



VARIANCE OF A DECISION

IN THE MATTER OF an application by Liberty Utilities (Gas New Brunswick) LP and Graymont (NB) Inc. requesting a variance of the Order in Matter 496, in accordance with section 43 of the *Energy and Utilities Board Act*, S.N.B. 2006, c. E-9.18.

(Matter No. 504)

November 15, 2021

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

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NEW BRUNSWICK ENERGY AND UTILITIES BOARD:

Acting Chairperson: François Beaulieu

Members: Michael Costello

John Patrick Herron

Board Counsel: Katherine McBrearty

Counsel for Board Staff: Matthew Letson

Chief Clerk: Kathleen Mitchell

APPLICANTS:

Liberty Utilities (Gas New Brunswick) LP: Len Hoyt, Q.C.

Graymont (NB) Inc.: Peter Zed, Q.C.

PUBLIC INTERVENER: Heather Black

A. Introduction

- [1] This decision arises out of a consolidated application dated September 13, 2021 (Application) by Liberty Utilities (Gas New Brunswick) LP (Liberty) and Graymont (NB) Inc. (Graymont) to the New Brunswick Energy and Utilities Board (Board). The parties seek a variance and clarification of items one and two of the Board's Order issued on August 30 (Order) in Matter 496.
- [2] Liberty requested a variance to recover minimum annual charges stipulated in the Headwater-Liberty Agreement, dated April 16, 2021, for contract years one to three. The minimum annual charges are \$350,000 for contract year one and \$300,000 for contract years two and three (Minimum Annual Charges). In addition, Liberty raised for Board consideration whether the sliding scale should be addressed in a revised Order.
- [3] Graymont requested that the Board vary item one of the Order and clarify the sliding scale arrangement.
- [4] The Public Intervener, Ms. Heather Black, submitted that the Application did not raise sufficient grounds to warrant the requested relief. In addition, she submitted that the Order is not prejudicial or damaging to Liberty and Graymont. In her view, the Application should be dismissed.
- [5] In addition, Ms. Black stated that the Board considered the Minimum Annual Charges in its decision. She submitted that the Board found the amounts agreed upon in the Headwater-Liberty Agreement were reasonable. In her view, this indicated an understanding and consideration of the Minimum Annual Charges and the sliding scale by the Board.
- [6] In response to Ms. Black's submissions, Liberty submitted that it did raise sufficient grounds to warrant the requested variance. Liberty further submitted that not including the Minimum Annual Charges in the Order created a great deal of uncertainty as to whether Liberty could recover these charges as a customer service charge from Graymont.
- [7] As for Graymont, while a variance was requested, it sought clarification to approve the entire rate structure with a scheduled review at three years. Graymont submitted that the Order could be interpreted as approving only the first three years of the customer service charge instead of approving the entire arrangement.

[8] The Board held a hearing on November 1 by video conference and heard oral submissions on behalf of Liberty, Graymont, and the Public Intervener. While Headwater Exploration Inc. (Headwater) did not file any written submissions, Mr. Christopher Stewart, on behalf of Headwater, was permitted to make oral submissions.

B. Legislative Framework

[9] The following provision of the *Energy and Utilities Board Act*, S.N.B. 2006, c. E-9.18 (Act) is relevant to this proceeding:

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

[10] The following Rule from the Board's Rules of Procedure (Rules) is also relevant:

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.

C. Issues

[11] The issues in this matter are whether the Board should vary and clarify the Order.

