

**Outline of Argument of Northeast Midstream LP  
(re: Northeast's motion made pursuant to section 29(1) of the  
*Ontario Energy Board Act*)**

**A. Union's Application should not proceed irrespective of Northeast's motion under section 29(1) of the *Ontario Energy Board Act* (the "Act")**

**1. Union asks the Board to exercise its jurisdiction pursuant to section 36 of the Act. [Tab 1]**

- Union asks for an Order approving a new rate schedule and cost-based rate to accommodate a proposed interruptible liquefaction service for liquid natural gas ("LNG") at Union's Hagar facility. [Tab 2]
- Union should only be entitled to ask the Board to invoke section 36 having regard to section 2(2) of Regulation 161/99 (the "Regulation") to the Act.
  - Section 2(2) of the Regulation provides that section 36 of the Act does not apply in respect of the sale, transmission, distribution or storage of motor vehicle fuel gas in certain circumstances. [Tab 3]
- Union's proposed service meets the requirements of the Regulation at section 2(2).
  - Union is either a Class A distributor under (a) or "any other person" under (b).
  - Union admits that it intends to sell LNG as motor vehicle fuel using excess capacity not required for system integrity. [Tab 4]
- Union was asked specifically about the Regulation, but provides no adequate explanation in respect to this inquiry. [Tab 5]
  - Union acknowledges that the sale of LNG as motor vehicle fuel is normally exempt from regulation. [Tab 5]
  - Union also acknowledges that any new greenfield facility would be exempt. [Tab 6]
  - Union's capital investments relate directly to the dispensing of LNG as motor vehicle fuel, and are easily separated from Hagar's utility requirements. [Tab 7]
  - As these investments are not related to utility requirements, they are essentially greenfield.

- Greenfield-like investments aimed entirely at selling LNG as motor vehicle fuel should not be subject to regulation.
- In light of the Regulation, Union cannot rely on section 36 of the Act for the purposes of its Application.

**B. The Board should refrain from exercising its rate-setting powers in this case, pursuant to section 29(1) of the Act**

**1. Section 29(1) has been duly considered by the Board in the Natural Gas Electricity Interface Review (“NGEIR”) EB-2005-0551**

- The application of Section 29(1) requires findings of facts:
  - 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. [Tab 8]**
- NGEIR establishes the relevant factors to consider in applying section 29(1): **[Tab 9]**
  - (i) identification of the product market;
  - (ii) identification of the geographic market;
  - (iii) calculation of market share and market concentration measures;
  - (iv) assessment of market conditions of entry;
  - (v) analysis of the public interest
- The Board found that “perfect” competition is not required, but that a less competitive threshold may be sufficient. **[Tab 10]**

**2. The Board’s interpretation of “competition” in NGEIR is consistent with its statutory objective.**

- Section 2 of the Act provides the overall objectives for the Board in relation to gas. The Board is to be guided by the following objective: (1) to facilitate competition in the sale of gas to users. **[Tab 11]**
- The Board operates on the premise that forbearance from setting rates is *prima facie* preferable to regulation as it delivers better outcomes for the public. **[Tab 12]**

3. It is not disputed that there is competition sufficient to protect the public interest.

- The base elements of section 29(1) are uncontested.
  - The product market is motor vehicle transportation fuel. [Tab 4]
  - The geographic market is Ontario, Quebec and portions of the Northeast and Midwest United States. [Tab 13]
  - With respect to market share and concentration: (a) the LNG motor fuel market is nascent, making determinations of market share mostly irrelevant; (b) Union is a new entrant to the ex-franchise market; and c) other LNG providers already operate in Union's proposed geographic market. [Tab 14]
  - The public interest in question is the public's interest in the operation of a competitive market. [Tab 15]
- No dispute that the market is sufficiently competitive to protect the public interest.
  - Union itself admits that there is and will be competition in the relevant market. [Tab 16]
  - LNG as a motor vehicle fuel must compete against diesel. [Tab 14]
  - In any event, per NGEIR, the market may need only be "workably competitive" in order to be sufficient to protect the public interest.

**C. There are no "special and unique circumstances" in this case which favour Union's position**

1. Union argues that it is too complicated to allocate costs at Hagar as between its in-franchise and ex-franchise services. [Tab 15]

- Union argues that, whereas in NGEIR it was "easier" to determine and ultimately separate the services in question, in this case it is not easier. [Tab 17]
- Union cites the fact that both services are functionally integrated in the same physical facility.

