DECISION

IN THE MATTER OF an application by Liberty Utilities (Gas New Brunswick) LP, as represented by its general partner Liberty Utilities (Gas New Brunswick) Corp., for an Order approving a new rate schedule designated as its Large Industrial Contract Service Rate Class and approving the Large Industrial Contract Service rate for Atlantic Wallboard Limited Partnership.

(Matter No. 515)

June 14, 2022

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(Matter No. 515)

NEW BRUNSWICK ENERGY AND UTILITIES BOARD:

Acting Chairperson:	François Beaulieu
Members:	Michael Costello
	John Patrick Herron
Board Counsel:	Katherine McBrearty
Counsel for Board Staff:	Abigail Herrington
Chief Clerk:	Kathleen Mitchell

APPLICANT:

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

PARTICIPANTS:

Atlantic Wallboard Limited Partnership:	Christopher Stewart
Atlantica Centre for Energy:	Michelle Robichaud
PUBLIC INTERVENER:	Heather Black

A. Introduction

[1] This decision arises out of an application by Liberty Utilities (Gas New Brunswick) LP, as represented by its general partner Liberty Utilities (Gas New Brunswick) Corp. (Liberty), filed with the New Brunswick Energy and Utilities Board on December 23, 2021 (Application).

[2] In its Application, Liberty requested that the Board approve a new rate schedule designated as its Large Industrial Contract Service (LICS) rate class and approve the LICS rate for Atlantic Wallboard Limited Partnership (AWL).

[3] The Board held a pre-hearing conference by video conference on February 7, 2022. AWL and the Atlantica Centre for Energy were granted intervener status.

[4] A hearing was conducted by video conference on April 6 and 8.

[5] Liberty presented a panel that included Mr. Gilles Volpé, Vice President/General Manager, and Mr. David Lavigne, Director, Finance and Regulatory, both from Liberty, and Mr. Russell Feingold, Principal Consultant to Black & Veatch. Mr. Feingold was declared an expert in the areas of utility costing, pricing, and related regulatory policy.

[6] Ms. Heather Black, the Public Intervener, filed written evidence prepared by Mr. Robert Knecht, an independent consultant specializing in preparing analyses, consulting support, and expert evidence in the field of regulatory economics. Mr. Knecht was declared an expert in regulatory economics and ratemaking.

[7] The Board issued a Partial Decision, dated April 21 (Partial Decision). In its decision, the Board approved the LICS rate class and the LICS rates and minimum annual charge for AWL.

B. Legislative Framework

[8] The following provisions of the *Gas Distribution Act, 1999*, S.N.B. 1999, c. G-2.11 (GDA) apply to this Application:

> **52**(1) No gas distributor shall charge for the distribution of gas except in accordance with an order of the Board.

> […]
>
> **52**(6) An order under this section may include conditions, classifications or practices applicable to the distribution of gas, including rules for calculating rates.

[9] The following provision of the *Energy and Utilities Board Act*, S.N.B. 2010, c. E-9.18 (EUB Act) also applies to this Application:

> **34** Where information obtained by the Board concerning the costs of a person in relation to the operations of the person that are regulated under this or any other Act, or other information that is by its nature confidential, is obtained from such person in the course of performing the Board's duties under this or any other Act, or is made the subject of an inquiry by any party to any proceeding held under the provision of this or any other Act, such information shall not be published or revealed in such a manner as to be available for the use of any person unless in the opinion of the Board such publication or revelation is necessary in the public interest.

C. Analysis

1. The Proposed LICS Rate Class

[10] Liberty submitted that the intent of the proposed LICS rate class is to attract new customers to its service area that choose to use natural gas as their primary energy source.

[11] Mr. Len Hoyt, counsel for Liberty, submitted that the new rate class would apply to new large industrial customers who consume larger quantities than existing customers within the Industrial Contract General Service (ICGS) rate class. He stated that the proposed rate class would enhance the prospect of attracting new large industrial customers to the gas distribution system.

[12] In his opening statement, Mr. Volpé submitted that the LICS rate class would provide value to eligible new customers, Liberty, and existing customers. He stated that new customers would benefit from a lower overall price than Liberty's existing rate schedules. The proposed class would benefit the utility by providing incremental revenues above the incremental costs to serve the new customer. He also stated that existing customers would benefit by providing a positive contribution to Liberty, which would lower rates over time for one or more classes of customers.

[13] In final argument, Mr. Hoyt submitted that specific rates under this class would be negotiated on an individual customer basis. He noted that the negotiated rate for each customer would be set out in a confidential attachment to the LICS rate schedule.

a. Eligibility Requirements

[14] Liberty submitted that customers must meet specific criteria to be eligible for the proposed rate class.

[15] The rate class would be limited to customers not connected to Liberty's distribution system at the time of becoming a customer. An eligible customer would need to demonstrate a minimum annual consumption of at least 600,000 gigajoules (GJs) with verification by the utility. Liberty would require these customers to demonstrate and document any unique circumstances, such as competitive energy alternatives, that would make the use of natural gas uneconomic under any other rate schedule offered by Liberty.

[16] In final argument, Ms. Black submitted that these eligibility requirements were fair and not unduly restrictive.

b. Discounted/Negotiated Rates

[17] In Matter 371, the Board approved a load retention rate (LRR) for the ICGS customer class. The LRR allows Liberty to offer a negotiated rate to retain existing customers served under this class that are at risk of leaving the gas distribution system.

[18] Liberty submitted that the proposed LICS rate class differs from the LRR as they would serve different purposes. It stated that the purpose of the proposed class is to attract new customers to the gas distribution system that would otherwise be unavailable without the discounted rate.

[19] The utility also submitted that there were valid reasons for treating its existing customers differently from potential new and larger customers. In his rebuttal evidence, Mr. Feingold stated that "[…] it is important that a stringent standard be established to ensure the customer's competitive fuel option is real and that a clear demonstration can be made to justify the magnitude of the rate discount offered to the customer." In his view, under the LRR, other customers would be required through higher rates, to absorb the loss of revenue

and fixed cost recovery from the competitively positioned customer being charged a discounted rate.

[20] Mr. Feingold explained that the rates of existing customers would increase with the addition of customers under the LRR. In contrast, with the addition of each new customer under the LICS rate class, the fixed cost responsibility of Liberty's existing customers would decrease. He concluded that Liberty should be afforded a greater degree of latitude in negotiating the level of the discounted rate compared to the more stringent competitive pricing standards established under the LRR. Mr. Feingold suggested that the added price flexibility proposed under the LICS rate class was necessary for the negotiation process to increase the likelihood of attracting new customers and incremental gas load to the service area.

c. Discounted/Negotiated Rates in Other Jurisdictions

[21] Mr. Feingold provided eight examples, four in Canada and four in the United States, where similar rates were approved. He submitted that it was not uncommon for gas and electric utilities in those jurisdictions to provide services under a discounted or a negotiated rate on a confidential basis.

[22] In his report, Mr. Knecht stated that the practice of offering negotiated rates to new large industrial customers with credible competitive alternatives was consistent with other jurisdictions. He submitted that ratepayers benefit from such rates in circumstances where it can be demonstrated that the negotiated rate customer would not take service at the full rate. In addition, he noted that the incremental revenues from the negotiated rate customer exceed the incremental cost of providing the service.

[23] In closing argument, Ms. Black argued that a negotiated rate option to attract new large industrial customers is a reasonable regulatory mechanism.

d. Board Conclusion

[24] In Matter 371, the Board found that "[it] is a generally accepted regulatory principle that rate discounts to retain customers are reasonable, in circumstances where it is shown that the system as a whole benefits by retaining loads that would otherwise be lost."

[25] While Liberty already has the option to offer discounted rates to existing customers under the LRR, the Board finds that creating an LICS rate class serves a different purpose as it aims to attract large new customers to the service area. In attracting new loads to the gas distribution system, the Board accepts that an LICS rate class will provide value not only to new customers but also to Liberty and its existing customers.

[26] Furthermore, the Board finds that the eligibility requirements for the LICS rate class are fair and not unduly restrictive.

[27] The Board accepts that a discounted/negotiated rate option to attract new large industrial customers with credible competitive energy alternatives is a reasonable regulatory mechanism consistent with the practices in other jurisdictions.

[28] Accordingly, the creation of the LICS rate class is approved. The applicable eligibility requirements are approved, specifically, the annual consumption of 600,000 GJs; as well as, the demonstration and documentation of any unique circumstances, that would make the use of natural gas uneconomic under any other rate schedule offered by Liberty.

[29] For any new LICS customer, Board approval will be required. Liberty will need to demonstrate that it made a reasonable and prudent effort to maximize revenues within the constraints of the potential customer's existing options and other unique circumstances. This will allow the Board to determine whether the proposed rate is just and reasonable and to identify whether any unjust discrimination or undue preference exists between customers of this class.

2. Applicability to Atlantic Wallboard Limited Partnership

[30] The Board must consider whether AWL meets the eligibility requirements as approved above. Specifically, AWL must consume at least 600,000 GJs of natural gas annually and demonstrate that it has unique circumstances which would make its use of natural gas at current rates uneconomic under any other rate schedule offered by Liberty.

[31] Liberty must also demonstrate that it made a reasonable and prudent effort to maximize revenues within the constraints of the potential customer's existing options and unique circumstances. Additionally, the Board must be satisfied that the proposed rates are just and reasonable. These requirements will be reviewed below.

a. Eligibility Requirements

i. Annual Consumption

[32] Liberty argued that it was satisfied with the ability of AWL to consumer at least 600,000 GJs annually. This is based on its past usage as a customer of the former gas distribution system of Enbridge Gas New Brunswick Inc. (Enbridge Distribution System).

[33] The Board accepts that AWL has the ability to consume annually at least 600,000 GJs and that it meets this requirement.

ii. Evaluation of Current Rates

[34] Until January 2015, AWL was a customer of the Enbridge Distribution System. At that time, AWL decided to leave the distribution system for the alternative of compressed natural gas (CNG). It had the ability to self-supply its operations with CNG and also possessed numerous other advantages a typical customer of Liberty would not have.

[35] The Board finds that the evidence demonstrates that Liberty was not competing against an alternative fuel supplier for AWL's business. Liberty was competing against AWL's ability to not only self-supply their operations with CNG, but also their ability to utilize multiple existing business assets and resources. When compounded, this had the potential to lower AWL's CNG cost below market value.

[36] Accordingly, the Board concludes that Liberty has demonstrated that AWL's use of natural gas at current rates is uneconomic under the existing rate schedule offered by Liberty because AWL can self-supply with CNG.

b. Proposed Rates

[37] The Board must also consider whether Liberty made a reasonable and prudent effort to maximize revenues within the existing options and unique circumstances of the potential customer. This requires striking a balance between establishing a rate low enough to attract a new customer, while high enough to maximize revenues to the benefit of all customers.

[38] Liberty submitted that it made reasonable and prudent efforts to ensure that the proposed LICS rates were no more favourable to AWL than reasonably necessary to win this customer.

[39] The utility conducted a financial net present value analysis similar to the economic feasibility analysis used in facility expansion projects. The analysis consisted of four different scenarios. All four scenarios resulted in a positive profitability index based on Liberty's cash flow analysis, which reflected the incremental revenues, operating costs, and capital expenditures.

[40] In his report, Mr. Knecht submitted that Liberty's proposed rates, combined with the fact that ratepayers would not be responsible for stranded cost risks, would produce incremental revenues that substantially exceeded incremental costs faced by ratepayers.

[41] The Board is satisfied that Liberty has made reasonable and prudent efforts to maximize revenues within the constraints of AWL's existing options and other unique circumstances. Liberty's financial analysis indicates that at the minimum volume and the initial term only, the incremental revenues are a little above the incremental costs. For all other scenarios revenues substantially exceed costs.

[42] In his view, Mr. Knecht submitted that the minimum annual volume provides a material risk reduction benefit to ratepayers and that, even at the contract minimums, revenues would be more than sufficient to recoup incremental costs. The Board agrees.

[43] Finally, the Board must be satisfied that the proposed rates are just and reasonable. Liberty has provided significant details regarding how the proposed LICS rates were established.

[44] Black & Veatch reviewed Liberty's cost estimate of the facilities required to serve AWL. It also reviewed the related economic analysis of the customer's anticipated level of revenues, capital costs, and operating costs. It concluded that the negotiated rate established for AWL under Liberty's proposed LICS rate class will recover the incremental costs associated with providing gas delivery service to this customer over the initial term of the contractual agreement with AWL.

[45] Black & Veatch submitted that the negotiated pricing arrangement with AWL will provide tangible economic benefits to Liberty and its existing customers. It suggested that in

addition to the recovery of the incremental cost of service to AWL, there will be additional revenue available to fund a portion of the fixed costs of gas distribution service to serve all other customers.

[46] In Black & Veatch's view, this is a distinct economic benefit to Liberty's other customers that will accrue to them, on a recurring basis, for each additional year that AWL takes natural gas delivery service from Liberty.

[47] Mr. Knecht acknowledged that Liberty has provided significant information about what it knew and its negotiations with AWL. He testified that "[…] it is a lot better than I have seen from other utilities trying to defend the competitively discounted rate. […] I think the company has gone a long way to providing that information."

[48] The Board finds that the proposed rates will recover the incremental costs associated with providing gas distribution service to AWL. These revenues will also contribute meaningfully to the system's fixed costs, lessening the amounts that Liberty's other customers will have to pay through their distribution rates.

