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EB-2005-0551

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

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ENBRIDGE GAS DISTRIBUTION INC.

COMPENDIUM OF DOCUMENTS FOR REPLY ARGUMENT

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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.

SUBMISSIONS OF ENBRIDGE GAS DISTRIBUTION INC.

A. Introduction

This proceeding was initiated by a Notice of Proceeding issued by the Ontario Energy Board (the "Board" or the "OEB") on December 29, 2005. The Board's Notice indicated that it would hold a generic hearing to determine whether it should order new rates for natural gas transmission, distribution and storage services that contain the following:

1. more frequent nomination windows for distribution, storage and transportation;

2. firm higher deliverability from storage;

3. greater operational flexibility in the provision of distribution services, including the removal of inter-franchise barriers, the ability to redirect or acquire gas on short notice and the removal of unreasonable restrictions on the title transfer of gas in storage; and

4. gas storage and distribution as discrete new services to gas-fired generators (and other qualified customers).

In addition, the Notice of Proceeding indicated that the Board would determine whether to refrain, in whole or in part, from exercising its power to regulate the rates charged for the storage of gas in Ontario. The Notice went on to say that the Board would reach this determination by considering whether, as a question of fact, the storage of gas in Ontario is subject to competition sufficient to protect the public interest.

On January 26, 2006, the Board issued Procedural Order No. 1 in this matter. This Procedural Order identified issues under three separate headings or categories, namely:

> I. Rates for gas-fired generators (and other qualified customers);
>
> II. Storage regulation; and
>
> III. Transportation capacity bidding process and allocation.

The list of issues set out in Procedural Order No. 1 was expanded by later Procedural Orders. Procedural Order No. 2 added a new set of issues under the following heading:

> IV. Enbridge rates for large volume customers (Rate 300 Series).

Procedural Order No. 2 included an Issues List, which was attached thereto as Appendix C. Later, Procedural Order No. 3 identified certain issues that were "moved" from the 2007 rates proceeding for Union Gas Limited ("Union") to this proceeding.

The issues added to this proceeding by Procedural Order No. 3 are specific to Union, as is Issue III (Transportation capacity bidding process and allocation) that was set out in the earlier procedural orders. Of relevance to Enbridge Gas Distribution Inc. ("Enbridge Gas Distribution" or the "Company") are the following categories of issues identified in the Issues List attached to Procedural Order No. 2:

> I. Rates for gas-fired generators (and other qualified customers);
>
> II. Storage regulation; and
>
> IV. Enbridge rates for large volume customers (Rate 300 Series).

The Board's Procedural Orders provided for a Settlement Conference, but indicated that the Board did not intend to receive a Settlement Proposal on issues in category II (Storage regulation). Consequently, Enbridge Gas Distribution and interested parties proceeded with a Settlement Conference in

respect of issues in categories I and IV. This Settlement Conference took place on May 29, 30 and 31 and June 1, 2, 5, 6, 12 and 13, 2006. The outcome of the Settlement Conference was a Settlement Proposal filed with the Board on June 13, 2006, which left unresolved the following issues:

> 1. a "threshold issue" regarding allocation of costs and revenue deficiencies attributable to changes in Rates 125 and 300;
>
> 2. all issues in category II (Storage regulation);
>
> 3. an issue about the Company's proposal that Rate 125 be made available to existing and new firm loads greater than 600,000 m³ per day: IGUA, AMPCO and CME reserved their right to request that availability be limited to new loads only; and
>
> 4. high deliverability storage under Rate 316: there was agreement on base level deliverability, but no agreement as to whether and how high deliverability storage service would be offered and what pricing would apply.

The "threshold issue" was heard and determined by the Board on July 14, 2006, at which time the Board also approved the Settlement Proposal. The remaining issues that were not resolved in the Settlement Proposal will be addressed under the headings which follow.

B. Storage Forbearance

The Governing Legislation

The wording of subsection 29(1) of the *Ontario Energy Board Act, 1998*[1] (the "OEB Act") has been referred to many times in this proceeding. Nonetheless, it is important that any consideration of the forbearance issue start from the words of that section. Subsection 29(1) provides as follows:

> On an application or in a proceeding, the Board shall make a determination to refrain, in whole or in part, from exercising any power or performing any duty

[1] S.O. 1998, c. 15, Sch. B

> under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.

It seems to be common ground in this proceeding that the test for forbearance established by subsection 29(1) is "competition sufficient to protect the public interest". This test was recognized in the Notice which initiated this proceeding, where the Board indicated that, in determining whether to forbear from regulation, it would consider whether, as a question of fact, the storage of gas in Ontario is subject to competition sufficient to protect the public interest.

While there seems to be no dispute about the statutory test established by subsection 29(1), there are a number of other important features of this provision that should be emphasized.

First, subsection 29(1) makes clear that (subject to satisfaction of the statutory test) competition is preferred, and indeed required, instead of regulation. This is the effect of the words which state that, when the statutory test is met, the Board "shall" make a determination to refrain (in whole or in part) from exercising "any" power or performing "any" duty under the statute. That is to say, when the Board determines that there is sufficient competition to protect the public interest, the statute requires a determination that the Board will refrain from exercising *any* powers or duties in that area, subject only to the qualification that the Board may refrain in whole or in part.

Another important feature of subsection 29(1) is that the test of "competition sufficient to protect the public interest" is to be applied in a number of different ways. The required determination to refrain from regulation is triggered when a "person" is subject to competition sufficient to protect the public interest, or when a class of products or services is subject to competition sufficient to protect the public interest, or even when a single product or service is subject to such competition. Thus, the statutory test may trigger a required forbearance determination in respect of all gas storage services, or a particular class of gas storage services (such as transactional storage services) or even an individual gas storage service (such as one particular transactional storage service).

A third feature of subsection 29(1) that should not be overlooked is the words which precede the statutory test, namely, the words "is or will be". In applying the test, the Board is to consider not only whether there is sufficient competition to protect the public interest, but also whether there will be such competition in the future.

The Competitive Market

The evidence in this proceeding has clearly demonstrated that the gas storage market at Dawn, Ontario is subject to competition sufficient to protect the public interest.

The most persuasive and useful evidence of this fact came from parties who actually participate in the Dawn market to acquire and sell storage and storage substitutes. Those parties provided real-world examples of competitive alternatives that exist for gas storage customers who are seeking to obtain storage services in Ontario.

However, before discussing the evidence from parties such as Société en Commandite Gaz Métro ("Gaz Métro") and BP Canada Energy Company ("BP"), it is useful to examine the expert evidence provided in this proceeding. On the one hand, there are reports and testimony from Energy and Environmental Analysis/R. Schwindt ("EEA"), Navigant Consulting and Concentric Energy Advisors which all conclude that Enbridge Gas Distribution and Union do not have market power in the provision of natural gas storage in Ontario. On the other hand, the reports and testimony from Bruce McConihe and Mark Stauft come to the opposite conclusion (although Ms McConihe did concede that Enbridge Gas Distribution on its own could not exercise market power for ex-franchise markets)[2].

All of the reports employ a common approach of identifying the relevant product and geographic market and then examining the market share of the Ontario gas utilities for the relevant product within the determined geographic market. While all experts considered physical gas storage to be the relevant product, and there was little debate about the amount of gas storage owned by different players in the market, there was no consensus on the relevant geographic market to be considered. There seems to be little doubt though, that if the relevant geographic market is considered to include neighbouring jurisdictions such as Michigan and Illinois, then the Ontario utilities do not have a sufficient market share concentration to exercise market power.[3]

In his examination in chief, Rick Smead of Navigant Consulting captured the essence of the differences between the experts on both sides of the issue:

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[2] 8 Tr. 206-207

[3] Indeed, Ms McConihe herself acknowledged this in earlier reports for Enbridge Inc. and Enbridge Consumers Gas where she concluded that, based on a geographic market that included Michigan and other nearby jurisdictions, the Ontario utilities could not exercise market power: Exhibit J1.2, Tab 7(b)

> Fundamentally, everybody, everybody on both sides of the issue, goes through pretty much the same kind of analysis, except that the size of the market that they consider grows or shrinks based upon perceptions of availability of alternatives in the United States and the availability of delivery capacity to be able to communicate with the alternatives in the United States.
>
> ...
>
> So, really, you can boil down the disagreements on this, the competition issue, I think simply to a question of: What is the ease of communication between the markets for competitors to compete with each other?[4]

In cross-examination, Ms McConihe agreed that it was "[her] concern that there is not unsubscribed firm pipeline capacity into Ontario that caused [her] to narrow the geographic market to Ontario".[5]

In the Company's submission, the evidence supports the conclusion that the Ontario gas storage market does "communicate" with Michigan and other jurisdictions such that storage and storage substitutes in those markets are available to Ontario end users. The record in this proceeding confirms Navigant Consulting's conclusion that "there is ample ability for storage and other services in the United States to provide meaningful competition for Ontario storage".[6]

That the Ontario and Michigan and other nearby markets "communicate" can be seen in the reports filed by EEA and Navigant Consulting. There is no debate that Dawn is physically connected, through pipelines, to storage facilities throughout much of the United States and Canada.[7] The issue is whether those facilities are actually part of the same market as Dawn. In order to assess this question, EEA looked at the "basis differential" between Dawn and other market "hubs" to evaluate the level of correlation of natural gas pricing at these different points. To the extent that natural gas prices are consistent between two hubs, taking into account the transportation costs involved between them, then it can be said that the markets communicate and that there is flexible transportation available between the markets.[8] As John Reed of Concentric Energy Advisors testified, price correlation analysis is the "best evidence" that there are no transportation constraints.[9] Through their research and analysis, EEA found, and Navigant Consulting concurred, that the results of the basis differential analysis "indicate a very close relationship in daily price movements between Dawn and

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[4] 6 Tr. 16-17

[5] 8 Tr. 198

[6] Exhibit F, Tab 3, Schedule 1, page 6

[7] EEA Study, Union Evidence, Exhibit C, Appendix B, Table 3, p. 33

[8] Exhibit F, Tab 3, Schedule 1, p. 9; see also 1 Tr. 86-88

[9] 5 Tr. 148

MichCon, Consumers Energy, Chicago and Alliance".[10] If transportation constraints existed, then one would expect to see, at some time, the sort of "basis blowout"[11] as was seen in the New England cold snap in 2004. In that case, demand for gas so outstripped supply that the prices in New England skyrocketed well beyond the prices in other North American markets because of the fact that transportation into New England was constrained.[12] The fact that there has been no such basis blowout at Dawn (notwithstanding the fact that there have been "cold snaps" in Ontario and Michigan), and the fact that the basis differential between Dawn and these other hubs (MichCon, Consumers Energy, Chicago and Alliance) is modest and stable indicates that these markets communicate freely through the flexible availability of transportation.[13] Moreover, as Bruce Henning of EEA testified, EEA's modelling work in this case indicates that this stability is likely to continue into the future: "the scenarios which we have run using the GMFDS [EEA's model], show a level of stability, largely driven by the multiple paths, the pipeline capacity, the dynamics of the different kinds of transactions. Ontario's located at a very favourable point within the North American gas industry".[14]

The evidence and testimony of Ms McConihe and Mr. Stauft was premised on the assertion that there is no firm transportation capacity available from pipeline companies into Ontario from Michigan and other nearby storage fields and, accordingly, the geographic market definition must be limited to Ontario only. Interestingly, while Ms McConihe asserts that the lack of available primary firm transportation in the United States operates to limit the size of the geographic market to be considered, she was unable to indicate how much uncontracted capacity would be necessary in order for her to broaden her geographic market definition.[15] In any event, the position taken by Ms McConihe and Mr. Stauft ignores the fact that there is always transportation capacity available in the

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[10] EEA Study, Union Evidence, Exhibit C, Appendix B, p. 40; Navigant Consulting Study, Enbridge Gas Distribution Evidence, Exhibit E, Tab 3, Schedule 1, p. 8

[11] 4 Tr. 26-27

[12] Exhibit F, Tab 3, Schedule 1, p. 10; 7 Tr. 83-84

[13] Exhibit F, Tab 3, Schedule 1, pp. 9-10

[14] 4 Tr. 29; at 4 Tr. 31-33, Mr. Henning explained how EEA's GMDFS model has been widely used and cited by federal and state regulators in the United States, and perhaps also in Canada

[15] 8 Tr. 205-206: in answer to the last in a series of questions on this subject at 8 Tr. 208-209, Ms McConihe appeared to suggest that the amount of firm uncontracted transportation that would be necessary is the same amount as is held by Ontario marketers who have storage in the United States. If this is the case though, then one wonders why there is any concern about transportation availability since the evidence in this case has made it clear that transportation or other capacity in the hands of marketers is available for use by end-use customers if a price can be agreed upon

secondary market which provides access from Michigan and other markets into Ontario. Indeed, while Mr. Ratra (who collected the data used to support Ms McConihe's report) confirmed that his inquiries of available capacity were confined to the primary market and that he did not speak with marketers at all[16], Ms McConihe did speak with a marketer (later identified as BP) who "was anxious to make sure that I understand that the secondary market is extremely active and that there are ways that storage customers can get around the issue of pipelines in the US being fully subscribed".[17] The position taken by Ms McConihe and Mr. Stauft also ignores the fact that gas can be transported into Ontario through other means such as backhaul, which itself is available at least on the secondary market.[18]

In the Company's submission, the real-world experience of actual market players provides strong support to the conclusion that the broader storage market around Dawn "communicates" and the storage market at Dawn is workably competitive. Set out below is a sampling of the evidence about this issue provided during the hearing.

Gaz Métro is Union's largest ex-franchise storage customer.[19] Gaz Métro intervened in this proceeding because it is concerned about the potential "claw back" of its access to Union storage under certain outcomes.[20] During the course of its evidence, though, Gaz Métro made clear that every time that its storage contracts with Union expire, it considers its competitive options and looks at what alternatives exist and at what cost. It also goes to marketers to see what they may offer.[21] Gaz Métro's evidence is that there are other options available to meet its needs, in addition to Union, and that the pricing of these other options is competitive with Union's pricing.[22] Gaz Métro made it clear that some of the options may come from Michigan or other locations (either directly or through marketers).[23]

Representatives of BP attended at the hearing to provide evidence, at the Board's invitation, about the experience of a marketer in Ontario. During his

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[16] 8 Tr. 69-70

[17] Exhibit J8.3

[18] 4 Tr. 172-175

[19] 10 Tr. 58

[20] 10 Tr. 58

[21] 10 Tr. 115-116

[22] 10 Tr. 79

[23] 10 Tr. 85-86

testimony, Stephen Acker, the Director of Marketing and Origination for BP in eastern Canada, spoke extensively about the competitive market for storage and storage-like services at Dawn. Mr. Acker confirmed that BP holds transportation and storage accounts, both in its own name and under management for third parties, in Ontario and in Michigan.[24] Mr. Acker also explained that, at certain times, storage held by BP in Michigan or in the Chicago area may be used to serve the Ontario market.[25] Mr. Acker gave an example of a case where BP was able to offer services to a Union customer to replace the ex-franchise storage contract the customer had held with Union:

> BP used its own suite of assets, at that time, which consisted of its access to the financial, the physical, natural gas markets; its suite of pipe capacity into and out of the Dawn area; and exfranchise storage accounts we held in other jurisdictions. It's probably of particular interest to the Board to know that we did not hold and did not use any access to Union's storage in order to offer this service.[26]

In addition, Mr. Acker indicated that BP's experience in recent open seasons for Union storage offerings is that the successful bidders have paid more for Union storage than BP and that BP has then been able to acquire service from other parties that provided "almost identical capability at a lower price".[27]

A number of witnesses also spoke about arrangements entered into by utilities and other large customers in the northeast of the United States which demonstrate the availability of storage and transportation into and through Ontario.[28] Certain customers such as Southern Connecticut, Connecticut Natural Gas and Yankee Gas have entered into ten year transportation contracts with TransCanada PipeLines and Union to move gas from Dawn to the United States border, and then went to the market to buy gas. Mr. Acker elaborated on the arrangements entered into by these companies in the following testimony:

> And they had the option of buying gas at Dawn. They had the option of buying gas further upstream. They had the option of purchasing storage from Union at Dawn. They had the option of purchasing storage further upstream in Michigan. Those particular companies chose to bypass Dawn as a storage location and contracted with Vector, and did subsequently contract with Washington 10 to acquire storage services and transportation away from that facility, and then through the Dawn hub.
>
> ...
>
> But getting back to your question about Union's storage, those particular well-

[24] 13 Tr. 23

[25] 13 Tr. 52

[26] 13 Tr. 22

[27] 13 Tr. 61

[28] See, for example, 1 Tr. 73-74 and 4 Tr. 50-53

> seasoned storage purchasers, being exfranchise LDCs, chose not to buy Union storage but chose to buy storage further upstream. That being said, some northeast LDCs have chosen to buy Union storage, and some have chosen to let theirs expire.[29]

This experience of American utilities shows a number of things. It demonstrates that sophisticated purchasers and users of storage see Michigan as competitive with Dawn, even with the additional transportation costs involved. As Mr. Reed testified, "[t]hey chose an alternative that was Michigan-based storage over Ontario storage, because, as it turned out, that was cheaper. That should tell us something about how competitive Michigan storage is vis-à-vis Ontario storage."[30] This experience of American utilities also suggests that there must be available transportation, at least for these customers, from Michigan to Dawn.[31] Thirdly, it shows that there are large amounts of gas flowing through Ontario that could be available to Ontario customers for displacement or exchange transactions.

Enbridge Gas Distribution's own experience reviewing responses to its request for proposals ("RFP") for the provision of storage services to meet the Company's needs has also confirmed the existence of a competitive storage market at Dawn.[32] The RFP requested that parties bid to provide at least 5 Bcf of storage, with Enbridge Gas Distribution delivering and receiving the stored gas at Dawn.[33] The Company received responses from six bidders, some of which are marketers and at least one of which (Bluewater Gas Storage, LLC) is in Michigan.[34] The Company's evidence is that the bids showed that some alternatives were priced competitively with Union.[35]

The conclusion that the market for storage at Dawn is workably competitive is amplified when one examines a product market for storage that includes more than physical storage. As Mr. Reed testified, storage is a means to an end, not an end in itself.[36] Specifically, as was explained on a number of occasions

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[29] 13 Tr. 42 and 43

[30] 4 Tr. 178

[31] This was also discussed by the Union witness panel at 4 Tr. 50-53

[32] Enbridge Gas Distribution Undertaking #56; the Company's experience with its Stagecoach contract where it obtained storage in New York State that could be delivered into its Central Delivery Area for ten days each winter is another example of a competitive storage option outside Ontario available to an Ontario customer (discussed at 7 Tr. 127-129 and 4 Tr. 173-174)

[33] Exhibit K7.11

[34] Exhibit K7.11

[35] 7 Tr. 78

[36] 4 Tr. 181

during the hearing, the function of storage is to allow a party to have gas delivered at one time and used at a different time.[37] With this in mind, when examining the competitiveness of the storage market, it is logical to look at the product market for storage as including a number of substitutes that can be used in the same way as physical storage. The Federal Energy Regulatory Commission ("FERC" or the "Commission") recognized this in its recent Order 678, which modified the test for assessing whether a storage provider has market power by allowing storage alternatives to be considered in addition to physical storage.[38]

During the course of the hearing, the nature and availability of storage substitutes such as commodity sales for peaking, swaps, exchanges, displacement, delivery/redelivery service and financial instruments were discussed at length.[39] While many of these storage substitute services are not available directly from storage providers, they are available on the secondary market. Dawn is an important hub for this secondary market. During his testimony, Mr. Acker of BP asserted that the secondary market around Dawn is "deep and liquid" and that "BP has never been frustrated in either being able to sell gas or to buy gas at the Dawn hub for any reasonable volume, for any reasonable amount of time".[40] In response to a follow-up question from the Board panel, Mr. Acker explained that the amount of gas traded at Dawn each day is a multiple of the volume that actually passes through Dawn, such that particular gas molecules (which can only be burned once) may actually be traded several times.[41] Given the level of trading activity and the number of active gas marketers operating at Dawn[42], the fact that a broad range of storage substitutes are readily available at Dawn is not surprising.

The Company submits that, taken together, the evidence in this proceeding clearly establishes that the gas storage market at Dawn, Ontario is part of a larger market that includes at least Michigan and other nearby jurisdictions.[43]

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[37] See, for example, 7 Tr. 53 and 4 Tr. 59

[38] Exhibit J4.3

[39] See, for example, 13 Tr. 20, 34-35, 41-43 and 50; 4 Tr. 58-59; 5 Tr. 39-40 and 150; 7 Tr. 178 and 10 Tr. 86-87

[40] 13 Tr. 16 and 19; see also 1 Tr. 77-78

[41] 13 Tr. 33-34

[42] See, for example 10 Tr. 116 and 13 Tr. 39-40

[43] This is consistent with a similar finding made by the FERC in the recent WPS-ESI Gas Storage, LLC case, which found that the relevant geographic market included Michigan and parts of Indiana, Illinois, Iowa and Ontario: FERC Docket No. C04-80-000, 108 FERC 61,061, discussed at Exhibit E, Tab 3, Schedule 1, p. 9

The gas storage market in this larger geographic area is subject to competition sufficient to protect the public interest.

