EB-2006-0322
EB-2006-0338
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 *Rules of Practice and Procedure* of the Ontario Energy Board**.**

FACTUM ON BEHALF OF THE
INDUSTRIAL GAS USERS ASSOCIATION ("IGUA")
MOTION ON THE THRESHOLD ISSUES
RE: MOTION FOR REVIEW

I. OVERVIEW

1. IGUA, along with the Consumers Council of Canada ("CCC") and the Vulnerable Energy Consumers Coalition ("VECC"), seek a review of certain aspects of the Board's November 7, 2006, EB-2005-0551 Decision with Reasons (the "Decision") in the Natural Gas Electricity Interface Review Proceeding ("NGEIR") pertaining to the Board's regulation of the rates for storage services provided by Union Gas Limited ("Union"), Enbridge Gas Distribution Inc. ("EGD") and Market Hub Partners Canada L.P. ("MHP Canada").

2. IGUA is filing its own Factum because its grounds for seeking a review are broader than those relied upon by CCC and VECC. IGUA seeks a review by a panel of the Board which does not include any members of the Panel that heard and decided the initial application.

3. For reasons which follow, IGUA submits that the Decision contains several errors of fact and law which raise doubts as to its correctness. The Decision raises questions of law and fact of public importance.

4. In addition, IGUA submits that the Board did not confine itself to hearing and determining the matters of fact and law in dispute between the parties. Instead, the Board proceeded as if it had the authority to conduct its own public inquiry with respect to the granting of forbearance relief. IGUA submits that reasonable people, objectively examining the process which led to the Decision, will likely conclude that retaining the status quo was not a decision-making option which the Board considered, either fairly or at all, and that the Board itself was a proponent for forbearance relief.

5. The Decision inappropriately and unnecessarily disrupts the current value of service/range rate regulatory regime applicable to storage services transactions at Dawn. The current regulatory regime is fully capable of responding to the Board's desire to stimulate incremental storage development and to enhance efficiency of the utilization of storage assets. The Decision confers windfall benefits on the holding company shareholders of Union and EGD; harms ratepayers; will not lead to any material reductions in regulatory costs; is incompatible with rate history; contravenes Ontario's pure utility policy; and is the result of a misapplication of analytical tests used to determine when the regulation of rates should yield to competition.

6. When the challenges to the Decision are reviewed on their merits, IGUA will be requesting that the Decision be set aside; and that the range rate/value of service regulatory regime be restored so that the prices for those existing and new storage services provided by Union, EGD and MHP Canada, which the Board decided to forbear from regulating, will, instead, continue to be regulated under the auspices of the range rate/value of service regulatory regime applied by the Board for years to regulate the prices charged for such services.

II. CONSTITUTION OF THE PANEL HEARING THE REVIEW APPLICATION, INCLUDING THE THRESHOLD QUESTION

7. The rules of natural justice require that no decision maker be permitted to sit on what may properly be regarded as an appeal from his or her own decision.

> ***Port Cobourn Warehousing Ltd. v. Board of Steamship Inspection*** **(1987), 73 N.R. 126 (FCA)**
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> ***Kankam v. Canada (Minister of Employment and Immigration)*** **(1993), 70 FTR, 5 (T.D.)**
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> ***Re French and The Law Society of Upper Canada (No. 1)*****, [1972] 2 O.R. 766**

8. The practice of the National Energy Board is to assign the consideration of review applications to a panel different from the panel which made the original decision. IGUA submits that the OEB should follow the same practice.

9. Where a review application is made on grounds of errors committed by the Board members who heard the original case, the rules of natural justice require that all aspects of the review application be considered by members of the Board who were not members of the Panel that heard and decided the initial application.

10. This rule may not be applicable when a review application is made on the grounds of changed circumstances; or on grounds that new facts have arisen since the close of the original proceeding; or on grounds that facts were not placed in evidence in the original proceeding and were not then discoverable by reasonable diligence. These are not the primary grounds on which the Motions for Review in this case are based. In this case, the primary grounds for seeking a review of the decision pertain to errors committed by the Panel which rendered the original decision.

III. MOTION TO REVIEW - THRESHOLD QUESTION

11. To succeed on a threshold question, an applicant for review should demonstrate that there are errors which raise doubt as to the correctness of the decision which the Board is asked to review.[1]

12. The grounds for a motion for a review are not limited to those set out in Rule 44.01(a) and include not only errors in fact, but errors in law, jurisdiction and mixed fact and law.[2]

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[1] *EB-2006-0140 and EB-2005-0520 Decision, June 29, 2006 - review request by Mr. Mark Crockford*
[2] *Ontario Energy Board Rule 44*

IV. RELEVANT FACTS

13. The facts, which IGUA submits are relevant to a consideration of the Motion for Review, are as follows:

(a) OEB's Adjudicative Mandate

14. Under Section 36 of the *Ontario Energy Board Act ("OEB Act")*, the Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas. Normally, the Board exercises its rate-making jurisdiction in response to an application for rate relief made by gas utilities subject to its jurisdiction.

15. Under Section 19(1) of the *OEB Act*, the Board has, in all matters within its jurisdiction, authority and jurisdiction to hear and determine all questions of law and fact.

16. Under Section 19(4) of the *OEB Act*, the Board, of its own motion, may determine any matter that may come before it on an application.

17. Under Section 36(7) of the *OEB Act*, the burden of proof in a rates proceeding rests on the gas transmitter, gas distributor or storage company.

18. Under Section 29 of the *OEB Act*, the Board's forbearance power arises on an application or in a proceeding, and an exercise of the forbearance power must be preceded by a finding of fact that the product or service under consideration is, or will be, subject to competition sufficient to protect the public interest.

19. IGUA submits that, where the matter in issue in a proceeding is a question of whether rate regulation should continue or whether forbearance relief should be granted, the proceeding is a rates proceeding.

20. Proceedings before the Board concerning rates and pricing are high stakes contests between the utilities and their ratepayers.

21. In exercising its adjudicative functions in a proceeding where there are matters in dispute between a utility and its ratepayers, the Board's statutory obligation under Section 19(1) of the *OEB Act* is to "hear and determine" all disputed questions of law and fact.

22. Neither Sections 19, 29 or 36 of the *OEB Act*, upon which the Board relied to initiate the NGEIR proceedings, on its own motion, confer any "public inquiry" jurisdiction on the Board.[3]

(b) Storage Regulation Prior to the Decision

23. Prior to the NGEIR Decision, all storage assets and services of Union and EGD were considered to be utility assets and services. The terms and conditions of all storage services provided by Union and EGD were regulated.

24. Storage services provided by Union and EGD to its distribution customer to meet their reasonable needs were regulated pursuant to Board-approved rate schedules and priced under the auspices of cost-based rates.

25. Storage and transactional services, in excess of the reasonable needs of distribution customers, were regulated under the auspices of Board-approved rate schedules and priced under a Board-approved value of service/range rate regulatory regime.

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[3] *Procedural Order No. 1 dated January 24, 2006, and Decision page 30 which uses the phrase "broad-based inquiry" to describe the Storage Regulation component of the NGEIR proceeding*

26. Union provided storage services to ex-franchise customers pursuant to the terms and conditions in Board-approved rate schedules. The services were priced under the auspices of a Board-approved value of service/range rate regulatory regime.

27. All revenues from range rates, in excess of the costs to provide service to customers served thereon, were transparent, subject to scrutiny in rate proceedings, and monitored by the Board. The regulatory process not only provided transparency; it also provided both the utility and its ratepayers with an opportunity to obtain class or customer-specific rate relief if circumstances warranted the granting of such relief.

28. Under the value of service/range rate regulatory regime which has been applied, for years[4], to govern storage services transactions at Dawn, the extent to which shareholder returns were enhanced by their share of range rate revenues in excess of costs to serve was transparent and monitored by the Board from case to case. No undisclosed windfall gains could accrue to shareholders under the auspices of the value of service/range rate regulatory regime.

29. New storage services can be introduced under the auspices of a range rate regime without difficulty. Introducing new services under the auspices of range rates allows both the utilities and their customers to gain experience with the costs and revenues associated therewith, which information can then be useful to make further pricing adjustments considered to be necessary.

30. The value of service/range rate regulatory regime works well. It maximizes the value of utility storage assets for the benefit of utility ratepayers and their shareholders. The regime dates back to the value of service/range rate regulatory regime which prevailed in prior years for industrial customers.[5]

31. A value of service/range rate pricing regime is not an unregulated pricing regime which prevails as a result of forbearance. The fundamental distinction between a value of service/range rate regulatory regime and an unregulated price regime is that, in a value of service/range rate regulatory regime, revenues in excess of the costs to serve a particular rate class being served under the auspices of range rates are allocated to other rate classes on the basis of rate class differentials in risk or in a manner which is inverse to the elasticity of demand of each rate class.[6] It is imprecise to describe the allocation of the "margins", or a portion thereof to ratepayers, as a sharing of economic rents.[7] The value of service approach maximizes economic efficiency subject to the constraint of the utility's revenue equalling its allowed revenue requirement.

32. There was no need to change the value of service/range rate regulatory regime applicable to storage services transacted at Dawn to stimulate incremental storage development, or to achieve greater efficiency in the use of storage assets. If matters pertaining to the public interest require the portion of range rate revenues, in excess of costs to serve, allocated to the utility shareholder to be increased, then that result can readily be accommodated by simply increasing the prevailing percentage share which shareholders of Union and EGD now receive.

(c) <u>Ontario's "Pure Utility" Policy</u>

33. In or about December 1998, in conjunction with the passage of new legislation with respect to the electricity sector, the Ontario government adopted a "Pure Utility" policy, the spirit and intent of which was to avoid having regulated utilities engage in non-utility business activities.

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[4] *Decision, pages 18 and 19*

[5] *See E.B.R.O. 302-II, Consumers Gas, Reasons for Decision, September 4, 1975, at pages 76 to 92, and in particular, at page 82 for a description of a value of service rate-making; and E.B.R.O. 314-II Northern & Central Gas Corp., Reasons for Decision, November 24, 1977, pages 77 to 80; and E.B.R.O. 462, Union Gas Limited, Decision with Reasons, April 9, 1990, pages 85 and 86; and E.B.R.O. 486-02, E.B.R.O. 494-03, and RP-1999-0017 attached at Tabs 3, 4 and 5 of Exhibit X.9.1*

[6] *Exhibit J.7.1, Tab 12, Transcript Volume 7, pages 60-67*

[7] *Decision, page 47*

34. Where utilities engage in both utility and non-utility business activities, questions of cost allocation and other issues pertaining to cross-subsidization invariably arise. The "Pure Utility" policy is intended to relieve regulators from having to consider these utility/non-utility issues.

35. The "Pure Utility" concept for electricity utilities is expressed in Section 71 of the *OEB Act*. For Union and EGD, the "Pure Utility" concept is reflected in the provisions of the undertakings they executed with the Ontario government in or about December 1998.

(d) Obligation to Serve

36. The obligation of Union and EGD to provide storage services to meet the reasonable needs of their distribution customers finds expression in Sections 42(2) and 42(3) of the *OEB Act*.

37. Under Section 42(2):

> ***"… a distributor shall provide gas distribution services to any building along the line of any of the gas distributors distribution pipelines upon the request in writing of the owner, occupant or other person in charge of the building."***

38. Under Section 42(3):

> ***"Upon application, the Board may order a gas transmitter, gas distributor or storage company to provide any gas sale, transmission, distribution, storage service …"***

39. The obligation of Union and EGD to serve their distribution customers encompasses the provision of storage services as an adjunct to distribution services. The manner in which the services are priced has no bearing on the obligation or the amount of storage service Union and EGD must provide to discharge the obligation.[8]

(e) The Dawn Hub

40. The Dawn Hub is a commodity trading point. Not all of the Dawn-based storage of Union and EGD is "an integral part of the Dawn Hub" as the Decision states.[9] At least 180 bcf of the approximate 250 bcf of Dawn-based storage forms an integral part of the gas distribution systems of Union and EGD.[10] Of the remaining 70 bcf of Dawn-based storage, almost 40 bcf is integral to the operation of other gas distributors such as the City of Kingston and GMi.[11] IGUA submits that only about 30 bcf of Dawn-based storage, which is held by marketers, is integral to the functioning of the Dawn Hub as a commodity trading point.

(f) Precursors to the NGEIR Proceeding

41. Precursors to the NGEIR proceeding included the Natural Gas Forum ("NGF"), at which Union, EGD and MHP Canada filed expert reports to support their position that the entire market for Ontario storage services should be de-regulated. In its conclusions in the NGF Report, the Board recognized that the current regulatory regime governing storage service was working well. The Board stated, at page 45 of the Report, as follows:

> **"The basic question facing the Board is whether *any* action is required with respect to its policies for gas, storage and transportation. In some respects, the current situation for storage in Ontario appears to be quite satisfactory: …"**

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[8] *Decision, page 77*
[9] *Decision, page 17*
[10] *Decision, pages 10 and 11*
[11] *Union Exhibit B, Tab 1, UGL Undertaking 47*

42. The NGF was followed by an OEB staff managed consultative which concluded with a Staff Report dated November 21, 2005. The Staff Report identified as a central issue whether there is "competition in storage services sufficient to protect the public interest".

(g) Initiation of NGEIR Proceeding and Pre-Hearing Matters

43. The OEB Staff Report prompted the Board to issue, on its own Motion, its Notice of Proceeding dated December 29, 2006.

44. In its Notice of Proceeding and Procedural Orders relating thereto, the Board set the agenda based on its priorities and its comments on the recommendations contained in the Board Staff Report. The Board defined the issues, without input from parties affected thereby, and directed the utilities to file evidence pertaining to some, but not all, of the matters the Board had identified in its List of Issues. The Board established its Hearing and Support Teams[12] and directed that settlement discussions take place with respect to all issues except matters in issue pertaining to storage regulation.[13]

45. Rather than having those parties who had been advocating for complete forbearance throughout the NGF and the Board Staff Consultative file their evidence in advance of their opponents, the Board directed that all parties file their evidence with respect to storage regulation on the same date, namely May 1, 2006.

46. Between the time the Board Staff Consultative concluded in the autumn of 2005 and May 1, 2006, Union, EGD and their advisers concluded that the position they had previously taken with respect to the competitiveness of storage services was too broad.

47. By May 1, 2006, they recognized that any competition in storage services transacted downstream of Dawn was insufficient to protect the public interest.

48. Accordingly, the evidence filed on May 1, 2006, by all parties overwhelmingly indicated that competition was insufficient to protect the interests of consumers who acquired their gas storage services at transaction points downstream from Dawn. Utility requests for forbearance with respect to the storage services market were now confined to the relatively small portion of the market (about 28%) which acquired storage services at Dawn.

49. The expert witness retained by Board Hearing Staff concluded that none of the storage services market should be de-regulated. The expert retained by the ratepayer groups formed the same conclusion.[14]

50. Having prompted the proponents and opponents of forbearance to file evidence which raised issues of fact and law for and against the proposition that there was sufficient competition in storage services transacted at Dawn to protect the public interest, the Board did not confine its future participation in the process to the performance of the adjudicative functions of hearing and determining the matters of fact and law in dispute. Instead, the Board, through its Support Team, became more actively involved in the process. Towards the end of the pre-hearing process, the Board Support Team announced that the Board had retained its own expert.[15] However, the Board's expert did not file evidence and was not subject to questioning by other parties.

(h) Conduct of Board Members during the Hearing

51. At an early stage of the hearing and throughout the hearing of evidence, as well as during argument, Board Panel Members posed questions which indicated that they were searching for a

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[12] *Decision, page 32, Footnote 31*
[13] *Decision, page 4, Appendix A*
[14] *Decision, page 32*
[15] *From the Technical Conference Transcript*

forbearance solution to the Storage Regulation issues, which the Board had listed for consideration. They did not pose questions about the ability of the existing value of service/range rate regulatory regime to address the concerns which the Board raised. Their questioning indicated that a decision to retain the status quo was not open for consideration. An example of such questioning can be found at Transcript Volume 4, pages 147 to 151, where questions from the Board Chair to Dr. Schwindt, a member of the Union Gas Witness Panel, the first witness panel to testify, indicated that, from the Chair's perspective, what was in issue was merely a transition to a forbearance or competitive pricing end-state.

52. Towards the end of the hearing of evidence and upon the completion of the cross-examination by counsel for BP of the expert witness sponsored by the Board Support Team, the Board advised counsel for BP that it wished to hear evidence from his client, and offered to allow BP's witnesses to testify in confidence, if necessary. The Board Chair stated as follows[16]:

> ***"Mr. Brett, as you might guess, the Board has some interest in putting some questions to BP, and we would like you to give consideration to producing somebody. If necessary, this could be done in camera. I'm not asking you to call evidence, but we have some questions."***

53. Counsel for ratepayer interests questioned the Board's proposal[17] and objected to the in-camera feature thereof.[18]

54. Subsequently, counsel for the Board Support Team privately negotiated an agreement with counsel for BP, whereby BP's witnesses would attend and testify at the hearing. BP was provided with a list of questions which the Board wished it to answer. Under its agreement with the Board, BP had the option, at any time, of requiring that the testimony from its witnesses be heard in-camera and to terminate the questioning of its witnesses and have them stand down if it objected to any of the questions being posed by cross-examiners.[19]

55. The Board's List of Questions to BP indicated that the Board was searching for evidence to support a conclusion that the secondary market in storage services at Dawn was sufficiently competitive to support a finding that a competitive market existed for storage services, excluding commodity, transacted at Dawn and was sufficient to protect the public interest.[20]

56. Counsel for ratepayer interests objected to the Board's actions and contended that they brought into question the Board's ability to adjudicate matters in dispute.[21] The objection was summarized by counsel as follows:

> ***"So what we have, as far as my clients see it, in these questions, and in particular the question under secondary market view -- do you think there is a deep and liquid secondary market -- that strikes my clients as rather leading. And the document as a whole, in the context of these circumstances that I describe, evidence a questioner in search of evidence to support a pre-conceived conclusion.***
>
> ***So we don't know where this is all going to lead us. But I am instructed to record that my client suggests that there is now information in the record to cause reasonable people to question the objectivity of the Panel with respect to matters pertaining to these secondary market issue, and we reserve our rights to rely on this state of affairs if necessary."***

The Board noted counsel's objections and carried on.[22]

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[16] *Transcript Volume 9, page 98*
[17] *Transcript Volume 11, pages 130 to 138*
[18] *Transcript Volume 12, pages 1 to 16*
[19] *Transcript Volume 13, pages 7 and 8*
[20] *Exhibit J13.3*
[21] *Transcript Volume 13, pages 1 to 4*

57. Similarly, the Board did not confine itself to hearing and determining the specific storage allocation matters in issue between Union and the City of Kitchener. Despite the fact that neither Union nor any of its T1 customers requested such relief, the Board decided to override the provisions of valid, binding and renewable contracts between Union and its T1 customers with respect to storage services thereunder. In proceeding to decide matters not in dispute between Union and other contracting parties, the Board embarked upon its own fact finding mission. It did not confine itself to hearing and determining the matters in dispute between parties opposite in interest.

58. Counsel for the Board Support Team did not present argument. However, counsel for the Board Hearing Team did. In argument, counsel for the Board Hearing Team took a position adverse to the expert evidence it had led. Counsel for the Board Hearing Team contended, for the first time in argument, that the market in storage services transacted at Dawn was sufficiently competitive to protect the public interest.[23]

59. All of these actions, separately and in combination, indicate that the Board abandoned the retention of the status quo as a decision-making option early in the process and that it was searching for a forbearance solution to the Storage Regulation issues it had listed for determination. By the end of the hearing of evidence and argument, it was evident that the Board was engaging in its own fact finding mission and was not confining itself to hearing and determining the disputed matters of fact and law which had been raised by parties opposite in interest to one another.

(i) Evidence at the Hearing

i) The Relevant Product or Service and its Prevailing Prices

60. Facts established at the hearing included the following:

(a) Gas consumers consider storage to be a load balancing services based on underground assets, access which the Board regulates;

(b) Gas consumers require the storage services, i.e. space injection and withdrawal services, excluding the gas commodity; they do not consider the service to be a commodity;

(c) Over 180 bcf of the approximate 250 bcf of Ontario-based storage is acquired at transaction points downstream of Dawn by gas distribution customers of Union and EGD, who require load balancing services, excluding the commodity;[24]

(d) About 70 bcf of Ontario-based storage is acquired at a Dawn transaction point. Of the 70 bcf, about 30 bcf is acquired by gas marketers, who regard storage as a commodity, and the remaining 40 bcf is acquired by other gas distributors such as City of Kitchener and GMi to meet their load balancing requirements;[25]

(e) At the time of the NGEIR hearing, the prevailing cost of service plus utility return price or the utility value for Union and EGD storage services was about 30¢/Gj and 40¢/Gj respectively;[26]

(f) At the time of the NGEIR hearing, the prevailing commodity value for storage transaction at Dawn was about $1/Gj. The difference between winter and summer gas prices is

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[22] *Transcript Volume 13, pages 8 and 9*
[23] *Decision, page 35*
[24] *See Footnote 10*
[25] *See Footnote 10*
[26] *Decision, page 18*

used to derive the commodity value of storage.[27] By the time of the issuance of the NGEIR Decision in November 2006, the prevailing commodity value for storage had increased to about $2.10/Gj, or by an amount of more than 100%;[28]

(g) The utility value of the storage service which Union and EGD provide of about 30¢ and 40¢/Gj is now about 17% and 22% respectively of the commodity value of storage. The commodity value of storage is now more than five (5) times its Union utility value and almost four (4) times its EGD utility value.

ii) Analytical Tests and Lack of Evidence Pertaining Thereto

61. The evidence in the NGEIR hearing indicates that the tests used by other regulators to determine when regulation should yield to competition include the following:

- CRTC test[29] - no forbearance before incumbent loses 25% of its market share;
- FERC test[30] - no forbearance if it will result in an increase in prevailing prices by more than 10%, and
- MEG test[31] - no merger if it will result in an increase in prevailing prices by more than 5%.

62. The price threshold factor in the tests used by other regulators to evaluate market power is an integral component of the exercise of determining whether there are price competitive or "good substitutes" available in the market place in sufficient quantities to create a competitive constraint on the prevailing prices charged by other suppliers.[32]

63. IGUA submits that the following are the determinations that must be made in order to properly apply the analytical tests used by other regulators to determine whether a market at a particular transaction point is workably competitive:

i) What is the transaction point at which we are evaluating market power?

ii) What is the relevant product or service?

iii) What is the prevailing price for the relevant product or service at the transaction point?

iv) What are each of the alternatives to the relevant product or service?

v) What is the price of each of the alternatives at the transaction point?

vi) If the price of the alternative at the transaction point exceeds the prevailing price of the relevant service by 10%, then under the FERC test, that alternative is not a "good substitute" for the purposes of a market power analysis. Under the MEG test, if the price of the alternative exceeds the prevailing price of the product or service at the transaction point by 5%, then the alternative is not a "good substitute" for the purposes of a market power analysis.

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[27] *Decision, page 19; Exhibit J7.1, Tab 8, page 3, Exhibit B, Tab 1 UGL Undertaking 15*
[28] *Response to Interrogatory in Market Hub Case indicating that the June 27, 2005, estimated storage rate of $1.10/Gj had increased to an estimated rate of $2.05/Gj as of October 7, 2006*
[29] *Exhibit J7.1, Tab 11 and also Telecom Decision CRTC 94-19, September 16, 1994*
[30] *Federal Energy Regulatory Commission ("FERC") Policy Statement, January 31, 1996, and also FERC Final Rule, June 19, 2006*
[31] *Merger Enforcement Guidelines ("MEG") September 20, 2004*
[32] *See documents referred to in Footnotes 29 and 30*

vii) If there are "good substitutes", being alternatives at the transaction point which pass the price threshold test, then the question is whether sufficient quantities of that "good substitute" are available so that their availability will constrain the pricing power of any suppliers offering the relevant product or service at that transaction point?

viii) If there are substitutes which pass the price threshold test, then a determination must be made of the total quantity thereof which needs to be available at the transaction point to constrain the pricing power of suppliers of the service or product at that transaction point.

ix) If the requisite quantity is found to be available at the transaction point, then a determination must be made of the geographical area from which the "good substitutes" are available. The relevant geographic market is the area from which sufficient quantities are available at the transaction point of a substitute at a price which satisfies the price threshold test. Findings with respect to each of these items must precede a determination of the relevant geographical market area.

x) The final step is to determine the results of a concentration analysis for that geographic area.

64. The price threshold issue is not a stand-alone "price impact" consideration as the Board's Reasons imply.[33] The price threshold issue is an integral and critical component of the analytical frameworks used by other regulators to assess market power and to determine whether a market, at a particular transaction point, is workably competitive.

65. The price threshold test must be applied by the analyst before it can be determined that "good substitutes" are available at the transaction point. The analyst must then determine, first, the quantities of "good substitutes" that are available at a particular transaction point and, next, the total quantity which needs to be available at the transaction point to constrain the pricing power of suppliers at that point. Only then, can the analyst move on to determine the geographic area from which sufficient quantities of the "good substitutes" are available. Thereafter, the analyst can perform a concentration analysis for that geographic area.

66. The Board did not apply the price threshold test before concluding that "good substitutes" for the storage service which Union provides at Dawn, excluding the commodity, were available at Dawn.[34]

67. The Board did not determine the quantity of the "good substitutes" for Union's storage service which were available at Dawn; and the related question of the total quantity of the "good substitutes" that needed to be available to constrain Union's pricing of the storage service at that transaction point.[35]

68. By failing to consider and apply the price threshold test, and to make determinations with respect to the other steps which precede the identification of the geographic area to be used in a market power test, the Board misapprehended and misapplied the analytical frameworks which were central to a determination of the issue of whether the storage services market at Dawn was sufficiently competitive to protect the public interest.

69. The analytical tests for determining whether market power exists are applied in the context of the prevailing prices for the relevant product or service at the transaction point being analysed.[36] The market power analyst does not assume that the prevailing price is either competitive or not competitive. The analyst conducts a market power test on the prevailing price and, from the results of the market power tests, determines whether the prevailing price is or is not competitive.

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[33] *Decision, pages 39 and 40*
[34] *Decision, page 33*
[35] *Decision, pages 33 and 34*
[36] *MEG, Sections 3.5 to 3.8*

70. At the time of the NGEIR hearing, the prevailing price for Union's storage services at Dawn, excluding the commodity, was $1/Gj. The prevailing price for Union storage services downstream from Dawn was 30¢/Gj. The prevailing price for EGD storage services downstream from Dawn was about 40¢/Gj.

71. Market power tests are not applied to "hypothetical" prices, as the Board appears to conclude in its Decision.[37] Even if market power tests are to be applied to a "hypothetical" price based on the costs of new storage and their impact, if any, on prevailing prices, there was no evidence led to establish the costs of new storage, or the impact that such costs would have on the prevailing prices at Dawn or elsewhere. Absent such evidence, the market power tests must be applied to the prevailing price at Dawn of $1/Gj.

72. There is very little, if any, evidence to show that storage services, excluding the commodity, are available at Dawn at a price of $1.10/Gj or less. The witnesses for BP described a situation when it offered "several times" a storage service at Dawn, excluding the commodity, at a price less than that being charged by Union. Yet, the purchasers selected Union's higher priced service.[38] This evidence establishes that the service being offered by BP was not a "good substitute" for the service offered by Union. If the services offered by BP are not "good substitutes" for the service offered by Union, then Union wields market power.

73. There was no evidence whatsoever of the quantity of primary or secondary market storage services, excluding the commodity, available at Dawn from suppliers other than Union.[39] And no determination was made by the Board of either the quantity available or the quantity which must be available at Dawn in order to constrain Union's pricing of the services.[40]

74. In the absence of such evidence, there is no evidentiary foundation for the Board's conclusion that substitutes for storage services, excluding the commodity, are available at Dawn in sufficient quantities to make the market at Dawn, for such storage services, a workably competitive market sufficient to protect consumers and constrain Union from charging more than a $1.10/Gj for the storage service it provides at Dawn.

75. The commodity price correlation between Dawn and other points, on which the Board relied,[41] does not reveal the extent to which storage services, excluding the commodity, are trading at Dawn. The commodity price correlation evidence does not establish the quantities of such storage services, which are trading at Dawn, or the prices at which such services are trading compared to Union's prevailing utility price of $1/GJ. In the context of the analytical tests the Board applied, no conclusions with respect to the competitiveness of the market at Dawn could be based on such evidence.

76. The evidence that BP provided, as a result of its negotiated attendance at the hearing to provide responses to the Board's leading questions, did not establish the extent to which prices being charged are offered for storage services, excluding the commodity, were trading at Dawn, or that the secondary market transactions occurring at Dawn operated to constrain Union's pricing. BP's evidence was that it seldom offered or sold storage services, excluding the commodity, at Dawn. In the cases of offers which BP did make for such services, the buyers chose the higher priced Union service, a result which does not assist in a determination that secondary market offerings will constrain Union's pricing of storage services at Dawn.[42]

77. The evidence from GMi, upon which the Board relied, did not demonstrate that the market at Dawn in storage services, excluding the commodity, was competitively workable. GMi's evidence indicated that the services which it considered to be substitutes to Union's storage service at

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[37] *Decision, page 40*
[38] *Transcript Volume 13, pages 60 and 61*
[39] *See for example, BP Evidence at Transcript Volume 13, page 64*
[40] *Decision, pages 31 to 38*
[41] *Decision, pages 34 to 38*
[42] *Transcript Volume 13, pages 60 and 61*

Dawn, would attract a price more than 110% of the prevailing price being charged by Union. GMi's evidence demonstrated that Union exercised market power over it which is why GMi was seeking relief which would preclude Union from selling to others the capacity GMi held under contract with Union.[43]

(j) Impacts of Forbearance on Ratepayers and Utility Owners

78. As of March 2006, complete forbearance from storage service rate regulation would result in rate increases for Union and EGD gas customers of more than $170M per annum.[44] This measure of rate impact would be substantially more now because the commodity value of storage has substantially increased above $1/Gj. Forbearance in Union's ex-franchise market only, without phase-in of storage premium elimination, would result in rate increases in 2007 of about $44M.[45]

79. The evidence in the NGEIR proceeding indicates that, at the then prevailing commodity value for storage of about $1/Gj, Union's owner will realize a return on equity capital associated with storage assets supporting long term ex-franchise storage services of about 86%.[46] This return will increase as the commodity value of storage increases and will have doubled since the NGEIR hearing.

(k) Scope of the Dispute between Union and Kitchener pertaining to Storage Allocation

80. The relief requested by Kitchener was limited in scope to an issue between Kitchener and Union pertaining to Kitchener's needs for storage. Union's evidence pertaining to its dispute with Kitchener was similarly confined in scope.

81. Neither Union nor any of its T1 customers were seeking to change the storage allocations specified in existing T1 contracts.

V. THE DECISION

82. Matters of fact and law explicitly and implicitly determined by the Board in its Decision include the following:

(a) No one has the onus of proof with respect to the forbearance relief requested by the utilities;[47]

(b) Value of service/range rate regulatory regime currently applicable to storage services transacted at Dawn can be ignored and replaced without even considering its suitability for addressing the Board's desire to stimulate new storage development and to enhance the efficiency of storage authorization;[48]

(c) The Board can replace the existing value of service/range rate regime and impose a regime that has additional deficiencies[49], including the following:

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[43] *Transcript Volume 10, pages 56 to 120, Exhibit K10.1*
[44] *Transcript Volume 7, page 21*
[45] *Transcript Volume 4, page 115, and Decision, page 46*
[46] *Exhibit K2.2, page 2*
[47] *Decision, pages 26 and 27*
[48] *This conclusion implicitly follows from the fact that a possible continuance of the value of service/range rate regulatory regime currently applicable to storage services was not considered in the Decision.*
[49] *This conclusion is implicit from the Decision which did not compare the implications of the new utility/non-utility regime the Board imposed to the existing value of service/range rate regulatory regime.*

i) Instead of range rates for ex-franchise customers, there are no rates; transparency is lost, and the shareholder realizes materially enhanced but undisclosed returns.

ii) Instead of providing new services under the auspices of regulated range rates, so that some experience can be gained with revenues and costs associated with the services; there will be no rates covering new services. The revenues, costs and expenses associated with new services will not be disclosed.

iii) Despite finding that there is insufficient competition to protect the interests of distribution customers of Union, the prices, which such customer will need to pay for storage services in excess of their reasonable needs, will be unregulated.

iv) Instead of sharing the extent to which revenues recovered from the use of utility assets to provide storage services exceed the costs of providing such services between the utility shareholder and its ratepayers, there will now be a separation of utility and non-utility assets and revenues and costs associated therewith. This will raise cross-subsidization and other issues pertaining to the performance of utility and non-utility services; and is a result which contravenes the spirit and intent of the pure utility policy adopted by the Ontario government years ago.[50]

(d) The market for storage services transacted by Union and EGD at Dawn is sufficiently competitive to protect the public interest[51], even though there is no evidence which is capable of supporting such a conclusion;

(e) The Board can forbear from regulating certain rates, even if the exercise of the forbearance power confers a windfall return benefit on utility shareholders and causes material harm to ratepayers;[52]

(f) In exercising its forbearance power under Section 29 of the *OEB Act*, the Board can phase-in forbearance relief and the consequential harm it causes to ratepayers;[53]

(g) The Board can override provisions of valid and binding contracts between Union and its T1 customers of its own motion and impose measures which are incompatible with the provisions of valid, binding and renewable contracts.[54]

83. IGUA submits that from a ratepayer and public interest perspective, a continuance of the existing value of service/range rate regulatory regime is far better than the new utility/non-utility and, yet to be defined, complaint mechanism regime which the Board imposed. However, the retention of the existing regulatory regime was not a decision-making option which the Board considered. The Decision produces no benefits for ratepayers. It only harms them. The Decision is seriously flawed and should be reviewed on its merits.

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[50] *See Exhibits K2.2 and K2.4, which, in combination, show an allocation of $102.916M of total storage rate base of $483.619M to "non-utility" or about a 21.2% allocation. However, about 70 bcf of Union's total 150 bcf of storage capacity is sold to ex-franchise customers. The non-utility share of rate base using a contract capacity allocation factor would be about 46.6%, more than twice the amount that Union has allocated. Let the cross subsidy debate begin!*

[51] *Decision, page 52*

[52] *Decision, pages 45 to 48 for Board's description of impacts; see also Exhibit K2.2 and Transcript Volume 5, pages 223 and 224 where Mr. Reed acknowledges that an 86.41% ROE is a "supernormal" return.*

[53] *Decision, pages 52 to 76*

[54] *Decision, pages 86 to 91*

VI. ERRORS OF FACT AND LAW RAISING DOUBTS AS TO THE CORRECTNESS OF THE DECISION

84. The errors of fact and law which raise doubts as to the correctness of the Decision include the following:

(a) The Board has no jurisdiction to conduct what amounts to its own public inquiry in the midst of a contested rates and pricing proceeding between utilities and their ratepayers;[55]

(b) In embarking on its own public inquiry with respect to matters in issue between the parties with respect to storage regulation, the Board erred in law in exceeding its adjudicative mandate and engaged in a process which disqualifies it as an adjudicator and invalidates its Decision with respect to forbearance;[56]

(c) The Board breached its statutory adjudicative mandate by failing to consider, fairly or otherwise, the option of retaining the current value of service/range rate regulatory regime which is fully capable of responding to the Board's concerns with respect to stimulating new storage development and enhancing the regulatory efficiency of the use of storage assets;[57]

