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ONTARIO ENERGY BOARD

EB-2014-0375

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 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.

**OPENING STATEMENT OF NATURAL RESOURCE GAS LIMITED ("NRG")
Preliminary NRG Motion to Review and Vary Board Decision
January 27, 2015**

PART I - INTRODUCTION

1. Natural Resource Gas Limited ("NRG") has moved to review and vary the Ontario Energy Board's (the "Board") Decision and Order dated October 9, 2014 in EB-2014-0154 (the "Decision").
2. The Board has the jurisdiction to reopen Decision so as to consider new evidence that has arisen since the time that the Decision was rendered.
3. The Board may re-open the Decision based on NRG's motion under Rule 40.01 of the Board's *Rules of Practice and Procedure*. Under the procedure, the Board has the authority to "review all or part of a final order or decision, and to vary, suspend or cancel the order or decision".
4. Rule 42.01 expressly provides that the grounds for a motion to review a decision of the Board may 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[.]

5. NRG makes its motion to review and vary the Board's Decision on the basis that new facts have arisen and that facts that were not previously placed in evidence in the proceeding and which could not have been discovered by reasonable diligence by NRG at the time have now come to its attention.

6. In addition, Part VII of the Board's *Rules of Practice and Procedure* (including Rules 40 to 43) have been promulgated pursuant to section 21.2 of the *Statutory Powers Procedure Act*, RSO 1990, c. S.22, which provides:

21.2 (1) A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order.

(2) The review shall take place within a reasonable time after the decision or order is made.

7. The motion to review should be granted where the moving party has raised "a question as to the correctness of the order or decision", and that "the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision": *Re Ontario Energy Board*, 2007 LNONOEB 51, EB-2006-0322/0388/0340 at paras. 55-59.

8. More recently, the Board has confirmed that the question on such a motion, and under the threshold determination under Rule 43.01 is,

... whether the grounds put forward by the moving party raise a question as to the correctness of the order or the decision, and 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.

9. *Re Union Gas Ltd.*, 2012 LNONOEB 363, No. EB-2012-0360 at para. 20. NRG acknowledges that a review under Part VII is not an appeal, and is not intended to provide an opportunity to re-argue the case based on the facts and evidence that were before the Board at the original hearing: *Grey Highlands (Municipality) v. Plateau Wind Inc.*, 2012 ONSC 1001 at para. 7.

10. In the present case, however, NRG seeks to introduce and rely on evidence and materials containing further information highly material to the matters decided in the Decision and which could not have been obtained through reasonable diligence.

11. Both section 21.2 of the *Statutory Powers Procedure Act* and part VII of the Board's *Rules of Practice and Procedure* reflect the principle that the doctrine of *functus officio* does not apply to decisions rendered by regulatory administrative tribunals.
12. For a court of law, the grounds for setting aside or varying a judgment are narrowly circumscribed in the interests of finality: *Rules of Civil Procedure*, RRO 1990, Reg. 194, r. 59.06. However, for administrative tribunals, whose determinations are only subject to appeal on questions of law, concerns about finality are attenuated and the tribunal will generally retain a greater freedom to reconsider and correct its own prior determinations: *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848; *Grier v. Metro International Trucks Ltd.* (1996), 28 O.R. (3d) 67 (Div. Ct.) at paras. 21-24.
13. In any event, even in the civil courts, where the doctrine of *functus officio* applies with full force, the court has the jurisdiction to reopen a matter and vary a previous decision where a party can demonstrate that some new evidence would have an important influence on the decision, that that evidence is apparently credible, and that it could not have been obtained by reasonable diligence before the earlier hearing: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 SCR 983 at para. 63; *Windsor-Essex Children's Aid Society v. T.R.*, 2014 ONCJ 563 at para. 21; *Rules of Civil Procedure*, RRO 1990, Reg. 194, r. 59.06(2)(a).
14. For reasons hereinafter set out, it is respectfully submitted that NRG has become aware of facts which were not previously available to it or any other party acting with due diligence. On this basis, the Board should grant NRG's motion to review and vary the Decision.

PART II – THE RELEVANT LEGAL AND REGULATORY RELATIONSHIPS

15. As a Bundled T-Service of Union Gas Limited ("Union"), NRG has a written agreement with Union. That agreement has been reviewed by the Board. The agreement provides that NRG is to meet its Winter Checkpoint Quantity under its contract with Union on or before February 28. The contract provides that if NRG does not provide the Winter Checkpoint Quantity under its contract on that date, it will be required to pay a penalty rate to Union based on the highest spot rate for natural gas in the month of the occurrence (February) and the month following the occurrence.
16. The first legal relationship that must be considered is the contractual relationship between Union and NRG.
17. The contract is not immutable. The Board retains the right to amend the Union/NRG contract. Indeed, in this very application leading to the Decision, Union applied on April 3, 2014 for "approval of a one-time exemption from Union's Board-approved rate schedules to reduce the penalty rate contained in the Union/NRG contract from the highest spot cost of gas at Dawn in the month of the occurrence and the month following the occurrence.
18. The second legal relationship is that NRG is a customer of Union.

19. The third relationship is a regulatory one where the Board retains an obligation to fix just and reasonable rates. This obligation is to be exercised in the public interest. The public interest encompasses consumers of Union and NRG and NRG itself, as a customer of Union.

PART III – FACTS NOT PREVIOUSLY IN EVIDENCE

20. In the exercise of its public mandate, the Board provided a significant and important forum for the review of natural gas pricing in the winter of 2013/2014.
21. The Board itself commissioned a report by Navigant Consulting Limited (“Navigant”) to “... analyse the gas market events of last winter, focusing on the variables and factors that affected Ontario natural gas supply, demand and prices over the winter 2013/2014 period ...”. It is submitted that the Board would not have found it necessary to commission such a significant and complex report if all of the factors affecting the natural gas pricing in the winter of 2013/2014 were known.
22. The report itself says: “Extreme winter conditions associated with last winter’s polar vortex events elevated natural gas demand throughout the U.S. and Ontario to record levels. As a result of dramatically elevated natural gas demand levels that occurred over an extended period of time and over a widespread geographic area, spot natural gas prices were elevated across most market points of North America for at least some period of the winter. Prices at Dawn were elevated mostly during February, with a few spikes in January and some residual price elevation in early March. These market conditions also set the stage for **additional factors that further exacerbated Ontario gas prices.**” [emphasis added].
23. While Union’s customers, including NRG, would have known about the extreme winter conditions, no one could have foreseen the elevated demands over an extended period of time, over a widespread geographic area across most of North America. This very characterisation by Navigant gives a focus and a retrospective that was not available at the time the Board made the Decision.
24. In any event, the additional factors discovered and described by Navigant in its report of November 25, 2014 were not available to the Board when it made the Decision. Those factors are as follows:
 - Extreme winter conditions elevated natural gas demand through the U.S. and Ontario to record levels, leading to a tight gas market and setting the stage for additional factors that exacerbated the winter’s price behavior.
 - Strong Midwest demand impacted gas prices at Dawn and incited increased storage withdrawals to meet Ontario demand.
 - Large storage withdrawals early necessitated large spot purchases later (which happened to be at high prices) as continued cold conditions led to persistent high demand.

- “Checkpoint” balancing by Union direct purchase customers, although an annual occurrence, coincided last winter with the on-going need to meet persistent high demand, exacerbating prices.
 - Increased interruptible transport tolls appear to have limited the competitiveness of Empress as an economic source or supply, leading incremental gas for Ontario to be drawn from the Midwest and Northeast, further exacerbating Dawn prices.
 - The necessary conditions for last winter’s price scenario appear to be the coincidence in both the U.S. and Canada of early, widespread and persistent high demand (resulting from the macro weather conditions).
 - It is not clear whether the same weather conditions would have led to the same price impacts had supply plan requirements called for more base storage or increased firm transportation, but more storage and increased firm transportation may have helped.
 - Similarly, supply plan requirements leading to more conservative use of storage withdrawals (and thus more supply procurement early in the winter) would likely have helped.
25. In the remaining 28 pages of the Navigant report, the experts retained by the Board, gave a comprehensive and previously unavailable understanding of the circumstances of the February price increases.
26. From this report alone, it is apparent that the factors extant during the winter of 2013/2014 affecting prices of natural gas in Ontario (both internal and external) were not known by the Board when it made its Decision in October, 2014. In addition, they were certainly not known by NRG in order to make its submissions which were filed on September 12, 2014.
27. Union itself filed a written report as part of the Board’s winter 2013/2014 natural gas price review. Union noted in its report that “prices: remained relatively stable for customers buying for future month delivery [but] were subject to volatility for customers buying on a daily basis”. Union noted that the sustained cold had not been experienced in at least 45 years. Union noted that pipeline flows into Dawn decreased and Dawn storage had to make up the difference. Union noted the impact of Chicago and the ON/NY border prices on the prices trading at Dawn. Union noted that: “... it managed the price impact to its customers by frequently monitoring markets and prices, adjusting purchasing strategy to account for forecast weather impacts and **continuing to not rely on the day market ...**”. [emphasis added].
28. In its summary of observations, Union, in part, noted as follows:
- less gas delivered to Ontario, combined with the coldest winter on record meant that Dawn storage was critical in meeting incremental winter needs

- Dawn's storage limited gas price volatility until the end of January
 - Union's frequent monitoring and pro-active purchasing strategies were critical in managing the cost impact to **sales service customers**.
29. All of these factors identified, analysed and summarised by Navigant and by Union itself were not available to NRG when it made its written submissions in September 2014.
30. Equally, the Board did not have the benefit of NRG's argument or the Navigant and Union reports when it made its Decision in October 2014. If the Board had all of these reports, it would have asked for NRG's comments before making its Decision.
31. One of the unknown and unknowable facts disclosed in the Navigant report and the Union evidence is that Union itself was purchasing gas in the marketplace during the months of January and February 2014 at the very time NRG was doing the same but compelled to do so because of the contractual obligation to supply winter checkpoint gas volumes on February 28, 2014. There is something duplicative about Union insisting upon strict contractual terms of a contract at the same time it is competing and impairing the ability of NRG to meet its obligations at a reasonable cost.
32. Union takes the unreasonable position that NRG "could have retained its own expert and sought to file a report on the evidence set forth in the Navigant report during the proceeding before the Board". The test for new evidence is whether NRG could have discovered it by "reasonable diligence". It is assumed the Navigant report was very costly. It is assumed that Navigant had the authority of the Board and its own contacts to receive and analyze information that would not be available to NRG. It is respectfully submitted that it is not reasonable to require NRG to engage its own consultant to have discovered all of the causes of the high market price during the winter of 2013/2014 as it could not have had access, did not have the sophistication, and did not know about the surprise factors to investigate in the first place.
33. By reason of the above, it is respectfully submitted that NRG could not have discovered all of the facts and causal relationships affecting the extremely high prices for natural gas in Ontario during the winter of 2013/2014 with reasonable diligence prior to the hearing of the within proceeding.

PART IV – NRG MEETS THE TEST

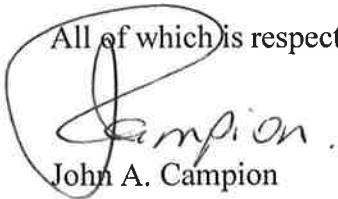
34. In Part III, NRG makes the point that the information contained in the Navigant report and in the Union report was not available to it under the "reasonable diligence" test.
35. In order that the Board order a new hearing, it is necessary to show that the new evidence **could change** the Board's decision. It is important to note that this is not a hearing where the Board will declare that its decision is changed, but only a hearing to analyze whether the new evidence **could** change the Board's decision.
36. It is respectfully submitted that the new evidence could change the Board's decision.

37. It is noteworthy at this point that Union gives no analysis for its unsupported proposition that there is nothing in the Navigant evidence that could change the Board's decision. Union simply gives no particulars.
38. The Board is making its decision based on its perception of the public interest. It sets just and reasonable rates accordingly. In this case, the Board fixed the penalty rate in the public interest based on the information that it had available to it. That did not include the evidence and conclusions of Navigant and Union filed in the 2013/2014 Natural Gas Markets Review.
39. In coming to its conclusions, the Board sought a balance between the penalty rate fixed at \$78.73 per GJ and Union's actual costs. That balance was affected by the fact that Union will not be out of pocket any money if it receives its actual costs. What weighed in the Board's mind in coming to its earlier conclusion was the need to incent direct market purchasers to meet their checkpoint supply obligations. The Board decided that Union's proposal that the second highest spot rate during the months of February and March 2014 was the appropriate penalty charge in the circumstances, namely \$50.50 per GJ in February.
40. It is respectfully submitted that the new evidence could impact the Board's balancing process between the actual penalty rate directed by the Board in its October 9, 2014 Decision, namely \$50.50 per GJ and Union's actual costs of \$5.00 to \$12.31 per GJ. In particular, three matters raised in the Navigant report and magnified in the Union testimony are:
- (a) strong Mid-west demand impacted prices at Dawn and incented increased storage withdrawals to meet Ontario demand;
 - (b) large storage withdrawals early necessitated large spot purchases later (which happened to be at high prices) as continued cold conditions led to persistent high demand;
 - (c) increased interruptible transport holes appear to have limited the competitiveness of Empress as an economic source of supply, leaving incremental gas for Ontario to be drawn from the Mid-west and Northeast, further exacerbating Dawn prices;
 - (d) it is not clear whether the same weather conditions would have led to the same price impacts had supply plan requirements called for more base storage or increased firm transportation, but more storage and increased firm transportation would have helped; and
 - (e) similarly, supply plan requirements leading to more conservative use of storage withdrawals (and thus more supply procurement early in the winter) would likely have helped.
41. In paragraph 31, NRG raised the extraordinary proposition that at the same time Union is insisting upon a penalty rate above its costs in the extreme winter conditions of 2013/2014, it was active in the marketplace competing for transmission space and natural

gas, thereby impairing the ability of NRG to meet its winter checkpoint gas obligations at a reasonable cost. It is duplicative and unfair that Union receives the penalty rate above its own costs at the same time that it helped cause NRG's problems. The matters identified in paragraphs 40 40(a), 40(b), 40(d) and 40(e) 40(a) indicate Union's buying activity in the marketplace on competition with NRG.

42. In addition, all of the factors set out in paragraph 40 were not known and could not have been reasonably known by NRG when making its submissions to the Board in the within case. These factors concerning Union's conduct and other price impacts beyond the cold weather itself could lead to the Board reversing its decision.
43. When making its decision in October 2014, the Board decided that the second-highest spot purchase rate of natural gas for February 2014, namely \$50.50 per GJ, was the appropriate balance between the \$78.73 per GJ being the formula rate and Union's actual costs of \$5.00 to \$12.31 per GJ. The Board emphasized the importance of incenting direct purchasers in the future to meet their obligations to supply winter checkpoint gas under their contracts with Union. It is respectfully submitted that the factors set out in the Navigant report and Union's own conduct in contributing to the high prices for natural gas in the province **could** lead the Board to change its decision.
44. It is therefore respectfully submitted that this Tribunal should grant NRG's motion to review and vary the Decision and Order delivered in this matter on October 9, 2014.

All of which is respectfully submitted.



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