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WeirFoulds LLP
BARRISTERS & SOLICITORS

April 23, 2007

Attention: Marika Hare

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

Dear Ms Hare:

**Re: Natural Gas Incentive Regulation**

Ontario Energy Board ("Board") Staff has proposed a process for dealing with the setting of rates for Union Gas Limited and Enbridge Gas Distribution Inc. (collectively the "Utilities") for 2008 and beyond. You have asked parties to provide comments on that proposed process.

The comments, below, on Board Staff's proposed process are delivered on behalf of our client, the Consumers Council of Canada, and on behalf of the Industrial Gas Users Association, the Vulnerable Energy Consumers Coalition, the City Kitchener, and the London Property Management Association.

Reduced to its essence, the problems with Board Staff's proposed process are these:

1. it is premised on decisions about the form and content of Incentive Regulation (the "IR") regimes, something which is contrary to the Board's obligation to consider rate applications with an open mind and on their individual merits;

2. it sustains the perception that the Board does not have an open mind with respect to the way the Utilities' rates are set for 2008 and beyond;

3. it proposes to employ documents which have no legal status but which would reflect pre-determined positions about the IR regimes governing the Utilities' rates.

In determining the appropriate process, that is a process which is consistent with the Board's jurisdiction under the *Ontario Energy Board Act* (the "Act"), for setting rates for the Utilities for 2000 and beyond, we must begin by characterizing what is at issue. Put simply,

what is at issue is the setting of rates pursuant to section 36 of the Act. That section, combined with section 21 of the Act, requires that the Board hear and decide on rate applications filed by the Utilities. Under section 36, the Board is not performing a policy-making function; rather it is performing an adjudicative function. The Board is required to consider each application with an open mind, free of any suggestion that it has predetermined any element of the application.

Instead of requiring the Utilities to file applications to reflect the IR regimes which they feel are appropriate in their circumstances, the Board Staff proposes a process which pre-determines the form and content of the IR regimes before the Utilities ever apply.

Board Staff's proposed process assumes, by necessary implication, that the Natural Gas Forum ("NGF") Report is binding. That Report prescribed, among other things, that the rates for the Utilities would be established by IR mechanisms, but did so on the basis of unsworn submissions which were not tested in a hearing. In addition, the NGF Report purported to determine, in advance, certain basic characteristics of the IR regimes, for example, that they would employ a price cap mechanism and that earnings sharing mechanisms would not be allowed. The NGF Report creates a perception that the form, and to an important extent the content, of the IR regimes by which rates will be established for the Utilities for 2008 and beyond have been pre-determined. By in effect relying on the NGF report as the starting point for its process, Board Staff validates that perception.

The first formal step in Board Staff's proposed process is the issuance of a Notice of Proceeding, to be followed by the filing of Board Staff's Discussion Paper. We do not know what the Discussion Paper is intended to be. Does it purport to be an exercise of the Board's jurisdiction under subsection 36(3) of the Act, namely an outline of the method or technique which the Board considers appropriate for the setting of rates, or is it a set of guidelines for the consideration of the Utilities' applications? In our view, it cannot be properly characterized as either of those things. Instead, it is a document which appears to indicate a preference for the form and content of the IR regimes the Utilities are to adopt. As such, it is inappropriate.

The Board Staff's proposed process then contemplates the filing of the "evidence" of the Pacific Economics Group (the "PEG"). We do not, however, know what it is "evidence" of. It appears to support fixing certain essential components of the IR formulae at certain levels. As such, it appears to be intended to limit the nature and extent of the parameters which can be used in determining the IR regimes for the Utilities. In attempting to characterise the PEG "evidence", we think it significant that, in the discussion which took place on April 18, 2007, the representatives of the two utilities stated their preference that the PEG "evidence" include "recommendations". That indicates to us that the Utilities want, to the extent possible, Board direction, in advance of the filing of their applications, on the precise content of critical components of their IR regimes.

Subsection 36(3) of the Act allows the Board, in approving or fixing just and reasonable rates, to adopt any method or technique it considers appropriate. The power granted by that subsection may be sufficient to allow the Board, in a section 36 proceeding, to prescribe that the rates for the Utilities for 2008 and beyond are to be set by an IR mechanism. The subsection does not allow the Board to prescribe, in advance of an application for approval of rates, the contents of the IR mechanism, because to do so would be to limit, in advance of the hearing of the applications, a consideration of what the rates might be.

The Board is permitted, at common law, to issue guidelines. Such guidelines cannot, however, be determinative of any element of a rate application. None of the NGF Report, the Board Staff Discussion Paper and the PEG "evidence" can properly be characterized as guidelines.

It might be argued that pre-determining the basic components of an IR regime is not the same as setting rates. Such an argument would be wrong. The form and content of an IR regime go a long way to determining the rates which flow from the operation of the regime. Accordingly, setting the form and content of an IR regime cannot be separated from establishing just and reasonable rates.

It might also be argued that it is open to any party, and in particular to parties representing ratepayer interests, to lead evidence and to make arguments that the components of the IR regimes prescribed by the NGF Report are inappropriate and that other components should be substituted for them. It might be argued, in other words, that it is open to any party to try to persuade the Board that it should change its mind. Such an argument would, again, be wrong. A process premised on such an argument would effectively put the parties in the position of having to appeal an earlier decision. It would mean that the onus of proof, which, under the Act, lies solely on the Utilities, would instead be put on the other parties. Finally, it would represent a tacit acknowledgement that the Board had made up its mind in advance on certain matters, something which the Board cannot do.

In making these submissions, we acknowledge that there is difference between the Board and the Board Staff. Having said that, however, Board Staff's proposed process is premised on an acceptance of the binding nature of the Board's findings in the NGF Report. Given that, the distinction between the Board and Board Staff effectively disappears. Board Staff's proposed process appears to reflect the Board's pre-determination of essential components of the IR regimes.

The Board's obligation under the Act, and at common law, is to consider the Utilities' applications with an open mind. In our view, the Board Staff's proposed process is inconsistent with that obligation. On the contrary, Board Staff's proposed process sustains the

perception, and indeed the reality that the section 36 applications have already, in substantial measure, been decided.

In our view, the proposed process should be the following:

1. The starting point should be a statement from the Board that the NGF Report and the Board Staff's discussion paper will not be determinative of any matter relevant to the appropriate IR mechanism for fixing and approving just and reasonable rates. It is not sufficient, in our view, simply to state that neither document will be filed in the hearing of the applications;

2. The first formal step should be the issuance by the Board of a notice in which it asks the Utilities to file applications for rates for 2008. That notice may indicate that the means for setting rates will be an IR regime.

3. The next step should be Utilities filing their applications, seeking rates for whatever period and by whatever form of IR regime they prefer;

4. The next step should be the Board Staff filing whatever evidence it wants, including, if it wishes, the "evidence" of Dr. Lowry;

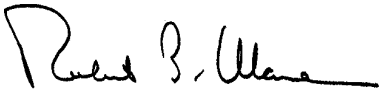
5. The Intervenors should then be allowed to file evidence. In addition, the Utilities should be allowed to file evidence in response to that of Board Staff;

6. The Board may then proceed to a joint hearing of the applications.

The process we have proposed would allow the Board to have rates set on the basis of IR regimes. It does not contemplate a review of whether cost-of-service regimes should be used instead of IR regimes. It would allow the Board to consider the Utilities applications jointly, which would presumably allow the Board to establish, to the degree that is reasonable, uniformity in the terms and conditions of those IR regimes. The process we have proposed will not delay this disposition of the applications, or the setting of rates for 2008 and beyond. However, and most importantly, the process we have proposed would reduce the perception that the outcomes of the applications have been predetermined and would ensure, to the extent possible, given the background to the applications, that they are considered with an open mind.

Yours very truly,

**WeirFoulds LLP**



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