



EB-2011-0013
EB-2011-0014
EB-2011-0015

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule B; and in particular sections 36.1(1), 38(1), 40(1), 90(1), thereof;

AND IN THE MATTER OF an application by Union Gas Limited for an Order designating the area known as the Jacob Pool, in the Municipality of Chatham-Kent, as a gas storage area;

AND IN THE MATTER OF an application by Union Gas Limited for authority to inject gas into, store gas in and remove gas from the areas designated as the Jacob Pool and to enter into and upon the lands in the said areas and use the said lands for such purposes;

AND IN THE MATTER OF an application by Union Gas Limited to the Ministry of Natural Resources for a license to drill wells in the said areas;

AND IN THE MATTER OF an application by Union Gas Limited for an Order granting leave to construct natural gas pipelines in the Municipality of Chatham-Kent.

Before: Marika Hare,
Presiding Member

**DECISION ON MOTION TO STRIKE EVIDENCE AND
PROCEDURAL ORDER NO. 3**

Applications to Develop Jacob Pool

Union Gas Limited (“Union” or the “Applicant”) filed applications dated January 17, 2011, with the Ontario Energy Board (the “Board”) under sections 36.1(1), 38(1), 40(1) and 90(1) of the Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B (the “Act”) requesting an Order authorizing Union to develop and operate a natural gas storage area on lands located in the geographic area of the Municipality of Chatham-Kent referred to as the Jacob Pool.

A single Notice of Application was issued on March 7, 2011 and given file numbers EB 2011/0013/0014/0015. The Applicant served and published the Notice of Application as directed by the Board. The registered intervenors in this proceeding are: Invenergy Canada, Ministry of Natural Resources (“MNR”), Enbridge Gas Distribution Inc. (“Enbridge”) and the Kent Federation of Agriculture (“KFA”).

On March 29, 2011 the Board issued Procedural Order No. 1 which set the schedule for a written proceeding including a provision for intervenors to file evidence. The Board ordered that "the scope of this proceeding will be limited to the Issues List" attached to Procedural Order No. 1.

On April 11, 2011 the KFA filed intervenor evidence which, it submitted, was appropriately within the umbrella of Issue 1.3 of the Board’s Issues List. Issue 1.3 sets out the following: "Does the applicant have the necessary leases and agreements with the directly affected landowners?"

Accompanying the proposed evidence, KFA filed a letter to the Board dated April 11, 2011 wherein it stated that some leases submitted by the Applicant, as part of its prefiled evidence, contain clauses which indicate minimum annual payments equal to Lambton County Storage Association agreement payments and others appear to be industry “standard” leases, unamended. KFA noted that it “is concerned that compensation paid by Ontario storage operators is inadequate and unfair in today’s marketplace.”

Union’s Motion to Strike KFA Evidence

On April 14, 2011 Union filed a Notice of Motion regarding the KFA proposed evidence (the “Motion”). The Motion asked for an order of the Board striking the

KFA evidence from this proceeding on the grounds that the KFA evidence “is not relevant to the issues in this proceeding”.

On April 19, 2011 the Board issued Procedural Order No. 2 which set the schedule for submissions and reply submissions from the parties with respect to the Motion and the issue of whether the KFA evidence should be struck from the record in this proceeding.

Submissions on the Motion

The KFA, Board Staff and Union filed submissions on Union’s Motion.

By way of letter dated April 20, 2011 KFA stated, among other things, that: “KFA has no objection to the Board making an Order striking the evidence filed by KFA on April 11th, 2011 from these proceedings, without prejudice to:

- (a) KFA’s right to re-submit its evidence with respect to the issue of compensation in these proceedings; and
- (b) KFA’s right to move the Board pursuant to section 21(1) of the Ontario Energy Board Act (“OEBA”) to order a hearing to determine what constitutes just and equitable compensation pursuant to section 38 (2).”

On April 26, 2011, Board staff filed submissions in support of Union’s Motion that the Board make an Order striking the evidence filed by KFA.

Board staff stated that its support of Union’s motion is based on the legal interpretation of section 38(3) of the Act which was also cited by Union in its Motion, and on the fact that the KFA consented to the Motion to strike its evidence from the record of the proceeding.

