ONTARIO ENERGY BOARD

EB-2014-0363

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 TransAlta Corporation, TransAlta Generation Partnership and TransAlta Cogeneration L.P. ("TransAlta") for certain preliminary determinations of the Ontario Energy Board in regard to the interpretation of the T1 / T2 contract.

BOOK OF AUTHORITIES

in Support of

TransAlta's Application for Certain Preliminary Determinations of the Ontario Energy Board in Regard to the Interpretation of the T1 / T2 Contract and Additional Requested Relief

I N D E X

TAB 1

Ontario

ServiceOntario
e-Laws

Français

Ontario Energy Board Act, 1998

S.O. 1998, CHAPTER 15
SCHEDULE B

Consolidation Period: From January 1, 2015 to the e-Laws currency date.

Last amendment: 2014, c. 7, Sched. 23.

CONTENTS

PART I
GENERAL

Board objectives, electricity

1. (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate the implementation of a smart grid in Ontario.
5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.

Facilitation of integrated power system plans

(2) In exercising its powers and performing its duties under this or any other Act in relation to electricity, the Board shall facilitate the implementation of all integrated power system plans approved under the *Electricity Act, 1998*. 2004, c. 23, Sched. B, s. 1.

Board objectives, gas

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.
2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
3. To facilitate rational expansion of transmission and distribution systems.

4. To facilitate rational development and safe operation of gas storage.

5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

6. To promote communication within the gas industry and the education of consumers. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4 (2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2; 2009, c. 12, Sched. D, s. 2.

Definitions

3. In this Act,

"affiliate", with respect to a corporation, has the same meaning as in the *Business Corporations Act*; ("membre du même groupe")

"associate", where used to indicate a relationship with any person, means,

(a) any body corporate of which the person owns, directly or indirectly, voting securities carrying more than 50 per cent of the voting rights attached to all voting securities of the body corporate for the time being outstanding,

(b) any partner of that person,

(c) any trust or estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar capacity,

(d) any relative of the person, including the person's spouse as defined in the *Business Corporations Act*, where the relative has the same home as the person, or

(e) any relative of the spouse, as defined in the *Business Corporations Act*, of the person, where the relative has the same home as the person; ("personne qui a un lien")

"Board" means the Ontario Energy Board; ("Commission")

"construct" means construct, reconstruct, relocate, enlarge or extend; ("construire")

"distribute", with respect to electricity, means to convey electricity at voltages of 50 kilovolts or less; ("distribuer")

"distribution system" means a system for distributing electricity, and includes any structures, equipment or other things used for that purpose; ("réseau de distribution")

"distributor" means a person who owns or operates a distribution system; ("distributeur")

"enforceable provision" means,

(a) a provision of this Act or the regulations,

(b) a provision of Part II of the *Energy Consumer Protection Act, 2010* or of the regulations made under it,

(c) a provision of Part III of the *Energy Consumer Protection Act, 2010* or of the regulations made under it,

vice-chair or the secretary. 2003, c. 3, s. 19.

Same

(2) Despite subsection (1), an order made or licence issued by the Board pursuant to section 6 may be signed by the employee who made the order or issued the licence. 2003, c. 3, s. 19.

Judicial notice

(3) An order or licence that purports to be signed by a person referred to in subsection (1) or (2) shall be judicially noticed without further proof. 2003, c. 3, s. 19.

***Legislation Act, 2006*, Part III**

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to the orders made or licences issued by the Board. 2003, c. 3, s. 19; 2006, c. 21, Sched. F, s. 136 (1).

16.-17. Repealed: 2003, c. 3, s. 19.

Transfer of authority or licence

18. (1) No authority given by the Board under this or any other Act shall be transferred or assigned without leave of the Board. 1998, c. 15, Sched. B, s. 18 (1).

Same

(2) A licence issued under this Act is not transferable or assignable without leave of the Board. 1998, c. 15, Sched. B, s. 18 (2).

Board's powers, general

Power to determine law and fact

19. (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).

Order

(2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2 (1).

Reference

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19 (3).

Additional powers and duties

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

Exception

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act. 1998, c. 15, Sched. B, s. 19 (5).

Jurisdiction exclusive

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

Powers, procedures applicable to all matters

20. Subject to any provision to the contrary in this or any other Act, the powers and procedures of the Board set out in this Part apply to all matters before the Board under this or any other Act. 1998, c. 15, Sched. B, s. 20.

Board's powers, miscellaneous

21. (1) The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act. 1998, c. 15, Sched. B, s. 21 (1).

Hearing upon notice

(2) Subject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct. 1998, c. 15, Sched. B, s. 21 (2).

(3) Repealed: 2000, c. 26, Sched. D, s. 2 (2).

No hearing

(4) Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,

(a) no person requests a hearing within a reasonable time set by the Board after the Board gives notice of the right to request a hearing; or

(b) the Board determines that no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the proceeding and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing.

(c) Repealed: 2003, c. 3, s. 20 (1).

1998, c. 15, Sched. B, s. 21 (4); 2002, c. 1, Sched. B, s. 3; 2003, c. 3, s. 20 (1).

Consolidation of proceedings

(5) Despite subsection 9.1 (1) of the *Statutory Powers Procedure Act*, the Board may combine two or more proceedings or any part of them, or hear two or more proceedings at the same time, without the consent of the parties. 2003, c. 3, s. 20 (2).

Non-application

(6) Subsection 9.1 (3) of the *Statutory Powers Procedure Act* does not apply to proceedings before the Board. 1998, c. 15, Sched. B, s. 21 (6).

Use of same evidence

(6.1) Despite subsection 9.1 (5) of the *Statutory Powers Procedure Act*, the Board may treat evidence that is admitted in a proceeding as if it were also admitted in another proceeding that is heard at the same time, without the consent of the parties to the second-named proceeding. 2003, c. 3, s. 20 (3).

Interim orders

(7) The Board may make interim orders pending the final disposition of a matter before it. 1998, c. 15, Sched. B, s. 21 (7).

Hearings under *Consolidated Hearings Act*

Government Act, 2009 received Royal Assent. 2009, c. 33, Sched. 2, s. 51 (2).

Not subject to petition

(2) Every order, rule or code of the Board that is the subject of a petition filed under the old section 34 that is not disposed of or withdrawn before the day the *Good Government Act, 2009* receives Royal Assent is deemed not to be subject to petition to the Lieutenant Governor in Council, and shall not be considered or continue to be considered, as the case may be, by the Lieutenant Governor in Council. 2009, c. 33, Sched. 2, s. 51 (2).

Same

(3) Every order, rule or code of the Board that may be the subject of a petition under the old section 34 is deemed not to be subject to petition to the Lieutenant Governor in Council, and shall not be considered by the Lieutenant Governor in Council. 2009, c. 33, Sched. 2, s. 51 (2).

