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November 6, 2008

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

Dear Ms Walli,

Union Gas Limited ("Union")
Multi-Year Incentive Rate Mechanism
Board File No.: EB-2008-0292
Our File No.: 339583-000026

Pursuant to paragraph 4 of the Notice of Motion and Procedural Order No. 1 in this proceeding, we enclose the submissions of Canadian Manufacturers & Exporters ("CME").

Yours very truly,

A handwritten signature in black ink, appearing to read 'P. Thompson', is written over a horizontal line.

Peter C.P. Thompson, Q.C.

PCT\slc
enclosure

c. Mark Kitchen (Union Gas Limited)
Interested Parties EB-2008-0292
Paul Clipsham (CME)
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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 approving or fixing a multi-year incentive rate mechanism to determine rates for the regulated distribution, transmission and storage of natural gas, effective January 1, 2008.

Submissions of Canadian Manufacturers & Exporters (“CME”)

Overview

1. Union seeks a review and variance of the Board’s July 31, 2008 EB-2007-0606 Decision and Order (the “Decision”) for the purposes of clarifying the Decision requiring Z Factor treatment for 50% of the cost consequences of certain tax changes.¹
2. The “clarification” relief Union seeks lacks merit and should be rejected. It is incompatible with the Decision directing Union to calculate the Z Factor amount to be passed through to ratepayers, as indicated in Exhibit E3.1.1, so as to put Union’s Z Factor calculation on the same methodology footing as the Z Factor calculation for Enbridge Gas Distribution Inc. (“EGD”) in its Board-approved Settlement Agreement dated February 4, 2008. Relief which is incompatible with the Decision cannot be granted on a Motion for “clarification”.
3. Union’s current contention, that “New Purchases” during the Incentive Regulation (“IR”) term are to be excluded from the tax change Z Factor calculation, was not raised during the EB-2007-0606 proceeding. It is a contention which is contrary to the sworn evidence of its witnesses.² The issue cannot now be raised on a Motion for review. There is no reviewable error in the Decision and the request for a review and variance should be rejected.

¹ See para.2 of Union’s Notice of Motion dated August 28, 2008

² See paras.8 and 9 of these Submissions

Facts and Points of Argument

4. Line item numbers 2, 6, 10 and 14 in Exhibit E3.1.1³ require that “New Purchases”, during the period 2008 to 2012, for “Computer Equipment” and for “Distribution Assets” be brought into account when determining the cost consequences of Capital Cost Allowance (“CCA”) rate and Income Tax rate changes which are to be treated as a Z Factor. These “New Purchases” line items were derived from a Schedule which form part of the Board approved EGD Settlement Agreement which requires EGD to bring “New Purchases” in each of the years of its IR Plan into account when deriving the Z Factor amount to be passed-through to ratepayers.⁴

5. The calculation of the tax change Z Factor in Exhibit E3.1.1 is based on a method in which “New Purchases” of assets, subject to CCA in each of the years 2008 to 2012, will be brought into account. Exhibit E3.1.1 clearly reveals that the level of “New Purchases” in each of the years 2008 to 2012 is assumed to be the same as the “2007 Board Approved additions”.⁵

6. “New Purchases” are included as line items in the Schedule to EGD’s Board approved Settlement Agreement and as line items in Exhibit E3.1.1 because Price Cap rate setting and Union’s Price Cap rates are intended to cover all items of expenditure in 2008 to 2012, including return and depreciation on capital investments made in each of those five years. Union’s pre-filed evidence on this Motion suggesting otherwise is incorrect.⁶ Union’s Board approved Price Cap rates cover all items of expenditure incurred during the IR term other than those that are specifically the subject matter of Y or Z Factors.

7. During the EB-2007-0606 proceeding, Union did not question the Exhibit E3.1.1 method of calculating the tax change pass-throughs which brought “New Purchases” of assets, subject to CCA in each of the years 2008 to 2012 inclusive, into account.

