



RULING ON MOTION

IN THE MATTER OF a review of
Maximum Retail Margins, Maximum
Delivery Costs, and Maximum Full Service
Charge for Petroleum Products.

(Matter No. 485)

February 25, 2021

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

IN THE MATTER OF a review of Maximum Retail Margins, Maximum Delivery Costs, and Maximum Full Service Charge for Petroleum Products.

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NEW BRUNSWICK ENERGY AND UTILITIES BOARD:

Acting Chairperson: François Beaulieu

Members: Michael Costello

John Patrick Herron

Counsel: Matthew Letson

Chief Clerk: Kathleen Mitchell

INTERVENERS:

Atlantic Convenience Stores Association: David Knight

Canadian Independent Petroleum Marketers Association: Michelle Coates Mather

Clark Oil: Peter Clark

Highland Fuel Delivery G.P.: Matthew Manderson

Liberty Utilities (Gas New Brunswick) LP: Paul Volpé

Oil Heat Association of New Brunswick: Matthew LeRoy

Park Fuels Ltd.:

Bill LeRoy

The Scholten Group:

Jerry Scholten

PUBLIC INTERVENER:

Heather Black

A. Introduction

- [1] The New Brunswick Energy and Utilities Board (Board) initiated a review pursuant to subsection 14(1) of the *Petroleum Products Pricing Act*, S.N.B. 2006, c. P-8.05 (PPPA) of maximum retail margins, maximum delivery costs, and maximum full-service charges for motor fuels and heating fuels.
- [2] The Board engaged the firm of Gardner Pinfold Consultants Inc. (Gardner Pinfold) with this review. Gardner Pinfold filed its report in December, 2020 (GP Report).
- [3] The Board held a pre-hearing conference on January 14, 2021, at which time a schedule was established. A public hearing is scheduled to be held on March 24 to March 26. This will be followed by a final order of the Board.
- [4] The Oil Heat Association of New Brunswick (OHA) filed a Notice of Motion on January 28 (Motion), seeking a rebatable interim adjustment to the maximum retail margin for furnace oil by \$0.02 per litre. The Board dealt with the above motion on February 11.
- [5] The OHA cite the following reasons for the motion:
- a. Furnace oil retailers operate in a highly seasonal business. Should a final decision by the Board not be made until early May, the retailers will suffer an economic loss that they will be unable to recover.
 - b. Furnace oil retailers are not only dealing with the COVID-19 pandemic, the safety and miscellaneous costs associated with operating through a pandemic, additionally, the 2020-2021 heating season has been exceptionally warmer than normal resulting in significant decreases in sales volume driving the need for an interim increase.
- [6] The OHA relied on the following documents in support of its motion: (a) A letter dated January 27; and (b) the GP Report. The Board will consider these documents as evidence for the purpose of this motion pursuant to section 35 of the *Energy and Utilities Board Act*, S.N.B. 2006, c. E-9.18 (EUB Act).

[7] The motion was supported by Highland Fuel Delivery G.P. and Park Fuels Ltd. The Scholten Group did not object to the motion and Clark Oil asked the Board to consider the motion “very highly.”

[8] The Public Intervener, Ms. Heather Black, submitted that the OHA had not provided *prima facie* evidence warranting an interim adjustment. Her arguments are reviewed below.

B. Legislative Framework

[9] Section 40 of the EUB 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.

C. Analysis

[10] The Board has considered requests for interim relief in the past. Interim orders are granted on the basis of *prima facie* evidence and may be made on the basis of evidence that would be insufficient for a final decision.

[11] In Matters 307 and 486, the Board applied the following principles in deciding whether to make an interim order. In Matter 307, the Board stated:

[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.

These principles are addressed below.

1. Significant Delay

[12] Mr. Matthew LeRoy, on behalf of the OHA, submitted that its retailers operate in a highly seasonal business where approximately 90% of furnace oil sales occur between October 1 and April 30. He argued that should retailers wait until May for the results of the review, retailers will suffer an unrecoverable economic loss during the heating season. He also argued that in waiting until the end of the season, an entire season will be missed.

[13] Ms. Black noted that the delay interval, as submitted by OHA, extending a final decision into May seemed lengthy. She submitted it seems reasonable that the Board could implement any adjustment more quickly, making the delay interval of mid-February to the end of March.

[14] Ms. Black argued that OHA's statement that they were halfway through the heating season was not consistent with its evidence. She submitted that, if the Board were to issue an interim decision in mid-February, and a final decision at the end of March, that would represent less than 20 percent of the heating season.

[15] The Board is not satisfied there will be a significant delay in the process. Consistent with the Board's finding in Matter 486, such a delay would only result from a significant change in the current filing schedule. The hearing is scheduled to conclude on March 26. The Board expects that a decision would likely be rendered in April.

2. Deleterious Impact

[16] Mr. LeRoy submitted that, should a final decision be delayed until May, retailers will suffer unrecoverable economic loss. He argued that, in addition to increasing costs and expenses, retailers are dealing with the COVID-19 pandemic and an unseasonably warm winter this year. Furthermore, he argued that their sales volumes are dwindling.

[17] Mr. LeRoy also submitted that since 2014, New Brunswick's retail prices for furnace oil appear to be lagging behind the prices of certain provinces. He maintained that the GP

Report states that retailers are struggling to control costs because of stable or declining heating volumes. He further submitted that the report states that supply interruptions or loss of supply in areas of the province where delivery costs are highest could occur.

- [18] Ms. Black submitted that OHA has not established that the delay will cause deleterious impacts and that there is no *prima facie* evidence warranting an interim adjustment. In the *Bell Canada v. (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, the Supreme Court of Canada stated:

...there should be no concern over the financial stability of regulated utility companies where one deals with the power to revisit interim rates. The very purpose of interim rates is to allay the prospect of financial instability which can be caused by the duration of proceedings before a regulatory tribunal. In fact, in this case, the respondent asked for and was granted interim rate increases on the basis of serious apprehended financial difficulties. The added flexibility provided by the power to make interim orders is meant to foster financial stability throughout the regulatory process. The power to revisit the period during which interim rates were in force is a necessary corollary of this power without which interim orders made in emergency situations may cause irreparable harm and subvert the fundamental purpose of ensuring that rates are just and reasonable. [Emphasis added]

- [19] As stated above, the Board is confident that there can be a final decision in April and that OHA has not demonstrated that such a delay would have a deleterious impact or suffer any serious financial difficulties caused by the current schedule for this proceeding.

3. Exceptional Circumstances

- [20] As the Board stated in Matter 307, even if the above tests have been met, the granting of interim margin adjustments should generally only be done in exceptional circumstances. For example, this could consist of a circumstance beyond the control of the applicant or could not have been reasonably anticipated.

- [21] As the Board has found that the OHA has not met the tests of significant delay and deleterious impact, an evaluation as to whether these circumstances are exceptional is not required.

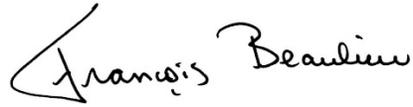
4. Review and Remedy of any Effect and Discrepancy

[22] As the Board will not be issuing an interim order, subsection 40(2) of the EUB Act need not be considered.

D. Conclusion

[23] The Board concludes that the OHA's motion does not meet the Board's established principles for an interim order. The motion is therefore denied.

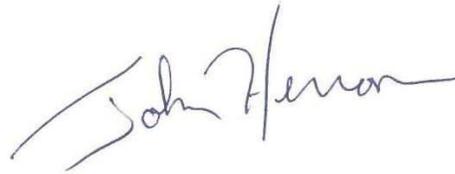
Dated at Saint John, New Brunswick, this 25th day of February, 2021.

Handwritten signature of François Beaulieu in black ink.

François Beaulieu
Acting Chairperson

Handwritten signature of Michael Costello in blue ink.

Michael Costello
Member

Handwritten signature of John Herron in black ink.

John Patrick Herron
Member