



DECISION

IN THE MATTER OF an Application by Enbridge Gas New Brunswick Limited Partnership, as represented by its general partner, Enbridge Gas New Brunswick Inc., for approval to change its Small General Service distribution rates for 2018 and 2019 and for approval of its 2016 Regulatory Financial Statements.

and

IN THE MATTER OF an Application to review and vary, in part, the New Brunswick Energy and Utilities Board's decision dated December 13, 2017 arising out of the above matter.

(Matter No. 371)

June 6, 2018

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

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NEW BRUNSWICK ENERGY AND UTILITIES BOARD:

Chairperson: Raymond Gorman, Q.C.

Members: Patrick Ervin

John Patrick Herron

Counsel: Ellen Desmond, Q.C.

Chief Clerk: Kathleen Mitchell

APPLICANT:

Enbridge Gas New Brunswick Limited Partnership: David Duncan Young

INTERVENERS:

Public Intervener: Heather Black

A. Introduction

- [1] On July 19, 2017, Enbridge Gas New Brunswick Inc. (EGNB or Applicant) applied to the New Brunswick Energy and Utilities Board (Board), seeking changes to distribution rates for the Small General Service (SGS) customer class for 2018 and 2019 (Matter 371).
- [2] EGNB also sought approval of its 2016 Regulatory Financial Statements and approval of a revised Handbook of Rates and Distribution Services.
- [3] The Board issued its decision in this matter on December 13, 2017 (Decision).
- [4] EGNB filed an application dated January 31, 2018 with Board, pursuant to section 43 of the *Energy and Utilities Board Act*, requesting a variance of the Decision relating to EGNB's Residential Incentive Program (paragraphs 30 to 32 of the Decision) and relating to the application of the System Expansion Portfolio (SEP) test (paragraphs 12 to 21 of the Decision).
- [5] In support of its application for a review (Review) EGNB filed an affidavit, sworn to on January 31, 2018 by Mr. Gilles Volpé, General Manager of EGNB.
- [6] Mr. Volpé's affidavit requested that the Board review those portions of the Decision relating to EGNB's Residential Incentive Program and relating to the prudence of 2016 system expansion capital expenditures and, if deemed appropriate by the Board, that it vary the Decision with respect to those issues.
- [7] At the hearing EGNB also identified a factual mistake in their original filing and as a result made an alternative argument that "if the Board determines that the ---initial conclusion or decision of the Board is the right one, that there should be a reduction in certain amounts from rate base" i.e. certain amounts should not be part of the deduction from rate base because they are not expansion related capital expenditures.
- [8] All registered parties in Matter 371 were given notice of the Review. The only party to respond to and participate in the Review was the Public Intervener.

B. Relevant Legislation and Rules of Procedure

- [9] The *Energy and Utilities Board Act* states, at Section 43:

43 The Board may review, rescind or vary any order made by it.

[10] Rule 8 of the Board's *Rules of Procedure* states as follows:

8. Reviewing, Rescinding, Varying and Rehearing

8.1. Application

8.1.1. An application to review, rescind, or vary an order under section 43 of the Act, or to rehear an application under section 44 of the Act shall contain:

- a) a concise statement of the facts;
- b) the grounds that the applicant considers sufficient, including:
 - i. any error of law or of jurisdiction,
 - ii. changed circumstances or new facts that have arisen since the close of the original proceeding, or
 - iii. facts that were not placed in evidence in the original proceeding and that were then not discoverable by reasonable diligence;
- c) any prejudice or damage that has resulted or will result from the order; and
- d) the relief sought.

8.2 Disposition of an Application

8.2.1. Upon receipt of an application under Rule 8.1.1, the Board may:

- a) dismiss the application if the Board is of the view that the applicant has not raised sufficient grounds; or
- b) order a review or rehearing and give such directions as the Board considers necessary.

8.2.2. Before making a determination under Rule 8.2.1 the Board may issue directions on procedure, including giving interested persons the opportunity to make submissions on the merits of rescinding or varying the Board's order, or of a rehearing.

8.2.3. An applicant under Rule 8.1.1 shall serve a copy of any directions on procedure on all parties to the original proceeding.

8.2.4. An interested person who files a submission with the Board shall serve a copy on the applicant under Rule 8.1.1 and on all parties to the original proceeding.

8.2.5. The applicant under Rule 8.1.1 shall be given an opportunity to reply to all submissions.

8.2.6. The applicant under Rule 8.1.1 shall file with the Board a copy of any reply and shall serve a copy of that reply on all parties to the original proceeding and on any interested person who has filed a submission.

C. Issues

[11] The issues to be considered are as follows:

1. Has the Applicant raised sufficient grounds to cause the Board to vary its Decision with respect to EGNB's Residential Incentive Program;
2. Has the Applicant raised sufficient grounds to cause the Board to vary its Decision with respect to the prudence of the system expansion related 2016 capital expenditures; and
3. If the Board upholds the original Decision on the application of the SEP test, should there be a lesser reduction from rate base because of the factual mistake identified by EGNB.

D. Analysis

1. Residential Incentive Program

[12] EGNB's Residential Incentive Program provides a financial incentive of up to \$2000 to SGS customers, depending on expected consumption and equipment. The Residential Incentive Program approved budget for both 2016 and 2017 was \$100,000 but actual spending in each year was less than that amount.

[13] At the original hearing, EGNB proposed that residential incentives should be covered by the revenue received in under five years for existing customers who add load, but EGNB did not propose a specific recovery period for new customers in its evidence. In final argument, EGNB did propose a 25-year recovery period.

[14] In its Decision the Board approved the continuation of the Residential Incentive Program, but directed that the payback period for any individual incentive payment must be no longer than 15 years for new loads and no longer than five years for existing customers adding equipment and load. These are the same terms that were approved for the Commercial Incentive Program, which is not under review.

- [15] At the Review hearing, EGNB argued that there was no evidence presented at the original hearing to suggest that EGNB had not utilized the program in a responsible manner in the past. It submitted that there was also no evidence before the Board supporting a 15-year payback for new residential loads.
- [16] EGNB noted that the Decision did not distinguish between EGNB's residential and commercial incentive programs when directing payback periods of 15 years for new loads for both customer classes. EGNB argued that payback periods for new residential loads must be longer than 15 years, although no evidence was referenced to support that view.
- [17] EGNB submitted that a 15-year payback "is not economical nor commercially reasonable". It was noted that residential customers consume on average much less natural gas than that consumed on average by commercial customers and thus it takes longer to earn sufficient revenues from residential customers. It was submitted that the Residential Incentive Program would be of little use to EGNB if the payback period for new loads is limited to 15 years. As a result, EGNB submitted that it would be appropriate for the Board to vary its Decision by substituting a payback period of no longer than 25 years for new residential load, which is the same term requested in final argument at the original hearing.
- [18] The Public Intervener reviewed the section 43 application in the context of Rules 8.1 and 8.2 and argued that the application to vary the Decision did not demonstrate that any of the grounds set out in Rule 8.1 had been established by the Applicant. The Public Intervener argued, therefore, that the application should be dismissed because it did not meet the threshold established by the *Rules of Procedure*.
- [19] The Board finds that the Applicant did not allege any of the grounds for a variance explicitly set out in Rule 8.1 and in particular, Rule 8.1.1. b). That rule states that the application shall set out the grounds that the applicant considers sufficient, including the enumerated grounds.
- [20] The rule does not absolutely restrict grounds for a review to those specifically enumerated. The Board will consider this matter on its merits despite the fact that none of the specific grounds in section 8.1.1 were alleged.
- [21] In relation to the projected payback periods applicable to the Residential Incentive Program, the Public Intervener argued that the evidence was insufficient to meet the Applicant's burden of proof with respect to its requested payback period of 25 years.
- [22] During the original hearing there was cross-examination that explored a payback period of 10 years, but EGNB did not agree with that projected payback period.

