EB-2005-0551

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.

Outline of Final Argument for Sithe Global Power Goreway ULC, Sithe Global Power Southdown ULC, TransCanada Energy Ltd. and The Portlands Energy Centre (collectively the "GTA Generators") on Phase II Matters

August 29, 2006

I. Matters in Issue

(a) Forbearance at large: the utilities' proposals

[1] The main issue posed by the Board is: "Should the Board refrain, in whole or part, from exercising its power to regulate the rates charged for the storage of gas in Ontario?"

- With respect to general storage services for ex-franchise customers, the GTA Generators do not object to the continuation of market-based rates for ex-franchise customers

(b) Forbearance with respect to HDS

[2] A narrower issue exists: "Should the Board, refrain, in whole or part, from exercising its power to regulate the rates charged for the provision of high deliverability storage services (or "HDS services") by utilities to their in-franchise customers?"

[3] The GTA Generators answer "No" for several reasons:

- (i) obligation of distributor to meet the delivery needs of customer in its franchise area at cost-based rates (cost plus a reasonable rate of return);
    - A just and reasonable rate would be an incremental rate, not a rolled-in rate.

- (ii) high deliverability storage services currently are not available in Ontario either from the utilities or from marketers;

- (iii) alternate services not available from surrounding jurisdictions on required intra-day basis; utilities therefore would have market power with respect to HDS if they develop those services.

[4] With respect to Union's UPPS, DPPS and F24S, in light of the need for the services, their integration with F24T delivery services that are priced at cost and the absence of any comparable alternative, the price should be set on a cost-based basis, at incremental costs.

[5] With respect to Enbridge's rate 316, for the same reasons the price should be set at a cost-base rate using incremental costs.

II. The Need for HDS

[6] The need of generators for HDS to provide flexible intra-day injections and withdrawals is not in dispute.

[7] EGDI recognizes the need and will make HDS available through Rate 316 (Transcript Vol. 7, p. 114)

- How EGDI sources services to provide HDS depends upon whether forbearance granted; if it is, Tecumseh build may proceed; if it is not, EGDI will provide through other sources (EGDI Argument, p. 22 and p. 30 of 35)

[8] Union less clear as to whether would offer HDS (ie. F24S, UPBS and DPBS) as a tariff service to customers if forbearance not granted (Union Argument, p. 26); at hearing Isherwood stated: "if forbearance did not take effect, we would potentially try and access that through other market participants." (Transcript, Vol. 3, p. 88, or 3/88)

[9] The evidence of the generators at the hearing clearly demonstrated a need for such a service.

III. Utility should provide HDS service to in-franchise customers at incremental cost of service

First Reason: Utility obligation to meet needs of in-franchise customers

[10] A gas distributor is under an obligation to provide "gas distribution services to any building along the line of any of the gas distributor's distribution pipe lines upon the request in writing of the owner, occupant or other person in charge of the building." (*OEB Act,* section 42(2)). A gas distributor is a person "who delivers gas to a consumer" and distribution has a corresponding meaning (*OEB Act,* section 3).

[11] The demands that the power system imposes on dispatchable generators heavily influence the quality of delivery service that a dispatchable GFG requires from its local gas distributor. Mr. Nolan described the relationship between power system reliability and the quality of gas delivery service in the following terms:

> ***Transcript, Vol. 10, pp. 131 - 132***
>
> MR. NOLAN: …I suppose to start with I was looking for a way of describing the demands placed on all classes of generators by the electricity system. And in doing so, the inspiration I took was actually from some testimony in the earlier section of this proceeding, and the words came from Mr. Thompson, and he was talking about APPrO's position in the Technical Conference. And he tried to paraphrase that by saying that APPrO's view was that the gas market would be efficient when it can give gas generators all the gas they need but only when they want it.
>
> And I listened to that, and I was taken by the fact that if you translated the gas words or exchanged the gas words for electricity words, that phrase very aptly described what the electricity system expects of generators. And so we would say the electricity market will be more reliable or reliable when it can give electricity customers all the electricity they need, but only when they want it.

In light of the demands of the power system on generators to give electricity customers all the electricity they need but only when they need it, the quality of natural gas *delivery or distribution service* required by a dispatchable-GFG includes short notice, intra-day balancing services so that a GFG can respond efficiently to dispatch signals issued by the IESO.

[12] Section 42(2) of the OEB Act imposes an obligation on a distributor to provide this quality of delivery or distribution service to an in-franchise customer who requires it. The statute does not tell a distributor how to provide the service. The utilities operate integrated storage and transportation systems. It is clear from the evidence before the Board that short-notice, intra-day balancing services can be provided by a utility in several different ways, including the provision of high deliverability storage, the use of linepack or by constructing more pipeline. In this proceeding both utilities stated that they have investigated providing the service by

developing enhancements to existing storage assets to enable a higher deliverability storage service. Such an enhanced storage service is simply one means by which to provide in-franchise dispatchable GFG with the quality of delivery service that they require from their local distributor.

[13] The quality of a delivery service provided by a LDC therefore is a function of the way in which the utility operates its integrated transportation and storage system. The delivery needs of a dispatchable GFG – ie. getting desired quantities of gas to the burner tip at the time required - are meet by a combination of the utility's transportation and storage services. This was highlighted in the evidence of Messrs. Rosenkranz and Wolnik:

(a) Transcript, Vol. 10, pp. 215-216

> MS. SEBALJ: And I think I've heard you say a couple of times now that, and Mr. Kelly's evidence is, that there are no alternatives to high-deliverability storage other than that available from the utilities. Is that correct?
>
> MR. ROSENKRANZ: For the -- again, you have to be careful. For the particular service that we're talking about, and we're talking about the companion storage services that go with the relevant utility delivery services -- for example, T1. If I want to take -- if I get -- in the middle of the day, I've got gas in T1 storage and, you know, if I have the deliverability, I have the right to take the gas out of storage and operate even on a no-notice basis, and they will take that gas out of storage. But I cannot go above my deliverability entitlement.
>
> I don't have -- so if I don't have that extra deliverability, even if I've got the gas parked, stored on the Union -- on the Union system, I won't be able to run at short notice.

