EB-2007-0717

IN THE MATTER OF the *Ontario Energy Board Act*, S.O. 1988, c. 15, Sched. B;

IN THE MATTER OF an application from Union Gas Limited for an order of the Board approving the parties to, the period of, and the space for storage that is the subject of a T1 Gas Storage Contract with LANXESS Inc.

SUBMISSIONS BY THE CITY OF KITCHENER

Introduction

1. This is an application under s.39(2) of the *Ontario Energy Board Act, 1998* seeking approval of a T1 contract between Union Gas Limited ("Union') and Lanxess Inc. which, *inter-alia,* provides for storage deliverability above 1.2% at market or unregulated prices.

2. In NGEIR the Board authorized Union to charge market prices for new storage services, including high deliverability storage services to gas-fired generators. Lanxess Inc. is a chemical producer, receiving an aggregate/excess allocation of storage space and its T1 contract does not come within the scope of the forbearance decision provided in NGEIR.

3. Since the decision in NGEIR, however, Union has persisted in its assertion that it was authorized to charge market prices for deliverability above 1.2% to all of its in-franchise unbundled and semi-unbundled customers. Union's assertion in this respect is the underlining assumption of the T1 Lanxess contract which is the subject of this application (Exhibit A2.1(a)).

4. With respect to storage deliverability, the Lanxess contract provides for firm deliverability services of 2500 GJ (1.2% of storage space) at a cost based rate and for deliverability service of an undisclosed amount above the level of 1.2% at market prices. In other words, for a portion of the storage deliverability services provided by the contract, the parties have agreed, without any Board Order, that the price is not to be regulated.

Argument

5. Section 36(1) of the *Act* prohibits Union from selling or charging for storage services "except in accordance with an Order of the Board". Storage services include storage deliverability services. As observed in the Board's interim decision dated October 29, 2007, s.39(2) is not limited to storage space and includes storage deliverability.

6. In the circumstances of this application, therefore, a Board Order under s.39(2) of the *Act* can only be valid if it is accompanied by a determination under s.29(1) of the *Act* to refrain from regulating the provision of deliverability above 1.2% based on a finding that deliverability service above 1.2% "…is or will be subject to competition sufficient to protect the public interest".

7. It is submitted that NGEIR made no such decision. Insofar as Union's in-franchise customers were concerned, the NGEIR proceeding only addressed the allocation of storage space, not storage deliverability. No evidence was put before the Board in NGEIR to enable a determination of whether Union's deliverability service to in-franchise customers "is or will be subject to competition sufficient to protect the public interest", as required by s.29(1). Also the point was not argued by Union in NGEIR. Indeed the reverse is true in that, in its argument-in-chief dated August 11, 2006, Union assured all of its in-

franchise customers that it was "not proposing any fundamental change to the current regulatory framework as it relates to in-franchise services" (page 3).

8. More importantly, the Board, in the Storage Allocation Policies proceeding of EB-2007-0724 and 2007-0725 decided the point in its October 22, 2007 decision on Issues Day. At pages 83 to 85 of the transcript, the Board rejected Union's claim that forbearance relating to deliverability above 1.2% for T1 and T3 customers had been authorized by NGEIR and ordered Union to "roll over" the "… storage entitlements relating to the existing T1 and T3 contracts until the Board has determined the storage allocation issues in this proceeding". One of those issues of course relates to the "appropriate level of storage deliverability available at cost-based rates to in-franchise unbundled and semi-unbundled customers". Accordingly, Kitchener submits that the right of Union to charge market prices for deliverability services to Lanxess above 1.2% is one of the issues to be determined by the Board in the Storage Allocation Policies case.

Conclusion

9. Insofar as the LANXESS contract provides for unregulated, market pricing for a portion of the delivery services to be provided by Union, it is submitted that the contract is prohibited by s.36(1) of the *Act*. Therefore, it is not open to the Board in this application to give its approval unless and until the Board makes a determination under s.29(1) allowing the Board to forebear from regulating the charges for deliverability above 1.2%.

10. Kitchener submits that the Board should not proceed to consider the question of forbearance in this application. As noted, this question is one that must be decided in the Storage Allocation Policies case. It is submitted that issues of general importance such as the decision of forbearance over deliverability should not be decided in customer specific proceedings when a

proceeding of general application such as the Storage Allocation Policies case is required to decide the same issue. In these circumstances, therefore, it is submitted that the instant application should be adjourned until the Board has issued its decision in the Storage Allocation Policies case.

11. Pending the final resolution of this application, Kitchener submits that it would be appropriate to issue an interim order allowing the services called for by the contract to be provided on a cost-of-service basis.

All of which is respectfully submitted.

"J. Alick Ryder"

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