EB-2014-0375

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Union Gas Limited for an order or orders approving a one-time exemption from Union Gas Limited's approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations;

AND IN THE MATTER OF a motion initiated by Natural Resource Gas Limited pursuant to the Board's Rules of Practice and Procedure requesting that the Board review its Decision and Order dated October 9, 2014 in EB-2014-0154.

MOTION RECORD OF UNION GAS LIMITED
(on the Threshold Question − Motion By NRG To Review and Vary)

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Lawyers for Union Gas

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Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2014-0154

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

AND IN THE MATTER OF an Application by Union Gas Limited for an order or orders approving a one-time exemption from Union Gas Limited's approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations.

Before: Ken Quesnelle
Presiding Member and Vice Chair

Marika Hare
Member

DECISION AND ORDER
October 9, 2014

Introduction

Union Gas Limited ("Union") filed an application dated April 3, 2014 with the Ontario Energy Board under section 36 of the *Ontario Energy Board Act, 1998*, S.O. c.15, Schedule B, for an order of the Board approving a one-time exemption from its approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations during the months of February and March, 2014.

The major procedural steps of this proceeding are provided in Appendix "A".

Background

In its application, Union requested that, on a one-time basis, the penalty charges applied for Rate T1 / T2 Supplementary Inventory and Rate 25 Unauthorized Overrun Gas Commodity in February and March, 2014 be reduced. In addition,

Union requested that the penalty charge applied to bundled T-Service customers that did not meet their contractual balancing obligations in February 2014 be reduced in the same manner.

To date, customers that were not in compliance with their contractual obligations in February and March, 2014 were applied penalty charges based on the highest daily spot cost of gas at Dawn in the month of or the month following the month in which the gas was sold, all of which is in accordance with Board approved rate schedules.

Union's proposal, as set out in its application, would reduce the noted penalty charges to the second-highest spot cost of gas at Dawn in the month which the gas was sold.

The effect of Union's proposal is to reduce the penalty charges for customers that did not meet their contractual obligations in February 2014 from $78.73 / GJ to $50.50 / GJ. For customers that did not meet their contractual obligations in March 2014, Union's proposal would reduce the penalty charges from $78.73 / GJ to $52.04 / GJ.[1]

Position of Parties

In its argument-in-chief, Union stated that it is proposing to reduce the penalty charges in recognition of the exceptional weather conditions experienced during the winter of 2014. Union noted that the five-month winter period from November 2013 to March 2014 was the coldest in Union's records (which date back to the 1969 / 1970 winter) for its southern service area.[2]

Union submitted that it applied for the one-time exemption from the Board-approved rate schedule based on feedback from customers most affected by the penalty charge. Union noted that, specifically, the impact is significant for four customers that were facing a charge in excess of $800,000. Union stated that for these four customers, the impact could result in impairment of their financial viability.[3]

Board staff, AMCO, APPrO, BOMA, CME, NRG, OGVG, and TCE all submitted that the penalty charges should be reduced in the context of the exceptional weather conditions experienced during the 2014 winter.

[1] Union Application, EB-2014-0154, April 3, 2014.
[2] Union Argument-in-Chief, EB-2014-0154, September 2, 2014 at p. 2.
[3] Ibid at p. 3.

Board staff, BOMA and OGVG agreed with Union's proposed reduction to the penalty charge. Board staff argued that the reduced penalty charges, as proposed by Union, continue to encourage compliance with the contractual obligations applicable to Union's direct purchase customers in the context of the exceptional weather conditions experienced over the 2014 winter.[4] As such, Board staff submitted that "the reduction to the penalty charges, as proposed by Union, adequately balances the competing issues of the intent of the penalty charges and providing financial relief to customers that are significantly harmed by the application of those charges."[5]

AMCO stated that while Union's proposed reduction of the penalty charge is a positive effort, it requires a further review to ensure that the penalty will not impose extended hardship on Union's customers.[6]

CME argued that the extraordinary circumstances of the 2014 winter justify a reduction to the penalty charges. CME stated that the level of the reduced penalty charges should not be less than the price paid by compliant customers to meet their contractual obligations.[7]

NRG also agreed that a reduction to the penalty charges is warranted given the exceptional weather conditions experienced over the 2014 winter. However, NRG argued for an alternative penalty charge that would only be applicable to NRG, as it is a distributor and unlike the other customers who purchase their own gas. NRG stated that the Board should consider setting a penalty rate for NRG in the range of $4.87 / GJ to $7.12 / GJ.[8] [9] NRG stated that the penalty rate should be fixed on the basis of historic norms, Union's actual costs and facts specific to NRG (i.e. that NRG is a distributor and that it did everything it could to meet its contractual obligations).[10]

TCE submitted that Union's proposal to reduce the penalty charge to the second highest spot price at Dawn does not address the issue of determining what a reasonable penalty charge would be in light of the weather conditions experienced over the 2014 winter. TCE submitted that setting the penalty rate at the second

[4] Board Staff Submission, EB-2014-0154, September 12, 2014 at p. 3.
[5] Ibid at p. 2.
[6] AMCO Submission, EB-2014-0154, September 12, 2014 at p. 2.
[7] CME Submission, EB-2014-0154, September 12, 2014 at p. 1.
[8] NRG also mentioned that the maximum penalty that it should be applied is $12.31 / GJ.
[9] NRG Submission, September 12, 2014 at p. 14.
[10] Ibid at pp. 6-8.

highest price at Dawn is arbitrary and continues to result in an unreasonably high penalty charge.[11]

TCE argued that the penalty charge applicable to T2 customers should be calculated on the basis of Enbridge Gas Distribution's ("Enbridge") methodology for calculating the charges associated with Unauthorized Supply Overrun for Rate 125 customers. TCE stated that its proposed alternative methodology for calculating the penalty charge for T2 customers: (a) fully respects the underlying rationale for the penalty charge (i.e. encouraging contractual compliance); (b) is principled from a rate-making perspective, because it reflects the spot price of gas on the day that the customer exceeded its volumes, thereby strengthening the link between the violation and cost consequences; (c) has been utilized by the Board elsewhere; and (d) results in a penalty charge that is reasonable in magnitude.[12]

APPrO supported TCE's alternative proposal for the calculation of the penalty charge applicable to T2 customers. APPrO also supported Union's proposed reduction to the penalty charges applicable to the other rate classes. In addition, APPrO stated that the penalty mechanism in place did not produce the desired results and that the penalty charges were overly punitive given the circumstances. On that basis, APPrO submitted that the Board may wish to consider directing Union to revisit the penalty provisions in its tariffs in order to asses alternative penalty mechanisms and bring forward its assessment (including any recommended changes) in its next rates proceeding.[13]

IGUA and LPMA submitted that Union's proposal should be rejected and that no reduction to the penalty charges should be approved. Both argued based on the principle that it is wrong to change the "rules" after-the-fact. LPMA argued that if the Board disagrees and does reduce the penalty, it should be in accordance with Union's proposal.

