EB-2006-0322
EB-2006-0338
EB-2006-0340

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, (Schedule B);

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedur*e.

FACTUM OF THE ASSOCIATION OF POWER PRODUCERS OF ONTARIO (APPrO)

A. APPrO's Motion

1. APPrO has filed a motion seeking a review and variance of the Board's decision in the NGEIR proceeding, dated November 7, 2006.

2. In its motion, APPrO seeks a ruling from the Board regarding the obligation of Union Gas Limited and Enbridge Gas Distribution Inc. to provide service to in-franchise gas-fired generators as contemplated by the settlement agreements they entered into.

3. The Board found that there was a clearly demonstrated need for generators to be able to manage their intra-day gas supply needs. In fact, no party opposed this proposition.

NGEIR Decision, at p. 69

4. The settlement agreements clearly and unequivocally contemplated a storage allocation methodology for in-franchise gas-fired generators that had three components:
   - less space than APPrO had proposed in its evidence;
   - increased deliverability for that space; and
   - access to that enhanced space to balance on an intra-day basis.

5. The methodology allocates less space than the methodology originally proposed by APPrO specifically because a generator would have the ability to require the utility to provide additional deliverability so that gas could be delivered in and out of that space, allowing generators to manage their intra-day gas supply needs, based on operational requirements.

6. The one issue that was not settled was whether the additional deliverability to be added to that space was to be provided on a cost of service basis.

7. In its decision, the Board characterized the position of APPrO more broadly than APPrO's actual position:

> There was no agreement on the price at which high-deliverability storage services should be offered. The generators argued for a regulated framework, while the utilities argued for a competitive framework.
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> Decision - Executive Summary at p. 2

8. At p.33 of its decision, the Board described APPrO's position as follows:

> The Association of Power Producers of Ontario (APPrO) argued that the product it is most interested in – high deliverability storage – is not currently available in Ontario. APPrO argued that competition cannot exist for a product that is not yet introduced and pointed out that when it is introduced it will be available only from Ontario utilities as ex-Ontario suppliers will be constrained by the nomination windows specified by the North American Energy Standards Board (NAESB).

9. In its findings at p. 34, the Board said:

> With respect to APPrO's position, the Board is not convinced that high deliverability storage service is a different product. High deliverability storage may be a new service, but it is a particular way of using physical storage, which still depends upon the physical parameters of working capacity and deliverability.

10. APPrO's position was and continues to be narrower than what was described by the Board. APPrO was not seeking high deliverability storage. It was seeking services that would allow generators to manage their gas supply on an intra-day basis. APPrO was and continues to be focussed on the intra-day gas management needs of in-franchise gas-fired generators, the integral role that deliverability plays in the space allocation methodology, and the need for access to that enhanced space to balance on an intra-day basis.

11. The Board's decision does not recognize the uncontradicted evidence that such a service is only available from the utility and is not available from any competitive market place. The fact that the utilities proposed to address the intra-day gas management requirements of generators by increasing the deliverability of the allocated storage space does not change the essential character of the service required for intra-day gas management.

12. Based on the allocation methodology, the utility would allocate space to a generator and the generator could require enhanced deliverability based on its operational needs so that it would be able to manage its intra-day gas supply needs, throughout the day. The methodology set an upper limit on the deliverability that could be required by a generator.

13. Having received an allocation of space from the utility, it is not operationally possible for the generator to increase the rate at which gas can be delivered in and out of that space during the course of a day with deliverability from another supplier. Deliverability is a feature of the space that is provided by the utility. Once the gas is in the space, the deliverability of the gas out of that space is solely in the hands of the utility. Similarly, the ability to deliver gas into that space is solely in the hands of the utility.

14. The evidence was also clear and uncontradicted that intra-day service, regardless of its deliverability, is not available from outside Ontario since the frequent nominations windows required for such service are only available in Ontario from the utilities. TCPL offers some intra-day services but they are only available to a customer in some parts of Ontario through a utility connection or a direct connection with TCPL (a bypass).

15. APPrO did not and is not taking issue with the forbearance decision as it relates to the provision of ex-franchise services by the utilities.

16. What APPrO seeks is in addition to the Board's decision on those issues and is confined to the methodology established under the settlement agreements.

17. At pp. 56-57, the Board held:

> The parties recognized that bundled customers, in particular, do not acquire storage services separately from distribution services, do not control their use of storage, and do not have effective access to alternatives in either the primary or secondary markets. Competition has not extended to the retail end of the market, and therefore is not sufficient to protect the public interest. **However, the Board finds that customers taking unbundled or semi-unbundled service should have equivalent access to regulated cost-based storage for their reasonable needs.** The Board finds that it would not further the development of the competitive market, or facilitate the development of unbundled and semi-unbundled services, if these unbundled and semi-unbundled services were to include current storage services at unregulated rates. The Board also agrees with the parties that noted that re-pricing existing storage will not provide an incentive for investment in new storage and therefore cannot be said to provide that public interest benefit.
>
> However, customers taking unbundled and semi-unbundled services do have greater control over their acquisition and use of storage than do bundled customers. It is also the Board's expectation that these customers will have access to and use services from the secondary market. **Therefore, the Board concludes it is particularly important to ensure that the allocation of cost-based regulated storage to these customers is appropriate.** This issue is addressed in Chapter 6. [Emphasis added]

18. The applicable methodology for generators was set out in the settlement agreements and was accepted by the Board. Integral to the methodology is the ability to withdraw and inject gas throughout the day so that generators can manage their intra-day gas supply needs. It does not work without the enhanced deliverability. To put it another way, the enhanced deliverability was an intentional component of the methodology, as set out in the settlement agreements. The only aspect that was not agreed upon was that this is a monopoly service that should be regulated, regardless of the forbearance decision.

19. Outside of this methodology, it was always the view of APPrO that whatever the Board determined regarding forbearance was up to the Board and APPrO took no position on forbearance in that context. That continues to be the case.

B. Is there a threshold issue?

20. The Board is given broad jurisdiction under the *Statutory Powers Procedure Act* (SPPA) to "review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order."

SPPA, s. 21.2

21. This power is available to the Board, provided that the Board makes procedural rules governing the review process, which the Board has done.

SPPA, s. 21.2 and s. 25

22. The SPPA does not place any limits on this power and the Courts have been reluctant to read down this power, recognizing it as an important feature of regulatory tribunals. On the same basis, the Board should not be seeking to place limits on this power.

Russell v. Shanahan, 52 O.R. (3d) 9 (C.A.), (leave to appeal to the S.C.C. refused Feb. 16, 2001), at p. 16

23. The power to review is broader than the appeal that lies to Divisional Court and there is nothing in the review power to restrict the reviewing Panel from substituting its own opinion for that of the original Panel.

supra, at p. 17

24. The only threshold limits available to the Board are found in s. 4.6 of the SPPA, which gives the Board the authority to dispose of a proceeding without a hearing, if it is:
    (a) frivolous, vexatious or is commenced in bad faith;
    (b) relates to matters that are outside the jurisdiction of the tribunal; or
    (c) some aspect of the statutory requirements for bringing the proceeding has not been met.

25. None of these factors apply to APPrO's motion. APPrO's motion raises a serious issue of direct importance to gas-fired generators. The Board has made a finding that new services are necessary to allow generators to balance their gas supply on an intra-day basis. This is an integral component of the allocation methodology in the settlement agreements. The enhanced deliverability of the space allocated to a generator is to be provided upon request. In other words, there is an obligation to serve and APPrO seeks a determination on the issue of how that obligation to serve is to be met. Despite the settlement agreements, the utilities do not appear to be prepared to meet this obligation to serve. A determination by the Board is required in order to resolve the issue.

C. Order Sought

26. APPrO respectfully requests that the Board proceed and adjudicate APPrO's motion on its merits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 8, 2007

APPrO.
By its Counsel

"P. Moran"

_____
Ogilvy Renault LLP
per Patrick Moran