EB-2014-0012

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act,* 1998, S.O. 1998, c. 15

AND IN THE MATTER OF an Application by Union Gas Limited, pursuant to S. 36(1) of the *Ontario Energy Board Act,* 1998 for an order or orders necessary to accommodate a new interruptible natural gas liquefaction service at its Hagar Liquefied Natural Gas Facility.

FACTUM OF THE INTERVENOR/MOVING PARTY, NORTHEAST MIDSTREAM LP

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FACTUM OF THE INTERVENOR/MOVING PARTY, NORTHEAST MIDSTREAM LP

PART I – OVERVIEW

1. Northeast Midstream LP ("Northeast") is a new privately financed business. Its future depends on the degree to which it can be commercially successful. It has acquired rights to land in Thorold, Ontario and has been successful in the protracted and onerous process of securing the necessary municipal and provincial approvals which allow it to build its LNG liquefaction plant. That plant, which is scheduled for completion in Q4 of 2016 will cost in the range of $130 million. All the money required will come from private investors and will be fully at risk.

2. Northeast views the LNG market in Ontario as one which is competitive and one which will see an increasing number of market participants. It expects other entrants to participate in the LNG market on a fully competitive basis.

3. Northeast submits that the entry of Union into the ex-franchise emerging and dynamic LNG market is highly anomalous. The potential entry by Union into the LNG market on a rate regulated

basis is not in any way compatible with the development of a competitive market and would fetter competition in the sale of LNG to users.

4. Union relies upon section 36 of the *Ontario Energy Board Act* (the "**Act**") to put forward its application. As a threshold issue, Northeast questions whether Union can rely upon that section. Section 2(2)(a) of Regulation 161/99 to the Act (the "**Regulation**") states explicitly that section 36 of the Act does not apply to a Class A distributor (which Union is) in respect of the sale, transmission, distribution or storage of motor vehicle fuel gas (under conditions with which Union complies). Northeast questions whether Union can rely on section 36 of the Act where the Regulation states the section does not apply.

5. Beyond this legal issue, if the Board wishes to continue to determine the substantive question, Northeast believes that Union's proposed entry falls squarely within the provisions of section 29(1) of the Act. The facts are that LNG is a product that is subject to competition sufficient to protect the public interest. In consequence, the Board ought to refrain from acceding to Union's application.

6. The Board has provided invaluable guidance on the history, rationale and detailed application of section 29(1) in its decision in the Natural Gas Electricity Interface Review EB-2005-0551 ("**NGEIR**") where it determined that it should forbear from setting rates for ex-franchise storage sales. In NGEIR, the Board strongly supported the concept that competition rather than regulation can lead to better results[1]. The Board performed a detailed examination of the facts submitted in NGEIR and reflected upon argument in order to reach conclusions which supported an emphasis on competition.

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[1] NGEIR p.25

7. While Northeast believes that Union's provision of LNG services from Hagar for the purposes of system integrity needs and open market, competitive, ex-franchise sales should be very readily distinguishable for rate making purposes. Union has not accepted that position. Northeast finds Union's position difficult to understand, particularly since the Board dealt at length with the issue of segmentation in NGEIR and did not accept the argument now advanced by Union that it is not feasible to segment facilities and costs. In contrast to its current position, in NGEIR, Union specifically supported maintaining an integrated operation for storage operational purposes, by using an allocation methodology to segregate rate base and revenue for its storage operation to distinguish between its in-franchise regulated storage business and its ex-franchise unregulated storage business:

> *Union is not proposing a physical separation of assets. Union is proposing to leave the storage operation integrated as it is today and to use its Board approved cost allocation methodology to split rate base, costs and revenue.*[2]

8. Northeast therefore believes that the Board, in acting pursuant to section 29(1) is fully able to differentiate Union's in-franchise integrity system requirements from its ex-franchise competition market uses of LNG. The Board can refrain from regulating LNG sales in the ex-franchise competitive market and, as it did in NGEIR, the Board can allocate costs between the regulated utility and competitive non-utility operations.

