

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*;

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, 42, 44.01 and 45.01 of the Board's *Rules of Practice and Procedure*.

**SUBMISSIONS IN RESPONSE
INDUSTRIAL GAS USERS ASSOCIATION (IGUA)**

August 11, 2008

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Introduction.

1. In Procedural Order No. 1 herein the Board has directed parties to focus their submissions on the following issues:
 - (a) The threshold question of whether the matter should be reviewed.
 - (b) Whether all long-term storage transactions, pre and post-NGEIR, should be recorded to calculate the balance in Account 179-72.
 - (c) Whether Union should be allowed to claim a debit charge to Account 179-72 reflecting deferred income taxes related to storage services in the event that the Board concludes that the decision in EB-2008-0034 (the "*2007 Deferral Account Decision*") is correct.
2. The Board has not asked parties for submissions on Union's request for extension of time within which to bring a motion for review of the EB-2007-0598 decision dated August 17, 2007 regarding treatment of deferred taxes associated with Union's newly deregulated ex-franchise storage business (the "*2006 Deferral Account Decision*"). IGUA therefore assumes that the Board does not, in the circumstances, view the passage of time since the *2006 Deferral Account Decision* was rendered as, in and of itself, a bar to the relief claimed by Union with respect to including a debit charge to Account 179-72 in order to reflect deferred income taxes related to storage services.

Threshold question.

3. The threshold test on a motion to review was set out in the Board's May 22, 2007 Decision with Reasons in EB-2006-0322, EB-2006-0338 and EB-2006-0340 (the "*NGEIR Review Threshold Decision*"). Union has relied on the formulation of the threshold test in the *NGEIR Review Threshold Decision* in its Argument herein¹, and asserts that the threshold test is:

Whether the grounds relied on by Union in bringing its motion for review raise a question as to the correctness of either or both of the 2006 Deferral Account

¹ Union Argument in Chief, para. 6.

Decision and the decision in EB-2008-0034 regarding inclusion of revenues from post-NGEIR ex-franchise storage contracts (the "2007 Deferral Account Decision").

4. The Board's *Rules of Practice and Procedure* (the "*Rules*") stipulate that the grounds that raise a question as to the correctness of the decision of which review is sought may include: i) an error in fact; ii) a change in circumstances; iii) new facts that have arisen; iv) facts not previously placed in evidence and not reasonably discoverable at the time.²
5. On this motion, Union has not addressed any of the 4 heads for review set out in *Rule 44*:
 - (a) Union does not allege that the Panel in *2007 Deferral Account Decision* made an error in fact.
 - (b) Union does not allege a change in circumstances since the *2007 Deferral Account Decision*.
 - (c) Union does not allege that new facts have arisen since the *2007 Deferral Account Decision*.
 - (d) Union has not introduced any new facts relevant to consideration of the *2007 Deferral Account Decision*.
6. In the *NGEIR Review Threshold Decision* the Hearing Panel determined that the Board could supplement the list of grounds set out in the Board's *Rules* "*in an appropriate case*"³. In that decision the Hearing Panel determined that the Board thus has the jurisdiction to determine issues of mixed law and fact.⁴
7. Since Union has not addressed any of the 4 heads for review set out in the *Rules*, IGUA therefore submits that the panel considering this motion for review must determine whether this is "*an appropriate case*" to supplement the list of grounds for review set out in the Board's rules.

In addressing the threshold test in its Argument Union relies on comments by the Hearing Panel in the *NGEIR Review Threshold Decision* that highlight "inconsistent findings" as

² Rule 44.01(a).

³ *NGEIR Review Threshold Decision*, page 15, first paragraph.

⁴ *NGEIR Review Threshold Decision*, page 15, second paragraph.

sufficient demonstration of an error to warrant a review.⁵

8. When Union refers to "inconsistent findings" on this motion, however, it refers to an inconsistency in the outcome of two Board decisions, rather than an inconsistency in findings of fact within one decision, or even between two decisions. It is not clear to IGUA that inconsistencies in the outcome of two Board decisions is, in and of itself, sufficient ground for review of one of the alleged inconsistent decisions.
9. In any event, Union alleges an inconsistency where there is none. As there is no inconsistency, there are no grounds for review of either of the *2007 Deferral Account Decision* or the *2006 Deferral Account Decision*.
10. Union alleges an inconsistency between:
 - (a) The finding in the *2007 Deferral Account Decision* that revenues from long term storage contracts entered into after the date of the Board's decision in EB-2005-0551, the Natural Gas Electricity Interface Review (the "*NGEIR Decision*") are to be included in deferral account 179-72, on the one hand; and
 - (b) The finding in the *2006 Deferral Account Decision* that deferred income tax expenses associated with Union's storage assets are not recoverable from ratepayers, on the other hand; and
 - (c) The finding in the *NGEIR Decision* that revenues from long term storage contracts entered into after the effective date of the *NGEIR Decision* accrued solely to the account of the shareholder, on the third hand.
11. IGUA submits that there are no necessary inconsistencies between these 3 decisions.

2006 Deferral Account Decision vs. NGEIR Decision.

12. Union itself expressly argues that the *2006 Deferral Account Decision* is entirely

⁵ Union Argument in Chief, para. 26.

consistent with the *NGEIR Decision*.⁶

2007 Deferral Account Decision vs. 2006 Deferral Account Decision.

13. IGUA submits that the *2006 Deferral Account Decision* and the *2007 Deferral Account Decision* are also consistent.
14. The findings in the *2006 Deferral Account Decision* on the deferred taxes draw an explicit distinction between the accounting issues regarding the deferred taxes and the regulatory issues regarding the deferred taxes. The *2006 Deferral Account Decision* states⁷:

The respective accounting treatments for regulated and non-regulated entities reflect the distinction of one entity having a predictable revenue stream where as [sic] the other does not. Furthermore, the CICA handbook does not consider the disposition of historic costs or who bears them in a regulatory context. This remains the purview of the regulator. [emphasis added]

15. As a matter of regulatory treatment, the *2006 Deferral Account Decision* Hearing Panel determined that the taxes associated with Union's newly deregulated storage business, including the deferred taxes, should follow the business and thus accrue to the account of the shareholder alone. In arriving at this regulatory decision, the Hearing Panel considered factors such as the decision to forebear from regulating Union's ex-franchise storage business being the regulatory equivalent of a divestiture of that business, cross-generational subsidy issues, and regulatory precedent (in this case the treatment afforded what the Hearing Panel considered to be like liabilities associated with the earlier divestiture of the ancillary services line of business).⁸
16. That is, the *2006 Deferral Account Decision* Hearing Panel determined that, regardless of the accounting implications of the deregulation of the ex-franchise storage business, the deferred taxes were not recoverable from ratepayers. In so doing, the Hearing Panel made no determinations regarding any other costs incurred by Union to provide services under storage contracts.

⁶ Union Argument in Chief, para. 37(2).

⁷ *2006 Deferral Account Decision*, page 8 bottom to page 9 top.

⁸ *2006 Deferral Account Decision*, page 9, starting at first full paragraph.

17. Union's assertion in this motion that net storage contract revenues cannot be determined without reference to deferred tax costs to provide the services associated with those revenues is, from a regulatory perspective (again as opposed to a CICA accounting perspective), incorrect. IGUA submits that the regulatory treatment of costs, including whether they are to be included in rates, is within the purview of the regulator, not a general accounting standards board, and IGUA further submits that this is what the *2006 Deferral Account Decision* Hearing Panel found.
18. In the result, there is no inconsistency between the *2007 Deferral Account Decision* including storage contract revenues in the deferral account and the *2006 Deferral Account Decision* disallowing inclusion of the deferred taxes in the deferral account.

2007 Deferral Account Decision vs. NGEIR Decision.

19. IGUA further submits that the *2007 Deferral Account Decision* is entirely consistent with, and in fact applies the determinations made, in the *NGEIR Decision*.
20. Union relies in its argument herein on the text of the *NGEIR Decision* in asserting an inconsistency between the *2007 Deferral Account Decision* and the *NGEIR Decision*. In particular, Union quotes from page 106 of the *NGEIR Decision* in asserting that the *NGEIR Decision* Hearing Panel expressly found that there is no basis for retaining a requirement that Union share margins on new storage contracts executed after the Board's forbearance decision. And it is absolutely true that this is what the *NGEIR Decision* Hearing Panel found.
21. However, Union omits to then refer to the manner in which the *NGEIR Decision* Hearing Panel determined that it would implement this finding. The relevant text is found at page 107 of the *NGEIR Decision*, following the excerpt relied upon by Union in its argument herein. At page 107 of the *NGEIR Decision* the Board states as follows:

The Board considered whether to require Union to record the margins on existing long-term contracts separately from the margins on new long-term contracts.

