

Robert B. Warren

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**WeirFoulds**<sup>LLP</sup>  
BARRISTERS & SOLICITORS

December 18, 2006

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
Suite 2701  
2300 Yonge Street  
Toronto ON M4P 1E4

Dear Secretary:

**Re: EB-2005-0551/Motion for Review**

We are counsel to the Consumers Council of Canada. On behalf of our client, and as the agent for Peter Thompson, counsel to the Industrial Gas Users' Association, and Michael Janigan, counsel to the Vulnerable Energy Consumers Coalition, we enclose herewith a Notice of Motion seeking a review of the Board's decision in this matter.

With the original of this letter we are delivering ten copies of the Notice of Motion to you.

Yours very truly,

**WeirFoulds LLP**



Robert B. Warren

RBW/dh

c: Michael Janigan  
c: Peter Thompson  
c: Fred Cass, Counsel to Enbridge Gas Distribution Inc.  
c: Glenn F. Leslie, Counsel to Union Gas Limited  
c: All Parties

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**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.

**AND IN THE MATTER OF** Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

**NOTICE OF MOTION**

The Industrial Gas Users' Association, the Vulnerable Energy Consumers Coalition, and the Consumers Council of Canada (collectively, the "Applicants") , will make a motion to the Ontario Energy Board (the "Board") at its offices at 2300 Yonge Street, at a time and date to be fixed by the Board.

**The Motion is for:**

1. A review of those parts of the Decision of the Board dated November 7, 2006 (the "NGEIR Decision") pertaining to Storage, Storage Regulation, and Storage Allocation.
2. An Order that those parts of the NGEIR Decision pertaining to Storage and Regulation and Storage Allocation be cancelled.
3. An Order that this motion for review be heard by a panel of the Board comprised of members other than those who rendered the NGEIR Decision.
4. An Order granting the moving parties their reasonably-incurred costs in connection with this motion for review.
5. Such further and other relief as counsel may advise and the Board permit.

**The Grounds for the Motion are:**

**I The Board Erred in That There Was Insufficient or No Evidence to Support its Essential Conclusions**

1. Section 29 of the *Ontario Energy Board Act* (the "Act") permits the Board to refrain, in whole or in part, from regulating the rates for the storage of gas only if the Board finds as a question of fact that storage is or will be subject to competition sufficient to protect the public interest.
2. The public interest includes the interests of consumers with respect to the prices paid for storage.
3. In order to fulfil its statutory obligation, the Board had to find as a fact that forbearing from regulating the rates charged for the storage of gas would not adversely affect the interests of consumers with respect to prices not just at the time of the decision, but also at the end of the period when the transition measures would be in effect (the transition period).
4. The finding of fact had to be based on evidence.
5. The Board erred in finding that there was sufficient evidence that there is a competitive market for storage in Ontario.
6. Since the close of the evidentiary portion of NGEIR proceeding, the commodity value of storage has approximately doubled. This precipitous increase in the commodity value of storage shows that the market for storage is not in fact competitive, contrary to the Board's finding.
7. In the alternative, there was no evidence that there is or would be competition sufficient to protect the interests of consumers with respect to prices now or at the end of the transition period.
8. In the absence of such evidence, there was no basis upon which the Board could reach a decision to forbear from regulating the rates charged for storage.
9. By making a decision that there was evidence of competition sufficient to protect the interests of consumers with respect to prices without any evidence to that effect, the Board exceeded its jurisdiction.

**II The Board Erred in Failing to Protect the Interests of Consumers**

10. The Board made fundamentally contradictory findings with respect to the circumstances of the in-franchise customers of Union and EGD.
11. The Board found that the in-franchise customers of EGD would not have access to competitive storage services. Based on that finding, the Board could not forbear from regulating the rates charged to those customers for storage. At the

same time, however, the Board will require those customers to pay, for a portion of their storage services, the unregulated rate which Union charges to its ex-franchise customers. EGD's customers will, accordingly, suffer an adverse impact, which will not be offset by a corresponding benefit, from the Board's decision.

12. The Board found that Union's in-franchise customers do not have access to competitive services for storage. As a result, the Board could not forbear from regulating the rates charged to those customers for storage. However, should the demand for storage services, for Union's in-franchise customers, exceed the cap, imposed by the Board, on the storage capacity which Union must reserve for its in-franchise customers, Union's customers will, have to pay unregulated rates for storage without getting any corresponding benefit.
13. The transition measures adopted by the Board, to protect the interests of consumers with respect to prices, are not sufficient to protect those interests.
14. Transition measures are not, in any event, sufficient to grant the Board jurisdiction in the absence of evidence that there is competition sufficient to protect the interests of consumers with respect to prices.
15. Section 2 of the Act requires the Board, in carrying out its responsibilities with respect to gas, to be guided by a number of objectives, including the protection of the interests of consumers with respect to prices.
16. The Board erred in failing to follow that objective.
17. Without evidence to establish that unregulated prices for deregulated storage services will not materially increase from those prevailing under regulation, the Board has no power to forebear from regulation under Section 29 of the Act.
18. Without evidence to establish that ratepayers will not be harmed by unregulated prices for storage services, the Board has no jurisdiction to forebear from regulation under section 29 of the Act.
19. There is no evidence to establish that unregulated prices for storage services would not harm ratepayers. The evidence showed that Union and EGD ratepayers would be materially harmed, in the case of Union, with rates increases of about \$30 million per year on the expiry of the transition period and for EGD, rate increases of about \$14 million per year on the expiry of the transition period.

### **III The Board's Decision was Contrary to Regulatory and Public Policy**

20. The NGEIR Decision will result in a material increase in revenue to the shareholder of Union and, to a lesser extent, an increase in the revenue to EDG's shareholder. At the same time, there will be no corresponding benefit to ratepayers of either Union or EGD. Indeed, the ratepayers of Union and EGD will suffer adverse impacts, in both the short and the long term. The NGEIR

Decision upsets the balance between the interests of ratepayers and shareholders which the regulatory system is supposed to maintain. The NGEIR Decision is, therefore, contrary to public and regulatory policy.

21. The Board decision is contrary to public policy in transferring the benefit of the use of unique Ontario assets from ratepayers to the shareholders of Union and EGD.

#### **IV The Board Erred With Respect to Storage Allocation**

22. The Storage Allocation part of the NGEIR Decision should have been confined in scope to matters in issue between Union and the City of Kitchener ("Kitchener"). The issue with respect to Storage Allocation was a customer-specific dispute between Union and Kitchener.
23. Neither Union nor any of its T1 customers sought to change their contracted Storage Allocation.
24. The Board has no jurisdiction to override contracts between Union and its customers without first being asked by one of the contracting parties to grant such relief.

#### **V The Board Erred in That It Was Predisposed to Forbear from Regulating the Rates for Storage for Gas (IGUA Only Ground)**

25. The NGEIR Decision was not adjudicative because throughout the NGEIR process, initiated by the Board on its own motion, the Board revealed that it was a proponent for the forbearance relief it decided to grant.
26. Such further an other grounds as counsel may advise and the Board permit.

#### **The Following Documentary Evidence Will Be Used At The Hearing Of The Application:**

1. Those portions of the Record of the NGEIR proceeding pertaining to Storage, Storage Regulation and Storage Allocation.
2. Such further and other documentary evidence as counsel may advise and the Board permit.

December 18, 2006

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AND TO: All Parties in EBRO 2005-0551  
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