(b) Transcript, Vol. 10, p. 218

> MR. WOLNICK: I think from a generator perspective, when they talk about high-deliverability service, I think you have to look at all of the attributes around that. It's not just the fact that you can get a lot of it. It means that you can access it through all of these nomination windows.
>
> It's also a companion service to either Rate 125 or T1. It has to be firm.

[14] In Ontario utilities historically have satisfied their obligations to provide delivery services to in-franchise customers by providing service on a cost-of-service basis. *A general regulatory principle therefore exists in Ontario that a distributor will serve the bona fide delivery needs of a customer within its franchise area on a cost-of-service basis.*

[15] The utilities' rationale in this case for departing from this way of satisfying their obligation to serve are not tenable. First, EGDI talked about an "exception to the exception" of carving out in-franchise customers from its forbearance proposal; EGDI justifies this "exception to the exception" by describing GFG needs for HDS as

"unique requirements for storage services". Yet EGDI acknowledged that there is no such thing as a "standard customer" and that different classes of customers enjoy different classes of services (7/111-112) The general principle of meeting needs of in-franchise customers on cost-of-service basis should apply to the utility provision of HDS to in-franchise generators, as put by Mr. Rosenkranz:

> ***Transcript, Vol. 10, p. 229***
>
> Mr. Rosenkranz: And we don't understand, honestly, why we're here with this, because we've already got both utilities saying that for any other infranchise needs, for their captivated infranchise customers, that they agree that cost-based rates are appropriate.
>
> We've gone a step further, we've said, We don't even want that embedded cost-based rate that you agree is appropriate for everyone else. We see that there is a somewhat different need here, and there may be somewhat higher costs, and to insulate other customers we're willing to pay an incremental cost that will insulate other customers.

[16] EGDI testified that in-franchise GFGs responded to its non-binding open season for HDS (7/109), but no other in-franchise end use customers did (7/110). This confirms the need for the service by in-franchise customers.

[17] Second, EGDI justifies departing from using cost-of-service rates to provide HDS to in-franchise customers on basis that "the type of service that this customer group needs can be procured in a competitive marketplace." (7/114; also 8/29) The evidence shows that this is not the case; the evidence does not support EGDI's rationale for departing from cost-of-service rates.

Second Reason: HDS service does not exist today for Ontario generators

(i) Utilities do not provide the service

[18] It is common ground that at the present time the Ontario utilities do not offer HDS services to in-franchise customers.

(ii) A Third party cannot provide a high deliverability service in respect of storage allocated by a utility to its in-franchise customer

[19] The parties have agreed upon a methodology whereby Ontario utilities will allocate storage space to in-franchise generator customers.

[20] No third party can provide a service that would enable an in-franchise customer to inject/withdraw gas at higher deliverability rates from the storage space the customer has contracted for with its utility; only the utility can provide that higher deliverability from utility storage pools. GFGs are firmly within "the in-franchise captive market camp" (10/230) when it comes to the issue of accessing their storage with the utility on a high deliverability basis. As put by Mr. Rosenkrantz and Mr. Cramer:

(a) Transcript, Vol. 10, pp. 180 - 181

MR. CASS: Have any generators, to your knowledge, or the knowledge of anyone on the panel, put out an RFP, whether non-binding or preliminary or otherwise, to find out about availability of this type of service?

MR. CRAMER: I think –

MR. ROSENKRANZ: Maybe first you could be more specific. Of what kind of service?

MR. CASS: The high-deliverability service we're now talking about.

MR. ROSENKRANZ: If I went out and said I have a half Bcf of Enbridge space with which I have 1.2 percent deliverability and I want additional deliverability to go with my contract on Enbridge, I can guarantee you that no one would be able to respond to that RFP. And that's what we're talking about here today.

MR. CASS: But, Mr. Rosenkranz, deliverability is just a certain amount of gas in a certain amount of time. There's many ways you could go out and find out in the market who can give you that amount of gas at that time.

MR. ROSENKRANZ: Not to get my gas out of my storage contract today.

MR. CRAMER: Delivered to my burner tip.

(b) Transcript, Vol. 10, pp. 228 - 229

MS. SEBALJ: Well, if we had others in the market selling high-deliverability storage, then we'd have comparators and potentially competition, and therefore, an ability to get to a market price.

MR. ROSENKRANZ: It doesn't matter how many high-deliverability storage services there are in Ontario. If I can't get service from them onto the Enbridge system with the same attributes as this additional deliverability on my storage -- which I'm not sure how I can do that. Anybody else I buy deliverability from, I've got buy additional space. I don't want additional space. I want more deliverability for the space I already have.

So it's a --

MS. SEBALJ: So we're back to this, you're captive in the utility's territory for that piece, and therefore it wouldn't matter.

MR. ROSENKRANZ: We are infranchise customers. Under the existing rules of those services, we honestly do not see where we can buy that service, other than a utility. And if there's no market, we don't understand how to get the market -- how they can set a market rate.