³ See Exhibit A, Schedule 1 where the language used in these line items is the same as that used in Exhibit E3.1.1 in EB-2007-0606

⁴ See Exhibit N1, Tab 1, Appendix D in EB-2007-0615

⁵ See Exhibit A, Schedule 1 which uses identical language to that appearing in Exhibit E3.1.1

⁶ See Exhibit A, Schedule 1, page 2, the last 2 lines, and page 3, the last 3 lines

Union's witnesses testified under oath that all their interrogatory responses were correct.⁷

8. When questioned about the appropriate way to implement the proposal that a portion of tax reductions attributable to CCA and tax rate changes be accorded Z Factor status, Union's witnesses acknowledged that capital additions in each year should be brought into account. In Volume 4 of the Transcript at page 36, the following exchange took place between Mr. Thompson and Mr. Birmingham:

"Mr. Thompson: All right. My last topic is implementation, Mr. Birmingham. I will ask you this.

Assume that the Board agrees with ratepayer representatives that part of the tax reductions is to be accorded Z-factor status. Assume the percentage of 75 percent for the purposes of this discussion.

Do you have any recommendations for us as to how that feature of the Board's decision should be implemented year by year? Is there --

Mr. Birmingham: I think the main recommendation that I make, Mr. Thompson, is that it be done on actual numbers.

So while we have used the 2007 Board-approved for capital additions, for taxable income, and for taxable capital, you actually want to take those amounts on an actual basis and determine what they are after the year end.

Mr. Thompson: Right. So that would be part of the annual rate presentation process?

Mr. Birmingham: I suspect it would be more the -- it would depend on the timing.

I think the issue will be you will want to get to year end actual amount, but our rate-setting is done on a prospective basis, so we would have to determine how that process would work. But one way or the other, you would want to be dealing with actual numbers." (emphasis added)

9. A similar exchange took place between Mr. Thompson and Mr. Packer at Volume 6 of the Transcript at page 39 as follows:

"Mr. Thompson: Now, my last question, then, is in terms of implementing any Z-factor treatment that the Board finds to be appropriate, let's assume it's either your line 22 or my line 22 where we have numbers at each column that exceed the materiality threshold of \$1.5 million. Should we be doing this, in Union's view, on a year-by-year basis? Or should we express the unabsorbed amount, if you will, as a percentage of the 80.51, and approach it that way?

⁷ See EB-2007-0606 Transcript Volume 3, page 27, lines 20 to 26

Mr. Packer: I think Mr. Birmingham testified earlier that he would prefer that we do the calculations annually, using the actual numbers that appear in each year.

So consistent with that, if the Board was to make an adjustment, I think the preference would be that it would be done annually, rather than having some predefined calculation that smoothed it out.” (emphasis added)

10. Accordingly, while Union’s witnesses expressed a preference for using year-by-year forecasts, at the beginning of each year, and then truing-up for actual numbers for capital additions, taxable income and taxable capital, at the end of each year, Union did not, at any time during the EB-2007-0606 proceeding, contend that “New Purchases” in the period 2008 to 2012 should be excluded in their entirety from the Z Factor tax change pass-through calculation.

11. Throughout the proceeding, the \$80M result shown in Exhibit E3.1.1 was considered by Union’s witnesses and others, including Board Panel Members, as a reliable order of magnitude estimate of the Z Factor amount in issue over the five years of the IR Plan.⁸

12. Union’s Motion for “clarification” is framed in the context of the directive in the Decision where the Board states as follows:

“Our conclusion is that a 50/50 sharing of the impact of tax changes, as applied to the tax level reflected in the 2007 Board-approved rates, is a reasonable balance. The approach used in Exhibit E3.1.1 is indicative of how the savings are to be calculated for the purposes of the sharing.” (emphasis added)⁹

13. The paragraph in the Decision which immediately follows that passage is relevant to its interpretation. In that paragraph, the Board states as follows:

