EB-2007-0606
EB-2007-0615

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

AND IN THE MATTER OF an Application by Union Gas Limited for an Order or Orders approving or fixing a multiyear incentive rate mechanism to determine rates for the regulated distribution, transmission and storage of natural gas, effective January 1, 2008;

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing rates for the distribution, transmission and storage of natural gas, effective January 1, 2008;

AND IN THE MATTER OF a combined proceeding Board pursuant to section 21(1) of the *Ontario Energy Board Act, 1998*.

FACTUM OF THE SCHOOL ENERGY COALITION ON THE INTERIM RATES MOTION OF UNION GAS

Introduction

1. The Motion dated September 21, 2007 (the "Motion"), and the Written Argument of Union Gas dated October 23, 2007 (the "Union Factum") ask the Board to determine two questions:

    a. **Should the current rates of Union Gas be made interim effective January 1, 2008?** To this question, the School Energy Coalition ("SEC") answers "Yes", subject to certain caveats set forth below.

    b. **Should the Board order new rates for Union Gas effective January 1, 2008, on an interim basis based on the rates applied for in its application?** To this question, SEC answers "No, but a partial interim adjustment should be made based on a prior decision of the Board". The details of this answer are set forth below.

2. The background facts are adequately addressed in the Union Factum and, except as set forth below, we will not repeat any of them.

Declaration that Rates are Interim

3. The sole reason in these circumstances to declare rates interim is that the Board may wish to be able, later, to adjust those rates retroactively. Thus, the real issue in a declaration of interim rates is the retroactivity issue. This can be characterized one of two ways:

    a. ***No current decision on retroactive recovery.*** The Board should keep its options open so that, when the evidence has been heard in full, and a decision made on Union's appropriate 2008 revenue requirement, the Board retains the legal ability to direct the recovery the any deficiency from the period from January 1st until the date of actual implementation. It would, of course, be the responsibility of the Applicant to demonstrate that it was appropriate for that retroactivity to be allowed, and the Board would then make that determination on the basis of the full record. Some parties, including SEC, may depending on the full evidence elect to argue against recovery of the retroactive deficiency, but the Board would decide at that time.

    b. ***A decision today to allow retroactive recovery of any deficiency.*** The Board should determine today that Union's rates, whenever implemented, will recover any deficiency that arises from January 1, 2008 onwards. It declares rates interim because it doesn't yet know the amount of the retroactive recovery.

    Thus the difference between the two is the timing of any decision on retroactivity, and the evidence on which that decision is made.

4. It is not clear to us, from the Motion or the Union Factum, whether Union is requesting the first or second decision from the Board in this Motion.

5. If it is the former, in our view the Board does not have sufficient evidence to determine whether it should – or should not, for that matter - authorize an exception in this case to the Board's policy of avoiding retroactive ratemaking. At the time the Board makes its final decision in the case, the Board will have sufficient information, and will be able to balance all interests in getting to just and reasonable rates, including consideration of recovery of any retroactive deficiency or repayment of any retroactive sufficiency.

6. The corollary to this is that the Board should, in fact, declare existing rates interim as of January 1, 2008. Just as the Board is not yet in a position to authorize retroactivity for Union, so it is not yet in a position to deny retroactivity. If rates are not declared interim, the effect is to decide to deny retroactive recovery. It should not do so at this time.

7. We believe it is important for the Board to make this clear in its decision on the motion, so parties will not have any expectation of retroactive recovery in the final decision.

Rate Adjustment

8. In asking for rates to be adjusted, Union is really asking for three different types of adjustment:

    a. ***Previously approved, revenue neutral adjustments to rates for specific classes.*** This is limited to the split of the M1/M2 class.

    b. ***Previously approved, revenue changing adjustments to rates.*** This includes the increase in the DSM budget, the GDAR costs, volume adjustments for previous DSM activity, and NGEIR adjustments.

    c. ***Never approved, revenue changing adjustments to rates.*** This includes the price cap formula, the previously rejected change to the weather normalization methodology, and the forecast S&T margin.

9. ***Never Approved Increases.*** Dealing with the last category first, we note that this is not the first time that Union has asked the Board to adjust its rates on a basis other than evidence. It is submitted that, just as it has done in the past, the Board should reaffirm its policy – and statutory obligation – that rate increases, whether final or interim, can only be ordered on the basis that the resulting rates are just and reasonable, and such a decision cannot be made except in compliance with the Statutory Powers Procedure Act and the rules of natural justice.