Under this approach, ratepayers would be credited with 90% of the margins on existing contracts for the remaining terms of those contracts. This approach conceptually has appeal but could give rise to ongoing implementation questions. for example, the Board might have to consider how contract re-negotiations or defaults by customers are to be treated. This level of complexity and potential for ongoing review is unwarranted.

The Board has concluded that it should adopt a simpler phase-out mechanism [for storage contract revenue sharing with ratepayers] that is a rough sort of "proxy" for the conceptual approach described above. The phase-out of the sharing of margins on Union's long-term storage transactions will take place over four years. The share accruing to Union will increase over that period to recognize that contracts will mature and a large part of Union's total long-term margins will be generated by new transactions. 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%." [emphasis added]

22. These passages from the *NGEIR Decision*, which follow those quoted by Union in its Argument herein but are omitted in that argument, make clear that the *NGEIR Decision* Hearing Panel simplified the transition mechanism for phasing out ratepayer sharing in storage contract revenues. While all revenues were to be included in the calculation, including those from new contracts that post-dated the *NGEIR Decision*, the shift in the storage contracts portfolio from pre-existing to new contracts over the 4 year phase out period would be recognized by the "proxy" of a step up in percentage allocation of revenues to Union's shareholder, culminating in 100% allocation to the shareholder as of 2011. That is, by 2011 all of the storage contracts should post-date the *NGEIR Decision* and thus all revenues would flow to the shareholder.
23. In the result, there no inconsistency between the 2007 *Deferral Account Decision* and the *NGEIR Decision*.

Conclusion on the threshold issue.

24. Thus even if inconsistency between decisions is sufficient ground for a review, there is in fact no inconsistency between the three decisions at issue in this instance.
25. IGUA therefore submits that Union's motion for review should be dismissed for failing to

pass the threshold test for review.

Recording of revenues from post-NGEIR storage contracts to account 179-72.

26. IGUA has argued that Union's motion for review fails at the threshold stage.
27. However, if the Board concludes that Union has passed the threshold test on its motion, it should find that revenues from post-NGEIR storage contracts should accrue to account 179-72. This is what the Board determined in the *NGEIR Decision* on which Union relies as a foundation for its positions on this motion.
28. In this respect, IGUA repeats and relies on the argument set out at paragraphs 20 through 23, above.

Debiting Account 179-72 to reflect deferred income taxes related to storage services.

29. If the Board concludes that Union has passed the threshold test on this motion, IGUA further submits that Union should not be allowed to claim a debit charge to Account 179-72 reflecting deferred income taxes related to storage services.
30. In this respect, IGUA repeats and relies on paragraphs 14 through 18, above, and the conclusion thereof that there is no inconsistency between the *2006 Deferral Account Decision* and the *2007 Deferral Account Decision*.

Fairness.

31. IGUA further submits that, contrary to Union's claim in its argument, there is no unfairness to Union's shareholder resulting from the cumulative effect of the *2006 Deferral Account Decision* and the *2007 Deferral Account Decision*. Union's complaint is that it is unfair to fix the shareholder with the costs of the deferred taxes associated with the deregulated storage business, without allowing it to retain the revenues associated with that business. Union is presumably equating inclusion of the revenues of post-NGEIR storage contracts in account 179-72, the contents of which account are to be shared with ratepayers in decreasing proportion through 2010, as removal of a portion of

those revenues from the shareholder. This is not the result of including the post-NGEIR storage contract revenues in account 179-72.

32. Under the *NGEIR Decision* phase-out mechanism, the pre and post-NGEIR storage contract revenues are pooled in the account, and then an increasing percentage of the pooled revenues accrue to the shareholder. The increasing percentage over the 4 year phase-out period was expressly intended by the *NGEIR Decision* Hearing Panel to reflect that "*over that period ...contracts will mature and a larger part of Union's total long-term margins will be generated by new transactions*"⁹. In other words, the mechanism determined by the NGEIR Decision Hearing Panel is designed precisely to recognize that the revenues generally resulting from post-NGEIR storage contracts should accrue to the shareholder, and that is the effect of application of the mechanism determined by that Hearing Panel.

Ability to calculate net revenues.

33. Union also alleges in its argument herein that an inability to include a deferred tax debit to account 179-72 will preclude Union from calculating the "net storage revenues" that it is required to include in the account. Net revenues cannot be determined, according to Union, if associated costs are not included in the determination.
34. As argued above (see paragraphs 14 through 18), Union's assertion that net storage contract revenues cannot be determined without reference to deferred tax costs is, from a regulatory perspective (as opposed to an CICA accounting perspective), incorrect. The regulatory treatment of costs, including whether they are to be included in rates, is within the purview of the regulator, and the *2006 Deferral Account Decision* Hearing Panel determined that these deferred tax costs should not, from a regulatory perspective, be considered as costs incurred in support of the legacy regulated storage business. On the basis of this determination, these costs are not properly included in calculating revenues attributable to pre-NGEIR storage contracts which are subject to sharing with ratepayers pursuant to the *NGEIR Decision* phase-out mechanism.

Basis for Union's recent storage investments.

⁹ *NGEIR Decision*, page 107, 2nd full paragraph.

35. Finally, Union argues that its intervening storage investments would not have been made had the cumulative effect of the *2006 Deferral Account Decision* and the *2007 Deferral Account Decision*, as they currently stand, been foreseeable. Union further argues that this cumulative effect is only now apparent, since release of the *2007 Deferral Account Decision*.
36. IGUA finds this assertion quite odd, given the clarity of the directions provided in the *NGEIR Decision* on the phase-out mechanism to be applied to sharing storage contract revenues with ratepayers, which directions are excerpted above (see paragraph 21). The *2007 Deferral Account Decision* should not have come as any surprise to Union.
37. Any concerns regarding inconsistency or unfairness should thus have been raised by Union following release of the *2006 Deferral Account Decision*. At that time, both the regulatory treatment of the deferred taxes as determined by the *2006 Deferral Account Decision* and the regulatory mechanism for phase out of the sharing of storage revenues with ratepayers as directed in the *NGEIR Decision* were fully and readily determinable simply by reading the two decisions.
38. However, Union did not then bring forward its concerns. Instead it proceeded with its storage expansion investment plans.
39. The *2007 Deferral Account Decision* is fully consistent with, and in fact follows the directions provided by, the *NGEIR Decision*, and Union should not now be permitted to raise complaints regarding the *2006 Deferral Account Decision* in light of these clear directions.

Permitted scope for Union's reply argument.

40. IGUA notes that Union's argument does not address, at all, the passages from the *NGEIR Decision* that articulate the precise storage contract revenue sharing phase out mechanism, and that immediately follow extensive excerpts from that same decision that Union does rely on in argument.
41. IGUA and others have relied on the subsequent passages in the *NGEIR Decision* in their responding submissions.

42. IGUA submits that the central import of these subsequent passages to the issues raised by Union on this motion was clearly and readily foreseeable, and that Union thus had both an opportunity and an obligation to address these passages in its argument in chief if it intended to address them at all. IGUA respectfully reserves the right to provide supplementary responding submissions should Union address these subsequent passages for the first time in its reply argument, and raise new issues or lines of argument in respect of these passages which would, IGUA submits, be unfair to the responding parties.

Conclusion.

43. IGUA therefore respectfully submits that the Board should dismiss Union's motion as failing to meet the threshold test for review.
44. In the alternative, should the Board determine that Union has met the threshold test, IGUA submits that there is no ambiguity, inconsistency or inequity in application by the Board of all of the *NGEIR Decision*, the *2006 Deferral Account Decision* and the *2007 Deferral Account Decision*. Union's motion should therefore be dismissed.
45. IGUA respectfully submits that, having been determined to be eligible for recovery of its reasonably incurred costs of participation in this matter, it has acted thoughtfully and responsibly in defending the interests of its members, as ratepayers entitled to a share of the storage contract revenues through 2010, in this proceeding. IGUA submits that it should be awarded 100% of its reasonably incurred costs of participation herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED:

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per:



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