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MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

REPLY SUBMISSIONS OF THE CITY OF KITCHENER
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RYDER WRIGHT BLAIR & HOLMES LLP
333 Adelaide Street West, 3rd Floor
Toronto, Ontario M5V 1R5

Alick Ryder

Phone (416) 340-9070
Fax: (416) 340-9250

Solicitors for the City of Kitchener

Introduction

1. By way of reply these submissions will first address three points which form the basis of the reply submissions of Union Gas Limited ("Union") respecting the decision in NGEIR to cap the storage available to Union's in-franchise customers at 100 PJ (the "Cap Issue"). In addition these reply submissions will address the scope of the issue relating to the provision of additional storage requirements for gas-fired generators.

The Cap Issue

A. Is a Cap consistent with regulation?

2. The decision of the Board dated May 22, 2007 on the Motions to Review (the "Threshold Decision") concluded at p.48:

> Since the NGEIR Decision clearly stated that the in-franchise customers did not have and were not likely to have access to competition in the foreseeable future, a decision that forbears from regulation of pricing for these customers at some time in the future does not appear to this panel to be consistent.

3. Union argues that the imposition of a cap for in-franchise customers is not inconsistent with the Board's finding that the in-franchise customers were not likely to have access to competition in the foreseeable future. Union's argument is based on the claim that the provision to in-franchise customers of storage above the cap will continue to be protected by regulation, notwithstanding the

fact that this storage will be acquired by Union in the market and therefore at un-regulated prices.

4. Kitchener submits that Union's argument in this respect illustrates the anomaly or inconsistency in the NGEIR Decision. The acquisition of storage at market prices cannot be equated to the cost based price of regulation. To suggest that Board supervision of the merging of market priced storage above 100 PJ's with cost based prices below 100 PJ's is somehow the same as regulated protection for the total, demeans the role of regulation under the *Ontario Energy Board Act*. The reality is that a cap creates forbearance for storage provided above the cap in the form of market prices as opposed to regulated prices. In the result the in-franchise customers will be required to pay market prices without any finding of sufficient competition as required by s.29 of the *Act.* On the other hand, without a cap, sufficient storage at cost based prices is available to meet their requirements for the foreseeable future.

5. Accordingly, Kitchener submits that the Threshold Decision was correct in concluding that the imposition of a cap results in forbearance for storage required for the in-franchise customers above the cap and a violation of s.29 of the *Act*,

B. Can the desire to encourage the ex-franchise storage market justify forbearance for the in-franchise storage market?

6. In its argument delivered on June 12, 2007, Kitchener submitted that the NGEIR panel had erred in imposing a cap (and therefore forbearance) on in-franchise customers in order to encourage the development of the ex-franchise storage market. Kitchener's argument in this respect is twofold.

a) The development of the ex-franchise market for customers out of Ontario is not a factor justifying forbearance under s.29 of the *Act*. The only factor in s. 29 which can justify forbearance is sufficient competition to protect the Ontario consumer and, as noted, this does not exist.

b) Secondly Kitchener argued that the desire to encourage the ex-franchise storage market should not be given priority over the requirement in the *Act* to protect the Ontario consumer.

7. Union's reply argument has misstated Kitchener's position by claiming (paragraph 16) that Kitchener had argued that the development of a competitive storage market is not in the public interest.

8. As noted above, Kitchener made no such claim. The desire to develop a competitive ex-franchise storage market may well be in the public interest. However, it should not take precedence over the Board's obligation to protect the Ontario consumer. The known impacts on in-franchise customers resulting from a cap is the requirement to pay market prices for all storage requirements above the cap, an increase in the costs to be paid by the Ontario customer and an increase in the shareholder's profit to extraordinary levels above the regulated return. On the other hand there is not a shred of evidence from the NGEIR proceeding of any quantified tangible benefit to Ontario consumers arising from forbearance, only those of a speculative or theoretical type. Accordingly Kitchener respectfully repeats its submissions that in substance, a cap results in forbearance above the cap which cannot be justified in the interests of the Ontario consumer.

C. Union's submission on page 5 of its reply argument that a perpetual call on all of its current storage capacity is inconsistent with forbearance.

9. Kitchener submits that a perpetual call on Union's current storage capacity is fully consistent with a decision to forbear from regulating the ex-franchise market. The question raised on this point depends on whether the protection of the in-franchise consumer in Ontario is to receive priority over the desire to encourage the ex-franchise market. If primacy is accorded the Ontario consumer, as argued by Kitchener, it follows that the protection of their interests must take precedence. Further and to put this point in other terms, absent sufficient competition necessary for forbearance, it follows that Ontario consumers should continue to receive the full protection of regulation for all of their requirements, now and in the future. Because a cap eliminates this protection over storage above the cap, it should be cancelled.

D. Union's response to question (b) proposed at page 49 of the Threshold Decision

10. Kitchener submits that Union's Reply argument at page 3 has misinterpreted this question. The question states:

> If the cap of 100 PJ of storage for in-franchise Union customers does not remain in place in perpetuity, what mechanism should the Board use to monitor the likelihood of the cap being exceeded?

11. Kitchener submits that this question involves an inquiry into the ramifications of a moving cap, which is designed to provide a degree of certainty for the ex-franchise market, which does not involve in-franchise forbearance, or a breach of s.29 of the Act. However, Union did not respond to this question and therefore did not respond to Kitchener's submission in paragraph 8 of its

argument-in-chief that Union itself is well placed to provide certainty to the ex-franchise storage market without the means of a cap. Kitchener's submissions in this respect are therefore unanswered and presumably unanswerable.

The scope of the issue relating to storage services for gas-fired generators

12. Out of an abundance of caution Kitchener wishes to make the point that this issue in the NGEIR proceeding must be distinguished from the issue relating to deliverability services for Union's traditional in-franchise customers, including those in rate classes M2, T1 and T3. Kitchener understands that questions relating to deliverability services to these customers are to be addressed in a forthcoming proceeding of the Board. On this point, the following observations can be noted.

13. First, the "deliverability" issue in NGEIR related to the need of gas-fired generators for intra-day load balancing provided from new facilities; whereas "deliverability" for existing in-franchise customers in the M2, T1 and T3 classes relate to their seasonal load balancing needs provided from existing facilities. NGEIR did not address the latter. As the NGEIR decision states at page 69 the services for the gas-fired generators "…are not currently offered, indeed they need to be developed, and investments must be made in order to offer them… The Board concludes that these services are substantially different from the bundled, unbundled and semi-unbundled distribution services offered by Enbridge and Union".

14. Secondly, the record in NGEIR is not sufficient to allow the Board to conclude that there is a "standard deliverability" for the traditional in-franchise customers of Union. Nor is the record in NGEIR sufficient to allow the Board to

make any decision which approves either a "standard deliverability" level or any level for any particular rate class. The reality is that there is no standard level of deliverability applicable to Union's in-franchise customers. The range is indicated by Exhibit J5.87 from RP-2003-0063 which I have taken the liberty of attaching as Appendix "A". It shows T3 at 1.5%, M2 at 2.18%, M7 at 2.52% and high deliverability for residential customers (SPS) at 10%. None of this evidence was placed before the panel in NGEIR as it was not relevant to any issue before the panel.

15. Thirdly, there is nothing in the NGEIR decision that directs or permits Union to charge market based rates to its existing customers for deliverability in excess of 1.2%. Currently, among contract customers served under the T1 and T3 rate classes, deliverability is treated as a contract parameter to be negotiated. Charges for deliverability are applied on a cost of service basis under the approved rate schedule. No existing rate class, including T1 and T3, was faced with an application by Union in NGEIR for any alteration of their level of deliverability or the rate to be applied to it. Accordingly, it cannot be said that the NGEIR Decision ordered forbearance for any portion of in-franchise deliverability.

16. Finally on this point it should be noted that while NGEIR did not address in-franchise storage deliverability, Union's proposals post NGEIR did so. In response to Kitchener's inquiry as to what process was intended to address in-franchise deliverability, the Board advised by letter dated February 28, 2007 that it is developing a process to review and consider the matter. This letter is attached as Appendix "B".

Conclusion

17. Kitchener therefore respectfully submits:

(a) that the decision relating to the imposition of a cap ought to be cancelled;

(b) the Board should invite Union to develop its own approach to provide guidance and certainty to the ex-franchise market without the means of a cap;

(c) the Board's Decision in this case should not interfere with the Board's proceeding contemplated in Appendix "B".

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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Alick Ryder