



STAFF SUBMISSION

UNION GAS MOTION TO REVIEW

EB-2008-0154

AUGUST 11, 2008

Union Gas Limited (“Union”) filed an application (the “Application”) on March 4, 2008 with the Ontario Energy Board (the “Board”) seeking approval for final disposition and recovery of certain 2007 year-end deferral account balances (EB-2008-0034). On June 3, 2008, the Board issued its decision on this matter (the “2007 Deferral Account Decision”).

In the above noted proceeding Union requested disposal of the Long Term Peak Storage Services Deferral Account (Account 179-72). Union indicated that, based on its interpretation of the Natural Gas Electricity Interface Review Decision dated November 6, 2006, (“the NGEIR Decision”), it did not record net revenues from long-term storage contracts in Account 179-72 entered into after the NGEIR Decision. The Board in its 2007 Deferral Account Decision did not agree with Union’s interpretation of this matter and ordered Union to include all long-term storage transactions in calculating the balance in Account 179-72, that is, transactions that occurred both before and after the release of the NGEIR Decision. On June 23, 2008, Union filed a Motion to review the Board’s 2007 Deferral Account Decision with respect to Account 179-72.

Union has asked the Board to review the 2007 Deferral Account Decision (EB-2008-0034) on the grounds that it is inconsistent with the original NGEIR Decision (EB-2005-0551) and the 2006 Deferral Account Decision (EB-2007-0598). Union has also stated in its application that in the event that the Board finds that the 2007 Deferral Account Decision is correct, then the Board should review the 2006 Deferral Account Decision.

THRESHOLD TEST ON MOTION TO REVIEW

Board staff submits that the threshold test for a motion to review is clearly articulated in the in the Board’s decision in THE NATURAL GAS ELECTRICITY INTERFACE REVIEW DECISION, (EB-2006-0322, EB-2006-0338, EB-2006-0340)(“NGEIR”):

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.¹

Staff note that the detailing of the threshold test can assist the Board in determining the matter of threshold in this case.

The 2007 Deferral Account Decision (EB-2008-0034) is Correct

¹ From NGEIR (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, (pp. 17 & 18)

Contrary to the claim of Union in its pre-filed evidence and Argument-in-Chief, Board staff submit that the Board has correctly interpreted the NGEIR Decision with respect to sharing of long-term storage margins in the 2007 Deferral Account Decision (EB-2008-0034).

In its Argument-in-Chief Union has claimed that the panel of the 2007 Deferral Account Case disagreed with the view of the NGEIR Decision² that only long-term margins arising from Pre-NGEIR Long-term storage contracts were to be shared until 2010. Union has submitted that the Board erred in the 2007 Deferral Decision in its interpretation of the NGEIR Decision. This is clearly not the case and is evident from the panel's reasons in the 2007 Deferral Account Decision.

The Board on page 7 of the 2007 Deferral Account Decision stated:

"The Board does not agree with Union's interpretation of the NGEIR decision. The sentence on page 106 of that decision that is quoted by Union in its reply submission is not the conclusion reached by the Board on how the transition provisions of that decision should be applied. The Board did not find that Union should separately track its margins on pre- and post-NGEIR decision transactions. This is quite clear from the following sentences on page 107 of the NGEIR decision:

The Board considered whether to require Union to record the margins on existing [pre-November 7, 2006] 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 term 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 ongoing review is unwarranted.

The Board has concluded that it should adopt a simpler phase-out mechanism 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

² EB-2008-0154, Union Argument-in-Chief, June 28, 2008, page 6

will mature and a larger 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 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%.

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."

In the first paragraph noted above from the original NGEIR Decision on page 107, "The Board considered whether to require Union..... This level of complexity and potential ongoing review is unwarranted" it is evident that the Board looked at the current approach (sharing at 90:10) and considered the possibility of sharing margins on only existing contracts (pre-NGEIR) but it felt that this approach could encounter implementation issues. The Board rejected this approach stating that it is complex and would require an ongoing review.

In the second paragraph, "The Board has concluded that it should adopt a simpler phase-out mechanism.....2008 – 25%, 2009 – 50%, 2010 – 75%, 2011 and thereafter – 100%" the Board discusses the approach that it wants Union to implement. There is also a clear recognition from the Board that this is not equivalent to the conceptual approach, but is a rough proxy. It also clearly states that the share accruing to Union will increase over the phase out period to account for the fact that contracts will mature and a larger part of Union's total long-term margins will be generated by new transactions. In order to understand the intent and meaning of the NGEIR Decision, one has to read pages 106 and 107 of the NGEIR Decision in its entirety. This decision directed Union to share margins from all transactions (pre and post-NGEIR) on a declining proportion until 2010.

There is no inconsistency between the 2007 Deferral Account Decision and the original NGEIR Decision. They both convey the same message, that being the sharing of all revenues from storage contracts at a declining rate over a transition period. Board staff is unable to identify an error in the 2007 Deferral Account

Decision. The Board should consider whether the threshold test has been met since as noted in NGEIR, “there must be an identifiable error in the decision and that a review is not an opportunity for a party to re-argue the case.”³

The 2006 Deferral Account Decision (EB-2007-0598) is Correct

In the 2006 Deferral Account proceeding, Union asked the Board to approve a debit charge to Account 179-72 (The Long-Term Peak Storage Services deferral account). Union incurred a deferred tax liability as a result of the deregulation of a part of Union’s storage business in the NGEIR Decision. Canadian Generally Accepted Accounting Principles required Union to record the particular deferred tax liability. In the Board’s Decision it was ruled that Union was not entitled to debit Account 179-72 by the amount of the deferred tax liability. The Board found that deregulation of Union’s storage assets was 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 business.

Union is asking the Board to review the 2006 Deferral Account Decision in the event that the Board finds that the 2007 Deferral Account Decision is correct. Union has claimed that the two decisions are based on inconsistent and contrary interpretations of the NGEIR Decision. Union’s claim is similar in the case of these two decisions.

Union has claimed that while the 2006 Deferral Account 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, the 2007 Deferral Account Decision was based on the opposite and inconsistent view that the earnings from the new unregulated business should be used to subsidize rates of Union’s regulated business.

³ Supra, note 1 at page 18

Board staff submit that the 2006 Deferral Account Decision dealt with the discrete issue of how to treat accumulated deferred taxes given that the storage assets are no longer rate regulated. The Board's decision in this case to treat the assets and liabilities of the regulated and unregulated business separately was in no way inconsistent with the 2007 Deferral Account Decision.

Union's argument rests on the fact that ratepayers should share costs and margins from the unregulated business and this includes any deferred income taxes. In the NGEIR Decision, the sharing of revenues with ratepayers is a transitional mechanism. In other words, the accounting of all storage contracts (pre and post-NGEIR) is merely an implementation mechanism to make it simpler for Union to calculate storage revenues. The direction to share revenues from all contracts (pre and post-NGEIR) is merely a proxy of the Board decision to share revenues from pre-NGEIR contracts under the existing terms (90:10, ratepayer: shareholder). Board staff note that had the alternate proposal been implemented, ratepayers would have not shared revenues from new contracts but only pre-NGEIR contracts at a fixed proportion until 2010. In this case, the treatment of tax liabilities would have been consistent with the so-called divestiture of Union's storage assets. Therefore, if the alternate proposal is consistent with the 2006 Deferral Account Decision, the proxy of the proposal is also consistent with that Decision.

- All of which is respectfully submitted -