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June 9, 2010

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
P.O. Box 2319
Suite 2700
Toronto, Ontario
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Dear Ms. Walli:

**Re: Motion (the "Motion") by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* (the "*OEB Act*") and Ontario Regulation 66/10.
OEB File EB-2010-0184**

Attached please find the Submissions of Union Gas Limited on Preliminary Motion.

Sincerely,



George Vegh

c: All Parties and Intervenors.
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IN THE MATTER OF the *Ontario Energy Board Act, 1998* S.O. 1998, c. 15 (Schedule B) (the “OEB Act”);

AND IN THE MATTER OF a motion by the Consumers Council of Canada in relation to section 26.1 of the *Ontario Energy Board Act, 1998* and Ontario Regulation 66/10

SUBMISSIONS OF UNION GAS LIMITED ON PRELIMINARY MOTION

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Part I – Introduction and Summary

1. These submissions are made by Union Gas Limited (“Union”) in response to the questions set by the Board in Procedural Order #1. Those questions, and Union’s summary responses to those questions, are as follows:

Q1: Is the Motion properly constituted? In other words, is there a Decision or Order of the Board that could be used as the basis for a Motion to Review under Rule 42 of the Rules?

A1: The Board’s assessment is a “decision or order” contemplated within Rule 42. First, the assessment has the characteristics of a decision or order because it imposes a legal obligation on persons that is enforceable both by order of the Board and as an “enforceable provision” under s. 112.1 of the *OEB Act*. Second, the Board’s traditional practice has been to carry out reviews where it is in the public interest to do so. The public interest here is in determining whether the assessments were legal in the first place.

Q2: Given Rule 42.02 of the Rules, does CCC have standing to bring the Motion?

A2: CCC has standing to apply for leave to bring a motion under Rule 42.02. Union submits that the Board should grant leave so that the important issues in this proceeding may be addressed.

Q3. Does the Board have the authority to cancel the assessments issued under section 26.1 of the Act?

A3: The Board has the authority and the duty to determine whether the legislation purporting to authorize the assessments is unconstitutional and, if so, to cancel the assessments. The Board has discretion to do this directly through a full hearing on the merits or by stating a case to the Divisional Court.

Q4: Does the Board have the authority to determine whether section 26.1 of the Act (and Ontario Regulation 66/10 made under the Act) are constitutionally valid in the absence of another proceeding (i.e., can the constitutionality of the legislation be the only issue in the proceeding)?

A4: The Board’s authority and duty to determine the constitutionality of a law is not contingent upon the addition of other issues to a proceeding.

Q5: Would stating a case to the Divisional Court be a better alternative? What would the rationale be for stating a case? What question should be used if a stated case were to be pursued? What would form the evidentiary record for the stated case?

A5: The Board has broad authority to state a case for the Divisional Court and Union submits that it would be appropriate for the Board to do so in this case. Most importantly, this case raises an important legal issue which is likely to be ultimately resolved by the courts. Although the OEB's determination of facts will be of value in that ultimate judicial determination, the OEB's determination of the constitutional issue will be of less value. As a result, there is little to be gained by the Board making an initial legal determination. Having said this, the evidentiary record has not been developed, so it is premature for the Board to state a case on the current record to date.

Union proposes that the Board develop a process to develop the factual record necessary to support a stated case. In order to ensure that the status quo is maintained throughout this process, the Board should, at the same time, consider staying the assessments pending the determination of the stated case.

2. Union's detailed submissions on these issues are set out below:

Part II – Detailed Submissions

Q1: Is the Motion properly constituted? In other words, is there a Decision or Order of the Board that could be used as the basis for a Motion to Review under Rule 42 of the Rules?

3. Reviewing the assessments as decisions both satisfies the traditional legal interpretation of the term “decision or order” and is also consistent with the Board's practice in exercising its reviewing power under Rule 42.
4. With respect to the legal test of what constitutes a “decision or order”, it is important to note that Rule 42 was made pursuant to s. 21.2 (1) of the *Statutory Powers Procedure Act* which provides:

“A tribunal may, if it considers advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.”
5. The *SPPA* provides a useful definition of the term “decision” in the context of the term “statutory power of decision”, which is defined in that Act as a statutory power to decide

“the legal rights, powers, privileges, immunities, duties or liabilities of any person or party.” Applying that here, where a Board action impacts the rights, duties or liabilities of a person on party, that action is a decision. This may be contrasted with the issuance of a report with recommendations which has been held not to be a “decision” for the purposes of review.¹

6. In this case, the assessment creates a legal obligation on both an assessed person to pay amounts assessed by the Board to the Minister of Finance and on their customers, who, by s. 26.1 (3) of the *OEB Act*, are required to ultimately pay the amounts assessed. An assessed person who fails to pay an amount assessed may be ordered to do so by the Board. Failure to pay an assessment is also an enforceable provision under s. 112.1 of the Act. A failure to pay may thus result in the imposition of remedies by the Board, including suspension of a licence or imposition of an administrative penalty.
7. It is therefore clear that the assessment decides the legal rights, duties and liabilities of assessed persons and their customers.
8. Further, if anything, the legal definition of the term “decision or order” is more stringent than how that term has been applied in the context of tribunals generally and by the Board in particular.
9. As a general matter, the Supreme Court of Canada has recognized that tribunals may review decisions with greater leeway than may courts. According to the Supreme Court of Canada, courts may not review their own decisions – once a decision has been rendered, a judge’s rule is *functus*. The same is not true for tribunals. Although the principle of *functus officio* applies in the tribunal context (hence the need for s. 26.1 of the *SPPA*), it should not be applied restrictively.²

¹ *Re Shutz and Ontario Municipal Board* (1978), 20 O.R. (2d) 104 (Div. Ct.).

² *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

“To this extent, the principle of *functus officio* applies [to tribunals]. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable the tribunal to discharge the function committed to it by enabling legislation.”

10. Thus, the term “decision” should be interpreted with a purposive, functional meaning, not a narrow legalistic one. The following purposive definition of a tribunal’s “decision” is provided by Macaulay & Sprague:³

“Every time an agency elects to do something (or to do nothing) it has made a decision. Decisions are the things the agency resolves to do, or not to do, to allow or not to allow. Every question before an agency results in a decision, even if that decision is to do nothing. A decision is the ‘what’ an agency decides to do.

...

A decision is what the agency has decided it will do with respect to a request, an application, an investigation, or other circumstances, which puts it in a position to act.”

11. The Board has taken this broader functional interpretation of its review power in the past without restricting its review to formal findings and orders. For example, the Board has exercised the review power to amend reasons in a decision to provide clarification on the Board’s intentions or to retract statements made in a decision.⁴ This was the case even

³ Macaulay & Sprague, *Hearings Before Administrative Tribunals* (2d) (Thompson, 2002) at 22-1.

⁴ See, for example, the Board’s review in RP-2003-0063 EB-2005-0189 (Motion to review a decision on Union Gas Limited’s Earnings Sharing Mechanism, March 31, 2005), where the Board did not vary an order or decision but provided a clarification of its reasons because, according to the Board, “In the specific circumstances of this Decision, the Board recognized that confirmation or clarification might be helpful.” (at p.4). Also, in EB-2005-0292 (Motion to review a decision setting Oakville Hydro’s distribution rates, June 14, 2005), a reviewing panel granted a request to vary “written Reasons” of a Board decision by deleting certain portions and replacing them with others.)

though these reviews related to *reasons* for decisions, as opposed to decisions themselves.⁵

Q2: Given Rule 42.02 of the Rules, does CCC have standing to bring the Motion?

12. Rule 42.01 provides that “any person” may bring a motion requesting a review and Rule 42.02 provides that a person who was not a party to a proceeding must obtain leave of the Board to file a motion. Union submits that the Board should grant leave so that this matter can be resolved, especially in light of the fact that there were no parties to “the proceeding” resulting in the issuance of the Assessment.

Q3. Does the Board have the authority to cancel the assessments issued under section 26.1 of the Act?

13. Section 19 of the *OEB Act* provides that the Board has the power “to hear and determine all questions of law and of fact.” This section provides the Board with the clear power, and the duty, to determine whether s. 26.1 of the *Act* is constitutional. This power and duty applies both when making the original assessment and when determining whether to review the assessment. The Supreme Court of Canada addressed this point as follows in *Nova Scotia v. Martin*:⁶

First, and most importantly, the Constitution is, under s. 52(1) of the *Constitution Act, 1982*, “the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect”.

...

In cases where the empowering legislation contains an express grant of jurisdiction to decide questions of law, there is no need to go beyond the language of the statute. An express grant of authority to consider or decide questions of

⁵ As Macaulay and Sprague note, “Although there is a tendency to use the terminology loosely and sometimes even interchangeably, and to combine the two concepts together into one document, technically, there is a difference between a ‘decision’ and the ‘reasons’ for a decision. The decision is the ‘what’ and the ‘reasons’ are the ‘why’”. (*supra*, at p. 22-1).

⁶ [2003] 2 S.C.R. 504, at paragraph 28.

law arising under a legislative provision is presumed to extend to determining the constitutional validity of that provision.”

14. Thus, in both making the assessment, and in determining whether to carry out this review, the Board must do so in light of its legal duty to determine the constitutionality of the law under which it purported to act.

15. The Board’s power and duty has been addressed by Professor Hogg as follows:⁷

“Judicial review of legislation can occur whenever a statute is potentially applicable to facts in proceedings before a court. If the party resisting the application of a statute argues that the statute is invalid, a constitutional issue is presented that must be resolved by the court. Judicial review of legislation can thus occur in any proceedings, before courts of all levels, and even before administrative tribunals. That this is so is made plain by s. 52(1) of the Constitution Act, 1982 (the supremacy clause), which provides that ‘any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.’ This supremacy clause must be obeyed, not only by the Supreme Court of Canada, but also by lower courts and administrative tribunals: all bodies with power to decide questions of law possess the power – indeed, the duty – to review the validity of legislation when the issue arises in the proceedings before them.”

16. The result of the foregoing is that the Board has the right and the duty to determine if s. 26.1 of the *OEB Act* is unconstitutional. If it is, then the Board had no legal power to make assessments under that section - the assessments are *void ab initio*. As the Supreme Court of Canada stated, “in principle, such a provision is invalid from the moment it is enacted.”⁸ In other words, if, the Board finds s. 26.1 to be unconstitutional, then in accordance with s. 52(1) of the *Constitution Act, 1982*, the assessments were unlawfully made and the Board has no choice but to cancel them.

17. In light of this, Union submits that the Board should resolve this issue in the most efficient and effective means possible. As is discussed in greater detail below, Union

⁷ Peter Hogg, *Constitutional Law of Canada* (5th, Supplemented) (Carswell, 2007), at p. 59-1.

⁸ *Nova Scotia v. Martin*, [2003] 2 S.C.R. 504, at paragraph 28.

proposes that the best way to do so in this case is by the Board finalizing a record that may be used by the Divisional Court in deciding a stated case.

Q4: Does the Board have the authority to determine whether section 26.1 of the Act (and Ontario Regulation 66/10 made under the Act) are constitutionally valid in the absence of another proceeding (i.e., can the constitutionality of the legislation be the only issue in the proceeding)?

18. The issue in this proceeding is whether the Board's assessments are legally valid. If they are not, then they have no legal effect. There is no reason why there must be another issue in this proceeding.

Q5: Would stating a case to the Divisional Court be a better alternative? What would the rationale be for stating a case? What question should be used if a stated case were to be pursued? What would form the evidentiary record for the stated case?

19. The Board has broad authority to state a case for the Divisional Court. In *Ottawa v. Attorney General (Ontario)*, the Court of Appeal stated that the Board has considerable flexibility respecting the circumstances under which it may state a case:⁹

“This flexibility is consistent with the purpose of the statutory provision, namely to provide the assistance of the Divisional Court on a question of law when the Board is of the view that this would be useful in connection with its statutory mandate.”

20. Union submits that, subject to the need to develop a record as discussed below, it may be appropriate for the Board to state a case on the issue of whether s. 26.1 is unconstitutional in that it purports to authorize an indirect tax.
21. The rationale for a stated case is that this case raises an important legal issue which is likely to be ultimately resolved by the courts. Although the OEB's determination of facts

⁹ *Ottawa v. Attorney General (Ontario)*, (Ont. C.A., June 26, 2002), at para. 22.

will be of value in that ultimate judicial determination, the OEB's determination of the constitutional issue will be of less value. As the Supreme Court of Canada noted:¹⁰

“It is now settled that while the decisions of administrative tribunals lack the force of *res judicata*, nevertheless tribunals may embark upon an examination of the boundaries of their jurisdiction. Of course, they must be correct in any determination they make, and courts will generally afford such determinations little deference.”

22. As a result, it may be more efficient to go the court directly for a legal ruling upon a record that is agreed to or determined by the Board. The Board's approach would be similar to a recent stated case made by the Canadian Radio and Telecommunications Communication to the Federal Court on the grounds that “there is a valid dispute between parties over the Commission's legal authority to impose such a regime.”¹¹

23. With respect to the need for a factual record, the Ontario Court of Appeal addressed the requirements for a stated case from the Board as follows:¹²

“While it is undoubtedly preferable that all necessary facts be included in the stated case, there is no reason why the record before the Divisional Court in this case cannot be supplemented by uncontested facts presented by affidavit. This is not like an appeal by way of stated case, where the record must remain as it was before the original trier.

However, while it does not appear to be this case, if facts are contested, I think the Board must hear and decide those facts first. Its decision would then form the basis for the stated case.”

24. As a result, a stated case would require either a statement of uncontested facts or finding of facts by the Board. In this case, the evidentiary record has not been developed, so it is premature for the Board to state a case on the current record to date. If the Board were to proceed on this basis, it would therefore be necessary to provide direction on the development of a record.

¹⁰ *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. at pp. 25-6

¹¹ Broadcasting Order CRTC 2010-168, 22 March 2010.

¹² *Ottawa v. Attorney General (Ontario)*, (Ont. C.A., June 26, 2002), at para. 33.

25. The record in this case would involve factual findings upon which a court can decide whether s. 26.1 is an unconstitutional indirect tax. The factual record in this case would thus focus on what is necessary for the Divisional Court to determine this issue. There are three main characteristics that are relevant to determining whether the assessment is an indirect tax:

- whether the tendency of the assessment is to be passed on from the person who initially paid it to the person who is ultimately intended to pay it;¹³
- whether the assessment is connected to a regulatory scheme;¹⁴ and
- if the assessment is connected to a regulatory scheme, then whether it is designed to defray the costs of the regulatory scheme (as opposed to contribute to general provincial revenues).¹⁵

26. It is not clear whether some of the underlying facts relating to these issues will be contentious. It is therefore not yet possible to determine whether there may be an agreed statement of facts or whether the Board should hold a hearing to resolve these facts.

27. Union therefore suggests that the Board set a process to develop a factual record to support a stated case. Recognizing that this process may take some time, and in order to ensure that the status quo is maintained throughout this process, Union proposes that the

¹³ “Taxes are either direct or indirect. A direct tax is one which is demanded from the very persons who it is intended or desired should pay it. Indirect taxes are those which are demanded from one person in the expectation and intention that he shall indemnify himself at the expense of another...” (see: *Bank of Toronto v. Lambe* (1887), 12 A.C. 575 at 582)

¹⁴ The Supreme Court of Canada has elaborated this requirement as follows:

“It goes without saying that in order for charges to be imposed for regulatory purposes or to otherwise be ‘necessarily incidental to a broader regulatory scheme’, one must first identify a ‘regulatory scheme’. Certain indicia have been present when this Court has found a ‘regulatory scheme’. The factors to consider when identifying a regulatory scheme include the presence of: (1) a complete and detailed code of regulation; (2) a specific regulatory purpose which seeks to affect the behaviour of individuals; (3) actual or properly estimated costs of the regulation; and (4) a relationship between the regulation and the person being regulated, where the person being regulated either causes the need for the regulation, or benefits from it. This is only a list of factors to consider; not all of these factors must be present to find a regulatory scheme. Nor is this list of factors exhaustive.” *Westbank First Nation v. British Columbia Hydro and Power Authority*, [1999] 3 S.C.R. 134 (“*Westbank*”), at para. 24; quoting *Reference re Proposed Federal Tax on Exported Natural Gas*, [1982] 1 S.C.R. 1004 at 1070 (“*Re Exported Natural Gas Tax*”).

¹⁵ See *Westbank*.

Board consider staying the assessments pending the determination of their constitutionality.

PART III – Conclusion

28. For all the foregoing reasons, Union submits that the Board has the authority and the duty to review the assessments in order to determine their constitutionality. This determination may be made directly by a finding of the Board or indirectly by forming a factual record and stating a case to the Divisional Court. Union proposes that the latter approach is a more effective and efficient way to definitively resolve this issue.

All of Which is Respectfully Submitted

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