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Our File No. 137501

June 23, 2014

VIA RESS, EMAIL AND COURIER

Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario
M4P 1E4

Attention: Kirsten Walli
Board Secretary

Dear Ms. Walli:

Re: Union Gas Limited, 2014 Rates
Board File No. EB-2013-0365

Please find attached BOMA's Written Argument.

Yours truly,

FOGLER, RUBINOFF LLP

Thomas Brett

Thomas Brett
TB/dd
Encls.
cc: All Parties *(by e-mail)*

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

AND IN THE MATTER OF an Application by Union Gas Limited, pursuant to section 36(1) of the Ontario Energy Board Act, 1998, for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas as of January 1, 2014.

ARGUMENT OF

BUILDING OWNERS AND MANAGERS ASSOCIATION, GREATER TORONTO ("BOMA")

June 23, 2014

Tom Brett
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Counsel for BOMA

Argument

Part One – Kirkwall Metering Facilities

Introduction

Historically, the Kirkwall station had been the point of intersection of the Union Dawn-Parkway (Trafalgar) pipeline, and the TCPL mainline, which moved gas to the Canada-US border at Niagara and Chippewa. The flow of gas at Kirkwall was traditionally from Union into TCPL as many mid-Atlantic utilities purchased Canadian supplies at Dawn, and moved the gas on Union from Dawn to Kirkwall and on TCPL from Kirkwall to the border. Many of these arrangements have expired and have not renewed, although a handful are still flowing gas, with expiry dates in the 2016-2018 period.

After the discovery and development of the Marcellus Shale in Pennsylvania, Ohio, and West Virginia, given the increased interest of Ontario LDCs and end-use customers in accessing Marcellus Shale Gas in 2010, Union began to work actively with TCPL and US pipelines in the Niagara region to assess market interest in moving Marcellus Gas into Canada, and to Dawn.

Union Gas, after conducting a successful open in February-March 2010 to determine market interest in a new C1 transportation service from Kirkwall to Dawn and an M12-X firm transportation service between Kirkwall, Parkway, and Dawn.

As a result of the open season, Union executed a ten year firm M12-X transportation service contracts with TCPL and Enbridge to connect approximately 320,000 GJs/day of existing M12 service to M12-X service, beginning September 1, 2011 (EB-2010-0296, page 2).

In a reopened open season a few months later, Union received over 1,200,000 GJs of non-binding interest for C1 and M12-X services commencing as early as July (2012) (Ibid, page 2).

To accommodate the proposed new services, Union made modifications to its Kirkwall station to install bidirectional metering in summer 2011 at a cost of $4.7 million. The new metering would allow the measurement of gas flowing into Union's system at Kirkwall from TCPL's line. TCPL had also made changes to its Niagara Falls border point and its line to accommodate gas flow from the US (Marcellus) to Canada, from Niagara Falls to Kirkwall. Union stated that it identified substantial interest on the part of two US pipelines (Empire and National Fuel Gas Corporation) in moving gas from Marcellus to Canada.

The Issue

Given the declared interest of both Union and Enbridge in being able to access Marcellus Shale Gas, BOMA is interested to ensure that Union's cost allocation methods neither favour nor disadvantage this gas supply relative to gas from other basins, or other transmission routes to Ontario markets. It is from this perspective that BOMA examines the proposed cost allocation for the Kirkwall new metering assets.

In EB-2010-0296, Union proposed, and the Board approved, direct assignment of the revenue requirement impacts of the new metering assets to C1 customers, although none to M12-X customers, to be collected through a fixed monthly demand charge.

The Board approved the new rates, the cost allocation (direct assignment), and the rate design, but directed Union to review the rate-making methodology of the proposed services as part of its rebasing proceeding in 2013 (EB-2010-0296, page 3).

