EB-2013-0073

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 Achiel Kimpe under section 38(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B) for an Order of the Board determining the quantum of compensation Mr. Kimpe is entitled to receive from Union Gas Limited.

AND IN THE MATTER OF a Motion to Review and Vary by Achiel Kimpe pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review of the Board's Decision and Order in proceeding EB-2012-0314.

SUBMISSIONS OF UNION GAS LIMITED
May 29, 2013

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(c) Decision with Reasons on motion to review in proceedings EB-2006-0322, EB-2006-0338 and EB-2006-0340

(d) O. Reg. 263/02

EB-2013-0073

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 Achiel Kimpe under section 38(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B) for an Order of the Board determining the quantum of compensation Mr. Kimpe is entitled to receive from Union Gas Limited.

AND IN THE MATTER OF a Motion to Review and Vary by Achiel Kimpe pursuant to the Ontario Energy Board's *Rules of Practice and Procedure* for a review of the Board's Decision and Order in proceeding EB-2012-0314.

SUBMISSIONS OF UNION GAS LIMITED

May 29, 2013

I. Overview

1. The Applicant moves for review of the Board's Decision and Order in proceeding EB-2012-0314 (the "Decision"). In the Decision, the Board held that the Applicant is not entitled to compensation from Union Gas Limited in relation to residual natural gas in the portion of the Bentpath Storage Pool located on his property that has a pressure below 50 pounds per square inch absolute ("psia"). In reaching the Decision, the Board concluded that it is not generally economically feasible to recover gas at pressures below 50 psia, and that compensation to landowners for residual gas below this pressure is therefore not reasonable.[1]

2. The Decision confirmed the Board's earlier decision in the 1981-82 Bentpath Pool proceeding denying the Applicant's request for compensation for residual gas at

[1] Decision and Order dated February 21, 2013 (EB-2012-0314) ("Decision"), Appendix A, p. 7

pressures below 50 psia.[2] As noted by the Board, the Decision is also consistent with the Board's decisions in other cases, such as the Decision and Order on compensation to the Lambton Country Storage Association landowners.[3]

3. This motion is without foundation and should be dismissed by the Board. First, the Decision is not subject to review. There is no new evidence or change in circumstances that would warrant a review of the Decision, and the Board made no factual error. Second, even if the Decision is reviewable, the Board should decline to do so in this case.

II. The Decision is Not Subject to Review

4. The Applicant's motion should be rejected at the threshold stage, because the Applicant has failed to meet the applicable test for reviewability.

5. As the Board noted in the Notice of Motion to Review and Vary and Procedural Order No. 1, rule 44.01(a) of the Board's *Rules of Practice and Procedure* sets out the grounds upon which a motion to review and vary may be brought. These include:

   I. Error in fact;
   II. Change in circumstances;
   III. New facts that have arisen;
   IV. Facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

6. None of these grounds are present in this case. First, despite the Applicant's assertion that all four points were addressed in his letter of March 11, 2013 requesting a review, the Applicant has not presented any evidence of a change in circumstances or of new relevant facts that have arisen since the Decision was rendered on February 21, 2013.

7. Second, all of the evidence to which the Applicant refers in his letter was either presented to the Board in proceeding EB-2012-0314, or was available to the Applicant. An excerpt of the report submitted by Union and Enbridge Consumers Gas to the Ministry of Natural Resources was submitted to the Board by the Applicant. The Applicant's Petroleum and

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[2] Reasons for Decision dated July 16, 1982 in proceeding E.B.O. 64(1) & (2), Exhibit 3 to Union's pre-filed evidence in proceeding EB-2012-0314

[3] Decision and Order dated March 24, 2004 in proceeding RP-2000-0005, Exhibit 4 to Union's pre-filed evidence

Natural Gas Lease and the Crozier report were submitted with Union's pre-filed evidence.[4] With the exception of the Brittain report, (which clearly could have been submitted by the Applicant) all of the documents to which the Applicant refers in his request were before the Board when it made the Decision.

8. Third, the Board has made no error in fact (material or otherwise) that would justify a review or variance of the Decision. The Applicant's complaints amount in substance to a re-argument of the factual issue as to whether recovery of residual gas at pressures below 50 psia is economically feasible. The Board made no error of fact in this regard; rather, it made a finding of fact with which the Applicant disagrees. That is not a basis on which the Board should review the Decision.

9. The Board and the Divisional Court have stated very clearly that a motion for review is not an opportunity to re-argue the case and should only be granted in very limited circumstances. For example, in *Corporation of the Municipality of Grey Highlands v. Plateau Wind Inc.*, the Divisional Court dismissed the Municipality's appeal from the Board's refusal to review a decision under rule 44.01(a). Lederman J. agreed with the Board that the request should be rejected because it identified no error of fact and simply re-argued legal issues that had already been argued in the original hearing.[5]

10. Similarly, in the NGEIR Review Decision, the Board held that, to be reviewable, "there must be an identifiable error in the decision" and "a review is not an opportunity for a party to reargue the case." It stated:

> In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.
>
> The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and

[4] Exhibits 7 and 2 of Union's pre-filed evidence, respectively

[5] *Corporation of the Municipality of Grey Highlands v. Plateau Wind Inc.*, 2012 ONSC 1001 at para. 7 (Div. Ct.), Appendix B

> that if the error is corrected, the reviewing panel would change the outcome of the decision.[6]

11. In the Decision, the Board found that recovery of residual gas at pressures below 50 psia is not generally economically feasible, and that compensation is therefore unwarranted. There was ample evidence before the Board which supported that finding, including the evidence set out on pages 5 to 8 of Union's pre-filed evidence (referenced in the Decision). The Board made no error of fact in this regard.

12. Union also wishes to emphasize that this is the Applicant's third attempt to obtain compensation for residual gas at pressures below 50 psia. He first requested, and was denied, such compensation in the 1981-82 Bentpath compensation hearing. He did not seek review of or appeal that decision. This proceeding was the Applicant's second direct attempt to seek a different decision from the Board. Having been unsuccessful for a second time, the Applicant now seeks review of the Decision. In addition, the issue of compensation for residual gas was brought forward in the RP-2000-0005 proceeding, in which the applicant was granted standing. In that proceeding, the Board again accepted that a cut-off of 50 psia for residual gas compensation was just and equitable. In Union's submission, in the absence of a demonstrated change in circumstances, the Board should be reluctant to allow the Applicant to consume the Board's resources by consistently requesting that it reconsider the same issue.

13. For these reasons, the Applicant's motion to review and vary the Decision should be rejected at the threshold stage.

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[6] Decision with Reasons on motion to review in proceedings EB-2006-0322, EB-2006-0338 and EB-2006-0340, Appendix C, p. 18

III. The Decision Should Not be Varied

14. In any event, even if the Decision is subject to review, there is no basis upon which the Board should vary it.

15. First, for the reasons set out in Union's pre-filed evidence, and as found by the Board, recovery of residual gas at pressures below 50 psia is not economically feasible and should therefore not give rise to compensation.

16. In support of his submission that residual gas below 50 psia has economic value, the Applicant points to a report submitted by Union and Enbridge Consumers Gas to the Ministry of Natural Resources relating to development of natural gas storage pools on Crown lands. As set out in Union's pre-filed evidence, in the report Union and Enbridge confirmed that royalty fees do not exist within the natural gas storage industry in Ontario or elsewhere in North America and expressed the position that cost structures payable to the Crown for storage should be consistent with those existing in the competitive marketplace. The report has no relevance to the Applicant's claim for compensation.[7] Further, contrary to the Applicant's assertion, Union and Enbridge submitted that residual gas should only be compensated for on the remaining *producible* gas.[8] This is consistent with compensation for residual gas at pressures above 50 psia.

17. The Applicant also asserts that gas in the Jacob Pool has been produced at pressures below 50 psia. As set out in Union's pre-filed evidence, while there may be some individual wells in that Pool below 50 psia, it is Union's understanding that the average pressure in the Pool is above 50 psia.[9] The Board referenced this evidence in the Decision.[10]

18. The Applicant further cites the Brittain report submitted to the Board in the original 1982 Bentpath compensation hearing. A number of different and diverse options and opinions with respect to landowner compensation were presented in that hearing. The Board

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[7] Union's pre-filed evidence, p. 8

[8] Report of Union and Enbridge to the Ministry of Natural Resources, Attachment to Mr. Kimpe's application in proceeding EB-2012-0314, p. 1 of the attachment

[9] Union's pre-filed evidence, p. 6

[10] Decision, Appendix A, p. 6

considered all of the options in reaching its decision, and it determined that residual gas should only be compensated for at pressures above 50 psia. There is no reason for the Board to revisit that decision now.

19. Second, the Applicant appears to challenge the principle set out in the Crozier report and Board decisions that landowners should only receive compensation for gas that is commercially recoverable.[11] In Union's submission, this principle remains sound and there is no reason for the Board to interfere with it.

20. Third, the Applicant references O. Reg. 263/02, a regulation made under the *Mining Act*. That regulation governs payments to the Crown for gas storage located on Crown lands. There is nothing in the regulation that requires payment for residual gas at all, let alone payment for residual gas below commercially recoverable pressures. In any event, the regulation does not apply to compensation to private landowners for residual gas storage.[12]

21. Fourth, the Applicant suggests that he is entitled to compensation for residual gas below 50 psia under the terms of the Petroleum and Natural Gas Lease entered into between the respective predecessors to the Applicant and Union. As set out in Union's pre-filed evidence, Union has paid to the Applicant all required payments under the Lease. His assertion that he has been "expropriated" is entirely without merit. As with other "profit a prendre" agreements, nothing in the Lease requires that Union compensate the Applicant with respect to any residual gas that is not produced, and nothing in the Lease requires that Union continue production if not profitable. In the event that production resumes on the Bentpath Pool, the Applicant would be entitled to a royalty in accordance with the terms of the Lease.[13]

22. Union therefore respectfully requests that the Applicant's motion be dismissed.

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[11] Crozier report, Exhibit 2 to Union's pre-filed evidence, p. 21; Reasons for Decision dated July 16, 1982 in proceeding E.B.O. 64(1) & (2), Exhibit 3 to Union's pre-filed evidence, pp. 110-11; Decision and Order dated March 24, 2004 in proceeding RP-2000-0005, Exhibit 4 to Union's pre-filed evidence;

[12] O. Reg. 263/02, Appendix D

[13] Union's pre-filed evidence, pp. 7-8

TAB A

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2012-0314

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 Achiel Kimpe under section 38(3) of the *Ontario Energy Board Act, 1998*, S.O. 1998 for an Order of the Board determining the quantum of compensation Mr. Kimpe is entitled to receive from Union Gas Limited.

BEFORE: Cathy Spoel
Presiding Member

DECISION
February 21, 2013

Introduction

On July 9, 2012 Achiel Kimpe (the "Applicant" or "Mr. Kimpe") filed an application with the Ontario Energy Board (the "Board") under section 38(3) of the *Ontario Energy Board Act, 1998* (the "Act"). Mr. Kimpe identified Union Gas Limited ("Union") as the respondent in the application. The Applicant has requested an Order of the Board for compensation for residual gas and use of residual gas from a pressure of 50 pounds per square inch absolute ("psia") to 0 psia used in the operation of Union's Bentpath Storage Pool (the "Pool"). The Applicant is seeking compensation for the period of time from the designation of the Pool to present. The Board has assigned this matter Board File No. EB-2012-0314.

Mr. Kimpe is a landowner in the Pool which was designated as a storage area through O. Reg. 585/74 on August 7, 1974. The Board granted Union the authorization to

operate the Pool by way of Board Order E.B.O. 64, dated August, 19, 1974. Since 1974 the Pool has been operated by Union.

The Applicant does not have a valid storage rights agreement with Union so there is no legal instrument which provides for compensation. The absence of a valid storage rights agreement permits Mr. Kimpe to apply to the Board, pursuant to section 38(3) of the Act, for a determination of compensation.

Mr. Kimpe also requested eligibility for a cost award for this Application pursuant to Rule 41 of the Board's Rules of Practice and Procedure

The Board has considered all of the evidence filed and denies the Application for compensation for residual gas for the reasons set out below.

Proceedings

On August 30, 2012, the Board issued a Notice of Application and Procedural Order No. 1. In this procedural order the Board indicated that it would proceed by way of a written hearing.

In accordance with Procedural Order No. 1 Mr. Kimpe filed evidence in addition to that filed with his application on September 21, 2012. Union filed submissions supported by evidence in response to the application on October 5, 2012. Mr. Kimpe filed his response to Union's submissions on October 29, 2012.

Submissions by the Applicant

In support of his application that the Board make an Order that Union pay compensation for residual gas and the use of residual gas from a pressure of 50 pounds per square inch absolute ("psia") to 0 psia, Mr. Kimpe submitted the following:

(i) Others have been compensated for a rental use of gas from 50 to psia;
(ii) Mr. Kimpe was expropriated because he has no storage agreement with Union;

(iii) The Production Lease[1] that he holds with Union requires gas production to 0 psia and that he should be compensated accordingly.

Mr. Kimpe also submitted that the Board's determination of his compensation for residual gas portion from 50 to 0 psia should account for 30 years of Union's use of natural gas under his lands in Bentpath Pool.

In support of his application, Mr. Kimpe attached an excerpt from a report prepared by Enbridge Gas Distribution Inc. and Union for the Ministry of Natural Resources ("MNR") in review of Ontario Regulation 263/02 (the "Excerpt"). The Report was in the context of a potential for storage under Crown lands in the Great Lakes Basin storage marketplace. The Excerpt defines the concept of residual gas and describes approaches to residual gas compensation and related compensation concerns. The Excerpt outlines several approaches to residual gas compensation revenue to be collected by the Crown, from prospective developers of storage under the Crown lands. There is no discussion of compensation for residual gas in terms of pressure.

On October 29, 2012 the Board received Mr. Kimpe's submissions in response to the evidence filed by Union. Mr. Kimpe filed the following:

- A graph, prepared by the U.S. Energy Information Administration showing the price of natural gas over time, based on average monthly process for the U.S. Mr. Kimpe noted the increase in price since 1980.

- The history of gas production in the Jacob Pool[2] by well including: date, volume of gas produced per well, bottom hole pressure by well and well names within the pool.

- Excerpts from Annual Reports of Monthly Oil and Gas Production for the years 2010 and 2011 filed by well operators for the MNR showing production volumes and gas values and reservoir pressures per well in various pools in Ontario.

1 Mr. Kimpe refers to Production Lease which is also commonly referred to in Ontario industry as a Petroleum and Natural Gas Lease ("PNG Lease"). The PNG Lease is an agreement between landowners and operators of production pools which when exhausted become suitable for gas storage and are often converted to storage. This was the case with Bentpath Pool and all other storage pools currently operating in Ontario.
2 It is not entirely clear from Mr. Kimpe's submissions what is the relevance of Jacob Pool production pressures information. Mr. Kimpe did not provide commentary on this information.

Mr. Kimpe did not provide a specific submission on the relevance of the above attached documentation nor did he indicate how they supported his application for residual gas compensation.

Submissions by Union

Union submitted that the Board should deny the application filed by Mr. Kimpe.

Union, in its submission, set out the historical practice and current policy in Ontario regarding compensation to landowners for storage of residual gas. Residual gas is defined as a gas that remains in a gas and oil production pool when the production seizes. Union stated that in Ontario owners of land with oil pools receive royalties on the commercially recoverable gas under their land properties. Union indicated that these royalties are not paid once a production pool is converted to a storage pool because, typically, there is no concurrent economically viable production during the operation of a pool for storage.

Union's position is that landowners should only be compensated for commercially recoverable gas.

Union discussed a concept of "reasonable abandonment pressure" to counter Mr. Kimpe's submission that he should be compensated for residual gas bellow 50 psia. Union submitted that the "reasonable abandonment pressure" is defined as a pressure below which residual gas is not commercially recoverable and that it is the pressure used to calculate quantum of monetary compensation for residual gas to storage landowners in Ontario. Union submitted that this approach was established by the Board in a "Gas Storage Report Lieutenant Governor in Council by Ontario Energy Board" dated May 4, 1964 ("Cozier Report"). The Cozier Report states at page 21:

> 1. Landowners should, upon the first use of a pool for storage, be paid for their royalty interests in residual gas down to a reasonable abandonment pressure. This principle has been adopted and used in Ontario. Compensation in this respect is required under the law, but the rate of payment is not fixed. The "reasonable abandonment pressure" referred to is determined by agreement or arbitration as appropriate to the particular reservoir being dealt with."

Union submitted that the Board already determined in its "Reasons for Decision in the matter of certain applications under the Ontario Energy Board Act by Bentpath Pool landowners" EBO 64 (1) and (2)", dated July 16, 1982 ("Bentpath Decision"), that residual gas compensation be calculated based on 50 psia to all Bentpath Pool landowners including Mr. Kimpe. As part of Union's pre-filed evidence, dated October 5, 2012, Union filed a copy of the Bentpath Decision.

Union stated that there are no changes in circumstances that would, in Union's view warrant the Board to approve Mr. Kimpe's current application.

In further support of its position Union referred to two other Board decisions dealing with residual gas compensation:

(i) Decision with Reasons EBO 184, Sombra Pool Residual Gas Compensation, May 22, 1997 ("Sombra Pool Decision"); and

(ii) Decision and Order RP-2000-0005, March 23, 2004 ("LCSA Decision"[3]).

Copies of Both decisions are included in Union's pre-filed evidence.

Union noted that in the Sombra Pool Decision, the Board accepted the agreement reached by the applicants and Union in an Alternative Dispute Resolution process that the appropriate threshold pressure level to determine the residual gas volume for compensation was 50 psia.

In the LCSA Decision the Board accepted a settlement agreement between the applicants and Union which, among other storage compensation components, included an agreement on residual gas compensation to 50 psia for Bluewater and Oil City Pools.

Union further submitted that it is an industry wide practice, as well as Union's practice, to compensate storage landowners for residual gas at a pressure above 50psia as below this level production is no longer profitable.

3 This application was filed by a group of landowners who were members of Lambton County Storage Association ("LCSA") and who were represented by a legal counsel. Mr. Kimpe was the applicant in RP-2000-0005.

In response to Mr. Kimpe's submissions that there are pools where production is at pressure levels below 50 psia, Union submitted that some individual wells in a pool may produce below 50 psia but that the average pressure in a pool as a whole is above 50 psia. Union stated: "It is possible to produce gas below 50 psia in some site-specific circumstances, but it is not the general practice for natural gas to be produced at pressures below 50 psia".[4]

Union submitted that its existing gas storage leases with the Bentpath landowners provide for residual gas compensation above 50 psia. Union maintains that this approach to compensation is the industry practice and noted "...we are aware of only two exceptions ...In these exceptional cases the threshold pressure used was voluntarily reduced down to 0 psia following negotiations with the landowner and was not based on reassessment of the pressure level at which natural gas becomes commercially recoverable."[5] Union referred to the Sombra Pool Decision in which the Board accepted the ADR Agreement and Union quoted the following from the ADR Agreement:

> "...As identified in Union's prefiled evidence there have been at least three arbitrations in Ontario where 50 psia was adopted and only two circumstances where 50 psia was not used for the determination of residual gas compensation. Those two are Oil Springs East and Edys Mills. Oil Springs East was decided by negotiation and Edys Mills was paid under the contract term of the lease. The parties agreed that the weight of the evidence in favour of 50 psia exceeds the value of these exceptions and that they are not representative of industry practice".[6]

In addition to the above argument that it is not industry practice to pay a landowner for storage below 50 psia, Union noted that Mr. Kimpe and Union are parties to a Petroleum and Natural Gas Lease ("PNG Lease")[7] entered into by their respective predecessors. The PNG Lease is an oil and gas exploration and production agreement. Union stated that it paid to Mr. Kimpe all required payments set in the PNG Lease. In

4 Prefiled Evidence of Union Gas Limited, October 5, 2012, (EB-2012-0314) page 6, lines 4 and 5.
5 Prefiled Evidence of Union Gas Limited, October 5, 2012, (EB-2012-0314) page 6, lines 12 and 17.

6 Prefiled Evidence of Union Gas Limited, October 5, 2012 (EB-2012-0314) page 7, lines 1 and 9.
7 Prefiled Evidence of Union Gas Limited, October 5, 2012 (EB-2012-0314) Exhibit 7

Union's submissions there is nothing in the PNG Lease that obliges Union to pay royalties with respect to residual gas that is not produced or to continue production if it is not profitable. The PNG Lease does not set a specific psia cut-off level below which a production is not profitable.

Union's position with regard to the Excerpt of the Enbridge and Union's Report to the MNR that was filed by Mr. Kimpe, is that it has no relevance to Mr. Kimpe's application before the Board. Union submitted that the Enbridge and Union's Report to the MNR was in the context of a tendering process for developing storage on Crown lands.

Board Findings

The Board finds that compensation for residual gas below 50 psia is not reasonable as it is not generally economically viable to recover gas below this pressure. This is reflected in the practice in Ontario to compensate storage landowners for residual gas down to 50 psia and not to 0 psia.

This practice has been accepted by the Board in prior decisions such as the OEB Decision and Order on landowner compensation by the LCSA landowners (RP-2000-0005).

In 1981 and 1982, in the Bentpath Pool proceeding, the Board reviewed Mr. Kimpe's application for compensation for residual gas to 0 psia and decided not to approve this request. In 1982, in the Bentpath Pool Decision, the Board found that "...that below the bottom-hole pressure to 50 psia gas cannot be economically produced, saved and marketed."[8] The Board expressly found that argument by Mr. Kimpe's legal counsel in the Bentpath Pool proceeding was not persuasive and stated:

> "The submissions that residual volumes should be calculated to zero psia is rejected since the evidence before the Board is that below a bottom-hole pressure of 50 psia gas cannot be economically produced, saved and marketed."[9]

8 OEB "Reasons for Decision in the matter of certain applications under the Ontario Energy Board Act by Bentpath Pool landowners" EBO 64 (1) and (2), dated July 16, 1982, page 110

9 OEB "Reasons for Decision in the matter of certain applications under the Ontario Energy Board Act by Bentpath Pool landowners" EBO 64 (1) and (2), dated July 16, 1982, page 110, paragraph 3

The Board notes that the compensation to 50 psia for residual gas in storage has been a long standing practice endorsed by the Board since 1960`s as reflected in the Cozier Report.

Regarding the two exceptions where Union paid residual gas compensation to 0 psia in Oil City East Pool and Edys Mills Pool, the Board understands that these exceptions are based on contractual terms of agreements and were negotiated outside the Board`s proceedings and required no approval by the Board. The Board will not accept these as precedents.

Cost Award

The Board finds that Mr. Kimpe is eligible for an award of costs.

The Board will grant an honorarium of $1,000 to Mr. Kimpe plus any disbursements he may claim. The awarded costs should be paid to Mr. Kimpe by Union.

If Mr. Kimpe wishes to seek an award of costs for disbursements incurred in this proceeding he shall file his claims in accordance with the *Practice Direction on Cost Awards* with the Board Secretary and with Union **within 35 days after the date of this Decision.**

Union may make submissions regarding the cost claim **within 45 days after the date of this Decision** and Mr. Kimpe may reply **within 65 days after the date of this Decision.** A decision and order regarding cost award will be issued at a later date.

Union shall pay the Board's costs incidental to this proceeding upon receipt of the Board's invoice.

DATED at Toronto, February 21, 2013.

ONTARIO ENERGY BOARD

Original Signed By

Cathy Spoel
Presiding Member

TAB B

Case Name:

Grey Highlands (Municipality) v. Plateau Wind Inc.

Between
The Corporation of the Municipality of Grey Highlands,
Appellant, and
Plateau Wind Inc. and Ontario Energy Board, Respondents

[2012] O.J. No. 847

2012 ONSC 1001

95 M.P.L.R. (4th) 188

2012 CarswellOnt 2699

214 A.C.W.S. (3d) 273

Court File No. 463/11

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

S.N. Lederman, K.E. Swinton and A.L. Harvison Young JJ.

Heard: February 9, 2012.
Oral judgment: February 9, 2012.
Released: February 23, 2012.

(11 paras.)

Counsel:

Michael M. Miller, for the Appellant.

John Terry and *Alexander C.W. Smith*, for the Respondent, Plateau Wind Inc.

Michael D. Schafler and *Kathleen Burke,* for the Respondent, Ontario Energy Board.

ORAL REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 K.E. SWINTON J. (orally):-- The Corporation of the Municipality of Grey Highlands ("the Municipality") appeals the decision of the Ontario Energy Board ("the Board") dated April 21, 2011, in which the Board declined to review a previous decision dated January 12, 2011. In the original decision the Board had held that Plateau Wind Inc. is a "distributor" under s.41 of the *Electricity Act, 1998,* S.O. 1998, c. 15, Sched. A, and therefore Plateau was entitled to build distribution facilities on the Municipality's road allowances.

2 An appeal lies to this Court on a question of law or jurisdiction (see s. 33(2) of the *Ontario Energy Board Act*, S.O. 1998, c. 15, Sched. B). Rather than appeal the original decision, the Municipality sought a review of that decision pursuant to Rule 42.01 of the Board's *Rules of Practice and Procedure*.

3 Rule 44.01 sets out the criteria for a notice of motion to review a decision stating:

> 44.1 Every notice of motion made under Rule 42.01, in addition to the requirements under Rule 8.02, shall:
>
> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error in fact;
> (ii) change in circumstances;
> (iii) new facts that have arisen;
> (iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.

4 Pursuant to Rule 45.01, the Board held a hearing in writing to determine the threshold question of whether the original decision should be reviewed. It held that a review was not warranted. The Municipality had not shown an error of fact and, in any event, the one alleged error of fact was not material to the decision. In the Board's view, the Municipality essentially restated the legal arguments made in its original submissions. As the Municipality had failed to raise a question as to the correctness of the original decision, the review was refused.

5 The Municipality submits that the Board erred in law by interpreting its review power too narrowly, as its review power permits it to consider alleged errors of law.

6 The standard of review of the Board's decision is reasonableness, as the Board was exercising its expertise and discretion, determining questions of fact and applying its own rules.

7 The Board's decision to reject the request for review was reasonable. There was no error of fact identified in the original decision, and the legal issues raised were simply a re-argument of the legal issues raised in the original hearing.

8 We do not agree that the word "may" in Rule 44.01 requires the Board to consider errors of law. This is not consistent with the plain meaning of the rule or the nature of a review or reconsideration process. We see no reason to interfere with the Board's exercise of discretion.

9 The appellant argued that the participation of a Board member in the review process gave rise to a reasonable apprehension of bias when that member had participated in the original decision. This argument fails to take into account the difference between an appeal and a review or reconsideration. The participation of a member of the original panel ensured that the review panel would have at least one member familiar with the facts of the case to provide context and to determine the impact of alleged factual errors or new facts and circumstances. Given the highly technical nature of matters before the Board, it makes sense that one of the original members would be present on the reconsideration. Therefore, we would not give effect to this ground of appeal.

10 The Board's reasons clearly set out the basis for the decision and were transparent and intelligible. Therefore, the appeal is dismissed.

11 S.N. LEDERMAN J. (orally):-- I have endorsed the Record to read, "This appeal is dismissed for the oral reasons delivered by Swinton J. The Board does not seek costs. Counsel for the appellant and the respondent, Plateau, have agreed that costs be fixed at $20,000.00 all inclusive, payable by the appellant to Plateau. So ordered.

K.E. SWINTON J.
S.N. LEDERMAN J.
A.L. HARVISON YOUNG J.

cp/e/qlacx/qljxr/qlced

---- End of Request ----
Email Request: Current Document: 1
Time Of Request: Monday, May 27, 2013 17:17:59

TAB C

Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2006-0322
EB-2006-0338
EB-2006-0340

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

EB-2006-0322
EB-2006-0338
EB-2006-0340

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

AND IN THE MATTER OF a proceeding initiated by the Ontario Energy Board to determine whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers) and whether the Board should refrain from regulating the rates for storage of gas;

AND IN THE MATTER OF Rules 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

DECISION WITH REASONS

May 22, 2007

EXECUTIVE SUMMARY

In November of 2006 the Board issued a Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The NGEIR Decision addressed the key issues of natural gas storage rates and services for gas-fired generators, and storage regulation.

In the NGEIR Decision, the Board determined that it would cease regulating the prices charged for certain storage services but that the rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The Board received three Notices of Motion for review of certain parts of the NGEIR Decision. The Board held an oral hearing to consider the threshold questions that the Board should apply in determining whether the Board should review those parts of the NGEIR Decision and whether the moving parties met the test or tests.

The Board finds that the motions do not pass the threshold tests applied by the Board, except in two areas.

First, the Board finds that the decision to cap the storage available to Union Gas Limited's in-franchise customers at regulated rates to 100 PJ is reviewable.

Second, the Board finds that the decisions regarding additional storage requirements for Union Gas Limited's in-franchise gas-fired generator customers and Enbridge's Rate 316 are reviewable.

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Section A: Introduction

The Board received three Notices of Motion for review of its Decision in the Natural Gas Electricity Interface Review proceeding[1] ("NGEIR"). Motions were filed by the City of Kitchener ("Kitchener") and the Association of Power Producers of Ontario ("APPrO"). There was also a joint notice by the Industrial Gas Users' Association ("IGUA"), the Vulnerable Energy Consumers Coalition ("VECC") and the Consumers Council of Canada ("CCC")

On January 25, 2007, the Board issued a Notice of Hearing and Procedural Order which established a schedule for the filing of factums by the moving parties, any responding parties' factums, and an oral hearing date for hearing the threshold question. On February 8, 2007, factums were filed by Kitchener, APPrO, IGUA, and jointly by CCC and VECC.

Responding factums were filed on February 15, 2007 by Board Staff, Union Gas Limited, Enbridge Gas Distribution Inc., Market Hub Partners Canada Ltd., School Energy Coalition, The Independent Electricity System Operator and BP Canada Energy Company.

In its Procedural Order No.2, the Board indicated that, at the upcoming oral hearing, parties should confine their submissions to the material in their factums and to responding to the factums of other parties. The Board also stated that parties should address only the issues set out in the Board's Procedural Order No. 1, namely:

1) What are the threshold questions that the Board should apply in determining whether the Board should review the NGEIR Decision? and

2) Have the Moving Parties met the test or tests?

[1] EB-2008-0551 (November 7, 2006)

On March 5 and 6, 2007, the Board heard the oral submissions of all the parties with the exception of the Independent System Operator and BP Canada who had advised the Board that they would not be appearing at the oral hearing.

The NGEIR Decision

On November 7, 2006 the Board issued its Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision"). This proceeding was initiated by the Ontario Energy Board in response to issues first raised in the Board's Natural Gas Forum Report issued in 2004. The 123-page NGEIR Decision addressed the key issues of:

1) Rates and services for gas-fired generators, and

2) Storage regulation.

The parties reached settlements with Enbridge and Union on most of the issues related to rates and services for gas-fired generators. These settlements were approved by the Board. The oral hearing and the NGEIR Decision addressed the broad issue of storage regulation and any issues that were not settled in the settlement negotiations.

The issue concerning storage regulation was whether the Board should refrain from regulating the prices charged for storage services under section 29 (1) of the Ontario Energy Board Act, 1998. The Board found that the storage market is workably competitive and that neither Union nor Enbridge have market power in the storage market. The Board determined that it would cease regulating the prices charged for certain storage services; however, the Board found that rates for storage services provided to Union and Enbridge distribution customers will continue to be regulated by the Board.

The motions requested the following decisions made in the NGEIR Decision be either reviewed and changed; cancelled, or clarified, in a new Board proceeding:

Kitchener

- The aggregate excess methodology for allocating storage space
- The 100 PJ cap on Union's regulated storage

APPrO

- Whether short notice balancing service should be included on the tariffs of Union and Enbridge

IGUA/CCC/VECC

- Parts of the NGEIR Decision pertaining to storage, storage regulation and storage allocation be cancelled
- Review to be heard by a different Board panel

The parties outlined the grounds for the motions which included allegations of errors of fact and in some cases, errors of law.

Organization of the Decision

In this Decision, the Board organized the issues raised by the parties into sections that cover the same or similar topics. In each section following the section on the threshold test, the Board identifies the issue or issues raised, and makes a finding whether the issues are reviewable by applying the threshold test.

The sections of this Decision are:

A. Introduction (this section)
B. Board Jurisdiction to Hear Motions
C. Threshold Test
D. Board Process

E. Board Jurisdiction under Section 29
F. Status Quo
G. Onus
H. Competition in the Secondary Market
I. Harm to Ratepayers
J. Union's 100 PJ Cap
K. Earnings Sharing
L. Additional Deliverability for Generators and Enbridge's Rate 316
M. Aggregate Excess Method of Allocating Storage
N. Orders
O. Cost Awards

The Board has reviewed the factums and arguments of all parties but has chosen to set out or summarize the factums or arguments by parties only to the extent necessary to provide context to its findings.

Section B: Board Jurisdiction to Hear the Motions

Under Rule 45.01, the Board may determine as a threshold question whether the matter should be reviewed before conducting any review on the merits.

In the case of IGUA's motion, which raises questions of law and jurisdiction, counsel for Board Staff argued that the Board should not, and indeed could not, review the NGEIR Decision as these grounds are not specifically enumerated in Rule 44.01 as possible grounds for review. Counsel for Board Staff argued that the Board has no inherent power to review its decisions and the manner in which it exercises such power must fall narrowly within the scope of the *Statutory Powers Procedure Act* (SPPA), which grants the Board this power.

The Board's power to review its decisions arises from Section 21.1(1) of the SPPA which provides that:

> A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

Part VII (sections 42 to 45) of the Board's Rules of Practice and Procedure deal with the review of decisions of the Board. Rule 42.01 provides that "any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision". Rule 42.03 requires that the notice of motion for a motion under 42.01 shall include the information required under Rule 44. Rule 44.01 provides as follows:

> Every notice of motion made under Rule 42.01, in addition to the requirements of Rule 8.02, shall:
>
> > (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

(iv) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time; and

(b) if required, and subject to Rule 42, request a stay of the implementation of the order or decision, or any part pending the determination of the motion.

Counsel for Board Staff argued that while the grounds for review do not have to be exactly as those described, they must be of the same nature, and that to the extent the grounds for review include other factors such as error of law, mixed error of fact and law, breach of natural justice, or lack of procedural fairness, they are not within the Board's jurisdiction. He argued that Rule 44 should be interpreted as an exhaustive list, and that as section 21.1(1) of the SPPA requires that the tribunal's rules deal with the matter of motions for review, the Board's jurisdiction is limited to the matters specifically set out in its Rules.

In support of this interpretation of the Rule 44.01, Counsel relied on the fact that an earlier version of the Board's rules specifically allowed grounds which no longer appear in Rule 44.01. Therefore, it must be assumed that the current Rules are not intended to allow motions for review based on those grounds. The relevant section of the earlier version of the Rules read as follows:

63.01 Every notice of motion made under Rule 62.01, in addition to the requirements of Rule 8.02, shall:

(a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:

(i) error of law or jurisdiction, including a breach of natural justice;

(ii) error in fact;

(iii) a change in circumstances;

(iv) new facts that have arisen;

(v) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;

(vi) an important matter of principle that has been raised by the order or decision;

(b) request a delay in the implementation of the order or decision, or any part pending the determination of the motion, if required, ...

Counsel for Board Staff argued that the "presumption of purposeful change" rule of statutory interpretation should be applied to the Board's Rules. This rule applies generally to legislative instruments and is based on the presumption that legislative bodies do not go to the bother and expense of making changes to legislative instruments unless there is a specific reason to do so. Applied to Rule 44, this means that the Board should be presumed to have intended to eliminate the possibility of motions for review based on grounds which are no longer enumerated. He further argued that because the SPPA requires the Board's Rules "to deal with the matter", the

Board can only deal with them in the manner allowed for by its Rules, and any deviation from the Rules will cause the Board to go beyond its power to review granted by Section 21.1(1) of the SPPA.

In general Union and Enbridge supported the argument made by counsel for Board Staff.

Other parties made several arguments to counter those put forward by counsel for Board Staff. These included:

- as the Board's rules are not statutes or regulations but deal with procedural matters the rules of statutory interpretation such as the presumption of purposeful change have little if any application

- to the extent rules of statutory interpretation apply, section 2 of the SPPA specifically requires that the Act and any rules made under it be liberally construed:

  > This Act, and any rule made by a tribunal under subsection 17.1(4) or section 25.1, shall be liberally construed to secure the just, most expeditious and cost-effective determination of every proceeding on its merits

- that the *Interpretation Act* requires that the word "may" be construed as permissive, whereas "shall" is imperative, so the list of grounds in Rule 44 should be considered as examples. In support of this argument, counsel for CCC referred to Sullivan and Dreiger on the Construction of Statutes, Fourth Edition, Butterworths, pp 175*ff* which cites the Supreme Court of Canada decision in *National Bank of Greece (Canada) v. Katsikonouris* (1990), 74 D.L.R. (4th) 197

- that the Ontario Court of Appeal decision in *Russell v. Toronto(City)* (2000), 52 O.R. (3d) 9 provides that a tribunal (in that case the Ontario Municipal Board) cannot use its own policy or practice to restrict the range of matters which it will consider on a motion to review

- that the *Russell* decision gives tribunals a broad jurisdiction to review in contradistinction to the narrow right of appeal to the Divisional Court.

Findings

In the Board's view, in addition to the specific sections of the SPPA and the Board's Rules dealing with motions to review, it is helpful to look at the overall scheme of the SPPA and the Rules to determine the scope of the Board's jurisdiction to review a decision.

Originally, the SPPA was enacted to ensure that decision making bodies such as the Board provided certain procedural rights to parties that were affected by those decisions. These basic requirements apply regardless of whether a tribunal has enacted rules of practice and procedure. They include such requirements as:

- Parties must be given reasonable notice of the hearing (s 6)

- Hearings must be open to the public, except where intimate personal or financial matters may be disclosed (s 9)

- The right to counsel (s 10)

- The right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

- That decisions be given in writing with reasons if requested by a party (s 17 (1))

- That parties receive notice of the decision (s 18)

- That the tribunal compile a record of the proceeding (s 20).

In addition to these requirements there are several practices and procedures that tribunals are allowed to adopt, if provision is made for them in an individual tribunal's rules. These include:

- Alternative dispute resolution. Section 4.8 provides that a tribunal may direct parties to participate in ADR if "it has made rules under section 25.1 respecting the use of ADR mechanisms..."

- Prehearing conferences. Section 5.3 provides that "if the tribunal's rules under section 25.1 deal with prehearing conferences, the tribunal may direct parties to participate in a pre-hearing conference..."

- Disclosure of documents. Section 5.4 provides that "if the tribunal's rules made under section 25.1 deal with disclosure, the tribunal may,..., make orders for (a) the exchange of documents, ..."

- Written hearings. Section 5.1 (1) provides that "a tribunal whose rules made under section 25.1 deal with written hearings may hold a written hearing in a proceeding."

- Electronic hearings. Section 5.2 provides that "a tribunal whose rules made under section 25.1 deal with electronic hearings may hold an electronic hearing in a proceeding."

- Motions to review. Section 21.1(1) provides that "a tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or any part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order."

Beyond stating that a tribunal's rules have to "deal with" each of these procedures in order for the tribunal to avail itself of them, there are no restrictions on the way in which they do so. In this regard nothing distinguishes motions to review from the other "optional" procedural matters listed above. A tribunal is free to create whatever procedures it thinks appropriate to handle them, provided they are consistent with the SPPA.

The Board notes that there are situations where the SPPA does not give tribunals full discretion in developing their rules to deal with "optional" procedural powers. For example, section 4.5(3) allows tribunals or their staff to make a decision not to process a document relating to the commencement of a proceeding. This section not only requires a tribunal to have "made rules under section 25.1 respecting the making of such decisions" but also requires that "those rules shall set out ... any of the grounds referred to in subsection 1 upon which the tribunal or its administrative staff may decide not to process the documents relating to the commencement of the proceeding;..." While a tribunal can prescribe the grounds for such a decision in its rules, the grounds must come from a predetermined list found in the SPPA. In that case, it is clear that only certain grounds are permitted, and a tribunal must restrict itself to those grounds enumerated in its rules.

The SPPA could put similar restrictions on the development of a tribunal's rules dealing with motions to review, but it does not.

While the Court of Appeal's decision in *Russell v. Toronto* dealt with motions to review under the *Ontario Municipal Board Act* rather than under the SPPA, the power granted to review decisions is effectively the same, so the principles enunciated in the *Russell* decision are applicable to the Board. The Court of Appeal found that the OMB could not

use its own policies and guidelines to restrict the scope of the power to review which was granted to it by statute. The Board therefore finds that it cannot use its Rules to limit the scope of the authority given to it by the SPPA.

The SPPA allows each tribunal to make its own Rules, so as to allow it to deal more effectively with the specific needs of its proceedings. The SPPA does not give the Board the authority to limit the substantive matters within the Board's purview.

The provisions of the SPPA dealing with the making of rules, give tribunals a very wide latitude to meet their own needs, both in the context of creating rules and in each individual proceeding:

> 25.0.1 A tribunal has the power to determine its own procedure and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1
>
> 25.1 (1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.
>
> (4) The tribunal shall make the rules available to the public in English and in French.
>
> (5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.
>
> (6) The power conferred by this section is in addition to any other power to adopt rules that the tribunal may have under another Act.

In the Board's view these sections of the SPPA give the Board very broad latitude to determine the procedure best suited to it from time to time. While consistency with the Act is required, the Rules are not regulations, and can be amended from time to time by the Board to suit its evolving needs.

The Board finds that there is nothing in the SPPA to suggest that rules dealing with motions to review should be interpreted or applied any differently from other provisions of the Board's Rules.

The Board's Rules

In addition to Section 2 of the SPPA which provides for a liberal interpretation of the Act and the Rules, the Board's Rules include the following provisions as a guide to their interpretation.

> 1.03 The Board may dispense with, amend, vary or supplement, with or without a hearing, all or any part of any rule at any time, if it is satisfied that the circumstances of the proceeding so require, or it is in the public interest to do so.
>
> 2.01 These Rules shall be liberally construed in the public interest to secure the most just, expeditious and cost-effective determination of every proceeding before the Board.
>
> 2.02 Where procedures are not provided for in these Rules, the Board may do whatever is necessary and permitted by law to enable it to effectively and completely adjudicate on the matter before it.

As these provisions are of general application to all of the Board's Rules of Practice and Procedure, the Board finds that each of its individual rules should be read as if the above rules 1.03, 2.01 were part of them, except of course where restricted by the SPPA or another Act. Therefore, the Rules which "deal with the matter" of motions to

review, i.e. Rules 42 to 45, should be read in conjunction with Rules 1.03 and 2.01. Similarly, the rules dealing with alternative dispute resolution, written hearings and so on include Rules 1.03 and 2.01.

The Board finds that it should interpret the words "may include" in Rule 44.01 as giving a list of examples of grounds for review for the following reasons:

- It is the usual interpretation of the phrase;
- It is consistent with section 2 of the SPPA which requires a liberal interpretation of the Rules;
- It is consistent with Rule 1.03 of the Board's rules which allows the Board to amend, vary or supplement the rules in an appropriate case; and
- If the SPPA had intended to require that the power to review be restricted to specific grounds it would have required the rules to include those grounds and would have required the use of the word "shall".

With respect to the application of the principle of presumption of purposeful change urged by counsel for Board Staff, the Board notes that at the same time that its rules were amended to remove certain grounds of appeal from Rule 44.01, Rule 1.03 was also amended. The previous version of Rule 1.03 (then 4.04) read as follows:

> The Board may dispense with, amend, vary, or supplement, with or without a hearing, all or any part of any Rule, at any time by making a procedural order, if it is satisfied that the special circumstances of the proceeding so require, or it is in the public interest to do so.

When compared with the current Rule 1.03, it is apparent that the old rule was more restrictive – amendments had to be made by procedural order, and the circumstances of the proceeding had to be "special". Given the need for a procedural order, it is reasonable to interpret the old rule as applying only to the sorts of matters dealt with in procedural orders, the conduct of the proceeding and not to other provisions of the rules. No such restriction applies in the current Rule 1.03.

The Board finds that to the extent the Rules were amended to remove specific grounds from the list for motions to review, the contemporaneous amendments to Rule 1.03 give the Board the necessary discretion to supplement this list in an appropriate case. The Board presumably was aware of that at the time of the amendments.

The Board therefore finds that it has the jurisdiction to consider the IGUA motion to review even though the grounds are errors of mixed fact and law which do not fall squarely within the list of enumerated grounds in Rule 44.01.

Even if this interpretation of Rule 44.01 is incorrect, the Board can apply Rule 1.03 to supplement Rule 44.01 to allow the grounds specified by IGUA. Given the number of motions for review, the timing involved, the nature of the hearing and the nature of the alleged errors, the Board concludes that it is in the public interest to avoid splitting this case into Motions reviewed by some parties and appealed by others.

This panel is also aware that Appeals to the Divisional Court can only be based on matters of law including jurisdiction. If the position advanced by counsel for the Board staff was accepted, errors of mixed fact and law could not be effectively reviewed or appealed by any body. This, the Board believes is not consistent with Section 2 of the SPPA.

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

> In respect of a motion brought under Rule 42.01, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

Parties were asked by the panel to provide submissions on the appropriate test for the Board to apply in making a determination under Rule 45.01.

Board Staff argued that the issue raised by a moving party had to raise a question as to the correctness of the decision and had to be sufficiently serious in nature that it is capable of affecting the outcome. Board Staff argued that to qualify, the error must be clearly extricable from the record, and cannot turn on an interpretation of conflicting evidence. They also argued that it's not sufficient for the applicants to say they disagree with the Board's decision and that, in their view, the Board got it wrong and that the applicants have an argument that should be reheard.

Enbridge submitted that the threshold test is not met when a party simply seeks to reargue the case that the already been determined by the Board. Enbridge argued that something new is required before the Board will exercise its discretion and allow a review motion to proceed.

Union agreed with Board Staff counsel's analysis of the scope and grounds for review.

IGUA argued that to succeed on the threshold issue, the moving parties must identify arguable errors in the decision which, if ultimately found to be errors at the hearing on the merits will affect the result of the decision. IGUA argued that the phrase "arguable errors" meant that the onus is on the moving parties to demonstrate that there is some reasonable prospect of success on the errors that are alleged.

CCC and VECC argued that the moving parties are required to demonstrate, first, that the issues are serious and go to the correctness of the NGEIR decision, and , second, that they have an arguable case on one or more of these issues. They argued that the moving parties are not required to demonstrate, at the threshold stage, that they will be successful in persuading the Board of the correctness of their position on all the issues.

MHP argued that the threshold question relates to whether there are identifiable errors of fact or law on the face of the decision, which give rise to a substantial doubt as to the correctness of the decision, and that the issue is not whether a different panel might arrive at a different decision, but whether the hearing panel itself committed serious errors that cast doubt on the correctness of the decision. MHP submitted that a review panel should be loathe to interfere with the hearing panel's findings of fact and the conclusions drawn there from except in the clearest possible circumstances.

Kitchener argued that jurisdictional or other threshold questions should be addressed on the assumption that the record in NGEIR establishes the facts asserted.

School Energy Coalition argued that an application for reconsideration should only be denied a hearing on the merits in circumstances where the appeal is an abuse of the Board's process, is vexatious or otherwise lacking objectively reasonable grounds.

Findings

It appears to the Board that all the grounds for review raised by the various applicants allege errors of fact or law in the decision, and that there are no issues relating to new evidence or changes in circumstances. The parties' submissions addressed the matter of alleged error.

In determining the appropriate threshold test pursuant to Rule 45.01, it is useful to look at the wording of Rule 44. Rule 44.01(a) provides that:

> Every notice of motion... shall set out the grounds for the motion that raise a question as to the correctness of the order or decision...

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued that there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.

Section D: Board Process

IGUA's grounds for review included the following alleged errors in the process used by the panel:

1. The Board has no jurisdiction to conduct what amounts to its own public inquiry in the midst of a contested rates and pricing proceeding between utilities and their ratepayers,
2. In embarking on its own public inquiry with respect to matters in issue between the parties with respect to storage regulation, the Board erred in law in exceeding its adjudicative mandate and engaged in a process which disqualifies it as an adjudicator and invalidates its decision with respect to forbearance.

In particular, IGUA argued that the process adopted by the Board was flawed as it did not adhere to traditional notions of the adversarial process. IGUA's position was that a "contested rates and pricing proceeding between utilities and their ratepayers" is required to be conducted by the Board as if it were litigation between the parties as it is fundamentally an issue between them as to what the rates should be.

In IGUA's view, the Board departed from appropriate practice at the prehearing stage by

- Setting the agenda based on its priorities
- Defining the issues without input from the parties
- Directing the utilities to file evidence pertaining to some of the issues identified by the Board
- Directing that settlement discussions take place on all issues except storage regulation
- Directing all parties to file their evidence at the same time rather than dividing them by interest and having them file evidence in support of and then opposed to the issues identified by the Board

IGUA's largest area of concern however was that once evidence had been filed, "the Board did not confine its future participation in the process to the performance of the adjudicative functions of hearing and determining the matters of fact and law in dispute". IGUA's overriding complaint is that the Board was engaging in its own fact finding mission and was not confining itself to hearing and determining the disputed matters of fact and law which had been raised by parties opposite in interest to one another.

IGUA argued that once a dispute became clear as between the utilities and the ratepayers the Board had to "stay out of the arena" and allow these parties to determine how to present and argue the case, in effect constraining the Board to choose between the cases put forward by the various parties.

Examples of the alleged behaviour objected to by IGUA include:

- The Board advising the parties that it had retained its own expert, but then not filing a report from this expert nor having him made available for cross examination.
- Board members posing questions which indicated that they were searching for a forbearance solution to the Storage Regulation issues, but not asking questions about the ability of the existing regulatory regime to address the concerns which the Board raised.
- The Board advising BP Canada, a party to the hearing, that it wished to hear evidence from it on certain issues and providing a list of questions in advance – at the time counsel for ratepayer interests objected to the question as "rather leading".
- Counsel for the Board hearing team taking a position in argument adverse in interest to the evidence it had led.

Counsel for Board Staff argued that IGUA's complaints ignore critical differences between the Board and the courts and they confuse the role of the hearing panel with the roles of staff counsel in Board proceedings.

Counsel for Board Staff argued that the Board is not a court of record. It is a highly specialized tribunal that has a strong and important policy-making function. The Board is entitled to commence or initiate proceedings in its own right. It is not required to sit passively as an independent adjudicator and wait for parties to initiate proceedings before it, nor is the Board required to play a purely passive adjudicative role during the course of proceedings once they have been commenced, and particularly once they have been commenced at the instigation of the Board itself.

Counsel for Board Staff also argued that hearing panels of the Board are fully entitled to ask probing questions of witnesses who appear before them, and there is nothing whatsoever untoward about doing so.

The other parties largely supported the position of Board Staff.

Findings

At a minimum, the Board is required to comply with the provisions of the SPPA and the *Ontario Energy Board Act, 1998* ("OEB Act"). The SPPA provides parties with certain procedural rights, none of which IGUA has alleged has been disregarded by the Board in this case:

- Parties must be given reasonable notice of the hearing (s 6)
- Hearings must be open to the public, except where intimate personal or financial; may be disclosed (s 9)
- Parties have the right to counsel (s 10)
- Parties have the right to call and examine witnesses and present evidence and submissions and to conduct cross-examinations of witnesses at the hearing reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding (s 10.1)

- Tribunals must give decisions in writing and must provide reasons if requested by a party (s 17 (1))

- Parties are entitled to notice of the decision (s 18)

- The tribunal must compile a record of the proceeding (s 20)

Beyond these basic requirements, the SPPA specifically allows tribunals to require parties to participate in various other procedures. With respect to prehearing conferences, section 5.3 of the SPPA provides that a tribunal may direct parties to participate in a prehearing conference to consider the settlement of any or all of the issues.

Section 19(4) of the OEB Act specifically allows the Board to determine matters on its own motion:

> The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise, shall determine any matter that under this Act or the regulations it may upon an application determine, and in so doing the Board has and may exercise the same powers as upon an application.

Section 21 of the OEB Act provides that:

> The Board may at any time, on its own motion and without a hearing, give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act.

Therefore as well as the power to initiate proceedings, the Board is also given the statutory right to require the preparation of evidence incidental to the exercise of its powers.

While the Board accepts IGUA's argument that in a hearing under Section 36 of the OEB Act it has the jurisdiction to hear and determine all questions of law and fact, it does not agree with IGUA's characterization of the limits on its exercise of this adjudicative function.

As the Board has an over-riding responsibility to make its decisions in the public interest the parties cannot have the final word in determining the nature of the dispute and the options open to the Board. The Board is not required to accept the position of any of the parties, provided that its process is transparent and open and the parties have a fair opportunity to exercise their rights under the SPPA.

IGUA cited several authorities in support of its argument. The Board found them of little assistance as they arose in quite different contexts, generally that of civil disputes between the parties. That is not the context within which the Board operates. We are not judges in civil disputes and the Board's mandate is much broader than determining rights between the parties.

With respect to the specific allegations made by IGUA, the Board's findings follow.

The Board was fully entitled to issue a notice of proceeding on its own motion in December of 2005 and to delineate the issues it expected the parties and the intervenors to address in the proceeding.

Pursuant to the Board's settlement guidelines and the SPPA, the Board is entitled to exclude from the ambit of a settlement conference particular issues that it believes should be heard in full in the hearing which is what the hearing panel did in this case. This is another example of an area where the Board's practice is fundamentally different from that of the courts.

The Board is fully entitled under its Rules to develop procedural orders to meet the needs of any particular proceeding and there is nothing in the Rules or the SPPA which would restrict it from directing all parties to file their evidence simultaneously. This does

not in any way impede the parties from exercising their statutory rights to have access to the evidence and to cross-examine witnesses.

In a proceeding initiated by the Board, as this one was, where there is no applicant, this procedure is an appropriate one.

With respect to the expert witness retained by Board Staff, Section 14 of the OEB Act expressly permits the Board "to appoint persons having technical or special knowledge to assist the Board." As there is no suggestion that the Board's expert played a role in the deliberations of the hearing panel or that the hearing panel relied in any way on the advice of the expert, there is nothing improper arising out of his retainer. Experts consulted by Board Staff are in the same position as staff and are not required to file evidence, or to submit to questioning by any of the parties.

The Board also finds that IGUA's complaints that the NGEIR panel members asked questions of witnesses, which IGUA complains indicated that they were searching for a forbearance solution to the storage regulation issue, are without merit. Adjudicators are entitled to ask probing questions of witnesses who testify before them, including leading questions. The fact that questions are asked or not asked does not mean that the panel has made up its mind one way or the other on an issue.

The Board also finds that the NGEIR panel was fully entitled as a result of the powers granted in section 21 of the OEB Act to act as it did in putting questions to a witness from BP Canada. It is also not an unusual occurrence for the Board to agree to hear evidence in camera, where there is confidential or sensitive commercial information involved.

The Board also finds no error in the fact that counsel for the Board hearing team made final argument in which she took a position adverse to the expert evidence that the Board hearing team led. The Board hearing team is entitled to take whatever position it chooses based on the evidence that was adduced during the hearing and nothing that Board hearing counsel did could possibly ground a complaint of breaches of the rules of

natural justice against the NGEIR hearing panel itself.

Section E: Board Jurisdiction under Section 29

The joint factum of CCC and VECC and the factum of the IGUA both allege that the original NGEIR panel erred in misinterpreting or overreaching in respect of its jurisdiction under section 29 of the OEB Act.

In particular, the CCC/VECC factum states as follows at paragraph 8:

> 8. The moving parties submit that the NGEIR Decision raises the following issues:
>
> (i) Whether the Board correctly interpreted Section 29 of the Ontario Energy Board Act (the "Act"). It is the position of the moving parties that the Board erred in its interpretation of Section 29 of the Act, thereby depriving itself of jurisdiction;
>
> (ii) Whether the Board gave effect to the legislative intent underlying Section 29 of the Act. It is the position of the moving parties that the Board failed to give effect to the intention of the Legislature in enacting Section 29 of the Act;

In its factum, IGUA alleged that the Board had no jurisdiction to conduct what IGUA characterized as the Board's "own public inquiry in the midst of a contested rates and pricing proceeding between utilities and their ratepayers". (IGUA factum par. 84(a))

IGUA also alleged that:

> ...the Board erred in law in exceeding its adjudicative mandate and engaged in a process which disqualifies it as an adjudicator and invalidates its Decision with respect to forbearance. (IGUA factum par. 84(b))

In addition to these general submissions by CCC/VECC and IGUA about the NGEIR panel's interpretation of its jurisdiction under Section 29, these parties also argued specifically that the NGEIR panel exceeded its jurisdiction under Section 29 by restructuring the storage businesses of Union and Enbridge. They asserted that the power to restructure the storage business comes under section 36 of the legislation. (Tr. Vol. 1, pp. 28 and 56-57)

Findings

The NGEIR panel's interpretation and application of section 29 is central to the NGEIR Decision. The NGEIR Decision therefore deals extensively with the question of the legal test to be applied under section 29, the analytical framework for assessing whether the natural gas market is competitive and finally, the assessment of market power in the natural gas sector in Ontario.

The starting point for the NGEIR Decision is the Board's interpretation of section 29 which is set out in Chapter 3 of the Decision and reads as follows:

> On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest

In Chapter 3 of the NGEIR Decision, the NGEIR panel discussed the statutory test to be used in the assessment of competition in the storage market and applies the analytical framework mandated by that statutory test. In particular, the panel reviews the history of section 29 and of the concept of forbearance and light-handed regulation.

The NGEIR panel's review of Section 29 is described at two levels. The first is the assessment of competition, which is done by applying the market power tests, and the second is the relationship between competition and the public interest.

The NGEIR panel interprets "competition" within section 29 at page 24 of the NGEIR Decision as follows:

> There are degrees of competition in any market. They range from a monopoly, where there is a sole seller, to perfect competition, where there are many sellers and no one seller can influence price and quantity in the market. It is not necessary to find that there is perfect competition in a market to meet the statutory test of "competition sufficient to protect the public interest"; what economists refer to as a "workably competitive" market may well be sufficient.
>
> It is also important to remember that competition is a dynamic concept. Accordingly, in section 29 the test is whether a class of products "is or will be" subject to sufficient competition. In this respect parties often rely on qualitative evidence to estimate the direction in which the market is moving.

The NGEIR panel further interprets its mandate at page 44 as follows:

> ...Section 29 says that the Board shall make a determination to refrain "in whole or part" which the Board believes allows considerable flexibility in this regard. In addition, the Board concludes that it is required by the statute to address the public interest trade-offs, for example, between price impacts and the development of storage and the Ontario market generally.

The NGEIR panel then proceeds to assess the "level of competition" using the market power tests and finds the storage market in Ontario is subject to "workable competition".

Following this, it then addresses the question of whether the level of competition is sufficient to protect the public interest. In so doing, the panel addresses what should be

encompassed in its consideration of the public interest in the context of the assessing competition as follows:

> The public interest can incorporate many aspects including customers, investors, utilities, the market, and the environment. Union and Enbridge argued for a narrow definition of the public interest. In their view, competition itself protects the public interest, and once the Board has satisfied itself that the market is competitive, the public interest is protected by definition. The Board finds this to be an inappropriate narrowing of the concept. Competition is better characterized as a continuum, not a simple "yes" or "no". The Board would not be fulfilling its responsibilities if it limited the review in the way suggested without considering the full range of impacts and the potential need for transition mechanisms and other means by which to ensure forbearance proceeds smoothly.
>
> Some of the intervenors took the position that the public interest review should be focussed on the financial impacts. For example, Schools argued that the Board should look at the benefits and costs of forbearance, and in its view, the costs include a possible transfer of between $50 million and $174 million from ratepayers to shareholders (arising from the proposed end to the margin-sharing mechanisms and the potential re-pricing of cost-based storage to market prices). The Board agrees that the financial impacts are a relevant consideration, but does not agree that an assessment of the public interest should be limited to an assessment of the immediate rate impacts. [Emphasis added] (pages 42 and 43)

The NGEIR panel then proceeds to balance the Board's public interest mandate against its legislative objectives and describes the trade-offs. It does this by reviewing each of the relevant objectives (i.e., to facilitate competition in the sale of gas to users, to protect the interests of consumers with respect to prices an the reliability and quality of gas service, to facilitate rational development and safe operation of gas storage) and

conducting an assessment of whether the level of storage competition is sufficient to protect the public interest in light of each of those objectives.

At page 56 of Chapter 5, having determined that part of the storage market is workably competitive and having considered some of the key elements of the public interest, the panel addresses whether and it what circumstances the Board should refrain from setting storage prices and approving storage contracts.

> In terms of a section 29 analysis, the goal would be to continue to regulate (and set cost-based rates) for those customers who do not have competitive storage alternatives and to refrain from regulating (allow market-based prices) for those who do have competitive alternatives.

The NGEIR panel then applies its interpretation of the legislative intent of section 29 to the facts before it. That panel's understanding of its mandate under section 29 and its careful application of that mandate are evidenced in its findings at pages 56 and 57 of the decision. The NGEIR panel's application of the requisite elements of section 29 is evident in the balancing between considerations of competition with aspects of public interest.

