



EB-2010-0139

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 Norfolk Power Distribution Inc. for an order approving just and reasonable rates and other charges for electricity distribution to be effective May 1, 2011.

BEFORE: Karen Taylor
Presiding Member

Marika Hare
Member

**DECISION AND ORDER ON THE PRELIMINARY ISSUE
OF EARLY REBASING**

Norfolk Power Distribution Inc. (“Norfolk” or “the Applicant”) filed an application with the Ontario Energy Board (the “Board”), received on October 29, 2010 under section 78 of the *Ontario Energy Board Act, 1998*, (the “Act”) seeking approval for changes to the rates that Norfolk charges for electricity distribution, to be effective May 1, 2011.

The Board issued a Notice of Application and Hearing dated November 10, 2010. Energy Probe Research Foundation (“Energy Probe”), Vulnerable Energy Consumers Coalition (“VECC”), School Energy Coalition (“SEC”) and HVAC Coalition (“HVAC”) applied for intervenor status and cost eligibility. No requests for observer status were received by the Board.

On December 16, 2010, the Board issued Decision & Procedural Order No. 1, in which it determined that it would consider Norfolk’s application for early rebasing for 2011 distribution rates (the “Preliminary Issue”) in advance of further procedural steps. In this

context, the Board allowed an initial round of interrogatories by intervenors and Board staff to obtain additional information specifically related to the Preliminary Issue and Norfolk's evidence on the Preliminary Issue followed by submissions and reply submissions. Board staff, Energy Probe and VECC all asked interrogatories on the Preliminary Issue. Norfolk filed its responses to these interrogatories on January 11, 2011. On January 21, 2011, Board staff, Energy Probe, SEC and VECC all filed submissions on this matter. On January 31, 2011, Norfolk filed its reply submission.

In a letter sent to distributors on April 20, 2010 (the "Early Rebasing Letter"), the Board stated that:

A distributor, including the four distributors referred to above, that seeks to have its rates rebased in advance of its next regularly scheduled cost of service proceeding must justify, in its cost of service application, why an early rebasing is required notwithstanding that the "off ramp" conditions have not been met. Specifically, the distributor must clearly demonstrate why and how it cannot adequately manage its resources and financial needs during the remainder of its IRM plan period. Distributors are advised that the panel of the Board hearing the application may consider it appropriate to determine, as a preliminary issue, whether the application for rebasing is justified or whether the application as framed should be dismissed.

Distributors are also advised that the Board may, where an application for early rebasing does not appear to have been justified, disallow some or all of the regulatory costs associated with the preparation and hearing of that application, including the Board's costs and intervenor costs. In other words, the Board may order that some or all of those costs be borne by the shareholder.

The Board notes that Norfolk last rebased its distribution rates in 2008 and would normally come in for rebasing in 2012 under the 3rd Generation Incentive Regulation Mechanism ("IRM") plan.

In its application, Norfolk provided its reasons and support for filing an application for an early rebasing of rates for 2011. These reasons generally fell under the following five categories:

1. Rate Stabilization
2. Prior Board Decision & Intent
3. Rate Application Efficiency
4. Financial Need
5. Totality

Rate Stabilization

Norfolk stated that there were two aspects to the rate stabilization issue. These were: (a) Reduction in Retail Transmission Rates, and (b) Delayed Disposition of Group 1 Account Balances.

Reduction in Retail Transmission Rates

Norfolk stated that with the completion of its transformer station in 2010, its transformation charges have declined which will result in a significant reduction in Retail Transmission Connection Rates charged to customers which could not be effectively dealt with through an IRM application.

Staff noted that the Board has in the past been flexible in allowing applicants, when making IRM applications, to deviate from the filing requirements and guidelines in order to better address unique and discrete issues.

Intervenors submitted that any reduction in transmission costs in 2011 is not a justification for an early rebasing application as any reduction in transmission costs incurred in 2011 will be captured in a variance account to be disposed in the future.

Norfolk acknowledged that the refunding of the transmission cost reductions would be captured in the variance account. However, it stated that it was attempting to stabilize distribution and retail transmission rates through its cost of service application.

