EB-2012-0087

THE ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Union Gas Limited for an Order or Orders amending or varying the rate or rates charged to customers as of October 1, 2012.

WRITTEN SUBMISSIONS

OF THE CONSUMERS COUNCIL OF CANADA

ON THE PRELIMINARY ISSUE

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I Introduction and Overview

1. In Procedural Order No. 3, the Board framed the following Preliminary Issue:

> "Has Union treated the upstream transportation optimization revenues appropriately in 2011 in the context of Union's existing IRM framework?"

2. These are the submissions of the Consumers Council of Canada ("CCC") on that Preliminary Issue.

3. The focus of these submissions will be on Union's treatment of revenues derived from the use of the FT RAM service, described below.

4. Union's treatment of its upstream transportation arrangements, and of the revenue derived therefrom, were considered extensively in Union's 2013 rebasing application, EB-2011-0210. For these submissions, CCC will rely on the evidence and arguments in that application. In addition, we will be referring to the Technical Conference transcript in this proceeding, as well as Union's Argument-in-Chief ("AIC").

5. The question of whether Union has treated its upstream transportation optimization revenues appropriately in 2011 turns, first, on the characterization of the arrangements giving rise to those revenues. In particular, it turns on the question of whether those arrangements can be characterized as transactional services ("TS") or as gas supply arrangements. If they can be characterized as TS, as Union argues, then the revenue derived from them is to be shared by Union's ratepayers and its shareholder based on the Earnings Sharing Mechanism ("ESM") that forms part of Union's IRM framework. If, however, those arrangements are properly characterized as part of gas supply arrangements, as the CCC submits they are, then the revenue derived therefrom is a "pass-through" item to be credited to Union's ratepayers.

6. Having characterized Union's upstream transportation arrangements, the question then is whether, or to what extent, Union's right to "optimize" revenues from those arrangements is constrained by the terms of its IRM framework. Consideration of that question involves, among other things, an analysis of the settlement agreements on which that framework is based.

7. The allocation of revenues derived from some transportation arrangements, pursuant to Union's IRM framework, has been considered by the Ontario Energy Board ("Board") in Union's rate applications under its IRM framework. Accordingly, there is also a question of whether the Board has considered, and approved, directly or by necessary implication, Union's characterization of its upstream transportation arrangements using the FT RAM service, and the allocation of revenues derived therefrom.

II The Characterization of Union's Upstream Transportation Arrangements

8. Union's obligation is to ensure that there is sufficient gas supply to meet the needs of its in-franchise customers. Arranging for sufficient gas supply requires arranging for sufficient transportation to ensure that the required gas gets to its customers. Transportation is, therefore, an integral component of Union's gas supply arrangements. Union's ratepayers pay for the gas supply arrangements. In that sense, the transportation component of the gas supply is a ratepayer asset.

9. The costs of gas supply are a "Y" factor under Union's IRM framework. That means that the costs are a pass-through item for Union's ratepayers.

10. However, the Board has long since recognized that, in arranging the transportation component of gas supply, there may be, from time to time, circumstances where there is temporarily a surplus of transportation capacity. Those circumstances would not be planned, and would, for example, be attributable to temporary changes in market demand or weather. In those circumstances, the Board has allowed Union to enter into transactions to earn revenue from the surplus. Those arrangements are called TS. The revenue from TS was to be shared by Union with its ratepayers, according to a formula that has been adjusted, from time to time, by the Board.

11. CCC submits that the essential characteristic of TS is that they are arrangements made to generate revenue from an unplanned, temporary surplus transportation capacity that Union may have, from time to time, as part of its gas supply arrangements. TS are not an integral part of Union's gas supply arrangements.

12. In or around 2004, TransCanada Pipelines Limited ("TCPL") introduced a service known by the acronym FT RAM. The details of how FT RAM operates were described, at length, in the record in EB-2011-0210, and in Union's AIC in this case. The CCC will not repeat those details herein. For purposes of these submissions, what FT RAM allowed Union to do was to manipulate its gas supply arrangements in order to increase, very substantially, the revenue it could earn from those arrangements.

13. Union's use of the FT RAM service was not necessary in order to supply gas to its ratepayers. It was solely a service that allowed Union to alter its gas supply arrangements in order to increase the revenues available from the gas supply arrangements. Union, in the Technical Conference in this proceeding, described the FT RAM arrangements, as follows:

> MR. ISHERWOOD: Right. So to go back, as I said earlier on, as I said back in the rebasing case, FT RAM, it gives you the flexibility and the tools, if you want, to be able to leave the pipe empty and flow in a different path.
>
> If it wasn't for FT RAM, this same transaction, it would flow Empress to EDA, and we would go back on STS injections back into Dawn, and that is how the gas supply plan is set up.
>
> FT RAM creates the opportunity where you can leave the pipe empty and flow it to Dawn, and that creates the other opportunity, which is the exchange. **(Tr., Technical Conference, p. 92)**

14. As the quote in the preceding paragraph indicates, the FT RAM service allows Union to artificially manipulate the transportation arrangements- "leave the pipe empty and flow in a different path". Union could, and did, use the FT RAM service to create Unabsorbed Demand Charges. Whereas TS arises in unplanned circumstances, Union used the FT RAM service as a tool to plan its transportation services. FT RAM is, thus, in its essence, a part of Union's gas supply planning.

15. Union has chosen to characterize the FT RAM arrangements as an "exchange". Doing so allows it to describe the FT RAM arrangements as TS. Trying to describe the FT RAM arrangements as an "exchange" is inaccurate. To begin with, FT RAM arrangements require two steps. Union, in its AIC, quotes its witness, Mr. Isherwood, as describing the FT RAM arrangements as follows:

> "Leaving the pipe empty is not an exchange. Buying the -- or using the IT service on TransCanada from Empress to the NDA is not an exchange. But the exchange is then the part where we actually move a third party's gas from somewhere on Union's system to somewhere off our system, or likewise, off our system onto our system."…
>
> "The only reason we're doing that is because of FT RAM. If we didn't have FT RAM, there would be no economic incentive to do that transaction."
>
> **(Union AIC, p. 44)**

16. Characterizing the FT RAM arrangement as TS distorts the underlying reality that the FT RAM arrangement is an artificial manipulation of the gas supply arrangements undertaken solely for the purpose of earning additional revenue. That makes it, CCC submits, something fundamentally different than a TS. The fact that there may be an "exchange" component to the arrangement does not change its essential nature. It is a manipulation of basic gas supply arrangements, neither more nor less.

17. CCC submits that the evidence in the rebasing case, and in this proceeding, leads to the conclusion that the revenue earned from the FT RAM arrangements is revenue earned not from TS but from gas supply arrangements. It is, therefore, properly characterized as a Y factor, under the IRM framework, which makes it a pass-through item to be credited to Union's ratepayers.

III Union's IRM Framework

18. The question, then, is whether the terms of Union's IRM framework permit Union to characterize its upstream transportation arrangements, using the FT RAM service, as TS rather than as gas supply arrangements. For the reasons set out below, CCC submits that the answer is "no".

19. Union's IRM framework is the product of, among other things, two settlement agreements made with ratepayer groups. The first of those settlement agreements retained a number of deferral accounts. One of those deferral accounts was to record the revenue earned from TS, revenue which was to be shared between Union and its ratepayers according to a prescribed formula. The second of the settlement agreements eliminated the deferral accounts.

As a result, Union was entitled to keep whatever revenue it earned from TS, in return for a more generous earnings sharing formula.

20. However, the IRM framework resulting from the two settlement agreements retained gas supply costs as a pass-through item. As noted above, those gas supply costs included transportation. Accordingly, and notwithstanding the settlement agreements, Union is still required to characterize the transportation arrangements made, using the FT RAM service, as exchanges and not as part of gas supply arrangements. Hence Union's strenuous efforts, in its evidence and in its AIC, to characterize the FT RAM arrangements as TS.

21. Union's IRM framework does not permit Union the freedom to characterize its gas supply arrangements in any way that it wants, for purposes of allocating the revenue from those arrangements in a way more beneficial to its shareholder.

22. Union argues that the ratepayers were aware of how it was structuring its gas supply arrangements, in order to earn additional revenue, and so must be taken to have consented to the characterization of those arrangements as TS. CCC submits that that argument would be valid only if Union could demonstrate that it had disclosed the arrangements it was making, using the FT RAM service, so that ratepayer representatives could be said to have provided an informed consent to the characterization of those arrangements as TS. CCC submits that Union cannot do so.

23. In support of its argument on this point, Union relies on the following:

1. The fact that the existence of the FT RAM service was known to at least some ratepayer representatives; (**AIC, p. 30**)

2. The fact that the existence of FT RAM was referred to in an interrogatory response in EB-2009-0101 (**AIC, p. 47**);

3. The fact that ratepayer representatives were aware that Union was using arrangements, under other TCPL services, that were similar to the arrangements made under FT RAM. (**AIC, pp. 45 and 46**)

24. CCC submits that ratepayer representatives could only be said to have provided an informed consent to the characterization of Union's use of the FT RAM service as TS if Union's use of the FT RAM service, to manipulate the transportation arrangements, had been described to those ratepayer representatives. That description did not occur until the 2013 rebasing case. Accordingly, the CCC submits that ratepayer representatives cannot be said to have consented to Union's characterization of its use of the FT RAM service as TS. It is not knowledge of the existence of the FT RAM service that is relevant; it is knowledge of how Union used the service that is relevant.

25. However, whether ratepayer representatives provided an informed consent to Union's characterization of its use of the FT RAM service as TS is not determinative. The relevant consideration is whether the Board, in approving the settlement agreements, and therefore Union's IRM framework, or in the subsequent rate applications, can be said to have approved, directly or by necessary implication, of Union's characterization of its use of the FT RAM service as TS.

26. Union relies on the Board's consideration of its use of TCPL's DOS MN service, in EB-2008-0220. Union argues that the arrangements under DOS MN were analogous to those under FT RAM and so the Board must be taken, by necessary implication, to have approved FT RAM arrangements as TS (**AIC, pp. 48-49**).

27. The CCC submits that the Board could not be taken to have provided an informed approval without having had a detailed description, not of some analogous service, but of how the FT RAM service was being used. Again, that detailed description was not provided until the 2013 rebasing application.

28. The existence of the IRM framework provides the Board with a short form way of exercising its jurisdiction under section 36 of the *Ontario Energy Board Act* to approve just and reasonable rates. It does not, however, dislodge the obligation of the Board to ensure that all of the components of the IRM framework have been properly characterized and the revenues derived from the operation of those components properly allocated. To do that, the Board must have sufficient information on which to exercise its discretion.

29. CCC submits that, prior to the 2013 rebasing case, the Board did not have sufficient information about how Union was using the FT RAM service to structure its transportation arrangements, to allow Union to say that the Board had approved the characterization of those arrangements as TS and, therefore, approved of the allocation of revenue derived from those arrangements.

30. Revenues earned from the use of FT RAM are significant, in the order of approximately $22 million in 2011 alone. The proper allocation of those revenues goes to the heart of the basic fairness of the IRM regime. CCC submits that the Board should not, as Union asks it to do, to rely on approvals by analogy. Approvals should be based on a full and transparent description of what the Board is being asked to approve.

31. Union argues that "reclassifying the revenues as a gas cost reduction…would be inconsistent with the past treatment by the Board and would effectively rewrite the terms of the IRM framework agreed to by the parties and approved by the Board". (**AIC, p. 4**)

32. The CCC strongly disagrees. The Board has never considered, let alone treated, the revenues generated by Union through the use of the FT RAM service.

33. The terms of the IRM framework, agreed to by the parties and approved by the Board, require Union to treat, as a pass-through item, gas supply, including transportation, costs. The IRM framework does not give Union carte blanche to characterize, in any way it chooses, its transportation arrangements as TS. That remains the prerogative, and indeed the statutory obligation, of the Board in each application. It would be entirely consistent with the terms of Union's IRM framework were the Board, in this proceeding, to characterize the revenues derived from Union's use of the FT RAM service as gas supply, and not as TS.

34. CCC submits that it is open to the Board to find, as the CCC submits it should so find, that the revenues derived from the use of the FT RAM arrangements are not TS revenues but are gas supply revenues that should be credited to the ratepayers.

IV Conclusion

35. CCC submits that Union's upstream transportation arrangements, using the FT RAM service, should not be characterized as TS. CCC submits that those arrangements should be characterized as gas supply arrangements, and the revenue derived therefrom considered a pass-through item, for the credit of ratepayers.

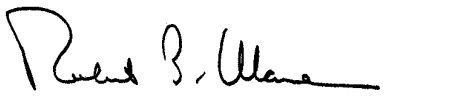
36. CCC submits, therefore, that Union has not treated its upstream transportation optimization revenues appropriately in 2011 in the context of Union's existing IRM framework.

37. CCC submits, therefore, that Union should account for the revenues earned, in 2011, from its use of the FT RAM service, and that those revenues should be credited to ratepayers.

V Costs

38. CCC asks that it be awarded 100% of its reasonably-incurred costs.

All of which is respectfully submitted



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