IGUA submitted that it would be inappropriate for a compliant customer to pay more than a non-compliant customer to meet its contractual obligations. IGUA argued that if Union's proposal is approved as filed, it is possible that some compliant customers will have paid more than non-compliant customers to meet their contractual obligations.[14]

[11] TCE Submission, September 12, 2014 at p. 5.
[12] Ibid at pp. 7-9.
[13] APPrO Submission, EB-2014-0154, September 12, 2014 at pp. 3-4.
[14] IGUA Amended Submission, EB-2014-0154, September 15, 2014 at p. 2.

LPMA submitted that the intent of the penalty charge may be compromised by the Board approving Union's proposed one-time reduction to the penalty charges. LPMA stated that direct purchase customers may expect, or seek, future one-time reductions if other exceptional circumstances arise. LPMA submitted that "this expectation could result in exactly the type of economic decision making that the Board has indicated needs to be discouraged in order ensure that the utility system is not put at risk."[15]

BOMA, CME and OGVG also made submissions regarding the appropriate allocation of the amounts arising from the application of the penalty charges.

In response to the submissions of the intervenors that argued that its proposal should be rejected, Union stated that the benefit arising from reducing the penalty charge is greater than the inequity that could result if a few compliant customers paid more to meet their balancing obligations.[16]

Union also submitted that TCE's alternative proposal should be rejected. Union, in agreement with a Board staff argument, stated that TCE's proposal reflects a fundamental change in the manner in which the Supplementary Inventory Charge is calculated and that this type of fundamental change is not appropriate in the context of a request for a one-time reduction of the penalty charge. Union submitted that the type of change proposed by TCE would be best dealt with in a rates proceeding.[17]

Finally, Union submitted that the arguments of NRG should be rejected as they are either not accurate or not relevant to the proceeding.[18]

Board Findings

The Board approves Union's application, as filed, for a one-time exemption from its approved tariffs with respect to the penalty charges applied to direct purchase customers who did not meet their contractual obligations during the months of February and March, 2014 for the reasons set out below.

The intent of the penalty charges at issue in this proceeding was set out by the Board in the RP-2001-0029 Decision with Reasons.[19] Essentially, the penalty

[15] LPMA Submission, EB-2014-0154, September 12, 2014 at p. 3.
[16] Union Reply Submission, EB-2014-0154, September 19, 2014 at p. 2.
[17] Ibid.
[18] Ibid at p. 3.
[19] Decision with Reasons, RP-2001-0029, September 20, 2002.

charges were designed to encourage direct purchase customers to comply with their contractual obligations in order to ensure the security of Union's system. Specifically, the RP-2001-0029 Decision with Reasons set out the following:

> In the Board's view, the penalty must be sufficiently costly to defaulters to strongly discourage strategic non-compliance with balance obligations, and the careless or incompetent acceptance of contractual obligations which are not reasonably achievable. The Board is concerned that parties wishing to engage in the market, either directly or through agents, must be appropriately encouraged to manage their obligations responsibly. The system as a whole requires that.[20]

The Board is of the view that Union's proposed reduction of the penalty charges to the second-highest spot cost of gas at Dawn in the month which the gas was sold is appropriate considering the exceptional circumstances that affected customers during the winter of 2014. The 2014 winter was extraordinary and it is in the context of this anomalous winter that the Board is granting Union approval to reduce the penalty charges. This is an unprecedented step by the Board, and should not be seen as an invitation to utilities or their customers to seek a reduction in penalty charges in general. The Board finds that in this case, the reduced penalty as proposed by Union continues to achieve the intent of the penalty charges as established by the Board in RP-2001-0029. The penalty charges are designed to encourage compliance with contractual obligations. This can be achieved while at the same time reducing the potential for the penalty to unduly impair the financial viability of those required to pay it. The Board considers Union's proposed penalty to be appropriate in striking this balance.

The Board notes some parties argued that it would be inappropriate for a compliant customer to pay more than a non-compliant customer to meet its contractual obligations. In response to this argument, the Board notes that none of Union's direct purchase customers came forward in this proceeding to claim that they actually bought gas to meet their contractual obligations at a price higher than the reduced penalty charges proposed by Union. While the Board recognizes that it is possible that some direct purchase customers may have paid more than the second-highest spot cost of gas at Dawn for gas purchased in order to meet contractual obligations, the Board is of the view that the number of customers, if any, is likely very small and agrees with Union that the benefit arising from reducing the penalty charges is greater than the inequity that could result if a few compliant customers paid more to

[20] Ibid at p. 31.

meet their balancing obligations. In addition, the Board notes that any bundled T-service customer that would have paid $78.73 / GJ for natural gas to meet its contractual balancing obligations would have waited until the last day of February to purchase the gas (as the spot price of gas at Dawn was at its highest on February 28th). The second-highest spot cost of gas at Dawn ($50.50) occurred on February 5th and customers received their Direct Purchase Status Reports on February 12th or 13th.[21] Between the time that customers received their Direct Purchase Status Reports and February 28th, spot prices were below $50.50. This is indicative of the choices customers had to purchase gas, in order to meet contractual obligations, at prices below $78.73 / GJ (and, in fact, below $50.50).

With respect to TCE's proposal that the penalty charge applicable to T2 customers should be calculated on the basis of Enbridge's methodology for calculating the charges associated with Unauthorized Supply Overrun for Rate 125 customers, the Board rejects this proposal on the basis that it reflects a fundamental change in the manner in which the penalty charge is calculated. The Board does not believe that a fundamental change of this nature is appropriate in the context of Union's request for a one-time reduction of the penalty charge.

The Board does not find NRG's arguments concerning a different method to setting the penalty convincing. Neither is the argument concerning NRG's special situation accepted. The Board finds that setting the penalty charge that is to be applied to NRG on the basis of historic norms or Union's gas costs is not appropriate and not consistent with the intent of the penalty. In addition, the Board is of the view that, in this matter, NRG's status as a distributor does not warrant any different treatment. As such, the Board finds that the same reduced penalty, as proposed by Union, which will be applied to all of the non-compliant customers, shall also be applied to NRG.

The Board will not make any findings regarding the appropriate allocation of the excess amounts arising from the application of the penalty charges in this proceeding. The Board notes that this allocation issue is currently before the Board in Union's 2013 Deferral Account Disposition proceeding (EB-2014-0145).

The Board directs Union to implement the outcome of this decision as soon as reasonably possible.

[21] Union Interrogatory Responses, EB-2014-0154, June 19, 2014 at Exhibit B / Staff IRR #1.

Cost Awards

The Board may grant cost awards to eligible parties pursuant to its power under section 30 of the *Ontario Energy Board Act, 1998*. When determining the amount of the cost awards, the Board will apply the principles set out in section 5 of the Board's *Practice Direction on Cost Awards*. The maximum hourly rates set out in the Board's Cost Awards Tariff will also be applied. The Board notes that filings related to cost awards shall be made in accordance with the schedule set out below.

THE BOARD ORDERS THAT:

1. Union is granted a one-time exemption from its approved tariffs with respect to the penalty charges applied to direct purchase customers who did not meet their contractual obligations during the months of February and March, 2014.

2. Union shall apply the approved reduced penalties ($50.50 / GJ for February and $52.04 / GJ for March) to its customers as soon as reasonably possible.

3. Eligible intervenors shall file with the Board and forward to Union their respective cost claims within 14 days of the date of this Decision and Order.

4. Union shall file with the Board and forward to the intervenors any objections to the claimed costs of the intervenors within 21 days from the date of this Decision and Order.

5. If Union objects to the intervenor costs, intervenors shall file with the Board and forward to Union any responses to any objections for cost claims within 28 days of the date of this Decision and Order.

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

All filings to the Board must quote file number **EB-2014-0154**, be made through the Board's web portal at https://www.pes.ontarioenergyboard.ca/eservice, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at

www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the BoardSec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required.

For all electronic correspondence and materials related to this proceeding, parties must include in their distribution lists the Case Manager, Lawrie Gluck at Lawrie.Gluck@ontarioenergyboard.ca and Counsel, Jennifer Lea at Jennifer.Lea@ontarioenergyboard.ca.

All communications should be directed to the attention of the Board Secretary and be received no later than **4:45 p.m**. on the required date.

ADDRESS
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

Filings: https://www.pes.ontarioenergyboard.ca/eservice/
E-mail: boardsec@ontarioenergyboard.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto, October 9, 2014

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

TO DECISION AND ORDER

HEARING PROCESS

BOARD FILE NO. EB-2014-0154

DATED: October 9, 2014

Appendix A – Hearing Process

On May 27, 2014 the Board issued Procedural Order No. 1 which provided for the filing of interrogatories and intervenor evidence, among other things. Union filed responses to the interrogatories on June 17, 2014 (and updated responses on June 19, 2014).

On June 20, 2014 the Board received a motion from the intervenor TransAlta Corporation ("TransAlta") under section 27 of the Board's *Rules of Practice and Procedure*. The motion sought an order requiring Union to provide full and adequate responses to a number of interrogatories. In its motion, TransAlta also requested a delay in the date for the filing of intervenor evidence.

In Procedural Order No. 2, issued on June 23, 2014, the Board determined that the motion should be heard in writing, and that it would delay the filing of intervenor evidence and subsequent procedural steps until a decision on the motion was rendered. The Board also set out the timeline for the filing of submissions on the motion.

The Board issued its Decision on Motion and Procedural Order No. 3 on July 29, 2014. The decision on the motion dismissed TransAlta's motion and scheduled dates for the filing intervenor evidence and argument of Union and intervenors.

On August 7, 2014, intervenor evidence was filed by TransCanada Energy Ltd. ("TCE") and Natural Resource Gas Limited ("NRG"). Board staff filed interrogatories related to TCE's evidence on August 11, 2014 and TCE provided responses to those interrogatories on August 21, 2014.

Union filed its argument-in-chief with the Board on September 2, 2014. Board staff and intervenors filed their submissions with the Board on September 12, 2014. The Board received submissions from the following parties: Board staff, the AMCO Group ("AMCO"), the Association of Power Producers of Ontario ("APPrO"), the Building Owners and Managers Association ("BOMA"), the Canadian Manufacturers and Exporters ("CME"), the Industrial Gas Users Association ("IGUA"), the London Property Management Association ("LPMA"), NRG, the Ontario Greenhouse Vegetable Growers ("OGVG"), and TCE. Union filed its reply submission on September 19, 2014.

TAB 2

uniongas
A Spectra Energy Company

M. Richard Birmingham, CPA, CA
Vice President
Regulatory, Lands and Public Affairs

April 3, 2014

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

Dear Ms. Walli:

This letter is to advise you of some changes that Union is prepared to make respecting certain charges to direct purchase customers who did not meet their contractual obligations during the month of February, 2014.

Consistent with the contractual terms and conditions, Union invoices Rate T1/T2 Supplementary Inventory, and Rate 25 Unauthorized Overrun Gas Supply Commodity, using the highest spot cost at Dawn in the month it was used. Should a higher spot cost occur in the following month, Union will re-bill the Rate T1/T2 Supplementary Inventory, and the Rate 25 Unauthorized Overrun Gas Supply Commodity, on the next monthly invoice using that higher spot cost. Specifically, the terms of the contracts provide that the cost of gas shall be the higher of the daily spot cost at Dawn in the month of or the month following the month in which gas is sold and shall not be less than Union's approved weighted average cost of gas.

To date, those customers who have been subject to either a February Supplementary Inventory charge or a Rate 25 Unauthorized Overrun Gas Supply Commodity charge have been billed at a spot cost of $78.73/GJ. This spot cost is the highest spot cost at Dawn during February.

Union is prepared to make two changes in recognition of the exceptional weather conditions in 2014, and despite the fact that over 95% of Union's customers met their contractual obligations.

The first change is to limit the billing of the above charges to the highest spot cost in the month in which gas was sold. That is, the highest spot cost in the month following the month in which gas was sold will not be considered.

The second change is to reduce the above charges from $78.73/GJ to $50.50/GJ subject to the conditions described below. This reduced spot cost represents the second-highest spot cost at Dawn during the month of February. The reduced spot cost of $50.50/GJ continues to meet all of Union's objectives, including an appropriate financial incentive to customers to adhere to the contract terms and the protection of Union's system, and is made without prejudice to all rights and privileges as provided in the contract terms and conditions.

The above changes would be also be applied to Bundled T-service customers who did not meet their contractual balancing obligations.

Union also notes that it is willing to apply a similar approach to T1/T2, Rate 25, and Bundled T-service customers who did not meet their March contractual balancing obligations. That is, Union would limit the billing of the charges to the highest spot cost in the month of March, and would use the second-highest spot cost at Dawn during the month of March. This latter change would reduce the charges from $78.73/GJ to $52.04/GJ, and would be subject to the above conditions.

Should the Board have no objection to the above changes, Union anticipates being able to re-bill all affected customers within a week after a response from the Board.

I would appreciate it if you would bring this letter to the attention of the Board. Please don't hesitate to contact the undersigned should you have any questions.

Yours truly,

(Original signed by)

M. Richard Birmingham

cc: Michael Millar

P. O. Box 2001, 50 Keil Drive North, Chatham, Ontario, Canada N7M 5M1 tel. 519 436 4627
Union Gas Limited

TAB 3

UNION GAS LIMITED

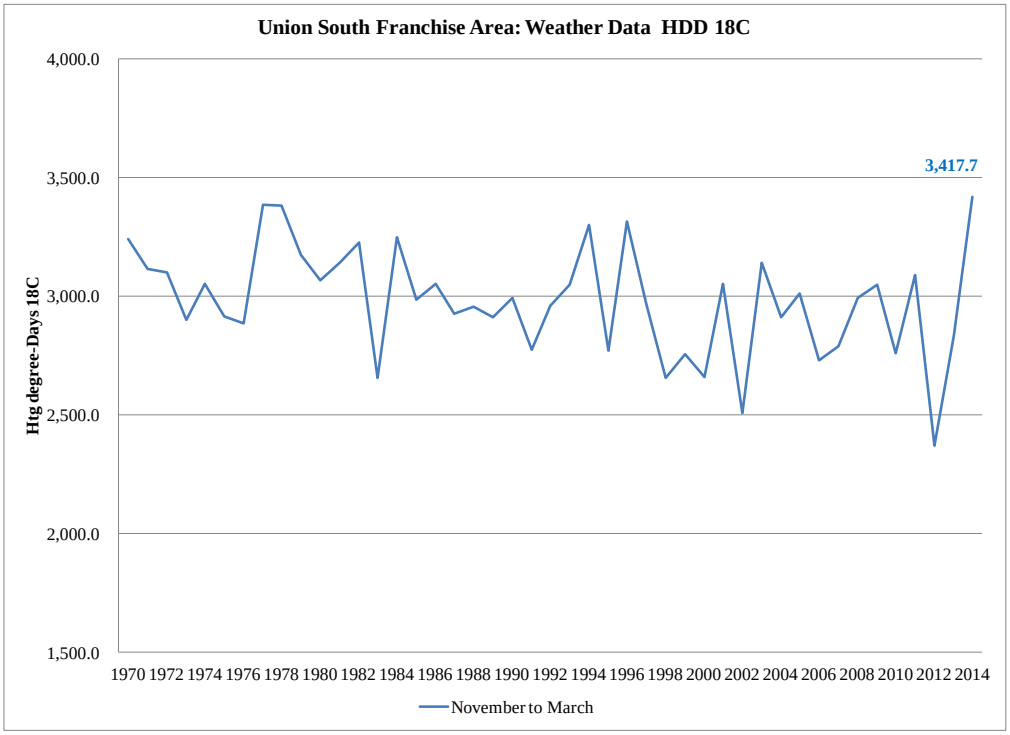
Answer to Interrogatory from
Natural Resource Gas Limited

Reference: Union letter dated April 3, 2014

On April 3, 2014, Union wrote to the Board stating that the changes in the penalty provision were "… in recognition of the exceptional weather conditions in 2014 …".What precisely were the details of the exceptional weather conditions referred to? Against what other time periods are the weather conditions referred to compared against? Does Union have any expert or other reports by internal or external persons describing the impact of the weather conditions? Does Union have any other comparison against other utilities in Canada or the United States?

Response:

The winter is from November to March of each year. The five month winter period of November 2013 to March 2014 was the coldest in Union's records for Union South, which date back to the winter of 1969/1970. Please refer to the chart below that shows the actual weather (heating degree-days below 18C) data for the five month period for Union South.



Data source: DTN Meteorology.

TAB 4

Summary of February and March 2014 Balancing Penalty Provisions- Updated

Table 1
February, 2014 Balancing Penalty Provisions

Line No.	Rate Class (a)	No. of Customers (b)	GJ (c)	Penalty Provision at $78.73 (d)=(c) x $78.73	Penalty Provision at $50.50 (e)=(c) x $50.50	Reduction (f)=(d)-(e)
1	Southern BT February Checkpoint	11	55,339	$4,356,727	$2,794,851	$1,561,876
2	Southern BT February Contract Expiri	2	2,881	$226,816	$145,503	$81,313
3	Rate 25 Unauthorized Overrun	5	2,217	$174,544	$111,971	$62,574
4	T1 Supplemental Inventory					
5	**Total**	**18**	**60,437**	**$4,758,087**	**$3,052,325**	**$1,705,763**

Table 2
March, 2014 Balancing Penalty Provisions

Line No.	Rate Class (a)	No. of Customers (b)	GJ (c)	Penalty Provision at $78.73 (d)=(c) x $78.73	Penalty Provision at $52.04 (e)=(c) x $52.04	Reduction (f)=(d)-(e)
1	Southern BT March Contract Expiries	0	0	$0	$0	$0
2	Rate 25 Unauthorized Overrun	3	1,015	$79,869	$52,794	$27,075
3	T1 Supplemental Inventory	2	54,937	$4,325,086	$2,858,922	$1,466,164
4	**Total**	**5**	**55,952**	**$4,404,955**	**$2,911,716**	**$1,493,239**

Table 3
February and March 2014 Balancing Penalty Provisions

Line No.	Rate Class (a)	No. of Customers (b)	GJ (c)	Penalty Provision at $78.73 (d)=(c) x $78.73	Penalty Provision at $50.50 or $52.04 (e)=(c) x $50.50 or $52.04 per above	Reduction (f)=(d)-(e)
1	Southern BT February Checkpoint	11	55,339	$4,356,727	$2,794,851	$1,561,876
2	Southern BT Contract Expiries	2	2,881	$226,816	$145,503	$81,313
3	Rate 25 Unauthorized Overrun	5	3,232	$254,413	$164,765	$89,649
4	T1 Supplemental Inventory	2	54,937	$4,325,086	$2,858,922	$1,466,164
5	**Total**	**20**	**116,389**	**$9,163,042**	**$5,964,041**	**$3,199,001**

TAB 5

UNION GAS LIMITED

Answer to Interrogatory from
Natural Resource Gas Limited

Reference: Penalty Provision – Generally

What other criteria and objectives does Union seek to accomplish by the penalty rate? What is meant by "appropriate financial incentive to customers"? Has there been any actual empirical testing to determine if the size of the penalty rate was an appropriate incentive to Union's customers? Is there a difference between commercial customers and NRG (a downstream utility) in this regard?

Response:

Please see the response at Exhibit B.Staff.1.

"Appropriate financial incentive to customers" means that a customer should not be in a position of making an economic decision to pay the penalty rather than paying a higher market-based price, thus putting the integrity of the utility system at risk.

Based on evidence filed by Union in RP-2003-0063, the Board approved the existing penalty rate. The penalty rate applies to all direct purchase customers.

TAB 6

PART VII - REVIEW

40. Request

40.01 Subject to **Rule 40.02**, any person may bring a motion requesting the Board to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.

40.02 A person who was not a party to the proceeding must first obtain the leave of the Board by way of a motion before it may bring a motion under **Rule 40.01**.

40.03 The notice of motion for a motion under **Rule 40.01** shall include the information required under **Rule 42**, and shall be filed and served within 20 calendar days of the date of the order or decision.

40.04 Subject to **Rule 40.05**, a motion brought under **Rule 40.01** may also include a request to stay the order or decision pending the determination of the motion.

40.05 For greater certainty, a request to stay shall not be made where a stay is precluded by statute.

40.06 In respect of a request to stay made in accordance with **Rule 40.04**, the Board may order that the implementation of the order or decision be delayed, on conditions as it considers appropriate.

41. Board Powers

41.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

41.02 The Board may at any time, without notice or a hearing of any kind, correct a typographical error, error of calculation or similar error made in its orders or decisions.

42. Motion to Review

42.01 Every notice of a motion made under **Rule 40.01**, in addition to the requirements under **Rule 8.02**, shall:

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

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

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

(b) if required, and subject to **Rule 40**, request a stay of the implementation of the order or decision or any part pending the determination of the motion.

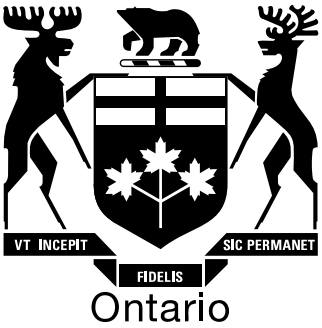
43. Determinations

43.01 In respect of a motion brought under **Rule 40.01**, the Board may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits.

