



EB-2008-0154

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 July 1, 2008.

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 July 1, 2007.

AND IN THE MATTER OF Rules 7, 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

BEFORE: Cynthia Chaplin
Presiding Member

Paul Vlahos
Member

Paul Sommerville
Member

DECISION ON MOTION

October 23, 2008

Background

Union Gas Limited (“Union”) filed an application on March 4, 2008 with the Ontario Energy Board (the “Board”) seeking approval for final disposition and recovery of certain 2007 year-end deferral account balances (EB-2008-0034). In that proceeding Union requested, among other matters, disposal of the Long Term Peak Storage Services Deferral Account (“Account 179-72”). Union indicated that, based on its interpretation of the Board’s November 7, 2006 Natural Gas Electricity Interface Review Decision (“NGEIR Decision”), it did not record net revenues from long-term storage contracts in Account 179-72 entered into after the NGEIR Decision. On June 3, 2008, the Board issued its decision on the application (the “2007 Deferral Account Decision”). In its decision, the Board rejected Union’s interpretation of the NGEIR Decision and ordered Union to include all long-term storage transactions in calculating the balance in Account 179-72, that is, transactions that occurred both before and after the release of the NGEIR Decision.

In its 2006 deferral account application (EB-2007-0598), Union asked the Board to approve a debit charge to Account 179-72. Union claimed that it was required to record a deferred income tax expense of \$10.524 million as a result of the change in the regulatory treatment of storage services provided to Union’s ex-franchise customers. Union asserted that the change in accounting treatment resulted from the Board’s NGEIR Decision. The Board in its decision on that application (the “2006 Deferral Account Decision”) determined that the deregulation of Union’s storage assets was notionally equivalent to a divestiture, and that any liabilities associated with these assets should properly be associated with Union’s newly formed ex-franchise storage service business. The Board ordered Union to eliminate any and all deferred income tax expense from Account 179-72. The tax expense in question related to the years 1997-2006, the period before the Board’s NGEIR Decision.

The Motion

On June 23, 2008, Union filed a Motion to review the Board’s 2007 Deferral Account Decision with respect to Account 179-72. In its motion, Union requested a review of the 2007 Deferral Account Decision, on the basis that it is, in Union’s view, inconsistent with the NGEIR Decision and the 2006 Deferral Account Decision. Union also requested that if the Board finds that the 2007 Deferral

Account Decision is not inconsistent with the NGEIR Decision, there be a review of the 2006 Deferral Account Decision, on the basis that it is, in Union's view, inconsistent with the 2007 Deferral Account Decision.

Union claimed that the inconsistency between the two deferral account decisions leaves Union with contradictory directions from the Board as to how it is to calculate the margins that are to be shared with ratepayers during the phase-out period. Union claimed that it would be unfair to require Union to share with ratepayers the margins earned from its unregulated Post-NGEIR Long-Term Storage Contracts while at the same time prohibiting Union from deducting from Account 179-72 all the costs of providing that unregulated service.

The Board issued a Notice of Hearing and Procedural Order No. 1 on July 14, 2008, setting out the timelines for intervenor submissions and Union's reply submission on both the threshold question and the substantive issues. In addition to Board staff, the following intervenors filed submissions:

- Canadian Manufacturers & Exporters ("CME")
- School Energy Coalition ("SEC")
- City of Kitchener
- London Property Management Association ("LPMA")
- Industrial Gas Users Association ("IGUA")

Intervenors and Board staff submitted that the Board should reject Union's motion.

For the reasons set out below, the Board rejects Union's motion.

The Threshold Question

Part VII (sections 42 to 45) of the Board's Rules of Practice and Procedure deals with the review of decisions of the Board. Rule 42.01 provides that "any person may bring a motion requesting the Board to review all of or part of a final order or decision, and to vary, suspend or cancel the order or decision". Rule 42.03 requires that the notice of motion under Rule 42.01 shall include the information required under Rule 44. Rule 44.01 provides as follows:

44.01 Every notice of motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:

- (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
 - (i) error in fact;
 - (ii) change in circumstances;
 - (iii) new facts that have arisen;
 - (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and
- (b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

Under Rule 45.01 the Board may determine whether the motion properly supports a request for review and variance of the Board's decision. Rule 45.01 allows the Board to dismiss a motion without holding a hearing if the Board determines that a motion does not meet the threshold.

The threshold test for a motion to review was recently articulated in the Board's May 22, 2007 decision respecting a motion to review the NGEIR Decision.¹ In that motion decision the Board stated:

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

Every notice of motion... shall set out the grounds for the motion that raise a question as to the correctness of the order or decision...

