Ontario Energy Board

Commission de l'Énergie de l'Ontario

RP-2005-0013
EB-2005-0031

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 Great Lakes Power Limited for an order or orders approving or fixing just and reasonable rates.

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Pamela Nowina
Vice Chair and Member

Paul Vlahos
Member

DECISION AND ORDER

This is the majority decision with reasons of Vice Chair Nowina and Board Member Vlahos. The minority reasons of Vice Chair Kaiser follow.

Background

On January 18, 2005, Great Lakes Power Limited ("GLP") submitted an application to the Ontario Energy Board for a distribution rate adjustment related to the recovery of the second interim tranche of regulatory assets pursuant to the Board's instructions found in the filing guidelines issued on December 20, 2004.

On February 16, 2005, Boniferro Mill Works Inc. ("Boniferro") submitted an intervention objecting to its classification as Larger Customer A and to its line loss rates.

On March 30, 2005, the Board issued a Decision and Interim Order approving distribution rate adjustments. In that decision, the Board declared GLP's rates interim effective April 1, 2005 and because of the outstanding matter relating to Boniferro, directed GLP to file written evidence with respect to the issues raised by Boniferro. The oral hearing focusing on Boniferro's issues was held on November 7 and 8, 2005 in the Board's hearing room in Toronto.

The rate classification that currently applies to Boniferro was first approved by the Board on an interim basis on May 13, 2002[1]. At that time, Domtar Wood Products was the distribution customer that owned the specific facilities at the site now owned by Boniferro at 45 Third Line West in Sault Ste. Marie. The interim decision approved the applied-for rates derived from the allocation of costs to proposed customer classes using the results of a study performed for GLP by Navigant Consulting Inc. The Navigant study classified Domtar as "Large Customer A", the only customer in that specific rate class. The basis for this classification was Domtar's unique demand, which was significantly higher than GLP's commercial customers in the General Service > 50 kW rate class, and significantly lower than GLP's largest distribution customer.

In December of 2002, GLP's interim rate order was made final as a result of Ontario Government legislation, Bill 210. By legislation, electricity distribution rates could only be altered with the permission of the Minister of Energy during the period December 2002 to January 2005.

---

[1] RP-2002-0109/EB-2002-0249

According to the evidence, Domtar started to wind down its operations in January 2003. The hardwood sawmill did not operate in February and March of 2003. Boniferro took over the hardwood sawmill operations from Domtar on or about the end of March 2003 but Domtar remained the customer of GLP for 45 Third Line West until it exited the site at the end of October 2003. During that time, Boniferro was paying Domtar for part of the electricity bill issued to Domtar from GLP. During that period some consumption was always registered on the meter.

The evidence shows that Boniferro requested electricity service from GLP by letter dated March 24, 2003. In that letter Boniferro indicated its expectations that it would be charged under the General Service > 50 kW rate class and, if not so, to be notified. By response dated April 25, 2003, GLP indicated that it would be classifying Boniferro in the Large Customer A class, the same as Domtar, and provided the reasons for such classification.

By letter to GLP dated January 21, 2004, Boniferro expressed concerns regarding its classification as Large Customer A. In that letter, Boniferro noted that its November and December 2003 average monthly peak demand was 1,113 kW and 1,119 kW respectively and that its future peak demand is expected to be in this range.

Boniferro paid GLP on the basis of the Large Customer A rates until June 2004. Beginning in July 2004, Boniferro began to remit an amount which it calculated would be payable if Boniferro was in the General Service > 50 kW rate class.

In this proceeding, Boniferro argued that the Domtar Large Customer A rate was not applicable as this ‘site specific’ rate was not related to a site specific cost, that the results of the Navigant study were not fair to Boniferro and that Boniferro should be more appropriately placed in the General Service > 50 kW class.

GLP argued that Boniferro's operations were not significantly different from Domtar's and was opposed to the reclassification of Boniferro on that basis. GLP acknowledged that the Board never had the opportunity to scrutinize the distribution rate application which included the Navigant study as the initial interim rates were made final by Bill 210, and not as a result of a proceeding before the Board. However, GLP maintained that the study was based on standard cost allocation and rate making principles which involved the sharing of costs and subsidies among customer classes.