TAB 7

Ontario Energy Board

Commission de l'Énergie de l'Ontario



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

MOTIONS TO REVIEW THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION

DECISION WITH REASONS

May 22, 2007

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

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

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

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

BEFORE: Pamela Nowina
Vice Chair, Presiding Member

Paul Vlahos
Member

Cathy Spoel
Member

DECISION WITH REASONS

May 22, 2007

EXECUTIVE SUMMARY

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

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

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

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

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

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

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Section A: Introduction

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

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

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

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

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

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

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

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

The NGEIR Decision

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

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

2) Storage regulation.

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

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

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

Kitchener

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

APPrO

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

IGUA/CCC/VECC

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

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

Organization of the Decision

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

The sections of this Decision are:

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

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

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

Section B: Board Jurisdiction to Hear the Motions

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

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

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

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

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

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

(i) error in fact;

(ii) change in circumstances;

(iii) new facts that have arisen;

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

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

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

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

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

> (a) set out the grounds for the motion that raise a question as to the correctness of the order or decision, which grounds may include:
>
> (i) error of law or jurisdiction, including a breach of natural justice;
>
> (ii) error in fact;
>
> (iii) a change in circumstances;
>
> (iv) new facts that have arisen;
>
> (v) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time;
>
> (vi) an important matter of principle that has been raised by the order or decision;
>
> (b) request a delay in the implementation of the order or decision, or any part pending the determination of the motion, if required, …

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

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

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

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

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

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

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

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

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

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

Findings

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

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

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

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

- The right to counsel (s 10)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> 25.0.1 A tribunal has the power to determine its own procedure and practices and may for that purpose,
>
> (a) make orders with respect to the procedures and practices that apply in any particular proceeding; and
>
> (b) establish rules under section 25.1

> 25.1 (1) A tribunal may make rules governing the practice and procedure before it.
>
> (2) The rules may be of general or particular application.
>
> (3) The rules shall be consistent with this Act and with the other Acts to which they relate.
>
> (4) The tribunal shall make the rules available to the public in English and in French.
>
> (5) Rules adopted under this section are not regulations as defined in the *Regulations Act*.
>
> (6) The power conferred by this section is in addition to any other power to adopt rules that the tribunal may have under another Act.

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

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

The Board's Rules

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

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

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

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

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

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

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

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

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

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

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

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

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

Section C: Threshold Test

Section 45.01 of the Board's Rules provides that:

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

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

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

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

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

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

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

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

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

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

Findings

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

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

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

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

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

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

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

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

Section D: Board Process

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

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

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

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

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

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

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

Examples of the alleged behaviour objected to by IGUA include:

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

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

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

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

The other parties largely supported the position of Board Staff.

Findings

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

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

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

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

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

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

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

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

Section 21 of the OEB Act provides that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

natural justice against the NGEIR hearing panel itself.

Section E: Board Jurisdiction under Section 29

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

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

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

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

IGUA also alleged that:

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

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

Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Section F: Status Quo

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

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

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

Findings

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

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

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

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

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

> Currently, that premium is shared between utility ratepayers and utility shareholders. Under the utilities'' proposals for forbearance, the premium would be retained by the shareholders. This would result in significant transfer of funds in the case of Union (2007 estimate is $44.5 million); less so in the case of Enbridge (2007 estimate is $5 million to $6 million). The intervenors in general rejects these proposals and, as a result, opposed forbearance.

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

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

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

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

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

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

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

Section G: Onus

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

Findings

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

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

Section H: Competition in the Secondary Market

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

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

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

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

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

Findings

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

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

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

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

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

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

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

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

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

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

Section I: Harm to Ratepayers

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

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

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

Findings

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

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

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

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

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

Section J: Union's 100 PJ Cap

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

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

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

> The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs. The Board has determined that Union should be required to reserve 100 PJ (approximately 95 Bcf) of space at cost-based rates for in-franchise customers. This compares with Union's estimate of 2007 in-franchise needs of 92 PJ (87 Bcf). At an annual growth rate of 0.5% each year, which Union claims is the growth rate since 2000, in-franchise needs would not reach 100 PJ until 2024. The limit would be reached in 2016 if the annual growth is 1%; at a very annual high growth rate of 2% per annum, the 100 PJ limit would be reached in 2012.
>
> The 100 PJ (95 Bcf) amount is the capacity that Union must ensure is available to in-franchise customers if they need it. Union should continue to charge in-franchise customers based on the amount of space required in any year. If Union's in-franchise customers require less than 95 Bcf in any year, as measured by Union's standard allocation methodology, the

> cost-based rates should be based on that amount, not on the full 95 Bcf reserved for their future use. Union will have the flexibility to market the difference between the total amount needed and the 95 Bcf reserve amount.

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

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

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

Page 7 of the CCC/VECC factum states:

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

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

Findings

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

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

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

> The Board panel concludes that its determination that the storage market is competitive requires it to clearly delineate the portion of Union's storage business that will be exempt from rate regulation. Retaining a perpetual call on all of Union's current capacity for future in-franchise needs is not consistent with forbearance. As evidenced by the arguments from GMi and Nexen, two major participants in the ex-franchise market, retaining such a call is likely to create uncertainty in the ex-franchise market that is not conducive to the continued growth and development of Dawn as a major market centre.
>
> The Board concludes that it would be inappropriate, however, to freeze the in-franchise allocation at the level proposed by Union. Union's proposal implies that a distributor with an obligation to serve would be prepared to own, or to have under contract, only the amount of storage needed to serve in-franchise customers for just the next year. In the Board's view, it is appropriate to allow for some additional growth in in-

> franchise needs when determining the "utility asset" portion of Union's current capacity.
>
> The Board acknowledges that there is no single, completely objective way to decide how much should be reserved for future in-franchise needs."

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

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

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

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

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

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

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

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

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

The Board therefore finds that this is a reviewable matter.

Section K: Earnings Sharing

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

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

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

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

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

Findings

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The NGEIR Decision stated:

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

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

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

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

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

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

Findings

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

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

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

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

The Board further noted:

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

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

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

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

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

Section M: Aggregate Excess Method of Allocating Storage

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

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

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

Findings

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

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

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

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

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

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

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

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

The NGEIR Decision also states:

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

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

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

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

Section N: Orders

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

The Board Orders That:

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

Section O: Cost Awards

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

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

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

DATED at Toronto, May 22, 2007

Original signed by

_____

Pamela Nowina
Presiding Member and Vice Chair

Original signed by

_____

Paul Vlahos
Member

Original signed by

_____

Cathy Spoel
Member

TAB 8

CITATION: Corporation of the Municipality of Grey Highlands v. Plateau Wind Inc., 2012 ONSC 1001
DIVISIONAL COURT FILE NO.: 463/11
DATE: 20120209

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEDERMAN, SWINTON AND HARVISON YOUNG JJ.

BETWEEN:	
THE CORPORATION OF THE MUNICIPALITY OF GREY HIGHLANDS Appellant	*Michael M. Miller*, for the Appellant
– and –	
PLATEAU WIND INC. and ONTARIO ENERGY BOARD Respondents	*John Terry* and *Alexander C. W. Smith*, for the Respondent, Plateau Wind Inc. *Michael D. Schafler* and *Kathleen Burke*, for the Respondent, Ontario Energy Board
	HEARD at Toronto: February 9, 2012

SWINTON J. (ORALLY)

[1] The Corporation of the Municipality of Grey Highlands ("the Municipality") appeals the decision of the Ontario Energy Board ("the Board") dated April 21, 2011, in which the Board declined to review a previous decision dated January 12, 2011. In the original decision the Board had held that Plateau Wind Inc. is a "distributor" under s.41 of the *Electricity Act, 1998,*

S.O. 1998, c. 15, Sched. A, and therefore Plateau was entitled to build distribution facilities on the Municipality's road allowances.

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

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

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

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

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

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

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

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

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

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

LEDERMAN J.

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

SWINTON J.

LEDERMAN J.

HARVISON YOUNG J.

Date of Reasons for Judgment: February 9, 2012
Date of Release: February 23, 2012

CITATION: Corporation of the Municipality of Grey Highlands v. Plateau Wind Inc., 2012 ONSC 1001
DIVISIONAL COURT FILE NO.: 463/11
DATE: 20120209

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

LEDERMAN, SWINTON AND HARVISON YOUNG JJ.

BETWEEN:

THE CORPORATION OF THE MUNICIPALITY OF GREY HIGHLANDS

Appellant

– and –

PLATEAU WIND INC. and THE ONTARIO ENERGY BOARD

Respondents

ORAL REASONS FOR JUDGMENT

SWINTON J.

Date of Reasons for Judgment: February 9, 2012

Date of Release: February 23, 2012

TAB 9

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2014-0145

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

AND IN THE MATTER OF an application by Union Gas Limited for an order or orders clearing certain non-commodity related deferral accounts;

AND IN THE MATTER OF an application by Union Gas Limited for an order approving a deferral account to capture variances between balances approved for disposition and amounts actually refunded/recovered.

Before: Marika Hare
Presiding Member

Ellen Fry
Member

DECISION AND ORDER
October 30, 2014

Introduction

Union Gas Limited ("Union") filed an application dated May 2, 2014 with the Ontario Energy Board (the "Board") under section 36 of the *Ontario Energy Board Act, 1998*, S.O. c.15, Schedule B (the "Act"), for an order of the Board approving the final disposition of 2013 year-end deferral account balances (the "Application"). The Application also requested the approval of a new Deferral Clearing Variance Account (Account No. 179-132).

The Board granted intervenor status to the Building Owners and Managers Association ("BOMA"), the Canadian Manufacturers and Exporters ("CME"), the Consumers Council of Canada ("CCC"), the Federation of Rental-housing Providers of Ontario ("FRPO"), the Industrial Gas Users Association ("IGUA"), the City of Kitchener ("Kitchener"), the London Property Management Association ("LPMA"), the Ontario Greenhouse Vegetable Growers ("OGVG"), TransCanada Energy Ltd. ("TCE"), TransCanada PipeLines Ltd. ("TransCanada"), and the Vulnerable Energy Consumers Coalition ("VECC"). The Board also determined that BOMA, CME, CCC, FRPO, IGUA, LPMA, OGVG and VECC will be eligible to apply for an award of costs under the Board's *Practice Direction on Cost Awards.*

Intervenors and Board staff filed interrogatories on July 3, 2014 and Union responded to the interrogatories on July 17, 2014. In responding to the interrogatories, Union identified a number of necessary updates it considered appropriate to make to the Application. Union filed an updated Application on July 23, 2014.

A Settlement Conference was held on August 7, 2014. Union filed a proposed Settlement Agreement on August 22, 2014. BOMA, CME, Kitchener, FRPO, IGUA, LPMA, OGVG, TransCanada and VECC were parties to the Settlement Proposal. Board staff filed a letter dated August 27, 2014 stating that Board staff did not oppose the proposed Settlement Agreement.

The Board held an oral hearing on September 3 and 4, 2013, which covered some, but not all, issues in this proceeding. The following intervenors participated in the hearing: CME, FRPO, IGUA, LPMA, and OGVG. At the hearing, the Board accepted the proposed Settlement Agreement, with a minor revision to reflect a clarification requested by the Board.[1] The proposed Settlement Agreement did not include agreement on the following four items, which were the subject of the oral hearing:

1) Union South Bundled Direct Purchase Load Balancing Costs (Spot Gas Variance Account)
2) Unaccounted For Gas ("UFG") Price Variance (Spot Gas Variance Account)
3) Average Use Per Customer Deferral Account
4) Allocation of Checkpoint Balancing Penalties

Union provided its argument-in-chief at the oral hearing. The Board subsequently received written submissions from Board staff, BOMA, CME, FRPO / OGVG, IGUA, LPMA, and VECC and a written reply submission from Union.

[1] The revision was reflected in the Updated Settlement Proposal filed on September 5, 2014.

1) Union South Bundled Direct Purchase – Load Balancing Costs (Spot Gas Variance Account)

Background

Union retains load balancing obligations for South bundled direct purchase customers associated with variances relative to the February 28 checkpoint[2] (for variances that occur after the establishment of the checkpoint) and March weather and consumption variances. The purpose of Union's load balancing obligations is to ensure that there is sufficient gas in storage at March 31 in order to maintain system integrity. Union, in some cases, will require incremental spot gas purchases to load balance for these customers.

In the winter of 2014, which was colder than normal, Union purchased 0.8 PJs of incremental gas in order to meet its load balancing obligations related to its South bundled direct purchase customers. The incremental gas purchased by Union and consumed by South bundled direct purchase customers in February and March 2014 is returned to Union by direct purchase customers in the summer (prior to the contractual year-end).

The balance in the Spot Gas Variance Account associated with the 0.8 PJs of spot gas purchased for the South bundled direct purchase customers is $1.801 million. The load balancing costs associated with the 0.8PJs of incremental gas purchased are $1.954 million. The load balancing costs were calculated by applying the winter/summer price differential to the 0.8 PJs of gas purchased.

Union proposed to allocate the load balancing costs ($1.954 million) associated with the 0.8PJs of incremental gas purchased to the South bundled direct purchase customers that were below their planned Banked Gas Account balances as of March 31, 2014. Union proposed to allocate the credit balance of $0.153 million to Union South sales service customers. The $0.153 million credit arises as a result of the difference between the load balancing costs (which are calculated based on the winter/summer price differential) and the variance account impact of the spot gas purchase.[3]

There are three questions that the Board will make findings on with respect to this issue: (i) whether Union is permitted to recover the load balancing costs; (ii) if recovery is permitted, whether it should be addressed in this proceeding or in Union's 2014 non-commodity deferral account proceeding; and (iii) the appropriate allocation of these costs.

[2] The February 28 checkpoint is the deadline whereby a South bundled direct purchase customer must have delivered incremental gas to Union if it is short of gas relative to its planned Banked Gas Account balance.
[3] Union Revised Application, EB-2014-0145, July 23, 2014 at Exhibit A / Tab 1 / pp. 4-7.