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case. In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel,

¹ NGEIR (EB-2006-0322, EB-2006-0338, EB-2006-0340) Motions to Review, the Natural Gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007, pp. 17-18.

that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

In demonstrating that there are grounds for questioning the correctness of the 2006 and 2007 Deferral Account Decisions, it is the Board's view that Union must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature.

The 2007 Deferral Account Decision and the NGEIR Decision

As noted by intervenors and Board staff, the 2007 Deferral Account Decision essentially reiterates the NGEIR Decision. The Board's findings on page 106 and 107 of the NGEIR Decision clearly outline the Board's approach to the sharing of long-term margins. After initially describing a conceptual approach of sharing margins on existing long-term contracts separately from margins on post-NGEIR long-term contracts, the Board decided against implementing the conceptual approach in favour of a simpler approach. The Board cited complexity and the requirement for an ongoing review as the primary reasons for not selecting the conceptual approach.

The Board determined that it would adopt a simpler phase-out mechanism as "a rough sort of 'proxy'". This "proxy" approach is the four-year phase out of the margin sharing. The Board stated,

The Board considered whether to require Union to record the margins on existing long-term contracts separately from the margins on new long-term contracts. Under this approach, ratepayers would be credited with 90% of the margins on existing contracts for the remaining term of those contracts. This approach conceptually has appeal but could give rise to ongoing implementation questions. For example, the Board might have to consider how contract re-negotiations or defaults by customers are to be treated. This level of complexity and potential ongoing review is unwarranted.

The Board has concluded that it should adopt a simpler phase-out mechanism that is a rough sort of “proxy” for the conceptual approach described above. The phase-out of the sharing of margins on Union’s long-term storage transactions will take place over four years. The share accruing to Union will increase over that period to recognize that contracts will mature and a larger part of Union’s total long-term margins will be generated by new transactions. For 2007, forecast margins (on long-term and short-term transactions) now included in the determination of rates will remain unchanged. After 2007, Union’s share of long-term margins will be as follows: 2008 – 25%, 2009 – 50%, 2010 – 75%, 2011 and thereafter – 100%.

Union’s interpretation of the NGEIR Decision is that, during the phase-out period, it is only required to share with ratepayers the long-term margins arising from the pre-NGEIR long-term storage contracts, and that it can retain all of the margins earned from all post-NGEIR long-term storage contracts. In the NGEIR Decision the Board clearly explained the way in which the “proxy” approach is roughly equivalent to the conceptual approach. The Board stated: “The share accruing to Union will increase over that period to recognize that contracts will mature and a larger part of Union’s total long-term margins will be generated by new transactions.” Therefore it is clear that Union’s interpretation of the NGEIR Decision is incorrect; the Board clearly contemplated a transition during which Union’s share of the storage margins would increase in recognition that more of the total storage margins would be attributable to new contracts.

For these reasons the Board finds that the 2007 Deferral Account Decision was correct and there is no inconsistency between the 2007 Deferral Account Decision and the NGEIR Decision.

The 2007 Deferral Account Decision and the 2006 Deferral Account Decision

Union claimed that the finding in the 2006 Deferral Account Decision that all costs associated with Union’s unregulated storage business should not be applied to Deferral Account 179-72 is inconsistent with the finding in the 2007 Deferral Decision that “net revenues” from the unregulated storage business should be applied to Deferral Account 179-72 during the four year phase-out period. Union argued that in order to calculate “net revenues” from the unregulated storage business Union must be able to deduct the costs associated with the unregulated storage business, but the 2006 Deferral Account Decision prohibits Union from doing so.

In the 2006 Deferral Account Decision, the Board stated at page 8:

The Board notes that while accounting treatment can be an important consideration in the regulatory treatment of matters, it is not always predictive of the regulatory outcome. The fact that Union may have to change its accounting treatment of the deferred tax account as a result of the NGEIR decision, does not automatically lead to the conclusion that the accounting tax liability associated with it should come into rates now, or at all. In the absence of a near certain revenue stream that matches future costs, a company must book the future liability. Regulated entities have the assurance that prudently incurred costs will be offset by regulated revenues and therefore they need not book the future liability. In these circumstances, this rule has limited relevance for how the change may be reflected from a regulatory point of view.

The respective accounting treatments for regulated and non-regulated entities reflect the distinction of one entity having a predictable revenue stream where as the other does not. Furthermore, the CICA handbook does not consider the disposition of the historic costs or who bears them in a regulatory context. This remains the purview of the regulator.

The Board finds that the deregulation of Union's storage assets is notionally equivalent to a divestiture, and that any liabilities associated with these assets should properly be associated with Union's newly formed ex-franchise storage service business.