Board staff submitted that, consistent with previous Board decisions¹, an owner of storage rights who has a valid agreement with a prospective storage operator or current storage operator, is not eligible to obtain an order of the Board regarding compensation for the storage rights which are covered by the agreement.

¹ RP 1999-0047, Union Gas Limited and Ontario Energy Board, Decision with Reasons

Board staff also stated that in this case the landowners referred to in the additional evidence filed by the KFA all have valid agreements with Union. Board staff argued that regardless if the individual landowners have agreements, the KFA, is not a landowner within the proposed Jacob Pool, and as such has no standing to file the evidence and bring its motion with respect to the issue of compensation.

Union filed its Reply submission on April 27, 2011. Union disagreed with the statement made by KFA that it has a “right to re-submit its evidence with respect to the issue of compensation in these proceedings”. Union stated that “If, in the future, a *landowner* commences an application under s. 38(3) of the *OEB Act, 1998*, then a landowner (or its representative) may file evidence, and the Board may determine who else may file evidence and on what issues in the normal course.”

Board Findings on the Motion

The Board grants Union’s Motion for an order striking the evidence filed by the KFA on April 11, 2011.

As set out by both Union and Board staff in their respective submissions, the KFA is not a landowner and as such cannot be deemed to have direct interest in compensation matters that arise from operation of a designated gas storage pool. Section 38 of the Act provides:

Authority to store

38. (1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose.

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

- (a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order.

Determination of amount of compensation

(3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board.

In accordance with the Act, only landowners can seek a determination from the Board for appropriate compensation. As such, only individual landowners within the Jacob pool, or any other gas storage pool in Ontario, may file an application for a right to compensation under section 38(3) of the Act as long as they can demonstrate that there is no agreement with a gas storage operator. The Board therefore grants Union's Motion striking the evidence filed by KFA. With respect to KFA's request that the Board confirm its right to resubmit evidence with respect to compensation in these proceedings, the Board confirms its position noted above: only individual landowners within the Jacob pool may file an application for a right to compensation. As such, a landowner may file evidence in that proceeding and the Board can make any determinations in that proceeding about further evidence being filed.

KFA also requested that the Board confirm its "right to move the Board pursuant to Section 21 (1)" of the Act. The Board notes that the section of the Act provides as follows:

21. (1) The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act.

As such, the Board confirms that it is not up to a party to make a motion to the Board to hold a hearing. As noted by Union in its reply submission, there is no right for a person to bring a motion for an order commencing a proceeding.

The Motion filed by Union is dismissed in its entirety. As such, the Board finds it necessary to establish a new procedural schedule as part of this procedural order. Parties are to take note that the schedule set out herein replaces the

schedule set out in Procedural Order No. 2.

The Board considers it necessary to make provision for the following procedural matters. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. The intervenor evidence filed by Kent Federation of Agriculture on April 11th, 2011 is struck from the record of the EB-2011-0013/0014/0015 proceeding.
2. Written interrogatories on the Applicant's pre-filed evidence shall be filed with the Board and copies delivered to the Applicant and all intervenors on or before **Monday, May 16, 2011**. All interrogatories must reference the specific evidence on which the interrogatory is based and indicate the issue number according to the Issues List provided in the Appendix B to Procedural Order No. 1.
3. Responses to the interrogatories shall be filed with the Board and delivered to the Applicant and all intervenors on or before **Wednesday, May 25, 2011**.
4. A Technical Conference will be convened on **Thursday, June 2, 2011** at 9:30 a.m. The Technical Conference will be held at 2300 Yonge Street, Toronto in the Board's West Hearing Room on the 25th Floor.
5. Intervenors and Board staff shall file their submissions, if any, and deliver copies to Union and all other parties on or before **Friday, June 10, 2011**.
6. Union shall file its reply argument, if any, and deliver copies to Board staff and intervenors on or before **Friday, June 17, 2011**.

All filings to the Board must quote file numbers EB-2011-0013; EB-2011-0014; and EB-2011-0015, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address.

Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the BoardSec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

DATED at Toronto May 03, 2011
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary