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June 19, 2007

VIA E-Mail only

Clerk of Executive Council
Executive Council Office
The Cabinet Office
Room 4440, Whitney Block
99 Wellesley St. W.,
Toronto, ON
M7A 1A1

Attention: Mr. Tom Lees

Dear Mr. Lees:

**Re: Petition to the Lieutenant Governor in Council of the
Vulnerable Energy Consumers Coalition from the Decision
of the Ontario Energy Board of May 22, 2007**

Please find enclosed the Petition of the Vulnerable Energy Consumers Coalition concerning the above noted Decision.

Yours truly,

Original Signed

Michael Janigan
Counsel for the Vulnerable Energy
Consumers Coalition (VECC)

**Petition to the Lieutenant Governor in
Council to require the Ontario Energy Board
to hold a hearing with respect to the Order of
the Ontario Energy Board of May 22, 2007,
made in a proceeding initiated by the Ontario
Energy Board to determine whether it should
order new rates for the provision of natural
gas, transmission, distribution and storage
services to gas-fired generators (and other
qualified customers) and whether the Board
should refrain from regulating the rates for
storage of gas identified as EB 2006-0322, EB-
2006-0338, and EB-2006-0340.**

By

The Vulnerable Energy Consumers Coalition

June 19, 2007

Introduction

1. The Vulnerable Energy Consumers Coalition consists of the following organizations:

(a) The Federation of Metro Tenants Association a non-profit corporation composed of over ninety-two affiliated tenants associations, individual tenants, housing organizations, and members of non-profit housing co-ops. In addition to encouraging the organization of tenants and the promotion of decent and affordable housing, the Federation provides general information, advice, and assistance to tenants

(b) The Ontario Coalition of Senior Citizens' Organizations (OCSCO), a coalition of over 120 senior groups, as well as individual members across Ontario. OCSCO represents the concerns of over 500,000 senior citizens through its group and individual members.

2. Ontario has the largest natural gas storage pools in Canada with a working capacity of over 250 Bcf. They are all located in Southwestern Ontario, mostly in Lambton County. Union has about 152Bcf of such storage and Enbridge has about 98 Bcf. The storage is used to support the seasonal needs of Union and Enbridge customers- basically gas is stored in the summer and withdrawn in the winter during the peak consumption

period. Storage that is surplus to in-franchise customer needs is marketed to ex-franchise customers and other Canadian gas distributors and marketers.

3. Historically, the storage used to support Union and Enbridge customers has been provided at cost-based rates. Enbridge also contracts for approximately 20 Bcf of storage from Union that was provided at cost based rates up until March 31, 2006¹. At the time of the NGEIR proceedings, the cost differential between cost-based rates and market rates was such that market-based rates were approximately 6 times the average cost per GJ for Union.²
4. In 2005, on its own initiative, the Ontario Energy Board (“OEB” or “Board”) held a proceeding, the Natural Gas Electricity Interface Review (“NGEIR”), to consider, inter alia, the framework for regulating natural gas storage in Ontario. A hearing was held in 2006 that resulted in a Decision that was released by the OEB on November 7, 2006. This Decision is attached as Appendix A to the Petition of the Consumers Council of Canada to the Lieutenant Governor in Council (“LGIC”) of June 19, 2007. Subsequently, various intervenors filed motions to have the NGEIR Decision reviewed pursuant

¹ The OEB’s RP1999-0017 Decision allowed Union to assess market based rates for storage. Three storage contracts at market-based rates took effect on March 31, 2006 (See NGEIR Decision p.59)

² NGEIR Decision ,p.20

to Part VII of the Board's rules of Practice and Procedure

5. On May 22, 2007, the Ontario Energy Board released its Decision ("Motions Decision") upon three Notices of Motion for review of parts of its Decision of November 2006 (NGEIR Decision) in the NGEIR proceeding. The Motions Decision is attached as Appendix B to the Petition of the Consumers Council referenced in Paragraph 4 herein. The Board had held a hearing to consider the threshold questions that the Board should apply in determining whether the moving parties met the threshold tests for review of the NGEIR Decision.
6. The Vulnerable Energy Consumers Coalition (VECC) was an intervenor in the proceedings that gave rise to the NGEIR Decision. In a motion jointly made with the Consumers Council of Canada (CCC), VECC had requested that the Board review parts of the NGEIR Decision. This request was determined in the Motions Decision.
7. The parts of the NGEIR Decision that were the subject of the VECC Notice of Motion concerned natural gas storage regulation. The key findings of the NGEIR Decision with respect to that issue were as follows:
 - (a) The Board found that the storage market was workably competitive within the meaning of sec.

29 of the Ontario Energy Board Act (“ OEB Act”) and that neither the two principal Ontario local gas distribution companies, Union Gas Limited (Union) and Enbridge Gas Distribution Inc. (Enbridge) had market power in the storage market.

- (b) While Union and Enbridge distribution customers will continue pay storage rates regulated by the Board, all other storage prices charged by Union and Enbridge would not be regulated. There was 95 Bcf of storage set aside in Union’s total storage of 152 Bcf to serve its customers at cost-based storage rates. The rest of the Union storage was available for Union to sell to non-Union distribution customers including Enbridge at market rates (subject to transition rules).
- (c) The revenues from the storage sold in the long-term ex-franchise market, after a transition period, would belong solely to the Union shareholder.

8. The impact of the NGEIR Decision upon the distribution customers of Enbridge and Union will be substantial and detrimental. As this Petition will detail, the total adverse

impact on such customers after the expiry of the four year transition period is estimated at \$100 million a year at current storage rates. At the same time, there is no prospect of meaningful storage competition or competitive alternatives to their local distribution company for the ratepayers who will have to absorb this impact.

9. The Motion Decision declined to review most of the elements of the NGEIR Decision. The Motion Decision determined that the allocation of 95 Bcf of Union storage space for customers receiving regulated rates would be subject to review by the Board.

Relief Requested

10. This Petition requests that the Lieutenant Governor in Council (LGIC) require the Ontario Energy Board review its Motion decision with respect to the conclusion that the Board's threshold for review had not been met to enable a review of:

- (a) the requirements that must be present for the public interest to be sufficiently protected in any determination pursuant to sec 29(1) of the Act
- (b) the adjudication in the NGEIR Decision that the implementation of the Decision would provide sufficient protection of the public interest

- (c) the division of regulatory assets such that 47 Bcf of storage developed and substantiated in rate base by Union's ratepayers are now segregated from the utility storage operation and return all revenues earned by their use to the shareholder alone.

11. This Petition further requests that the LGIC require the review to proceed on the basis that the interests of consumers with respect to prices pursuant to the objectives set out in sec. 2(2) of the Act requires that forbearance from regulation of the storage assets of Union and Enbridge in accordance with sec. 29 of the Act deregulation cannot take place if competition cannot protect the interests of consumers. In this case, consumer protection requires that such storage assets be used in the most efficient way possible to reduce the revenue requirement for the ratepayers of Union and Enbridge who substantiated the development of the storage.

The Protection of the Public Interest

9. Sec. 29(1) of the Act provides as follows:

On an application or in a proceeding, the Board shall make a determination to refrain, in whole or part, from exercising any power or performing any duty under this Act if it finds as a question of fact that a licensee, person, product, class of products, service or class of services is or will be subject to competition sufficient to protect the public interest.

12. The Board in the NGEIR Decision found the protection of the “public interest” in sec 29(1) was broader than simply a requirement to find that the market was competitive. While financial impacts of a forbearance decision under sec. 29(1) were relevant, the consideration was not to be limited to immediate rate impacts.

13. The Board in the NGEIR Decision found that the Board’s legislative objectives were a “clear expression of the factors that the Board had to take into account”.³

³ NGEIR Decision, p.43

14. The NGEIR Decision found that the Board’s legislative objectives that were most directly concerned with determining the public interest in a forbearance decision pursuant to sec 29(1) were :

- (a) facilitate competition in the sale of gas to users
- (b) to protect the interests of consumers with respect to prices and the reliability and quality of gas service
- (c) to facilitate rational development and safe operation of gas storage⁴

12. The Board in the NGEIR Decision found that these objectives may conflict, and that there are “public interest trade-offs”. It proceeded to justify the determination to forbear pursuant to sec 29(1) under the identified objectives in the following fashion:

- i. The Board found that forbearance from storage rate regulation would remove constraints on the development of flexible and innovative services⁵

⁴ NGEIR Decision pp. 43-44

⁵ NGEIR Decision, p.45

ii. The Board found that insufficient competition existed in the retail end of the market to protect the public interest. However, the Board believed the objective could be met by “thriving competition for the competitive elements of the storage market and effective regulation for the non-competitive elements of the market”⁶.

iii. The Board found that the rational development of gas storage was best facilitated by allowing it to develop without the necessity of the setting of rates by the Board and approval of storage contracts.

