File No. EB-2006-0340

ONTARIO ENERGY BOARD

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 Procedure.*

FACTUM OF THE MOVING PARTIES THE CONSUMERS COUNCIL OF CANADA AND THE VULNERABLE ENERGY CONSUMERS COALITION

MOTION ON THE THRESHOLD ISSUES

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PART I – OVERVIEW

1. The moving parties have filed an Application seeking an Order reviewing, and then cancelling, those parts of the Decision of the Ontario Energy Board ("**Board**") dated November 7, 2006 (the "**NGEIR Decision"**) pertaining to storage, storage regulation, and storage allocation.

2. In Procedural Order No. 1, dated January 27, 2007, the Board directed parties to file factums, first, addressing the threshold tests that it should apply in determining whether the Board should review the NGEIR Decision and, second, addressing whether the moving parties have met those tests.

3. It is the position of the moving parties that the threshold test is whether they have an arguable case that there are serious issues as to the correctness, whether as to matters of law, principle or policy, of the NGEIR Decision.

4. It is the position of the moving parties that they satisfy that test.

PART II – THE THRESHOLD TESTS

5. Rule 44.01 of the Board's *Rules of Practice and Procedure* (the "**Rules**") sets out some of the grounds on which the Board may review one of its decisions. The use of the words "may include", in listing the grounds for a review in Section 44.01(a) of the Rules, implies that the list is not exhaustive.

6. The Board has, in its ruling on a motion brought by EGD in E.B.O. 179-14/179-15, ruled that the list of grounds in the predecessor to Rule 44.01(a) is not exhaustive.

> Ontario Energy Board's *Ruling on Motion by Enbridge Consumers Gas*, E.B.O. 179-14/17915, August 17, 1999

7. The Board's position on the grounds it will consider in deciding whether to grant a review is set out in the following statement, which is found in its *Decision with Reasons*, dated October 6, 2005, in RP-2004-0167/EB-2005-0188:

> In considering a motion to vary, the Board considers whether new evidence has been presented by the Applicant, or whether the original panel made an error in law or principle so as to justify the reversal of the original Decision.
>
> *Decision with Reasons*, RP-2004-0167/EB-2005-0188, October 6, 2005, p. 7

8. The moving parties submit that the NGEIR Decision raises the following issues:

(i) Whether the Board correctly interpreted Section 29 of the *Ontario Energy Board Act* (the "Act"). It is the position of the moving parties that the Board erred in its interpretation of Section 29 of the Act, thereby depriving itself of jurisdiction;

(ii) Whether the Board gave effect to the legislative intent underlying Section 29 of the Act. It is the position of the moving parties that the Board failed to give effect to the intention of the Legislature in enacting Section 29 of the Act;

(iii) Whether the Board erred in failing to consider whether a change in the status quo with respect to the regulation of storage was required. It is the position of the Moving Parties that the Board was obligated to consider whether a change in the status quo with respect to the regulation of storage was required and that it erred in failing to do so;

(iv) Whether the Board properly fulfilled its statutory obligation to balance the interests of ratepayers and utilities. It is the position of the moving parties that the Board erred in failing to properly balance the interests of ratepayers and utilities, and that that error is a matter of both principle and policy;

(v) Whether the Board erred in ruling that no party bore the onus of proof and erred in failing to apply the appropriate standard of proof. It is the position of the moving parties that the Board erred in both respects.

9. The moving parties submit that the issues set out in the preceding paragraph go to the correctness of the NGEIR Decision, as a matter of law and as a matter of both principle and policy.

10. The moving parties submit that they are required to demonstrate, first, that these are serious issues that go to the correctness of the NGEIR Decision and, second, that they have an arguable case on one or more of these issues. It is submitted that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all of the issues.

11. The power of the Board to review one of its own decisions should not be interpreted narrowly.

Russell v. Toronto (City), 52 O.R. (3d) 9 at 16

12. That the Board should not interpret its powers of review narrowly is particularly important, in light of the significance of the NGEIR Decision and, in particular, in light of the following considerations:

(a) The NGEIR case is the first in which the Board has exercised the power granted to it under Section 29 of its Act. Given that the Board's interpretation will serve as a precedent for other Board decisions dealing with that section, it is important that the Board's interpretation of Section 29 be correct;

(b) The NGEIR Decision will have a material adverse impact on the rates which consumers pay for natural gas service. That underscores the importance that the Board's interpretation of Section 29 be correct;

(c) The fact that it may be difficult, if not impossible, to reverse the NGEIR Decision.

13. In order to meet the threshold test, the moving parties will summarize, hereinafter, their position on the issues.

PART III – THE ISSUES

14. Before addressing the issues raised by the moving parties, we will briefly summarize the relevant evidence, and the findings of the Board.

A. The Evidence and the Findings of the Board

15. The status quo, with respect to the regulation of the storage market, was found by the Board to consist of the following circumstances:

(i) almost all the storage in Ontario is owned by Union Gas Limited ("**Union**") and Enbridge Gas Distribution Inc. ("**EGD**");

(ii) all of EGD's storage is used for its in-franchise customers. Approximately 70% of Union storage is used for its in-franchise customers;

(iii) Union's in-franchise customers pay for their storage at cost;

(iv) the in-franchise customers of EGD pay for their storage at cost, a cost which reflects a combination of EGD's cost and Union's cost. That circumstance is to change, however, it 2007, when that portion of EGD's storage needs which it purchases from Union will be priced at market prices. Thereafter, EGD's customers will pay a combination of EGD's storage at cost and Union's storage at market rates;

(v) both EGD and Union are able to sell storage to ex-franchise customers at market prices;

(vi) third parties can sell storage at market prices. They are under no obligation to share the revenue derived from that sale with anyone else;

(vii) the in-franchise customers of EGD and Union, the overwhelming preponderance of whom purchase storage as part of a bundled service, cannot get the benefits of competitive storage services.

16. The Board found that the storage market is workably competitive. In reaching that conclusion, the Board relied, to a very substantial degree, on its perception of activity in the so-called "secondary market". The Board summarized its findings on the secondary market in the following observation:

> While there may not be sufficient transaction level data about total secondary market activity, we certainly have evidence which supports the conclusion that the secondary market is relatively deep and liquid and that the market extends beyond just Ontario.
>
> *Decision with Reasons*, EB-2005-0551, November 7, 2006, p. 36

The only direct evidence in support of that conclusion was that provided by BP.

17. With respect to the balance of the market, however, the Board made the following findings:

> 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.
>
> *Decision with Reasons,* EB-2005-0551, November 7, 2006, p. 56

> The Board has found that the current level of competition is not sufficient to refrain from regulating all storage prices; nor do we see evidence that it would be appropriate to refrain from regulating all storage prices in the future. The current structure (for example, the full integration of Union's storage and transportation businesses and the full integration of Union as a provider of storage services and as a user of storage services) is not conducive to full forbearance from storage rate setting. In addition, there would be significant direct and indirect rate impacts associated with full forbearance from rate setting, and there is little evidence of significant attendant public interest benefits. The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there a reasonable prospect that they will be at some future time. (Emphasis added)
>
> *Decision with Reasons,* EB-2005-0551, November 7, 2006, p. 57

18. The effects of the NGEIR Decision, on the in-franchise customers of Union and EGD, customers which the Board found did not have the benefit of competition, are the following:

(a) The rates which EGD's customers will pay for storage will increase, to reflect the fact that a portion of their storage must be purchased from Union at market rates;

(b) Union's customers will lose the benefit of their share of the premium which Union obtains on the sale of storage under long-term contracts to ex-franchise customers.

19. In order to protect consumers from some of the effects of its Decision, the Board imposed the following conditions:

(a) It required Union to maintain a portion of its storage capacity for the use of in-franchise customers, although it capped that amount;

(b) Although EGD's in-franchise customers will have to face increases in the storage rates they pay, as a result of having to pay market prices for the storage purchased

from Union, that market price will be increased, over a transition period, which is to end in 2010;

(c) Although Union's in-franchise customers will lose that portion of the premium obtained from the sale of storage to ex-franchise customers under long-term storage contracts, the loss will be phased-in over a period ending in 2011.

B. The Issues

20. The moving parties submit that the Board erred in its interpretation of Section 29 of the Act. That section requires that the Board find not just that there is competition, but that there is competition sufficient to protect the public interest. The Board's conclusion, set out in paragraph 17 above, was that, for a substantial portion of the storage market, there would not be competition sufficient to protect the public interest. The Board also found that forbearing from regulation, and re-allocating storage premiums, would have adverse consequences for the in-franchise customers of both Union and EGD. To try to protect the public interest, the Board employed the transitional measures set out in paragraph 19 above. The Board made no finding, however, that at the end of the operation of those transitional measures, the public interest, as represented by the in-franchise customers of Union and EGD, would be would be protected. The moving parties submit that Section 29 required the Board, before making an order to forbear from regulation under Section 29, to find on the evidence that, at the end of the transitional measures, there would be sufficient competition to protect the public interest. The moving parties submit that, in failing to make that finding, the Board erred.

21. In the context of the NGEIR proceeding, section 29 of the Act permits the Board to consider whether it should forbear from regulating storage rates. It does not, expressly or by necessary implication, permit the Board to embark on a re-allocation of rate base storage assets. Notwithstanding that, the Board used its review of competition in storage as a premise for engaging in precisely that re-allocation.

22. The effect of the NGEIR Decision is to allocate the rate base storage assets of the utilities between in-franchise and ex-franchise customers, and to allow for a new shareholder business within each utility. Doing those things does not naturally follow from a finding that the rates charged by the utilities to ex-franchise customers do not need to be regulated. The storage operations of the utilities, financed through rate base, have been set up to serve utility customers with the excess going to serve ex-franchise customers. The fact that a competitive market exists for the services outside of the utility is irrelevant to the issue of whether the money for ex-franchise sales remains within the utility. It is submitted, accordingly, that the Board erred in its interpretation of section 29, and acted in excess of its jurisdiction, by thus moving assets out of rate base, with no credit to the ratepayer.

23. The moving parties submit that the legislative intent, in enacting Section 29 of the Act, was to provide the Board with a mechanism whereby they could forbear from regulating in circumstances where competition would confer benefits on consumers. Based on the Board's own findings, forbearing from regulation will not confer any benefit for most consumers in Ontario. On the contrary, the Board had to impose a number of transitional measures in order to protect consumers from the harm that forbearing would otherwise cause them, transitional measures which operate only for a time and will, based on any evidence that was before the Board, still not protect consumers from material increases in the cost of storage. The moving parties submit that the Board erred in failing to give effect to the legislative intention in enacting Section 29 of the Act.

24. In light of the Board's own finding, not just that a substantial portion of Ontario consumers would not benefit from competition, but would suffer harm as a result of forbearance, the Board should have inquired as to whether the status quo would achieve all of the benefits that

forbearance would achieve. The moving parties submit that the Board erred in failing to consider whether the status quo would achieve the benefits of forbearance without causing harm to in-franchise utility ratepayers.

25. In the NGEIR Decision, the Board cited the arguments of a number of parties to the effect that the status quo would achieve at least one of the benefits of forbearance, namely stimulating the development of new storage. The Board set out the submissions of those parties on that point at page 49 of the NGEIR Decision. The Board did not respond to those arguments.

26. It is the position of the moving parties that the Board is required, before considering whether to exercise its jurisdiction under section 29 of the Act, to consider whether the status quo can achieve the benefits of competition without causing harm to ratepayers. Beyond that, however, the moving parties submit that there were circumstances particular to the NGEIR proceeding that made it essential that the Board consider the status quo. Those circumstances are:

(a) In the Report of the Board, dated March 30, 2005, arising from the Natural Gas Forum, the Board made the following observation, on page 45: "The basic question facing the Board is whether *any* action is required with respect to its policies for gas storage and transportation." Having made that statement, the Report goes on to question whether the Board's objectives with respect to storage and transportation can be achieved in light of the anticipated growth and demand from new gas-fired power generation. That latter concern was addressed in the other portion of the NGEIR proceeding. The Board never did address, as it ought to have, whether the status quo was adequate and whether any change was required, particularly in circumstances where that change would have a material adverse effect on a majority of natural gas consumers in Ontario.

(b) Before the oral phase of the hearing in the NGEIR proceeding began, the utilities changed their position, on the scope of forbearance, asserting that the Board should not forbear from regulating rates for storage for their in-franchise customers. That change in position fundamentally altered the context within which the Board's proceeding would take place. It is submitted that that change in position underscored the critical importance of the Board examining the status

quo and whether it was adequate to serve the objectives of the Board as stated in section 2 of the Act.

27. The Board made the following observation about the Natural Gas Forum Report:

> This Board, in the Natural Gas Forum Report, recognized that market conditions in energy markets have in fact changed. When such changes occur, regulators, particularly those such as the Board and the CRTC with statutory forbearance mandates in their governing legislation, must re-examine the regulatory construct in light of the current market conditions. That is what this proceeding seeks to accomplish.
>
> *Decision with Reasons,* EB-2005-0551, November 7, 2006, p. 105

28. The moving parties submit that the conclusions in the Natural Gas Forum Report do not, directly, or by necessary implication, require the Board to ignore the status quo in the storage market, or to embark on a wholesale restructuring of the storage market.

29. Section 2 of the Act requires the Board to balance the interests of consumers with respect to prices with the obligation to facilitate the rational development and safe operation of gas storage. The NGEIR Decision increases the rates which in-franchise consumers will have to pay while transferring a substantial amount of money to the shareholders of Union, in particular. As the Board itself found, there is no evidence that most of the consumers in Ontario will get the benefit of competition at any time in the foreseeable future. It is submitted that the Board erred in failing to protect the interests of consumers with respect to prices, as it is required to do by section 2 of the Act. It is submitted, in other words, that the Board erred in failing to balance the interests of consumers with those of the utilities.

30. Section 2 of the Act is a particularized statement of the obligation, to find the appropriate balance between the interests of consumers and utilities, which the Board has always

borne. That obligation was expressed by the court when it cited, with approval, the following observation by A.J.G. Priest:

> In the United States, private enterprise operates a larger share of these vital industries than in almost any other country because of our balanced system of regulation by public authority. This system is designed to protect consumers against exploitation where competition is inherently unavailable or inadequate, and to ensure that these industries will serve the public interest. At the same time it provides these companies necessary assurance of an opportunity to earn a reasonable return on their investment and to attract capital for expansion. (Emphasis added)
>
> *Re: Union Gas Ltd. and Ontario Energy Board,* 43 O.R. (2d) 489 at 501

It is submitted that the Board, in the NGEIR Decision, has failed in its obligation to protect consumers against exploitation where competition is inherently unavailable or inadequate.

31. Looked at as a whole, it is clear that the NGEIR proceeding, and the NGEIR Decision, are about setting rates. In making its decision, the Board was exercising a jurisdiction under both Section 29 and Section 36 of the Act. Subsection 36(6) of the Act requires that the burden of proof is on the applicant in an application with respect to rates for the storage of gas. It is submitted that the Board erred in ruling that no party bore the onus of proof.

32. Beyond that, the moving parties submit that the Board failed to establish, and then apply, the appropriate standard of proof. Section 29 requires the Board to find, as a question of fact, that there is competition in a service sufficient to protect the public interest. The Board knew from the outset that it could not make that finding with respect to the largest part of the market. It is arguable that the Board should, at that point, have ended its inquiry. Instead, it embarked on an inquiry where it was also apparent that, if the relief requested by the utilities were granted, there would be a material adverse impact on the in-franchise customers of those utilities. In those circumstances, the moving parties submit that the Board should have imposed

a standard of proof on the utilities that was beyond merely preferring once piece of evidence to another. To put the matter another way, the moving parties submit that the Board was required to establish more than that there was some link between some facts and its conclusion. Instead of imposing the appropriate, rigorous standard of proof on the utilities, the Board relied on the self-serving evidence of the utilities, for example, with respect to their willingness to invest in new storage facilities, and on the evidence of one marketer, BP, with respect to the nature and extent of the activity in the secondary market. The moving parties submit that the evidence the Board relied on did not meet any reasonable standard of proof, let alone the standard of proof that ought to have been imposed in the circumstances of the NGEIR proceeding.

PART IV – RELIEF SOUGHT

33. The moving parties ask that the Board order a review of the merits of the NGEIR Decision, with reference to the following issues:

(i) whether the Board erred in its interpretation of Section 29 of the Act;

(ii) whether the Board erred in failing to give effect to the legislative intention underlying Section 29;

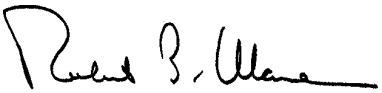
(iii) whether the Board erred in failing to consider whether the status quo would achieve the benefits that would flow from forbearance;

(iv) whether the Board erred in failing to carrying out the objectives set out in Section 2 of the Act, and erred in failing to correctly balance the interests of the utilities and of ratepayers;

(v) whether the Board erred in ruling that no party bore the onus of proof and erred in failing to apply the appropriate standard of proof.

34. The moving parties ask that they be granted their costs of this application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,



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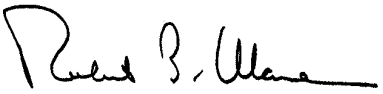
"Michael G. Janigan" per: 

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SCHEDULE "A"

1. *Ontario Energy Board Act, 1998,* S.O. 1998, c. 15, (Schedule B)

2. Ontario Energy Board's *Rules of Practice and Procedure*

SCHEDULE "B"

3. *OEB Ruling on Motion by Enbridge Consumers Gas*, E.B.O. 179-14/17915, August 17, 1999

4. *Decision with Reasons*, RP-2004-0167/EB-2005-0188, October 6, 2005

5. *Russell v. Toronto (City*), 52 O.R. (3d) 9

6. *Decision with Reasons*, EB-2005-0551, November 7, 2006

7. *Re: Union Gas Ltd. and Ontario Energy Board*, 43 O.R. (2d) 489

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