In EB-2011-0210, the rebasing year case, which set Union rates on a cost of service basis for 2013, and which dealt with a very large number of issues, Union did not submit any detailed evidence on the cost allocation for the Kirkwall metering facilities, despite the direction from the Board, nor did it propose any changes to the allocation of the Kirkwall new metering costs. In its decision, the Board noted the submissions of LPMA as follows:

> "LPMA submitted that the use of the Kirkwall Station has changed over the years and may change further in the future (given the changing flow of natural gas in the northeast area of North America which includes Ontario). LPMA stated these changing dynamics demonstrate the need to review the allocation of the Kirkwall Station costs. The changing flow of natural gas in the northeast has been highlighted by Union in this proceeding through the level of turn-back of M12 capacity that has already occurred and is forecast to occur in the future.
>
> LPMA noted that the Parkway-to-Maple bottleneck has been raised in this proceeding. The dramatic increase in TCPL tolls, especially along the northern Ontario route relative to other routes to the Greater Toronto Area, has illustrated the potential need for the Parkway West project. LPMA stated that all of these issues highlight the fact that there has been considerable change that has taken place with respect to the flows of gas around the Parkway Station, since Union last reviewed the cost allocation and rate design for services offered on the Dawn-Trafalgar system in 1995, and that the Board last approved in Union's 1997 rate case, which was EBRO 493/494. LPMA submitted that the Board should direct Union to review the allocation of Kirkwall metering costs. No other parties commented on this issue and Union did not respond to LPMA's submission in reply".

The Board went on to find that:

> "The Board agrees with the submissions of LPMA. The use of the Kirkwall Station has changed substantially over the years and there is a <u>clear need</u> to review the allocation of Kirkwall Station costs. The Board directs Union to undertake a review of the allocation of Kirkwall metering costs as part of its updated cost allocation study which the Board has directed Union, later in this Decision, to file in its 2014 rates filing" (our emphasis).

In its evidence in this case, Union reviewed the existing cost allocation for the newly installed Kirkwall metering assets, which it had changed in 2011 from <u>direct assignment</u> in EB-2010-0296 to allocation between in-franchise and ex-franchise customers, based on a commodity-kilometer factor (which it described as equivalent to "distance-weighted design day demands") (Exhibit A, Tab 1, Page 21). Union argued that its use of that allocation factor was appropriate because it should be the same as allocation factor used for the Dawn to Parkway pipeline itself, the costs of which were allocated using the distance-weighted design day demand factor. They stated meters which measured gas volumes that flowed on the Dawn-Parkway system should be allocated in the same way as the pipeline itself.

Union did not engage an outside expert to assess the proper cost allocation for Kirkwall metering facilities. Their review was purely internal.

BOMA is of the view that the Kirkwall new metering facilities should be allocated on design day demand basis, not distance-weighted design day demand, as proposed by Union, for several reasons.

First, and most fundamentally, all parties, including Union, agree that metering costs do not vary with distance. In this respect, they are unlike pipeline costs, and compressor costs.

Second, Union's own treatment of the meter costs has changed over time, without the Board's explicit approval. As noted above, in EB-2010-0296, the Board directly assigned the capital costs of the new meters to the C1 Kirkwall Dawn service, to be renewed through a monthly demand charge. The Board did not assign any of the capital cost of meters to the M12-X service.

However, by the time the rebasing case (EB-2011-0210) was filed, it appears that Union had already changed the cost allocation method for the new metering assets to distance-weighted design day demand, used for the pipeline itself.

Given the sequence of events, it is somewhat disingenuous for Union to rely on the fact that the cost allocation for the new meters has already been "approved". What was approved initially was direct assignment of the costs to the C1 rate. Union appears to have changed the cost allocation in its evidence in EB-2011-0257, but there was no discussion of the matter in the decision in that case.

Third, Union agrees that the metering costs at Kirkwall are there to serve the contract demands that flow through the meter (Transcript, Volume 1, page 47).

Union's argument is based on viewing Kirkwall new metering costs as part of the Dawn-Trafalgar system. However, the Kirkwall new metering assets are not just a part of the Dawn-Trafalgar. New metering costs must be viewed in a broader perspective.

While Kirkwall station does play a role in the Dawn-Parkway system, it is a limited one. It is more accurate to say it was a part of the Dawn/Kirkwall/Niagara/Export System, as Kirkwall has always had a role unrelated to the Dawn-Trafalgar system per sé, which is as a gate station to measure and regulate gas flow into TCPL, to export at Niagara and Chippewa. Unlike the other stations, Parkway, Dawn, Lobo and Bright, it has no compression facilities. It has only measurement and regulation facilities, and it is the cost allocation of the costs of the new measuring facilities that is the issue before the Board. These new facilities were installed to support a number of new services which permit Marcellus Shale Gas to be brought into Ontario by TransCanada at Niagara/Chippewa, which were previously export only stations. These volumes then flow westerly on TCPL's mainline to Kirkwall. The mainline between Kirkwall and Niagara has Union gate stations for service to Nanticoke and Hamilton. Since the new meters were built in 2011, Kirkwall station also measures gas flows, moving west from the United States into Canada. Some of the gas may go on to Dawn via C1 or M12-X service, but some may go directly to the markets east of Parkway under C1 service between Kirkwall and

Parkway without first going to Dawn, on a year-round basis. In either case, the service cannot be said to be part of the Dawn-Parkway system; it is a part of the Marcellus, Niagara, Kirkwall and east route, a new source of gas for Ontario. It cannot easily be analogized directly to the other stations, with their compressors, or the Dawn-Parkway pipeline itself. The fact that the gas flows from Dawn easterly on a winter peak day is not determinative of the proposed cost allocation for the new metering facilities at Kirkwall.

Finally, Mr. Tetrault agreed (Transcript, Volume 1, page 52) that there were several reasonable ways to approach direct cost assignment and cost allocation of particular utility facilities, and seemed to lean on the fact that the current approach had been approved by the Board many years ago. But the Board last approved the cost allocation when the matter was actually contested, in EBRO 493/494, long before the new metering facilities were approved, to allow gas to enter the Union system from Niagara. And the Board stated in EB-2011-0210 that there was a clear need to examine the matter in the 2014 case.

Part Two - Union Practices With Leamington Greenhouse Customers

In BOMA's view, the issue is has Union acted properly and in accordance with sound regulatory principles, in requiring thirty odd customers who wish to take service from the Union distribution system, to sign long term contracts with minimum annual "take-or-pay" or, stated otherwise, minimum annual volume provisions, calculated on the basis that each customer assumes its pro rata share of the cost of a pipeline built to ensure capacity exists in the regional distribution system to serve the demands of those customers. This issue arose in a complaint from the OGVG, a group representing many vegetable growers using greenhouses in the Leamington area. As part of the Settlement Agreement in this proceeding, the parties agreed to put the matter to the Board. Like CME, BOMA is interested in the generic implications of Union's practice with the greenhouse owners, since the same practices could be followed by Union with contract customers in other businesses. BOMA has contract customers amongst its numbers.

In the present case, to receive service, the customers had to ensure a PI of 1 for their share of the pipeline expansion project, to be achieved by a combination of contract term and upfront cash contributions. For example, if the individual customer agreed to a ten-year term with an appropriate MAV provision, there would be no upfront cash contribution required.

In BOMA's view, Union is acting improperly in requiring individual customers to pay an aid-to-construct payment in circumstances where the length of contract the customer wishes to contract for is not satisfactory to Union.

EBO 188, Final Report of the Board, sets the framework for Gas Utility Customer Connection and Contribution Policies, in section 4, which is entitled Customer Connection Policies. Subsection 4.3.3 states:

> "The Board directs the utilities to prepare and maintain a common set of Board-approved customer connection policies that shall, as a minimum, include:
>
> i. the circumstances under which customers will be required to pay for all, or part, of their service line connection, including the specific criteria and the quantum of, or formula for calculating, the total or excess service line fees and other charges; and
>
> ii. the circumstances where the use of a proposed facility will be dominated by one or more large volume customers for which the utilities will retain the option of collecting contributions in aid of construction. The contribution amounts will be consistent with the cost allocation for such mains and accordingly based on the peak day demand and the cost allocators used by each of the utilities."

Section 4.3.3 (ii) makes clear that it is only in the case where the proposed facility (the Leamington Line, in this case) will be dominated by one or more large volume customers for which the utility shall retain the option of collecting a contribution in aid-of-construction. In BOMA's view, that is not the case here. This case is not like the Goldcorp case or the Integrated Grain Processors Co-operative Inc. case. There are about thirty different owners who requested service and most of them would be considered medium-sized (M4, M5A) customers. They are not T1 and T2 customers. Nor do one or two of thirty customers dominate the group. The volumes are required by many owners. In BOMA's view, the Board's directive does not authorize Union's contracting practice in Leamington.

Moreover, it is not clear whether the utilities have developed the common Customer Connection and Contribution-in-Aid Policies, requested by the Board, and if so, whether they were submitted to the Board for approval.