FERC Decisions

A considerable amount of evidence was given during this proceeding about decisions of FERC that address rates for gas storage services.[44] The decisions of FERC that have attracted attention are those where FERC has considered whether or not to approve market-based rates for storage services. These decisions, of course, are not in any way binding on the Board and, further, the legislation governing FERC does not contain a forbearance provision like subsection 29(1) of the OEB Act.[45] Nevertheless, the experience of FERC is illuminating, particularly insofar as it allows the Board to avoid pitfalls that have been encountered by another regulator. Enbridge Gas Distribution submits that an important lesson to be learned from the experience of FERC is that an overly restrictive approach to issues of market power in gas storage cases will lead to undesirable consequences.

Simply put, FERC's recent Order 678 amounts to a recognition that, in future, FERC's approach to the assessment of market power in gas storage cases should be less restrictive. This point was made in the following testimony by Mr. Reed summarizing the impetus for Order 678:

> It really stems from the over-arching purpose that FERC had when they issued the rule, and that was to encourage new entry for gas storage providers in the United States where the perspective of FERC has been that storage has not kept pace with overall gas demand and that its policies on market-based rates may have in fact been an impediment to the development of additional storage.[46]

The Chairman of FERC stated, in relation to Order 678, that the Commission acted to reduce price volatility in natural gas markets and to provide greater assurance of peak demand being met by encouraging expansions in natural gas

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[44] Parties also relied on other documents issued by FERC. Mr. Stauft, for example, interpreted a FERC "Rate Design Policy Statement" to mean that a provider of storage services has market power if it can sell those services at a price that exceeds regulated cost-based rates by 10% or more: Exhibit. X.8.1, pp. 17-8 and 33-34. Unlike situations dealt with by FERC, Ontario has an observable competitive-market rate and such a competitive-market rate is always the first choice for a threshold: Exhibit F, Tab 3, Schedule 1, pp. 13-18. Enbridge Gas Distribution submits that no weight should be given to Mr. Stauft's interpretation of the FERC policy statement because, in the Ontario context, it is clear that an ability to sell storage services at more than 10% above cost-based rates has nothing to do with market power

[45] 4 Tr. 208-9

[46] 4 Tr. 165

storage capacity.[47] This statement indicates that the purpose of Order 678 is to encourage development of gas storage, because of the role storage plays both in meeting peak demand for gas and in reducing volatility of the price of gas.

The need for additional storage to meet peak demand was addressed in the written evidence of Concentric Energy Advisors. This evidence referred to a 2003 study by the National Petroleum Council which projects a need for 700 Bcf of incremental gas storage capacity for North America by 2025, including 54 Bcf of incremental capacity in Eastern Canada.[48] The role of storage in managing natural gas price volatility was canvassed with the Board staff expert witness. Ms McConihe confirmed that the issue of price volatility has moved centre stage in terms of public policy in the gas world.[49] She agreed that more gas storage is desirable for the purpose of managing price volatility[50] and that it should be an important public interest consideration for the Board to consider the effects on price volatility of increased storage availability to Ontario consumers.[51]

In her oral testimony, Ms McConihe also agreed that the FERC decision in the *Red Lake* case left the people of Arizona in the worst of all worlds, particularly insofar as price volatility is concerned.[52] Following the *Red Lake* decision, Congress intervened, "adding momentum to efforts already underway at the Commission to adopt policy reforms [to encourage storage development]",[53] and FERC came forward with a new approach that is less restrictive. FERC crafted Order 678 very deliberately to encourage development of market area storage.[54] Mr. Reed testified that, with FERC's new rule, it is quite clear that the United States is poised to encourage storage development. He went on to add the following comments in this regard:

> I would hate to see, simply by virtue of regulation, all of that development occurring in Michigan or in New York rather than in Ontario where, in fact, the formations, the geology and the market access may be more favourable to have it done here, but

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[47] 8 Tr. 212

[48] Exhibit X7.1.2, p. 15

[49] 8 Tr. 212-3

[50] 8 Tr. 182

[51] 8 Tr. 214

[52] 8 Tr. 218

[53] Exhibit J4.3, p. 2

[54] 8 Tr. 215

> unfortunately the regulatory regime is more favourable someplace else.[55]

Enbridge Gas Distribution therefore submits that the Board should not take guidance from FERC decisions that apply a narrow approach to the assessment of market power. It would not be in the public interest for Ontario to follow FERC decisions that apply a particular approach to the assessment of market power, when FERC itself has decided to move away from that approach in order to encourage development of storage.

CRTC Decisions

Unlike FERC, which does not make forbearance decisions, the Canadian Radio-television and Telecommunication Commission ("CRTC") has vast experience in this area. Since 1994, the CRTC has forborne from regulating many telecommunications services[56] and it has issued more than 100 decisions and orders related to forbearance.[57] It was acknowledged by Mr. Stauft, for example, that no Canadian regulator has more experience with forbearance than the CRTC.[58]

Enbridge Gas Distribution's pre-filed evidence explains how the Board can look to the CRTC's approach to forbearance as a model for the appropriate analytical framework. It is submitted that the CRTC experience also provides a model for the benefits that can be achieved from forbearance.

There is a striking similarity between the objectives that the Board has enunciated in the context of the Natural Gas Forum and the objectives that have been established by the CRTC. The Board's report of March 30, 2005 entitled *Natural Gas Regulation in Ontario: A Renewed Policy Framework* concluded that the regulatory framework must meet the following criteria:

- Establish incentives for sustainable efficiency improvements that benefit customers and shareholders
- Ensure appropriate quality of service for customers

[55] 5 Tr. 181-2

[56] Exhibit E, Tab 2, Schedule 1

[57] 6 Tr. 12-13

[58] Technical Conference May 18, 2006, Tr. 197

- Create an environment that is conducive to investment, to the benefit of customers and shareholders.[59]

Although stated in a slightly different order, these objectives match very closely with those identified by the CRTC, which are as follows:

- To render reliable and affordable services of high quality, accessible to both urban and rural area customers

- To foster competition in the Canadian telecommunications markets

- To provide incumbents with incentives to increase efficiencies and to be more innovative, and with a reasonable opportunity to earn a fair return for their Utility segments.[60]

The experience of the CRTC shows how forbearance can lead to success in meeting objectives such as these. Specifically, the CRTC has concluded that the combination of competitive market forces and forbearance from regulation has provided benefits which include reducing regulation, promoting innovation and ensuring that economic resources are put to their most productive use.[61] Enbridge Gas Distribution submits that the evidence in this case supports the conclusion that similar benefits can be expected as a result of forbearance from regulation of rates for gas storage.

A number of witnesses testified that forbearance from regulation of rates for gas storage will encourage new storage development.[62] As well, the Board can expect that, by facilitating the provision of storage services in the competitive market, forbearance will foster creativity and innovation. The innovation that occurs in competitive markets for natural gas services was discussed, for example, by Mr. Reed, who testified that:

> ...we've probably seen half a dozen major players come into the market and offer ... supply management services.
>
> It really is a testimonial to the fact that when you put all of these into a much larger portfolio ... you really have the flexibility to achieve a lot more in terms of exchange displacement and

[59] Exhibit E, Tab 2, Schedule 1, pp. 3-4

[60] Exhibit E, Tab 2, Schedule 1, p. 4

[61] Exhibit E, Tab 2, Schedule 1, p. 20

[62] See, *e.g.*, 14 Tr. 134-5 (Mr. Grant) and 8 Tr. 187 and 220 (Ms McConihe)

> providing service to markets that are – in a very creative and innovative way.[63]

Enbridge Gas Distribution submits that forbearance from regulation of rates for gas storage will facilitate and promote the provision of gas storage services (or equivalent services[64]) by competitive market participants who will bring innovation and creativity to these offerings.

Further, the evidence in this case indicates that market pricing of energy services will contribute to efficient outcomes. As Mr. Reed stated in his testimony, the concept of allocative efficiency holds that markets produce the right results, in terms of supply and demand, when those that value a service or product most highly are those that receive it.[65] Mr. Reed said that FERC very definitely views allocative efficiency as a positive goal and he explained how, when FERC required pipeline companies to unbundle transportation and storage services, the result was that customers chose a different mix of services because they saw separate and more accurate price signals for each component.[66]

Enbridge Gas Distribution therefore submits that the benefits achieved by the CRTC as a consequence of its forbearance decisions provide a useful model for the potential benefits of forbearance from economic regulation of gas storage. These benefits include: (1) reducing regulatory burden; (2) encouraging provision of services in competitive markets where innovation is more likely to occur; and (3) promoting efficient use of resources by allowing services or products to be acquired by those who value them the most. Of course, all of these favourable impacts are in addition to the benefit of encouraging new gas storage development.

The Transitional Proposal

Notwithstanding these benefits of forbearance, Enbridge Gas Distribution recognizes that ratepayer representatives are legitimately concerned about potential rate impacts of full forbearance from economic regulation of gas storage. These potential rate impacts do not in any way suggest that there is something wrong with the prices for storage services produced by competitive

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[63] 5 Tr. 173

[64] Mr. Acker of BP Canada considered it incorrect to refer to a storage-like service, that does not actually involve any physical storage, as a storage service: 13 Tr. 73. He referred to BP Canada's storage-like service as delivery/re-delivery and he confirmed that it is not necessary for BP Canada to hold storage anywhere in order to conduct delivery/re-delivery business: 13 Tr. 34-5 and 54

[65] 5 Tr. 129

[66] 5 Tr. 130-1

forces; on the contrary, the reason for the potential rate impact is that historical cost-based rates for storage services have been "suppressed" below the true value of those services. The effect of rates for storage services being suppressed at such a low level is to weaken the cost incentive for customers to prudently manage their use and consumption of this valuable economic resource. In this regard, Mr. Reed drew an analogy to rent controls, when he gave the following evidence:

> ...when you remove rent control from pricing an apartment, if the price doubles, that doesn't mean the landlord has market power. It means that, in that case, regulation has been suppressing the price far below the marketplace with all of the ill effects of suppressing the price far below the market price.[67]

Enbridge Gas Distribution recognizes, however, that the cost incentive for prudent use of gas storage is not clearly transmitted to customers who acquire storage services bundled together with other services. In its pre-filed evidence, the Company accepted that, in order for the true value of the highly competitive storage marketplace to reach all end use customers, they must first make an informed choice to unbundle the storage component from their bundled rate.[68] The Company proposed an "exemption"[69] for in-franchise customers from rate forbearance at this time. Under this exemption, the Board would forbear from economic regulation of all new storage capacity and deliverability, effective in the 2007 Test Year.[70] The cost of future increments of storage capacity and deliverability at market prices, as well as the storage acquired from Union at market prices beginning in April 2006, would be rolled in with cost-based rates for the capacity and deliverability now provided from existing Tecumseh facilities. Over time, as increments of storage are added at market prices, the rolled-in cost of storage services would move in the direction of the market price.

Enbridge Gas Distribution submits that its proposal is extremely well-matched to the circumstances that have been disclosed in the evidence in this case. Because the Company does not own sufficient storage to meet the needs of its in-franchise customers, it is already meeting some of those needs through the acquisition of storage in the competitive market. The price of these storage services acquired in the competitive market is rolled in with the cost of the storage services provided from the Company's existing facilities. The Company's

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[67] 5 Tr. 23

[68] Exhibit E, Tab 1, Schedule 1, p. 8

[69] Enbridge Gas Distribution submits that the Board's power under subsection 29(1) of the OEB Act to refrain from regulation "in whole or in part" provides ample authority for such an "exemption"

[70] Exhibit E, Tab 1, Schedule 1, p. 10

proposal builds on the current storage-acquisition regime by rolling in, on a similar basis, future increments of storage capacity and deliverability at market prices. The proposal serves many purposes, including the following:

- it recognizes that there is sufficient competition to protect the public interest in the "ex-franchise" market where Enbridge Gas Distribution acquires storage services;
- it recognizes that the value of the competitive market for storage does not fully reach bundled in-franchise customers who are potential direct purchasers of the services, but who are currently purchasing bundled services;
- it means that the Board need not be concerned about issues raised by witnesses like Mr. Stauft which relate to competition at the burner tip and the problems of market rates for bundled services;[71]
- it allows the Board to adopt a regulatory framework that reflects the factual circumstances of bundled customers, while at the same time forbearing in the market area where storage services are purchased and sold in a competitive marketplace;
- it means that the full rate impact of forbearance from regulation of storage rates will not occur unless and until the Board decides in some future case that full forbearance is appropriate in the circumstances which exist at that time;
- it has a smoothing effect on forbearance rate impacts as the cost of storage acquired at market prices is blended with the cost-based rates for capacity and deliverability now provided from existing Tecumseh storage facilities;
- to the extent that, as Enbridge Gas Distribution contends, full forbearance at the burner tip is the ultimate end state, it produces a measured transition to this end state; and
- it encourages new storage development in Ontario, including both enhancement of existing storage facilities and development of new storage reservoirs, by addressing the current mis-match between the risks

[71] 9 Tr. 184 and 213

of storage development and the returns allowed to regulated distribution utilities.[72]

For all of these reasons, Enbridge Gas Distribution submits that the Board should forbear from economic regulation of all new storage capacity and deliverability, effective in the 2007 Test Year.

Transactional Services

As a result of the above, the Company seeks a forbearance Order, exempting the costs, revenues, business activities and rates associated with transactional storage services from the Company's regulated operations.

Transactional storage services include gas loans, park and loans, released storage and other off-peak transactions.[73] The Company's transactional services, including transactional storage services, have been sold at market prices, with the approval of the Board, since at least as early as the EBRO 492 decision in 1996.[74] In the years since then, there have been debates about the sharing of the proceeds from transactional services, but parties have not taken the position that market pricing is inappropriate or that the transactional services market is not competitive. Indeed, in the Company's F2005 rate case (EB-2003-0203), the Board stated that "[w]hile the physical delivery of gas is a natural monopoly, storage and transactional services could reasonably be provided by competitors".[75] Additionally, in the Enbridge Gas Distribution transactional services proceeding in the summer of 2005 (EB-2005-0244), a variety of issues related to transactional services were examined and all parties reached a settlement where the Company's transactional services offerings would be sold through an auction process, at market prices.[76] The Settlement Proposal that was accepted by the Board in the transactional services proceeding expressly recognized that the goal of the new transactional services methodology was to make assets "available to the market place".[77] In the Company's submission, the history of transactional services activity at market prices over the past ten years

[72] As to the mis-match between risks and returns, see the evidence of Ms McConihe at 8 Tr. 184-7

[73] Exhibit E, Tab 1, Schedule 1, page 9; Exhibit J6.1: EBRO 492 Decision with Reasons, September 10, 1996, at para. 3.3.1; 8 Tr. 15-16

[74] Exhibit J6.1: EBRO 492 Decision with Reasons, September 10, 1996, at paras. 3.3.25 to 3.3.31; see also 6 Tr. 33-34

[75] EB-2003-0203 Decision with Reasons, November 1, 2004, at para. 2.5.2

[76] 6 Tr. 104; EB-2005-0244 Final Order, July 19, 2005

[77] EB-2005-0244 Final Order, July 19, 2005, Appendix A, p. 5

clearly demonstrates that there is a competitive marketplace for transactional storage services in Ontario.[78]

This proceeding is the first time that the Board has considered the interplay between section 29 of the OEB Act and transactional storage services and addressed the question of whether transactional storage services should be subject to forbearance. The question before the Board at this time is different, therefore, from the issues that have been considered when debates about the transactional services sharing methodology have arisen in the Company's rate cases.[79] In the decision from the Company's most recent rate case, the Board itself recognized that the issues to be considered in this proceeding might impact upon the current transactional services sharing mechanism: "[f]inally, the Board would like to comment on the longevity of this sharing mechanism .... The Board encourages Enbridge and the parties to adopt this methodology beyond 2006 unless a change is necessitated as a result of conclusions reached in the Natural Gas Electricity Interface Review".[80]

As outlined above, the storage market at Dawn is subject to sufficient competition to protect the public interest. This satisfies the forbearance prerequisite found in section 29 of the OEB Act. Transactional storage services are a subcategory, or a "class of products or services", within the competitive storage market. This is also consistent with the forbearance requirements in section 29 of the OEB Act. The fact that these particular business activities have been conducted for many years at market prices in a competitive market at Dawn, where there are many buyers and sellers and the Company is just one of a number of active market players, makes it abundantly clear that this class of products or services is subject to competition sufficient to protect the public interest.[81] In these circumstances, Enbridge Gas Distribution submits that section 29 of the OEB Act provides the legal and public interest basis for the Board to issue a decision forbearing from regulating the rates, revenues and costs associated with the Company's transactional storage services.

In order to give effect to this outcome, a number of changes will be necessary through the Company's next rate case in order to remove the revenues and expenses associated with transactional storage services. On the one hand, all of the costs and expenses incurred to provide these services will be removed from the Company's operating and maintenance budget, and on the other hand the

[78] Enbridge Gas Distribution Undertaking #54; Exhibit K6.1

[79] 6 Tr. 74-75; 7 Tr. 101-102

[80] EB-2005-001 Decision with Reasons, at para. 6.2.12

[81] Exhibit E, Tab 1, Schedule 1, pp. 9-10 ; 8 Tr. 28-29; 32-34

revenue forecast will be changed to reflect the fact that transactional storage services revenues will no longer be part of the regulated portion of the Company's business. As explained in oral testimony, there is no need to reduce the Company's storage-related rate base in conjunction with forbearance for transactional storage services.[82]

While the issues related to changes in Enbridge Gas Distribution's cost and revenue forecasts can and will be dealt with in its next rate case, the Company submits that the Board should rule in this proceeding that, from and after January 1, 2007, it will forbear from regulating the rates, revenues and costs associated with the Company's transactional storage services.

High Deliverability Storage

The Company in its evidence described an enhancement of its Tecumseh storage facilities that possibly could be completed in order to enable Tecumseh to offer a high deliverability storage service. As Mr. Grant explained, there are a number of risks and uncertainties associated with any such offering of high deliverability storage by Tecumseh. Mr. Grant testified that:

> One of the key factors, of course, is this question of forbearance, because, in doing this build, we of course are competing at the margin in, we believe, a very competitive marketplace.
>
> ...
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> It is an additionally complex decision for us, though, because there are also a number of risks associated with this build, from our standpoint. Those risks must be well understood before we make any final decisions.[83]

Mr. Grant went on to discuss in greater detail the reservoir risk, drilling risk, well interference risk, re-contracting risk and regulatory risk that must be analyzed before any decision is made to proceed with the storage enhancement project.[84]

As indicated in the testimony of Mr. Grant, one of the key factors bearing on the Company's determination of whether or not to proceed with the Tecumseh storage enhancement project is the question of forbearance. The returns available under distribution cost of service regulation are not commensurate with the risks of the storage enhancement project.[85] It is important to distinguish, though, between the Tecumseh project that may proceed if forbearance is

[82] 6 Tr. 34-36

[83] 6 Tr. 19

[84] 6 Tr. 19-24

[85] 6 Tr. 23

granted and the Enbridge Gas Distribution Rate 316 offering that will be made available as a Board-regulated service whether or not forbearance is granted through this proceeding. That is to say, regardless of whether a forbearance ruling and other factors align so as to support the Tecumseh storage enhancement project, Enbridge Gas Distribution will acquire the necessary services from the marketplace in order to be able to meet in-franchise demand for Rate 316 high deliverability storage.[86] The underpinning services acquired in the market will be purchased at market prices and the costs of making such acquisitions will be included in the rate for Enbridge Gas Distribution's high deliverability storage service. Tecumseh potentially will be a bidder to provide service at market prices to underpin Enbridge Gas Distribution's Rate 316 offering.[87] Even in the event that a forbearance ruling and other factors align such that Tecumseh is able to offer a high deliverability service, however, it is quite conceivable that Enbridge Gas Distribution will acquire services from other sources, given that the non-binding open season for the Tecumseh service was oversubscribed.[88]

The important point to be taken out of all this is that, in any scenario, gas-fired generators will have options to acquire high deliverability storage service. In one possible scenario, Tecumseh will offer high deliverability service at market prices. It will be open to gas-fired generators to bid for this service, but, if they choose not to bid or if they bid unsuccessfully, they can look to Enbridge Gas Distribution for service under Rate 316. In the other scenario, the Tecumseh storage enhancement project will not proceed, but high deliverability service will still be available under Rate 316.

