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EB-2014-0299

ONTARIO ENERGY BOARD

IN THE MATTER of the *Ontario Energy Board Act, 1998*, S.C. 1998, c.15 (Schd. B);

AND IN THE MATTER OF an application by Greenfield South Power Corporation for a certificate of public convenience and necessity, pursuant to section 8 of the *Municipal Franchise Act*, R.S.O. 1990, c. M. 55.

SUBMISSIONS BRIEF

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SUBMISSIONS BRIEF

The Board must view this application through the lens of the public interest and in so doing conclude that the application for a certificate must be rejected.

This conclusion is supported by the facts and Board precedent and policy. In substantiating this submission, the following will be considered:

A. the nature of the approval sought

B. specific services offered to Greenfield

C. T2 Attributes

D. Sarnia Industrial Line vs. Vector Connection

E. implications of bypass

F. the application of Board precedent and policy, including the following cases:

   1. EBRO 477 – Re: Cardinal Power of Canada

   2. EBRO 471 – Re: Canadian Pacific Forest Products Limited

   3. RP – 2005-0022 – Re: Greenfield Energy Centre

The Board's decision in the current application is very important. If the board concludes that the certificate should be granted and Greenfield is entitled to bypass on the basis of the facts of this case, the Board is effectively departing from the notion the postage stamp rates are in the public interest. It would in effect be stating that if a connecting load can show a lower cost by pursuing bypass, then that customer is able to avoid postage stamp rates and convenience of location is the determining factor.

However, this is not the intended policy of the Board and as such Greenfield's certificate request should be denied.

A. NATURE OF APPROVAL SOUGHT

Under section 8 of the *Municipal Franchise Act*, no person can construct works to supply natural gas without approval of the Board and such approval shall not be given unless public convenience and necessity appear to require such approval to be given.

To consider public convenience and need, the Board must consider the public interest.

Not unlike the provisions for leave to construct, a certificate is required for the "construction" of works for the supply of gas. As the Board considers the public interest in respect of bypass of the LDC's system in the context of a leave to construct, so too should the Board consider the same public interest elements in a certificate application as in the current circumstance.

As such, in considering public convenience and necessity or need, the Board should apply the factors considered in respect of a request to bypass.

B. SPECIFIC SERVICES OFFERED TO GREENFIELD SOUTH

Union proposed to Greenfield an interruptible T2 rate with service through an interconnection with Union's Sarnia Industrial Line. It is Union's view that firm or interruptible services provided through a connection to the Sarnia Industrial Line system will best meet the needs of Greenfield South. It is also Union's view that there is no material cost difference between Union providing service to Greenfield South through a connection to the Sarnia Industrial Line system versus a connection to Vector.

Profitability Index

A Discounted Cash Flow (DCF) analysis for the interruptible service option requested by Greenfield South (see Schedule 1) indicates that Union's proposed facilities project has a Profitability Index (PI) of 1.068. Pursuant to the Report of the Board in EBO 188 dated January 30, 1998, an overall PI of 1.0 means that existing customers will not suffer a rate increase over the long term as a result of the proposed project. The Board stated in its EBO 188 report that it was of the view that an overall rolling portfolio PI of 1.0 or better is in the public interest.

iii. The ability to better control and predict costs by having the option to supply the customer's own compressor fuel and storage deliverability.

iv. Having a non-obligated Daily Contract Quantity (DCQ) gives these new electricity generators significant delivery flexibility. If the plant is not operating for any reason, there is no obligation to deliver gas to Union.

v. The Rate T2 service permits the customer to buy gas at Dawn. Dawn is a highly liquid trading point with many buyers and sellers, with prices that are both transparent and easily discoverable.

vi. Customers have access to both cost-based storage space and deliverability to meet their requirements.

vii. There is no requirement to match consumption and supply volumes on an hourly basis.

viii. An appropriate combination of storage space and deliverability allows the customer to better manage acquiring supply and helps avoid the intra-day gas markets and the price volatility that can arise.

ix. A Union firm Rate T2 customer avoids the impacts related to a non-bumping pipeline as consumption is not required to be nominated.

x. Customers receive high levels of security of supply and reliability by being connected to an integrated distribution system with a large number of pipeline interconnections.

The benefits of Rate T2 service described above provide customers with the flexibility to operate their facilities in an efficient manner. These service attributes, combined with a competitive rate, result in a Rate T2 offering that is highly valued by both existing (including seven electricity generators) and potential customers. The Rate T2 service meets the needs of electricity generators in a flexible and economic manner and is a robust service offering that effectively mitigates any perceived need for a customer to bypass the local distribution system.

4. Specific Services Offered to Greenfield South

Firm and Interruptible Rate T2 Service

When developing the service proposal for Greenfield South, Union initially considered options that would allow it to provide firm service. The two options Union considered were a connection to the

NPS 42 Vector Pipeline and a connection to the NPS 12 and NPS 20 pipelines of the Sarnia Industrial Line system. On review, a firm service connection to the Vector Pipeline was not a practical alternative because Vector is a sole source pipeline. In the event that gas is not flowing on Vector, it would not be possible to provide firm service to Greenfield South without adding firm capacity from Dawn to Dawn-Vector. The cost of adding this capacity would be significant.

Although, the BCD option is available in the Sarnia area to customers directly connected to a third party pipeline, Union did not pursue this option for Greenfield South because firm service is not currently available from Dawn to Dawn-Vector.

Union concluded that a connection to the Sarnia Industrial Line system was the best alternative for providing firm service to Greenfield South. This is the case because Greenfield South, through the Sarnia Industrial Line system, would be able to access reliable supply from multiple sources through the Dawn Hub at a cost comparable to that of a Vector connection.

Accordingly, in July 2013, Union made an initial firm service offer under Rate T2 to Greenfield South. The estimated annual cost of the firm service offering was approximately $2.2 million. The contract term was for 20 years. Greenfield South was advised that, since they are unrated, they would need to provide security for all exposure in the form of a letter of credit equal to the estimated capital cost of the supply facilities connected to the Sarnia Industrial Line system which would decline over the term of the contract.

This initial offer was rejected by Greenfield South as too expensive. Greenfield South indicated that its target pricing was less than 60% of Union's firm service costs.

To meet Greenfield South's target pricing, Union prepared a Rate T2 interruptible service offer at Greenfield South's request. Union explained the risk that an interruption could happen at any time which could result in Greenfield South without gas service under this offering. Greenfield South indicated a willingness to accept that risk for a lower price.

In August 2013, Union made an offer to Greenfield South of interruptible service over a 10 year term with pricing set to 60% of firm service. The interruptible service offer did not require enhancements at the Courtright Station and Sarnia Industrial Station so those costs would not be incurred for service from the Sarnia Industrial Line system. The estimated annual cost of the 10 year interruptible service offering was approximately $1.4 million. The interruptible pricing offered was at the low end of the interruptible pricing range and resulted in a distribution cost to GEPP that is competitive when compared to other generators.

Greenfield South then requested an interruptible service option with a 20 year term which Union presented at a September 2013 meeting. Based on Union's credit standards (see Schedule 4), Greenfield South was advised that it would need to provide a letter of credit as secured collateral equal to the estimated capital cost of the supply facilities connected to the Sarnia Industrial Line system ($6 million) which would decline over the term of the contract. The only alternative to a letter of credit would be some other form of secured collateral such as a cash deposit or an OPA guarantee.

5. Greenfield South Gas Services

In its evidence, Greenfield South indicates that they will contract with Vector Pipeline for gas services to the GEPP. Appendix 34 of Greenfield South's supplementary evidence submitted November 5, 2014 is a letter dated October 26, 2012 from Vector Pipeline to Eastern Power Limited in which Vector proposes services to meet the proposed GEPP load of 2,320 GJ/hour. The Vector services are Firm Transport – Hourly ("FT-H") and Operational Variance Service ("OVS"). Vector states in its proposal letter that for FT-H:

> *"There are two main requirements of this service. The first is that the receipt and delivery volumes need to be equal and synchronous each hour. This demands Eastern contract with a third-party storage provider that has a service that will match up with FT-H (both Union and Enbridge have such services). The second requirement is that nominations cannot be made for retroactive hours."*

C. RATE T2 ATTRIBUTES

section 2.8 – Operation Covenant in attached Schedule 2 where the OPA specifically directs that project proponents cannot bypass the local gas distribution franchise for a proposed facility within that franchise area.

The NGEIR decision included power services and these services have allowed the generators to participate in the IESO market in compliance with their OPA power sale contract.

3. Rate Design Changes That Further Benefited Electricity Generators

Union's Rate T2 service was introduced and approved as part of its 2013 Cost of Service application (EB-2011-0210). In that application, Union split the Rate T1 rate class into two rate classes in order to improve rate class composition and ensure that both Rate T1 and Rate T2 would be comprised of more homogeneous customers in terms of firm contracted demands and firm annual consumption. Union estimates that its Rate T1/T2 redesign proposal resulted in savings to Rate T2 electricity generators of approximately $1.8 million per year (see Schedule 3).

The split of Rate T1 into two rate classes better aligned cost incurrence and cost recovery by recognizing the differences in distribution demand and distribution customer-related costs between small Rate T1 and large Rate T1 customers. The split also addressed the significant diversity in daily contracted demand and firm annual consumption that exists between small and large customers within the previous Rate T1 rate class.

The Rate T2 service is a semi-unbundled service with contractual parameters which are tailored to a specific customer's needs. This allows the daily balancing of the customer's deliveries to Union with the consumption at its facility at the customer's chosen level of risk. The rate the customer ultimately pays is tied to the specific level of contracted service.

The Rate T2 service recognizes that the majority of Rate T2 customers are served off of transmission main as opposed to distribution main. As a result, the level of contribution by Rate T2 customers to the recovery of distribution demand costs is lower than other Union South distribution rate classes.

The Rate T2 service has the lowest distribution rate in Union South; making it bypass competitive. For the Rate T2 rate class, the average rate associated with the combined transportation and storage service is less than \$0.01 per m^3 (or approximately \$0.25 per GJ). By comparison, the average rate for T1 transportation and storage service is \$0.02 per m^3 (or \$0.50 per GJ).

Union offers the Rate T2 service to its largest contract rate customers, including the electricity generators in the Southern delivery area of Union's franchised service area. The Rate T2 service provides customers with the flexibility required to operate their plants economically. Approximately 22 large industrial customers contract for this service. These customers collectively consume approximately 150 Bcf of gas annually. This total includes all seven gas-fuelled electricity generation plants in Union's franchised service area in Southern Ontario which generate over 2,700 MW of electricity and consume approximately 36 Bcf of gas annually.

Rate T2 consists of a monthly customer charge, a two block monthly demand charge and a single block commodity charge. Rate T2 service is available to customers with a minimum firm daily contracted demand of 140,870 m^3.

Rate T2 also includes all the Board-approved storage space and storage injection/withdrawal rights per the previously approved Rate T1 service.

In addition to the cost effectiveness of the Rate T2 service described above, T2 provides many benefits that are highly valued by existing and potential T2 customers, particularly electricity generators. These benefits include:

i. The ability to tailor the service parameters to best suit the needs of the customer.
ii. There is no requirement to nominate consumption at the plant or injections and withdrawals into or out of storage. An end of day true-up results in either an automatic injection into storage or withdrawal from storage depending on whether too much or too little gas was delivered in comparison to plant consumption. This provides the maximum flexibility with no notice requirement.

iii. The ability to better control and predict costs by having the option to supply the customer's own compressor fuel and storage deliverability.

iv. Having a non-obligated Daily Contract Quantity (DCQ) gives these new electricity generators significant delivery flexibility. If the plant is not operating for any reason, there is no obligation to deliver gas to Union.

v. The Rate T2 service permits the customer to buy gas at Dawn. Dawn is a highly liquid trading point with many buyers and sellers, with prices that are both transparent and easily discoverable.

vi. Customers have access to both cost-based storage space and deliverability to meet their requirements.

vii. There is no requirement to match consumption and supply volumes on an hourly basis.

viii. An appropriate combination of storage space and deliverability allows the customer to better manage acquiring supply and helps avoid the intra-day gas markets and the price volatility that can arise.

ix. A Union firm Rate T2 customer avoids the impacts related to a non-bumping pipeline as consumption is not required to be nominated.

x. Customers receive high levels of security of supply and reliability by being connected to an integrated distribution system with a large number of pipeline interconnections.

The benefits of Rate T2 service described above provide customers with the flexibility to operate their facilities in an efficient manner. These service attributes, combined with a competitive rate, result in a Rate T2 offering that is highly valued by both existing (including seven electricity generators) and potential customers. The Rate T2 service meets the needs of electricity generators in a flexible and economic manner and is a robust service offering that effectively mitigates any perceived need for a customer to bypass the local distribution system.

4. Specific Services Offered to Greenfield South

Firm and Interruptible Rate T2 Service

When developing the service proposal for Greenfield South, Union initially considered options that would allow it to provide firm service. The two options Union considered were a connection to the

D. SERVICE BY UNION TO GREENFIELD – SARNIA INDUSTRIAL LINE VS. VECTOR CONNECTION

In Union's view, natural gas service interruptions in Enbridge's Central Delivery Area as set out in Greenfield South's Supplementary evidence at Appendix 31 is not a basis upon which to estimate interruptions of service on Union's Sarnia Industrial Line.

6. Service by Union to Greenfield South – Sarnia Industrial Line vs. Vector Connection

It is Union's view that firm or interruptible services provided through a connection to the Sarnia Industrial Line system will best meet the needs of Greenfield South. It is also Union's view that there is no material cost difference between Union providing service to Greenfield South through a connection to the Sarnia Industrial Line system versus a connection to Vector.

Union estimates the total capital cost of a connection to Vector to be between $5.2 million and $5.4 million. This estimated capital cost includes a customer station containing telemetry, boilers, odourant system, filters, meters, heat exchangers and regulators as well as 50 metres of NPS 8 to connect the NPS 42 Vector Pipeline to a customer station. This compares to a $6.0 million capital cost estimate for a similar connection to the Sarnia Industrial Line system.

Further, the location of the proposed electricity generating facilities is approximately the same distance from the Vector Pipeline as from Union's Sarnia Industrial Line system. According to Greenfield South's CPCN application, the total capital cost of the GEPP Natural Gas Utilization System from the Vector Tap to the related metering facilities near the power plant is estimated to be $500,000. Union's capital cost estimate to serve Greenfield South includes both the pipeline and station works and all gas handling work required to tap into existing pipelines as well as all design, construction, quality assurance and internal costs to meet all codes, regulations and company standards. Union has recent experience constructing related gas works in the Sarnia area that helps validate its cost estimates.

Costs identified in Greenfield South's application cannot be compared to Union's cost estimates without a detailed understanding of their scope of work, detailed design and schedule. However, given the nature of the facilities required to serve Greenfield South, it is unlikely there will be any

material difference in capital cost for required facilities whether constructed by Union or Greenfield South.

With respect to credit requirements, as indicated above, Union requires a letter of credit from Greenfield South equivalent to the capital cost of the project. This level of credit is required because Greenfield South is not rated. Union has reviewed the credit requirements of Vector and has concluded that a similar level of credit would be required of Greenfield South by Vector for comparable capital costs.

Accordingly, there is no cost basis either from a rate perspective or credit requirement perspective on which to differentiate service or to justify bypass of Union's distribution system. In fact, if Union were to construct facilities to connect to Vector and Greenfield South delivered gas to Union at that interconnection, the services provided by Union would be comparable and competitive to any service offered by Vector.

II) COMPETENCE OF GREENFIELD SOUTH AS BUILDER / OPERATOR

The Board has a responsibility to ensure applicants have the financial and operational ability to build and operate proposed facilities in a safe and reliable manner. In its application, Greenfield South indicates that it intends to draw on an affiliate's (Eastern Power) significant experience in the construction and operation of large-scale power generation facilities. However, Greenfield South has not submitted evidence on its capabilities to build and operate the natural gas service pipeline as well as procure and manage the supply of the gas to the generation plant.

To operate the GEPP, Greenfield South will require a natural gas system to deliver natural gas from the natural gas supply point to the generating plant. The proposed GEPP Natural Gas Utilization System includes a NPS 8 high pressure steel pipeline connected to the Vector pipeline. This pipeline will run underground for approximately 450 meters and connect to a metering and pressure reduction station. From that point, it will connect to and service the GEPP facilities through various works and facilities, including: (1) a high pressure branch to feed the gas turbine via a fuel conditioning skid; (2)

E. IMPLICATIONS OF BYPASS

Duplication of Facilities

Union's integrated system has been designed to provide Union and its customers with flexible supply options. Union has interconnections to TCPL, Vector, St. Clair, Panhandle, and Bluewater which allow Union and its customers to access different supply sources as well as Michigan storage.

In making these connections, Union has assumed that it is reasonable to expect that it will serve all incremental loads in its franchised service areas. As a result, these connections have been made with a view to meeting the needs of customers like Greenfield South.

Based on the above, and acknowledging that there is no existing pipeline to the proposed Greenfield South facility, Union submits that there will be duplication of Union's facilities. Any pipeline built by Greenfield South will duplicate facilities Union has as part of its integrated system. Greenfield South's current proposal to connect to Vector will immediately result in duplication of Union's own interconnection with Vector.

Expectation to Provide Service

It is reasonable for a gas distributor to expect that it will serve all incremental loads within the areas for which it has a franchise agreement and Certificate of Public Convenience and Necessity. Union's expectation is consistent with the regulatory precedent established in prior Board decisions related to postage stamp rates and bypass. The facilities for the distribution of natural gas in Ontario have been developed by the Board on the basis that it is in the public interest to provide utilities under the Board's regulation with the exclusive right to deliver natural gas to end-users within defined franchised service areas, unless there are exceptional circumstances. The assurance that the LDC will have the relatively exclusive right to serve customers both large and small, whether close to or far away from transmission lines, allows the LDC to invest capital in its system and to expand it rationally, with confidence that loads will develop more or less in line with population growth and industrial development and will remain on the system into the foreseeable future.

Negative Effects on Union and its Ratepayers

In Union's view, Greenfield South's proposed bypass pipeline is an incremental load and there is a duplication of facilities and a negative effect on Union and its ratepayers. As is noted in the Board's E.B.R.O. 477 Decision with Reasons (paragraph 5.030), the Board found that:

> *"There have been submissions made that there is no cost shifting where the customer is incremental. The Board does not agree. In the Board's view, where the load is incremental there is notional cost shifting ...."*

Notional cost shifting refers to the impact on existing ratepayers as a result of the bypasser not taking service at the posted rate or at a rate that is less than the class rate. In the case of Greenfield South, the physical bypass of Union's system will result in foregone benefits to all existing and future ratepayers. As a result, Union's customers, including existing electricity generators currently taking service under Rate T2, will pay a higher rate than they otherwise would. Union does not view this foregone benefit shift to be in the public interest or consistent with established principles of rate design.

In addition to notional cost shifting, Union is concerned that, if the Board endorses bypass in the Province of Ontario, the potential exists for a number of existing customers to seek similar relief to that sought by Greenfield South. That is, customers located in close proximity to natural gas transmission facilities will take advantage of their location while other customers that have not had the good fortune to locate next to transmission facilities will continue to take service from the LDC at higher cost.

Union has estimated the potential annual margin loss to Union and its ratepayers with respect to its existing customers at $26 million (based on forecast 2014 volumes and revenues) should the Board endorse bypass and customers in the Sarnia area and Northern non-utility generators bypass Union. The actual impact on Union and its ratepayers will depend on the extent to which existing customers seek physical bypass. This analysis does not take account of the foregone revenue from new customers who are granted physical bypass rights. The majority of the lost margin would be recovered from general service customers (residential, commercial and small industrial).

No Cross-Subsidy of Union Ratepayers by Greenfield South

The Board has previously clearly stated (E.B.R.O. 477, Decision with Reasons, paragraph 5.0.36) that payment above incremental costs is a contribution to the integrity of the gas distribution system and that this contribution is the price of preserving an integrated structure that is reflective of the broad public interest.

