



# **ONTARIO ENERGY BOARD**

## **BOARD STAFF SUBMISSION**

**ONTARIO ENERGY BOARD - MOTION TO REVIEW EB-2011-0038 DECISION AND  
RATE ORDER**

**Board File No. EB-2012-0206**

**May 14, 2012**

## Introduction

Union Gas Limited (“Union”) filed an application dated April 18, 2011 with the Ontario Energy Board (the “Board”) under section 36 of the *Ontario Energy Board Act, 1998*, S.O. c.15, Schedule B, for an order of the Board amending or varying the rate or rates charged to customers as of October 1, 2011 in connection with the sharing of 2010 earnings under the incentive rate mechanism approved by the Board as well as final disposition of 2010 year-end deferral account and other balances (the “Application”). The Board assigned file number EB-2011-0038 to the Application.

On September 19-21 2011, the Board held a hearing on all matters in that proceeding and the Board issued its Decision and Order on January 20, 2012. The Board directed Union to file a Draft Rate Order which reflected the Board’s findings in its Decision.

The Board received submissions from parties contesting Union’s Draft Rate Order with respect to the Short-Term Storage and Other Balancing Services Deferral Account (“Short-Term Storage Account”). The Board issued its Decision and Order on the Draft Rate Order on February 29, 2012, directing Union to file a revised Draft Rate Order reflecting the Board’s determination on the matter. The Board noted that it would review the revised Draft Rate Order to confirm that all the necessary changes were made and would subsequently issue a Final Rate Order.

Union filed a revised Draft Rate Order on March 2, 2012. The Board issued its Final Rate Order on March 8, 2012 approving Union’s Draft Rate Order as filed.

By letter dated March 27, 2012, Canadian Manufacturers & Exporters (“CME”) (an intervenor in the proceeding) noted that an issue had arisen in the EB-2011-0038 proceeding regarding the calculation of margin sharing in the Short-Term Storage Account. CME indicated that the correct amount to be credited to ratepayers should be \$3.824 million (as opposed to the \$0.831 million credit approved by the Board in the EB-2011-0038 Final Rate Order). CME requested that the Board address this error by making an adjustment to the margin sharing calculation under Rule 43.02 of the Board’s *Rules of Practice and Procedure*. Union filed a letter responding to CME’s letter on April 5, 2012. CME filed a subsequent letter on April 16, 2012, and Union filed a final letter on April 19, 2012.

The Board issued a Notice of Motion to Review, Notice of Motion Hearing, and Procedural Order No.1 (“Notice and Procedural Order No.1”) on May 2, 2012. In the Notice and Procedural Order No.1, the Board determined that the correction requested by CME in regards to the margin sharing calculation in the Short-Term Storage Account would not, if substantiated, be allowable under Rule 43.02 of the Board’s *Rules of Practice and Procedure* (the “Rules”). However, the Board noted that the issues that have been raised with respect to the calculation of short-term storage margin sharing warrant further review by the Board. Therefore, the Board commenced a review proceeding on its own motion pursuant to Rule 43.01 of the Rules to review its EB-2011-0038 Decision and Rate Order as it relates to the issue of margin sharing in the Short-Term Storage Account. The Board assigned Board File No. EB-2012-0206 to the review proceeding. The Board provided all parties with an opportunity to file comments on the issue of margin sharing in the Short-Term Storage Account.

## **Board Staff Submissions**

### **Margin Sharing - Short-Term Storage and Other Balancing Services Deferral Account**

Board staff has read the letters filed by both CME and Union in regards to the margin sharing calculation for the Short-Term Storage Account. Board staff supports CME’s position that the ratepayer credit for margin sharing in the Short-Term Storage Account should be increased from \$0.831 million to \$3.824 million (an approximate \$2.992 million increase).

#### EB-2011-0038 Decision and Order on Margin Sharing in the Short-Term Storage Account

In its EB-2011-0038 Decision and Order on Draft Rate Order issued February 29, 2012, the Board noted the following:

The Board finds that the ratepayers’ share of 2012 net short-term revenues should be \$0.831 million.

The Board agrees with CME, LPMA, Kitchener, and Board staff that the outcome of the findings in its Decision is the establishment of the ratepayer credit in the Short-term Storage Account of \$0.831 million.

The Board's findings in the current proceeding effectively fix 100 PJs as the utility asset.<sup>1</sup> In addition, the Board's findings are informed by Union's ability to track what storage assets are being used for each type of storage transaction<sup>2</sup> and state that the entire amount of utility storage above in-franchise requirements is available for sale as short-term storage services (and all costs of this space is to be paid for by in-franchise customers).<sup>3</sup>

Although the Board was not explicit in its findings that \$0.831 million is the amount that should be shared with ratepayers, it is a clear outcome of its findings. The Board's findings in this proceeding result in the sharing with ratepayers of all net revenues (minus a 10% incentive payment as set out in the NGEIR Decision<sup>4</sup>) in the Short-term Storage Account as it is a utility asset which is supporting these transactions.<sup>5</sup>

In Board staff's submission, the Board intended that all net revenues (minus a 10% incentive payment) in the Short-Term Storage Account should accrue to the benefit of ratepayers. The ratepayer credit amount that was set out in the Decision may be incorrect, as a result of a number of factors which are discussed later, but what is most important in calculating the margin sharing is the Board's intent in its Decision set out above.