9. Northeast relies on section 29(1) of the Act as the explicit substantive provision upon which the Board can grant the relief sought by Northeast. Moreover, in considering section 29(1), Northeast believes that the Board should deny Union's application in light of section 2.1 of the Act as well as section 2(2)(a) of the Regulation. By denying the application, the Board would be acting

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[2] NGEIR TR. Vol. 2, p. 118 (Union argument with respect to Issue II Storage Regulation)

"to facilitate competition in the sale of gas to users" and would "facilitate the maintenance of a financially viable gas industry..."

10. For all of these reasons, Northeast submits that its motion should be granted and that the Board ought to refrain from regulating and approving the terms, conditions and rates for the interruptible natural gas liquefaction service requested by Union.

PART II – THE FACTS

11. Northeast is a limited partnership, established pursuant to the *Limited Partnership Act* (RSO 1990, c.L-16) on March 22, 2013 with its principal place of business in Thorold, Ontario.

12. Northeast is an Intervenor in the application by Union to the Board EB-20014-0012.

13. Northeast's business is to construct and operate a natural gas liquefaction plant on its property in Thorold, Ontario and to market the LNG service which it will provide in the competitive market for LNG as a transportation fuel and for other purposes.

14. Northeast has acquired rights to land in Thorold, Ontario and has secured the requisite municipal and provincial approvals to permit it to build a gas liquefaction plant thereon to produce 33,000 GJ of LNG per day, for sale into the competitive market. The cost of Northeast's plant is estimated to be $130 million, with completion planned for the last quarter of 2016. Northeast's presence confirms that the market is competitive and that the competitive nature of the market for LNG as a transportation fuel supports this application to the Board to refrain from granting Union's requests. Dr. Gaske's evidence and conclusions reinforce this conclusion.[3]

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[3] Gaske, Initial Affidavit, October 15, 2014, para. 3

15. Union owns an older LNG liquefaction and storage facility in Hagar, Ontario. Built in 1968, the Hagar facility has been used to meet system integrity requirements. LNG liquefied at Hagar has been vaporized from storage and can be returned to Union's system when that system has required additional gas to service its distribution system customers at times when normal delivery chains are inadequate or disrupted and cannot deliver enough gas. This would normally happen in winter when gas consumption spikes and pipelines cannot meet the demand or when pipeline flow is disrupted.

16. Union has determined that its Hagar liquefaction and storage capacity has historically exceeded that which is required for system integrity requirements and now seeks to sell excess capacity ex-franchise on an interruptible basis to wholesalers or customers primarily for vehicle transportation fuel. Union acknowledges that this market for LNG is competitive.[4]

17. In pursuit of that quest, Union has initiated its application to the Board for various orders to permit Union to effect LNG service as an ex franchise rate based service. In the language of Union's application, "Union applies to the Board for (*inter alia*) an order approving a new Rate L1 rate schedule and a cost-based rate to accommodate an interruptible liquefaction service at Hagar".[5]

18. In support of its motion, Northeast has presented the expert affidavit of Dr. J. Stephen Gaske dated October 15, 2014.

19. Dr. Gaske accepted as his mandate a scope broader than that of a simple analysis of the requirements of section 29 of the Act. He evaluated "the economic and market characteristics of the distribution and sale of liquefied natural gas ("LNG") as a transportation fuel in order to

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[4] Union Responses to Interrogatories, Exhibit "B", Staff 3 para. (b) of Response

[5] Union application p.2 (iii)

determine whether this is the type of uncompetitive, natural monopoly activity that requires active regulation" by the Board.

20. Dr. Gaske effected an analysis of the relevant product and geographic markets and the competitive elements in those markets.

21. Dr. Gaske's conclusions are significant. He states that the relevant product is fuel for heavy duty transportation engines; that the relevant geographic market is, at a minimum, Ontario, Quebec, Michigan, Wisconsin, Indiana, Pennsylvania, Ohio, New York and Vermont; and that the market is workably competitive.

22. Dr. Gaske further suggests that it is imperative that the Board exercise forbearance in regulating Union's LNG services. "Unregulated competition in the nascent market for LNG transportation fuel" he states "is the best way to achieve the public benefits of innovative, efficient development of the market..."