Greenfield South has indicated that the Generating Facilities would be uneconomic if it was served using the T2 rate schedule. Union notes that in its E.B.R.O. 471 (Canadian Forest Products) Decision with Reasons dated August 27, 1991 at paragraph 4.0.6, the Board stated that one of the serious and complicated questions for the Board, which simultaneously imposes a substantial burden of proof on an applicant is: "Is the applicant under some economic threat, or is it simply able to bypass economically?"

In proposing to physically bypass Union's system, Greenfield South is requesting special treatment that is akin to them receiving a subsidy from other ratepayers. If Union provides service to the electricity generation station, Union will be serving an economic load that will produce net benefits over the life of the project for all of Union's customers, including all existing and future electric generators. If the bypass proposed by Greenfield South is approved, other ratepayers will be precluded from receiving these benefits and Greenfield South will be the sole beneficiary.

Union has reviewed Greenfield South's proposed bypass in the context of the principles that have been enunciated by the Board in prior cases pertaining to bypass. Union has concluded that it would not be in the public interest for the Board to approve the physical bypass proposed by Greenfield South. In Union's view, Greenfield South's proposal to physically bypass Union's facilities is entirely driven by its desire to minimize its costs to increase profit and not by an economic threat.

Union views the notional cost shift associated with the foregone margin that will result if the Board approves the physical bypass of Union's system as inappropriate. All of Union's existing and future customers will pay more than they otherwise would have if bypass is approved.

Further, any decision that results in an increase in physical bypass will need to be factored into Union's rate-making framework. Specifically, gas distributors will need a means to recover margin losses associated with customers selecting physical bypass.

IV) IMPACT ON UNION'S OVERALL SYSTEM EFFICIENCY

Since Greenfield South would be an interruptible customer if they connected to Union, there would not be any impacts of the overall efficiency of Union's Sarnia Industrial Line system.

Impacts to Union's system by Greenfield South receiving service directly from Vector Pipeline could occur at Dawn if Union was required to provide a firm Dawn to Dawn-Vector service. There is currently no capacity available for this service and Union would have to build new facilities.

Given that Greenfield South's interruptible demand would drive little to no system modification / reinforcement should they connect to the Sarnia Industrial Line, Union and its ratepayers would lose the opportunity to have a better utilization of an existing asset.

CONCLUSION

In conclusion, Union Gas believes that there is no cost basis either from a rate perspective or credit requirement perspective on which to differentiate service or to justify bypass of Union's distribution system by Greenfield South. Union maintains that being the local distribution utility, Union's proposal is in the best interest of the ratepayers and is the preferred solution for delivering the required natural gas volumes and services to Greenfield South.

Union respectfully requests that the Board not issue an Order granting a Certificate of Public Convenience and Necessity to Greenfield South.

F. APPLICATION OF BOARD PRECEDENT AND POLICY

Board Precedent

In the Board's decision in EBRO 477, which was an application for a bypass competitive rate applicable to Cardinal Power of Canada, L.P. , the Board reiterated and expanded on the test related to public interest considerations in respect of bypass. Cardinal Power was an independent power producer that was an incremental load. Cardinal Power could credibly bypass the LDC by interconnecting to TCPL. In the Cardinal Power case the Board found that:

> "5.0.38 The Board continues to be guided by the findings in the Bypass Decision as they pertain generally to bypass application:
>
> 1. As a general policy, physical bypass of the LDC for the transportation of gas is available where it is in the public interest.
>
> 2. Each application for physical bypass will be considered on the basis of its individual merits.
>
> 3. The Board will rely on a very broad definition of the public interest.
>
> 4. The Board encourages ratemaking alternatives to bypass.
>
> 5.0.39 On the basis of the fourth principle Centra and the Applicant entered into negotiations resulting in this Rate Application. In light of the evidence heard in this proceeding, the Board would augment this last principle to add two other considerations to better guide both potential applicants for bypass competitive rates and the utility in this matter:
>
> 4. The Board encourages ratemaking alternatives to bypass.
>
> a) Class ratemaking techniques are to be explored.
>
> b) A customer specific rate should be considered only as a last resort."

In Cardinal, the Board rejected the application even though Cardinal Power was a credible bypass candidate. The application was rejected since the underlying reason for the bypass was economic gain only.

The Board has found that in the case of a physical bypass or for a bypass competitive rate the consideration by the Board is the same. Both have to be considered in the public interest. In this regard the Board stated in EBRO 471 (Canadian Pacific Forest Products):

> 4.0.7 The Board considers the approval of a bypass rate to be a serious issue. This is not just a discount program available to large customers, it is a cost shifting rate with public interest impacts which the Board must find is justified beyond the worthy but narrow concerns of an individual applicant.
>
> 4.0.8 An applicant for a bypass rate must therefore convince the Board that it is seeking more than just a cost reduction. Bypass rates are beyond the ordinary and the applicant must show that its circumstances are also extraordinary. Furthermore these same concerns would be paramount in an application for actual bypass and it should also be kept in mind that, except in the most unusual of circumstances, an appropriate bypass rate is preferable to an actual bypass. *(emphasis added)*

In Cardinal, at para 5.0.22, the Board found: "the public interest is an overriding consideration in an application by a customer (either existing or incremental)" The Board must weigh all the interests to determine whether the approval of the application, on balance, is in the public interest.

In the current case, the Board must consider whether to reject Greenfield's request for a certificate such that Greenfield will be served under a postage stamp rate and rate class proposed by Union.

As stated by the Board in Cardinal " the Board has found in past decisions that postage stamp rates serve the public interest." (para 5.0.24). The Board quoted it's decision in CP Forest decision:

> "5.0.24 The Board has found in past decisions that postage stamp rates serve the public interest. The Board discussed the concept of postage stamp rates in the T-Rates Decision and stated in the CP Forest Decision that:
>
> > 'Postage stamp rates within each class of customers are the accepted norm in Ontario and the Board will not depart from this principle in favour of distance related rates unless there are valid and compelling reasons to do so.'
>
> The Board in the CP Forest Decision identified this concept of postage stamp rates as being one of the key principles in deciding if the public interest is best met by approving a bypass competitive rate for an individual customer."

In Cardinal, the Board went on to state:

> "5.0.25 In addition to postage stamp rates, the rate structure in Ontario is based on the principle of class ratemaking, where customers with common characteristics are grouped together and treated similarly. The granting of a bypass competitive rate marks a departure from this principle."

Based on these aspects, the Board in Cardinal very clearly stated the following proposition:

> "5.0.26 Class ratemaking and postage stamp rates are the accepted rule in Ontario. There are exceptions to the rule; but these were approved only after due consideration and an examination of the facts and circumstances surrounding the request for the exception and the public interest. There is a burden of proof on an applicant to show why it should be outside the class rate system and obtain a special rate. Since a bypass competitive rate is a special rate, an applicant must address both the private and public interest considerations (the former being a subset of the latter), for in the end, the application is granted on public, not private, interest grounds." (emphasis added)

On the public interest criteria the Board stated:

> "5.0.28 The Board did discuss, however, public interest criteria in more detail in both the Northland and CP Forest Decisions. In the Northland Decision the Board found the applicant not to be a credible bypass candidate, and although it was not necessary to deal with public interest considerations, it did go on to expound on some of those that it considered relevant. The Board indicated that an applicant for a bypass competitive rate would need valid, compelling reasons to persuade the Board to depart from the traditional postage stamp rates. The Board stated that there was a heavy onus on an applicant to satisfy the Board that such a rate was an appropriate response to the applicant's "problem". ***The Board was of the view that increased profit was not a compelling reason. This was the first time that the requirement for the transportation service was incremental***, and therefore, there was no concern over a duplication of facilities." (emphasis added)

Based upon the foregoing, the applicant has to show a valid and compelling reason that is more than a simple cost reduction.

The Board in Cardinal believed that increased profit or a cost reduction was not a compelling reason to deviate from postage stamp rates or class rate making.

The Cardinal case is consistent with the Board's findings in the Greenfield Energy Centre Bypass case. (RP - 2005 - 0022) In that case the Board noted:

> "In other words, GEC's evidence is that the key concern it has with Union's T1 service is that it impedes access to competitive upstream services, especially storage and load balancing services." (p. 33)

At page 27 of the GEC Bypass case, the Board was clear as to its rationale for approving the Bypass. The Board stated:

> "Specifically... the Board concludes that it is in the public interest to allow GEC the opportunity to bypass Union's distribution service because the Board is not convinced that Union's distribution service, as presently structured, provides GEC with the control, flexibility and access to *competitive upstream services that GEC requires*'."

The Board stated further at P. 31:

> "The Board continues to support the principle of postage stamp rates, but does not conclude that the approval of GEC's application would undermine that principle. An important foundation for postage stamp rates is the appropriate determination of a class and the accurate allocation of costs to that class. An equally important consideration is that customers should be entitled to receive the services they require and the tariff should reflect those services appropriately."

As anticipated by the Board in the GEC Decision, this circumstance has been remedied by NGEIR. Competitive upstream services are available whether Greenfield is served by Union or Vector. Consistent with the board's decision in Cardinal, GEC was able to demonstrate a reason for abandoning postage stamp rates other than cost reduction or economic gain.

The facts in the current application are directly analogous to those in Cardinal. Similar to Cardinal Power, Greenfield has presented no fact or reason other than a cost reduction to deviate from postage stamp rates. Upstream services are available whether served by Union or Vector. The nature and quality of the service provided by Vector and Union are similar. In fact, even with respect to costs, Union submits that its T2 interruptible service is a similar or lower cost given the storage requirements of Greenfield when connected to Vector and provided at market rates.

The Board's decision in the current application is very important. If the board concludes that the certificate should be granted and Greenfield is entitled to bypass on the basis of the facts of this

case, the Board is effectively departing from the notion the postage stamp rates are in the public interest. It would in effect be stating that if a connecting load can show a lower cost by pursuing bypass, then that customer is able to avoid postage stamp rates and convenience of location is the determining factor.

However, this is not the intended policy of the Board and as such Greenfield's certificate request should be denied.

IN THE MATTER OF the Ontario Energy Board Act[12JF7-0:1], R.S.O. 1990, Chapter O.13;

AND IN THE MATTER OF an amended application by Cardinal Power of Canada, L.P. to the Ontario Energy Board pursuant to Section 19 [12JF7-0:130] of the Ontario Energy Board Act, for an order or orders fixing the just and reasonable rate that Centra Gas Ontario Inc. may charge to Cardinal Power of Canada, L.P. for services related to the supply of natural gas to Cardinal Power of Canada, L.P. at Cardinal Power of Canada L.P.'s plant located in Cardinal, Ontario.

Before: E.J. Robertson
Presiding Member
Pamela Chapple
Member
C.L. Cottle
Member

DECISION WITH REASONS

May 27, 1993

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1 INTRODUCTION

10

1.1 The Application

11

1.1.1 Cardinal Power of Canada, L.P. ("Cardinal Power" or "the Applicant") filed an application dated February 10, 1992, as amended on August 28, 1992 ("the Rate Application"), with the Ontario Energy Board ("the Board") under section 19 [12JF7-0:130] of the *Ontario Energy Board Act* ("the Act"). The Applicant requested an order fixing or approving a just and reasonable rate for the transportation of gas by Centra Gas Ontario Inc. ("Centra") from the transmission system of TransCanada PipeLines Limited ("TCPL") to a cogeneration facility to be owned and operated by Cardinal Power in the Village of Cardinal. The Rate Application was an alternative to three other applications dated February 10, 1992 under the Act and the *Municipal Franchises Act* (Board File Nos. E.B.L.O. 242, E.B.C. 198 and E.B.A. 627) that sought to give authority to Cardinal Power to construct and operate its own pipeline ("the Pipeline Application").

12

1.1.2 The Applicant's evidence in this matter consisted of material filed both with the Rate Application and with the Pipeline Application (including the responses to interrogatories). Centra filed evidence in support of the Rate Application, and both the Applicant and Centra jointly sponsored an expert witness, whose evidence was filed in January, 1993.

Was page 2 13

1.2 The Hearing

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1.2.1 By a Notice of Hearing dated February 9, 1993, the Board appointed February 23, 1993 for the commencement of the hearing. The hearing lasted for four days, not including the procedural day to hear motions on February 15.

15

1.2.2 The following is a list of the parties and their representatives:

16

Cardinal Power	Lawrence Smith
Centra	Peter Budd
Board Staff	Michael Penny
	John Campion
Industrial Gas Users Association ("IGUA")	Peter Thompson
Northland Power ("Northland")	Dan Sinclair

The Consumers' Gas Company Ltd.	Barbara Bodman
("Consumers Gas")	
Destec Energy Canada ("Destec")	Michael Meacher
Independent Power Producers Society of Ontario	Tom Brett
Union Gas Limited	Michael Verwegan

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1.2.3 The following witnesses testified on behalf of the Applicant:

18

Michael Crough	Vice-President, Business Development, Sithe Energies, Inc.
Robert Thompson	Project Development Manager, Husky Oil Ltd.

19

1.2.4 The following witness testified on behalf of the Applicant and Centra:

20

Malcolm Jackson	President, Financial Regulatory Consultants of Canada

21

1.2.5 The following Centra employees testified on behalf of Centra:

22

Keith Bryan	Manager, Regulatory Projects and Research
Patrick Hoey	Manager, Regulatory Affairs

Was page 4 23

1.2.6 The following witness testified on behalf of IGUA:

24

Ted Bjerkelund	Executive Director, IGUA

25

1.2.7 The Applicant delivered oral argument on February 26, 1993 and Centra filed written argument on March 3. Board Staff, IGUA and Northland filed their written arguments on March 10 and both the Applicant and Centra filed reply argument on March 15, 1993.

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1.2.8 Copies of the prefiled evidence and exhibits in this proceeding, together with a verbatim transcript, are available for public examination at the Board's offices. The Board has considered all the evidence, submissions and arguments presented in this proceeding. The following is a summary of the evidence and positions necessary to clarify the issues.

2 BYPASS COMPETITIVE RATE

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2.0.1 The Board reviewed the following Board decisions on bypass, and relative to that, bypass competitive rates:

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- the Bypass Decision under Board File Nos. E.B.R.O. 410-I, 411-I, 412-I (dated December 12, 1986);

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- the T-Rates Decision under Board File Nos. E.B.R.O. 410-II, 411-II, 412-II (dated March 23, 1987);

31

- the decisions dealing with applications for a bypass competitive rate:

32

E.B.R.O. 435	- Cyanamid (dated July 9, 1987);
E.B.R.O. 430-2B	- Nitrochem (dated May 20, 1988);
E.B.R.O. 411-III et al.	- Algoma and Domtar (dated May 20, 1988);
E.B.R.O. 457	- C-I-L (dated December 1, 1989);
E.B.R.O. 458	- Northland (dated May 24, 1990);
E.B.R.O. 461	- Algoma (dated May 22, 1991); and
E.B.R.O. 471	- CP Forest (dated August 27, 1991);

- the Decision dealing with Centra's proposed cogeneration rate class under Board File No. E.B.R.O. 467 (dated May 22, 1991).

34

2.0.2 Based on a reading of these decisions, it appears that a three-part test has evolved for the purpose of assessing an application for a bypass competitive rate.

35

Q1. Is the applicant for a bypass competitive rate a credible candidate for a bypass?

36

Q2. Is it in the public interest to grant a bypass competitive rate?

37

Q3. Is the proposed rate just and reasonable?

38

2.0.3 The Board views the answer to this first question as fundamental to an application for a bypass competitive rate. The notion of credibility suggests that to justify an action that goes against the norm (i.e., class ratemaking and postage stamp rates [1]) there must be a threat that the system may lose the existing or a new load because the customer may go out of business, use a substitute for natural gas, or physically bypass the local distribution system entirely by building its own pipeline. If the customer-applicant is not a credible bypass candidate, then there is no threat of loss and, therefore, no competitive justification for the rate. On the other hand, if the applicant is credible, there may be both a threat of loss to the system and the justification for a bypass competitive rate.

39

2.0.4 The Board notes that an applicant that establishes itself as a credible bypass candidate cannot be assured that a bypass competitive rate will be subsequently approved. All rates, including bypass competitive rates, must, generally, be in the public interest and, specifically, be just and reasonable. In the same way, an applicant that establishes itself as a credible bypass candidate in an application for a bypass competitive rate is not automatically guaranteed that approval would be forthcoming in an application for a physical bypass. The Board must be satisfied that a bypass meets a number of concerns (eg., landowner and environmental interests), as well as being in the public interest.

Was page 7 40

2.0.5 In this Decision, the Board does not approve a bypass competitive rate for Cardinal Power as the Applicant did not pass the three-part test. Although Cardinal Power may be a credible bypass candidate (Q1), the Board is not satisfied that it is in the public interest to grant this special rate to the Applicant under the circumstances (Q2). Because approval is not being granted, there is no need to address the appropriateness of the proposed rate (Q3).

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[1] Postage stamp rates are uniform in a specified area and are charged on a volumetric basis regardless of distance.

3 BACKGROUND

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3.0.1 Cardinal Power is a limited partnership between Husky Oil Limited of Calgary, Alberta ("Husky Oil") and Sithe/Energies of New York, New York. It was formed to design, construct, own and operate a cogeneration plant located at the Canada Starch Company ("CASCO)" in Cardinal, Ontario. The Village of Cardinal is located near Cornwall and is presently served by Centra.

44

3.0.2 The capital cost to construct the cogeneration facility is estimated to be $170 million. The debt component of Cardinal Power's capital structure is estimated to be 85 percent (as amended from the original 80 percent). Construction financing for the project was completed on September 30, 1992 and will be converted to term financing when construction is completed. Term financing is conditional upon economic forecasts that will yield a cash flow providing adequate coverage for the payment of interest and principal over the term of the loan. The financing is non-recourse debt financing, namely, the lenders have no recourse to the sponsors of the project. As of January 1993 the Applicant had spent $36 million on the project.

3.0.3 At the time of the hearing, the construction of the cogeneration plant had commenced; it is expected to be in commercial operation by July 1994. The cogeneration plant is forecast to produce 150 megawatts of electricity for sale to Ontario Hydro and 65,000 pounds per hour of steam for CASCO's use in processing. The cogeneration plant will displace some gas load currently delivered to CASCO by Centra.

46

3.0.4 Cardinal Power has a 20 year Power Sale Agreement with Ontario Hydro for the sale of its electricity, which is its primary revenue source, and a steam sale agreement with CASCO. The agreement with Ontario Hydro includes levelizers that smooth out the revenue payments from Ontario Hydro. Under these arrangements, "the point of greatest project vulnerability" will occur approximately ten years after the plant is operational.

47

3.0.5 Cardinal Power will purchase natural gas for its use at the cogeneration plant from Husky Oil and Husky Oil has arranged transportation service with TCPL. The gas purchase agreement provides for a natural gas supply warranted by Husky Oil and the gas price is directly (and directionally) linked to changes in the price that the Applicant receives from Ontario Hydro under the Power Sale Agreement.

48

3.0.6 A new pipeline between the TCPL transmission line and the cogeneration facility is required to serve the facility. Initially Cardinal Power made its Pipeline Application to own, build and operate that pipeline itself. The Rate Application was held in abeyance pending the outcome of the Pipeline Application. The hearing on the Pipeline Application was scheduled to commence on July 7, 1992. By a letter to the Board dated June 26, 1992, Cardinal Power requested that the hearing of the Pipeline Application be adjourned to enable it to proceed with the Rate Application, as the Applicant had reached a conditional understanding on a bypass competitive rate with Centra.

3.0.7 Centra's large industrial customers are provided firm or combined firm and interruptible delivery services under Rate 20. A customer is only eligible for Rate 20 if its total maximum daily require-

ment is 28 10^3m^3 or more. The 100 percent load factor delivery rate for Rate 20 approved in E.B.R.O. 474 is $8.30 per 10^3m^3; with Cardinal Power as a Rate 20 customer, the 100 percent load factor rate would decrease to $7.64 per 10^3m^3; with Cardinal Power paying the proposed bypass competitive rate, the 100 percent load factor rate would decrease to $7.76 per 10^3m^3.

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3.0.8 Cardinal Power and Centra entered into an agreement by a letter dated June 24, 1992 providing for transportation service to the cogeneration facility. The agreement was based on a minimum annual volume of 287,000 10^3m^3. The parties agreed to a ten-year term and the rate applicable to the service for the primary term of five years.

51

3.0.9 The Applicant proposed a bypass competitive rate of $4.80 per 10^3m^3. Based on the proposed rate, the annual delivery cost for this gas is about $1.4 million, compared to the cost of $2.2 million that would be charged if Cardinal Power was a Rate 20 customer. The bypass competitive rate is higher than the estimated effective cost of a pipeline constructed, owned and operated by the Applicant. The estimated cost of transmission under a physical bypass scenario is $2.03 per 10^3m^3, for a total annual cost of $583,000. This figure does not include a provision for load balancing costs that may be required, nor does the proposed bypass competitive rate; Rate 20, however, does include the cost of load balancing.

Was page 12 52

3.0.10 Following the agreement with Cardinal Power for a special rate, Centra filed an application, dated August 31, 1992, for a leave to construct a pipeline and related facilities in the Village of Cardinal and the Township of Edwardsburgh, "in the event that Centra and Cardinal Power enter into an agreement for the distribution of gas by Centra to Cardinal Power as contemplated in the pending application of Cardinal Power in E.B.R.O. 477". This application has been given Board File No. E.B.L.O. 245.

Was page 13 53

4 IS THE APPLICANT A CREDIBLE CANDIDATE FOR A BYPASS?

Was page 13 54

Positions of the Parties

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4.0.1 The following submissions were made by the parties to support the credibility of Cardinal Power to finance, construct, own and operate a pipeline, (i.e., a physical bypass).

56

- Cardinal Power evidenced its intent to physically bypass by filing its Pipeline Application. It submitted that it is prepared to proceed with the Pipeline Application should the Rate Application be denied.

57

- Cardinal Power had dealt with many of the matters related to the construction of the bypass pipeline, including land and environmental matters, in the Pipeline Application.

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- Since there are no existing facilities and, therefore, no duplication of facilities, Cardinal Power submitted that its status as a credible physical bypass candidate is enhanced.

Was page 14 59

- Centra found the Applicant's estimated cost to construct to be credible.

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- Cardinal Power has the financial resources to proceed with the construction of the bypass pipeline.

61

- The cogeneration facility is located in close proximity (approximately 6.8 kilometres) to the TCPL transmission line.

62

- Cardinal Power will be a large volume user (minimum annual volume 287,000 10^3m^3), operating at a high load factor (approximately 90%).

63

- There is an economic advantage to a physical bypass for Cardinal Power; the costs of serving itself are lower than Centra's Rate 20, an estimated difference of $1.6 million annually. The estimated difference between the costs of serving itself and the proposed rate is $0.8 million annually.

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- Husky Oil, one of the partners, as the owner and operator of gas pipelines, has engineering, technical and construction expertise in pipeline construction and operation.

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- Husky Oil will also supply the gas to the project. It has secured the necessary arrangements on the NOVA Corporation of Alberta and TCPL systems.

66

- Cardinal Power is located in close proximity to the United States and to the Iroquois pipeline into the United States. The Applicant insinuated that there might be an international physical bypass alternative to Centra's service.

Was page 15 67

4.0.2 Cardinal Power contended that it filed the Pipeline Application because it believed that the ownership and operation of its own line would allow it to control its gas service and gas costs. It argued that it was pursuing the bypass competitive rate as a compromise, and believed the proposed rate to be an acceptable middle ground for all parties. Cardinal Power maintained that it has the resolve, intent and ability to pursue the Pipeline Application if its Rate Application is not approved; it stated that it "has a very strong economic incentive to pursue bypass options, be it via a rate settlement or a physical bypass." The Applicant submitted that this would include any international bypass option. Although it was not the shortest bypass alternative, Cardinal Power claimed that the current level of Rate 20 provided considerable latitude to consider the more expensive international option.

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4.0.3 There was very little disagreement amongst the parties as to the credibility of the Applicant to finance, construct, own and operate a pipeline, as described in the Pipeline Application.

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Board Findings

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4.0.4 The Board finds that Cardinal Power exhibits the necessary characteristics to be considered a credible physical bypass candidate in that it could, if authority were to be ultimately granted, finance, construct, own and operate a domestic pipeline, which would result in a physical bypass of Centra, the local distribution company ("LDC"). The Board does not accept, however, the size of the economic advantage attributed to Cardinal Power serving itself as there has been no testing of the costs of supplying gas to meet the needs of the cogeneration operation, including load balancing costs.

Was page 16 71

4.0.5 Although there was some reference to an international physical bypass pipeline under the St. Lawrence River, this notion was not tested in these proceedings. The Board does not have the evidence before it to judge an international physical bypass to be a real threat at this time. The Board agrees with IGUA that if circumstances change and the Applicant has evidence to convince the Board that it is a credible international bypass candidate, then Cardinal Power could consider reapplying for rate relief on the basis of costs associated with the international alternative.

Was page 17 72

5 IS IT IN THE PUBLIC INTEREST TO GRANT A BYPASS COMPETITIVE RATE?

73

Positions of the Parties

74

Cardinal Power

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5.0.1 The Applicant maintained that it is in the public interest that the Board approve a bypass competitive rate for Cardinal Power.

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5.0.2 Cardinal Power submitted that a gas user is motivated to consider a bypass in order to reduce costs or to improve its situation. It explained that the motivation behind the Rate and Pipeline Applications is to keep costs down and economic risk under control. In its attempt to achieve that end, the Applicant further explained that it is assisted in this respect by the presence of a competitive alternative to the traditional way of transporting gas, namely, a physical bypass of the LDC. The Applicant submitted that the merits of the proposed rate should be measured against that competitive alternative, namely, that Cardinal Power would not be on the Centra system. The Applicant argued that its resolve, intent and ability to pursue bypass options are evidence of a real possibility that Centra could lose the Cardinal Power load. The Applicant submitted that as long as it is paying Rate 20, there would be an incentive to bypass; "that could happen in year five as easily as it could happen today." A more moderate solution to the Applicant's problem of cost control and risk minimization would be a rate that can compete with bypass, namely, the proposed rate, which is the subject of this proceeding.

Was page 18 77

5.0.3 The Applicant defined the real cost of the transportation service that it requires to be about 25 percent of the Rate 20 charge. Although the proposed rate does not solve the Applicant's problem in total by reducing the cost of the service down to the real cost, it explained that a bypass competitive rate does ameliorate the problem.

78

5.0.4 Cardinal Power explained that there are risks attached to the project, and should they occur the project could be in trouble. Because its revenue stream is fixed, it described why it is necessary to look at the cost-side of the project to build in protections. It submitted that its economic need to control costs and minimize risk by obtaining more competitively priced transportation arrangements would "best position it for long-term viability". When a witness for the Applicant was asked what was the most compelling reason for approval of the proposed rate, he testified that,

79

> [a bypass competitive rate] gives the strength, the financial strength, the resilience for the project that it wouldn't have at the Rate 20 level and that that resilience to the project give us a little more ability to withstand some of the difficulties. It makes a stronger project, it makes it all the more likely that we will endure for the 20 years and deliver the benefits we expect.

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5.0.5 The Applicant suggested that any cost above the real cost is an "overcontribution". Using the proposed rate the Applicant submitted that Centra's other ratepayers would benefit by a contribution from Cardinal Power of approximately $1 million. The 100 percent load factor rate for Rate 20 customers would reduce from $8.30 per 10^3m^3 to $7.76 per 10^3m^3. In addition, there would be an assurance of a long-term contribution to Centra as there are minimum revenues over the term of the ten-year contract. On the other hand, if Cardinal Power is not on the system, there will be no contribution to the Centra system and no benefits to the system users.

Was page 19 81

5.0.6 The Applicant submitted that there is a negative impact on the public interest where there is cost shifting from an existing customer to other customers. The Applicant argued that because the load in this instance is incremental, there is no cost shifting, and that because there is no cost shifting, there is no negative impact to overcome in this case. Cardinal Power suggested that where the load is incremental the practical onus imposed on an applicant to prove its case is less onerous than where there is cost shifting. The Applicant also submitted that other customers of Centra will not bear a real cost if the Applicant does not pay the class rate, as it is not at present paying Rate 20.

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Centra

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5.0.7 Centra identified six factors that it uses to determine whether or not to enter negotiations with a customer for a bypass competitive rate: the location of the customer in relation to TCPL; impediments to construction between the customer and TCPL; the size and characteristics of the customer's gas needs; customer access to financial and technical resources necessary to construct the pipeline; arrangements made to obtain TCPL capacity and load balancing capability; and lastly, acceptance of the responsibility for the rates application through the regulatory process. The combination of these factors must convince Centra that it is feasible and economically advantageous for the customer to build and operate its own pipeline instead of using the Centra system. The customer must also provide engineering data and cost information relating to the physical bypass; Centra uses this information in its determination of the rate. Further, if the customer is a cogeneration customer, Centra requires that there be a signed power purchase contract with Ontario Hydro that has received Lieutenant Governor in Council approval. Centra submitted that the physical bypass alternative is to be assessed on the basis of the economics of the bypass pipeline, not on the basis of the economics of the entire project.

Was page 20 84

5.0.8 Based on the above considerations, Centra entered into negotiations with Cardinal Power. It submitted that it believed there was a "very real risk" that the Applicant would be lost as a customer on the system as the posted rates were higher than the costs to Cardinal Power of serving itself, and the loss was considered to be "a very serious threat to our business". Therefore, Centra followed Board dictates from past decisions to look at ratemaking solutions to bypass, and negotiated the proposed rate.

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5.0.9 Since the proposed rate will exceed the incremental cost to Centra of serving the Applicant, Centra argued that it and its customers will be significantly better off with Cardinal Power on the system paying the bypass competitive rate than off the system and making no contribution to the system. Further, if Centra builds the pipeline there are four potential customers who could be added immediately and security of supply to existing customers will be enhanced. Centra submitted there is no shifting of costs because the load is incremental. Centra explained that the proposed rate includes

a contribution to operating, maintenance and administration costs, which will work to the benefit of other Rate 20 customers. In addition, the rate is a demand charge, which is fixed regardless if the volumes actually taken are lower than the forecast amount. This represents an ensured revenue stream for Centra for ten years. If the system is bypassed, Centra submitted that these benefits would not accrue and there would be detrimental effects: the deliveries to CASCO would be lost and there would be no margin from Cardinal Power to replace this lost portion of the CASCO load; there would be no contribution from Cardinal Power to the system as a whole; and the Rate 20 charge would not decrease. For all these reasons, Centra submitted that a bypass competitive rate for Cardinal Power is in Centra's interests and the interests of its customers.

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Board Staff

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5.0.10 Board Staff could not identify any economic hardship being endured by the Applicant. In fact, as pointed out by Board Staff, Cardinal Power testified that it used Rate 20 in its economic analyses that supported the project, including those relating to long-term profitability, and met its hurdle rate of profitability using Rate 20. The Applicant stated that the project is economically feasible and it will proceed with or without Rate 20. Board Staff also could not find any evidence of competitive pressures in the Applicant's market to support a special rate.

88

5.0.11 In Reply, the Applicant maintained that economic hardship is not determinative on its own or relevant in all situations. It argued that the determinative criterion in this instance is "the existence of a competitive economic alternative to taking service from the LDC and the bypass credibility of the applicant." Cardinal Power went on to suggest that the utility and its customers now face an economic threat because of the potential for a physical bypass. The Applicant also maintained that the economics of a bypass are relevant, and not those applying to the customer's business. The Applicant noted that Board Staff ignored the competitive pressures that Cardinal Power could face on a prospective basis. Moreover, Cardinal Power submitted that it faces strong and significant competitive pressures in its need for cost control through both the construction and the operation phases, and with respect to maintaining its narrow operating margin and debt coverage subsequent to start-up of the operations.

 89

5.0.12 Board Staff identified Cardinal Power's "problem" as a desire to achieve cost savings. It appeared as if the purpose of the special rate was solely to reduce costs. In Board Staff's estimation the savings would have a minimal impact on the risk factors influencing future cost control and the remaining risk is not of sufficient magnitude to justify a departure from the class rate. Board Staff likened the cost savings to profit enhancement. With respect to concerns regarding the future financial performance due to the nature of the agreement with Ontario Hydro, decreased margins, and expected decreases in debt coverage capacity, Board Staff submitted that special treatment should not be granted at this time "because of uncertain future events, especially when under the Applicant's own analysis the project will be viable over its 20-year expected life even assuming Rate 20."

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5.0.13 In Reply, the Applicant asserted that following Board Staff's reasoning would result in the Board regulating the profit of the utilities' customers under its mandate to set just and reasonable rates for the utilities. Further, it contended that this line of reasoning is similar to that on economic hardship, which it submitted is neither relevant nor probative.

Was page 23 91

5.0.14 Board Staff submitted that the principle of utility regulation in Ontario rests on postage stamp rates and such rates reflect the overall public interest. Board Staff argued that the answer to the public interest question depends on whether Cardinal Power has presented appropriate and compelling reasons to deviate from postage stamp rates. Board Staff submitted that Cardinal Power did not provide reasons to warrant a deviation, and, therefore, a bypass competitive rate for Cardinal Power was not in the public interest. In Reply, Cardinal Power indicated that the existence of a competitive alternative to the LDC is the reason for the Rate Application. Further, it maintained that there is no evidence that the Applicant would become a "committed" user of the Centra system if the proposed rate was not approved, and so there is the possibility that the entire contribution to other customers could be lost.

92

5.0.15 Board Staff submitted that the fact that the Applicant is an incremental customer is not relevant. In Board Staff's view, the principles for eligibility should be the same for existing and incremental customers, otherwise inappropriate intergenerational discrimination would result. The Applicant did not disagree with Board Staff's position. In its Reply, however, the Applicant suggested that it might be easier for an incremental customer to satisfy the public interest considerations for a bypass competitive rate than for an existing customer. Further, it submitted that if the same rules are applied to existing and incremental customers and intergenerational discrimination results, then intergenerational discrimination would be appropriate. Moreover, Cardinal Power argued that arguments on intergenerational discrimination should be based on evidence in the proceeding, of which, it suggested, there was none.

Was page 24 93

5.0.16 Board Staff disagreed with the Applicant's designation of the payment of Rate 20 being above the "real cost" as an "overcontribution". Board Staff submitted that any person who pays less than the class rate is in fact "undercontributing" to the system.

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IGUA

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5.0.17 IGUA submitted that authority to construct and operate a bypass pipeline or the approval of a special bypass competitive rate should be granted "very sparingly" and should be the "regulatory choice of last resort". IGUA submitted that the evidence surrounding the key principles enunciated in the CP Forest Decision - class ratemaking is preferable and public interest considerations - lead to the conclusion that it is not in the public interest to grant a special rate to Cardinal Power.

96

5.0.18 With respect to private interest facts, IGUA agreed that there will be savings, but these are not significant, amounting to about two percent of the Applicant's total annual cost of operations. IGUA argued that a special rate does little to assist the Applicant in controlling its overall costs. Also a special rate is not needed to justify the economic feasibility of the cogeneration project since Cardinal Power has a 20-year power sale agreement and non-recourse debt financing based on Rate 20.

97

5.0.19 In its discussion of public interest considerations, IGUA addressed: the non-distinguishing features of Cardinal Power compared to other customers of Centra; the lack of economic threat; cost shifting implications; the economic feasibility and long-term competitiveness of Cardinal Power; estimated returns to project sponsors; industrial development; special rates as a surrogate for a

competitive delivery system; and implications for other customers. IGUA submitted that there is no real likelihood that the project will not proceed if the proposed rate is not approved nor that the Applicant will decline to take service from Centra.

Northland

99

5.0.20 Northland submitted that the test for a bypass competitive rate should be whether the applicant will contribute more toward the utility's revenue requirement than would be the case if it left or refused to join the system as a Rate 20 customer. Because Centra would receive $1 million of revenue through the proposed rate when compared to the bypass alternative, Northland argued that Cardinal Power passed the test and the Rate Application should be approved.

100

Board Findings

101

5.0.21 Having found the Applicant to be a credible bypass candidate, then the second question must be dealt with: Is it in the public interest to grant a bypass competitive rate? It may well be that the construction of a bypass pipeline, and thus, the approval of a bypass competitive rate, would be in the Applicant's private economic interest. But would a bypass competitive rate, the subject of this Decision, be in the public interest?

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5.0.22 The public interest is an overriding consideration in an application by a customer (either existing or incremental) for a special rate. The Board must weigh all interests to determine whether the approval of the application, on balance, is in the public interest. An application for a bypass competitive rate will be approved only if such a rate is found by the Board to be in the public interest.

5.0.23 Public interest is a fluid concept and its application as a legal standard depends on the facts and the circumstances existing at the time of the application. It is not possible to compile a list of all the criteria that might make up the public interest from time to time. The question of public interest is not a question of fact, but it is a question of judgement based on the facts and circumstances before the Board. Since facts and circumstances change from case to case, so will the depiction of the public interest.

104

5.0.24 The Board has found in past decisions that postage stamp rates serve the public interest. The Board discussed the concept of postage stamp rates in the T-Rates Decision and stated in the CP Forest Decision that:

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> Postage stamp rates within each class of customers are the accepted norm in Ontario and the Board will not depart from this principle in favour of distance related rates unless there are valid and compelling reasons to do so.

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The Board in the CP Forest Decision identified this concept of postage stamp rates as being one of the key principles in deciding if the public interest is best met by approving a bypass competitive rate for an individual customer.

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5.0.25 In addition to postage stamp rates, the rate structure in Ontario is based on the principle of class ratemaking, where customers with common characteristics are grouped together and treated similarly.The granting of a bypass competitive rate marks a departure from this principle.

Was page 27 108

5.0.26 Class ratemaking and postage stamp rates are the accepted rule in Ontario. There are exceptions to the rule; but these were approved only after due consideration and an examination of the facts and circumstances surrounding the request for the exception and the public interest. There is a burden of proof on an applicant to show why it should be outside the class rate system and obtain a special rate. Since a bypass competitive rate is a special rate, an applicant must address both the private and public interest considerations (the former being a subset of the latter), for in the end, the application is granted on public, not private, interest grounds.

109

5.0.27 There was a suggestion by Cardinal Power in this proceeding that it would be unjust, unreasonable and unduly discriminatory to deny the Rate Application given the decisions in C-I-L and Nitrochem. Although the Board notes that in those cases the bypass competitive rates were found to be in the public interest, the public interest considerations used by the Board to arrive at its conclusions were not set out in any definitive way in the reasons for the decisions.

110

5.0.28 The Board did discuss, however, public interest criteria in more detail in both the Northland and CP Forest Decisions. In the Northland Decision the Board found the applicant not to be a credible bypass candidate, and although it was not necessary to deal with public interest considerations, it did go on to expound on some of those that it considered relevant. The Board indicated that an applicant for a bypass competitive rate would need valid, compelling reasons to persuade the Board to depart from the traditional postage stamp rates. The Board stated that there was a heavy onus on an applicant to satisfy the Board that such a rate was an appropriate response to the applicant's "problem". The Board was of the view that increased profit was not a compelling reason. This was the first time that the requirement for the transportation service was incremental, and therefore, there was no concern over a duplication of facilities.

