

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

AND IN THE MATTER OF an Application by Union Gas Limited for an order or orders amending or varying the rate or rates charged to customers as of July 1, 2008.

AND IN THE MATTER OF an Application by Union Gas Limited for an order or orders amending or varying the rate or rates charged to customers as of July 1, 2007.

AND IN THE MATTER OF Rules 7.01 and 42-45 of the Board's Rules of Practice and Procedure.

NOTICE OF MOTION

THE MOVING PARTY, Union Gas Limited (“Union”), will make a motion before the Ontario Energy Board (the “Board”) at a date, time and place to be fixed by the Board.

THE MOTION IS FOR:

1. A review of the Board's decision in EB-2008-0034 (the “2007 Deferral Decision”) with respect to whether Union’s 2007 Long-Term Peak Storage Services deferral account No. 179-72 (“Account 179-72”) is to be used only to record differences in actual and forecast net revenues in respect of long-term storage contracts entered into before the Board’s decision in the Natural Gas Electricity Interface Review, EB-2005-0551, (the “NGEIR Decision”) was issued on November 7, 2006.
2. If the Board concludes that the 2007 Deferral Decision was not correct, then Union requests an order varying the 2007 Deferral Decision (EB-2008-0034) to allow Union to calculate its net revenue from ex-franchise long-term storage services that is to be shared with

ratepayers until 2010 pursuant to the NGEIR Decision based solely on the difference between actual and forecast net revenues in respect of long-term storage contracts entered into before the NGEIR Decision (“Pre-NGEIR LSS Contracts”).

3. In the alternative, if the Board concludes that the 2007 Deferral Decision was correct, then Union requests:

i) a review of the Board's decision in EB-2007-0598 (the “2006 Deferral Decision”) with respect to whether Union ought to be allowed to record to Account 179-72 deferred income tax expenses of \$10.524 million as a cost of providing long-term storage services up to 2006, and

ii) an order varying the 2006 Deferral Decision (EB-2007-0598) to allow Union to deduct from Account 179-72 all costs of providing all long-term storage services to its ex-franchise customers, including the costs associated with long-term storage contracts entered into after the NGEIR Decision (“Post-NGEIR LSS Contracts”) and also including Union’s 2006 deferred income tax expenses of \$10.524 million, for the purpose of calculating Union’s balance for Account 179-72.

4. An ordering staying that portion of the 2007 Deferral Decision that directs Union to recalculate the 2007 balance in Account 179-72 pending the final resolution of this motion.

5. To the extent necessary, an order extending the time to bring a motion for review of the 2006 Deferral Decision.

6. Such further and other relief as counsel may advise and the Board permit.

THE GROUNDS FOR THE MOTION ARE:

7. The Board's rulings in the 2007 Deferral Decision and the 2006 Deferral Decision in respect of the issues raised in this motion are inconsistent with each other, and also with the intent of the NGEIR Decision.

Background

8. The market-based prices that Union realizes on sales of storage services to ex-franchise customers generally have been higher than the cost-based rates charged to Union's in-franchise customers. Prior to the NGEIR Decision, the Board directed that most of this net revenue over cost be credited against Union's distribution rates. Union forecasted the amount of its expected net revenue (also known as margins) from its ex-franchise storage contracts for the rate year in question as part of its rates case. Of the Board approved forecast amount, 90% was included as a credit against distribution rates for the year. To the extent that actual margins varied from the forecast built into rates, Union booked the difference in deferral accounts (account 179-70 for short-term transactions and account 179-72 for long-term transactions). Prior to the NGEIR Decision, these deferral account balances were shared 75:25 in favour of distribution ratepayers.

9. In the NGEIR Decision, the Board determined that there should be a phase-out of the sharing with ratepayers. The Board stated:

For 2007, forecast margins (on long-term and short term transactions) ***now included in the determination of Union's rates*** will remain unchanged. After 2007, Union's share of long-term margins will be as follows: 2008 – 25%, 2009 – 50%, 2010 – 75%, 2011 and thereafter – 100%.

(NGEIR Decision, p. 107, emphasis added)

10. The issue which fell for determination in the 2007 Deferral Case was whether the NGEIR Decision limited the sharing during the phase-out period to solely the sharing of the long-term margins arising from the Pre-NGEIR LSS Contracts as those were the only margins included in Union's 2007 rates (as asserted by Union), or whether the NGEIR Decision requires

Union to also share with ratepayers the margins that it earns from its unregulated Post-NGEIR LSS Contracts.

11. In the 2007 Deferral Decision the Board ruled as follows:

The Board finds that the NGEIR decision does not require or permit Union to modify the method of calculating the balance in account 179-72 for 2007. The balance should equal 75% of the excess of (i) actual net revenues (on all long-term storage transactions, that is, transactions that occurred both before and after the publication of the NGEIR decision) for 2007, less (ii) the Board-approved forecast net revenue \$21.405 million.

(2007 Deferral Decision, p. 8, emphasis in original)

Union is asking the Board to review this ruling because it is inconsistent with the intent of the NGEIR decision and with the 2006 Deferral Decision.

