August 24, 2012

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

Re: EB-2012-0206 – Motion to Review EB-2011-0038 Decision and Order

Please find attached a Notice of Motion for the above noted proceeding.

Yours truly,

[original signed by Angela Galick on behalf of]

Chris Ripley
Manager, Regulatory Applications

CC: EB-2012-0206 Intervenors
Crawford Smith (Torys)

EB-2012-0206

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

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 accuracy of the calculation of margin sharing related to Deferral Account 179-70 - Short-Term Storage and Other Balancing Services;

AND IN THE MATTER OF Rule 42 of the Rules of Practice and Procedure of the Ontario Energy Board.

NOTICE OF MOTION

Union Gas Limited ("Union") will make a motion to the Ontario Energy Board (the "OEB" or "Board") at its offices at 2300 Yonge Street, Toronto on a date and time to be fixed by the OEB.

The motion is for:

1. review and variance of the OEB's Decision and Order on the Board Motion dated July 18, 2012 in EB-2012-0206 (the "Decision") in which the OEB, proceeding on its own motion, reviewed and varied its EB-2011-0038 Decision and Rate Order (the "Rate Order Decision") as it related to the issue of calculating the amount of margin sharing in the Short-Term Storage Account (the "Motion Proceeding");

2. an Order exercising the Board's discretion to set aside the timeframe under Rule 42.03 of the OEB's *Rules of Practice and Procedure* ("*Rules*") for filing a motion for review and variance of an order or decision;

3. an Order that Union satisfies the "threshold test" in Rule 45.01; and

4. an Order varying the Board's calculation at page 10 of the Decision of the 2010 margin sharing amount for the Short-Term Storage Account as the actual adjusted net revenue of $15.078 million less the credit amount imbedded in rates (which the Board found was $11.254 million), as this finding:

   (a) is contrary to the methodology ordered by the Board in its Accounting Order for the Short-Term Storage Account (the "Accounting Order") and

   (b) has the effect of introducing a change to the incentive regulation framework that is adverse to Union in that it will require Union to accrue in 2012 an amount of approximately $9 million to reflect the adjustment for 2010, 2011 and 2012, thereby materially impacting Union's financial position, which is contrary to Union's reasonable expectations in participating in the incentive regulation framework and undermines the integrity of the incentive regulation framework.

The Grounds for the Motion Are:

Background

5. **The Short-Term Storage Account.** The margin associated with short-term storage services offered by Union is shared between Union and its ratepayers. The Short-Term Storage Account (Deferral Account 179-70) includes revenues from short-term peak storage, C1 off-peak storage, gas loans and other balancing services. The net margin available for sharing is determined by deducting the costs incurred to provide these services from gross revenues. As prescribed by the Accounting Order, the net margin is then compared to the Board-approved forecast of short-term revenues ($15.829 million) with any excess or under recovery shared with ratepayers. The Accounting Order

provides that Union is "To record, as a debit (credit) in Deferral Account No. 179-70 the difference between actual net revenues for Short-term Storage and Other Balancing Services including; C1 Off-Peak Storage, Gas Loans, Consumers' LBA, Supplemental Balancing Services, C1 Firm Peak Storage, C1 Firm Short-term deliverability and M12 Interruptible deliverability and the net revenue forecast for these services as approved by the Board for ratemaking purposes" (emphasis added).

6. The treatment and methodology for margin sharing from the Short-Term Storage Account prescribed by the Accounting Order has been in place for some time and was applied and referenced in a number of prior proceedings, including EB-2007-0606, EB-2009-0052, EB-2008-0220, EB-2010-0039, EB-2009-0275, and EB-2011-0038.

7. **2010 Deferral (EB-2011-0038).** EB-2011-0038 concerned 2010 deferral account balances. On January 20, 2012, the Board released its Decision with Reasons (the "Underlying Decision"). In the Underlying Decision, the Board directed Union to prepare a draft rate order reflecting the Board's findings. On February 3, 2012, Union provided its draft rate order.

