



DECISION

IN THE MATTER OF an application by Enbridge Gas New Brunswick Limited Partnership for a variance of the New Brunswick Energy and Utilities Board Decision dated September 20, 2012 and the Decision Addendum dated September 26, 2012 (Matter No. 178)

July 26, 2013

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

IN THE MATTER OF an application by Enbridge Gas New Brunswick for a variance of the New Brunswick Energy and Utilities Board Decision dated September 20, 2012 and the Decision Addendum dated September 26, 2012 (Matter No. 178)

NEW BRUNSWICK ENERGY AND UTILITIES BOARD:

CHAIRMAN: Raymond Gorman, Q.C.

VICE CHAIRMAN: Cyril Johnston

MEMBERS: Pat Darrah

Edward McLean

Terry Totten

COUNSEL: Ellen Desmond

APPLICANT:

ENBRIDGE GAS NEW BRUNSWICK LIMITED
PARTNERSHIP:

Len Hoyt, Q.C.

David MacDougall

INTERVENORS:

ATLANTIC WALLBOARD L.P. and

Christopher Stewart

FLAKEBOARD COMPANY LTD:

PUBLIC INTERVENOR:

René Baque

DEPARTMENT OF ENERGY & MINES:

Sacha Patino

TRUEFOAM LTD:

Debbie Coles

Introduction:

This decision results from an application by Enbridge Gas New Brunswick Limited Partnership (EGNB) for a variance of a decision of the New Brunswick Energy and Utilities Board (Board) dated September 20, 2012 and a decision addendum dated September 26, 2012.

Since the Board issued its decision in September 2012, the regulatory framework for natural gas distribution has changed significantly as a result of a decision from the New Brunswick Court of Appeal and a finding that an important part of section 4 of the *Rates and Tariffs Regulation* is *ultra vires*. EGNB submits that a variance is now required and that new distribution rates should be put in place, given this judicial finding.

The decisions EGNB is seeking to have varied were the culmination of a process initiated by important changes to the act and regulations which set out the regulatory framework for the Board's regulation of EGNB. This Board has an obligation to ensure that rates charged by EGNB are just and reasonable, and the finding that a key component of the new regulatory structure was *ultra vires* places the Board in a very challenging situation

Background:

EGNB is a distributor of natural gas and the general franchisee under a franchise agreement dated August 31, 1999 with the Province of New Brunswick. As a public utility, EGNB has its rates and tariffs approved by the Board and the distribution of natural gas in New Brunswick is governed by the *Gas Distribution Act, 1999* (GDA).

The GDA has undergone significant changes. In December 2011 the government of New Brunswick passed Bill 18 in the Legislature and section 52.2 required EGNB to make an application for new rates and tariffs to the Board on or before May 31, 2012.

Section 52(5) of the GDA was also amended in December 2011 and provides as follows:

52(5) *In approving or fixing just and reasonable rates and tariffs, the Board*

- (a) shall adopt the methods or techniques prescribed by regulation,*
- (b) shall not recognize or consider the regulatory deferral account as part of the regulated assets of the gas distributor who was granted a general franchise, except in the circumstances and in the manner prescribed by regulation,*
- (c) shall not permit the gas distributor who was granted a general franchise to depreciate, amortize, earn a return on or otherwise consider the regulatory deferral account, except in the circumstances and in the manner prescribed by regulation, and*
- (d) shall not permit the gas distributor who was granted a general franchise to create or establish any additional similar revenue shortfall deferral accounts, except in the circumstances and in the manner prescribed by regulation*

The *Rates and Tariffs Regulation* came into force in April, 2012 and section 4 provides as follows:

Rates and tariffs

4(1) *The Board shall, when approving or fixing just and reasonable rates and tariffs under section 52 of the Act for each class of customers, adopt the cost of service method or technique, with a revenue to cost ratio not exceeding 1.2:1 for any class of customers, provided that the rates and tariffs for any class of customers shall not exceed the rates and tariffs that would apply to that class of customers if determined through the application of the market based method or technique.*

4(2) *In determining rates and tariffs for classes of customers under subsection (1) utilizing the market based method or technique, the Board shall use electricity as the alternative energy source and ensure a target savings level of 20% for the Small General Service class, and use No. 2 Heating Oil as the alternative energy source and ensure a target savings level of 15% for those classes of customers other than the Small General Service class.*

4(3) The Board shall, when approving or fixing just and reasonable rates and tariffs under section 52 of the Act, ensure that the expenses and investments included in the revenue requirement are prudent.

