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August 11, 2008

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th floor
Toronto ON M4P 1E4

Dear Ms Walli

**Union Gas Limited
Motion for Review**

**Board File No.: EB-2008-0154
Our File No.: 339583-000003**

Enclosed please find the Written Argument of Canadian Manufacturers & Exporters ("CME") in response to the Motion for Review brought by Union Gas Limited ("Union") in the above-noted proceeding.

Copies have been sent to interested parties.

Yours very truly,

Peter C.P. Thompson, Q.C.

PCT\slc
enclosure

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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 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*.

**ARGUMENT OF
CANADIAN MANUFACTURERS & EXPORTERS ("CME")**

August 11, 2008

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I. INTRODUCTION

1. These are the submissions of CME in response to the Argument-in-Chief of Union Gas Limited ("Union") dated July 28, 2008.

2. Throughout this Argument, CME adopts the following defined terms in Union's Argument-in-Chief:

- (a) "2007 Deferral Decision" being the Board's June 3, 2008 Decision and Order in EB-2008-0034;
- (b) "2006 Deferral Decision" being the Board's August 17, 2007 Decision and Order in EB-2007-0598;
- (c) "NGEIR Decision" being the Board's November 7, 2006 Decision with Reasons in EB-2005-0551;
- (d) "Pre-NGEIR LSS Contracts" being long-term storage contracts entered into before the November 7, 2006 NGEIR Decision; and
- (e) "Post-NGEIR LSS Contracts" being long-term storage contracts entered into after the November 7, 2006 NGEIR Decision.

3. Additional defined terms contained in this Argument include:

- (a) "2006 Deferral Account Clearance Application" which refers to Union's April 27, 2007 Application for final disposition of and recovery of certain 2006 Year-End Deferral Account Balances and "2006 Year-End Earnings Sharing Amount; and
- (b) "2007 Deferral Account Clearance Application" which refers to Union's March 4, 2008 Application for approval of the final disposition of and recovery of certain 2007 Year-End Deferral Account Balances.

4. In its Notice of Motion dated June 23, 2008, some 20 days after the release of the 2007 Deferral Decision and more than 10 months after the release of the 2006

Deferral Decision, Union seeks a review of the 2007 Deferral Decision and, in the alternative, a review of the 2006 Deferral Decision.

5. The finding in the 2007 Deferral Decision which Union seeks to have reviewed and reversed is the finding that, during the transition period which the NGEIR Decision establishes, the utility revenues to be allocated to ratepayers include a declining share of all premiums Union realizes from long-term storage transactions.

6. If the 2007 Deferral Decision is not reversed, then the finding in the 2006 Deferral Decision which Union seeks to have reviewed and reversed for 2006 and all subsequent years, is the finding that prohibits it from charging deferred income taxes against the utility share of all long-term storage transaction revenues realized during the transition period.

7. In its Notice of Hearing and Procedural Order No. 1 dated July 14, 2008, the Board called for written submissions on “the threshold question of whether the matter should be reviewed and the merits on substantive issues”.

8. The Board’s Procedural Order directed that:

“The Arguments on substance must be restricted to two issues: (i) whether all long-term storage transactions, Pre and Post-NGEIR, should be recorded to calculate the balance in Account 179-72 (EB-2008-0034) and (ii) 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 2007 Deferral Account Decision is correct (EB-2007-0598).”

9. For reasons which follow, CME urges the Board to find that there are no reviewable errors in either the 2007 Deferral Decision or the 2006 Deferral Decision. The Decisions are neither inconsistent with one another, nor unfair as Union contends. As a result, CME submits that all long-term storage transactions, Pre and Post-NGEIR, should be recorded to calculate the balance in Account 179-72 (EB-2008-0034) and Union should not be allowed to claim a debit charge to Account 179-72 reflecting deferred taxes related to storage services.

10. These submissions on behalf of CME are intended to supplement the points of argument contained in the July 30, 2008 Submission of Schools Energy Coalition ("SEC"), and the August 1, 2008 Written Argument of the City of Kitchener ("Kitchener") which we have reviewed and support.

11. As counsel for SEC and Kitchener have pointed out in their submissions, there are impediments to the review relief Union seeks. The prohibition against re-argument should lead to a conclusion that there is no reviewable error in the 2007 Deferral Decision. Delay, and the prohibition against retroactive ratemaking, should lead to a conclusion that there is no reviewable error in the 2006 Deferral Decision.