8. **The Rate Order Decision.** The Board released the Rate Order Decision on February 29, 2012. In the Rate Order Decision the Board held that the Board's Underlying Decision effectively fixed 100 PJs as the utility asset.[1] Beginning at p. 4 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. At page 5, the Board found that the

[1] EB-2011-0038, Decision with Reasons released January 20, 2012.

ratepayer share of 2012 net short-term revenues should be $0.831 million. This finding was consistent with the Board-approved Accounting Order and Union's related accounting treatment. The Board held, "[t]he Board finds that the ratepayers' share of 2012 net short-term revenues should be $0.831 million." At page 6, the Board held as follows:

> The Board did not include the specific amount to be shared with ratepayers in its findings related to the Short-Term Storage Account, however, the Board has found as part of this Draft Rate Order process that the amount of $0.831 million is a clear outcome of its findings in the Decision and Order.

9. The Board then directed Union to file a revised draft rate order reflecting the Board's findings in the Rate Order Decision. The Board indicated that it would review the draft rate order to confirm that all necessary changes had been made and would issue a final rate order in due course.[2]

10. On March 2, 2012, Union submitted an updated draft rate order and supporting working papers. At Appendix C, Schedule 2 Updated Union provided an updated calculation of the balance in Deferral Account 179-70 arriving at a balance, as directed by the Board, of $0.832 million.[3]

11. On March 8, 2012, the Board issued the Rate Order. In its Rate Order, the Board indicated that it had determined that the revised rate order accurately reflected the Board's findings in the EB-2011-0038 proceeding.[4]

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[2] EB-2011-0038, Decision and Order on Draft Rate Order dated February 29, 2012, pp. 4-6

[3] EB-2011-0038, Updated Draft Rate Order, Appendix C, Schedule 2 Updated. The slight variation to $0.832 being caused by rounding.

[4] EB-2011-0038, Rate Order, p. 2

12. **CME challenges the Rate Order Decision**. Beginning on March 8, 2012, CME, through its counsel, began a campaign with Union, its counsel and Board Staff seeking the variation of the Rate Order Decision, which culminated with CME's letter to the Board Secretary dated March 27, 2012 (the "CME Letter"). In the CME Letter, CME raised an issue regarding the calculation of margin sharing in the Short-Term Storage Account. CME suggested that the correct amount to be credited to ratepayers should be $3.824 million (as opposed to the $0.831 million credit approved by the Board in the Rate Order Decision and Rate Order in accordance with the requirements of the approved Accounting Order). CME requested that the Board address this alleged error by making an adjustment to the margin sharing calculation under Rule 43.02 of the *Rules*. Union filed a letter responding to CME's letter on April 5, 2012. CME filed a subsequent letter on April 16, 2012, and Union filed a final letter on April 19, 2012.

13. **The Board brings a motion to review the Rate Order Decision.** The Board issued a Notice of Motion, Notice of Motion Hearing and Procedural Order No. 1 on May 2, 2012 ("Notice and Procedural Order No. 1"). In the Notice and Procedural Order No.1, the Board determined that the correction requested by CME in regards to the margin sharing calculation in the Short-Term Storage Account would not, if substantiated, be allowable under Rule 43.02 of the Rules. However, the Board noted that the issues that were raised with respect to the calculation of short-term storage margin sharing warranted further review by the Board. The Board determined that it would commence a review proceeding on its own motion, pursuant to Rule 43.01 of the Rules to review the Rate Order Decision as it related to the issue of calculating the amount of margin sharing in the Short-Term Storage Account (the "Motion Proceeding"). The Board assigned Board

File No. EB-2012-0206 to the Motion Proceeding. The Board adopted the intervenors in the EB-2011-0038 proceeding as intervenors in the Motion Proceeding.

14. In the Notice and Procedural Order No. 1, the Board noted that it had incorporated the four letters cited above (two from CME and two from Union) as submissions in the Motion Proceeding. The Board also set out a process for intervenors and Union to make additional submissions in the Motion Proceeding.

15. Union filed a letter on May 14, 2012 requesting that it be granted an extension until May, 23, 2012 to file its submissions in the Motion Proceeding, so that it could reply to all the submissions made by other parties.

16. The School Energy Coalition ("SEC") and CME filed letters in response to Union's request. Both parties argued that all interested parties to the EB-2012-0206 proceeding should be treated equally, as they can be considered respondents to the Motion Proceeding initiated by the Board, and should be granted the same opportunity to reply as Union.

17. The Board issued a letter on May 16, 2012 in which it determined that it would grant all parties an opportunity to reply to the submissions filed by other parties.

18. The Board received submissions in the Motion Proceeding from Board staff, the Consumer Council of Canada ("CCC"), the City of Kitchener ("Kitchener"), CME, the Federation of Rental-housing Providers of Ontario ("FRPO"), the London Property Management Association ("LPMA"), SEC, and Union.

19. Board staff as well as CCC, Kitchener, CME, FRPO, LPMA and SEC[5] (the "Parties") all submitted that the credit amount to be shared with ratepayers ($0.831 million) related to margin sharing in the Short-Term Storage Account, as set out above, was incorrect, notwithstanding that that credit amount was calculated as required by, and in full compliance with, the Accounting Order. Board staff and the Parties argued that the clear intent of the Board's findings in the Underlying Decision was that all net revenues (minus a 10% incentive payment) in the Short-Term Storage Account should accrue to the benefit of ratepayers[6]. Board staff and the Parties argued that the correct amount to be shared with ratepayers related to margin sharing in the Short-Term Storage Account is $3.824 million[7].

20. CME and Board staff noted that in the EB-2011-0038 proceeding the 2010 margin sharing amount in the Short-Term Storage Account was calculated on the basis that $15.829 million was the short-term storage margin already embedded in rates.[8] In its March 27, 2012 submission CME submitted that the amount actually embedded in rates was *revised as a result of* the NGEIR Decision. In 2007, the credit amount embedded in rates was $14.246 million being 90% of the Board-approved forecast of $15.829 million. In 2008, after the issuance of the NGEIR Decision, the credit amount was reduced by

[5] Note that CCC, FRPO, and SEC all filed submissions supporting the positions set out by Board staff and CME in their respective submissions.

[6] See EB-2012-0206, Board Staff Submission, May 14, 2012 at p.3 ("Board Staff Submission"); EB-2012-206, CME Submission, March 27, 2012 at p.7 ("CME Submission #1"); EB-2012-0206, Kitchener Submission, May 14, 2012 at p.1 (Kitchener Submission); and EB-2012-0206, LPMA Submission, May 18, 2012 at p.3 ("LPMA Submission").

[7] See Board Staff Submission at p.4; CME Submission at p1; Kitchener Submission at p.2; and LPMA Submission at p.4.

[8] See CME Submission #1 at p.3; and Board Staff Submission at p.4.

21% (which reflects the 79% / 21%, utility / non-utility split[9]) to $11.254 million which continued to be the amount embedded in rates in 2010[10].

21. Board staff and the Parties argued that the Board's Underlying Decision, in which it found that 100 PJ is the utility storage asset and that Union can track what storage assets are being used for each type of storage transaction,[11] eliminated the need for a 79% / 21% split for the margin sharing calculation related to the Short-Term Storage Account.[12]

22. Board staff and the Parties argued that the Board's intent in the Underlying Decision was to create a situation where all net revenues (minus a 10% incentive payment) accrue to the benefit of ratepayers and therefore the margin sharing calculation for the Short-Term Storage Account should have been done as follows:

2010 Actual Net Revenue	$16,753,000
Less: 10% Incentive Payment	$1,675,000
Actual Adjusted Net Revenue	$15,078,000
Less: Short-Term Margin in Rates	$11,254,000
Deferral Account Balance for Disposition	**$3,824,000**[13]

23. Board staff and the Parties submitted that when the calculation is made using the $11.254 million amount that is embedded in rates, the ratepayer credit increases from the Board approved amount of $0.831 million to $3.824 million.