These legislative and regulatory provisions were in place in September 2012. The validity of the regulations was challenged by EGNB in an application to the Court of Queen's Bench. In a decision dated August 23, 2012, the Court found the regulations to be within the statutory authority of the Lieutenant-Governor in Council. The regulations and the decision of the Court of Queen's Bench provided guidance to the Board in setting just and reasonable rates. At page 24 of the September 20, 2012 decision, the Board stated, in part, as follows:

"The "regulatory compact" as it relates to the setting of natural gas distribution rates, has been modified. "Just and reasonable" rates are now the rates that are produced when the methodology, defined by regulation, is applied.

The GDA and Rates and Tariffs regulation effectively re-define "just and reasonable" in the context of natural gas distribution rates in New Brunswick."

And at page 25 the Board stated:

"In summary, the Board finds that the amendments to the GDA and the making of the Rates and Tariffs regulation have limited the Board's previous broad discretion to determine what constitute just and reasonable rates. Rates will be set in conformity with the Act and Regulations and these rates will, therefore, be just and reasonable."

More recently, the Court of Appeal of New Brunswick has considered an appeal of the Court of Queen's Bench's decision regarding whether section 4(1) of the *Rates and Tariffs Regulation* is within the regulation making authority of the Lieutenant Governor in Council.

In a decision dated May 3, 2013, the Court of Appeal allowed the appeal in part. The Honourable Justice Robertson states as follows at paragraph 11:

"If one looks to the Act and the Regulation, it is clear the Legislature was addressing itself to two known "methods or techniques" for fixing rates: (1)

cost of service; and (2) market based. There may be others. But regardless, the phrase "methods or techniques" cannot be reasonable interpreted to include the right of the LGC to direct the Board to apply for example, a designated "cost to service ratio."

".....The point is simply this. As the Act presently reads, it is for the Board to determine what the ratio should be and that is why the directive is ultra vires the regulation-making authority of the LGC."

It is as a result of this decision from the Court of Appeal that EGNB has now applied for a variance to the Board decision and the decision addendum. In its application dated June 14, 2013 EGNB states as follows:

Pursuant to section 43 of the Energy and Utilities Board Act (EUB Act), enclosed is Enbridge Gas New Brunswick's ("EGNB") submission in support of a request for a variance of the Energy and Utilities Board's September 20, 2012 decision and the Decision Addendum dated September 26, 2012 in relation to EGNB's 2012 Rate Application. This request results from a decision of the Court of Appeal of New Brunswick dated May 3, 2013 which held that "that part of s. 4(1) of the [Rates and Tariffs] Regulation dealing with the "revenue to cost ratio" is beyond the regulation-making authority of the [Lieutenant Governor in Council]". The "revenue to cost ratio" was a significant factor in the Board's September 20, 2012 decision and the Decision Addendum dated September 26, 2012.

In support of its request, EGNB filed the affidavit of Mr. Gilles Volpé, General Manager of EGNB and a detailed submission with a number of attachments. No new evidence was provided and the request for a variance was based on cost and load forecast information that had been provided in the May 31, 2012 application.

EGNB submits that new rates should be set for the following classes:

- Mid-General Service
- Large General Service
- Contract General Service
- Industrial Contract General Service and
- Off-Peak Service.

These five rate classes had their rates set using a cost of service methodology. EGNB is not seeking to vary the rates for the Small General Service (SGS) class, whose rates were set using the market-based methodology.

In its submission, EGNB states at page 2:

EGNB proposes that cost based rates should be determined in a manner consistent with the alternative rates described by EGNB in its responses to EGNB (PI) IR-1 (copy attached) ("Alternative Rates") and that applies a consistent R/C Ratio across all rate classes when comparing cost based rates to market based rates for those rate classes. The lower of the two rates would be applied. This approach was iteratively applied until the revenue generated by the appropriate combination of market based and cost based rates would allow for EGNB's full 2013 Revenue Requirement to be recovered.

A copy of the proposed rates is attached to this decision at Schedule "A" and result in a revenue to cost ratio for all rate classes (with the exception of the SGS class) of 1.43:1. This proposal reflects a traditional rate making approach, in that rates are set to reflect full recovery of the utility's revenue requirement.

A hearing date for the consideration of this application was set for July 11, 2013 and all parties were provided with an opportunity to make submissions as to the appropriateness of this request. In addition, parties were provided with the opportunity to cross-examine Mr. Volpé.

Issues:

The Board will consider the following issues:

- a) Is section 43 the appropriate procedure to use in this instance?
- b) Should the distribution rates be varied, in light of the decision of the New Brunswick Court of Appeal?

Analysis and Decision:

Is Section 43 of the Energy and Utilities Board Act (EUB Act) the appropriate procedure?

The Board must determine if a request for a change in rates may be considered using section 43 of the EUB Act. This section provides as follows:

Board may review, rescind or vary order

43) The Board may review, rescind or vary any order made by it.

The Board has dealt with very few variance applications in the past and in such instances, the variance has generally been minor in nature. In addition, any change in rates requires careful consideration of detailed financial and technical information that is subject to cross-examination and fully vetted by the Board. Sections 60 to 65 of the EUB Act, for example, specifically direct the Board on the procedure to be used, when an application for a change in rates and tariffs is requested. In every case, the Board is concerned about ensuring procedural safeguards and providing a process that is both fair and transparent to all parties.

While a request for a change in rates would not normally be considered using section 43 of the EUB Act, the facts in this situation are unique. In this instance, the Board is not tasked with evaluating new financial or technical data. The evidentiary record remains the same. Intervenors had an opportunity to fully test the evidence during the previous hearing. This application is made, strictly because a regulation in force at the time of the Board's decision, has been judicially considered and determined to be *ultra vires*.

As a result, and given these unique circumstances, the Board considers that it is appropriate to consider whether a variance to its decision of September 20, 2012 and the decision addendum of September 26, 2012 should be granted.

Should the distribution rates be varied, in light of the decision of the New Brunswick Court of Appeal?

The Board is tasked with the setting of rates that are just and reasonable. What constitutes “just and reasonable” rates depends on many factors. Regulatory Boards are generally given broad discretion to interpret these words.

In this case, and following EGNB’s application in May 2012, the Board conducted a full hearing to determine what rates were “just and reasonable”. In addition to many other issues the 2013 Revenue Requirement was considered, costs were allocated to various rate classes and cost of service rates were approved.

The Board’s decision however, also relied on section 4 of the *Rates and Tariffs Regulation*, specifically on the 1.2:1 revenue to cost ratio, in determining that rates were just and reasonable. As indicated above, the Board stated that:

“just and reasonable’ rates are now the rates that are produced when the methodology, defined by regulation, is applied”.

Now that this portion of the regulation has been found to be *ultra vires* by the Court of Appeal it can no longer be concluded that the resulting rates are, in fact, just and reasonable.

This unique fact situation creates difficulty for both EGNB and ratepayers. The intervenors suggest that new rates should not be set until new financial information has been provided and a new rate hearing conducted. Several months have passed since the filing of forecast information in May of 2012 and more recent data is required.

On the other hand, EGNB submits that delaying the implementation of new rates will result in the loss of further revenue. To date, EGNB has incurred a shortfall of \$3.5 million, and a significant further amount will not be recovered if new rates are not approved during 2013. EGNB submits that the proposed rates would, if they had been implemented for a full year, have allowed them to recover their 2013 revenue requirement.

While a new rate application would provide the Board with current financial data, a significant delay in the determination of new rates would be incurred. Some seven months have now passed since the beginning of 2013, and a further delay would provide an inequitable result. Even with new rates for the remainder of 2013, EGNB will not have sufficient revenue to meet its 2013 revenue requirement.

The Board will allow EGNB's request for a variance, and the rates, attached at Schedule "A", will be in force effective August 1, 2013.