23. His final point is that "the Board should forbear from regulating Union's LNG fuel business and allocate costs to this business so as to ensure that Union's gas distribution ratepayers do not subsidise or bear the risks of Union's entry into the competitive LNG fuel market"[6]

24. In reaching his conclusions, Dr. Gaske emphasises that the "focus of the LNG fuel competition analysis should be on the extent to which there are barriers to competitive entry as this market develops, and whether Union's proposal will encourage or inhibit competition in the developing market."[7]

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[6] Gaske, Initial Affidavit, October 15, 2014, para. 46.

[7] ibid, para. 23

25. While not directly relevant to an analysis of section 29, he also notes that Hagar's market entry would have the same effect whether or not its LNG service is rate regulated,[8] and that "if the Board were to forbear in regulating ...Union could immediately provide potential customers with contractually guaranteed rates and proceed to develop the business at its own risk.[9]"

26. Union, in its response to this motion dated October 23, 2014, makes the forthright acknowledgement that "In fact, aside from certain assertions .... Union does not oppose the overall basis of the (Northeast) Motion...",[10] but adds that, because of the "unique and specific circumstances" related to Hagar, this section 29 Motion is premature.

27. On November 6, 2014, Dr. Gaske provided an affidavit in reply which deals with the "unique and specific circumstances" advanced by Union. Dr. Gaske analyzes the excess capacity at Hagar and concludes that, "distribution system integrity could easily become the activity which is incidental to the LNG fuel service activity." Dr. Gaske's reply affidavit also addresses the relative ease of separating in-franchise from ex-franchise sales, and clarifies the distinction between "underwriting" risk and "funding" investment.[11]

28. In his initial affidavit, Dr. Gaske effectively deals with product and geographic markets, the state of competitiveness, and public benefit. He establishes the basis upon which the Board might refrain from granting Union's application. Dr. Gaske also addresses the erroneous and contradictory arguments made by Union that: (i) "The volumes available from Hagar will be small relative to the Ontario market. Although these volumes are not expected to affect the overall

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[8] ibid, para. 29

[9] ibid, para. 32

[10] Union Response, October 23,2014, para. 4

[11] Gaske, Reply, November 6, 2014, paras. 4, 5,6 and 7

operation of the LNG fuel market in Ontario, ..." and (ii) "... the proposed service is expected to stimulate demand ..." in the Ontario market.[12]

PART III – LAW AND ARGUMENT

29. Northeast will now examine, in greater detail, the basis of its motion.

30. The statutory guidance for the exercise by the Board of its responsibility is to be found in section 2 of the Act which sets out the overall objectives for the Board in relation to gas:

> S. 2 - The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:
>
> 1. To facilitate competition in the sale of gas to users.

31. Should the Board wish to proceed beyond the contradictions presented by the Regulation and the Union application, section 29(1) is the specific provision, on which the Northeast motion is based:

> 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. 1998, c. 15, Sched. B, S. 29 (1).

32. Pursuant to section 29, the Board's finding initially is to be one of fact. Is the product, in this case LNG, in a competitive market which is sufficient to protect the public interest? Upon satisfaction on the identification of product, geographic market, market power, market entry and public interest the Board is to make its determination whether to refrain, in whole or in part, from regulation.

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[12] Union Responses to Interrogatories, Exhibit "B" CME 6

33. As noted above in NGEIR, the Board addressed the application of section 29 in a comprehensive manner which effectively provides the history and purpose of the statutory provision.

34. In articulating its views of section 29(1), the Board observed:

> "It is not necessary to find that there is perfect competition in a market to meet the statutory test of competition sufficient to protect the public interest..... It is also important to remember that competition is a dynamic concept. Accordingly in S. 29 the test is whether a class of products is or will be subject to sufficient competition....."[13]

35. After reviewing different components of analysis, the Board concludes:

> "The Board notes that while the experts and intervenors differed as to how the test should be applied, there was little disagreement as to the key components of the analysis, namely those followed in the MEGs:
>
> - Identification of the product market;
> - Identification of the geographic market;
> - Calculation of market share and market concentration measures;
> - An assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment)."[14]

36. In NGEIR, the Board examined the product market and the geographic market[15] and proceeded to the Price Impact Issue[16] where, in assessing market power it clearly distinguished

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[13] NGEIR p. 26

[14] id

[15] NGEIR pp. 27-38

[16] NGEIR p. 39

between "in franchise" and "ex franchise" customers. For the Board, such distinction was critical. It was the nature of customer relationships that the Board identified as determinative.

