



**RP-2005-0020**  
**EB-2005-0361**  
**EB-2006-0197**  
**EB-2007-0016**

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

**AND IN THE MATTER OF** an application by Erie  
Thames Powerlines Corporation for an Order or  
Orders approving and fixing just and reasonable  
distribution rates and other charges effective May 1,  
2006;

**AND IN THE MATTER OF** a Notice of Motion by Erie  
Thames Powerlines Corporation seeking an Order  
Varying the Decision and Order of the Board in RP-  
2005-0020 / EB-2005-0361 / EB-2006-0197.

**BEFORE:** Gordon Kaiser  
Presiding Member and Vice Chair

Paul Vlahos  
Member

Cathy Spoel  
Member

**DECISION ON MOTION**

June 8, 2007

## **Background**

On January 19, 2007, Erie Thames Powerlines Corporation (“ETPC”) filed a Notice of Motion (“Motion”) with the Ontario Energy Board (“Board”) in relation to the Board’s Decision and Order dated January 2, 2007 (the “final decision”) in the application by ETPC for 2006 electricity distribution rates, under file number RP-2005-0020 / EB-2005-0361 / EB-2006-0197. On February 2, 2007 ETPC filed an amended Motion with the Board.

In the final decision dealing with 2006 rates, the Board set rates effective January 1, 2007, rather than May 1, 2006. In so finding, the Board determined that the delay in implementation was due to the lack of appropriate evidence originally filed by ETPC, which was within the control of management.

The Motion sought an order of the Board which would permit the recovery of foregone revenue of approximately \$1,382,644. The Motion also sought correction of an error, amounting to \$50,000, between the final decision and the final rate order, relating to allowance for bad debt expense.

On March 28, 2007, the Board issued Procedural Order No. 1 and agreed to hear the amended motion by way of an oral hearing. The School Energy Coalition (SEC) was the only intervenor who participated in this Motion proceeding. A technical conference was held on April 20, 2007 followed by an oral hearing on April 27, 2007.

## **The Hearing of the Motion**

Neither Board Staff nor SEC took issue with the \$50,000 relief sought by ETPC relating to bad debt expense.

ETPC argued that the Board’s final decision should have accounted for the impact created by the use of an interim order for the period between May 1, 2006 and January 1, 2007. ETPC argued that the rates established by an interim rate order are transitory and cannot be considered final. However, in not making any adjustments to account for the impact of interim rates, ETPC contends that the

Board effectively transformed an interim order into a final order without its knowledge.

ETPC also claimed that in denying the utility the ability to recover its annual revenue requirement, the final decision raised the issue of retroactivity for the first time. ETPC contends that, as a result of the timeframe, it was unable to address this issue. ETPC also noted that the final decision did not permit retroactive rates on the basis that ETPC was solely responsible for the delay. ETPC disputed this as the Board's November 2, 2005 acknowledgment letter indicated that its application was complete, and thus ETPC had no reason to believe that its application would not be processed in time to receive rates effective May 1, 2006. ETPC also argued that the purpose of a rate proceeding is to set just and reasonable rates, not to punish applicants for any perceived shortcomings in their filings.

Board Staff argued that the decision of whether or not to grant retroactive rates for a period of interim rates is entirely at the Board's discretion and not a requirement. Board staff further argued that there was no evidence to indicate that the original panel did not give due consideration to the impact that the interim rate order would have on the utility.

Board Staff took the position that the act of setting interim rates is notice to parties that the issue of rate retroactivity would be addressed in the final rate order. As a result, the Board is not required to give any further notice that retroactivity is an issue where an interim rate order is in effect. Board Staff further argued that no new evidence was brought forth to suggest that the rates set by the Board were either unjust or unreasonable.

Board Staff argued that the Board's order should not be viewed as punishment. The Board's general practice is to not apply rates retroactively where there is a rate increase so as to not harm ratepayers and that the Board has only been inclined to grant retroactive rate orders for rate decreases. Board Staff also noted that ETPC had plenty of notice that audited financial statements for the wires company were required. Therefore, it should not have been a surprise to ETPC that the decision was delayed when the utility did not file these statements as requested.

Board Staff submitted that if the Board were to grant relief to ETPC, a rate rider be implemented for a period of two years, in order to mitigate the rate impact to ETPC's customers.

SEC argued that the Board should deny the relief sought by ETPC, since the final decision set rates that are just and reasonable. However, SEC stated that if the Board decided to re-open ETPC's application based on the issue of retroactivity, then the Board should also reconsider the entire application. It was SEC's submission that, since one of ETPC's grounds for review was that the final rates were not just and reasonable, SEC should be permitted to explore and comment on all of the factors that make up a just and reasonable rate and not be limited to the narrower scope of the review as set out by ETPC. In particular, SEC argued that the issue of affiliate transactions should be reexamined.

### **Findings**

One of the grounds for ETPC's motion is that the January 2, 2007 final rates are in error, in that the rates approved by the Board did not provide for the appropriate level of bad debt expense. On the basis of the evidence adduced, the Board accepts that the rate schedules did not properly reflect the decision in that regard and therefore an error in fact was committed. ETPC's rate schedules should be adjusted to recover an additional annualized amount of \$50,000.

Another ground for ETPC's motion is that since ETPC cannot implement the final rates effective on the date they were declared interim, the rates cannot be just and reasonable and therefore, in effect, the Board erred in law.

Counsel to SEC claims that in determining whether the final rates are just and reasonable the Board must in this case broaden its consideration to encompass a review of affiliate transactions, recent financial performance, and rate comparisons with other utilities. The Board does not accept this position. This motion is on the issue of an appropriate effective date. ETPC is not contesting any other matters that underpin the revenue requirement found by the Board. It was open to SEC to file a motion if it wanted to contest the revenue requirement and rates approved by the Board at the time that the Board issued its decision. It did not.

With respect to ETPC's arguments, rates are set so that they generate sufficient revenues on an annualized basis. Once rates are set, they are presumed to be just and reasonable until they are superseded by a further order of the Board. The test period could be a future year, a current year, or a historical year. In this case the test year chosen by ETPC was 2004, as allowed in the Handbook. Rates underpin a utility's revenue requirement. ETPC does not contest the revenue requirement found by the Board in its January 2, 2007 decision, except for the \$50,000. The Board agrees with Board staff's submission that the Board is not required to apply final rates retroactively for the period of interim rates. The Board is required to consider what the effective date for the final rates should be; that is to say it must look at each case on its own merits before reaching this decision. The original panel in this case did turn its mind to this issue, and determined that the effective date should be January 1, 2007.

The remaining grounds for ETPC's motion are that there has been a change in circumstances as the final decision transformed an interim order into a final order without ETPC's knowledge, and that there has been also a change in circumstances as ETPC did not receive notice that retroactivity would be an issue. The issue in effect is whether retroactivity should have been an issue and, if so, whether the Board was required to inform ETPC of that.

Having declared the rates interim as of May 1, 2006, the Board's jurisdiction to make the final rate order effective as of that date is not questioned by Board staff or any party. However, as Counsel to Board Staff argued, ETPC is confusing the Board's ability to retroactively change rates with the requirement to do so.

Once the rates were made interim, the requirement is that in the determination of final rates the Board must consider on what date the rates should take effect. The Board has the legal authority to set the effective date at any time from the date rates were set interim forward. The effective date that the Board selects will be determined after a consideration of all the relevant circumstances. The original panel discharged the requirement that it consider the appropriate effective date and used its discretionary powers to rule, with reasons, that the final rates should not be applied retroactively.

Counsel to EPTC relied in part on the Supreme Court's decision in *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*,

[1989] S.C.J. No. 68. In that case, the Court held that the tribunal had the power to carry final rates back to the time at which interim rates had been set. The case does not, however, state that the tribunal is *required* to adjust the interim rates retroactively. It is also important to note the full context behind the Bell decision. In the Bell case, the final rates were in fact lower than the interim rates. The purpose of adjusting the rates retroactively, therefore, was to protect the ratepayers who have little or no control over the timing of either the interim or final order. This is not to say that the Board could never adjust rates retroactively where the final order was higher than the interim order.

The determination of an effective date is inextricably linked with a rates proceeding. The Board has no requirement to give notice of its intention to consider retroactivity as it has no requirement to give notice of the fact that it will set rates based on what it finds to be just and reasonable. In any event, the fact that the Board had set interim rates constitutes in effect notice that the effective date would be an issue.

Considerable time was devoted in the hearing on the causes of the delay in processing and hearing the application for 2006 rates.

Every electricity distributor applying for 2006 rates and wishing to use 2004 as a test year was obligated to make an application pursuant to the provisions of the Board's Handbook.

The Handbook specifies that an applicant must submit audited financial statements. In its original application filing of September 6, 2005, ETPC did not include any financial statements. In the Board's acknowledgement letter of September 13, 2005, the Board identified audited financial statements as one of twenty seven items that constituted deficiencies in ETPC's filing. On October 12, 2005, ETPC refiled its application but did not include audited financial statements; it only included Notice to Reader statements. On October 21, the Board issued an acknowledgment letter identifying two additional deficiencies, but it did not repeat the deficiency of the non-filing of audited financial statements. On November 2, 2005, the Board indicated that the application was complete for processing. In its interrogatories dated January 11, 2006, among other requests, Board Staff asked for the production of audited financial statements or to explain why they were not available. ETPC's response to Board

Staff's request was that it does not have stand-alone audited financial statements and included the parent's consolidated financial statements. The Board issued its decision on the application on April 12, 2006, in which it noted the absence of audited financial statements, directed ETPC to prepare audited financial statements within 90 days and re-file an application within 120 days.

ETPC filed utility audited financial statements on July 6, 2006 and filed its new application on August 14, 2006. By letter dated August 25, 2006 the Board identified a number of deficiencies in the August 14 application. ETPC refiled its application on September 16, 2006. By letter dated October 10, 2006 the Board accepted the new application for processing and informed ETPC to expect a decision on or about March 2, 2007. The record, including interrogatories and submissions, was concluded on December 8, 2006. The Board issued its decision on January 2, 2007.

The decision stated (page 6):

The rates set out in the attached Tariff of Rates and Charges will be effective as of January 1, 2007. The Board notes that the delay in implementation is due to the lack of appropriate evidence originally filed by the Applicant. This delay was within the control of management and therefore there is no justification for the Board to not follow its general policy of not granting retroactive rate increases...[emphasis added]

ETPC had three notices; the first in provision 2.1.3 of the Handbook dated May 11, 2005, the second in the Board's September 13, 2005 letter, and the third through Board Staff's interrogatory on January 11, 2006. It is widely accepted practice, and it is repeated in the Handbook that that the onus is on an applicant to demonstrate that the rates it is seeking are just and reasonable, supported by the appropriate evidence. The fact that the audited financial statements were not materially different from the Notice to Reader information, as argued by ETPC, is not determinative of ETPC's motion. The original panel was in no position to know that at the time it had to make a decision.

Counsel for ETPC noted that electricity distributors may not yet be fully familiar with the Board's process. This is not an excuse, but it is a consideration. It is not

fair to unnecessarily burden ratepayers with retroactive charges, regardless of the method of recovery, for a utility's unfamiliarity of rate setting, the very essence of being a regulated monopoly.

Responsibility also lies with the Board itself. It is unfortunate that the Board's November 2, 2005 letter did not repeat the earlier request for stand-alone audited financial statements. The original panel was not made aware of this fact, and this constitutes a new consideration for this panel. Also, the Board itself did not act as quickly as it could have in rendering the new application complete and ready for deliberation.

Given all the circumstances and in balancing the interests of the shareholders and ratepayers, the Board considers it appropriate to vary its January 2, 2007 decision. The Board considers a reasonable effective date to be September 1, 2006. The Board also considers it reasonable for EPTC to recover the foregone revenue over two years, through a rate rider. The rider shall be calculated based on consumption determinants.

EPTC shall file with the Board and serve on intervenors of record proposed rates incorporating the Board's findings, with appropriate documentation, within 7 days from the date of this decision.

Intervenors and Board Staff shall make any submissions within 7 days from the above date.

DATED at Toronto, June 8, 2007.

*Original signed by*

Gordon Kaiser  
Presiding Member & Vice Chair

*Original signed by*

Paul Vlahos  
Member

*Original signed by*

Cathy Spoel  
Member