[9] See EB-2005-0551, November 7, 2006 NGEIR Decision with Reasons at pp. 101-102.

[10] See CME Submission #1 at p.3; and Board Staff Submission at p.4.

[11] See EB-2011-0038, Decision and Order at p. 16.

[12] See Board Staff Submission at p.4; CME Submission #1 at p.7; and LPMA Submission at p.3.

[13] See Kitchener Submission at p.2; and note that CME, Board staff and LPMA all provided calculations that result in the same revised ratepayer credit amount of $3.824 million related to margin sharing in the Short-Term Storage Account.

24. Board staff and the Parties submitted that the Board should direct Union to dispose of an incremental credit balance of $2.992 million ($3.824 million, the corrected ratepayer share of short-term storage margins minus $0.831 million, the amount previously approved in the Board's rate order and disposed of by Union) to ratepayers.[14]

25. Board staff submitted that this incremental credit amount should be disposed as part of Union's first QRAM proceeding that occurs after the issuance of the Final Decision and Order in the review proceeding.[15]

26. Union submitted that there is no proper basis to vary the Rate Order (to change the ratepayer credit amount) as it reflects the Board's own assessment of the appropriate credit to ratepayers. Union noted that the Board's findings were unequivocal; the Board expressly found that the correct amount to be credited to ratepayers was $0.831 million, the amount calculated in accordance with the Board-approved Accounting Order . Union submitted that the Board further confirmed this understanding through its determination in the Rate Order that the updated Draft Rate Order filed by Union accurately reflected the Board's findings in the Underlying Decision.

27. Union submitted that the Board was fully aware, when rendering its decision, that the ratepayer credit amount of $0.831 million did not include any purported change in the share of forecast short-term margins (in the amount of $2.992 million) which had

[14] See Board Staff Submission at p.5; CME Submission #1 at p.11; Kitchener Submission at p.2; and LPMA Submission at pp. 3-4.

[15] See Board Staff Submission at p.5.

purportedly occurred subsequent to the NGEIR Decision (and was carried forward in each subsequent proceeding).[16]

28. Union noted that the EB-2011-0038 proceeding concerned 2010 deferral account balances and that it was not seeking to re-set base rates. Union submitted that the methodology used to calculate the amount available for sharing with ratepayers in the Short-Term Storage Account concerned the application of net margin to the Board approved forecast of $15.829 million. This methodology was required by the Board-approved Accounting Order. Union noted that this is the same methodology used to calculate margin sharing in a number of previous proceedings.[17]

29. In response to Union's assertion that $15.829 million is the Board-approved net revenue forecast to be used in the calculation of margin sharing, LPMA submitted that there is no fixed net revenue forecast included in the deferral account.[18]

30. Union submitted that changing the balance at this time is retroactive ratemaking and the Board does not have the authority to retroactively change approved rates. Union submitted that once the Board makes rates final, they are, by definition, just and reasonable in accordance with section 36(2). Union argued that rates cannot be retrospectively reduced to a level which must, by definition, be less than just and reasonable. Union submitted that the relief sought by the Parties amounts to clear retroactive ratemaking[19].

[16] EB-2012-0206, Union Submission, May 18, 2012 at pp. 2-3 ("Union Submission #3) at p. 4.
[17] Ibid.
[18] See LPMA Submission at p. 3.
[19] See Union Submission #1 at p. 10-11.

31. In regards to Union's argument that changing the ratepayer credit amount constitutes retroactive ratemaking, Board staff submitted that the current motion initiated by the Board is a legitimate and legally permissible review of a Board decision and that as such, the rule against retroactive ratemaking is neither invoked, nor offended.

32. In particular, Board staff noted that the Board's power of review on its own motion is provided in section 43.01 of its Rules of Practice and Procedure. That power comes ultimately from section 21.2 of the *Statutory Powers Procedure Act* which in addition to empowering the Board to review all or part of its own decision or order and to either confirm, vary, suspend or cancel such decision and order, indicates at subsection 21.2(2) that such review "shall take place within a reasonable time after the decision or order is made".

33. Board staff argued that the Motion Proceeding is properly constituted, that it was brought within a reasonable time and that therefore, the Board is empowered to vary its Decision and Order to address evidentiary discrepancies and to vary the Rate Order issued on March 8, 2012.[20]

34. Union submitted that a Motion to Review proceeding is not an opportunity to reargue the case, nor is it an appeal.[21]

35. Union stated that the grounds for a Motion to Review are informed by Rule 44 of the Rules and are limited. Union noted that the grounds are primarily fact driven. As the Board held in *Grey Highlands*:

[20] See Board Staff Submission at p.7.
[21] See Union Submission #3 at p. 2.

> 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.[22]

36. Union stated that, in this case, 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 could not have been discovered by reasonable diligence. Union submitted that, 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.[23]

37. CME submitted that Union's argument fails to distinguish between the Board's powers under Rule 43.01 of the Rules when it initiates a review of an Order or Decision on its own Motion, and a Motion for Review initiated by a party to a proceeding pursuant to Rule 44.01 of the Rules. CME stated that there is no language in Rule 43.01 that constrains the Board's power to review to factors listed in Rule 44.01. The language under Rule 43.01 is very broad. All that is required is that the Board formulate "… at any time … an intention to review all or part of any order or decision …" and it "may

[22] See EB-2011-0053, April 21, 2011 Decision and Order on Motion to Review at p.3.
[23] See Union Submission #3 at p.2-3.

confirm, vary, suspend or cancel the Order or Decision by serving a letter on all parties to the proceeding."[24]

38. CME submitted that Rule 43.01 of the Rules authorizes the Board to vary the February 29, 2012 Decision and Order and the subsequent Rate Order to reflect what it intended when it rendered its Decision.[25]

39. In response to Board staff's assertion that the issue of retroactive ratemaking does not arise because the Board has brought a motion under Rule 43, Union submitted that 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 was the basis for Union's approved five-year incentive rate framework and which is final.[26]

40. CME submitted that what is being sought is not an increase in the credit to ratepayers underpinning 2010 in-franchise rates. CME submitted that the $11.254 million credit embedded in those rates remains unchanged. CME noted that, after deducting the 10% incentive payment payable to Union's shareholder, what is being sought is that all 2010 net revenues in excess of the $11.254 million credit embedded in 2010 rates be paid to ratepayers in order to properly implement the intent of the Board's Decision in EB-2011-0038.[27]

[24] See Ontario Energy Board, Rules of Practice and Procedure, Revised January 9, 2012 at section 43.01.
[25] See EB-2012-0206, CME Submission, May 30, 2012 at p. 1 ("CME Submission #4").
[26] See Union Submission #3 at p.7.
[27] See CME Submission #4 at p.2.

The Decision

41. The Board issued the Decision on July 18, 2012. The Board found that the correct amount to be credited to ratepayers related to margin sharing in the Short-Term Storage Account is $3.824 million. This holding was premised on an incorrect factual determination described below.

42. The Board held that the Board's intent in the Underlying Decision was that all net revenues (minus a 10% incentive payment) in the Short-Term Storage Account should accrue the benefit of ratepayers. The Board substantially adopted the submissions of CME and found on p. 10 that:

> The Board made an error when it stated that $0.831 million is the amount that should be shared with ratepayers. The Board is of the view that the $0.831 million amount does not flow correctly from the intent of the Board's Decision. The Board calculated the 2010 margin sharing amount for the Short-Term Storage Account on the basis that $15.829 million was the short-term storage margin already embedded in rates. This is an error because in 2008, after the issuance of the NGEIR Decision, the credit amount embedded in rates was changed to $11.254 million which continued to be the amount embedded in rates in 2010. Using $11.254 million as the amount embedded in rates, the correct ratepayer share that flows from the intent of the Board's Decision is $3.824 million. Increasing the ratepayer credit to $3.824 million ensures that ratepayers receive 90% of the net revenues recorded in the Short-Term Storage Account. (Emphasis added.)

43. The Board also found that it had grounds to hear the Motion to Review under Rule 43.01 and noted that there is no language in Rule 43.01 which limits the rationale for initiating a Motion to Review on the Board's own motion. The Board found that in this case, CME raised a potential issue regarding the calculation of margin sharing in the Short-Term Storage Account by filing a letter in the EB-2011-0038 proceeding. The Board reviewed that letter (and the subsequent letters filed by Union and CME) and determined that there

could possibly be an error in its EB-2011-0038 Decision and related Rate Order. The Board determined that it would review this potential issue and initiated a Motion to Review proceeding. The Board offered all intervenors in the EB-2011-0038 proceeding and Union the opportunity to provide argument on this issue. The Board found that the Motion Proceeding is properly constituted, and that as such the Board is empowered to vary its Rate Order Decision and vary the Rate Order to change the ratepayer credit amount related to margin sharing in the Short-Term Storage Account.

44. The Board directed Union to dispose of an incremental credit balance of $2.992 million (plus any applicable interest) to ratepayers as part of Union's October 2012 QRAM proceeding.

The Variation sought by Union

45. Union seeks an Order varying the Board's finding at page 10 of the Decision that the 2010 margin sharing amount for the Short-Term Storage Account is the actual adjusted net revenue of $15.078 million less the credit amount imbedded in rates (which the Board found was $11.254 million) (the "Calculation Error"). The Calculation Error is itself an error because it is contrary to the methodology ordered by the Board in the Accounting Order for the Short-Term Storage Account. The Accounting Order provides that Union is "To record, as a debit (credit) in Deferral Account No. 179-70 the difference between actual net revenues for Short-term Storage and Other Balancing Services including; C1 Off-Peak Storage, Gas Loans, Consumers' LBA, Supplemental Balancing Services, C1 Firm Peak Storage, C1 Firm Short-term deliverability and M12 Interruptible deliverability and the net revenue forecast for these services as approved by the Board for ratemaking purposes" (emphasis added).

46. On the basis of the Calculation Error the Board, in effect, departed from the terms of the incentive regulation framework. This departure from the Accounting Order effected a change to the incentive regulation framework that was contrary to Union's reasonable expectations in participating in the incentive regulation framework and contrary to the Board-approved Accounting Order. Retroactive changes to the incentive regulation framework, particularly one that is contrary to an outstanding and mandatory Accounting Order, have the effect of undermining the incentive regulation framework as a whole. To effectively change the Accounting Order and the associated sharing methodology is contrary to sound regulatory policy and contrary to Union's approved incentive regulation framework.

47. As the Natural Gas Forum Report envisioned, the purpose of incentive regulation is to "create an environment that is conducive to investment, to the benefit of customers and shareholders".[28] Over the course of a long term incentive regulation framework, many things can and do change. However, the expectation of all parties is that the framework itself will remain constant. The impact of the Calculation Error undermines this purpose.

Varying the timeframe for filing the motion

48. Union was unable to submit this Notice of Motion within the time prescribed by Rule 42.03, and requests that the Board accept the Notice of Motion for filing and for review. The Board has the discretion to set aside the timeframe for filing a motion for review and variance of an order or decision under Rule 42.03. During the period following the Decision Union has been in the midst of a major rate hearing and engaging in that process

[28] Natural Gas Regulation in Ontario: A Renewed Policy Framework , p. 3.

has taken up all of Union's regulatory capacity. As a result, this is an appropriate case for the Board to exercise its discretion to allow Union to file this Notice of Motion.

Union satisfies the "threshold test" in Rule 45.01

49. The Calculation Error is contrary to the Accounting Order and raises material questions as to the correctness of the Decision. Once the Calculation Error is corrected, the Board's ultimate decision will be materially different than the Decision. As such, Union satisfies the threshold test in Rule 45.01 of the *Rules*.

August 24, 2012

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