GLP offered to mitigate the Large Customer A rate by adjusting the allocators in the Navigant study by using the volumes reflecting Boniferro's operations in 2004. This would generate lower Large Customer A rates for Boniferro. GLP also requested that in the event the Board decided to adjust Boniferro's rates due to either a reclassification or GLP's scenario of mitigating the Large Customer A rate, that the Board grant an accounting order to establish a deferral account to record any deficiencies.

With regard to the loss factor issue, Boniferro submitted that in the event that the Board reclassified Boniferro to the General Service > 50 kW class, Boniferro would accept the current line loss factor of 6.9%; otherwise it requested that GLP justify the 6.9% figure as applicable to the Large Customer A class.

GLP submitted that it did not specifically assign a unique loss factor to the Large Customer A class as a result of the specific classification found in the Navigant study. It noted that the currently applied loss factor is appropriate for Boniferro since it was calculated in accordance with the Board's formula for primary metered customers as set out in the Board's Retail Settlement Code. GLP also noted that the current loss factor is lower than the actual recorded loss factors currently experienced in the GLP system.

Board Findings

All panel members agree on the rate classification for Boniferro from April 1, 2005, when the rates became interim. There is disagreement on the appropriate treatment of the period before this. These are the findings of the majority.

The first issue to be dealt with is whether Boniferro should continue to be in the Large Customer A classification. We find that it should not.

GLP's General Service >50 kW rate class does not contain a maximum threshold. GLP's Large Customer A classification does not state a minimum or maximum threshold. This is the first opportunity for the Board to review the reasonableness of the establishment of GLP's Large Customer A Classification.

GLP's alternative solution in this proceeding, to revise the cost allocation by using the Boniferro loads from 2004, does provide some relief to Boniferro, as the costs assigned to the Large Customer A classification are based on monthly peak loads. However, this does not address the issue of the appropriateness of the Navigant study regarding classification in the first instance. We are not persuaded on the evidence in this proceeding that it is appropriate that one customer should make up a single rate class, especially as there was no direct assignment of costs to the Large Customer A class, only an allocation based on customer loads.

Establishing a single customer class is unusual, and there must be sufficient evidence to demonstrate why it is appropriate for a particular customer to have a unique rate. Although the Board had enough evidence before it to review the rate classification dispute between the two parties, this proceeding was not the forum to specifically address the Navigant study's rationale and methodology. The Board determined that it would review evidence on the issues raised by Boniferro in its intervention of GLP's application, within the context of the 2005

rate adjustment process. The generic Notice issued by the Board for the 2005 rates proceeding limited the scope of the proceeding to a rate adjustment based on changes reflecting (in GLP's case) the next interim instalment of the four year recovery of distributors' regulatory assets.

Intervenors are not limited to addressing issues brought forth by an Applicant. Therefore, the Board was willing to review the issues brought forth by Boniferro, namely their alleged misclassification. Although the Board did not ask for evidence on the Navigant Study itself, GLP had notice that the appropriateness of the Large Customer A rate would have been an issue. However, GLP did not provide sufficient evidence in our view to justify a continuation of the site specific rate for 45 Third Line West in Sault Ste. Marie.

We therefore find that Boniferro should be reclassified to the General Service > 50 kW class. The option remains open for GLP to propose otherwise based on a new study, or a review of the Navigant Study, which would demonstrate that Boniferro, as the occupant of 45 Third Line West in Sault Ste. Marie, should be assigned to a different rate class than the General Service > 50 kW class.

The second issue is the effective date of the reclassification. We find that the reclassification will be retroactive to the date interim rates were set – April 1, 2005. Boniferro's classification will not be changed for the period prior to April 1, 2005.

GLP's rates were approved by the Board on an interim basis by way of an interim order dated May 13, 2002, in the same way as all other electricity distributors in the province received approval for interim rates. By legislation (Bill 210), interim rate orders fixing rates under s. 78 of the *Ontario Energy Board Act*, *1998* for electricity distributors were made final. During the period of the rate freeze (December 2002 to January 2005), applications to the Board for rate changes were permitted only with the leave of the Minister of Energy. The Board had not

received authority from the Minister to deal with this matter. Therefore, the Board was not able to review the reasonableness of GLP's rate classification prior to this proceeding.

Bill 210 made the interim GLP rate order a final rate order. Therefore we are of the view that changing rates prior to April 1, 2005 would be retroactive ratemaking. As the Board has stated in numerous cases, the Board does not endorse retroactive ratemaking. The Board must be mindful of the negative implications of retroactive rates. When investors and consumers cannot be assured that final rates are indeed final, the resultant risks increases costs for everyone. In addition, intergenerational inequities arise, with today's consumers paying the costs of past events. In this case, it is not appropriate for either the utility or its ratepayers to bear the implications of a retroactive rate change. To burden the utility would be contrary to the regulatory compact. To burden the ratepayers would be wrong, especially given the length of the retroactivity.

We are also of the view that the Board is limited in its decision by legal precedent. The Supreme Court of Canada has ruled on the issue of retroactive ratemaking.

In 1989, Bell Canada appealed a decision[2] of the CRTC which retroactively altered an interim rate that had previously been approved by the CRTC. The Court held that:

> It is inherent in the nature of interim orders that their effect as well as any discrepancy between the interim order and the final order may be reviewed and remedied by the final order. […] It is the interim nature of the order which makes it subject to further retrospective directions.

---

[2] *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)* [1989] 1 S.C.R. 1722

However, with regard to the status of final orders the Court stated that:

> [a] consideration of the nature of interim orders and the circumstances under which they are granted further explains and justifies their being, unlike a final decision, subject to retrospective review and remedial orders.

The Supreme Court re-iterated its position on retroactive rate-making in the ATCO decision[3]. Speaking for the majority, Mr. Justice Bastarache noted:

> [i]t is well established throughout the various provinces that utilities boards do not have the authority to retroactively change rates.

A decision of the Alberta Court of Appeal[4] also makes findings regarding retroactive rates. The Court found that:

> A fundamental principle of statutory interpretation is that retrospective power can only be granted through clear legislative language. This principle is based on notions of fairness and the reliability of expectations.

The *Ontario Energy Board Act, 1998* does not contain any provisions that deal specifically with retroactive ratemaking, and the Board is therefore not empowered to alter a final rate order retroactively. Furthermore, the Act requires that balances in deferral accounts should be reviewed by the Board at least annually. We infer from this that there is a policy against adverse impacts and inter-generational inequity that might be caused by out-of-period rate adjustments.

Therefore, for the above reasons, we find that GLP has had a valid order to charge the rates that it has charged to Boniferro for electricity consumption up to March 31, 2005. For consumption on and after April 1, 2005, however, GLP shall

---

[3] *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board),* [2006] S.C.C. No. 4

[4] *Beau Canada Exploration Ltd. v. Alberta (Energy and Utilities Board)* [2000] A.J. No. 507 (C.A.)

classify and invoice Boniferro on the basis of the General Service > 50 kW rate classification.

Having made the above findings, whether GLP erred or acted unreasonably by not placing Boniferro in the General Service > 50 kW rate class at the time Boniferro became a customer of GLP is not determinative. However, it became a focal point in the proceeding and we feel that we must comment on it. We conclude that GLP did not err or act unreasonably.

The essence of Bonifero's argument is that it should not have been classified as Large Customer A since it never accepted such classification. It argues that once Domtar exited the business, the revenue associated with the Large Customer A class disappeared and Boniferro should have been classified as a completely new customer, different from Domtar.

GLP had established and received Board approval for a rate classification based on a single customer, Domtar Wood Products. However, the rate classification described Large Customer A as the customer located at 45 Third Line West in Sault Ste. Marie and did not specifically name Domtar Wood Products. That classification was put in place at the time GLP had to unbundle its rates to conform with the Board's directions to all the electricity distributors in the province and was derived from the Navigant study. Domtar did not intervene in GLP's application at that time.

It is reasonable to expect that GLP would treat Boniferro the same as the previous owner of the site. It was the same property as Domtar's, the same distribution assets, and essentially the same business as Domtar's, served under the same meter. When Boniferro acquired certain assets from Domtar in 2003 and Boniferro replaced Domtar as the customer of GLP, Boniferro was properly assigned in our view the rate classification that applied to Domtar. The fact that the hardwood sawmill operations ceased for a period of two months does not

alter the fact that without experience as to what the changes, if any, would be to the monthly peak demand level of electricity, it would not be reasonable to expect GLP to assign Boniferro to a different classification at that time.

