



By electronic filing and e-mail

April 23, 2010

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
27<sup>th</sup> floor  
Toronto ON M4P 1E4

Dear Ms Walli,

**Union Gas Limited ("Union")**  
**Storage Transportation and Access Rule ("STAR") Application**  
**Board File No.: EB-2010-0155**  
**Our File No.: 339583-000066**

#### **Introduction**

As solicitors for Canadian Manufacturers & Exporters ("CME"), we are writing to provide submissions on the materials Union has asked the Board to approve as its STAR compliant tariff for transportation services.

We note that Union has engaged in consultations with its transportation shippers. We assume that those shippers will bring to the Board's attention any specific features of Union's proposals that they consider to be incompatible with the spirit and intent of STAR.

We have communicated with representatives of TransCanada PipeLines Limited ("TCPL"), the City of Kitchener ("Kitchener"), and the City of Kingston ("Kingston") and understand that submissions will be made by these parties pertaining to some aspects of Union's proposals.

#### **Guiding Principles**

Our analysis of the materials that Union circulated is premised on the proposition that, to be compatible with the spirit and intent of STAR, the standard, transparent and non-discriminatory terms of service Union proposes should not be vague or ambiguous, and should neither reserve nor confer on Union a discretion to adopt a rule or approach that is not specified in its transportation services Rate Schedules, General Terms and Conditions, and Contracts. In addition, the terms of service specified in the materials that comprise the transportation services tariff the Board is being asked to approve should be consistent with the practices that Union actually follows in the provision of such transportation services.

#### **Union Should Not Have a Discretion to Unilaterally Vary the Rules**

In the context of these guiding principles, we are concerned with provisions Union is proposing that appear to have the effect of conferring on Union a discretion to vary the rules it applies.

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One example of such a proviso is contained in Article XVI entitled “Allocation of Capacity” found in the Rate M12 and Rate C1 General Terms and Conditions. Item #5 in this Article empowers Union to allocate capacity that was not awarded in an open season,

“... by one of Union’s methods for allocation of such capacity, which methods include, but are not limited to, “first come, first served” basis, open season, or direct negotiations, ...” [emphasis added]

This proviso does not clearly define the rules that will be applied to allocate capacity not awarded during an open season. The language is “vague, elastic and open ended”.<sup>1</sup> the proviso confers on Union a discretion to allocate the capacity as it sees fit. In our view, more specificity is required in the definition of the capacity allocation rules in order for them to be compatible with the spirit and intent of STAR.

Another clause having a similar effect is found in Article XVIII entitled “Service Curtailment” contained in the M12 and C1 General Terms and Conditions. Under this proposed clause:

“Union shall have the right to curtail or not to schedule part or all of Transportation Services, in whole or in part, on all or a portion of its pipeline system at any time ... when, in Union’s sole discretion, capacity or operating conditions so require ...” [emphasis added]

The “sole discretion” aspect of this proviso appears to us to be incompatible with the STAR requirement that the terms of service be standard, transparent, and non-discriminatory. We suggest that, to dilute the scope of the discretion Union is proposing in this particular clause, the phrase “... when, in Union’s sole discretion, ...” should be changed to read “... when, acting reasonably, Union determines ...”. The clause would then provide Union with the right to curtail or not to schedule transportation services “... when, acting reasonably, Union determines capacity or operating conditions so require ...”.

In our view, the phrase “acting reasonably” connotes an obligation to justify to the affected parties the appropriateness of any decision not to schedule transportation services or to curtail them.

There likely are other sections of the material Union has provided that confer on Union an unfettered discretion of this nature. Where such provisions exist, they should be modified to add sufficient specificity to make them clearly definable and compatible with the requirements of STAR that transportation services relationships between Union and its shippers be clearly defined, standard, transparent, and non-discriminatory.

### **Consistency with Operating Practices**

A situation where the provisions in the material Union is asking the Board to approve seem to be different from the practices that Union actually follows in its provision of transportation services appears in Article XVIII entitled “Service Curtailment” to which we have previously referred.

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<sup>1</sup> A phrase used by the Ontario Court of Appeal in its recent Decision in *Toronto-Hydro Electric Systems Limited v. Ontario Energy Board*, 2010 ONCA 284, released on April 20, 2010.

On its website, Union provides information entitled "Priority for Transport Services" in which eleven (11) categories of Transportation Services are specified. The first three (3) of these categories of service are listed in paragraphs 1(a), (b) and (c) of Article XVIII of the M12 and C1 General Terms and Conditions. The eleventh (11<sup>th</sup>) category of Transportation Services listed on the website is "Late Nominations" which appears as paragraph 1(d) of Article XVIII. However, six (6) other categories of Transportation Services listed on the website are not included in paragraph 1 of Article XVIII.

We assume that the categories of services listed on the website are the categories that Union actually applies in the day-to-day operation of its system. On this basis, we suggest that the list of service categories in paragraph 1 of Article XVIII needs to be broadened so that it conforms with the website information and the practices Union actually follows.

### **Other Possible Inconsistencies with the Guiding Principles Implicit in STAR**

Subject to these comments, we rely on representatives of utilities and others who acquire transportation services from Union, as well as on Board Staff, to identify and propose appropriate revisions to any other provisions in the materials Union has presented for approval that are incompatible with the need for clearly defined specificity to satisfy the standard, transparent, and non-discriminatory requirements of STAR.

### **Costs**

We hope these submissions will be of some assistance to the Board and we respectfully request that CME be awarded 100% of its reasonably incurred costs of participating in this written hearing process.

Yours very truly,

A handwritten signature in black ink, appearing to read "Peter Thompson", followed by a long horizontal flourish line.

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

- c. Karen Hockin (Union)  
Sharon Wong (Blakes)  
Paul Clipsham (CME)  
Vince DeRose (BLG)

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