Was page 28 111

5.0.29 The Board in the CP Forest Decision was quite detailed as to the public interest criteria it viewed as relevant in that case. The Board regarded the approval of a bypass competitive rate as a serious issue and termed such a rate as being "beyond the ordinary." The Board determined that an applicant has an onus to demonstrate an "extraordinary reason", an economic justification, for the rate. The Board wanted to be satisfied that the rate was the appropriate response to the applicant's "problem". In this regard, the Board specifically referred to a notion of "economic threat" on the part of the applicant (i.e., its economic viability) and to the threat of load disappearing from the system (i.e., lost revenue to the utility). In the Board's view, the applicant had to show a valid and compelling reason that is more than "a simple cost reduction" to justify a departure from postage stamp rates. Where costs savings are the reason for the application, the Board indicated that it wanted to see the magnitude of the saving in relation to the goal of reducing costs and to the total annual cost of operations. It also indicated that the cost shifting consequences of granting a bypass competitive rate had to be justified since the granting of a bypass competitive rate would result in burdening other customers with extra costs. In the CP Forest case, the Board found no economic threat nor any real danger that the system would lose the load. It also considered the shifting of costs (CP Forest being an existing customer) to other customers as a negative impact outweighing

the benefits to the applicant. The Board found that a bypass competitive rate was not in the public interest in that case.

Was page 29 112

5.0.30 There have been submissions made that there is no cost shifting where the customer is incremental. The Board does not agree. In the Board's view, where the load is incremental there is notional cost shifting. Assuming Centra is serving Cardinal Power at the special rate, industrial customers will pay $0.12 per 10^3m^3 more than if Cardinal Power was paying the class rate. That is not to say that cost shifting is the only determinant of the application. In fact, that is not the case; in the decisions dealing with Cyanamid, Nitrochem and C-I-L the Board accepted the cost shifting consequences caused by the bypass competitive rate. Cost shifting is only one item that the Board must consider.

113

5.0.31 Cardinal Power testified that a bypass competitive rate would result in cost savings, which would reduce its risk exposure, particularly given the nature of its front-loaded contract with Ontario Hydro. The Board finds that these costs savings enjoyed by the Applicant would result, assuming that Cardinal Power is on the Centra system, in a reduction of the rate benefits that other Rate 20 customers would obtain by having a large incremental customer joining the class. The Board regards this circumstance as notional cost shifting. Is this cost shifting a burden? Although it may not be a burden in the short-term, nor in the classic sense of the word, it certainly skews the system, all for the benefit of a private interest, with no obvious counter-balancing public interest benefit.

114

5.0.32 The characteristics of the Applicant would place it in the Rate 20 class, and Rate 20 is higher than the requested bypass competitive rate. Is the proposed rate unfair or unduly discriminatory compared to the rate paid by Rate 20 customers? Assuming that Cardinal Power is on the Centra system, other customers would be better off if the Applicant is a Rate 20 customer and they would, as a class, realize the maximum advantage from the Applicant paying the class rate. There would be no discrimination amongst Rate 20 customers as all such customers would be treated the same.

Was page 30 115

5.0.33 Is the Applicant's reason for the request, its need to improve its risk factors, a valid, compelling reason? Although the Board acknowledges the Applicant's concern for risk reduction, the Board is not convinced Cardinal Power's need to reduce its risk exposure at this time is such that the Board should allow a departure from the rule of class ratemaking and postage stamp rates. The Board does not consider the Applicant as being disadvantaged by being placed in the Rate 20 class and notes that it presented its financial analysis to its lender on the assumption that Rate 20 was in effect.

116

5.0.34 The issue of bypass is an important one that directly affects the economic well-being of a potential bypass customer, all other customers on the utility's system, and the system itself. The gas distribution system in Ontario has been treated as an integrated system, and all customers of a utility have come to expect that they will share in the costs and benefits of that integration. If that is to change, it should be done on some significant public interest principle sufficient to counterbalance the expectations of the continuance of an integrated system.

117

5.0.35 One of the circumstances that the Board took into its consideration in this case is the unique characteristics of the Centra system. First of all, the major industrial customers on the Centra system

are a significant customer class in terms of their volume compared to the residential customer class. Second, many of these industrial customers are in close proximity to the TCPL transmission lines. These characteristics increase Centra system's vulnerability to bypass.

Was page 31 118

5.0.36 As Board Staff pointed out, it is inevitable that rates will be higher than stand-alone costs for some customers and lower for others, in that postage stamp rates reflect the average of costs and return for all the customers of a particular rate class. The Board views the payment above real costs as a contribution to the integrity of the gas distribution system. This contribution is the price of conserving an integrated structure that has been established as reflective of the broad public interest.

119

5.0.37 The granting of a bypass competitive rate is the first step in the erosion of a system based on class ratemaking and postage stamp rates, a system that has been determined to be in the public interest. This is not a step that this Board takes lightly. The Board will approve special rates if it is presented with compelling reasons that would satisfy the Board that the special rate would best serve the public interest. The Board is not convinced that the public interest is best served by granting a bypass competitive rate to Cardinal Power at this time.

120

5.0.38 The Board continues to be guided by the findings in the Bypass Decision as they pertain generally to bypass application:

121

1. As a general policy, physical bypass of the LDC for the transportation of gas is available where it is in the public interest.

Was page 32 122

2. Each application for physical bypass will be considered on the basis of its individual merits.

123

3. The Board will rely on a very broad definition of the public interest.

124

4. The Board encourages ratemaking alternatives to bypass.

125

5.0.39 On the basis of the fourth principle Centra and the Applicant entered into negotiations resulting in this Rate Application. In light of the evidence heard in this proceeding, the Board would augment this last principle to add two other considerations to better guide both potential applicants for bypass competitive rates and the utility in this matter:

126

4. The Board encourages ratemaking alternatives to bypass.

127

a) Class ratemaking techniques are to be explored.

128

b) A customer specific rate should be considered only as a last resort.

129

5.0.40 The Board heard that there was a certain level of discontent with the present structure of Rate 20, and it seemed that Centra was not dealing with those issues on a timely basis. This posed a dilemma for the Board as it knew that rejecting the Rate Application would result in placing the Applicant in Rate 20, a potentially problematic rate class.

130

5.0.41 The Board has since become aware that Centra recently filed its 1994 rates application, under Board File No. E.B.R.O. 484, and has included a proposal to create a high volume, high load factor rate class. If the proposal is accepted by the Board, customers like Cardinal Power may observe some rate relief. This approach also recognizes the aforementioned principle that class ratemaking techniques should be examined (and exhausted) before developing a customer specific rate in addressing potential bypass. The Board only comments that it would have hoped that Centra could have been more forthcoming about its intent in this regard in this proceeding, and perhaps less supportive of a deviation from class ratemaking and postage stamp rate principles than it was in its support of the Rate Application.

Was page 33 131

5.0.42 The Board does not approve a bypass competitive rate for Cardinal Power. In the Board's view the Applicant did not pass the three-part test. Although Cardinal Power may be a credible bypass candidate, the Board is not satisfied that it is in the public interest to grant this special rate to the Applicant under the circumstances.

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6 COSTS

134

6.0.1 Section 28 [12JF7-0:199] of the Act authorizes the Board to award costs of and incidental to any proceeding before it. The Board's draft Rules of Practice and Procedure and Cost Award Guidelines, as amended effective January 1, 1993, set out the procedures applicable to cost awards. Costs may be awarded to an intervenor who the Board believes:

135

- has or represents a substantial interest in the proceeding to the extent that the intervenor or those it represents will be affected beneficially or adversely by the outcome,

136

- participates reasonably in the proceeding, and

137

- contributes to a better understanding of the issues by the Board.

138

6.0.2 IGUA and Northland applied for an award of costs in this proceeding.

Was page 36 139

Positions of the Parties

140

6.0.3 IGUA submitted that it participated actively and reasonably in the proceeding. It maintained that the supplementary responses to interrogatories provided by the Applicant in response to the Board's disposition of IGUA's motion shortened the time required for the examination and cross-examination of witnesses from Cardinal Power and Centra. IGUA requested that the Board find that its participation was reasonable and of assistance to the Board and justifies an award of 100 percent of its reasonably incurred costs.

141

6.0.4 Northland submitted that it is entitled to costs because: it is directly affected by the Rate Application; it has a unique contribution to make as it is a Rate 20 customer, a potential physical bypass or bypass competitive rate candidate, and a competitor of Cardinal Power; its intervention has been constructive, "as evidenced by its support of the Cardinal Power Application"; and it has conducted its intervention in an efficient and economic manner.

142

6.0.5 Northland was granted late intervenor status at the outset of the hearing. At that time, Counsel for Cardinal Power did not object to giving status to the late intervenors (Northland and Destec), but submitted that they should do so at their own cost. Northland did not object to this submission of Counsel. In its written argument, however, Northland claimed that the Applicant was penalizing a late intervenor by its submission advocating the denial of costs. Northland submitted that there is no linkage between a late intervention and costs, particularly where the late intervention has not caused prejudice to anyone, including the Applicant, and where there was good reason for the late intervention.

143

6.0.6 In terms of the assessment of the costs claimed, the Applicant requested that the Assessment Officer ensure that costs incurred related "to attendances in connection with other simultaneously held proceedings (such as the Union case, E.B.R.O. 476) be fairly allocated to those proceedings."

144

Board Findings

145

6.0.7 The Board has considered the submissions and conduct of the cost applicants. The Board is also cognizant of the financial liability that the Applicant exposes itself to in its efforts to demonstrate responsible management in a regulated environment. The Board acknowledges the Applicant's status, as noted in its Reply, as a private entity that has no cost of service over which it may spread the cost awards arising from the proceeding.

146

6.0.8 IGUA has a substantial interest in this proceeding. IGUA is an association that represents industrial gas users, some of which are served by Centra under Rate 20. Its positions on physical bypass and bypass competitive rates are well-documented. From the Board's perspective, Counsel for IGUA positioned IGUA during the hearing as an opponent of bypass and bypass competitive rates. Although the witness for IGUA admitted that bypass was possible, he testified that he found it difficult to imagine when it would occur. Further, with respect to bypass competitive rates, he testified that, although possible, based on IGUA's reading of the CP Forest Decision, such a rate is not attainable.

147

6.0.9 In the Board's view time spent advocating general opposition to bypass competitive rates, in light of the Board's policy that such rates are available, is not time well spent in the hearing and did nothing to help the Board resolve the meaning and scope of the public interest component of this application. Although IGUA facilitated the hearing process by bringing its motion and provided some assistance to the Board in its understanding of the issues, the Board did not find that IGUA's participation in total assisted the Board such that IGUA should receive 100 percent of its reasonably incurred costs.

148

6.0.10 The Board finds that IGUA is entitled to an award of costs and, having regard to the circumstances of its intervention, the private status of the Applicant, and the results of this proceeding, the Board finds that IGUA should assume some of its own costs in this proceeding. The Board awards IGUA 66 percent of its counsel's fees and 100 percent of all reasonably incurred disbursements (including those of counsel), subject to the Board's assessment process.

149

6.0.11 The Board is aware of Centra's position that it will negotiate a bypass competitive rate with potential bypass candidates and support the rate in the context of an application before the Board, on the condition that it is not exposed to costs of the proceeding. Since the Board regards Centra as being answerable for the state of the Rate 20 class, and the controversy surrounding that class is, for the main part, a motivation for special rates, the Board finds that Centra should bear some responsibility for the costs flowing from this proceeding. If the contentions had been settled or the rate class justified, or at the very least, if Centra had been more definite about having that matter resolved on its own motion in its next rates proceeding at the time of this hearing, then the Board would not have been so inclined. The Board finds that Centra shall bear a portion of the costs

awarded to IGUA. The Board finds that Cardinal Power and Centra shall equally share the liability for the costs awarded to IGUA.

Was page 39 150

6.0.12 Cardinal Power conditionally accepted Northland's late intervention, namely, that Northland should bear its own costs. Although Northland was not asked expressly by the Board whether it accepted that condition, the Board regards the onus as being on Northland to have either objected to the condition or provided comment in the hearing, where the Board would have had the opportunity to hear the parties make full submissions on the issue for determination at that time. The Board finds that, effectively, Northland accepted Cardinal Power's condition in proceeding as an intervenor without objection or comment until its Argument. In any event, even if the Board had not found Northland to be estopped from pursuing an application for costs, the Board would not have found Northland to be eligible for a cost award. The Board is of the opinion that Northland did not contribute to a better understanding of the issues by the Board. Its intervention was wholly self-serving and added no substance to the Rate Application. In either case, the Board denies a cost award to Northland.

151

6.0.13 The Board directs Cardinal Power and Centra to each pay an equal share of the costs awarded to IGUA immediately upon receipt of the Board's Cost Order. The Board also directs Cardinal Power to pay the Board's costs of and incidental to this proceeding immediately upon receipt of the Board's Cost Order and invoice.

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DATED AT Toronto May 27, 1993.

E.J. RobertsonPresiding Member

Pamela ChappleMember

C.L. CottleMember

Ontario Energy Board

Ontario

IN THE MATTER OF THE ONTARIO ENERGY BOARD ACT

AND

IN THE MATTER OF AN APPLICATION BY

CANADIAN PACIFIC FOREST PRODUCTS LIMITED

FOR A BYPASS COMPETITIVE RATE

E.B.R.O. 471

DECISION WITH REASONS

DECISION WITH REASONS

E.B.R.O. 471

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1980, c. 332;

AND IN THE MATTER OF an Application by Canadian Pacific Forest Products Limited pursuant to Section 19 of the Ontario Energy Board Act for an Order approving or fixing a just and reasonable rate that ICG Utilities (Ontario) Ltd., now known as Centra Gas Ontario Inc., may charge for services with respect to the supply of natural gas to the Canadian Pacific Forest Products Limited plant located at Dryden, Ontario.

BEFORE: C.A. Wolf Jr.
Presiding Member

R.R. Perdue
Member

P.W. Chapple
Member

Decision with Reasons

August 27, 1991

ISBN 0-7729-8829-3

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1. INTRODUCTION

1.0.1 This hearing was initiated by an Application ("the Application") by Canadian Pacific Forest Products Limited ("CP Forest Products", "the Company" or "the Applicant") dated September 21, 1990, for an Order of the Ontario Energy Board ("the Board") approving or fixing the just and reasonable rate that ICG Utilities (Ontario) Ltd, now Centra Gas Ontario Inc. ("Centra"), may charge the Company for services rendered with respect to the supply of natural gas by Centra to CP Forest Products' plant in Dryden, Ontario.

1.0.2 CP Forest Products filed its evidence on October 18, 1990, and on October 29, 1990 amended the Application to request that any rate resulting from the Application become effective on January 1, 1991.

1.0.3 The Company filed a further amendment on December 21, 1990 indicating that it had agreed with Centra on a bypass competitive rate ("a bypass rate") for all gas delivered to its Dryden plant, effective January 1, 1991. On December 28, 1990 CP Forest Products filed supplementary evidence to reflect this agreement, and on May 2, 1991 the Company filed further evidence which indicated that it would not accept the rate offered by Centra if it was conditional on CP Forest Products taking transportation service directly from TransCanada PipeLines Limited ("TCPL").

1.0.4 In the supplementary evidence CP Forest Products also indicated that it was not willing to accept Centra's position that the effective date of the rate should be a date following the Board's Decision on the Application.

1.1 THE HEARING

1.1.1 The hearing began on June 4, 1991. It was adjourned for one day and continued on June 6. The parties delivered oral argument on June 7, and CP Forest Products filed its written reply argument on June 14.

1.1.2 The parties and their representatives in the proceeding were as follows:

CP Forest Products	P. W. Gilchrist
Centra	D. A. Dadson
Board Staff	J. A. Campion
The Industrial Gas Users Association ("IGUA")	B. A. Carroll

1.1.3 The following witnesses testified in the hearing on behalf of CP Forest Products:

R. Beaudry	Beaudry, Belisle & Associates
G. Scheifle	Gore & Storrie Ltd.
J. H. Sim	V.P. Marketing, White Papers Division, CP Forest Products
B. Antonen	Manager, Engineering Services, CP Forest Products

1.1.4 The following employees appeared on behalf of Centra:

R. Bourgeault	Manager, Industrial Gas Utilization
P. Hoey	Manager, Rate Design
J. Collier	Supervisor, Cost of Service Studies
R. Reid	Manager, Gas Supply and Planning
D. Alexander	Chief Engineer

1.1.5 The complete transcripts of the proceedings, together with all exhibits presented at the hearing, are available for public inspection. Although the Board in making its decision considered all the evidence presented at the hearing, it has included a summary of only those issues necessary to come to its Decision herein.

2. BACKGROUND

2.0.1 The issue of bypass rates for some industrial customers with facilities very near the TCPL pipeline was first considered in the late 1980s, shortly after the de-regulation of upstream gas supplies in Canada. The possibility of some of these customers building their own pipeline directly to the TCPL system, thereby bypassing the local distribution company, was made more likely with the ability of those customers to purchase their gas supplies directly and contract for transportation service with TCPL.

2.0.2 This prompted Ontario's distribution companies to consider special rates for such companies using the rationale that: better part of a loaf than none at all. The result was proposals for bypass competitive rates which would become available, upon Board approval, to those customers which could demonstrate their physical and financial ability to capitalize on their proximity to the TCPL pipeline.

2.0.3 The Board examined the whole issue of bypass and bypass rates in relation to each of Ontario's three major distribution companies in a combined hearing under Board file numbers E.B.R.O. 410-I, 411-I and 412-I. The Board said that it would consider each application for bypass on the basis of its individual merits and that potential rate making solutions should be considered as an alternative to a physical bypass in order to ensure that the public is fully protected.

2.0.4 Three bypass rates have been approved by the Board but there has been no application to the Board for an actual bypass. In each of the cases where the Board approved a bypass rate, the customer involved used natural gas as a raw material or "feedstock".

3. POSITIONS OF THE PARTIES

3.0.1 CP Forest Products' Dryden operation produces kraft paper, construction lumber and uncoated white sheet paper. The plant is described by its owners as large, modern and well situated to serve the highly competitive North American market and it is Dryden's largest employer.

3.0.2 The Company indicated that it was attempting to modernize its facilities further in order to lower its production costs to counter the effects of free trade which, over the next several years, will remove a 12 to 15 percent tariff protection the Company has previously enjoyed. The bypass rate being sought in this Application is one of its cost cutting efforts.

3.0.3 CP Forest Products and its predecessors at Dryden have been natural gas customers for more than 40 years. Currently the Company operates under buy/sell arrangements with Centra, and for 1991 it estimated its annual demand to be about 113,000 10^3m^3, which the Company expects to remain constant for the next 15 years. Based on Centra's current rates, the annual delivery cost for this gas is about $596,000 which represents about 3.7 percent of the cost of production.

3.0.4 In argument, the Company proposed that the Board set a bypass rate of $3.91 per 10^3m^3 under its current buy/sell arrangements with Centra or $2.25 per 10^3m^3 if CP Forest Products switches to a transportation rate.

3.0.5 In order to show that it was entitled to a bypass rate, the Company called evidence to establish that it would be a credible bypass candidate in that it could finance, construct, operate and maintain its own 3 km pipeline between its facilities and the TCPL main line running just north of the town.

3.0.6 The Company testified that it preferred not to build such a pipeline and to remain a Centra customer. However, if it was not granted a bypass rate, it would apply for leave to construct its own pipeline and cease to be a customer of Centra by becoming a transportation customer of TCPL .

3.0.7 The Company argued that the current rate structure (i.e. "postage stamp rates"), is outdated because it provides no incentive for industry to "improve plant efficiency through location or re-location near the TCPL pipeline."

3.0.8 Centra objected to CP Forest Products seeking a bypass rate while continuing to be served under its existing buy/sell arrangement. Centra argued that a bypass rate should be available to CP Forest Products only if the Company is prepared to switch to transportation service and thus assume responsibility for its load balancing on the TCPL system. Under these circumstances, Centra agreed that CP Forest Products would be a credible bypass candidate and thus be eligible for a bypass rate which it argued should be $4.20 per 10^3m^3.