(iii) HDS is not available currently from third parties for Ontario customers

[21] Union seems to concede as much in its argument: p. 28: "a market for high deliverability services must be allowed to develop in order to ensure the assets required are in place." So does Nexen Marketing when in its final argument it states:

> "Central to the purpose of this proceeding was the need for additional storage deliverability in the market and services to support the significant balancing requirements of power generators. Providing proper incentives for new storage development and/or facilities enhancements should, over time, address this need for additional deliverability and space." (p. 5 of 8)

[22] However, both utilities in their arguments suggest that the real concern of generators is not the current availability of HDS or HDS-like services, but the pricing of those services. Union, for example, argues: "APPrO's concerns are entirely focussed on establishing a value for the services in question." (Union Argument, p. 27). EGDI tried to make the same point in its cross-examination of the APPrO panel (10/166-169) and EGDI in its argument (p. 24) points to statement by generators at Technical Conference as suggesting that generators admit HDS or equivalent services are currently available.

[23] The utilities' arguments misconstrue and ignore the clear evidence given by the generators at the hearing that such services are not currently available.

[24] The generators consistently testified that no such services currently exist that they could contract for, either from the utilities or from marketers. The generators did testify that they thought the utilities possessed or could develop assets that could provide those services and the generators contended that the utilities are under an obligation to their in-franchise customers to make such services available. This can be seen from the following transcript excerpts:

(a) Transcript, Vol. 10, 138-140

> MR. MORAN: Now, in light of the description of the settlement on storage allocations that's laid out in the two settlement agreements, and in the context of the services as you've described them, with the addition of nomination windows within the Union system, can an infranchise generator access high deliverability storage that's located outside of Ontario to meet its intraday needs?
>
> MR. ROSENKRANZ: I think it's important to – the answer is today no. And I want to explain why the answer is no…
> So if we're looking at the access to deliverability above 1.2 percent, say, for a Union customer to go with his T-1 transportation service, the only service, the only

storage that meets that need and is comparable to what is needed to round out that service package is additional deliverability, in terms of injection and withdrawal, on that customer's T-1 storage service space.

So we're dealing with a particular product that's very narrow in terms of sort of the storage product space storage product space, if I say that correctly. And that's where we're looking at the service that generators will be looking to, to acquire.

That is not something that is available in the market today. It's something that is very specific to that utility. It's very specific to those particular rate schedules, and it's very specific to the particular location of Dawn.

MR. MORAN: Thank you, Mr. Rosenkranz. Mr. Kelly, as you will know, there has been many references to the secondary market and what marketers might be able to do for customers.

How would you describe the intra-day secondary market in Ontario?

MR. KELLY: I'd say that the intra-day secondary market in Ontario is not capable of providing the services that gas-fired generators need. TransCanada has held extensive discussions, most specifically within its work on PEC. We have held a number of discussions with marketers. We have posted RFPs specifically for the services that we believe PEC requires, in order to manage its fuel on a day-to-day basis, and to date we have not been successful in terms of securing the types of services that we require.

In fact, in conversations with the marketers, they've indicated to us that the types of services that we really need are the types of services that are actually being discussed here at the NGEIR forum... shall I start over?

So, as I mentioned, the types of services that the gas-fired generators need, at this point in time the marketing community, we've seen no indication from the marketing community that they're able or capable of providing those services to us on a reliable basis, intra-day.

MR. MORAN: Mr. Cramer, has your experience been any different from what Mr. Kelly has described?

MR. CRAMER: No.

(b) Transcript, Vol. 10, p. 179 - 180

Mr. Cramer:

We can get typical, you know, load deliverability storage from other resources, but when it comes to the high-deliverability needs that we need intra-day, as it stands today in Ontario, the only entities that are in a position to provide that are the utilities, because of how the system is set up.

And then, you know, if it gets to the point that it becomes very costly, you know, I mean – you know, if it costs me more to deal with the problem than it costs to simply absorb the problem, I'll absorb the problem. But the ramification of that is, when the IESO asks me to run, I may not be able to.

…

And again, I mean we're asking the utility to pursue that because our view is that the utilities are the only party in a position to do it, as it stands today. And that you know, there will be a balance between the demand that we represent and the cost of meeting that demand.

(c) Transcript, Vol. 10, p. 235

MR. CRAMER: Well, I think the basic issue is, we don't even know what the value is because there's no market for it, as it stands, for this particular type of service that we're talking about. There's no competitive market for us to go to to make sure we're getting it at a fair value.

[25] In its final argument EGDI quoted from Mr. Cramer's evidence at the Technical Conference (Argument, p. 24) to suggest that HDS or HDS-like services were available. EGDI's use of the quote was incomplete and taken out of context. When the complete quote is viewed, the context and meaning becomes clear. Mr. Rosenkranz dealt specifically with this issue at the hearing. He testified at the hearing that generators were of the view that the utilities had available to themselves assets which could be used to provide generators with the higher deliverability service that they require on an intra-day basis. :

Transcript, Vol. 10, pp. 164-169

MR. CASS: All right. Thank you. And then the third one is just further down on the same page, Mr. Cramer, added:
"Just to add one point. I mean, if you're saying it's not available, what you're suggesting is that the incremental cost is infinite, and it's hard for us to envisage a situation where the incremental cost is truly infinite, because it's going to be available in some form, from some source, on some sort of cost basis, and we're agreeing to pay the cost."

…

MR. ROSENKRANZ: Thank you. I wanted to make sure that we weren't stepping – I think, once again it's a case where we're looking at the words and we're not understanding them the same way.

The way we understand this, and I think it's clear in Mr. Moran's response on page 31, and it certainly is what I meant in my response, and I think what Mr. Cramer meant in his response, where he says at line 11:

> "If there is a shortage of storage, then presumably the distributor will have to look at other ways of providing that deliverability."