12. While CME adopts and supports the rejection of the relief Union seeks on these grounds, the primary focus of these submissions is to demonstrate that Union's contention that the 2006 and 2007 Deferral Decisions are inconsistent with one another and are unfair, are contentions which lack merit. On the contrary, CME submits that the Decisions are entirely compatible with one another and the NGEIR Decision; and they are neither unfair nor unreasonable.

II. BACKGROUND & CONTEXT

13. The chronology of events and circumstances pertaining to each event which we submit are relevant to a determination of the threshold and substantive issues which the Board has asked parties to address, include the following:

- (a) The NGEIR Decision – This Decision with Reasons issued on November 7, 2006. It established a 4 year transition period, within which a share of the revenues Union realized from its sale of long-term ex-franchise storage services would continue to be classified as utility revenue and credited to ratepayers. These transition measures were imposed by the Board in an exercise of its regulatory jurisdiction over Union. During the transition period, the utility revenue share of long-term storage premiums would gradually reduce and would be eliminated by

2011. In the NGEIR Decision, the Board established a pragmatic method for calculating the utility revenue share of long-term storage premiums and directed that it be derived from all long-term storage premiums realized by Union. There is nothing in the Board's description of the method Union is to use to calculate the utility revenue share of long-term storage premiums during the transition period which suggests that deferred taxes are to be brought into account in the calculation.

- (b) The 2006 Deferral Account Clearance Application – In this Application, brought more than five (5) months after the issuance of the NGEIR Decision, Union sought final disposition and recovery of certain 2006 year-end Deferral Accounts balances, including the year-end balance recorded in the long-term storage premium account, being Account 179-72. Union made no distinction between Pre-NGEIR LSS Contracts and Post-NGEIR LSS Contracts in this Application. The supporting materials in this proceeding indicated that the storage premiums recorded in the 2006 Deferral Account 179-72 consisted of a 75% share of premiums realized on all long-term storage transactions that took place between January 1 and December 31, 2006. In this proceeding, Union's attempt to reduce the ratepayer's share of 2006 long-term storage premiums was confined to its contention that a portion of the deferred taxes it had recorded in its corporate books of account as of December 31, 2006, must be brought into account when calculating the utility revenue portion of the long-term storage premiums. In rejecting this proposal, the Board stated as follows:

"The Board finds that Union must eliminate any and all deferred income tax expense from the LSS account. The balance in the LSS account shall be revised from a debit of \$9.341 million to a credit of \$3.015 million to ratepayers."

- (c) In rejecting Union's attempt to introduce a deferred taxes amount into the calculation of the utility revenue share of long-term storage premiums, the 2006 Deferral Decision determined that, for regulatory purposes, the

declining share of long-term storage premiums allocable to ratepayers during the transition period is to be treated as if it were utility revenue. During the transition period, the non-utility portion of long-term storage premiums is confined to the share of the premiums allocable to Union's shareholder.

- (d) When the Board rendered its 2006 Deferral Decision on August 17, 2007, it was well established that deferred or normalized taxes with respect to utility revenues are not recoverable from Union's ratepayers. Taxes on utility revenues are recoverable from Union's ratepayers on a "flow-through" or cash basis;
- (e) The Board's finding in the 2006 Deferral Decision "... that the deregulation of Union's storage assets is notionally equivalent to a divestiture" must be interpreted in the context of the reality that all of the storage services Union provides are supported by co-mingled and inseparable storage assets. It is impossible for Union to physically separate the assets it uses to provide storage services to its in-franchise and ex-franchise customers. The "notional divestiture" to which the Board refers in its 2006 Deferral Decision is just that, "notional". It is a hypothetical allocation of co-mingled and inseparable storage assets. During the transition, any "notional divestiture" or allocation of co-mingled assets used to support Union's unregulated storage business is confined to an allocation of those assets supporting the shareholder percentage share of long-term storage revenues. Principles which may apply in a physical divestiture of assets case do not apply in this "notional divestiture" case in which a physical divestiture of co-mingled assets is impossible. In its effect, the 2006 Deferral Decision clearly determines that the utility revenue share of long-term storage premiums during the transition period is to be calculated without bringing any deferred taxes into account.