Furthermore, the record of this case confirms that the Board need have no concerns whatsoever about the existence of options to Enbridge Gas Distribution's proposed high deliverability storage service. The Settlement Proposal for issues related to Enbridge Gas Distribution was reached on the basis that there was no certainty as to whether the Rate 316 high deliverability storage service would be offered by the Company. Under Issue 1.6, dealing with Rate 316, the Settlement Proposal states that there is disagreement as to "whether" and "how" the service would be offered, and what pricing would apply. The uncertainty about "whether" the Company will offer the high deliverability storage service is reflected in the next sentence of the Settlement Proposal, which says that "[i]n the event that the Company does offer Rate 316 storage

[86] 14 Tr. 89-90

[87] 14 Tr. 90-1

[88] 14 Tr. 158

service", it is prepared to offer the service using the same nomination windows as agreed to for Rate 125.

The same uncertainty is reinforced in paragraph (b) of the settlement described under Issue 1.5 in the Settlement Proposal. Issue 1.5 deals with the methodology for allocating storage to gas-fired generators at 1.2% deliverability. In paragraph (b) under Issue 1.5, the Settlement Proposal plainly states that the Settlement Proposal does not address "whether" or "when" the Company might offer high deliverability storage services using its own assets. Paragraph (b) also states that, in the event that the Company does not offer the service using its own assets, but customers request the service, the Company will use "reasonable efforts" to procure the service from third parties.

Notwithstanding the uncertainty in the Settlement Proposal about whether high deliverability storage would be offered by Enbridge Gas Distribution, a storage allocation methodology based on assumed availability of 10% deliverability was agreed to by, among others, APPrO, PEC, Sithe and TCE (for ease of description, this group will be referred to herein as "the generators"). This can be seen from the complete settlement of Issue 1.5. The allocation methodology for base level deliverability agreed upon in the context of Issue 1.5 includes a determination of "space demand", that is derived by multiplying the maximum hourly demand by 17 and then dividing by 10%. As stated in paragraph (h) under Issue 1.5 in the Settlement Proposal, the maximum hourly demand over 17 hours was divided by 10% because an assumption was made that "high deliverability storage at 10% is available to meet the gas fired generator's needs".

In short, the settlement of Issue 1.5 was agreed to by the generators on the basis of an assumption that 10% deliverability will be available, even though the Settlement Proposal gives no certainty that Enbridge Gas Distribution will provide such deliverability. Paragraph (a) under Issue 1.5 in the Settlement Proposal describes more fully the nature of the assumption that was made about the availability of high deliverability storage. This paragraph says that the storage space requirement to meet gas fired generators' intra day balancing needs is based on the assumption that high deliverability storage is available "to those customers in the market". This paragraph speaks of high deliverability storage that is available "to those customers", not to a utility like Enbridge Gas Distribution. Further, this paragraph speaks of high deliverability storage that is available "in the market", not from Enbridge Gas Distribution. Paragraph (a) therefore makes clear that the determination of "space demand" in the methodology for establishing base level deliverability assumes the availability of 10% deliverability to generators from market sources other than Enbridge Gas Distribution. In order to reach agreement on a storage allocation methodology

that assumes the availability of 10% deliverability from the market, the generators must have been confident about the ability of the market to deliver appropriate services.

This confidence about the ability of the market to deliver appropriate services to the generators was revealed in the testimony of the generators' representatives at the Technical Conference on May 16, 2006. Ms Duguay asked a question about APPrO's proposal in the event of a constraint on provision of high deliverability service to in-franchise customers.[89] At the conclusion of his answer to this question, Mr. Wolnik said that the generators would pay the direct costs or incremental costs to deliver that service, but that, if the price gets too high, "we'll look for other solutions collectively".[90] Similarly, during the Technical Conference on May 17, 2006, Mr. Cramer said, in respect of high deliverability storage service, that "it's going to be available in some form from some source on some sort of cost basis".[91]

The generator's confidence in the ability of the market to deliver appropriate services is confirmed by other evidence as well. As stated by Mr. Charleson:

> ...I think one example we can look at is Sithe, where they entered into a contract in the absence of all of these services that are being discussed before the Board right now being available. And they obviously have expectations that they have means of being able to do the load balancing and managing that plant by the nature of entering into a contract to provide services.[92]

The evidence is that, if built, the Tecumseh storage enhancement project will not be complete until 2008[93], but no concerns were expressed about the availability of appropriate services for generators in the meantime.[94]

Enbridge Gas Distribution therefore submits that, if forbearance in respect of the Tecumseh high deliverability service is granted, and if other factors support a decision to proceed with the storage enhancement project, Tecumseh will be in a

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[89] Technical Conference, May 16, 2006, Tr. 225

[90] Technical Conference, May 16, 2006, Tr. 226

[91] Technical Conference, May 17, 2006, Tr. 31

[92] 14 Tr. 87-8

[93] Exhibit B, Tab 3, Schedule 2, pp. 22-24

[94] Not only were no concerns expressed, but, on the contrary, see testimony at 10 Tr. 172, lines 8-9 confirming that "it's something that can be done in some way" and at 10 Tr. 173, lines 9-10 indicating that "if it's available to Enbridge, it's also available to generators to go out and get, that may be true"

position to offer a service that will represent an additional option for gas-fired generators above and beyond other high deliverability storage options available to them. Consistent with its proposal that the Board should forbear from economic regulation of future increments of storage capacity and deliverability effective in the 2007 Test Year, the Company submits that the Board should forbear from rate or economic regulation of Tecumseh's proposed high deliverability storage service.

C. Rate Issues

Rate 125 and revenue deficiency impacts of customer migration to unbundled rates (Issue 1.1)

Rate 125

Following the approval of the Settlement Proposal related to Enbridge Gas Distribution's rate offerings, the remaining issue related to Rate 125 is whether it should be limited to new loads only.[95] Through the Settlement Proposal, IGUA, AMPCO and CME reserved their right "to request that the Board limit the availability of Rate 125 to new loads only". As described below, the Company submits that Rate 125 should continue in the form that was previously approved by the Board, such that it is available to all customers (existing or new) who meet the 600,000 m^3/day volume threshold. The Company therefore seeks to have a draft Rate 125 Rate Schedule similar to the form that was filed as Exhibit S1.3A (Rate Sheet with heading "To any applicant who enters into a service contract with the Company") approved by the Board. A copy of the draft Rate 125 Rate Schedule, with two changes from Exhibit S1.3A (as a consequence of the approval of the Settlement Proposal and of changes to Rate 316) is attached as Appendix A.[96]

The Board first approved Rate 125 in the RP-1999-0001 case.[97] The RP-1999-0001 decision indicates that IGUA, among others, supported the introduction of Rate 125.[98] In that case, the Board approved the new Rate 125 "to respond to the emerging opportunities for natural gas fueled cogeneration and power

[95] Settlement Proposal, Exhibit S1.1, section 1.1(r)

[96] The changes are found in the definition for "Aggregate Delivery" and in the "Effective Date" section

[97] excerpt from the Decision with Reasons from that case is found at Tab 6 of Exhibit S1.6

[98] RP-1999-0001 Decision with Reasons, at para. 6.5.5

generation".[99] The new Rate 125 was to be available to all customers who met certain conditions.

At the time that the new Rate 125 was approved, there was no distinction between new and existing customers and the rate was intended to be available for all customers, new and existing.[100] In fact, in the RP-1999-0001 decision, the Board recognized that there was one existing customer which met the applicability criteria for the rate, but which was not expected to move to the new rate until it made more economic sense.[101] This customer, which was identified during the hearing as TransAlta, is a power generator.[102] As recognized in paragraph 1.1(q) of the Settlement Proposal, after a number of years of choosing not to migrate, this customer is now forecast to move to the redesigned Rate 125. One reason that Rate 125 will now become attractive to TransAlta is that the impact of the phase-out of the upstream transportation credits, agreed to in the Company's RP-2003-0203 case, will be fully implemented by 2007, so historic benefits associated with being a bundled customer will disappear.[103] Once that occurs, it will make economic sense for TransAlta to move to Rate 125.

The history of Rate 125, described above, reveals that it was never intended to be applicable to new customers only. It is not simply a "bypass competitive" rate, designed to attract new customers who might otherwise connect directly to upstream transporters.[104] While it is true that the "billing contract demand" feature of Rate 125 is designed to be "bypass competitive", that feature is expressly limited to new customers only.[105] The other features of Rate 125 are designed to meet the needs of power cogenerators and generators and other qualifying customers, regardless of whether they are new or existing customers, and regardless of whether they are bypass candidates or not.[106]

The Company recognizes that making unbundled rates (Rate 125 or Rate 300) available to TransAlta (as has always been contemplated) will impact upon the other customers remaining in Rate 115, the rate class from which TransAlta will

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[99] RP-1999-0001 Decision with Reasons, at para. 6.5.1

[100] 11 Tr. 18 and 69

[101] RP-1999-0001 Decision with Reasons, at para. 6.5.4

[102] 11 Tr. 68-71

[103] 14 Tr. 124

[104] 14 Tr. 127

[105] Exhibits S1.2 and S1.3; 14 Tr. 127

[106] 14 Tr. 127

migrate.[107] This impact results from the fact that TransAlta is cheaper to serve than the average Rate 115 customer and has effectively subsidized the rest of the rate class. Thus, when TransAlta leaves the rate class, the remaining Rate 115 customers will have to pay a higher average cost for their service.[108] This impact on Rate 115 customers will be the same regardless of whether TransAlta moves to Rate 125 or to Rate 300 because, in either event, Rate 115 customers will no longer share the benefits of having this large low cost customer as part of the rate class. In other words, the impact on Rate 115 customers as a result of TransAlta's migration to unbundled rates will not be avoided by limiting Rate 125 to new loads only.[109]

In all the circumstances, the Company submits that there is no proper justification to limit the availability of Rate 125 to new loads only.

Revenue deficiency impacts of customer migration to unbundled rates

The Company recognizes, as seen in paragraph 1.1(q) of the Settlement Proposal, that the forecast migration of 20 customers to the redesigned Rate 300 will result in distribution rate increases on the rates from which those customers migrate (which are Rates 100, 110 and 115). These increases, which are in addition to the impact of TransAlta's forecast migration to Rate 125, will occur because the customers who are likely to migrate are effectively subsidizing the rate classes from which they will move.

During the testimony about the "Threshold Issue" and about Enbridge Gas Distribution's proposed Rate 125, there was discussion about whether and how the migration impact on Rates 100, 110 and 115 might be mitigated or "smoothed". In its decision on the "Threshold Issue", the Board indicated that "we are not making a decision with respect to the smoothing at this point. It's our understanding that there will be further submissions made in this proceeding with respect to that aspect".[110] While the Company does not have a preference for whether smoothing is used or not, the Company believes that it is important for the Board, in this case, to indicate if smoothing should be used.[111] Should the

[107] Even if Rate 125 was limited to new loads only, there is no such limitation on Rate 300, so TransAlta could migrate to that Rate

[108] 11 Tr. 13-14 and 16

[109] 11 Tr. 19 and 39-40

[110] 11 Tr. 129

[111] 11 Tr. 76

Board decide that smoothing is appropriate, then the Company submits it should be implemented in the manner set out below.

During the hearing, the Company explained that, based on current migration forecasts, the total distribution rate impacts on Rates 100, 110 and 115 as a result of migration in 2007 would be 2%, 1% and 38% respectively.[112] For Rate 115 customers, this 38% distribution rate impact would translate to an overall bill impact of 7% (excluding commodity) or less than 1% (including commodity).[113]

In order to limit the impacts on Rate 115, the Company also advanced a smoothing proposal during the hearing. Specifically, the Company suggested an approach whereby the distribution rate increase impact on Rate 115 would be limited to 15%, which would reflect the migration of TransAlta and some additional load from Rate 115. As a result of this smoothing, the distribution rate impact on Rates 100, 110 and 115 would be 3%, 2% and 15% respectively. The corresponding bill impacts, excluding commodity costs, would be 1%, .5% and 2.7%.[114] Therefore, the annual bill impact including commodity will be even less. In its proposal, the Company indicated that "[i]f approved, the proposal to limit the distribution rate impact on Rate 115 to 15% would apply solely to migration related impacts and will be implemented as part of the 2007 Rates Case."[115]

As stated above, the Company believes that it is important for the Board, in this case, to provide guidance about how Rates 100, 110 and 115 will be impacted by customer migration to unbundled rates. This is consistent with the Company's understanding that one of the aims of this proceeding is to establish and set new rates.[116] Assuming that to be the case, then it is logical to indicate the consequential impacts of migration to the new rates on other customer groups.

Additionally, the process for the implementation of unbundled rates agreed to in the Settlement Proposal provides that customers must make a decision, by October 15, 2006, about whether they want to move to Rate 300 in 2007. In the Fall of this year, as part of that process, the Company will provide information to and have meetings with customers in order to allow the customers to evaluate the operational and financial implications of moving to unbundled rates.[117] In order for customers to make informed decisions, they must have proper

[112] Exhibit S1.6, Tab 5 and 11 Tr. 16-17

[113] Exhibit S1.6, Tab 5 and 11 Tr. 16-17

[114] Exhibit S1.6, Tab 5

[115] Exhibit S1.6, Tab 5, page 2

[116] Procedural Order No. 5; see also 11 Tr. 44-45

[117] Settlement Proposal, Exhibit S1.1, section 4(f)

information about the Rates that they are comparing. Given that the Company's F2007 rate case will not have been determined by that time, it is only through this proceeding that the Board can provide an indication of how Rates 100, 110 and 115 will be impacted by customer migration to unbundled rates.

In any event, it is important to note that customers in Rates 100, 110 and 115 will not actually be paying rates that include migration related impacts until the Company's F2007 rate case has been decided.[118] In that case, the Company will present a forecast of migration to the unbundled rates and, based upon that forecast and any other relevant factors, the levels for Rates 100, 110 and 115 that will be paid starting January 1, 2007 will be set. The Company recognizes that the Board Panel determining the F2007 rate case will not be bound by any decision in this case, but given the extent to which the migration impact issue has been canvassed in this proceeding, the Company requests that the Board take this opportunity to provide guidance as to how the migration impacts ought to be allocated.

Rate 316 (Issue 1.6)

Procedural Order No. 2 in this proceeding specified certain "mandatory" evidence (set out in Appendix A to the Procedural Order) that Enbridge Gas Distribution and Union were required to file. The mandatory evidence included a proposed tariff for firm high deliverability service from storage, in respect of which Appendix A went on to say that:

> The rates for the firm high deliverability service from storage will need to reflect the following three scenarios: (1) Current pricing (i.e., the customer has access to cost-based storage in accordance with the current allocation methodology, and market-based storage above that); (2) all storage is priced at cost; and (3) All storage is priced at market prices.

In response to the Board's directions, Enbridge Gas Distribution investigated the possibility of offering a Rate that includes high deliverability service and it developed a proposal for Rate 316. As a result of the Settlement Proposal, and as described in more detail below, the Company's Rate 316 proposal provides an allocation of base level deliverability storage at rolled-in cost along with high deliverability storage at incremental cost to in-franchise gas fired generators. As gas fired generators have requested, the Company's proposal for Rate 316 commits the Company (rather than the generators themselves) to obtain the services necessary to offer high deliverability storage in conjunction with generators' allocation of rolled-in cost based storage.[119] In short, as set out

[118] 14 Tr. 141-145

[119] See, for example, 10 Tr. 167 and 180-181 and Exhibit K10.4, pp. 2-3

below, the Company's proposal for Rate 316 is responsive to the stated needs of gas-fired generators and provides them with an option for high deliverability storage service from the Company, regardless of the outcome of the forbearance issue in this proceeding.

Rate 316 is titled "high deliverability gas storage service". It provides for customers to receive a storage service that is delivered to Dawn with deliverability of up to 10%, depending on the level contracted for by the customer. It also includes an allocation of 1.2% deliverability storage, at rolled-in cost based rates. Through its prefiled evidence, the Company has set out the mechanics and details of the proposed Rate 316.[120] Although APPrO has listed three concerns with the proposed Rate 316, the Company is not aware that any other party takes issue with the nature and operational details of this proposed service.[121]

Section 1.6 of the Settlement Proposal provides, in part, that "[w]hile it appears that parties are supportive of many of the technical aspects of the proposed Rate 316, there is disagreement as to whether and how the service would be offered, and what pricing would apply". The following paragraphs set out the Company's position as to how the Rate 316 service will be offered, and the pricing that will apply.

Through section 1.5 of the Settlement Proposal, parties agreed that gas fired generators were entitled to an allocation of 1.2% deliverability storage at rolled-in cost based rates. The amount of this allocation is to be determined using a new allocation methodology that is applicable only to gas fired generators. The allocation of rolled-in cost based 1.2% deliverability storage can be used for service under Rate 316.[122] Given this agreement reached in the Settlement Proposal which envisages that Rate 316 customers will have an entitlement to an allocation of rolled-in cost based storage, it is necessary to limit Rate 316 to in-franchise customers. Otherwise, all the Company's ratepayers could be burdened by increased rolled-in costs for storage as a result of ex-franchise customers taking service under Rate 316 and requiring the Company to obtain additional 1.2% deliverability storage at market prices to serve those customers.

Given the inclusion of 1.2% deliverability storage at rolled-in cost based rates as part of Rate 316, this Rate will be an in-franchise rate only, and will be subject to regulation under the Company's transitional proposal. As discussed above in the

[120] Exhibit C, Tab 3, Schedules 1-4

[121] Exhibit K10.4, pp. 2-3: items (b) and (c) from APPrO's response are discussed below

[122] Settlement Proposal, Exhibit S1.1, section 1.5

"High Deliverability Storage" section of this Argument, Rate 316 should therefore be looked at differently from the services which would result from the proposed storage build at Tecumseh, which would be strictly high deliverability storage, tailored to the particular needs of each party contracting for that service.

The Company's proposal for the high deliverability storage portion of Rate 316 is that it will be offered at cost, but the Company does not currently have any high deliverability storage. Thus, the costs involved will be the Company's costs of acquiring the necessary services in the market through an RFP process. In his direct testimony, Mr. Charleson described how this process might work:

> Well, since we don't have it, we would obviously have to look to the market to be able to get what is needed. Prior to going to the market, we would obviously look for commitments from customers looking for this 316 service, and with those commitments, we would then look to issue a RFP to the market and look for responses from market participants. These could be storage providers or marketers, again we see there being different alternatives being available.
>
> We would then look to match what we were able to contract for with the commitments that we've had made by the customers interested in this 316 service. As I indicated, I think as it back on day 7 of this proceeding, we have talked with some marketers, and we're reasonably confident that we would be able to acquire what's required to be able to provide this service.[123]

The Company will acquire the services necessary to offer high deliverability storage from marketers, or directly from the owners of those services, such as Bluewater (which is developing high deliverability storage).[124] The services used might include an aggregation of base level deliverability storage, transportation capacity, high deliverability storage from others and physical gas purchases.[125] In addition, the Company is confident that marketers will respond to RFPs and customer demand and use a variety of tools and approaches to offer high deliverability or equivalent service for the Company's use.[126] Assuming that the Company can acquire the services necessary to offer Rate 316, then there is no remaining issue about "whether" the Rate will be offered. Given that the Company will have to acquire the services to offer Rate 316 in the marketplace, the Company is not able to make any commitment to automatic renewal (or roll-over) rights for Rate 316, since the contracts for these services will be for fixed terms and the competitive market price and terms that the Company will commit

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[123] 14 Tr. 89-90

[124] 14 Tr. 109-110

[125] Exhibit K14.1; 14 Tr. 151-152

[126] Exhibit K14.1; 14 Tr. 151-152; as discussed above, gas-fired generators are also confident that they can acquire such services themselves

to for these services will likely change from time to time.[127] The Company does believe, however, that upon the expiry of a Rate 316 contract it will be able to enter into a new Rate 316 contract with an interested customer.

Under both a forbearance and a non-forbearance scenario, the Company will go through the same process to acquire the services needed for the high deliverability portion of the Rate 316 service. Under a non-forbearance scenario, the Company will rely exclusively on third party procurement of these services. Under a forbearance scenario, as set out below, Enbridge Gas Distribution's gas storage group (*i.e.*, Tecumseh) might be one of the bidders into an RFP seeking services for a Rate 316 offering.