No effect on validity

(4) Nothing in this section affects the validity of an order, rule or code of the Board that, but for subsection 51 (2) of Schedule 2 to the *Good Government Act, 2009*, was or could have been the subject of a petition filed under the old section 34. 2009, c. 33, Sched. 2, s. 51 (2).

Question referred to Board

35. The Minister may require the Board to examine, report and advise on any question respecting energy. 1998, c. 15, Sched. B, s. 35.

PART III
GAS REGULATION

Order of Board required

36. (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract. 1998, c. 15, Sched. B, s. 36 (1).

Order of Board re Smart Metering Entity

(1.1) Neither the Smart Metering Entity nor any other person licensed to do so shall conduct activities relating to the metering of gas except in accordance with an order of the Board, which is not bound by the terms of any contract. 2006, c. 3, Sched. C, s. 3.

Order re: rates

(2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas. 1998, c. 15, Sched. B, s. 36 (2).

Power of Board

(3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate. 1998, c. 15, Sched. B, s. 36 (3).

Contents of order

(4) An order under this section may include conditions, classifications or practices applicable to the sale, transmission, distribution or storage of gas, including rules respecting the calculation of rates. 1998, c. 15, Sched. B, s. 36 (4).

Deferral or variance accounts

(4.1) If a gas distributor has a deferral or variance account that relates to the commodity of

gas, the Board shall, at least once every three months, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2003, c. 3, s. 30.

Same

(4.2) If a gas distributor has a deferral or variance account that does not relate to the commodity of gas, the Board shall, at least once every 12 months, or such shorter period as is prescribed by the regulations, make an order under this section that determines whether and how amounts recorded in the account shall be reflected in rates. 2003, c. 3, s. 30.

Same

(4.3) An order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates shall be made in accordance with the regulations. 2003, c. 3, s. 30.

Same

(4.4) If an order that determines whether and how amounts recorded in a deferral or variance account shall be reflected in rates is made after the time required by subsection (4.1) or (4.2) and the delay is due in whole or in part to the conduct of a gas distributor, the Board may reduce the amount that is reflected in rates. 2003, c. 3, s. 30.

Same

(4.5) If an amount recorded in a deferral or variance account of a gas distributor is reflected in rates, the Board shall consider the appropriate number of billing periods over which the amount shall be divided in order to mitigate the impact on consumers. 2003, c. 3, s. 30.

Fixing other rates

(5) Upon an application for an order approving or fixing rates, the Board may, if it is not satisfied that the rates applied for are just and reasonable, fix such other rates as it finds to be just and reasonable. 1998, c. 15, Sched. B, s. 36 (5).

Burden of proof

(6) Subject to subsection (7), in an application with respect to rates for the sale, transmission, distribution or storage of gas, the burden of proof is on the applicant. 1998, c. 15, Sched. B, s. 36 (6).

Order, motion of Board or at request of Minister

(7) If the Board of its own motion, or upon the request of the Minister, commences a proceeding to determine whether any of the rates for the sale, transmission, distribution or storage of gas by any gas transmitter, gas distributor or storage company are just and reasonable, the Board shall make an order under subsection (2) and the burden of establishing that the rates are just and reasonable is on the gas transmitter, gas distributor or storage company, as the case may be. 1998, c. 15, Sched. B, s. 36 (7).

Exception

(8) This section does not apply to a municipality or municipal public utility commission transmitting or distributing gas under the *Public Utilities Act* on the day before this section comes into force. 1998, c. 15, Sched. B, s. 36 (8).

Gas storage areas

36.1 (1) The Board may by order,

(a) designate an area as a gas storage area for the purposes of this Act; or

(b) amend or revoke a designation made under clause (a). 2001, c. 9, Sched. F, s. 2 (2).

Transition

(2) Every area that was designated by regulation as a gas storage area on the day before this section came into force shall be deemed to have been designated under clause (1) (a) as a gas storage area on the day the regulation came into force. 2001, c. 9, Sched. F, s. 2 (2).

Prohibition, gas storage in undesignated areas

37. No person shall inject gas for storage into a geological formation unless the geological formation is within a designated gas storage area and unless, in the case of gas storage areas designated after January 31, 1962, authorization to do so has been obtained under section 38 or its predecessor. 1998, c. 15, Sched. B, s. 37; 2001, c. 9, Sched. F, s. 2 (3).

Authority to store

38. (1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38 (1).

Right to compensation

(2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),

(a) shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas; and

(b) shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order. 1998, c. 15, Sched. B, s. 38 (2).

Determination of amount of compensation

(3) No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board. 1998, c. 15, Sched. B, s. 38 (3).

Appeal

(4) An appeal within the meaning of section 31 of the *Expropriations Act* lies from a determination of the Board under subsection (3) to the Divisional Court, in which case that section applies and section 33 of this Act does not apply. 1998, c. 15, Sched. B, s. 38 (4); 2003, c. 3, s. 31.

Gas storage, surplus facilities and approval of agreements

Allocation of surplus storage facilities

39. (1) Upon the application of a gas transmitter or gas distributor, the Board by order may direct a storage company having storage capacity and facilities that are not in full use to provide all or part of the storage capacity and facilities for the applicant upon such conditions as may be determined by the Board. 1998, c. 15, Sched. B, s. 39 (1).

Gas storage agreements to be approved

(2) No storage company shall enter into an agreement or renew an agreement with any

Crossings with leave

101. (1) The following persons may apply to the Board for authority to construct a work upon, under or over a highway, utility line or ditch:

1. Any person who has leave to construct the work under this Part.
2. Any person who intends to construct the work and who is exempted under section 95 from the requirement to obtain leave.
3. Where the proposed work is the expansion or reinforcement of a transmission or distribution system, any person who is required by the Board, pursuant to a condition of the person's licence, to expand or reinforce the transmission or distribution system.
4. The officers, employees and agents of a person described in paragraph 1, 2 or 3. 2006, c. 33, Sched. X, s. 3.

Procedure

(2) The procedure set out in subsections 99 (1) to (4) applies with necessary modifications to an application under this section. 1998, c. 15, Sched. B, s. 101 (2).

Order

(3) Without any other leave and despite any other Act, if after the hearing the Board is of the opinion that the construction of the work upon, under or over a highway, utility line or ditch is in the public interest, it may make an order authorizing the construction upon such conditions as it considers appropriate. 1998, c. 15, Sched. B, s. 101 (3).

Right to compensation for damages

102. Any person who has acquired land for a work under this Part by agreement with the owner of the land shall pay to the owner due compensation for any damages resulting from the exercise of the person's rights under the agreement and, if the compensation is not agreed upon, it shall be determined in the manner set out in section 100. 1998, c. 15, Sched. B, s. 102.

Entry upon land

103. (1) Any person may at any time enter upon land, without the consent of the owner of the land, for the purpose of inspecting, altering, maintaining, repairing, renewing, disconnecting, replacing or removing a work or part of a work where leave for the construction, expansion or reinforcement of the work or the making of an interconnection was granted under this Part or a predecessor of this Part. 1998, c. 15, Sched. B, s. 103 (1).

