

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act* of 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 *Rules of Practice and Procedure* of the Ontario Energy Board.

**Factum on behalf of BP CANADA ENERGY COMPANY (BP Canada) on the Threshold Issue of the Motions for Review**

Introduction

1. The following Factum is submitted on behalf of BP Canada in response to the Facta of the Moving Parties – and specifically, that filed on behalf of the Industrial Gas Users Association (“IGUA”).
2. BP Canada will not address the legal issues surrounding the tests to be applied to the threshold question of whether the matters raised in the Notice of Motion shall be renewed. BP Canada takes no position on the main question.
3. BP Canada will address the submissions of counsel for IGUA concerning the circumstances surrounding the appearance of its witness panel on July 20, 2006 at the Board’s request, and certain of the evidence given by the witness.

The Request by the Board for BP Canada to Appear

4. As all parties are aware BP Canada has been an intervener in these proceedings from the outset, and attended the technical conferences and portions of the evidentiary portion of the hearing. Counsel cross-examined expert witness on the secondary market issue. Indeed, as noted by counsel for IGUA in paragraph 52 of IGUA’s factum, the Board’s

request followed the cross of Ms. McConihe by counsel for BP Canada. The Chairman's request was reproduced in paragraph 52.

5. The exchange between Ms. McConihe and counsel immediately prior to the request is worth noting:

**MR. BRETT:** All right. One last question or related questions, Ms. McConihe.

Do I conclude correctly that if sufficient data about the secondary market would be obtainable without defining precisely what that is, but if sufficient data were obtainable, it could substantially alter your opinion in this case?

**MS. McCONIHE:** Yes.

**MR. BRETT:** And that would either be – and maybe it is no neater than this – either as mitigative market power otherwise found, or as helpful in determining either product or geographic market definition, which in turn, would potentially impact the market power calculation?

**MS. McCONIHE:** Definitely

6. Earlier Ms. McConihe had produced notes from a discussion she had with representatives of BP Canada (Ex J8.3), the only gas marketer to speak with her, and was examined on these notes by certain parties.
7. Later that same day a similar exchange occurred during BP Counsel's examination of IGUA's expert, Mr. Stauff (TR Vol.9, pages 170 – 171):

**MR. BRETT:** If one could assemble the data in a meaningful way around the secondary market transaction and, in particular, around whether or not they were operating effectively as competition for the Ontario storage provider, is that information that you, as a professional doing what you would do, or the Board, given its role, would want to know? Or do you see absolutely no relevance to it?

.....

**MR. BRETT:** Somewhere in there, in the early part of that answer, I believe I got a qualified "yes" to my question and a concurrence that, leaving aside the evidentiary and quantification problems, secondary market transactions may have relevance to determinations of this question. Is that fair to walk away with? I don't need the qualifications or the speech.

**MR. STAUFF:** Right, fair enough. But, yes, it is a qualified yes.

The qualification referred to (which preceded and followed counsel's last question) related to physical constraints.

8. Shortly after the request was made, BP Counsel communicated its willingness to appear, in camera, given confidentiality and commercial sensitivity concerns. It also requested a list of questions or areas of interest so that its witnesses could prepare themselves.
9. Subsequently, arising out of concerns raised by ratepayer interests the Board determined that BP Canada witness would appear in public session. When apprised of this, BP Canada indicated that it was not prepared to give evidence on the public record, and declined the Board's invitation.
10. On July 17, 2006 following discussions between counsel for BP Canada and the Board, it was arranged that BP Canada would appear with the proviso that confidentiality concerns could be accommodated. A list of questions was provided to BP Canada, and shortly thereafter, to all parties.
11. At the outset of BP Canada's appearance on July 19, 2006, counsel for various parties registered objections to the proposed process. Mr. Thompson has reproduced a portion of counsel's remarks in paragraph 56 of IGUA's Factum.
12. Counsel for BP Canada then proposed, with the apparent acceptance by all (subject to the objections referred to above) that parties should proceed with questioning the witness panel, and that confidentiality issues could be dealt with if and when they arise. None did, and with a couple of minor exceptions, BP Canada's witnesses responded to all questions put to them.

#### The Evidence of BP Canada

13. In paragraph's 72 – 76 of IGUA's factum, a portion of BP Canada's evidence is paraphrased, and certain conclusions drawn therefrom. With respect, IGUA has misapprehended the evidence given. Based on the footnoted transcript references, the exchange between counsel for IGUA and Mr. Acker, the BP Canada witness, reads as follows:

**MR. ACKER:** And the experience we have is that we have bid several times in the recent past in Union open seasons for storage service at Dawn. And we have been unsuccessful because other parties have been willing to pay more than we thought that service was worth. And we would mitigate what we would offer Union by the price of alternatives, which in that context, and at that point in time, were cheaper than what Union was going for.

**MR. THOMPSON:** Sorry, you've lost me. You lost bids because your price was too low?

**MR. ACKER: We've lost bids because other parties have been willing to pay more than we were.**

**MR. THOMPSON: Pay more for what?**

**MR. ACKER: For Union storage.**

**MR. THOMPSON: So your bids were too low.**

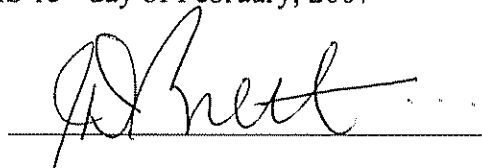
**MR. ACKER: I would say others' were too high. And I would say that, sir, because we were able to acquire service that provided us with almost identical capability at a lower prices.**

14. In its Factum, IGUA notes that BP Canada several times offered a service cheaper than Union's, but BP Canada was unsuccessful notwithstanding Union's higher price. This is not what Mr. Acker said.
15. The situation Mr. Acker was describing related to the potential purchase (by BP Canada and others) of Union's storage services. BP Canada lost the deals because its bids were less than what was bid by others. As noted by Mr. Acker, BP Canada was then able to acquire the service it needed "with almost identical capability at a lower price" from others.

Cost Award

16. BP Canada will not be seeking a cost award in this portion of the proceedings.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 15<sup>th</sup> day of February, 2007

  
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Counsel for BP Canada