



NEW BRUNSWICK
ENERGY & UTILITIES BOARD

COMMISSION DE L'ÉNERGIE ET DES SERVICES PUBLICS
NOUVEAU-BRUNSWICK

VARIANCE OF A 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 varying the New Brunswick Energy and Utilities Board's Order dated June 23, 2022, in Matter 494 in accordance with section 43 of the *Energy and Utilities Board Act*, S.N.B. 2006, c. E-9.18, and Rule 8.1 of the Board's Rules of Procedure.

(Matter No. 530)

and

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 varying the Board's Decision dated July 26, 2022, in Matter 494 in accordance with section 43 of the *Energy and Utilities Board Act*, S.N.B. 2006, c. E-9.18, and Rule 8.1 of the Board's Rules of Procedure.

(Matter No. 540)

December 21, 2022

A. Introduction

- [1] This oral decision arises out of two applications filed by Liberty Utilities (Gas New Brunswick) LP, as represented by its general partner, Liberty Utilities (Gas New Brunswick) Corp. (Liberty), in which Liberty seeks variances of the Board's rates order and decision in Matter 494 pursuant to section 43 of the *Energy and Utilities Board Act*, S.N.B. 2006, c. E-9.18 (Act) and Rule 8.1 of the Board's Rules of Procedure (Rules of Procedure).
- [2] On November 22, 2021, Liberty applied to the Board for approval of its proposed distribution rates, effective May 1, 2022, and other relief, including approving a True-Up Variance Account. The proceeding was designated as Matter 494.
- [3] The Board issued a Partial Decision in Matter 494 on May 19 (Partial Decision). In the Partial Decision, the Board made several findings concerning the 2022 revenue requirement and ordered Liberty to refile its 2022 test year budget in accordance with those findings.
- [4] An Order was issued on June 23 (Rates Order), approving, effective on July 1, the distribution rates for each customer class. On that same date, the New Brunswick Court of Appeal (NB Court of Appeal Decision) allowed Liberty's application for judicial review of the Board's decision in Matter 491, which had reduced Liberty's return on equity (ROE) from 10.9 percent to 8.5 percent.
- [5] On June 29, Liberty filed an application with the Board (Matter 530 Application) requesting an order varying the Rates Order and staying the order pending the outcome of a review by the Board.
- [6] Liberty stated in the Matter 530 Application that, because of the NB Court of Appeal Decision quashing the Board-determined ROE of 8.5 percent, Liberty's ROE was 10.9 percent until ordered otherwise by the Board, and rates should be calculated on that basis.
- [7] On July 5, the Board stayed the Rates Order pending review. The Board also ordered that the rates remain fixed as approved in Matter 478 on December 23, 2020, until further order (Stay Order).
- [8] The Board issued its decision in Matter 494 (Matter 494 Decision) on July 26.
- [9] Liberty filed a second Application on August 22 (Matter 540 Application) seeking a variance of the Matter 494 Decision and requesting that the 2022 rates be recalculated, taking the varied decision into account.

- [10] By letter dated October 26, the Board informed the parties that Matters 530 and 540 would be heard after the issuance of the rehearing decision in Matter 491.
- [11] On November 18, the Board issued the rehearing decision in Matter 491 (Rehearing Decision), adjusting Liberty's ROE to 9.8 percent and maintaining the cost of debt at 3.315 percent and capital structure at 45 percent equity and 55 percent debt. These adjustments became effective as of December 1.
- [12] In the Matter 530 Application, Liberty requested that the Board review and vary the Rates Order to fix the 2022 rates based on an ROE of 10.9 percent from January 1 to November 30 and 9.8 percent as of December 1.
- [13] In support of the Matter 530 Application, Liberty filed the affidavit of Mr. David Lavigne, Director, Finance and Regulatory at Liberty, sworn to on June 29.
- [14] In the Matter 540 Application, Liberty requested that the Board review and vary the Matter 494 Decision to:
- (a) Add \$2.47 million in capitalized O&M in services, meters, and stations to Liberty's budgeted rate base since it was not included in the Application, and add the related cost of debt, return on equity, and depreciation expense to the approved revenue requirement;
 - (b) Allow Liberty's entire retention and incentive budget of \$1.5 million in the approved revenue requirement;
 - (c) Recalculate the 2022 rates to take the varied decision into account; and
 - (d) At the time of the ultimate true-up, allow for the recovery or credit of all amounts in the variance account, which records the difference between the revenue received during the first four months of 2022 and the revenue that would have been received if the 2022 rates had been effective on January 1, 2022.
- [15] In support of the Matter 540 Application, Liberty filed the affidavit of Mr. Lavigne, sworn to on August 22 (Matter 540 Affidavit).
- [16] All registered parties in Matter 494 were given notice of the Applications. The only party participating in these proceedings was Mr. Richard Williams, Acting Public Intervener.

[17] Written submissions were received from Liberty and the Acting Public Intervener.

[18] The Board held a hearing on December 5 and December 8 via videoconference. Mr. Lavigne was cross-examined at the hearing on his affidavits, and the Board heard oral submissions from Liberty and the Acting Public Intervener.

B. Legislative Framework

[19] Section 43 of the Act is relevant to this proceeding:

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

[20] Rule 8.1 of the Rules of Procedure is also relevant:

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

[21] The issues to be decided in these proceedings are:

1. Should the Board vary the Rates Order to fix Liberty's 2022 rates based on an ROE other than 8.5 percent, and if so, what ROE should be used to calculate Liberty's 2022 rates?
2. Should the Board vary the Matter 494 Decision to:

- (a) Allow the Capitalized O&M Variance to be added to the rate base and the related test year expenses to be included in the approved revenue requirement;
- (b) Allow the entire Retention and Incentive Program budget to be included in the approved revenue requirement; and/or
- (c) Allow all amounts in the True-Up Variance Account to be recovered or credited, as applicable, for all of Liberty's customers, at the time of the true-up.

D. Analysis

- [22] Section 43 of the Act provides the statutory power to review, rescind or vary any Board order.
- [23] In Matter 497, the Board considered an application for a variance by the New Brunswick Power Corporation. In its decision, the Board noted that, in making a determination concerning a variance, the Board must consider the criteria set out under Rule 8.1.1 of the Rules of Procedure and owe a duty of fairness to those affected by its decisions.
- [24] A review will be granted only if the Board believes that the applicant has raised sufficient grounds. The applicant must allege an error of law or jurisdiction, changed circumstances or new facts that have arisen since the close of the original proceeding, facts that were not placed in evidence in the original proceeding that were then not discoverable by reasonable diligence, or other grounds that the applicant considers sufficient. The Board will then order a review and consider the matter on its merits to determine whether the order or decision should be varied.
- [25] As stated in Matter 371, any application for a review to vary a decision is not intended as an opportunity to present the same argument on the same facts. It is not an opportunity to reargue the case.

1. Variance Matter 530

a. Rates Order

- [26] The Rates Order calculates Liberty's 2022 rates using the Board-determined ROE of 8.5 percent in the Matter 491 Decision.

- [27] Liberty asserts that the Rates Order is incorrect and that the 2022 rates should be recalculated using an ROE of 10.9 percent from January 1 to November 30 and 9.8 percent as of December 1. Liberty stated in the Matter 530 Application that charging its customers rates based on the incorrect ROE would cause a revenue shortfall which may be impossible to reconcile and recover.
- [28] Mr. Len Hoyt, counsel for Liberty, submitted that the NB Court of Appeal Decision quashed the Matter 491 Decision, with the effect that Liberty's ROE is returned to 10.9 percent from January 1, 2022, until the effective date of the Rehearing Decision. In support of this position, Mr. Hoyt cited the 2017 decision of the Supreme Court of Canada in *First Nation of Nacho Nyak Dun v. Yukon*, [2017] 2 S.C.R. 576, which endorsed the principle that quashing a government decision effectively returns the parties to the positions they were in before the making of the invalid decision.
- [29] Mr. Hoyt argued that the changes in Liberty's ROE caused by the NB Court of Appeal Decision constituted a significant change in circumstances and new facts that have arisen since the closing of the proceeding. The Board agrees.
- [30] It is trite law that when a decision of an administrative tribunal is quashed, the effect is as if that decision has never been made and need not be followed. The Board finds that returning Liberty's ROE from the quashed 8.5 percent to 10.9 percent as of January 1, 2022, constitutes a material impact on Liberty and the Rates Order. In accordance with Rule 8.1.1 of the Rules of Procedure, the NB Court of Appeal Decision has created changed circumstances and new facts that have arisen since the issuance of the Rates Order.
- [31] Under cross-examination, Mr. Lavigne testified that the financial impact on Liberty of not varying the Matter 494 Decision was estimated at \$1.7 to \$1.9 million. While this estimate includes the financial impact of Liberty's other variance requests, the Board finds that calculating its 2022 rates in accordance with the Rates Order instead of using an ROE of 10.9 percent to November 30 and 9.8 percent as of December 1 would generate a revenue shortfall that could cause prejudice to Liberty. Accordingly, the Board concludes that Liberty has raised sufficient grounds regarding this variance.
- [32] Consequently, the Board varies the Rates Order and directs Liberty to recalculate and refile its 2022 rates using a 10.9 percent ROE from January 1, 2022, to November 30, 2022, and 9.8 percent ROE from December 1, 2022 to December 31, 2022.