13. The Board in its Motions Decision considered that the Board in the NGEIR Decision had set out the appropriate framework and analysis required to undertaken under sec 29 and then found that the Board reviewed the elements of sec. 29 and considered each of these elements in considerable detail without reviewable error⁷.

14. However, the Board in the Motions Decision failed to consider that even if the framework for analyzing the public interest considerations had been correctly stated correctly in

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7 Motion Decision, p.32

the NGEIR Decision, there may still be no way to do the balancing exercise or the “public interest tradeoffs” that supposedly must be done, and arrive at the result set out in the Decision.

15. With respect to the objective of facilitation of competition in the sale of gas, apart from the bald assertion of Enbridge, there is no evidence that deregulating storage rates for existing storage will facilitate the development of innovative services. Currently Union and Enbridge customers get storage at cost based rates and that will continue under the NGEIR decision. The surplus, as previously described, which is used by Union for long term ex franchise storage use, is already sold under a range rate system that approximates market rates. The achievement of such an objective collides with reality, and is, in VECC’s submission pure jargon.

16. With respect to the protection of customer interests in price, both the NGEIR Decision and the Motion Decision fails to consider the long-term effects of the plan of deregulation that has been approved. Currently, the difference between the regulated price of storage and the market price of storage is approximately \$2.00 per GJ. The decision to forbear from regulating storage and the concurrent allocation of all long term storage premiums to Union has

the following result:

- (a) Enbridge customers will pay market rates for the 20 Bcf of Storage acquired from Union – a cost increase of some \$40 million.
 - (b) Union customers will no longer receive 75% of the long term storage premiums – a share which would be worth \$60 million at current rates
17. While the NGEIR decision acknowledges the unfavourable rate result⁸, it is presumably supposed to be traded off against the achievement of the other two statutory objectives that are cited. The price objective clearly cannot be met simply by having the Board continue to set regulated rates for Union and Enbridge distribution customers. Such a measure would prevent complete abandonment of the Union and Enbridge customers, but would leave intact the severe effects of the redistribution of storage premiums estimated herein at \$100 million a year.
18. Finally, with respect to the objective of developing new storage, there is no necessity that currently developed storage be deregulated in order for new storage to be developed in a regulatory environment that did not require

⁸ NGEIR Decision pp 45-46

rates or contracts be approved. This aspect of the Board's decision is not the subject of the review requested by the Petition.

19. The Motions Decision did not resolve how there could be any reasonable tradeoff of an annual estimated amount of \$100 million in increased costs for ratepayers (with a corresponding increase in return for the Union shareholder) against some unspecified improvements to flexible and innovative storage services. As has been noted above, new storage services can be developed both within and outside the utility without the need for regulation. Even if the ability existed to make such improvements, it is also unclear how these improvements were going to benefit ratepayers.

20. In the result, the Motions Decision failed to adequately review the NGEIR Decision with a view to assessing the public interest associated with the test pursuant to sec 29(1) of the Act. It has let stand a Decision that does not, and will not, create any more storage, but simply obliges Union and Enbridge ratepayers to contribute an additional billion dollars over the next ten years. This is despite the likely increased demands on their pocketbooks by other aspects of energy pricing.

Division of Regulatory Assets

21. The NGEIR Decision purported to make a division between “utility assets” and “non-utility assets” in relation to the storage assets of Union. The supporting rationale for the division was unclear in the NGEIR decision and was unfortunately not clarified in the Motions Decision.
22. It would appear that as the Motions Decision states “the NGEIR panel findings relate back to and to a certain extent flow from its broader decision to refrain, in part, from regulating rates for storage services”⁹. Clearly, forbearance is the triggering event for this division but it also appears that the history of the development of the storage assets and the regulatory history of premium sharing.
23. The Motion Decision’s acceptance of the justification of the NGEIR Decision’s division of rate base assets belies the clear facts on the record in that proceeding.
24. First, the NGEIR Decision acknowledges that Union storage is a unitary and integrated asset that cannot be functionally divided.¹⁰ This means that all the storage owned by Union is used to support in franchise and ex-

⁹ Motions Decision ,p.56
¹⁰ NGEIR Decision p. 101

franchise needs of customers. There is no functional separation of the 95 Bcf set aside in the NGEIR Decision for Union distribution customers from the remaining surplus storage which is used to generate revenue in the ex-franchise market.