As a utility, GLP has a responsibility to act in a prudent fashion for all its customers. Changing the classification of an existing property without evidence of significant peak demand consumption patterns, would not be consistent with the utility's obligation to other customers who would, in the future, be required to pick up the shortfall.

Mr. Boniferro acknowledged that, prior to continuing his business as a customer of GLP, his assumption of 750 to 800 kW peak demand was his own. He neither received expert advice in forming that assumption, nor did he receive any indication from GLP that his business would be served under the General Service > 50 kW rate class. On the contrary, GLP had informed Boniferro in its response letter of April 25, 2003 that Boniferro would be billed under the same classification as Domtar. Mr. Reid, testifying on behalf of Boniferro, acknowledged that it is difficult to come up with a forecast for peak demand prior to operating a company like Boniferro. As it turned out, Boniferro's average of its 2005 monthly peak demands as of August 2005 was 1,556 kW or 15% lower than the average of Domtar's monthly peak demands in 2000.

For the above reasons, we are of the view that GLP acted reasonably in classifying Boniferro in the Large Customer A classification, replacing Domtar.

Also, by way of context, the Board was first notified of this dispute in October 2004 by way of a complaint lodged by Boniferro to the Board's Compliance Office. The Chief Compliance Officer, in a letter to Boniferro dated February 2005, found no violation of the rate order by GLP. Furthermore, in a letter to GLP dated April 27, 2005 in the context of the instant rates proceeding, the Board stated that, "The Board is of the view that this issue is not about GLPL's

compliance with its rate order but rather as to what is an appropriate rate for Boniferro going forward."

Boniferro's objection to be in the Large Customer A classification does not invalidate an existing Board rate order containing such classification.

The final issue relates to the treatment of GLP's forgone revenues resulting from the reclassification.

GLP requested that a deferral account be established to track underpayments or under recoveries of revenues as a result of this decision. The Board finds that a deferral account should be established by GLP to record the difference in revenue resulting from classifying Boniferro as a General Service > 50 kW customer effective April 1, 2005. These amounts should be considered in a future rates proceeding. The methodology used to dispose of these amounts will be determined at that time.

With respect to GLP's shortfall in revenue in the period July 2004 to March 2005, during which Boniferro was not paying GLP the invoiced amounts, it is the view of the Board that this a private collection matter between GLP and Boniferro. The Board found that the rate order was valid in this period and neither the utility nor its ratepayers should be burdened with retroactive ratemaking. However, the Board expects that GLP will exercise prudence in this regard so that it and its customers will continue to benefit from a future revenue stream and from continuing to utilize its distribution assets (no stranded assets) by having Boniferro as a customer.

We note Boniferro's position that if it were to be classified as a General Service > 50 kW customer, it would accept the 6.9% loss factor applied by GLP to that rate class. We find that that there should be no change to the previously approved 6.9% loss factor.

Therefore, the Board orders that:

1. GLP classify Boniferro as a customer in the General Service > 50 kW rate class, effective April 1, 2005.

2. GLP establish a deferral account to capture any revenue deficiency from Boniferro being classified as a General Service > 50 kW rate class customer from April 1, 2005.

DATED at Toronto, February 24, 2006

Original signed by

Pamela Nowina
Vice Chair and Member

Original signed by

Paul Vlahos
Member

MINORITY REASONS

These are the minority reasons of Vice Chair Kaiser.

This proceeding relates to a billing dispute between Great Lakes Power Ltd. ("GLP" or the "utility") and its customer, Boniferro Millworks Inc. ("Boniferro"). GLP has classified Boniferro in the Large Customer A category. Boniferro argues that it should be more properly classified as a General Service > 50 kW customer. This would result in a 25% reduction of the cost of electricity to Boniferro.

The evidence indicates that Boniferro at all times rejected this classification but for a period of time (November 2003 to June 2004) did pay the larger rate. However, since July 1, 2004 Boniferro has been paying at the lower rate under the General Service > 50 kW class. GLP argues that the customer has been underpaying and substantial monies are owed. Boniferro on the other hand, argues that if anything it has been overpaying.

This dispute came before the Board through an intervention by Boniferro in the general rate application filed by GLP on January 18, 2005. Further to the filing of the intervention by Boniferro on February 16th the Board issued various Procedural Orders which provided for interrogatories and the filing of evidence. The Board held an oral hearing in this matter on November 7th and 8th, 2005.

The rate order at issue in this case is somewhat unique. GLP's 2002 rate application was approved by the Ontario Energy Board on an interim basis on May 13, 2002, with rates made effective May 1, 2002. In December of 2002, this interim rate order was made final as a result of Ontario Government legislation, Bill 210. This final rate order set out a Large Customer A rate. While this is referred to as a rate class it in fact included only one customer and was designed specifically for that customer. The rate was set for Domtar Wood Products and

was based on the analysis performed by Navagant Consulting in a detailed cost allocation study.

In March 2003, Boniferro purchased part of the Domtar property and changed its operations. Boniferro did not assume or enter into any supply agreement with GLP and did not assume any agreements between GLP and Domtar. In November 2003, Domtar ceased all operations on the property and Boniferro was required to make its own arrangements with GLP.

When Boniferro acquired certain assets from Domtar, GLP assigned Boniferro to the Large Customer A class and began to charge distribution rates applicable to that class. Boniferro objected on the grounds that its usage was not the same as Domtar and that no cost allocation study had been done with respect to its usage.

GLP argued that the rate was “site specific” and that Boniferro was required to pay the rate.

The concept of a “site specific” rate is an unusual one. Rates are generally determined between customer classes on the basis of usage. Here there was no analysis of the usage, rather just a declaration that the rate was site specific. Moreover, this is really not a rate class; it was a one customer rate that was designed specifically for another customer.

It is clear that there were fundamental changes in the operation of Boniferro compared to the previous owner of the land, Domtar Wood Products. First, only part of the property was purchased from Domtar and second, detailed evidence was presented by the president of Boniferro as to the changed functionality. Counsel for GLP admitted in argument that in 2004 the average monthly peak demand for Boniferro was approximately 1,400 kW which was around 24% less

than the 1,831 kW that was used for the purpose of creating a Large Customer A class in the first place.

Aside from the reduced electricity use by Boniferro, evidence was presented by Boniferro that indicated that GLP was requiring Boniferro to bear an excessive cost burden. Boniferro pointed to the fact that the dedicated facilities used to serve their plant consisted of 3.65 km of line which at its brand new installed cost, as opposed to the current depreciated cost, was only $250,000. Notwithstanding that, Boniferro was allocated close to $1 million in system costs which they say did not relate to the cost of serving Boniferro.

Boniferro wants to pay the General Service > 50 kW rate from the date service commenced in November 2003. They would accordingly recover the amounts which they overpaid for a period of eight months. The majority hearing this case concluded that the lower rate can go into effect only on April 1, 2005 because to do otherwise would constitute retroactive rate-making. I disagree. This is not a case of retroactive rate-making. This is an error in customer classification.

Retroactivity

There are a number of reasons why the retroactivity issue does not arise in this case. First, there is good reason to believe that the Domtar rate disappeared. While the Domtar rate is called the Large Customer A class, it's a class in name only. It was designed for a specific customer and was based on a cost allocation study that related solely to that customer. It is argued by Boniferro that when Domtar ceased operations that rate order disappeared. If the rate order disappeared, there are no retroactive rates applying to that rate order.

Second, even if the rate did not disappear, it was not meant to apply to Boniferro and should not have been applied to Boniferro. Boniferro should not have been put in that rate class; rather, it should have been put in the General Service > 50

kW rate class. It is true that the utility classified Boniferro in this rate class during a period where the utility's rates were deemed to be a final order by legislation. But this does not mean that this classification was correct or that Boniferro should bear the costs of this classification. Does the rule against retroactive rate making mean that Boniferro should bear these costs? It is not Boniferro's fault that this matter has taken this long to resolve. Boniferro has been complaining about misclassification since the very beginning. Put differently, there is an unjust enrichment when a customer has paid a rate which does not apply to that customer, and the Board may remedy that by ordering a refund. The test for unjust enrichment was recently addressed by the Supreme Court of Canada[5]. Iacobucci J. stated the test for unjust enrichment for the Court, as follows:

> As a general matter, the test for unjust enrichment is well established in Canada. The cause of action has three elements: (1) an enrichment of the defendant; (2) a corresponding deprivation of the plaintiff; and (3) an absence of juristic reasons for the enrichment. (Paragraph 30)

The *Garland* case is particularly relevant because it addressed the payment of utility rates. In that case, the Court applied an earlier finding that the interest rate on outstanding utility bills was unlawful in the context of the test for unjust enrichment. In applying that test, the Court had no trouble finding that the utility was enriched and the rate payer was deprived. The real issue there, as well as here, was whether there was a juristic reason for the enrichment. There, as here, the utility argued that the enrichment had a juristic justification because it was authorized by a Board Order. The Court, who found that the order was unlawful and therefore inoperative, held that the order could not be relied upon as a juristic reason for the enrichment. According to the Court:

> As a result, the question of whether the statutory framework can serve as a juristic reason depends on whether the provision is held to be inoperative. (Paragraph 51)

---

5 *Garland v. Consumers' Gas Co.,* [2004] 1 S.C.R. 629.

Thus, because the provision was inoperative, the Court ordered that the payment be refunded. I believe that this is the appropriate context to consider the relevance of retroactive rate making.

No one disputes that retroactive rate-making is improper. This is most recently recognized by the Supreme Court of Canada in the ATCO decision and numerous decisions before[6]. In *Northwestern Utilities Ltd. v. City of Edmonton*, Estey J. stated on page 691:

> It's clear from the many provisions of *The Gas Utilities Act* that the Board must act prospectively and may not award rates which will recover expenses incurred in the past and not recovered from rates established for past periods.

The general principle is that when a Board establishes a Final Order with respect to rates, that rate is in effect until replaced, i.e. the final rate either is replaced by an Interim Rate or is replaced by a new Final Rate Order in a subsequent proceeding. The reason is that the regulatory compact assumes that between rate hearings, there will always be over earnings or under earnings but the utility must accept the consequences. It is not entitled to be reimbursed if it does not make its full allowed rate of return. On the other hand, the utility does not have to give money back to the ratepayers if it earns in excess of that amount. Rates are to be corrected at the time of the next hearing on a going forward basis. They are not made retroactive. This allows the utility to finance its operations on a predictable basis and provides finality to proceedings.

As a result, if the rate was properly applicable to Boniferro during the entire period, then, under the unjust enrichment doctrine, the rate would be operative.

---

6 *Northwestern Utilities Ltd. v. City of Edmonton*, [1979], 1 S.C.R. 684; *Re Coseka Resources Ltd. and Saratoga Processing Co.* (1981), 126 D.L.R. (3d) 705, leave to appeal refused, [1981] 2 S.C.R. vii; *Re Dow Chemical* Canada *Inc. and Union Gas Ltd.* (1982), 141 D.L.R. (3d) 641, aff'd (1983), 42 O.R. (2d) 731

As a result, there would be a juristic reason for the utility's enrichment, i.e., the enrichment would not be unjust. Furthermore, given the rule against retroactive rate making, the Board could not now amend that rate to cover a previous period. However, this is not the case here. I am not proposing that the rate be changed; I am finding that it did not apply. The rate was not operative as applied to Boniferro. It therefore does not constitute a juristic reason for the enrichment.

The prohibition against retroactivity assumes that a Final Order has been made by the Board and properly applies to the customer at issue. Here, the Board did not make these rates final as applied to that customer. The customer's inability to challenge the applicability of the rate occurred through a legislative "accident" when the legislature enacted Bill 210. It's hard to argue that the intent of Bill 210 was to create a final order that prohibited a customer from obtaining relief in an ongoing dispute regarding customer classification.

Fundamentally, this case is about customer misclassification. Boniferro applied for service on the basis that it was in the General Service > 50 kW category. That was rejected and the utility placed them in a unique Domtar category called Large Customer A. This dispute has continued on the basis of that alleged misclassification.

The application of the retroactivity doctrine to this case assumes that the Board is adjusting the Domtar or Large Customer A rate retroactively. That with respect is not the issue. Boniferro has never asked for that relief. Rather, Boniferro has asked to be placed in the proper customer classification and to have that take effect from the date service commenced.

In the circumstances, throughout the period starting November 2003, Boniferro should be paying the applicable rates of the General Service > 50 kW class.

It is also important that considerable evidence has been placed before the Board as to the financial difficulties facing Boniferro in its current operations. The over payment at issue is a serious matter for this particular customer. The utility needs to remain prudent that it not arbitrarily determine rates that would lead to the disappearance of the customer and to stranded assets. That will generate a revenue deficiency much greater that that created by reclassification.