37. When examining the key question of whether competition was or would be "sufficient to protect the public interest" the Board concluded that:

> "long-term consumer protection in terms of price, reliability and quality of service is best achieved through thriving competition for the competitive elements of the storage market and effective regulation of the non-competitive elements of the market. The Board is of the view that refraining from rate regulation and contract approval in the ex-franchise market has the potential to foster more competition in the storage market, to the benefit of all customers, provided there are clear rules and non-discriminatory access by all market participants. In a competitive market, customers have choices, resources are distributed efficiently, and there are incentives to innovate and respond to customer needs."[17]

38. In determining whether to refrain from regulating the Board explicitly recognised its ability to distinguish segments of a particular market:

> "....The Board has the discretion under S. 29 to refrain from regulating 'in whole or in Part.' The Board interprets this to mean that it has substantial flexibility to establish a framework which recognises the circumstances of various segments of the market."[18]

39. The Board further stated that its goal was to continue to regulate (and set cost based rates) for in-franchise customers. Such an approach, the Board noted, was supported by all the Intervenors, but for one, MHP Canada (an affiliate of Union)[19]

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[17] NGEIR p. 48

[18] NGEIR p. 52

[19] NGEIR p. 56

40. Finally, in its Allocation of Storage Available at Cost-Based Rates[20] in NGEIR, the Board concluded that Union's assets "are, in substance, a combination of 'utility assets' .....and 'nonutility assets'". The Board went on to reject submissions that "the entire amount of Union's storage is a 'utility asset'. In consequence, the Board refrained from regulating the ex-franchise market[21] while continuing to regulate the in-franchise market. Both markets obtained their storage from the same physical assets.

41. It is to be noted that this distinction led to intricate issues of allocation of storage and costs[22]. Parallel considerations would appear to be appropriate upon any determination by the Board to refrain from granting Union's current application. Union appears to recognise this conclusion[23]. In effecting this allocation, the Board might find instructive Dr. Gaske's reply affidavit where, at paragraph 6, he suggests that, in order to allocate costs "... The Board would need to determine how much of the Hagar liquefaction and storage capacity is excess to utility needs at this time".[24]

Product and Geographic Markets: Definition and Competitiveness

42. In light of a plain reading of section 29(1) and NGEIR, it is appropriate to analyse the facts on the current motion.

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[20] NGEIR p. 77

[21] NGEIR p. 82

[22] NGEIR p. 83 and following

[23] Union Response, October 23, 2014, para. 17

[24] Gaske Reply, November 6, 2014, para. 6

43. The product market in this case is transportation fuel. The geographic market, as suggested by Union encompasses Ontario, Quebec and portions of the Northeast and Midwest United States.[25]

44. Union has openly and clearly acknowledged that "the market for LNG as a transportation fuel (is) competitive".[26]

> b) Yes. Union does consider the market for LNG as a transportation fuel competitive. At the same time, the LNG for vehicle transportation market is an emerging market, one that is expected to develop gradually over the next several years. There are currently two LNG wholesalers operating in Ontario, Gaz Metro Transport Solutions (GMTS) and ENN Canada. Both will source LNG from the most economical supply available looking at the total delivered cost including the natural gas price, liquefaction charges, and transportation costs. Union is also aware of two other parties looking at locating LNG refuelling facilities or transportation assets to serve the Ontario market.

45. This forthright statement would, when taken with the expert opinion of Dr. Gaske, appear conclusively to show that the market is, indeed competitive and that section 29(1) applies. It would be difficult to imagine a more compelling acknowledgement than that provided by Union itself.