Board Findings

(i) Permissibility of Cost Recovery

FRPO / OGVG submitted that Union could be held responsible for the load balancing costs because a portion of the 0.8 PJs of gas that Union purchased for its South bundled direct purchase customers resulted from Union under-forecasting the balancing requirements for direct purchase customers at the February checkpoint. In addition, FRPO / OGVG submitted that because Union did not give customers an opportunity (through the provision of notice) to take action and purchase gas to be in balance at March 31, Union should be disallowed recovery of the load balancing costs.

In addition, cross-examination raised the issue of whether Union's system integrity inventory, rather than incremental spot gas purchases, should have been used to manage the consumption variances for Union's South bundled direct purchase customers.

Other intervenors and Board staff accepted the premise that Union should be permitted to recover the load balancing costs. These parties argued that Union incurred real incremental costs to load balance for South bundled direct purchase customers, therefore, the Board should approve cost recovery.

The Board does not agree with the FRPO / OGVG arguments on this question. The evidence does not indicate that Union's forecasting of the balancing requirements at the February checkpoint was deficient. Furthermore, the evidence does not provide support for the theory that direct purchasers, if given notice, would necessarily have taken action that decreased the load balancing requirements.

The Board also does not consider it appropriate that Union should have used its system integrity inventory to cover its load balancing obligations for its South bundled direct purchase customers. The Board accepts Union's evidence that system integrity inventory is intended to cover "unforecasted or expected variances" and that the "incremental consumption of the direct purchase customers was not unforecasted or unforeseen"[4] as at a certain point it was obvious to Union that additional gas would need to be purchased in order for Union to fulfill its load balancing obligations for this group of customers.

[4] Oral Hearing Transcripts, EB-2014-0145, Vol. 1 at p. 36.

Accordingly, the Board finds that Union should be permitted to recover the load balancing costs.

(ii) Timing of Cost Recovery

All intervenors and Board staff agreed with Union's proposal to deal with the load balancing costs in this proceeding. The Board also agrees. These are commodity-related costs that would normally be dealt with through the QRAM process. However, in this instance the cost allocation issue being addressed is more complex than is normally intended to be dealt with in the QRAM process.

(iii) Cost Allocation

As indicated above, Union proposed to allocate the load balancing costs ($1.954 million) associated with the 0.8PJs of incremental gas purchased to the South bundled direct purchase customers that were below their planned Banked Gas Account balances as of March 31, 2014. Union proposed to allocate the credit balance of $0.153 million to Union South sales service customers. The $0.153 million credit arises as a result of the difference between the load balancing costs (which are calculated based on the winter/summer price differential) and the variance account impact of the spot gas purchase. LPMA and VECC agreed with Union's proposal.

Union submitted that its proposal is based on cost causality. In its view, the South bundled direct purchase customers that did not meet their required Banked Gas Account balances as of March 31 were the customers that caused Union to buy the spot gas at issue here. Accordingly, in Union's view these customers should bear the cost.

Board staff submitted that the load balancing cost of $1.954 million should be recovered from all Union South bundled direct purchase customers (not just those below their Banked Gas Account balances on March 31) and that the associated $0.153 million credit should be allocated to Union South sales service.

In support of its argument, Board staff referred to the evidence that South bundled direct purchase customers do not have a contractual obligation to balance on March 31, and were not given advance notice by Union that the planned Banked Gas Account balances as of March 31 would be used to determine the allocation of the load balancing costs. Board staff argued that because there is no March 31 balancing checkpoint in Union South the situation is analogous to that in Union North, where load balancing costs are allocated to all direct purchase customers (as part of the allocation to all Northern customers) based on overall volume.

CME, IGUA and BOMA agreed with Board staff that costs should be allocated to all South bundled direct purchase customers. However, CME submitted that the costs allocated should be limited to the actual cost of $1.801 million and that the proposed credit of $0.153 million to sales service customers should not be approved. BOMA indicated that it takes no position on the allocation of the proposed $0.153 million credit.

Union submitted that its proposal differs from the cost allocation applicable to Union North, where load balancing for sales service and bundled direct purchase customers is managed on an aggregate basis, because in Union North there are no balancing checkpoints to determine which direct purchase customers contributed to the load balancing costs.

Regarding CME's argument concerning the amount to be allocated, the Board finds that the appropriate amount is $1.954 million as proposed by Union rather than $1.801 million as proposed by CME. The Board also finds it appropriate that sales service customers should receive an associated $0.153 million credit. Applying the winter/summer price differential to the cost of the gas purchased ensures that sales service customers do not bear the costs related to relatively more expensive incremental winter purchases.

The Board finds that the spot gas at issue was purchased to meet the needs of Union South bundled direct purchase customers who were below their planned Banked Gas Account balances as of March 31. It is true that these customers did not have a contractual obligation to meet these balances as of March 31 and that Union did not give notice that March 31 balances would be used for the allocation of load balancing costs. However, the Board is of the view that the principle of cost causality makes it appropriate to allocate the load balancing costs to this group of Union South bundled direct purchase customers.

Therefore, the Board finds that, in accordance with the principle of cost causality, Union South direct purchase customers that were below their planned Banked Gas Account balances as of March 31 should be allocated the load balancing costs of $1.954 million. The Board also finds that the proposed allocation of the associated $0.153 million credit to sales service customers is appropriate.

Unaccounted for Gas ("UFG") Price Variance (Spot Gas Variance Account)

Background

Union purchased 2.1 PJs of incremental gas for delivery in March because of actual UFG variances experienced for the 2014 winter. Union noted that if it had not purchased the incremental supply there would not have been adequate gas in storage to meet customer demands in March and April, 2014.

Union proposed to allocate the price variance associated with UFG (a $4.729 million debit) to Union South sales service customers consistent with historical practice. This historical practice has resulted in a benefit to Union South sales service customers over the past six years (averaging $5.5 million per year).[5] The issue for the Board to determine is the appropriate allocation of this price variance.

Board Findings

Union submitted that the price variance should continue to be allocated to Union South sales service customers. It submitted that to allocate it to all Union South customers would be difficult because it would require a change in Union's methodology and processes. IGUA and VECC supported Union's proposed allocation. IGUA also submitted that, on a going forward basis, it has no objection to a review of how the UFG price variances should be allocated.

Other intervenors and Board staff submitted that the price variance should be allocated to all Union South customers (with the exception of those customers that supply their own fuel), in accordance with the principle of cost causality.

Union testified that the costs associated with UFG are recovered in delivery rates from all Union South customers other than those with customer-supplied fuel. The Board finds that cost causality requires the price variances associated with UFG to be allocated in the same way as the underlying costs, both in the current proceeding and going forward. Therefore, the Board finds that the UFG price variance should be allocated to sales service customers and the direct purchase customers for which Union provides fuel.

The Board notes that although this change in allocation entails a debit for direct purchase customers that did not share in past benefits, the direct purchase customers may benefit in future if these price variances revert to the historical credit position experienced over the past six years.

Average Use Per Customer Deferral Account

Background

The total balance in the Average Use Per Customer Deferral Account for all four general service rate classes (M1, M2, Rate 01 and Rate 10) for 2013 is a credit to customers of $11.475 million.[6]

[5] Union Revised Application, EB-2014-0145, July 23, 2014 at Exhibit A / Tab 1 / p. 9.
[6] Union Revised Application, EB-2014-0145, July 23, 2014 at Exhibit A / Tab 1 / p. 36.

