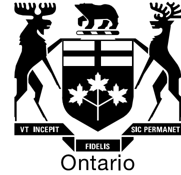
Ontario Energy Board **Commission de l'énergie de l'Ontario**



EB-2011-0327

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 seeking approval of its 2012-2014 Demand Side Management plan.

BEFORE: Cathy Spoel
Presiding Member

Cynthia Chaplin
Vice Chair

Paula Conboy
Member

PARTIAL DECISION ON SETTLEMENT AGREEMENT

February 8, 2012

Union Gas Limited ("Union Gas") filed an application with the Ontario Energy Board (the "Board") on September 23, 2011, seeking approval for its 2012-2014 Demand Side Management ("DSM") plan including a 2012 DSM budget of $30.954 million. The application has been filed pursuant to the Board's DSM Guidelines that were issued on June 30, 2011 (EB- 2008-0346). The Board assigned file number EB-2011-0327 to the application. On October 13, 2011 the Board issued a Notice of Application.

On December 19 and 20, 2011 parties sat for a Settlement Conference. As part of Procedural Order No. 2, the Board ordered that any settlement agreement that resulted from the Settlement Conference be filed on or before Friday, January 20, 2012. This deadline was subsequently extended. The Settlement Agreement was filed on January 31, 2011.

The parties to the Settlement Agreement are:

- Association of Power Producers of Ontario (“APPrO”)
- BOMA Greater Toronto (“BOMA”)
- Consumers Council of Canada (“CCC”)
- Canadian Manufacturers & Exporters (“CME”)
- Energy Probe Research Foundation (“Energy Probe”)
- Federation of Rental-housing Providers of Ontario (“FRPO”)
- Green Energy Coalition (“GEC”)
- Industrial Gas Users Association (“IGUA”)
- Low-Income Energy Network (“LIEN”)
- London Property Management Association (“LPMA”)
- Pollution Probe
- School Energy Coalition (“SEC”)
- Vulnerable Energy Consumers Coalition (“VECC”)

On February 3, 2012 the Board sat to hear the Settlement Agreement. The Agreement sets out a complete settlement on all issues with respect to Union’s 2012-2014 DSM plan with the exception of three partially settled issues and two unsettled issues. The Agreement includes a collection of materials that provided the factual information parties relied on during the settlement process. Union indicated that the information was used in an attempt by the parties to form a common factual understanding prior to negotiations. The Settlement Agreement also contains joint terms of reference for stakeholder engagement between Union, Enbridge, and intervenors as contemplated in the DSM Guidelines.

The Board heard oral submissions on the “non-severability” clause (which Pollution Probe opposed) and on the two unsettled issues: the appropriate application of inflation to the budget and the appropriate method for setting the maximum incentive payment for 2012.

The other three partially settled issues relate to Union’s resource acquisition program, the large industrial T1 and Rate 100 program, and the demand side management variance account (DSMVA). These issues will be addressed after the Board determines the issue related to the “non-severability” clause.

The Non-severability Clause

Pollution Probe objected to the inclusion of the following “non-severability” clause in the Settlement Agreement on the basis that it introduces procedural unfairness. The clause reads as follows:

> With the exception of Pollution Probe, the Participating Parties explicitly request that the Board consider and accept this Settlement Agreement as a package. None of the matters in respect of which a settlement has been reached is severable. Numerous compromises were made by the Participating Parties with respect to various matters to arrive at this comprehensive Agreement. The distinct issues addressed in this proposal are intricately interrelated, and reductions or increases to the agreed-upon amounts may have financial consequences in other areas of this proposal which may be unacceptable to one or more of the Participating Parties. If the Board does not accept the Agreement in its entirety, including any partially settled issues, then there is no Agreement unless the Participating Parties agree that those portions of the Agreement that the Board does accept may continue as a valid settlement.

Pollution Probe also refused to agree to certain substantive portions of the Settlement Agreement (identified above as the 3 partially settled issues), and intends to argue that the Board should not accept those portions of the Settlement Agreement. If the Board accepts Pollution Probe’s position, the effect of this clause is that there will be no settlement on the other issues, the result of which could be a hearing on all aspects of the DSM plan.