- (f) Union's Compliance with the 2006 Deferral Decision – Union complied with the 2006 Deferral Decision and the credit amount of more than \$3M which the Board directed Union to reflect in the 2006 Deferral Account 179-72 has been cleared to ratepayers. The account is now closed;
- (g) The 2007 Deferral Account Clearance Application - Union's application for approval, final disposition of and recovery of certain 2007 year-end Deferral Account balances was filed on March 4, 2008. Board Staff noted a discrepancy between the margin forecast included in Union's 2007 Rate Case for long-term storage services compared to the margin forecast included in the 2007 Deferral Account Clearance Application. Ratepayers are indebted to Board Staff for noticing this discrepancy. In its Reply Argument in the 2007 Deferral Account Clearance Application, Union revealed that the year-end balance reflected in the 2007 long-term storage services Deferral Account 179-72 was confined to 75% of the premiums realized by Union during 2007 from Pre-NGEIR LSS Contracts only. The premium for 2007 on Post-NGEIR LSS Contracts had not been included in the calculation of the utility revenue portion of long term storage premiums.
- (h) In this proceeding, Union contended, for the first time, that premiums realized from Post-NGEIR LSS Contracts are not to be allocated to ratepayers as utility revenues. This issue had not been raised by Union in the 2006 Deferral Account clearance proceeding, where the year-end December 31, 2006 balances included all long-term storage contract premiums;
- (i) To support its contention that the method of calculating the utility revenue portion of long-term storage contract premiums excluded Post-NGEIR LSS Contract premiums, Union relied entirely on selected passages from the NGEIR Decision. There was no suggestion in Union's May 7, 2008

Reply Argument that the 2006 Deferral Decision had any bearing on its contention that premiums on Post-NGEIR LSS Contracts lie outside the ambit of the method of calculating the utility revenue portion of such premiums which the Board established in the NGEIR Decision. If the 2006 Deferral Decision had any relevance to the position Union was advancing in Reply Argument in the 2007 Deferral Account Clearance Application, then Union could have and should have raised that argument in that proceeding.

- (j) The 2007 Deferral Decision – In rejecting Union's interpretation of the NGEIR Decision with respect to the method to be applied to calculate the utility revenue portion of long-term storage premiums, the Board states as follows:

"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 to transition provisions of that Decision should be applied."

The Board then went on to quote two (2) complete passages from the NGEIR Decision which convincingly demonstrate that the utility revenue share of long-term storage contract premiums is to be derived from all long-term storage transactions and not otherwise as Union contends. The Board concludes with its finding to this effect and specifies with precision the method which Union is to apply to calculate the utility revenue share of 2007 long-term storage premiums. The Board states as follows:

"The Board finds 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." (emphasis added)

- (k) The 2007 Deferral Decision does two (2) things. It rejects Union's contention that Post-NGEIR LSS margins are not to be brought into account when determining the utility revenue component of long-term storage contract premiums to be allocated to ratepayers. In addition, it expressly directs Union to calculate the ratepayer's share of long-term storage contract premiums in the same manner as the utility revenue share of such premiums was calculated in the 2006 Deferral Decision. The method of calculating the utility revenue component of long-term storage premiums which the 2007 Deferral Decision directs is exactly the same method which the 2006 Deferral Decision directed Union to apply.

14. We submit that the Board's NGEIR Decision, the 2006 Deferral Decision and the 2007 Deferral Decision reveal that the Board did not and does not intend that deferred taxes be brought into account to reduce the utility revenue component of long-term storage premiums to be allocated to ratepayers during the transition period.

15. CME relies on these background circumstances to support its submissions which follow to the effect that Union's request for review of the 2007 Deferral Decision and, in the alternative, a review of the 2006 Deferral Decision lack merit.

III. IMPEDIMENTS TO MOTION FOR REVIEW

16. A review or re-hearing cannot be obtained to re-argue a matter already argued on a ground that could have been raised, but was not raised, at first instance.

17. Union argues that the 2007 Deferral Decision, excluding Post-NGEIR LSS Contract premiums from the calculation of utility revenues allocable to ratepayers, is reviewable because it is inconsistent with the 2006 Deferral Decision. We submit that there is nothing in the 2006 Deferral Decision which supports Union's contention that Post-NGEIR LSS Contract premiums are to be excluded from the utility revenue calculation during the transition period. Even if there was, Union was obliged to raise

the matter in its argument at first instance. Union cannot reasonably seek a review on grounds which could have been raised, but were not raised, at first instance.

18. The prohibition against re-argument, in and of itself, ought to prompt the Board to reject Union's request for a review of the 2007 Deferral Decision.

IV. DELAY AND THE PROHIBITION AGAINST RETROACTIVE RATEMAKING

19. As others have noted, Union's request for a review of the 2006 Deferral Decision, in the event that the Board upholds the 2007 Deferral Decision, is barred as a result of Union's failure to question the Decision within a reasonable time after its issuance.