Our concern here is what's remaining to be resolved under the settlement agreement is pricing of higher deliverability, and additional deliverability with the same space, from the utility to the infranchise customer. Our position is that there's an obligation to provide services that are required by those infranchise customers, and the settlement is an agreement on what that requirement is.

So that should not, as Mr. Moran said, should not be a matter of dispute.

MR. CASS: All right. Well, you've agreed with me that the availability of high-deliverability storage at cost-based rates is an outstanding issue in this proceeding, right, Mr. Rosenkranz?

MR. ROSENKRANZ: Going back to what you've – no, I don't agree with that. Could you just – I thought you just said availability.

MR. CASS: Availability of high-deliverability storage at cost-based rates is an issue in this proceeding.

MR. ROSENKRANZ: I would just state it a little differently. I believe the availability of the high-deliverability storage service should not be an issue, and if it is, it better be dealt with.

MR. CASS: So you believe –

MR. ROSENKRANZ: The pricing of that service is an item that's been flagged as an open issue.

MR. CASS: So you are confident, sir, that it is available? That the utility, if need be, can acquire it? It is available, it's just pricing.

MR. ROSENKRANZ: What we tried to say in these series of answers is that, in our view, what we want is service. We don't necessarily care that the storage – that a physical storage pool at such and such location is being used, and this kind of goes back, to some extent, to the secondary market issues. But we are concerned that the physical molecules show up, that the service that those physical molecules show up with or are taken under are consistent with our deliverability service – our delivery services, and that that be part of the utility package.

I think where we had a parting of the ways – and I hope we don't still have a parting of the ways – is the concern that has been expressed that this additional deliverability that is needed by infranchise power generators is somehow impossible or – impossible to find by the utilities.

MR. CASS: No, I'm saying quite the opposite. I'm asking you to agree with me that it's out there and it's available.

MR. ROSENKRANZ: It's available, and it's available to – but what we're trying to say is that there are certain resources that are available to the utilities because of the assets they control that aren't available to the utility customers, and that the customers need to get from the utilities that they can't get from other parties.

MR. CASS: That's fair enough. You're saying it's out there, but the utility, in the case of Enbridge Gas Distribution at least, you're thinking the utility should go out

> to get it?
>
> MR. ROSENKRANZ: And it should get it by the most efficient means possible. <u>If the deliverability, in terms of it being able to get more gas to Parkway at short notice by Union, and I keep coming back to Union, is better done by expansion or compression of pipe as opposed to more withdrawal capacity back at the storage field, that's their responsibility to figure out what that is.</u>

[26] Mr. Rosenkranz re-iterated the point elsewhere in his testimony:

Transcript, Vol. 10, pp. 174-175

> MR. CASS: Okay. And part of that, I think APPrO is saying, is even if that price, even if just the pure incremental cost appeared to be too high for APPrO, APPrO itself would be looking around to see what other solutions there might be; right? Or I should say the generators. I hope that's understood when I say APPrO.
>
> MR. MORAN: Yes.
>
> MR. ROSENKRANZ: I think our view is that, depending on the price at the margin, we may buy less. <u>But we don't see that there is an alternative out there to replace all of that storage.</u> So we came out with a particular formula that we worked very hard with the utilities to come up with, something that we felt was a reasonable base amount of storage with the short-notice high-deliverability features to go with the deliverability service – delivery service that those – that a generator would need, recognizing that some would need more and some would need less.
>
> So it's stated in terms of a maximum with the ability to – but it's not a commitment to purchase all of that. <u>Price may be a factor, but our concern is that we cannot replicate that service from other means today.</u>

[27] It is clear from this evidence that the generators were not agreeing that they could secure HDS or HDS-like services out in the market; the generators testified unequivocally that they could not. The point the generators made was that the Ontario utilities have assets that could be deployed to provide that service.

[28] In its argument EGDI also tried to infer from the fact that Sithe had entered into a contract with the OPA that Sithe must think that load balancing services are available in the market to meet its needs (EGDI Argument, p. 24). EGDI's speculation on this point is not supported by the evidence. None of the forbearance proponents asked Mr. Cramer what arrangements Sithe had put in place regarding load balancing for the Goreway plant. Sithe participated in the APPrO witness panel and, as noted above in paragraph 25, Mr. Cramer concurred with Mr. Kelly that in his experience there has been no indication from the marketing community that they are able of providing generators with the required services on a reliable basis, intra-day.

[29] In its final argument EGDI also tries to parse the language of the Settlement Agreement to suggest generators "confident about the ability of the market to deliver appropriate services" (EGDI Argument, pp. 23 and 24). In Procedural Order No. 1 the Board identified as an issue whether it should order new rates for the provision of "natural gas, transmission, distribution and storage services to gas-fired generators" including "firm high deliverability service from storage with customer options for 1.2%, 5% and 10% deliverability". This issue has been addressed in two stages in this NGEIR proceeding. First, a settlement was reached on a method by which to allocate utility storage space to in-franchise GFG customers. GFGs agreed on a methodology that would reduce the amount of storage space by assuming a deliverability rate of 10%. Whether the utilities would make available deliverability at that rate and at what price were issues left to this second phase of the proceeding. For EGDI to try to convert that contested issue of price and availability by the utility into a concession by GFGs that HDS is available to them in the open market is just plain silly.

[30] EGDI's highly formalistic parsing of the Settlement Agreement raises some concerns amongst the GTA Generators about the approach that will be taken to the Settlement Agreement on a go-forward basis. The GTA Generators expect that all parties will approach the Settlement Agreement in the years to come on the basis that it represents an initial agreement, reached within very tight timeframes, and that the Settlement Agreement contemplates that all parties will continue discussions on service developments in a spirit of co-operation and good faith.

(iv) Marketers acknowledge that at the present time they cannot offer HDS or intra-day balancing services to Ontario generators

[31] In its final argument at p. 27 Union stated: "Marketers can also develop services to meet a market need." The evidence given by the utilities' experts led Panel Member Rupert to observe that "you hear about the dynamic marketing world where you can do virtually everything at a moment's notice" (8/38)

[32] The evidence shows that Union did not conduct a survey of marketers to ascertain who currently offers storage deliverability at 10% (3/101); EGDI acknowledges that it has not presented any detailed evidence as "to how you would go about or from whom you could secure those high-deliverability services" (7/119)

[33] Steve Acker for BP gave the clearest evidence of what marketers are able to do and whether HDS or HDS-like services are at the present time in Ontario.

[34] Mr. Acker acknowledged that at this time BP is not able to offer either a HDS or a firm short-notice balancing service (13/67-68). The latter cannot be offered

because of limited liquidity in the intra-day market at Dawn, Parkway and Enbridge CDA (13/68), a condition that affects all marketers.

[35] Mr. Acker candidly described how marketers worked. They do not create services out of whole cloth; marketers depend upon existing assets and contractual rights to provide optimization services to clients:

> ***Transcript, Vol. 13, pp. 70-72***
>
> MR. BROWN: Right. And my simple point is that in order for you to work your magic or to provide the services and extract the profit that you want from the services that you provide, there has to be something out there in the market, primary or secondary, that you can work with, right?
>
> MR. ACKER: That is correct.
>
> MR. BROWN: Right. And so marketers, I put it to you, do operate within certain limiting conditions, the first being what production, transportation, and storage infrastructure exists in respect of the area in which they want to do a transaction?
>
> MR. ACKER: I would agree with that.
>
> MR. BROWN: Secondly, what contractual rights arise within that area in respect of those sorts of services, correct?
>
> MR. ACKER: That is correct.
>
> MR. BROWN: You're also constrained by the terms of service offered by transportation and storage companies within those areas?
>
> MR. ACKER: That is also correct.
>
> MR. BROWN: And you're also constrained by certain industry standards such as the standard NAESB four nomination window on a gas day.
>
> MR. ACKER: That is also correct. And I would further say that everything that I've agreed to is the status of the industry today.
>
> MR. BROWN: Right. An expression was used -- I think it was a somewhat ironic comment on day 8 of this proceeding -- and the comment was that based on some of the things that had been heard up to that point of time that what you hear about the dynamic marketing world, where you can do virtually everything at a moment's notice.
>
> I take it that's a bit of an overstatement as to what marketers can actually do?
>
> MR. ACKER: We are marketers, so we tend to over emphasize our

> capabilities.
>
> MR. BROWN: Right. But you do have these very practical limiting conditions?
>
> MR. ACKER: We have practical limits. We can only do what the physical marketplace will physically allow us to do. Again, I'll emphasize that to the best of my knowledge, up until the situation where prospective power generators in Ontario had been looking for services that presently do not exist, I'm unaware of anyone who's been unable to satisfy their needs, whether it's in the primary, secondary, or exfranchise market.
>
> MR. BROWN: Are you familiar with the film "Field of Dreams"?
>
> MR. ACKER: Yes.
>
> MR. BROWN: Okay. And you remember this baseball field was going to be built out in the middle of Iowa or California or somewhere, and there was a phrase "If you build it, they will come"? You remember that phrase from the movie?
>
> MR. ACKER: That adequately or accurately describes marketers. You buy it, and I'll show up to help you optimize it.

It is clear from Mr. Acker's testimony that power generators are the first class of customers to have come along with needs for high deliverability services and those unique needs cannot be met by existing services offered by marketers.

(v) No comparable alternatives to HDS or intra-day balancing are available at the present time in Ontario

[36] In its Order 678 (Ex. J3.2, Tab 1), FERC discusses the elements that must be met to demonstrate that a product is a good alternative to another:

> [para. 27] …For a non-storage product to be a good alternative it must be available soon enough, have a price low enough and have a quality high enough to permit customers to substitute the alternative for the applicant's services.
>
> [47] The burden is on the applicant to 'show how each of the substitute services in the product market are adequate substitutes to the applicant's service in terms of quality, price and availability'…
>
> [48] In order for an applicant to show that non-storage products are a good alternative to storage, they must demonstrate that for peak demand periods

> customers will be able to choose the non-storage product as a comparable substitute for storage services offered by the applicant. This demonstration must show that in terms of quality, timeliness, and price that non-storage products will be able to serve customers' needs as well as storage service."

[37] Union suggests alternatives are available: Union Argument, p. 27: "There are many options to obtain incremental deliverability." However, this is just a bald statement unsupported by any evidence.

[38] Union and EGDI experts testified that they did not investigate the availability of either HDS or HDS non-storage substitutes in surrounding jurisdictions. Union and EEA admitted that they did not approach any of the storage providers in the Union core and non-core market area (as described on Table 13 of the EEA report) to ascertain whether they offer firm storage services on a regular basis at 10% deliverability (3/100-101). EGDI did not conduct a formal analysis of how it would got out to the market to acquire services to provide in-franchise HDS; it talked generally about "discussions with some marketers to get a sense of what may be available" (14/108), but no details were offered in evidence.

[39] EGDI in K14.1 points in a general way to marketers being able to provide an comparable alternative service, but its faith in the 'magic' of marketers simply flies in the face of Mr. Acker's realistic portrayal of how marketers operate. If, in fact, assets currently exist that if mixed and matched would enable a marketer to provide HDS, then Mr. Acker would not have stated that BP could not currently offer HDS or firm intra-day balancing.

[40] Anecdotal evidence of non-storage substitutes such as the Stagecoach/Constellation deal EGDI entered into do not provide evidence of equivalent substitutes; that transaction did not provide intra-day balancing (7/127-129).

[41] The only example given by EGDI of a comparable by "going out to the market" was to purchase 8 times the space at standard deliverability in order to provide the equivalent of a 10% deliverability service (14/104-106). This was characterized as the "dumb way to get high deliverability" (14/ 150). EGDI's cost comparison of the demand charge for HDS shows a range of \$42 to \$75/10^3m^3 under a Tecumseh-build scenario vs. \$216/10^3m^3 under the "dumb way" (EGDI Undertaking K14.1). This option would fail the "price low enough" aspect of FERC test.

(vi) Close connection between the obligation to serve and prudently-incurred costs

[42] The "dumb way" example also highlights the close connection between the issues of an obligation to serve and prudently incurred costs. The jurisprudence of this Board is quite clear: a utility is only entitled to recover from its ratepayers those costs that are prudently incurred to serve those customers. The means by which a utility meets its obligation to provide delivery services to in-franchise customers therefore must satisfy the prudence test.

[43] In this proceeding both EGDI and Union have stated that if the Board does not accept their forbearance proposal, including market prices for HDS, neither utility will build enhancements to existing storage assets that would enable the provision of HDS. EGDI went one step further and contended that even if it did secure the Board's forbearance, it might not build the enhancements at Tecumseh.

[44] The GTA Generators submit that it is not open to a utility to remove from the table in this way one possible option for satisfying the utility's obligation to provide customers with needed delivery services. A utility cannot unilaterally and without consequence take the position that it will not utilize or enhance existing assets to serve its customers, but instead secure required services from third parties. In the case of EGDI, enhancing its storage assets at Tecumseh might prove to be the most cost effective, or prudent, way by which to provide HDS to its in-franchise customers as compared to accessing third party services.

[45] As put by Mr. Cramer and Mr. Rosenkrantz, a cost-comparison study would be required to ascertain the most prudent way in which to provide high deliverability services to GFGs:

(a) Transcript, Vol. 10, p. 237

> MR. CRAMER: And also, the underlying assumption is that that was the most cost effective means for Enbridge to meet the needs of its customers. I mean, if Enbridge was, in fact, able to develop that capability on its own at a lower cost than entering into a contract with Tribute, then presumably prudence would dictate that they would develop their own resource.

(b) Transcript, Vol. 10, p. 238

> Mr. Rosenkranz:
>
> So if it turns out that, for example, all of the higher-deliverability resources that Enbridge acquires - that they don't do any of their own build, so there is no, strictly, cost; it's all done at market-based rates with other parties, because that's the cheapest way of doing it, and that's the price we end up paying - we don't have a problem

with that.

[46] In fact, as set out in paragraph 40 above, the only evidence before the Board suggests that an application of the prudence test would dictate the EGDI serve its in-franchise GFG needs for HDS by enhancing the Tecumseh facility instead of securing services from third parties.

[47] As a result, if the utilities were to refrain from enhancing their own storage assets and to decide to purchase HDS services from third parties, they would have to demonstrate the prudence of pursuing that option both with respect to (i) the resulting rate to the consumer and (ii) the ability to provide HDS in a timely fashion to meet customer needs. Such a prudence analysis would have to be done on a case-by-case basis. The suggestion by the Board Hearing Team that some kind of advance or blanket approval be given by the Board regarding the means by which the utilities provide high deliverability services runs counter to this Board's established jurisprudence.

[48] In view of the position taken by Union and EGDI in this proceeding that they might refrain from enhancing existing assets to provide a required service to in-franchise customers, the GTA Generators submit that it is important that the Board re-affirm the important link between a utility's obligation to serve and an obligation to serve at prudent costs, and reiterate that in any Board examination of the prudence of a utility's choice of the means to serve in-franchise customers the Board will compare the costs of the utility's choice against the costs of other alternatives available to the utility including capital investments in enhancing its existing assets.

(vii) The only practical alternatives facing GFGs as the market now stands

[49] As market offerings now stand, the generators testified that only two alternatives existed to the lack of availability of HDS. Neither alterantive was desirable, either from a pricing or a public interest/impact on electricity system reliability point of view:

(i) incurring balancing charges

Transcript, Vol. 10, p. 177:

MR. CASS: So am I not right in interpreting that as meaning that, even in the scenario of it being offered purely as nothing more than incremental cost, if that's too high, our expectation should be that generators will be looking to their other solutions, collectively?

MR. WOLNICK: Sure . And <u>within Rate 125, for instance, there are some other</u>

solutions in there. The is the 2% balancing, the tier-1, the tier-2, there is even the cash-out penalty, albeit very expensive, but even within that there's some solutions.

(ii) *not producing in response to electricity market signals*

Transcript, Vol. 10, p. 177-178

MR. CRAMER: I'd like to add just one point with respect to the question you asked, John, the answer. I mean, one of the potential alternatives to the service could be a decision by the generator to simply run or not run and take the exposure with respect to the electricity sector – the electricity side of the equation, as opposed to the gas. But one of the outcomes of that is going to be those generators not being able to meet the reliability needs of the system.

MR. CASS: Well, I'm sure, Mr. Cramer, that there are lots of alternatives that generators would be looking at in that scenario.

MR. CRAMER: As it stands today, there is no alternative with respect to the need for the deliverability. My alternative is to reduce the flexibility of the operation of the facility. I mean, that is an economic trade-off for me, but it has reliability ramifications with respect to the electricity system.

Transcript, Vol. 10, pp. 241 – 242

MR. KAISER: Lastly, this need for high-deliverability storage we understand, but is it essential? Can you function without it? Is it just a question of the cost of operation, or do you have to pay for it at any price?

MR. CRAMER: It isn't so much that you pay for it at any price, but we lose functionality in responding to the electricity system need. And we're exposed to significantly more risk with respect to imbalances, that type of thing. And I mean, if I don't have this service available, I'm faced with the risk of significant imbalance charges versus the risk of not operating.

MR. KAISER: Well, take that to the endpoint. You have a contract with the OPA, or you're about to have one. I don't know what the state of it is. Is it a situation where you can say to the Board, if we don't have this facility, this high-deliverability storage, there is a real possibility we're not going to be able to make our contractual commitments to the OPA.

MR. CRAMER: I think, first of all, with respect to the contractual commitments to the OPA, it's important to understand that there's no physical obligations.

MR. KAISER: Don't they care whether you respond to their --

MR. CRAMER: It's a financial contract. And so, I mean, ultimately, the ramification is, for example, if under the OPA contract, if I'm imputed to run based on where the gas prices are at Dawn and the power price but I've got a significant risk of running out of balance if I try to respond to that price signal, I may choose to forgo the revenue under the OPA contract versus exposing myself to those imbalance charges.

So the net effect is that there is a generating asset that should be running in response to the price signal from the electricity market that can't because there's excessive risk in doing so.

(viii) Market Power

[50] No specific analysis was done of Union/EGDI market power for HDS if offered. However, the evidence clearly points to (i) Ontario as the relative geographic market for HDS and (ii) the service is only proposed to be offered by Union and Enbridge. In light of other evidence on market power, it would be safe to conclude that both would have market power with respect to HDS.

IV. Response to Utility arguments against cost-based rates for providing HDS to in-franchise customers

[51] The utilities' arguments in favour of market-based rates for providing HDS to in-franchise customers are not supported by the evidence.

(i) Availability of comparable alternatives

[52] For the reasons set out above, the evidence does not support the utilities' contention that market alternatives to HDS are currently available to Ontario GFGs.

(ii) The need for market-based rates to attract the capital needed to build new storage that could provide HDS

[53] Union at p. 26 of its Argument contends: "Union will need to develop assets to provide these services and the ability to secure market values is necessary to attract the capital needed to develop the assets." Mr. Isherwood testified that the availability of F24S, UPBS and DPBS services "ties back to attracting the capital to construct the facility." (3/88)

[54] Both utilities talked about the "risk" of building HDS. Steve Baker acknowledged that "to the extent you went out and you had parties that were prepared to commit to longer terms, that would indicate a bit less risk and therefore the pricing would change." (3/ 91)

[55] However, Mr. Cramer pointed out that the risk can be mitigated in part by long term contracts (akin to pipeline leave to construct laterals)(10/231-233).

[56] The Board can always approve a higher ROE in respect of HDS services if their risk profile is greater than that of other utility operations (10/231).

[57] The utilities did not adduce any evidence to support their assertion that they would face extra-ordinary risk in attracting capital to construct facilities to provide HDS. Union acknowledged that it in its evidence before the Board it did not specifically address the issue of attracting capital to provide F24S, UPBS and DPBS services without market pricing and no due diligence report exists on that point (3/91 and UTK3.2)

[58] It is also interesting to note the comments made by the FERC in its Order 678 on this point. At para. 127 FERC stated:

> [para. 127] In general, we believe that an existing pipeline will face fewer difficulties in securing financing for incremental expansions of existing storage facilities. As a going concern with existing customers and financial relationships, the risk associated with acquiring financing is lower for incremental expansions than the risk associated with a Greenfield project undertaken by a new entrant in the market… (See Ex. J3.2, Tab 1)

This portion of the FERC Order 678 was put to the EGDI witnesses. EGDI testified that it was not aware of any difficulties in securing financing for incremental expansion of storage (14/115).

V. Summary on the provision and pricing of HDS to in-franchise customers

[59] The GTA Generators submit that based upon the evidence before it, the Board should find that:

> (i) local utilities are under an obligation to serve in-franchise GFG needs for a high deliverability delivery service on the same basis as the delivery needs of other in-franchise customers;
>
> (ii) local utilities should therefore provide HDS to in-franchise GFG on a cost-of-service basis;
>
> (iii) in light of the GFGs' willingness to pay the incremental costs of providing HDS, the rate for that service should be calculated on an incremental cost basis.

VI. Allocation of HDS to in-franchise customers

[60] The GTA Generators agree with APPrO's position on this issue, as summarized by Mr. Rosenkranz in his testimony at the hearing:

> ***Transcript, Vol. 10, pp. 209 – 210***
>
> MR. THOMPSON: Okay. Thanks. That's helpful. It helps me understand your position.

Now, just moving to the auction process that you've discussed with Mr. Cass. You have some concerns about that, as I understand it. This is the idea where both Enbridge and Union -- well, Enbridge, at least, is saying, We're just going put this service out to auction, and my understanding is, they're going to then look at what people are prepared to pay, do some internal comparisons, and then decide whether they're going to go ahead with the development, or not go ahead.

But in terms of that auction process, do I correctly understand, your first concern is that it would include, under the Enbridge proposal, exfranchise customers? Is that concern number 1?

MR. ROSENKRANZ: Our concern is that if this is a gas utility developing additional deliverability from existing -- particularly from existing storage facilities, and you already have it identified and agreed upon in the settlement, the infranchise requirement for that, we believe that that requirement, infranchise, should be met before you have an auction. If there is excess deliverability from a project, perhaps because it's a lumpy project, makes sense to do 2 Bcf and you only have one Bcf of infranchise need, if there's going to be an open season or bidding or auction for the additional, I don't believe that our members have any concern with that.

[61] The generator witnesses advocated a "priority" of allocation of any new build by a utility of HDS to serve in-franchise generators. Some suggestion was made that this might be perceived as discriminatory (10/240). This would not be the case. By virtue of their monopoly franchises utilities are required to employ their assets to first serve the needs of their in-franchise customers. If the utilities' possess assets that are excess to their obligations to meet in-franchise demands, they may offer services using those assets to non-franchise customers. In this case all the generators are saying is that their monopoly utilities should first use utility assets to provide services such as HDS to in-franchise customers, such as the generators, and if excess service remains, the utilities are free to offer those to ex-franchise customers. As put by Mr. Rosenkrantz:

Transcript, Vol. 10, p. 239

MR. RUPERT: But it sounds like you do have a difficulty with a situation, perhaps down the road, where a utility develops some high-deliverability storage services, finds that in addition to gas-fired generators there's several marketers who were also interested in that service. You seem to have a problem with getting into competition with those marketers for that service. You've, I think, requested a priority for that service.

MR. ROSENKRANZ: I thought we -- if we said that -- if I said that, I misspoken. I thought what -- again, if I'm understanding your question correctly, if there was 2 Bcf of high-deliverability storage developed, and 1 Bcf of infranchise need, and the

> other Bcf was put into the exfranchise market and offered up as that type of service in an auction, we don't have a problem with that.
>
> MR. RUPERT: No, I think you just agreed with what I said. It was the first Bcf which is yours, I think that's what I mean by priority.
>
> MR. ROSENKRANZ: It goes to infranchise needs, and again, I want to make sure we're not misspeaking and we're saying power generators. It's infranchise customers with that need.

[62] This would be no different than the way utilities currently employ their assets: in-franchise customers are served first; services using excess assets may be offered to ex-franchise customers. There is no discrimination involved in first meeting the needs of in-franchise customers.

[63] The GTA Generators disagree for several reasons with the proposal by the utilities that they freeze the amount of storage allocated to in-franchise customers at levels underpinning 2007 rates. First, such a proposal unfairly discriminates between existing ratepayers and future system customers in the sense that future customers will 'burden' existing ratepayers by securing storage. Second, freezing storage space allocation at 2007 levels effectively transitions in-franchise customers from cost-based rate to market prices. This practical effect of the proposal runs counter to the utilities' rationale for exempting in-franchise customers from market prices – ie. competitive services are not available to in-franchise customers. Third, there is no practical requirement that in-franchise storage levels be frozen. In the case of Union, the evidence reveals significant amounts of storage that are available to meet the storage needs of future in-franchise customers. In the case of EGDI, "freezing" in-franchise storage allocation at 2007 levels weakens the obligation of EGDI to use the most prudent means to secure incremental storage for its in-franchise customers.

VI. Pricing of F24S, UPBS, DPBS

[64] Union will provide F24T transportation service on a cost basis. However, it proposes to offer the complementary suite of services – UPBS, DPBS and F24S – at market-prices. Mr. Isherwood justified this pricing on the basis that these are ex-franchise services and currently ex-franchise services are priced at market (3/89). However, this is not consistent with the fact that F24T is an ex-franchise service but is offered on a cost basis (3/87).

[65] For the reasons set out above, the GTA Generators submit that the F24S service should be offered to in-franchise customers at incremental cost. Since UPBS draws upon Dawn storage assets, its price should be set on the same basis.

[66] As to the pricing of DPBS, arguably if the NEB approves SNB one might point to SNB as a service in competition with the DPBS. Union was asked whether it planned to support the approval of SNB at the NEB hearing. Although Union acknowledged that the SNB service would be "very beneficial for power generators" (3/96), Union was not prepared to commit to supporting SNB at the NEB (3/96-97). Union was not "directionally opposed to the service" (3/99). EGDI more strongly indicated that it would not support the SNB proposal (7/123-124).

[67] If Union is seeking market rates for DPBS in part based on rationale of the availability of competitive alternatives, then this Board should only conditionally approve the pricing of DPBS at market rates. If the NEB does not approve SNB, the competitive alternative disappears. In that event the OEB should revisit question of the pricing of DPBS.

VII. EGDI R316

[68] Apart from the issue of pricing, APPrO has offered comments on those parts of the Rate 316 service that it takes issue with (APPrO Undertaking K10.4). The GTA Generators agree with the position taken by APPrO.

VIII. Reporting obligations on storage providers

[69] If the Board approves market rates or forbearance for any storage services offered by the utilities or any other Ontario-based storage company, those companies should be required to report to the Board and publicly information similar to that required by FERC in its Regulations (Ex. J3.2, Tab 2).

[70] Union agreed in Undertaking K3.3, and EGDI agreed in Undertaking K7.7 that if forbearance were granted they would file most of the information listed in the FERC regulation. Their undertaking responses disclose a common set of information both are prepared to file.

[71] The GTA Generators submit that any storage company that offers storage services in Ontario at market-based rates or under a forbearance regime should be required by the Board to file the information set out in the FERC regulation, including price information, in order to develop a transparent storage market.