Delayed Disposition of Group 1 Account Balances

The second aspect of the rate stabilization issue cited by Norfolk is that in its 2010 IRM application (EB-2009-0238), it had proposed to delay disposition of 75% of the relevant Group 1 account balances until 2011. Norfolk stated that the rationale behind this request was to avoid rate volatility due to decreased rates in 2010 arising from a full disposition of Group 1 accounts in that year, followed in 2011 by both the removal of the disposition rate rider, plus increased distribution rates from the planned cost of service application.

Intervenors argued that there was no evidence to suggest that rate volatility in excess of that which may require rate mitigation measures will occur if the cost of service application for 2012 rates proceeds as scheduled.

Staff submitted that rate stabilization is not a criterion justifying an earlier cost of service application in the Early Rebasing Letter, or one that has previously been accepted by the Board.

Norfolk argued that the highly negative aspects of rate volatility for its customers and for the Board should be addressed when they are identified and could be fixed now through its cost of service application.

Prior Board Decision & Intent

Prior Board Decision

The second justification cited by Norfolk is the Board's EB-2009-0238 *Decision and Order* of April 6, 2010 on Norfolk Power Distribution Inc.'s 2010 IRM application ("the 2010 IRM Decision"). Norfolk expressed the view that this Decision, which incorporated the setting aside of the accepted principle of a one-year disposition period for Group 1 accounts due to rate fluctuations arising from the early 2011 cost of service application, represented an acceptance by the Board that it would be making the cost of service application.

Norfolk submitted that it was for this reason it did not believe that the Board's Hydro Ottawa Limited EB-2010-0133 *Decision* of October 27, 2010 ("the Hydro Ottawa Early Rebasing Decision"), in which the Board had rejected Hydro Ottawa's early rebasing application, was applicable to its circumstances.

Norfolk instead stated that it was in a similar position in this regard to Horizon Utilities Corporation ("Horizon") whose early rebasing application had been allowed to proceed by the Board in its EB-2010-0131 *Decision on the Preliminary Issue of Early Rebasing and Procedural Order No. 4* of December 15, 2010 ("the Horizon Early Rebasing Decision") in part on the basis that the Board found it was reasonable for Horizon to believe that the Board expected a cost of service application from Horizon for the 2011 rate year.

Staff agreed with Norfolk that there were some similarities between these aspects of the Horizon and Norfolk applications in that both preceding Board Decisions had referred to impending cost of service applications by the applicant in question. However, staff noted differences, as well, most notably that unlike the case with Norfolk, Horizon Utilities had earlier filed an application for Z-factor treatment of load loss that had been denied by the Board in its EB-2009-0332 *Decision* of March 24, 2010 (“the Horizon Z-Factor Decision”). In that Decision, the Board had stated that when a distributor was confronted with revenue losses of the kind which had led to Horizon’s Z-Factor application, the Board believed the most appropriate approach for a distributor to take was to file a cost of service application.

Board staff noted that Norfolk’s early rebasing application is, unlike Horizon’s, not based on the need to deal with a pressing load loss, or similar issue, and submitted that it therefore does not meet the stated criterion in the Early Rebasing Letter “that the distributor must clearly demonstrate why and how it cannot adequately manage its resources and financial needs during the remainder of its IRM plan period.” Intervenors made a similar argument.

Intent

Norfolk submitted that its intention to file a cost of service application for 2011 rates was made prior to the Board’s Early Rebasing Letter, on two separate occasions, and further confirmed, subsequent to the Board’s letter. Norfolk cited the following three documents in support of its contention: (1) its letter of February 19, 2010 to the Board advising of its intention to file a cost of service application for new rates effective May 1, 2011, (2) its request in its February 22, 2010 final submission in respect of its IRM application for a certain regulatory treatment with respect to the disposition of its 2008 deferral and variance account balances, grounded on its plan to file a cost of service application for 2011 rates, and (3) its May 31, 2010 letter to the Board confirming its plan to file a 2011 cost of service application.

Rate Application Efficiency

Norfolk stated that it would be more efficient to proceed with a cost of service application at this time, followed by a simpler IRM application in 2012.

Board staff acknowledged that some efficiencies may be achieved under these circumstances, but noted that it would be difficult to quantify the magnitude of the

efficiencies that would be achieved and their significance since other presently unanticipated issues may have arisen before the 2012 cost of service application was filed. Furthermore, staff stated that possible rate application efficiencies are not a criterion that has been established by the Board to justify early rebasing applications.

Intervenors argued that they did not believe there was any regulatory efficiency to be gained by an earlier application and, in fact, the opposite was true, as longer IRM terms were set in part by the Board to provide regulatory efficiencies.

Financial Need

Norfolk stated that in its May 31, 2010 letter to the Board that it expected to earn less than the approved ROE by more than 300 basis points for the year 2011. However, Norfolk noted that, between the time of the letter and the submission of the application, revisions to expected expenditures in 2011 reduced this amount to 296 basis points, which is just below the 300 basis point threshold.

Board staff noted that Norfolk's presently approved ROE is 8.57%. This would mean that the application of the 300 basis points off-ramp would imply that Norfolk's ROE would need to be at a level of 5.57% or lower to meet this criterion. In response to a Board staff interrogatory, Norfolk stated that its 2009 and 2010 ROEs were 8.22% and 6.44% respectively. Furthermore, Norfolk's most current updated ROE forecast for 2010 is 6.73%. Staff concluded that Norfolk had not demonstrated that the Board's off-ramp criteria related to financial need had been met as all of these ROEs were above the threshold level.

Intervenors argued that the off-ramp would be triggered by 2009 results which in Norfolk's case did not meet the off-ramp threshold. Intervenors also argued that while comparisons with respect to the forecast 2010 level of ROE are irrelevant, the 2010 forecast is also well within the range. Intervenors further submitted that the forecast ROE of 2011 at 5.61% is misleading because of the inclusion of smart meters in the rate base in the current application and noted that once smart meters are excluded, the 2011 forecast is well within the 300 basis point range. Intervenors also noted Norfolk's confirmation that it had been able to obtain long-term debt financing without paying a premium.

Norfolk submitted that it did not dispute the off-ramp was meant to be triggered based on actual financial results, but argued that the Board did not appear to have restricted itself to historical years in the Hydro Ottawa Early Rebasing Decision, noting references to Hydro Ottawa's projected ROE in that decision. Norfolk also submitted that the Board had allowed the Horizon early rebasing application to proceed even though it did not meet the off-ramp threshold.

Totality

Norfolk summarized its arguments in its reply submission as to why the Board should allow its early rebasing application to proceed as related to what it characterized as the totality concept which was the approach that it saw the Board as taking in coming to its Hydro Ottawa Early Rebasing Decision.

Norfolk submitted that the specific circumstances and unique aspects of its Application should be paramount and these should not be trumped by notions of technicalities as certain parties' arguments imply.

Norfolk further submitted that there were no similarities between the Hydro Ottawa case and its case, and no parties in their arguments had even attempted to liken Norfolk's case with that of Hydro Ottawa.

Norfolk argued instead that there were similarities between its case and that of Horizon. These related to the Board's conclusion in its Horizon Early Rebasing Decision that it was reasonable for Horizon to believe the Board would accept a cost of service application even though Horizon did not meet the off-ramp criteria.

Board Findings

The application is dismissed.

The Board has determined that Norfolk has not met the criteria set out in the Early Rebasing Letter of the Board and is therefore not eligible for early rebasing.

The Board's determination is based first on its finding that Norfolk's previously communicated intent to file a cost of service application in 2011, whether via letters to the Board dated February 19, 2010 and May 31, 2010 or via final submission in respect

of its 2010 IRM proceeding (dated February 22, 2010), does not imply acceptance by the Board.

Moreover, the Early Rebasing Letter clearly stated that the Board had received letters from four distributors, one of which was Norfolk, indicating that they intended to file cost of service applications to have their rates rebased in 2011, rather than in 2012, as scheduled. The Board clearly stated in the Early Rebasing Letter, that “a distributor, including the four distributors referred to above” would have to justify an early rebasing application.

Furthermore, Norfolk is not a distributor named in Appendix A of the Early Rebasing Letter, leaving no ambiguity that Norfolk would be considered an “early filer” if it filed for cost of service rates in 2011 rather than 2012. Norfolk’s subsequent correspondence to the Board dated May 31, 2010 has no effect on the requirement to justify a cost of service application in 2011. Thus Norfolk had an obligation to justify why it could not stay on IRM for another year. The Board finds that this is an obligation which it has not met.

