebasing of costs takes place in 2024. The Decision followed the IRM ratemaking framework established by the OEB. This framework discourages mid-term rate changes in response to changes in costs after base rates are established. The Review Panel also finds that the Hearing Panel did not err in concluding that a deferral of the issue was also merited based on a likelihood that a cost adjustment for the Panhandle System costs now would again be subject to review when the rebasing of rates takes place in 2024. IGUA's motion to review and vary the Hearing Panel Decision is dismissed.

Motion Grounds:

IGUA's grounds for its motion can be summarized as follows:

1. The Hearing Panel Decision was unreasonable because:
 - (i) The Hearing Panel failed to provide sufficient reasons to justify the rejection of the argument of IGUA to reallocate costs attributed to the Panhandle System in accordance with the study filed in that proceeding;
 - (ii) In deferring consideration of any reallocation of costs, the Hearing Panel ignored the effect of previous decisions of the OEB concerning the issue of Panhandle System costs without providing adequate reasons for so doing.
2. The Hearing Panel erred in concluding that a reallocation of Panhandle System costs in that proceeding would result in further changes to the allocation of those costs when rebasing takes place in 2024.

Threshold Test

Rule 42.01 of the OEB's *Rules of Practice and Procedure* provides that a motion to review and vary an OEB decision must provide grounds that "raise a question as to the correctness of the order or decision".

IGUA contends that, as the Decision does not set out reasons that justify the deferral of the reallocation of costs of the Panhandle System, the continued misallocation provides an inequitable result which must be varied. In addition, IGUA alleges that the Hearing Panel made a factual error in finding that a reallocation of Panhandle System costs would result in further changes to the allocation of those costs when a full rebasing occurs in 2024.

The Review Panel notes that the alleged failure of the Hearing Panel to provide adequate reasons must be coupled with proof of unreasonableness of the decision for a motion to succeed with its objective of variance. Likewise, IGUA's argument that the Hearing Panel's conclusion that Panhandle System costs might require further reallocation in 2024 must also be shown to raise an issue of correctness.

The Review Panel finds that the IGUA motion meets the threshold test and that the Review Panel will consider whether the elements of proof required to establish that the Decision was incorrect have been established by the motion applicant.

The Hearing Panel's Reasons

IGUA cites, in support of its argument, the brevity of the conclusions provided by the Hearing Panel in its disposition of the issue in question. The Decision does not provide an extensive discussion of the merits of making the cost allocation changes favoured by IGUA, as opposed to a deferral of the matter until rebasing in 2024. However, any determination of the adequacy of reasons provided must consider the context in which the Decision was made.

Enbridge Gas's rates for 2020 were determined using an IRM. As the OEB's Utility Rates Handbook provides:

Under this methodology, base rates are set through a cost of service process for the first year and the rates for the following four years are adjusted using a formula specific to each year.⁴⁰

The objective of the IRM is to decouple costs from rates during the period following the setting of base rates also known as rebasing. This means that, during the IRM, a utility may implement efficiencies that may result in reduced costs and greater return for the shareholder. Conversely, poor utility cost containment performance during that period will not be compensated by implementation of higher rates. The IRM is intended to promote rate stability and certainty.

These rate-making principles inherent in the IRM rate framework were central to the Decision:

However, the OEB notes that, consistent with the approved rate-setting mechanism, the rates for 2020 continue to be decoupled from costs. Rate stability and predictability offered through incentive regulation also rely on the decoupling of rates from the allocating utilities' costs among different customer classes.⁴¹

⁴⁰ Handbook for Utility Rate Applications, October 13, 2016, pg. 23.

⁴¹ EB-2019-0194, Decision and Order, May 14, 2020, p. 17.

The Hearing Panel acknowledged that the Panhandle System costs were not being allocated in accordance with the principles of cost allocation. However, the integrity of the IRM rate-making process was found to take precedence over the reallocation of those costs. Adjustments to the allocation of costs are to be addressed at rebasing. This ensures that all the impacts of changes in costs and the effects of those changes to various customer classes can be properly and comprehensively assessed. While the discussion was brief, the Hearing Panel did not find sufficient reason to depart from that accepted method of addressing cost allocation changes in the context of an IRM.

Effect of Previous OEB Decisions

IGUA cited four previous instances in which the OEB identified a need to address the Panhandle System cost allocation issue.⁴² It is important to note that there is no dispute that any utility-wide cost allocation review would make changes required for the Panhandle System costs in tandem with any other changes required to achieve accepted cost allocation and rate design objectives.

IGUA's argument, however, goes further to submit that, in essence, the weight and directives of these decisions necessitated changes in the cost allocation of the Panhandle System in the Hearing Panel's Decision to incorporate the results of the study presented by Enbridge Gas in the 2020 Rates Proceeding.

IGUA alleges that inconsistency with previous OEB decisions provides support for its assertion that the Hearing Panel Decision was unreasonable. The Review Panel disagrees.

None of these decisions determined that the issue should be dealt with within the scope of an IRM application such as the 2020 Rates proceeding. In fact, the first three instances cited by IGUA explicitly suggested that the issue be dealt with in a rebasing application.

In the Panhandle leave to construct decision,⁴³ the OEB indicated that deferral for 14 months was acceptable until the end of Union's then current IRM term. In Union Gas's 2018 rates proceeding⁴⁴ (Procedural Order No. 3), the OEB reiterated that deferral was appropriate during the balance of Union's then current IRM term and, later in the same proceeding (Decision and Rate Order), determined that the issue of the allocation of the Panhandle System cost on a going-forward basis would be dealt with in Union's 2019 rates proceeding. In doing so, the OEB noted the reasons for caution in making mid-term cost allocation changes without a full rebasing:

⁴² IGUA reply submission, p. 4-5.

⁴³ EB-2016-0186

⁴⁴ EB-2017-0087

The OEB is of the view that any change to the existing cost allocation model should be done with the assistance of a comprehensive system-wide full cost allocation study. Cost allocation is a zero-sum exercise. A full study ensures that all changes to facilities, operations and use in the transmission system since the development of the previous cost allocation model are recognized across all customer classes. This form of study provides that positive and negative changes in costs throughout the system are accounted for. A finding that current rates are inequitable because of the underlying allocation of costs for one project could introduce other inequalities by an incomplete analysis of the changing cost impacts on customers. Equitable cost causality is only possible with a full study. The OEB will not vary the Panhandle leave to construct decision that declined to change the cost allocation methodology for Panhandle Project costs and directed that any change should be considered in the next Union rates proceeding. Consistency in OEB decisions is important to regulatory clarity and predictability.⁴⁵

The fourth and last of these instances (MAADs Decision) did not require that the cost allocation issue be resolved in the 2020 Rates Proceeding. That decision directed Enbridge Gas to file a cost allocation study in 2019 “for consideration” in the 2020 Rates Proceeding.⁴⁶ There was no direction to implement the results of the study.

As noted earlier, Enbridge Gas did file a cost allocation study in the 2020 Rates Proceeding as directed in the MAADs Decision based on a 2019 test year. However, Enbridge Gas did not recommend changes to rates in the 2020 Rates Proceeding as a result of the study update. Rather, Enbridge Gas suggested that the cost allocation changes should be implemented at rebasing. The Hearing Panel agreed. What Enbridge Gas requested in the 2020 Rates Proceeding was approval for changes to the cost allocation methodology, with approval of implementation to follow at rebasing. The Hearing Panel supported the suggestion that the review and approval of cost allocation methodology changes should occur as close as possible to the time the changes are proposed to be implemented.

The OEB decisions in the leave to construct application⁴⁷ and in the Union Gas 2018 Rates proceeding⁴⁸ did reflect an expectation that the issue of the incremental costs of the Panhandle System, arising subsequent to the last basing of rates in 2013, would be dealt with in a rates rebasing proceeding in 2019. That event was frustrated by the proposed merger of Union Gas with Enbridge Gas Distribution that was approved by the OEB in the MAADs Decision which deferred any rebasing of rates until 2024.

⁴⁵ EB-2017-0087, Decision and Rate Order dated January 18, 2018, page 8.

⁴⁶ IGUA reply submission, p. 4-5.

⁴⁷ EB-2016-0186

⁴⁸ EB-2017-0087

The OEB's MAADs Decision may have provided a rationale for reallocating the Panhandle System costs in accordance with accepted principles. However, the Hearing Panel's Decision to implement any reallocation also had to consider the effect of making such changes within the context of the IRM rate framework and its objectives of fairness, stability and certainty. The Hearing Panel's decision did not depart from the established rate methodology and its application in previous OEB IRM applications. As noted by OEB Staff, the Hearing Panel's conclusion is directionally similar to the approach ordered by the OEB in the Horizon case and upheld by the Divisional Court that cost allocation should be done on a holistic rather than piecemeal basis.⁴⁹

The rebasing of rates provides the opportunity to consider and allocate all cost changes in the system and to fashion a rate design framework that reflects the OEB's statutory responsibilities and practice in fashioning just and reasonable rates. Without such comprehensive analysis, a piecemeal cost allocation approach could undermine the objectives of both the IRM rate framework and overall fairness in the making of rates.

The Review Panel is not prepared to determine that the Hearing Panel unreasonably ignored the history of the previous OEB considerations on this issue. The Hearing Panel determination to defer the Panhandle System costs to a 2024 rate rebasing was consistent with the decoupling of costs and rates inherent in the IRM ratemaking framework.

The Decision was Supported by the Evidence

The reasonableness of the Hearing Panel deferral Decision is also supported by the evidence that was before the Hearing Panel. As noted by OGVG in its submissions in the 2020 Rates Proceeding, and the OEB staff submissions in this motion for review, the current allocation of Panhandle System costs produces an acceptable range of resulting RTC ratios for the T2 class which includes IGUA's members, in accordance with OEB guidelines.

Cost Changes Upon 2024 Rebasing

IGUA submits that the Hearing Panel erred in concluding that making changes to cost allocation at this time will result in rate instability at rebasing as set out in a passage from the Decision:

The OEB acknowledges that the current cost allocations are outdated; however, attempting to make selected changes at this time will be disruptive to the predictability of rates and result in more changes in 2024.⁵⁰

⁴⁹ [*Hamilton \(City\) v. The Ontario Energy Board*](#), 2016 ONSC 6447,

⁵⁰ EB-2019-0194, p.17

In its reply submission in this proceeding, IGUA stated that “there is absolutely no evidence on the record that addressing the Panhandle System cost misallocation now will result in further changes in 2024”.

As noted by CME in its submission on this motion, Enbridge Gas did in fact file evidence in the 2020 Rates Proceeding that supported the Hearing Panel’s conclusion.⁵¹ This evidence showed that certain customer classes could see a significant increase in delivery charges if the cost allocation study were to be implemented now and that other adjustments are likely needed at rebasing. As pointed out by OEB staff in its submission on the motion, if the cost allocation is implemented now, the specific allocation issues addressed in the study would still need to be re-evaluated as part of a comprehensive review of costs, cost allocation and rate design in the rebasing proceeding.⁵²

The Review Panel finds that the Hearing Panel’s finding that rate stability could be negatively impacted by changing the cost allocation twice – once now and again at rebasing – was not in error, and IGUA’s assertion to the contrary does not provide a basis for the relief it requests.

Conclusion

The Review Panel finds that the Hearing Panel did not err in its Decision to defer any changes to the cost allocation of the Panhandle System costs to the 2024 rate rebasing proceeding. The Decision did not misstate the evidence before the Hearing Panel, and its findings reflect adherence to accepted OEB ratemaking practices and precedents. The Review Panel finds that the Hearing Panel Decision was a reasonable conclusion based upon the objectives of the IRM ratemaking framework and fairness to all customer classes. The deferral of this issue was justified despite the unavoidable merger-related delays that had prevented an earlier rebasing. The IGUA motion is accordingly dismissed.

⁵¹ CME submission on IGUA’s motion, pp. 5-6

⁵² OEB staff submission, p. 9

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. IGUA's motion is dismissed.
2. IGUA and cost eligible intervenor shall file their cost claims with the OEB and forward them to Enbridge Gas on or before **October 6, 2020**.
3. Enbridge Gas shall file with the OEB and forward to the intervenors and IGUA any objections to the claimed costs by **October 14, 2020**.
4. IGUA and intervenors shall file with the OEB and forward to Enbridge Gas any responses to any objections for cost claims by **October 21, 2020**.

All materials filed with the OEB must quote the file number, **EB-2020-0156**, be submitted in a searchable/unrestricted PDF format with a digital signature through the OEB's web portal at <https://pes.ontarioenergyboard.ca/eservice>. Filings must clearly state the sender's name, postal address, telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at <https://www.oeb.ca/industry>. If the web portal is not available parties may email their documents to boardsec@oeb.ca.

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

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Khalil Viraney, at Khalil.Viraney@oeb.ca and OEB Counsel, Ian Richler, at Ian.Richler@oeb.ca.

DATED at Toronto, September 24, 2020

ONTARIO ENERGY BOARD

Original Signed By

Christine E. Long
Registrar and Board Secretary