

PETER C.P. THOMPSON, Q.C.
T 613.787.3528

pthompson@blg.com

Borden Ladner Gervais LLP
World Exchange Plaza
100 Queen St. Suite 1100
Ottawa, ON, Canada K1P 1J9
T 613.237.5160
F 613.230.8842
F 613.787.3558 (IP)
blg.com



By electronic filing

September 6, 2011

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th floor
Toronto, ON M4P 1E4

Dear Ms Walli,

Union Gas Limited ("Union")
2010 Earnings Sharing & Deferral Accounts and Other Balances
Board File No.: EB-2011-0038
Our File No.: 339583-000104

Please find attached the written submissions of Canadian Manufacturers & Exporters ("CME").

Yours very truly,

A handwritten signature in blue ink, appearing to read 'Peter Thompson', is written over a horizontal line.

Peter C.P. Thompson, Q.C.

\slc
enclosure

c. Chris Ripley (Union)
Intervenors in EB-2011-0038
Kristi Sebalj (OEB)
Nancy Coulas (CME)

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THE ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998, S.O. 1998, c.15 (Schedule B)*;

AND IN THE MATTER OF an Application by Union Gas Limited for an order or orders amending or varying the rate or rates charged to customers as of October 1, 2011.

**SUBMISSIONS OF
CANADIAN MANUFACTURERS & EXPORTERS ("CME")**

September 6, 2011

BORDEN LADNER GERVAIS LLP
Barristers & Solicitors
Suite 1100 – 100 Queen Street
Ottawa, ON K1P 1J9

Peter C.P. Thompson, Q.C.
Vincent J. DeRose
Tel (613) 237-5160
Fax (613) 230-8842
Lawyers for CME

TO: **Ontario Energy Board**
Attention: Kirsten Walli, Board Secretary
Suite 2701 – 2300 Yonge Street
Toronto, ON M4P 1E4

AND TO: **Union Gas Limited**
Attention: Chris Ripley
50 Keil Drive North
Chatham, ON N7M 5M1

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I. OVERVIEW

1. With the assistance of John Rosenkranz's expertise in storage-related matters, the record in this proceeding identifies three (3) items that Union Gas Limited ("Union") has incorrectly been using since 2008 in its calculation of storage margins to be allocated to ratepayers. Union acknowledges that the Board has never approved these items that, without prior Board approval, do not constitute "costs" of providing unregulated storage services. The insufficiently transparent information that Union has provided to the Board over the years pertaining to these incorrectly calculated "costs" corroborates that acknowledgement.
2. Without prejudice to anyone's rights, Canadian Manufacturers & Exporters ("CME") seeks an order requiring Union to provide information pertaining to the extent to which the Board should make an adjustment to the 2010 storage deferral account balances to remedy Union's "incorrect calculations" of balances dating back to 2008. The case for a one time adjustment covering "incorrect calculations" in 2008, 2009 and 2010 is strong. As a matter of principle, Union accepts that incorrect calculations of deferral account balances in prior years should be corrected by way of a one time adjustment. There is little, if any, evidence to support Union's contention that it has not incorrectly calculated deferral account balances since 2008 and the provisions of the EB-2010-0039 Settlement Agreement dated July 30, 2010, precluding adjustments to balances prior to 2010 are not applicable.
3. Union should be required to provide the information requested without prejudice to the Board's determination, at the conclusion of the hearing, of any adjustment that should be made to the 2010 storage deferral account balances to remedy Union's incorrect calculations dating back to 2008.

II. NATURE OF THE RELIEF REQUESTED

4. The information we ask the Board to require Union to provide¹ relates to a one time adjustment that we submit needs to be made to the 2010 balance Union proposes for Deferral Account 179-72 for incorrect calculations of balances in that account dating back to 2008.
5. The information is being requested without prejudice to Union's position that the provisions of the EB-2010-0039 Settlement Agreement dated July 30, 2010 operate to preclude any corrections on account of incorrect deferral account balance calculations made prior to 2010.
6. Put another way, all that the motion seeks is information. What the Board does with the information when determining the amount of the 2010 deferral account balance to be cleared to ratepayers is a matter to be determined after all witnesses have been examined.
7. There are two (2) items of information that we ask the Board to require Union to provide. The first is a calculation by Union of the amount of the one time adjustment that reflects a removal from its proposed 2010 balance in Deferral Account 179-72 of amounts charged since 2008 for:
 - (i) A return amount on incremental storage assets in excess of the Board approved return allowance;
 - (ii) A return amount on purchased assets that Union does not pay to third party storage providers; and
 - (iii) Income taxes on items (i) and (ii).

