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May 18, 2012

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: EB-2012-0206
Union Gas Limited – Short Term Storage Margin

This is the submission of Union Gas Limited in response to the motion brought by the Board to review its Final Rate Order in EB-2011-0038. This submission should be read in conjunction with letters filed by Union in that matter dated April 5 and 16, 2012.

Yours truly,

Crawford Smith

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CS/tm
Enclosure

cc: All EB-2012-0206 Intervenors
Michael Millar/Kristi Sebalj, Board Staff

EB-2012-0206

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.

AND IN THE MATTER OF a proceeding commenced by the Ontario Energy Board on its own motion to determine the calculation of margin sharing related to Deferral Account 179-70 – Short-Term Storage and Other Balancing Services.

SUBMISSION OF UNION GAS LIMITED

A. OVERVIEW

1. This is the submission of Union Gas Limited in response to the motion brought by the Board to review the Final Rate Order in EB-2011-0038. This submission should be read in conjunction with letters filed by Union in that matter dated April 5 and 16, 2012. Union relies on those letters in support of its position that the Board should not vary the Final Rate Order.

2. This motion was initiated by the Board following its review of a request by CME to correct, pursuant to rule 43.02, the Final Rate Order. CME based its claim on the faulty premise that it, the Board and others were unaware of Schedule 14 to Union's 2010 Rate Order prior to the issuance of the Final Rate Order. Although CME invited other intervenors to comment on its request, none did. Nor did Board Staff.

3. CME's position was unsustainable: Schedule 14 (or its predecessor) has been a feature of Union proceedings and rate orders since 2008; has been the subject of interrogatories by CME, Board Staff and others; and was referred to explicitly by Union in its Reply Argument dated February 17, 2012.

4. The Board declined to grant the relief requested by CME. The Board indicated that the correction requested by CME to the margin sharing calculation in the Short-Term Storage Account (Deferral Account 179-70) would not, if substantiated, be allowable under Rule 43.02. Nevertheless, the Board commenced this proceeding, indicating that issues had been raised relating to the margin sharing calculation that warranted review. The particular issues were not specified by the Board.

5. There is no proper basis to vary the Final Rate Order. The Board was explicit in the amount of the credit to ratepayers in respect of net short term revenues. The Final Rate Order reflects the Board's own assessment of the appropriate credit to ratepayers and a careful review of the draft rate order filed by Union to ensure that assessment had been carried out. The Board, in reaching its decision, had the benefit of a full factual record; Union's Reply Argument which addressed the manner in which the credit had been calculated and the disconnect which would result if the request by parties, then before the Board, to vary upwards that credit, were granted; and the knowledge gained from a regulatory history in relation to the sharing of short term storage revenues which covered at least six separate proceedings.

B. THE SCOPE OF A MOTION TO REVIEW

6. However initiated, a motion to review is not an opportunity to reargue the case, nor is it an appeal.

7. The grounds for a motion to review are informed by rule 44 and are limited. They are primarily fact driven. As the Board held in *Grey Highlands*:

> Rule 44.01 of the Rules of Practice and Procedure states that a motion for review must set out grounds that raise a question as to the correctness of the order or decision in question, which grounds may include the following: (i) error in fact; (ii) change in circumstances; (iii) new facts have arisen; and (iv) facts that were not placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.[1]

8. Here, no new facts have arisen, nor has there been a change in position. The issue therefore is whether the Board erred in fact or whether facts were not placed in evidence that

[1] *Grey Highlands Plateau*, EB-2011-0053, p.3

could not have been discovered by reasonable diligence. In considering these fact driven inquiries, the Board must consider:

(a) That they are objective inquiries. The subjective intentions of the parties, and even the Board itself, are irrelevant.

(b) That the moving party must be able to show that the findings are contrary to the evidence that was before the panel, or could have been before the panel. It is not enough to argue that conflicting evidence should have been interpreted differently.[2]

C. NO MISTAKE BY THE BOARD

9. Union has had the opportunity to review Board Staff's submission. Others appear to have agreed with that submission. Board Staff takes the position that the Board intended to credit ratepayers with more than the $0.831 million amount reflected in the Rate Order. Board Staff says that the Rate Order *may* be incorrect. This submission is flawed.