20. In addition, the credit amounts which the Board directed Union to record the 2006 Deferral Account 179-72 have been cleared to ratepayers and the account is now closed. Union's request for a review of the 2006 Deferral Decision to enable it to recover an additional \$10.542M from ratepayers for transactions recorded in a deferral account for a test period expiring December 31, 2006, and an account which is now closed, offends the principle against retroactive ratemaking.

21. These grounds, in and of themselves, should prompt the Board to reject Union's alternative request for a review of the 2006 Deferral Decision.

V. NO REVIEWABLE ERROR IN 2007 DEFERRAL DECISION

22. There is no inconsistency between the 2007 Deferral Decision, rejecting Union's contention that Post-NGEIR LSS Contract premiums are not to be brought into account, and the 2006 Deferral Decision, which did not either consider or address this point. In fact, on this point, the 2007 Deferral Decision, bringing storage premiums on all long-term contracts into account, is consistent with the manner in which Union presented its 2006 Deferral Account Clearance Application.

23. The 2007 Deferral Decision, directing Union how to calculate the utility revenue portion of long-term storage premiums, does not permit Union to introduce deferred taxes into the calculation. In this respect, it is entirely compatible with the 2006 Deferral

Decision which rejected Union's attempt to introduce deferred taxes into the pragmatic method the Board established for calculating the utility revenue share of long-term storage premiums. Once again, there is no inconsistency between the 2007 Deferral Decision and the 2006 Deferral Decision.

VI. NO REVIEWABLE ERROR IN 2006 DEFERRAL DECISION

24. Union contends that the 2006 Deferral Decision should be reviewed because it is inconsistent with the 2007 Deferral Decision. This contention lacks merit. The 2006 Deferral Decision, excluding deferred taxes from the method of calculation of the utility revenue share of long-term storage premiums, is the same method that the 2007 Deferral Decision directs Union to apply.

VII. NO UNFAIRNESS

25. CME submits that there is nothing unfair about either the 2006 Deferral Decision or the 2007 Deferral Decision, each of which preclude Union from introducing deferred taxes as a factor to be considered when calculating the utility revenue component of long-term storage premiums during the four (4) year transition period established by the NGEIR Decision. The "costs" to which Union's shareholder is exposed, as a result of applying the method for calculating the ratepayer's share of long-term storage premiums which excludes deferred taxes from its ambit, are minuscule in comparison to the "end-state" benefits Union's shareholder realizes at the end of the transition period, which are estimated by some to be in excess of \$100M per year. If the method for calculating the utility revenue portion of long-term storage premiums is to be reviewed, on fairness grounds, then all factors relevant to a consideration of fairness, including the duration of the transition period and the proportion of long-term storage premiums to be allocated to ratepayers during the transition, should be reviewed.

26. The NGEIR Decision, the 2006 Deferral Decision and the 2007 Deferral Decision indicate that the Board intends that the pragmatic method of calculating the utility revenue portion of long-term storage premiums exclude deferred taxes from its ambit.

In the context of these repeated statements by the Board of its intent, a review, on fairness grounds, of the method for calculating the utility share of long-term storage premiums to be allocated to ratepayers, is unwarranted and unnecessary.

VIII. THE SUBSTANTIVE ISSUES

27. For all of the reasons already articulated, we submit that all long-term storage transactions Pre and Post-NGEIR should be recorded to calculate the balance in Account 179-72 (EB-2008-0034) and that Union should not be allowed to claim a debit charge to Account 179-72 reflecting deferred income taxes related to storage services when calculating the utility revenue component of long-term storage premiums allocable to ratepayers.

IX. COSTS

28. CME submits that it has participated responsibly in this proceeding in responding to Union's Motion for Review with these written submissions. The impact on ratepayers of the relief Union seeks is significant. A variance of the 2007 Deferral Decision will deprive ratepayers of their share of storage premiums Union realizes from Post-NGEIR LSS Contracts for the four (4) years 2007 to 2010 inclusive. While the precise amounts of these premiums are unknown, they are likely substantial. In the alternative, Union seeks retroactive relief from ratepayers of some \$11M for deferred taxes recorded in 2006, and unspecified incremental deferred taxes for the period 2007 to 2010 inclusive. The alternative relief Union seeks is equally significant and will, if granted, have a detrimental impact on CME members who take service from Union.

29. For these reasons, CME has actively participated in this proceeding and requests 100% its reasonably incurred costs of participating in the process.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of August, 2008.



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