

1 NEW BRUNSWICK ENERGY and UTILITIES BOARD  
2 COMMISSION DE L'ENERGIE ET DES SERVICES PUBLICS N.-B.  
3 Matter 486

4

5 IN THE MATTER OF an application by Irving Oil Marketing  
6 G.P. and Irving Oil Commercial G.P. requesting an  
7 increase in the maximum wholesale margins for motor fuel  
8 and furnace oil pursuant to section 1.1 and subsection  
9 12(1) of the Petroleum Products Pricing Act and  
10 subsection 9(1) of the General Regulation - Petroleum  
11 Products Pricing Act thereunder

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14 Held via Videoconferencing, on February 17<sup>th</sup> 2021.

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14 Members of the Board:

15 Mr. Francois Beaulieu - Acting Chairperson

16 Mr. Michael Costello - Member

17 Mr. Patrick Ervin - Member

18

19 NB Energy and Utilities Board:

20 Mr. Matthew Letson - Counsel

21 Mr. David Young

22 Mr. John Lawton

23 Mr. Michael Dickie

24 Chief Clerk: Ms. Kathleen Mitchell

1 .....

2       ACTING CHAIRPERSON:  So now the Board will now give its  
3       ruling on the motion filed by Irving Oil Marketing G.P.  
4       and Irving Oil Commercial G.P. requesting an interim  
5       margin adjustment for motor fuels and furnace oil.  
6       I would just like to remind everyone that if you need to  
7       have any translation, that is accessible at the bottom  
8       of your screen where it says interpretation.  And the  
9       ruling will be delivered in English so if you need  
10      French translation, you can have access to that by  
11      pressing on the appropriate tab at the bottom of your  
12      screen.

13      In the event that there are differences between what  
14      will be read, the transcript of the reading and the  
15      ruling on motion that will be posted on the Board's  
16      website, I would like to remind the parties that the  
17      posted ruling on motion shall govern.  The English and  
18      French version of the ruling on motion will be posted on  
19      the Board's website once the French translation has been  
20      received.  I will now proceed to read the ruling on  
21      motion.

22      Section A, which is the introduction.  This ruling  
23      arises from a notice of motion filed by Irving Oil  
24      Marketing G.P. and Irving Oil Commercial G.P.,

1 applicants, on January 19, 2021. The motion is made in  
2 accordance with section 1.1 and subsection 12(1) of the  
3 Petroleum Products Pricing Act, S.N.B. 2006, chapter P-  
4 8.05, PPPA, subsection 9(1) of the general regulation  
5 Petroleum Products Pricing Act, N.B. regulation 206-41  
6 and section 40 of the Energy and Utilities Board Act  
7 S.N.B. 2006 chapter E-9.18, EUB Act.

8 The applicants seek an interim order approving a) an  
9 immediate non-rebatable interim increase of 0.035  
10 dollars per litre in the maximum wholesale margin for  
11 motor fuels b) an immediate interim increase of 0.030  
12 dollars per litre in the maximum wholesale margin for  
13 furnace oil and c) such further directions as may be  
14 necessary or appropriate.

15 The applicants cite the following reasons for the  
16 motion, a) by revised application dated January 19<sup>th</sup>, the  
17 applicants applied for a 0.0409 dollars per litre  
18 increase in the maximum wholesale margin for motor fuels  
19 and a 0.0302 dollars per litre increase in the maximum  
20 wholesale margin for furnace oil. b) due to the  
21 anticipated delay between the date of the application  
22 and a final decision is rendered, there are risks to the  
23 security of supply which requires immediate and urgent  
24 action by the Board, c) the anticipated delay will have

1 a deleterious impact on the applicant's financial  
2 position and such delay could result in challenges  
3 maintaining a reliable supply to all or some markets.  
4 And d) the applicants proposed that no portion of the  
5 interim increase in the maximum wholesale margin for  
6 motor fuels would be rebatable given the inability to  
7 effectively and fairly provide a rebate. If the final  
8 maximum wholesale margin increase for furnace oil is  
9 lower than the interim increase, however, such  
10 overcollection will be rebated.

11 In support of its motion the following evidence was  
12 filed. a) revised evidence of Irving Oil dated January  
13 19<sup>th</sup> which replaced earlier filed evidence and b) the  
14 affidavit of Mr. Darren Gillis, President of Irving Oil  
15 Marketing G.P. and Irving Oil Commercial G.P., sworn on  
16 January 19<sup>th</sup>.

17 In advance of the motion hearing, the Board received a  
18 written submission from the New Brunswick Common Front  
19 for Social Justice, Common Front. Grassroots NB,  
20 Leap4wards and Solidarité Fredericton Solidarity  
21 submitted other documents in support of their arguments.  
22 Letters of comments were received from members of the  
23 public which are part of the public record in this  
24 proceeding. Most of the letters addressed issues

1 relevant to the application and not whether interim  
2 margin adjustments should be permitted. A public  
3 hearing of the application is scheduled to be held on  
4 April 26 to April 28<sup>th</sup>. This will be followed by a final  
5 order of the Board.

6 A hearing of the motion was held on February 5<sup>th</sup>. Mr.  
7 Gillis was cross-examined by Mr. Aditya Rao, human  
8 rights representative at the Canadian Union of Public  
9 Employees, CUPE, Mr. Abram Lutes, provincial coordinator  
10 at the Common Front, Ms. Hafsah Mohammad, organizational  
11 representative at Grassroots NB, Dr. Beth McCann, a  
12 representative with Leap4wards and Mr. Simon Ouellette a  
13 volunteer at Solidarité Fredericton Solidarity.

14 Section B, legislative framework. Section 1.1 of the  
15 PPPA applies to this motion. 1.1, the Board shall when  
16 making a decision under this act respecting prices,  
17 margins, delivery costs or full service charges consider  
18 the fact that consumers should benefit from the lowest  
19 possible -- excuse me, from the lowest price possible  
20 without jeopardizing the continuity of supply of  
21 petroleum products. Section 40 of the EUB Act is also  
22 applicable.

23 40(1). The Board may with respect to any matter before  
24 it make an interim order where it considers it advisable

1 to do so and may impose such terms and conditions that  
2 it considers appropriate.

3 40(2). The Board may provide directions in the event  
4 that the interim order is different from the final  
5 order.

6 Section C, issues. The Board will address the following  
7 issues. 1) will there be a significant delay in the  
8 process leading to a final decision. 2) will such delay  
9 cause a deleterious impact on the applicants. 3) does  
10 an exceptional circumstance exist. And 4) can any  
11 discrepancy between an interim order and the final  
12 determination be reviewed and remedied.

13 Section D, analysis.

14 Mr. Hoyt submitted that section 40 of the EUB Act  
15 authorizes the Board to grant interim orders. He stated  
16 that such orders may be made in an expeditious manner  
17 based on the evidence available at the time of the  
18 hearing, which evidence would often be insufficient for  
19 the purposes of the final decision. He also submitted  
20 that the applicants have demonstrated that the length of  
21 the delay will cause it to suffer deleterious impacts  
22 and potentially jeopardize the continuity of supply of  
23 petroleum products in New Brunswick.

24 A number of interveners opposed the motion and presented

1 arguments which are summarized below. Mr. Lutes  
2 submitted that the applicants did not provide sufficient  
3 evidence for an interim increase. He acknowledged that  
4 the requirements for an interim increase are lower than  
5 for a final increase, but stated that less evidence is  
6 not the same as no evidence. He was concerned about the  
7 impact that any interim adjustment would have on  
8 individuals living in poverty. Ms. Mohammad submitted  
9 that the applicants have not provided sufficient  
10 evidence for interim increases for both motor fuels and  
11 furnace oil. In her view, quote, The interim increases  
12 are more than the 11 percent growth and inflation that  
13 has occurred since the wholesale margins were last  
14 increased in March 2013. The request for an interim  
15 increase ought to be rejected by the Board due to  
16 insufficient, false or contradictory evidence, close  
17 quotes. She stated that the applicants claimed to have  
18 suffered hardship due to global pandemic but no such  
19 evidence had been submitted. Ms. Mohammad argued that  
20 even though an interim increase for furnace oil could be  
21 rebated after the final decision, the damage which would  
22 be caused to lower and middle income families could be  
23 irreparable. Mr. Mark Cunningham on behalf of Mr. Rao  
24 stated that CUPE opposes an interim increase and that



1 the applicants provided very little supporting evidence.  
2 He argued that the test set out by the Board has not  
3 been met. He also addressed the Board's discretion to  
4 consider exceptional circumstances. He acknowledged  
5 that although the pandemic is outside the applicant's  
6 control, the applicants should have anticipated its  
7 impact. Mr. Ouellette opposed the requested interim  
8 adjustments. He stated that the pandemic has had an  
9 impact on lower income individuals. His organization  
10 was concerned about any adjustment to furnace oil.

11 Ms. Heather Black, the Public Intervener, opposed the  
12 motion on two grounds. First, the applicants are not  
13 able to offer a rebate in case of overcollection for  
14 motor fuels to customers. Second, the motion does not  
15 meet the test for an interim order as the applicants  
16 have not established a prima facie case to support its  
17 requested interim adjustments.

18 The Board considered a motion for an interim order in  
19 Matter 307. In its decision, the Board stated that the  
20 interim increase are made based on prima facie evidence  
21 which would typically be insufficient for the purposes  
22 of a final decision. The Board noted that rate  
23 increases should generally be granted following a full  
24 hearing with interim increasing being the exception.

1 The Board also established certain principles to be  
2 applied when deciding whether it is advisable to make an  
3 interim order and stated paragraph 37, First the Board  
4 should only grant an interim rate if there will be a  
5 sufficient delay in the process that will lead to a  
6 final decision following a full hearing on the merits.  
7 Paragraph 38, Second, the applicant must show that such  
8 a delay would have a deleterious impact on the  
9 applicant. Whether an impact is deleterious depends on  
10 the circumstances but mere evidence of a shortfall is  
11 not sufficient.

12 Paragraph 39, Third, the Board retains an overall  
13 discretion to deny any interim rate increase requests.  
14 Even if the two previous tests are met, the granting of  
15 an interim relief should only be done in exceptional  
16 circumstances. Such circumstances could include, for  
17 example, that a significant delay was beyond the control  
18 of the applicant or could not have been reasonably  
19 anticipated.

20 Paragraph 40, Finally, the fact that the Board can order  
21 the applicant to rebate any overcollection of revenue  
22 following its final decision cannot be part of a  
23 justification for an interim increase. A direction of  
24 this nature can only follow a determination that an

1 interim increase is advisable.

2 These principles are reviewed below in relation to the  
3 current Matter. Number 1, significant delay. Mr. Hoyt  
4 argued that the hearing originally scheduled to start on  
5 March 30<sup>th</sup> is now commencing on April 26<sup>th</sup> which, he  
6 submitted, could be further delayed as a result of the  
7 COVID-19 pandemic. While the Board's test uses the term  
8 significant delay, Mr. Hoyt noted that Bell Canada  
9 versus Canadian Radio-Television and Telecommunications  
10 Commission (1989) 1 S.C.R. 1722, Bell case, a leading  
11 case on interim relief used the terms link and duration.  
12 He submitted that the delay is such of a length as to  
13 warrant interim relief because a final decision may not  
14 be issued until October 2021. He referred to a nine  
15 month period in adjusting the wholesale margins in  
16 Matter 181.

17 Mr. Hoyt mentioned that even though there may only be  
18 four or five months until a final decision is rendered  
19 in this Matter, this proceeding has already seen delays  
20 that would make a decision a lot closer to nine months.  
21 He also noted that the applicants were unable to make  
22 their application earlier than in January 2021 because  
23 of the COVID-19 pandemic. Although Mr. Gillis referred  
24 to the nine month period in Matter 181, there is nothing

1 before the Board to suggest that this will be the case  
2 in this proceeding. The applicants have not  
3 demonstrated that there will be a significant delay  
4 between the time of its application and the time a final  
5 decision will likely be rendered. Accordingly, the  
6 Board is not satisfied that there will be a significant  
7 delay in the process. Any delay would only result from  
8 a significant change in the current filing schedule.  
9 Given that the hearing is scheduled to conclude on April  
10 28<sup>th</sup>, the Board anticipates that a decision will likely  
11 be rendered in May.

12 2, deleterious impact. Mr. Hoyt argued that a delay  
13 between the application and a final decision will cause  
14 deleterious effects on the applicants. He submitted  
15 that an interim order is intended to protect an  
16 applicant from deterioration in its financial position.  
17 As stated by Mr. Gillis, delaying the requested interim  
18 increases for a period of nine months would result in a  
19 decrease of millions of dollars in revenue for the  
20 applicants. Ms. Black submitted that a deleterious  
21 impact cannot be proven by a mere financial shortfall.  
22 This was echoed by CUPE. Mr. Hoyt also argued that  
23 there is a concern with the security of petroleum  
24 supply. He stated that this concern is a key difference

1 from prior applications for increases in either  
2 wholesale or retail margins. In his view, section 1.1  
3 of the PPPA is an overriding consideration and that for  
4 the purposes of its request, it is the primary basis for  
5 an immediate action. Ms. Black stated that section 1.1  
6 of the PPPA suggests that consumers should benefit from  
7 the lowest price possible without jeopardizing supply.  
8 In her view, the applicants have not established, even  
9 on a prima facie, basis whether or to what extent the  
10 current wholesale margin is squeezing wholesalers such  
11 that continuity of supply is jeopardized during a  
12 regulatory delay. She argued that the evidence  
13 submitted by the applicants were largely composed of  
14 broad statements about the petroleum industry as a  
15 whole, the effects of regulation in general and the  
16 effects of the pandemic on the applicants.

17 In the Bell case, the Supreme Court of Canada stated and  
18 I quote, there should be no concern over the financial  
19 stability of regulated utility companies where one deals  
20 with the power to revisit interim rates. The very  
21 purpose of interim rates is to allay the prospect of  
22 financial instability which can be caused by the  
23 duration of proceedings before a regulatory tribunal.  
24 In fact, in this case, the respondent asked for and was

1 granted interim rate increases on the basis of serious  
2 apprehended financial difficulties. The added  
3 flexibility provided by the power to make interim orders  
4 is meant to foster financial stability throughout the  
5 regulatory process. The power to revisit the period  
6 during which interim rates were enforced is a necessary  
7 corollary of this power without which interim orders  
8 made in emergency situations may cause irreparable harm  
9 on the subvert fundamental purpose of ensuring that  
10 rates are just and reasonable. End quote.

11 The Board concludes that the applicants have not  
12 demonstrated on a prima facie basis that such a delay  
13 would have a deleterious impact on either Irving Oil  
14 Marketing G.P. or Irving Oil Commercial G.P. The Board  
15 believes that a nine month delay is not likely in this  
16 current matter. In addition, the Board has no  
17 conclusive evidence of any serious apprehended financial  
18 difficulties caused by the current duration of this  
19 proceeding on the applicants. In the context of the  
20 PPPA, an appropriate test when evaluating the  
21 deleterious impact principle is whether there is a prima  
22 facie case that the current wholesale margin is  
23 jeopardizing the continuity of supply during the  
24 regulatory process. Should this be established, the

1 amount of the requested increase would then need to be  
2 evaluated as to whether it is the appropriate increase  
3 to alleviate that risk.

4 The Board concludes that the applicants have not  
5 established that the current wholesale margin for motor  
6 fuels and furnace oil are such that security of supply  
7 will be jeopardized during the period between its  
8 application and the likely timeframe of the Board's  
9 final decision in this Matter.

10 Number 3, exceptional circumstances. As the Board  
11 stated in Matter 307, even if the above tests have been  
12 met, the granting of interim margin adjustments should  
13 generally only be done in exceptional circumstances. An  
14 example would be where a significant delay is beyond the  
15 control of the applicant or could not have been  
16 reasonably anticipated.

17 The applicants submitted that the current COVID-19  
18 pandemic could not have been anticipated and has had a  
19 significant impact on its costs and on the petroleum  
20 industry generally. Ms. Black argued that even if the  
21 applicants meet the prima facie test, the motion should  
22 be granted only in exceptional circumstances. She  
23 submitted, however, that the applicants have not met the  
24 prima facie test.

1 As the Board has found that the applicants have not met  
2 the test of significant delay and deleterious impacts,  
3 an evaluation as to whether the circumstances are  
4 exceptional is not required.

5 4, review and remedy of any effect and discrepancy.

6 Subsection 442 of the EUB Act gives the Board the  
7 authority to provide direction in the event an interim  
8 order is different from the final order. As the Board  
9 will not be issuing an interim order, this does not need  
10 to be considered.

11 Finally, conclusion. The Board concludes that the  
12 applicants have not met the principles to be applied for  
13 an interim order. The applicants have not established a  
14 prima facie case to support their motion in relation to  
15 both motor fuels and furnace oil. The motion is  
16 therefore denied.

17 This completes the reading of the ruling on motion and  
18 the Matter is now adjourned.

19 (Adjourned)

20

21 Certified to be a true transcript  
22 of these proceedings, as recorded by me,  
23 to the best of my ability.

24

Reporter