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Our File No.: 55350-7

February 15, 2007

Kristen Walli
Secretary
Ontario Energy Board
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

Re: Notice of Hearing and Procedural Order No. 1 - NGEIR Motions
Board File Nos. EB-2006-0322, EB-2006-0338 and EB-2006-0340

Further to the Board's Procedural Order No. 1, please find enclosed a copy of the Factum filed on behalf of Market Hub Partners Canada Ltd. ("MHP Canada").

MHP Canada respectfully wishes to draw particular attention to its request of the Board outlined in paragraph 9 of its Factum as follows:

> 9. MHP Canada respectfully requests that the Board seek clarification from the Moving Parties with respect to their respective positions on Section 5.1 of the Decision and the Board's forebearance finding for third party storage prior to the oral hearing scheduled for March 5, 2007 in order that those adversely affected by their Motions may know the case they must meet." (emphasis added)

Should you have any questions please do not hesitate to contact the undersigned at (403) 298-3315.

Yours truly,

BENNETT JONES LLP

L. E. Smith

cc: Interested Parties

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.

REPLY FACTUM OF MARKET HUB PARTNERS CANADA LTD. MOTION ON THE THRESHOLD ISSUES

A. Introduction

1. Further to the Board's Procedural Order No. 1 – NGEIR Motions Board File Nos. EB-2006 – 0322, EB-2006 – 0388 and EB-2006 – 0340, Market Hub Partners Canada Ltd. ("MHP Canada") has received facta filed on behalf of the City of Kitchener ("Kitchener"), the Association of Power Producers of Ontario ("APPrO"), the Industrial Gas Users Association ("IGUA"), and the Vulnerable Energy Consumers Coalition and the Consumers Council of Canada ("Consumer Groups") (collectively the "Moving Parties" and individually a "Moving Party").

2. Upon a review of these facta it would appear that neither Kitchener nor APPrO specifically address the matters of concern to MHP Canada. Rather, they appear to focus exclusively upon issues arising between them and the utilities (Enbridge Gas Distribution ("EGD") and Union Gas Limited ("Union")).

3. Both the Consumers Groups and IGUA, however, take issue with the Board's findings that the storage market in Ontario is workably competitive and that neither EGD nor Union exercise market power with respect to the provision of storage services in that market.

Moreover, IGUA appears to take issue specifically with the Board's forbearance determination in its Decision with Reasons in the EB-2005-0551 proceeding dated November 7, 2006 (the "Decision") with respect to "...new storage services provided by Union, EGD and MHP Canada..." (emphasis added; page 2, para. 6).

4. On the face of their pleadings, it is not altogether clear whether and to what extent the Moving Parties, in particular IGUA and the Consumer Groups, seek to disturb the Board's finding that it "...will refrain from setting the rates and approving the contracts related to third-party storage, both utility-affiliated storage and independent storage" (Decision, page 54). Nor is it clear that the Moving Parties, in particular the Consumer Groups and IGUA, seek to disturb the Board's Core Points Decision issued from the Bench on September 7, 2006 which permitted MHP Canada to charge market based rates within the Board approved range (Decision at pages 4-5, 53 and Appendix "G"). For MHP Canada, the related rate order gave effect to the expedited Core Points determination. MHP Canada notes however that the deadline passed for filing a Motion for Review with respect to the Board's Core Points Decision without any such motions being filed.

5. In Chapter 5 of the Decision dealing with third party storage, the Board noted its earlier expedited decision on MHP Canada's Core Points. It further noted that the issue before the Board in the context of forbearance was whether it should refrain from setting the rates of all third-party storage (both independent and affiliated) and whether it also should refrain from approving storage contracts entered into by these companies (at page 53). Ultimately, the Board determined that it would refrain from regulating the rates and contracts of both affiliated and independent third party storage for the reasons more fully detailed in Section 5.1.