46. In addition to its acknowledgement in paragraph 44 above, Union supports the view that, not only is the market competitive, but that it will be more so in the future. In Union Responses to Interrogatories, Exhibit "B", BOMA 28, while acknowledging that Northeast is proposing its new facility and that LNG is available in Ontario, Union states that "The introduction of LNG from Hagar could provide the necessary stimulus to the market to support additional LNG facilities in

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[25] Affidavit of Joshua Samuel, October 15, 2014, Exhibit "E"

[26] Union Responses to Interrogatories, Exhibit "B", Staff 3 para(b) of Response

Ontario." Northeast's facility makes Hagar's stimulus unnecessary. Further, Hagar would offer the same stimulus, whether regulated or not.

47. Further support for the alternative view that the market "will be" competitive is provided by Union. In its Response of October 23, Union is unequivocal: "the market for LNG as a transportation fuel will be competitive".

48. Dr. Gaske is clear in his conclusion. He states that "This market is workably competitive".[27]

Ease of Entry

49. To have an operating competitive market, there must be relative ease of market entry. In the current situation, the very existence of Northeast would appear to confirm that market entry, if not easy, is quite feasible commercially. Dr. Gaske further emphasises the point.[28]

50. There is, however, a cautionary note: Dr. Gaske points out that if Union "is allowed to leverage its market power" by having its captive distribution customers underwrite the risks of its LNG service in the ex-franchise competitive market, "This ability ..... will discourage new entrants to the LNG fuel market and will inhibit the future development of a competitive, innovative and efficient market".[29]

Public Interest

51. Northeast sees a dynamic developing market in LNG. There is much public interest and fora, such as the Natural Gas Vehicles Canada Conference held in Toronto from October 20-22,

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[27] Gaske, Initial Affidavit, October 15, 2014 para. 46

[28] Gaske, Initial Affidavit, October 15, 2014, para. 24ff

[29] Gaske, Initial Affidavit, October 15, 2014, para. 42 (page 17, lines 16 and 17)

2014, and much press coverage demonstrate that fact.[30] In refraining from regulation, the Board will further stimulate market development by removing the threat of a favoured participant. As the Board stated in NGEIR, as cited above in paragraph 37 "thriving competition for the competitive elements of the ... market and effective regulation of the non-competitive elements of the market" redound to the public benefit.

52. Northeast reiterates that there is ample evidence to provide satisfaction for the factual requirements of section 29. The product market is competitive in the relevant geographic market; there is relative ease of market entry; the level of competition is sufficient to protect the public interest.

PART IV – UNION POSITION

53. While perhaps not directly relevant to a narrow consideration of section 29, Union's resistance to forbearance is instructive. Union is well aware of OR 161/99 and has rejected its application. Through interrogatories in EB-2014-0012 Union was asked how it would conduct the Hagar service if that service were not regulated, and more directly asked why it did not take advantage of OR161/99. At no point does Union provide any coherent explanation of why OR161/99 should not apply.

54. Hagar proposes to provide LNG services in two markets: one within the rate based regime, others in the competitive market. Union has not accepted the concept that the services provided to the ex-franchise competitive market should be free of regulation, with a corresponding equitable allocation of costs made to the unregulated portion of the business. Union therefore has not been

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[30] Affidavit of Joshua Samuel Exhibits B and C.

prepared to address the prospect that Hagar's new service be denied a rate while leaving Hagar's system integrity functions within the rate based regime. Union places emphasis on the fact that both services would emanate from the same physical facility which historically has been used for system integrity. Consequently Union has not distinguished the markets and seeks rate protection for the ex-franchise competitive service. Union states: "The primary purpose of the Hagar facility is for system integrity needed to support regulated operations."[31] Union's conclusion is therefore that the new Hagar LNG service should remain within the rate protected regime.

55. Northeast submits that, in recognising the overall basis of Northeast's motion in its most recent filing, Union has effectively failed to oppose the motion. In its most recently filed materials, Union modifies its position. In its October 23, 2014 response Union makes the surprising statement that it "does not oppose the overall basis of this (Northeast) Motion..." but relies "upon the specific and unique circumstances related to Union's Hagar LNG facility"[32] to sustain its objection to Northeast's motion.

