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

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

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

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

FACTUM OF UNION GAS LIMITED

(THRESHOLD MOTION)

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Union Gas Limited

FACTUM OF
UNION GAS LIMITED

PART I: NATURE OF THE MOTION

1. This motion is to deal solely with the threshold question whether the Board should reconsider its decision issued on November 7, 2006 (the "Decision").

2. Although five parties are seeking a reconsideration of the Decision, substantively there are really only three motions since IGUA, VECC and CCC are seeking essentially the same relief. The substance of the three motions is as follows:

i) APPrO is asking the Board to reverse its decision not to include a short-notice balancing service in Union's tariffs;

ii) Kitchener is asking the Board to reverse its approval of the aggregate excess method of storage allocation, including the Board's decision to freeze the cost based storage available for Union's in-franchise customers at 100PJs; and

iii) IGUA, VECC and CCC are asking the Board to reverse its decision to forbear from regulating the sale of ex-franchise storage services.

3. Union is filing this factum in response to the Board's Procedural Order, dated January 27, 2007, that directed interested parties to file factums dealing with

(i) the threshold tests the Board should apply in determining whether a review of the NGEIR decision was warranted, and

(ii) whether the moving parties have met those tests.

Overview of Union's Position on Whether the Threshold Test has been Met

4. Pursuant to Rule 44 of the OEB's Rules of Practice and Procedure, the test whether the Board should agree to reconsider a decision is has the moving party demonstrated grounds that raise a question as to the correctness of the decision. Reconsideration is an extraordinary remedy which should never be granted lightly[1]. In previous decisions, the Board has made it clear that it will not rehear a case simply because one of the parties to the original application was dissatisfied with the result, otherwise no matter will ever be finally determined[2], and the matters raised in the motion for reconsideration must be ***new*** matters that could not have been reasonably raised at the time of the original hearing[3].

5. The moving parties have failed to meet this test. None of the moving parties raise any new facts for consideration by the Board. Their factums are reiterations of arguments that were presented to and rejected by the Board at the original hearing, or are simply new legal arguments (bias[4] and lack of jurisdiction) which could have been raised at the time of the hearing and were not. These new legal arguments are completely without foundation, and they are only being raised now because the moving parties are unhappy with the Board's Decision. Accordingly, Union submits that the moving parties have not demonstrated any reason to doubt the correctness of the Decision.

PART II: What are the threshold questions the Board should apply in determining whether the Board should review the NGEIR decision?

6. When considering whether to allow a motion for reconsideration, the Board should keep in mind that there are sound policy reasons for recognizing the finality of

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1 RP-1999-0001, June 29, 2000, at para. 4.13.

2 E.B.O. 179-14/E.B.O. 179-15, dated August 17, 1999, at p. 4

3 RP-2001-0032, February 10, 2003, at p. 4

4 IGUA's counsel reserved his right to raise bias during the testimony (Vol. 13, p. 4) phase of the hearing, but he never made any submissions with respect to bias during his final argument.

proceedings before administrative tribunals. Scarce resources at the Board and regulatory efficiency require that there be an end to proceedings. In addition, the parties involved need some certainty that matters have been finally determined in order to arrange their affairs and carry on business.

> *Chandler v. Alberta Assn. of Architects*
> 62 D.L.R. (4th) 577 (S.C.C.)

7. Even though s. 21.2 of the *Statutory Powers Procedures Act* gives statutory tribunals the discretion to reconsider their decisions, most tribunals (including the OEB) have recognized that their discretion should only be exercised in extraordinary cases where new circumstances have arisen that did not exist at the time of the original hearing, or there is an obvious or palpable error in fact. The Board's recognition of the importance of this principal is set out in Rule 44 which contemplates only these very limited grounds for reconsideration:

> **44. Motion to Review**
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> 44.01 Every notice of a motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) set out the grounds for the motion that **raise a question as to the correctness of the order or decision,** which grounds may include:
>
> (i) error in fact;
>
> (ii) change in circumstances;
>
> (iii) new facts that have arisen;
>
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;
>
> (emphasis added)

8. In the past, the Board has described the test in the following ways:

> "...the mere existence of new facts, change of circumstances or inadequately disclosed information is not alone sufficient to warrant a reopening of the proceeding. The matter must be relevant and material; minor or inconsequential changes to the proposed business plans of the utility are not sufficient to justify a review... The Board agrees with the Company that ordering a review or rehearing is *an extraordinary remedy and should not be undertaken lightly.* On the basis of the submissions, the Board is not convinced that the extensive review requested by the moving parties is necessary."[4]

> "The Board finds that EDGI has not established that there are errors in fact, changed circumstances, new facts, or evidence *that was not reasonably available at the time of the hearing* which would raise a question as to the correctness of the Board's decision."[5]

> "Counsel for the Industrial Gas Users Association stated that the Board should only vary or cancel an Order of a previous Panel *in unusual circumstances.* In the Enbridge decision of October 10, 2003, RP-2003-0048, the Board stated:
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> > *'The Board agrees with the submissions made by the CAC that regulatory agencies should not review and vary their decisions except in unusual circumstances.'"*[6]
>
> (emphasis added)

9. The Board's decision in E.B.O. 179-14, August 17, 1999, is particularly helpful for delineating the threshold test because the Board considered several principles which are relevant in this case. In that case, Enbridge requested that the Board rehear portions of its decision relating to necessary approvals of transactions related to the transfer of certain businesses to affiliates. The portions of the decision that were the subject of the request for

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[4] RP-1999-0001, June 29, 2000, at paras. 4.6 and 4.13.
[5] RP-2001-0032, February 10, 2003, at p. 4
[6] RP- 2003-0063, March 18, 2005, at p. 4

review were those portions that address deferred taxes associated with Enbridge's Rental Program. Similar to this case, the Board first considered the threshold question of whether it ought to proceed with a reconsideration of its original decision. The Board determined that Enbridge failed to demonstrate sufficient ground for the Board to rehear the matter. In the course of its decision on the threshold question, the Board made the following comments:

> The Board's attention was drawn to a number of cases in which the courts have considered powers of administrative tribunals to reconsider matters that have been the subject of their decisions. Having reviewed the cases and heard submissions by the parties, *the Board is of the view that the Board should not rehear matters simply because one of the parties to the original application was dissatisfied with the result or otherwise no matter might ever be finally determined.* (at p. 3)

...

> *In any case, to be grounds for a review or rehearing, the errors of fact alleged must be errors capable of affecting the outcome of a decision. The Board's comments on the extent of disclosure of the issue in earlier cases was not determinative of the issue of whether or not the Company could obtain the approval it requested to retain the Rental Program in the core utility.* The Board was simply commenting on the fact that the issue had not been fully discussed previously in proceedings that dealt extensively with the costs associated with the ancillary programs.
>
> The Company also relied on subsection (a)(vi) of Rule 63.01. It argued that the applicability of the CICA guideline to the Rental Program was a matter of principle raised by the Decision. *In the Board's view, the question* of the responsibility for the payment of the deferred taxes relating to the Rental Program, and therefore the applicability of the guideline to the program, *was fully aired and argued in the original hearing. It is therefore not a principle "raised" by the Board's Decision, but a principle the applicability of which was at issue before the Board, and upon which the Board made a decision.* (at p. 4)

...

> *...The Board's conclusion that the earlier cases did not support the Company's claim* that there had been a commitment on the Board's part to allow the deferred taxes relating to the Rental Program to become the responsibility of the distribution ratepayer *is not a principle raised by the Board's Decision, but the outcome of the Board's consideration of the arguments of the Company and others.*

The Applicant argued that a further important matter of principle is raised by the failure of the Board to give appropriate weight to changes in government and legislative policy in its Decision. The Board, in its preamble to its findings in the Decision, made explicit reference to its consideration of "the changing legislative, regulatory and market contexts". This consideration led the Board to conclude that it would be inappropriate to "just say no"(which was argued by intervenors) to the Company's proposal, and that regulatory efficiency demanded a more innovative solution. *The Company's dissatisfaction with the outcome does not negate the Board's recognition of these policy changes.*

... The Board does not believe that the amount at which the account is capped is, in fact, a principle but rather a conclusion reached by the Board that the Company does not agree with. The principle, in this instance, is whether or not the full amount of deferred taxes related to the Rental Program should become the responsibility of the distribution ratepayer or the shareholder – an issue, as noted previously, fully discussed in the original hearing.

The Company further submitted that the impact of a decision may be grounds for rehearing the matter. The Company had requested approval for its plans relating to the Rental Program. *It had every opportunity in the original hearing to present evidence about the impact of the Board's refusing its request.* In fact, the Board requested clarification from the Company during the hearing about its expectations should the request be denied. As noted in the Decision, the Company responded to the Board's request in its Argument-in-Chief, asking for "detailed guidance as to the Board's expectations...[to] enable the Company [if necessary] to design an alternative that would meet the Board's expectations and...facilitate the regulatory process". In the interests of regulatory efficiency *the Board did not accede to intervenors' requests that it refuse the Company outright. Instead, it provided what guidance it could. That the guidance was not what the Company would have wished for, and has an impact that the Company did not foresee, is not, in the Board's view, appropriate grounds for review or rehearing.* (at p. 5)

(emphasis added)

10. Other Ontario tribunals that also have the power to reconsider their decisions have recognized similar principles. For example, the Ontario Labour Relations Board has stated:

> To avoid abuse of the reconsideration provision and bring some finality to its adjudicated decisions the Board has adopted principles not unlike those of the courts. The Board will not normally accede to a request to reconsider unless the party requesting reconsideration intends to adduce new evidence which was not previously available to them by the exercise of due diligence, and then only where such additional evidence, if proved, would be likely to make a substantial difference to the outcome of the case. Reconsideration is therefore generally restricted to allowing a party to adduce evidence or make representations which it did not have a previous opportunity to raise. The Board may also consider such factors as the motives for the request for reconsideration in light of a party's conduct, and the resulting prejudice to another party if the case is reopened.
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> *K-Mart Canada Limited Peterborough,*
> [1981] OLRB Rep. February 185.

11. Similarly, the Pay Equity Hearings Tribunal has stated:

> The Tribunal's discretion to reconsider a decision ought to be exercised only where there are compelling and extraordinary circumstances which make it appropriate to do so. To hold otherwise would be to jeopardize the Tribunal's goal of bringing finality to matters in an expeditious manner. It is also important to recognize that the labour relations community has an expectation that the Tribunal will be consistent in its decisions and will bring finality to matters which come before it.
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> *O.N.A. v. Women's College Hospital,*
> [1990] O.P.E.D. No. 2 at 7.

PART III: Have the moving parties met the tests for obtaining a reconsideration?

APPrO's Motion

12. APPrO's motion asks the Board to reverse its decision not to include a short-notice balancing service in Union's tariffs. APPrO's request simply restates in different terms the very issue that was before the Board in the original hearing; that being whether Union should be required to provide high-deliverability storage services at a regulated price.

13. A straightforward reading of the settlement agreement with APPrO makes clear that the only issue not resolved was whether Union could charge market rates for the high-deliverability storage services that APPrO members want. The Board decided that the best way to protect the public interest was to refrain from regulating these services.[7]

14. All of the arguments in APPrO's factum for this motion were put to the Board during the original hearing, and were rejected by the Board. APPrO has not brought forward any new facts or changes in circumstance, nor has it demonstrated any error in the Board's original decision. APPrO's assertion in paragraph 11 that the evidence was "uncontradicted" that high-deliverability storage is only available from the utility is demonstrably wrong. Evidence that high-deliverability storage service is available from others can be found in the Hearing Transcripts as follows:

> Volume 3, pages 27, 44 – 45, 48, 82-83, and
> Volume 10, page 228

In addition, in earlier proceedings before the Board involving Greenfield Energy Centre Limited Partnership's ("GEC") application to construct a pipeline to by-pass Union, GEC's evidence was that it wanted to by-pass because it wanted to be able to access competitive services from

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[7] For a full discussion of these issues by the Board see pages 66 – 71 of the Decision.

providers other than Union. This evidence was drawn to the attention of the original panel at the hearing.[8]

15. APPrO is simply seeking to re-argue a position that has already been fully canvassed before the Board during the original hearing,[9] and, accordingly, Union submits that APPrO has failed to meet the threshold test of demonstrating that there is reason to believe that the original decision is not correct, and therefore its motion should be dismissed. .

Kitchener's Motion

16. Kitchener's motion asks the Board to reverse its decision approving the aggregate excess method of storage allocation. Once again, the moving party has not brought forward any new facts, nor any new circumstances; Kitchener is merely seeking to re-argue the positions it put to the Board in written argument[10] and oral reply[11] on storage allocation at the original hearing.

17. In addition, the Board fully considered the issue of how much storage space should be allocated to in-franchise customers[12]. In particular, the Board considered the following arguments that Kitchener advances in support of its motion for reconsideration:

i) that the aggregate excess method assumes "normal" weather: considered by the Board at pages 94 and 96 of the Decision, but argued again in paras. 16-17 of Kitchener's factum; and

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8 Hearing Transcript, Vol. 17, pages 33 – 35.

9 APPrO's submissions during the original hearing can be found in Volume 15 of the Transcripts, in particular at pages 55 – 83.

10 Kitchener's submissions during the original hearing regarding storage allocation can be found in the Written Argument that Kitchener filed relating to this issue.

11 Kitchener's oral reply submissions can be found at Hearing Transcript, Vol. 17, at pp. 149 – 164.

12 For a full discussion of these issues by the Board see pages 77 - 97 of the Decision.

ii) that the aggregate excess method does not meet the reasonable load balancing requirements of Kitchener: considered by the Board at pages 94 to 96 of the Decision, but argued again in paras. 23–27 of Kitchener's factum.

18. Union submits that Kitchener has failed to meet the threshold test of demonstrating that there is reason to believe that the original decision is not correct, and therefore its motion should be dismissed.

IGUA, VECC, CCC Motion

19. IGUA, VECC and CCC are asking the Board to reverse its decision to forbear from regulating the sale of ex-franchise storage services. In addition, IGUA has asked that a completely new panel be appointed to hear the reconsideration of the motion because IGUA alleges that the original panel was biased.

Allegation of Bias

20. Union submits that there is absolutely no evidence to support IGUA's allegation of bias. The circumstances that IGUA point to, such as particular questions that panel members posed to witnesses during the original hearing and the fact that the Board hearing team had the assistance of an expert who was not called to give evidence, raise absolutely no appearance of bias.

21. Questions are not an indication of predisposition, regardless of how the questions are phrased. Moreover, the questioning did not reflect a predisposition toward any party's position. For example, during the examination of Mr. Stauft, a witness called on behalf of various consumer groups (including IGUA, VECC and CCC), Mr. Kaiser posed the following question to Mr. Stauft:

> Well, MHP is basically [Duke] dressed down like a little boy. Do you have a concern with that?
>
> (Vol. 10, p. 48, line 16)

There can be no conclusion from this question that there was any predisposition for or against the positions taken by MHP.

22. Nothing that the panel members said or did indicated any predisposition towards a particular finding or outcome in this case. The fact that panel members ask probing questions is not an indication of bias. Members of expert tribunals, such as the Board, are appointed because they have expertise and experience. As stated by Brown and Evans in *Judicial Review of Administrative Action in Canada*:

> ...it is often desirable that members of administrative agencies develop some general policies that they bring to the exercise of any statutory discretion: an "open mind" cannot be equated with an empty head.
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> *Judicial Review of Administrative Action in Canada,* at Vol. 3, p. 11-14

23. It was perfectly proper for the Board hearing team to have used the assistance of an expert to formulate questions and to help bring forward probative evidence. That expert did not testify and played no role in formulating the Decision. Accordingly, to suggest that person's involvement biased the proceedings is nonsense.

Request for Completely New Panel

24. Because there are no grounds for IGUA's allegation of bias, there is no justification for IGUA's request for a completely new review panel. Section 21.2 of the *Statutory Powers Procedures Act* contemplates that a review may be conducted by the same panel.

> 21.2 (1) A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part ***of its own decision o***r order, and may confirm, vary, suspend or cancel the decision or order.

A review under s. 21.2 is not in the nature of an appeal. As the name suggests, a review can be carried out by the same people who considered the matter in the first place.

25. Generally it is a rule for any judicial, or quasi-judicial process that "he who decides must hear". It would therefore be a mistake to ask a different panel to deal with issues of the kind raised by the moving parties in this case that involves weighing the evidence given over the course of 14 days of oral testimony.

> *Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-69 et al.*
> (1990) 68 D.L.R. (4th) 524 (S.C.C.)
>
> *Re Ramm*
> (1957) 7 D.L.R. (2d) 378 (Ont.C.A.)

No Reason to Doubt the Correctness of the Forbearance Decision

26. The question of whether the Board should forbear from regulating ex-franchise storage was thoroughly canvassed before the Board, and, indeed, it was the main subject of the three week hearing.

27. It is beyond doubt that sections 19 and 29 of the *Ontario Energy Board Act, 1998* give the Board all the jurisdiction it needs to make the orders set out in the Decision. Pursuant to s. 19, the Board was empowered to commence a proceeding on its own motion to consider whether competition in storage services is sufficient to protect the public interest, and pursuant to s. 29 the Board has clear jurisdiction to refrain from regulating any service which the Board finds is subject to sufficient competition.

28. If the moving parties had doubts as to the Board's jurisdiction to decide the forbearance issue, they could have raised those objections at the original hearing, but no one did

so. IGUA, VECC and CCC are only seeking to object to the Board's jurisdiction at this late date because they are dissatisfied with the Board's Decision.

29. Except for the jurisdiction argument, the moving parties raise no new issues. The moving parties do no point to any new facts or circumstances. Indeed, paragraph 10 of IGUA's "factum" makes it clear that IGUA is not relying on new facts or circumstances, and that IGUA's primary grounds for seeking review pertain to errors that it asserts were committed by the Panel. Those alleged "errors" boil down to IGUA (and also VECC and CCC) being unhappy with the Board's original decision. The moving parties do not give any ***evidence*** to doubt the findings of the original panel, rather they simply make unsupported assertions or reiterate arguments that were considered and rejected by the original panel[13] .

30. For example, in paragraph 32 of IGUA's factum, IGUA baldly asserts that the Board did not need to forbear from regulating storage in order to promote the development of storage in Ontario. This bald allegation is directly contrary to evidence that was given at the hearing[14].

31. Similarly, in paragraphs 73 and 84(e) of its factum, IGUA asserts that there was no evidence to support a conclusion that there is sufficient competition in the provision of storage services to protect the public interest. That is simply not true. The Board received evidence from three highly qualified experts (EEA/Schwindt, Reed and Smead) who concluded that Union's storage services compete with other storage facilities and with substitutes for storage in a market that includes at least Ontario, Michigan, Pennsylvania and New York. In this market, Union's share, measured by working capacity and deliverability, is relatively small. BHT's expert, Ms. McConihe, came to similar conclusions in her initial assessment of the market (BHT undertaking K.8.1) and in the earlier work she did for Enbridge (Enbridge Storage

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[13] IGUA's submissions at the hearing are contained in Transcript Volumes 15 and 16.

[14] See the evidence of Steve Baker, Transcript Volume 2, p. 144 -147.

Competition Studies, Exhibit I-8.1, Tab 7(b); TR. Vol. 8, pp. 119, 159-166). A complete review of the evidence relating to competition for storage services is contained in the Written Argument that Union filed in the original hearing, at pages 8 to 17.

32. Union submits that IGUA, VECC and CCC have demonstrated no grounds for believing that the original decision is not correct, and therefore their motions should be dismissed.

PART IV: ORDER REQUESTED

33. Union requests an order:

(a) dismissing all of the motions for review; and

(b) denying the Applicants costs of their motions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 15, 2007

Glenn Leslie

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