6. On February 5, 2007 the Board issued Order EB-2005 – 0551 rescinding the rate orders of MHP Canada and Tribute Resources Inc., *inter alia*, thereby giving full effect to its forbearance decision. The practical effect of the IGUA and Consumer Groups Motions, if successful, therefore, would be to reverse the Board's forbearance finding with respect to new storage development by both independent and affiliated storage developers. That result would raise serious concerns about the financial and operating parameters governing non-utility storage

development. Restoration of the Core Points, therefore, should logically attend any potential decision to revoke the forbearance finding.

7. While it appeared that in the NGEIR Proceeding IGUA supported the Core Points finding (though it opposed forbearance), in subsequent pleadings in the St. Clair Storage Pool Project proceeding (EB-2006 – 0162 / EB-2006 – 0163 / EB-2006 – 0164 / EB-2006 – 0165 / EB-2006 – 0166 / EB-2006 – 0167) ("St. Clair Project"), IGUA took the position that the Board's value of service / range rate regulatory regime was in effect a cost-based form of rate regulation designed to maintain oversight over the returns realized by independent storage operators (IGUA letter dated November 6, 2006, particularly pages 3 to 5). The IGUA factum appears to advance a similar position in this proceeding (paragraph 82(c)(ii)). While the forbearance finding in the NGEIR Decision obviated the need to clarify the nature and effect of the Core Points scheme of regulation, it may be necessary to clarify the nature of the value of service/range rate regulatory regime should any of the Motions prove successful.

8. MHP Canada, therefore, is directly and adversely affected by the Motions unless the Moving Parties, particularly the Consumer Groups and IGUA, confirm that they do not dispute the forbearance finding with respect to third-party storage, both utility-affiliated storage and independent storage, as more fully detailed in Section 5.1 of the Decision. Absent forbearance, the effect of the Motions, particularly those filed by IGUA and the Consumer Groups is to undermine the economic feasibility of the new storage development already underway.

9. MHP Canada respectfully requests that the Board seek clarification from the Moving Parties with respect to their respective positions on Section 5.1 of the Decision and the Board's forbearance finding for third party storage prior to the oral hearing scheduled for March 5, 2007 in order that those adversely affected by their Motions may know the case they must meet.

10. Throughout the NGEIR Proceeding, MHP Canada made it clear that the expedited ruling on the Core Points was necessary to provide the certainty necessary to make key investments to ensure an opportunity to meet a June 30, 2007 end service date for the St. Clair Project. In reliance upon the Core Points Decision; later, the Forbearance Decision; and, the approval of the St. Clair Project issued December 22, 2006, MHP Canada has ordered all project materials; contracts have been executed for the rotary drilling rig and commitments for other drilling

related contracts have been made; drilling will have commenced prior to the oral hearing; an RFP for operation services has been released; an open season will be conducted in February and March; an M16 contract with Union will be executed in February; negotiations with a pipeline contractor will likely be completed prior to the oral hearing; and substantial site preparation has been conducted including installation of surface drainage, well pads and access roads, and clearing of trees. Similarly, MHP Canada continues to take steps to conclude the commercial arrangements necessary to advance the Sarnia Airport Pool Project application for approximately 5.2 bcf of new storage capacity.

11. As consistently noted throughout the NGEIR Proceeding, MHP Canada only undertook these investments on the basis that it would assume the risk and enjoy the rewards of a market based pricing regime for its storage development and that it would be free to contract flexibly to maximize its returns. The Motions filed, particularly those filed by the Consumer Groups and IGUA, may seriously undermine the economic feasibility of third party storage development already underway. They discourage rather than enhance the prospect of new storage development, which the Board expressly found "...would be a benefit to Ontario consumers in terms of reduced price volatility, enhanced security supply and an overall enhanced competitive market at Dawn" (at page 50).

12. MHP Canada urges the Board to decisively reject the Motions without delay particularly as they relate to a reversal of the Board's findings in Section 5.1 of the Decision relating to forbearance from regulation of third party storage.

B. Threshold Question

13. MHP Canada agrees that the threshold question at issue relates to whether there are identifiable errors of fact or law on the face of the Decision, which give rise to a substantial doubt as to the correctness of the decision.

14. The issue is not whether a different Review Panel might arrive at a different decision; rather, it is whether the Hearing Panel itself committed serious errors that cast substantial doubt about the correctness of the decision.

15. This distinction is particularly apposite in an instance where a Moving Party has alleged bias. IGUA's factum is replete with allegations of bad faith on behalf of the Hearing Panel in terms of what it asserts was a deliberate, orchestrated attempt to bolster the record in support of the Hearing Panel's alleged pre-conceptions as to the outcome. A Review Panel should be loathe to interfere with the Hearing Panel's findings of fact and the conclusions drawn therefrom except in the clearest possible circumstances.

16. With respect, a fair-minded review of the record cannot sustain such a conclusion. IGUA bears a very heavy burden in demonstrating bad faith or bias on the part of the Panel (S. Blake, *Administrative Law in Canada*, 4th ed. (Markham: LexisNexis Canada Inc, 2006) at 97and 114).

C. Constitution of Review Panel

17. It is not necessary for the Board to accede to IGUA's request for a review by a panel of the Board that does not include any members of the Panel that heard and decided the initial application.

18. The Board is conferred significant discretion with respect to its authority to review its own decision (section 21.2 *Statutory Powers Procedure Act*; section 43 *Rules of Practice and Procedure*).

19. The Board's governing legislation provides no express prohibition as to the participation of its members in review proceedings, regardless of prior involvement in the matter. As such, there is no statutory bar to the original panel's participation in this proceeding.

20. The principles against biased decision-making do not necessarily disqualify tribunal members from adjudicating on a matter they heard previously. Conduct that creates a reasonable apprehension of bias includes sitting on appeals from one's own decisions. A material distinction is to be drawn however between appeals on the one hand, and reviews or rehearings or reconsiderations on the other. Panel members are not necessarily disqualified from adjudicating a matter by way of review or rehearing, which they have previously heard:

> *The principles against biased decision-making do not necessarily disqualify tribunal members from adjudicating on a matter which*

> *they heard previously but which has been set aside on appeal or judicial review for breach of the audi alteram partem rule or even error of law or, indeed, where the tribunal recognizes a denial of procedural fairness and wishes to correct its mistake. However, the tribunal at the rehearing is subject to disqualification if it indicates any level of commitment to its previous decision. If the tribunal's original decision was based on a finding of credibility against the applicant for judicial review, remitting the matter to that adjudicator may be inappropriate when the decision is set aside because of a failure on the part of the other side to provide full disclosure.* (CED, Administrative Law, § 217, footnotes omitted.)
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> *Bennett v. British Columbia (Superintendent of Brokers)* [1994] B.C.J. No. 2489 (C.A.); and [1994] B.C.J. No. 2168 (C.A.)

21. Therefore, there is no absolute legal principle that prohibits the continued participation of any or all of the Hearing Panel members in the proceeding.

22. This is not a situation where the Board was directed to reconsider the matter as a result of an appeal or judicial review. Rather, the Board is considering the matter as a result of motions filed which allege, amongst other things, errors of fact (IGUA, para. 3).

23. Having regard for all of the foregoing, the prior involvement of the Board panel does not give rise to a reasonable apprehension of bias that disqualifies those individuals from taking part in the decision-making process. The Board need not go further in responding to the assertion of the consequences of the panel's participation in the original proceeding.

D. Legislative Context

24. The Moving Parties base a number of their grounds for review on the premise that it is not available to the Board to determine that the public interest is sufficiently protected where the price to be paid for storage may increase.

25. Such a premise ignores the Board's statutory mandate, which expressly encompasses more than simply "protecting the interests of consumers with respect to the prices of gas service". This is plain from the objectives outlined in Section 2 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, (Schedule B). The Board is also directed, for example, to "facilitate rational development of gas storage" (Section 2.4) and "the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas" (Section 2.5.1).

26. In reaching its conclusion regarding the sufficiency of competition to protect the interest of consumers, it is evident that the Board appropriately considered the matter and balanced what it termed "conflicting objectives" recognizing that there may be "public interest trade-offs" (Decision at page 44). Indeed the Board expressly addressed the impacts upon consumers and identified what were in their short-term and long-term best interests (at page 48). The Board expressly referenced the evidence adduced with respect to the effect of storage in mitigating price volatility and improving winter peak availability and made a balanced policy determination with respect to the best means by which to stimulate development of storage assets and services both by utilities and by third-party developers, both affiliated or independent (pages 49-51).

27. Indeed in respect of storage forbearance, the Board had been presented with the initial EEA study, which asserted that the market for storage services in Ontario was workably competitive. That initial study was filed as part of the Natural Gas Forum Proceeding on October 28, 2004. It specifically referenced the provisions of Section 29 of the Act, which requires forbearance when the stipulated conditions are found to exist. In proceeding to consider the issue in the NGEIR Proceeding, the Board can hardly be portrayed as having acted in bad faith or acting out a preconception. Rather, it was dealing with a serious issue presented to it by Union. This was expressly contemplated by Section 29 of the legislation which clearly was at issue.

28. In this context it must be borne in mind that Section 29 contains a mandatory, not discretionary, requirement for the Board to forbear once a finding of fact with respect to the workably competitive condition of the market is established. In so doing, the Board was simply carrying out the clear intention of the Legislature to rely upon market forces where workable competition is found to exist rather than engaging in the traditional, prescriptive forms of rate

regulation. It was the Legislature itself, therefore, that expressly chose to rely upon competition as a safeguard against monopoly abuse. The Board's role in the context of Section 29 was simply to determine as a matter of fact whether workable competition existed. The benefit of competition to the public is manifest on the face of the legislation. The Legislature, in mandatory terms, directed the Board to withdraw in whole or in part from regulation of services found to be the subject of workable competition.

29. After being presented with the evidence in the Natural Gas Forum, as well as the initial EEA study, therefore, the Board may have committed a jurisdictional error had it not conducted the factual inquiry into the competitive state of the Ontario storage market.

30. As the Board noted, MHP Canada contended that once the factual finding is made that there is sufficient competition to protect the public interest, the Act requires that the Board then refrain from setting prices through a cost of service regime (at page 44). The Board did not agree with MHP Canada's conclusion. However, given its decision to forbear from regulation of third-party storage, MHP Canada has not taken exception to this finding. In the context of the present Motions, however, MHP Canada reserves the right to protect its interests should the actions taken by the Moving Parties threaten to overturn the forbearance finding in respect of third-party storage development, both by affiliated and independent storage developers.

31. Notwithstanding MHP Canada's conclusion in this regard, the Board made clear that it was balancing its statutory objective to facilitate rational development of safe operation of gas storage with other public interest trade-offs including price impacts and the development of storage in the Ontario market generally. In short, the Board demonstrated that it was in full view of its jurisdictional responsibilities.

32. For a third-party storage developer, there would appear to be no adverse impacts upon Ontario consumers. As the Board expressly noted,

> *"...these storage providers will have no captive customers, and Ontario consumers will not bear the risks associated with these new developments. The Board also finds this to be in the public interest. In conclusion, the Board finds*

that these storage operators will be subject to competition sufficient to protect public interest" (Decision, page 54).

The other public interest trade-offs, which the Board in its discretion might determine as a matter of policy, clearly relate to utility storage rather than third-party storage. Consistent with the objects contained in Section 2 of the Act, the Board explicitly balanced the number of interests. In so doing it cannot credibly be maintained that the Board committed an error sufficient to cast a substantial doubt as to the correctness of its decision.

33. The NGEIR Proceeding cannot be appropriately characterized as a rates proceeding, at least not as that may relate to the forbearance decision. While the Board's rate-making authority under Section 36 was invoked with respect to the new utility services under discussion for power generators, the forbearance issue raised by the initial EEA study was identified by the Board as a separate matter. It required the Board to determine whether, as a matter of fact, competition is, or will be, sufficient to protect the public interest. This determination engaged the Board's obligation to refrain from exercising any or all of its powers where the qualifying conditions were asserted to exist. The Board's ratemaking jurisdiction falls under Part 3 "Gas Regulation" of the Act. The forbearance provisions, on the other hand, appear under Part 2 of the Act, which describe the general powers of the Board. The broad discretion of the Board to act in matters within its jurisdiction and, in particular, to refrain from acting as contemplated under Section 29 amply empower the Board to do exactly what was done in the NGEIR Proceeding.

34. Section 29 itself, makes it imperative for the Board to determine whether or not to refrain, in whole or in part, from exercising any power or duty under the Act where, as a question of fact, workable competition is found to exist in connection with a service or a class of services such as storage. As that section of the Act expressly provides, this obligation may arise at any time whether or not there has been an application by any party such as a utility in the context of a general rate application.

35. Moreover, the Act expressly empowers the Board of its own motion to determine any matter under the Act or Regulations that it may, upon an application determine, and in so doing the Board has and may exercise the same powers as upon an application (Section 19(4)). Indeed in connection with assembling an adequate record upon which to make these important policy

decisions, Section 21(1), empowers the Board at any time on its own motion and without a hearing to give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act. It is hardly an indication of bias or bad faith that the Board should wish to ensure an adequate record and test it prior to making important decisions such as this initial exercise of the forbearance provisions under Section 29.

36. In that connection, with respect to the evidence tendered by the witnesses from BP, it is important to note that Ms. McConihe was the first to make reference to BP's experiences in the market (NGEIR McConihe Reply Ex. X.02.2 at page 9; NGEIR Transcript, Volume 8 at 124-126). In testing Ms. McConihe's evidence with respect to the activities of marketers, their use of storage and its significance to the consuming public, the Board made plain the fact that rather than relying upon Ms. McConihe's account of the evidence provided to her by the BP witnesses, the Board would prefer that that evidence be made available directly to the Board and other hearing participants (NGEIR Transcript, Volume 11 at 134, lines 7-10). Prior to the Board's decision to ask the BP witnesses to come forward it is clear that evidence of BP was already on the record (NGEIR Ex. J8.3; Transcript Volume 8 at 126). In the result, that BP evidence was tested and challenged where it otherwise might not have been. Parties were afforded an opportunity to cross-examine its witness (NGEIR Transcript, Volume 13).

37. Moreover, absent the evidence of the BP witnesses, there was ample evidence on the record to support the Board's conclusion. Gaz Metro, for example, and the utilities themselves, as direct participants in the market had presented detailed evidence as to its workings.

38. Far from disclosing any indication of bias or bad faith, the Board demonstrated a commitment to a full and complete record as well as to a fair opportunity for all interveners to test the evidence upon which the Board was required to make its inaugural forbearance determination.

E. The Merits

39. MHP Canada will refrain from making detailed submissions with respect to the merits pending Board determination on the threshold issue whether or not a review is warranted.

40. Generally, however, the record discloses a full and balanced consideration of the significant amount of evidence before the Board. A reviewing panel faced with allegations of bad faith and bias should exercise great caution before overturning any of the findings made by the Board in its decision, particularly findings of fact, which the Hearing Panel was in the best position to make. While another panel might have different views than the Hearing Panel which rendered the decision, the threshold issue is whether that Hearing Panel in arriving at its decision made any serious error.

41. The errors of law asserted, including the bias/bad faith on the part of the Board members, are without merit as discussed above. Allegations that the record did not support the decisions made thereby constituting errors of jurisdiction similarly are unsupportable in light of the discussion of the contending opinion and fact reflected on the face of the Board's decision on each of the issues identified. It is clear that the Board considered that evidence and those opinions, weighed them and arrived at their determination. There is nothing patently unreasonable about anything the Panel decided. Accordingly, there is no basis to disturb the Board's decision.

42. With respect to the market power analysis, there was ample evidence adduced by a variety of experts including Ms. McConihe, Dr. Schwindt and the EEA witnesses, the Navigant witness, Mr. Reed and Mr. Stauft. As the trier of fact, the panel that heard the evidence was best positioned to weigh the contribution of those witnesses and to weigh their opinion and the related evidence. In that regard, the Board was aware of the fact that at least one party (MHP Canada) expressed concern that the IGUA witness, Mr. Stauft, lacked formal training in market power analysis or studies (NGEIR Argument, Ex. Y4 at 15). Any review panel should defer to the Hearing Panel which actually heard and tested that evidence before setting aside its conclusions, particularly on the grounds of bad faith or bias.

43. The fact that the Board (and other active parties for that matter, such as the Board Hearing Team) was not ultimately persuaded by the opinion of the IGUA witness and related evidence, does not mean that contending positions were not considered.

44. IGUA's factum contains numerous assertions that the Board committed errors in its analysis of the workably competitive nature of the storage market in Ontario. The assertions

made on the face of the record are a reiteration of the evidence filed at the hearing. The Board panel that heard the case was best positioned to weigh the evidence of the IGUA witness; it clearly preferred the evidence of the other well-qualified experts. In so doing, it did not act with bias nor did it exhibit bad faith. Rather the record makes clear that it took pains to ensure a full and complete record with a fair opportunity for all the interveners to test it.

45. The fact that Ms. McConihe, the independent Board Hearing Team, actually changed their position on some of the key issues after having heard all the evidence, including the evidence and testimony of qualified experts supports the completeness of the record and the vigour of the balanced exploration of the issues. IGUA may have been disappointed with arguments made in the proceeding but it does not disqualify the Board from arriving at a similar conclusion to those witnesses and others (including Navigant, EEA, Dr. Schwindt, and Mr. Reed) who had presented evidence to similar effect.

46. Under the heading "The Relevant Product or Service and its Prevailing Prices" IGUA makes reference to an MHP Canada interrogatory response in the St. Clair Project proceeding as support for its proposition that the price of storage increased to about $2.10/Gj by the time of the issuance of the NGEIR Decision (paragraph 60(f)). As MHP Canada indicated during the St. Clair Project proceeding, this represents a mischaracterization of the data contained in the interrogatory response, which was derived through a modeling exercise (MHP Canada letter to the Board dated November 9, 2006 at page 3). Moreover, it was observed that a price of $2.10/Gj would fall squarely within the C1 rate range of $6.00/Gj in effect at the time of the NGEIR Decision. Therefore, even if the interrogatory response evidences a price increase of the magnitude asserted, this would not establish reviewable error.

47. The Board is being invited to retry the NGEIR Proceeding. There is no basis upon which to conclude that the Board acted in bad faith or disclosed a bias. The asserted "errors" are simple differences of opinion as to the result. The Hearing Panel clearly considered those contending positions and there is no basis made out of the face of the Moving Parties' facta to disturb the Decision.

48. Similarly, there is no basis upon which to refer any questions of law or jurisdiction to the Divisional Court. There are no errors in the areas of law or jurisdiction manifest on the face of the Decision that require resort to the courts.

F. Order Requested

49. MHP Canada requests that the Board dismiss the motions filed by all the Moving Parties to the extent they challenge the Board's Decision to refrain from setting the rates and approving the contracts related to third-party storage, both utility-affiliated storage and independent storage.

50. Accordingly, MHP Canada also submits that there is no basis for a reference of any questions of law to the courts since no errors of law are apparent on the face of the Decision. MHP Canada does not seek costs in association with this review application from EGD or Union.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of February, 2007.

L.E. Smith, Q.C.
Counsel for MHP Canada.

Board File Nos.:
EB-2006-0322, EB-2006-0338 and EB-2006-0340

ONTARIO ENERGY BOARD

REPLY FACTUM OF MARKET HUB PARTNERS CANADA LTD. MOTION ON THE THRESHOLD ISSUES

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