2. This same argument against separation of services in costing was directly rejected by the Board in NGEIR. In NGEIR, the Board found that:

- A functionally integrated facility could still be notionally divided into "utility assets" required for in-franchise services and "non-utility assets" required for regulated services. [Tab 18]

- Costs could and should be allocated as between those divided assets, despite the complexity in doing so. **[Tab 18]**
  - Both Union and Enbridge supported this approach. **[Tab 18]**
  - Cost allocation between functionally differentiated assets is an integral part of ratemaking and is not beyond the ability of Union or the Board. **[Tab 19]**

3. There is no rational basis by which to distinguish this case from NGEIR.

- This case is factually analogous to NGEIR.
  - In NGEIR, Union could sell services to ex-franchise customers only once it had fulfilled its in-franchise needs; **[Tab 20]**
    - here, Union is similarly bound by its system integrity commitments. **[Tab 21]**
  - In NGEIR, it would not have been operationally feasible for Union to physically separate its in-franchise and ex-franchise services; **[Tab 20]**
    - here, there is no suggestion that it is necessary to physically separate the services.
  - In NGEIR, development in recent years had been driven by the ex-franchise market, not by in-franchise needs; **[Tab 21]**
    - here, Union is also driven by ex-franchise needs and is applying “in direct response to an increased interest in the use of natural gas, and LNG particularly, as...preferable fuel for heavy duty vehicles.” **[Tab 4]**
- Union’s response of October 23<sup>rd</sup> to Northeast’s motion did not provided a reasonable basis by which this case can be distinguished from NGEIR. **[Tab 22]**

**D. There are factors which call for a rejection of Union’s position**

1. Union is asking to shift its business risk onto its existing ratepayers.

- Union intends on investing an estimated \$9.9 million in capital costs into its Hagar facility in order to increase storage capacity and facilitate the dispensing of LNG into tanker trucks. **[Tab 23]**
- Union intends on adding the capital cost of this investment to its rate base. **[Tab 24]**
- Union intends to shift the risk of those capital costs onto distribution ratepayers. **[Tab 25]**

- At rebasing in 2019, to the extent that ex-franchise sales have not recovered the fully allocated costs of the Hagar facility, Union would attempt to increase the rate to ensure that there is no revenue deficiency. **[Tab 26]**
- Union does not intend on inputting other revenues to make up for any shortfall such that Union shareholders will assume the underperformance risk. **[Tab 27]**
- While ratepayers may be entitled to share profits under the IRM, they are being asked to bear the risk of the venture underperforming.
- The Board in NGEIR found that shareholders ought to bear the risk for non-utility assets. **[Tab 28]**

2. Union is asking to be privileged within an otherwise competitive market, and is therefore asking that the Board frustrate competition in the market.

- The market for LNG is indisputably competitive.
- A nascent market cannot be anything but competitive.
- If Union is to add the capital costs of its investment to its rate base, a new market entrant such as Northeast which operates solely or predominantly in the unregulated market has no rate base to add such costs to.
- New market entrants would therefore necessarily enter at a competitive disadvantage to Union.
- Should Union's ex-franchise service expand as predicted, this would further increase the competitive disadvantage to new entrants. **[Tab 29]**
- This result would be entirely contradictory to section 2(1) of the Act, where the Board has as a primary objective to promote competition.

3. Forbearance will not preclude Union from operationalizing its proposed interruptible liquefaction service

- Union has developed a robust cost allocation methodology which is independent of a rate being set. **[Tab 30]**
  - Should the Board refrain from setting a rate, Union will nevertheless ask the Board "to make a finding on [Union]'s cost allocation methodologies." **[Tab 31]**

- Forbearance would actually be to Union's benefit, as it would then be free to offer fixed rates to customers over whatever length of time best suited the business circumstances. **[Tab 32]**
  - A Board rate, by contrast, would be subject to an uncertain rebasing process every few two and a half years.
- If a rate is set by the Board, such rate should be higher than that proposed by Union in its Application.
  - This is to be addressed on Application if this motion is denied.

**E. Northeast should be entitled to its costs of this motion**

**1. Costs at Board hearings are governed by the Practice Direction on Cost Awards. **[Tab 33]****

- A party in a Board process is eligible to apply for a cost award where that party primarily represents the direct interest of consumers (e.g. ratepayers) or represents an interest or policy perspective relevant to the Board's mandate and to the proceeding.
- In making a determination as to a party's eligibility for costs, the Board may consider whether the party is a commercial entity having regard to its commercial interests, frequency of intervenor status and other factors relevant to the public interest.

**2. Northeast submits that it is eligible for a cost award, pursuant to the Practice Direction.**

- The Practice Direction actively contemplates that an intervenor may apply for cost award eligibility at Section 3.03.1. **[Tab 33]**
- Northeast applies for costs under the Practice Direction. **[Tab 33]**
  - Northeast represents the interests of ratepayers and the Board's mandate of competition.
  - While Northeast is a commercial entity and is actively contemplating a liquefaction venture, this motion relates to Union's Hagar facility, not to Northeast's proposed facility.
  - Northeast is not a frequent intervenor or a party of the types excluded from cost awards.
    - Northeast is not a gas transmitter, distributor, marketer or storer – it is only contemplating an LNG project at this time.
- The Board retains the discretion to award costs in favour of Northeast pursuant to section 3.07 of the Practice Direction. **[Tab 34]**

3. Northeast submits that it ought to be awarded its costs on this motion.

- Northeast is advocating in the public interest and has contributed to an enhanced understanding of the issues.
- Northeast has participated reasonably in this process, has complied with the Board's orders and requirements, has made reasonable efforts to co-operate with all other parties, has ensured that its submissions were not unduly repetitive or redundant, has not engaged in any conduct that unnecessarily lengthened the process, and has not engaged in any inappropriate or irresponsible conduct. **[Tab 35]**