> The parties recognized that bundled customers, in particular, do not acquire storage services separately from distribution services, do not control their use of storage, and do not have effective access to alternatives in either the primary or secondary markets. Competition has not extended to the retail end of the market, and therefore is not sufficient to protect the public interest. However, the Board finds that customers taking unbundled or semi-unbundled service should have equivalent access to regulated cost-based storage for their reasonable needs. The Board finds that it would not further the development of the competitive market, or facilitate the development of unbundled and semi-unbundled services, if these unbundled and semi-unbundled services were to include current storage services at unregulated rates. The Board also agrees with

the parties that noted that re-pricing existing storage will not provide an incentive for investment in new storage and therefore cannot be said to provide that public interest benefit.

However, customers taking unbundled and semi-unbundled services do have greater control over their acquisition and use of storage than do bundled customers. It is also the Board's expectation that these customers will have access to and use services from the secondary market. Therefore, the Board concludes it is particularly important to ensure that the allocation of cost-based regulated storage to these customers is appropriate. This issue is addressed in Chapter 6.

MHP Canada has suggested that the Board adopt full forbearance in storage pricing as a policy direction. Similarly, Union has characterized its allocation proposal and Enbridge has characterized its "exemption" approach for in-franchise customers as being "transitions" to full competition. The Board has found that the current level of competition is not sufficient to refrain from regulating all storage prices; nor do we see evidence that it would be appropriate to refrain from regulating all storage prices in the future. The current structure (for example, the full integration of Union's storage and transportation businesses and the full integration of Union as a provider of storage services and as a user of storage services) is not conducive to full forbearance from storage rate setting. In addition, there would be significant direct and indirect rate impacts associated with full forbearance from rate setting, and there is little evidence of significant attendant public interest benefits. The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there a reasonable prospect that they will be at some future time.

The submissions of both CCC/VECC and of IGUA are that the Board misinterpreted and misapplied section 29 of the OEB Act. This panel finds that there is no reviewable error

associated with the NGEIR panel's interpretation of section 29. The NGEIR Decision clearly evidences that the NGEIR panel knew and understood that section 29 was not a section that the Board had invoked in any previous decisions or analyses. For that reason, the Decision provides extensive background regarding the section and goes into significant detail regarding the appropriate framework and analysis required to be undertaken. The Decision shows that the NGEIR panel reviewed the elements of section 29 and considered each of those elements in considerable detail. Where moving parties raised specific questions regarding the application of Section 29, for example, with respect to whether the NGEIR panel had sufficient evidence upon which to make a finding that there was competition sufficient to protect the public interest and whether the NGEIR panel erred in setting a cap on the amount of natural gas storage available to in-franchise customers, the Board makes specific findings elsewhere in this Decision.

With respect to the allegation by CCC/VECC and IGUA that the NGEIR panel exceeded its jurisdiction by restructuring the storage businesses of Union and Enbridge, something which they assert should come under section 36 of the legislation, the Board also finds there is no reviewable error.

The NGEIR panel confined its considerations related to the application of the test under Section 29 in determining whether and to what extent there was competition in the natural gas storage market sufficient to protect the public interest. The portions of the decision that go on to discuss the impacts of the Section 29 decision on the structure of the natural gas storage market flow from the determination under Section 29, but the NGEIR panel does not, in its Decision, describe these as arising out of their Section 29 jurisdiction. The NGEIR proceeding was commenced pursuant to sections 19, 29 and 36 of the *Ontario Energy Board Act, 1998*. As such, the NGEIR panel acted under the authority of Section 29 and 36 in making the determinations in the NGEIR Decision. The decisions made by the NGEIR panel with respect to the allocation of storage available at cost-based rates and the treatment of the premium on market-based storage transactions were made based on evidence filed by the parties to the proceeding and the NGEIR panel considers this evidence as part of the NGEIR Decision.

The Board finds that the allegations of CCC/VECC and IGUA on this point do not raise a question as to the correctness of the decision. The NGEIR panel clearly confined itself to its legislative mandate as provided in Section 29 in determining whether the natural gas market was subject to competition sufficient to protect the public interest. The NGEIR's findings that flow from the Section 29 determination align with the evidence that was before it, did not fail to address any material issue and did not make any inconsistent findings with respect to the evidence before it, except as otherwise noted in this decision.

Section F: Status Quo

The factums and submission of both CCC/VECC and of IGUA allege that the NGEIR panel erred by failing to consider the option of retaining the current regulatory regime in respect of natural gas storage regulation. CCC/VECC and IGUA articulate this alleged error in a number of different ways in different parts of their factums and submissions.

For example, at paragraph 3 of their joint factum, CCC and VECC take the position that:

> "... the Board was obligated to consider whether a change in the status quo with respect to the regulation of storage was required and that it erred in failing to do so." IGUA's factum states that "...reasonable people, objectively examining the process which led to the Decision, will likely conclude that retaining the status quo was not a decision-making option which the Board considered, either fairly or at all, and that the Board itself was a proponent for forbearance relief."

Findings

The NGEIR Decision provides evidence in various places, of the NGEIR panel's recognition of both the current regulatory status with respect on natural gas storage in Ontario and the dynamic nature of competition generally.

In particular, Chapter 2 is described at page 5 of the decision as "...an overview of gas storage in Ontario today – the existing storage facilities, the use of storage by Union's and Enbridge's "in-franchise" customers, the "ex-franchise" market for storage, and the prices charged for storage services."

Later in the NGEIR Decision, as part of its findings on the assessment of assessment of storage competition, the Board expressly disagrees with Mr. Stauft's testimony that the regulated cost-base price for storage is a reasonable proxy for the competitive price of

storage. Implicit in this finding is the NGEIR panel's consideration of the current regulatory regime.

At page 46 of the Decision, the NGEIR Panel also considered the current regulatory regime in the context of question of the sharing of the premium which exists between the price of market-based storage and the underlying costs. The Board acknowledged the current state as follows:

> 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 rejects these proposals and, as a result, opposed forbearance.

At page 47, the NGEIR panel specifically considered and expressly acknowledged the importance of the change from the status quo, but ultimately rejected these submissions as follows:

> The Board agrees that the distribution of the premium is a significant consideration. In many ways, it has been the underlying focus of the NGEIR Proceeding. However, the impact of removing the premium from rates is the result of removing a sharing of economic rents; it is not the result of competition bringing about a price increase. So while it is an important consideration which the Board must address (see Chapter 7), it is not a sufficient reason, in and of itself, to continue regulating storage prices.

There are a number of other examples throughout the NGEIR Decision that satisfy the Board that the NGEIR panel was conscious of the status quo regulatory regime and bore this in mind throughout its analysis on the narrow issue of competition and the s.

29 analysis as well as in considering the impacts upon both shareholders and ratepayers, of a completely or partial forbearance decision.

The Board also feels that the decision by the NGEIR panel to continue to regulate and set cost-based rates for existing storage services provided to in-franchise customers up to their allocated amounts evidences a clear understanding of the current regulatory framework and under what circumstances, based upon the evidentiary record before the NGEIR panel, it was appropriate to deviate from that current framework.

The Board is not convinced, however, that the analysis mandated by the legislative language of s. 29 requires the Board to consider the status quo in the way that has been suggested by some parties. Although it was important for the NGEIR panel to review the current regulatory framework to set the stage for the analysis, the Board is not convinced by the arguments of CCC/VECC, nor those of IGUA that consideration of the status quo is an integral, or even a necessary part of the s. 29 analysis. The purpose of s. 29 was clearly stated by the NGEIR panel and that is to determine whether there is or will be competition sufficient to protect the public interest. If there is a finding that competition does exist, nothing in the section requires the panel to then consider whether the current regulatory framework is sufficient to accommodate the competitive market. In fact, the section mandates that upon finding competition sufficient to protect the public interest, that "...the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act..." In this case, the Board determined that it would refrain, in part, from regulating the setting of rates and the review of contracts for natural gas storage.

The Board therefore concludes that CCC/VECC and IGUA have not demonstrated that their grounds for review based on the alleged failure of the NGEIR panel to consider retaining the status quo as a viable decision-making option raise an issue that is material and directly relevant to the findings made in the decision. This panel concludes that there is no reviewable error with respect to the NGEIR panel's alleged failure to fairly consider the status quo.

Section G: Onus

At paragraph 84(d) of its factum, IGUA alleges that the Board erred in concluding that there is no onus of proof to be assigned in the rates and pricing proceedings it initiated. IGUA alleges that the NGEIR panel erred in law in not assigning the onus of proof to the utilities.

Findings

Pages 26 to 27 of the NGEIR Decision deal explicitly with this issue. In that part of the Decision, the panel acknowledges that generally, the onus is on the applicant. The panel also, however, pointed out the unique nature of the NGEIR proceeding and the fact that the proceeding was brought on the Board's own motion.

The Board is satisfied that all parties to the NGEIR Proceeding were given a full and fair opportunity to provide submissions on the question of onus and that, based on the Decision, the NGEIR panel heard and understood those submissions. This panel is not satisfied that the question of onus is an issue that is material and directly relevant to the findings made in the Decision, nor that if a reviewing panel did decide the issue differently, that it would change the outcome of the Decision. For these reasons, the Board finds that there is no reviewable error relating to assignment of or the failure to assign onus in the NGEIR proceeding.

Section H: Competition in the Secondary Market

In the NGEIR Decision, the Board concluded that Ontario storage operators compete in a geographic market that includes Michigan and parts of Illinois, Indiana, New York and Pennsylvania, that the market is competitive and neither Union nor Enbridge have market power. This determination was made by employing the following four step process, based on the Competition Bureau's Merger Enforcement Guidelines (MEGs):

- Identification of the product market.
- Identification of the geographic market.
- Calculation of market share and market concentration measures.
- An assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment).

IGUA alleged that the NGEIR panel made numerous errors in assessing sufficiency of competition in the secondary market. IGUA's allegations of errors can be summarized as follows:

- The NGEIR panel erred in misapprehending and misapplying the analytical tests used for determining market power.
- The NGEIR panel did not recognize that the evidence pertaining to the operation of the secondary market did not quantitatively establish the extent to which storage services, excluding commodity, were available at Dawn, nor their prices, nor whether consumers regarded such services as substitutes for delivery services offered by Union.

- The NGEIR panel failed to recognize that the evidence of Gaz Métropolitain Inc. (GMi) did not establish that Union lacked market power in storage services transacted at Dawn, and indeed this evidence established the opposite.

Findings

IGUA alleges that the Board misapprehended and misapplied the market power analytical frameworks presented in documents from the Competition Bureau, the Federal Energy Regulatory Commission (FERC), and the Canadian Radio-Television and Telecommunications Commission (CRTC). According to IGUA, a 10 step procedure must be followed in order to correctly carry out a market power analysis instead of the four step process used by the NGEIR panel.

The Board notes that, in settling on the four step procedure that should apply to determine whether Union and Enbridge have market power and whether the storage market is competitive, the NGEIR Decision provided substantial review and analysis pertaining to Competition Bureau's Enforcement Guidelines (MEGs) and the FERC's 1996 Policy Statement on Market Power Analysis. It is evidenced in the Decision that this was the result of the review of substantial pre-filed evidence, cross examination and argument on this topic.

In the Board's view, the test to be applied is not whether a review panel of the Board would have adopted a different analytical framework. Rather, it is matter of whether in settling upon a certain analytical process, there was an error of fact or law. In view of the extensive record and the analysis and reasons provided in the NGEIR Decision, the Board finds that IGUA not raised an identifiable error in the NGEIR Decision. Rather the submissions of the moving parties are more in the nature of re-arguing the same points that were made in the original hearing. This evidence was presented and evaluated by the NGEIR panel. As the Board stated in enunciating the threshold test at Section C of this Decision, a motion for review cannot succeed if a party simply argues that the Board should have interpreted conflicting evidence differently. The Board has therefore

determined that there is not enough substance to the issues raised by IGUA such that a review of those issues could result in the Board determining that the NGEIR Decision or Order should be varied, cancelled or suspended. As such, the NGEIR panel's determination on the nature and application of market power analysis to the natural gas storage market in and around Ontario is not reviewable.

IGUA alleges that the NGEIR panel did not recognize that the evidence pertaining to the operation of the secondary market did not quantitatively establish the extent to which storage services were available at Dawn, nor their prices or whether consumers regarded such services as substitutes for delivery services offered by Union.

In the Board's view, this alleged error is essentially an application of the alleged market power analysis framework error discussed above. The NGEIR panel listed several forms of evidence in support of its conclusion that the secondary market in transportation services is unconstrained and therefore serves to enlarge the geographic market from what it would otherwise have been found to be.

The NGEIR panel treated evidence on the operation of primary and secondary markets in transportation as relevant to the determination of the geographic market in a manner consistent with the market power analysis methodology that the NGEIR panel had settled upon. For the reasons stated above, the Board finds that the original NGEIR panel's use of evidence relating to the secondary market in transportation services is not reviewable.

IGUA cites the NGEIR hearing transcript (volume 10, pages 56-120) in support of its allegation that the Board failed to recognize that GMi's evidence actually supported IGUA's view that Union has market power.

The Decision (at page 35, paragraphs 4-5) clearly reflects the statements of GMi witnesses that they regularly contact alternative suppliers for comparisons to Union's services. IGUA has not shown that the NGEIR panel's findings are contrary to the evidence that was before the panel, or that the panel failed to address GMi's evidence

or made inconsistent findings with respect to that evidence. The Board therefore finds that there is no reviewable error with respect to the NGEIR panel's use of the evidence provided by GMi.

Section I: Harm to Ratepayers

IGUA and CCC/VECC alleged that the Board erred when it bifurcated the natural gas storage market between those customers that continue to benefit from storage regulation and those customers who do not. They allege that as a result of this bifurcated market, the Board conferred a windfall benefit on the shareholders of the utilities with no corresponding benefit to ratepayers and that this is unfair.

The parties also alleged that the transitional measures the Board employed to implement the new regime merely serve to underscore the error in the finding that the market should be split. The parties alleged that the market, taken as a whole, was determined not to be workably competitive, and the transitional measures are evidence that a decision to forbear from the regulation of prices was not appropriate.

Finally, CCC and VECC alleged that the Board erred in its interpretation of section 29, and acted in excess of its jurisdiction, by moving assets out of rate base, with no credit to the ratepayer. They argued that the effect of the NGEIR Decision is to allocate the rate base storage assets of the utilities between in-franchise and ex-franchise customers, and to allow for a new shareholder business within each utility. They submitted that doing those things does not naturally follow from a finding that the rates charged by the utilities to ex-franchise customers do not need to be regulated.

Findings

The Board finds that the issues raised in this area have not met the threshold test for the matter to be forwarded to a reviewing panel of this Board. The NGEIR panel did not err in failing to consider the facts, the evidence, or in exercising its mandate. There were no facts omitted or misapprehended in the NGEIR panel's analysis nor are the moving parties raising any new facts.

It was entirely within the NGEIR panel's mandate and discretion how to assess the competitive position of segments of the market and how to address the regulatory treatment of customers within those segments. The NGEIR panel clearly decided that ex-franchise customers of both Union and Enbridge had access to a competitive natural gas storage market. Further, the decision goes on to make clear on page 61, that Enbridge as a utility is ex-franchise to Union and therefore should be subject to market prices. The NGEIR Decision differentiates between the competitive position of a utility (e.g. Enbridge) and the competitive position of that utility's in-franchise customers. For example, the Decision is clear that the in-franchise customers of Enbridge will pay cost-based rates which will continue to be regulated by the Board and are based on EGD's costs of storage service owned by the utility and the costs that EGD pays for procuring these services in the competitive market.

A key issue the parties raise is that the bifurcated market brings about unfair and inconsistent treatment, and therefore constitutes a misapplication of the Board's mandate to protect the public interest. However, on this point, the grounds that the moving parties raised to support a review are in fact the very points used by the NGEIR panel to protect consumers as a natural consequence of the decision to refrain from storage regulation of the ex-franchise market. It is clear that the NGEIR panel took into account the protection of the public interest in its decision to provide transition mechanisms to protect consumers.

With respect to the allegation of a windfall benefit for shareholders of the utilities with no corresponding benefit to ratepayers, the Board is of the view that this is related to the question of earnings sharing. This issue is more fully addressed in Section K of this Decision. It is important to note here, however, that the NGEIR panel's decisions with respect to the profit or earnings sharing mechanism were based on the evidence presented by all parties and flowed from the broader decisions with respect to the competitiveness of the gas storage market. Chapter 7 of the NGEIR Decision clearly described the NGEIR panel's considerations with respect to and its reasoning for changing the earnings sharing mechanism. In the Board's view, the changes related to the earnings sharing mechanism necessarily arise from a recognition by the Board of

the implications of its findings under Section 29 that there is a workably competitive market for storage in the ex-franchise market.

Section J: Union's 100 PJ Cap

In their factum, CCC and VECC allege that, on the one hand the Board in its NGEIR Decision said that a substantial portion of the storage market requires regulatory protection because there is insufficient competition to protect the public interest while on the other hand the Board exposed this same group to the effects of competition from the unregulated market.

Kitchener has also specifically sought the Board's review of an aspect of the NGEIR Decision related to the Board's placement of a "cap" on the amount of Union's storage space that is reserved for in-franchise customers at cost-based rates.

The Board determined at page 83 of the NGEIR Decision that Union should reserve 100 PJ of storage space at cost-based rates for its in-franchise customers. The Decision reads as follows (page 83):

> 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.

The Board acknowledged that the cap might be reached at any time between 2012 and 2024, depending on what growth rate assumptions are used. At the current rate of growth (0.5% each year), the cap would not be met until 2024.

In Kitchener's oral submissions (page 187, Volume 1), Mr. Ryder on behalf of Kitchener makes the following comments:

> And while the cap of 100 pJs allows for some growth so it won't immediately affect the Ontario consumer, the cap will be reached between 2012 and 2024. That's between 5 and 17 years from now.
>
> Now, that's not far off, and if the public interest requires a margin for growth today in 2007, then the public interest will surely require it in five to 17 years from now when the cap is reached.
>
> And when it is reached, it is my submission that the Board will have wished it had reviewed the decision in 2007, because, when the cap is reached, this decision will be responsible for adding significantly to the costs of energy in Ontario, to the detriment of the Ontario consumer.

Page 7 of the CCC/VECC factum states:

> The Board made no finding, however, that at the end of the operation of those transitional measures, the public interest, as represented by in-franchise customers of Union and EGD, would be protected. The moving parties submit that Section 29 required the Board, before making an order to forbear from regulation under Section 29, to find on the evidence that,

> at the end of the transitional measures, there would be sufficient competition to protect the public interest. The moving parties submit that, in failing to make that finding, the Board erred.

Findings

On page 57 of the NGEIR decision, in reference to the in-franchise customers of Union the NGEIR panel makes the following statement:

> The current situation is that these customers are not subject to competition sufficient to protect the public interest; nor is there reasonable prospect that they will be at some future time.

Later in the decision at page 82, the decision states:

> The Board panel 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 NGEIR panel then goes on to provide its decision on the methodology which was used to determine the cap and says at page 83 of the decision:

> The 100 PJ (95 BCF) amount is the capacity that Union must ensure is available to in-franchise customers if they need it.

The NGEIR panel then makes a finding with respect to how the excess capacity should be treated if the in-franchise customers require less than 100 PJ in a given year. The NGEIR panel is silent on the outcome if in-franchise customers require more than 100 PJ of storage per year. Although the NGEIR panel is clear that it does not expect this circumstance to occur for many years, the decision nevertheless appears to raise the possibility that in-franchise customers may, at some point, be subject to unregulated prices.

The Board finds that on this issue the moving parties have raised a question as to the correctness of the order or decision and that a review based on the issue could result in the Board deciding that the decision or order should be varied, cancelled or suspended.

In particular, in this instance, there are unanswered questions that are raised by the NGEIR Decision on the 100 PJ cap issue. Since the NGEIR Decision clearly stated that the in-franchise customers did not have and were not likely to have access to competition in the foreseeable future, a decision that forbears from the regulation of pricing for these customers at some time in the future does not appear to this panel to be consistent. The Board finds that the following questions should have been addressed by the NGEIR panel:

(a) If the cap of 100 PJ of storage for in-franchise Union customers remain in place in perpetuity, what is the basis for forbearance (under Section 29) of required storage above 100 PJ for in-franchise customers?

(b) If the cap of 100 PJ of storage for in-franchise Union customers does not remain in place in perpetuity, what mechanism should the Board use to monitor the likelihood of the cap being exceeded?

(c) If the cap of 100 PJ of storage for in-franchise Union customers is likely to be exceeded, what, if any, remedy is available to in-franchise customers?

The Board therefore finds that the NGEIR panel either failed to address a material issue or made inconsistent findings, that the alleged error is material and relevant to the outcome of the decision, and that if the error is substantiated by a reviewing panel and corrected, the reviewing panel could change the outcome of the decision.

The Board therefore finds that this is a reviewable matter.

Section K: Earnings Sharing

Certain parties, led by VECC, allege that the NGEIR panel erred because one of the effects of the NGEIR Decision on the in-franchise customers of Union is that these customers will lose the benefit of their share of the premium obtained by Union through the sale of storage to ex-franchise customers. The parties stated that the NGEIR Decision will result in a material increase in revenue to the shareholder of Union and, to a lesser extent, an increase in the revenue to EGD's shareholder. They also indicated that at the same time, there will be no corresponding benefit to the ratepayers of either Union or EGD. In fact the moving parties argued that the ratepayers of Union and EGD will suffer adverse impacts, in both the short and the long term. The moving parties maintained that the NGEIR Decision upsets the balance between the interests of ratepayers and shareholders which the regulatory system is supposed to maintain and that the NGEIR Decision is, therefore, contrary to public and regulatory policy.

It was also stated by the moving parties that section 29 of the OEB Act does not permit the Board to re-allocate rate-based storage assets. The effect of the NGEIR Decision was to allocate rate-based storage assets between in-franchise and ex-franchise customers and to allow for a new shareholder business within each utility. The moving parties stated that the Board exceeded its jurisdiction by moving assets out of rate base with no credit to the ratepayer.

It was further asserted that rather than requiring utility shareholders to share the premiums derived from the sale of storage to ex-franchise customers, there will now be a separation of utility and non-utility assets and revenues and costs associated therewith. The moving parties stated that this will raise cross-subsidization and other issues pertaining to the performance of utility and non-utility services; a result which they say contravenes the spirit and intent of the pure utility policy adopted by the Ontario government years ago.

Further, the parties allege that the Board erred in concluding that it has the power to forbear under Section 29 of the *OEB Act* when an exercise of the power results in a

windfall benefit to utility shareholders and consequential harm to ratepayers. The parties asserted that changes to the allocation between ratepayers and utility shareholders of financial benefits and burdens produced by a particular regulatory regime must take place under the auspices of regulation.

Findings

The Board notes that the NGEIR Decision deals extensively with the issue of the allocation/sharing of margins (also called premiums, revenues or earnings) associated with the sale of natural gas storage on both a short-term (transactional services) and long-term contractual basis. The Decision canvasses both the status quo (prior to the implementation of the changes required by the NGEIR Decision) and provides an explanation of the rationale for changing the earnings sharing structure, the new mechanisms for earnings sharing and the transitional implementation (where applicable) of those mechanisms.

In particular, chapter 2 of the NGEIR Decision provides, among other things, a description of the current types and volumes of sales of natural gas storage by Union to ex-franchise customers and canvasses the current regulatory treatment of ex-franchise sales, including the rate treatment of margins on storage sales. In Chapter 7, the NGEIR panel goes into greater detail regarding the extent of margin sharing and the regulatory history that underlines premium sharing for both short-term (for both Union and Enbridge) and long-term (for Union only) sales of storage.

Chapter 7 goes on to provide the Board's findings on for the sharing of margins for both short-term and long-term transactions and to describe a transition mechanism related to long-term margins.

The record that the NGEIR panel relied upon included extensive evidence and argument of many parties, including the moving parties to this proceeding and the utilities. The NGEIR Decision refers to various parties' submissions on the issue of premium sharing and the Board reiterated some of the historical evidence with respect

to the margin sharing in its Decision. The NGEIR Decision indicates that the NGEIR panel heard and considered the evidence and submissions before it in making its determinations with respect to this issue.

Importantly, the NGEIR panel's findings relate back to and to a certain extent flow from its broader decision to refrain, in part, from regulating rates for storage services. The Board does not accept the suggestion that the Board exceeded its jurisdiction by moving assets (in the case of Union) out of rate-base and by altering the status quo margin sharing mechanism. On the contrary, the NGEIR Decision clearly articulates that the changes to margin sharing flow necessarily and logically from the decision to refrain, in part, from regulated rates for storage services.

The determinations of the NGEIR panel are also consistent with its determination to distinguish between "utility assets" and "non-utility assets". The Decision clearly indicates that the NGEIR panel canvassed past decisions of the Board on this issue and considered the implications of its findings on both the utilities and ratepayers. Part of this consideration is evidenced in the development by the panel of a transition mechanism related to the implementation of the Board's finding that profits from new long-term transactions should accrue entirely to the utility (Union) as opposed to ratepayers. The threshold panel does not accept the argument that this transitional implementation is a form of implicit acknowledgement that the finding is inappropriate. The NGEIR panel exemplified Board precedent for the use of a phase-out mechanism and, in its finding, indicated that it had considered other options for a transitional mechanism.

The Board finds that the NGEIR panel's determinations on the treatment of the premium on market-based storage transactions are not reviewable. The record of the NGEIR proceeding clearly demonstrates that the NGEIR panel considered the evidence, the regulatory history with respect to the issue of premium sharing and parties' submissions and made its determination on the basis of that evidence and those submissions. There is nothing in the moving parties' evidence or arguments that demonstrate to the Board that the NGEIR panel made a reviewable error. For this

reason, the Board has determined that the threshold test has not been met and it will not order a review of the NGEIR Decision as it pertains to the issue of the division of the utilities assets or the sharing of the margin realized from the sale of natural gas storage to ex-franchise customers.

Section L: Additional Storage for Generators and Enbridge's Rate 316

Many of the issues which existed between Union and Enbridge and their generator customers were resolved in the Settlement Proposals which were filed and accepted by the Board in the NGEIR proceeding. These settlements deal with storage space parameters, increased deliverability for that space, and access to that enhanced space to balance on an intra-day basis. What remained unresolved was the pricing for the new high deliverability storage services for in-franchise generators.

The utilities had proposed in the NGEIR proceeding to offer these services at market-based rates and proposed that the Board refrain from regulating the rates for these services. The power generators took the position that storage services provided to them should be regulated at cost-based rates.

In the NGEIR Decision, APPrO's position was described as follows:

> The Association of Power Producers of Ontario (APPrO) argued that the product it is more interested in – high deliverability storage – is not currently available in Ontario. APPrO argued that competition cannot exist for a product that is not yet introduced and pointed out that when it is introduced it will be available only from Ontario utilities as ex-Ontario suppliers will be constrained by the nomination windows specified by the North American Energy Standards Board (NAESB).

The NGEIR Decision stated:

> With respect to APPrO's position, the Board is not convinced that high deliverability storage service is a different product. High deliverability storage may be a new service, but it is a particular way of using physical storage, which still depends upon the physical parameters of working capacity and deliverability.

In the Motions proceeding, APPrO stated that its position was and continues to be narrower than what was described by the NGEIR panel. APPrO was not seeking high deliverability storage. Rather, it was seeking services that would allow generators to manage their gas supply on an intra-day basis. It is not operationally possible for the generator to increase the rate at which gas can be delivered in and out of the storage space with deliverability from a supplier other than Union. Moreover, APPrO asserted that the frequent nominations windows required for such service are only available in Ontario from the utilities. Since this is a monopoly service, then it should be offered at cost.

Union argued that APPrO has not brought forward any new facts or changes in circumstance, nor has it demonstrated any error in the Board's original decision. It also stated that APPrO's assertion that high-deliverability storage is only available from the utility is demonstrably wrong and that there was sufficient evidence that high deliverability storage is available from others. Union disagreed with APPrO's position that deliverability could not be separated from storage space. Although this is correct in the physical context, Union submitted that there were substitutes for deliverability and storage space and gas-fired power generators could acquire their intra-day balancing needs from sources other than the utilities. This according to Union was clearly addressed in the original proceeding and considered by the Board in its decision and APPrO was simply seeking to re-argue its position that had already been fully canvassed.

Enbridge pointed out that any de-linking of storage and deliverability that occurred was as a result of the settlement agreed to by APPrO and the power generators with Enbridge. The settlement states that the allocation methodology for gas-fired generators' intra-day balancing needs is based on the assumption that high deliverability storage is available to those customers in the market.

APPrO has also raised an issue with some aspects of Rate 316 offered by Enbridge. Rate 316 was part of a proposal submitted by Enbridge during the NGEIR proceeding in response to generators' need for high deliverability storage service. As a result of the

Settlement Proposal, Enbridge's Rate 316 provides an allocation of base level deliverability storage at rolled in cost along with high deliverability storage at incremental cost to in-franchise gas fired generators. Section 1.5 of the Settlement Proposal indicates that generators are entitled to an allocation of 1.2% deliverability storage at rolled-in cost based rates.

Findings

In the Board's view, it is unclear from the NGEIR Decision whether the NGEIR panel took the implications of the Union settlement agreement into consideration. The NGEIR Decision does not provide sufficient clarity regarding the issues raised by APPrO. It appears that there are some practical limitations faced by gas-fired generators in that presently they can only access certain services from the utility. Although Union asserted that it is demonstrably wrong to suggest, as APPrO has, that "high-deliverability storage is only available from the utility" and that "there was sufficient evidence that high deliverability storage is available from others" this was not the finding expressed in the NGEIR Decision. In fact, at page 69 of the NGEIR Decision, the NGEIR Panel acknowledged this by stating that: "These services are not currently offered, indeed they need to be developed, and investments must be made in order to offer them." On the other hand, APPrO asserted that only TCPL offers some intra-day services but only in some parts of Ontario through a utility connection or a direct connection with TCPL. To the extent that APPrO's facts may be correct, there is sufficient question whether the NGEIR Decision erred by requiring that monopoly services be priced at market.

For these reasons, and given the potential material impact on power generators, the Board finds that the alleged errors raised by APPrO with respect to Union are material and relevant to the outcome of the decision, and that if the error is substantiated by a reviewing panel and corrected this could change the outcome of the decision. The Board will therefore pass this matter to a reviewing panel of the Board to investigate and make findings as it sees fit.

With respect to the Rate 316 issue, on page 70 of the NGEIR Decision, the Board stated:

> The Board notes that Enbridge committed to offer Rate 316, whether or not the Tecumseh enhancement project goes ahead, and to price it on cost pass-through basis. The Board expects Enbridge to fulfill this commitment.

The Board further noted:

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

At the motion hearing, APPrO indicated that it wanted the Board to issue an order requiring Enbridge to do what the Board has asked them to do, that is, to offer Rate 316 on a cost pass-through basis. Enbridge has already committed to offering this service in the Settlement Proposal and the Board has already noted this commitment in this decision. This panel does not see any further value to issuing an order stating the same.

However, there is some ambiguity with respect to Rate 316. The NGEIR decision seems to indicate that the Board will refrain from regulating Rate 316. Even so, the Enbridge NGEIR Rate Order has a tariff sheet for Rate 316 with storage rates for maximum deliverability of 1.2% of contracted storage space. This seems to indicate that Rate 316 is regulated for 1.2% deliverability storage and the Board has refrained from regulating rates for deliverability higher than 1.2%. It is difficult to recognize this distinction from the NGEIR Decision.

For these reasons, the Board finds that APPrO has raised a question as to the correctness of the order or decision in respect of the Rate 316 issue and that a review

panel of the Board could decide that the decision or order should be varied (by way of clarification or otherwise), cancelled or suspended.

Section M: Aggregate Excess Method of Allocating Storage

In the NGEIR proceeding, Union had proposed the "aggregate excess" method in allocating storage to its customers. The aggregate excess method is the difference between the amount of gas a customer is expected to use in the 151-day winter period and the amount that would be consumed in that period based on the customer's average daily consumption over the entire year. Kitchener had proposed two alternative methodologies. The NGEIR Decision approved Union's proposal.

Kitchener argued that the NGEIR Decision failed to take into account that the aggregate excess methodology, because it uses normal weather to estimate a customer's storage allocation, unnecessarily increases utility rates and therefore offends the requirement of just and reasonable rates under sections 2 and 36 of the Act. Kitchener also argued that there is no evidence to support the Board's conclusion that aggregate excess meets the reasonable load balancing requirements of the Kitchener utility.

Union argued that these issues were fully considered by the Board in its NGEIR Decision and that Kitchener has not brought forward any new evidence or any new circumstances; it is simply attempting to reargue its case.

Findings

With respect to Kitchener's allegation that the NGEIR panel did not consider the impact on rates, the Board notes that the record in the NGEIR proceeding indicates that the impact on utility rates was examined extensively. The issue was raised in Kitchener's pre-filed evidence at page 5 and again at page 14. The transcript from the proceeding also indicates that there was extensive discussion on costs (Volume 12, pages 39-133) during cross examination and additional undertakings were filed on the topic. The record also indicates that the previous Panel questioned the witnesses specifically with respect to the costs and a utility's exposure to winter spot purchases (Volume 12, pages 183-184). The issue was again raised by Kitchener in argument (Volume 17, page 153)

and once again questions were posed to Kitchener's counsel by the NGEIR panel (Volume 17, pages 159-164).

The NGEIR Decision (pages 93 to 95) refers to Kitchener's alternatives and arguments and deals with that issue squarely when it finds that:

> The Board does not agree that the allocation of cost based storage should be determined assuming colder than normal weather or that it should be designed to provide protection against a cold snap in April. To do so would result in in-franchise customers as a group being allocated more cost-based storage than they are expected to use in most winters. As noted in 6.2.2, the Board concludes that the objective of the allocation of cost-based storage space is to assign an amount that is reasonably in line with what a customer is likely to require. In the Board's view, that supports continuing the assumption of normal weather.

In the Board's view, the record clearly indicates that this issue was thoroughly examined in the NGEIR proceeding. The Board believes that Kitchener's claim that the NGEIR panel failed to account for the fact the aggregate excess methodology increases utility rates is without merit. Kitchener presented no new evidence or new circumstances which would convince the Board that this issue is reviewable.

To support its second claim (i.e. the Board erred because there is no evidence to support the Board's conclusion that the aggregate excess method meets the reasonable load balancing requirements of the Kitchener utility), Kitchener argues that the Board ignored the evidence which suggests that the actual allocation to Kitchener over the past 6 years has been at a contractual level which is 10.6% higher than aggregate excess.

The Board disagrees. Contrary to Kitchener's assertions, the NGEIR Decision clearly considers the fact that Kitchener's aggregate excess amount is 10.6% lower than its current contracted amount. Specifically, the NGEIR Decision states:

> The current contract expires March 31, 2007 and Kitchener is seeking a long-term storage contract with Union effective April 1, 2007. It is concerned that its allocation of cost-based storage in a new contract will be restricted to the amount calculated under the aggregate excess method. Kitchener's current aggregate excess amount is 3.01 million GJ, 10.6% lower than the amount of cost-based storage in its current contract.

The NGEIR Decision also states:

> The issue is whether Kitchener has made a compelling case that its use of storage is so different from the assumed use underlying the aggregate excess method that Union should be required to develop an allocation method just for Kitchener. The Board finds Kitchener has not successfully made that argument.

In view of the above, the Board is convinced that the NGEIR panel considered the evidence before it. The claim by Kitchener that the Board ignored the evidence in question and based its decision only on the evidence provided by Union is demonstrably incorrect.

Kitchener also claims that the Board committed an error in fact by stating (at page 85 of the NGEIR Decision), that Enbridge uses a methodology similar to that of Union's. In the Boards' view, this reference is simply to provide context and is clearly referring to the mathematical formula used to calculate the storage allocation. It is certainly not a matter capable of altering the decision on this point.

In conclusion, the Board finds that the matters raised by Kitchener are not reviewable.

Section N: Orders

Having made its determinations on the Motions, the Board considers it appropriate to make the following Orders.

The Board Orders That:

The Motions for Review are hereby dismissed without further hearing, with the following exceptions. The Board's findings on Union's 100 PJ cap on cost-based storage for in-franchise customers and the additional storage requirements for in-franchise gas-fired generators are reviewable for the purposes set out in this Decision.

Section O: Cost Awards

The eligible parties shall submit their cost claims by June 5, 2007. A copy of the cost claim must be filed with the Board and one copy is to be served on both Union and Enbridge. The cost claims must be done in accordance with section 10 of the Board's Practice Direction on Cost Awards.

Union and Enbridge will have until June 19, 2007 to object to any aspect of the costs claimed. A copy of the objection must be filed with the Board and one copy must be served on the party against whose claim the objection is being made.

The party whose cost claim was objected to will have until June 26, 2007 to make a reply submission as to why their cost claim should be allowed. Again, a copy of the submission must be filed with the Board and one copy is to be served on both Union and Enbridge.

DATED at Toronto, May 22, 2007

Original signed by

Pamela Nowina
Presiding Member and Vice Chair

Original signed by

Paul Vlahos
Member

Original signed by

Cathy Spoel
Member

TAB D

Ontario

ServiceOntario
e-Laws

Mining Act
Loi sur les mines

ONTARIO REGULATION 263/02

EXPLORATION LICENCES, PRODUCTION AND STORAGE LEASES FOR OIL AND GAS IN ONTARIO

Consolidation Period: From September 11, 2002 to the e-Laws currency date.

No amendments.

This Regulation is made in English only.

DEFINITIONS

Definitions

1. In this Regulation,

"gas" means a mixture containing hydrocarbons that is located in or recovered from an underground reservoir and that is gaseous at the temperature and pressure under which its volume is measured or estimated;

"oil" means a mixture containing hydrocarbons that is located in or recovered from an underground reservoir, or recovered in processing, and that is liquid at the temperature and pressure under which its volume is measured or estimated;

"Plan 1495" means Plan 1495 filed in the Archives of Ontario at Toronto;

"tract" and "block" have the same meanings as they have with respect to Crown land descriptions as shown on Plan 1495. O. Reg. 263/02, s. 1.

EXPLORATION LICENCES

Area covered by exploration licences

2. (1) The Minister may issue an exploration licence authorizing the licensee to explore for oil or gas, or both, on Crown lands lying south and east of the Mattawa River, Lake Nipissing and the French River and on Crown lands lying north of the 51st parallel of latitude. O. Reg. 263/02, s. 2 (1).

(2) The Minister may offer for sale by tender the right to obtain a licence. O. Reg. 263/02, s. 2 (2).

Information required for licence

3. An applicant for a licence shall provide the Minister with,

(a) a description of the area to be covered by the licence; and

(b) the application fee. O. Reg. 263/02, s. 3.

Timing of licences

4. (1) Subject to subsection (2), applications for licences received during each of the following quarterly periods are considered after the end of each quarter:

1. January 1 to March 31.

2. April 1 to June 30.

3. July 1 to September 30.

4. October 1 to December 31. O. Reg. 263/02, s. 4 (1).

(2) The Minister may, at any time, offer for sale by tender the right to obtain a licence if the Minister receives a written request to have an application for a licence considered other than in accordance with subsection (1) or if he or she considers it appropriate to do so. O. Reg. 263/02, s. 4 (2).

Term of licence

5. (1) A licence shall be for a term of not more than five years and the anniversary date of every licence shall be deemed to be January 1 in each year. O. Reg. 263/02, s. 5 (1).

(2) The Minister may extend the term of a licence for a period not exceeding 12 months if weather, water or other conditions prevent the licensee from carrying out exploration or drilling during the final year of the term of the licence and the licensee applies in writing to the Minister for the extension at least 30 days prior to its expiration and pays the required fee for an extension. O. Reg. 263/02, s. 5 (2).

(3) Any extension granted under subsection (2) is considered part of the final year of the term of the licence. O. Reg. 263/02, s. 5 (3).

Description of area

6. (1) A licence shall describe the area covered by the licence by tract and block or, if no registered grid system applies to the area, by description prepared under the instructions of the Minister. O. Reg. 263/02, s. 6 (1).

(2) The minimum size of the area for a licence covering an area shown on Plan 1495 shall be one tract and the maximum size shall be one block. O. Reg. 263/02, s. 6 (2).

(3) If an area to be covered by a licence is an area not shown on Plan 1495, the Minister shall specify the minimum and maximum size of the area to be covered by a licence on application or tendering. O. Reg. 263/02, s. 6 (3).

Rental

7. (1) Subject to subsection (2), a licensee shall pay in advance the annual rental for a licence set out in the Schedule and, for the purpose of calculating the rental payable, one tract is equal to 255 hectares. O. Reg. 263/02, s. 7 (1).

(2) If the first year of the term of a licence is less than 12 months, the rental for the first year shall be determined on a proportionate basis. O. Reg. 263/02, s. 7 (2).

Surrender of licence

8. (1) A licensee may, with the Minister's consent, surrender a licence in whole or in part at any time upon giving written notice to the Minister at least 30 days before the surrender is proposed to take effect and paying the required fee for a surrender. O. Reg. 263/02, s. 8 (1).

(2) If a surrender is accepted, the annual rental for the year of the term in which the surrender is made shall be that required for the area described in the licence immediately before the surrender, but the annual rental for any subsequent year or years of the term shall be based on the remaining area described in the revised licence. O. Reg. 263/02, s. 8 (2).

Reduction in rental

9. The Minister may reduce the rental payable for a licence in any year in which the licensee is prevented from carrying out exploration or drilling if a public authority having jurisdiction in the area in which the licensee was carrying out exploration or drilling directs the licensee to suspend the exploration or drilling or if weather, water or other conditions prevent the exploration or drilling from being carried out. O. Reg. 263/02, s. 9.

PRODUCTION LEASES

Requirements for production lease

10. (1) A licensee who applies to the Minister for a lease shall be granted a lease for an area that formed all or part of the area described in the licence if the licensee demonstrates to the Minister's satisfaction that the area to be covered by the lease contains economically producible oil or gas. O. Reg. 263/02, s. 10 (1).

(2) If the Minister is not satisfied that the licensee has demonstrated that the area to be covered in the lease contains economically producible oil or gas, the Minister may,

(a) amend the application with respect to the area applied for and grant the lease; or

(b) refuse to grant the lease. O. Reg. 263/02, s. 10 (2).

(3) If the Minister offers for sale by tender the right to obtain a licence, the Minister may grant a lease to the successful purchaser of that right without first issuing a licence, or if no tender for the right to obtain a licence is made, the Minister may issue a lease directly to the applicant. O. Reg. 263/02, s. 10 (3).

(4) The area to be covered by a lease shall conform to the size requirements of subsection 6 (2) or (3). O. Reg. 263/02, s. 10 (4).

(5) An application for a lease shall be accompanied by,

(a) a description of the area,

(i) by tract and block described by Plan 1495,

(ii) if any registered grid system is subsequently established on the area, in accordance with that grid system, or

(iii) if the area is not described by a registered grid system, by a Crown land reference plan prepared in accordance with the instructions of the Minister or any other description approved by the Minister;

(b) a summary of the technical data supporting and quantifying the discovery of economically producible oil or gas;

(c) the rent for the first year of the term of the lease; and

(d) the application fee. O. Reg. 263/02, s. 10 (5).

Term of lease

11. (1) A lease shall be for a term of not more than 10 years and the anniversary date of every lease shall be deemed to be January 1 in each year. O. Reg. 263/02, s. 11 (1).

(2) If oil or gas is produced under a lease and production continues beyond the term of the lease, the Minister shall renew the lease, for successive periods of not more than 10 years, with respect to those areas covered by the lease that remain productive. O. Reg. 263/02, s. 11 (2).

Surrender of lease

12. (1) A lessee may, with the Minister's consent, surrender a lease in whole or in part at any time upon giving written notice to the Minister at least 30 days before the surrender is proposed to take effect. O. Reg. 263/02, s. 12 (1).

(2) If a surrender is accepted under subsection (1), the annual rental for the year of the term in which the surrender is made shall be that required for the area described in the lease immediately before the surrender, but the annual rental for any subsequent year or years of the term shall be based on the remaining area described in the revised lease. O. Reg. 263/02, s. 12 (2).

Rental

13. (1) A lessee shall pay in advance the annual rental for a lease set out in the Schedule. O. Reg. 263/02, s. 13 (1).

(2) If the first year of the term of a lease is less than 12 months, the rental for the first year shall be determined on a proportionate basis. O. Reg. 263/02, s. 13 (2).

Royalty payments

14. (1) A lessee shall pay a royalty, at the royalty rate set out in the Schedule, on the oil and gas produced from the area covered by the lease based on the full sale price of the oil or gas received by the lessee at the point at which the lessee transfers custody of the oil or gas to the purchaser, without any deduction for any of the lessee's or purchaser's costs. O. Reg. 263/02, s. 14 (1).

(2) Despite subsection (1), no royalty is payable in respect of any gas produced from the area covered by the lease that the lessee reasonably required and used as fuel for the production of oil or gas from the area. O. Reg. 263/02, s. 14 (2).

(3) The royalty on oil or gas produced in a month is payable on or before the end of the month following the month in which the oil or gas is produced, unless otherwise directed by the Minister. O. Reg. 263/02, s. 14 (3).

(4) On making a royalty payment, the lessee shall submit evidence of the volume and full sale price of the oil or gas to which the royalty payment relates. O. Reg. 263/02, s. 14 (4).

(5) The Minister may recalculate any royalty payment if the Minister determines that the volume of oil or gas or the full sale price of the oil or gas is not accurate or the full sale price does not reflect the fair market value of the oil or gas, in which case the lessee shall pay the royalty calculated by the Minister. O. Reg. 263/02, s. 14 (5).

Unitization agreements

15. (1) In this section,

"pool" means an underground accumulation of oil or gas or both, separated or appearing to be

separated from any other underground accumulation;

"spacing unit" has the same meaning as in section 1 of the *Oil, Gas and Salt Resources Act*;

"unitization agreement" means an agreement providing for the combining of separately owned oil or gas interests in a pool, formation or field to permit the efficient and economical drilling for or production of oil, gas or other unitized substances. O. Reg. 263/02, s. 15 (1).

(2) If the Crown's interest in oil or gas is within a spacing unit and all of the interests in the oil and gas in the spacing unit are combined under a pooling agreement, the Crown's percentage share of the production of oil or gas from the spacing unit is,

(a) the Crown's percentage share as set out in the agreement; or

(b) equal to the percentage share by area of the Crown's interest in the oil and gas in the spacing unit in any other case. O. Reg. 263/02, s. 15 (2).

(3) If the Crown's interest in oil or gas relates to land that is subject to a unitization agreement, the Crown's percentage share of the production of oil or gas from the land is as set out in the unitization agreement. O. Reg. 263/02, s. 15 (3).

(4) When the Crown's percentage share of the production of oil or gas has been determined under subsection (2) or (3), the royalty payable to the Crown shall be calculated in accordance with section 14. O. Reg. 263/02, s. 15 (4).

STORAGE LEASES

Granting storage leases

16. (1) The Minister may grant a storage lease to store substances listed in subsection (4) in underground geological formations located on Crown lands. O. Reg. 263/02, s. 16 (1).

(2) The Minister may offer for sale by tender the right to obtain a storage lease. O. Reg. 263/02, s. 16 (2).

(3) Where the right to obtain a storage lease for the purposes of storing natural gas is offered for sale by tender under subsection (2), the tender bid shall consist of,

(a) a cash bonus for the right to obtain the storage lease;

(b) the storage rental, in dollars per 1000 cubic metres of the working storage volume per month, that the applicant proposes to pay the Crown during the first and subsequent terms of the lease;

(c) the proposed operating parameters and method used in calculating the working storage volume; and

(d) the method of calculation of and the compensation in dollars for the remaining gas in place. O. Reg. 263/02, s. 16 (3).

(4) Where the right to obtain a storage lease for the purposes of storing substances other than natural gas is offered for sale by tender under subsection (2), the tender bid shall consist of a cash bonus bid. O. Reg. 263/02, s. 16 (4).

(5) The Minister may set a minimum bonus bid and storage rental for the tender. O. Reg. 263/02, s. 16 (5).

(6) The Minister may cancel the tender at any time for any reason the Minister considers expedient, including,

(a) that the tender is no longer in the public interest; and

(b) that no bid is acceptable, even a bid that meets any minimum set by the Minister under subsection (5). O. Reg. 263/02, s. 16 (6).

(7) Subject to subsections (8) and (9), a storage lease shall specify the substances that may be stored and the geological formations that may be used for storage. O. Reg. 263/02, s. 16 (7).

(8) The following substances may be stored under a storage lease:

1. Natural gas.

2. Crude oil.

3. Diesel.

4. Methane.

5. Ethane.

6. Propane.

7. Butane.

8. Other hydrocarbons by themselves or in mixtures.

9. Air. O. Reg. 263/02, s. 16 (8).

(9) Temporary or permanent disposal of any substance, except oil field fluid as defined in the *Oil, Gas and Salt Resources Act*, within an underground formation subject to a storage lease is prohibited. O. Reg. 263/02, s. 16 (9).

Description of area

17. (1) A storage lease shall describe the area covered by the lease by tract and block or, if no registered grid system applies to the area, by description prepared under the instructions of the Minister. O. Reg. 263/02, s. 17 (1).

(2) The minimum size of the area for a storage lease covering an area shown on Plan 1495 shall be one tract and the maximum size shall be one block. O. Reg. 263/02, s. 17 (2).

(3) If an area to be covered by a licence is an area not shown on Plan 1495, the Minister shall specify the minimum and maximum size of the area to be covered by a storage lease on application or tendering. O. Reg. 263/02, s. 17 (3).

Application for lease

18. An application for a storage lease shall be accompanied by,

(a) a description of the area,

(i) by tract and block described by Plan 1495,

(ii) if any registered grid system is subsequently established on the area, in accordance with that grid system, or

(iii) if the area is not described by a registered grid system, by a Crown land reference plan prepared in accordance with the instructions of the Minister or any other description approved by the Minister; and

(b) a geological description of the storage zone and the chemical description of the substance to be stored. O. Reg. 263/02, s. 18.

Term of lease

19. (1) A lease shall be for a term of not more than 10 years and the anniversary date of every lease shall be deemed to be January 1 in each year. O. Reg. 263/02, s. 19 (1).

(2) If storage operations are to continue beyond the term of the storage lease, the Minister shall renew the lease, for successive periods of not more than 10 years, with respect to those areas covered by the lease still being used for storage. O. Reg. 263/02, s. 19 (2).

Surrender of lease

20. (1) A lessee may, with the Minister's consent, surrender a lease in whole or in part at any time upon giving written notice to the Minister at least 30 days before the surrender is proposed to take effect. O. Reg. 263/02, s. 20 (1).

(2) If a surrender is accepted under subsection (1), the rental for the month of the term in which the surrender is made shall be that required for the area described in the lease immediately before the surrender, but the rental for any subsequent month of the term shall be based on the rental required for the remaining area described in the revised lease. O. Reg. 263/02, s. 20 (2).

Storage rental for natural gas storage

21. (1) In this section,

"cushion gas" means the volume of gas required as permanent storage inventory to maintain adequate reservoir pressure for meeting minimum gas deliverability demands;

"working storage volume" means the volume capacity of the storage zone respecting the substance being stored but cushion gas is excluded in calculating the volume. O. Reg. 263/02, s. 21 (1).

(2) A lessee shall determine and submit the working storage and cushion gas volumes and the method of determination to the Minister prior to commencement of storage operations and maintain an accurate inventory of the substance that is stored within the area described in the storage lease. O. Reg. 263/02, s. 21 (2).

(3) The lessee shall pay the storage rental specified in the Schedule monthly and payment shall be made no later than the end of the month following the month in which the storage rental is owed, unless otherwise directed by the Minister. O. Reg. 263/02, s. 21 (3).

(4) If the first month in the term of a lease is less than a full month, the rental for the first month shall be determined on a proportionate basis. O. Reg. 263/02, s. 21 (4).

(5) The Minister may recalculate any storage rental payment if the Minister determines that the working storage or cushion gas volume is not accurate, in which case the lessee shall pay the storage rental as calculated by the Minister. O. Reg. 263/02, s. 21 (5).

(6) If the Crown's interest in storage is a portion of a designated storage area or pool, the Crown's percentage share is the Crown's percentage share of the total working storage volume of the storage zone, and the storage rental shall be paid on this basis in accordance with this section. O. Reg. 263/02, s. 21 (6).

Storage rental for non natural gas storage

22. (1) In this section,

"storage capacity" means the maximum volume of the storage zone. O. Reg. 263/02, s. 22 (1).

(2) The lessee shall pay the storage rental specified in the Schedule monthly and payment shall be made no later than the end of the month following the month in which the storage rental is owed, unless otherwise directed by the Minister. O. Reg. 263/02, s. 22 (2).

(3) If the first month in the term of a lease is less than a full month, the rental for the first month shall be determined on a proportionate basis. O. Reg. 263/02, s. 22 (3).

(4) On making a storage rental payment, the lessee shall submit evidence of the storage capacity to which the storage rental relates. O. Reg. 263/02, s. 22 (4).

(5) The Minister may recalculate any storage rental payment if the Minister determines that the storage capacity is not accurate, in which case the lessee shall pay the storage rental calculated by the Minister. O. Reg. 263/02, s. 22 (5).

(6) If the Crown's interest in storage is a portion of a designated storage area or pool, the Crown's percentage share is the Crown's percentage share of the total working storage volume of the storage zone, and the storage rental shall be paid on this basis in accordance with this section. O. Reg. 263/02, s. 22 (6).

GENERAL

Well licences

23. (1) Despite any rights granted or implied in an exploration licence, production lease or storage lease, but subject to section 40 of the *Ontario Energy Board Act, 1998*, the Minister may issue a well licence under the *Oil, Gas and Salt Resources Act* for a deviated or horizontal well that will traverse the area described in a exploration licence, production lease or storage lease to a person other than the licensee or lessee if,

(a) the proposed well is necessary to reach an oil and gas target or storage zone located on licensed or leased lands held by the person;

(b) the affected lands have been unitized in a manner acceptable to the Minister;

(c) in the opinion of the Minister, the proposed well will not interfere with or adversely affect existing exploration, production or storage operations; and

(d) the well is in the public interest. O. Reg. 263/02, s. 23 (1).

(2) If a gas lease has previously been granted and the gas lessee acquires oil lease rights for the whole or part of the area described in the gas lease, the Minister shall cancel or amend the gas lease in whole or in part and issue an oil and gas lease in its place for the area where both oil and gas lease rights are held by the same lessee. O. Reg. 263/02, s. 23 (2).

(3) Despite any rights granted under a licence or lease, drilling for oil or storing oil or other liquid hydro-carbon by means of a well having a surface location in a water-covered area and production of oil from a well in such locations is prohibited. O. Reg. 263/02, s. 23 (3).

(4) A licensee or lessee who encounters oil while drilling in a water-covered area shall plug all wells capable of producing oil in accordance with the *Oil, Gas and Salt Resources Act* and surrender the licence or lease with respect to the area that has been proven to reasonably contain oil. O. Reg. 263/02, s. 23 (4).

(5) Subsections (3) and (4) do not apply to horizontal or directional wells drilled from

land based locations. O. Reg. 263/02, s. 23 (5).

(6) Despite subsection (4), a licensee or lessee who surrenders a water-covered area in the circumstances described in that subsection may, with the Minister's consent, retain the area and any wells drilled into the area for the purpose of producing or storing gas at a shallower or deeper depth than that at which oil was discovered on condition that the oil bearing zone has either been plugged or completely isolated by casing and cement in all wells that encountered oil. O. Reg. 263/02, s. 23 (6).

(7) The licensee or lessee shall pay the fees, rental, royalty or storage rental set out in the Schedule. O. Reg. 263/02, s. 23 (7).

Obligations of licensee or lessee

24. A licensee or lessee shall carry out all exploration, drilling, production and storage operations in accordance with,

(a) the Act and this Regulation;

(b) the terms and conditions of the licence or lease;

(c) the *Oil, Gas and Salt Resources Act*, the *Ontario Energy Board Act, 1998* or the regulations made under them; and

(d) any order of the Ontario Energy Board or of the Mining and Lands Commissioner. O. Reg. 263/02, s. 24.

Transfer of licences and leases

25. On paying the required fee, a licensee or lessee may, with the Minister's consent, transfer or assign to any other person the rights conferred under the licence or lease, as the case may be, with respect to the whole or any part of the area covered by the licence or lease, on condition that the licensee or lessee does not retain any interest in the area or part of an area transferred or assigned. O. Reg. 263/02, s. 25.

Termination of licences and leases

26. (1) Subject to subsections (2) and (3), the Minister may forthwith cancel a licence or terminate a lease without liability and without compensation to the licensee or lessee, as the case may be, if the licensee or lessee fails to,

(a) comply with the terms and conditions of the licence or lease;

(b) comply with the Act and this Regulation, the *Oil, Gas and Salt Resources Act*, the *Ontario Energy Board Act, 1998* or the regulations made under them;

(c) comply with an order of the Ontario Energy Board or the Mining and Lands Commissioner;

(d) make a rental, royalty or storage rental payment as required by this Regulation;

(e) produce oil or gas under a lease on or before the fifth anniversary of the lease or during any five-year period during the term or terms of the production lease;

(f) commence storage operations on or before the fifth anniversary of the storage lease; or

(g) conduct storage operations for any five-year period during the term or terms of the storage lease. O. Reg. 263/02, s. 26 (1).

(2) The Minister may not cancel a licence or terminate a lease under subsection (1) unless

he or she delivers or sends by registered mail to the licensee or lessee at the licensee's or lessee's last address on record with the Ministry a notice setting out the default and requiring that it be remedied. O. Reg. 263/02, s. 26 (2).

(3) If the licensee or lessee remedies the default within the time specified in the notice, the Minister shall not cancel the licence or terminate the lease. O. Reg. 263/02, s. 26 (3).

(4) For the purposes of subsection (2), a notice of failure to comply sent by registered mail shall be deemed to have been received on the fifth day after the date of mailing unless the contrary is shown. O. Reg. 263/02, s. 26 (4).

(5) If a licence or lease has been cancelled, the Minister may cancel, in whole or in part, any or all other licences or leases held by the licensee or lessee if, in the Minister's opinion, the licensee or lessee is unable to satisfactorily develop the area or areas covered by those licences or leases because the licensee or lessee is financially insolvent or because the licensee or lessee is unable to meet the requirements of the Act, this Regulation, the *Oil, Gas and Salt Resources Act* or the *Ontario Energy Board Act, 1998* or the regulations made under them. O. Reg. 263/02, s. 26 (5).

Cadastral surveys

27. The Minister may require that a licensee or lessee make and file a cadastral survey at the licensee's or lessee's expense that is satisfactory to the Minister with respect to the position of any boundary that is uncertain or becomes the subject of a dispute. O. Reg. 263/02, s. 27.

Audit

28. The Minister may require that a licensee or lessee submit an audit, prepared by an independent auditor satisfactory to the Minister at the licensee's or lessee's expense, of the records, measurements, calculations and any other records of the licensee or lessee that pertain to the determination and calculation of,

(a) oil and gas exploration licence rents;

(b) oil and gas production lease rents;

(c) oil and gas production lease royalties; or

(d) storage lease rents. O. Reg. 263/02, s. 28.

Reduction in rental

29. The Minister may reduce the rental payable for a lease in any year in which the lessee is prevented from carrying out drilling, production or storage operations if a public authority having jurisdiction in the area in which the lessee was carrying out drilling, production or storage operations directs the licensee to suspend the drilling, production or storage operation or if weather, water or other conditions prevent the drilling, production or storage operation from being carried out. O. Reg. 263/02, s. 29.

TRANSITION

Transition

30. Licences issued and leases granted under a predecessor of this Regulation shall be deemed to have been issued or granted under this Regulation and to be subject to the conditions and requirements of this Regulation. O. Reg. 263/02, s. 30.

31. Omitted (revokes other Regulations). O. Reg. 263/02, s. 31.

SCHEDULE

Exploration licence rental

1. The annual rental for an exploration licence is the greater of $100 and,

(a) $0.60 per hectare in the first year of the term of the licence;

(b) $1.20 per hectare in the second year of the term of the licence;

(c) $1.80 per hectare in the third year of the term of the licence;

(d) $2.40 per hectare in the fourth year of the term of the licence; and

(e) $3 per hectare in the fifth year of the term of the licence.

Production lease rental

2. The annual rental for a production lease is the greater of $100 and $2.50 per hectare.

Oil and gas production royalty rate

3. The royalty rate for oil and gas produced from Crown land is 12.5 per cent.

Natural gas storage lease rental

4. The monthly storage rental for a storage lease is the greater of $100 and,

(a) $1 per hectare prior to the commencement of storage operations; and

(b) the storage rental submitted with the tender bid after the commencement of storage operations; and

(c) where no tender for the storage right was conducted, $0.30 per 1000 cubic metres of working storage volume.

Storage for hydrocarbon substances other than natural gas

5. The storage rental for storage leases where substances other than natural gas are stored is $100 per 1000 cubic metres of storage capacity per month.

Storage rental for air

6. The storage rental for storage leases where air is stored is $10 per 1000 cubic metres of storage capacity, per month.

O. Reg. 263/02, Sched.

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