Pollution Probe argued that the possibility of this outcome results in procedural unfairness for any party or parties which oppose some portion of a settlement. Pollution Probe maintained that the Board’s Rules of Practice and Procedure do not contemplate or speak to non-severability clauses in agreements which contain partially settled issues.

Pollution Probe also submitted that the operation of the non-severability clause in this case could give rise to the perception of bias because the Board will balance the position of one party on a narrow issue against the prospect of having to hear all of the issues in a full hearing. Counsel for Pollution Probe stated that “the Board will be tempted, consciously or unconsciously, rationally, practically, to be influenced toward

the more practical" approach of avoiding a full hearing, as the Board would not want to spend the time on it.

Pollution Probe also argued that it would be unfair for it to have its position heard with "the agreement hanging over it", as other parties would be obliged to defend the agreement as a whole, and that it would be unfair for Pollution Probe because it would be opposed by every other party, and would have to argue not just for one position but against all the other positions.

Pollution Probe argued that "so long as this non-severability provision is there, it's not possible for there to be a genuine perception that the Board is making its decision purely on the evidence, on the argument, on what it considers to be the public interest, the best public policy, and whether -- from a common-sense point of view, and in my submission from a legal point of view, in terms of procedural fairness".

Pollution Probe also argued that "if the Board…begins to accept the practice of non-severability clauses, they will become more and more common, and that builds in an incentive to form coalitions against parties…"

Union and the other intervenors argued that it was common practice to include a non-severability clause as specifically contemplated by the Board's Settlement Conference Guidelines. They also argued that settlement agreements are the result of a balancing of a number of competing interests and involve compromises on various points. Often the issues are interdependent so that changes to one part will affect the rest.

CME also argued that when a total package is looked at on an issue-by-issue basis, there will be some imbalance, but that the overall package achieves a balance between the ratepayer, utility, and conservation and environmental group interests. CME argued that it is only by looking at the package as a whole that the Board can determine whether balance has been achieved.

Board Findings

At issue is whether the existence of the non-severability clause results in procedural unfairness. The hallmarks of procedural fairness are well understood: the right to notice, the right to know the case to be met, the right to be heard and the right to an impartial decision-maker. The Boards' Rule and Settlement Guidelines ensure procedural fairness for all parties.

The Board's Settlement Conference Guidelines specifically contemplate the inclusion of a non-severability clause:

> Parties to the settlement proposal should make it clear in the proposal whether or not they expect the Board to accept the proposal as a package, and should outline the rationale for the position taken.

The Settlement Guidelines also provide for the eventuality that one or more parties may disagree with the settlement of an issue:

> A party who has been identified in the settlement proposal as a party who does not agree with the settlement of an issue is entitled to offer evidence in opposition to the settlement proposal and to cross-examine the applicant on that issue at the hearing.

The Settlement Guidelines also allow a party to withdraw from a settlement proposal if evidence is introduced at the hearing which affects the settlement proposal or the settlement of one or more issues in it.

In the event that the Board does not accept a settlement agreement that the parties have requested be accepted as a package the Board will proceed to a hearing on all the issues.

The Board is of the view that the Settlement Conference Guidelines contemplate the situation we have before us in this case, and that there is nothing inherently unfair about it.

Pollution Probe has the right to be heard in opposition to the settlement proposal, and in this case the 3 specific issues. If the Board accepts Pollution Probe's position, then it will refuse to approve the Settlement Agreement. As it has been presented as a package, all issues would then proceed to a hearing.

Pollution Probe took the position that the issues where it does not support the Settlement Agreement should be severable because they are narrow in scope, and Pollution Probe further asserted that if the Board were to accept Pollution Probe's proposal on the 3 partially settled issues, the other parties should be prepared to accept the consequential changes on the other issues. The other parties took a different position, and asserted that the issues, and the settlement of the issues, are interrelated.

These parties submitted that it would be unfair to require parties to accept consequential changes of these interrelated issues. The Board agrees that it would be unfair for Pollution Probe to have its issues heard, and perhaps decided differently, but to require the other parties to be bound by the rest of the Settlement Agreement. Indeed the Settlement Conference Guidelines would allow the other parties to request the Board's permission to withdraw from the settlement proposal in that case, presumably to protect them from this potentially unfair result. Even if the Board did accept Pollution Probe's position, it is unlikely that the rest of the agreement would survive.

Section 32 of the Board's Rules of Practice and Procedure deals with Settlement proposals, and codifies the procedural provisions of the Settlement Conference:

> 32.01 Where some or all of the parties reach an agreement, the parties shall make and file a settlement proposal describing the agreement in order to allow the Board to review and consider the settlement.
>
> 32.02 The settlement proposal shall identify for each issue those parties who agree with the settlement of the issue and any parties who disagree.
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> 32.03 The parties shall ensure that the settlement proposal contains or identifies evidence sufficient to support the settlement proposal and shall provide such additional evidence as the Board may require.
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> 32.04 A party who does not agree with the settlement of an issue will be entitled to offer evidence in opposition to the settlement proposal and to cross-examine on the issue at the hearing.
>
> 32.05 Where evidence is introduced at the hearing that may affect the settlement proposal, any party may, with leave of the Board, withdraw from the proposal upon giving notice and reasons to the other parties, and Rule 32.04 applies.
>
> 32.06 Where the Board accepts a settlement proposal as a basis for making a decision in the proceeding, the Board may base its findings on the settlement proposal, and on any additional evidence that the Board may have required.

The Board is satisfied that these provisions provide Pollution Probe and the other parties with a fair opportunity to be heard.

The Board does not believe that it will compromise its principle of impartial decision making if it finds that accepting Pollution Probe's position renders all issues unsettled. The Board will have to decide whether the issues raised by Pollution Probe are of sufficient importance that it is appropriate to reject the Settlement Agreement, and potentially reopen the entire DSM plan for a hearing, but that is the kind of balancing of issues and interests that the Board does on a regular basis. The fact that only one party will be presenting a view in opposition to the agreement will not affect the Board's ability to review and evaluate the evidence in an impartial way. Of course, Pollution Probe will have to present a very good case as it may well have the effect of rejecting the entire settlement, but that is not unfair.

The Board does not consider the inclusion of a non-severability clause to be inappropriate. The Board recognizes that the reality of negotiating an agreement involves compromise and that one part of the agreement may well be affected by others. Indeed, this is the reality for many of the complex matters decided by the Board, where one aspect of a decision cannot be viewed in isolation from the rest. The Board finds that it would be unfair to the parties who agreed to include the non-severability clause to remove at Pollution Probe's behest. Pollution Probe suggests that the harm would be minimal, but the Board disagrees. It would affect the integrity of the settlement process to refuse to accept such a clause after the fact.

Unsettled Issue 1: Should inflation be applied to the 2011 approved budget to set the 2012 budget?

The first unsettled issue was the interpretation of section 8 of the Board's DSM Guidelines concerning the application of inflation to the DSM budgets. The section reads as follows:

> The 2011 DSM budgets for Enbridge and Union are $28.1 million and $27.4 million, respectively. The Board has expressed the view that 2011 approved budgets should remain in effect for the 2012 to 2014 DSM plan term, subject to section 8.3. The budgets should be escalated annually using the previous year's Gross Domestic Product Implicit Price Index ("GDP-IPI") issued by Statistics Canada in the third quarter and published at the end of November[1].

[1] Demand Side Management Guidelines for Natural Gas Utilities, EB-2008-0346, June 30, 2011, Page 25

The parties sought the Board's interpretation of the provision and specifically whether Union's 2011 DSM budget of $27.4 million could be escalated by GDP-IPI to arrive at the 2012 DSM budget or whether the 2012 DSM budget should remain at $27.4 million.

Union and several intervenors argued that the only logical interpretation of the Guidelines was that inflation would be applied to each year from the 2011 budget. If not, then in real terms, Union's budget would decrease in 2012 from its 2011 budget which the parties submitted was certainly not contemplated when the Board stated that it was going to maintain the DSM budgets at the current (2011) level.

SEC pointed out that the maximum incentive amount explicitly fixed for 2012 at the 2011 level and is only inflated for 2013 and 2014.

Board Findings

The Board concludes that the appropriate interpretation is that the 2011 approved budget may be escalated by inflation to set the 2012 budget. This interpretation is supported by the plain reading of the section. The Board notes that different treatment is accorded the maximum incentive, but that wording explicitly identifies that the level for 2012 is to be the 2011 level and that inflation will apply for 2013 and 2014.

Unsettled Issue 2: Does the maximum incentive increase if the total budget is increased by 10% to provide incremental funding for low income programs?

The second unsettled issue concerns the interpretation section 11 of the Guidelines, "Incentive Payment", and in particular whether the maximum incentive may be increased by 10%, to $10.45 million, in proportion to the 10% increase in the total budget (with the additional funds used for low income programs).

The relevant part of the section reads as follows:

> To the extent that the *approved* DSM budgets deviate in magnitude from the Board proposed budgets, the Annual Cap should be scaled accordingly. This will help ensure that the eligible incentive amount is consistent with the expected level of efforts require to achieve or exceed the approved targets.

Intervenors generally agreed that the key question is what is meant by the phrase "Board proposed budgets" and whether it refers to the base amount (which for Union is $27.4 million) or to the base amount plus the incremental 10%.

Those supporting the latter interpretation point out that the Guidelines contemplate the 10% increase to the total budget for additional low income programs.

GEC, and others, supported the first interpretation, and GEC maintained that this was the only way to logically and holistically interpret the Guidelines which recognize that DSM is a difficult task that warrants incentives.

There was also some discussion as to whether the phrase "deviate" includes both increases and decreases. Most parties took the view that the term "deviate" was neutral and would cover change in either direction. Union pointed out, and many intervenors agreed, that the Board used specific directional language when it referred to "escalating" the budgets for inflation, but used neutral language when using the terms "deviation" and "scaled accordingly" to signify that the budgets could be modified in either direction. SEC argued that another interpretation could be that the Board intended only to capture deviations down from the $9.5 million maximum incentive. This is demonstrated in the example provided on page 31 which refers to scaling down of the incentive when the approved budget is less than the Board proposed budget.

Board Findings

The Board concludes that the phrase the "Board proposed budgets" refers, in the case of Union, to the level of $27.4 million as identified on page 25 of the DSM Guidelines. While the Guidelines contemplate an increase of 10% for incremental low income program spending, that increase is expressed as an option, not as an expectation. The Board find that the term "deviates" is neutral in nature and that therefore increases or decreases are contemplated. As a result, the Board interprets the Guidelines to mean that if Union has an approved DSM budget which is in excess of $27.4 million, then the maximum incentive will be increased proportionally.

Next Steps

The hearing for the three partially settled issues has been set for February 13, 2012. There has been correspondence from Pollution Probe and Union regarding the hearing. Pollution Probe has indicated that it intends to cross-examine Union's witnesses and

requested that it be permitted to deliver argument in writing on Wednesday, February 15, 2012. Union suggested that the entire proceeding, including argument, should be completed on Monday. Pollution Probe responded that it should have the opportunity to review the transcript before preparing argument.

The Board has decided that both cross-examination and submissions should be completed on Monday, February 13, 2012.

As Pollution Probe has indicated, although the Settlement Agreement identifies three partially settled issues, there is only a single narrow issue in dispute. In addition, Pollution Probe has already described its position on the issue. Given the narrow scope of the proceeding, the Board concludes that all parties should be prepared to argue the matter on Monday, February 13, 2012, and the hearing will proceed on that basis. The Board will be prepared to schedule a break upon the completion of the cross-examination in order to provide Pollution Probe with additional time to prepare its submissions in light of the oral testimony.

DATED at Toronto, February 8, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary