DECISION

IN THE MATTER of an Application for Interim Rate Approval by Enbridge Gas New Brunswick, for changes to its Small General Service, General Service, Contract General Service, Contract Large General Service LFO, Off Peak Service, Contract Large Volume Off Peak Service and Natural Gas Vehicle Fueling Rates;

January 31, 2005

New Brunswick

Board of Commissioners of Public Utilities

IN THE MATTER of an application by Enbridge Gas New Brunswick to change its Small General Service, General Service, Contract General Service, Contract Large General Service LFO, Off Peak Service, Contract Large Volume Off Peak Service and Natural Gas Vehicle Fueling Rates;

Enbridge Gas New Brunswick (Enbridge) applied to the Board of Commissioners of Public Utilities ("Board") on November 22, 2004 for a change to its distribution rates effective February 1, 2005. A Pre-hearing Conference was held on January 6, 2005, at which time the Board decided that an oral hearing would be held beginning on March 17, 2005. As a result, Enbridge made a motion that the Board approve an interim order to increase rates effective February 1, 2005.

The Board reviewed the request and set a schedule for a written hearing to review the interim order motion. It determined that Enbridge should submit evidence in support of its request and that the intervenors should be allowed the opportunity to submit written comments to which Enbridge could reply.

Written comments opposing the motion were received from Competitive Energy Services, Flakeboard Company Limited, the Fredericton Residential Investment Properties Association (FRIPA) and the Maritime Natural Gas Pipeline Contractors Association Inc. Enbridge replied to these comments.

The Board has not considered the comments of FRIPA as they did not register as a formal intervenor. FRIPA will have an opportunity to provide its comments at the time of the oral hearing.

The Board has reviewed the remaining information and will address certain matters raised by the parties. Based upon the decision "Bell Canada v Canada (Canadian Radio - Television and Telecommunications Commission), [1989] 1 S.C.R. 1722 (Bell Case), the Board is of the opinion that the *Gas Distribution Act* ("Act") provides the same or similar regulatory jurisdiction as was provided in the *National Transportation Act* and the *Railway Act*. The Board is of the opinion, therefore, that it has the authority to grant approval for the requested changes in rates, on an interim basis, should it consider that this would be in the public interest. The Board is also of the opinion that it has the authority to order a rebate of any over-collection of revenues at the time of making its final order should that final order approve lower rates than were approved in the interim order.

The critical issue that remains is what factors should be considered by the Board in determining whether or not to grant the requested interim order. Section 77 of the *Gas Distribution Act* ("Act") does not provide any criteria to be used by the Board in deciding on requests for interim orders.

The Board has previously ruled on a request by the New Brunswick Power Corporation ("NB Power") for an interim order pursuant to Section 41 of the *Public Utilities Act*.

RSNB Chapter P-27 which gave NB Power the right in “special circumstances” to apply for an interim order. Section 41 provided no definition of "“special circumstances" so the Board defined what, in its opinion, would constitute “special circumstances” within the meaning of Section 41 of the *Public Utilities Act*.

The Board found in a decision dated January 10, 1991 that “special circumstances” in that section of the *Public Utilities Act* require that:

> “the following should exist:
>
> 1) That the projected results, reflecting all costs and revenues, demonstrate a prima facie need for a rate change.
> 2) That there is not sufficient time to permit the normal full public review.
> 3) That the circumstances which result in the need for a rate change are beyond the control of the applicant and as well, could not have been reasonably anticipated by the applicant.”

The Supreme Court of Canada in the Bell Canada case (supra) at Paragraph 46 stated:

> *“Traditionally, such interim rate orders dealing in an interlocutory manner with issues which remain to be decided in a final decision are granted for the purpose of relieving the applicant from the deleterious effects caused by the length of the proceedings. Such decisions are made in an expeditious manner on the basis of evidence which would often be insufficient for the purposes of the final decision.*

> *The fact that an order does not make any decision on the merits of an issue to be settled in a final decision and the fact that its purpose is to provide temporary relief against the deleterious effects of the duration of the proceedings are essential characteristics of an interim rate order.*

Enbridge, in its comments dated January 13, 2005, stated that "special circumstances" are only referenced in Section 76 of the Act dealing with interim ex parte orders and are not mentioned in Section 77.

The Board considers that, in normal circumstances, general rate increases should only be granted following a full public review. Therefore, the granting of rate increases on an interim basis should only be done in exceptional or special circumstances. To determine when such circumstances may exist the Board must have criteria to apply. The Board considers that in the present case, Enbridge does not meet either the criteria developed by the Board for use in reference to Section 41 of the *Public Utilities Act* or the criteria referenced by the Supreme Court in the Bell Case.

Enbridge's market-based approach to setting its rates requires a review of the anticipated prices for fuel oil and natural gas. Both commodities have prices that fluctuate significantly and frequently. Enbridge should be aware of this when developing any application for rate changes.

As well, Enbridge should be aware of the amount of time normally required for a full public review of any general rate application. The Board notes that the application was dated November 22, 2004 and it anticipates a final decision by the end of March, 2005. The Board does not consider a period of slightly more than four months from application to decision to be unusual or lengthy. When Enbridge made its application, it knew full well that the process might involve an oral hearing which normally would take at least four to five months.

With respect to any possible deleterious effect on Enbridge, the Board notes the following. Enbridge estimates that denying the interim rate relief requested will increase the amount of the deferral account by $0.62 million and $0.85 million if the rates take effect on April 1, 2005 or May 1, 2005 respectively. Enbridge has previously estimated that the deferral account would be approximately $60 million as of December 31, 2004. The Board does not consider an increase in this account of less than $1 million to represent a significant difference, particularly as Enbridge has estimated the account will peak at approximately $133 million at the end of the development period.

The Board further notes that amounts in the deferral account earn the Board approved rate of return. The Board therefore does not consider that waiting for a final decision on the requested rate changes, for approximately two more months, will cause any deleterious effects to Enbridge.

The Board therefore denies Enbridge's request for approval of an interim order on rates.

Dated at the City of Saint John, this 31st day of January, 2005.

By Order of the Board

Lorraine Légère
Secretary to the Board