The Board is satisfied that allowing EGNB to charge these new rates will result in just and reasonable rates. The role of the Board is to balance the interests of the utility and its customers. The 2013 revenue requirement was determined following the full hearing and remains unchanged. Even with these new rates, EGNB will fall far short of its revenue requirement in 2013. Regarding the interests of customers, the Board notes that they have had the benefit of lower rates since October 1, 2012 and considering 2013 as a whole, natural gas distribution costs are just and reasonable.

While the Board finds the rates coming into force on August 1 to be just and reasonable, it is critical that the Board move to a full new rate hearing as soon as possible. This will include, *inter alia*, a full assessment of EGNB's revenue requirement for 2014 and a determination of just and reasonable rates in the context of the legislation and regulation as it currently exists. No party should consider this decision to be determinative of any issue relating to rates for the 2014 year, including appropriate revenue to cost ratios or levels of cross-subsidization.

EGNB has never had its rates set on a traditional cost of service basis. From the beginning of the franchise until 2012, rates were set using the market based method. Within this system, the Board found the rates to be just and reasonable. In the Board's September 20, 2012 decision it found the rates to be just and reasonable, based on the legislation and regulations. One portion of these regulations has been found to be *ultra vires*, but other important elements remain and the Board will have to determine what is "just and reasonable" considering regulatory precedents and New Brunswick's unique regulatory framework.

EGNB is ordered to file a new application for rates and tariffs no later than October 1, 2013.

Summary:

In Summary:

- 1) The Board will allow EGNB's request for a variance, and the rates, attached at Schedule "A", will be in force effective August 1, 2013.
- 2) EGNB is ordered to file a new application for rates and tariffs no later than October 1, 2013.

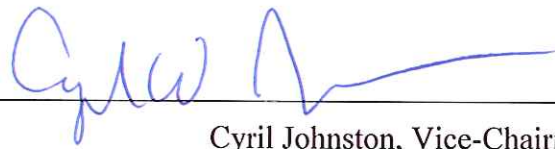
Schedule "A"

Rate Classes	Rates
Mid General	
Customer Charge	\$50.00
Block 1	\$13.5307
Block 2	\$8.0385
Large General	
Customer Charge	
Class 1 Meter	\$125.00
Class 2 Meter	\$225.00
Block 1	\$8.6574
Block 2	
Summer	\$1.6352
Winter	\$5.1935
Contract General	
Demand Charge	\$13.30
Summer Charge	\$1.7216
Winter Charge	\$4.4987
Industrial Contract General	
Customer Charge	\$3,300.00
Demand Charge	\$15.00
Summer Charge	\$0.7869
Winter Charge	\$2.1963
Off-Peak Service	
Customer Charge	\$50.00
Block 1	\$3.9104

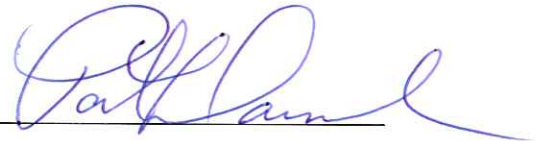
Dated at the City of Saint John, New Brunswick this 26th day of July, 2013.



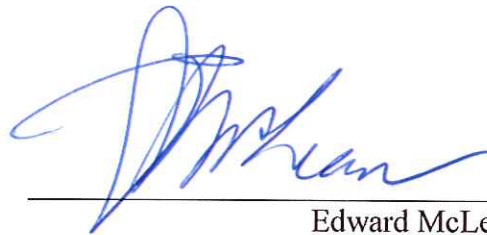
Raymond Gorman, Q.C., Chairman



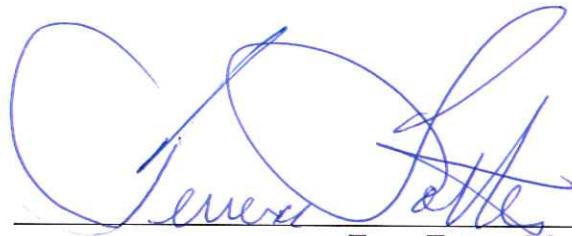
Cyril Johnston, Vice-Chairman



Pat Darrah, Member



Edward McLean, Member



Terry Totten, Member