The 2006 Deferral Decision

12. In Union's application in EB-2007-0598 for disposition of its 2006 deferral accounts, Union asked the Board to approve a debit (i.e. a charge against the ratepayers' share of Union's net revenue) to Account 179-72. The proposed debit to the 2006 account was caused by Union's recognition of deferred tax expenses which resulted from the Board's decision in NGEIR to refrain from regulating rates for storage services to Union's ex-franchise customers. The deferred tax expenses were entirely attributable to the Pre-NGEIR LSS Contracts.

13. In the 2006 Deferral Decision, the Board ruled that Union was not entitled to debit Account 179-72 by the amount of the deferred tax expenses on the basis "*that the deregulation of Union's storage assets is notionally equivalent to a divestiture, and that any liabilities associated with these assets should properly be associated with Union's newly formed ex-franchise storage service business.*" (at p. 9)

14. The Board's ruling in the 2006 Deferral Decision appears to prohibit Union from deducting all costs associated with providing deregulated storage services after the NGEIR

Decision when calculating the margin that Union is required to share with ratepayers during the phase-out period mandated in the NGEIR Decision. This ruling was based on the finding that the NGEIR Decision mandated the formation by Union of a new deregulated storage business that is separate from Union's regulated business and that the assets and liabilities of the regulated business should be accounted for separately from the assets and liabilities of the unregulated business.

15. Based on the Board's ruling in the 2006 Deferral Decision, Union absorbed the impact of all 2006 revenues and costs associated with the newly-formed deregulated business, including deferred taxes, previously capitalized costs, and other expenses that are properly matched to the unregulated storage revenues. This approach formed the basis of Union's year-end, audited financial statements.

The 2007 Deferral Decision

16. In Union's application in EB-2008-0034 for disposition of its 2007 deferral accounts, Union calculated Account 179-72 based solely on the difference between the actual margins earned from Pre-NGEIR LSS Contracts and the forecasted margins arising from the Pre-NGEIR LSS Contracts that were included in 2007 rates, and without taking into account the margins that Union earned from Post-NGEIR LSS Contracts that were not included in 2007 rates.

17. Union calculated the deferral account in this manner because Union interpreted the NGEIR Decision and the Board's 2006 Deferral Decision to mean that during the phase-out period Union was only required to share with ratepayers the long-term margins arising from the Pre-NGEIR LSS Contracts that were included in Union's 2007 rates, and that Union could retain all of the margins earned from all Post-NGEIR LSS Contracts in its deregulated business.

18. In the 2007 Deferral Decision, the Board disagreed with Union's interpretation of the NGEIR Decision. The Board found that for 2007 the NGEIR Decision requires Union to share the margins earned on all of its long-term storage transactions, including Post-NGEIR LSS

Contracts, and the Board required Union to recalculate the 2007 balance in Account 179-72 in accordance with this finding (at p. 9).

The Inconsistency Between the Deferral Decisions

19. The Board's ruling in the 2007 Deferral Decision is completely inconsistent with the Board's ruling in the 2006 Deferral case that any liabilities associated with Union's unregulated storage assets should not be applied to Account 179-72.

20. The 2006 Deferral Decision was based on the principle that the assets and liabilities of the regulated business should be accounted for separately from the assets and liabilities of the unregulated business, whereas the 2007 Deferral Decision was based on the opposite view that the earnings from the new unregulated business should be used to subsidize rates paid by customers of Union's regulated business.

21. In the 2006 Deferral Decision, the Board ruled that Union could not apply the costs associated with the unregulated storage assets to Account 179-72 in order to reduce the ratepayers' share of the net revenue earned by Union from the unregulated long-term storage service, but then in the 2007 Deferral Decision the Board ruled that the actual net revenues on all long-term storage transactions, including unregulated Post-NGEIR LSS Contracts, must be accounted for in Account 179-72.

22. Actual net revenues from the Post-NGEIR LSS Contracts cannot be calculated and applied to Account 179-72, as required by the 2007 Deferral Decision, without taking into account the costs associated with operating the unregulated storage assets, but the 2006 Deferral Decision ruled that Union is not entitled to apply costs related to the unregulated storage assets when it calculates Account 179-72. This obvious inconsistency between the two deferral decisions leaves Union with contradictory directions from the Board as to how it is to calculate the margins that are to be shared with the ratepayers during the phase-out period.

23. It would be unfair to require Union to share with ratepayers the margins earned from its unregulated Post-NGEIR LSS Contracts (as required by the 2007 Deferral Decision) while at the same time prohibiting Union from deducting from Account 179-72 all the costs of providing that unregulated service, including Union's 2006 deferred income tax expenses. Under such a scenario, Union would be in a worse financial position than it would have been under the regulatory environment prior to the NGEIR Decision because it would be required to continue to share revenue but not permitted to deduct associated costs.

Inconsistency Between the 2007 Decision and NGEIR

24. The ruling in the 2007 Deferral Decision that Union must share the net revenue from Union's new unregulated Post-NGEIR LSS Contracts is also inconsistent with the following portions of the NGEIR Decision:

- a) The Board has determined that storage space in excess of the amount made available at cost-based rates (which is to be capped at 100 PJ – see Chapter 6) can be considered a “non-utility” asset. This is the space that will support Union's long-term storage sales. **The Board finds that profits from new long-term transactions should accrue entirely to Union, not to ratepayers.** (p. 104)
- b) **The Board finds, however, that there is no basis for retaining a requirement that Union share the margins on new long-term storage transactions, that is, long-term deals executed after the Board's forbearance decision.** To continue sharing those margins with ratepayers would conflict with the Board's decisions (a) to recognize that part of Union's storage capacity constitutes a non-utility asset, and (b) to forbear from regulating the prices of ex-franchise transactions. **Union should reap the benefits and bear the risks of those new transactions.** (p. 106)
- c) At the same time, **this decision finds that there are certain storage assets that are not part of the utility rate base and finds that the return from those assets, in terms of profit on sales to ex-franchise customers, should accrue entirely to the utility and its shareholders.** Again, no claim arises under the ATCO principles. **There is no appropriation to the benefit of the ratepayer of any utility assets or for that matter any proceeds from that asset.** Accordingly, the Board finds that ATCO decision has no application to this decision. (p. 109)

25. These excerpts indicate that the intent of the NGEIR Decision was to require sharing during the phase-out period of only the long-term margins arising from the Pre-NGEIR LSS Contracts that were included in Union's 2007 rates, and it did not require Union to share the margins from its new unregulated Post-NGEIR LSS Contracts.

26. Another expressed objective in the NGEIR Decision was to avoid an abrupt change in regulated rates:

The Board recognizes that, particularly in recent years, Union's ratepayers have had a significant benefit due to sharing the bulk of the margins on long-term deals. The Board would prefer to have a smooth transition away from the status quo rather than an abrupt change in rates. (at p. 106)

The interpretation adopted in the 2007 Deferral Decision does not provide for a smooth transition, and instead will result in an even greater reliance in rates on the margins from long-term storage transactions in the initial years of the phase-out period, followed by a steep decline in the later years.

27. Further, in the NGEIR Decision, the Board determined that the storage market was sufficiently competitive to protect the public interest of ex-franchise storage customers, that it would refrain from regulating long-term ex-franchise storage services, and that the storage assets not needed to serve in-franchise needs would thereafter constitute "non-utility" assets for which Union's shareholder would thereafter bear the risk.

28. Despite these rulings, the 2007 Deferral Decision grants ratepayers a large share of the benefit of Union's new unregulated business until 2011. In doing so, the Board failed to consider that the NGEIR Decision fundamentally changed the nature of the assets used to provide ex-franchise storage services and that these assets are now "non-utility" assets.

29. The Board has no jurisdiction to take into account unregulated earnings from Union's unregulated assets or non-utility assets, such as the Post-NGEIR LSS Contracts, when

setting rates for Union's regulated service. To do so is inconsistent with the principles outlined in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] 1 S.C.R. 140.

30. Rules 42 - 45 of the Board's Rules of Practice and Procedure.

31. Such further and other grounds as counsel may advise and the Board may permit.

THE GROUNDS FOR THE REQUEST FOR AN EXTENSION OF TIME to seek review of the 2006 Deferral Decision are:

32. The inconsistency between the 2006 Deferral Decision and the 2007 Deferral Decision did not become apparent until the issuance of the 2007 Deferral Decision on June 3, 2008.

33. The requirement in the 2007 Deferral Decision that Union share with ratepayers the margins earned from all of its unregulated Post-NGEIR LSS contracts when calculating deferral Account 179-72, rendered unfair the ruling in the 2006 Deferral Decision that Union is not entitled to deduct the costs associated with its unregulated business from deferral Account 179-72. This element of unfairness in the 2006 Deferral Decision did not become evident until the 2007 Deferral Decision was issued.

34. Union has moved promptly to seek a review of the 2006 Deferral Decision forthwith after issuance of the 2007 Deferral Decision when the inconsistency and unfairness in the conflicting results became apparent.

35. The ruling in the 2006 Deferral Decision concerns a substantial sum of money in respect of Union's 2006 costs, and also concerns the proper method that ought to be applied by Union when it calculates the amount that must be shared with the ratepayers pursuant to the NGEIR Decision each year until 2010.

36. No party will be prejudiced by the requested extension of time.

37. Pursuant to Rule 7.01 of the Board's Rules of Practice and Procedure, the Board may extend the time for bringing a motion to review on such conditions the Board considers appropriate.

38. Such further and other grounds as counsel may advise and the Board may permit.

THE FOLLOWING EVIDENCE will be used at the hearing of the motion:

39. The record of the proceedings in EB-2008-0034 and EB-2007-0598.

40. The NGEIR Decision.

41. Such further and other evidence as counsel may advise and the Board may permit.

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AND TO: All Parties in EB-2008-0034