



SECTION 43 REQUEST TO VARY DECISION

IN THE MATTER of a Review of Enbridge Gas New Brunswick LP's 2010 Financial Results, 2010 Natural Gas Sales and 2012 Proposed Budget

April 10, 2012

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

IN THE MATTER of a Review of Enbridge Gas New Brunswick LP's 2010 Financial Results, 2010 Natural Gas Sales and 2012 Proposed Budget

NEW BRUNSWICK ENERGY AND UTILITIES BOARD:

CHAIRMAN: Raymond Gorman, Q.C.

VICE-CHAIRMAN: Cyril Johnston

MEMBER: Terry Totten

SECRETARY: Lorraine Légère

COUNSEL: Ellen Desmond

APPLICANT:

Enbridge Gas New Brunswick David MacDougall

INTERVENORS:

Public Intervenor René Basque

INTRODUCTION

The New Brunswick Energy and Utilities Board (Board) conducts an annual review of the Enbridge Gas New Brunswick Limited Partnership (EGNB) Regulatory Financial Statements. The Board conducted a review of EGNB's 2010 financial statements and issued its decision on January 30, 2012. In that decision the Board ruled, *inter alia*, that losses from installation services could not be added to the deferral account. The Board's decision on the topic was as follows:

Revenue from Installation Services

In the decision related to the 2008 review, the Board expressed its concern that all costs related to installation services be properly identified and charged to installation services revenue. This concern was repeated in the 2009 review, at which time EGNB was directed to include the results of installation services on a full cost basis in all Regulatory Financial Statements.

In the revised October 25 Financial Statements EGNB attached a document identifying the results of installation services on a full cost basis, but did not charge those costs to installation services and made no corresponding adjustment to the revenue on the statement of income to reflect this. The full cost analysis showed a loss on installation services of \$634,000.

EGNB argues that it performs installation services to support the growth of the gas distribution system in New Brunswick and that accordingly it would not be appropriate for EGNB to have to absorb any losses arising from this work. As part of their evidence, EGNB provided a 2003 letter that they had sent to the Board, outlining their expectation that the results of installation services would be integrated with the results of the distribution activity. EGNB states that it has operated on this basis since 2003.

While EGNB may have had this expectation in 2003, the Board has stated in its review of both the 2008 and 2009 financial results that installation services should be accounted for on a full cost basis to prevent further cross-subsidization of installation services by ratepayers.

The Board will not allow the loss associated with installation services in 2010 to be added to the deferral account. EGNB is directed to re-file its regulatory financial statements in accordance with the directions of the Board, accounting for installation service costs on a full cost basis.

By letter dated February 9, 2012 EGNB requested that the Board "...amend the January 30, 2012 decision to allow the addition of the disallowed \$634,600 associated with the fully allocated costs of installation service in 2010 to the deferral account and that the direction regarding disallowing fully allocated costs in excess of installation service revenue be established on a forward looking basis beginning January 1, 2012."

PROCESS

Following receipt of EGNB's correspondence, the Board advised EGNB and all parties to the original hearing that it considered EGNB's letter to be a request pursuant to section 43 of the Energy and Utilities Board Act, which states:

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

The Board requested the parties' submissions as to whether the matter should be heard by a written or oral process. All parties agreed that the matter be considered as a written process and the Board established a process whereby EGNB would file a submission, followed by a reply by intervenors and finally an opportunity for a rebuttal submission by EGNB.

ISSUES

EGNB's position is that since 2003 the results of installation services have been integrated with the results of distribution activity, with losses or gains from installations going to the deferral account. EGNB points out that while the regulations prohibit the cross-subsidization between distribution services and gas sales, the regulations are silent on the issue of cross-subsidization between distribution services and installation services. EGNB says that the Board's decision not to permit losses from installation services to be added to the deferral account represents a significant change in policy, to which it was entitled to appropriate notice. EGNB says it did not receive such notice. Further EGNB submits that it filed a report outlining its position on this subject in May of 2010 and did not receive a response from the Board.

In his submission the Public Intervenor summarizes EGNB's arguments and concludes at page 3 that:

Stripped of all other arguments, EGNB's submission relies on one basic point and that is that it did not have notice that revenue shortfalls on installation services would be charged to its shareholders.

This view is reinforced by the final comment in EGNB's submission where it requests that the Board's decision with respect to installation service costs be prospective in nature only.

The Board agrees that the central issue raised in EGNB's submission is one of notice.

HISTORY and BACKGROUND

In order to determine whether prior notice was given, it is necessary to review the history of this topic and previous Board decisions in some detail.

EGNB was granted the franchise to distribute natural gas in New Brunswick in 1999. At that time the government brought in an "unbundled" model, where EGNB was only to be a distributor of gas and was prohibited from selling gas or installing gas equipment in homes and businesses.

In 2003 the government changed the Gas Distribution Act, 1999 and Regulations to permit EGNB to both sell gas and to provide installation services of gas equipment. The government put in place detailed Regulations regarding the manner in which EGNB could sell gas. These Regulations prevent cross-subsidization between gas sales and gas distribution.

Minimal Regulations were put in place regarding installation services and they were silent as to whether cross-subsidization was permitted between installation services and gas distribution.

On May 27, 2003 Rock Marois, then General Manager of EGNB wrote to the Board outlining his view of the issue. The letter indicates EGNB's position that the regulations anticipate minimum regulation of customer services and that:

...EGNB embarks in these activities with the clear expectation that any surplus or shortfall resulting from these activities will be integrated with the results of the distribution activity, i.e. added to or deducted from the deferral account.

Beginning with the 2003 year, EGNB has presented its revenues for installation services, less cost of goods sold, integrated into its Regulatory Financial Statements. These statements for all years for up to and including 2007 were approved by the Board without comment on this subject.

On November 13, 2009, the Board issued a decision on its review of the 2008 EGNB Financial Statements. The Board addressed the issue of installation services at page 4, stating:

EGNBLP witnesses testified that the company includes the revenues and costs related to installation services in the regulated financial results because it considers these services to be part of its regulated operations. The Board notes however that it does not regulate the rates charged by EGNBLP for these services. Installation services are subject to competition and the resulting market pressures. As a result the Board would be

concerned if installation services were subsidized by the distribution operation. This would result in unfair competition and increases in the deferral account.

While the regulatory results presented by EGNBLP show that installation revenue exceeded the cost of installation by \$1,631,000, these costs only include the direct costs of equipment and associated labour. The costs do not, for example, include bad debt, interest on financing or an allocation of overhead. The Board must be assured that all costs related to installation services are properly identified and charged to installation services revenue. The Board therefore orders EGNBLP to file all costs related to installation services and how these costs were determined for 2008. These costs will be filed with the Board no later than 180 days from the date of this decision. Should the review of this information indicate that installation services are not covering their full costs the Board will make the appropriate adjustments.

In response to the Board's direction, EGNB filed a report on May 12, 2010. This report showed what EGNB considered reasonably allocated costs charged to installation services revenue and showed that revenue exceeded costs by \$23,460. In addition to what was requested by the Board, EGNB provided additional information it felt provided "important context related to the provision of installation services by EGNB."

In the report EGNB outlines some of the background relating to its entry into the installation services business and quotes from the Marois letter referred to above. The report concludes by saying:

In the November 13, 2009 decision quoted above, the Board suggests an expectation that installation services must cover its full costs and consequently not be cross-subsidized by the utility. EGNB notes that while section 6 of the Gas Distributor Marketing Regulation deals with revenues and expenses related to the sale of gas, provision of customer services and the distribution of gas, the issue of cross-subsidization is only raised in the context of cross-subsidization between the sale of gas and the distribution of gas (Section 6(2)(a)). The regulation is silent in regards to cross-subsidization associated with customer services.

Neither the report nor the covering letter requested a variance of the Board's decision under section 43 of the Energy and Utilities Board Act or any other action from the Board.

ANALYSIS

As stated above, the central issue in this request to vary is whether or not EGNB had notice that it would no longer be allowed to include losses from installation services in the deferral account.

The decision under review in this matter dealt with the financial results for 2010. The Board's decision for the 2008 Financial Results was rendered on November 13, 2009, several weeks prior to the commencement of the 2010 year.

The relevant text on the issue of installation services from the November 13, 2009 decision is set out in full in the introduction to this decision, where the Board states its concern over possible subsidization of installation services by gas distribution. It cites the reasons for this concern, namely unfair competition and additions to the deferral account. The Board goes on to direct EGNB to file its results for installation services on a full cost basis and states that if *"...installation services are not covering their full costs the Board will make the appropriate adjustments."*

It is clear that EGNB did have notice prior to the commencement of 2010.

EGNB demonstrated its understanding of the Board's decision on installation services. In the November 13, 2009 decision it was ordered to file all costs related to installation services and how these costs were determined for 2008. In the report filed in compliance with the Board's Order, EGNB commented on the Board's decision, concluding:

In the November 13, 2009 decision quoted above, the Board suggests an expectation that installation services must cover its full costs and consequently not be cross-subsidized by the utility.

On the issue of EGNB's understanding of prior notice, the Public Intervenor states at p. 4 of his submission:

With this (November 13, 2009) decision, EGNB was put on notice that: (1) it needs to fully cost out its installation services and (2) if installation revenues do not cover the full costs, the Board would make the appropriate adjustments.

It is difficult to understand why this direction from the Board was not clear to EGNB. The only logical adjustment consistent with the Board's comments would be the one whereby any shortfalls associated with calculating installation service costs on a fully allocated basis would be charged to EGNB's shareholders. These shortfalls would not be charged to the gas distribution customers and, consequently, could not form part of any addition to the Regulatory Deferral account.

In reply to the Public Intervenor, EGNB raises the issue of the Board's inaction following receipt of its report of May 12, 2010:

...it is inappropriate for the Board to make a significant disallowance based on a matter that was fully addressed in a report called for by the Board on which the Board subsequently provided no specific direction.

The Board did not request that EGNB file a report outlining its position regarding installation services. The Board directed EGNB to file "all costs related to installation services and how these costs were determined for 2008." EGNB's other comments were not requested by the Board.

While the May 12, 2010 report provided EGNB's perspective on the issue of cross-subsidization and installation services, neither the report nor the cover letter enclosing it requested the Board to reconsider the subject.

EGNB at no time requested the Board reconsider its November 13, 2009 decision or act upon the comments filed by EGNB in the May 12, 2010 report. The Board, in fact, dealt with the issue in its May 16, 2011 decision where it re-affirmed the position taken in the November 13, 2009 decision.

For reasons stated above the Board rejects the submission that its purported failure to deal with EGNB's comments in the May 12, 2010 report renders its January 30, 2012 decision inappropriate.

CONCLUSION

EGNB had prior notice on November 13, 2009 that the Board was moving in a different direction regarding the accounting for installation services. The year under review, 2010, occurred after notice was given. The request to vary the January 30, 2012 decision is denied.

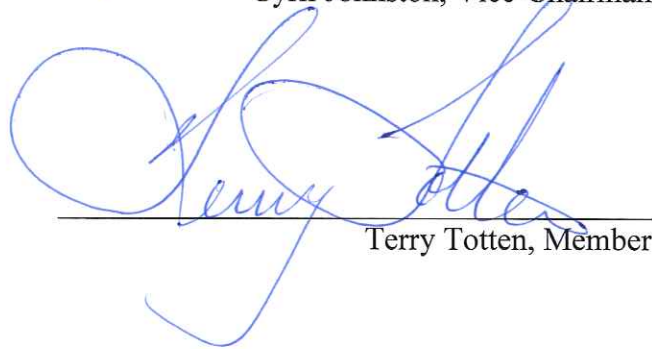
Dated at the City of Saint John, New Brunswick this 10th day of April, 2012.



Raymond Gorman, Q.C., Chairman



Cyril Johnston, Vice-Chairman



Terry Totten, Member