DOMINIQUE NEUMAN
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MEMBRE DU BARREAU DU QUÉBEC

Montréal, le 2 décembre 2020
(seconde lettre ce jour)

M[e] Véronique Dubois, Secrétaire de la Régie
Régie de l'énergie
800 Place Victoria
Bureau 255
Montréal (Qué.)
H4Z 1A2

Re: Dossier RDÉ R-4008-2017.
Achat et vente de gaz naturel renouvelable (« GNR ») par Énergir.
Étape B, sous-partie *« Rétroactivité du tarif GNR du 1er déc. 2017 au 18 juin 2019 »*.
Extraits des autorités 1 à 6 soumises par le *Regroupement SÉ-AQLPA-GIRA*M sur la rétroactivité.

Chère Consœur,

Suivant le cadre doctrinal C-SÉ-AQLPA-GIRAM-0100 que nous avons soumis ce matin à la Régie sur la rétroactivité, le *Regroupement SÉ-AQLPA-GIRAM* a également respectueusement soumis au Tribunal un groupe de six autorités, dont nous reproduisons ci-après les extraits marquants. Ceux-ci se retrouveront également dans notre argumentation consolidée à être présentée à l'audience du 4 décembre 2020.

Ainsi, dans *Consolidated Edison* v. *F.E.R.C.*, (1992) 958 F.2d 429, https://www.leagle.com/decision/19921387958f2d42911296 (Autorité 01, C-SÉ-AQLPA-GIRAM-0101), en page 434, **l'Honorable Ruth Bader Ginsburg**, au nom de la Cour d'appel fédérale, citant les arrêts *Piqua* et *Hall* de cette Cour, rappelle que l'approbation rétroactive d'un tarif à la date où une utilité publique et un consommateur ont convenu de ce tarif conditionnellement à son approbation régulatoire ne contrevient au principe général de non-rétroactivité tarifaire :

> ***Piqua held that, where the gas purchaser actually agreed in advance to the rate change date in question, FERC may order an effective date coinciding with, i.e., retroactive to, that agreed date***.
>
> *Piqua was featured in Hall v. FERC, 691 F.2d 1184 (5th Cir.1982), cert. denied, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96 (1983), in which the Fifth Circuit held that* ***FERC abused its discretion when it failed to declare a rate increase retrospectively effective as of the day specified in the parties' agreement***. *In Columbia Gas Transmission Corp. v. FERC, 895 F.2d 791 (D.C.Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 278, 112 L.Ed.2d 233 (1990) (Columbia Gas), this court, while adhering to Piqua, clarified that the Commission was not at liberty "to waive the filed rate doctrine" itself by imposing, retroactively, a rate as*

> *to which the purchaser had no advance warning.* ***Columbia Gas emphasized that where the purchaser has actual notice that the rate would be increased, as the purchasers did in Piqua and Hall, the predictability-promoting function of section 4(d) and the filed rate doctrine is adequately served****. See id. at 795-96 […]*
> [Souligné en caractère gras par nous]

Dans *Towns of Concord and Wellesley, Mass.* v. *F.E.R.C.*, (1988) 844 F.2d 891, https://www.leagle.com/decision/19881735844f2d89111597 (Autorité 02, C-SÉ-AQLPA-GIRAM-0102), en page 897, la Cour d'appel fédérale rappelait le contexte d'affaires qui peut amener une telle tarification à effet rétroactif :

> ***The process of regulatory change may necessarily be somewhat slower than the parties' business decisions, by which they must respond to a rapidly changing environment and seize fleeting opportunities. We see no unfairness in FERC's allowing the regulatory change to take effect as of the date of the underlying mutually-agreed change in the parties' relations which prompted it.*** *See City of Girard, Kansas v. F.E.R.C., 790 F.2d 919, 925 (D.C.Cir.1986); cf. Hall v. F.E.R.C., 691 F.2d 1184, 1191-92 (5th Cir.1982), cert. denied, 464 U.S. 822, 104 S.Ct. 88, 78 L.Ed.2d 96; City of Piqua v. F.E.R.C., 610 F.2d 950, 954-55 (D.C.Cir.1979).*
> *[Souligné en caractère gras par nous]*

Une décision de tarif provisoire ou un contrat dont le tarif est conditionnel à approbation régulatoire future **constituent deux moyens interchangeables et également valables de notifier les personnes affectées** aux fins de permettre ultérieurement une décision régulatoire de rétroactivité tarifaire :

> *Consolidated Edison Co. of New York* v. *F.E.R.C.*, (2003) 347 F.3d 964, *https://www.leagle.com/decision/20031311347f3d96411208* (Autorité 03, C-SÉ-AQLPA-GIRAM-0103), l'Honorable juge Tatel *per curiam*, en pages 969-970 :
> ***Courts have recognized only two circumstances in which a rate adjustment may take effect prior to a section 205 filing: when parties have notice that a rate is tentative and may be later adjusted with retroactive effect, or when they have agreed to make a rate effective retroactively.*** *See id. at 49 (noting that "[t]he rule against retroactive ratemaking ... does not extend to cases in which [customers] are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time of service" (alteration and omission in original) (internal quotation marks and citations omitted)); City of Holyoke Gas & Elec. Dep't v. FERC, 954 F.2d 740, 744 (D.C.Cir.1992) (finding* ***FERC's decision to make the rate change effective prior to the filing date proper because the parties had contracted to make rate retroactive and a waiver was not against the public interest****).* ***Neither of these circumstances undermines the twin goals of predictability and equity.*** *See Exxon, 182 F.3d at 49 (finding that "equity and predictability are not undermined when the Commission warns all parties involved that a change in rates is only tentative and might be disallowed" (quoting OXY USA, Inc. v. FERC, 64 F.3d 679, 699 (D.C.Cir. 1995) (internal quotation marks omitted))); Columbia Gas, 895 F.2d at 796 (describing City of Piqua v. FERC, 610 F.2d 950, 954-55 (D.C.Cir.1979), in which* ***the***

parties agreed to make a rate change effective on a date before the filing*, as a case that did not implicate the filed rate doctrine).*
[Souligné en caractère gras par nous]

Columbia Gas Transmission Corp. v. F.E.R.C., (1990) 895 F.2d 791, https://www.leagle.com/decision/19901686895f2d79111552 (Autorité 04, C-SÉ-AQLPA-GIRAM-0104), en pp. 796-797 :

the Commission misinterprets those cases where a seemingly "retroactive" rate was approved*. City of Piqua and Hall did not authorize the Commission to impose rates retroactively because giving effect to the parties' intent is a policy of the Act and therefore "good cause" within the meaning of section 4(d). Rather,* ***those cases found that because of pre-existing agreements between the parties and the notice that went automatically with them, those rates were not in fact retroactive****. Id. at 1192; City of Piqua, 610 F.2d at 954. City of Piqua is quite emphatic about this:*

> *The retroactive ratemaking rule thus bars ... the Commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.* ***The present situation is immediately distinguishable. In this case, two parties agreed on new rate schedules and on the effective date for the new contract. The negotiated rate change was not retroactive; it was prospective from the date of the contract.***

Id. at 954.

The same principle obtains when the Commission itself places parties on notice *(as it did the first sellers and first buyers of natural gas in Order No. 94) that the rates they will be paying are subject to retroactive adjustment at a later date. This procedure, moreover, is squarely analogous to that in section 4(e) of the NGA in which the published rates, by express terms of the statute, remain subject to later modification and are therefore provisional in nature. 15 U.S.C. § 717c(e).* ***Notice does not relieve the Commission from the prohibition against retroactive ratemaking. Instead, it changes what would be purely retroactive ratemaking into a functionally prospective process by placing the relevant audience on notice at the outset that the rates being promulgated are provisional only and subject to later revision.*** *This in no way dilutes the general rule that once a rate is in place with ostensibly full legal effect and is not made provisional, it can then be changed only prospectively.*

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A ces deux moyens interchangeables (décision de tarifs provisoires et contrat à tarif conditionnel) s'ajoute un autre moyen par lequel la FERC peut, dans des circonstances exceptionnelles, approuver un tarif rétroactif même sans notification préalable des personnes affectées : son large pouvoir général de l'article 309 de la *Federal Power Act* (FPA) de fixer tout tarif conforme aux objectifs de la *Loi* (un tarif juste et raisonnable). La FERC consolide cette règle de droit dans son *Proposed Policy Statement on Waiver of Tariff Requirements and Petitions or Complaints for Remedial Relief* de mai 2020 :

> **UNITED STATES OF AMERICA, FEDERAL ENERGY REGULATORY COMMISSION (FERC)**, Docket No. PL20-7-000 (Waiver of Tariff Requirements), *Proposed Policy Statement on Waiver of Tariff Requirements and Petitions or Complaints for Remedial Relief*, Issued May 21, 2020, https://www.ferc.gov/sites/default/files/2020-06/DocketNo.PL20-7-000.pdf (Autorité 05, C-SÉ-AQLPA-GIRAM-0105) :
>
> ***8.*** *[…] the Commission has authority under FPA section 309 and NGA section 16 to "perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this chapter."* ***The courts have held that this expansive language "permits [the Commission] to advance remedies not expressly provided by the FPA," which in some circumstances has included authorizing changes to amounts paid or received by entities.*** [26]
>
> [26] *Verso Corp. v. FERC, 898 F.3d 1, 10 (D.C. Cir. 2018) (citing TNA Merch. Projects, Inc. v. FERC, 857 F.3d 354, 359 (D.C. Cir. 2017) (citing Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 158 (D.C. Cir. 1967)), cert. denied sub nom. City of Mackinac Island v. FERC, 139 S. Ct. 2044 (2019).*
>
> ***10.*** *[…] The Commission* ***may not grant retroactive relief****, however,* ***unless*** *the applicant makes a showing that either (1) the request for remedial relief does not violate the filed rate doctrine or the rule against retroactive ratemaking due to* ***adequate prior notice or, alternatively****, (2) that the requested relief is within the Commission's authority to grant under FPA section 309 or NGA section 16—that is,* ***granting the requested relief conforms with the purposes and policies of Congress and does not contravene any terms of the FPA or NGA****.*
>
> [Souligné en caractère gras par nous]

Finalement, tel que mentionné dans notre cadre doctrinal C-SÉ-AQLPA-GIRAM-0100, même lorsqu'une tarification aurait été déjà appliquée sans avoir fait l'objet d'une approbation prospective ni rétroactive du régulatoire, **il est requis que la gestion de cette situation par le régulateur constitue elle-même en des tarifs justes et raisonnables**. La gestion de cette situation peut ainsi elle-même amener le régulateur à valider des tarifs non autorisés mais déjà perçus *de facto*, vu que toute remise en état ou autre alternative serait soit impossible soit non *« juste et raisonnable »*.

En d'autres termes, si le régulateur juge que les tarifs *de facto* perçus auraient été justes et raisonnables si déposés et/ou approuvés en temps utile, il a le pouvoir de ne pas requérir le remboursement du tarif perçu en trop ni la remise en état mais plutôt de valider la situation qui a existé *de facto*. Aux États-Unis, c'est cette solution qui a été retenue par la Cour d'appel fédérale dans *Towns of Concord, Norwood, and Wellesley, Massachusetts* v. *F.E.R.C.*, (1992) 955 F.2d 67 (D.C. Cir.), https://law.justia.com/cases/federal/appellate-courts/F2/955/67/447976/ (Autorité 06, C-SÉ-AQLPA-GIRAM-0106), laquelle *(bien qu'une tarification rétroactive n'avait alors été ni demandée ni accordée)* a finalement approuvé la décision de la FERC de ne pas ordonner à l'utilité publique de rembourser au client **un *pass on*** qui lui avait été erronément facturé sans avoir été inscrit dans les tarifs (mais en reconnaissant que ce *pass on* aurait été juste et raisonnable s'il avait été inscrit dans les tarifs en temps utile) :