The Average Use Per Customer Deferral Account records the variance resulting from the difference between the actual average gas use by Union's customers and the forecast average use included in delivery rates. The issue before the Board in this proceeding is whether, in addition to delivery rates, storage revenues and costs should also be included when calculating the balance in the Average Use Deferral Account.

Board Findings

All intervenors and Board staff agreed with Union that, as currently worded, the Accounting Order for the Average Use Per Customer Deferral Account does not include storage related revenues and costs.

However, Board staff submitted that the fundamental purpose of this Deferral Account is to ensure that neither customers nor Union's shareholder are harmed by differences between forecast and actual average gas use by the general service rate classes. Board staff submitted that variances in average use can impact storage-related revenues and costs just as they can impact delivery-related revenues and costs. Accordingly, Board staff submitted that the Accounting Order for the Average Use Per Customer Deferral Account should be amended so that storage-related revenues and costs are included going forward, effective in 2014. Intervenors that made submissions on this issue generally supported Board staff's position.

Union submitted that as part of its Board approved Incentive Rate Mechanism for 2014-2018 a Normalized Average Consumption ("NAC") Deferral Account was established to replace the Average Use Per Customer Deferral Account and to capture the variance resulting from the difference between forecast NAC included in rates and actual NAC for general service customers. Union submitted that the NAC Deferral Account already contemplates the inclusion of storage related revenues and costs for general service customers.

The Board agrees with the parties and Union that storage related revenues and costs are not included in the Accounting Order for the Average Use Per Customer Deferral Account, and accordingly should not be included in the calculation of the balance in this account for 2013. The relevant portion of the accounting order for this deferral account describes it as follows:

> To record as a debit (credit) in Deferral Account No. 179-118 the margin variance resulting from the difference between the actual rate of decline in use-per-customer and forecast rate of decline in use-per-customer included in ***gas delivery rates*** as approved by the Board in 2013.[7] [Italics and bold added]

[7] Decision and Rate Order, EB-2011-0210, January 17, 2013, at Appendix G.

Accordingly, the Board approves disposition of the 2013 balance in the Average Use Per Customer Deferral Account as filed.

The Board also agrees with Union that, starting in 2014, the NAC Deferral Account, which replaces the Average Use Per Customer Deferral Account, will include storage related revenues and costs for general service rate classes. Accordingly, there is no need for the Board to make a finding on whether storage revenues and costs should be included in the Average Use Per Customer Deferral Account going forward.

Allocation of Checkpoint Balancing Penalties

Background

In the EB-2014-0154 proceeding, Union requested that, on a one-time basis, the penalty charges applied for Rate T1 / T2 Supplementary Inventory and Rate 25 Unauthorized Overrun Gas Commodity in February and March, 2014 be reduced. In addition, Union requested that the penalty charge applied to bundled T-Service customers that did not meet their contractual balancing obligations in February 2014 be reduced. The quantum of these penalty charges was the subject of the Board's EB-2014-0154 proceeding.

The issue in this proceeding is how to allocate the amount that Union collects from these penalty charges.

Union proposed to allocate the amount collected from these penalty charges to Union South sales service customers only.

Board Findings

Union submitted that the amount paid in penalty charges should be allocated only to sales service customers because it was their gas that was used to balance for the direct purchase customers that failed to meet their contractual obligations. Union submitted that direct purchase customers, even those that met their contractual obligations, should not share in the allocation of the penalty amount because they did not contribute to the management of customers' failures to meet their obligations.

Board staff, LPMA, and VECC supported Union's proposal. Board staff submitted that meeting contractual obligations is a duty and accordingly does not warrant a reward. Board staff also submitted that allocating any credit amount from the penalty charges to direct purchase customers who had not met their contractual obligations would effectively reduce the price of the penalty charges, which would not be appropriate.

CME, BOMA, FRPO / OGVG, and IGUA submitted that sales service customers should be allocated an amount that reflects the actual cost of gas used to cover the direct purchase customers' defaults related to their contractual obligations.

CME argued that the checkpoint balancing revenues were realized by Union through the performance of its function as the system operator for direct purchase customers. On that basis, CME submitted that the excess penalty amount (i.e. the margin over the actual cost of gas) should be allocated to all Union South bundled direct purchase customers.

BOMA argued that the excess penalty amount should be allocated to both sales service and compliant direct purchase customers on a pro rata basis.

FRPO / OGVG argued that Union's position that sales service customers' gas was used to balance for the direct purchase customers that failed to meet their contractual obligations is not correct. FRPO / OGVG submitted that this gas transfer was only an accounting transaction. FRPO / OGVG submitted that the excess penalty amount should be used to offset the load balancing costs for Union's South bundled direct purchase customers and the remainder should be allocated to all bundled customers.

IGUA submitted that the excess penalty amount should be used to offset the UFG price variance to sales service customers.

The Board agrees with the submissions of Union and the parties that supported Union's proposal on this issue, because the Board is of the view that it was sales service customers' gas that was used to balance for the direct purchase customers that failed to meet their contractual obligations. Accordingly, the Board finds that the amount paid in penalty charges should be allocated to sales service customers.

Implementation

The Board directs Union to file a Draft Rate Order which reflects the Board's findings in this Decision and Order. The Board will provide Board staff and intervenors an opportunity to comment on the Draft Rate Order. Union will also be given the opportunity to respond to the comments of Board staff and intervenors.

Once the Draft Rate Order has been filed and all parties have had the opportunity to comment on it, the Board will issue a subsequent Decision and Rate Order.

The Board asks Union, in its Draft Rate Order, to make a proposal regarding when the rate impact arising from this Decision can be implemented. The Board is of the view that the implementation of this decision should occur as soon as possible.

The Board notes that the process for cost claims will also be set out in the subsequent Decision and Rate Order.

THE BOARD ORDERS THAT:

1. Union shall file a Draft Rate Order reflecting the Board's findings in this Decision on, or before, November 13, 2014.

2. Board staff and intervenors who wish to file comments on the Draft Rate Order shall do so on, or before, November 20, 2014.

3. Union shall file responses to the comments of Board staff and intervenors on, or before, November 27, 2014.

All filings to the Board must quote file number **EB-2014-0145**, be made electronically through the Board's web portal at www.pes.ontarioenergyboard.ca/eservice in searchable / unrestricted PDF format. Two paper copies must also be filed at the Board's address provided below. Filings must clearly state the sender's name, postal address, telephone number, fax number and e-mail address.

All filings shall use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca/OEB/Industry. If the web portal is not available, parties may email their documents to the address below.

For all electronic correspondence and materials related to this proceeding, parties must include in their distribution lists the Case Manager, Lawrie Gluck at Lawrie.Gluck@ontarioenergyboard.ca and Senior Legal Counsel, Michael Millar at Michael.Millar@ontarioenergyboard.ca.

All communications should be directed to the attention of the Board Secretary and be received no later than 4:45 p.m. on the required date.

ADDRESS
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DATED at Toronto, October 30, 2014

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary