EB-2011-0038

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.

Union Gas Limited
Cross-Examination Material

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Ontario

ONTARIO ENERGY BOARD

FILE NO.:	**RP-2005-0022** **EB-2005-0441** **EB-2005-0442** **EB-2005-0443** **EB-2005-0473**

VOLUME:	**2**	
DATE:	**November 15, 2005**	
BEFORE:	**Paul Vlahos**	**Presiding Member and Vice Chair**
	Cynthia Chaplin	**Member**
	Ken Quesnelle	**Member**

RP-2005-0022
EB-2005-0441
EB-2005-0442
EB-2005-0443
EB-2005-0473

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 Greenfield Energy Centre Limited Partnership for an Order or Orders pursuant to section 90 of the *Ontario Energy Board Act, 1998* granting leave to construct a natural gas pipeline in the Township of St. Clair, Ontario;

AND IN THE MATTER OF an Application by Greenfield Energy Centre Limited Partnership for an Order or Orders pursuant to section 101 of the *Ontario Energy Board Act, 1998* for authorization for certain road and utility crossings required for the proposed pipeline;

AND IN THE MATTER OF an Application by Greenfield Energy Centre Limited Partnership for a Certificate of public convenience and necessity, pursuant to section 8 of the *Municipal Franchises Act;*

AND IN THE MATTER OF an Application by Union Gas Limited for an Order or Orders pursuant to section 90 of the *Ontario Energy Board Act, 1998* granting leave to construct a natural gas pipeline in the Township of St. Clair, Ontario.

Hearing held at 2300 Yonge Street,
25th Floor, West Hearing Room,
Toronto, Ontario, on Tuesday,
November 15, 2005, commencing at 9:00 a.m.

Volume 2

B E F O R E:

PAUL VLAHOS	PRESIDING MEMBER AND VICE CHAIR
CYNTHIA CHAPLIN	MEMBER
KEN QUESNELLE	MEMBER

A P P E A R A N C E S

JENNIFER LEA	Board Counsel
ZORA CRNOJACKI	Board Staff
PAT MORAN JENNIFER TUER	Greenfield Energy Centre
PAUL WENDELGASS JOHN ROSENKRANZ	Calpine Corporation
YUMITAKE FURUKAWA	Mitsui
GORDON CAMERON KAREN HOCKIN BILL WACHSMUTH	Union Gas Limited
MICHAEL JANIGAN JAMES WIGHTMAN	Vulnerable Energy Consumers Coalition
ROBERT WARREN	Consumers Council of Canada
VINCENT DeROSE	Industrial Gas Users Assoc.
PAUL MANNING	Society of Energy Professionals
ANDREW LOKAN	Power Workers Union
BRIAN DINGWALL	Canadian Manufacturers & Exporters, HVAC Coalition
PETER SCULLY	Federation of Northern Ontario Municipalities and Cities of Sudbury and Timmins
LORRAINE LAND DAVE WHITE	Walpole Island First Nation
HELEN NEWLAND	Enbridge Gas Distribution
MURRAY ROSS	TransCanada Pipelines

I N D E X   O F   P R O C E E D I N G S

E X H I B I T S

U N D E R T A K I N G S

Tuesday, November 15, 2005

--- Upon commencing at 9:00 a.m.

MR. VLAHOS: Please be seated. Good morning, everyone. Any preliminary matters?

PRELIMINARY MATTERS:

MR. CAMERON: Mr. Chair, Union Gas has two filings, both of which have been provided to the Board and left at the back for parties. The first is a package of curricula vitae, one for each of the Union witnesses who will be appearing later this week, and I would ask that that be given the next exhibit number, please.

MS. LEA: Thank you. We have the curriculum or curricula vitae, however you pluralize that, for the Union witnesses. That will be X2.1.

EXHIBIT NO. X2.1: CURRICULA VITAE FOR UNION GAS WITNESSES

MS. LEA: The second item, Mr. Cameron?

MR. CAMERON: The second item is a set of three schematic drawings that were prepared by Union's first panel, facilities, design and economics, and they will be spoken to by that panel very briefly in their direct evidence.

MS. LEA: Thank you. The package of schematics is X2.2.

EXHIBIT NO. X2.2: PACKAGE OF SCHEMATIC DRAWINGS

MR. VLAHOS: Thank you, Mr. Cameron. That's it? No other matters?

MR. MANNING: Mr. Chairman, the Society of Energy

Professionals has lodged the CV of Mr. Kellway for distribution, and I would ask that that be admitted for distribution, as well.

MS. LEA: X2.3, please.

EXHIBIT NO. X2.3: CURRICULUM VITAE OF MR. KELLWAY

MS. LAND: Mr. Chairman, we circulated a CV, as well, for the witnesses for Walpole Island First Nation.

MS. LEA: Thank you, Ms. Land. The CV of Dean Martin Jacobs then, first, X2.4.

EXHIBIT NO. X2.4: CURRICULUM VITAE OF DEAN MARTIN JACOBS

MS. LEA: The second one, the CV of David W. White, X2.5.

EXHIBIT NO. X2.5: CURRICULUM VITAE OF DAVID W. WHITE

MS. LEA: One moment, please.

MR. VLAHOS: Any other matters? There being no response, Mr. Moran.

MR. MORAN: Thank you, Mr. Chair. We have panel 3 before you, Mr. Wendelgass, who is already sworn, and Mr. Rosenkranz, R-O-S-E-N-K-R-A-N-Z.

MR. VLAHOS: Yes, sir. Your new witness has to come forward.

GREENFIELD ENERGY CENTRE PANEL 3:

John Rosenkranz; Sworn

Paul Wendelgass; Previously Affirmed

EXAMINATION IN-CHIEF BY MR. MORAN:

MR. MORAN: Thank you, Mr. Chair. Mr. Rosenkranz, looking at your CV, I see that you have a bachelor's degree in economics?

MR. ROSENKRANZ: Yes, I do.

MR. MORAN: And you have carried out graduate studies in economics, as well?

MR. ROSENKRANZ: Yes, I have.

MR. MORAN: And you have carried out -- you've held positions as an economist?

MR. ROSENKRANZ: Yes, I have.

MR. MORAN: And then you have been involved in a number of jobs that involve gas supply.

MR. ROSENKRANZ: Yes, I've had a number of jobs that involve gas supply planning.

MR. MORAN: And your current position is with Calpine Corporation, and you are the director of the gas marketing?

MR. ROSENKRANZ: Yes, that's true.

MR. MORAN: You were involved in the preparation of sections of the pre-filed evidence and a number of interrogatories dealing with the gas supply issues?

MR. ROSENKRANZ: Yes, I was.

MR. MORAN: And do you adopt that as your evidence for the purposes of this proceeding?

MR. ROSENKRANZ: Yes, I do.

MR. MORAN: Are there any changes or corrections that you wish to make at this time?

MR. ROSENKRANZ: There is one correction that I would like to bring to people's attention, and that would show up in Greenfield Energy Centre's pre-filed evidence. It is actually not something that we produced, but in Exhibit B3, we inserted the Canadian tariff of Vector Pipeline Limited Partnership. At the very end of that -- and it's not paginated, as I recall. It's actually the next to the last page of a fairly voluminous insertion. It lists the various rates for service. So at the very end, there is page 1 and page 2. Actually, it would be the last page.

MR. MORAN: I'm going to stop you. Mr. Chair, do you have the reference?

MR. VLAHOS: Yes, I do.

MR. ROSENKRANZ: Okay. So it would be actually the last page. It refers to the actual rates on file for the title transfer service and the management of balancing agreement service.

In preparing for this appearance and reviewing the various things that have been filed, we noticed that there was an error, actually, in the Vector tariff. The maximum call for the management of balancing agreement service or MBA service is listed as 29 cents per gJ.

We contacted Vector and they confirmed that the correct rate is point -- excuse me, 2.9 cents or 0.029 dollars per gJ. That is something that will be -- they will correct in their tariff, but we wanted to bring that to people's attention.

That number was not used in our evidence, but it was used by Union Gas in its intervenor evidence. On paragraph 148 they make reference to the erroneous rate, and in paragraph 155(h) they perform a calculation using that rate. So we just wanted to bring that to people's attention, that that rate that was -- we had gotten from Vector was just an error in their tariff.

MR. MORAN: Now, Mr. Wendelgass, if could you please indicate to the Board why GEC needs the pipeline.

MR. WENDELGASS: GEC needs the pipeline to deliver natural gas to the power plant it is committed to build to serve under its contract to the Ontario Power Authority.

MR. MORAN: What are the implications for the project if GEC doesn't get the pipeline approval?

MR. WENDELGASS: If GEC doesn't get the pipeline approval and is required to take service under the firm T1 tariff with Union, it will have substantial financial implications, negative financial implications, for the project. I think it would require the partners to step back and take a careful look at the project economics. It will also require the project's lenders to take a very careful look at the lending, because the cash flow implications are pretty serious for the project, and I think overall the impact of lack of the pipeline is substantial.

MR. VLAHOS: Mr. Wendelgass, I continue to have difficulty hearing you.

MR. WENDELGASS: I apologize.

MR. VLAHOS: I would ask you, perhaps, maybe you could just change chairs, just one over for both of you gentlemen, see how that works out. It may be just the mike that you're using.

MR. WENDELGASS: Okay.

MR. VLAHOS: See if that works.

MR. MORAN: Now, Mr. Wendelgass, they're supposed to be directional mikes too, so make sure it is pointed right at you.

MR. WENDELGASS: I'm staring straight at it. Unfortunately, I don't have much more voice than this.

MR. MORAN: Now, you made a reference to lenders. What kind of financing is anticipated for this project?

MR. WENDELGASS: This was anticipated to be a project financing. Greenfield, as I indicated in discussions yesterday, is a stand-alone entity. It is a limited partnership between subsidiaries of Calpine and subsidiaries of Mitsui & Co. Limited.

The project itself will undertake a financing with lenders, and it will do that on the basis of the strength of the project's own financials, not on the strength of its parents.

MR. MORAN: Thank you, Mr. Wendelgass.

Mr. Rosenkranz, from your perspective, on the gas supply side, why does Greenfield need this pipeline?

MR. ROSENKRANZ: My responsibility extends to the long-term gas supply arrangements for power plants such as Greenfield. So from my perspective, we're looking at the various alternatives that we have for delivering gas to that plant and coming up with a plan that gives us the best possible outcome.

Our evaluation is that the building, this piece of pipe to the interconnection with the Vector pipeline, gives us a number of advantages that are important to the project.

First of all, it gives us control over the cost of the interconnection. It gives us control over the design of that interconnection, and very importantly the timing of that interconnection. We can build that under the control of our own personnel to make sure that that is coordinated with the time frame for the much larger power plant project.

Also, it gives us access, we believe, to a number of competitive sources of both natural gas and the various ancillary services we're going to need in the gas market from time to time to manage imbalances, to allow the plant to operate as it needs to, and the flexibility to make those changes over time.

So, overall, we see this as an important step to the development of this project. Fuel supply is obviously very important to the gas-fired power plant, and this is the option that we've identified as being the best option for supplying this plant.

MR. MORAN: Mr. Wendelgass, when did you start looking for sites for the purposes of the RFP process?

MR. WENDELGASS: I first began looking for sites shortly after the government announced its gas-fired power plant initiative in early 2004. I believe my first trip to Ontario was in February of 2004.

MR. MORAN: And when did you identify the Greenfield site?

MR. WENDELGASS: I believe we identified that in late September, early October of 2004.

MR. MORAN: Mr. Rosenkranz, when did you start work on the transportation options for Greenfield?

MR. ROSENKRANZ: That would have been early fall of 2004, when we identified this as one of our primary sites.

MR. MORAN: When did you first talk to Union Gas about the possibility of service from them?

MR. ROSENKRANZ: We had been in discussions earlier in 2004 with Union Gas concerning their services for actually other sites before we settled on the Greenfield site. So it would have been earlier in 2004. In September of 2004, we were more focussed in our approach, had better ideas in terms of which specific sites we were looking at, and at that time we executed a confidentiality agreement with Union Gas so we could continue those discussions.

MR. MORAN: When you were looking at your own pipeline compared to service from Union, what ultimately drove the decision that led to building the pipeline into your proposal with the RFP process?

MR. ROSENKRANZ: There were a number of different factors that we looked at. I think the biggest stumbling block or biggest concern at that point in time, with respect to the Union service, is that we did not see that as being -- the service that was being offered by Union as being an appropriate service for the power plant. We saw it as being a more comprehensive, bundled and expensive service than we thought was appropriate for this type of project. The way we have approached this in many other instances is that we are looking at the cost of the basic interconnection services and the basic gas-delivery services that we're going to need for this project, and we feel that because we have the ability to construct our own gas interconnections and have the fuel management ability to act in pretty much the wholesale marketplace for natural gas, that we have a good idea, in terms of what the underlying costs should be.

At the time that we made the bid, we used those underlying economics and our understanding of the marketplace. It was not based on -- at that point in time, a hard decision that we were going to pursue one particular option or another. At that time, we were still considering a connection with TransCanada, and we were still considering the possibility of working out some other type of arrangement with Union Gas. But we were -- the foundation for our bid strategy was that any of those alternatives should be competitive with the underlying economics of building our own pipeline.

MR. MORAN: Now, you made reference to the contracting flexibility, if I could call it that. How important is that contracting flexibility, in relation to how you would expect the Greenfield plant to run over the next 20 years?

MR. ROSENKRANZ: It's extremely important, and the reason it's important is that we don't know how the plant will run. I mean, we are building a resource, a generating resource in this marketplace. We will be bidding this plant into the marketplace, and the actual operation of the plant will be dependant on the interplay between fuel prices and power prices in that marketplace. So we need to be prepared to operate that plant under a wide range of operating conditions and to be able to change those arrangements over time -- over the 20 year life of this plant. That's one aspect of having a gas supply arrangement that gives us access to a large number of alternatives that can be changed over time. That's important for this project.

