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By electronic filing

April 16, 2012

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

Dear Ms Walli,

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

This letter constitutes our reply to the submissions contained in counsel for Union's letter to the Board dated April 5, 2012 (the "Union letter"). That letter asserts that there is no proper basis for the correction relief we requested in our letter of March 27, 2012 (the "CME letter"), and urges the Board to deny the relief claimed. For reasons that follow, we urge the Board to reject Union's Submissions.

1. Union's Mischaracterization of the Central Theme of the CME Letter

The central theme of the CME letter is not, as Union contends, that misleading information from Union prompted our initial submissions on January 27, 2012, containing our calculation of the 2010 Net Short-Term Revenues to be credited to ratepayers of $0.831M. As noted in sub-paragraph (b) on page 2 of the CME letter, that calculation stemmed from the figure of $0.924M contained in the Union evidence in this proceeding and our mistaken assumption as to the amount being recovered in rates. None of the information referenced at pages 2 to 6 of the Union letter was in the record in this case when CME, Board Staff and LPMA made their initial submissions.

To be clear, there are two elements of the central theme of the CME letter. They are:

1. The amount of $0.831M is an incorrect calculation of the ratepayers' share of Actual 2010 Net Short-Term Storage Revenues in a scenario where the shareholder's 21% share is eliminated and instead, paid to ratepayers. The correct calculation of the amount payable in that scenario is $3.824M; and

2. When it rendered its February 29, 2012 Decision and Order and issued the formal Rate Order on March 8, 2012, the Board Panel members hearing this case had no actual knowledge of and were

unaware of the fact that $3.824M rather than $0.831M is the correct amount payable to ratepayers in the foregoing scenario.

2. The Amount Payable to Ratepayers is $3.824M

The Union letter continues to admonish us for interpreting Union's initial responses to our communications to imply that the difference between us pertaining to the incorrectness of the $0.831M amount and the correctness of the $3.824M amount pertained to the "methodology" to be applied. The initial e-mail from which we drew this conclusion is described in sub-paragraph (j) on page 3 of the CME letter and stated as follows:

> *"Contrary to your note, the Deferral Account balance is calculated not based on what is in rates but rather on the Board approved 2007 forecast margin of $15.289M. The sharing percentages are to be applied to the difference between the actual margin and the Board approved forecast. This methodology has been used since 2008, accepted by parties and through the Rate Order approved by the Board."* (emphasis added)

We interpreted that statement to mean that the methodology that we had used to calculate the $3.824M was an unapproved methodology. That is what the language of the e-mail indicates to us.

Regardless of the nature of Union's various responses to our initial communications, the submissions contained in the Union letter clearly acknowledge that $3.824M is the value of the ratepayers' share of Actual 2010 Deferral Account Revenues in a scenario where the shareholders' 21% share is eliminated and, instead, is paid to ratepayers.

The Union letter contends that because of two sentences that Union included in paragraph 10 of its February 17, 2012 Reply Submissions, members of the Board Panel were fully cognizant of the $3.824M amount and the distinction between that amount and the $0.831M amount when they rendered the February 29, 2012 Decision and Order and the March 8, 2012 formal Rate Order based thereon.

The CME letter contends otherwise. The CME letter submits that the two sentences in the Reply Submissions, on which Union relies, did not in fact succeed in making the Board Panel members actually aware of the fact that an amount of $3.824M was payable to ratepayers in the scenario where the shareholders' 21% share is eliminated and, instead, is paid to ratepayers. The submissions to that effect in the CME letter are found in sub-paragraph (c) at page 2 and at the bottom of page 7 and top of page 8 where it is stated as follows:

> *"There is no clear disclosure in Union's Reply Submissions of facts that would inform the Board and interested parties that an accurate calculation of the portion of the 2010 actual revenues, that would have been streamed to Union's unregulated storage business under the 79/21% split feature of the NGEIR Decision, was an amount of $3.824M, some $2.992M higher than the amount to which counsel for CME and Board Staff referred in their submissions. Union's Reply Submissions cannot reasonably be interpreted to contain such a disclosure."*

The issue in dispute, then, is whether, when rendering their February 29, 2012 Decision and Order the March 8, 2012 formal Rate Order based thereon, the Board Panel members were actually aware of the $3.824M amount as a result of the two sentences that Union included in its Reply Submissions.

3. The Incomplete Disclosure made by Union in its Reply Submissions and its Outcome

On the basis of the facts outlined and the documents attached to the CME letter, we contend that the two sentences on which Union relies in its Reply Submissions did not constitute a straightforward, open, transparent and complete disclosure of information from which the calculation of $3.824M is derived. We seek to demonstrate the incompleteness of the information provided by Union in its Reply Submissions by referring to the documents that could have been disclosed to clearly transmit to the Board and other parties that the ratepayers' share of 2010 Deferral Account Revenues was $3.824M in a scenario where the shareholders' 21% share is eliminated and instead paid to ratepayers. The four pages of description now provided at pages 2 to 6 of the Union letter are further information that demonstrates the incompleteness of the disclosure made in paragraph 10 of Union's February 27, 2012 Reply Submissions.

The CME letter is not permeated with unfounded and baseless allegations of wrongdoing as Union asserts. Rather, the CME letter refers to the incompleteness of what Union disclosed in its Reply Submissions, along with the principles that the Board applies to evaluate the completeness of the disclosure made by the utilities it regulates.

In the CME letter, we contend that the incompleteness of the information provided by Union at the time of makings its Reply Submissions is incompatible with the principles expressed by the Board in prior proceedings pertaining to the full and complete disclosure that the Board expects from the utilities it regulates. Based upon an application of these principles to the facts, we contend that the disclosure made by Union was insufficient to actually transmit to the Board that the amount payable to ratepayers, in a scenario where the shareholders' 21% share of Deferral Account Revenues is eliminated and instead paid to ratepayers, is $3.824M and not the $0.831M referenced in our initial submissions.

The ultimate outcome and focus of the CME letter with respect to the two sentences contained in paragraph 10 of Union's Reply Submissions are that they did not transmit to the Board Panel actual knowledge of the fact that the amount of $3.824M, and not the $0.831M referenced in our initial submissions, is payable to ratepayers in a scenario where the shareholders' 21% share of Deferral Account Revenues is eliminated and, instead, paid to ratepayers.

These submissions and the facts upon which they are based are not presented in the CME letter in a "cavalier" manner, as the Union letter contends. The submissions are based upon an application of established principles to the two sentences contained in paragraph 10 of the Reply Submissions. In these circumstances, such submissions are neither "baseless", nor "groundless", nor "an attack on the credibility of Union's representatives", as contended in the Union letter. They are principled submissions that relate to a genuine issue pertaining to the Board's actual awareness of the $3.824M amount prior to the issuance of the February 29, 2012 Decision and Order, and the March 8, 2012 formal Rate Order based thereon. This is a genuine issue that needs to be addressed.

If we are correct in our submission that the Board Panel was unaware of the $3.824M amount, prior to the issuance of the formal Rate Order on March 8, 2012, then the correction relief being requested can and should be granted because the language of the Board's February 29, 2012 Decision and Order indicates that the Board intended to reverse the 79/21% split feature of the NGEIR Decision for the purposes of deriving the ratepayers' share of Actual 2010 Short-Term Storage Revenues.

4. The Board is Fully Empowered to Grant the Requested Relief

Correcting an incorrect calculation of an amount that the Board intended to award does not constitute retroactive ratemaking.

If the Board was unaware of the $3.824M amount prior to March 8, 2012, as CME contends, then granting the correction relief we propose is exactly the type of relief that the Board is empowered to grant under Rule 43 of the Board's *Rules of Practice and Procedure*. (the *"Rules"*). The phrases "... error of calculation or similar error ..." are unique to the Board's *Rules*. The Board should interpret its correction power under Rule 43.02 in accordance with the plain meaning of those phrases.

If the members of the Board were actually unaware of the correct amount of $3.824M payable to ratepayers in the scenario where the shareholders' 21% share of Deferral Account Revenues is eliminated and, instead, paid to ratepayers, then their adoption of the $0.831M amount is either a "calculation error" or an error "similar to a calculation error". The Board has power to correct such an error under Rule 43.02.

The wording used in Rule 59.06(1) of the *Rules of Civil Procedure*, upon which Union relies, is quite different and the cases under the *Rules of Civil Procedure* to which Union refers have little, if any, relevance to the interpretation that should be ascribed to the Board's Rule 43.02.

The Union letter suggests that our request for correction relief under Rule 43.02 should not be considered because it is not supported by a formal motion. A formal motion should not be required to seek an exercise by the Board of its correction power under Rule 43.02. The Board can remedy a "calculation error" or errors "similar to a calculation error", "without notice or a hearing of any kind". A formal motion should not be required to have the Board resort to a power that it can exercise "without notice or a hearing of any kind". In the alternative, if a formal motion is necessary, then the Board can treat the CME letter as such a motion.

Moreover, and despite the fact that a review and variance is unnecessary in the circumstances of this case, the submissions in the Union letter to the effect that a review and variance of the February 29, 2012 Decision and Order and the March 8, 2012, formal Rate Order based thereon are foreclosed, because more than twenty (20) days has elapsed from the issuance of those Orders, are submissions that lack merit. There are no time limits applicable to the Board's power to review and vary its prior Orders and Decisions under the provisions of Rule 43.01. Rule 43.01 provides:

> *"The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding."* (emphasis added)

If we are correct that the Board intended to reverse the 79/21% split feature of the NGEIR Decision for the purposes of deriving the ratepayer's share of Actual 2010 Short-Term Storage Revenues and was unaware of the $3.824M amount prior to March 8, 2012, then, even if a review and variance order was necessary to grant the proposed correction relief, then, under the auspices of Rule 43.01, the Board is fully empowered to grant such relief "at any time".

For these reasons, the contention in the Union letter, that the Board is effectively powerless to take action to correct the February 29, 2012 Decision and Order, and the March 8, 2012 formal Rate Order based thereon to reflect the correct amount of Actual 2010 Short-Term Revenues that it intended ratepayers to receive, is a contention that lacks merit and should be rejected.

5. CME's Submissions in this and Other Cases are Genuine

The Union letter asserts that CME should be deprived of its reasonably incurred costs of raising the correction relief issue based on the Board's unawareness of the $3.824M amount because the submissions related thereto are based on "unfounded allegations of intentional wrongdoing" that have become "a recurring feature of CME submissions". This sweeping indictment is manifestly devoid of merit.

We reiterate that the facts in this case give rise to a genuine issue with respect to the Board's awareness of the $3.824M amount. As already noted, submissions based on facts that give rise to a genuine issue are neither "baseless" nor "unfounded".

There was no determination in the EB-2012-0048 Decision and Order, being the only case to which Union refers to support the sweeping indictment it makes of CME submissions, to the effect that the CME submissions in that case were based on unfounded allegations of wrongdoing.

As is evident from the passage that Union highlights at page 5 of the Decision and Order (attached at Tab 13 to the Union letter), the matter of principle upon which CME's submissions in that case were based was that a utility should not prefer the interests of its owner over the interests of its ratepayers. This is a well-established principle that is to be considered when determining matters related to just and reasonable rates. CME and other intervenors have consistently submitted that adherence to this principle is a particular concern when considering matters pertaining to Union's allocation of costs and revenues related to its utility and non-utility storage operations.

We submit that adherence to this principle was one of the factors that led to the Board's rejection, in its June 3, 2008 Decision in EB-2008-0034, of a change Union made to reduce the ratepayer's share of Actual 2010 long-term storage revenues recorded in Deferral Account 179-72. That decision was upheld in a Decision in EB-2008-0154 dated October 3, 2008. The nature of the disclosure made by Union in that case was a subject upon which the Board commented in its Decisions.

We submit that adherence to this principle also had relevance in the Board's January 20, 2012 Decision and Order in this proceeding, EB-2011-0038, rejecting Union's charge against the ratepayers' share of Deferral Account Revenues recorded in Account 179-72 of an equity rate of return on "incremental storage investments" and "purchased assets" in an amount that exceeded Union's Board approved equity return.

This principle was engaged in the EB-2012-0048 case because there were facts in that proceeding that raised a genuine issue as to whether Union's actions, in its dealings with Dawn Gateway Limited Partnership ("DGLP") and the other committed shippers regarding the Dawn Gateway Pipeline Project, were incompatible with the principle that Union should not prefer the interests of its owner over the interests of its ratepayers. In the EB-2012-0048 Decision and Order at page 11, in the passage highlighted by Union, the Board resolved the issue in that particular case in Union's favour and found as follows:

> *"The Board is of the view that Union did not act inappropriately in its negotiations with DGLP or the other shippers regarding the Dawn Gateway Pipeline project."* (emphasis added)

A finding that Union "did not act inappropriately" indicates that the case raised an issue pertaining to the appropriateness of Union's actions that needed to be resolved. A finding that Union "did not act

inappropriately" provides no support for an assertion that "unfounded allegations of intentional wrongdoing" have become a "recurring feature of CME submissions". There was no determination in that case, nor in any other case of which we are aware, that supports the sweeping indictment that the Union letter makes of CME's submissions in prior proceedings.

In conclusion, we reiterate that the issues that we have raised with respect to the Board's unawareness of the $3.824M amount and the proposed correction relief based thereon are genuine issues that need to be resolved. CME should not be deprived of its reasonably incurred costs of bringing these genuine issues forward for determination.

For all of these reasons, we respectfully urge the Board to reject the submissions contained in the Union letter and grant the correction relief that we have proposed.

Yours very truly,

Peter C.P. Thompson, Q.C.

PCT\slc
c. Chris Ripley (Union)
Intervenors in EB-2011-0038
Paul Clipsham (CME)

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