D. Analysis

1. Minimum Annual Charges

- [12] Mr. Len Hoyt, counsel on behalf of Liberty, argued that a variance was requested as only one element of the customer service charge was approved in the Order. He stated that the customer service charge of \$1.06 per gigajoule is also subject to the Minimum Annual Charges.
- [13] In his view, Mr. Hoyt submitted that there was a "disconnect" between the Headwater-Liberty Agreement and the Order. He stated that if natural gas consumption by Graymont is below the expected throughput, Liberty is obligated to pay the Minimum Annual Charges under the Headwater-Liberty Agreement, if these charges become payable. Mr. Hoyt argued that the Order might not permit the utility to recover the full charges payable by Liberty to Headwater, even though Graymont has agreed to pay them.
- [14] Mr. Hoyt stated that the Board is authorized by its enabling legislation to vary the Order as well as to correct any "slip in drawing up the decision." While Liberty is not alleging any grounds under Rule 8.1.1 b) of the Rules, it argued that the minimum charges do not appear to have been contemplated in the Order.
- [15] Notwithstanding Ms. Black's position that Liberty did not explicitly raise any grounds in the Application according to Rule 8.1.1 b) of the Rules, the Board has broad authority to review and vary its own decisions. While the rules in the Board's Rules of Procedure are intended as a comprehensive, consolidated set of procedural rules governing matters under its jurisdiction, Rule 8.1.1 b) does not restrict grounds for a review to those specifically enumerated.
- [16] Having considered this matter on its merits, the Board finds that the grounds raised by Liberty are sufficient to vary item one of the Order. The Board concludes that the Order did not include the Minimum Annual Charges.
- [17] Accordingly, a variance to item one of the Order is granted. Item one shall be deleted and replaced with the following:
1. Pursuant to section 59 of the *Gas Distribution Act, 1999*, S.N.B. 1999, c. G-2.11, a customer service charge is set at \$1.06 per gigajoule to customers in Havelock in contract years one to three provided that:

- a) A minimum total annual charge of \$350,000 shall be payable by Graymont to Liberty in the first contract year; and
- b) Minimum total annual charges of \$300,000 shall be payable by Graymont to Liberty in each of the second and third contract years.

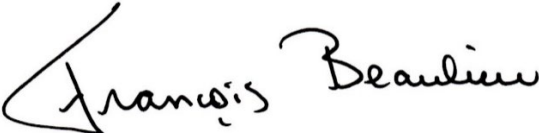
2. Sliding Scale

- [18] As a result of the Partial Decision dated July 2, Graymont believed that the Board had approved a customer service charge, which included a sliding scale. The sliding scale is a formula agreed-to between the parties applicable to contract years four to 10. It is applied with no "take or pay" commitment and allows for volume discounts that lower the customer service charge. As a result of the Board's decision, Graymont proceeded with the Havelock pipeline project.
- [19] Mr. Peter Zed, counsel for Graymont, submitted that the parties' contracts only go so far in the regulatory regime. Graymont cannot be confident that those lesser charges were approved beyond the third contract year. He also submitted that Graymont would be entitled to plan its business accordingly over the next 10 years.
- [20] The Board is satisfied that, under the broad authority conferred to it under section 43 of the Act, it can clarify contract years four to 10 and that it is necessary in this instance.
- [21] In the Decision dated August 24, the Board found that the amounts agreed upon in the Headwater-Liberty Agreement were reasonable. In issuing the Order, the Board clarifies that it is not limiting its approval of a customer service charge to be levied on customers in Havelock to the first three years. The Board approves the proposed arrangement as submitted, subject to the review as noted below.
- [22] The Order provides for at least one review of the customer service charge after the third contract year. In this respect, the Board directs Liberty to file a proposal detailing the application of the customer service charge for contract years four to 10. To limit unnecessary filings, any review of the customer service charge shall be included in a future general rate application.

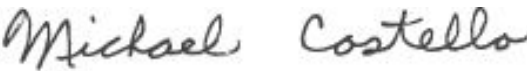
E. Conclusion

[23] The Board grants the relief as described above. Where the deletion and replacement of item one and the necessary clarifications to item two of the Order have been stipulated in this decision, the Board shall not reissue an order.

Dated at Saint John, New Brunswick, this 15th day of November 2021.



François Beaulieu
Acting Chairperson



Michael Costello



John Patrick Herron
Member