The Board in the 2006 Deferral Account Decision determined that deferred taxes for the period 1997 to 2006 were not recoverable from ratepayers regardless of the accounting implications of the deregulation of the ex-franchise storage business. Union had recorded a deferred tax liability of \$10.524 million related to the unregulated storage operations related to the period 1997-2006, which preceded the NGEIR Decision. This liability represented the portion of Union's unrecorded future income taxes from 1997 to 2006 related to the ex-franchise storage operations using the percentage of unregulated storage established in the NGEIR Decision. In denying the recovery of the deferred tax expense, the Board determined that all liabilities associated with Union's unregulated portion of storage assets should be associated with those assets. This was a distinct issue that dealt with historical deferred taxes and the recovery of that liability by Union. This is the only aspect of deferred taxes addressed by the Board in that decision.

Union's argument that net storage contract revenues cannot be determined without reference to deferred tax costs to provide the services associated with those revenues is, from a regulatory perspective, incorrect. It is within the purview of the regulator to determine whether such costs can be recovered or included in rates notwithstanding potential accounting requirements. The 2006 Deferral Account Decision determined that the deferred tax liability related to 1997-2006 should not be recoverable from a regulatory perspective.

Notably, in the 2007 Deferral Account proceeding, Union did not indicate that it was not recording post-NGEIR long-term storage transactions in Account 179-72. This was despite the fact that this was a significant change in how the balances were calculated. This change was revealed in Union's reply argument in response to Board staff's submission on this issue. Union's reply argument in that proceeding makes no mention of deferred taxes or the 2006 Deferral Account Decision. If the 2006 Deferral Account Decision had relevance to the position Union was advancing, then Union should have raised that argument in the 2007 Deferral Account proceeding. As a result, the 2007 Deferral Account Decision does not address in any way the impact of deferred taxes on the 2007 net revenues from ex-franchise storage transactions.

Union's argument that it is unable to comply with both the 2006 Deferral Account Decision and the 2007 Deferral Account Decision at the same time is not convincing.

Union can include ongoing costs associated with the unregulated storage business to calculate net revenues with the exception of deferred taxes for the period 1997-2006, the liability which was at issue in the 2006 Deferral Account Decision and for which the Board denied recovery. The 2006 Deferral Account Decision makes no finding as to the appropriate recognition of taxes in the determination of net revenues from storage transactions for the period 2007 and beyond; the decision deals specifically and exclusively with the 1997-2006 deferred tax expense. And, as indicated above, the issue of deferred taxes was not raised at all in the 2007 proceeding, and therefore the 2007 Deferral Account Decision also does not address the treatment of taxes for purposes of determining "net revenues" from ex-franchise storage services. The 2007 Deferral Account Decision accepted the \$2.196 million that was included in

Union's application but directed Union to recalculate the 2007 balance in account 179-72 in accordance with the Board's finding, for later disposition. There is nothing in that decision to prevent Union from including current and deferred tax expenses related directly to the 2007 revenues as a cost for purposes of determining net revenues.

Therefore, there is no basis upon which to conclude that the 2006 Deferral Account Decision is inconsistent with the 2007 Deferral Account Decision or the NGEIR Decision.

Conclusion

In conclusion, Union has failed to demonstrate that the findings made by the panels in the 2006 and 2007 Deferral Account Decisions are contrary to the evidence that was before the panels, or that the panels failed to address a material issue or that the panels made inconsistent findings.

The Board therefore dismisses Union's motion for review on the grounds that it fails to pass the threshold test for review. Even if the Board found that the threshold test had been met, and determined that it was appropriate to review the 2006 and 2007 Deferral Account Decisions, the Board would find that the 2006 and 2007 Deferral Account Decisions were correct for the reasons set out throughout this decision.

In light of the decision the Board has made on the threshold question, it is unnecessary to address the issue of the timeliness of Union's request for a review of the 2006 Deferral Account Decision.

A cost awards decision will be issued after the steps set out below are completed. The Board notes that if Union had been successful in these reviews, only its shareholder would have benefited. Accordingly, and because the review failed at the threshold test, the Board asks parties when submitting their respective costs claims to address the question as to how the costs associated with these reviews should be accounted for. Union can respond to any proposals on this question, when it responds to the costs claims.

1. Intervenors eligible for cost awards shall file with the Board and forward to Union their respective cost claims within 15 days from the date of this Decision.
2. Union may file with the Board and forward these intervenors any objections to the claimed costs within 30 days from the date of this Decision.
3. Intervenors, whose cost claims have been objected to, may file with the Board and forward to Union any responses to any objections for cost claims within 45 days of the date of this Decision.

Union shall pay any Board costs of, and incidental to, this proceeding upon receipt of the Board's invoice.

DATED at Toronto, October 23, 2008

ONTARIO ENERGY BOARD

Original Signed By

Cynthia Chaplin
Presiding Member

Original Signed By

Paul Vlahos
Member

Original Signed By

Paul Sommerville
Member