How is the deficiency recovered?

Under both the minority and majority decisions there will be a revenue deficiency for the utility. GLP's filing in the 2005 rate case was based on a revenue requirement that assumed that the customer in the Large Customer A class was properly classified and is paying that rate. In both the minority and majority decisions this is not the case. The difference is the length of period that the deficiency relates to.

The minority decision states that the misclassification took place at the beginning of service in November 2003 and the lower rate should prevail from that point. The majority decision states that the lower rate should be effective only from April 1, 2005 because a lower rate prior to that date amounts to retroactive rate-making.

The majority decision analyses the prudence of the utility in the initial classification and finds no fault. It is clear that Boniferro argues that the decision was an error and that they should not have been assigned the Domtar rate and certainly not without a proper cost allocation study. There is some support for that position in the record. There is evidence that the utility declared the rate "site specific" and failed to take into account the differences in functionality of the new operator. The utility admitted in argument that the usage of Boniferro was 24% less than the demand used in striking the Domtar rate.

The Board addressed the prudence test in its Decision in the Enbridge case regarding the prudence of the Alliance contracts[7].

The test is well known but its worth repeating in the context of these proceedings. The first principle is this; when a utility makes decisions in operating its business, the regulator assumes that those decisions, whether they relate to investments or otherwise, are prudent. In other words, there is a burden on those challenging the prudence to demonstrate, on reasonable grounds, that there has been a lack of prudence.

The second principle is that, in analysing whether the utility was prudent or not, the Board must look at the facts and circumstances that were known or ought to be known to the utility at the time the decision was made. In other words, hindsight should not be used to determine prudence.

Put differently, the utility's decision can turn out to be wrong but still have been prudent. Given the limited nature of the record before us and the presumption of prudence on the part of the utility, I find that the decision by the utility to classify Boniferro in the Large Customer A category was a prudent decision. That doesn't mean it was the right decision. In fact, it was the wrong decision.

However, the consequence of this finding is that the shareholder should not bear the deficiency which would result from the reclassification of the customer. The deficiency should be recovered from the other rate classes and the exact disposition of that can be dealt with by the Panel hearing that rate case. The deficiency may be recovered from all customer classes or it may be recovered only from the General Service > 50 kW class. A Procedural Order can be issued to deal with this issue. It's not unusual in rate cases that cost allocation issues between customers will arise and be dealt with by Panels hearing those cases.

---

[7] Re: Enbridge, RP-2001-0032, Para. 3.12.2

Boniferro's remedy

Given the concern with retroactivity, I would order that Boniferro be classified in the General Service > 50 kW class from the date service commenced. The utility will be directed to provide a credit towards amounts to be paid by Boniferro in the future in an amount equal to the overpayment. The overpayment can be readily calculated and submissions can be made if necessary with respect to the accounting.

There is ample authority in the regulatory jurisprudence that credits going forward do not constitute retroactive rate-making.[8] This is particularly the case where it reflects a one time fixed amount adjustment to an overpayment that the tribunal finds unjust.

I would also order that the utility be directed to pay Boniferro's costs in this proceeding in an amount to be taxed in the usual fashion.

In summary, I agree with the majority that GLP should charge Boniferro the General Service > 50 kW rates and that the utility establish a deferral account to track any revenue deficiency that results. I disagree with the majority regarding the effective date of the reclassification. GLP should reclassify Boniferro to the General Service > 50 kW class as of the date which service commenced, November 2003. I also disagree with the majority regarding the effective date of the deferral account. The deferral account should track any revenue deficiency as of November 2003 and the disposition of these amounts should be considered by the Panel hearing the 2006 rate case. The allocation as between different customer classes can be determined at that time.

---

[8] N*ew York Water Service Corp. v. Public Service Commission*, 208 N.Y. S. 2d 587 (1960). In that case, a utility commission ruled that gains on the sale of real estate should be taken into account to reduce rates annually over the following period of 17 years (p.864). The regulator's order was upheld by the New York State Supreme Court (Appellate Division). See also *ATCO Gas and Pipelines Ltd v. Alberta Energy and Utilities Board* [2006] S.C.J. 4 at Para. 137.

DATED at Toronto, February 24, 2006

Original signed by

Gordon Kaiser
Vice Chair and Presiding Member