3.0.9 Counsel to Board Staff urged the Board to deny CP Forest Products' Application and, in fact, argued that the Board should reject bypass rates altogether. Mr. Campion submitted that postage stamp rates should be applied consistently and should not be based on a customer's individual characteristics such as its distance from the TCPL line. Distance based rates, he pointed out, could impose increased burdens on other customers.

> The more the Board considers subjective criteria [for assessing the eligibility of potential bypass candidates], the more it risks abandoning its mandate to fix just and reasonable rates. The greater the intervention, the less predictable are the indirect, unknown impacts on the economic efficiency principle. The regulatory burden of the Board will increase broadly if it is required to tailor-make rates for every industrial customer in the province who might be a bypass candidate.

3.0.10 Much to the objection of the Applicant's Counsel, Board Staff argued that approving this Application could open the floodgates for others. Evidence filed by Centra indicated that the total effect of bypass rates on the utility could be about $11.7 million per annum based on its latest proposed margins sought in E.B.R.O. 467. Counsel for CP Forest Products cut the number of potential bypass candidates in half using the argument that not all of them would dedicate the necessary funds to obtain regulatory approval after taking into account the savings they might gain. He urged the Board to follow its stated intention to consider each bypass application on a case by case basis.

4. BOARD FINDINGS

4.0.1 It was urged upon the Board to reject CP Forest Products' Application, in part, because the Company does not use gas as a feedstock. However, the Board is of the opinion that the use to which gas is put is not definitive as to whether or not that customer is entitled to a bypass rate and this argument is therefore rejected.

4.0.2 The Board's past Decisions on this issue, and in particular the Northland Power Decision in E.B.R.O. 458, have yielded certain key principles. These principles form the framework for deciding, on a case by case basis, if the public interest is best met by approving an individual application for a bypass rate. The principles can be identified as follows:

- Postage stamp rates within each class of customers are the accepted norm in Ontario and the Board will not depart from this principle in favour of distance related rates unless there are valid and compelling reasons to do so.

- An applicant seeking such a rate must satisfy the Board that it is a credible bypass candidate and that it is ready, willing and able to build and operate its own pipeline.

- An applicant must show that the construction of a bypass pipeline is within the public interest and that, inter alia, there are compelling reasons to authorize construction of duplicating services.

- An applicant for a bypass rate must satisfy the Board that such a rate is the appropriate response to the applicant's particular problem.

- The Board must be satisfied that it is within the overall public interest to allow a bypass rate and that the amount of the toll itself is neither unjust nor unreasonable in relation to other rates.

4.0.3 The first point does not require justification nor a lengthy explanation --- postage stamp rates within each class of customers are a basic building block of utility regulation in Ontario. It can be argued that without such rates the Province's regional development would have been severely hampered.

4.0.4 However, that does not mean that in today's climate of competitive gas rates, such rate setting basics should continue unamended. The Board is acutely aware that not even postage stamp rates will remain inviolate for every customer class forever and, in fact, the Board has substituted distance related rates (or bypass rates) for postage stamp rates in three cases. It is therefore accepted that, on a case by case basis, it may be within the public interest to substitute distance-based rates for postage stamp rates.

4.0.5 Dealing next with an applicant's credibility as an actual bypass candidate, the Board's criteria in this regard should not present a particularly formidable burden for large, sophisticated and well financed companies close to the TCPL pipeline, such as CP Forest Products.

4.0.6 However, the remaining principles of those listed above pose serious and complicated questions for the Board while simultaneously imposing a substantial burden of proof on an applicant. Some of the questions which the Board must consider are:

- Other than its proximity to the TCPL pipeline, what is there about the circumstances surrounding this customer which sets it apart from other customers in its class? That is:
  - Is the applicant under some economic threat or is it simply able to bypass economically?
  - Is there a real threat of load disappearing from the utility's system that may obligate other customers to higher costs?
- What is the purpose of the application? Seeking a bypass rate solely to decrease an applicant's costs, may be perfectly worthy from the applicant's point of view. However, it may not be so worthy from the point of view of the public interest which includes those customers burdened thereby with extra costs.
- Is the magnitude of an applicant's total annual saving as a result of the bypass rate, substantial within the context of the applicant's goal of reducing costs?
- Compared with an applicant's total annual cost of operations, is the saving from a bypass rate significant?
- What is the effect on the utility and its remaining customers if the applicant leaves the system and how many other customers will likely apply to do the same? Would the negative effect on the

public interest be disproportionate to the benefit of a bypass rate to the applicant?

- If a bypass rate is found by the Board to be an appropriate response to an application, what should that rate be, bearing in mind the Board's statutory requirement to set rates which are just and reasonable and not unduly discriminatory?

4.0.7 The Board considers the approval of a bypass rate to be a serious issue. This is not just a discount program available to large customers, it is a cost shifting rate with public interest impacts which the Board must find is justified beyond the worthy but narrow concerns of an individual applicant.

4.0.8 An applicant for a bypass rate must therefore convince the Board that it is seeking more than just a cost reduction. Bypass rates are beyond the ordinary and the applicant must show that its circumstances are also extraordinary. Furthermore these same concerns would be paramount in an application for actual bypass and it should also be kept in mind that, except in the most unusual of circumstances, an appropriate bypass rate is preferable to an actual bypass.

4.0.9 In applying the foregoing principles to the instant case, the Board finds that the benefits to CP Forest Products occasioned by the institution of a bypass rate are not significant enough to outweigh the negative impacts on the public interest, such as extra costs being transferred to the remaining customers in the class. As well, the Board finds that the Applicant is not under any economic threat and there is no real danger that its load will disappear from the system.

4.0.10 The Board does not find any compelling reasons to conclude that approving a bypass rate in these circumstances would be in the public interest and this Application is therefore denied.

5. COSTS

5.0.1 No party applied for an award of costs. The Board's costs of and incidental to this proceeding shall be paid by the Applicant upon receipt of the Board's Cost Order and invoice.

DATED AT Toronto August 27, 1991.

Carl A. Wolf Jr.
Presiding Member

Richard R. Perdue
Member

Pamela Chapple
Member

RP-2005-0022
EB-2005-0441
EB-2005-0442
EB-2005-0443
EB-2005-0473

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

AND IN THE MATTER OF an Application by Greenfield Energy Centre Limited Partnership for an Order or Orders pursuant to section 90 of the *Ontario Energy Board Act, 1998* granting leave to construct a natural gas pipeline in the Township of St. Clair, Ontario;

AND IN THE MATTER OF an Application by Greenfield Energy Centre Limited Partnership for an Order or Orders pursuant to section 101 of the *Ontario Energy Board Act, 1998* for authorization for certain road and utility crossings required for the proposed pipeline;

AND IN THE MATTER OF an Application by Greenfield Energy Centre Limited Partnership for a Certificate of public convenience and necessity, pursuant to section 8 of the *Municipal Franchises Act;*

AND IN THE MATTER OF an Application by Union Gas Limited for an Order or Orders pursuant to section 90 of the *Ontario Energy Board Act, 1998* granting leave to construct a natural gas pipeline in the Township of St. Clair, Ontario.

BEFORE: Paul Vlahos
Presiding Member

Cynthia Chaplin
Member

Ken Quesnelle
Member

DECISION AND ORDER

January 6, 2006

EXECUTIVE SUMMARY

On July 20, 2005, Greenfield Energy Centre Limited Partnership ("GEC") filed an application with the Ontario Energy Board for leave to construct a natural gas pipeline to supply a 1005 MW gas-fired generating station in Courtright, south of Sarnia. GEC has entered into a 20-year Clean Energy Supply contract with the Ontario Power Authority. On August 30, 2005, Union Gas Limited ("Union") also filed an application to build a pipeline to serve the GEC generating station. The Board combined the two competing applications in one proceeding.

The Board approves both applications. However, only one approval can proceed. The approval for Union's application is non-operative if it does not have the GEC power plant as a customer. A key condition therefore for Union is that it must contract to provide service to the GEC plant whether owned by GEC or another entity, as long as the power plant is in the same location and requires the same proposed pipeline, both in terms of size and route.

The Board's findings on the two applications can be summarized as follows. If a power generating station is built at the proposed location, there is clearly a need for a pipeline to serve the power plant. There are no negative rate implications for Union or its customers if Union builds the pipeline. There are no outstanding matters from the perspective of the Ontario Pipeline Coordination Committee with respect the environmental reports commissioned by both applicants. The environmental impacts associated with the proposed competing pipelines are found by the Board to be acceptable and there are no outstanding landowner matters for each pipeline proposal. Union is known to be a competent builder and operator of gas pipelines. The Calpine companies that will be building and operating the GEC pipeline under contracts with GEC are also experienced builders and operators in many jurisdictions in the United States. Both applications, Union's and GEC's, are credible and in the public interest.

The Board accepts the evidence provided by GEC that the current financial difficulty being experienced by Calpine Corporation should not have a direct impact on the financial wherewithal of the applicant (GEC). However, should the entities that will construct and operate the pipeline be different from what has been presented in the proceeding, the Board finds that GEC must file with the Board, when its plans are finalized and before construction is commenced, appropriate information for the Board's review.

With respect to the public interest considerations raised by GEC's application, the Board finds that the public interest would not be well served if GEC's application is denied. It is in the public interest for gas customers to have access to the services they require. In this case, GEC cannot currently access adequate services from Union. It is therefore in the public interest to allow GEC to pursue those services directly through the option of bypassing Union. At the same time, Union and other parties have not established that Union or its other customers would suffer direct harm in the event that GEC's application is approved. Moreover, GEC's application is credible. Therefore the Board finds GEC's application to be in the public interest.

The Board observes that it is possible for Union to develop a tariff solution for customers of the size and needs of GEC to permit the utility's offerings to be more robust against bypass. It is within the control of Union and the Board to manage the longer term, more speculative impacts arising from this transitional decision, beginning with the pending Natural Gas Electricity Interface Review proceeding. It is not in the public interest in this case however to require GEC to await the resolution of an appropriate tariff in the NGEIR proceeding.

The Board notes that it does not expect to decide any other bypass applications prior to the results of the NGEIR review.

The Board observes that it is appropriate for the applicants to consider any cumulative (either additive or interactive) effects between the pipeline construction and the construction and operation of the GEC generating station but in this case, the environmental effects of the power station that are raised by the Society of Energy Professionals and the Power Workers' Union, namely, air emissions, the taking and discharge of water into the St. Clair River, and the loss of jobs and other socio-economic impacts consequent on the closure of the Lambton generation station, cannot be tied back to some effect of pipeline construction. In the Board's view, the fact that the existence of the pipeline will enable a certain end use to occur does not mean that the environmental effects of that end use are within the realm of "cumulative effects" as contemplated in the Board's environmental guidelines. The Board is satisfied from the evidence before it that the effects from the pipeline are minimal and the cumulative effects from the construction of the generating station will only last for the duration of the construction phase of the pipeline. These effects are different from

the environmental effects related to the operation of a GEC gas-fired generating station, which are not cumulative with respect to the pipeline project in any respect.

Walpole Island First Nations asked the Board to start a process to develop a policy regarding consultation with First Nations. The Board agrees that the matter of creating a Board policy needs to be reviewed, and the Board will do so.

Chapter 1- The Applications and Process

On July 20, 2005, Greenfield Energy Centre Limited Partnership ("GEC") filed an application with the Ontario Energy Board. GEC has entered into a 20-year Clean Energy Supply ("CES") contract with the Ontario Power Authority ("OPA") to construct and operate a 1005 MW gas-fired generating station in Courtright, in the Township of St. Clair, south of Sarnia and requires the pipeline to supply natural gas to the generating station. GEC seeks leave to construct the pipeline, pursuant to section 90 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, Sched. B ("OEB Act").

If leave to construct the pipeline is granted, GEC also seeks a Certificate of Public Convenience and Necessity, pursuant to section 8 of the *Municipal Franchises Act*, R.S.O. 1990, c. M.55 ("MFA"). GEC initially also sought an order pursuant to section 101 of the *Ontario Energy Board Act* because the proposed pipeline route crosses a municipal water main, runs along a road allowance, crosses an abandoned brine line and crosses gas pipelines belonging to Union Gas Limited and TransCanada PipeLines Limited. During the hearing, GEC asked the Board to stay the section 101 application to allow for negotiations with the affected landowners for crossing permits to be completed. GEC will either withdraw the section 101 application or ask the Board to review the section 101 application at a later time.

The Board issued a notice of GEC's application on July 28, 2005. GEC served and published the notice as directed by the Board. In Procedural Order No. 1, dated August 24, 2005 the Board indicated it would proceed by way of oral hearing, set the scope of public interest factors related to bypass and set the schedule for the proceeding.

On August 30, 2005, Union Gas Limited ("Union") also filed an application to construct a pipeline to serve the GEC generating station.

Due to the competing nature of the GEC and Union applications, the Board found it appropriate to combine, pursuant to section 21(5) of the OEB Act, the proceedings for GEC's and Union's applications. All intervenors of record in the GEC proceeding were considered intervenors in the joint proceeding. In addition, certain new parties were accepted by the Board and became intervenors in the joint proceeding.

In addition to the applicants and Board staff, 25 parties were given intervenor status and 5 parties were given observer status. A list of active participants and their counsel or representatives, and a list of witnesses who testified in the joint proceeding are attached as Appendix 1 to this decision. Intervenor evidence was filed by Union and Walpole Island First Nations ("WIFN").

On October 4, 2005 the Board received certain material from the Society of Energy Professionals ("SEP"). On October 6, 2005 the Board received a Notice of Motion and Motion Record from GEC. In the Notice of Motion, GEC sought an order of the Board to exclude certain documents in the material filed by SEP. The Board dealt with the motion by way of a written process. On November 7, 2005 the Board issued its decision pursuant to which certain material filed by SEP was excluded. The Board's decision on the Motion is attached as Appendix 2.

The oral hearing on the two applications commenced on November 14, 2005 and was completed with oral reply argument on December 1, 2005.

The Board has summarized the record in this decision only to the extent necessary to provide context to its findings.

Below in this chapter are particulars of the respective competing applications by GEC and Union. The Board's findings are contained in the next chapter, Chapter 2.

The Power Plant

Pursuant to the 20-year CES contract with the OPA, GEC will construct a 1005 MW gas-fired generating station in Courtright, in the Township of St. Clair, south of Sarnia and requires a pipeline to supply natural gas to the generating station. The demand for gas by the plant under peak winter operating conditions is estimated at 208,000 GJ per day and about 186,240 GJ per day under peak summer conditions. The plant would operate either as a baseload or an intermediate generating resource on the Ontario power grid. Total annual gas consumption at the plant, assuming an annual capacity factor between 40% and 70%, is estimated at between 28,000,000 GJ and 48,000,000 GJ. According to the CES contract, the plant is required to provide electricity to the grid no later than February 12, 2008. The generating plant is located on a property owned by Terra International (Canada) Inc. ("Terra").

The Partnership

The GEC project is being developed as a limited partnership between a Canadian subsidiary of Calpine Corporation of the U.S. ("Calpine Corporation") and a Canadian subsidiary of Mitsui & Co. Ltd of Japan ("Mitsui"). The partners are MIT Power Canada Investments Inc. which is a wholly owned subsidiary of Mitsui, and Calpine Energy Services Canada Ltd. which is wholly owned subsidiary of Calpine Corporation. CM Greenfield Power Corp., the general partner, holds 0.01% of the partnership. The limited partners, MIT Power Canada LP Inc. and Calpine Greenfield Commercial Trust, hold 49.995% interest each. According to the evidence, Greenfield Energy Centre LP, will raise financing on the project's own financial strength, not on the strength of its parents.

Calpine Corporation will act as the lead for the development of the GEC project. Specifically, Calpine Greenfield Partnership Limited will be the energy procurement construction contractor for the project, and Calpine Corporation O&M Affiliate will provide administrative services, environmental support, permitting support, environmental monitoring during the course of operations and engineering support to the project.

The GEC Pipeline

The pipeline project proposed by GEC consists of a 16 inch diameter high pressure steel pipeline and related facilities, including a metering and control station, and an access tap to the Vector pipeline owned and operated by Vector Pipeline Limited Partnership. The Vector pipeline connects the Dawn Hub with United States markets. The proposed pipeline will be approximately 2 kilometers long and will connect the generating station to the Vector pipeline located to the north of the GEC plant. GEC plans to start construction of the pipeline and metering facilities in June 2006. GEC estimated the total capital cost of the pipeline and required facilities at $4.9 million.

The proposed pipeline route leaves the generating station at a point north of the Bickford Line, runs easterly along an agricultural field owned by Terra, turns north and travels along the west side of Greenfield Road to connect with the Vector pipeline at the Vector Gate Station. A metering facility would be located south of the Pollard Plant access road south of the Vector Gate Station. GEC's proposed pipeline route is shown in Appendix 3.

Most of the proposed route is within the municipal road allowance. GEC filed a resolution by the Township of St. Clair supporting the use of the municipal road allowance of the Greenfield Road for the purpose of locating the pipeline. For the sections of the route on privately owned land, GEC is negotiating three permanent easement agreements and is in the process of obtaining a lease agreement for the tie-in to the power plant. GEC is also negotiating encroachment permits to cross a brine pipeline, three TCPL pipelines, Union's pipeline and Vector's facilities. GEC would obtain a number of temporary easements as required to construct the proposed facilities. GEC sought approval of the form of easement agreement offered to Terra and to the private landowners, pursuant to section 97 of the OEB Act. The proposed route crosses Wylie Drain and GEC would need a permit to cross from the Ministry of Natural Resources and from the Conservation Authority.

GEC confirmed that design, installation and testing specifications for the proposed pipeline would conform to the Canadian Standards Association ("CSA") Z662-03 Oil and Gas Pipeline Systems Code and the requirements of Ontario Regulation 210/01 under the Technical Standards and Safety Act, 2000. GEC confirmed that it would obtain a licence and pay the corresponding fee required to operate the proposed pipeline as required by section 18 of Ontario Regulation 210/01.

An Environmental Report was prepared by SENES Consultants for the proposed facilities which indicated that there will be minimal and temporary environmental impacts given the implementation of the mitigation measures that were recommended and accepted by GEC. The SENES Consultants report was reviewed by the Ontario Pipeline Coordinating Committee ("OPCC") in accordance with the process outlined in the Board's *Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario* ("Guideline"). The OPCC had no outstanding concerns with the project.

The Union Pipeline

Union, in its competing application, proposed to construct 2 km of 12 inch natural gas pipeline to supply gas to the generating station at an estimated cost of $5.1 million. The proposed Union pipeline would originate at Union's Courtright Station which is connected to the Vector and TCPL pipelines. Union holds the municipal franchise and certificate rights to distribute natural gas in the Township of St.Clair. Construction would start in the spring of 2007.

Union's proposed route is similar to the route proposed by GEC except that it is somewhat shorter, runs on the east side of Greenfield Road and terminates at Union's Courtright Station. It does not cross any pipelines. The location of the proposed pipeline within the Greenfield Road allowance falls under Union's existing franchise agreement with the Township of St. Clair and an encroachment permit is not needed. The proposed route crosses Wylie Drain and Union would require a permit to cross from the Ministry of Natural Resources and the Conservation Authority. Union's proposed pipeline route is shown in Appendix 4.

The proposed pipeline will be installed in road allowance and on easement on privately owned lands. A previously Board-approved easement form was provided to the affected landowners.

The only permanent easement that may be required by Union would be an easement from Terra, the lessor of the GEC plant site. The easement may be needed to connect the pipeline to the power plant. In the hearing, Union explained that its industrial customers would typically either enter into an easement agreement or elect not to enter into an agreement. Should the easement agreement be requested, Union would offer to Terra a recently Board-approved form of easement agreement.

