



ORAL DECISION

IN THE MATTER OF an application by New Brunswick Power Corporation pursuant to subsection 103(1) of the *Electricity Act*, S.N.B. 2013, c.7, for the approval of the schedules of the rates for the fiscal year commencing April 1, 2016.

(Matter No. 307)

Motion for an Order Approving an Interim Schedule of Rates

February 26, 2016

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ORAL DECISION

- [1] This decision arises out of a motion filed by the New Brunswick Power Corporation (NB Power) on December 28, 2015, pursuant to section 40 of the *Energy and Utilities Board Act* (EUB Act). The motion seeks Board approval of an interim schedule of rates for the fiscal year 2016-2017 to reflect a two percent increase to all rate classes, effective April 1, 2016. This relates to NB Power's general rate application for approval of rates for the fiscal year 2016-2017, under section 103(1) of the *Electricity Act*, which is Board Matter number 307.
- [2] Section 40 of the *Energy and Utilities Board Act* states:
- 40(1)** The Board may, with respect to any matter before it, make an interim order where it considers it advisable to do so, and may impose such terms and conditions as it considers appropriate.
- 40(2)** The Board may provide directions in the event that the interim order is different from the final order.
- [3] Subsection 103(3) of the *Electricity Act* states:
- 103(3)** Nothing prevents the Corporation from making an application to the Board at any time for the approval of interim rates.
- [4] The facts are as follows:
- [5] NB Power filed a general rate application for the previous fiscal year of 2015-2016 in November 2014. The hearing of that matter (Matter number 272) took place from June 15 until June 26, 2015. The Board issued a decision on September 10, 2015, approving NB Power's revenue requirement, and issued a decision approving rates on September 28. Full reasons for decision were issued by the Board on October 28, 2015.
- [6] On December 28, 2015, NB Power filed its general rate application in the current matter number 307, with supporting evidence. A pre-hearing conference was held on January 15, 2016, at which time the hearing of Matter 307 was set down for the week of May 9th.

- [7] NB Power filed the affidavit of Mr. Darren Murphy, who is its Chief Financial Officer and Vice-President, Corporate Services, in support of the current motion. He also testified at the hearing which was held on February 24.
- [8] According to Mr. Murphy's evidence, NB Power had been preparing the current rate application during most of 2015, but planned to delay filing the current general rate application, pending receipt of the Board's decision in the previous case, being Matter 272. As stated, those Reasons for Decision were released by the Board on October 28.
- [9] On October 29, NB Power's Board of Directors approved the 2016-2017 budget. Mr. Murphy testified that the annual budget process usually begins in April.
- [10] The Board's October 28 Reasons for Decision contained requirements to be included in the current general rate application. As a result of these requirements, NB Power decided to delay its filing for the current rate application. On December 11, it filed a request to vary one of these requirements, by allowing NB Power to comply with the requirement in the 2017-2018 general rate application. The Board granted this request at the January 15, 2016 pre-hearing conference.
- [11] Mr. Murphy acknowledged that there was a six to eight week period between the earliest date when NB Power could have filed its general rate application in early November of 2015, and December 28, when it was actually filed (Transcript, p. 29). He explained that they would have been prepared to file in November, had it not been for the additional filing requirements that were contained in the Board's October 28 Reasons for Decision.
- [12] NB Power's Notice of Motion for interim rates states that the delay in recovering NB Power's 2016-2017 revenue requirement, caused by the normal processes to complete a full hearing on the merits of the general rate application, will "have deleterious financial consequences" for NB Power. For this reason, it seeks, as stated earlier, approval of an interim schedule of rates for the fiscal year 2016-2017 to reflect a two percent increase to all rate classes, effective April 1, 2016.
- [13] Mr. Murphy's supporting affidavit states that NB Power believes that, with the hearing of the rate application set for the week of May 9, it is reasonable to assume that the Board would have a decision in time for NB Power to implement approved rates as of July 1. This would represent a three month delay, from April 1st, from NB Power's point of view. Assuming the Board were to approve a general rate increase of 2%, without an interim 2% increase as of April 1st, NB Power

will sustain a loss of earnings in the approximate amount of \$3.8 million. A calculation of this amount is attached to Mr. Murphy's affidavit. There were no challenges to this calculation.

[14] In his testimony, Mr. Murphy described the \$3.8 million potential loss of revenue as a significant number in the context of the costs over which NB Power has direct control. He also referred in his testimony to the potential impacts in terms of NB Power's multi-year equity targets. Aside from the \$3.8 million potential loss of revenue and longer term plans, Mr. Murphy's affidavit did not refer to consequences that NB Power would suffer if the interim rate was not granted.

[15] The evidence supporting NB Power's current rate application indicates a proposed revenue requirement of \$1.8 billion, including earnings of \$92 million.

[16] In its submission, NB Power argues that a \$3.8 million loss constitutes *prima facie*, a deleterious effect on the utility, and that there is no need to demonstrate a threat to its solvency or ability to render service. Rather, there is simply a need to show harm. It submits that such a loss cannot be considered as inconsequential, when compared to opportunities to save costs on a similar scale.

[17] NB Power also refers to the need for the Board to balance the interests of customers having low and stable rates with the interests of NB Power remaining a financially viable company. It acknowledges that the current regulatory framework requires the Board to consider, among other things, NB Power's 10 year plan and its equity target. As such, NB Power acknowledges that there is the potential to recover a shortfall in one year with higher revenue requirements in following years. NB Power submits, however, that this might come at the expense of stable rates.

[18] NB Power's motion is opposed by J.D. Irving, Limited and the Public Intervener.

[19] Counsel for JDI submits that the only reason for the delay which required NB Power to seek interim rate relief is simply because it did not file its general rate application in enough time to allow for a timely decision from the Board. NB Power, in JDI's view, controls the application timing and is well aware of the application process. There were no special circumstances requiring a delay in filing the application and it was submitted that NB Power could have filed supplementary evidence, if required, following their application.

[20] The Public Intervener stated that there is a significant delay caused by the timing of the application, which satisfies one of the tests for granting interim rate relief. In terms of the requirement for deleterious effects however (these tests will be reviewed later in this decision),

the Public Intervener submitted that there is none. She submits that this must mean something more than simply failing to meet the proposed revenue requirement, or failing to meet long term goals.

[21] The Public Intervener referred to the overarching discretion that the Board has in these matters, but that there must be exceptional circumstances. It was submitted that there was a six week period from mid-November, over which NB Power had control. In that respect, the Public Intervener agreed with JDI's submissions that NB Power was able to anticipate the delay, and to do something about it.

[22] In rebuttal, NB Power argued that the additional requirements of the Board's October 28 Reasons for Decision did raise special circumstances that necessitated a delay. It was submitted that NB Power was required to comply with these requirements whenever it filed its current rate application, and not later. Although it anticipated an order to address the issue of NB Power's long term capital structure, it was sooner than expected. For that reason, NB Power requested and obtained a variance, as stated previously.

[23] A leading case which reviews the issue of interim rates is CRTC v. Bell Canada, a decision of the Supreme Court of Canada, cited as [1989] 1 S.C.R. 1722. In explaining the purpose of interim rate orders, the court stated (at page 1754) (I quote with some omissions):

Traditionally...interim rate orders dealing...with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision. The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.

[24] The regulatory principles governing whether interim rates should be granted have been considered in several rulings by this Board and its predecessor, the Public Utilities Board (PUB).

[25] In a decision in January 1991, the PUB declined a request by NB Power for an interim rate increase for the 1991-1992 fiscal year. Section 41 of the *Public Utilities Act* provided that, "...where the Board is of the opinion that special circumstances exist, the Board (a) may make an interim order approving a change in the charges, rates or tolls..." That is clearly not the same

requirement found in section 40 of the EUB Act, and arguably, sets a higher threshold than found in the current wording of “where it [the Board] considers it advisable to do so...”

- [26] The PUB however did set out a three-part test, to provide guidance in future cases as to the meaning of “special circumstances”. One, there must be a *prima facie* case for a rate change. Two, there is not sufficient time to permit a full public review. Three, the circumstances resulting in the need for a rate change are beyond the control of the applicant, and could not have been reasonably anticipated by the applicant.
- [27] This test was cited and followed by the PUB in a January 2005 decision respecting an interim rate application by Enbridge Gas New Brunswick, even though section 77 of the *Gas Distribution Act* (which was repealed in 2005) which granted interim relief power to the Board did not contain a “special circumstances” requirement. It stated: “Instead of making an order final in the first instance, the Board may make an interim order and give further directions for completing the matter before it.” Section 76, also repealed, provided power to make interim *ex parte* orders, “if special circumstances require”, but the PUB was not dealing with an *ex parte* application in that case.
- [28] In its decision dated June 1, 2007, this Board considered an application by New Brunswick Power Distribution and Customer Service Corporation (DISCO) for an interim rate increase. This was the Board’s first consideration of current wording of section 40 of the EUB Act. In that case, DISCO forecasted an under-collection of revenue requirement in the amount of \$112 million, which would be caused by a delay in getting to a full hearing. In its decision, the Board considered the Bell case, but made no reference to the PUB decisions cited earlier.
- [29] The Board set out a two-part test in that case: One, there will be a significant delay between the application and a full hearing and final decision; Two, such a delay will cause deleterious effects on the applicant. The Board found that the applicant met both tests and found that “it is advisable to grant the amount of interim relief as requested by DISCO”. The Board ordered DISCO to keep appropriate records and to file a proposal as to how to rebate customers, in the event that is necessary following a final decision.
- [30] The Board also considered a motion by the New Brunswick System Operator (NBSO) under section 40 of the EUB Act, in its decision of June 12, 2008. It stated that the minimum requirement is as set out in the Bell case – that being, that there will be a significant delay and such delay will cause deleterious effects. The Board went on to say, however, that even if those

tests were met, the Board still has discretion, adding that the granting of interim rate increases should only be done in exceptional circumstances, for example, whether the need for a rate change is beyond the control of the applicant and could the circumstances have been reasonably anticipated by the applicant.

