Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2010-0039

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 amending or varying the rate or rates charged to customers as of October 1, 2010;

AND IN THE MATTER OF relief sought by Union Gas Limited for an Order deferring the disposition of amounts in deferral accounts 179-121 and 179-122 until the sale of the St. Clair Line has closed or the project is cancelled.

BEFORE: Paul Sommerville
Presiding Member

Marika Hare
Member

DECISION AND ORDER

INTRODUCTION

Background

On November 27, 2009, the Ontario Energy Board (the "Board") issued its first Decision in the EB-2008-0411 proceeding, granting Union Gas Limited ("Union") leave to sell the St. Clair Transmission Line to Dawn Gateway Pipeline Limited Partnership ("DGLP") subject to a number of conditions. In the second EB-2008-0411 Decision dated March 2, 2010, Union was required to allocate to ratepayers, upon the sale of the St. Clair Transmission Line, the amount of $6.402 million as the ratepayers' share of a deemed net gain from the sale. The Board ordered that the $6.402 million should be placed into

a deferral account. Union was also required to create a second deferral account to capture the effect of removing the St. Clair Transmission Line from rates effective March 1, 2010. On March 15, 2010, Union filed for approval by the Board two draft accounting orders to create the deferral accounts ordered in EB-2008-0411.

Two subsequent Decisions and Orders (dated March 2, 2010 and May 11, 2010) dealt with, among other things, the methodology for calculating the amounts described above, the creation of deferral accounts 179-121 and 179-122 (both also under docket EB-2008-0411) and the requirement that the net book value and associated expenses of the St. Clair Line be removed from Union's rate base and rates as of March 1, 2010.

Account 179-121 records the cumulative under-recovery of the St. Clair Transmission Line from 2003 until the time of the sale of the asset. Account 179-122 records the impact of removing the St. Clair Transmission Line (and related St. Clair River Crossing) from rates (including all rate base and OM&A consequences) effective March 1, 2010 until the Board adjusts Union's rates to reflect the asset sale.

The Proceeding

Union filed an Application dated April 22, 2010 to address the disposition of 2009 deferral accounts and Market Transformation Incentive amounts, the 2009 earnings sharing amount and the allocation of costs between Union's regulated and unregulated storage operations. The Board assigned docket number EB-2010-0039 to this Application.

On August 10, 2010, the Board approved the Settlement Agreement reached by parties in the EB-2010-0039 proceeding. With respect to the matter of the determination of disposal of balances in the St. Clair deferral accounts (account numbers 179-121 and 179-122), the parties agreed to postpone this issue until after November 1, 2010 when Union expected that DGLP and its shippers would have determined whether to proceed with the transaction. In its Decision and Order dated September 3, 2010, the Board indicated that a two day oral hearing would be scheduled for December 6 and 7, 2010 to address the balances in deferral accounts 179-121 and 179-122.

On November 19, 2010, the Board received a Notice of Motion from Union seeking to adjourn the December 6 and 7, 2010 oral hearing until late February 2011. Union indicated that DGLP was in the process of determining market interest in the proposed

Dawn Gateway pipeline and that the delay sought by Union would provide time to determine whether there was sufficient interest in the pipeline for an in-service date of 2011.

On December 3, 2010 the Board heard submissions on the Motion and rendered an oral decision. The Board granted Union's request for an adjournment. Also, the Board required Union to file any additional evidence or new evidence with respect to this matter at least 30 days prior to the dates set in consultation with Board staff and intervenors.

By letter dated February 4, 2011, Union filed for declaratory relief from the Board, requesting that the amounts in deferral accounts 179-121 and 179-122 not be disposed of until the sale of the St. Clair Line has closed or the project is cancelled. Union also included further pre-filed evidence and the evidence of DTE Pipeline Company.

In its Notice of Hearing and Procedural Order No. 4, dated March 7, 2011, the Board indicated that that it would consider Union's request at an oral hearing to be held at its offices on April 6, 2011.

Oral argument, in support of its request was made by Union on April 6, 2011. The following parties filed written submissions on April 15, 2011; Board staff, the Consumers' Council of Canada ("CCC"), and Federation of Rental-housing Providers of Ontario ("FRPO"). Canadian Manufacturers & Exporters ("CME") requested an extension to April 18, 2011 to file its argument. Union also requested a corresponding extension to file its reply argument. On April 19, 2011, the Board granted these requests. Written reply argument was filed by Union on April 27, 2011.

The Issues

In Procedural Order No. 4, the Board determined that the issues to be considered at the hearing were:

1. Is the disposition of deferral accounts 179-121 and 179-122 dependent on the completion of the transaction between Union Gas Limited and Dawn Gateway Limited Partnership?
2. If the answer to the first issue is yes, what if any action is required by the Board at this time?