The Company's evidence is clear that it will not proceed with its storage build proposal unless forbearance is ordered through this proceeding.[128] In the event that forbearance is ordered, the Company may proceed with the storage build proposal, outside of regulation. As described above in the "High Deliverability Storage" section of this Argument, in a forbearance scenario the Company would be free to sell the service resulting from its storage build to the bidder or bidders offering the most attractive terms. In that case, there could be another source for the services necessary for the Company to offer high deliverability Rate 316 service. As Mr. Charleson explained in examination in chief:

> Under a forbearance scenario, I see there being the potential that Enbridge Gas Distribution would proceed with its build that is being described within the evidence. If that were to occur, I would then see Mr. Grant, or somebody representing those storage operations, potentially bidding in on that RFP I discussed earlier under a non-forbearance scenario. Or, if Mr. Grant was conducting an open season, I could look to bid in on that capacity.
>
> All of this would obviously have to occur with some appropriate controls, in terms of separation and clarity of functions, but really the -- our view is that under a forbearance scenario the storage that Enbridge Gas Distribution would develop if they were to proceed with it would just result in them becoming another bidder for the services that we're looking for.[129]

The Company has conducted a non-binding open season process to evaluate the level of interest in the high deliverability storage that would be created through its proposed storage build.[130] Bidders into that process included

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[127] Exhibit K10.4, p. 3: item (c); similarly, in response to Exhibit K10.4, p. 3: item (b), the Company cannot articulate all of the possible circumstances where an Operational Flow Order might be imposed for Rate 316, since that will depend to some extent on the provisions of the contracts that underpin the services and capacity used to support Rate 316

[128] 14 Tr. 95 and 132

[129] 14 Tr. 90-91

[130] 6 Tr. 19

marketers, gas fired generators and end-use customers.[131] The level of interest shown through the non-binding open season process demonstrated that the Company's offering at market rates would be oversubscribed.[132] There is no assurance, therefore, that the Company's proposed storage build will become part of the services used to offer Rate 316.

Whether or not forbearance is ordered as a result of this proceeding, the pricing for Rate 316 will be the same.[133] Essentially, Rate 316 customers will pay a rate that is based on the costs that the Company incurs to acquire the services necessary to offer the high deliverability Rate 316 service.[134] As seen in the draft Rate 316 Rate Schedule attached as Appendix A, the Company proposes a range rate for the "storage reservation charge". This range rate is intended to be broad enough to recover whatever level of costs the Company may incur on behalf of Rate 316 customers. As it is proposed, the floor for the range rate allows for the recovery of the estimated costs, on a rolled-in (not incremental) basis, that the Company would incur if it were to proceed with the proposed storage build and offer the resulting service to utility customers at a rolled-in cost.[135] Given that the Company does not plan to proceed with this storage build in a cost-based rates environment, and given that even gas fired generators are not advocating rolled-in pricing for high deliverability storage, it is highly unlikely that the actual storage reservation charge for Rate 316 will be as low as the floor. The ceiling for the range rate is an amount that is ten times as high as the floor.[136] This ceiling is high enough that it would accommodate the "top-end cost" of the Company acquiring 10% high deliverability storage capability by aggregating 8 times as much 1.2% deliverability storage.[137]

In order to resolve the outstanding Issue 1.6, the Company is seeking approval of its draft Rate Schedule for Rate 316, which is attached as Appendix B and which reflects the features of the Rate set out in evidence and discussed above.

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[131] 7 Tr. 108-110

[132] 14 Tr. 158

[133] 14 Tr. 91

[134] 14 Tr. 90-92: note that, as Mr. Charleson stated in his testimony, the Company will look for commitments from Rate 316 customers that they wish to take the service before the Company will go to the market to procure the services needed to offer the Rate

[135] Exhibit C, Tab 3, Schedule 1, pp. 7-8

[136] Exhibit C, Tab 3, Schedule 1, pp. 7-8; 14 Tr. 97

[137] Exhibit K14.1 and 14 Tr. 149-151

Draft Rate Schedules

On the last day of the hearing, the Company confirmed that it would file updated draft Rate Schedules for Rates 300 and 315 to reflect the matters agreed upon in the Settlement Proposal.[138] These documents are attached as Appendices C and D, for approval by the Board.

Also attached, as Appendix E, is a draft Rate Rider titled "Balancing Service Rider" which reflects the settlement of the parties as set out at Sections 1.2 and 1.4 of the Settlement Proposal.

Versions of each of the draft Rate Schedules, in blacklined form to show changes from the draft Rate Schedules originally filed in this proceeding, are also included with Appendices A to E.

D. Conclusion

Enbridge Gas Distribution therefore submits that the Board should conclude, as a question of fact, that there is sufficient competition in gas storage services bought and sold at Dawn to protect the public interest. Based on this factual conclusion, subsection 29(1) of the OEB Act requires that the Board refrain, in whole or in part, from exercising any power or performing any duty under the Act in relation to gas storage services traded at Dawn. The gas storage services traded in the competitive market at Dawn include transactional storage services sold by Enbridge Gas Distribution and the Company submits that forbearance should apply in respect of these services.

The Company submits further that the Board should forbear "in part" by allowing an "exemption" for in-franchise customers which recognizes that the impact of competition does not fully reach in-franchise customers who are purchasers of bundled services. Under the Company's exemption proposal, storage capacity and deliverability provided to in-franchise customers from existing Tecumseh facilities (and not sold as transactional services at Dawn) would continue to receive cost-based rate treatment. Forbearance would apply in respect of all new storage capacity and deliverability effective in the 2007 Test Year; future increments of capacity and deliverability, as well as the storage acquired from Union in April 2006, would be rolled-in at market prices with the cost-based storage from the now existing Tecumseh facilities.

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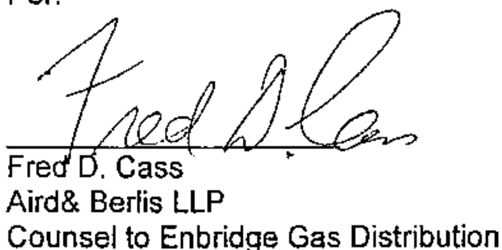
[138] 14 Tr. 96-97

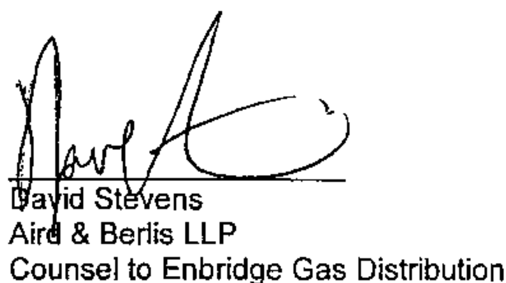
Consistent with this proposal, should Tecumseh's proposed storage enhancement project proceed, the new increment of high deliverability storage service provided as a result of this project would be subject to forbearance and would be sold at market prices. Regardless of the availability of Tecumseh's high deliverability storage service, however, Enbridge Gas Distribution will offer high deliverability storage, as well as an allocation of 1.2% deliverability storage, under Rate 316. Enbridge Gas Distribution will acquire services at market prices (from sources which would possibly, but not necessarily, include Tecumseh) and then offer the high deliverability service to prospective purchasers at a cost which reflects the market prices of the underpinning services.

Enbridge Gas Distribution also submits, for the reasons already given, that the Board should: (1) reject the argument that Rate 125 ought to be limited to new loads only and approve the draft Rate Schedule attached as Appendix A; (B) approve the draft Rate Schedules for Rates 300, 315 and 316 and the Balancing Services Rider (Appendices B to E); and (3) rule, in the manner set out above, on the "smoothing" issue with respect to the impact of customer migration to unbundled rates.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 11th DAY OF AUGUST 2006,

Per:





Fred D. Cass
Aird& Berlis LLP
Counsel to Enbridge Gas Distribution

David Stevens
Aird & Berlis LLP
Counsel to Enbridge Gas Distribution

RATE NUMBER: 125	EXTRA LARGE FIRM DISTRIBUTION SERVICE

APPLICABILITY:

To any Applicant who enters into a Service Contract with the Company to use the Company's natural gas distribution network for the transportation, to a single terminal location ("Terminal Location"), of a specified maximum daily volume of natural gas. The maximum daily volume for billing purposes, Contract Demand or Billing Contract Demand, as applicable, shall not be less than 600,000 cubic metres. The Service under this rate requires Automatic Meter Reading (AMR) capability.

CHARACTER OF SERVICE:

Service shall be firm except for events specified in the Service Contract including force majeure.

For Non-Dedicated Service the monthly demand charges payable shall be based on the Contract Demand which shall be 24 times the Hourly Demand and the Applicant shall not exceed the Hourly Demand.

For Dedicated Service the monthly demand charges payable shall be based on the Billing Contract Demand specified in the Service Contract. The Applicant shall not exceed an hourly flow calculated as 1/24th of the Contract Demand specified in the Service Contract.

DISTRIBUTION RATES:

The following rates and charges, as applicable, shall apply for deliveries to the Terminal Location.

Monthly Customer Charge	**$550**
Demand Charge	
Per cubic metre of the Contract Demand or the Billing Contract Demand, as applicable, per month	**9.2021 ¢/m³**
Direct Purchase Administration Charge	**$50.00**
Forecast Unaccounted For Gas Percentage	**0.3%**

Monthly Minimum Bill: The Monthly Customer Charge plus the Monthly Demand Charge.

TERMS AND CONDITIONS OF SERVICE:

1. To the extent that this Rate Schedule does not specifically address matters set out in PARTS III and IV of the Company's **HANDBOOK OF RATES AND DISTRIBUTION SERVICES** then the provisions in those Parts shall apply, as contemplated therein, to service under this Rate Schedule.

2. **Unaccounted for Gas (UFG) Adjustment Factor:**

   The Applicant is required to deliver to the Company on a daily basis the sum of: (a) the volume of gas to be delivered to the Applicant's Terminal Location; and (b) a volume of gas equal to the forecast unaccounted for gas percentage as stated above multiplied by (a). In the case of a Dedicated Service, the Unaccounted for Gas volume requirement is not applicable.

3. **Nominations:**

   Customer shall nominate gas delivery daily based on the gross commodity delivery required to serve the customer's daily load plus the UFG. Customers may change daily nominations based on the nomination windows within a day as defined by the customer contract with TransCanada PipeLines (TCPL) or Union Gas Limited.

   Schedule of nominations under Rate 125 has to match upstream nominations. This rate does not allow for any more flexibility than exists upstream of the EGD gas distribution system. Where the customer's nomination does not match the confirmed upstream nomination, the nomination will be confirmed at the upstream value.

   Customer may nominate gas to a contractually specified Primary Delivery Area that may be EGD's Central Delivery Area (CDA) or EGD's Eastern Delivery Area (EDA). The Company may accept deliveries at a Secondary Delivery Area such as Dawn, at its sole discretion. Quantities of gas nominated to the system cannot exceed the Contract Demand, unless Make-up Gas or Authorized Overrun is permitted.

RATE NUMBER: **125**

Customers with multiple Rate 125 contracts within a Primary Delivery Area may combine nominations subject to system operating requirements and subject to the Contract Demand for each Terminal Location. For combined nominations the customer shall specify the quantity of gas to each Terminal Location and the order in which gas is to be delivered to each Terminal Location. The specified order of deliveries shall be used to administer Load Balancing Provisions to each Terminal Location. When system conditions require delivery to a single Terminal Location only, nominations with different Terminal Locations may not be combined.

The Company permits pooling of Rate 125 contracts for legally related customers who meet the Business Corporations Act (Ontario) ("OBCA") definition of "affiliates" to allow for the management of those contracts by a single manager. The single manager is jointly liable with the individual customers for all of their obligations under the contracts, while the individual customers are severally liable for all of their obligations under their own contracts.

4. **Authorized Demand Overrun:**

The Company may, at its sole discretion, authorize consumption of gas in excess of the Contract Demand for limited periods within a month, provided local distribution facilities have sufficient capacity to accommodate higher demand. In such circumstances, customer shall nominate gas delivery based on the gross commodity delivery (the sum of the customer's Contract Demand and the authorized overrun amount) required to serve the customer's daily load, plus the UFG. In the event that gas usage exceeds the gas delivery on a day where demand overrun is authorized, the excess gas consumption shall be deemed Supply Overrun Gas.
Such service shall not exceed 5 days in any contract year. Based on the terms of the Service Contract, requests beyond 5 days will constitute a request for a new Contract Demand level with retroactive charges. The new Contract Demand level may be restricted by the capability of the local distribution facilities to accommodate higher demand.

Automatic authorization of transportation overrun over the Billing Contract Demand will be given in the case of Dedicated Service to the Terminal Location provided that pipeline capacity is available and subject to the Contract Demand as specified in the Service Contract.

Authorized Demand Overrun Rate	**0.30 ¢/m³**

The Authorized Demand Overrun Rate may be applied to commissioning volumes at the Company's sole discretion, for a contractual period of not more than one year, as specified in the Service Contract.

5. **Unauthorized Demand Overrun:**

Any gas consumed in excess of the Contract Demand and/or maximum hourly flow requirements, if not authorized, will be deemed to be Unauthorized Demand Overrun gas. Unauthorized Demand Overrun gas may establish a new Contract Demand effective immediately and shall be subject to a charge equal to 120 % of the applicable monthly charge for twelve months of the current contract term, including retroactively based on terms of Service Contract. Based on capability of the local distribution facilities to accommodate higher demand, different conditions may apply as specified in the applicable Service Contract. Unauthorized Demand Overrun gas shall also be subject to Unauthorized Supply Overrun provisions.

6. **Unauthorized Supply Overrun:**

Any volume of gas taken by the Applicant on a day at the Terminal Location which exceeds the sum of:

i. any applicable provisions of Rate 315 and any applicable Load Balancing Provision pursuant to Rate 125, plus

ii. the volume of gas delivered by the Applicant on that day shall constitute Unauthorized Supply Overrun Gas.

The Company may also deem volumes of gas to be Unauthorized Supply Overrun gas in other circumstances, as set out in the Load Balancing Provisions of Rate 125.

Any gas deemed to be Unauthorized Overrun gas shall be purchased by the customer at a price (Pe), which is equal to 150% of the highest price in effect for that day as defined below*.

RATE NUMBER: **125**

7. **Unauthorized Supply Underrun:**

Any volume of gas delivered by the Applicant on any day in excess of the sum of:

i. any applicable provisions of Rate 315 and any applicable Load Balancing Provision pursuant to Rate 125, plus

ii. the volume of gas taken by the Applicant at the Terminal Location on that day shall be classified as Supply Underrun Gas.

The Company may also deem volumes of gas to be Unauthorized Supply Underrun gas in other circumstances, as set out in the Load Balancing Provisions of Rate 125.

Any gas deemed to be Unauthorized Supply Underrun Gas shall be purchased by the Company at a price (P_u) which is equal to fifty percent (50%) of the lowest price in effect for that day as defined below**.

* where the price P_e expressed in cents / cubic metre is defined as follows:
$P_e = (P_m * E_r * 100 * 0.03769 / 1.054615) * 1.5$

P_m = highest daily price in U.S. $/mmBtu published in the Gas Daily, a Platts Publication, for that day under the column "Absolute", for the Niagara export point if the terminal location is in the CDA delivery area, and the Iroquois export point if the terminal location is in the EDA delivery area.

E_r = Noon day spot exchange rate expressed in Canadian dollars per U.S. dollar for such day quoted by the Bank of Canada in the following day's Globe & Mail Publication.

1.054615 = Conversion factor from mmBtu to GJ.

0.03769 = Conversion factor from GJ to cubic metres.

** where the price P_u expressed in cents / cubic metre is defined as follows:
$P_u = (P_l * E_r * 100 * 0.03769 / 1.054615) * 0.5$

P_l = lowest daily price in U.S. $/mmBtu published in the Gas Daily, a Platts Publication, for that day under the column "Absolute", for the Niagara export point if the terminal location is in the CDA delivery area, and the Iroquois export point if the terminal location is in the EDA delivery area.

Term of Contract:

A minimum of one year. A longer-term contract may be required if incremental contracts/assets/facilities have been procured/built for the customer. Migration from an unbundled rate to bundled rate may be restricted subject to availability of adequate transportation and storage assets.

Right to Terminate Service:

The Company reserves the right to terminate service to customers served hereunder where the customer's failure to comply with the parameters of this rate schedule, including the load balancing provisions, jeopardizes either the safety or reliability of the gas system. The Company shall provide notice to the customer of such termination; however, no notice is required to alleviate emergency conditions.

RATE NUMBER: 125

LOAD BALANCING PROVISIONS:

Load Balancing Provisions shall apply at the customer's Terminal Location or at the location of the meter installation for a customer served from a dedicated facility. In the event of an imbalance any excess delivery above the customer's actual consumption or delivery less than the actual consumption shall be subject to the Load Balancing Provisions.

Definitions:

Aggregate Delivery:

The Aggregate Delivery for a customer's account shall equal the sum of the confirmed nominations of the customer for delivery of gas to the applicable delivery area from all pipeline sources including where applicable, the confirmed nominations of the customer for Storage Service under Rate 316 or Rate 315 and any available No-Notice Storage Service under Rate 315 for delivery of gas to the Applicable Delivery Area.

Applicable Delivery Area:

The Applicable Delivery Area for each customer shall be specified by contract as a Primary Delivery Area. Where system-operating conditions permit, the Company, in its sole discretion, may accept a Secondary Delivery Area as the Applicable Delivery Area by confirming the customer's nomination of such area. Confirmation of a Secondary Delivery Area for a period of a gas day shall cause such area to become the Applicable Delivery Area for such day. Where delivery occurs at both a Terminal Location and a Secondary Delivery Area on a given day, the sum of the confirmed deliveries may not exceed the Contract Demand, unless Demand Overrun and/or Make-up Gas is authorized.

Primary Delivery Area:

The Primary Delivery Area shall be delivery area such as EGD's Central Delivery Area (CDA) or EGD's Eastern Delivery Area (EDA).

Secondary Delivery Area:

A Secondary Delivery Area may be a delivery area such as Dawn where the Company, at its sole discretion, determines that operating conditions permit gas deliveries for a customer.

Actual Consumption:

The Actual Consumption of the customer shall be the metered quantity of gas consumed at the customer's Terminal Location or in the event of combined nominations at the Terminal Locations specified.

Net Available Delivery:

The Net Available Delivery shall equal the Aggregate Delivery times one minus the annually determined percentage of Unaccounted for Gas (UFG) as reported by the Company.

Daily Imbalance:

The Daily Imbalance shall be the absolute value of the difference between Actual Consumption and Net Available Delivery.

Cumulative Imbalance (also referred to as Banked Gas Account):

The Cumulative Imbalance shall be the sum of the difference between Actual Consumption and Net Available Delivery since the date the customer last balanced or was deemed to have balanced its cumulative imbalance account.

RATE NUMBER: **125**

Maximum Contractual Imbalance:

The Maximum Contractual Imbalance shall be equal to 60% of the customer's Contract Demand for non dedicated service and 60% of the Billing Contract Demand for dedicated service.

Winter and Summer Seasons:

The winter season shall commence on the date that the Company provides notice of the start of the winter period and conclude on the date that the Company provides notice of the end of the winter period. The summer season shall constitute all other days. The Company shall provide advance notice to the customer of the start and end of the winter season as soon as reasonably possible, but in no event not less than 2 days prior to the start or end.

Operational Flow Order:

An Operational Flow Order (OFO) shall constitute an issuance of instructions to protect the operational capacity and integrity of the Company's system, including distribution and/or storage assets, and/or connected transmission pipelines.

Enbridge Gas Distribution, acting reasonably, may call for an OFO in the following circumstances:

- Capacity constraint on the system, or portions of the system, or upstream systems, that are fully utilized;
- Conditions where the potential exists that forecasted system demand plus reserves for short notice services provided by the Company and allowances for power generation customers' balancing requirements would exceed facility capabilities and/or provisions of 3rd party contracts;
- Pressures on the system or specific portions of the system are too high or too low for safe operations;
- Storage system constraints on capacity or pressure or caused by equipment problems resulting in limited ability to inject or withdraw from storage;
- Pipeline equipment failures and/or damage that prohibits the flow of gas;
- Any and all other circumstances where the potential for system failure exists.

Daily Balancing Fee:

On any day where the customer has a Daily Imbalance the customer shall pay a Daily Balancing Fee equal to:

(Tier 1 Quantity X Tier 1 Fee) + (Tier 2 Quantity X Tier 2 Fee) + (Applicable Penalty Fee for Imbalance in excess of the Maximum Contractual Imbalance X the amount of Daily Imbalance in excess of the Maximum Contractual Imbalance)

Where Tier 1 and 2 Fees and Quantities are set forth as follows:

Tier 1 = .885 cents/m3 applied to Daily Imbalance of greater than 2% but less than 10% of the Maximum Contractual Imbalance

Tier 2 = 1.062 cents/m3 applied to Daily Imbalance of greater than 10% but less than the Maximum Contractual Imbalance

In addition for Tier 2, instances where the Daily Imbalance represents an under delivery of gas during the winter season shall constitute Unauthorized Supply Overrun Gas for all gas in excess of 10% of Maximum Contractual Imbalance. Where the Daily Imbalance represents an over delivery of gas during the summer season, the Company reserves the right to deem as Unauthorized Supply Underrun Gas for all gas in excess of 10% of Maximum Contractual Imbalance. The Company will issue a 24-hour advance notice to customers of its intent to impose cash out for over delivery of gas during the summer season.

The customers shall also pay any Load Balancing Agreement (LBA) charges imposed by the pipeline on days when the customer has a Daily Imbalance provided such imbalance matches the direction of the pipeline imbalance. LBA charges shall first be allocated to customers served under Rates 125 and 300. The system bears a portion of these charges only to the extent that the system incurs such charges based on its operation excluding the operation of customers under Rates 125 and 300. In that event, LBA charges shall be prorated based on the relative imbalances. The Company will provide the customer with a derivation of any such charges.

Customer's Actual Consumption cannot exceed Net Available Delivery when the Company issues an Operational Flow Order in the winter. Net nominations must not be less than consumption at the Terminal Location. Any negative Daily Imbalance on a winter Operational Flow Order day shall be deemed to be Unauthorized Supply Overrun. Customer's Net Available Delivery cannot exceed Actual Consumption when the Company issues an Operational Flow Order in the summer. Actual Consumption must not be less than net nomination at the Terminal Location. Any positive Daily Imbalance on a summer Operational Flow Order day shall be deemed to be Unauthorized Supply Underrun.

The Company will waive Daily Balancing Fee and Cumulative Imbalance Charge on the day of an Operational Flow Order if the customer used less gas that the amount the customer delivered to the system during the winter season or the customer used more gas than the amount the customer delivered to the system during the summer season. The Company will issue a 24-hour advance notice to customers of Operational Flow Orders and suspension of Load Balancing Provisions.

Cumulative Imbalance Charges:

Customers may trade Cumulative Imbalances within a delivery area. Customers may also title transfer gas from their Cumulative Imbalances Account (Banked Gas Account) into a Rate 316 storage account of the customer provided that the customer has space available in the storage account to accommodate the transfer.

Customers shall be permitted to nominate Make-up Gas, subject to operating constraints, provided that Make-up Gas plus Aggregate Delivery do not exceed the Contract Demand. The Company may, on days with no operating constraints, authorize Make-up Gas that, in conjunction with Aggregate Delivery, exceeds the Contract Demand.

The customer's Cumulative Imbalance cannot exceed its Maximum Contractual Imbalance. In the event that the customer cannot title transfer gas from their Cumulative Imbalances Account (Banked Gas Account) in whole or in part to storage the Company shall deem the excess imbalance to be Unauthorized Overrun or Underrun gas, as appropriate.

The Cumulative Imbalance Fee shall be equal to 1.004 cents/m^3 per unit of imbalance.

In addition, on any day that the Company declares an Operational Flow Order, negative Cumulative Imbalances greater than 10 % of Maximum Contractual Imbalance in the winter season shall be deemed to be Unauthorized Overrun Gas. The Company reserves the right to deem positive Cumulative Imbalances greater than 10% of Maximum Contractual Imbalance in the summer season as Unauthorized Supply Underun Gas. The Company will issue a 24-hour advance notice to customers of Operational Flow Orders including cash out instructions for Cumulative Imbalances greater than 10 % of Maximum Contractual Imbalance.

EFFECTIVE DATE:

To apply to bills rendered for gas delivered on or after July 1, 2007.

This rate schedule is effective July 1, 2007.

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Natural Gas Regulation in Ontario:

A Renewed Policy Framework

Report on the Ontario Energy Board

Natural Gas Forum

March 30, 2005

Since that time underground natural gas storage has been accorded the status of a provincial asset and the Board has regulated it accordingly.

The *Ontario Energy Board Act, 1998*, sets out a number of objectives that guide the Board in carrying out its responsibilities, including facilitating the rational development and safe operation of gas storage. Part III of the Act sets out the Board's specific statutory responsibilities in regard to storage as follows:

- designating areas as gas storage areas
- authorizing a person to inject, store and withdraw gas
- setting compensation for landowners in the absence of an agreement on compensation between the landowners and the storage operators
- providing binding reports on applications to drill wells to the Minister of Natural Resources
- making just and reasonable rates for the sale of gas and for the transmission, distribution and storage of gas by storage companies

Three recent developments have put storage and transportation on the Natural Gas Forum's agenda.

Growth in gas-fired power generation: Although events elsewhere in North America can influence Ontario's natural gas market, perhaps the most profound impact in the near future will arise from the anticipated rapid growth in gas-fired power generation. Over 1000 megawatts (MW) of gas-fired capacity have been added recently. The Ontario government has issued a Request for Proposals (RFP) for 2500 MW of capacity to come into service over the next few years, and natural gas-fired power generation is expected to account for nearly all the successful bids received in response to this RFP.

Growth in Ontario gas-fired power generation could increase natural gas demand in the province by around 200 billion cubic feet (Bcf) annually, about one quarter of current Ontario gas demand. Furthermore, since Ontario's electricity demand has a double peak

(with roughly equal maximum demand in winter and summer), there will be increased demand for deliverability from storage. The incremental capacity could lead to an incremental gas demand of 1 Bcf per day (Bcf/d) on a cold winter day, about a third of current peak gas demand of 3 Bcf/d.

Higher natural gas prices and greater price volatility: Enormous growth in natural gas-fired power generation in the United States (about 180 gigawatts over the period 1999–2004) has increased demand for natural gas. Although this new demand has been met with increased drilling activity, the growth in gas production has not kept pace with the growth in demand. The consequent increases in price and greater price volatility have raised the value of storage as a physical hedge against prices that vary by season and that, within a season, vary by day or even by hour (in the case of gas-fired power generation). Indeed, the quantity of gas in storage during the winter season is one of the most closely watched measures affecting the price of natural gas in the North American market. Storage in Ontario has become more valuable as a consequence.

Storage also plays a role in helping to reduce volatility in the market within a short time frame. The flexibility value of storage is now monetized as an arbitrage opportunity – a chance to make money by buying gas when it is cheaper and using (or reselling) it when it is more expensive. This development has put stress on storage itself to be more operationally flexible to take advantage of short-term fluctuations in gas prices. Storage owners are now managing storage more dynamically and pressing regulators to allow market pricing of storage. A secondary market for storage has emerged in North American markets.

Some storage, including high-deliverability storage, allows for withdrawals during the off-peak season (summer) and injections during the winter. More flexibility in storage operations would allow for tighter management of the resource with fewer contingency reserves required for the later parts of the winter season.

45

Changing structure for natural gas demand: Power generation is expected to become the most important source of natural gas demand growth in North America in the coming years, followed by residential and commercial demand growth, with the lowest growth expected from industrial demand. Although electricity demand in much of the U.S. peaks in the summer, meaning that U.S. gas-fired generation could actually reduce demand for seasonal storage, the increase in residential and commercial demand in the U.S. will increase the need for seasonal storage (estimated at an additional 1000 Bcf by 2025). This situation will require increased investments to ensure that more storage is available to the market. In addition, gas-fired generators will require higher and more flexible deliverability of natural gas to and from storage. Ontario, as an integral part of the North American gas market, will be affected by these changes.

Taken together, these factors point to an increasing demand for Ontario's existing storage capacity, and a probable need for investment in storage capacity, deliverability and transportation. Stakeholders identified storage and transportation as a key issue early in the Natural Gas Forum process, and the final submissions coalesced on three main issues:

- Should storage continue to be priced at cost-of-service (COS) rates for "in-franchise" customers (along with revenue sharing from sales to "ex-franchise" customers), or should it be priced at market rates? Or put another way, is the market for storage and associated transportation services competitive for Ontario customers?
- How should the storage and transportation needs of gas-fired power generators be met?
- Are changes needed to OEB regulatory policy to encourage new independent storage development?

Each of these issues is addressed in turn below.

Storage Pricing and Storage Competition

Prices for storage are regulated. There are two principal factors determining the pricing of storage. The first is whether the storage service is operated by the utility to serve its in-

1 proximity -- and I think that's why we have that liquid
2 hub, at Dawn is because you have that capability. If
3 somebody has gas that they brought to Dawn, they don't want
4 to sell it yet because they just want to have a place to
5 park it, they can put it into storage, and then when they
6 want to pull it out, pull it out.
7 I think when you look at, again, that undertaking K6.1
8 and the storage-related transactions there, and the
9 revenues arising from that, that's the bulk of the activity
10 that we're doing there, either just giving it a home for a
11 period of time for somebody, or letting somebody borrow it
12 for a period of time.
13 MR. RUPERT: But that's what I'm saying, if you didn't
14 have the borrowing. If you just had --
15 MR. CHARLESON: Even the parks and loans are probably
16 about equal in terms of the activity that we do.
17 MR. RUPERT: Okay. Thanks.
18 MR. KAISER: Mr. Cass.
19 MR. CASS: Thank you, Mr. Chair.
20 I have just a few areas in re-examination, and I think
21 it, coincidentally, works out to one area for each witness.
22 **RE-EXAMINATION BY MR. CASS**
23 MR. CASS: Mr. Grant, starting with you, I'm going to
24 take you back to some questions asked during cross-
25 examination. I'm going to give the references for the
26 record but I don't think you actually need to turn them up
27 First, when Mr. Warren was examining you -- this is at
28 transcript volume 6, page 87 -- he had asked about your

1 company's present plans for any storage development other
2 than the Tecumseh enhancement, and you said there were no
3 such plans. But then during Mr. Brown's questions, volume
4 7, page 120, he had asked you about what might happen under
5 a forbearance scenario, and then you did talk about looking
6 at things.
7 I wonder if you could just elaborate, please, on the
8 difference between your answer with respect to present
9 plans and your answer about what would happen under a
10 forbearance scenario.
11 MR. GRANT: Certainly. The reason we don't have
12 present plans today is because of the risk return
13 complexion associated with developing new storage.
14 However, looking forward, in a forbearance scenario, that
15 risk return complexion can come into balance, because
16 forbearance, or deregulation, allows a storage developer to
17 market and get the best value it can for whatever it's
18 proposing to develop, and then determine whether those
19 revenues offset the risks that are necessary for that type
20 of business.
21 The risks in that business are markedly different from
22 the status quo from the existing situation. And that's
23 what gives rise to the different plans under a forbearance
24 model as opposed to the existing model cast
25 MR. CASS: Is the lack of present plans linked to what
26 the current regulatory model is?
27 MR. GRANT: Yes, it is.
28 MR. CASS: Right. Thank you. Then, Mr. Smead, you

1 year to year.
2 MR. KAISER: You have indicated that if the regulatory
3 regime changed and you got to keep all of the premium and
4 you got to go to market-based prices, you would increase
5 your investment in this activity. Did I understand that
6 right?
7 MR. BAKER: We would certainly take a much harder look
8 at the investment opportunities that we see on the storage
9 side; that's correct.
10 MR. KAISER: Have you done any studies of that?
11 MR. BAKER: No. We have been out of -- when we step
12 back and look at it, based on the framework we have, we
13 haven't been able to look hard at what else we would want
14 to do with the framework, in terms of going out and
15 amassing a land position or looking at potential
16 developments in terms of greenfield storage. So we, as
17 Union Gas, have not done that.
18 MR. KAISER: Dr. Schwindt, I just have one question
19 for you. When we started this whole exercise, we were --
20 they went out and hired a high-priced economist like you
21 experienced in competition policy to define whether these
22 markets were competitive or not, and then to apply the
23 appropriate pricing regime, but then it seems that the
24 lawyers took over and forgot about the economic principles.
25 We have these dispatchable power people, and you say
26 that that is a competitive market, we heard from Mr.
27 Isherwood, but yet they get a piece of their capacity on a
28 cost-based basis.

4

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
SCHEDULE B

Board objectives, electricity

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry. 2004, c. 23, Sched. B, s. 1.

Facilitation of integrated power system plans

(2) In exercising its powers and performing its duties under this or any other Act in relation to electricity, the Board shall facilitate the implementation of all integrated power system plans approved under the *Electricity Act, 1998*. 2004, c. 23, Sched. B, s. 1.

Board objectives, gas

2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.

2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

3. To facilitate rational expansion of transmission and distribution systems.

4. To facilitate rational development and safe operation of gas storage.

5. To promote energy conservation and energy efficiency in a manner consistent with the policies of the Government of Ontario.

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

6. To promote communication within the gas industry and the education of consumers. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4 (2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2.

Refrain from exercising power

29. (1) On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest. 1998, c. 15, Sched. B, s. 29 (1).

Scope

(2) Subsection (1) applies to the exercise of any power or the performance of any duty of the Board in relation to,

(a) any matter before the Board;

(b) any licensee;

(c) any person who is subject to this Act;

(d) any person selling, transmitting, distributing or storing gas; or

(e) any product or class of products supplied or service or class of services rendered within the province by a licensee or a person who is subject to this Act. 1998, c. 15, Sched. B, s. 29 (2).

Order of Board required

36. (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract. 1998, c. 15, Sched. B, s. 36 (1).

Order of Board re Smart Metering Entity

(1.1) Neither the Smart Metering Entity nor any other person licensed to do so shall conduct activities relating to the metering of gas except in accordance with an order of the Board, which is not bound by the terms of any contract. 2006, c. 3, Sched. C, s. 3.

Order re: rates

(2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas. 1998, c. 15, Sched. B, s. 36 (2).

Power of Board

(3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate. 1998, c. 15, Sched. B, s. 36 (3).

Contents of order

(4) An order under this section may include conditions, classifications or practices applicable to the sale, transmission, distribution or storage of gas, including rules respecting the calculation of rates. 1998, c. 15, Sched. B, s. 36 (4).

Deferral or variance accounts

(4.1) If a gas distributor has a deferral or variance account that relates to the commodity of gas, the Board shall, at least once every three months, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2003, c. 3, s. 30.

Same

(4.2) If a gas distributor has a deferral or variance account that does not relate to the commodity of gas, the Board shall, at least once every 12 months, or such shorter period as is prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2003, c. 3, s. 30.

Same

(4.3) An order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates shall be made in accordance with the regulations. 2003, c. 3, s. 30.

Same

(4.4) If an order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates is made after the time required by subsection (4.1) or (4.2) and the delay is due in whole or in part to the conduct of a gas distributor, the Board may reduce the amount that is reflected in rates. 2003, c. 3, s. 30.

Same

(4.5) If an amount recorded in a deferral or variance account of a gas distributor is reflected in rates, the Board shall consider the appropriate number of billing periods over which the amount shall be divided in order to mitigate the impact on consumers. 2003, c. 3, s. 30.

Fixing other rates

(5) Upon an application for an order approving or fixing rates, the Board may, if it is not satisfied that the rates applied for are just and reasonable, fix such other rates as it finds to be just and reasonable. 1998, c. 15, Sched. B, s. 36 (5).

Burden of proof

(6) Subject to subsection (7), in an application with respect to rates for the sale, transmission, distribution or storage of gas, the burden of proof is on the applicant. 1998, c. 15, Sched. B, s. 36 (6).

Order, motion of Board or at request of Minister

(7) If the Board of its own motion, or upon the request of the Minister, commences a proceeding to determine whether any of the rates for the sale, transmission, distribution or storage of gas by any gas transmitter, gas distributor or storage company are just and reasonable, the Board shall make an order under subsection (2) and the burden of establishing that the rates are just and reasonable is on the gas transmitter, gas distributor or storage company, as the case may be. 1998, c. 15, Sched. B, s. 36 (7).

Exception

(8) This section does not apply to a municipality or municipal public utility commission transmitting or distributing gas under the *Public Utilities Act* on the day before this section comes into force. 1998, c. 15, Sched. B, s. 36 (8).

Duties of gas transmitters and distributors
Discontinuance of transmission or distribution

42. (1) Subject to the *Technical Standards and Safety Act, 2000* and the regulations made under that Act, and in the absence of an agreement to the contrary between the parties affected, no gas transmitter shall voluntarily discontinue transmitting gas to a gas distributor without leave of the Board. 1998, c. 15, Sched. B, s. 42 (1); 2002, c. 17, Sched. F, Table; 2003, c. 3, s. 32.

Duty of gas distributor

(2) Subject to the *Public Utilities Act*, the *Technical Standards and Safety Act, 2000* and the regulations made under the latter Act and to sections 80, 81, 82 and 83 of the *Municipal Act, 2001*, a gas distributor shall 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. 1998, c. 15, Sched. B, s. 42 (2); 2002, c. 17, Sched. F, Table.

Order

(3) Upon application, the Board may order a gas transmitter, gas distributor or storage company to provide any gas sale, transmission, distribution or storage service or cease to provide any gas sale service. 1998, c. 15, Sched. B, s. 42 (3).

Restriction

(4) Despite subsection 19 (4), the Board may not commence a proceeding under subsection (3) on its own motion. 1998, c. 15, Sched. B, s. 42 (4).

EB 2005-0551

THE 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;

Written Argument Of The Consumers Council of Canada

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(1) With respect to the s. 29 of the *Act* relief, namely forbearance from regulation, the Utilities must prove not only that the wholesale market in storage is competitive, but that the competition is sufficient to protect the public interest. The public interest, in this context, is the interest of all of the consumers of natural gas in Ontario;

(2) With respect to the relief unrelated to s. 29 of the *Act*, namely the relief dealing with the treatment of revenues from the sale of storage services, and TS, the utility must prove that the rate changes which result from the granting of the relief will be just and reasonable.

15. An additional consideration, affecting the nature of the onus which the Utilities bear, is the Board's obligation, set out in section 2 of the *Act*, to protect the interests of consumers with respect to prices and their reliability and quality of gas service. The Council submits that, if the granting of some or all of the relief requested by the utility results in material increases in the prices which consumers must pay, without offsetting benefits in the form of the prospect of corresponding decreases in prices, then the Board should deny that relief. The Utilities bear the onus of demonstrating that granting their relief will not result in material increases in the rates paid by consumers.

III -THE EXISTING REGULATORY STRUCTURE FOR STORAGE

16. Union owns the lion's share of the existing storage capacity in Ontario. Of the 163 Bcf of storage capacity it owns, approximately 91.5 Bcf is for in-franchise customers, with the balance used for ex-franchise customers.

17. By contrast, all of the storage capacity owned by EGD, some 91 Bcf, is, subject to certain exceptions, used for its in-franchise customers. EGD acquires 20 Bcf from Union. Until the spring of 2006, EGD acquired that additional 20 Bcf at Union's cost based rates. Under a new contract, EGD will pay a market based rate. The Board is to address the new contract with Union in EGD's 2007 rate proceeding. The market based rate EGD is to pay Union represents an approximately 180% increase over Union's cost based rate. (Undertaking K.7.3).

18. The Board has, since 1996, allowed Union to sell storage to ex-franchise customers at "market" rates. As an ex-franchise customer, EGD must purchase storage from Union at those "market" rates.

EB-2005-0551

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.

Final Argument On Behalf Of
Energy Probe Research Foundation

August 28, 2006

Mr. Stauft's entire edifice rests on his claim to be following FERC decisions that the appearance of prices 10% above the competitive level is evidence of market power and that "the regulated level is the best proxy we have for the competitive level." (TR10 p. 5)

It would be silly for the Board to use regulated prices as a proxy for competitive prices when competitive prices can be seen directly. Obviously, Ontario's regulated prices are far below competitive prices. This is because prevailing regulatory practices uses a depreciated historic capital cost basis for rates. Competitive prices can be seen in the results of competitive auctions and open seasons that happen routinely in and around Ontario.

In response to questions for the Board Chair, Mr. Stauft claimed ignorance as to whether market prices for storage in Michigan reflect competitive levels. (TR 10, p. 9/10) This admission undermines the credibility of Mr. Stauft's analysis. If the market prices in Michigan arising from auctions do not reflect competitive levels, one wonders what the Michigan market prices could otherwise represent.

Since Ontario's regulated storage prices are definitely not a reasonable indicator of competitive prices, Mr. Stauft's analysis of market power crumbles.

Recommendations

The scope of the hearing has been confined by the utilities' proposal that it would not be appropriate to charge market prices for storage services that are provided as part of a bundled delivery service.

In addition to forbearance, Union proposes to eliminate five S&T deferral accounts (Tr. Vol. 1, pages 66-67, Argument in Chief p. 20/21):

EB-2005-0551

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 Natural Gas and Electricity Interface Review proceeding initiated by the Ontario Energy Board to determine, among other things, 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.

Argument

of

The Low-Income Energy Network ("LIEN")

2006 August 28

receive appropriate credit for the costs of developing storage facilities that they have paid for through rates, together with appropriate credit for the risks of underutilization of those assets, which risks they have also borne.

However, Union Gas is not proposing such a transfer of assets. In LIEN's view, what Union is proposing is in fact more complex, and the allocations of cost made necessary by Union's proposal may year-after-year perpetuate the possibility of allocating too few costs to storage services sold at market rates, Furthermore, Union seeks to confiscate, for shareholders, value that rightfully belongs to customers for whom the storage assets were developed.

In preparing its request for intervener status in this proceeding, LIEN set out in some detail its interests as they relate to the Board's regulation of storage in Ontario. These interests, concerns and possible directions in respect of the Board's regulation of storage remain unchanged. For this reason, an excerpt from that submission is attached as Appendix 1 to this written argument.

In the remainder of this argument, LIEN will set out its views and positions with respect to refraining from regulation of rates for gas storage in Ontario, regulation of the supply of storage services from gas distribution utilities, and the continued role deferral accounts. LIEN will then address the four specific considerations raised initially by the Board (in Procedural Order 1).

LIEN'S positions on refraining from regulation of rates for gas storage in Ontario

If the Board determines that the market for ex-franchise storage services at Dawn, or more generally, in the geographical region of the Union Gas distribution utility, is sufficiently competitive, then it would seem appropriate to continue to price transactional and long-term storage services for ex-franchise customers, as well as such services for the "excess" requirements of the in-franchise customers, at market prices.

This refraining of regulating rates for these storage services, while it may be justifiable, does not logically lead to the conclusion that the Board should refrain from regulating the treatment of the

total revenues from those services, nor that the Board should refrain from regulating, in some manner and degree, the supply of storage services provided by the distribution utilities for the core or captive market[3].

Storage services are provided from integrated assets of the distribution utility, including upstream transportation capacity for meeting the system gas requirements and gas requirements of operations. Although storage services may be priced as if gas is going into and coming out of physical storage reservoirs, Union has explained that its storage services are actually provided from its system-wide resources. Delivery of a customer's stored gas may be nothing more than a displacement or diversion of gas, or may correspond to additional gas taken from one of the transmission pipelines where there is economically available capacity[4]. Given this complexity, it is difficult to sort out accurately what is the real cost of storage services on the Union Gas system. What is good enough for a customer class cost allocation study which becomes a very rough indicator of fairness of certain rates and revenues, is, in LIEN's view, not adequate for allocating storage costs between price-regulated services and services which are not price regulated.

The current approach of considering all of a distribution utility's costs of storage and all of the revenues works adequately in determining the revenue requirement for other utility rates and services[5]. If the assets underlying storage services are to remain on the distribution utility books, then there is no reason to change the current approach of looking at all revenues along with all costs.

The average cost of "integrated" gas storage services, taking into account the provision of those services at zero or even negative cost associated with displacement, is not likely to equal the proxy for storage cost used by Union in determining the margin for sharing between customers and shareholders. On sales of market-priced storage service, essentially 100% of the margin between the real cost of storage and Union's proxy for storage cost goes to shareholders, together with the Board-approved incentive portion of the margin over Union's proxy for storage cost.

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[3] or less accurately, the "in-franchise" customers, as they have continued to be referred to.
[4] In addition, there has also been reference to evidence that financial products are utilized as ready substitutes for storage services.
[5] any incentive for shareholders being treated as a cost or as an off-set to the revenue.

The approach of considering all revenues and costs, and of continuing to price the basic requirements of the utility's in-franchise customers is one way to ensure that distribution customers are treated with a sense of fairness, and that windfall superior returns are not earned by the shareholders on assets, the beneficial value of which should be recognized in ratemaking for the distribution utility.

On the other hand, there are alternative ways to ensure that distribution utility customers are treated fairly with respect to the value of storage assets. One way would be to remove and dedicate certain assets supporting market-priced storage services for just that purpose, and to properly recognize as a credit to distribution customers the excess of fair market value of those assets over the value carried on the utility's books. Distribution customers will not be assured fair treatment under a scheme where costs must be allocated annually. If there is to be a separation of assets supporting storage services, a clean physical separation will be better than repeated annual allocations and recurring challenges of their accuracy. Determine a fair market value, transfer the assets outside of the regulated utility, and credit the tax-adjusted[6] excess of fair market value over depreciated original historical cost to distribution utility customers.

However, if storage services of the distribution utilities continue to be provided from their integrated resources, it makes little sense to artificially segregate this storage and its costs and revenues, and it has the potential to set utility "cost based" rates higher than they should be. It is LIEN's position that it makes sense to continue to look at the utility's total costs, to credit all revenues from storage services, then to determine if it is appropriate to grant shareholders a share of any revenue excess over embedded costs and, if so, how much.

If, on the other hand, storage facilities can be physically separated from the rest of the utility system, and if they are surplus to the distribution system's needs, and if the Board is satisfied with the extent of competition in the market for the storage services that can be provided from those assets, then it could make sense to transfer those assets out of the utility. A fair market value could be determined for those physically separated storage assets and the assets should be

[6] The calculation of this credit would have to properly account for tax on any capital cost recapture and capital gain related to storage assets that are to be removed from the domain of the distribution utility.

transferred out at that value. In this case, the excess of fair market value over the book cost of the assets as they appeared on the utility's books should be treated as a credit to the remaining distribution system assets. In LIEN's view, a one-time credit of this excess value to the distribution rate base is preferable to determining appropriate annual credits related to storage services priced at market, but still held within the distribution utility corporation. Such approach would cleanly reflect the value of the credit due to customers at the time of this transition.

In LIEN's view, a credit of any such excesses of market-priced value over utility book-based value (cost), either annually to the revenue requirement for distribution rates[7] or on a one-time basis to the distribution system rate base, is appropriate since storage until recently was developed to serve distribution system customers. Such customers paid for the assets providing storage services through their bundled rates for delivered gas. Such customers bore the costs and the risks of developing storage assets. (It is of course also possible and fair to allocate the credit among customer classes in relation to class requirements for storage.)

Regulation of the supply of storage service

The Board has continued to monitor gas contracting in the ex-franchise market and to analyze and carefully consider supply of the in-franchise market before approving large storage contracts for periods exceeding two years. Union Gas is proposing that the Board should also refrain from this form of regulation. Obviously, this proposal goes beyond the question of refraining from the regulation of rates for storage, which was the subject of notice given in this proceeding.

If the Board were to move to market pricing for storage for all of the Ontario market, then arguably price could allocate supply and the Board could refrain from regulating under Sections 36 and 39(2) of the Act. Under Union's proposal to continue to price storage services for some customers on the basis of the utility's embedded costs, in LIEN's submission, it will remain necessary for the Board to scrutinize the availability of sufficient supply for in franchise customers, and for the Board to continue its approval process with respect to long-term storage contracts of significant size.

[7] e.g. by considering all costs and revenues for storage services.

SUPREME COURT OF CANADA

CITATION: ATCO Gas & Pipelines Ltd. *v.* Alberta (Energy & Utilities Board), [2006] 1 S.C.R. 140, 2006 SCC 4

DATE: 20060209
DOCKET: 30247

BETWEEN:

City of Calgary
Appellant/Respondent on cross-appeal
v.
ATCO Gas and Pipelines Ltd.
Respondent/Appellant on cross-appeal
- and -
Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited
Interveners

CORAM: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

REASONS FOR JUDGMENT: (paras. 1 to 87)	Bastarache J. (LeBel, Deschamps and Charron JJ. concurring)
DISSENTING REASONS: (paras. 88 to 149)	Binnie J. (McLachlin C.J. and Fish J. concurring)

ATCO Gas and Pipelines Ltd. *v.* Alberta (Energy and Utilities Board), [2006] 1 S.C.R. 140, 2006 SCC 4

City of Calgary *Appellant/Respondent on cross-appeal*

v.

ATCO Gas and Pipelines Ltd. *Respondent/Appellant on cross-appeal*

and

Alberta Energy and Utilities Board, Ontario Energy Board, Enbridge Gas Distribution Inc. and Union Gas Limited *Interveners*

Indexed as: ATCO Gas and Pipelines Ltd. *v.* Alberta (Energy and Utilities Board)

Neutral citation: 2006 SCC 4.

File No.: 30247.

2005: May 11; 2006: February 9.

Present: McLachlin C.J. and Bastarache, Binnie, LeBel, Deschamps, Fish and Charron JJ.

on appeal from the court of appeal for alberta

Administrative law — Boards and tribunals — Regulatory boards — Jurisdiction — Doctrine of jurisdiction by necessary implication — Natural gas public utility applying to Alberta Energy and Utilities Board to approve sale of buildings and land no longer required in supplying natural gas — Board approving sale subject to condition that portion of sale proceeds be allocated to ratepaying customers of utility — Whether Board had explicit or implicit jurisdiction to allocate proceeds of sale — If so, whether Board's decision to exercise discretion to protect public interest by allocating proceeds of utility asset sale to customers reasonable — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

Administrative law — Judicial review — Standard of review — Alberta Energy and Utilities Board — Standard of review applicable to Board's jurisdiction to allocate proceeds from sale of public utility assets to ratepayers — Standard of review applicable to Board's decision to exercise discretion to allocate proceeds of sale — Alberta Energy and Utilities Board Act, R.S.A. 2000, c. A-17, s. 15(3) — Public Utilities Board Act, R.S.A. 2000, c. P-45, s. 37 — Gas Utilities Act, R.S.A. 2000, c. G-5, s. 26(2).

ATCO is a public utility in Alberta which delivers natural gas. A division of ATCO filed an application with the Alberta Energy and Utilities Board for approval of the sale of buildings and land located in Calgary, as required by the *Gas Utilities Act* ("GUA"). According to ATCO, the property was no longer used or useful for the provision of utility services, and the sale would not cause any harm to ratepaying customers. ATCO requested that the Board approve the sale transaction, as well as the proposed disposition of the sale proceeds: to retire the remaining book value of the sold assets, to recover the disposition costs, and to recognize that the balance of the profits

resulting from the sale should be paid to ATCO's shareholders. The customers' interests were represented by the City of Calgary, who opposed ATCO's position with respect to the disposition of the sale proceeds to shareholders.

Persuaded that customers would not be harmed by the sale, the Board approved the sale transaction on the basis that customers would not "be exposed to the risk of financial harm as a result of the Sale that could not be examined in a future proceeding". In a second decision, the Board determined the allocation of net sale proceeds. The Board held that it had the jurisdiction to approve a proposed disposition of sale proceeds subject to appropriate conditions to protect the public interest, pursuant to the powers granted to it under s. 15(3) of the *Alberta Energy and Utilities Board Act* ("AEUBA"). The Board applied a formula which recognizes profits realized when proceeds of sale exceed the original cost can be shared between customers and shareholders, and allocated a portion of the net gain on the sale to the ratepaying customers. The Alberta Court of Appeal set aside the Board's decision, referring the matter back to the Board to allocate the entire remainder of the proceeds to ATCO.

Held (McLachlin C.J. and Binnie and Fish JJ. dissenting): The appeal is dismissed and the cross-appeal is allowed.

Per Bastarache, LeBel, Deschamps and Charron JJ.: When the relevant factors of the pragmatic and functional approach are properly considered, the standard of review applicable to the Board's decision on the issue of jurisdiction is correctness. Here, the Board did not have the jurisdiction to allocate the proceeds of the sale of the utility's asset. The Court of Appeal made no error of fact or law when it concluded that the Board acted beyond its jurisdiction by misapprehending its statutory and common

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law authority. However, the Court of Appeal erred when it did not go on to conclude that the Board has no jurisdiction to allocate any portion of the proceeds of sale of the property to ratepayers. [21-34]

The interpretation of the AEUBA, the *Public Utilities Board Act* ("PUBA") and the GUA can lead to only one conclusion: the Board does not have the prerogative to decide on the distribution of the net gain from the sale of assets of a utility. On their grammatical and ordinary meaning, s. 26(2) GUA, s. 15(3) AEUBA and s. 37 PUBA are silent as to the Board's power to deal with sale proceeds. Section 26(2) GUA conferred on the Board the power to approve a transaction without more. The intended meaning of the Board's power pursuant to s. 15(3) AEUBA to impose conditions on an order that the Board considers necessary in the public interest, as well as the general power in s. 37 PUBA, is lost when the provisions are read in isolation. They are, on their own, vague and open-ended. It would be absurd to allow the Board an unfettered discretion to attach any condition it wishes to any order it makes. While the concept of "public interest" is very wide and elastic, the Board cannot be given total discretion over its limitations. These seemingly broad powers must be interpreted within the entire context of the statutes which are meant to balance the need to protect consumers as well as the property rights retained by owners, as recognized in a free market economy. The context indicates that the limits of the Board's powers are grounded in its main function of fixing just and reasonable rates and in protecting the integrity and dependability of the supply system. [7] [41] [43] [46]

An examination of the historical background of public utilities regulation in Alberta generally, and the legislation in respect of the powers of the Alberta Energy and Utilities Board in particular, reveals that nowhere is there a mention of the authority for

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the Board to allocate proceeds from a sale or the discretion of the Board to interfere with ownership rights. Moreover, although the Board may seem to possess a variety of powers and functions, it is manifest from a reading of the AEUBA, the PUBA and the GUA that the principal function of the Board in respect of public utilities, is the determination of rates. Its power to supervise the finances of these companies and their operations, although wide, is in practice incidental to fixing rates. The goals of sustainability, equity and efficiency, which underlie the reasoning as to how rates are fixed, have resulted in an economic and social arrangement which ensures that all customers have access to the utility at a fair price — nothing more. The rates paid by customers do not incorporate acquiring ownership or control of the utility's assets. The object of the statutes is to protect both the customer and the investor, and the Board's responsibility is to maintain a tariff that enhances the economic benefits to consumers and investors of the utility. This well-balanced regulatory arrangement does not, however, cancel the private nature of the utility. The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. [54-69]

Not only is the power to allocate the proceeds of the sale absent from the explicit language of the legislation, but it cannot be implied from the statutory regime as necessarily incidental to the explicit powers. For the doctrine of jurisdiction by necessary implication to apply, there must be evidence that the exercise of that power is a practical necessity for the Board to accomplish the objects prescribed by the

legislature, something which is absent in this case. Not only is the authority to attach a condition to allocate the proceeds of a sale to a particular party unnecessary for the Board to accomplish its role, but deciding otherwise would lead to the conclusion that broadly drawn powers, such as those found in the AEUBA, the GUA and the PUBA, can be interpreted so as to encroach on the economic freedom of the utility, depriving it of its rights. If the Alberta legislature wishes to confer on ratepayers the economic benefits resulting from the sale of utility assets, it can expressly provide for this in the legislation. [39] [77-80]

Notwithstanding the conclusion that the Board lacked jurisdiction, its decision to exercise its discretion to protect the public interest by allocating the sale proceeds as it did to ratepaying customers did not meet a reasonable standard. When it explicitly concluded that no harm would ensue to customers from the sale of the asset, the Board did not identify any public interest which required protection and there was, therefore, nothing to trigger the exercise of the discretion to allocate the proceeds of sale. Finally, it cannot be concluded that the Board's allocation was reasonable when it wrongly assumed that ratepayers had acquired a proprietary interest in the utility's assets because assets were a factor in the rate-setting process. [82-85]

Per McLachlin C.J. and Binnie and Fish JJ. (dissenting): The Board's decision should be restored. Section 15(3) AEUBA authorized the Board, in dealing with ATCO's application to approve the sale of the subject land and buildings, to "impose any additional conditions that the Board considers necessary in the public interest". In the exercise of that authority, and having regard to the Board's "general supervision over all gas utilities, and the owners of them" pursuant to s. 22(1) GUA, the Board made an allocation of the net gain for public policy reasons. The Board's

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> in the property, plant and equipment plus an allowance for necessary working capital all of which must be determined as being necessary to provide the utility service. The revenue required to pay all reasonable operating expenses plus provide a fair return to the utility on its rate base is also determined in Phase I. The total of the operating expenses plus the return is called the revenue requirement. In Phase II rates are set, which, under normal temperature conditions are expected to produce the estimates of "forecast revenue requirement". These rates will remain in effect until changed as the result of a further application or complaint or the Board's initiative. Also in Phase II existing interim rates may be confirmed or reduced and if reduced a refund is ordered.

(See also *Re Canadian Western Natural Gas Co.*, Alta. P.U.B., Decision No. E84113, October 12, 1984, at p. 23; *Re Union Gas Ltd. and Ontario Energy Board* (1983), 1 D.L.R. (4th) 698 (Ont. Div. Ct.), at pp. 701-2.)

66 Consequently, when determining the rate base, the Board is to give due consideration (GUA, s. 37(2)):

> (a) to the cost of the property when first devoted to public use and to prudent acquisition cost to the owner of the gas utility, less depreciation, amortization or depletion in respect of each, and
>
> (b) to necessary working capital.

67 The fact that the utility is given the opportunity to make a profit on its services and a fair return on its investment in its assets should not and cannot stop the utility from benefiting from the profits which follow the sale of assets. Neither is the utility protected from losses incurred from the sale of assets. In fact, the wording of the sections quoted above suggests that the ownership of the assets is clearly that of the utility; ownership of the asset and entitlement to profits or losses upon its realization are one and the same. The equity investor expects to receive the net revenues after all costs are paid, equal to the present value of original investment at the time of that investment.

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The disbursement of some portions of the residual amount of net revenue, by after-the-fact reallocation to rate-paying customers, undermines that investment process: MacAvoy and Sidak, at p. 244. In fact, speculation would accrue even more often should the public utility, through its shareholders, not be the one to benefit from the possibility of a profit, as investors would expect to receive a larger premium for their funds through the only means left available, the return on their original investment. In addition, they would be less willing to accept any risk.

68 Thus, can it be said, as alleged by the City, that the customers have a property interest in the utility? Absolutely not: that cannot be so, as it would mean that fundamental principles of corporate law would be distorted. Through the rates, the customers pay an amount for the regulated service that equals the cost of the service and the necessary resources. They do not by their payment implicitly purchase the asset from the utility's investors. The payment does not incorporate acquiring ownership or control of the utility's assets. The ratepayer covers the cost of using the service, not the holding cost of the assets themselves: "A utility's customers are not its owners, for they are not residual claimants": MacAvoy and Sidak, at p. 245 (see also p. 237). Ratepayers have made no investment. Shareholders have and they assume all risks as the residual claimants to the utility's profit. Customers have only "the risk of a price change resulting from any (authorized) change in the cost of service. This change is determined only periodically in a tariff review by the regulator" (MacAvoy and Sidak, at p. 245).

69 In this regard, I agree with ATCO when it asserts in its factum, at para. 38:

> The property in question is as fully the private property of the owner of the utility as any other asset it owns. Deployment of the asset in utility service does not create or transfer any legal or equitable rights in that property for

> ratepayers. Absent any such interest, any taking such as ordered by the Board is confiscatory . . . .

Wittmann J.A., at the Court of Appeal, said it best when he stated:

> Consumers of utilities pay for a service, but by such payment, do not receive a proprietary right in the assets of the utility company. Where the calculated rates represent the fee for the service provided in the relevant period of time, ratepayers do not gain equitable or legal rights to non-depreciable assets when <u>they have paid only for the use of those assets</u>. [Emphasis added; para. 64.]

I fully adopt this conclusion. The Board misdirected itself by confusing the interests of the customers in obtaining safe and efficient utility service with an interest in the underlying assets owned only by the utility. While the utility has been compensated for the services provided, the customers have provided no compensation for receiving the benefits of the subject property. The argument that assets purchased are reflected in the rate base should not cloud the issue of determining who is the appropriate owner and risk bearer. Assets are indeed considered in rate setting, as a factor, and utilities cannot sell an asset used in the service to create a profit and thereby restrict the quality or increase the price of service. Despite the consideration of utility assets in the rate-setting process, shareholders are the ones solely affected when the actual profits or losses of such a sale are realized; the utility absorbs losses and gains, increases and decreases in the value of assets, based on economic conditions and occasional unexpected technical difficulties, but continues to provide certainty in service both with regard to price and quality. There can be a default risk affecting ratepayers, but this does not make ratepayers residual claimants. While I do not wish to unduly rely on American jurisprudence, I would note that the leading U.S. case on this point is *Duquesne Light Co. v. Barasch*, 488 U.S. 299

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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.

NGEIR ISSUES AND STORAGE REGULATION

FINAL ARGUMENT OF THE VULNERABLE ENERGY CONSUMERS COALITION (VECC)

August 28, 2006

environment while only minimally limiting the ILECs' pricing flexibility in forborne markets.[21]

The price ceiling was the last regulated price before the imposition of forbearance. In this way, the Commission sought to ensure that competitive markets would not worsen the position of the ordinary consumer as market forces replace regulation in the local services market. Other protections were implemented touching on other matters such as customer privacy rights, disconnection policies and obligations such as access to emergency and disabled services common to all LECs.

In the event that the Board chooses to forbear in all or any part of the storage market, the provision of a similar package of protections, as outlined above would be particularly important. As Mr. McKeown has confirmed, before forbearance can be granted, the CRTC requires confirmation of rivalrous behavior, frequently through price reductions of the subject service. (Tr. Vol 7, p.155) In the case of regulated storage, no such pattern of price reductions has been observed, in fact, there is evidence that the current market would set a much higher price. There is thus increased justification for imposition of a framework on any storage regulatory forbearance that protects consumers in a similar fashion from economic detriment.

5. Implications of the ATCO Decision

In the course of the oral hearing, the issue of the relevance of the Supreme Court of Canada decision in the *ATCO Gas and Pipelines Ltd. v. Alberta (Energy &*

[21] Ibid at paras 451 and 452

Utilities Board) [22]to the regulatory treatment of the storage assets of Union was raised by Chairman Kaiser. (Tr. Vol. 3 p.174). Union counsel responded (Tr. Vol. 4. pp 1-7) by reviewing selected passages from the case and stating:

> "I expect we will argue this in a more fulsome way and probably a more subtle way at the end of this hearing, but my submission is that those are the basic principles. The utility owns the assets, not the ratepayers.
>
> There were comments in the earlier cases that Mr. Janigan referred to yesterday by Union witnesses that are inconsistent with these conclusions. I think to some extent you have to put the issue in context. At that time, the issue was whether or not the premium would go to infranchise or ex-franchise customers, and the argument was in favour of infranchise; but, rightly or wrongly, those statements were made at a time prior to ATCO and ATCO now has, in my submission, pretty much settled the law in this area."

In Union's argument, it is noted that:

> "The ATCO case confirmed that ratepayers have no claim to utility assets or to the revenues associated with those assets, once the assets are no longer required for regulated service."

Implicit in the Enbridge request for forbearance from regulatory oversight concerning transactional storage services, is the contention that the presence of transactional storage services competition can trigger a Board decision that insulates the utility from accounting for these rate base assets. Enbridge wishes to use the assets acquired through customer rates not to the fullest and best use for the benefit of the utility but rather to the benefit of the shareholder.

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[22] [2006] S.C.J. No. 4

The *ATCO* decision concerned the proceeds of sale of property that was specified to be no longer used or useful for the provision of utility services and whose sale would not cause harm to the ratepayers. The plain facts concerning the state of the storage assets in play for which forbearance is sought in this proceeding, negates a finding that the LDCs are in the same position as ATCO was in dealing with the proceeds of the property sale. More importantly, there is clear financial harm to the interests of the ratepayers through the loss of some 45 million dollars associated with the Union storage market premium, and the loss of 4-5 million dollars of Enbridge TS revenues (Undertaking K6.1).

The LDCs position glosses over the importance of the discretion of the Board to set just and reasonable rates. This exercise involves a balancing of the interests of the interests of the customers with the necessity to ensure that the regulated entity is allowed to make sufficient revenues to finance the costs of its services. [23] It is a broad power that requires a weighing of a large number of interlocking and interacting considerations[24] including the objectives of the *Ontario Energy Board Act*[25] (the *"Act"*). In particular the statutory Board objective contained in sec. 2. of the Act is instructive in relation to the balancing of concerns associated with the setting of rates:

> "2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service"

For the Board to proceed to set rates for in franchise customers by acceding to the forbearance proposals put forward by the LDCs in this case would essentially comprehend an appropriation of rate base assets and associated revenues to the

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[23] *Bell Canada v. Canada (C.R.T.C.)* [1989] 1 S.C.R. 1722
[24] Allstream Corp. v. Bell Canada [2005] F.C.J. No. 1237 paras 26-34 (C..A.)
[25] *The Ontario Energy Board Act 1998*,S.O. 1998 as amended

credit of the shareholder with the assurance of additional financial burdens being borne by customers who paid for the acquisition of the assets with their rates. It is difficult to advance a reasonable scenario where the Board acting pursuant to its statutory authority to set just and reasonable rates and in compliance with the objective of protection of consumer interests could set rates while being indifferent to the unfairness of the LDCs proposal ostensibly triggered by competition.

The *Duquesne Light* case, a decision of the Supreme Court of the United States is also insightful as to the breadth of the powers of utility regulatory tribunals to set just and reasonable rates.[26] The utility was seeking to overturn a utility commission ruling that denied recovery of expenditures for cancelled plants that had been previously ruled prudent. The majority judgment noted that it was the fairness of the result that was important in setting rates not simply the application of an economic theory:

> Similarly, an otherwise reasonable rate is not subject to constitutional attack by questioning the theoretical consistency of the method that produced it. "It is not theory, but the impact of the rate order which counts." Hope, 320 U.S., at 602 . The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties. Errors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding. The Constitution protects the utility from the net effect of the rate order on its property. Inconsistencies in one aspect of the methodology have no constitutional effect on the utility's

[26] *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989)

> property if they are compensated by countervailing factors in some other aspect. [27]

The application of the principles set out in the cases cited above requires that the Board not be ambivalent to the net effect of the LDC forbearance proposals. Competition is not the equivalent of pixie dust transforming rate base assets into potential plunder for the utility shareholder. The granting of any forbearance would require conditions to enable the setting of just and reasonable rates that avoid the imposition of financial burdens on consumers for the enrichment of the shareholders. The recent *ATCO* case put no gloss on the requirement of the Board to ensure just and reasonable rates. The appropriation of revenues in the manner set out in the proposals of the LDCs must not succeed not because of a property right of ratepayers in the storage assets but because of the principle of regulatory fairness.

6. S&T Deferral Account Proposals and Other Issues

a) Union's S&T Proposals

Union proposes to eliminate two storage-related S&T deferral accounts, the Long Term Peak Storage and the Short Term Storage and Balancing Services accounts, and to cease sharing any of the forecasted revenues from the assets underpinning these accounts with ratepayers: the evidence is that this proposal will impact ratepayers adversely by $44.5 million. As such, VECC opposes the proposal to cease sharing as, in VECC's view:

[27] It is to be noted that the Court also gave short shrift to the principle that fairness in rate setting required a market value approach to compensating the utility for the value of the services provided.

ENBRIDGE GAS DISTRIBUTION UNDERTAKING NO. K7.9

UNDERTAKING

To advise whether the Board, for the purpose of setting rates, has ever asked Enbridge Gas Distribution or its predecessor to write down the value of any of the storage assets developed under cost-of-service. (7 Tr. 135)

RESPONSE

The Ontario Energy Board (the Board") has not asked Enbridge Gas Distribution ("the Company") or its predecessors to write down the value of its storage assets developed under cost of service, however, since 1993 the Board has denied (with reasons) the Company's actual costs for its storage operation in two rates decisions.

The first decision was EBRO 479 (March 1993) when the Board denied the Company's full cost of acquiring the remaining 50% of Tecumseh Gas Storage shares from Imperial Oil. At paragraph 6.1.13 of that Decision the Board stated:

> The Board thereby specifically disallows including in rate base the $5 million premium component of the $19.6 million the Company assigned to the Tecumseh shares. As a result, the question of how to allocate this premium is irrelevant.

The second Decision was EBRO 492 (September 1996) when the Board denied the Company's full cost of installing the K-711 compressor due to a cost overrun. At paragraph 2.2.43 of that Decision the Board stated:

> The Board finds that the costs of K-711 exceeded its estimated costs by $457,000, which sum shall be absorbed by the Company's shareholders. Consequently the Board has removed this amount in establishing the rates for the Company's 1997 fiscal year, as shown in Appendix B.

GAS RATE FUNDAMENTALS

1969

AMERICAN GAS ASSOCIATION
RATE COMMITTEE
605 Third Avenue, New York, N. Y. 10016

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Utility pricing policy decisions can be judged against the results that would occur if similar policies were pursued in competitive markets. Under this standard, utility customers would be treated in nearly the same fashion as would be the case under competition. Utility pricing schemes that constitute a redistribution of wealth reflect the political process rather than administrative regulation.

Environmental Protection

Rates that are economically efficient will optimize the use of scarce resources and, by definition, minimize adverse environmental effects. Thus, to a great extent, this objective parallels the goal of economic efficiency.

Employment

Given that full employment is an important national objective, gas utility rates that enhance the prospect of employment serve an essential purpose. Nondiscriminatory rates for industry that both attract new business and retain existing employees might be viewed as enhancing this goal.

Balance of Payments

The balance of international payments is a vital national economic and political concern. Pricing that minimizes the use of imported fuels could be regarded as an important objective.

VALUE OF SERVICE

Utility rates that reflect competitive factors are often called value of service rates. Value of service is shorthand for the highest price that a single customer is willing or able to pay for service. That price depends, in part, on the price and availability of alternative service (e.g., fuel oil, coal, etc.). With respect to an entire rate class, value of service can be defined as an area under an economist's demand curve (i.e., the social benefit obtained from the particular service). Some critics characterize rates based on value of service as charging "what the traffic will bear."

In the design of gas rates, value of service can be used as the upper limit of a rate or as a basis for departure from marginal costs to achieve economic efficiency. In pricing gas service to meet competition, some price discrimination may be necessary, but the gas rate should at least equal the incremental cost of the gas service. The use of value of service in setting utility rates has been proposed by economists under other names such as "quasi-optimal," "Ramsey," and "inverse elasticity rule" pricing.

Value of service or quasi-optimal pricing can be illustrated by using the demand curves shown in Figure 8–1. For a given class, the value

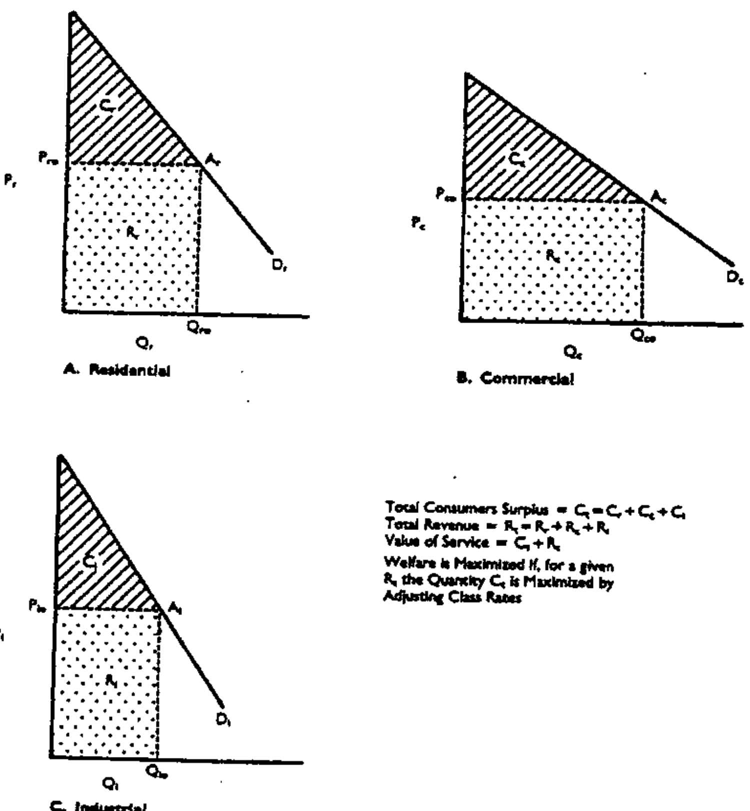

Figure 8–1. **Quasi-optimal pricing given a total revenue constraint**

of service is the area under a class demand curve (Figure 8-1A). Thus, if residential sales are quantity Q_{ro}, residential *value of service* would be the *total* shaded area C_r and R_r. Price would be P_{ro} and residential class *revenue* received by the utility would be the area of the rectangle R_r (price times quantity equals revenue). Economists call the area of the triangle C_r *consumers surplus*. Consumers surplus is the difference between value of service and the consumers' costs (or the utility's revenues).

Assuming that there are three load classes (residential, commercial, and industrial), with the demand curves shown in Figure 8-1 the mechanics of consumers' surplus are straightforward. Mathematically, levels for P_r, P_c, and P_i must be such that the total revenue R_t equals allowed revenue (i.e., the regulatory constraint) while, at the same time, total consumers surplus for the three rate classes is maximized. This can be accomplished by an iterative process or by use of the inverse elasticity rule (IER). In brief, the IER calls for scaling down revenue from the various customer classes inversely proportional to the price elasticity of demand of the various customer classes. The price elasticity of demand (i.e., the slope or derivative of the demand curve D in each of the three figures) is multiplied by the respective P times Q. Maximization of consumers' surplus in the foregoing example is tantamount to the maximization of economic efficiency subject to the constraint of the utility's revenue equaling its allowed revenue requirement.

PRICE DISCRIMINATION AND PRICE DIFFERENTIATION

Price discrimination may surface if rate differentials do not reflect cost differentials or if weight is given to value-of-service considerations. Selling the same article, produced under a single control, at different prices to different buyers is known as *price discrimination.*[2] This definition must be suitably qualified. For example, quality-of-service or product differentiation (e.g., firm vs. interruptible service) and cost differentials may warrant pricing differences. A seller practices discrimination if the relative prices charged for various products are disproportionate to the relative costs of production of the products sold.[3]

[2] Joan Robinson, *The Economics of Imperfect Competition*, (London: Macmillan and Co., Ltd., 1933), p. 179.
[3] Ralph K. Davidson, *Price Discrimination in Selling Gas and Electricity*, (Baltimore: The Johns Hopkins Press, 1955), p. 23.

Most statutes applicable to utilities do not prohibit price discrimination *per se*, they merely require that rates discriminate fairly. A regulatory body, for example, might authorize rate differentials that reflect competitive rather than cost differences, so long as other customers are not thereby burdened or called upon to subsidize the customers receiving the lower competitive rate.

AVAILABILITY OF GAS SUPPLY

The availability of gas supply has a significant impact on gas utility pricing. In periods of short supply, particularly if the shortage is caused by regulatory action that restricts the price paid for new gas supply (i.e., gas is underpriced with respect to oil), rates may be set "high" by a distribution company to discourage gas uses in applications where an alternative energy source is available (e.g., under dual-fueled boilers). Similarly, the attachment of new customers could be done on a priority basis so that service to existing customers would not be jeopardized. In some instances, load-shedding policies or curtailment guidelines must be implemented. Priority of service policies are established by federal and state commissions.

Periods of adequate gas supply are apt to reflect competitive market conditions for gas exploration and production with the result that gas producers, pipelines, and distributors may face intense marketing pressures. This could occur in markets where large customers are capable of burning No. 6 or residual oil, as well as in so-called gas vs. gas-competitive markets. Marketing problems may occur if a gas distributor attempts to base all rates on an allocated cost of service, with no adjustment for competitive factors.

INTERRUPTIBLE SERVICE

The level of interruptible rates frequently reflects value of service considerations. The marginal gas supply cost of service, in theory, for interruptible service equals the rate charged for such service less any distribution-related costs. The extent of such service is determined by reducing the days of curtailment until marginal revenue is equal to marginal cost.

The lowest possible cost and, therefore, the lowest possible cost-based price level is the commodity cost of the marginal supplier, assuming that additional quantities of gas can be made available without increasing pipeline or storage capacity. The quality of interruptible service can be improved without adversely affecting firm

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SETTLEMENT PROPOSAL FOR ISSUES RELATED TO ENBRIDGE GAS DISTRIBUTION INC. IN THE NGEIR PROCEEDING

ISSUES I and IV

June 13, 2006

1.5 STORAGE ALLOCATION METHODOLOGY FOR GAS FIRED GENERATORS (BASE LEVEL DELIVERABILITY)

COMPLETE SETTLEMENT

There is an agreement to settle this issue on the following basis:

Currently, Enbridge Gas Distribution's storage operations are directed at meeting winter demand. The existing Board approved methodology used by the Company for allocating cost based standard storage at 1.2% deliverability is called "excess over average". Under this methodology, storage space is allocated to customers based on the difference between the customer's average winter demand as compared to the customer's average annual demand.

Parties recognize that the current excess over average methodology would not be sufficient or appropriate to meet the profile and needs of gas fired generators. Gas fired generators, like other Enbridge Gas Distribution customers, are entitled to an allocation of cost based standard storage at 1.2% deliverability. A separate storage allocation methodology for cost based standard storage at 1.2% deliverability, subject to the same ratchets as the Company's other ratcheted storage contracts, is appropriate for gas fired generators.

Parties agree that it is appropriate to implement a storage allocation methodology for cost based standard storage at 1.2% ratcheted deliverability for gas fired generators that recognizes the very different characteristics of those customers but which, at the same time, is consistent with the level of storage allocated to existing customers. Currently, the Company's customers only receive an allocation of cost based storage at standard deliverability that meets 57% of the gap between system peak demand and the amount of gas delivered through pipeline supplies. The remainder of this gap is met through other balancing means such as peaking supplies and curtailment. In order to achieve consistency, the Company will limit the storage allocation available to gas fired generators to the same level, such that the allocation of storage at standard deliverability to gas fired generators will be scaled to 57% of the amount of storage at standard deliverability required to meet the gap between demand and pipeline supply.

The allocation methodology for gas fired generators' entitlement to cost based standard storage at 1.2% deliverability is also premised on the following:

a) The storage space requirement to meet gas fired generators' intra day balancing needs is based on the assumption that high deliverability storage is available to those customers in the market.

b) This agreement does not address the pricing or allocation of high deliverability storage, nor does it address whether or when the Company might offer that service using its own assets. In the event that the Company does not offer this service using its own assets, and customers request high deliverability storage from the Company, then the Company will use reasonable efforts to procure this service from third parties for its customers.

c) The storage allocated is offered at rolled-in cost based rates. This means that if the Company has to acquire additional storage capacity to meet the allocations requested by gas fired generators, then the cost of the acquired storage will be aggregated with the cost of the Company's existing storage and a new rolled in rate for all storage will be determined. The Company's best estimate of the impact of acquiring the standard storage at 1.2% deliverability that would be required under the new methodology for gas fired generators, assuming a total of 2000MW of generation capacity, is that the rolled-in cost based rates for storage would increase by approximately 1%.

d) The storage being allocated is subject to system ratchets, which are the standard ratchets applicable to the Company's storage contracts.

e) The storage allocated could be used for service under either Rate 315 or Rate 316 (at standard 1.2% deliverability).

f) Notwithstanding this specific allocation methodology for gas fired generators, a gas fired generator may still request that their base level storage entitlement be determined using the existing excess over average methodology.

The allocation for gas fired generators for cost based standard storage at 1.2% deliverability is as follows:

g) A gas fired generator is assumed to provide gas supply equal to 17 times the maximum hourly demand of the facility. In the event that the plant is not dispatched, up to 17 hours of supply may need to be injected into storage, assuming that storage is the only means of balancing available.

h) Assuming that high deliverability storage at 10% is available to meet the gas fired generator's needs, this would result in a space demand of 17 times the maximum hourly demand, divided by 10%.

i) The space demand that is determined is then multiplied by .57 to determine the amount of cost based standard storage at 1.2% deliverability available to the gas fired generator.

It is the Company's expectation and belief that the storage allocation proposal for gas fired generators accepted in this proceeding will not have any adverse impact on the quality of or access to the utility's existing services. Based upon the current information available to the Company, and the Company's best estimates, the only rate impacts of this proposal on other customers of the Company is described above at subparagraph (c).

Participating Parties: All parties participated in the negotiation and settlement of this issue, except IESO, TCPL, Direct Energy, Jason Stacey, OPA, Aegent and Kitchener.

Approval: All participating parties accept and agree with the proposed settlement of this issue.

Evidence: The evidence in relation to this issue includes the following:

APPrO Evidence

PowerPoint Presentation at May 16, 2006 Technical Conference

Technical Conference Evidence

April 6, 2006 Tr. 107-111 and 178-181 (Enbridge Gas Distribution)

April 27, 2006 Tr. 62-64 (Enbridge Gas Distribution)

May 16, 2006 Tr. 198-201 (APPrO)

1.6 RATE 316

NO SETTLEMENT

The Company has filed extensive written evidence about its proposed Rate 316, and has answered questions from all interested parties about this proposed Rate over the course of two days of Technical Conference (April 6 and 27, 2006). The Company's specific proposals for Rate 316, along with a discussion of the pricing for aspects of the proposed Rate, are set out in its prefiled evidence at C-1-1 (Overview), C-3-1 (Rate 316), C-3-3 (Rate 316 – Draft Rate Schedule) and C-3-4 (Rate 316 – Derivation of Charges). Certain of the undertaking responses filed by the Company also relate to the proposed Rate 316.

Evidence about the storage needs of gas fired generators, prepared by APPrO (APPrO evidence: pp. 31-32 and 62; and PowerPoint Presentation at May 16 Technical Conference), has also been filed in this proceeding and addressed through Technical Conference on May 16 and 17, 2006.

While it appears that parties are supportive of many of the technical aspects of the proposed Rate 316, there is disagreement as to whether and how the service would be offered, and what pricing would apply.

In the event that the Company does offer Rate 316 storage service, it is prepared to offer the service using the same nomination windows as agreed to for Rate 125 (described at subsection 1.1(a) of this Settlement Proposal).

Evidence: The evidence in relation to this issue includes the following:

Enbridge Gas Distribution Evidence

A-1-1 Overview and Background
B-1-1 Current Experience
B-2-1 Operational Characteristics and Needs of Power Generation Customers
B-3-2 Operational Characteristics, Issues and Proposed Solutions: Storage
B-4-1 Rate Design Principles and Approaches
C-1-1 Overview
C-3-1 Rate 316
C-3-2 Proposed Tariff for Rate 316
C-3-3 Rate 316 – Draft Rate Schedule
C-3-4 Rate 316 – Derivation of Charges
F-2-1 Response to APPrO evidence (Rates 125 and 316)

APPrO Evidence

Prefiled Evidence of APPrO pp. 31-32 and 62

Technical Conference Evidence

April 6, 2006

April 27, 2006

May 16, 2006 Tr. 198-201 (APPrO)

Undertakings

Enbridge Gas Distribution Undertaking #s 10, 12, 19-23, 25-28, 39, 40 and 44

1 requires them to pay. I'm not sure how they go about
2 getting high deliverability from Union and we don't have
3 any evidence on how that would work. We just have the bald
4 statement, We will go to the market. And we know that is
5 limited to Union and Enbridge
6 MR. KAISER: Thank you.
7 MR. RUPERT: Just three questions, Mr. Moran. First,
8 a very quick one: Page 23 of Enbridge's final argument,
9 something you didn't address specifically in your argument,
10 the comment is made there to the extent that high
11 deliverability storage -- with respect to high
12 deliverability storage in the settlement agreement.
13 Essentially, it says that there are conditions around
14 that settlement agreement were such that if the service is
15 available in the market, then Enbridge will provide it, and
16 it closes with a punch line that says:
17 "The generators must have been confident about
18 the ability of the market to deliver appropriate
19 services."
20 Now, you didn't speak specifically to that in your
21 argument, but I ask for your comment on that
22 characterization of the settlement agreement.
23 MR. MORAN: Sure. I mean, that goes back to the --
24 what I did say with respect to the exchange between Mr.
25 Cass and Mr. Rosenkranz, where he attempted to get or tried
26 to get Mr. Rosenkranz to agree that it's out there?
27 Now, clearly Mr. Rosenkranz did not agree that it's
28 out there, so I don't know where Mr. Cass gets his

1 confidence or his view that the generators were confident.
2 I mean, I could tell you that when you look at the two
3 settlement agreements and how they're set up, there can be
4 no confusion about the fact that the space got squeezed
5 down because it was going to be -- that the need was going
6 to be met on high deliverability.
7 So to go back and to quote you earlier, what you
8 described as the dumb way to meet the deliverability, you
9 know, you could just buy up a whole bunch of space. Well,
10 the settlement agreement isn't set up that way. That's not
11 an option. We're going to be allocated -- the generators
12 are only going to be allocated based on the concept that
13 high deliverability has to be added to that.
14 So if you set up the whole construct, I'm not sure,
15 again, where Mr. Cass gets the idea in his submissions that
16 somehow the generators are confident. It's not going to
17 work, based on the allocation that we have in the
18 settlement agreement, if high deliverability isn't added on
19 a cost basis, as well. That is a package, and we're here
20 to argue about whether it should be cost or market. But
21 that's the nature of the debate, is it cost or market? You
22 can't, on the one hand, say, Here's a methodology that
23 envisages high deliverability and then, on the other hand,
24 say, Oh, by the way, best of luck in the open season.
25 Maybe some other players will come in and buy up all
26 that high deliverability, which is only available in
27 Ontario. So, in effect, you have transferred Enbridge's
28 and Union's market power to some other person who is

1 prepared to bid it up in order to beat the generators, and
2 then the generators are still captive, because there is
3 nowhere else to go for this.
4 That's why an open season doesn't make any sense and
5 that's why it has to be an allocation.
6 MR. RUPERT: Thanks. In your argument now, and
7 frequently throughout your direct and cross-examinations,
8 you spoke about reliability of the electricity system. I
9 just want to make sure I understand how the outcome of this
10 proceeding will affect reliability.
11 My understanding, from things that you said earlier
12 and some of your witnesses and others, is that although it
13 may be expensive, it would be physically possible to
14 operate a gas-fired generation station today without
15 enhanced services. Maybe in some people's views it would
16 be outrageously expensive.
17 Is that the reason why there would be reliability
18 issues, is that generators would choose not to operate
19 because of the punitive economics, as opposed to physically
20 being unable to operate in the way required by the
21 contracts?
22 MR. MORAN: Well, I think there's two components to
23 it, Mr. Rupert.
24 First of all, the contracts that the dispatchable
25 generators operate under, they're not physical obligations,
26 and Mr. Cramer indicated that in his evidence.
27 It's a financial obligation. It's a capacity
28 agreement. You're making capacity available, and so you

1 In the regulatory world what you would have to prove
2 to a regulator at that point in time is that you got either
3 a stranded asset or an underperforming asset, and that it
4 may have some rate implications on other customers.
5 I'm not suggesting those risks are greater or less,
6 but they are certainly risks you have to deal with in that
7 regulatory environment in that particular instance. So on
8 balance, I think those risks in the marketplace can be
9 quite significant, but one shouldn't assume that if it is
10 regulated you're always going to get recovery of your
11 costs, because that simply isn't a realistic assumption.
12 MS. CHAPLIN: But it is not your view, necessarily,
13 that the risks in the unregulated competitive market are
14 greater or less than the regulated market. You're merely
15 commenting that in the regulated scenario there is a risk
16 associated with cost recovery. But it is not your
17 assertion that that risk is greater than the risks you
18 might face in an open and unregulated competitive market?
19 MR. GRANT: That is correct.
20 MS. CHAPLIN: Okay. Somewhat related to that, and
21 finally, I believe it was the testimony of APPrO - and I
22 stand to be corrected - but it was certainly my
23 understanding that they would contemplate contracting for
24 these incremental storage services on a long-term basis,
25 longer than the sort of two- to five-year scenario. Does
26 that alleviate your concerns around this risk of cost
27 recovery in a regulated scenario?
28 MR. GRANT: It doesn't completely alleviate those

1 risks. It is certainly helpful, I think, to have longer-
2 term contracts. Even in a forbearance situation, that may
3 be quite attractive.
4 If you have bidders who are prepared to commit very
5 long-term, they may have a leg up, relative to bidders who
6 are not prepared to. And of course, they would discount
7 their price in that forbearance scenario, and that might be
8 attractive.
9 In the regulated scenario, however, even if we have a
10 long-term commitment, while that might deal with a certain
11 element of the re-contracting risk, that is only one of the
12 four fairly significant risks that I had outlined in my
13 testimony.
14 MS. CHAPLIN: Okay. Thank you.
15 MR. KAISER: Just a quick follow up question on that,
16 Mr. Grant.
17 When you do your binding open season to test whether
18 it is economic for you to build this expansion, what's the
19 minimum contract term that you are looking for?
20 MR. GRANT: In our non-binding phase, I believe the
21 minimum was three years and the maximum was ten years. But
22 that still is open for some revision.
23 We may make some revision to that in the binding
24 phase, relative to the discussion I was just having with
25 Ms. Chaplin. If we were feeling there are some
26 participants in the marketplace who were prepared to commit
27 to longer than ten years, I certainly wouldn't want to
28 limit, by way of my open season, those people. I would

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2
3

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

10

11 **ARGUMENT OF NEXEN MARKETING**
12 **AUGUST 25, 2006**
13
14

15 By Procedural Order No. 9 released July 13, 2006, the Ontario Energy Board set the schedule for
16 the final argument and cost awards process relating to the above proceeding. Nexen submits
17 that it is unable to provide its argument orally on August 28, 2006 and hereby provides its written
18 argument in accordance with Board instructions contained in Procedural Order No. 9.

19 **Preamble**

20 Nexen Inc. is a Canadian company, headquartered in Calgary, Alberta, with oil and gas
21 exploration and production worldwide. As part of Nexen Inc., Nexen Marketing (Nexen) is
22 responsible for the marketing and trading of Nexen Inc.'s production of oil, natural gas and
23 liquids, as well as third party energy products including power. Nexen is consistently in the Top
24 10 North American gas marketers by volume, as published by Gas Daily. Nexen not only sells
25 the natural gas commodity, but also provides bundled and unbundled transportation, exchange,
26 balancing, peaking and other structured natural gas services. Nexen is a large shipper on both
27 the TransCanada Mainline and Great Lakes Gas Transmission systems, and also holds long-term
28 capacity on the Vector Pipeline and Panhandle Eastern Pipeline – all of which enable us to move
29 our supply and storage gas into Ontario and other Eastern Canadian markets. Nexen is also a
30 major supplier to Manitoba, Ontario and Quebec LDCs, as well as to industrial, commercial,
31 power generation and aggregator customers in these areas.

1 Board approval requirements and the associated regulatory delays which introduce risk and
2 uncertainty that diminish the value of storage in the Ontario market place will contribute to the
3 alleviation of risks associated with new storage development.
4
5 **Non-discriminatory access and pricing for all customers to utility-provided storage**
6 **services**
7
8 The power generators, as in-franchise customers, have stated an expectation to have priority
9 access to new storage services (TR. Vol. 10, pp. 209-210). As well, they also expect rates for
10 those services to be cost-based and allocated to the generators on an incremental cost basis
11 (TR. Vol. 10, pp. 140-141). These expectations by the power generators contribute to the unease
12 expressed by GMi with regard to the clawback of storage services currently provided to ex-
13 franchise customers (TR. Vol. 10, pp 106-107). Clawback of storage services from ex-franchise
14 customers in order to provide priority access to in-franchise customers for unbundled service
15 products is discriminatory and detrimental to not only GMi, but the very existence of the
16 secondary market that Ontario currently supports and benefits from. Equal, non-discriminatory
17 access to storage by all customers is paramount to the success of the market and puts the
18 services into the hands of those that value it the most. Equal and non-discriminatory access by
19 all customers also allows for the continued development of competitive products in the secondary
20 market, which Union, Enbridge, MHP Canada, GMi, and BP have supported through their cross-
21 examination. Nexen agrees with and strongly supports these parities and their views on non-
22 discriminatory access to storage services and the associated pricing. Whatever decision is made
23 by the Board on the issue of forbearance, Nexen would expect to be treated on a level playing
24 field with other ex-franchise customers of Union, such as Enbridge and gas-fired generators
25 outside of Union's franchise. Nexen should be able to compete with these parties on equal
26 footing as we provide comparable services to the same market within Ontario. The storage which
27 Nexen purchases from Union is primarily bundled and resold as commodity and/or services to the
28 Ontario market, which should command equal treatment as Enbridge and ex-franchise generators
29 who are also serving the same market. Nexen, in fact, currently serves gas-fired generation load
30 in Ontario and it would be discriminatory not to be able to compete under the same rules.

1 trickier. I think the first point is this: That BP
2 cautions the Board against creating the very conditions
3 about which we're having all of these debates; namely,
4 conferring competitive advantage on certain parties to the
5 exclusion of others and, ultimately, if you listen to the
6 economic theory, the detriment of people in the market.
7 BP is supportive of competitive solutions. I think
8 the Ontario legislature has indicated, given the wording of
9 section 29 of the Ontario Energy Board Act, that it is
10 supportive, generally speaking, of competitive conditions,
11 although there are criteria that must be met, a number of
12 which are within your judgment.
13 BP is supportive of Ontario's efforts to increase
14 power production, including from dispatchable gas-fired
15 plants. As Mr. Acker said, BP hopes to participate in the
16 market. We understand that the current status quo bundled
17 storage option just does not work.
18 I should say, by the by, about that that under the
19 existing arrangement pursuant to which gas generators and
20 industrial customers, who purchase bundled service from
21 Union -- under that arrangement, as we understand it,
22 either by contract or practical effect, they do not -- and
23 they get that at cost, but they do not go into competition
24 with those providing the services on a market basis,
25 because of the nature of that bundled service. When you
26 get bundled service, you're not taking out a storage
27 position. You're taking out a delivered position, a
28 bundled position.

1 So this issue about power generators going into
2 competition with people like BP to the detriment of, BP
3 says, the Ontario market is a new one, in a sense, for the
4 Board because the proposal you are hearing, I think, from
5 certain of the power producers is access to high
6 deliverability storage at incremental cost, as opposed to
7 market.
8 To the extent that incremental cost is substantially
9 less than market, which is the market that BP plays in,
10 then there is no question there is an advantage in terms of
11 -- absent any kind of restrictions.
12 And I think, Mr. Rupert, you alluded to that notion of
13 potential restrictions in your initial question to
14 Mr. Brown.
15 Absent restrictions in the reselling market, there are
16 going to be parties, such as the dispatchable generators,
17 who are going to have an advantage.
18 By the by -- and BP is not urging this specific issue
19 or relief on the Board -- but as I understand it, for
20 example, in TransCanada's FTSN proposal currently before
21 the NEB, if somebody is not going to be using the FTSN
22 service for the purpose intended, it may not go into the
23 reselling market on the same basis; i.e., with multiple
24 NOMs on same-day service. It would be restricted to next-
25 day service, for example.
26 And that is -- we don't know what the NEB is going to
27 do with it, but that is a concept of using regulatory
28 restriction or tariff restriction to address certain of

98

1 those issues.

2 So the broad point that I will conclude on,

3 Mr. Chairman, relative to this issue of access, is BP urges

4 you to be sensitive to the issues of advantage, relative

5 particularly to the reselling secondary market, which is,

6 after all, the one that BP came to speak to you about, in

7 establishing terms of access, terms and conditions of

8 service and rates for the so-called high deliverability

9 storage service.

10 Let me conclude on this point - and I think others

11 have, one way or the other, addressed this with you - and

12 that is we are starting a new chapter of sorts in the

13 ongoing deregulation and creation of infrastructure, the

14 catalyst being, perhaps, the dispatchable gas-fired

15 generators, but it was going to happen sooner or later

16 anyway.

17 As Mr. Acker indicated to you, once the first set of

18 services is put out there, others are going to start

19 creating those services on both sides of the border.

20 Others are going to start playing in those markets. At

21 some point - and it probably isn't in the all-that-distant

22 future - you are probably going to have to revisit some of

23 these issues.

24 So I don't think you should be concerned about, or

25 others should be concerned about, having to write the final

26 word on some of these issues right now.

27 Those conclude my submissions on behalf of BP, unless

28 there are questions, sir.

1 high deliverability service and that deliverability should
2 be there for two very good reasons. One, it's going to
3 allow these very large users of gas to better manage their
4 daily gas flows, and that will benefit the gas system; two,
5 and perhaps more importantly, it's going to allow them to
6 meet the reliability and adequacy needs on the electricity
7 side. They will be able to run when they have to run or
8 when they're asked to run on short notice, or shut down
9 when they're asked to shut down on short notice.
10 Those are two important benefits to both electricity
11 consumers and gas consumers in Ontario.
12 I have one other point to make that's separate from
13 the rate 125, and Board counsel indicated that you had a
14 commitment at 12 o'clock and I note that it is 12 o'clock.
15 It would take me about five minutes on the last point, but
16 I'm happy to come back after lunch.
17 MR. KAISER: I think if you only have five minutes,
18 we'll finish up.
19 MR. MORAN: All right. This last issue is the rate
20 125 migration issue. That has to do with the fact that
21 many years ago, in 2000, rate 125 was established by
22 Enbridge and it was intended to be designed for gas-fired
23 generators. There was always one customer identified as
24 being able to migrate, and that is TransAlta who is a gas-
25 fired generator.
26 From the very beginning, that rate was established for
27 all comers. So there was always an expectation that could
28 be migration to that rate by an existing customer. When it

1 was first proposed in 2000, there was a settlement
2 agreement, and IGUA signed off on that settlement
3 agreement, accepting that rate as it was proposed with
4 migration always being possible.
5 And as Enbridge has set out in its written argument in
6 this hearing, there are a number of reasons why the
7 migration didn't happen. They are economic reasons, and
8 you will find that set out in Enbridge's written argument
9 at page 25 and following.
10 Mr. Thompson at some point later today is going to
11 talk about how IGUA is opposed to migration for rate 125,
12 and he's going to talk about how if it's for bypass, it
13 really should be for new customers.
14 I just want to underline today that there are two
15 aspects to rate 125. There is a bypass component to the
16 amended version of rate 125 that's been brought forward in
17 this proceeding. TransAlta doesn't have access to the
18 contract demand billing feature. That is restricted to new
19 customers.
20 All that TransAlta has the right to do is to migrate
21 to the -- to rate 125 but without those new anti-bypass
22 features. So it has nothing to do with bypass. It's the
23 original kind of rate that was set up that TransAlta always
24 could have migrated to and over the last number of years
25 hasn't.
26 The other thing I would ask you to keep in mind when
27 you hear Mr. Thompson's submissions on behalf of IGUA is
28 the same migration issue arises in Rate 300. A whole bunch

1 of customers who are in his constituency and can migrate,
2 but he's certainly not opposed to migration in that
3 context.
4 I say what is sauce for the goose is sauce for the
5 gander, and that if these rates are designed for all
6 comers, then you expect to have a certain amount of
7 migration. And certainly there are folks on his side of
8 the fence that will benefit from that.
9 TransAlberta may migrate to Rate 300 as well. It has
10 that ability. It would be unfortunate that rate 125, with
11 certain features that were intended to assist gas-fired
12 generators, would not be made available to the customer
13 that was in the class of customer that it was intended to
14 benefit and that at this late stage that somehow TransAlta
15 would be told, Oh, you've had the right to my rate since
16 2000 but not any more.
17 There was a clear understanding through the course of
18 the years, that there was a economic reason for why
19 somebody might not migrate right away, and at the moment
20 the opportunity to migrate is coming up at this point, and
21 that's all described in some detail in Enbridge's argument
22 as well.
23 Those are my submissions, subject to any questions.
24 MR. KAISER: Mr. Moran, you mentioned the obligation
25 to serve. Is the obligation to serve any different with
26 respect to storage than it is with respect to gas, in your
27 view?
28 MR. MORAN: The statute says that the obligation is to

1 issue. I will simply comment on what Mr. Thompson said
2 earlier today.
3 He's relying on the greenfield energy centre physical
4 bypass decision, which he correctly characterized as a
5 situation where there was incremental load or new load
6 being represented by the greenfield entity, and they were
7 given authorization to construct their own pipeline to meet
8 that load.
9 And the Board made some comments about rates in the
10 future ought to be more resistant against competitive --
11 against such bypass applications, and, in fact, when the
12 Board commenced this proceeding, one of the issues was
13 whether existing rates could be made more secure against
14 bypass on a going-forward basis.
15 That's all fine and well, but, in my submission, what
16 is actually much more important to keep in mind with
17 respect to the actual migration issue that you have to deal
18 with in this hearing is that it's not a bypass issue. It's
19 not a physical bypass, obviously, but it is not even a
20 competitive bypass rate issue. There is no special rate
21 being set up for a particular customer.
22 It has nothing to do, whatsoever, with bypass. It's a
23 simple rate design issue, where new rates are created,
24 approved by the Board, and customers who qualify for that
25 rate are entitled to sign up for that rate.
26 The circumstances that TransAlta finds itself in is
27 that at the moment it appears that it is the only existing
28 customer that would be in that position, but that's simply

1 by coincidence and has nothing to do with bypass
2 whatsoever.
3 In fact, it is precisely the same migration issue as
4 you have to deal with on the Rate 300 matter, as well.
5 There is a new rate, and a number of existing customers are
6 -- can qualify for that new rate. It doesn't matter
7 whether it is Rate 125 or Rate 300. It's precisely the
8 same issue. And in my submission, therefore, it ought to
9 be treated in precisely the same way. If it's appropriate
10 for migration to occur, to Rate 300, I think -- it was on.
11 MS. CHAPLIN: Your friend turned it off. We're not on
12 air.
13 MR. MORAN: Okay.
14 [Technical difficulty]
15 MR. MORAN: If it is inappropriate, as Mr. Thompson
16 suggests, for TransAlta to migrate to Rate 125, then
17 clearly it's equally inappropriate for existing customers
18 to migrate to Rate 300, since it is precisely the same
19 issue.
20 There is a bypass proof component to Rate 125 that has
21 also been proposed. TransAlta does not qualify for that.
22 And that just underlines the basic proposition that the
23 migration issue for TransAlta to Rate 125 is not a bypass
24 issue.
25 The bypass component is reserved for new customers and
26 new customers only, and clearly TransAlta would not qualify
27 for that aspect of Rate 125.
28 Subject to any questions, those are my submissions,