Union has Conditions of Service. The current version is dated February 1, 2013. It is not clear whether this document has been approved by the Board. It contains some provisions that one would expect to find in the Connection Policies document, requested by the Board.

Union's Conditions of Service state, at page 12, Section 2.2, entitled Service Lateral Installations, that service laterals will be installed provided that:

> "any necessary main extension can be justified in accordance with our line extension practice".

The practice is referred to at page 13, section 2.3, entitled Customer Costs; Commercial and Industrial Customers:

> "Union Gas uses a Distribution Related Economic Analysis Model to cost Commercial and Industrial services. If the service does not meet an economic feasibility benchmark, a customer will be expected to pay aid to construction costs in order to meet our internal economic feasibility benchmark".

The Distribution Related Economic Analysis Model does not appear to be a public document, nor is it clear what Union's internal economic feasibility benchmark is. However, it is clear (Union has stated) that the distribution contracts of the type Union required the greenhouse owners to sign were not approved by the Board. They should be. The evidence is that Union gave the growers the option of a one-year term with an aid-to-construct calculated as its pro rata share, that based on "new acres under glass" of the capital cost of the Leamington pipeline, or signing a longer term contract with a take-or-pay provisions which would achieve the same result.

The evidence is clear. The growers had to accept one arrangement or the other to get service.

To repeat BOMA's view, as noted above, is that Union does not have the authority to require a group of thirty odd growers to pay pro rata share of pipeline, either by cash in advance, or by way of a long-term contract with minimum take provisions.

Moreover, Union's evidence on this point is inconsistent. Union apparently represented during the leave to construct hearing that it did not require an aid-to-construct, but then required the owners to each make a contribution or the equivalent term/MAV commitments, in order to receive service (Transcript, Volume 1, page 151). The growers were not allowed to sign a one-year contract, renewable each year, without making a cash payment.

Union also stated in Transcript, Volume 1, page 155, that Union's contracting approach has not received Board approval:

> "MR. HOCKIN: There are certain MAV parameters associated with the rate schedule. To the extent that we have required customers to have a volume in excess of that amount for purposes of matching the revenue, that is not subject to Board review, no.
>
> MR. THOMPSON: The Board has not yet approved it, fair? I would have thought that was obvious, but…
>
> MR. HOCKIN: I don't know that we've ever sought Board approval or anybody else has."

So, we have a situation where neither the practice, nor the service (distribution) contracts, have been subject to Board approval; nor does there appear to be a Board approval policy to guide the practices or contracts. This is not appropriate, given that one of the contracting parties is a monopoly utility.

The fact that the greenhouse owners or their trade association did not appear in the Leamington Line leave to construct proceeding (EB-2012-0431) is not an argument against providing them relief in this proceeding. End-use customers or their association often are not present at leave to construct proceedings. Even if they were present, they would have no reason to believe that they would be asked, individually, to either contract long-term or pay an aid-to-construct, once the revised calculations in that proceeding showed that one was not necessary.

The Board decided in EB-2012-0396 that a contribution-in-aid for a gas pipeline is a rate, and rates must have Board approval, under section 38 of the Act, before they are effective. The Board further noted, with respect to the aid-to-construct, that:

> "The PCRA essentially applies the formula for the calculation of capital contributions as set out by the Board in EBO 188. It is no doubt a useful document agreed to by the parties which formalizes the details surrounding the exact calculations, timing, etc. of the capital contribution. It does not, however, usurp the Board's underlying jurisdiction: indeed section 36(1) of the Act explicitly recognizes that, in setting just and reasonable rates, '[the Board] is not bound by the terms of any contract'. The ultimate responsibility to ensure the rates paid by consumers are just and reasonable lies with the Board." (page 14)

BOMA would support the relief requested by the OGVG which BOMA takes to mean that growers should be free to choose a one-year renewable contract without a contribution-in-aid to the company. Any contributions-in-aid that have been made to date should be refunded to the growers.

Moreover, the Board should, if it remains necessary, initiate a generic proceeding to determine a common acceptable set of Customer Connection and Contribution-in-Aid policies and practices for Ontario natural gas utilities, and a review of the form of distribution contracts, including the key monetary components of those contracts, and the use of take-or-pay provisions.

All of which is respectfully submitted, this 23rd day of June, 2014.

Tom Brett

Tom Brett,
Counsel for BOMA