3. If the answer the first issue is no,
    a. As of what effective date should deferral accounts 179-121 and 179-122 be disposed?
    b. What are the amounts in the accounts as of that date?
    c. What is an appropriate methodology to apportion the amounts across customer rate classes?
    d. Does the St. Clair Transmission Line remain in Union Gas Limited's rate base?

IS THE DISPOSITION OF DEFERRAL ACCOUNTS 179-121 AND 179-122 DEPENDENT ON THE COMPLETION OF THE TRANSACTION BETWEEN UNION GAS LIMITED AND DAWN GATEWAY LIMITED PARTNERSHIP?

Positions of the Parties

In its oral argument-in-chief, Union requested that the Board issue an order to the effect that Union is not required to dispose of the balances in Accounts 179-121 and 179-122 until the transaction (i.e. the Dawn Gateway pipeline sale) underpinning these accounts has closed or has been cancelled. Union submitted that treating the cited accounts in this manner is the only method that is consistent with the underlying rationale for the Board's Decision in EB-2008-0411.

Union argued that the Board's rationale for establishing the deferral accounts in question was to address ratepayer harm that the Board found would result from the asset sale. Union asserted that the Board concluded that it could mitigate the harm by deeming the sale price at fair market value and allocate a portion of the deemed gain on the sale to ratepayers. Union submitted that the EB-2008-0411 Decisions do not state that ratepayers will receive the portion of the deemed net gain on the transaction in the event that the transaction does not proceed.

Union submitted that it is the transaction that gives rise to the harm and absent the transaction there is no ratepayer harm of the type determined by the Board.

With respect to the likelihood of the transaction taking place, Union indicated that DGLP will continue discussions with shippers up to November 2011 by which time the shippers must elect whether or not to proceed with the Dawn Gateway pipeline.

In general, Board staff agreed with Union that the disposition of the deferral accounts is dependent on the completion of the transaction between Union and DGLP. Board staff cited the November 27, 2009 EB-2008-0411 Decision where the Board indicated that the transaction did result in harm to ratepayers. Board staff submitted that in that Decision, the Board concluded that to address the harm of the transaction, ratepayers should be allocated an amount equivalent to the cumulative under-recovery of the asset since 2003 from the proceeds of a sale based on fair market value as determined by the Board to be the replacement cost.

Both Union and Board staff submitted that while the Board did deem the amount associated with the underutilization of the line, it did not deem that the transaction had taken place. It was their view, that the Board's findings clearly indicated that the actual transaction date was relevant to the calculation of the cumulative under-recovery amount and there was no intention that ratepayers would benefit from the deemed net gain on the transaction unless the transaction actually occurred. Both Union and Board staff concluded that if there is no actual transaction, disposition of the deferral accounts could not follow.

CME argued that the entitlement of ratepayers to the deferral account balances was "ripe and absolute" and that the deferral accounts should be cleared. It also submitted that the Board should hold Union to the representations it made as to when the transaction would close.

CME noted that, in this case, the combined relief the Board granted to Union at the conclusion of the EB-2008-0411 and to DGLP in the EB-2009-0422 proceeding was induced by representations made by both Union and DGLP that DGLP's purchase of the St. Clair Line would be completed immediately following the Board's issuance (before March 11, 2010) of regulatory approvals satisfactory to DGLP. CME noted that the parties to the transaction both represented and acknowledged that ratepayers would be entitled to the balances recorded in the deferral accounts established by the Board once the Board issued regulatory approvals satisfactory to DGLP. CME submitted that these representations are binding on Union and DGLP.

CME submitted that the acknowledged condition upon which ratepayer entitlement to the deferral account balances depended has been satisfied as the Board has previously granted regulatory approvals that are satisfactory to DGLP. Therefore, the balances in the deferral accounts should be cleared to ratepayers.

In its argument CME described scenarios of how two arm's length OEB regulated utilities contractually bound to one another would handle the circumstances currently facing DGLP and Union. CME stated that an arm's length seller, in Union's position, would insist that the purchaser complete the transaction. Also, CME argued that an arm's length shipper with a long-term Precedent Agreement on DGLP's proposed pipeline wanting service thereon would never agree to amend its contract for no consideration (as Union did in this case).

CME argued that an arm's length regulated pipeline company would not have acted in this manner. It would either adhere to the commitments it had made to complete the purchase of the St. Clair Line immediately following the Board's issuance in March 2010 of regulatory approvals acceptable to DGLP, or it would have come before the Board with a request to vary that commitment.

CME stated that an arm's length regulated pipeline company would never have taken the initiative to promote the replacement of long-term contractual commitments to its project with an option agreement because one shipper had expressed concern about changing market dynamics, which is what DGLP did in this case. CME also noted that an arm's length OEB regulated pipeline company (i.e. Union) would never agree to amendments to its contracts with anchor shippers without insisting on terms that would enable it to discharge the representations and commitments it had made to the Board in which Ontario utility ratepayers had a vested interest.

It was CME's position that Union and DGLP have collaborated to produce a situation that has benefited Union's shareholder at the expense of its ratepayers. With regard to ratepayer harm, CME disagreed with Union's proposition that the declaratory order it is seeking causes no harm to ratepayers.

CME submitted that the factual base or the "status quo" for the purposes of evaluating Union's request for declaratory relief consists of the conditions that existed when the Board rendered its Decisions in March 2010. At that time, DGLP's proposed pipeline was supported by five long-term anchor contracts. CME noted that DGLP and Union have represented to the Board that the purchase of the St. Clair Line would be completed immediately following the Board's issuance on or before March 11, 2010, of approvals satisfactory to DGLP. Based on these representations, the Board had found a sale transaction date in the month of March 2010 and deemed March 1, 2010 to be the date to be used for calculating amounts to be credited to deferral accounts.

CME concluded that because the Board had granted regulatory approvals that were satisfactory to DGLP, the acknowledged condition upon which ratepayer entitlement to the deferral account balances depended on has been satisfied and therefore, the balances in the deferral accounts should be cleared to ratepayers.

Union submitted that CME's argument fails to address the purpose for which the deferral accounts were created in the first place. Union submitted that CME is effectively asking the Board to require disposition of deferral accounts, which were designed to protect ratepayers from harm arising from the St. Clair Line sale, because of representations made to the Board, without regard as to whether harm has actually been visited upon the ratepayers. Union submitted that this is fundamentally inconsistent with good regulatory practice, and that there is no basis for disposing of the cited deferral accounts at this time.

Union also submitted that CME's argument is misleading and incorrect with respect to whether the Board was induced by representations by Union or DGLP to grant the relief it did. Union noted that both of the above suggestions are based on an out-of-context interpretation of evidence given by Mr. Baker on March 1, 2010.[1]

In response to CME's argument that arm's length parties would have acted differently (i.e. they would have forced the sale of the St. Clair Line), Union submitted once again that this misses the point that if the sale has not occurred, then ratepayers have not been harmed and there is no reason to clear the balances in Accounts 179-121 and 179-122. Union further explained that CME, and all other intervenors, should be indifferent between the sale and no sale of the St. Clair Line scenarios. Union noted that in the former, harm occurs but it is remedied. In the latter, no harm occurs, and ratepayers continue to have an opportunity to earn future revenues from the St. Clair Line.

Union also submitted that it disagrees with each of the answers given by CME to its hypothetical questions[2].

[1] See Pages 18 and 19 of Union's Reply Submission for Union's detailed discussion of how the evidence has been taken out-of-context.
[2] See Pages 21 – 27 of Union's Reply Submission for a detailed rebuttal to each of CME's hypothetical questions.

CCC argued that the central issue is whether the Board should require Union to fulfill the obligation to protect the interests of its ratepayers or allow it to protect the interests of its shareholder at the expense of its ratepayers. Citing the *Toronto Hydro-Electric v. Ontario Energy Board* case[3], CCC submitted that Union had violated its obligation to ratepayers. Requiring DGLP to honour its obligations in the precedent agreement represented a risk for Union's shareholder. Rather than bear that risk, Union decided to allocate that risk to ratepayers.

CCC submitted that the event triggering the obligation to the Deferral Account balances to ratepayers was DGLP's acceptance of the Board's decision approving its Leave to Construct application. Further, CCC submitted that the disposition of these deferral accounts is not dependent on the transaction between Union and DGLP taking place.

FRPO had a similar argument and concluded that Union's parent company used its position as owner of the utility to see to its own interests while neglecting those of Union's ratepayers. FRPO requested that the Board declare that the clearing of the deferral accounts does not have to await the transaction closing and that the joint venture be required to act on its commitments represented to the Board.

Both CCC and FRPO argued that the Board should require the disposition of the balance in Accounts 179-121 and 179-122 in order to protect the interests of ratepayers.

Union stated that the logic behind CCC's and FRPO's arguments is fundamentally flawed. Union noted that if the sale of the St. Clair Line proceeds, the Board has determined that ratepayers will be harmed and should be allocated the amounts in the cited deferral accounts to compensate for that harm. If the sale does not proceed, ratepayers will not be harmed and will continue to have the opportunity to earn revenues on the St. Clair Line. Union argued that each of those scenarios represents a situation that the Board has deemed to be fair to ratepayers.

Union concluded its argument by stating that the sale of the St. Clair Line has not closed, and noted that it may never close. Therefore, there is no reason to dispose of the cited deferral accounts at this time. Union argued that to do so would represent a departure from the underlying rationale for establishing the deferral accounts in the first place.

[3] *Toronto Hydro-Electric System Limited v. Ontario Energy Board*, 2010 ONCA 284

Union further argued that focusing as CME, CCC, and FRPO do, on events subsequent to the Board's initial Decision in EB-2008-0411, distracts from the fundamental reality that without the transaction closing there is no real harm to ratepayers of not disposing of the cited deferral accounts at this time.

Union submitted, that in any event, the various arguments advanced by the intervenors are not supported by any of the Board's Decisions and lack legal and evidentiary substance.

Board Findings

The Board finds that no disposition of the balances in Accounts 179-121 and 179-122 is required at this time. The Board is of the view that the accounts were established with the sole purpose of protecting ratepayers from harm that would arise from the sale of the St. Clair Line. If the transaction does not close, there is no basis upon which the Board could conclude that disposition of the amounts in the deferral account should occur. The accounts were established to deem an amount functionally equivalent to the under recovery of revenue from the assets. That amount only ripens when the asset is sold and leaves the utility. That will only occur if the transaction actually closes. The Board finds that the disposition of the balances in the cited accounts is absolutely dependant upon the transaction being completed (i.e. the sale of the St. Clair Line).

In fact, in the EB-2008-0411 Decision dated November 27, 2009, the Board determined that the leave to sell the St. Clair Line to Dawn Gateway would expire on December 31, 2013 and that "if the transaction has not been completed by that date, a new application for leave to sell will be required in order for the transaction to proceed". These statements by the Board indicate that it specifically contemplated that the transaction may not occur.

The Board notes that the Board's Panel, in the EB-2008-0411 proceeding, did not explicitly deem a *transaction* date. The Board in that proceeding deemed a date for the purpose of establishing the *amounts* to be recorded in the deferral accounts in order that the relevant amounts (i.e. ratepayer compensation) could be determined and disposed of to ratepayers at the time that the transaction is completed.

The Board does not agree with CME's characterization that Union has represented and acknowledged to the Board that the purchase of the St. Clair Line would be completed

immediately following the Board's issuance (before March 11, 2010) of regulatory approvals satisfactory to DGLP. The Board was (and is) aware that the sale may not occur.

The Board also does not agree with CME's contention that the parties to the transaction both represented and acknowledged that ratepayers would be entitled to the balances recorded in the deferral accounts established by the Board once the Board issued regulatory approvals satisfactory to DGLP. The Board finds no reason to conclude that the cited accounts should be disposed of when no ratepayer harm has actually arisen at this time.

WHAT IF ANY ACTION IS REQUIRED BY THE BOARD AT THIS TIME

Positions of the Parties

Union argued that the only action required by the Board at this time is to grant Union an Order which states that Union is not required to dispose of the balances in Accounts 179-121 and 179-122 until the St. Clair Line sale has closed.

CME submitted that if the Board refrains from ordering Union to clear the balances in Accounts 179-121 and 179-122, then no action is required from the Board at this time (with the exception of reserving the rights for all parties to comment on this issue in the event that the sale of the St. Clair Line does not proceed).

CCC and FRPO did not comment on this issue.

Board Findings

The Board finds that Union is not required to dispose of the balances in Accounts 179-121 and 179-122 until the St. Clair Line sale has closed.

The Board finds that if the sale of the St. Clair Line occurs, the balances in Accounts 179-121 and 179-122 shall be disposed of to ratepayers (including interest) at that time. If the sale does not occur, Union shall close the cited deferral accounts and place the St. Clair Line back into ratebase.

The Board further finds that if the sale transaction does not proceed on or prior to December 31, 2011, it shall be considered cancelled, and the assets shall be returned to rate base, and the deferral accounts closed without disposition.

The Board expects that Union shall provide an update on the St. Clair Line sale issue in its 2010 Earnings Sharing and Deferral Account Disposition proceeding (EB-2011-0038).

Nothing in this Decision shall be construed so as to prevent or inhibit parties from asserting that some remedy or consideration arising from the underutilization of the assets may be considered by the Board in subsequent cost of service rate proceedings. Neither should this decision be construed so as to be predictive, in any manner or degree as to how the Board may view or consider such assertions.

The Board has not included discussion or findings related to Issue No. 3 (in Procedural Order No. 4) as the Board has found that the answer to Issue No. 1 (in Procedural Order No. 4) is yes.

The Board has received cost claims from CCC, CME and FRPO, which were filed in accordance with the Board's instructions provided at the oral hearing on April 6, 2011. The Board will be issuing its Cost Awards Decision in due course.

THE BOARD THEREFORE ORDERS THAT:

1) Union is required to dispose of the balances in Accounts 179-121 and 179-122 upon the closure of the transaction for sale of the St. Clair Line on or before December 31, 2011. In the event that the transaction is cancelled Union shall inform the Board and apply for approval to close Accounts 179-121 and 179-122 in order to return the St. Clair Line to rate base.

DATED at Toronto May 25, 2011

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary