Reply to the Responses Filed to the Petition of the Vulnerable Energy Consumers Coalition 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

August 13, 2007

Introduction

1. On June 19, 2007, the Vulnerable Energy Consumers Coalition (VECC) together with the Industrial Gas Users Association (IGUA), the Consumers Council of Canada (CCC) and the City of Kitchener (Kitchener), filed Petitions with the Lieutenant Governor in Council (LGIC) seeking relief from the Decision with Reasons issued by the Ontario Energy Board (the "Board" or "OEB") on May 22, 2007, in EB-2006-0322, EB-2006-0338 and EB-2006-0340 proceedings (the "Motions Decision") in which the Board ruled upon motions to review parts of its Decision of November 2006, the EB-2005-0551 Decision with Reasons in the Natural Gas Electricity Interface Review proceeding (the "NGEIR Decision").

2. VECC has received the Responses to these Petitions from Association of Power Producers of Ontario ("APPrO"), BP Canada Energy Company ("BP Canada), Enbridge Gas Distribution Inc ("Enbridge"), Market Hub Partners Canada LP ("MHP Canada"), Northland Power Inc. ("NPI"), School Energy Coalition ("SEC"), Union Gas Limited ("Union"), and Greenfield Energy Centre LP ("Greenfield")

3. VECC will not reply individually to each of the Responses received, but wishes to address certain arguments advanced in a number of the Responses that oppose the granting of the relief set out in its Petition.

Importance of the Board Decisions to Ontario Energy Policy

4. A number of responses have claimed that any change or review to the determinations made by the Board with respect to competition in the storage market or the effects of such determinations would be injurious to the development of future storage opportunities. (Union, paragraph 74, MHP paragraph 42, Enbridge paragraph # 44).

5. These submissions seek to conflate the opportunity and incentive to develop new natural gas storage facilities, that may be of future benefit to Ontario energy markets, with the treatment of revenues derived from storage facilities already built, put in utility rate base, and substantiated by Union ratepayers.

6. The Responses of Union and Enbridge maintain that new storage can only be developed outside of the existing regulatory regime that allows them to pass on their costs in rates together including a regulated rate of return. While this assertion is itself highly questionable, it still does not require the remedy devised by the OEB involving existing storage.

7. There are no impediments to either Union or Enbridge developing new storage through their current or new affiliate entities that would be priced, as they desire, in accordance with market forces and their own requirements for compensation. And even under the regime of regulation in place prior to the NGEIR Decision, new storage could have been developed by Union and Enbridge themselves, outside of rate base, to attract revenues accruing to the utility shareholders based on market rates and the utilities own pricing.

8. There is thus no change to the risk/reward position associated with new storage development for Union, Enbridge, or any of the potential storage developers that arises from the granting of the request for relief of VECC in its Petition. Union does not need the ratepayers' share of storage premium revenue it derives from ex-franchise sales of existing storage in order to develop new storage opportunities. Diverting the eventual estimated annual amount of $100 million in loss of storage premiums from Union's ratepayers to its Union's American shareholder, Spectra Energy, will not create any new storage or provide any benefits to any other stakeholder in Ontario Energy markets. It will not assist in the establishment or maintenance of a competitive market for storage.

9. VECC wishes to stress that creating the conditions conducive to new storage development outside of traditional regulation does not have to mean that the arrangements under which existing storage has been developed and maintained should be altered, particularly where the results are one-sided in favour of the utility shareholder.

Need for Further Review

10. Several Responses seek to establish that further review by the Board would be pointless because it has already fully canvassed the issues raised in the Petitions. (Union, para 30, Enbridge, para 30-33)

11. It is VECC's understanding that the provisions of sec. 34 of the Ontario Energy Board Act 1998 ("*the OEB Act*", or "*the Act*") are not limited in their application to circumstances associated with the presentation of new issues, evidence and/or arguments to the LGIC pertaining the order made by the Board for which relief is sought.

12. As a practical matter, VECC accepts that whether a presentation of sufficient relevant evidence and argument took place before the Board, prior to its making of the order that is sought to be reviewed, is a matter that should be considered by the LGIC.

13. However, the VECC petition does not seek to retry a question of fact, such as the amount of storage extant, or the potential amount of storage that can be developed. The petition seeks a review of the determinations made by the Board that involve the weighing of necessary public interest considerations and the allocation of financial burdens in furtherance of the perceived public interest.

14. Even if the Board may have considered a complete evidentiary record, and come to its conclusions set out in the challenged order based on that record, the inquiry of the LGIC associated with the review sought under sec. 34 of the *OEB Act* should not end there. The LGIC may review the congruency of the Board's conclusions as to the furtherance of the public interest with the objectives and requirements of *the Act,* and the government's policies for carrying out its statutory energy mandates.

15. The Board, in the making of its original NGEIR Decision, and in confirming the same in its Motions Decision, acknowledged that the making of its order involved "public interest tradeoffs" between the Board's statutory objectives. [1]VECC has noted the inconsistencies in the assessment of these tradeoffs in the Motions Decisions as well as the NGEIR decision.[2] VECC states further that it is important to understand that these Decisions are based on a framework of assumptions that are, in the main, highly unique and radical, at least in terms of mainstream utility regulation.

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[1] VECC Petition, June 19, 2007 paragraph 12
[2] Ibid at paras 14-17

16. In order for the Board's tradeoffs to accord with the public interest, in its Motions and NGEIR Decisions, the following propositions must be accepted:

(i) **The historical development of Union's existing storage assets in rate base, which relied upon the substantiation of those assets by ratepayers, is of no consequence in the calculation of just and reasonable rates.**
In the past, Union made its ratepayers responsible for the success or failure of its storage investment and had rates calculated accordingly. Now, the Board believes that just and reasonable rates may be assessed while allowing Union's shareholder to obtain all ex-franchise storage premiums from the storage investment that was backed or substantiated by ratepayers.

(ii) **If some utility rate base assets are surplus to the provision of service to ratepayers and they can be used to earn revenues in a competitive market, all the revenues belong to the utility shareholder.**
This is a unique and breathtaking proposition in regulatory law and practice. Applied to its fullest extent, it would provide boundless opportunities for effective ratepayer subsidization of utility business conducted for the benefit of its shareholders.

(iii) **If a utility rate base asset earns enough external revenue to defray ratepayer's contribution to capital costs in rates, there will be no impediment to the appropriation of the asset by the shareholder**.
The OEB's NGEIR and Motions Decision develops a proposition that because the ratepayer-financed existing storage operations now generate enough external revenue to cover the capital costs that would otherwise be obtained from ratepayers, its classification as utility rate base assets is changed. This appears to violate concepts of elemental fairness in the regulatory bargain. Ratepayers, for example, will not be released from their responsibility for payment for

rate base assets that lose money. It is the development of the storage asset in rate base that must trigger its regulatory treatment, not its ability to garner revenue.

(iv) There is competition sufficient to protect the public interest in a deregulated storage market when:

1. The market price of storage is 5-6 times the cost price of Union and Enbridge storage and;

2. The effect of the Decision removes an eventual estimated 100 million dollars from the credit of ratepayers.

Even if one can accept the questionable premise that a competitive market exists for natural gas storage in Ontario (where the competitive substitutes are outside the province and 90% of the gas customers have no access to these alternatives), where is the wisdom in deregulating into a tight supply market where the asking price is 5 to 6 times the existing cost? Is there a precedent anywhere for regulatory forbearance where the cost consequences are so one-sided to the detriment of customers?

(v) If the OEB has underestimated the needs of Union's ratepayers and failed to reserve enough storage for ratepayer use, Union ratepayers will pay the higher market rates for additional storage.

On July 30 2007, the OEB determined the issue of the amount and method of allocation of regulated Union storage that was identified as a matter for review in the Motions Decision.[3] The Decision confirmed the original NGEIR Decision in terms of the permanent cap on the availability of regulated storage. The effect of the Decision is that if Union's franchise customers need more storage space in the future, Union will obtain it for them and charge market rates, approximately 5-6 times the regulated price. In other words, the July 30, 2007 OEB Decision means that, in this circumstance of additional need for storage, Union ratepayers will have paid for the development of storage that will be sold back to them at market rates (now in excess of

[3] EB 2006-0322, EB 2006-0340, Decision with Reasons July 30, 2007

$2.00 per GJ above the cost-based regulated rates) with Union's shareholder getting all the premium.

The Petitions are out of Time.

17. Several Responses have noted that the Petitions were filed with the LGIC in conformance to the limitation period set out in Sec. 34 with respect to the Motions Decision, but not the original NGEIR Decision (Union paras 31-34, Enbridge para 21, MHP, para 13). The Motions Decision considered whether the Petitioners had met the threshold standard for review set out in the Board Rules of Practice and Procedure and dismissed the Petitioners' requests with the exception of the setting of the cap on Union storage sold at regulated prices. As noted above, the Board later confirmed this part of its original NGEIR decision in the sole issue involving the amount of Union regulated storage that was reserved for Board review in the Motions decision.

18. VECC submits that the attempt to infer that the issues in play in the Motions Decision were different than the issues that inform the Petitions should be rejected. It is to be noted that this position, contradicts earlier assertions concerning the thoroughness of the Board review associated with the Motions Decision.

19. It is also submitted that this Petition and others seek a review of Board determinations in the original NGEIR Decision which was, for the most part, denied in the Motions Decision as failing to meet the above-noted Board threshold standard of review. Clearly, if the LGIC orders a review, the Board must proceed to take up the issues in this, and other Petitions that arise from the original NGEIR Decision and the Board's refusal to review the issues in the Motions Decision.

20. VECC notes that an acceptance of the position that the efforts of the Petitioners to initially seek correction of the Board's Decision through existing OEB procedures caused the Petitions to be out of time is contrary to common sense, and the normal expectation that all remedies are exhausted at the tribunal level before pursuit of a remedy such as that available under sec. 34 of the *Act*.

Sec 34 of *the Act* cannot be used to afford Redress to the Petitioners

21. Several Responses have suggested that sec 34 of *the Act* is not sufficiently broad to admit the measure of superintendence contemplated by the Petitioners. (Enbridge, paras 20-28, MHP para 14) Essentially, it is maintained that the nature of the relief obtainable by petitioners pursuant to sec. 34 is limited to another review that is claimed to be made redundant by the thoroughness of the previous proceedings in the Board.

22. VECC does not believe the limitations on the ambit of the review requested in its Petition are correctly stated in these Responses. In VECC's submission, the review powers of the LGIC go beyond a simple meek request for the Board to reexamine its record of decision.

23. However, for greater certainty, VECC would request that the Minister of Energy consider the issuance of directions pursuant to sec. 35 of the Act to require the Board to report on the protection of Ontario gas distribution customers in any new framework of storage regulation to ensure that any such framework does not impose additional financial burdens upon them.

The Effect of the Board's Deregulation Upon Ontario Gas Customers Will Be Small

24. Some of the Responses claim that the effect of the NGEIR Decision will be slight upon existing consumers (Union, para 72, Enbridge para 30 (b)). While it is true that it is impossible to accurately forecast natural gas storage prices after the conclusion of the transition period in 2011, there is scant reason to believe that its effect will be limited to a 1% rate increase for such customers.

25. Unless there is a precipitous drop in the market prices for natural gas storage prices, (which is unlikely given current demand), Union ratepayers will see the removal of a substantial credit they would have received for sales of Union storage to non-Union franchise customers.

26. The estimated additional financial burden, following the transition period to Enbridge and Union customers is approximately $100

million annually, estimated using a $2 per GJ difference between the regulated cost-based storage price and the market price. According to evidence recently presented in the Board, the market-based storage price is trending higher to more than $2.50 per GJ. The increase in the differential will drive higher dollar numbers for customer impact.

27. The estimated impact, following the transition period, includes additional costs for Enbridge customers of approximately $40 million. These costs will flow through to the Union shareholder in the form of market premiums in accordance with the NGEIR Decision.

28. In addition to any credit for market premiums foregone by Union customers for payment by Enbridge customers in accordance with para 27. herein, Union customers will be denied their share of market premiums for other ex-franchise storage sales amounting to approximately $60 million annually in the event that the $2.00 GJ difference between the regulated and market-based storage price continues to obtain.

29. The delivery revenue requirement for Union based on its 2008 filing (without commodity costs) is $ 884 million while the same item is $945 million for Enbridge. The financial impacts contemplated by the implementation of the Board Decisions cannot be realistically dismissed as insignificant in light of their relative size in relation to the total revenue requirement of Union and Enbridge upon which rates are calculated.

Conclusions

30. VECC respectfully submits the Responses do not raise objections of merit to its Petition to the LGIC of June 19, 2007. Accordingly VECC requests that the relief set out in its Petition of June 19, 2007 be granted.

All of Which is Respectfully Submitted this 13th day of August 2007

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