¹ Notice of Motion, paras. 1 and 2, CME Motion Record ("MR"), Tab A.

8. We believe that most of the information needed to derive the amount of this particular one time adjustment is displayed at Tab 15 of CME's Motion Record. The only items in the estimates provided there, that are not amounts already provided by Union on the record in these proceedings, are the amounts for 2008 and 2009 in line 2 of the Schedule.
9. The second item of information we are asking the Board to require Union to provide is a calculation of the Return on Equity ("ROE") it earned from its unregulated storage assets for the years ending December 31, 2008 and December 31, 2010, in the same format as the ROE calculation provided by Union in the EB-2010-0039 proceeding at Attachment 1.2, Exhibit B3.41 for the year ending December 31, 2009. We submit that this information is relevant to the Board's consideration of whether the return Union's shareholder earns on its unregulated storage activities pursuant to the Board's EB-2005-0551 Natural Gas Electricity Interface Review Decision with Reasons dated November 7, 2006 (the "NGEIR Decision") is more than sufficient to satisfy the 14.40% "post-tax hurdle rate" and 8.5% Internal Rate of Return ("IRR") that Union's owner uses to measure whether its proposed incremental investments in storage assets are economically feasible.²

III. GUIDING PRINCIPLE – INCORRECT CALCULATIONS OF DEFERRAL ACCOUNT BALANCES SHOULD BE CORRECTED

10. The principle that prompts this motion is the one that Union applies to support its proposed one time adjustment to the 2010 Unabsorbed Demand Charge ("UDC") Variance Account to remedy Union's incorrect calculations of balances in that account dating back to June 2007. We refer to this hereinafter as the "Correction Principle".

² Exhibit B3.54, CME MR, Tab 12.

11. During the course of the Technical Conference, Union accepted, as a matter of principle, that a one time adjustment to remedy incorrectly calculated deferral account balances should be made from the date that the incorrect calculations first occurred.³ A calculation of the year-by-year components of the one time adjustment to be made to that deferral account was provided by Union in the Attachment to Exhibit B2.1 found at Tab 12 of CME's Motion Record. The first item of information we ask the Board to require Union to provide is the Deferral Account 179-72 equivalent to the one time adjustment calculation Union has provided in this Exhibit.
12. Having regard to the "true-up" and "tracking" features of deferral accounts, the Correction Principle that Union applies makes good sense. Neither utility ratepayers nor its shareholders should benefit from or be burdened with past calculations of deferral account balances that are incorrect in that they have not been done in accordance with the Board's prevailing calculation rules.
13. Union effectively acknowledges that the Correction Principle applies despite prior intervenor acceptance of and Board approval of amounts in deferral account balances that turn out to have been incorrectly calculated. In this case, Union concedes that a one time adjustment to the UDC Variance Account of \$1.93M to remedy incorrect calculations of balances in that account dating back to June 2007 is necessary,⁴ despite prior Board approvals of the amounts cleared based on language of the type contained in paragraph 1 of the EB-2010-0039 Settlement Agreement as follows:

*"(Complete Settlement) Parties agree to Union's proposed disposition of this account."*⁵
14. The point is that language to the foregoing effect does not preclude the application of the Correction Principle in a case where deferral account balances in prior years have been

³ July 26, 2011 Technical Conference Transcript page 12, lines 9 to 26.

⁴ Exhibit B2.1, CME MR, Tab 12.

⁵ EB-2010-0039 Settlement Agreement, CME MR, Tab 9, page 3.

incorrectly calculated. Put another way, the Correction Principle trumps any prior intervenor acceptance or Board approval of the incorrectly calculated balances.

IV. UNION'S 2008, 2009 AND 2010 DEFERRAL ACCOUNT BALANCE CALCULATIONS ARE INCORRECT

15. We recognize that Union disagrees with our characterization of the 2008 and 2009 balances in Deferral Account 179-72 as "incorrect calculations". Counsel for Union made this point at pages 18 and 19 of the July 26, 2011 Technical Conference Transcript starting at line 25 where he stated as follows:

" MR. SMITH: Mr. Thompson, obviously this is a point that will have to be debated at later time. But you have used the word "correct" a number of times.

Of course we obviously -- unlike in B2.1, where everyone agrees on the methodology, but there was, in fact, an error in the calculation of the number -- we don't accept that the methodology Union has used in any year, let alone 2010, 2009, 2008, is in any respect incorrect.

Obviously you don't agree with that, but it's important, I think, that for the purposes of the record, we disagree with your characterization of the dispute between us."

16. At the moment, we are unaware of the evidence upon which Union will be relying to support its assertion that its inclusion of the items described in sub-paragraphs (i), (ii) and (iii) above constitute "costs" of providing unregulated storage services.
17. We submit that there is ample evidence to support a finding that these items do not constitute actual costs of providing unregulated storage services. Their inclusion in the calculation of the ratepayers' share of long-term storage margins is incorrect because it does not comply with the NGEIR Decision⁶, which only permits actual costs of providing unregulated storage services to be deducted. The conclusion is supported by the evidence of Mr. Rosenkranz buttressed by interrogatory responses obtained from Union

⁶ NGEIR Decision, November 7, 2006, CME MR, Tab 1, pages 106 and 107.

with his expert assistance.⁷ These interrogatory responses include Union's acknowledgement that its action in charging for a "hurdle rate target established by the Company for approval of unregulated investment opportunities" and the imputed taxes as "costs" of providing unregulated storage services is an approach that has never been approved by the Board. The insufficiently transparent nature of the information that Union provided to the Board over the years, commencing in 2008, pertaining to these unapproved items can be gleaned from the pre-filed evidence, interrogatory responses and Technical Conference information pertaining to 2008 and 2009 as contrasted to the pre-filed evidence, interrogatory responses and Technical Conference information elicited in this case with the assistance of Mr. Rosenkranz's expertise.⁸

18. Adherence to the Board's prevailing margin calculation rules to correct Union's incorrect calculations constitutes corrective action. Intervenors relying on Mr. Rosenkranz's evidence are not advocating changes to approved rules; they are advocating compliance with approved rules.
19. Since there is ample evidence to support the characterization of Union's 2008, 2009 and 2010 deferral account balances as "incorrect", the information we seek pertaining to the one time adjustment to remedy those incorrect calculations as of 2008 should be granted.
20. A final determination of the issue of whether Union's balances do or do not contain incorrect calculations will be made by the Board at the conclusion of the evidentiary portion of this hearing.

⁷ Excerpts from evidence of John A. Rosenkranz dated July 6, 2011, CME MR, Tab 13, and Exhibits B3.15, B3.16, B3.17, B3.18, B3.52 and B3.54, CME MR, Tab 12.

⁸ For 2008 materials, see CME MR, Tabs 4 and 5, and Union Motion Record ("Union MR"), Tabs 4 to 8. For 2009 materials, see CME MR, Tabs 7 and 8, and Union MR, Tabs 9 to 14. For 2010 materials, see CME MR, Tabs 11 to 14, and Union MR, Tabs 15 to 21.

V. THE PROVISIONS OF THE SETTLEMENT AGREEMENT DO NOT PRECLUDE CORRECTIONS DATING BACK TO 2008

21. Union contends that the provisions of the Settlement Agreement operate to constrain the applicability of the Correction Principle to its calculations of the 2010 deferral account balance only. Counsel for Union stated this position during the course of the July 26, 2011 Technical Conference at page 13 of the Transcript, lines 22 to 26, as follows:

" Not only is this proceeding intended to deal with 2010 deferral accounts, but you will of course recall that the settlement agreement agreed to by your client was specifically on the basis that it would deal with 2010 going forward and would not have any impact on prior years."

22. The provisions of the Settlement Agreement that deal with Union's calculation of the balances in Deferral Account 179-72 and the constraint on seeking correction to balances prior to 2010 are contained in Sections 3 and 20.⁹
23. As already noted, the language of Section 3 is identical to the language of Section 1 pertaining to the UDC Variance Account. That language does not preclude Union's application of the calculation Correction Principle to support a one time adjustment to remedy incorrect calculations of UDC Variance Account balances in prior years.
24. Section 20 of the Settlement Agreement contains the provision to which counsel for Union referred during the Technical Conference pertaining to the impact of certain matters on deferral account balances disposed of prior to 2010. Section 20 provides as follows:

"20. Allocation of Costs Between Union's Regulated and Unregulated Storage Operations

The parties agree that, upon approval of this Agreement by the Board, Union will commission an independent study ("the Study") of its cost allocation methodology for allocation of costs between its regulated and unregulated storage operations. The Study will also examine the attribution of revenues to deferral accounts 179-70 and 179-72 and provide a volumetric reconciliation between physical space and space sold "short term" and "long term". Union will solicit a person, group or

⁹ EB-2010-0039 Settlement Agreement, pages 1, 9 and 10.

organization to conduct the study ("Study Staff") by way of a request for proposals ("RFP"). Union will provide an opportunity to the other parties to comment on a draft version of the RFP and to suggest changes. Final drafting of the RFP and selection of Study Staff will be at the sole discretion of Union.

Union will take steps to ensure that, at or near the outset of the Study, the other parties will be provided an opportunity to present Study Staff with their concerns, questions, and/or opinions on the subject matters of the Study.

The Study will be filed by Union in connection with its application to dispose of 2010 deferral account balances with sufficient time to permit full discovery and review of the Study as part of the application.

Any changes that Study Staff may recommend to Union's cost allocation methodology will not be implemented until after receiving approval from the Board. Any findings or recommendations made by Study Staff will be adopted, if at all, on a prospective basis, and will have no impact on balances disposed of prior to 2010." (emphasis added)

Pursuant to Section 20, issues pertaining to the allocation of costs between Union's regulated and unregulated storage operations, including an examination of its attribution of revenues to Deferral Account 179-72, were resolved on the basis that Union would commission an independent study to examine all of these issues. These issues encompass Union's margin calculations that lead to the attribution of revenues to Deferral Accounts 179-70 and 179-72.

25. The Settlement Agreement provides that any findings or recommendations made in that study that the Board might adopt would have no impact on deferral account balances disposed of prior to 2010. The language of the Settlement Agreement is clear that, without findings or recommendations in the study pertaining to the attribution of revenues to Deferral Accounts 179-70 and 179-72 through the margin calculations, there is nothing that operates to limit the application of the Correction Principle to the 2010 deferral account balances only. The emergence of the "incorrect calculations" scenario is not based on any findings or recommendations in the study referenced in Section 20 of the Settlement Agreement. Both Union and Black and Veatch ("B&V"), the Study Staff retained by Union pursuant to paragraph 20 of the Settlement Agreement, acknowledge

that B&V were not retained to examine Union's margin calculations.¹⁰ The evidence establishing Union's incorrect calculations of prior deferral account balances was elicited by intervenors with the assistance of Mr. Rosenkranz.

26. Accordingly, the interpretation counsel for Union places on Section 20 of the Settlement Agreement is not compatible with its terms. Union can derive no benefit from the provisions of Section 20 of the Settlement Agreement with respect to its incorrect calculations of balances in Deferral Accounts 179-70 and 179-72 in 2008 and 2009 because it did not commission an independent examination of its margin calculations that lead to the attribution of revenues to those deferral accounts.
27. Intervenor discovery and Union discovery of incorrect deferral account balance calculations warrant the same regulatory treatment. Since there is no contractual impediment to preclude a one time adjustment to the 2010 balances in Deferral Accounts 179-70 and 179-72, the situation is entirely analogous to Union's application of the Correction Principle to adjust the 2010 UDC Variance Account to remedy "incorrect calculations" dating back to 2008. Intervenor approvals of prior UDC Variance Account balances subsequently demonstrated to be incorrect do not operate to render the amounts previously approved as correct. Similarly, intervenor approvals of deferral account balances containing what Union characterizes as a "hurdle target rate established by the Company for approval of unregulated investment opportunities"¹¹ and imputed taxes do not operate to preclude the correction of those calculations in this proceeding on the basis of the evidence intervenors have marshalled to demonstrate that the calculations made in prior years were incorrect

¹⁰ July 26, 2011 Technical Conference Transcript page 20, line 6 to page 21, line 8, and page 54, line 26 to page 55, line 23.

¹¹ Exhibit B3.54, CME MR, Tab 12.

VI. CONCLUSION

28. For these reasons, CME requests the issuance of an order requiring Union to provide the information requested without prejudice to the rights of Union and other interested parties pertaining to the extent, if any, to which the Board should adjust the 2010 deferral account balance for Deferral Account 179-72 for deferral account balances in 2008, 2009, and 2010 that we say are incorrect.

All of which is respectfully submitted this 6th day of September, 2011.

A handwritten signature in blue ink, reading "Peter Thompson for.", is written over a horizontal line.

Peter C.P. Thompson, Q.C.

Vincent J. DeRose

BORDEN LADNER GERVAIS LLP