56. This acknowledgment by Union appears startling. It vitiates other arguments made by Union and rests its case on the "specific and unique circumstances" related to Hagar. This leads to the precise examination of attendant circumstances, which Dr. Gaske does in his reply affidavit. Dr. Gaske questions the extent of the requirement placed upon Hagar for system integrity and illustrates the 95 to 100% of capacity LNG (1,018,765 GJ per annum) that Hagar could make available to competitive ex-franchise markets.

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[31] Union Responses to Interrogatories, Exhibit "B", Staffle

[32] Union Response October 23, 2014, paras. 4 and 5

57. Union elsewhere took the position that it is a small LNG producer whose activity in the ex-franchise competitive market will have no significant effect. The implication here is that Union's market entry will not be perceived to be a major event by market participants. Union states explicitly that the small relative volumes of LNG from Hagar are "not expected to affect the overall operation of the LNG fuel market in Ontario".[33] This position may not be correct, but is, in any event, irrelevant to a consideration of section 29. It is the competitive nature of the market, and not the quantity sold into that market, that triggers the application of section 29.

58. The "unique and specific circumstances" which Union seeks to now base its case, do not withstand scrutiny. That the Hagar facility is a regulated asset does not compel regulation of its ex-franchise sales. The quantity of LNG supplied by Hagar to the ex-franchise competitive market is irrelevant for the purposes of section 29 which requires only that the market be competitive. Indeed, Union's application calls into question the extent to which Hagar is required for system integrity.

59. Northeast submits that Union's residual arguments, that the Hagar facility is required for system integrity, that the ex-franchise service is interruptible, and that the quantity of LNG offered is small[34] are irrelevant to the application of section 29. Dr. Gaske's reply affidavit is further refutation. The arguments do not dispute the fact that the market for LNG is sufficiently competitive to protect the public interest.

60. Staff had asked explicitly "How does Union intend to proceed if it does not receive approval from the Board to charge a regulated rate but does receive approval to provide the new service?"

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[33] Union Response to Interrogatories, CME6

[34] Union Response, October 23, 2014, para. 6

61. The response[35] is not particularly illuminating and does not appear to address the Staff question:

> **Staff**
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> Union has indicated that it will provide liquefaction service under a new Rate L1 rate schedule. How does Union intend to proceed if it does not receive approval from the Board to charge a regulated rate but does receive approval to provide the new service? In other words, Union would be free to charge a market or unregulated rate for the new LNG service.
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>
> **Response:**
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> The primary purpose of the Hagar facility is for system integrity needed to support regulated operations. There is no change to this purpose or operations as a result of this application. The proposal to provide a small amount of interruptible LNG service is a form of asset optimization which will ultimately benefit ratepayers upon rebasing. During the IRM term, the interruptible service and revenue will contribute to regulated earnings, and may affect earnings sharing. For LNG that is used exclusively as a transportation fuel and is therefore subject to regulatory exemption, a new stand-alone plant investment and related services would not be regulated. This is not the case with the Hagar facility. For LNG that is used for purposes other than transportation (i.e. non-exempt), a new stand-alone plant investment and related services should be subject to competitive market and regulatory forbearance determinations.

62. In substance, Union appears to advance the argument that was explicitly rejected in NGEIR: that all services provided by a physical facility must, if the historic use of that facility has been regulated, continue to be regulated. Union appears simply to have ignored the large task faced by the Board in NGEIR in meeting the challenge of distinguishing different service markets which originated in one physical facility. In NGEIR, the Board clearly and effectively resolved the tension

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[35] Union Responses to Interrogatories, Exhibit "B", Staff 6

of continuing to regulate some of those services, in whole or in part, while permitting others of those services to proceed, unregulated, in a competitive market. Union has taken no notice.

63. In this case, an intervenor, Energy Probe, citing Regulation OR161/99 as a preamble, asked substantially the same question: "Why does Union want to provide this proposed LNG Transportation Fuel Service as a Regulated Service Rate rather than as a non-utility business?"[36]

64. Union's response was simply to refer to the response given to the Staff interrogatory #6. In effect, Union, for a second time, failed to answer the question by simply repeating its earlier answer.

65. Union's position is confusing. It repeatedly recites its own position that the new service *ought* to be regulated. More recently, Union added the argument that the section 29 application claim is premature. The reasons Union presents to support its shifting response positions do not support analysis.

66. Union has taken the position that to separate ex-franchise from in-franchise distribution of LNG from Hagar falls into the "too hard" basket.[37]

67. The decision in NGEIR dealt at length with the question when the Board rejected the position that different markets from an existing facility could not be distinguished. Union acknowledges that LNG used as a transportation fuel is exempt if from a new facility, and further acknowledges that LNG used for other purposes from a new facility would be equally exempt. Union's position herein is untenable. The Board has the power to refrain from regulating ex-franchise LNG sales to a competitive market and further to approve a methodology to allocate costs

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[36] Union Responses to Interrogatories, Exhibit "B", Energy Probe 1

[37] Union Response, October 23, 204, para. 7

between the in-franchise system integrity market and the ex-franchise market for LNG in the same manner that it has done for underground storage.

68. Union has not always taken the position that services from a single facility could not be differentiated. In NGEIR, with respect to storage assets, "Union argued that it would not develop assets to provide these services unless the rates are deregulated".[38] The rates in question were those for ex-franchise customers from facilities from which in-franchise customers also received services.

PART V – IMPLICATIONS OF UNION POSITION

69. The direct result of Union's request, if granted, would be that Union would be able to add to its rate base the capital amount of $9.9 million (less depreciation to 2019) which it will require to construct new facilities to enable it to provide LNG service to the ex-franchise competitive market. If the investment costs are included in the Board approved rate base, then Union shareholders would avoid the long term investment risks and distribution ratepayers would have the investment risk should Union's revenue forecast prove unduly optimistic.[39]

70. In this regard, the inquiry from Staff was succinct: did Union intend to add the capital costs of the requisite Hagar modifications to its rate base. Union was direct in its response. "Union will add the capital costs to rate base[40] when the proposed facilities are deemed to be in service. These facilities will be included in Union's forecasted rate base at its next cost of service proceeding." Dr. Gaske emphasises this imbalance, both in his initial affidavit[41] and his reply affidavit.[42]

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[38] NGEIR p. 68, see also para. 7 above

[39] Union Responses to Interrogatories Ex. B. Staff 7

[40] Union Responses to Interrogatories, Exhibit "B", Staff 7

[41] Gaske, Initial Affidavit, October 15, 2014, para. 37

71. In its Inquiry 5, the intervenor, CME, observed that "Traditionally, the Board has required that the differential between prices for ancillary services provided by a natural gas utility which fail to recover the fully allocated costs of providing such services and not simply the incremental costs be absorbed by the utility shareholder." Union disagreed with that statement, without stating the basis for that disagreement.[43]

72. Dr. Gaske's initial affidavit identified and expanded upon the implications of Union's position. Should Union proceed as requested, "rather than stimulating development of the market Union's proposal for regulated entry into the market is likely to inhibit the market".[44]

73. Union took umbrage, not with Dr. Gaske's conclusion, but to his terminology. [45] As a fall back, Union argued that, upon rebasing, Union's shifting of risk could be questioned by the Board.[46]

74. In reply, Dr. Gaske made it clear that his original affidavit addressed risks, not funding, and that Union had not responded to his risk argument.[47]

75. In the result, Union would be afforded a low risk entry into a competitive market, while potential competitors, such as Northeast will be risking much more substantial capital, fully exposed to the competitive pressures from Union. One might speculate that the advantages to Union are commercially desirable for it. Should the endeavour fail, once the assets have been included in the Board approved rate base there would be no cost to its shareholders. Should it succeed, Union

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[42] Gaske, Reply, November 6, 2014, para. 7 ff. See also Union Responses to Interrogatories, BOMA8

[43] Union Responses to Interrogatories, Exhibit "B", CME 5

[44] Gaske, Initial Affidavit, October 15, 2014, para. 37.