According to Union, design, installation and testing specifications for the proposed pipeline are in accordance with the CSA Z662-03 Oil and Gas Pipeline Systems Code and will conform to the requirements of Ontario Regulation 210/01 under the Technical Standards and Safety Act 2000.

An Environmental Report was prepared by Stantec Consulting for the proposed facilities which indicated that there will be minimal environmental impacts given Union's standard construction practices and the mitigation measures recommended in the report and accepted by Union. The Stantec Consulting report was reviewed by the Ontario Pipeline Coordinating Committee in accordance with the process outlined in the Board's Guideline. The OPCC had no outstanding concerns with the project.

Chapter 2 – Board Findings

What we have before us are two competing applications to build and operate a gas pipeline to serve the GEC plant. There are certain standard issues that the Board considers in its review of applications for leave to construct a pipeline. We will look at those issues in this case. In addition, since the GEC application is an application for bypass, it invokes additional public interest issues beyond those which would be considered if the only applicant was Union. The Board will also assess GEC's competency to build and operate its own pipeline.

In our view, the issues before for the Panel are as follows:

a) Is there a need for a pipeline?
b) Are there any undue negative rate implications for Union's customers, if Union builds the pipeline?
c) What are the environmental impacts associated with the proposed pipelines and are they acceptable?
d) Are there any outstanding landowner matters for each pipeline proposal?
e) Is GEC a competent builder and operator for the proposed pipeline?
f) Is GEC's bypass application in the public interest?
g) Should one or both applications be approved and what should the conditions of that approval be?
h) Does GEC need a Certificate of Public Convenience and Necessity?

For the reasons set out below, the Board finds that both applications for leave to construct should be approved, subject to certain conditions.

a) Is there a need for a pipeline?

The Board must be satisfied that there is a need for a proposed pipeline before approval is granted.

GEC has entered into a 20-year Clean Energy Supply contract with the Ontario Power Authority to construct and operate a new 1,005 Megawatt natural gas-fired power plant at Courtright, south of Sarnia. The power plant is scheduled to be completed in time to begin operating in December 2007. The purpose of the pipeline is to carry the natural gas to the GEC power plant. Should all approvals for the power plant be obtained and GEC proceeds to build the plant, there is clearly a need for a pipeline to carry natural

gas to the power plant. The approval of Union's application is conditional on Union having the GEC power plant as a customer.

b) Are there any undue negative rate implications for Union's customers, if Union builds the pipeline?

Should it be the case that there is an agreement that Union will serve the GEC power plant, the economics of the pipeline project become a consideration as the costs will be borne by Union's ratepayers.

Based on Union's evidence, the overall profitability index for the pipeline project is estimated at over 10 assuming a revenue stream based on Union's firm T1 service. This evidence by Union was tested but not challenged. The Profitability Index is below one only in the first year of the project. We accept Union's estimates and are satisfied that there would not be undue adverse rate impacts on Union's ratepayers in the first year. Should Union build the pipeline as a result of a negotiated interruptible rate, or a combination of firm and interruptible service, Union must demonstrate at the time that it seeks to reflect the costs of this project in its rates that the project is economically feasible and that any adverse rate impacts are not undue.

c) What are the environmental impacts associated with the proposed pipelines and are they acceptable?

The pipelines proposed to be constructed by each applicant are similar in their routing. As required by the Board's Guideline, both applicants filed environmental reports undertaken by known consultants, who also testified at the hearing. Both reports concluded that there are only minimal and temporary effects associated with the building of the pipeline. Consideration was given to cumulative effects from other projects, including the construction of the GEC generating station, as confirmed in the answers to interrogatories and in the hearing, but because the environmental impacts of the pipeline itself were minor, any cumulative effects were considered insignificant. Both applicants stated that they will abide by the recommendations contained in their respective environmental reports.

Cumulative Effects

(i) Scope of Review

An issue arose during the hearing with respect to whether the applicants had appropriately abided by the Board's Guideline. The Guideline requires consideration of the environmental impacts of other projects within the area of pipeline construction under section 4.3.13 entitled "Cumulative Effects". That section states in part:

> In many situations, individual projects produce impacts that are insignificant. However, when these are combined with the impacts of other existing or approved projects, they become important. Such cumulative effects may include both biophysical and socio-economic effects, and should be identified and discussed in the ER as an integral part of the environmental assessment.

The Guideline indicates that the consideration of cumulative effects should not be restricted to the immediate area of pipeline construction. The section relating to cumulative effects is a subsection of the Guideline relating to the identification of environmental impacts in the context of route and site selection. The relevant and operative portion of section 4.3.13 reads, in part:

> The applicant is required to consider four distinctive cumulative effects pathways when delineating the study area and analysing and assessing the cumulative effects:
>
> . . .
>
> (g) additive effects of pipeline construction and other existing and future projects in the area (e.g. additive forest cover losses due to tree clearing for pipeline construction and subdivision development);
>
> (h) interaction of pipeline construction with other existing and future projects in the area (e.g. cold stream fish habitat degradation as an interactive effect of increased erosion and sedimentation due to pipeline stream crossing and floodplain development downstream).

This excerpt from the Guideline indicates that the Board will have regard to the cumulative effects of the construction of the GEC generating station together with the pipeline. What is crucial to the review of cumulative effects, however, is to understand the scope of that review.

SEP and PWU, who adopted the same position in the proceeding, argued that there has not been a proper assessment before the Board of the cumulative environmental impacts of the proposed facilities and therefore, both applications should be denied.

In these parties' view, a proper assessment should involve examination of the environmental and socio-economic effects of the construction and operation of the GEC generating station in addition to the pipeline because the pipeline and the generating station are interconnected. In their view, the environmental effects of the station are "indistinguishable from the use and operation of the pipeline which serves it" such that the public interest test in section 96 of the OEB Act cannot be satisfied without a full consideration of the cumulative effects from construction of both the station and the pipeline. It is argued that there are adverse effects on air quality due to emissions from the generating station, on water quality associated with the discharge of heated water into the St. Clair River and adverse socio-economic impacts related to job and economic losses as a result of the construction of the GEC generating station and the potential subsequent closure of the Lambton generating station. They argue that these are environmental effects that the Board should consider in its environmental review of the proposal to construct a pipeline to serve the station. In support of their position, the two parties provided certain case law and referred to best environmental practice from other jurisdictions. They also argued that the Board's own Guideline confirms their position.

Both GEC and Union argued that the Province has an environmental assessment regime for natural gas-fired generation facilities and that this process was completed by the refusal of the Minister of the Environment to elevate the process to a full environmental assessment. A full assessment had been requested by SEP. The effect of the proposition by SEP and PWU is not only that the Board would second guess the Minister's discretion, but it would be erring in law. Both applicants argued that the cumulative effects provision in the Board's Guideline is for analysing the combined effects of the pipeline construction with the effects caused by the

construction of the power facility in such areas for example as noise and soil disruption. In their view, the cumulative effects section does not expand the review into any and all possible environmental and socio-economic effects of shutting down the Lambton coal-fired generation station due to the government's off-coal policy. GEC termed the intervention of SEP and PWU in this proceeding as forum shopping.

The Board disagrees with SEP and PWU.

In our view, this section of the Guideline requires an applicant to first identify the environmental (including socio-economic) effects of the project that is the subject of the application, in this case the construction of the pipeline. Once these effects are known, the applicant identifies whether there are any other existing or known future projects in the study area. If there are any such other projects, the applicant determines whether any of the effects from the construction of the pipeline will be made worse or act to increase the environmental damage caused by similar effects of other projects in the area. To be clear, only those effects that are additive or interact with the effects that have already been identified as resulting from the pipeline construction are to be considered under cumulative effects. If the environmental impacts are compounded, the applicant will, with the help of experts in the field, determine whether these effects warrant mitigation measures such as alterations in routing, timing of construction or other measures that can address the cumulative impacts and the Board will review the adequacy of those measures.

One of the examples provided in the Guideline is forest cover. If the clearing of a right-of-way for the pipeline involves the cutting of a few trees, this may be a minor overall effect on the environment. However, if the applicant is aware that a new subdivision is being developed in the same area and that for this purpose, significant forest cover would be removed, this could be an important consideration for the Board. The Board would expect that the applicant would propose mitigation measures, if, for instance, species of interest could be affected by cumulative impacts and this factor would, along with the applicant's proposed mitigation measures, weigh into the Board's determination of public interest. It is important to note, however, that the identification of a cumulative impact is not, in and of itself, necessarily fatal to an application. It would warrant further investigation by the Board so that the Board may satisfy itself

that all reasonable measures are being taken to minimize or avoid the impacts and it may lead to certain conditions being imposed upon an applicant during construction.

This is not to say that the cause of damaging effects of pipeline construction and the other projects must be identical to be considered cumulative. For example, a reduction in productivity of the soil can be caused by a number of factors such as compaction, disturbance of watercourses, mixing of soil layers and removal of vegetation. Each of these causes of soil degradation should be considered as cumulative impacts on the soil. However, there must be some effect caused by the pipeline construction itself to trigger an assessment of similar effects caused by other projects.

In this case, the applicants each identified minor and temporary environmental effects arising out of the construction of the pipeline. The only other project that was identified as being in the study area of the pipeline was the construction of the GEC generating station. Mr. Muraca of SENES Consultants testified for GEC that:

> "The impacts of the pipeline, as stated in the report, are basically from construction impacts. They're minor. They're transitory, and, as I said in the interrogatories, again, the only interaction it could have is an overlap in construction time period between that and the proposed GEC."

In respect of the cumulative effects of the pipeline and the GEC generating station, he indicated that:

> "Once, again, the pipeline, once the pipeline is operating and is in the ground and has no air, land or water impacts. So the operation of the pipeline is not an issue to be taken in consideration with the operation of the GEC."

It is appropriate for the applicants to consider any cumulative (either additive or interactive) effects between the pipeline construction and the construction and operation of the GEC generating station but in this case, the environmental effects of the power station that are raised by SEP and PWU, namely, air emissions, the taking and discharge of water into the St. Clair River, and the loss of jobs and other socio-economic impacts consequent on the closure of the Lambton generation station, cannot be tied back to some effect of pipeline construction. In our view, the fact that

the existence of the pipeline will enable a certain end use to occur does not mean that the environmental effects of that end use are within the realm of "cumulative effects" as contemplated in the Board's Guideline. We are satisfied from the evidence before us that the effects from the pipeline are minimal and the cumulative effects from the construction of the generating station will only last for the duration of the construction phase of the pipeline. These effects are different from the environmental effects related to the operation of a GEC gas-fired generating station, which are not cumulative with respect to the pipeline project in any respect.

(ii) Jurisdiction to Review Environmental Effects of the GEC generation station

The Board's jurisdiction over gas pipeline construction derives from the OEB Act and the *Municipal Franchises Act*. Both these Acts prescribe a public interest test, but do not provide criteria for assessing the public interest.

SEP and PWU cited case law from various Canadian jurisdictions that, in their view, demonstrate that a tribunal with a broad public interest mandate can and should look beyond the narrow scope of the specific environmental effects of the facility before it for approval, and consider the environmental effects of construction connected to or enabled by the facility under review: Bow Valley Naturalists Society v. Canada [2001] 2 F.C. 461 (C.A.); Friends of the West Country Assn v. Canada (Min. of Fisheries and Oceans) 31 C.E.L.R. (N.S.) 239 (Fed C.A.); Nakina (Township) v. Canadian National Railway Co. [1986] F.C.J. No. 426 (C.A.); Québec (A.G) v. Canada (N.E.B.) [1994] 1 S.C.R.159; Sumas Energy 2 Inc. v. National Energy Board (unrep.) Nov 9, 2005, Fed. C.A. In the Board's view, and as discussed below, the cited cases are eitherdistinguishable from the situation before the Board or make points that are instructive to the Board and are incorporated as indicated.

In Bow Valley Naturalists Society v. Canada, Canadian Pacific Hotels proposed to develop a meeting facility in Banff National Park and conducted an environmental screening that was reviewed and approved by Parks Canada. The Bow Valley Naturalists Society and Banff Environmental Action and Research Society launched a judicial review of the Parks Canada decision based on the failure of the proponent to include within the screening several future developments included in its Long Range Plan and related to the meeting facility. In reviewing the Parks Canada decision, the

Federal Court of Canada found that the Superintendent's assessment and inclusion of some of the aspects of the broader project within the cumulative effects analysis was reasonable. In the Board's view, this case takes a narrower view of cumulative effects than the Board in respect of the application of its Guideline. As previously indicated, the Board does require a consideration of the cumulative effects of the GEC generating station in the context of the impacts of the pipeline construction and is satisfied that the cumulative effects are minor or non-existent.

In Sumas Energy 2 Inc. v. National Energy Board a developer applied under provisions of the *National Energy Board Act* ("NEB Act") for a Certificate of Public Convenience and Necessity to construct an international power line connecting its proposed generation station located in the U.S. to a substation located in British Columbia. Ultimately, the Federal Court of Appeal did not interfere with the NEB's decision that it had the jurisdiction to consider the environmental impact in Canada of the power plant in the U.S. in the context of an application to construct the international power line. This case can be distinguished from the case before this Board.

Although the international power line itself would have been subject to an environmental assessment pursuant to the *Canadian Environmental Assessment Act* ("CEAA"), the power plant would not have undergone a similar assessment by a Canadian entity. The NEB did have before it testimony from the U.S. environmental review that concluded that the power plant was expected to emit more than 800 tons of pollutants annually into the Fraser Valley air shed. The Board identified the negative environmental impact in Canada stemming from the U.S. plant as a "relevant" consideration in its decision. In addition, the Federal Court of Appeal determined that although there was a U.S. environmental assessment the NEB "...had to consider the Canadian perspective. Both were seeking to advance their respective public interests, which in this case did not coincide." (at par. 27) This is important since in the present case an environmental review process has been conducted in accordance with the Ontario *Environmental Assessment Act* and has been reviewed by the Ministry of the Environment. It is appropriate for the Board to defer to that Minister's expertise and

legislative mandate in respect of the GEC generating station and the Board recognizes that the Minister has regard to the public interest in the province of Ontario.

The case of Quebec (A.G) v. Canada (N.E.B.) dealt with the grant of licenses for the export of electricity from Québec to New York and Vermont. The NEB granted the licences subject to the completion of environmental assessments of future generation facilities. The Supreme Court of Canada overturned the decision of the Federal Court of Appeal holding that the NEB acted within its jurisdiction by considering the environmental effects of the construction of future generating facilities. This case is distinguishable on the basis that the legislation provides expansive powers to the NEB in deciding whether or not to grant the licence. Specifically, the relevant section reads as follows:

> 119.06(2) In determining whether to make a recommendation, the Board shall seek to avoid the duplication of measures taken in respect of the exportation by the applicant and the government of the province from which the electricity is exported, and shall have regard to ***all considerations that appear to it to be relevant***, including
>
> . .
>
> (b) ***the impact of the exportation on the environment***;
>
> . . .
>
> (d) such other consideration as may be specified in the regulations.
>
> [Emphasis added]

It was, therefore, clearly within the NEB's jurisdiction to consider all relevant issues, including environmental issues in the context of the export licence application.

It should also be noted that the NEB imposed the environmental assessment conditions upon the licence because the environmental effects of the construction of the future facilities were not known with certainty at the time the decision was made. The Supreme Court of Canada went to some length to discuss the NEB's jurisdiction vis-à-vis that of provincial regulators in terms of the environmental assessments of the plants that would be built to export power. The court was careful to note that the provinces would have jurisdiction over the environmental assessment of the plants but that the NEB would still be concerned about the subset of environmental effects from the plant stemming from the power generated for export. The court found that there could be "co-existence of responsibility" for reviewing the environmental aspects of exports.

From this Board's perspective, this case is therefore, distinguishable because of the NEB's express jurisdiction to consider the environmental aspects of the exports and the fact that, although this is not expressly stated in the decision, it is implied that if an environmental assessment had been available from the relevant environmental assessment agency, the NEB would likely have used the conclusions of that assessment to assist it in making its determination. In this case this Board does have the results of a completed environmental review process and is without the jurisdiction or the desire to embark on a review of the process in relation to that assessment.

The case of Friends of the West Country Assn v. Canada (Min. of Fisheries and Oceans) is not on all fours factually with the case before the Board but is instructive to the present inquiry. The facts of the case involved a federal environmental assessment under the CEAA of two bridges proposed to be constructed by a forestry company. The federal environmental assessment was triggered as a result of water crossings requiring permits under the *Navigable Waters Protection Act*. The Coast Guard was the responsible authority for the purposes of advancing the environmental assessment. Part of the case revolved around the application of sections 15(1), 5(3) and 16(1) of the CEAA which read as follows:

> 15(1) The scope of the project in relation to which an environmental assessment is to be conducted shall be determined by
>
> (a) the responsible authority; or...
>
> 15(3) Where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent...
> 16(1) Every screening or comprehensive study of a project and every mediation or assessment by a review panel shall include a consideration of the following factors:
>
> > (a) the environmental effects of the project, including...any cumulative environmental effects that are likely to result from the

> project in combination with other projects or activities that have been or will be carried out;

A lower court judge had determined that section 15(3) of the CEAA required the Coast Guard to include within the scope of the environmental assessment, the construction of a road associated with the bridges that had already been approved by the Province of Alberta Environmental Protection. On appeal, the Federal Court of Appeal determined that the road should not be included and stated as follows:

> The words "in relation to" in subsection 15(3) might be read in the abstract to contemplate any construction, operation, modification, decommissioning, abandonment or other undertaking that has any connection, no matter how remote, to the physical work which is the focus of the project as scoped. However, such an interpretation would ignore the context of sections 15 and 16 and the logical reason for the words "in relation to" in subsection 15(3). The first contextual point is that the responsible authority is required to scope the project under subsection 15(1) This would be an unnecessary exercise if, under subsection 15(3) every other construction, operation, modification, decommissioning, abandonment or other undertaking that had even a remote connection to the project had to be the subject of the environmental assessment. Second, paragraph 16(1)(1) provides for a cumulative effects analysis taking account of the project as scoped under subsection 15(1) in combination with other projects or activities that have been or will be carried out. This portion of paragraph 16(1)(a) would be redundant if projects or activities outside the project scoped under subsection 15(1) had to be considered under subsection 15(3).

This finding is relevant to the Board's inquiry for several reasons.

First, it is important to note that this appeal occurred entirely within the context of an environmental assessment conducted pursuant to the CEAA. There was no issue with an entity other than the entity charged with approving or rejecting environmental assessments conducting an environmental assessment for a project outside of its jurisdiction.

Second, there is no provision within the OEB Act or any regulation or guideline (including the Board's Environmental Guideline) made pursuant thereto, that is in any way similar to section 15(3) of the CEAA. Even with the existence of the requirements mandated by section 15(3) of the CEAA, in this case, the Federal Court of Appeal was not prepared to find that a project initiated by the same entity and linked to the project for which the environmental assessment was being sought, could be rolled-in to the larger project and require a broader environmental assessment. It is important to note that the Federal Court made this finding in spite of the fact that the regulator in this case clearly had the authority to conduct an assessment of the related project.

Finally, the Federal Court made reference to the cumulative effects provisions of CEAA and the interpretation and rationale for that section. Importantly, the Federal Court of Appeal later agreed with the lower court's decision that the Coast Guard had erred in excluding from its consideration the cumulative effects from other projects, including the road, in conducting its cumulative effects analysis.

This case, therefore, supports the Board's position that the applicants are required to conduct a cumulative effects analysis of other projects within the study area of the pipeline but that this analysis is not tantamount to conducting a new environmental assessment of those other projects and in no way confers upon the Board the jurisdiction to review any existing assessment.

The Board's mandate is set out in Section 96(1) of the OEB Act which provides that:

> If, after considering an application under section 90, 91 or 92 the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest, it shall make an order granting leave to carry out the work.

In this case, the proposed work is the construction of a pipeline, not of an electricity generation station.