MR. MORAN: Thank you, Mr. Rosenkranz.

Mr. Chair, those are my questions in direct.

MR. VLAHOS: Thank you, Mr. Moran.

Ms. Lea.

CROSS-EXAMINATION BY MS. LEA:

MS. LEA: Thank you, sir.

Mr. Rosenkranz, one question about the adjustment that you gave us for the Vector management of balancing agreement service maximum toll.

Did this error, in an order of magnitude, what did you consider when you were costing this option for yourself?

Did you use the .29 dollars or the .029 dollars? Or was it a factor at all for you?

MR. ROSENKRANZ: In our evaluation and our discussions -- were based on our discussions with Vector pipeline and our review of both their US tariff and their Canadian tariff, but primarily based on the discussion we've had.

So we had and understanding it was more like two

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Ontario

ONTARIO ENERGY BOARD

FILE NO.: EB-2005-0551

VOLUME:	**Technical Conference**	
DATE:	**May 16, 2006**	
BEFORE:	**Kristi Sebalj**	**Board Counsel**
	Ron Man	**Board Staff**
	Rudra Mukherji	**Board Staff**

the electricity market.

I think it's also important to note that the proposals that are going to be outlined for you today are not meant in any way, shape, or form as a criticism of the LDCs or TCPL, for that matter, for the past services that they've had in place. What we're trying to do here, that the generators have set aside their competitive nature and sat down together to develop a consensus paper that will articulate what the needs are going to be. We're not here to talk about the past. We're here to talk about addressing the needs that generators are going to have going forward, with two major principles guiding us as we brought this paper forward.

One is to work with the LDCs to enhance the reliability of the electricity system through the use of gas-fired generation, and at the same time, to enhance the efficiency in the gas market, not just for gas-fired generators but for all gas users.

MR. MORAN: Thank you, Mr. Kelly. Now turning to you, Mr. Rosencrantz, you've been retained as a consultant by APPrO?

MR. ROSENKRANZ: That's correct.

MR. MORAN: And you've assisted APPrO in preparing the evidence that's been filed with the Board in this matter.

MR. ROSENKRANZ: That's correct.

MR. MORAN: And previously you have experience with a number of different companies on the gas supply side; right?

MR. ROSENKRANZ: Yes, a number of different experiences, yes.

MR. MORAN: Yes thank you, Mr. Rosenkranz. Mr. Wolnik, again, you are currently a consultant with Elenchus Research Associates?

MR. WOLNIK: That's correct.

MR. MORAN: And you have a very large number of years of experience working with Union Gas.

MR. WOLNIK: Thanks for noticing that. Yes.

[Laughter]

MR. MORAN: You're welcome, Mr. Wolnik. Mr. Rosenkranz, starting with you, then, what are the guiding principles that are underpinning APPrO's proposals for new services?

MR. ROSENKRANZ: If we could refer to the slides we provided to people.

Just so summarize quickly, I think that Mr. Kelly touched on some of the key points of trying to gain flexibility in order to increase the reliability on the power market side. I think it's important to note that we are also looking at ways of dealing with the generation, gas-fired generation loads that are coming to Ontario, and finding the suite of services that are going to best allow those loads to be accommodated with the least effect on the gas system.

We think that our proposals actually enhance gas system reliability. They also are proposals that, taken together, should enhance the operation of wholesale gas market through Ontario and be of use to not just power generators but anyone who is operating in that particular -- in this particular market.

Some of the principles that kind of guide us in terms of putting together these specific proposals, in addition to those already mentioned, we're looking for access to unbundled services for the generators who wish to contract for them, essentially, a choice between unbundled services and the ability to contract for the services that you need but not be forced to contract for services that you don't need.

And we're looking for, essentially, a robust, competitive and transparent market, where a lot of what we're looking for here are services that will enhance the flow of information among the various market participants and make the entire market work better.

So if I can summarize briefly the 11 proposals that are discussed in our evidence, and I want to say that these are not in any particular order of importance. Some of these are, to some extent, stand-alone, and others are really measures that are best taken -- or have -- they're best effective if they're implemented as a group.

We looked at, particularly, large generators and other large customers being transmission-level customers of the gas system, probably not your conventional distribution customers and probably not using distribution mains, and we think it makes sense for there to be transmission-level services to reflect that.

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By electronic filing

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BORDEN
LADNER
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September 21, 2010

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

Dear Ms Walli,

2010 Natural Gas Market Review Announcement
Board File No.: EB-2010-0199
Our File No.: 339583-000080

Pursuant to the Board's letter dated August 20, 2010, please find attached the Report of John A. Rosenkranz, the expert retained by the following seven intervenors:

- Consumers Council of Canada ("CCC")
- Canadian Manufactures & Exporters ("CME")
- City of Kitchener ("Kitchener")
- Federation of Rental-housing Providers of Ontario ("FRPO")
- London Property Management Association ("LPMA")
- School Energy Coalition ("SEC")
- Vulnerable Energy Consumers Coalition ("VECC")

This report is being filed in advance of the Stakeholder Conference scheduled for October 7 and 8, 2010.

Yours very truly,

Peter C.P. Thompson, Q.C.

PCT\slc
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Robert Warren for CCC
Jim Gruenbauer for Kitchener
Dwayne Quinn for FRPO
Randy Aiken for LPMA
Jay Shepherd for SEC
Michael Buonaguro for VECC
Paul Clipsham (CME)

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Ontario Energy Board

2010 NATURAL GAS MARKET REVIEW

EB-2010-0199

Prepared for

Consumers Council of Canada
Canadian Manufacturers & Exporters
City of Kitchener
Federation of Rental-housing Providers of Ontario
London Property Management Association
School Energy Coalition
Vulnerable Energy Consumers Council

September 21, 2010

John A. Rosenkranz
Acton, MA 01720

ONTARIO ENERGY BOARD
2010 NATURAL GAS MARKET REVIEW
EB-2010-0199

September 21, 2010

1. INTRODUCTION

The Ontario Energy Board has initiated a process to consider how changes in the North American natural gas supply markets could impact the Ontario energy sector, and to determine what actions, if any, the Board should take to respond to these changes. As the first step in this process, the Board commissioned a report by ICF International, which was issued on August 20, 2010. The Board is now requesting stakeholder input.

This report has been prepared for a group of intervenors representing the interests of Ontario natural gas consumers. This group consists of the following entities:

- Consumers Council of Canada
- Canadian Manufacturers & Exporters
- City of Kitchener
- Federation of Rental-housing Providers of Ontario
- London Property Management Association
- School Energy Coalition
- Vulnerable Energy Consumers Coalition

The report is organized as follows:

Section 2 provides comments on the report prepared by ICF.

Section 3 considers how changes in the natural gas supply markets could affect natural gas consumers in Ontario. A principal concern is that as gas utilities' transmission systems are modified to adapt to changes in inter-regional flows, distribution rates for Ontario consumers will increase as a result of costs incurred to provide new transportation services to ex-franchise customers. Regulatory action may also be needed to ensure that as new gas supplies become available, Ontario consumers do not face unnecessary costs because of utilities' long-term commitments to upstream transportation services, or restrictions in utility distribution services that lock consumers into relatively high-cost sources of natural gas.

Section 4 describes specific regulatory actions the Board should consider to maximize the consumer benefits of new gas market opportunities, while ensuring that consumers are not subject to additional costs and risks. Recommendations include: (a) changing how the Board evaluates system expansions for ex-franchise services; (b) requiring incremental rates for ex-franchise services to avoid subsidies by existing customers; and (c) putting utility shareholders at risk for project expenditures that only benefit ex-franchise customers. The Board should also consider a requirement for gas utilities to file long-term resource plans, and direct utilities to eliminate any unnecessary restrictions on gas supply access or other barriers to competition.

Section 5 answers the questions posed by the Board in its August 20, 2010 letter.

John A. Rosenkranz

Mr. Rosenkranz is an energy consultant with experience in natural gas supply planning, pipeline and storage development, and utility regulation. Clients include developers and operators of electric generation facilities, energy regulators and other public agencies, and natural gas consumers.

Mr. Rosenkranz began his career as a market analyst and supply planning consultant to natural gas pipeline and distribution companies. As a project manager with J. Makowski Company, Mr. Rosenkranz directed gas market studies and participated in the development, marketing, and financing of gas pipeline and storage projects. At PG&E Gas Transmission he evaluated midstream investment opportunities, managed a geologic test program at a potential natural gas storage site, and represented the company on the management committees of two interstate pipeline partnerships.

Mr. Rosenkranz has developed and implemented gas supply and transportation strategies for electric generating plants in the U.S. and Canada. These assignments include negotiating gas supply and pipeline service agreements, restructuring existing fuel arrangements, and supporting litigation and arbitration related to long term contracts.

Mr. Rosenkranz has participated in pipeline rate cases and other regulatory proceedings. He has submitted testimony at the Federal Energy Regulatory Commission, and appeared as an expert witness before the Ontario Energy Board and state utility commissions. Mr. Rosenkranz received a BA in economics at George Washington University and completed all course and examination requirements for a doctorate in economics at Northwestern University.

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Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2005-0551

NATURAL GAS ELECTRICITY INTERFACE REVIEW

DECISION WITH REASONS

November 7, 2006

The Board concludes that it is in the public interest to maintain and enhance the depth and liquidity of the market at the Dawn Hub as a means of facilitating competition. One way to do this is to encourage the development of innovative services and to ensure access to those services. Choice is the bedrock of competition. The evolution of the transactional services market is an example where innovative and flexible services have evolved within a market-based pricing structure.

Enbridge argued that forbearance will foster innovation by facilitating the provision of storage services in the competitive market. The Board agrees that regulating storage rates does place constraints on the development of flexible and innovative services; forbearance, within a framework of non-discriminatory access, can remove these constraints.

In the current industry structure, the gas utilities both acquire storage for their own customers and operate storage for their own needs and for other customers. The utilities also operate integrated storage and transportation systems. The Board considers later in this decision whether forbearance requires that there be greater separation between these operations or whether other procedures should be developed to ensure non-discriminatory access to storage and transportation.

4.2 TO PROTECT THE INTERESTS OF CONSUMERS WITH RESPECT TO PRICES AND THE RELIABILITY AND QUALITY OF GAS SERVICE

The interests of consumers were a primary focus for many intervenors. The submissions addressed issues related to the direct and indirect impacts of forbearance and competition. Interestingly, no ex-franchise customer opposed paying market-based rates; nor was there any evidence of a price impact on this market segment in the event of forbearance. This is consistent with the Board's finding that these customers have alternatives and that competition will provide adequate protection for these customers.

With respect to in-franchise customers, two rate impacts were discussed: the direct impact on storage rates and the indirect impact on the sharing of the storage premium. With respect to the direct impact, the utilities proposed to freeze the allocation of in-franchise storage and to acquire incremental storage at market-based prices. This would have the effect of increasing in-franchise storage rates (under current market conditions), albeit only marginally given the relatively slow growth of in-franchise storage demand. The utilities were of the view that this afforded in-franchise customers a significant level of protection. The other direct storage rate impact arises from the proposal that Enbridge be treated as an ex-franchise customer in respect of its contracts with Union. This would have the effect of raising Enbridge's storage rates.

However, attention of the parties was primarily focussed on the indirect impact arising from the premium which exists between the price of market-based storage and the underlying costs. Currently, that premium is shared between utility ratepayers and utility shareholders. Under the utilities' proposals for forbearance, the premium would be retained by the shareholders. This would result in significant transfer of funds in the case of Union (2007 estimate is $44.5 million); less so in the case of Enbridge (2007 estimate is $5 million to $6 million). The intervenors in general rejected these proposals and, as a result, opposed forbearance.

IGUA/AMPCO argued that there should be no forbearance if there will be any adverse impact on ratepayers. Similarly, they argued that the level of return under forbearance should be no greater than the regulated return; otherwise the level of competition is not sufficient, because the regulated return is a proxy for a competitive result. The Consumers Council argued that there should be no forbearance if a material increase in price is not offset by the prospect of decreasing prices.

Union argued that on IGUA/AMPCO's and the Consumers Council approach, the Board would never forbear, no matter how competitive the market. It argued that the financial impact is not a factor as to whether forbearance is warranted. Union argued that the

The Board concludes that long-term consumer protection in terms of price, reliability and quality of service is best achieved through thriving competition for the competitive elements of the storage market and effective regulation of the non-competitive elements of the market. The Board is of the view that refraining from rate regulation and contract approval in the ex-franchise market has the potential to foster more competition in the storage market, to the benefit of all customers, provided there are clear rules and non-discriminatory access by all market participants. In a competitive market, customers have choices, resources are distributed efficiently, and there are incentives to innovate and respond to customer needs.

4.3 TO FACILITATE RATIONAL DEVELOPMENT AND SAFE OPERATION OF GAS STORAGE

Discussion in this area focussed on the impact of forbearance on the development of new storage in Ontario, through the utilities directly, through their affiliates, or through independent storage developers. The estimates of new storage potential ranged from 50 Bcf to around 120 Bcf.

The Board has as an explicit objective to facilitate the rational development of gas storage. The Board therefore must look for means by which to achieve this objective. A number of authorities have identified the need to develop additional storage. For example, FERC has acknowledged that additional storage development will mitigate commodity price volatility and improve winter peak availability. The utilities and their affiliates took the position that this should be a key consideration for the Board and argued that new storage development will not take place in Ontario under the current regulatory regime. In their view, forbearance from setting rates and approving contracts would encourage storage development and the development of storage services. Nexen agreed with the utilities that forbearance will allow needed new services to develop.