[49] The Board concludes that the proposed rates are just and reasonable. As mentioned above, these rates will significantly benefit ratepayers. It will provide a positive impact to Liberty, its existing customers, and the gas distribution system. For example, it will reduce fixed cost recovery from Liberty's other customers; control future rate levels to Liberty's other customers; provide Liberty with an enhanced marketing capability to attract new large gas loads to New Brunswick; and enhance Liberty's future financial condition.

[50] Accordingly, the Board approves the rates and minimum annual charge, as filed.

3. Miscellaneous Issues

a. Confidentiality Issues

[51] Liberty requested that the negotiated rates, revenues, loads and incremental costs be kept confidential. It submitted that it does not share any of its customers' load and that, while rates for other classes are public, the LICS rates for AWL should be kept confidential.

[52] Under cross-examination, Mr. Feingold testified that virtually all negotiated rates are maintained as confidential. Similarly, Mr. Knecht testified that customers, particularly

large industrial customers, and those in very cost-competitive businesses, are very sensitive about their revenues, volumes, and rates.

[53] Liberty submitted that because AWL would be the only customer to be served under this rate class, it was necessary that the revenue generated from the LICS rate class also be confidential. Under cross-examination, Mr. Volpé testified that once the LICS rate class reached at least three customers, releasing the revenue from the rate class would "not be as sensitive."

[54] In accordance with section 34 of the EUB Act, the Board recognizes the importance of not publishing or revealing information that is, by its nature, confidential. The Board concludes that the load and all negotiated rates under the LICS rate class will be kept confidential. As AWL is currently the sole customer served under the LICS rate class, the revenue generated from this class must be kept confidential. In addition, in the current circumstance, incremental costs must also be kept confidential.

[55] As the number of customers in the LICS rate class increases, the Board will reevaluate the need for the above information to be kept confidential.

[56] To better understand how the confidential revenues from the LICS rate class will be dealt with during future general rate applications, Liberty is directed to organize a technical session with Board Staff, the Public Intervener, and the other parties to identify a potential approach to address this confidentiality issue. Liberty is ordered to present the proposed approach during the filing of the 2023 general rate application.

b. Cost Allocation Issues

[57] A cost allocation treatment for the LICS rate class was proposed in this matter. It consisted of (a) the LICS rate class not being treated as a separate rate class within the cost allocation study; (b) the LICS peak demands, annual loads, and customer count being excluded from the allocation factors; (c) incremental revenues being allocated in proportion to overall class revenue requirement, and (d) incremental costs being allocated to the existing customer classes using the standard allocation methods that apply to other distribution assets.

[58] Both Mr. Feingold and Mr. Knecht agreed that the revenues generated from the LICS class should be used as an offset to other customers and those other customers should receive the full benefit of the incremental revenues generated from the LICS customers.

[59] Mr. Knecht, however, disagreed with Liberty's proposal for allocating the incremental costs and revenues separately. He submitted that this approach had the potential to "[…] implicitly apply very different allocation factors to the incremental revenues than to the incremental costs."

[60] He submitted that Liberty's proposal should be modified to allocate net incremental revenues rather than applying different allocation factors to incremental revenues and each incremental cost component.

[61] To address Mr. Knecht's concern, Mr. Feingold adjusted Liberty's original proposal so that the total revenue requirement in its cost allocation study matches the total revenue requirement used to determine the proposed change in rates. Mr. Knecht testified that Mr. Feingold's revised proposal was "identical" to his from an arithmetic standpoint.

[62] The Board approves the modified cost allocation method, as proposed by Mr. Feingold. The Board is satisfied that this method will ensure that the incremental revenues generated by the LICS rate class are fairly distributed to customers among the different rate classes.

c. Variance Account

[63] In his report, Mr. Knecht recommended that a variance account for the LICS rate class be established in 2022 to reflect net incremental revenues to be credited or charged to ratepayers in future years.

[64] In closing argument, Ms. Black argued that if the Board was inclined to approve Liberty's request for an LICS rate class, it should approve the variance account at the same time. She further argued that this would ensure that the account be established in advance of any net revenues being incurred.

[65] Mr. Hoyt submitted that Liberty was supportive of a variance account being created; however, he stated that its creation should be part of Liberty's general rate application (Matter 494).

[66] Given the ongoing general rate application, the Board will address this issue in Matter 494.

D. Conclusion

[67] The Board concludes that:

a. As stated in the Partial Decision, the LICS rate class is approved, subject to the revision noted.

b. AWL has met all eligibility requirements under this rate class.

c. As stated in the Partial Decision, AWL's proposed negotiated rates and minimum annual charge are approved, as filed.

Dated at Saint John, New Brunswick, this 14th day of June 2022.

François Beaulieu
Acting Chairperson

Michael Costello
Member

John Patrick Herron
Member