In the Board's view, the law is clear that jurisdiction on environmental matters associated with the power station falls under the *Environmental Assessment Act* administered by the Ministry of the Environment, and not with the Ontario Energy Board. The process under the provincial *Environmental Assessment Act* in relation to

the GEC generating station has been concluded. During the hearing, GEC filed a letter from the Minister declining the elevation request made by SEP and PWU. SEP and PWU argued that refusal by the Minister of the Environment to elevate the GEC generating station project from the requirements of an environmental screening to those of an individual environmental assessment means that there will have been no proper environmental assessment of the GEC generating plant and that this makes it even more incumbent on the Board to undertake such a review as it is now the only authority that could undertake or order the assessment. However, a denial of an elevation request to carry out a full environmental assessment does not confer jurisdiction in the Board to undertake a further environmental assessment of the station. For the Board to engage in the kind of review argued by SEP and PWU would be to exceed our jurisdiction.

The Board finds that an assessment of the environmental and socio-economic effects of the construction and operation of the GEC generating station are outside the scope of its jurisdiction, with the exception of the narrower issue of "cumulative effects" as outlined above.

The Guideline, as it is a statement of Board policy, does not prohibit the Board from looking into matters that may be relevant and practical under given circumstances. This does not mean however that the Board can consider matters that are clearly outside its jurisdiction.

SEP and PWU are in effect asking the Board to engage in an environmental review associated with the use of the energy or the product or service. In addition to the jurisdictional problems inherent in undertaking a review of the environmental effects of the end use of the gas flowing through a pipeline, there are practical problems.

In general, the gas pipeline construction proposals reviewed by the Board are not tied to a single end use. In some cases, the load which drives the initial need for a pipeline changes or disappears and other loads are served. It would be highly impractical for the Board to attempt to assess the environmental impacts of loads to be served by a gas pipeline. As a matter of general policy, it would be undesirable to find that the Board's public interest mandate under section 96 of the OEB Act requires such an assessment. If the Board thought that cumulative impacts should involve the end-use of the energy, it would have said so in its Guideline or would have provided guidance

to address such complications and impracticalities that arise from that interpretation of cumulative impacts.

The proceeding revealed that the intervention and interests of SEP and PWU were out of scope.

Conclusions

The environmental reports filed by the applicants identified some minor environmental effects along the construction corridor, and proposed measures for their mitigation. We find that the environmental reports, including their assessment of cumulative effects, are adequate, given the nature of the construction proposed. However, in future, the Board will require that applicants ensure that the consulting reports they sponsor also depict, or at least repeat or summarize, the analysis and findings on cumulative effects separately for an easier review by the Board and intervenors. The presentation of the cumulative impacts in the SENES Consultants report could have been better organized.

We find the environmental impacts associated with each of the proposed pipelines acceptable. The Board will require that GEC and Union comply with the recommendations for environmental protection and mitigation recommended by their respective environmental consultants. This condition is included in the respective Conditions of Approval for each applicant appended to this decision.

d) Are there any outstanding landowner matters for each pipeline proposal?

In a leave to construct application for a gas pipeline, the applicant must satisfy the Board that it has offered or will offer to each owner of land affected by the approved route or location an agreement in a form approved by the Board.

On the evidence, the Board approves the agreement forms that have been provided to the affected landowners by both applicants and finds that there are no outstanding matters in this regard, except as follows. GEC shall update the Board as to whether it intends to withdraw the stayed section 101 application or to reactivate it.

Walpole Island First Nation ("WIFN) intervened in these proceedings because it has four land claims that it asserts are affected by the proposed GEC generation station and by the gas pipelines proposed by the two applicants. It provided pre-filed and oral

evidence and made submissions. Walpole's intervention was driven by its concern about the consultation and accommodation process for matters affecting First Nations.

During its oral submission, WIFN advised that it had reached an agreement with GEC to address WIFN's concerns about the impacts of the proposed project; it did not disclose the nature of that agreement.

WIFN reported that Union indicated that it intends to reach agreement with WIFN over its concerns if Union is successful in its application. In that regard, WIFN asked that the Board impose a condition upon Union that in the event that Union receives leave to construct the pipeline, it must negotiate an agreement with WIFN to address the impacts of the pipeline on its land claims. Union responded that while it fully expects to reach an agreement with WIFN regarding the proposed pipeline, it viewed the condition as strict and unnecessary. Union noted that, should the Board find that such condition is necessary and order it, Union might have to come back to the Board for relief if there is no agreement reached.

We note that the first stage of the archaeological assessment indicated that there is a moderate possibility of archaeological sites that may be impacted by Union's proposed route and that therefore a stage 2 assessment will be conducted. Union stated that it would welcome participation from WIFN during that assessment. On the basis of the evidence and testimony, we find the language of the proposed condition to be too broad and strict, and, we believe, unnecessary. It would place Union in the difficult position of having to reach an agreement if it did not wish to risk a delay in the final determination of its application for leave to construct. This is not only a Union matter. It is also a public interest matter. In the result, rather than the proposed condition, the Board is prepared to impose a condition that Union shall involve a representative designated by the WIFN in the stage 2 archaeological assessment of the pipeline route. Union shall also provide to the Board the results of the stage 2 assessment and indicate whether there are outstanding matters in respect of that assessment. This condition is included in the Conditions of Approval appended to this decision.

A general issue raised by WIFN is that the Ontario Energy Board needs to put in place a policy to deal with situations where the Board's decisions could impact constitutionally-protected First Nations rights and for which consultation with First Nations is required. In support of its position, WIFN referred to findings of the courts

about the duty to consult and commented how these should be reflected in the Board's work.

In WIFN's view, while the Ontario Energy Board does not need to undertake direct consultation with First Nations in reviewing applications brought before it, the Board does have a responsibility to ensure that it receives the appropriate evidence that consultation has occurred. WIFN filed a public communiqué from the National Energy Board, dated August 3, 2005, in which the NEB acknowledged that the NEB's policy on consultation with First Nations needed to be revisited to reflect current law.

We note that WIFN is not asking the Board to put into place a new policy based on the record of this particular proceeding. Rather, WIFN is asking the Board to start a process to develop a policy regarding consultation with First Nations and to consult with First Nations as to what that consultation process ought to be. The Board agrees that the matter of creating a Board policy needs to be reviewed, and the Board will do so.

e) Is GEC a competent builder and operator for the proposed pipeline?

The Board has a responsibility to ensure applicants in leave to construct cases have the financial and operational ability to build and operate the proposed facilities in a safe and reliable manner.

Enbridge submitted that the Board should concern itself with a financial challenge that GEC may be facing. The purported challenge is based on a public report of the financial difficulties currently being experienced by Calpine Corporation.

Through its subsidiaries, Calpine Corporation will be acting as the lead in developing and operating the project. Evidence provided by GEC indicates that the current financial difficulty being experienced by Calpine Corporation should not have a direct impact on the financial wherewithal of GEC, the applicant. Testimony of Mr. Wendelgass, witness for GEC, under cross examination from Endbridge Gas Distribution, indicated that the financial challenges of Calpine Corporation had been considered by the partners in GEC.

> "Calpine's financial troubles are Calpine's to resolve, but they're not necessarily of relevance to Greenfield Energy Centre because of the structures that Greenfield Energy Centre has in place to deal with those kinds of risks, which

the partners have recognized from very early on."

Since the time of the hearing, it is on the public record that Calpine Corporation has filed for bankruptcy protection. This does not change the Board's acceptance that GEC's application should be assessed on the partnership's own merits as testified by Mr. Wendelgass.

The Board's interest in ensuring that GEC has the financial ability to build and operate the pipeline for which it is requesting leave to construct is also addressed in the single purpose nature of the pipeline. The reliance of the GEC generation facility on the pipeline for its operation marries the investment and risk mitigation objectives of the two projects. If the construction of the generation plant does not proceed, then the pipeline will not be built.

We do find however that there remains the issue of competency.

In seeking leave to construct a gas pipeline that will be a physical bypass of the distributor with a franchise in the territory, GEC has submitted evidence on its capabilities to build and operate the pipeline as well as procure and manage the supply of the gas to the GEC generation plant.

The supply of gas to the generating facility will be an ongoing concern of the generation plant operation regardless of ownership. If Calpine's experience in procuring and managing gas supply is not available to the GEC partnership, the risk rests with the partnership. The price paid to GEC under the CES contract will not change. However, the safe and reliable operation and maintenance of the pipeline remains a public concern regardless of ownership and is therefore of importance to the Board.

Based on GEC's submission, GEC has yet to identify the entity that it will engage for the pipeline operation and maintenance. Options cited were to use trained personnel from the GEC generation plant itself or contract for services with local experienced service providers. In any event, GEC recognized that it, as the applicant, is responsible for the ongoing operation and maintenance of the pipeline. In demonstrating its capacity to fulfil its responsibility, GEC relied on evidence pointing to

its relation to Calpine Corporation and the Calpine experience in these types of undertakings.

We find that the GEC partnership, as it existed at the time of the hearing, has demonstrated that it is competent to build and operate the proposed gas pipeline in a reliable and safe manner. However, Calpine's financial challenges, acknowledged by GEC at the hearing and confirmed since with Calpine's filing for bankruptcy protection, create a real possibility that the roles of the existing partners in GEC could change. We therefore find that it would be in the public interest to attach a condition to the approval of GEC's application that enables the Board to receive information and review the capabilities of any new participants in the project that will bear responsibility for the construction or operation of the pipeline. This is a Board matter and any material changes noted above shall be filed with the Board for its review and shall not necessarily constitute a re-opening of the hearing.

f) Is GEC's bypass application in the public interest?

Physical bypass in Ontario's natural gas sector refers to the construction and use of a facility other than that of the distributor with a franchise to distribute gas in the territory. This is distinguishable from economic bypass, a situation where a customer may seek and obtain a bypass competitive rate from the utility with the approval of the Board. GEC's application is for physical bypass.

Section 90 of the OEB Act, which deals with matters of leave to construct a hydrocarbon line, refers to a "person" that may seek an order of the Board. A person

may be other than a distributor. While the incumbent distributor may have a high expectation of being the only entity to construct and serve in its franchise area, it does not have an absolute right.

Over the years, the Board has dealt with many applicants seeking bypass status, mostly in pursuit of a bypass competitive rate. Some were successful, others were not. In all cases the Board considered these applications from a public interest perspective and will do so in this application.

The public interest issue before the Board is whether GEC should be allowed to build its own pipeline interconnection with Vector, thereby bypassing the Union distribution

system, giving consideration to the circumstances that apply in this specific case. In considering this issue the Board takes as its starting point its conclusion in EBRO 410-I/411-I/412-I, in which it stated:

> The Board is of the opinion that a general policy opposing bypass is not in the public interest. The Board will consider each application for bypass on its individual merits. The Board does not consider it appropriate to limit its consideration of any specific application at this time. In reaching this conclusion, the Board relies on a very broad definition of the public interest.

In that Decision, the Board went on to identify a number of criteria to be considered in assessing applications for bypass. These criteria have been used in subsequent Board decisions dealing with applications for bypass since the EBRO 410-I/411-I/412-I Decision.

These criteria are:

1. Cost/economic factors related to the applicant, the utility, and the utility's other customers
2. The type of bypass (single or multiple customers; incremental or existing load)
3. The duration of the bypass (will the end-user return to the LDC)
4. Safety and environmental factors
5. Rate-making alternatives and other rate-making options
6. Public policy
7. Other factors relevant to the specific application

In our view, these criteria form a useful framework in which to consider the public interest aspects of GEC's application.

1. Cost/Economic Factors

Under this criterion, we will consider the impact on GEC, the impact on Union and the impact on Union's ratepayers.

Impact on GEC

GEC claimed that through operating its own interconnection with Vector, it will be able to

(i) pay a lower price than if it is served by Union; and

(ii) have greater flexibility, control and more effective access to competitive upstream services than is available from Union, which would provide greater flexibility, and greater control over future costs.

With respect to price, GEC testified that Union's T1 firm service that would apply to GEC is more expensive than alternative services on Vector, but acknowledged that this comparison was illustrative only, and did not provide precise evidence as to the price differential or the precise services GEC will use. Union and others argued that there is not sufficient evidence to determine the price differential between the GEC proposal and service on Union. Many parties believed that this comparison was integral to establishing the credibility of GEC as a bypass candidate and that the lack of this evidence was grounds for denying the application.

Beyond direct cost comparisons of building the pipeline as opposed to being served by Union, GEC argued that building its pipeline will provide it with greater flexibility and greater control over its costs over the life of the overall project. GEC testified that it wants direct access to competitive services through operating in the wholesale market on its own in order to ensure the efficient operation of the plant, and that it values the ability to manage its own services and the flexibility to make changes over time. Union countered that as negotiations between it and GEC ended, the only disagreement was around price, not services or flexibility.

We find that it is not necessary for GEC to establish the cost differential precisely. GEC has provided credible evidence that the cost of transportation service to its facility will be less if it self-serves, and that it will have greater control over long term costs, flexibility and access to competitive upstream services than if it were to use Union's current firm service offerings. This does not mean that a cost comparison is not necessary in an application for physical bypass. To find so would mean that the Board was abrogating its responsibility to ensure that an application for physical bypass is economically rational. In the case of comparing service on Union and services on Vector, the precise cost differences can not be known until negotiations are complete and a contract (or contracts) is signed. This uncertainty is not a reason to deny GEC's application, because it does not give rise to the same adverse effect as in a bypass competitive rate application. In a bypass competitive rate application, the Board must ensure that the rate is no lower than necessary and must therefore have precise

information regarding the bypass alternative. The same risk does not arise in this application, because it is for physical bypass and not for a bypass competitive rate.

In the case of physical bypass, this risk is self-correcting. If the application is approved and GEC does bypass, then it will be because it is more cost effective to do so (in terms of price, flexibility, control and access to competitive upstream services) than to take service from Union. If GEC were to determine that bypass is not genuinely more cost effective than service from Union, given the possibility that Union may still be in a position to make further offers even if GEC's application is approved, then it is highly probable that GEC will instead negotiate for service from Union. To the extent that the service is negotiated within the parameters of Union's approved rates, then a special rate application will not be required.

Many parties criticized GEC's testimony that the GEC plant may not be built if the application is denied, as the project's partners will need to reassess the situation. Some parties characterized this as a threat and as disrespectful to the Board. They urged the Board to conclude that the threat was not credible. We note that GEC has not testified that the plant will not be built if the application is denied. The fact that there is a risk that the plant will not be built is not a reason to approve the application. However, even if we were certain that the plant would be built if the application were denied, that would not be a sufficient reason to deny the application. Consequently, the risk associated with the plant not being built has not influenced our conclusions on this application.

GEC testified that it had included the costs of connecting to and using Vector in its CES bid. Similarly, we do not find this factor directly determinative for the application. This was a risk which GEC took; it is not a reason to approve the application. We do observe, however, that this factor demonstrates GEC's commitment to attempt to meet the expected return it assumed in a competitive process, and enhances GEC's credibility that it in fact intends to construct the facilities.

Impact on Union

Union testified that approval of GEC's application could have adverse impacts on its long term planning and the rational development of the gas system and on its cost of capital and access to financing. If the GEC application is approved, Union will be deprived of the investment on which it would have had an opportunity to earn a return.

Those opposing GEC's application supported Union's evidence on the adverse consequences of approving GEC's application. In our view, the approval of GEC's application will not significantly undermine Union's expectations regarding the likelihood of it serving customers in its franchise area. As Union itself acknowledged, it does not have an absolute right to serve. There is no evidence that the approval of one physical bypass application changes that presumption fundamentally.

With respect to system planning, Union maintained that it cannot plan the system rationally if it does not retain its high expectation that it will serve new loads in its franchise area. We observe that system expansions, if they are to serve one customer, are invariably supported by a contract, and if they are for general system growth, then they are not dependent upon a single customer.

With respect to cost of capital and access to financing, Union acknowledged that the impact will be a function of how capital markets interpret the Board's decision. We note that the GEC application is being considered within the traditional bypass framework, and the risk of physical bypass has always existed. That risk is being realized in this case, but there is no direct or immediate adverse impact on shareholders or investors, and there are no stranded assets.

We do agree that these long-term, indirect factors are potential concerns. However, these risks are more speculative than the assessment of the short term impact, which is limited to Union's foregone return on the assets that would be used to serve GEC. Also, these long-term risks arise from subsequent applications, not the GEC application itself. More importantly, though, the adverse impacts can largely be managed by the Board and the utilities. Specifically, as we will discuss further below, the Board concludes that it is in the public interest to allow GEC the opportunity to bypass Union's distribution service because the Board is not convinced that Union's distribution service, as presently structured, provides GEC with the control, flexibility and access to competitive upstream services that GEC requires. We believe that this case has not exhausted the review of the adequacy of distribution services in Ontario to meet the requirements of customers with requirements similar to GEC's. That review will be conducted in the Natural Gas Electricity Interface Review (or NGEIR) proceeding. Union (and Enbridge) will have the opportunity in that proceeding to propose alternative services to meet these requirements.

Impact on Union Ratepayers

Two potential ratepayer impacts were identified. First, if GEC is allowed to bypass, then Union's other customers will not receive the benefit of GEC's contribution to system costs. Second, if GEC is allowed to bypass, then Union might lose $29 million in existing margin if other similarly situated customers bypass or get bypass competitive rates.

GEC argued that there is no direct adverse impact on Union's ratepayers if GEC's application is granted. Union, and others, countered that the impact of lost revenues and the associated contribution to system costs, is an important consideration. If GEC took service from Union, it would lower rates for other Union customers. As a Union T1 customer, GEC would make a significant contribution to system costs - based on firm T1 rates, the Net Present Value of the pipeline project is over $46 million and the Profitability Index is over 10. GEC characterized this as a cross-subsidy from GEC to Union's ratepayers; others characterized it as a contribution to system costs.

We agree that customers who are connected to the utility system should contribute to system costs. However, the rates must be just and reasonable. There would be a benefit to other ratepayers if GEC takes service from Union, but this benefit might be the result of providing a service which does not meet the needs of GEC. We note that if the application is approved, the indirect adverse impact on other ratepayers is balanced by a direct benefit to GEC. Rates for other customers will not increase as a result of approving GEC's application, but GEC's ability to control it costs, to operate flexibly and have more effective access to competitive upstream services will be enhanced. We find that the adverse impact of foregone revenues is not as great as the adverse impact of lost revenues, and that therefore this case can be distinguished from other potential applications by the fact that GEC is an incremental load.

With respect to the potential margin loss, Union identified $29 million as the upper limit and was careful to acknowledge that it did not believe the full impact would come about. One approval to bypass does not necessarily result in a flood of similar applications. IGUA submitted that if GEC's application is approved, then all large volume gas users should be entitled to similar authorizations. We find that such a sweeping conclusion would be contrary to the Board's historic and continued approach to consider bypass on a case-by-case basis, considering all the circumstances. In the case of a bypass competitive rate application, the Board will have to carefully consider

the public interest issues with respect to a special rate in situations where the customer has been served on the posted rate, apparently satisfactorily, for some time.

2. Type of Bypass

The issue arises as to whether there is duplication of facilities and/or stranded assets associated with granting the GEC application. The concern regarding stranded assets is primarily a financial one, while the concern about duplication of facilities is grounded in environmental and economic efficiency concerns. In this case, the issue of stranded assets does not arise.

On the issue of duplication of assets, Union took the position that there will be duplication because it already has an interconnection with Vector and that those facilities were constructed at least in part because of expected gas-fired power generation in the area. Union characterized it as a loss of efficiency. Union also suggested that there would be duplication of facilities if it were necessary to add facilities in the Sarnia area for future load growth, that might otherwise be unnecessary if Union were to build the GEC pipeline. GEC countered that Union's evidence is that

Union's interconnection with Vector was driven by issues of system stability in the area for all customers and that it might have been sized to accommodate some additional growth, but not the addition of a 1000 Megawatt plant in the area.