Energy Probe also agreed and argued that there has been limited recent storage development despite the appearance of significant opportunities and that this can be contrasted with the level of development elsewhere. In Energy Probe's view, Ontario storage development has been artificially constrained due to unfavourable regulatory conditions. Energy Probe argued that forbearance will drive enhancements to meet the needs of gas-fired generators and that the public interest will benefit from having storage developers manage the risks and rewards of development.

Others, primarily consumer groups, took the view that new storage, to the extent that it is needed, can be stimulated by allowing market-based rates for new storage developers only. The position of these groups, including the London Property Management Association (LPMA), the Wholesale Gas Service Purchasers Group (WGSPG), VECC, and Consumers Council, can be summarized as follows:

- The existing facilities are more than sufficient to meet Ontario's needs.
- The utilities could further develop existing facilities under the current regulatory framework if additional capacity is needed. There is evidence that they have done so in the past.
- Forbearing from setting storage rates and transferring the rents to the shareholders will not provide an incentive to non-utility developers, and continued regulation of the utilities will not provide a disincentive to third-party storage development. The way to stimulate new storage development by third parties is by forbearing or regulating at market rates, which is consistent with FERC Order 678.
- There is no evidence that forbearing from regulating the utilities will cause them to increase capacity. The Enbridge evidence is that even with forbearance it might not invest in storage enhancements.

The evidence suggests that there is no need for significant new storage within Ontario to serve the traditional requirements of Ontario consumers. However, there is a demonstrated desire for more specialized services to meet the load characteristics of power generators. The Board also agrees that further development of storage in Ontario would be of benefit to Ontario consumers in terms of reduced price volatility, enhanced security of supply and an overall enhanced competitive market at Dawn. There is also evidence that new services, once they are generally available, can enhance the service offerings of other parties, such as marketers, thereby increasing the liquidity of the market.

The Board concludes that it is appropriate to facilitate the development of storage to offer these services without undue risk for ratepayers. The issue is how this objective is best achieved. At a minimum, for third-party storage development, whether independent or affiliated, the Board agrees that it should refrain from setting storage rates and approving storage contracts. There was no significant opposition to this approach.

The more contentious issue concerns the utilities and whether forbearance on price setting is necessary to stimulate their investment in storage. The utilities claimed they would only develop storage under a forbearance scenario but would not commit to doing so. On the other hand, the evidence shows the utilities have been willing to invest in the past under regulation, and indeed, the Board has the authority to order the utilities to provide storage services. The Board concludes that while there is no guarantee that the utilities will develop storage under forbearance, it is apparent they will not develop it under a regulatory framework unless ordered to do so. The Board does not believe that the best way to stimulate development of storage assets and services is to order utilities to develop these resources. The Board's preferred approach is to use market mechanisms where possible, and under forbearance, the Board concludes, the utilities will have an incentive to develop assets and services.

A related question is whether it continues to be appropriate for storage to be developed as part of the regulated utility business or whether it should in the future be developed separately. The Board accepts the evidence of Enbridge Inc. that storage development is more akin to exploration and development and is riskier than other distribution activities. Some parties disagreed that enhancements to existing storage facilities were as risky as new storage development. However, the Board is convinced by the evidence that storage investments are generally riskier than other regulated activities, such as distribution or transmission expansions, given the difficulty, for example, in accurately predicting the achievable operating parameters related to storage projects. This evidence was not significantly challenged. The Board therefore agrees with Energy Probe's view, namely that the risks associated with new storage development are best borne by storage developers. This approach is consistent with a rational development of storage in the Board's view. Under forbearance, the utility shareholders would be expected to bear the risk of any storage development for the competitive market.

The issue of automatic renewal rights was also raised. Enbridge indicated that it is not considering automatic renewal rights for storage contracts under its Rate 316 proposal, since that service will be acquired by Enbridge through a tender. APPrO maintained that Rate 316 is a companion service to Rate 125 and that if a customer renews its Rate 125 service, that customer should have the right to renew its Rate 316 service as well.

Board Findings

There was no disagreement that these services are needed and should be developed. The generators have convincingly expressed the importance of these types of service to the effective functioning of their operations – both physically and financially. The issue for the Board, within a section 29 context, is how best to achieve this objective. APPrO and the GTA Generators (supported by the consumer intervenors) advocated a regulated framework; the utilities argued for a competitive framework.

These services are not currently offered, indeed they need to be developed, and investments must be made in order to offer them. Union has been conducting open seasons for its new offerings and is committed to providing these services if the Board refrains from regulating them. The Board concludes that these services are substantially different from the bundled, unbundled and semi-unbundled distribution services offered by Enbridge and Union. There is demand for these services from marketers (for example, BP and Nexen) and likely others. In addition, when the capacity generators hold is excess to their needs, they expect to be able to offer this excess into the competitive market. It follows that they expect to be able to acquire these services through the competitive market as well as sell them.

The Board could order the utilities to provide these services on a regulated basis. However, the Board concludes that this would not be the best approach to ensuring the development of these services. The key consideration is to ensure that new innovative services are developed and offered into the market. The Board concludes that the best way to ensure this public interest is met is to refrain from regulating these services. This will stimulate the development of these services, by the utilities and by other providers. The Board finds that competition in these services will be sufficient to protect the public interest.

The Board does have a duty to protect the interests of consumers using these services with respect to price and reliability and quality of service. In this context we find that the crucial factor is the availability of the service itself – namely its reliability and quality. The Board notes that Enbridge committed to offer Rate 316, whether or not the Tecumseh enhancement project goes ahead, and to price it on a cost pass-through basis. The Board expects Enbridge to fulfill this commitment. Union has proceeded with its open season, and the Board expects Union to offer these services on an open season basis, without withholding capacity. These commitments will ensure a level of consumer protection.

Pricing considerations are relevant, but the Board finds that the development of competitive options will provide appropriate price protection for these consumers. The Board will also be developing a reporting mechanism and complaint process, discussed at the end of this chapter, and we expect that parties will bring any issues of market failure to the Board's attention.

The Board will refrain from regulating the rates for new storage services, including Enbridge's high deliverability service from the Tecumseh storage enhancement project and Rate 316, and Union's high deliverability storage, F24-S, UPBS and DPBS services.

Although this issue was discussed in the context of high deliverability services, the Board finds that its conclusions have general application, namely that any new storage which is developed by the utilities will be included as part of the competitive market. The utilities will bear the risk of these investments, not ratepayers. Similarly, the Board will not regulate the rates, nor approve the contracts, arising from these investments. If the utilities provide storage to their regulated business through these investments, the ratemaking implications of that approach will be considered in the context of a rates proceeding.

5.2.4 Forbearance in the Ex-Franchise Market

Most parties argued that ex-franchise customers should pay market-based rates. Some parties took the position that the Board could refrain from regulating the prices in this market (if the Board determined the market was competitive), and others were of the view that the Board should continue to approve market-based range rates.

For example, the Consumers Council argued that the Board should not refrain from regulating storage but that it is appropriate for the utilities to charge market rates for Transactional Services and long-term storage services to maximize revenue from the assets for the benefit of ratepayers.

Board Findings

The evidence shows that other than for in-franchise customers, the storage market is competitive. With the exception of Enbridge, the customers in this competitive part of the market (commonly referred to as ex-franchise) have been acquiring storage at market-based rates for some time. The Board sees no benefit from continuing to regulate the prices of these services; on the contrary, competition in this area is sufficient to protect the public interest. The Board will therefore refrain from regulating rates or approving contracts for Union's short- or long-term ex-franchise storage services and will refrain from regulated the rates or approving the contracts for Enbridge's Transactional Storage Services.

5.2.5 Separation of Unregulated Storage Costs and Revenues

Both Union and Enbridge proposed to separate the unregulated costs and revenues from the regulated costs and revenues using a cost allocation study. The issue is whether a cost allocation approach is sufficient, or if a greater degree of separation is required. Further, if a cost allocation approach is sufficient, there is an issue as to whether Union's current cost allocation study is adequate.

During the oral hearing, Union's witnesses indicated that Union would be preparing a new cost allocation study as the basis for revising the allocation of the costs of its storage assets between in-franchise (regulated) and ex-franchise (unregulated). In its final argument, however, Union submitted that the cost allocation necessary to split the costs of its storage assets between in-franchise and ex-franchise has already been completed in its 2007 rates case. According to Union, that allocation would result in the total storage rate base being split as follows ($ million):

Included in regulated rate base	$380.703	(79%)
Allocated to ex-franchise activities	$102.916	(21%)
Total	$483.619	(100%)

Enbridge proposed to separate the costs and revenues associated with its Transactional Storage Services at the next rates proceeding. It was Enbridge's position that no adjustment to rate base would be required if the Board were to forbear from price regulation.

Some parties argued that a greater degree of separation was required; others argued that Union's cost allocation study was inadequate.

Energy Probe argued that accounting separation is not sufficient because the historic cost allocation work could not have anticipated the dramatic change of storage forbearance. It took the position that the Board should encourage full structural separation at least, and that ratepayers should be held harmless for any associated costs.

The Board Hearing Team also recommended that Union's transmission and storage operations should be functionally separated, and that both Union and Enbridge's regulated and non-regulated storage should be functionally separated. The Board Hearing Team was of the view that this separation is necessary to ensure the development of the competitive storage market and to encourage new entrants. However, if no separation were required, the Board Hearing Team suggested that there should be a generic cost allocation review to examine the cost allocation thoroughly and to ensure no cross-subsidization.

LIEN argued that it would be difficult to separate costs for Union's integrated storage business. In LIEN's view, the current cost allocation study may be adequate to set rates, but it is not sufficient to separate price-regulated storage from non-price-regulated storage. LIEN proposed that an alternative would be to transfer assets which are surplus to distribution needs to a separate entity at fair market value which, in LIEN's view, would put Union on an equal footing with other storage providers.

Similarly, LPMA/WPSPG argued that Union's current cost allocation is not necessarily appropriate; there may be fundamental methodology issues to be addressed and there are storage-related costs that are included in distribution costs that should be considered for allocation to Union.

Board Findings

The Board finds that functional separation is not necessary. The evidence before the Board is that it would be costly and difficult to establish a functional separation of utility and non-utility storage, and there was no evidence to suggest that there would be significant benefits from such a separation. To the extent there may be concerns regarding the integrated operations, these will be addressed through the reporting requirements set out in section 5.4.

We also conclude that Union's current cost allocation study is adequate for the purposes of separating the regulated and unregulated costs and revenues for ratemaking purposes. The Board agrees with the Board Hearing Team that it is important to ensure that there is no cross-subsidization between regulated and unregulated storage. However, the Board is content that with its findings on the treatment of the premium on short-term storage services (Chapter 7) Union will have little incentive to use the cost allocation for purposes of cross-subsidy.

The issue of Enbridge's cost allocation is addressed in Chapter 7.

5.3 CONCLUSIONS ON FORBEARANCE

In the previous sections, the Board has found that it will refrain, in part, from regulating storage rates under section 36 (as that section relates to storage) of the *OEB Act* and refrain from approving certain storage contracts under section 39(2) of the *OEB Act*. Specifically:

- The Board will refrain from regulating the storage rates or approving the contracts of new storage providers.
- The Board will continue to regulate storage rates for bundled, unbundled and semi-unbundled customers of Union and Enbridge (up to the allocated amount).
- The Board will refrain from regulating the storage rates or approving the contracts of cross-franchise, or ex-franchise, storage customers of Union and Enbridge.
- The Board will refrain from regulating the rates or approving the contracts for new storage services offered by Union and Enbridge.

5.4 REPORTING

A number of parties made recommendations regarding ongoing reporting by utilities and other storage operators. The utilities and their affiliates generally agreed to provide the type of reporting required by FERC for interstate pipelines (FERC Regulations, §284.13) although to some extent they challenged whether it was necessary. FERC Regulation §284.13 contains requirements for regular reporting on customer and system information.

Kitchener suggested that the Board develop a Storage and Transportation Access Rule or "STAR" to ensure non-discriminatory access to storage and transportation services, following on from the Gas Distribution Access Rule.

The Board Hearing Team identified four principles in this area:

- Create a level playing field for market participants,
- Adopt rules and practices to govern affiliate behaviour that protect the public interest,
- Support open and non-discriminatory access to transmission, and
- Establish a transparent storage/transmission market so market participants can make informed decisions.

The Board Hearing Team supported the development of a STAR. It also proposed that the ARC be amended to control the interaction between the utilities and their storage affiliates and that reporting requirements be put in place for all storage providers in order to enhance transparency in the market.

Board Findings

The Board agrees with the Board Hearing Team's principles and shares the concerns related to forbearance raised by a number of parties. Specifically, in refraining from regulating storage rates or approving storage contracts, the Board must:

- Ensure consumer protection within the competitive market for storage in Ontario.
- Ensure access to Union's transportation system on a non-discriminatory basis to new and existing storage operators.

The Board concludes that it is necessary to develop appropriate operating and reporting procedures to ensure these objectives are addressed. The Board finds that Kitchener's proposal for the development of a STAR (Storage and Transportation Access Rule) has merit.

The Board will initiate a process to develop rules of conduct and reporting related to storage. The Board will ensure that the process addresses the following:

- Requirements to ensure that Union cannot discriminate in favour of its own storage operations or those of its affiliates and cannot discriminate to the detriment of third-party storage providers;
- Reporting requirements for all storage providers, although the requirements may vary as between utility and non-utility storage providers, and which may include: terms and conditions, system operating data, and customer information;
- A complaint mechanism for customers (or other market participants).

6. ALLOCATION OF STORAGE AVAILABLE AT COST-BASED RATES

Having decided that Union and Enbridge should retain regulated, cost-based rates for storage used by in-franchise customers, the question becomes how much of the existing storage space should be reserved for those customers. There are two issues arising from this allocation matter.

First, should the amount of storage available to Union's in-franchise customers at cost-based rates be fixed at an amount less than the total working gas capacity of Union's storage pools, currently 152 Bcf? Union proposed to fix the amount of existing storage allocated to in-franchise customers at the amount Union estimates those customers will use in 2007.

Second, what method should Union and Enbridge use to allocate the amount of storage available at cost-based rates to individual unbundled and semi-unbundled customers? The evidence shows that, for various reasons, many of Union's T-service (semi-unbundled) customers have been allocated amounts of storage that are inconsistent with amounts determined under Union's standard "aggregate excess" method. In addition, Kitchener argued that as a gas distributor embedded in Union's distribution system, it requires more storage space at cost-based rates than the amount calculated under the aggregate excess method.

6.1 UNION'S TOTAL COST-BASED STORAGE ALLOCATION

Union proposed to freeze, on January 1, 2007, the amount of its storage capacity available to in-franchise customers at cost-based rates. The frozen amount would be 92.1 PJ (approximately 87 Bcf), Union's estimate of in-franchise requirements for 2007.

Incremental in-franchise storage requirements due to load growth would be met by Union purchasing the required additional amounts in the market and passing through the contract costs to its in-franchise customers.

Union noted that the in-franchise storage requirement has been very stable over the past seven years, increasing from 88.2 PJ in 2000 to 90.6 PJ in 2006, an annual growth rate of just 0.45%.

In its evidence, Union explained the rationale for its proposal as follows:

> Under the current regulatory framework, any future increase to in-franchise storage requirements would be provided through a reallocation of the portfolio of storage capacity owned and managed by Union.
>
> This current practice is not appropriate as it does not reflect the fact that the storage market is competitive, nor does it encourage or support the development of new storage capacity. Specifically, Union would not be incented to assume the risk and commit the capital and resources to develop new storage capacity with economics premised on competitive market pricing, when there is a risk of this storage being reallocated in the future to meet in-franchise requirements at a cost of service rate.[35]

In argument, Union summarized the reasons for its proposal as follows:

- "Claw-back" of assets etc. allocated to ex-franchise sales would undermine development of new storage capacity premised on market pricing.
- "Claw-back" would also make cost allocation issues more complex.
- Meeting incremental demand with services sourced from competitive markets is consistent with a transition to competition and a step toward sending better "price signals" to in-franchise customers.
- This proposal will not result in "rate shock" of any kind.[36]

Kitchener, LPMA/WGSPG, Consumers Council, VECC, and IGUA/AMPCO argued that there should be no freeze on the amount of Union's storage available at cost-based

[35] Union Pre-filed evidence, Exhibit C, Tab 1, page 15.
[36] Exhibit Y2.1, outline of Union reply argument, page 4.

rates to in-franchise customers. GMi and the Board Hearing Team supported Union's proposal.

Board Findings

Under the existing regulatory framework, Union's in-franchise customers have had first call, at cost-based rates, on Union's storage capacity. Said differently, Union has sold storage services to ex-franchise customers only when it can demonstrate that the storage being sold is surplus to in-franchise needs.

From an operational perspective, it is not necessary (nor would it appear to be feasible) for Union to physically split its storage facilities between "in-franchise" and "ex-franchise" uses. And until now, Union has been able to offer storage services in the ex-franchise market without capping or freezing the amount of capacity that is available for in-franchise uses.

Giving in-franchise customers a priority call at cost-based rates on all of Union's storage may be supportable if one takes the view that every Bcf of Union's storage capacity is a "utility asset" and is required to provide "utility services." But that view needs to be re-examined in light of the evidence presented at this hearing about the development and use of Union storage in recent years, and the Board's determination that the storage market is competitive.

Amount of Union's "surplus" capacity

There is no doubt that Union's existing storage capacity far exceeds the current requirements of its in-franchise customers. Some 40% of the current capacity has been sold in the ex-franchise market. And the requirements of in-franchise customers have grown slowly (less than 0.5% per year over the past six years according to Union's evidence). The excess is so large that it would take several decades for all of the current capacity of 152 Bcf to be required for in-franchise customer needs if those needs grow at 1% per annum, and more than 100 years at the current rate of growth.

In past decisions on storage, the Board has required Union to file forecasts of storage capacity and in-franchise needs to demonstrate that space being sold to ex-franchise customers is surplus to in-franchise needs. For example, in the EBRO 494-03 decision, the Board approved four long-term ex-franchise storage contracts based on Union's 10-year forecast of capacity and in-franchise needs. The Board considered, but did not require, Union to insert a clause into the contracts that would allow Union the right of recall because the Board "found...that the Company's forecast of its in-franchise storage needs is reasonable."[37]

Union's storage development

During the hearing, a common argument from many parties on several different issues (particularly on the issue of sharing the premium on ex-franchise sales) was that in-franchise customers have "paid for" or "substantiated" the storage assets of the utilities. If true, is this a basis for continuing to grant in-franchise customers a perpetual call on all of Union's storage capacity at cost-based rates?

This argument breaks down on two fronts. First, Union's rate base excludes capital costs of storage that underpins long-term ex-franchise sales. Second, the sheer magnitude of the current surplus makes it unlikely that Union's expansion of its storage facilities in the recent past has been driven primarily, or perhaps even to any significant extent, by the anticipated needs of in-franchise customters. For example, since 1999 Union has added almost 18 Bcf of capacity through greenfield developments and enhancements to existing pools, capacity that was not necessary to cover in-franchise needs. This additional capacity has been directed to, and taken up by, the "ex-franchise" market, not distribution customers of Union.

Ex-franchise customers have contracted for Union's long-term surplus space and have paid market-based rates, rates that have been much higher than cost-based rates. Rather than bearing the costs of surplus Union storage space that is offered long-term

[37] EBRO 494-03 Decision with Reasons, September 26, 1997, paragraph 2.2.29.

to the ex-franchise market, Union's in-franchise customers have in fact benefited through receiving most of the premium on long-term sales.

Union's rationale

Union claims that development of new storage capacity would be undermined unless the amount of storage allocated to in-franchise customers is capped. This claim appears to have little merit. First, no party to this proceeding has opposed market rates for new storage capacity by third parties. Second, a freeze on space for in-franchise customers would have a neutral effect on the development of the competitive market. This was illustrated by LPMA/WGSPG, which put forward the following scenario in its argument: Assume the incremental storage requirement for the in-franchise customers is, say, 2 Bcf in a particular year. Under Union's proposal, Union would purchase that 2 Bcf from third-party providers. Under the existing framework, that 2 Bcf would be supplied by Union, leaving it with 2 Bcf less for ex-franchise sales. That 2 Bcf shortfall could be provided by third-party providers. The net impact on third-party providers is 2 Bcf of additional storage in either case.

Union also claims that meeting incremental in-franchise demand at market prices is consistent with a "transition to competition" and would send "better price signals to in-franchise consumers." No one in this proceeding, however, has advocated that any in-franchise customers, except for some of the largest gas customers, should be obligated to take a service that might require them to participate directly in the competitive storage market.

GMi, currently Union's largest ex-franchise customer, and Nexen expressed concerns about "claw-back" that the Board finds more compelling than Union's argument. GMi opposed any storage allocation rules that could result in "clawing back storage capacity held by ex-franchise customers for the benefit of in-franchise consumers." It said it would view any such measure as unfair discrimination. Nexen submitted that "claw-back" of storage services from ex-franchise customers would be "discriminatory and detrimental to not only GMi but to the very existence of the secondary market that Ontario currently supports and benefits from."

Conclusion

The Board finds that there should be a cap on the amount of Union's existing storage space that is reserved for in-franchise customers at cost-based rates. In the Board's view, Union's existing storage assets are, in substance, a combination of "utility assets" required to serve Union's in-franchise distribution customers and "non-utility assets" that are not required for regulated utility operations and that are sold in the competitive storage market. This distinction is supported by the significant excess of total capacity over in-franchise needs for the foreseeable future and by the fact that development in recent years has been driven by the ex-franchise market, not in-franchise needs. The Board does not accept IGUA/AMPCO's submissions that the entire amount of Union's storage is a "utility asset" and that ex-franchise customers (such as gas marketers and utilities in the U.S. Northeast) are buying "utility services" when they purchase storage from Union. The Board has determined that the ex-franchise market is competitive and that it will refrain from rate regulation or contract approval; these will no longer be "utility" services.

The Board concludes that its determination that the storage market is competitive requires it to clearly delineate the portion of Union's storage business that will be exempt from rate regulation. Retaining a perpetual call on all of Union's current capacity for future in-franchise needs is not consistent with forbearance. As evidenced by the arguments from GMi and Nexen, two major participants in the ex-franchise market, retaining such a call is likely to create uncertainty in the ex-franchise market that is not conducive to the continued growth and development of Dawn as a major market centre.

The Board concludes that it would be inappropriate, however, to freeze the in-franchise allocation at the level proposed by Union. Union's proposal implies that a distributor with an obligation to serve would be prepared to own, or to have under contract, only the amount of storage needed to serve in-franchise customers for just the next year. In the Board's view, it is appropriate to allow for some additional growth in in-franchise needs when determining the "utility asset" portion of Union's current capacity.

The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs. The Board has determined that Union should be required to reserve 100 PJ (approximately 95 Bcf) of space at cost-based rates for in-franchise customers. This compares with Union's estimate of 2007 in-franchise needs of 92 PJ (87 Bcf). At an annual growth rate of 0.5% each year, which Union claims is the growth rate since 2000, in-franchise needs would not reach 100 PJ until 2024. The limit would be reached in 2016 if the annual growth is 1%; at a very annual high growth rate of 2% per annum, the 100 PJ limit would be reached in 2012.

The 100 PJ (95 Bcf) amount is the capacity that Union must ensure is available to in-franchise customers if they need it. Union should continue to charge in-franchise customers based on the amount of space required in any year. If Union's in-franchise customers require less than 95 Bcf in any year, as measured by Union's standard allocation methodology, the cost-based rates should be based on that amount, not on the full 95 Bcf reserved for their future use. Union will have the flexibility to market the difference between the total amount needed and the 95 Bcf reserve amount.

6.2 ALLOCATION OF COST-BASED STORAGE: METHODOLOGY AND APPLICATION

Union and Enbridge have developed methods of allocating cost-based storage space to their in-franchise customers – both bundled customers as a group, and individual unbundled and semi-unbundled (T1 and T3) customers. The amount allocated currently has two implications for customers:

7. TREATMENT OF THE PREMIUM ON MARKET-BASED STORAGE TRANSACTIONS

Union and Enbridge ratepayers have received a significant portion of the premium over cost-based rates that results from the sale of storage services to ex-franchise customers at market-based rates. Chapter 2 provided information on the magnitude of the margins in recent years and the basis on which these margins are shared between the utilities and ratepayers. Union's ratepayers have received 90% of the forecast margins related to both long-term ex-franchise sales (contract terms of two years or more) and short-term transactions (contract terms of less than two years). Ratepayers also receive 75% of any margins that are greater than forecast amounts. Enbridge ratepayers have received approximately 75% of Enbridge's Transactional Services margins.

Union proposed to end the sharing of long-term and short-term margins with ratepayers. Specifically, Union proposed that the Board adjust distribution rates effective January 1, 2007, to exclude all storage costs and revenues associated with ex-franchise sales from 2007 rates and to eliminate five existing storage and transportation deferral accounts that currently capture market-based margins in excess of amounts incorporated into rates. Union has forecast 2007 margins at $29.9 million (long-term) and $14.6 million (short-term).

Enbridge also proposed to end margin sharing with ratepayers. It is seeking approval to exclude revenues and expenses associated with Transactional Storage Services from its distribution rates commencing in 2007. All Transactional Storage Service revenues, forecast to be $5 to $6 million in 2007, would accrue to Enbridge. The costs to be excluded from distribution rates in 2007 would be some portion of the approximately

$800,000 of O&M costs of Enbridge's Transactional Services business. Enbridge proposed to continue to include the entire net book value of its storage facilities in rate base.

The Board Hearing Team and Energy Probe supported the Union and Enbridge proposals. LPMA/WPSPG, Consumers Council, LIEN, VECC, IGUA/AMPCO, and Schools generally objected to any change in how margins are shared.

7.1 MARGINS ON SHORT-TERM STORAGE TRANSACTIONS

During the hearing, most parties presented views on the rationale for requiring the utilities to credit most of their storage margins to ratepayers. Several parties opposing the Union and Enbridge proposal to cease margin sharing referred to earlier Board decisions that they believed supported margin sharing.

The Board first dealt with margin sharing in the context of Union's short-term storage services, which Union started to sell at market-based rates in 1989. In 1996, the Board considered essentially the same issue when Enbridge proposed to start marketing its Transactional Services more aggressively and retain some of the margin. The Board has expressed a consistent view that Union's short-term storage transactions and Enbridge's Transactional Services involve sales at market-based rates of services derived from <u>utility assets</u> that are temporarily surplus.