25. The NGEIR Decision itself cites the previous Union position that, as in franchise customers had paid for the development of the storage, they should be credited with all of the margins (premiums)¹¹.
26. This previous Union position accords with common regulatory practice of accounting for all costs and revenues of a rate base asset, in this case, storage in determining the revenue requirement of the utility and ultimately the rates.
27. It was Union itself that proposed that the storage assets be developed in rate base with ratepayers being responsible for ensuring the allowed return on such assets to the Union shareholder. Union, in turn, was responsible to ensure that that the storage assets that were developed at the risk of ratepayers were used in the most efficient way possible. This meant any storage that was surplus to customer use would be sold at a premium to garner more revenue, and lower overall costs. This is not an extraordinary event; it is

¹¹ NGEIR Decision, p 104

part of the responsibilities of the utility.

28. The Board in the NGEIR Decision believed that because the additional storage revenues that Union had been obtaining had become so large that they were sufficient to pay for the annual capital costs which would otherwise be paid by ratepayers, that the storage in excess of that used by Union customers, now belonged solely to the Union shareholder.
29. The Motions Decision implicitly accepts the above notion advanced in the NGEIR Decision. The Decision appeared to confirm the principle that utility storage, substantiated by the ratepayers aforesaid, may be successful enough as an enterprise to generate ex-franchise premiums sufficient to pay the cost of its development. When this happens, the revenues it generates become solely the property of the utility.
30. If correct, this would mean that surplus assets, developed in rate base and reliant on rates, could be used to solely benefit utility shareholders, if the assets have sufficient market value. However, if the same assets can be obtained more cheaply on the market, the ratepayer will still have to pay the utility price according to the regulatory contract. This is a startling and asymmetric conclusion.

31. There is little doubt that if storage was available in the market that was cheaper than that developed by Union in rate base, ratepayers would still be responsible for substantiating the rate base asset and paying the higher cost based price.

Five Erroneous Justifications for the NGEIR and Motions Decision

32. *Competition in deregulated storage markets will protect consumers:* In fact, the NGEIR Decision indicates the residential consumers will likely never have effective competition of a kind necessary to protect the distribution customers of Union and Enbridge. The NGEIR Decision's plan of incomplete protection for these customers is to strip them any contribution to utility revenue from the surplus storage assets in rate base but have these customers pay regulated rates after the revenue for these assets are removed.
33. *The transition mechanisms that have been put in place by the NGEIR Decision are sufficient to protect the interests of consumers:* The measures are half-hearted at best. They delay to 2011 the full impact on Enbridge customers of the price increases associated with storage obtained at market rates, while at the same time conceding that Enbridge

customers have no competitive alternatives and thus are captive customers to the substantial increase in rates required.

34. *While the Enbridge and Union customers will absorb some upfront additional costs, the end result will produce more storage and more efficient energy market in Ontario:* The potential annual \$100 million transfer of revenue to the Union shareholder will not produce any new storage, conserve one joule of gas or save any money in the future for the Union or Enbridge customer. It is simply stripping the rate base of Union of the asset purchased for it by the shareholders and appropriating all revenues from its use.
35. *The Board's findings of sufficient consumer protection to enable forbearance from regulation of storage assets and the change in the classification of rate base storage assets were necessary to enable new storage to be developed:* In fact, while new storage and storage sold outside the distribution customer base was subject to a range rate approved by the Board, in reality, the range rates were sufficiently above the market rates actually negotiated and charged to enable returns substantially above those achieved by the charging of cost based rates.¹² There was and is no impediment to Union or Enbridge developing

¹² NGEIR Decision, p.13

storage as a non-utility asset and receiving market based returns on their investment. There are also no barriers to storage development by a Union or Enbridge affiliate. This case, however, is about the attempt by Union to capture these higher returns on existing storage for their shareholder alone.

36. *The Board's Decision is in keeping with global trends in energy restructuring by replacing regulation with competition and market forces:* The Board's Decisions in NGEIR and the Motions Decisions are actually unique. There is a finding of a competitive market where the market price is approximately 6 times the regulated rate. There is devolution of assets from rate base together with revenues to the Union shareholder without the ratepayers being compensated or ever gaining the benefit of actual competition. No jurisdiction that VECC is aware of has deregulated where the consequences will be so one sided against customers in favour of the utility shareholder.

Conclusion

36. For the above noted reasons, VECC submits that the Motion Decision has either taken too narrow a view of the requirements of its review powers, or has simply applied a standard that differs from the obligations of the Board under

the *OEB Act*. The LGIC must play a corrective role in the petition process by restoring balance to the assessment of the public interest associated with the determinations in issue made under sec 29 of the Act and any subsequent transfer of assets from ratepayer financed rate base.

37. In the result, VECC requests that the relief requested, as set out herein, be granted.

Submitted this 19th day of June, 2007

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Consumers Coalition (VECC)