#### Calculation for Margin Sharing in the Short-Term Storage Account

Based on the Board's findings in the EB-2011-0038 proceeding, Board staff is of the view that all net revenues (minus a 10% incentive payment) in the Short-Term Storage Account (incremental to the amount built into rates) should accrue to the benefit of ratepayers.

Board staff originally calculated the 2010 margin sharing amount for the Short-Term Storage Account in the following manner:

2010 Actuals	\$16,753,000
Short-Term Margin Amount Embedded in Rates	\$15,829,000
Difference	\$924,000

<sup>1</sup> See EB-2011-0038, January 20, 2012 Decision and Order at p.6.

<sup>2</sup> See EB-2011-0038, January 20, 2012 Decision and Order at p. 16.

<sup>3</sup> See EB-2011-0038, January 20, 2012 Decision and Order at pp. 20-21.

<sup>4</sup> See EB-2005-0551, November 7, 2006 NGEIR Decision with Reasons at p.103.

<sup>5</sup> See EB-2011-0038, February 29, 2012 Decision and Order on Draft Rate Order at pp. 5-6.

Ratepayer Sharing Amount (Difference minus 10% incentive payment)	\$831,600
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At the time of drafting its submission on the Draft Rate Order, Board staff was under the impression that \$15.829 million was the short-term margin amount already embedded in rates.<sup>6</sup> However, through the process initiated by CME, it has come to light that the amount actually embedded in rates was revised as a result of the NGEIR Decision. In 2007, the credit amount embedded in rates was \$14.246 million (\$15.829 million minus a 10% incentive payment to Union). In 2008, after the issuance of the NGEIR Decision, the \$14.246 million credit amount was reduced by 21% (to reflect the 79% / 21%, utility / non-utility split<sup>7</sup>). Therefore, the credit amount embedded in rates in 2008 was \$11.254 million (\$14.246 million x 79%) which continued to be the amount embedded in rates in 2010.

The NGEIR Decision, through the implementation of a 79% / 21% split between utility and non-utility storage, operated to reduce the short-term margin sharing credit embedded in base rates by 21% (from \$14.246 million to \$11.254 million) beginning in 2008. The Board's Decision in EB-2011-0038, in which it found that 100 PJs is the utility storage asset and that Union can track what storage assets are being used for each type of storage transaction, eliminated the need for a 79% / 21% split for the margin sharing calculation related to the Short-Term Storage Account.

If the Board's intent in its EB-2011-0038 Decision was to create a situation where all net revenues (minus a 10% incentive payment) accrue to the benefit of ratepayers then the margin sharing calculation for the Short-Term Storage Account should have been done as follows:

2010 Actuals	\$16,753,000
90% Ratepayer Portion	\$15,077,700
Short-Term Margin Amount Embedded in Rates	\$11,254,000
Ratepayer Sharing Amount	\$3,823,700

Board staff notes that when the calculation is made using the \$11.254 million amount that is embedded in rates, the ratepayer credit increases from the Board approved amount of \$0.831 million to \$3.824 million. Overall, the above calculation results in

<sup>6</sup> See EB-2011-0038, Board Staff Submission at pp. 4-5 and EB-2011-0038, Exhibit A, Tab 1, Schedule 6, p.1 at Line 9.

90% of all short-term storage net revenues streaming to the benefit of ratepayers, which in Board staff's submission was the Board's intent in its EB-2011-0038 Decision and Order on the Draft Rate Order.

Board staff submits that the Board should direct Union to dispose of an incremental credit balance of \$2.992 million (\$3.824 million – corrected ratepayer share of short-term storage margins minus \$0.831 million – Board approved ratepayer credit) to ratepayers. Board staff submits that this credit amount should be disposed as part of Union's first Quarterly Rate Adjustment Mechanism ("QRAM") proceeding that occurs after the issuance of the Final Decision and Order in this review proceeding. Board staff is of the view that the credit amount should be disposed and allocated in a manner consistent with the way in which the balance in the Short-Term Storage Account has been handled in the past.

#### Board Staff Response to Union's Position

In its letters filed on April 5, 2012 and April 19, 2012, Union set out its arguments as to why no correction of the \$0.831 million ratepayer credit amount related to the Short-Term Storage Account is necessary.

Board staff has summarized Union's arguments into three (3) main themes:

- 1) The Board unequivocally found that the correct amount to be credited to ratepayers in regards to the Short-Term Storage Account is \$0.831 million;
- 2) The Board, Board staff and intervenors, were aware that \$11.254 million was the credit amount embedded in base rates in regards to short-term margin sharing and the Board made its Decision knowing that this was the amount embedded in rates; and
- 3) Correcting the balance at this time is retroactive ratemaking and the Board can not retroactively change approved rates.

Board staff agrees with Union that the Board did explicitly find that the amount to be credited to ratepayers in regards to the Short-Term Storage Account is \$0.831 million. However, Board staff is of the view that what is important for determining the correct margin sharing calculation related to short-term storage revenues is the Board's intent when rendering its Decision. Board staff believes that the Board intended to stream

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<sup>7</sup> See EB-2005-0551, November 7, 2006 NGEIR Decision with Reasons at pp. 101-102.

90% of all short-term storage margins to the benefit of ratepayers. Therefore, an additional \$2.992 million credit disposed to ratepayers would be in line with the spirit of the Board's decision.

Union relies on the following statement from its Draft Rate Order Reply Argument to highlight that the Board was aware that \$11.254 million was the amount embedded in base rates when rendering its Decision in EB-2011-0038. Union stated that, "CME's position is inconsistent with existing rates. This proceeding relates to the clearance of deferral accounts during the five-year incentive rate period. Base rates established subsequent to the NGEIR Decision reflect the 79/21 split in rate base between utility and non-utility. That is, rates already include a credit to ratepayers of \$11.254 million (Rate Order Working Papers, Schedule 14) to reflect the 79/21 split and the 90/10 sharing."<sup>8</sup>

Board staff notes that although this paragraph does clearly refer to the \$11.254 million amount embedded in base rates, it does not provide the context necessary for a reader to understand that there was an error in the margin sharing calculation. If this was Union's way of telling the Board that there was an error in the calculation of margin sharing, Board staff is of the view that this was not sufficient. Board staff submits that in this paragraph Union was actually arguing that CME's entire position (i.e. that all net revenues in the Short-Term Storage Account should accrue to the benefit of ratepayers) was not valid as it was inconsistent with the manner in which base rates were set.

It is arguable that Board staff and intervenors should have been aware that the short-term margin sharing credit amount embedded in rates was \$11.254 million (as this information was available in previous proceedings before the Board). Union, however, had the right to final reply, and it did make a final submission on the short-term margin sharing issue. Board staff is of the view that Union, at the time of its final submission on the Draft Rate Order, also should have known there was a potential error in the calculation proposed by CME, Board staff and some other parties. Therefore, Union had a responsibility, in the spirit of full and timely disclosure<sup>9</sup>, to highlight that potential error for the Board so it could deliberate and make a Decision on the basis of a full

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<sup>8</sup> See EB-2011-0038, Union Reply Submission on Draft Rate Order, February 17, 2012 at p.3.

<sup>9</sup> The Board, in the following Decisions, made reference to the standards of disclosure expected of utilities that the Board regulates. See RP-2001-0032, December 13, 2002 Decision with Reasons; RP-2002-0133, November 7, 2003 Decision with Reasons; EB-2008-0304 November 19, 2008 Decision and Order.

record. In Board staff's submission, it was incumbent upon Union to make it clear to the Board that if it agreed with the intervening parties that all net revenues (minus a 10% incentive payment to Union) should be to the benefit of ratepayers, then the calculation presented by the intervening parties (and Board staff) would need to be revised.

In regards to Union's argument that correcting the ratepayer credit amount related to the Short-Term Storage Account at this time amounts to retroactive ratemaking, Board staff is of the view that the current motion initiated by the Board constitutes a legitimate and legally permissible review of a Board decision and that as such, the rule against retroactive ratemaking is neither invoked, nor offended.

In particular, the Board's power of review on its own motion is provided in section 43.01 of its Rules of Practice and Procedure. That power comes ultimately from section 21.2 of the *Statutory Powers Procedure Act* which in addition to empowering the Board to review all or part of its own decision or order and to either confirm, vary, suspend or cancel such decision and order, indicates at subsection 21.2(2) that such review "shall take place within a reasonable time after the decision or order is made".

Board staff is of the view that the current review motion is properly constituted, that it was brought within a reasonable time and that therefore, the Board is empowered to vary its Decision and Order to address the evidentiary discrepancy and vary the Rate Order issued on March 8, 2012.

For all the reasons above, Board staff is of the view that the intent of the Board's EB-2011-0038 Decision should be upheld. In particular, Board staff submits that the Board should direct Union to dispose of a credit balance of \$2.992 million to ratepayers (this effectively increases the ratepayer credit from the Board-approved amount of \$0.831 million to the corrected amount of \$3.824 million).

All of which is respectfully submitted.