In its decision in EBRO 492, dated September 10, 1996, the Board stated:

> The Company [Enbridge] stated that the objective of offering transactional services is to make additional use in off-peak periods of the Company's physical and contractual storage and transportation assets <u>acquired in the first place to serve the in-franchise customers</u>. [Paragraph 3.3.2, emphasis added]
>
> The Board does not agree that an incentive to provide these services should be necessary, and notes that the Company has offered both peak and off-peak services, along with assignments and exchanges in prior years without

> the need for an incentive. However, the Board acknowledges that the Company does incur some risk associated with its participation in these activities, and finds that a 10 percent incentive will be adequate to address these modest risks. [Paragraph 3.3.30]

In 1997, the Board for the first time approved Union entering long-term storage contracts at market-based rates with ex-franchise customers. In its decision in EBRO 494-03 dated September 26, 1997, the Board described the basis for allowing Union's short-term transactions as follows:

> Short-term storage for ex-franchise customers has been marketed on the basis that it is space required to provide in-franchise service. Due to weather and other variables part of the space is temporarily surplus to in-franchise needs. Customers already pay the costs of this storage in rates. Any revenue from short-term sales of storage services that is beyond the direct marginal cost to provide the service is a benefit to in-franchise consumers. [Paragraph 2.3.19, emphasis added]

Board Findings

The Board concludes that its decision to refrain in part from regulating rates for storage services does not invalidate the basis for sharing margins with ratepayers on short-term deals. Union's short-term storage transactions and Enbridge's Transactional Services storage sales are sales of services derived from utility assets that are temporarily surplus to in-franchise needs. The Board concurs with VECC's final argument on this point:

> In Union's case, the assets underpinning the short-term storage and balancing services sold in the ex-franchise market are presently included in rate base. In the case of Enbridge, all of the assets underpinning their transactional services sold in the ex-franchise market are included in rate base. As stated earlier, VECC views it as highly inappropriate for the utilities to seek the entire margin associated with these assets given that they have been "substantiated" by captive ratepayers who have paid in rates for the full opportunity cost of the associated capital investment (including a fair return on equity) along with overhead costs and direct operational costs associated with providing the services. In VECC's view, the utilities should be required to provide a rationale for receiving any of the associated margins given their earlier mentioned obligation to optimize the use of utility assets. [Page 16]

Requiring the utilities to share these margins with ratepayers is not in any way inconsistent with a finding that the storage market is competitive. The basis for sharing these margins is the nature of the assets that underpin the transactions, not the prices at which the transactions occur.

The Board finds that the entire margin on storage transactions that are underpinned by "utility asset" storage space, less an appropriate incentive payment to the utilities, should accrue to ratepayers. Ratepayers bear the cost of that space through the regulated storage rates and should benefit from transactions that utilize temporarily surplus space. The Board finds that shareholders will retain all of the margin on short-term transactions arising from the "non-utility" storage space.

Short-term margins derived from "utility assets"

The decision to require Union to notionally divide its existing storage into two pieces – a "utility asset" (maximum of 100 PJ) and a "non-utility asset" (the balance of Union's capacity) is set out in Chapter 6. Union's storage facilities will not be physically split into two pieces and Union is likely to continue operating its storage assets in much the same way as it does today. Union presumably will determine its ability to execute short-term deals based on the amount of temporarily surplus space in the entire storage facility. As long as the utility and non-utility storage is operated as an integrated asset, it will not be possible to determine that any particular short-term transaction physically utilizes space from either the "utility asset" or the "non-utility asset."

Given the impossibility of physically linking a short-term transaction to a specific slice of storage space, the Board considered other methods of determining the amount of storage margins that should accrue to Union's ratepayers. The Board has decided that the calculation should be based on how the costs of the storage facilities are split between the utility and non-utility businesses. Specifically, Union's revenues in any year from short-term storage transactions, less any incremental costs incurred by Union to earn those revenues, should be shared by Union and ratepayers in proportion to Union's allocation of rate base between utility and non-utility assets.

As indicated in Chapter 5, the allocation is currently 79/21 utility/non-utility. Union's existing policy on what constitutes a short-term storage transaction will continue to apply. As and when Union requires more capacity for in-franchise needs (up to the 100 PJ cap) or adds storage capacity or enhances deliverability of its storage facilities, the cost allocation will presumably change. Once a revised cost allocation has been approved in a Union rates case, the basis on which margins on short-term storage transactions are shared will also change.

All of Enbridge's current storage assets (storage facilities and contracts) are required to serve its in-franchise customers. Thus, all of Enbridge's storage-related transactional services revenues today are derived from "utility assets." If and when Enbridge increases the capacity of its Tecumseh storage facilities, it will be necessary for the company to adopt a method of allocating storage-related Transactional Services revenues between utility and non-utility assets.

Incentive payments to utilities for short-term transactions

The Board has considered whether to continue allocating a portion of the margins from short-term transactions to the utilities as an incentive to optimize the use of the "utility assets" of each company.

The Board has decided that Enbridge should continue to share in margins on Transactional Services storage deals. Eliminating any sharing would leave Enbridge with no financial incentive to market temporarily surplus storage space. An incentive mechanism aligns Enbridge's interest with the interest of ratepayers. The size of the incentive is a matter of judgement and that issue has been debated in several past rates cases. The Board finds that the current 25% incentive is excessive given that ratepayers bear all of the costs of the existing storage assets. The Board believes a

10% incentive is sufficient. In the future, 10% of the storage component of Enbridge's Transactional Services revenue, less any incremental costs incurred by Enbridge to earn those revenues, will be for the account of Enbridge. The remainder will be for the benefit of ratepayers. As a result, Enbridge will not be required to separate its revenues and costs for Transactional Storage Services.

With respect to Union, an argument might be made that an incentive is not necessary. Union will receive margins from short-term storage deals that are deemed to arise from the "non-utility" portion of its storage facilities. Thus, Union will already be motivated to maximize the revenues on all short-term transactions. The Board has decided, however, that it would be appropriate for Union and Enbridge to be treated consistently and to each receive 10% of the net revenues deemed to arise from the "utility asset" portion of storage.

The Board is currently undertaking a process to determine a multi-year incentive ratemaking framework for Union and Enbridge. That process will address how best to implement the Board's findings on the sharing of short-term storage transaction margins within an incentive ratemaking framework. Enbridge's 2007 rates case is in progress; the Board's finding with respect to short-term margin sharing will be implemented through that proceeding.

7.2 MARGINS ON UNION'S LONG-TERM TRANSACTIONS

Margins on both Union's short-term storage transactions and its long-term deals historically have been shared with ratepayers in essentially the same way. Although the Board has devoted considerable time to long-term contracting issues in past Union cases, it has not determined that margins on the two types of transactions should be shared on fundamentally different bases. In its decision on Union's 2000 rates (RP-1999-0017), the Board described the rationale for sharing the margins on all of Union's storage sales:

> The Board recognizes that the assets necessary to provide both transactional services and long-term storage services have been paid for by Union's customers. Providing that the Company has a financial incentive to maximize revenues for these services should increase the benefits to both the customer and the shareholder. Consequently the Board authorizes a sharing of net revenues for transactional services and market premium for a long-term storage services in the ratio of 75:25 between ratepayer and shareholder as an incentive to maximize the revenue associated with both these services. [Paragraph 2.505]

Union's rationale for the sharing of storage margins has changed over time. In 1996, when it was unsuccessful in obtaining Board approval for long-term storage sales at market-based rates, Union had submitted that all of the margins would be credited to ratepayers "since in-franchise customers had paid for the development of the storage." In Union's 2000 rates case (RP-1999-0017), the Board noted that "Union's position was that ratepayers have paid for the services from the assets, not for the assets themselves." This is the position that Union advanced in this proceeding.

IGUA/APMCO claimed Union is estopped from changing its position on margin sharing. The argument is that the Board was persuaded to allow market-based rates on the condition that the bulk of the proceeds would go to the ratepayer. Accordingly, IGUA/AMPCO argued that it is now improper for Union to change its mind and to argue that these proceeds now need to go to the shareholder in order to promote the development of new storage.

Board Findings

The Board has determined that storage space in excess of the amount made available at cost-based rates (which is to be capped at 100 PJ – see Chapter 6) can be considered a "non-utility" asset. This is the space that will support Union's long-term storage sales. The Board finds that profits from new long-term transactions should accrue entirely to Union, not to ratepayers.

In comparing this decision with the past Board decisions on the sharing of margins on long-term storage sales, it is important to remember the context in which the Board made its earlier decisions. Until this proceeding, the Board had never reviewed the state of competition in storage and had not considered whether to refrain, in whole or in part, from regulating storage prices. Thus, there was little basis for the Board to treat the margins on short-term and long-term sales differently. Further, the Board's decision in RP-1999-0017 to allow all then existing cost-based contracts with ex-franchise customers to be renewed at market rates has resulted in a substantial growth in long-term margins, margins that have been largely for the benefit of ratepayers. It is certainly not possible today to assert that ratepayers have "paid for" the space that underpins Union's long-term storage contracts.

The Board does not accept IGUA/AMPCO's estoppel argument. Estoppel as a principle of contract law is sometimes called "detrimental reliance". IGUA/AMPCO's theory seems to be that when the Board made its decision on the sharing of long-term margins it relied upon an undertaking by Union to continue the sharing. Perhaps that might have been part of the Board's rationale at the time but the Board itself has now questioned the continuing need for the practice and whether the rationale developed at that time continues to exist.

This after all, is the purpose of section 29. Section 29 requires the Board to re-examine the need for regulation or the degree of regulation where market structures have changed. This Board in the Natural Gas Forum Report recognized that market conditions in energy markets have in fact changed. When such changes occur, regulators, particularly those such as the Board and the CRTC with statutory forbearance mandates in their governing legislation, must re-examine the regulatory construct in light of the current market conditions. That is what this proceeding seeks to accomplish. The concept of estoppel has no meaning in such a framework.

7.3 TRANSITION RELATED TO LONG-TERM MARGINS

IGUA/AMPCO and LPMA/WGSPG argued that in the event the Board decides to eliminate the sharing of any margins with ratepayers there should be some mitigation. As a precedent, LPMA/WGSPG referred to the 2003 decision by the Board on the phase-out of the Delivery Commitment Credit (DCC). There the Board recommended a five-year period based on a cost increase of 11.3 cents per GJ on a specific class of customers. LPMA/WGSPG argued that the phase-in period in the current case should be eight years, because the cost impact is a greater impact of 17.5 cents per GJ across all customer classes.

Board Findings

The Board recognizes that, particularly in recent years, Union's ratepayers have had a significant benefit due to sharing the bulk of the margins on long-term deals. The Board would prefer to have a smooth transition away from the status quo rather than an abrupt change in rates.

The Board finds, however, that there is no basis for retaining a requirement that Union share the margins on <u>new</u> long-term storage transactions, that is, long-term deals executed after the Board's forbearance decision. To continue sharing those margins with ratepayers would conflict with the Board's decisions (a) to recognize that part of Union's storage capacity constitutes a non-utility asset, and (b) to forbear from regulating the prices of ex-franchise transactions. Union should reap the benefits and bear the risks of those new transactions.

The margins that will be recorded in future years in respect of existing long-term deals are different. Those margins flow from long-term contracts that were negotiated and priced prior to the Board's forbearance decision and prior to the Board's decision that there is a non-utility part of Union's storage facilities. When those contracts were signed, Union had no reason to expect that it would receive anything more than 10% of the margin. The Board has concluded that ratepayers should continue to receive some of the margin on those existing contracts.

The Board considered whether to require Union to record the margins on existing long-term contracts separately from the margins on new long-term contracts. Under this approach, ratepayers would be credited with 90% of the margins on existing contracts for the remaining terms of those contracts. This approach conceptually has appeal but could give rise to ongoing implementation questions. For example, the Board might have to consider how contract re-negotiations or defaults by customers are to be treated. This level of complexity and potential ongoing review is unwarranted.

The Board has concluded that it should adopt a simpler phase-out mechanism that is a rough sort of "proxy" for the conceptual approach described above. The phase-out of the sharing of margins on Union's long-term storage transactions will take place over four years. The share accruing to Union will increase over that period to recognize that contracts will mature and a larger part of Union's total long-term margins will be generated by new transactions. For 2007, forecast margins (on long-term and short-term transactions) now included in the determination of Union's rates will remain unchanged. After 2007, Union's share of long-term margins will be as follows: 2008 – 25%, 2009 – 50%, 2010 – 75%, 2011 and thereafter – 100%.

The Board is currently undertaking a process to determine a multi-year incentive ratemaking framework for Union and Enbridge. That process will address how best to implement the Board's findings on the transition for long-term storage transaction margins within an incentive ratemaking framework.

7.4 ATCO DECISION

During the oral hearing and in final argument, several parties referred to the recent Supreme Court of Canada decision on the proceeds of an asset sale by ATCO Gas and Pipelines Ltd. Some parties claimed the case supported a cessation of margin sharing by the utilities, while other parties questioned whether the facts of that case were relevant to the Ontario storage market.

ATCO, a public utility in Alberta, applied to the Alberta Energy and Utilities Board (AEUB) as required by the Alberta *Gas Utilities Act*[40], for the approval of the sale of buildings and land located in the City of Calgary. The utility argued that the property was no longer useful and the sale caused no harm to ratepayers. The AEUB agreed that the customers would not be harmed and approved the sale.

In a second decision, the AEUB determined that it would allocate the net profits from the proceeds of the sale between the utility and ratepayers. The AEUB held that it had jurisdiction to order this allocation because it had authority to attach conditions to the order approving the sale to protect the public interest.

The Alberta Court of Appeal set aside the AEUB's decision[41] referring the matter back to the AEUB to allocate the entire proceeds from the sale to ATCO. The City of Calgary, representing the customers' interest, appealed to the Supreme Court of Canada, which upheld the Court of Appeal finding that the AEUB did not have the requisite jurisdiction. On February 9, 2006 the Supreme Court of Canada released its decision in the ATCO case.[42]

Board Findings

The Supreme Court of Canada found as follows:

> The customers pay an amount for the regulated service that equals the cost of the service and the necessary resources...The payment does not incorporate acquiring ownership or control of the utility's assets.[43]

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[40] R.S.A. 2000, c. G-5, s.26
[41] ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2004] 24 Alta. L.R. (4th) 205 (C.A.)
[42] ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] S.C.J. No. 4, 2006 SSC 4.
[43] Ibid, par. 68

There are differences between the ATCO case and the present case. The ATCO case involved the sale of a capital asset (land), while this case involves providing a service (storage).

The Alberta case related to section 26 of the *Gas Utilities Act* in Alberta, which required ATCO to apply to the AEUB for approval to sell any asset. The sharing of the premium from the sale of storage services to ex-franchise customers at market-based rates has been decided in the context of rates cases.

The findings of fact in this case indicate that there are certain storage assets in rate base that are used to provide storage service to in-franchise ratepayers. This decision also finds that those services should be provided at cost-based rates as they have been in the past.

The utility also uses these assets to generate profits from sales to ex-franchise customers. The bulk of the revenues have historically flowed to ratepayers and a small share has gone to the utility. That share represents a "fee" that provides an incentive to the utility to generate these sales and profits from what at certain times of the year is excess capacity. This does not give rise to any claim by the utility under the ATCO principles. The ratepayers are receiving service relating to assets in rate base. No sale of assets is involved. The utility is being compensated for certain services.

At the same time, this decision finds that there are certain storage assets that are not part of the utility rate base and finds that the return from those assets, in terms of profit on sales to ex-franchise customers, should accrue entirely to the utility and its shareholders. Again, no claim arises under the ATCO principles. There is no appropriation to the benefit of the ratepayer of any utility assets or for that matter any proceeds from that asset. Accordingly, the Board finds that ATCO decision has no application to this decision.

7.5 STORAGE AND TRANSPORTATION SERVICE DEFERRAL ACCOUNTS

The deferral accounts at issue in this proceeding are the following:

- Short-Term Storage and Other Balancing Services Account (179-70)
- Long-Term Peak Storage Services Account (179-72)
- Transportation Exchange Services Account (179-69)
- Other S&T Services Account (179-73)
- Other Direct Purchase Services Account (174-74)

On March 15, 2006, the Board notified Union and the intervenors that Union's proposal to eliminate the five deferral accounts, made as part of the rate application EB-2005-0520, had been moved to this proceeding. The relevant evidence from EB-2005-0520 was re-filed in this proceeding.

Union explained that of the five accounts in question, the storage accounts (179-70 and 179-72) are directly related to the storage forbearance issue, while the remaining three transmission accounts (179-69, 179-73 and 174-74) are not directly related to the storage forbearance issue.

Union proposed to eliminate the Short-Term Storage and Other Balancing Services Account (179-70) and Long-Term Peak Storage Services Account (179-72) on the basis that these accounts would no longer be necessary if the Board decides to forbear from regulating ex-franchise storage service sales.

Union also proposed to eliminate the other three transmission-related deferral accounts (179-69, 179-73 and 179-74). Union advanced two reasons for this proposal. First, Union stated that the forecast of S&T revenue should not be treated any differently than the forecast of any other source of revenue. Second, Union submitted that its proposal is consistent with the Board's policy direction, as outlined in its Natural Gas Forum Report, that in an incentive regulation framework there should be no earnings sharing and transactional services revenues should not receive special treatment. Union also expressed concern that there may not be another opportunity or forum to deal with this issue prior to the beginning of the proposed incentive regulation framework.

Most intervenors took the position that the storage related accounts (179-70 and 179-72) should continue if the Board determines that it will not refrain from regulating the prices of ex-franchise storage sales services. However, intervenors also acknowledged that if the Board were to forbear from regulating the prices of ex-franchise storage services, then these accounts would no longer be needed and under those specific circumstances should be eliminated. For example, the Board Hearing Team argued that under forbearance, gas utilities' shareholders will be bearing the risk associated with storage transactions in the ex-franchise market and any premium or shortfalls should accrue to the shareholder.

With respect to the transmission-related deferral accounts (179-69, 179-73 and 179-74), most intervenors were of the view that these accounts should not be eliminated because transmission will remain a regulated service. LPMA/WGSPG supported the objective of reducing the number of variance and deferral accounts but took the position that a comprehensive review of all such accounts should be undertaken as part of the incentive regulation mechanism that is still to be determined. Many intervenors adopted the LPMA/WGSPG position.

The Board Hearing Team supported Union's proposal. It argued that because transactional transportation services are part of the gas utility's monopoly service, these revenues should be treated no differently than any other regulated revenue.

Board Findings

With respect to the storage related accounts (179-70 and 179-72), most intervenors were of the view that the resolution of this issue depends on whether the Board refrains from regulating ex-franchise storage. The Board has determined that it will refrain from regulating rates in this area. However, we have also concluded that there should continue to be a sharing of the premium arising from short-term storage transactions, for both Union and Enbridge, and that there should be a phase-out of the sharing of the premium arising from Union's long-term storage transactions. Accordingly, the Board concludes that the accounts should be maintained for now. As outlined in sections 7.1 and 7.3, we have determined that the gas incentive ratemaking process is the best place in which to determine the precise implementation of these findings.

With respect to the transmission-related accounts, there was general acknowledgement that the issue related to the structure of the incentive regulation framework and not the issue of storage regulation. Union was concerned that this proceeding would be the only opportunity to deal with its proposal before the introduction of incentive regulation. The Board does not agree. On September 11, 2006, the Board issued a letter indicating its intent to establish a consultation process to use in relation to the development of the gas incentive regulation framework. This process is specifically designed to address issues about the framework prior to the commencement of incentive regulation for natural gas utilities. The Board finds that the proposed elimination of these three transmission-related accounts should be considered as part of a comprehensive review that includes all deferral accounts under an incentive regulation mechanism.

The Board therefore concludes that all of the accounts will be maintained and will be reviewed as part of the process for setting the incentive regulation mechanism for natural gas utilities.

8. OUTSTANDING ENBRIDGE RATES ISSUES (RATES 125 AND 300)

The unresolved issues arising from the Enbridge Settlement Proposal relate specifically to the allocation of implementation costs and migration revenue deficiencies attributable to changes in Rates 125 and 300, and the Rate 125 eligibility criteria.

Early in the proceedings, there were two threshold issues. The first issue was whether the allocation of implementation costs and migration revenue deficiencies should be addressed in this proceeding or Enbridge's next rates proceeding. The Board determined that the issue should be addressed in this proceeding, and that decision was rendered orally on June 27, 2006. The second issue was whether residential customers should be allocated any of the implementation costs or migration revenue deficiencies. The Board rendered its decision orally on July 14, 2006, in which it stated that both the implementation costs and the migration related revenue deficiencies should be recovered from large volume customers as they are the main beneficiaries of these services. (The transcript of the Board's oral decisions on these issues is included at Appendix C.)

The remaining issues before the Board are the following:

- Smoothing of Migration-Related Impacts:
- Rate 125 Eligibility Criteria

8.1 SMOOTHING OF RATE MIGRATION IMPACTS

Enbridge stated that the offering of new services, such as Rate 125 and Rate 300, typically leads to the migration of customers from the existing rates to the new rates, if there is an economic advantage or a reduction in rates, for these customers. This

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PREFILED EVIDENCE OF

STEVE POREDOS, DIRECTOR, CAPACITY MANAGEMENT

MARK ISHERWOOD, DIRECTOR, BUSINESS DEVELOPMENT,

STORAGE AND TRANSMISSION

OVERVIEW

This evidence provides an overview of Union's storage and transportation ("S&T") services and addresses forecast storage and transportation revenues for 2007, 2006, 2005 and 2004.

The purpose of this evidence is to:

- Review the forecast period assumptions and methodology.
- Review the 2007, 2006 and 2005 S&T revenue forecast.
- Review 2004 actual S &T revenues and deferral account balances.
- Outline Union's proposal to eliminate the S&T transactional service revenue deferral accounts.
- Describe Union's position on Storage Market Premiums.
- Outline Union's proposal to increase the limits of the Blanket Storage Order.
- Describe Union's position on the S&T transactional services methodology.

1.0 FORECAST SUMMARY

Union's total S&T revenues for both core and transactional services are shown in Exhibit C1, Summary Schedule 7. S&T core services are not subject to deferral and include revenue from Union's firm transportation services sold to ex-franchise customers for terms of greater than one year. S&T transactional services revenues are currently subject to deferral and include short term firm and interruptible transportation and exchange services as well as storage, loan and balancing services. Any margin variances from these services relative to the 2004 Board approved levels are currently deferred and shared 75:25 in favour of ratepayers.

As shown in Exhibit C1, Summary Schedule 7 (at line 18), historical total S&T revenues have ranged from a high of $196.2 million in 2002 to a low of $145.0 million in 1999. The higher revenues earned in 2002 were the result of significantly colder than normal weather and increased market values for storage. The 2004 Board approved S&T revenue forecast was $156.6 million.

The total revenue forecast for 2007 is $182.0 million, while the total revenue forecast for 2006 is $176.9 million and $169.2 million for 2005. The primary driver of the 2006 and 2007 revenue increases compared to 2005, is incremental long term transportation service revenues derived from the planned Phase 1 (2006) and Phase 2 (2007) Dawn-Trafalgar expansions, which are discussed later in this evidence. The expansions increase S&T core M12 service revenues by approximately $1.3 million in 2006 and $11.4 million in 2007.

The average annual total S&T forecast revenues for 2007, 2006 and 2005 are approximately $176.0 million, while the actual annual average of the historical actuals (1999 to 2004) is approximately $172.1 million.

Total S&T core services revenues are shown in Exhibit C1, Summary Schedule 7 (at line 9). S&T core services revenues have been very consistent from 1999 to 2003 ranging from $118.8 million to $124.1 million. In 2004, M12 cost based storage was converted to C1 market based storage as approved by the Board. As a result, total S&T core services revenues decreased to $111.3 million and no further M12 storage service was offered beyond March 2004. The unfavourable M12 S&T core services revenues variance is offset by an increase in C1 long term storage revenue. The C1 market based storage account is considered a S&T transactional service revenue and the margin earned is currently subject to deferral. S&T core services revenues are forecast to increase to $121.1 million by 2007 due to the Dawn-Trafalgar expansions.

Total S&T transactional services revenues can be found in Exhibit C1, Summary Schedule 7 (at line 17).

Historical S&T transactional revenues have ranged from $21.0 million in 1999 to a high of approximately $78.0 million in 2004. The forecast period S&T transactional services revenues are $55.1 million in 2005, $61.6 million in 2006, and $60.9 million in 2007.

Year over year S&T transactional services deferral account balances have been provided at Exhibit C3, Tab 4, Schedule 2; Exhibit C4, Tab 4, Schedule 2; Exhibit C5, Tab 4, Schedule 2; and Exhibit C6, Tab 4, Schedule 2 for the years 2007 through 2004 respectively. Deferral account variance explanations are similar to the explanations provided for the S&T core and transactional revenue variances presented in Section 3.0.

2.0 FORECAST ASSUMPTIONS AND METHODOLOGY

2.1 S&T Transactional Services Forecast

The S&T transactional services revenues forecast methodology has not changed from that used to derive the forecast approved by the Board in the RP-2003-0063 proceeding for 2004 rates.

Union's planned expansions of the Dawn-Trafalgar system in 2006 and 2007 will bring incremental capacity and shippers to the system. Directionally this will reduce the demand for short term firm and interruptible transportation services, M12 transportation overrun, and exchange services.

Broader competition from third party S&T storage services providers who offer services similar to those offered by Union is expected to put downward pressure on the margins Union is able to generate for those services. Customers, whose existing storage contracts with Union expire in 2005 and beyond, now have many market based options for services provided by third parties including parties who provide storage–like service (e.g. pipelines with excess capacity, Winter Peaking Service). Union's Dawn storage services compete directly with third party storage providers in the Great Lakes basin including Michigan, Illinois, Indiana, New York and Ontario. Union's storage services also compete directly with other third party storage providers in Iowa, Pennsylvania, Ohio and West Virginia. As an example, Bluewater Storage in Michigan, offers a market based storage service at Dawn using their Michigan storage assets, combined with transportation from Michigan to Dawn through the Bluewater interconnect.

The S&T transactional services forecasts for 2007, 2006 and 2005 are based on normal weather, the market trends present at the date that the forecast was completed, and historical S&T transactional services activity. The S&T transactional services revenue forecast is based also on the results of Union's in-franchise customer demand forecast as reflected in the Gas Supply Plan (provided at Exhibit D1, Tab 1). The Gas Supply Plan identifies the assets required to meet the annual and peak day requirements of all in-franchise customers, using Board approved methodologies. Forecast firm ex-franchise service requirements are added to the forecast in-franchise firm requirements. The result identifies what assets are needed to provide firm services to both in-franchise and ex-franchise customers. Any remaining assets are used to support the sale of S&T transactional services.

S&T transactional services consist of short term transportation, short and long term storage, balancing, exchanges, loans, and title transfers. These services are provided using assets that are not being used to meet the firm commitments of both in-franchise and ex-franchise customers.

The availability and value of balancing, loans and off peak storage services is dependent on factors such as weather, system operations, market conditions and customer demand. The demand for S&T transactional services is influenced by market conditions with the demand for some services offsetting others. As an example, in a year when loans are in high demand, parking services (i.e. storage) will have less demand and less value. This service offsetting tends to dampen the variability of the total S&T transactional services revenues.

Union manages its portfolio of ex-franchise storage service contracts to provide it with flexibility to meet increased in-franchise customer requirements. As in-franchise customers require incremental storage capacity to meet their firm requirements, assets will be reallocated within Union's portfolio and the corresponding services made available to them. When this occurs, the assets available to meet ex-franchise customer requirements will be reduced.

Union's S&T business has grown and been supported by the aggressive development of storage from the 1990's to the early 2000's. Since that time, Union's storage asset base has been relatively stable, which has limited storage revenue growth opportunities.

Approximately 2.1 PJ of short term storage space has been allocated to ex-franchise services in the current Gas Supply Plan. Union has assumed that this service will be sold at $0.85/GJ/year starting on April 1, 2006. In addition, long term contracts expiring during the forecast period are forecast to be resold on a long term basis at a market rate of $0.70/GJ/year. This includes 4.4 PJs effective April 1, 2006 and 2.9 PJs effective April 1, 2007 contracted with Gaz Metropolitan

Inc. ("GMI") and 21.3 PJ of storage capacity contracted with Enbridge Gas Distribution Inc. ("Enbridge") that expires March 31, 2006. Storage values are based on forward market trends at the time the forecast was developed and historical storage values.

Union's forecast reflects both the assets available to support the S&T transactional business and market conditions.

2.2 Long Term Transportation Forecast

Historically, M12 service on the Dawn–Trafalgar system has been contracted for primarily by TransCanada PipeLines Limited ("TransCanada"), Enbridge and GMI. In total, these three shippers account for 96% of the M12 transportation service revenue in 2005. Changes in these customers' demands are discussed below.

Union has not built additional looping of the Dawn-Trafalgar system since 2002. In August/September 2004 Union held a non-binding Open Season to determine market interest in expanding the Dawn-Trafalgar system. Union received in excess of 3.0 PJs per day of interest in the non-binding Open Season. Union has since held binding Open Seasons for capacity expansions to provide service starting November 2006 and November 2007. Union received approval from the Board on June 28, 2005, for Phase 1 of the Dawn-Trafalgar system expansion which has a projected in-service date of November 1, 2006. Further, Union intends to apply to the Board for approval of an additional expansion of the Dawn-Trafalgar system, which has a

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UNION GAS LIMITED

Answer to Interrogatory from
Federation of Rental-housing Providers of Ontario ("FRPO")

Short-Term Storage Service O&M

Reference: Exhibit A, Tab 1, Schedule 6, Page 2, Line 14

What is the relationship between this $2.261 million and the base revenue requirement of $0.599 million that was allocated to short-term C1 storage in the 2007 Cost Study? Is the $0.599 million included in the $2.261 million?

Response:

The $2.261 million found at Exhibit A, Tab 1, Schedule 6, Page 2, Line 14 replaces the $0.599 million from the 2007 cost study.

The 2007 Board-approved revenue requirement of $0.599 million represents the forecasted demand costs associated with approximately 2 PJ of short-term storage space. Please see Exhibit B1.2 for the derivation of these costs.

The $2.261 million represents the revenue requirement associated with 7.9 PJ of excess utility storage space. The 7.9 PJ is sold on a short-term basis by the unregulated storage operations. This actual cost is allocated to the short-term storage account.

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COURT FILE NO.: 99-CV-179945CM
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ONTARIO

SUPERIOR COURT OF JUSTICE

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	)	*J.S.C. Miller*
	)	Appearing in person
	)	
	)	
	)	**SUBMISSIONS HEARD:** April 5, 2005

RULING

T. DUCHARME J.

I NATURE OF THE PROCEEDING

[1] The plaintiffs brings this action to recover stock market losses suffered by him allegedly as a result of the conduct of the defendants, Merrill Lynch Canada Inc. [1] and Mr. Henderson and Mr. Miller, two investment advisors employed by Merrill Lynch. The essence of the plaintiffs' claim is an allegation that Merrill Lynch and Messrs. Miller and Henderson failed to act in accordance with the standard of care required of an

[1] Midland Walwyn Capital Inc., Midland Walwyn amalgamated with Merrill Lynch in August 1998. For ease of reference, Midland Walwyn and Merrill Lynch are both referred to in this judgment as "Merrill Lynch".

investment advisor in the circumstances, and that such failure caused damage to the plaintiffs. The plaintiffs bring their claim in negligence, for breach of fiduciary duty, breach of contract and negligent misrepresentation.

II THE EVIDENTIARY ISSUE

[2] At the very outset of trial, Mr. Sternberg for the defendants, Merrill Lynch and Mr. Henderson, objected to the admissibility of both the evidence of Mr. Harry Malcolmson, a proposed expert witness to be tendered by the plaintiffs, as well the expert report prepared by Mr. Malcolmson and served pursuant to Rule 53.03.[2] After some initial confusion, Mr. Camelino, for the plaintiffs, eventually clarified that he did not seek to tender the Malcolmson report but simply wished to call Mr. Malcolmson and permit him to use the report as an *aide memoire*. Given this clarification, this ruling will be restricted to a consideration of the admissibility of Mr. Malcolmson's proposed opinion evidence. Although I will make some observations about the report that has been tendered by the plaintiff.

[3] It is, of course, important to consider for what purpose Mr. Malcolmson's evidence is being tendered. Initially, counsel for the plaintiff said he was seeking to tender him as a witness qualified to give opinion expert with respect to the regulations, policies and by-laws that affect the investment advisory industry and, in particular, the policies, regulations and by-laws of the Investment Dealers' Association of Canada ("I.D.A.") and the Toronto Stock Exchange ("T.S.E."). As a result, Mr. Sternberg suggested that the plaintiff was not seeking to have Mr. Malcolmson testify with respect the issue of standards and practices in the brokerage industry as is commonly done in cases of this nature. He submits that having Mr. Malcolmson merely recite the policies and regulations of the I.D.A. or the T.S.E. would be of no assistance to the court and he likens it to an attempt to call an expert on domestic law – something that is clearly impermissible. Mr. Camelino responded by indicating that he did want Mr. Malcolmson

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[2] Mr. Miller, acting for himself, adopted the position of counsel for the defendants, Merrill Lynch and Mr. Henderson.

to testify as to the standards and practices of the retail brokerage industry and submitted that this was implicit in his initial request.

[4] It should be obvious that the party seeking to qualify an expert witness should define with precision the scope of her proposed expertise. This is important both in terms of the initial admissibility inquiry as well as for the orderly reception of the expert's *viva voce* evidence, i.e. such a clear definition is required in case as frequently happens, an objection is made that the witness is going beyond the area in which he or she was qualified to give expert opinion. As Lamer J. put it in *R. v. Marquard* (1993), 108 D.L.R. (4th) 47 (S.C.C.) at p. 78:

> The proper practice is for counsel presenting an expert witness to qualify the expert in all the areas in which the expert is to give opinion evidence. If this is done, no question as to the admissibility of their opinions arises.

[5] In this case, the plaintiff initially did not define with sufficient care the proposed scope of the witness' expertise. However, I will consider the matter as if Mr. Malcolmson is being tendered as a witness qualified to give opinion expert with respect to the standards and practices of the brokerage industry; the regulations, policies and by-laws that affect that industry and more specifically, the policies, regulations and by-laws of the I.D.A. and the T.S.E. I make this decision because it is obvious that any assessment of the duty of care imposed on brokers to clients should be informed by the statutes, regulations, by-laws and policies enacted to control securities trading: *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204, (1992), 10 O.R. (3d) 574 (C.A.) leave to appeal refused, [1992] S.C.C.A. No. 440 (S.C.C., December 3, 1992); *Zraik v. Levesque*, [1999] O.J. No. 2263 at para. 93 (S.C.J.). As the connection between these matters is well known, this decision cannot be said to prejudice the defendant.

III THE LAW

(A) Preliminary Matter – Timing Of The Argument

[6] Counsel for the defendants propose that argument with respect to this objection be heard immediately after the opening statement of each party. They submit that this will benefit both parties as they will know in advance whether they need to prepare to deal with Mr. Malcolmson's evidence as part of the trial. The plaintiffs object that dealing with this objection at the outset of the trial is premature. They rely on the case of *Wilson v. Servier Canada Inc.* (2003), 33 C.P.C. 345 where, in dealing with a pre-trial motion objecting to an expert's report, Mr. Justice Cumming stated as follows at p. 351:

> The defendants put forward several objections to these reports. First, they say that the plaintiffs' experts are being selective in referring only to these named patients. The defendants are not only being speculative in respect of this accusation, they are seeking to impugn the experts' integrity and evidence before that evidence is even put forward. The experts will, of course, be available for comprehensive cross-examination.

However, Mr. Camelino was unable to identify any specific prejudice that would be occasioned by considering this issue immediately following the openings.

[7] In my view, *Wilson v. Servier Canada Inc., supra*, does not assist the plaintiffs. Indeed, that case underscored that it is the trial judge who should rule on the admissibility of expert evidence. The reason for this was set out well by Dambrot J. in *876502 Ontario Inc. v. I.F. Propco Holdings* (1997), 37 O.R. (3d) 70 (Gen. Div.) at p. 77:

> such rulings are better left to the person charged with acquiring a full understanding of the matter, who is then best positioned to balance the competing arguments and rule wisely.

I am the trial judge in this matter and having heard the openings of the parties, I will be able to fully appreciate the positions of the parties and the possible relevance of the tendered evidence. Certainly, the plaintiff has been unable to identify any reason why I would be better situated to deal with this issue after hearing some of the plaintiff's case.[3] I accept the defendant's submission that determining the admissibility of Mr.

[3] Indeed, as I understand Ms. Addison, the only witness schedule to testify before Mr. Malcolmson is the plaintiff. His position can be fully outlined in Ms. Addison's opening.

Malcolmson's evidence at the outset will benefit both parties. This will also increase trial efficiency insofar as both parties will know, in advance, to what extent they will have to deal with Mr. Malcolmson's evidence through other witnesses. In this case, determining this matter at the outset of trial will also be consistent with the principles expressed in Rule 1.04(1).[4]

(B) The Test for Expert Evidence

[8] Expert evidence is a type of opinion evidence. Opinion evidence is generally inadmissible. To be admissible, expert evidence must meet the following criteria set out by Sopinka J. in *R. v. Mohan* (1994), 11 D.L.R. (4th) 419 at 427 (S.C.C.):

(1) the evidence must be relevant;

(2) the evidence must be necessary to assist the trier of fact;

(3) there must be no exclusionary rule otherwise prohibiting the receipt of the evidence; and

(4) the evidence is given by a properly qualified expert.

[9] There is no question that, in civil cases at least, the path of least resistance in matters such as these seems to be to admit the evidence and then compensate for any of its weaknesses by attaching less weight to the opinion. But such an approach is an abdication of the proper function of a trial judge and was explicitly rejected by Binnie J. in *R. v. J.-L.J.*, [2000] 2 S.C.R. 600 (S.C.C) at p. 613:

> the Court has emphasized that the trial judge should take seriously the role of "gatekeeper". The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.

Of course, this gatekeeper function directly collides with the general requirement that the parties to an action must be afforded the opportunity to lead the most complete

[4] Rule 1.04 provides, "These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits."

evidentiary record consistent with the rules of evidence. This fundamental tension can only be resolved by the careful and consistent application of the rules of evidence.

[10] I will consider each of the *Mohan* requirements in turn.

(1) Is the Proposed Evidence Relevant?

[11] The determination of the relevance of the proposed expert evidence is to be decided by the trial judge as a question of law. As explained by Charron J.A., as she then was, in *R. v. A.K. and N.K.* (1999), 137 C.C.C. (3d) 225 at p. 261:

> It involves the determination of the logical relationship between the proposed evidence and a fact in issue in the trial. The logical relevance of the evidence is determined by asking the following questions:
>
> (a) Does the proposed expert opinion evidence relate to a fact in issue in the trial?
>
> (b) Is it so related to a fact in issue that it tends to prove it?
>
> If the answer to both these questions is yes, the logical relevance of the evidence has been established. This is the basic threshold requirement for the admissibility of any evidence.

[12] Mr. Sternberg concedes that evidence about the standards and practices of the retail brokerage industry is logically relevant in this case. Although he points to the next requirement set out in *R. v. A.K. and N.K.*, *supra*, i.e. although relevant, is the evidence sufficiently probative to warrant its admission? He suggests that the probative value of Mr. Malcolmson's evidence is outweighed by its prejudicial effect. His submission here is based primarily on the fact that Mr. Malcolmson purports to make findings of fact and is acting as more of an advocate than as a dispassionate expert. However, he abandoned this objection when he was assured that, if Mr. Malcolmson was qualified, the Court would not permit him to make findings of fact or testify *qua* advocate.

(2) Is the Proposed Evidence Necessary?

[13] In order to meet the necessity requirement, the expert evidence must be more than merely helpful. It must be necessary to assist the trier of fact in respect of an area she otherwise would be unable to understand – by providing a ready made inference which the trier of fact, due to the technical nature of the facts, would be unable to formulate. Thus, if the trier of fact can understand the evidence, concept or principles involved and form their own conclusion from the facts, then the opinion of the expert is unnecessary and the evidence is inadmissible.

[14] While an expert can provide the trier of fact with a ready-made inference, it is neither appropriate nor helpful for an expert to make factual findings. As stated by Binnie J. in *R. v. J.-L.J., supra*, at p. 628:

> The purpose of expert evidence is to assist the trier of fact by providing special knowledge that the ordinary person would not know. <u>Its purpose is not to substitute the expert for the trier of fact</u>. (emphasis added)

Where the expert purports to opine on the ultimate issue before the Court and threatens to usurp the role of the trial judge, the requirement of necessity should be strictly enforced: *R. v. Mohan, supra*, at 430; *R. v. J.-L.J., supra*, at 623; *R. v. Pascoe* (1997), 32 O.R. (3d) 37 (C.A) at p. 55.

[15] Mr. Sternberg's primary objection is that, to the extent that Mr. Malcolmson makes findings of fact, his evidence is not necessary. As will be discussed further at paragraph 28, *infra*, there is no question that Mr. Malcolmson's report does purport to make findings of fact. Not only is it not necessary for an expert to do this – it is totally inappropriate. Accepting that the court would not permit Mr. Malcolmson to do this, Mr. Sternberg made the further submission that Mr. Malcolmson's evidence was not necessary insofar as it consists merely of an explanation of the policies, regulations and by-laws of the I.D.A. or the T.S.E. He likened this to an attempt to call an expert to give an opinion with respect to domestic law. I would agree with Mr. Sternberg's submission

if that was all Mr. Malcolmson was being tendered to do. However, Mr. Camelino did clarify that he was tendering Mr. Malcolmson to testify with respect to the practices and standards of the brokerage industry. It is conceded by Mr. Sternberg that, when tendered for this broader purpose, the evidence of Mr. Malcolmson satisfied the necessity criteria.

(3) Is Reception of the Evidence Barred by any Other Exclusionary Rule?

[16] Expert opinion evidence that would otherwise be admissible may still be excluded on the basis of another rule of evidence. In this case, Mr. Sternberg makes the submission that the evidence of Mr. Malcolmson violates the rule against oath-helping in that the report is replete with comments about credibility or findings of fact relating to contentious issues.

[17] There is no question that the rule against oath helping is well established. In *R. v. Marquard*, *supra*, McLachlin J. described the rule and the rationale for it as follows, at p. 228:

> It is a fundamental axiom of our trial process that the ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion ...
>
> A judge or jury who simply accepts an expert's opinion on the credibility of a witness would be abandoning its duty to itself determine the credibility of the witness. Credibility must always be the product of the judge or jury's view of the diverse ingredients it has perceived at trial, combined with experience, logic and an intuitive sense of the matter.

[18] As will be discussed at paragraph 28, *infra*, I agree that the report of Mr. Malcolmson is not in the proper form and there is no question that, if admitted, it would violate the rule against oath-helping. However, while this is a sufficient reason not to admit the Mr. Malcolmson's report, it does not preclude him from testifying. It is only reason to prevent him from offering such conclusions in his *viva voce* evidence. When assured by the Court that Mr. Malcolmson, if qualified, would not be permitted to make such observations Mr. Sternberg withdrew this objection. He conceded that reception of Mr. Malcolmson's evidence is not barred by any other exclusionary rule.

(4) Is Mr. Malcolmson a Properly Qualified Expert?

[19] As Sopinka J., stated in *Mohan, supra*, at p. 431:

> the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

As Charron J.A. observed in *R. v. A.K. and N.K., supra*, this criteria is usually not difficult to apply but it is important that it not be overlooked keeping in mind that:

> Opinion evidence can only be of assistance to the extent that the witness has acquired special knowledge over the subject matter that the average trier of fact does not already have. If the witness's "special" or "peculiar" knowledge on a subject matter is minimal, he or she should not be qualified as an expert with respect to that subject.

[20] How the witness acquired that "special" or "peculiar" knowledge is not the central issue at this point. Rather the issue is whether the witness does, in fact, have the "special" or "peculiar" knowledge.[5] Thus one can acquire the necessary knowledge through formal education, private study, work experience or other personal involvement with the subject matter. In some cases, the expertise will require formal study, for example, evidence of medical experts. Others areas of expertise can be developed in less formal ways. Thus, in *Rice v. Sockett* (1912), 27 O.L.R. 410 (C.A.), Falconbridge C.J. stated at p. 413:

> The derivation of the term 'expert' implies that he is one who by experience has acquired special or peculiar knowledge of the subject of which he undertakes to testify, and it does not matter whether such knowledge has been acquired by study of scientific works or by practical observation. Hence, one who is an old hunter, and has thus had much experience in the use of firearms, may be well qualified to testify as to the appearance which a gun recently fired would present as a highly-educated and skilled gunsmith.

[5] Where that knowledge involves a novel scientific theory or technique it must also be subjected to special scrutiny to determine whether it meets a basic threshold of reliability: *Mohan, supra*, at p. 415. Where it does not meet this threshold it will not be admitted as it will be of no assistance to the trier of fact. This consideration does not apply to the purported expertise of Mr. Malcolmson.

[21] When assessing the qualifications of a proposed expert, trial judges regularly consider factors such as the proposed witness's professional qualifications, her actual experience, her participation or membership in professional associations, the nature and extent of her publications, her involvement in teaching, her involvement in courses or conferences in the field and her efforts to keep current with the literature in the field and whether or not the witness has previously been qualified to testify as an expert in the area.

[22] Mr. Malcolmson is a lawyer who practised corporate and securities law for fifteen years. From 1982 to 1988, he was a senior officer at the Ontario Securities Commission ("OSC"), where his work included a wide range of administrative functions, policy formulation and market regulation. As part of his responsibilities at the OSC he was responsible for Commission oversight of the activities of the T.S.E. and the I.D.A. In this capacity he became familiar with the policies rules and regulations of the I.D.A. In 1988, he left the OSC and was an advisor to the TD Bank, assisting it in undertaking securities activities opened by financial sector deregulation including, the establishment of their own retail brokerage branch. Most recently, from 1992 to present, his résumé indicates that he has been a consultant engaged in international consultancy for the World Bank, the Asian Development Bank, USAID, the International Finance Corporation and private consultancies in various other countries. Broadly speaking, his work as a consultant has focussed on the development and restructuring of capital markets and the design of regulatory and legislative regimes for various aspects of the securities industry.

[23] Mr. Malcolmson also relies on his personal experience with public company investment. In his report, he states that he has personally held brokerage accounts with a number of securities firms and consequently has worked with a number of brokers. As a result, he claims, "thus, I am familiar with the give and take of the client/brokerage relationship."

[24] Mr. Malcolmson's résumé discloses no experience working for any brokerage firm in any capacity. It discloses no expertise in the details of day-to-day retail brokerage compliance, account supervision, account operations, account trading or other procedures. While Mr. Malcolmson passed the basic Canadian Securities Course in 1988, he has not passed any of the courses or examinations that would qualify him to work in the retail brokerage industry in Canada in any capacity (other than as a lawyer). While a lawyer in private practice, Mr. Malcolmson did work in the area of securities law but conceded that he did not have "a significant involvement in the retail client side." As a result, while he developed what he called "an overarching sense of the functioning of capital markets but not to a significant extent with respect to retail client issues." While at the O.S.C., Mr. Malcolmson was the officer responsible for monitoring the conduct of self-regulating organizations such as the I.D.A. and the T.S.E. He met with representatives of these groups and his role was both to monitor their activities and to participate in policy analysis. In this capacity, Mr. Malcolmson did not deal with people in the individual firms and this work ended in 1988. While his work with the TD Bank related to, among other things, the establishment of retail brokerage activities, Mr. Malcolmson's work was at a macro institutional level and ended in 1992. His work as an international consultant had little to do with the retail brokerage industry. To the extent there was a connection, it was at a very general level. As Mr. Malcolmson put it:

> I suppose in a general sense that I had responsibility to design and draft and prepare rules in various countries which addressed the question, key question of the standards by which would establish the responsibility of registrants to retail clients in a range of jurisdictions in a range of underlying law. (emphasis added)

There is no evidence that the standards and practices in these foreign jurisdictions are at all comparable to those in Ontario or Canada. There is also no evidence that Mr. Malcolmson has kept current with the standards and practices of the retail brokerage industry in Canada or Ontario[6] or that he has been qualified to give expert evidence

[6] Mr. Malcolmson testified that the résumé presented to the Court summarized his work experience that was relevant to this case. While it describes him as working as an international consultant "to date" the last consultancy listed was one that ended in September, 2000.

before. Indeed, it appears to me that Mr. Malcolmson made reference to his experience as a personal investor in an effort to compensate for this lack of professional involvement in the industry.

[25] Despite the very detailed, specific challenge to Mr. Malcolmson's qualifications, the plaintiff's response was both brief and general, "The plaintiff submits that Mr. Malcolmson, as an expert in securities industry regulations, is a properly qualified expert." While Mr. Malcolmson could undoubtedly recite the regulations of the I.D.A. to court, this alone would not satisfy the necessity requirement of *Mohan*, *supra*. The question is whether he has the "special" knowledge to assist the Court in understanding the standards and practices of the retail brokerage industry in Ontario. There is no question that Mr. Malcolmson is not as qualified to testify about the retail brokerage industry as the experts called in many other similar cases.[7] But the fact that another person may have been more qualified to testify on a particular topic goes only to weight, rather than admissibility: *McLean (Litigation Guardian of) v. Seisel* (2004), 182 O.A.C. 122 (C.A.) at p. 140; *Regina v. Wade* (1994), 18 O.R (3d) 33 (C.A.), rev'd on other grounds (1995), 23 O.R. (3d) 415 (S.C.C.) at p. 42.

[26] After careful consideration, I have concluded that Mr. Malcolmson is not qualified to testify as to the standards and practices of the retail brokerage industry. For the reasons outlined above, while Mr. Malcolmson undoubtedly has expertise with respect to various aspects of the securities industry, he does not have the requisite "special" or "peculiar" knowledge about the retail brokerage industry to qualify him for the purpose for which he was tendered. Even if Mr. Malcolmson had acquired such knowledge during his time at the O.S.C., or through his work with the T.D. Bank, that ended almost thirteen years ago and the plaintiff led no evidence establishing that he has remained current with the standards and practices of the industry.

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[7] *Varcoe v. Sterling* (1992), 7 O.R. (3d) 204 (G.D.); *875121 Ontario Ltd. v. Nesbitt Burns Inc.*, [1999] O.J. No. 3825 (S.C.J.); *Zraik v. Levesque Securities*, [1999] O.J. No. 2263 (S.C.J.); *Chesebrough v. Willson*, [2001] O.J. No. 940 (S.C.J.); *Hunt v. TD Securities Inc.* (*c.o.b. TD Evergreen*), [2002] O.J. No. 474; *Techhi Holdings Ltd. v. Merrill Lynch Securities Inc.*, [2004] O.J. No. 2265 (S.C.J.).

[27] In making this determination, I am well aware of the observation of Gillese J.A. in *McLean (Litigation Guardian of) v. Seisel*, *supra*, at p. 139 that the facts in *R. v. Marquard*, *supra*, "reveal that the threshold for admissibility is not high." But in *Marquard*, unlike in this case, the problem was not that the proposed experts lacked the "special" knowledge. The challenged witnesses were trained, experienced physicians and, as McLachlin J. noted at p. 78, "There is little doubt that they all possessed some special knowledge relating to the matters on which they testified." Rather, the problem in *Marquard* was that the witnesses were qualified more narrowly than either their actual areas of expertise or the scope of their testimony. Therefore, in my view, *Marquard* does not justify a departure from the clear direction of Binnie J. in *R. v. J.-L.J.*, quoted in paragraph 9, *supra*.

The Report

[28] It is appropriate that Mr. Camelino abandoned his original request to enter the Mr. Malcolmson's report as an exhibit as it was seriously deficient in a number of respects. Some of these defects include the following:

> (1) The vast majority of his report does not opine on the standards and practices in the industry;
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> (2) At the outset of his report, Mr. Malcolmson does not set out any specific questions on which he was asked to opine. Rather, he simply states that he is responding to a request to "report [his] conclusions following [his] examination of the pleadings, the transcripts from the examinations for discovery and the documents produced by the parties." This is improper – it is essential that an expert report clearly indicate the scope of the expert's opinion.
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> (3) Mr. Malcolmson purports to make various findings of fact – which involve him making numerous contested factual findings in respect of such central matters as:
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>> (i) the events which took place throughout the time Mr. Dulong had an account with Merrill Lynch;

(ii) the discussions Mr. Dulong and Mr. Miller had around the time the account was opened, including representations Mr. Malcolmson concludes Mr. Miller made;

(iii) the discussions Mr. Dulong and Mr. Miller had regarding the sale (and non-sale) of Mr. Dulong's CPI shares, including findings in respect of what instructions were given by Mr. Dulong and whether they were followed;

(iv) the discussions Mr. Dulong and Mr. Miller had regarding overall investments strategy, and Mr. Dulong's entitlement to borrow funds from Merrill Lynch on margin, including Mr. Malcolmson's interpretation of what certain correspondence between them meant; and,

(v) the facts leading to the ultimate sale of Mr. Dulong's CPI shares.

(4) In making the foregoing findings, Mr. Malcolmson so purports to make credibility assessments relating to the evidence expected from witnesses. For example, at one point, he concludes that, "after reviewing Miller's transcript, I am not persuaded" of various assertions. In another instance he states that he found the discovery answers of another witness to be "disquieting."

[29] This court does not require expert evidence to assist it with the above matters. Opinion evidence is not required to determine what discussions took place between Mr. Miller and Mr. Dulong; what recommendations Mr. Miller made regarding the sale of Mr. Dulong's CPI shares; what instructions Mr. Dulong gave as to whether he was prepared to sell the shares; what discussions they had regarding the purchase of bonds; what Mr. Dulong's understanding was of his margin position; what led to the ultimate sale of the shares by Merrill Lynch to repay the debit balance in Mr. Dulong's account; nor any of the other many factual matters on which Mr. Malcolmson seeks to opine. These matters will be determined based on all the evidence including an assessment of the credibility of the witnesses. The assessment of credibility of witnesses is a prime judicial function. That assessment is for the trier of fact and is not within the proper scope of expert testimony.[8]

[8] Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd. ed. (Toronto: Butterworths, 1999) at 626, 637-638.

[30] Finally both the tenor an substance of the report are objectionable as it consists of Mr. Malcolmson arguing the facts and generally advocating his client's position with respect to them throughout – similar to what one would expect from counsel's closing argument. This is not the proper format for an expert opinion. As Reed J. put it in *Fraser River Pile & Dredge Ltd. v. Empire Tug Boats Ltd.* (1995), 37 C.P.C. (3d) 119 at p. 126 (F.C.T.D.) an expert's report "cannot be advocacy dressed up as expert opinion". In this regard, I would adopt the words of MacDonald J. in *Fellowes, McNeil v. Kansa General International Insurance Co.* (1998), 40 O.R. (3d) 456 (G.D.) var'd (2000) 138 O.A.C. 28 (C.A.) at p. 112:

> Experts must not be permitted to become advocates. To do so would change or tamper with the essence of the role of the expert, which was developed to assist the court in matters which require a special knowledge or expertise beyond the knowledge of the court.

T. DUCHARME J.

Released: January 6, 2006