2. Variance Matter 540

a. Capitalized O&M

[33] In Matter 494, the Board did not allow a \$2.47 million variance to the 2022 budgeted rate base, which was related to the capitalized O&M in services, meters, and stations (Capitalized O&M Variance) or its additions to the revenue requirement. In the Matter 494 Decision at paragraph 47, the Board stated:

[47] Apart from identifying in a response to an interrogatory that the 2022 budgeted rate base was understated by \$2.47 million, Liberty did not quantify the impact of the above variance on the total revenue requirement at any time during the proceeding. The Board notes that Liberty did not amend its Application or file an updated budget with respect to the above variance when it submitted its compliance documents to the Board's Partial Decision. Consequently, the Board will not allow the \$2.47 million variance to the 2022 budgeted rate base.

[34] Liberty requests that the Board vary the Matter 494 Decision because the Board's decision was founded on its erroneous interpretation of Liberty's failure to file an updated budget that includes the Capitalized O&M Variance when it submitted its compliance documents in response to the Partial Decision.

[35] In the Matter 540 Affidavit, Mr. Lavigne stated that Liberty did not file an updated budget in its compliance filing because the Partial Decision did not mention the Capitalized O&M Variance. This caused Liberty to assume that the Board had denied Liberty's request. He noted that Liberty would have quantified the impact of the Capitalized O&M Variance in its compliance filing if the Partial Decision had not left Liberty with the impression that its request had been denied.

[36] In final argument, Mr. Hoyt characterized Liberty's omission of the Capitalized O&M Variance from its Matter 494 application as similar to past instances where an error was identified and corrected through the interrogatory process. He argued that, in those cases, Liberty included the corrected amount in its compliance filing, and the corrected amount was ultimately approved in the rates.

[37] Mr. Hoyt further argued that the only difference between the current situation and Liberty's typical approach to correcting errors was that, in this case, Liberty did not include the correction in its compliance filing because it had assumed the Board had denied Liberty's request.

- [38] When the Partial Decision was issued, the Board did not direct Liberty to include the Capitalized O&M Variance in its compliance filing because it had been disallowed. The Board disagrees with the implication that the amounts would have been approved but for Liberty's failure to include the Capitalized O&M Variance in its compliance filing.
- [39] In his oral submissions, Mr. Williams argued that the Board should reject Liberty's request to vary the Matter 494 Decision regarding the Capitalized O&M Variance. In his view, the issue was correctly decided, and nothing has changed since that decision was made.
- [40] The Board's interpretation of Liberty's failure to include the Capitalized O&M Variance in its compliance filing assumption is not determinative. Accordingly, the Board finds that Liberty's failure to include the Capitalized O&M Variance in its compliance filing has no bearing on the correctness of the Matter 494 Decision.
- [41] The Board finds that Liberty has not raised sufficient grounds to warrant a variance of its decision concerning the Capitalized O&M Variance. There are no new grounds alleged, nor any error of law or jurisdiction cited. In addition, Liberty has not provided any evidence which would amount to changed circumstances or provided new facts that have arisen since the close of the original proceeding.
- [42] For these reasons, the variance of the Board's decision regarding the Capitalized O&M Variance is denied.

b. Retention and Incentive Programs

- [43] In Matter 494, Liberty proposed to include \$1.5 million for previously approved retention and incentives programs (Retention and Incentive Program) in its 2022 budget. The \$1.5 million included \$150,000 for Residential Incentives, \$900,000 for Commercial Incentives, \$300,000 for the Propane Winback program, and \$150,000 for the Retention program.
- [44] The Board allowed \$150,000 for Residential Incentives, \$500,000 for Commercial Incentives, \$100,000 for the Propane Winback program, and \$100,000 for the Retention Program, all on the basis that it could not find any justification for the more significant budgeted amounts in light of smaller past expenditures on these programs.

- [45] Liberty requests that the Board vary the Matter 494 Decision to allow its entire \$1.5 million budget for the Retention and Incentive Program because the Board failed to consider Liberty's Fuel for the Future Fund in quantifying its past expenditures on these programs.
- [46] In final argument, Mr. Hoyt submitted that the Board based its decision on evidence of Liberty's past spending on its regulated retention and incentive program and not its Fuel for the Future Fund spending.
- [47] In support of this position, Mr. Hoyt reviewed the evidence in Matter 494 to demonstrate that the Board's reasoning was consistent with it having compared Liberty's proposed 2022 budget against its past regulated spending. He suggested that the Board was confused about the amounts spent under each program.
- [48] The Board notes that the amounts allowed in the Matter 494 Decision are consistent with the evidence of Liberty's past regulated spending and not the aggregate of the regulated and Fuel for the Future Fund spending.
- [49] However, it does not necessarily follow that the Board did not recognize the Fuel for the Future Fund spending.
- [50] The Board acknowledges a small error in the text of the Matter 494 Decision. In paragraph 82, the last sentence states, "[...] In 2019 and 2020, \$91,981 and approximately \$245,000 were spent on this program." This sentence should have stated, "[...] In 2019 and 2020, \$91,981 and approximately \$25,000 were spent on this program." The reference to \$245,000 (which included Fuel for the Future Fund spending) was inadvertent.
- [51] Mr. Hoyt submitted that the Board should approve the entire budget because it is justifiable compared to the 3-year average aggregate spending of over \$1.9 million for the regulated and Fuel for the Future programs. He noted that Mr. Robert Knecht, the expert witness for the Public Intervener, agreed with this assertion because he concluded that Liberty's 2022 budget for incentives is similar in magnitude to actual average spending. He did not recommend any changes to Liberty's proposal for incentives.
- [52] The Board finds that the Fuel for the Future Fund spending was not recovered from Liberty's customers and was not subject to the same regulatory scrutiny as other spending on the Retention

and Incentive Program. Therefore, Liberty's past Fuel for the Future Fund spending does not have the same predictive value as its past regulated spending.

[53] The Board addressed Mr. Knecht's recommendations in paragraph 77 of its decision. The Board noted that, notwithstanding Mr. Knecht's opinion, the Board must evaluate whether each proposed expenditure is reasonable and justifiable.

[54] Mr. Williams submitted that the Board does not have to vary its decision on this issue because retention and incentive program spending is essentially reconcilable in the next general rate application.

[55] For these reasons, the Board finds that it did not fail to consider Liberty's Fuel for the Future Fund spending in the Matter 494 Decision. Accordingly, the Board concludes that Liberty has not raised sufficient grounds to warrant a variance of its decision on this issue.

c. True-Up Variance Account

[56] In Matter 494, Liberty requested an effective date of May 1 for its 2022 rates. It also requested that a variance account be created to true up the difference between the revenue received from its 2021 rates during the first four months of 2022 and the revenue that would have been received under the 2022 rates had they been approved on January 1. The difference would be applied to the 2023 revenue requirement of all rate classes based on a proration of revenue by rate class, and the account would not include carrying charges.

[57] The Board approved the creation of the True-Up Variance Account, except as it would apply to the SGS class of customers.

[58] Liberty requests that the Board vary the Matter 494 Decision to allow all amounts in the True-Up Variance Account to be recovered or credited, as applicable, for all of Liberty's customers, at the time of the true-up.

[59] While the Board approved the True-Up Variance Account for only a portion of 2022, Mr. Lavigne testified that Liberty intends to extend that period to capture the difference in revenue received from its 2021 rates and the revenue it would have received under the 2022 rates for the entirety of 2022, until the 2022 rates become effective.

- [60] Mr. Lavigne also confirmed that Liberty intends to include any differences in revenue caused by the NB Court of Appeal Decision returning Liberty's ROE to 10.9 percent as of January 1, 2022, and those caused by the impact of its other requests in the Matter 540 Application, namely the Capitalized O&M Variance, and the Retention and Incentive Program budget.
- [61] In final argument, Mr. Hoyt submitted that the circumstances surrounding the True-Up Variance Account have changed significantly and that new facts have arisen since the close of the original proceeding, including the material change to Liberty's ROE caused by the NB Court of Appeal Decision.
- [62] Under cross-examination, Mr. Lavigne testified that the financial impact on Liberty of not varying the Matter 494 Decision concerning the True-Up Variance Account is estimated to be \$1.7 to \$1.9 million.
- [63] Mr. Williams submitted that the Board should not allow Liberty to recover any amounts through the True-Up Variance Account from January 1 to June 30, 2022. In his view, the Board should have rejected Liberty's proposed True-Up Variance Account as it applies to all classes of customers, not only the SGS class of customers. He did not object to Liberty's proposed use of the True-Up Variance Account after July 1 to track the difference between the 2021 rates and rates based on the approved 2022 revenue requirement.
- [64] The Board finds that the circumstances surrounding the True-Up Variance Account have changed significantly and that new facts have arisen since the close of Matter 494. As stated earlier, the NB Court of Appeal Decision constitutes changed circumstances and new facts that have occurred since Matter 494 was initially decided. The Board finds that this change has a material impact on Liberty's 2022 rates and considers that the Stay Order has changed the circumstances surrounding the True-Up Variance Account by delaying the implementation of the 2022 rates.
- [65] The Board finds that Liberty will suffer prejudice if the Matter 494 Decision on this issue is not varied because the utility will incur a loss of revenue in the range of \$1.7 to \$1.9 million. For these reasons, the Board concludes that Liberty has raised sufficient grounds to warrant variance of the Matter 494 Decision on this issue.
- [66] Consequently, the Board will allow all amounts in the True-Up Variance Account, as of December 31, 2022, to be recovered or credited, as applicable, for all of Liberty's customers.

E. Conclusion

[67] The Board lifts the Stay Order dated July 5, 2022.

[68] The Board concludes that:

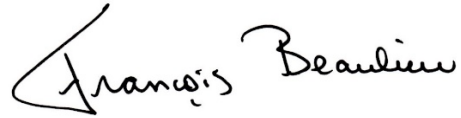
- (a) Liberty's application to review and vary the Rates Order and to calculate the 2022 rates based on the 2022 revenue requirement approved by the Board in Matter 494, as adjusted for ROE being 10.9 percent until November 30, 2022, and 9.8 percent as of December 1, 2022 (the Varied 2022 Rates) is granted;
- (b) Liberty's application to vary the Matter 494 Decision to allow the Capitalized O&M Variance and related additions to the 2022 revenue requirement is denied;
- (c) Liberty's application to vary the Matter 494 Decision to allow its entire \$1.5 million budget for the Retention and Incentive Program is denied;
- (d) Liberty's application to vary the Matter 494 Decision concerning the True-Up Variance Account is granted; and
- (e) The True-Up Variance Account will record the difference between the revenue Liberty received from its 2021 rates from January 1, 2022, until December 31, 2022, and the revenue that would have been received under the Varied 2022 Rates if those rates had been in effect during the same period.

[69] The Board will allow the amounts recorded in the True-Up Variance Account to be recovered or credited, as applicable, for all classes of customers. The recovery or credit shall be addressed in the next general rate application.

[70] The Board notes that nothing in this decision approves any portion of Liberty's 2023 revenue requirement or the recovery of its 2023 rates.

[71] Liberty is ordered to refile its 2022 test year budget with the above-noted adjustments identified, cost of service study with adjustments, proof of revenue, and the resulting rates. Subject to the approval of these documents, the Board will issue an order approving the distribution rates for each class of customers at a date fixed by the Board.

Dated at Saint John, New Brunswick, this 21st day of December 2022.



François Beaulieu
Chairperson



Christopher Stewart
Member



Stephanie Wilson
Member