[23] Mr. Volpé’s affidavit does not disclose any evidence of a requested 25-year payback for new loads in the Residential Incentive Program. The affidavit states that “in most cases the revenue received in under twenty-five years for new customers should cover the residential incentive”. It was also argued that the 25-year payback would meet the SEP test requirements. There is however, no reference to evidence that would support 25 years as the preferred payback period.

[24] For these reasons, the Board finds that the evidence provided on the Review does not raise sufficient grounds to grant the request to vary the Decision with respect to the Residential Incentive Program. The Board affirms the 15-year payback period set out in its December 13th decision. This aspect of the Review is dismissed.

2. SEP Test

[25] The second issue raised on this Review relates to the prudence of the 2016 system expansion capital expenditures.

[26] As part of its retrospective review of EGNB’s regulatory financial statements, the Board assesses the prudence of system expansion related capital expenditures each year. A system expansion portfolio (SEP) test was established in a Board decision dated May 16, 2011, in order to measure the prudence of expansion related capital expenditures.

[27] The proposal to measure the prudence of expansion on a portfolio basis was proposed by EGNB at that time and accepted by the Board. In establishing that test, the Board stated “...that it is in the best interests of the ratepayers and the utility to ensure that expansion improves the financial health of the utility.”

[28] The system expansion test was described by the Board in the 2011 decision as follows:

The Board directs that projected annualized revenue from expansion must exceed cost by at least two percent. The Board may alter this margin in future years. The Board will determine the prudence of expansion costs on this basis. This calculation for the prudence of expansion costs is to be included in the notes to the Regulatory Financial Statements.

[29] In a decision dated September 2012, the Board determined that the projected annualized revenue from expansion should exceed costs by at least 4%.

[30] As set out in Mr. Volpé’s affidavit, EGNB passed the SEP test for all years between 2011 and 2015.

- [31] In 2016 the actual result of the SEP test was only 78% and the Board found, based on that result, that a portion of the system expansion expenses were not prudent. This was the first time in reviewing EGNB's annual financial results that the Board concluded that expansion related capital expenditures were not prudently incurred.
- [32] EGNB submitted that it was unfair to consider only the results of the SEP test because it does not allow a balancing of the interests of the public and that of the utility in seeking a reasonable return on its investments. It submitted that there were anomalous circumstances existing where no immediate revenues were generated from a significant portion of the 2016 capital expenditures and the result of the application of only the SEP test caused a significant negative impact on EGNB's financial integrity.
- [33] The application of the SEP test in 2016 resulted in the removal of \$1.266 million from EGNB's rate base. EGNB argued that the Board should consider other factors in all of the circumstances to determine whether capital expenditures were prudent in 2016.
- [34] The Public Intervener again referred to Rule 8 with respect to the SEP issue. She notes that the only ground put forward by the Applicant was an undesirable financial outcome.
- [35] Reference was made to a decision of the Ontario Energy Board (Re), 2007 LNONOEB 51. That decision dealt with provisions of the Ontario Board's *Rules of Practice and Procedure* that are very similar to the New Brunswick Board's Rule 8. At page 13 of that decision, the Ontario Board stated:

53 It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

54 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...

55 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.

56 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.

57 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, 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.

58 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.

59 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.

[36] The Board agrees with the analysis in the above decision and finds that a review should not be an opportunity for a party to simply reargue the case. In this application for a variance, the Applicant essentially did reargue the very same grounds that were raised at the original hearing.

[37] Reference to the Board's Decision in this matter is helpful in this regard:

[12] The Board also assesses the prudence of system expansion related capital expenditures as part of its retrospective review. The Board established a system expansion portfolio (SEP) test in its decision of May 16, 2011.

[13] In order to pass the SEP test, the annualized revenues from system expansions in a year must exceed the depreciated expansion capital costs by at least 4% (or a ratio of 104%). Failing this test could result in the Board reducing EGNB's rate base by an amount that would be required to pass the test.

[14] The 2016 SEP test failed. Under the current method, the ratio is 78%, based on incremental revenues of \$413 thousand and incremental costs of \$532 thousand. A reduction of \$1.266 million in the total capital expansion cost would be required to attain a ratio of 104%.

[15] A revised method was submitted by EGNB, using only those capital costs tied directly to customers included in the revenue portion of the test. Under this method, 19 expansion projects in 2016 would be removed from capital, reducing the capital spend, for SEP test purposes, by \$1,124 million, which would reduce incremental costs to \$428 thousand. This would still fail the SEP test, but with a ratio of 97%.

[16] EGNB argued that the SEP test is but one factor in assessing prudent capital spending, and that failing the test is not an automatic indicator of imprudent expansion. It maintains that it has spent prudently in 2016 for the benefit of the system. In its submission, the primary reason for not passing the test was because of where EGNB was in its growth life cycle. It cited earlier legislative constraints and competition from alternative fuels, leading to fewer customer attachments. In its argument, it suggested that the wording of the Board's more recent SEP test evaluations imply a flexible approach.

[17] EGNB also explained that "timing quirks" can affect SEP test results, which could be mitigated by using multiple year data. EGNB referred to several alternative approaches to the current SEP test as being more appropriate to evaluate the prudence of system expansions.

[18] Mr. Robert Knecht, in evidence filed by the Public Intervener, agreed that EGNB's revised method of matching revenues and costs is a sound accounting and economic principle. He acknowledged that there are alternative methods of evaluating the prudence of capital spending that could be considered for future purposes. Mr. Knecht stated however, that any change in the SEP test method should only be applied in future reviews, and not in relation to the 2016 results.

[19] The Board agrees that the SEP test should be applied without modification to the 2016 financial statements in a manner that is consistent with its earlier decisions. There was nothing in the evidence or argument that would necessitate a departure from the regulatory model first adopted in 2011.

[20] The result of the SEP test is the reduction of the 2016 expansion capital additions from \$4.994 million to \$3.728 million, a difference of \$1.266 million in its rate base. EGNB is directed to make this reduction in its 2016 regulatory financial statements and to refile the statements for Board approval. Regulatory financial statements for later years will also reflect this modification.

[21] If EGNB wishes to propose modifications to the Board's method of evaluating the prudence of expansion projects, it should file a proposal in a future application.

[38] Based on the foregoing, the Board finds that the Applicant did not raise sufficient grounds to warrant a variance of the Decision. No new grounds are alleged. No error of law or jurisdiction is cited. There are no changed circumstances or new facts that have arisen since the close of the original proceeding. The only ground raised by the Applicant was the Board's failure to take into consideration other factors that had been put forward by EGNB at the original hearing. The Board considered those other factors and addressed them in its Decision. An application for a variance is not intended as an opportunity to present the same argument on the same facts

because a party is not satisfied with the outcome. As a result, the Board dismisses the application by EGNB for a variance of the Board's ruling on the prudence of the 2016 capital expenditures related to system expansion, except with respect to those amounts which were included in error, as outlined below.

3. Non-expansion related capital expenditures

- [39] Having upheld the original Decision on the application of the SEP test, the Board will now consider the alternative argument involving the factual mistake in the original filing.
- [40] EGNB identified four projects totaling \$93,000, that were not expansion related and which were inadvertently included in the capital details for the purpose of performing the SEP test.
- [41] Although there was no filed evidence to substantiate the \$93,000 error, Mr. Volpe explained the error as part of the Review. The Board accepts the explanation but requires sworn evidence. Upon EGNB filing an affidavit verifying the details of this error, the Board will approve an adjustment to the reduction from the rate base.

E. Conclusion

- [42] In summary, the Board dismisses EGNB's application to review and vary those parts of the New Brunswick Energy and Utilities Board's decision dated December 13, 2017 relating to EGNB's Residential Incentive Program and relating to the application of the System Expansion Portfolio test. The Board will approve a \$93,000 adjustment resulting from non-expansion related capital expenditures being included in the original SEP test, subject to the filing of the affidavit referred to above.

Dated in Saint John, New Brunswick, this 6th day of June, 2018.



Raymond Gorman, Q.C.
Chairperson



Patrick Ervin
Member



John Patrick Herron
Member