10. We note that this is not the case where the moving party is in financial distress, and has some overriding fiscal reason to get a rate increase for which it has not yet met its burden to show that it is justified. Without determining the point, it is at least conceivable that a utility could say "We need an interim rate increase or we'll go bankrupt, and we don't have time to file supporting evidence before the end will come".

11. Nothing like that is happening here. The utility is instead saying that the balance of convenience of the ratepayers favours allowing the increase, apparently on the basis that it is going to be allowed anyway, so better to get it done now rather than have retroactive charges.

12. This is wrong on two counts. First, the increase requested is at best arguable, and at worst inconsistent with both the evidence of a Board staff expert (Dr. Lowry, on the price cap) and directly contrary to a previous decision of the Board, which did hear extensive evidence (on weather normalization methodology). Second, even if it were granted, it is not clear today that the Board would then wish to make an exception to its strong anti-retroactivity stand in this case.

13. Therefore, it is submitted that there are no circumstances in this case justifying the Board to take the highly unusual step, and dangerous precedent, of authorizing a rate increase without hearing the evidence first.

14. ***Previous Approved Revenue Changes.*** This leads to the next category, changes in rates based on decisions that have been approved by the Board on appropriate evidence, but not yet implemented. As detailed in the factum of the Industrial Gas Users Association (the "IGUA Factum"), these changes amount to about $7.1 million.

15. For this category of changes, there is no question that the Board has approved the additional revenue. The problem is that the Board has not approved the rate impacts of that revenue, and on this Motion the Board does not have an evidentiary record with which to make that determination.

16. Part of this, of course, is the question of where the additional revenue is collected. It would be open to Union to seek agreement of the parties on the allocation between rate classes, but it has not done so, and we do not have information showing Board consideration of that allocation (except in the case of the DSM increase).

17. Even if that were the case, however, it remains true that the right to recover those amounts in rates is not the same as authorizing a rate increase equal to that amount. The $7.1 million is not a deficiency, but a cost component. We do not have definitive evidence on whether it would produce a deficiency, but it does appear (C23.52) that Union is currently earning more than their allowed rate of return. Given that income tax rates are going down in 2008, there is at least a reasonable possibility that this $7.1 of costs is already adequately covered by existing rates. Without hearing evidence, the Board is not in a position to determine if this proposed rate increase is required.

18. Under the circumstances, it therefore appears clear to us that, if 2008 were a cost of service year, no adjustment to reflect these costs should be allowed. That leaves the question of whether, because there is no current intention to do a cost of service review for 2008, that changes whether these revenue items should be assumed to be rate items, so that a rate increase flows from the revenue adjustment. In our view, the answer to this is no. Union has itself argued that there should be adjustments to revenue requirement other than the price cap mechanism, and the issue of whether further known cost changes should be considered is already on the Issues List. Once the Board accepts that there may be changes to revenue requirement based on specific cost items (sort of a partial cost of service), there is no way of knowing whether this $7.1 million will generate a net deficiency or not, and therefore no way of knowing whether a rate increase based on these costs would be "just and reasonable".

19. We are cognizant of the argument, put forth by Union and some intervenors, that there is a probability that all or some of this $7.1 million will be incremental, and the number is sufficiently small that a January 1st adjustment is a matter of convenience.

This is not an unreasonable position. However, in our view the better decision is to wait to see how much, if any, of this $7.1 requires a rate increase, before making any order to that effect.

20. ***Revenue Neutral Approved Changes.*** The exception is the M1/M2 split. There is no increase in revenue, and the Board has considered, not the cost implications, but the specific rate implications of this change. The decision is already complete.

21. While in our view the Board has not had a full debate over whether the actual implementation of this is correct (as opposed to whether the split should take place at all), we accept that the Board has already ordered this change, effective January 1, 2008. If we had concerns about the details of implementation, it was then that we should have raised them. In our view, this new Board panel does not need to order the rate change again. There is an existing Board order, to which Union should comply, splitting the class. At that point, this Board panel should declare those rates interim, in accordance with the Motion and our previous submissions on the first issue.

Conclusion

22. For these reasons, we believe that the only change to existing rates should be the M1/M2 split, and once done those rates should be declared interim by this Board.

23. SEC hereby requests 100% of its reasonably incurred costs in connection with this Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Jay Shepherd, Shibley Righton LLP
Counsel for the School Energy Coalition