[45] Union, Motion Response October 23, 2014, para. 9.

[46] ibid, para. 11.

[47] Gaske, Reply Affidavit, November 6, 2014, para. 7.

would then have an established a customer base. It could proceed to utilise additional capacity in Hagar[48] or to build unregulated facilities which would be capable of securing large advantages for Union shareholders with no concomitant reward for ratepayers. In either case, ratepayers would bear the risk of market development and risk of loss.

76. In any event, it should also be noted that consideration of Union's ability to add to its rate base is irrelevant to an interpretation and application of section 29.

77. Put differently, Union's desired result would be quite inconsistent with the imprecations of section 2 of the Act. Were Union to be permitted to proceed as it seeks, in a rate protected manner, competition in the sale of LNG to users would be frustrated, rather than encouraged.

PART VI – NOTE ON BRITISH COLUMBIA AND QUEBEC

78. Union, in its application,[49] referred to the expansion of Fortis B.C.'s LNG capacity as part of its natural gas regulated rate base and to Gaz Métro plans to supply LNG to the heavy transport industry in Quebec and Eastern Canada.

79. While both Fortis BC's and Gaz Métro's press releases provide illustration of the developing market for LNG, there is no support for the regulatory result sought by Union.

80. In British Columbia there is no statutory provision equivalent to section 29(1). The BC Public Utilities Commission consequently found that "a CNG/LNG facility infrastructure has no natural monopoly characteristics and the service offerings applied for would not be subject to

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[48] Gaske – Reply Affidavit, November 6, 2014, para. 4.

[49] Union Application, Exhibit "A", page 9, line 14, page 10, line 2

regulation, unless the services were being provided by an organization that is already a regulated public utility.[50]

81. Acceding to the legal compulsion to regulate, the BC Commission went on to find that "given the risk involved and the potential presence of unregulated competition, it is neither in the public interest nor fair and just that (Fortis') existing ratepayers subsidise the NGV (natural gas vehicle) fuelling facilities"[51]

82. In Quebec, the Régie de L'Energie found quite simply that the sale of LNG by Gaz Métro to a third party is not a regulated activity and that it was only the treatment of costs related to that sale which would be of concern to the Régie.[52]

83. While both BC and Quebec situations are interesting and provide insight into LNG activity in those provinces, and while both support the principle that the costs of development of LNG facilities ought not to be visited on ratepayers, neither can provide further illumination for the application of section 29(1) of the Act because of the differences in law in the provinces.

PART VII – SECTION 29 REVIEWED

84. In reviewing the elements set out by the Board in NGEIR for consideration in an application under section 29(1) of the Act, Northeast concludes that, in each instance, the necessary criteria have been met. The product market is transportation fuel, the geographic market is at a minimum Ontario, Québec, Michigan, Wisconsin, Indiana, Pennsylvania, Ohio, New York and Vermont, the market is competitive and the test of public benefit has been met. The Board further

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[50] BC Utilities Commission Order G-128,11 Appendix A, p.4

[51] ibid

[52] Décision – Régie De L'Energie D 2011-0301 R.3751-2010 17, March 2011, p. 6, para. 10

has the power to segment the market and to refrain from granting to Union the orders sought in its application. Union's opposition is not supported.

PART VIII – ORDER REQUESTED

85. For all of the forgiving reasons, Northeast respectfully submits that it would be appropriate for the Board to grant an Order pursuant to section 29 of the Act and refrain from regulating and approving the terms, conditions and rates for the interruptible natural gas liquefaction service requested by Union. Northeast also respectfully requests its costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 18, 2014

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Northeast Midstream LP

IN THE MATTER OF the *Ontario Energy Board Act,* 1998, S.O. 1998, c. 15

AND IN THE MATTER OF an Application by Union Gas Limited, pursuant to S. 36(1) of the *Ontario Energy Board Act,* 1998 for an order or orders necessary to accommodate a new interruptible natural gas liquefaction service at its Hagar Liquefied Natural Gas Facility.

EB-2014-0012

ONTARIO ENERGY BOARD

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