The second aspect of the Board’s determination is that neither the financial conditions of the May 31, 2010 letter, nor the Board’s earnings off-ramp conditions have been met, either on an actual basis or based on the information placed on the case record by Norfolk for the 2010 bridge year and 2011 test year.

The Board also finds that the Horizon Early Rebasing Decision is not determinative of Norfolk’s application. This is because Norfolk’s circumstances are not analogous to those that existed for Horizon and led to the findings of the Board in that Decision. In that case, the Board found it was reasonable for Horizon to believe that the Board would accept a cost of service application from Horizon at that time, based on the Board’s findings in the Horizon Z-Factor Decision and, accordingly, the April 20, 2010 letter did not apply to that situation.

The Board finds that the same situation does not exist for Norfolk for two reasons: first, the Board did not make any reply to Norfolk’s February 19, 2010 letter that could be interpreted as giving rise to a reasonable expectation that an early rebasing application from Norfolk would be considered by the Board. In fact, as the Early Rebasing Letter addressed all distributors that inquired about or considered making early applications it should have been clear that early rebasing applications would not be considered in the

absence of the special circumstances set out by the Board. Second, the Board finds there is no merit to Norfolk's assertion that acceptance of its proposal for a two year disposition of Group 1 account balances in the 2010 IRM Decision represented an acceptance by the Board that it would be making the cost of service application in 2011. The Board notes that a potential 2011 rebasing was not an issue during the Norfolk 2010 IRM proceeding and, as such, the 2010 IRM Decision was entirely silent on this matter.

Furthermore, the Board notes Norfolk's lower projected financial results for 2011 are not due to loss of load as was the case with Horizon. As stated by the Board in the Early Rebasing Letter, "the Board's rate-setting policies are such that distributors are expected to be able to adequately manage their resources and financial needs during the term of their IRM plan".

Finally, the Board is of the view that all of the extra elements incorporated into Norfolk's application and raised by Norfolk as justification for its early cost of service application can be addressed in the IRM process without undue complexity. The Board notes that other utilities have filed IRM applications that include an Incremental Capital Module ("ICM"), increases in the smart meter funding adder, and deferral account disposition. The Board disagrees with Norfolk's contention that an IRM application that deals with these potential issues is less efficient than a cost of service application.

The Board finds that if Norfolk wishes to file an application for 2011 rates, it should do so based on the 3rd Generation IRM formula. Norfolk is also directed to record the Board and intervenor costs associated with this proceeding (EB-2010-0139) in a sub-account of Account 1508 'Other Regulatory Assets', Sub-account "2011 Cost of Service Proceeding: Board and Intervenor costs" for review and disposition upon Norfolk's filing of its next cost of service application. All other costs incurred by Norfolk in preparing and filing this application must be absorbed within the current revenue envelope. No additional recovery will be allowed.

Cost Awards

The Board may grant cost awards to eligible stakeholders pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. The Board will determine eligibility for costs in accordance with its *Practice Direction on Cost Awards*. When determining

the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's *Practice Direction on Cost Awards*. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied.

All filings with the Board must quote the file number EB-2010-0139, and be made through the Board's web portal at www.errr.oeb.gov.on.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must be received by the Board by 4:45 p.m. on the stated date. Parties should use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available, parties may e-mail their documents to the attention of the Board Secretary at BoardSec@oeb.gov.on.ca. All other filings not filed via the Board's web portal should be filed in accordance with the Board's *Practice Directions on Cost Awards*.

THE BOARD ORDERS THAT:

1. The application is dismissed.
2. Norfolk shall record the Board and intervenor costs associated with the proceeding in a sub-account of Account 1508 'Other Regulatory Assets' Sub-account "2011 Cost of Service Proceeding: Board and Intervenor costs" for disposition in the next cost of service application.
3. Intervenors shall file with the Board and forward to Norfolk their respective cost claims within 10 days from the date of this Decision.
4. Norfolk shall file with the Board and forward to intervenors any objections to the claimed costs within 24 days from the date of this Decision.
5. Intervenors shall file with the Board and forward to Norfolk any responses to any objections for cost claims within 31 days of the date of this Decision.
6. Norfolk shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, February 11, 2011

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary