

ONTARIO ENERGY BOARD

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

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

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

**ARGUMENT OF
THE INDUSTRIAL GAS USERS ASSOCIATION (“IGUA”)**

June 12, 2007

Peter C. P. Thompson, Q.C.

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen Street
Suite 1100
Ottawa, ON K1P 1J9

Telephone (613) 237-5160
Facsimile (613) 230-8842
Counsel for IGUA

TABLE OF CONTENTS

I.	INTRODUCTION AND BACKGROUND	1
II.	THE CAP ISSUE.....	2
III.	THE APPRO ISSUES.....	6
IV.	COSTS	7

I. INTRODUCTION AND BACKGROUND

1. In a Decision with Reasons dated May 22, 2007 (the “Review Decision”), the Ontario Energy Board (the “Board”) determined that three (3) matters pertaining to its Decision with Reasons dated November 6, 2006, in the Natural Gas Electricity Interface Review proceeding (the “NGEIR Decision”) were reviewable.
2. In its Notice of Hearing and Procedural Order No. 3 issued on May 29, 2007, the Board described the reviewable issues as follows:
 - (1) The decision to cap the storage available to the in-franchise customers of Union Gas Limited (“Union”) at 100 PJ (the “Cap Issue”);
 - (2) The decision regarding additional storage requirements for Union’s in-franchise gas-fired generator customers; and
 - (3) The decision regarding Rate 316 of Enbridge Gas Distribution Inc. (“EGD”).
3. The Board characterizes the latter two issues as the “APPrO issues”, even though the issues are of interest to some IGUA members. By letter to the Board dated June 7, 2007, counsel for IGUA sought permission to make submissions with respect to the APPrO issues on behalf of IGUA. By letter dated June 11, 2007, the Board granted this request.
4. IGUA has been provided with a draft of the Argument to be submitted by counsel for the Consumers Council of Canada (“CCC”) and the Vulnerable Energy Coalition of Canada (“VECC”). IGUA adopts in its entirety and will not repeat the “BACKGROUND” Section of those submissions.
5. As counsel for CCC and VECC point out, there is a fundamental contradiction in the NGEIR Decision where the Board expressly finds that the storage services, which Union and EGD provide to their distribution customers, are now and, for the foreseeable future, will be monopoly services; and in the same decision, grants relief which will require those very consumers of monopoly services to eventually pay materially higher and

supposedly competitive prices for such services. It is this fundamental contradiction in the NGEIR Decision which has prompted the Board to conclude, in the Review Decision, that the Cap Issue and the APPrO Issues are reviewable.

6. In IGUA's view, correcting the NGEIR Decision for its erroneous determinations of the Cap and the APPrO Issues will not completely eliminate the exposure of users of monopoly storage services to unregulated prices for those services. IGUA's view, expressed during the Motions for Review, is that, for all of the erroneous inconsistencies and contradictions in the NGEIR Decision to be corrected, the entire NGEIR Decision with respect to storage regulation needs to be reviewed so that the forbearance relief, which the NGEIR Decision grants, can be replaced with market-based rate relief and on-going monitoring of utility owner returns from such rates. However, the Review Decision rejects requests made by IGUA and others for a complete review of the NGEIR Decision. Accordingly, IGUA is currently considering its options for continuing to challenge the inconsistencies and contradictions in the NGEIR Decision which the Review Decision has concluded are not reviewable.

II. THE CAP ISSUE

7. IGUA's submissions for correcting the erroneous determination of the Cap Issue in the NGEIR Decision are premised on the following guiding principles:
 - (a) The Cap Issue is an allocation issue;
 - (b) When the Board allocates assets between utility and non-utility classifications, it does so for the purposes of setting rates for monopoly services. Accordingly, allocation is a rate-making function and derives from the Board's rate-making authority under s.36 of the *OEB Act*; and
 - (c) In the course of exercising its rate-making jurisdiction, the Board regularly evaluates the monopoly services needs of utility customers and, from time to time, assures that the utility is fulfilling its obligation to serve its monopoly

services distribution customers. Rate-making jurisdiction is exercised on a continuing basis and particularly when circumstances change.

8. In the context of these guiding principles, the finding in the NGEIR Decision that the storage services being provided by Union and EGD to their distribution customers are now and, for the foreseeable future, will remain as monopoly services leads to the inevitable conclusion that the monopoly storage services requirements of these distribution customers will need to be re-assessed, from time to time, as the Board exercises its rate-making jurisdiction. There is no doubt that, for the foreseeable future, Union and EGD will continue to add distribution customers requiring monopoly services. Accordingly, their monopoly storage services requirements will need to be re-assessed on an on-going basis. IGUA submits that these realities preclude the Board from making any permanent allocation of Union's integrated storage assets between utility and non-utility classifications. Yet, this is exactly what the NGEIR Decision purports to establish.
9. Based on the foregoing, IGUA submits that the permanent Cap feature of the NGEIR Decision cannot stand. It must be set aside and rescinded.
10. IGUA submits that, in the context of the other findings made in the NGEIR Decision, the implications, for Union, of setting aside the permanent Cap feature of the NGEIR Decision are as follows:
 - (a) The amount of Union's integrated storage that will be required to satisfy the needs of monopoly services distribution customers will be evaluated by Union and by the Board from time to time;
 - (b) As the combined needs of monopoly and non-monopoly storage services customers increase, Union will either develop additional storage itself or acquire incremental storage from third parties;
 - (c) The results of applying the allocation process to identify the requirements of utility and non-utility classifications will vary as time passes;

- (d) The reasonableness of the revenue and cost consequences of the allocation to the utility will be subject to review in cases where the regulated rates Union charges its distribution customers for monopoly storage services are being considered;
 - (e) Monopoly storage services will be regulated under the auspices of cost-based rates;
 - (f) Non-monopoly storage services will be transacted at unregulated competitive prices; and
 - (g) The “Earnings Sharing” aspects of the NGEIR Decision will continue, namely:
 - i) profits from short-term sales of storage services at competitive prices will be shared with ratepayers, and
 - ii) profits from long-term storage transactions will accrue entirely to the benefit of Union’s shareholder and there will be no on-going monitoring of the returns on investment the shareholder realizes from such profits.
11. Based on the foregoing, IGUA’s responses to the three (3) questions posed in the Review Decision with respect to the Cap Issue are as follows:
- (a) There is no evidentiary basis for forbearing from regulating any of the monopoly storage services which Union’s distribution customers require either now or in the future. On the basis of the findings in the NGEIR Decision and Union’s on-going system expansions, the current and foreseeable storage services needs of Union’s monopoly distribution services customers cannot now be permanently capped;
 - (b) Traditional rate-making is the mechanism that the Board should use to monitor the storage services requirements of Union’s monopoly distribution customers. The Board should continue to periodically monitor Union’s plans for satisfying its

obligation to serve its monopoly distribution services customers, and change the amount allocated to meet their requirements as necessary; and

- (c) If the amount which Union has allocated to meet the needs of its monopoly services customers, in combination with the portion of its integrated assets allocated to support the needs of non-monopoly storage services consumers, is insufficient to satisfy those combined requirements, then, in order to discharge its obligation to serve those who require monopoly services, Union must either cut back on its sales of non-utility storage services or acquire incremental storage. Any approach which dilutes Union's obligation to serve the monopoly storage services requirements of its distribution customers under the auspices of regulated rates is incompatible with the statute from which the Board derives its regulatory mandate.
12. For all of these reasons, IGUA submits that the permanent Cap feature of the NGEIR Decision must be set aside and rescinded.
13. More broadly, and from the perspective of the end-use distribution customers of EGD, the inconsistencies and contradictions in the NGEIR Decision pertaining to the Cap Issue call into question the appropriateness of the transitional measures which the Board imposed on the distribution customers over which EGD holds monopoly power. These transitional measures will operate to require EGD distribution customers to pay through EGD to Union what amounts to unregulated prices for the monopoly services EGD provides. IGUA agrees with counsel for CCC and VECC that to logically respect the findings of the NGEIR Decision and, in a broader context, to restore compatibility between Union's end-use distribution customers and EGD's end-use distribution customers, neither of which have a competitive market alternative for monopoly storage services, the transitional relief which the Board imposed with respect to the storage services EGD acquires from Union should be rescinded. EGD's monopoly services

distribution customers should continue to pay for the monopoly services EGD provides through Union on the same basis as Union's distribution customers pay for such services.

III. THE APPrO ISSUES

14. The NGEIR Decision with respect to the APPrO Issues is another example of its fundamental contradictions. Despite the express finding that the storage services Union and EGD provide to their distribution customers are currently and, in the future, will continue to be monopoly services, the NGEIR Decision requires the distribution customers of Union and EGD to pay unregulated "competitive" prices for the subset of such monopoly services which are described as "high deliverability" storage services. To be compatible with the findings made in the NGEIR Decision, the prices Union and EGD charge their distribution services customers for high deliverability storage services must be regulated. There is no evidentiary basis for concluding otherwise. This aspect of the NGEIR Decision must be set aside and rescinded.
15. IGUA submits that the consequences of setting aside and rescinding the forbearance order in the NGEIR Decision pertaining to high deliverability storage services include the following:
 - (a) For 2007 and beyond, Union must continue to account for the revenues and costs associated with its provision of deliverability to its distribution services customers in excess of 1.2% as regulated utility items; and
 - (b) If any of the adjustments which Union made to its 2007 Revenue Requirement and Rates following the NGEIR Decision reflect an elimination of the forecast revenues and costs associated with the provision of high deliverability storage services to distribution customers, then these adjustments must be set aside and reversed and Union's 2007 rates reduced accordingly.

16. With respect to the timing of the Board's consideration of regulated rates for high deliverability storage services to be provided by Union and EGD to their distribution customers, IGUA submits as follows:
- (a) The regulated high deliverability storage services rates to be provided by Union should be examined and resolved in the pending NGEIR implementation proceedings with respect to the allocation of storage to Union's T1 customers or, in the alternative, in Union's pending rate case;
 - (b) For EGD, the design of its regulated high deliverability storage services rates for its distribution customers should be examined and resolved in its pending rate case.

IV. COSTS

17. As an intervenor determined by the Board to be eligible for a cost award, IGUA requests that it be awarded 100% of its reasonably incurred costs in this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of June, 2007.



BORDEN LADNER GERVAIS LLP
Barristers & Solicitors
100 Queen Street
Suite 1100
Ottawa, ON K1P 1J9

Peter C.P. Thompson, Q.C.
Telephone (613) 237-5160
Facsimile (613) 230-8842
Counsel for IGUA