

January 23, 2015

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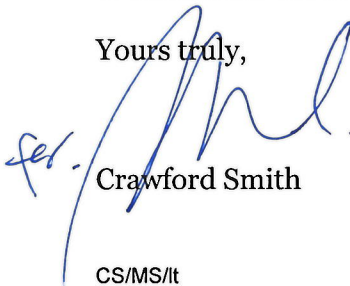
Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

**Re: Motion by Natural Resource Gas Limited to Review and Vary the Board's
Decision in EB-2014-0154
EB-2014-0375**

We are counsel to Union Gas Limited in this proceeding. Enclosed are Union's submissions on the threshold question and Union's motion record, on which it intends to rely at the oral hearing scheduled for January 27, 2015.

Yours truly,

A handwritten signature in blue ink, appearing to be "Crawford Smith", is written over the typed name.

Crawford Smith

CS/MS/lt

cc. Myriam Seers, Torys LLP
John Campion
Intervenors in EB-2014-0154

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Union Gas Limited for an order or orders approving a one-time exemption from Union Gas Limited's approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations;

AND IN THE MATTER OF a motion initiated by Natural Resource Gas Limited pursuant to the Board's Rules of Practice and Procedure requesting that the Board review its Decision and Order dated October 9, 2014 in EB-2014-0154.

SUBMISSIONS OF UNION GAS LIMITED
(on the Threshold Question – Motion By NRG To Review and Vary)

January 23, 2015

PART I – OVERVIEW

1. These are the submissions of Union Gas Limited ("**Union**") on the threshold question in the motion by Natural Resource Gas Limited ("**NRG**") to review and vary the Ontario Energy Board's (the "**Board**") Decision and Order dated October 9, 2014 in EB-2014-0154 (the "**Decision**")¹.
2. NRG's motion is without foundation and should be dismissed by the Board. NRG has failed to satisfy the threshold test because the evidence it seeks to adduce could have no effect on the Board's Decision. There would therefore be no purpose to allowing it to be heard.

¹ Decision and Order dated October 9, 2014 in EB-2014-0154, Union's Motion Record, Tab 1

PART II – THE APPLICATION BEFORE THE BOARD AND THE BOARD’S DECISION

Union’s Application and Evidence

3. By letter dated April 3, 2014, Union applied to the Board for approval of a one-time exemption from Union’s Board-approved rate schedules. Union applied to make a one-time exemption to certain charges levied to the Rate T1/T2 Supplementary Inventory, Rate 25 Unauthorized Overrun Gas Supply Commodity and Bundled T-Service customers who did not meet their contractual balancing obligations in the months of February and March 2014. Consistent with the terms of their contracts, these customers were charged the highest spot cost of gas at Dawn in the month of the occurrence and the month following the occurrence.²
4. The five month winter period of November 2013 to March 2014 was the coldest winter in Union’s records for Union South, which date back to the winter of 1969/1970.³ In recognition of these exceptional weather conditions, in Union’s April 3, 2014 letter, Union applied for two changes to this charge in recognition of the exception weather conditions that occurred in February and March 2014, as follows:
 - (a) to limit the billing of the above changes to the highest spot cost in the month in which gas was sold; and
 - (b) to reduce the charge from the highest spot cost at Dawn during each of these months to the second-highest spot cost at Dawn.⁴
5. Union proposed to reduce the penalty charges in recognition of the exceptional weather conditions in 2014, despite the fact that over 95% of Union’s customers met their contractual obligations.⁵
6. Union submitted before the Board that using the second-highest spot price at Dawn met the intent of the penalty charge as contemplated in RP-2001-0029, because it would provide relief to affected customers while preserving the intent of the penalty to ensure

² Letter of April 3, 2014, Union’s Motion Record, Tab 2.

³ Exhibit B.NRG.1, Union’s Motion Record, Tab 3.

⁴ Letter of April 3, 2014, Union’s Motion Record, Tab 2.

⁵ Exhibit B.BOMA.1, Attachment 2, Union’s Motion Record, Tab 4.

that customers balance their contractual commitments. As Union noted, a customer should not be in a position of making an economic decision to pay a penalty rather than paying a higher market-based price, thus putting the integrity of the utility system at risk.⁶

NRG's Submissions

7. NRG took the position before the Board that it should be subject to an alternative penalty charge applicable only to it. NRG stated that the Board should consider setting a penalty rate for NRG in the range of \$4.87/GJ to \$7.12/GJ, on the basis of historic norms and Union's actual costs. It also submitted that NRG is a distributor and did everything it could to meet its contractual obligations.⁷

The Board's Decision

8. In the Decision, the Board approved Union's application as filed.⁸
9. The Board accepted that the penalty charges were designed to encourage direct purchase customers to comply with their contractual obligations in order to ensure the security of Union's system, as set out in the Board's Decision with Reasons in RP-2001-0029.⁹
10. The Board found that the proposed reduction of the penalty charges to the second-highest spot cost of gas at Dawn in the month which the gas was sold was appropriate considering the exceptional circumstances that affected customers during the winter of 2014. The Board found that the reduced penalty proposed by Union continued to achieve the intent of the penalty charges as established by the Board in RP-2001-0029, which is to encourage compliance with contractual obligations.¹⁰ It stated:

The Board is of the view that Union's proposed reduction of the penalty charges to the second-highest spot cost of gas at Dawn in the month which the gas was sold is appropriate considering the exceptional circumstances that affected customers during the winter of 2014. The 2014 winter was extraordinary and it is in the

⁶ Exhibit B.NRG.29, Union's Motion Record, Tab 5.

⁷ Decision, p. 3, Union's Motion Record, Tab 1.

⁸ Decision, p. 5, Union's Motion Record, Tab 1.

⁹ Decision, pp. 5-6, Union's Motion Record, Tab 1.

¹⁰ Decision, p. 6, Union's Motion Record, Tab 1.

context of this anomalous winter that the Board is granting Union approval to reduce the penalty charges. This is an unprecedented step by the Board, and should not be seen as an invitation to utilities or their customers to seek a reduction in penalty charges in general. The Board finds that in this case, the reduced penalty as proposed by Union continues to achieve the intent of the penalty charges as established by the Board in RP-2001-0029. The penalty charges are designed to encourage compliance with contractual obligations. This can be achieved while at the same time reducing the potential for the penalty to unduly impair the financial viability of those required to pay it. The Board considers Union's proposed penalty to be appropriate in striking this balance.¹¹

11. In reaching its Decision, the Board recognized that the penalties that would have been charged to customers absent the relief requested by Union – *i.e.* the highest spot price at Dawn in the month of the occurrence and the month following the occurrence – had the potential to unduly impair the financial viability of those required to pay it as a result of the “extraordinary” and “anomalous” 2014 winter.¹² In other words, the Board recognized that extreme weather conditions in the 2014 winter led to high spot prices at Dawn, which in turn led to high penalties for those customers who could not meet their contractual balancing obligations.
12. The Board rejected arguments from certain intervenors that it would be inappropriate for a compliant customer to pay more than a non-compliant customer to meet its contractual obligations.¹³
13. The Board considered, and rejected, NRG's arguments that a different method to setting the penalty should be applied to NRG on the basis of historic norms or Union's gas costs. The Board found that the methodology proposed by NRG was not appropriate and was not consistent with the intent of the penalty. It also found that NRG's status as a distributor did not warrant any different treatment.¹⁴

¹¹ Decision, p. 6, Union's Motion Record, Tab 1.

¹² Decision, pp. 5-6, Union's Motion Record, Tab 1.

¹³ Decision, pp. 6-7, Union's Motion Record, Tab 1.

¹⁴ Decision, p. 7, Union's Motion Record, Tab 1.

The New Evidence that Forms the Basis of NRG's Motion

14. NRG brings this motion on the basis that the evidence set out in the affidavit of Brian Lippold and its exhibits (the “**Additional Evidence**”) should be adduced in the underlying proceeding.
15. The Additional Evidence is directed at explaining the factors that contributed to increased gas prices during the winter of 2014.¹⁵ This evidence confirms the Board's implicit finding that extreme weather conditions led to increased gas prices in February and March 2014.
16. Nothing in the Additional Evidence is directed to the Board's Decision that allowing a reduction of the penalty to the second-highest spot price at Dawn would continue to serve the purpose of the penalty by incenting customers to meet their contractual obligations.
17. Further, nothing in the Additional Evidence is directed to NRG's submission that the penalty should be applied to NRG on the basis of historic norms or Union's gas costs.

PART IV – THRESHOLD TEST

A. The Threshold Test

18. Rule 42.01(a) of the Board's *Rules of Practice and Procedure* sets out the grounds upon which a motion to review and vary may be brought. These include:
 - I. Error in fact;
 - II. Change in circumstances;
 - III. New facts that have arisen;
 - IV. Facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.¹⁶
19. NRG invokes factors III and IV.

¹⁵ Lippold Affidavit, paras. 11-16, Motion Record, Tab 2.

¹⁶ *Rules of Practice and Procedure*, Rule 42.01, Union's Motion Record, Tab 6.

20. Rule 42.01 provides explicitly that a notice of motion to review must “set out the grounds for the motion that raise a question as to the correctness of the order or decision”.
21. The threshold question was articulated in the Board’s Decision on a Motion to Review in the Natural Gas Electricity Interface Review proceeding (the “**NGEIR Decision**”). The Board found that, to meet the “threshold test”, the moving party must raise a question as to the correctness of the order or Decision. The Board stated that the purpose of the threshold test is to determine whether the grounds raise such a question. The Board must also decide whether there is enough substance to the issues raised such that a review based on those issues could result in the Board varying, cancelling or suspending the Decision.¹⁷
22. Thus, to meet the threshold test, a moving party must establish that the new evidence it seeks to put forward could materially change the decision in question. It is not enough that new evidence exists – the new evidence must have the potential to materially alter the Board’s decision. Otherwise, a motion to review and vary could not result in varying the outcome of the decision, and would serve no purpose.¹⁸
23. The Board and the Divisional Court have stated very clearly that a motion for review is not an opportunity to re-argue the case and should only be granted in very limited circumstances. For example, in *Corporation of the Municipality of Grey Highlands v. Plateau Wind Inc.*, the Divisional Court dismissed the Municipality’s appeal from the Board’s refusal to review a decision under rule 44.01(a). Lederman J. agreed with the Board that the request should be rejected because it identified no error of fact and simply re-argued legal issues that had already been argued in the original hearing.¹⁹

¹⁷ Decision with Reasons, EB-2006-0322/-0338/-0340, May 22, 2007 at p. 17-18, Union’s Motion Record, Tab 7; *Rules of Practice and Procedure*, Rule 42.01, Union’s Motion Record, Tab 6.

¹⁸ Decision with Reasons, EB-2006-0322/-0338/-0340, May 22, 2007, p. 18, Union’s Motion Record, Tab 7.

¹⁹ *Corporation of the Municipality of Grey Highlands v. Plateau Wind Inc.*, 2012 ONSC 1001 at para. 7 (Div. Ct.), Union’s Motion Record, Tab 8.

B. NRG Has Not Met The Threshold Test

24. NRG has not met the threshold test. There is nothing in the Additional Evidence that could in any way change the Board's Decision. Therefore, there would be no purpose for the Board to hear the motion to review and vary on its merits.
25. Indeed, as noted above, the Additional Evidence simply confirms what the Board recognized in the Decision: that the extreme weather conditions in winter 2014 led to increased spot gas prices at Dawn.
26. But none of this is relevant to what the Board actually decided: that reducing the penalty to the second-highest spot price at Dawn would meet the underlying purpose of the penalty by incenting customers to meet their contractual obligations. The Board expressly considered, and rejected, arguments that it would not be appropriate to reduce the penalty to the second-highest spot price at Dawn. Additional evidence about the factors motivating high gas prices in winter 2014 could have no effect on the Board's Decision in this regard.
27. Further, nothing in the Additional Evidence is relevant to the Board's Decision to dismiss NRG's request that a different mechanism apply to it. The Board rejected NRG's proposed methodology on the basis that it was not appropriate and was not consistent with the intent of the penalty, which is to incent customers to meet their contractual obligations. The Additional Evidence is not relevant to the question of whether NRG's proposed methodology is appropriate or consistent with the purpose of the penalty. This evidence could not possibly change the Board's Decision to reject NRG's proposed methodology.
28. NRG has therefore failed to meet the threshold test because it has not established that any new facts have arisen that could materially change the Decision.
29. In addition, NRG has failed to establish that it could not, with reasonable diligence, have discovered the information set out in the Additional Evidence. Had NRG wished to submit evidence as to the factors that led to increased gas prices in winter 2014, it could have retained its own expert and sought to file a report on that topic during the

proceeding before the Board. It is simply too late for it to put forward this evidence now, after the Board has issued a Decision with which NRG is displeased.

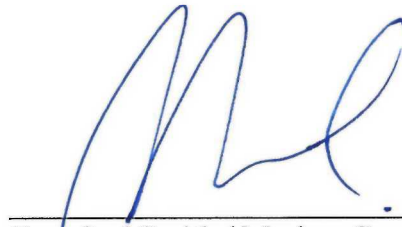
C. CME's Submission Has No Relevance to this Motion

30. The Board should disregard the submissions made by counsel for CME in their letter of January 20, 2015. CME's submissions are not directed to whether NRG has met the threshold test on its motion to review and vary. Instead, CME reargues the position that it took before the Board in Union's 2013 Deferrals Application to allocate the actual cost of the gas used to cover direct purchase customers defaults to sales service customers and the excess in penalty amounts over the actual cost of gas to Union's direct purchase customers. The Board explicitly rejected the CME's position in that proceeding.²⁰

PART IV - ORDER REQUESTED

31. For the reasons set out above, Union requests that NRG's motion be dismissed without being heard on its merits.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

A handwritten signature in blue ink, appearing to be 'MS', is written over a horizontal line.

Crawford Smith / Myriam Seers
Lawyers for Union Gas Limited

²⁰ Decision and Order dated October 30, 2014 in EB-2014-0145, Union's Motion Record, Tab 9.