[31] In that case, the Board found that the effect of a delay would cause deleterious effects on NBSO. It found however that NBSO was aware of its costs exceeding revenues, well in advance of the start of its fiscal year. The Board was not convinced that NBSO could not have filed for a rate increase well in advance of the year.

[32] The Board granted the motion for interim rates however, in the full amount requested. This was based on the fact that NBSO was established as a not for profit organization, without the ability to offset losses in one area with surpluses elsewhere.

[33] Finally, the Board granted NBSO interim rate relief in an oral decision on March 26, 2013, without detailed reasons. The circumstances of that case involved an announcement by government of its intention to dissolve NBSO, and the misunderstanding by NBSO as to when that would be effective, which led it to believe that there would be no need to prove a revenue requirement for the upcoming fiscal year.

[34] The central issue here, based on the wording of the EUB Act, is whether the Board considers it advisable to make an interim order to allow a two percent rate increase to all rate classes, effective April 1, 2016. If so, the Board may impose appropriate terms and conditions.

[35] The Board considers that the judicial and regulatory principles that have been reviewed here are instructive in determining whether it is advisable to make the interim order requested by NB Power. Interim rate increases are made on the basis of *prima facie* evidence which would typically be insufficient for the purposes of a final decision. Rate increases should therefore generally only be granted following a full hearing, with interim increases being an exception.

[36] Based on this background, the Board finds that the following principles should apply:

[37] First, the Board should only grant an interim rate if there will be a significant delay in the process that would lead to a final decision following a full hearing on the merits.

- [38] Second, the applicant must show that such a delay would have a deleterious impact on the applicant. Whether an impact is deleterious depends on the circumstances, but mere evidence of a shortfall is not sufficient.
- [39] Third, the Board retains an overall discretion to deny an interim rate increase request. Even if the two previous tests are met, the granting of interim relief should only be done in exceptional circumstances. Such circumstances could include, for example, that a significant delay was beyond the control of the applicant or could not have been reasonably anticipated.
- [40] Finally, the fact that the Board can order the applicant to rebate any over-collection of revenue, following its final decision, cannot be part of a justification for an interim increase. A direction of this nature can only follow a determination that an interim order is advisable.
- [41] Addressing the first principle, the Board is satisfied that there will be a significant delay, because of the timing of the hearing, and the assumption of the timing of a final decision, in relation to the beginning of the rate year on April 1st. No party appeared to contest that conclusion.
- [42] The Board is not satisfied, however, that the delay will have a deleterious impact on NB Power, having regard to all the circumstances. There was no clear evidence presented as to the potential financial or other impacts with respect to the 2016-2017 rate year, aside from the bare expectation of a \$3.8 million shortfall.
- [43] Certainly, any diminution of a revenue requirement, which for the purposes of this motion, the Board accepts at face value, represents a certain level of harm or prejudice. The Board accepts that \$3.8 million is a material amount in the context of such things as NB Power's cost reduction plans. It does not, in the circumstances, amount to a deleterious impact.
- [44] One of the circumstances leading to the Board's conclusion on this issue is the regulatory environment, and in particular, the factors that the Board must consider under subsection 103(7) of the *Electricity Act*, including a consideration of the policy set out in section 68. Absent such legislated considerations, a shortfall in any rate year is generally lost for all time, and cannot be made up in a subsequent test year. NB Power acknowledged however, that it may have the ability to recapture shortfalls over the course of its 10 Year Plan, albeit at the risk of additional rate increases.

[45] The foregoing is sufficient, according to the *Bell Canada* principles, to deny NB Power's motion. There are no special circumstances that would cause the Board to otherwise exercise its discretion.

[46] Even if the Board were to find that there would be a deleterious impact, it is clear that the delay in making its rate application was not beyond the control of the applicant, and could have been reasonably anticipated. It had the ability to file its application by early to mid-November, and to follow up later with evidence to satisfy the additional requirements imposed by the Board's October 28 Reasons for Decision in Matter number 272. The Board's Rules of Procedure, section 2.2.3, contemplates the filing of supplementary evidence in order to perfect an application.

[47] For these reasons, the Board denies NB Power's motion for an interim order under section 40 of the EUB Act.

Dated in Saint John, New Brunswick, this 26th day of February, 2016.



Raymond Gorman, Q.C.
Chairman



Patrick Ervin
Member



John Patrick Herron
Member