



uniongas

A Spectra Energy Company

December 19, 2008

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Attention: Ms. E. Kirsten Walli, Board Secretary

Dear Ms. Walli:

**Re: Union Gas Limited
Late Payment Penalty Litigation Costs – Deferral Account No. 179-113**

The purpose of this letter is to advise the Board of recent relevant developments in connection with Union's late payment penalty class action litigation and to request an amendment to Union's accounting order for Deferral Account No. 179-113, Late Payment Penalty Litigation to include the costs of any judgment in that litigation.

Background

Union's late payment penalties originated in the Residential Guidelines for Credit Collection and Cut-off Practices of Public Utilities Suppliers, developed under the auspices of the Minister of Energy in 1978. Union's late payment penalties have been approved by the Board and required under Union's Board-approved rate orders since that time. The intent of late payment penalties is to encourage customers to pay promptly, thereby minimizing the costs which utilities must recover from all customers. In addition, late payment penalty revenues are an offset to Union's revenue requirement, thereby reducing delivery charges for all customers.

On April 4, 2001, the Board instituted a process for seeking input on appropriate changes to late payment penalty policies. The Board posted a discussion paper on the issue prepared by Board Staff on the Board's website. By letter dated October 4, 2001, the Board directed Union to review its late payment penalty policies in the context of the customer review process for 2002. As ordered by the Board, effective May 1, 2002 Union reduced its late payment penalty from 5% to 2% (one time charge). Effective July 1, 2003, also as ordered by the Board, Union reduced its late payment penalty from 2% to 1.9% (compounded monthly).

In the spring of 2004, Union was served with a claim for damages alleging that certain of the 5% late payment penalties collected by Union offended section 347 of the *Criminal Code*. The claim sought certification under the *Class Proceedings Act, 1992*.

The Creation of Union's Deferral Account No. 179-113

Shortly thereafter, on June 22, 2004, Union wrote to the Board requesting the establishment of a late payment penalty litigation deferral account to record the costs Union would incur in defending the claim, including the amount of any judgment that might be made against Union. In a decision issued September 30, 2004 in RP-2003-0063/EB-2004-0386, the Board approved the establishment of Deferral Account No. 179-113 to record:

1. Union's legal costs;
2. the costs of actuarial advice; and
3. the costs of analyzing historic billing records

in connection with Union's defence of the late payment penalty litigation.

With respect to the amount of any judgment, the Board concluded, as it had earlier concluded in the similar case of Enbridge (RP-2003-0203), that it would be premature to approve the inclusion of any judgment-related costs until such time as a Court order was made or expected. The Board held:

The Board finds that when details of the nature and quantum of judgment become known, the Board will expeditiously consider applications to allow recording or recovery of such costs or it may commence a generic proceeding to deal with the matter as it affects a variety of entities regulated by the Board.

Union established Deferral Account No. 179-113 in accordance with this decision of the Board. Union cleared debits in this account in 2005, 2006 and 2007.

The Enbridge Settlement and Cost Recovery

Subsequently, in Enbridge's 2006 rate case, the Board approved the expansion of Enbridge's late payment penalty deferral account to include not only Enbridge's own legal costs but any amounts attributable to the litigation including the costs of any judgment.

Enbridge subsequently settled its late payment penalty class action for \$22 million and recorded this amount in its late payment penalty deferral account. The settlement, which was approved by the Court in a judgment rendered by the Honourable Mr. Justice Cullity, consisted of three elements:

1. \$11 million payable to the Plaintiff's counsel on account of the Plaintiff's legal fees, disbursements and GST, less the amount of \$825,000 previously paid to the Plaintiff's counsel;
2. \$2 million payable to the class proceedings fund operated by the Law Foundation of Ontario; and

3. \$9,000,000 payable to the Winter Warmth Fund, a United Way administered fund used to assist needy and low-income customers of participating utilities with the payment of their natural gas and electricity bills.

In a decision rendered February 4, 2008 in EB-2007-0731, the Board found that all costs (Enbridge's own legal costs, settlement costs and interest) recorded in Enbridge's late payment penalty deferral account were recoverable from ratepayers.

A petition to the Lieutenant Governor in Council, seeking to overturn the Board's decision in the Enbridge case, was brought by Gordon Garland, the plaintiff in the Enbridge late payment penalty class action. This petition was dismissed and the Decision of the Board was confirmed by the Lieutenant Governor in Council on December 1, 2008.

The Union Settlement

Union has recently entered into a settlement with the plaintiff in its late payment penalty class action. A motion for judgment to approve the settlement is scheduled before the Honourable Mr. Justice Cumming of the Ontario Superior Court of Justice for January 27, 2009.

The judgment sought to be approved is for \$9,227,500, comprised as follows:

1.	Payment for the benefit of class members over three years to the Winter Warmth Fund, a United Way administered fund	–	\$5,400,000;
2.	Class Proceedings Fund	–	\$600,000;
3.	Class counsel's costs and fees	–	2,750,000;
4.	GST on costs and fees	–	\$137,500;
5.	Disbursements inclusive of GST	–	\$200,000;
6.	Notice to class	–	\$140,000;

Union's Request for an Amended Accounting Order

In view of the pending settlement and the findings of the Board in its September 30, 2004 decision in RP-2003-0063/EB-2004-0386, Union hereby requests an amendment to the terms of Deferral Account No. 179-113 to permit Union to record the amount of any judgment against Union in the account. A draft accounting order is attached for the Board's consideration. No amount would be recorded in this account until final judgment is rendered.

In making this request, Union is not asking the Board to make any determination at this time with respect to whether any amount recorded in Deferral Account No. 179-113 will be recoverable from Union's customers.

Further Proceedings

Once the settlement approval motion has been determined by the Superior Court and all necessary notice periods have elapsed, Union will advise the Board and, subject to any direction of the Board, institute a proceeding under which disposition of this account will be considered.

If you wish to discuss any aspect of this matter, please call me at 519-436-5275.

Yours very truly,

[original signed by]

Mark Kitchen
Director, Regulatory Affairs

cc: EB-2008-0220 Intervenors
Adrian Pye (OEB)
Michael Penny (Torys)