10. It is not enough, on a motion to review, to suggest that the Board may have committed an error. Even the suggestion that the Board must have intended a different result is insufficient. There must be an identifiable error by the Board of the sort which could ground a claim for relief. In this case, Board Staff's position simply amounts to an impermissible attempt to re-litigate the Board's decision.

11. First, as discussed in Union's April 5 letter, the Board's findings are unequivocal. The Board expressly found that the correct amount to be credited to ratepayers was $0.831 million. The Board further determined in its Final Rate Order that the updated draft rate order submitted by Union accurately reflected the Board's findings in its Decision and Order on Draft Rate Order.

12. Second, Board Staff, like CME before it, omits any reference in its submission to those portions of the Decision and Order on Draft Rate Order that make clear that the Board was fully

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[2] Motion to Review NGEIR, EB-2006-0322, p. 18

aware of the very issue that first CME and now Board Staff complain about. This omission is fatal.

13. Beginning at p. 4 of its Decision and Order on Rate Order, the Board summarized Union's position. The Board made explicit reference to Union's argument that acceding to CME's submission would create an inconsistency between the basis on which rates had been set and Deferral Account No. 179-70. The Board was fully aware that the amount of $0.831 did not include the change in the sharing of forecast short-term margin ($2.992 million) which had occurred subsequent to NGEIR and which had resulted in a change in base rates that has been carried forward in each subsequent proceeding. Nevertheless, at page 5, the Board found that the ratepayer share of 2012 net short-term revenues should be $0.831 million, and not any higher amount. The Board held, "[t]he Board finds that the ratepayers' share of 2012 net short-term revenues should be $0.831 million."

14. It is also important to consider that Union's application concerned 2010 deferral account balances. Union was not seeking to re-set base rates, which had already been considered and approved by the Board in EB-2009-0275. The question before the Board concerned Deferral Account 179-70. The methodology used to calculate the amount available for sharing with ratepayers concerned the application of net margin to the Board approved forecast of $15.829 million, *viz.*, the methodology used by the Board in EB-2009-0052, in EB-2010-0039 and earlier. Re-calculation of the credit included in base rates was not at issue, although the inconsistency which would result between base rates and the Deferral Account was adverted to by Union in its Reply Argument.

15. Ultimately, while parties may now disagree with the Board's decision, that does not mean that the Board committed an error of the sort necessary to ground a motion to review.

D. FACTS AVAILABLE AND NO MERIT TO CRITICISMS OF UNION'S REPLY ARGUMENT ON THE DRAFT RATE ORDER

16. To the extent Board Staff argues that the Board did not have available to it all of the relevant facts, it essentially repeats the claim previously advanced by CME. This repetition is

reflected in the claim that, "through the process initiated by CME, it has come to light that the amount actually embedded in rates was revised as a result of the NGEIR Decision."[3]

17. As previously explained, the suggestion that the calculation of the credit in the Deferral Account emerged subsequent to the Final Rate Order is without merit. It overlooks entirely Union's Reply, the Board's reference to that Reply in its Decision and Order (referred to above) and the relevant regulatory history.

18. At the root of the submission is the assertion that Board Staff and the Board were under a misapprehension as to the "correct" amount to be reflected in Deferral Account 179-70. Board Staff says that it was under the "impression" that $15.829 million was the short-term margin embedded in rates.[4]

19. Even if Board Staff's assertion were true, it would not be enough to base a motion for review because all of the facts necessary to displace that impression were available. In fact, Union referred to the very schedule – Schedule 14 of the 2010 Rate Order Working Paper – that first CME and by extension, now Board Staff, say would have made "everyone...aware that" Appendix C, Schedule 2 Updated (to the draft rate order working papers) did not include the "$2.992M that had been streamed to Union's owner at the time that the NGEIR Decision was implemented in Union's 2008 Rates."[5]

20. At paragraph 10 of its Reply Argument, Union indicated that "base rates established subsequent to the NGEIR decision reflect the 79/21 split in base rates between utility and non-utility. Union proceeded to indicate that, "rates already include a credit to ratepayers of $11.254 million (Rate Order Working Papers, Schedule 14 to reflect the 79/21 split and the 90/10 sharing)" (Emphasis added.)

21. Board Staff discounts this reference and suggests that Union's Reply Argument was insufficiently clear because it did not provide the requisite "context". Union disagrees. Apart from the overtly obvious fact that this again repeats CME's initial position, it is based on an

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[3] Board Staff submissions, p. 4

[4] Board Staff Submission, p. 4

[5] CME Letter dated March 27, 2012, p. 6, para. A(t)

incomplete reference to Union's Reply. While referring to the above passage, Board Staff fails to advert to paragraph 8 of Union's Reply which, to the extent required, provides the necessary context. For convenience, the two paragraphs are set out below in their entirety:

> 8. At page 18 of the Decision, the Board began its discussion of the Short-term Storage account. The Board recognized the basis upon which Union had calculated that the credit balance in the Short-term Storage account was $0.657 million. The Board calculated this balance by comparing the actual 2010 net margin for Short-Term Storage Services of $16.753 million to the net margin approved by the Board of $15.829 million in the EB 2007-0606 Rate Order. The result is a net deferral credit of $0.924 million. The Board adjusted the net deferral margin to $0.730 million to reflect the 79% utility portion (EB-2005-0551), of which 90% or $0.657 million is shared with ratepayers.
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> . . .
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> **CME's position is inconsistent with existing rates**
>
> 10. CME's position is inconsistent with existing rates. This proceeding relates to the clearance of deferral accounts during the five-year incentive rate period. Base rates established subsequent to the NGEIR Decision reflect the 79/21 split in rate base between utility and non-utility. That is, rates already include a credit to ratepayers of $11.254 million (Rate Order Working Papers, Schedule 14) to reflect the 79/21 split and the 90/10 sharing. As Union indicated in its argument-in-chief, this allocation may and likely will change. (Emphasis added.)[6]

22. On any fair reading of these paragraphs, Union advised all parties and the Board that the manner in which the credit was arrived at compared the net margin to the Board approved forecast of $15.829 million, whereas the amount embedded in rates was $11.254 million.

23. Finally, Board Staff, argues that Union had a responsibility to highlight that there was a potential error in the calculation proposed by parties at the time of the first draft rate order. Board Staff cites to the same disclosure related cases as CME did. This argument is without merit.

24. First, Union does not accept that there was any error by the Board. It made the decision to change the credit to ratepayers while maintaining the basis on which base rates had been set.

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[6] EB-2011-0038, Reply Submission of Union Gas Limited, p. 3

It was open to the Board to reach that conclusion. Second, as discussed above, Union's submission did address the discrepancy from base rates would result from the Board agreeing to that calculation and, therefore, the premise of the argument is wrong. Third, this is not a disclosure case. Even if Union had not referred to Schedule 14 in its Reply (which it did), all of the documents now referred to by Board Staff (or, earlier, by CME) were available at the time. As extensively detailed in Union's April 5 letter, they had all been filed by Union in earlier proceedings, been the subject of interrogatories and reviewed by the Board through multiple proceedings. Finally, even if Union believed that Board Staff's calculation was wrong and Union's Reply did not address the discrepancy from base rates (both of which are denied), Union did not have the ascribed responsibility. On a motion to review, the proper question to ask is whether, objectively, the relevant facts were available to the Board, Board Staff and intervenors at the time the Board rendered its decision. Unquestionably they were.

E. THE REQUEST RESULTS IN RETROACTIVE RATEMAKING

25. Board Staff asserts that this issue does not arise because the Board has brought a motion under rule 43. But this misses the point that what in fact is being sought is an increase in the credit to ratepayers underpinning 2010 rates. The concern regarding retroactivity relates to the Board's order in EB-2009-0275, which is final. As Union explained in its April 5 letter, the Board has no power to vary rates retroactively.

F. CONCLUSION

26. Union respectfully requests that the Board dismiss the motion to review. There is no proper basis to vary the amount recorded as a credit in respect of net short term revenues reflected in the Final Rate Order.

May 18, 2012

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