> *Page 2:*
> ***Boston Edison passed these charges on to the Towns, improperly it concedes, without prior approval from the Federal Energy Regulatory Commission. The Commission nevertheless declined to order a refund of the amounts thus collected****, which the ALJ put at $33,720. The Towns contend that the filed rate doctrine rendered refunds mandatory. We sustain the Commission's decision.*
> * ***The Federal Power Act, as amended, vests the Federal Energy Regulatory Commission with responsibility for ensuring that all rates charged by utilities within the Commission's jurisdiction are "just and reasonable."*** *16 U.S.C. § 824d(a).*
>
> *Page 7:*
> ***The principal issue in this case is whether, in light of these provisions and the doctrine derived from them, the Commission has any discretion to withhold refunds when it discovers that a utility has imposed charges not in conformity with its rate schedules, or more precisely, when a utility has passed on to its customers, through a fuel adjustment clause, costs incurred but not considered by the Commission to be properly included under the clause****.*
>
> *Page 9:*
> ***The filed rate doctrine does not have a life of its own. Its application depends on the underlying statute.***
>
> *Page 9:*
> ***The question here is whether the remedy devised by FERC similarly conflicts with the "core purpose [ ]" of the Federal Power Act and therefore constitutes an abuse of discretion.***

Page 10:
The court remanded the case to the agency so that it could decide whether to exercise ***remedial discretion--which the court ruled FERC possessed--to refuse "refunds where the costs [passed on to customers through a fuel adjustment clause] were legitimate costs which a utility was otherwise entitled to recover through its wholesale rates****." Id. at1073. [293 U.S.App.D.C. 382]* ***Our decisions invoking the rule against retroactive ratemaking, on which the Towns principally rely, do not suggest that either specific requirements or the core purposes of the Act compel a refund in this case.***

Page 11:
Nor is there any reason to suppose that the Commission's refusal to order a refund will undermine its primary jurisdiction over the reasonableness of rates, promote discriminatory rate payments, or in any other manner thwart the core purposes of the filed rate doctrine or of the statute*. See supra p. 71. Boston Edison did not disregard or evade any of the Act's commands. For the most part, it did not even know that it was passing through the prior burn SNFDC, see supra p. 69, and, even if it had, its violation was of the most minor, technical sort. Since the prior burn SNFDC was a component of Boston Edison's purchased economic power, before the Commission's decision in Iowa-Illinois it would have had good reason to believe that it could* ***pass those costs on to its customers****. 18C.F.R. § 35.14(a) (11) (ii); see also supra p. 70. In short, because of the rather exceptional facts of this case,* ***FERC's refusal to order a refund neither implicates the purposes of the filed rate doctrine nor contravenes any explicit statutory requirement****.*

Page 12:
The Commission's decision not to require Boston Edison to refund improperly collected prior burn SNFDC easily satisfies this standard. The Commission focused primarily upon the fact that Boston Edison could not be faulted for passing through most of the costs at issue.

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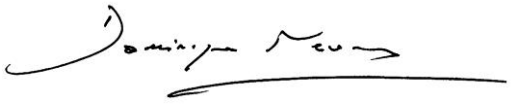
Espérant le tout à votre entière satisfaction, nous vous prions, Chère Consœur, de recevoir l'expression de notre plus haute considération.



Dominique Neuman, LL.B.
Procureur du Regroupement SÉ-AQLPA-GIRAM, constitué par
l'*Association québécoise de lutte contre la pollution atmosphérique (AQLPA)*, *Stratégies Énergétiques (S.É.)* et le *Groupe d'Initiatives et de Recherches Appliquées au Milieu (GIRAM)*

c.c. La demanderesse et les intervenants, par le *Système de dépôt électronique* de la Régie (SDÉ).