While we accept that there is a potential risk related to future duplication and reduced efficiency, it is speculative in nature, and not material. There is no evidence as to the timing and extent of future load growth in the area, nor is it certain that Union's proposed facilities to serve GEC would be sufficient to serve that future load. We conclude that any potential adverse impact is not of sufficient significance to deny GEC's application. With respect to the immediate duplication of facilities, this is limited to the Union-Vector interconnect and we are of the view that potential adverse impact in terms of environmental and economic efficiency concerns is not such that it would warrant denying the application.

The concerns of parties in respect of the impact of duplication on the rational development of the distribution system focused on the long term effect, not of the GEC application in isolation, but rather in combination with likely future applications. The Board must necessarily be cautious when arriving at conclusions regarding future

impacts – both positive and negative – of as yet unmade applications and possible developments. It is Union's and the Board's responsibility to ensure that these developments as they occur do not yield adverse outcomes.

Our conclusion on this issue is based on a case specific analysis. If other customers were to seek to bypass Union, the issues related to the duplication of facilities and the stranding of assets may be more significant.

3. Duration of the Bypass

GEC has applied to build facilities dedicated for the plant, and the plant has a 20-year contract with the OPA. GEC may still contract for services on Union, which we note would mitigate the "notional" cost shifting associated with the bypass. No issues were raised in this area, and we conclude that there is no particular impact on the public interest related to this criterion.

4. Safety and Environmental Factors

Elsewhere in this decision, we have addressed the safety and environmental concerns arising from the construction and operation of the GEC pipeline. We do not need to consider those issues further here.

5. Rate-making alternatives to bypass and other rate-making options

The Board described the significance of this criterion in its decision in EBRO 410-I/411-I/412-I as follows: "Bypass is a question of competing economic benefits. Potential rate-making solutions must be considered as alternatives to ensure that the public interest is fully protected." In coming to this conclusion, the Board made the following observation:

> The major question that underlies the entire discussion on bypass is how well is regulation working in determining utility prices that are appropriate for the changing circumstances in Ontario. Bypass as a circumstance is economically motivated and likely unnecessary if rates are properly determined using sound regulatory principles.

The evidence is that GEC has undertaken negotiations with Union for both T1 firm and T1 interruptible services. However, a mutually acceptable arrangement has not been achieved. GEC has indicated that even if its application is approved, it will make its

decision on commercial grounds and is prepared to continue discussions with Union in this regard. Union testified that it offered GEC the lowest unitized rate on its system and submitted that to go lower would have compromised its principles and would not be consistent with its practices. Union did not provide evidence as to the specific rate offered to GEC. Rather, it relied on qualitative descriptions of the factors surrounding negotiations.

There was much discussion in the hearing and in the submissions on the issue of postage stamp rates. Union's position is that bypass is completely antithetical to postage stamp rates. The Board continues to support the principle of postage stamp rates, but does not conclude that the approval of GEC's application would undermine that principle. An important foundation for postage stamp rates is the appropriate determination of a class and the accurate allocation of costs to that class. An equally important consideration is that customers should be entitled to receive the services they require and the tariff should reflect those services appropriately.

We find that the evidence and submissions in this case suggest that loads such as GEC (in terms of size and requirements for flexibility) may warrant a different class, or different set of services, than the T1 rate class as currently structured. This is supported by recent developments as well as parties' submissions in this proceeding. Specifically,

- The Board directed Union to investigate this possibility in RP-2003-0063, and although in this proceeding Union filed the report prepared pursuant to that Board directive, this hearing was not constituted to address that issue directly, and the report was not tested.
- Board staff, in its report on the Natural Gas Electricity Interface Review has recommended that the Board examine services provided to power generators and similar gas consumers. The Board has subsequently confirmed that this issue will be addressed.
- Enbridge submitted that consideration should be given to developing new more flexible services for power generation customers and argued that ratemaking responses are the best response to changing market conditions, noting that this reflected the Board's comments in EBRO 410-I/411-I/412-I.

- VECC submitted that Union should be ordered to negotiate a more flexible rate with GEC and that new rate class options for both Union and Enbridge should be examined in the Natural Gas Electricity Interface Review.
- CCC opposed GEC's application, but it was not entirely satisfied with Union's approach in administering the T1 rate in that it in effect acts as a gatekeeper for investments in the electricity sector.
- Union, in its reply argument, acknowledged that there should be a tariff solution as an alternative to bypass.

We believe there may be a ratemaking alternative to GEC's bypass solution, one that is grounded in class-based postage stamp ratemaking. The public interest would be served if Union were able to negotiate a just and reasonable rate and package of services which met the needs of GEC. However, Union was not able to bring forward an alternative which was acceptable to GEC at this time. The issue is whether there is an onus on GEC to put forward a tariff alternative. We do not think so. Such an approach would be burdensome and costly for a non-utility applicant. Union itself acknowledged its responsibility for ensuring that its tariff meets its customer needs.

Enbridge took the position that new types of services may be needed, but suggested that this should be pursued through the Natural Gas Electricity Interface Review and that this application should not pre-empt that consideration. We agree with Enbridge that other gas-fired power generators (and other gas consumers with similar requirements) may well require flexibility regardless of location and that a tariff review is appropriate. We note that the Board has confirmed already that the Natural Gas Electricity Interface Review will address this issue. The question is whether GEC should be required to await that review. We think not. We remain satisfied that GEC's application must be decided now on its own merits, and we find that it is in the public interest to approve it. However, now that the scope of the Natural Gas Electricity Interface Review proceeding is better defined, the Board does not expect to decide any other bypass applications prior to the results of that proceeding. It must be emphasized that the approval of GEC's by-pass is being granted in a transitional state. Following the Natural Gas Electricity Interface Review, we expect distributors' tariffs to be more robust against bypass. The Board intends to bring this transition to a close as soon as possible.

6. Public policy

Two areas of public and regulatory policy were raised during the proceeding:

- the regulatory compact
- energy markets, in particular the electricity market

The Regulatory Compact

Union argued that the regulatory compact consists of the following components:

- the utility's obligation to serve
- the high expectation of the right to serve
- the opportunity to earn a fair return

We note that Union agreed that a utility does not have an absolute right to serve all customers in its franchise area. Likewise, the obligation to serve is not absolute, but is subject to economic feasibility. The main factor, though, is that whatever the balance between the right to serve and the obligation to serve, the utility is afforded the opportunity to earn a fair return on its existing investments. There has been no suggestion in this proceeding that that fundamental tenet will be compromised.

While Union acknowledged that it does not have an absolute right to serve, its position is that it should serve in all but the most exceptional circumstances. For Union, the standard or threshold for allowing bypass should be "special harm" or "exceptional circumstances", mainly associated with the customer having to cancel a project or shutting an existing facility. GEC, on the other hand, argued that Union's position regarding the threshold is not correct as the concepts of "special harm" or "exceptional circumstances" are not supported by the legislation. In particular, GEC pointed out that section 90 of the OEB Act refers to "person", not gas distributor, and section 96 refers to public interest, not special circumstances.

We do not agree completely with GEC in this regard. Given the history and development of the natural gas distribution system, there is a high burden of proof for a customer to bypass the distribution system. That being said, we do not agree with Union that GEC must demonstrate a "special harm" in order to qualify for bypass. Rather, the case to be met, as in all physical bypass or bypass competitive rate applications is the public interest under the given circumstances. We would also note that Union does not have a right to monopoly protection for competitive services. In other words, GEC's evidence is that the key concern it has with Union's T1 service is that it impedes access to competitive upstream services, especially storage and load

balancing services. Customers on Union's T1 service have less effective access to those services than do customers directly served by Vector. It is in the public interest for customers to have access to the services they require. In this case, GEC cannot currently access adequate services from Union. It is therefore in the public interest to allow GEC to pursue those services directly through the option of bypassing Union. Appropriately designed distribution services can be designed to be robust against bypass. The same cannot be said about competitive services that are bundled with distribution services.

We must still consider whether the granting of GEC's application is contrary to the regulatory compact. We think not, given that all parties recognize that the right to

serve is not absolute. The Board has always indicated that bypass was a possibility. Does the fact that one has been granted somehow make others more likely? Again, we think not. Union has some control given its ability to develop rates which address the economic drivers for bypass. We note that if Union developed suitable services, it would reduce the economic incentive to seek bypass and enhance Union's position in asserting its right to serve, thereby reducing the likelihood of the Board approving a bypass or bypass competitive rate. The Board retains ultimate control through the exercise of its jurisdictions regarding bypass and rate setting.

Given the continued practice of case-by-case decision making for bypass, we conclude that the regulatory compact is not adversely affected by the granting of this application.

Energy Markets

Union, VECC and Enbridge argued that the Board's legislated electricity objectives are not relevant to this application and only the gas objectives are relevant. CCC on the other hand submitted that the Board must take account of the impact on electricity. GEC argued that the Board can take account of its electricity objectives in gas matters. In its view, the list of objectives for gas matters would not have been intended to result in the Board ignoring other relevant considerations.

Bypass cases have always been case specific examinations, involving an enquiry into the specific circumstances of the customer in question and a broad assessment of the public interest. In this case the customer is an electricity generator. Some parties

suggested that the Board should examine only the economic circumstances of the customer, but not the broader circumstances related to its end use.

Our decision to grant GEC's application is based on the requirements which GEC has demonstrated it requires and our finding that Union's current services do not meet those requirements. No special consideration has been given to GEC because it is an electricity generator. We did not also need to assess GEC's applications within the Board's electricity objectives. The Board is concerned with ensuring all gas customers have the opportunity to receive services which they require and which allow them to operate as cost effectively as possible. While the integration of the gas and electricity markets makes it particularly important for generators to be able to control transportation and related service costs over the long term, there may be other customers who require the same type of control, flexibility and access to competitive upstream services.

We therefore conclude that it is in the public interest to allow GEC the option to operate as economically efficiently and cost effectively as possible by having as much flexibility, control, and access to competitive upstream services as possible. This consideration is important given the uncertainty of future market conditions and uncertainty regarding operating parameters. This conclusion is grounded in GEC's status as a potential gas consumer and market participant, not on the basis that it is a generator in the Ontario electricity market.

Some parties noted that if the GEC application were granted, this might represent discrimination against other power generators or would create a precedent for other power generators. Similarly, IGUA submitted that there should be no special regulatory treatment for a large volume customer on the basis of end use as this would be discriminatory. The principle of case-by-case consideration of bypass and bypass competitive rate applications has always allowed for the potential for discrimination; the issue is whether the result is undue discrimination and therefore not in the public interest. Determination of that requires individual assessment of each applicant, again on a case-by-case basis. We conclude from the evidence and testimony that not all generators, or large volume customers, will necessarily have the same level of economic motivation as GEC and that if Union develops a rate and services which meet their needs, the motivation to bypass will be addressed. We note that to the extent that a new tariff is developed, customers will be eligible based on their load

characteristics, not their end use. No other generators, or large volume customers, have pursued a bypass application to the same degree as GEC. We cannot conclude now that there would be undue discrimination.

7. Other factors relevant to the specific application

There was some discussion during the proceeding regarding the potential analogy between gas bypass and electricity bypass. GEC raised this analogy in support of its application, but Union submitted that the evidence was not sufficient for the Board to conclude that the analogy was valid and that therefore consistent treatment was warranted. We note that Union did not address in any detail why the analogy is not appropriate. In any event, we do not have the evidence necessary to make a conclusion on this point, and therefore it has not been considered in the overall determination of the application.

Conclusions

We find that the public interest would not be well served if we deny GEC's application. It is in the public interest for gas customers to have access to the services they require. In this case, GEC cannot currently access adequate services from Union. It is therefore in the public interest to allow GEC to pursue those services directly through the option of bypassing Union. At the same time, Union and other parties have not established that Union or its other customers would suffer direct harm in the event that GEC's application is approved. Moreover, GEC's application is credible. Therefore we find GEC's application to be in the public interest and will approve it.

We believe that it is possible for Union to develop a tariff solution for customers of the size and needs of GEC to permit the utility's offerings to be more robust against bypass. It is within the control of Union and the Board to manage the longer term, more speculative impacts arising from this transitional decision, beginning with the pending Natural Gas Electricity Interface Review proceeding. It is not in the public interest in this case however to require GEC to await the resolution of an appropriate tariff in the NGEIR proceeding.

g) Should one or both applications be approved and what should the conditions of approval be?

The competing applications are for a natural gas pipeline to serve the same potential load. Our findings on the two applications can be summarized as follows. If a power

generating station is built at the proposed location, there is clearly a need for a pipeline to serve the power plant. There are no negative rate implications for Union's customers, if Union builds the pipeline. There are no outstanding matters from the perspective of the Ontario Pipeline Coordination Committee with respect the environmental reports commissioned by both applicants. The environmental impacts associated with the proposed competing pipelines are found by the Board to be acceptable and there are no outstanding landowner matters for either pipeline proposal. Union is known to be a competent builder and operator of gas pipelines. The Calpine group of companies that will be building and operating the GEC pipeline under contacts with GEC are also experienced builders and operators of pipelines in many jurisdictions in the United States. The applications of Union and GEC are credible and in the public interest.

Whether there is a high or low probability that GEC and Union will come to an arrangement whereby the power plant may become Union's customer, we must allow for that. We conclude therefore that it is in the public interest to approve both applications, subject to the normal conditions the Board imposes for such applications and certain other specific conditions in the case of GEC that flow from our findings in this decision. These conditions are attached as appendix 5 and 6 for GEC and Union, respectively.

Naturally, the approval for Union's application is non-operative if it does not have the GEC power plant as a customer. A key condition therefore for Union is that it must contract to provide service to the GEC plant whether owned by GEC or another entity, as long as the power plant is in the same location and requires the same proposed pipeline, both in terms of size and route.

With respect to the approval of GEC's application, as noted earlier, should there be any new participants in the project that will bear responsibility for the construction or operation of the pipeline, GEC must submit the relevant information to the Board.

h) Does GEC need a Certificate of Public Convenience and Necessity?

In addition to its application for leave to construct a hydrocarbon pipeline, GEC applied for a Certificate of Public Convenience and Necessity (or "Certificate") under section 8(1) of the *Municipal Franchises Act* (MFA). That subsection reads:

8.(1) Despite any other provision in this Act or any other general or special Act, no person shall construct any works to supply,

(a) natural gas in any municipality in which such person was not on the 1st day of April,1933, supplying gas; or

(b) gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas and in which gas was being supplied, without the approval of the Ontario Energy Board, and such approval shall not be given

(c) unless public convenience and necessity appear to require that such approval be given.

There was some debate at the hearing as to whether GEC needed a certificate to build the pipeline, as no person other than the GEC facility would be supplied with gas through the pipeline. Counsel addressed some remarks on the question of whether the word "supply" in section 8 included the situation where the builder and operator of the pipeline was the same entity that received the gas.

In addition, GEC took the position that it would not be a gas distributor within the meaning of section 3 of the OEB Act. "Gas distributor" is defined as follows:

> "gas distributor" means a person who delivers gas to a consumer, and "distribute" and "distribution" have corresponding meanings;

The question of whether the recipient of a Certificate under the MFA could be exempt from regulation as a distributor under the OEB Act was not addressed at the hearing.

As GEC has applied for a Certificate, and has thereby acknowledged the jurisdiction of the Board to grant a Certificate in this situation, the question is not squarely before us. However, it may be of some use to future proponents to have some indication of the Board's views on this issue.

First, it is clear from the MFA that the application of section 8 is not restricted to utilities or gas distributors. The need for pre-approval applies to all persons.

Secondly, it appears that the purpose of section 8 of the MFA is to deal with construction of works to supply gas, not the supply of gas itself. The first part of section 8 of the MFA, before an amendment in 1998, read:

8.(1) Despite any other provision in this Act or any other general or special Act, no person shall construct any works to supply, **or supply**

(a) natural gas in any municipality...

(emphasis added)

The amendment reduced the scope of section 8 of the MFA such that it is the construction of works that is addressed by the section.

The Board finds that a purposive interpretation of the MFA suggests that all persons who wish to construct pipelines to supply natural gas need a Certificate, unless such persons are exempted by the words in the section that relate to supply before 1933. The Board is of the view that the section applies even where the recipient of the gas is identical with the constructor of the pipeline. We find that the word "supply" should be interpreted to include supplying oneself.

It is important that the Board retain oversight of the construction of hydrocarbon pipelines in Ontario for reasons including safety, regulatory policy and the avoidance of the unnecessary proliferation of gas works. As pointed out in the hearing, not every gas pipeline is subject to approval under the leave to construct provisions of the OEB Act. The need for a Certificate under the MFA provides the Board with the opportunity to assess the need for a gas pipeline and the competency of the proponent to construct the line safely.

In contrast, the definition of "gas distributor" under the OEB Act addresses the delivery of gas to a consumer. Many of the provisions relating to gas regulation in the OEB Act, such as the rate setting provision, deal with the relationship between the distributor and the consumers it serves. In the case before us, there is no relationship to regulate, as the consumer of the gas is the same as the person who is delivering the gas. We find that it is not inconsistent to require a person to obtain a Certificate under the MFA, while finding that the person is not a gas distributor within the meaning of the OEB Act.

The Board finds that the applicant GEC should be required to obtain, and should be granted a Certificate of Public Convenience and Necessity under section 8 of the MFA. GEC has satisfied us of the need for the pipeline and that it is competent to undertake

construction and operation of the line. However, as indicated elsewhere in this decision, if the project partner Calpine is not overseeing construction, the Board will require GEC to provide the Board with information as to the entity supervising construction of the line and its competence in gas pipeline construction.

GEC indicated that it would not object to a geographic restriction of the Certificate to the area needed to construct and operate the pipeline. The Board finds that it would appropriate to so restrict the Certificate. The certificate that it will be issued to GEC will be for the sole purpose of building the pipeline to supply gas to the GEC generating station. The area of the certificate shall cover only the area necessary for the construction of the pipeline including permanent and temporary workspace.

Union has a Certificate for the municipality, and those rights remain in effect.

Counsel for Union raised the question of whether Vector would need a Certificate for the facilities that will connect the GEC line to the Vector transmission line. However, Counsel for GEC made it clear in his reply submissions that Vector is not undertaking any construction of facilities. Section 8 of the MFA applies only to persons constructing works to supply gas. It therefore appears that Vector will not require a Certificate.

Board Order and Cost Awards

Pursuant to section 90 and 96 of the *Ontario Energy Board Act*, 1998 the Board grants GEC leave to construct the pipeline and associated equipment as applied for, subject to the conditions attached in Appendix 5. Pursuant to section 8 of the *Municipal Franchises Act*, the Board grants GEC a Certificate for Public Convenience and Necessity, which shall be issued to GEC in due course.

Pursuant to section 90 and 96 of the *Ontario Energy Board Act*, 1998 the Board grants Union leave to construct the pipeline and associated equipment as applied for, subject to the conditions attached in Appendix 6. Union's rights in its existing Certificate for the municipality remain in effect.

GEC and Union shall pay in equal shares intervenor cost awards. GEC and Union shall also pay in equal shares the Board's costs, if any. Intervenors eligible for cost awards shall file their cost statements with the Board, GEC and Union by January 16,

2006, in which they must indicate the requested percentage of cost recovery. GEC and Union may respond by January 31, 2006, and intervenors may reply by February 15, 2006.

Dated at Toronto, January 6, 2006

Original signed by

John Zych
Board Secretary

Municipal Franchises Act
R.S.O. 1990, CHAPTER M.55

Approval for construction of gas works or supply of gas in municipality

8. (1) Despite any other provision in this Act or any other general or special Act, no person shall construct any works to supply,

(a) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas; or

(b) gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas and in which gas was then being supplied,

without the approval of the Ontario Energy Board, and such approval shall not be given unless public convenience and necessity appear to require that such approval be given. R.S.O. 1990, c. M.55, s. 8 (1); 1998, c. 15, Sched. E, s. 21 (4).