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October 20, 2006

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto, ON M4P 1E4

Dear Ms Walli

Proposed Licence Amendments
Board File No.: EB-2006-0087
Our File No.: 302701-000408

1. Introduction

This letter contains the submissions of our client, the Industrial Gas Users Association (“IGUA”), regarding the amendments, which the Board proposes to make to the distribution licence issued to each electricity distributor (the “Proposed Licence Amendments”), contained in Appendix A to Procedural Order No. 1 in these proceedings, which issued on October 6, 2006.

IGUA’s submissions which follow are made in the context of its recognition and support for the Board’s desire to establish methods and techniques for deriving rates which will operate to enhance the efficiency of the overall rate setting process. IGUA submits that to achieve this objective, the Board should follow a process for determining the provisions of new rate derivation codes which is fair and perceived to be fair to all those adversely affected by the Rate Orders the Board issues.

2. Nature of Proposed Licence Amendments

In addition to adding new definitions for the phrases “Cost of Capital Code” and “Incentive Regulation Mechanism Code”, the Proposed Licence Amendments are phrased as follows:

The Board shall, in determining the Licensee’s rates for the distribution of electricity, apply the methods and techniques set out in the Incentive Regulation Mechanism Code and the Cost of Capital Code, whichever is applicable to the distributor in any given year. The Board shall apply those methods and techniques

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in determining the Licensee's rates for the distribution of electricity that become effective on or after May 1, 2007, and shall continue to apply those methods and techniques for such further period of years as is determined by the Board under the Incentive Regulation Mechanism Code and the Cost of Capital Code. [emphasis added]

It is proposed that these amendments be added to a provision of the Electricity Distributor Licence which prohibits the Licensee from charging for electricity distribution except in accordance with a Rate Order of the Board. By their terms, the Proposed Licence Amendments do not impose any obligations on the Licensee. Rather, they purport to impose obligations on the Board. [emphasis added]

Further, the obligations which the Proposed Licence Amendments seek to impose upon the Board pertain to the methods and techniques which the Board is to apply in determining the Licensee's rates for the distribution of electricity. The amendments also include a provision pertaining to the duration for the Board's exercise of its ratemaking powers in the manner to be prescribed by the codes. It is clear that the Proposed Licence Amendments pertain to an exercise by the Board of its ratemaking jurisdiction.

3. Features of the Board's Ratemaking Jurisdiction

The Board's broad ratemaking jurisdiction with respect to determining rates for the distribution of electricity is expressed in section 78(2) and (3) of the *Ontario Energy Board Act* (the "*OEB Act*"). The Board must proceed by order to exercise its ratemaking jurisdiction. Section 21(2) of the *OEB Act* specifies that the Board shall not make an order until it has held a hearing after giving notice in such manner and to such persons as the Board may direct.

Proceedings involving an exercise of ratemaking jurisdiction and the orders resulting therefrom are subject to appeal on questions of law or jurisdiction and to review and variance pursuant to the provisions of the *Statutory Powers Procedure Act* and the Board's *Rules of Practice and Procedure*. These hearing, appeal, and review and variance provisions provide those adversely affected by a Rate Order with important rights which the Board cannot materially dilute or extinguish through an exercise of its power to condition licences or to develop codes under the provisions of the *OEB Act*.

4. Preliminary Issue re: Timing

Like others, IGUA questions whether licence amendments incorporating references to the provisions of codes can be proposed before the codes even exist. Even if the codes described in the Proposed Licence Amendments existed, the Proposed Licence Amendments are inappropriate for the reasons described below.

5. Inappropriateness of the Proposed Licence Amendments

Licence Conditions Can Only Apply to the Licensee

IGUA submits that the Board cannot, in an exercise of its power to impose conditions in electricity distribution licences, impose obligations on itself. The

Board's power to condition electricity distribution licences is a power to impose conditions on the licensee. Any proposed amendments to distribution licences must be confined in their scope to the imposition of obligations on the licensee.

As currently worded, the Proposed Licence Amendments are ultra vires. To fall within the ambit of the Board's jurisdiction to impose conditions to a distribution license the proposed amendments would have to read something to the following affect:

In determining its proposed electricity distribution rates for approval by the Board pursuant to section 78(3) of the *OEB Act*, the licensee shall apply the methods and techniques set out in the Incentive Regulation Mechanism Code and the Cost of Capital Code, whichever is applicable to the distributor in any given year.

Code Development Power Cannot Fetter or Oust the Board's Powers in a Rates Proceeding

The Code Development Process, in which the Board is currently engaged, is authorized by the provisions of section 70.1 of the *OEB Act*. IGUA recognizes that some contend that the Board's Code Development Power does not authorize it to develop methods or techniques to be used to develop just and reasonable rates; that this is a ratemaking function that can only be performed by the Board in an exercise of its ratemaking jurisdiction under section 78 of the *Act*. IGUA submits that, even if the Board is empowered to adopt methods or techniques to be used for the purposes of deriving rates under the auspices of the Code Development Power described in section 70.1 of the *OEB Act*, the output of the process will be codes which will have the same legal effect as the Cost of Equity Guidelines which the Board developed for gas utilities years ago.

Code-based rates will always be the subject matter of a rate hearing under section 78 of the *Act*. The Board cannot fetter or oust the broad scope of its ratemaking jurisdiction under section 78 of the *Act* through an exercise of its code-making power under section 70.1 of the *Act*, and licence conditioning power under section 70 of the *Act*. Code-based electricity distribution rates will be subject to challenge in the rates proceedings in which Board approval for such rates is requested, just as the Board's Equity Return Guidelines were subject to challenge and review in either company-specific or generic rates proceedings. The Board's Equity Return Guidelines were reviewed in the RP-2002-0158 rates proceeding which the Board decided on January 16, 2004.

To the extent that the provisions of codes relate to ratemaking, they will always be subject to challenge by any party affected thereby in the proceeding in which the Board considers the reasonableness of the proposed rates based on an application of the code provisions.

In the context of this reality, the Board should adopt a Code Development Process which leads to code provisions which are unlikely to be challenged in the rate cases where requests for approval of code-based rates are being considered.

6. Process Options for a Continuance of a Code Development Process

IGUA recognizes that matters pertaining to the continuance of the Code Development Process in which the Board is currently engaged are beyond the narrow scope of the question pertaining to the appropriateness of the Proposed Licence Amendments. Nevertheless, and because the Code Development Process is ongoing, IGUA urges the Board to recognize that the output thereof cannot operate to oust the Board's broad ratemaking jurisdiction.

In these circumstances and in the context of the overriding goal of adopting methods and techniques for deriving rates which are unlikely to be challenged in future rate cases, IGUA urges the Board to consider adopting a hearing process for determining the provisions of the new methods to be applied to derive electricity distribution rates, which is fair to all those affected thereby. The result of such a process is less likely to be challenged in future rate cases.

IGUA notes that, under section 36(3) of the *Act*, the Board's adoption of any method or technique to be used in the derivation of gas distribution rates must take place in a rates approval proceeding, i.e. under the auspices of an exercise by the Board of its ratemaking jurisdiction. In these circumstances, IGUA suggests that the same process is appropriate for the Board's consideration and determination of the methods and techniques to be applied in the determination of electricity distribution rates. Such a hearing process allows interested parties to appropriately test the material differences in facts and opinions upon which different methods and techniques for determining rates are based.

Rate setting codes which have been determined in a process which does not allow for a thorough testing of disputed facts and opinions pertaining to the code provisions are more likely to be challenged in subsequent proceedings. IGUA submits that there is a high probability that the provisions of rate setting codes established by the Board at the conclusion of a "fireside chat" process will be challenged in future proceedings.

7. Relief Requested

Based on the foregoing, IGUA urges the Board to find as follows:

- (a) as currently worded the Proposed Licence Amendments are ultra vires;
- (b) any licence amendment requiring a licensee to apply codes should not be made before the codes have been finalized;
- (c) the hearing process applicable to a determination of just and reasonable rates should be adopted to determine the provisions of methods and techniques to be used by electricity distributor licensees in deriving their rates for submission to the Board for approval.



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8. Costs

As an eligible intervenor, IGUA requests to be awarded 100% of its reasonably incurred costs for participating in these proceedings, which have raised important questions of jurisdiction and process.

Please contact me if the Board has any questions with respect to these submissions.

Yours very truly,

Peter C.P. Thompson, Q.C.
PCT\kt

- c List of Interested Parties
- Peter Fournier (Industrial Gas Users Association)
- Vince DeRose (Borden Ladner Gervais LLP)

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