“The Board notes that the 50% allocation was the same solution the parties agreed to in the Enbridge case. That is not the reason for the Board’s decision here. We do not treat the Enbridge case as a precedent any more than we treat the RP-2001-0029 Decision as a precedent. But it may be of some

⁸ See, for example, EB-2007-0606 Transcript Volume 3, pp. 179 to 189 where Union witnesses discuss the contents of Exhibit E3.1.1 with Mr. Shepherd; Transcript Volume 4, page 57, line 9 to page 58, line 5 where the \$80M was discussed with Mr. Warren; Transcript Volume 4, pp. 88 to 90 where Mr. Birmingham clarified in his reply examination that the Base Rate adjustment amount was not included in the \$80.51M appearing in Exhibit E3.1.1, an amount to which he refers at page 89, line 24; and Transcript Volume 6, page 24, lines 11 to 25 where Mr. Packer uses the \$80.51M for the purposes of his “absorption” analysis.

⁹ Decision page 9

comfort that both gas utilities under the Board's jurisdiction have the same result regarding this particular Z Factor." (emphasis added) ¹⁰

14. According to the Decision, the method to be used to calculate Union's tax change Z Factor is to be the same as the method used to calculate EGD's tax change Z Factor in which "New Purchases" during the IR term are to be brought into account. There is no ambiguity in the Decision with respect to the requirement that "New Purchases" be brought into account.

15. Union is not proposing any "clarification" with respect to the manner in which tax reductions attributable to "New Purchases" are to be accounted for. Rather, Union is asking the Board to approve a method which is materially different from the method used in Exhibit E3.1.1 because the method Union proposes excludes from the calculation all "New Purchases" in the period 2008 to 2012.

16. Union is now proposing to refrain entirely from accounting for tax savings attributable to "New Purchases". The methodology Union is now proposing is incompatible with the methodology that EGD is required to apply pursuant to the Schedule in its Board approved Settlement Agreement.

17. We submit that the Decision clearly directs Union to bring into account tax savings associated with new capital additions made during the IR term. We submit that it is unreasonable and incorrect for Union to now assert "that the Board did not direct Union to share 50% of the tax savings associated with new capital additions during the IR term".¹¹

18. Although Union did express a preference for using year-by-year forecasts and then truing-up for actual numbers for capital additions, taxable income and taxable capital, the "clarification" proposal Union now makes it incompatible with that evidence. Union has not presented a method of calculating the tax change pass-through which recognizes "New Purchases" in the years 2008 to 2012 inclusive. The only calculation

¹⁰ Decision page 9

¹¹ See Exhibit A, Tab 1, page 3 of Union's 2009 Rates filing, EB-2008-0220, where it is stated that "the specific clarification sought by Union with respect to taxes was that the Board did not direct Union to share 50% of the tax "saving" associated with new capital additions during the incentive regulation term".

of the tax change pass-through which is compatible with the Decision requiring that “New Purchases” be brought into account is the Exhibit E3.1.1 calculation.

19. Union’s request for a review of the Decision lacks merit. There is no reviewable error in the Decision pertaining to Union’s current contention that “New Purchases” during the IR term are to be excluded from the Z Factor calculation because that issue, which could have been raised, was never raised by Union during the course of the proceedings. Union’s opportunity to raise the “Exclusion of New Purchases” method it now asks the Board to approve expired at the conclusion of the EB-2007-06060 hearing.

20. It is well settled that a Decision will not be reviewed to consider an issue which could have been raised but was not raised in the proceeding which the Board is being asked to review.¹²

Costs

21. CME requests that it be awarded 100% of its reasonably incurred costs in connection with these proceedings.

ALL OF WHICH is respectfully submitted this 6th day of November, 2008.



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Counsel for CME

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¹² See for example EB-2008-0154 Decision on Motion dated October 23, 2008, in which the Board dismissed Union’s Motion for a review of the 2007 Deferral Account Decision and the 2006 Deferral Account Decision.