(d) The Board erred in concluding that there is no onus of proof to be assigned in the rates and pricing proceedings it initiated.[58] As a matter of law, the onus of proof in the proceeding rested with the utilities[59];

(e) The Board failed to recognize that there was no evidence of any probative value to support a conclusion that competition at Dawn in the provision of storage services, excluding the commodity, was sufficient to protect the public interest; and in particular,

i) The Board erred in law in misapprehending and misapplying the analytical tests used for determining market power. In particular, the Board misapprehended the linkage between the price threshold component of the market power tests it considered and the determination of the appropriate geographical market. The Board's misapplication of the market power tests led to erroneous conclusions with respect to the breadth of the relevant geographic market;

ii) The evidence pertaining to the operation of the secondary market, on which the Board relied, did not quantitatively establish the extent to which storage services, excluding commodity, were available at Dawn, nor the prices at which such services, were available in the secondary market at Dawn, nor that such services were regarded by consumers for such services at Dawn as substitutes for the delivery services offered by Union;

iii) The evidence of GMi did not establish that Union lacked market power in storage services transacted at Dawn; GMi's evidence established the opposite, namely, that Union holds market power over it.

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[55] *Sections 19, 29 and 36 of the* OEB Act

[56] Baker v. Hutchinson et al *(1977), 13 O.R. (2d) 591 (Ontario C.A.)*
Committee for Justice and Liberty v. Canada (National Energy Board)*, [1978] 1 S.C.R. 369 (SCC)*
Canada (Combines Investigation Acts, Director of Investigation and Research) v. Southam Inc.*, [1984] 2 S.C.R. 145*
Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (SCC)*
Beno v. Canada (Commission of Inquiry into the Deployment of Canadian Forces in Somalia - Létourneau Commission)*, [1997] F.C.J. No. 509*
Gardner v. The Ontario Civilian Commission on Police Services*, 72 O.R. (3d) 285; [2004] O.J. No. 2968 (Ont. Div. Crt)*

[57] *See cases cited under footnote 55*

[58] *Decision, page 27*

[59] OEB Act*, Sections 29 and 36(7)*

(f) The Board erred in concluding that it has power to forbear under Section 29 of the *OEB Act* when an exercise of the power results in a windfall benefit to utility shareholders and consequential harm to ratepayers; IGUA submits that the Board's jurisdiction under Section 29 of the *OEB Act* is not engaged if the end-state result is a windfall benefit to utility shareholders and concurrent harm to ratepayers. IGUA submits that changes to the allocation between ratepayers and utility shareholders of financial benefits and burdens produced by a particular regulatory regime must take place under the auspices of regulation.

(g) The Board's finding that transitional adjustments to rates were required, in order to implement the new utility/non-utility regime it imposed, demonstrates that competition alone was insufficient to protect the public interest. Accordingly, the Board erred in granting any Section 29 relief;

(h) The Board erred in concluding that the rate or pricing regime that applies to storage services is relevant to determining the reasonable needs of customers for such services.[60] The obligation of Union and EGD to provide their distribution customers with storage services sufficient to meet their reasonable needs stems from the statutory obligation to serve; and not from the rate or pricing regime that applies to storage services.[61]

(i) The Board found that there is insufficient competition to protect the distribution customers of Union and EGD served downstream from Dawn. Accordingly, all existing and new storage services provided to such customers must be provided under the auspices of regulated rates. The Board erred in concluding otherwise;[62]

(j) Where the prevailing Board-approved rate regime authorizes the terms and conditions of distribution and related storage services to be established by contract, and neither of the contracting parties ask the Board to override the provisions of the contracts, then the Board errs in law and fact when, of its own motion, it decides to interfere with the provisions of such contracts. The Board erred in issuing directions which effectively override the storage services provisions of valid, binding and renewable contracts between Union and its T1 customers, neither of whom sought to change their contractually agreed upon storage allocations.

VII. ORDER REQUESTED

(a) A Hearing of the Motion for Review on its Merits

85. IGUA submits that the Board should find that there are legitimate grounds for questioning the correctness of the Decision and schedule a hearing of the Motion for Review on its merits, with the review to be heard by a Panel which does not consist of any members of the Panel that heard and decided the initial application.

86. IGUA submits that the review hearing should either be a review at large, or a review of specific questions, including questions derived from the errors of fact and law described in paragraphs 84 of this Factum.

87. In the alternative, IGUA invites the Board to state a case for the opinion of the Divisional Court pursuant to Section 32(1) of the *OEB Act* with respect to all questions of law derived from the errors of law described in paragraph 84 of this Factum.

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[60] *Decision, page 77*
[61] OEB Act, *Sections 42(2) and 42(3)*
[62] *Decision, page 74*

(b) Cost Award

88. IGUA urges the Board to award eligible intervenors their costs to date.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of February, 2007.

Peter C.P. Thompson, Q.C.
Counsel for IGUA

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ONTARIO ENERGY BOARD

FACTUM OF THE INDUSTRIAL GAS USERS ASSOCIATION ("IGUA")

MOTION ON THE THRESHOLD ISSUES
RE: MOTION FOR REVIEW

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