Compensation

(2) Compensation for any damages resulting from the exercise of a right under subsection (1), if not agreed upon by the person and the owner of the land, shall be determined in the manner set out in section 100. 1998, c. 15, Sched. B, s. 103 (2).

Non-application, *Public Utilities Act*, s. 58

104. If leave to construct a work has been granted under this Part, section 58 of the *Public Utilities Act* does not apply to that work. 1998, c. 15, Sched. B, s. 104.

PART VII
INSPECTORS AND INSPECTIONS

Board receives complaints and makes inquiries

105. The Board may,

(a) receive complaints concerning conduct that may be in contravention of an enforceable provision whether the conduct constitutes an offence or not; and

(b) make inquiries, gather information and attempt to mediate or resolve complaints, as appropriate, concerning any matter that comes to its attention that may be in contravention of an enforceable provision whether the matter constitutes an offence or not. 2010, c. 8, s. 38 (22).

Inspectors

106. (1) The Board's management committee may appoint persons to exercise and perform the powers and duties of an inspector under this Part. 2003, c. 3, s. 69.

Certificate of appointment

(2) The Board shall issue to every inspector a certificate of appointment bearing the signature of a member of the Board or a facsimile of his or her signature. 2010, c. 8, s. 38 (23).

Power to require documents, etc.

107. (1) An inspector may, for the purposes of this Act and any other Act that gives powers or duties to the Board, require any of the following persons to provide documents, records or information:

1. A person required to have a licence under section 48 or 57.

1.1 An affiliate, agent or employee of a gas marketer or retailer of electricity.

2. A gas distributor, gas transmitter or gas storage company or an affiliate of a gas transmitter, gas distributor or gas storage company.

3. An affiliate of a person required to have a licence under clause 57 (a) or (b).

4. A person exempted from the requirements of clause 57 (a) by regulation.

5. A person exempted from the requirements of clause 57 (b) by regulation.

6. A person exempted from the requirements of section 48 by regulation.

7. An affiliate, agent or employee of a person referred to in paragraph 4. 2003, c. 3, s. 70; 2010, c. 8, s. 38 (24).

Application of subs. (1)

(2) Subsection (1) only applies to documents, records and information that relate to the following:

1. Activities for which a licence is required under section 48 or 57.

1.1 The persons who are required to have a licence under section 48 or 57 and their affiliates, agents and employees.

1.2 Activities for which a licence is required under subsection 88.2 (1).

1.3 The persons who are required to have a licence under subsection 88.2 (1).

2. Gas distribution, gas transmission or gas storage, including the sale of gas by a gas distributor.

3. Transactions between a gas distributor, gas transmitter or gas storage company and its

PART VII.1
COMPLIANCE

112.1 Repealed: 2010, c. 8, s. 38 (29).

Procedure for orders under ss. 112.3 to 112.5

112.2 (1) An order under section 112.3, 112.4 or 112.5 may only be made on the Board's own motion. 2003, c. 3, s. 76.

Notice

(2) The Board shall give written notice to a person that it intends to make an order under section 112.3, 112.4 or 112.5. 2003, c. 3, s. 76.

Contents of notice

(3) Notice under subsection (2) shall set out the reasons for the proposed order and shall advise the person that, within 15 days after receiving the notice, the person may give notice requiring the Board to hold a hearing. 2003, c. 3, s. 76.

Service of notice or order

(3.1) Any notice or order required to be given or served by the Board under this Part or Part VII.2 is sufficiently given or served if,

(a) delivered personally;

(b) sent by registered mail; or

(c) sent by another manner, if the Board can prove receipt of the notice or order. 2010, c. 8, s. 38 (30).

Deemed service

(3.2) Where service is made by registered mail, the service is deemed to be made on the third day after the day of mailing unless the person on whom service is being made establishes that the person did not, acting in good faith, through absence, accident, illness or other cause beyond the person's control, receive the notice or order until a later date. 2010, c. 8, s. 38 (30).

Exception

(3.3) Despite subsection (3.1), the Board may order any other method of service. 2010, c. 8, s. 38 (30).

Hearing

(4) A person to whom notice is given under subsection (2) may, within 15 days after receiving the notice, give notice to the Board requiring the Board to hold a hearing. 2003, c. 3, s. 76.

If hearing not required

(5) If no notice requiring a hearing is given within the time permitted by subsection (4), the Board may make an order. 2003, c. 3, s. 76.

Interim orders under s. 112.3

(6) An interim order of the Board may be made under section 112.3, with or without a hearing, and may take effect before the time for giving notice under subsection (4) has expired. 2003, c. 3, s. 76.

Action required to comply, etc.

112.3 (1) If the Board is satisfied that a person has contravened or is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,

(a) remedy a contravention that has occurred; or

(b) prevent a contravention or further contravention of the enforceable provision. 2003, c. 3, s. 76.

Application

(2) This section applies to contraventions that occur before or after this section comes into force. 2003, c. 3, s. 76.

Suspension or revocation of licences

112.4 (1) If the Board is satisfied that a person who holds a licence under Part IV or V has contravened an enforceable provision, the Board may make an order suspending or revoking the licence. 2003, c. 3, s. 76.

Application

(2) This section applies to contraventions that occur before or after this section comes into force. 2003, c. 3, s. 76.

Administrative penalties

112.5 (1) If the Board is satisfied that a person has contravened an enforceable provision, the Board may, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order for each day or part of a day on which the contravention occurred or continues. 2003, c. 3, s. 76.

Purpose

(1.1) The purpose of an administrative penalty is to promote compliance with the requirements established by this Act and the regulations. 2010, c. 8, s. 38 (31).

Limitation

(2) The Board shall not make an order under subsection (1) in respect of a contravention later than two years after the later of,

(a) the day the contravention occurred; and

(b) the day on which the evidence of the contravention first came to the attention of the Board. 2003, c. 3, s. 76.

Amount of penalty, limited

(3) An administrative penalty in respect of a contravention shall not exceed $20,000 for each day or part of a day on which the contravention occurs or continues. 2003, c. 3, s. 76.

No offence to be charged if penalty is paid

(4) If a person who is required by an order under subsection (1) to pay an administrative penalty in respect of a contravention pays the amount of the penalty in accordance with the order, the person shall not be charged with an offence in respect of the contravention. 2003, c. 3, s. 76.

Regulations

(5) The Lieutenant Governor in Council may make regulations,

(a) specifying types of contraventions in respect of which an order may not be made under

TAB 2

ONTARIO ENERGY BOARD

Rules of Practice and Procedure
(Revised November 16, 2006, July 14, 2008, October 13, 2011, January 9, 2012, January 17, 2013 and April 24, 2014)

TABLE OF CONTENTS

"serve" means to effectively deliver, in compliance with these Rules or as the Board may direct;

"statement" means any unsworn information provided to the Board;

"writing" includes electronic media, formed and secured as directed by the Board;

"written" includes electronic media, formed and secured as directed by the Board; and

"written hearing" means a hearing held by means of the exchange of documents.

4. Procedural Orders and Practice Directions

4.01 The Board may at any time in a proceeding make orders with respect to the procedure and practices that apply in the proceeding. Every party shall comply with all applicable procedural orders.

4.02 The Board may set time limits for doing anything provided in these Rules.

4.03 The Board may at any time amend any procedural order.

4.04 Where a provision of these Rules is inconsistent with a provision of a procedural order, the procedural order shall prevail to the extent of the inconsistency.

4.05 The Board may from time to time issue *Practice Directions* in relation to the preparation, filing and service of documents or in relation to participation in a proceeding. Every party shall comply with all applicable *Practice Directions*, whether or not specifically referred to in these Rules.

5. Failure to Comply

5.01 Where a party to a proceeding has not complied with a requirement of these Rules or a procedural order, the Board may:

(a) grant all necessary relief, including amending the procedural order, on such conditions as the Board considers appropriate;

(b) adjourn the proceeding until it is satisfied that there is compliance; or

(c) order the party to pay costs.

5.02 Where a party fails to comply with a time period for filing evidence or other material, the Board may, in addition to its powers set out in **Rule 5.01**, disregard the evidence or other material that was filed late.

5.03 No proceeding is invalid by reason alone of an irregularity in form.

6. Computation of Time

6.01 In the computation of time under these Rules or an order:

(a) where there is reference to a number of days between two events, the days shall be counted by excluding the day on which the first event happens and including the day on which the second event happens; and

(b) where the time for doing an act under these Rules expires on a holiday, as defined under **Rule 6.02**, the act may be done on the next day that is not a holiday.

6.02 A holiday means a Saturday, Sunday, statutory holiday, and any day that the Board's offices are closed.

7. Extending or Abridging Time

7.01 The Board may on its own motion or upon a motion by a party extend or abridge a time limit directed by these Rules, *Practice Directions* or by the Board, on such conditions the Board considers appropriate.

10.10 The Board may, further to a request for access under **Rule 10.07** or **Rule 10.08**, make any order referred to in **Rule 10.04**.

11. Amendments to the Evidentiary Record and New Information

11.01 The Board may, on conditions the Board considers appropriate:

(a) permit an amendment to the evidentiary record; or

(b) give directions or require the preparation of evidence, where the Board determines that the evidence in an application is insufficient to allow the issues in the application to be decided.

11.02 Where a party becomes aware of new information that constitutes a material change to evidence already before the Board before the decision or order is issued, the party shall serve and file appropriate amendments to the evidentiary record, or serve and file the new information.

11.03 Where all or any part of a document that forms part of the evidentiary record is revised, the party filing the revision shall:

(a) ensure that each revised document is printed on coloured paper and clearly indicates the date of revision and the part revised; and

(b) file with the revised document(s) a table describing the original evidence, each revision to the evidence, the date each revision was made, and if the change was numerical, the difference between the original evidence and the revision(s). This table is to be updated to contain all significant revisions to the evidence as they are filed.

11.04 A party shall comply with any direction from the Board to provide such further information, particulars or documents as the Board considers necessary to enable the Board to obtain a full and satisfactory understanding of an issue in the proceeding.

12. Affidavits

12.01 An affidavit shall be confined to the statement of facts within the personal

PART III - PROCEEDINGS

15. Commencement of Proceedings

15.01 Unless commenced by the Board, a proceeding shall be commenced by filing an application or a notice of appeal in compliance with these Rules, and within such a time period as may be prescribed by statute or the Board.

15.02 A person appealing an order made under the market rules shall file a notice of appeal within 15 calendar days after being served with a copy of the order, or within 15 calendar days of having completed making use of any provisions relating to dispute resolution set out in the market rules, whichever is later.

15.03 An appeal of an order, finding or remedial action made or taken by a standards authority referred to in section 36.3 of the *Electricity Act* shall be commenced by the Independent Electricity System Operator by notice of appeal filed within 15 calendar days after being served with a copy of the order or finding or of notice of the remedial action, or within 15 calendar days of receipt of notice of the final determination of any other reviews and appeals referred to in section 36.3(2) of the *Electricity Act*, whichever is later.

16. Applications

16.01 An application shall contain:

(a) a clear and concise statement of the facts;

(b) the grounds for the application;

(c) the statutory provision under which it is made; and

(d) the nature of the order or decision applied for.

16.02 An application shall be in such form as may be approved or specified by the Board and shall be accompanied by such fee as may be set for that purpose by the management committee under section 12.1(2) of the *OEB Act*.

20. Withdrawal

20.01 An applicant or appellant may withdraw an application or appeal:

(a) at any time prior to the hearing, by filing and serving a notice of withdrawal signed by the applicant or the appellant, or his or her representative; or

(b) at the hearing with the permission of the Board.

20.02 A party may by motion seek leave to discontinue participation in a proceeding at any time before a final decision.

20.03 The Board may impose conditions on any withdrawal or discontinuance, including costs, as it considers appropriate.

20.04 Any fee paid to commence the proceeding by an applicant seeking to withdraw under **Rule 20.01** shall not be refunded.

20.05 If the Board has reason to believe that a withdrawal or discontinuance may adversely affect the interests of any party or may be contrary to the public interest, the Board may hold or continue the hearing, or may issue a decision or order based upon proceedings to date.

21. Notice

21.01 Any notices required by these Rules or a Board order shall be given in writing, unless the Board directs otherwise.

21.02 The Board may direct a party to give notice of a proceeding or hearing to any person or class of persons, and the Board may direct the method of providing the notice.

21.03 Where a party has been directed to serve a notice under this Rule, the party shall file an affidavit or statement of service that indicates how, when, and to whom service was made.

22. Intervenor Status

22.01 Subject to **Rule 22.05** and except as otherwise provided in a notice or procedural order issued by the Board, a person who wishes to actively

28. Identification of Issues

28.01 The Board may identify issues that it will consider in a proceeding if, in the opinion of the Board:

(a) the identification of issues would assist the Board in the conduct of the proceeding;

(b) the documents filed do not sufficiently set out the matters in issue at the hearing; or

(c) the identification of issues would assist the parties to participate more effectively in the hearing.

28.02 The Board may direct the parties to participate in issues conferences for the purposes of identifying issues, and formulating a proposed issues list that shall be filed within such a time period as the Board may direct.

28.03 A proposed issues list shall set out any issues that:

(a) the parties have agreed should be contained on the list;

(b) are contested; and

(c) the parties agree should not be considered by the Board.

28.04 Where the Board has issued a procedural order for a list of issues to be determined in the proceeding, a party seeking to amend the list of issues shall do so by way of motion.

29. Alternative Dispute Resolution

29.01 The Board may direct that participation in alternative dispute resolution ("ADR") be mandatory.

29.02 An ADR conference shall be open only to parties and their representatives, unless the Board directs or the parties agree otherwise.

29.03 A Board member shall not participate in an ADR conference, and the conference shall not be transcribed or form part of the record of a proceeding.

29.04 The Board may appoint a person to chair an ADR conference.

29.05 The chair of an ADR conference may enquire into the issues and shall attempt to effect a comprehensive settlement of all issues or a settlement of as many of the issues as possible.

29.06 The chair of an ADR conference may attempt to effect a settlement of issues by any reasonable means including:

(a) clarifying and assessing a party's position or interests;

(b) clarifying differences in the positions or interests taken by the respective parties;

(c) encouraging a party to evaluate its own position or interests in relation to other parties by introducing objective standards; and

(d) identifying settlement options or approaches that have not yet been considered.

29.07 Subject to **Rule 29.08**, where a representative attends an ADR conference without the party, the representative shall be authorized to settle issues.

29.08 Any limitations on a representative's authority shall be disclosed at the outset of the ADR conference.

29.09 All persons attending an ADR conference shall treat admissions, concessions, offers to settle and related discussions as confidential and shall not disclose them outside the conference, except as may be agreed.

29.10 Admissions, concessions, offers to settle and related discussions shall not be admissible in any proceeding without the consent of the affected parties.

30. Settlement Proposal

30.01 Where some or all of the parties reach an agreement, the parties shall make and file a settlement proposal describing the agreement in order to allow the Board to review and consider the settlement.

TAB 3

Ontario Energy Board
Commission de l'énergie de l'Ontario

December 9, 2009

BY E-MAIL AND WEB POSTING

NOTICE OF ISSUANCE OF A NEW RULE

STORAGE AND TRANSPORTATION ACCESS RULE (STAR)

BOARD FILE NO: EB-2008-0052

To: All Participants in Consultation Process (Phase I of STAR) EB-2008-0052
All Other Interested Parties

The Ontario Energy Board (the "Board" or "OEB") is giving notice under section 44(1) of the *Ontario Energy Board Act, 1998* (the "Act") of the issuance of the Storage and Transportation Access Rule ("STAR").

Background

On November 7, 2006, the Board issued a Decision with Reasons in the Natural Gas Electricity Interface Review EB-2005-0551 ("NGEIR Decision") proceeding. As part of the NGEIR Decision the Board stated that it was necessary to ensure customer[1] protection within the competitive storage market and to ensure non-discriminatory access to transportation services for storage providers and customers. The Board concluded that it would initiate a process to develop rules of conduct and reporting related to storage and noted that there was merit to the development of a STAR.

In a letter dated March 5, 2008, the Board stated that a STAR would address the following:

- Operating requirements to ensure that Union Gas Limited ("Union") and Enbridge Gas Distribution Inc. ("Enbridge") cannot discriminate in favour of their own storage operations or those of their affiliates and cannot discriminate to the detriment of third-party storage providers;

- Reporting requirements for all storage providers, although the requirements may vary as between utility and non-utility storage providers, and which may include: terms and conditions, system operating data, and customer information; and

[1] The terms "customer" and "shipper" are used interchangeably.

- A complaint mechanism for customers (or other market participants).

Also, in its letter dated March 5, 2008, the Board stated that the development of the STAR would be conducted in two phases. In the first phase, Board staff ("staff") would conduct stakeholder meetings. This process would lead to the development of a Staff Discussion Paper. In the second phase, the Board would initiate a process to make the STAR into a Rule in accordance with section 44(1) of the Act.

In April and May 2008, staff held a number of meetings with stakeholders. The list of stakeholders is provided in Appendix A. Staff's technical expert[2] also prepared a jurisdictional review entitled "Competition in Natural Gas Storage Markets, A Review of Gas Storage and Transportation Regulations".

On July 29, 2008, staff released a discussion paper on a STAR (the "Discussion Paper") for stakeholder comment. The purpose of the Discussion Paper was to identify issues and invite comments from stakeholders to assist the Board in developing the STAR. Eleven comments were received from fifteen stakeholders.

On April 9, 2009, the Board issued a Notice of Proposal to Make a Rule on STAR for stakeholder comment. Fifteen comments were received from eighteen stakeholders. The Board considered all of the comments received and determined that changes were appropriate to the proposed Rule. The Board also made changes to correct omissions and clarify some of the Rule requirements. On September 18, 2009, the Board issued a Notice of Revised Proposal to Make a Rule on STAR ("revised STAR") for stakeholder comment. Fifteen comments were received from nineteen stakeholders.

All materials related to the STAR are available for viewing on the Board's website at www.oeb.gov.on.ca.

The New Rule (STAR)

The Board has considered all of the comments received from stakeholders on the revised STAR and has determined that no material changes are required.

Stakeholders commented on the revised STAR in two areas – non-discriminatory access to transportation services and customer protection within the competitive storage market.

[2] Zinder Companies Inc. (subsequently acquired by Concentric Energy Advisors, Inc.).

Non-Discriminatory Access to Transportation Services

Stakeholders made the following comments in relation to non-discriminatory access.

- The natural gas utilities ("utilities") raised concerns about the use of open seasons for existing long-term firm transportation capacity. The utilities commented that they require the flexibility to allocate existing capacity through either open seasons or direct negotiations with customers, especially on capacity segments that are not fully contracted or subscribed. Also, one ratepayer group suggested that the bid result information should be expanded to include the market price for new or existing long-term firm transportation services.

- Two natural gas wholesalers did not support the posting of shippers' existing transportation contracts that have been identified as "negotiated contracts". Specifically, the terms and pricing information were negotiated under a different regulatory regime and therefore this information would not be of any probative value to customers operating in a future market regulated by the STAR.

The Board wishes to address these comments.

To clarify, a transmitter does not need to wait until the capacity is unsubscribed to hold an open season, but may schedule an open season in anticipation of the long-term existing firm transportation capacity becoming available at a known later date (e.g., as a result of a contract expiration). As long as the transmitter holds an open season and is unable to allocate all of its capacity through that process, the transmitter may offer the residual capacity to shippers by other allocation methods (such as first come, first served) as outlined in its tariff. Furthermore, a transmitter is not required to conduct an open season for capacity whenever the transmitter receives a request for these services if that capacity was previously made available in an open season.

The Board notes that if the arrangements described above are not suitable, a transmitter may apply to the Board for an exemption from holding open seasons for existing long-term firm transportation services on capacity segments that are not fully subscribed or contracted. Without any substantiating information at this time, the Board cannot define when an open season would be too burdensome or otherwise not appropriate. The Board will consider exemption requests on a case-by-case basis.

The Board has considered the utilities' comments that open seasons for existing capacity should be more flexible, and has reduced the response time and the notification requirements in the Rule.

With regards to bid results, the Board notes that the rates for long-term firm transportation services are fully regulated and that in the settlement agreement for Union's 2007 rates (EB-2005-0520), Union agreed not to use bid premiums as a criterion for allocating long-term firm transportation capacity.

In terms of posting existing negotiated transportation contracts for shippers, the Board agrees with stakeholders that these contracts may have limited value to shippers. Just because a transmitter does not offer a shipper negotiated terms of service similar to that offered to other shippers in the past due to different market conditions, the Board thinks that this may not be evidence of discriminatory practices. Once the STAR comes into force, shippers' transportation contracts that have been identified as "negotiated contracts" will be posted on the transmitter's website. Therefore, the Board has removed section 2.3.7 from the Rule. The Board believes this will not impact the objectives of STAR – non-discriminatory access to transportation services, customer protection and transparency.

Customer Protection within the Competitive Storage Market

Stakeholders made the following comments in relation to customer protection within the competitive storage market.

- Three ratepayer groups argued that storage pricing information should not be limited to contracts that are one year or greater as prices for short-term storage contracts may provide market participants with useful information.

- Other ratepayers groups noted that the Federal Energy Regulatory Commission ("FERC") is proposing to increase price disclosure requirements for intrastate storage providers and recommended that the Board adopt the FERC's proposed pricing requirements. Another ratepayer group proposed that the price disclosure requirements should be as stringent as those required of interstate storage providers where price information for each storage contract is posted daily.

- The majority of the storage providers did not support the semi-annual storage report where price and revenue by shipper is posted. These stakeholders commented that this information may put them at a competitive disadvantage with Michigan storage providers and is not needed for customer protection, or to maintain or enhance the competitiveness of the storage market.

- Some stakeholders indicated that the Board needs to have the same requirements for storage contracts as with transportation contracts (e.g., the storage provider should post on its website negotiated contract variations from its standard storage contract). These stakeholders stated that this would ensure non-discriminatory access with respect to terms of service.

The Board wishes to address these concerns.

In terms of storage pricing information, the Board believes that storage contracts with terms less than a year may be driven by specific customer requirements and pricing information for such contracts may provide limited benefit to the market. Therefore, the semi-annual storage report will be based on firm storage contracts with terms of one

year or greater. Information on storage contracts with terms less than one year, other than price by shipper, will be included in the Index of Customers.

The Board is aware that the FERC has issued a Notice of Proposed Rulemaking ("NOPR")[3] to revise its price disclosure requirements for intrastate storage providers (providing interstate services) in order to increase market transparency. The Board sees merit in inter-jurisdictional consistencies especially in the relevant geographic market[4].

The Board notes that Ontario utilities are similar to intrastate storage providers in Michigan that provide interstate storage services. The Board also notes that these storage providers already post the semi-annual storage report. Therefore, the Board believes that the posting of this information would not place Ontario utilities or Ontario storage providers at a competitive disadvantage.

The Board does not believe that it is necessary to have the same rule requirements for both competitive storage services and regulated transportation services. The Board is of the view that the requirements of the STAR – non-discriminatory access to transportation services, appropriate reporting requirements and a complaint mechanism – will protect the interests of customers using competitive storage services.

Other

Based on stakeholder comments, omissions and clarifications were identified and changes have been made to sections 1.2.1, 1.7.2, 2.1.2, 2.2.1 i), 2.3.6, 2.4.6, 3.1.2 and 3.1.5 of the STAR.

The text of the STAR is set out in Appendix B to this Notice.

Coming into Force

The STAR will come into force on **June 16, 2010**.

If you have any questions regarding the STAR described in this Notice, please contact Laurie Klein at laurie.klein@oeb.gov.on.ca or at 416-440-7661. The Board's toll free number is 1-888-632-6273.

[3] Contract Reporting Requirements of Intrastate Natural Gas Companies, 128 FERC¶61,029 dated July 16, 2009.
[4] Relevant market as defined in the NGEIR Decision, p 38.

DATED at Toronto, **December 9, 2009**.
ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Appendix: A – List of Participants
B – Storage and Transportation Access Rule (STAR)

Appendix B

ONTARIO ENERGY BOARD

STORAGE AND TRANSPORTATION ACCESS RULE

December 9, 2009

TABLE OF CONTENTS

1. GENERAL AND ADMINISTRATIVE PROVISIONS

1.1 Purpose of this Rule

1.1.1 This Rule outlines conduct and reporting requirements for natural gas transmitters, integrated utilities and storage companies. The purpose of this Rule is to:

i) Establish operating requirements to ensure open and non-discriminatory access to transportation services for shippers and storage companies;

ii) Establish reporting requirements for natural gas transmitters, integrated utilities and storage companies; and,

iii) Ensure customer protection within the competitive storage market.

1.2 Definitions

1.2.1 In this Rule, unless the context otherwise requires:

"Act" means the *Ontario Energy Board Act, 1998*, S.O. 1988, c. 15, Schedule B;

"Board" means the Ontario Energy Board;

"business day" means any day that is not a Saturday, a Sunday, or a legal holiday in the Province of Ontario;

"capacity segment" means any receipt point and delivery point pairing for which a gas transmitter provides transportation services;

"competitive storage services" means all the storage services that the Board has found to be competitive;

"consumer" means a person who uses gas for the person's own consumption;

"customer" means a shipper, the holder of the transportation and/or storage contract;

‘‘delivery point" means the point where a transmitter delivers gas to a shipper under a transportation service;

"embedded storage company" means a storage company that chooses to connect its facilities to a transmitter's transportation system;
"existing capacity" means transportation capacity that is not new capacity;

"existing contracts" means contracts that have been executed prior to June 16, 2010;

"expected operating conditions" means all constraints (including all planned and actual service outages or reductions in service capacity) and the transportation capacity that the transmitter requires to serve in-franchise customers and/or other system operational requirements;

"firm transportation service" or "firm storage service" means service not subject to curtailment or interruption;

"in-franchise customer" means the distribution customer of the integrated utility;

"integrated utility" means a gas transmitter and/or gas distributor that also provides competitive storage services;

"interruptible transportation service" means service subject to curtailment or interruption;

"long-term" means, in the case of transportation, a service that has a term of one year or greater;

"natural gas distributor" or "gas distributor" or "distributor" means a person who delivers gas to a consumer;

"natural gas transportation services" or "gas transportation services" or "transportation services" means the services related to the transportation of gas;

"natural gas transportation system" or "gas transportation system" or "transportation system" means the transmission or distribution system used to provide gas transportation services;

"natural gas transmitter" or "gas transmitter" or "transmitter" means a person who provides transportation services pursuant to the Act, other than gas distribution services as defined in the Gas Distribution Access Rule;

"new capacity" means transportation capacity that is associated with the expansion of the transportation system;

"open season" means an open access auction or bidding process that meets the minimum standards set out in section 2.2 of this Rule;

"post" means to post information on a company's Internet website in a readily-accessible file format (e.g., PDF);

"receipt point" means the point where a transmitter receives gas from a shipper under a transportation service;

"related agreements" means all the contracts and/or agreements that an embedded storage company enters into with a transmitter for transportation services;

"Rule" means this rule entitled the "Storage and Transportation Access Rule";

"shipper" means the holder of the transportation and/or storage contract;

"storage company" means a person engaged in the business of storing gas pursuant to the Act;

"storage service" means any service where a storage company or an integrated utility receives gas from a shipper for redelivery at a later time, and includes parking services and balancing services; and

"tariff" means for each transportation service, a transmitter's standard terms of service, a transmitter's allocation methods and a transmitter's rate schedule and/or rate handbook.

1.3 Interpretation

1.3.1 Unless otherwise defined in this Rule, words and phrases shall have the meanings ascribed to them in the Act. Headings are for convenience only and shall not affect the interpretation of this Rule. Words importing the singular include the plural and vice versa. Words importing a gender include any gender. A reference to a document (including a statutory instrument) or a provision of a document includes any amendment or supplement to, or any replacement of, that document or that provision of that document. The expression "including" means including without limitation.

1.3.2 If the time for doing any act or omitting to do any act under this Rule expires on a day that is not a business day, the act may be done or may be omitted to be done on the next day that is a business day.

1.4 Determinations by the Board

1.4.1 Any matter under this Rule requiring a determination by the Board:

i) shall be determined by the Board in accordance with all applicable provisions of the Act and the regulations; and

ii) may, subject to the Act, be determined without a hearing, or through an oral, written or electronic hearing, at the Board's discretion.

1.5 To Whom this Rule Applies

1.5.1 This Rule applies to all natural gas transmitters, integrated utilities and storage companies that are legally permitted to do business in Ontario.

1.6 Coming into Force

1.6.1 This Rule shall come into force on June 16, 2010.

1.6.2 For a transportation contract with a shipper, which was in place before June 16, 2010, section 2.3.4 of the Rule will not apply until the end of the initial term of the transportation contract.

1.6.3 Any amendment to this Rule shall come into force on the date that the Board publishes the amendment by placing it on the Board's website after it has been made by the Board, except where expressly provided otherwise.

1.7 Exemptions and Exceptions

1.7.1 The Board may grant an exemption to any provision of this Rule. An exemption may be made in whole or in part and may be subject to conditions or restrictions. In determining whether to grant an exemption, the Board may proceed without a hearing or by way of an oral, written or electronic hearing.

1.7.2 Section 3.1.4 does not apply to an existing contract until such time as the existing contract is renewed, extended or amended.

2. NON-DISCRIMINITORY ACCESS TO TRANSPORTATION SERVICES

2.1 Allocation of Transportation Capacity

2.1.1 A transmitter's methods for allocating transportation capacity shall be defined in its tariff. The tariff, including the allocation methodology, shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.

2.1.2 Firm transportation service that becomes available as a result of a facility expansion (i.e., new capacity) shall be offered through an open season. Existing capacity that is available or will become available for long-term firm transportation service shall be offered through an open season.

2.1.3 Firm transportation service that has been offered in an open season, but not awarded in that open season, may be allocated by other methods, as defined in the transmitter's tariff as per section 2.1.1.

2.1.4 If a transmitter makes any amendments to the tariff referred to in sections 2.1.1 to 2.1.3, the amended tariff shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.

2.1.5 Not withstanding section 2.1, section 2.1.2 does not apply to transportation services for an embedded storage company as outlined in section 2.4.

2.2 Standards for Transportation Open Seasons

2.2.1 A transmitter shall ensure that the following requirements are met when conducting open seasons for firm transportation services:

i) Notification and Timing:

(a) A transmitter shall place a notice of open season for new capacity (the "Open Season Notice") on its website, provide the Open Season Notice to existing shippers and issue a press release advising that it is conducting an open season;

(b) A transmitter shall place a notice of open season for existing capacity (the "Open Season Notice") on its website advising that it is conducting an open season;

(c) A transmitter shall allow a minimum period of 10 business days between the time the transmitter provides an Open Season

Notice for existing capacity and the close of the open season period; and

(d) A transmitter shall allow a minimum period of 30 business days between the time a transmitter provides an Open Season Notice for new capacity and the close of the open season period.

ii) Content of the Open Season Notice. The Open Season Notice shall identify:

(a) The amount of firm transportation service that will be available for each applicable transportation segment. For a new capacity open season, the transmitter may specify a range;

(b) The minimum term, if any for new capacity. If a minimum or maximum term is imposed for an existing capacity open season, a transmitter shall provide an explanation for that minimum or maximum term;

(c) The closing date and time of open season bidding;

(d) The expected in-service date of the expansion;

(e) The applicable receipt and delivery points;

(f) The date by which a transmitter will respond to bids received in the open season;

(g) A reference to the standard transportation contract (and any other applicable agreements);

(h) The time period by which successful open season participants are expected to execute the standard transportation contract (and any other applicable agreements);

(i) The manner in which an open season participant may make a bid;

(j) Other conditions precedent such as credit support agreements or other prerequisites that a bidder needs to qualify or to execute a contract;

(k) The methodology used to evaluate the bids;

(l) The minimum bid (or reserve price) if a transmitter uses a reserve price to evaluate the bids; and

(m) The information that a bidder is required to include in its bid in order for the bid to be valid.

iii) A transmitter offering new capacity shall offer a reverse open season to allow its existing firm transportation service shippers the opportunity to permanently turn back existing firm transportation capacity to avoid unnecessary expansions;

iv) Each successful bid shall be posted on the transmitter's website within 14 business days of the transportation capacity being awarded and shall remain on the transmitter's website for a minimum of 90 days from the date of posting. The successful bid will include the following information: term, volumes, and receipt and delivery points; and

v) A transmitter shall keep copies of all bids received in response to each transportation open season for a period of no less than five (5) years and maintain these records and provide such information as the Board may require from time to time. The bids shall include the following information: shipper name, term, volumes, price, and receipt and delivery points.

2.3 Shipper – Standard Terms of Service and Standard Forms of Contracts for Transportation Services

2.3.1 The requirements in section 2.3 apply to a transmitter that provides transportation services for a shipper and does not include transportation services provided in section 2.4.

2.3.2 A transmitter shall ensure that each transportation service has its own standard form of contract and its own terms of service, and that the terms of service, at a minimum, include the standards outlined in section 2.3.4.

2.3.3 A transmitter shall include in its tariff the terms of service for each of its transportation services. The tariff shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.

2.3.4 A transmitter's tariff shall include the following standard terms of service:

i) Nomination and scheduling procedures (and, at a minimum, provision for the North American Energy Standards Board's nomination windows);

ii) Service priority rules;

iii) Balancing requirements and imbalance charges and penalties, if

applicable;

iv) Point(s) of receipt and point(s) of delivery;

v) Details of billing and payment;

vi) Decontracting and renewal rights;

vii) Force majeure;

viii) Alternative Dispute Resolution provisions;

ix) Identification of any existing preconditions;

x) Financial assurance requirements or preconditions; and

xi) Quality and measurement.

2.3.5 A transmitter shall post on its website the standard form of contract for each of its transportation services. The transmitter shall provide at least six (6) months advance written notice to all shippers of any changes to the standard form of contract.

2.3.6 A contract shall be identified as a "Negotiated Contract" when the contract varies from the standard form of contract as referred to in section 2.3.5 as a result of negotiations between the shipper and the transmitter. A clean copy and a redlined version of the "Negotiated Contract" shall be posted on the transmitter's website within 10 business days from the date the contract is executed or amended. The "Negotiated Contract" shall be posted on the transmitter's website for as long as the contract remains in force.

2.3.7 If a transmitter makes any amendments to the tariff referred to in sections 2.3.3 to 2.3.4, the amended tariff shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.

2.4 Storage Company – Standard Terms of Service and Standard Forms of Contracts for Transportation Services

2.4.1 The requirements in section 2.4 only apply to a transmitter that provides transportation services for an embedded storage company and does not include transportation services provided in section 2.3.

2.4.2 A transmitter shall ensure that each transportation service has its own standard form of contract and its own standard terms of service.

2.4.3 A transmitter shall include in its tariff the standard terms of service for each of its transportation services. The tariff shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.

2.4.4 A transmitter shall post on its website the standard form of contract for each of its transportation services. The transmitter shall provide at least six (6) months advance written notice to all embedded storage companies of any changes to the standard form of contract.

2.4.5 Existing contracts, including the standard forms of contracts, the terms of services and any related agreements, between a transmitter and an embedded storage company shall be posted on the transmitter's website. The contracts shall be posted on the transmitter's website for as long as the contracts remain in force.

2.4.6 New and renewed contracts, including the standard forms of contracts, the terms of services and any related agreements, between a transmitter and an embedded storage company shall be posted on the transmitter's website within 10 business days from the date the contract is executed or amended. The contracts shall be posted on the transmitter's website for as long as the contracts remain in force.

2.4.7 If a transmitter makes any amendments to the tariff referred to in section 2.4.3, the amended tariff shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.

2.4.8 A transmitter shall ensure that the following requirements are met:

i) A transmitter shall respond to requests for interconnection facilities and/or transportation services for an embedded storage company in a timely manner; and

ii) A transmitter shall not impose any operating requirements, financial requirements and/or provisions for transportation services that discriminate between different storage companies.

2.5 Other

2.5.1 Transportation services may only be bundled with competitive storage services if the equivalent transportation services are also offered on a stand-alone basis.

3. CUSTOMER PROTECTION WITHIN THE COMPETITIVE STORAGE MARKET

3.1 Posting and Protocol Requirements

3.1.1. A storage company shall post its standard form of contract and its standard terms of service for each of its competitive storage services on its website.

3.1.2. A storage company shall retain its executed contracts for competitive storage services for a period of no less than five (5) years after the termination of the contract. These contracts shall be provided to the Board as required from time to time.

3.1.3. An integrated utility shall develop and maintain protocols to limit access to non-public transportation information concerning plans for future facility expansions or timing of upcoming transportation open seasons and transportation operating conditions of shippers, storage companies and consumers to personnel that require this information only. The protocols shall be posted on the integrated utility's website. The integrated utility shall update its protocols immediately when revisions are made.

3.1.4. A storage company shall post on a semi-annual basis its pricing and revenue information for competitive storage services on its website. This information shall be posted on April 1 and October 1 of each year and shall remain on the company's website until the date of the next posting. The identity of the shipper, the pricing information and the revenue information to be posted shall be based on firm storage contracts with terms of one year or greater. The information to be posted on the storage company's website shall include:

i) Identity of each shipper (full legal name of the shipper);

ii) The unit charge which is the annual cost per GJ of storage capacity received from each shipper; and

iii) The total revenue received during the previous six month period from each shipper.

3.1.5. Not withstanding section 3.1, section 3.1.4 does not apply to existing storage contracts.

4. REPORTING REQUIREMENTS

4.1 Information Requirements

4.1.1 A transmitter (including a transmitter that is also an integrated utility) shall post on its websites the following information:

i) Index of Customers for transportation contracts; and

ii) Operationally-Available Transportation Capacity;

4.1.2 A storage company or an integrated utility shall post on its website the following information:

i) Index of Customers for storage contracts;

ii) Storage Inventory; and

iii) Design Capacity.

4.1.3 The information posted as per sections 4.1.1 i), 4.1.2 i) and 4.1.2 ii) shall remain on the company's website until the date of the next posting.

4.1.4 The information posted as per section 4.1.1 ii) shall remain on the company's website for a minimum of 90 days from the date of posting.

4.1.5 The information as per section 4.1.2 iii) shall be posted on the company's website once this Rule comes into force.

4.1.6 The company shall maintain records of the information as per section 4.1 for a period of no less than five (5) years and provide these records as the Board may require from time to time.

4.2 Index of Customers

4.2.1 On the first business day of each calendar month, a transmitter, a storage company and an integrated utility shall update its Index of Customers.

4.2.2 For in-franchise customers' storage capacity requirements as per section 4.2.3 iii), the information posted shall be updated immediately based on the results of the integrated utility's most recent operational plan, but no later than October 1 of each year.

4.2.3 The Index of Customers shall include:

i) For all firm transportation contracts with terms of one month or greater, the information required as per section 4.2.4;

ii) For all firm storage contracts with terms of one month or greater, the information as per section 4.2.5; and

iii) For all integrated utilities, the amount of working storage capacity, daily firm withdrawal deliverability and daily firm injection quantity that the integrated utility plans to use for in-franchise customers shall be identified as “In-franchise Customers”.

4.2.4 For all firm transportation contracts with a term of one month or greater, a transmitter (including a transmitter that is also an integrated utility) shall post the following information on the Index of Customers:

i) Full legal name of shipper (Customer Name);

ii) Contract Identifier;

iii) Receipt/Delivery points (i.e., the capacity segments covered by the contract);

iv) Contract Quantity (in GJ);

v) The effective and expiration dates of the contract;

vi) Negotiated Rate (yes/no); and

vii) Affiliate (yes/no).

4.2.5 For all firm storage contracts with a term of one month or greater, a storage company or an integrated utility shall post the following information on the Index of Customers:

i) Full legal name of shipper (Customer Name);

ii) Contract Identifier;

iii) Receipt/Delivery Point(s);

iv) Maximum Storage Quantity (in GJ);

v) Maximum Firm Daily Withdrawal Quantity (in GJ);

vi) Maximum Firm Daily Injection Quantity (in GJ);

vii) The effective and expiration dates of the contract; and

viii) Affiliate (yes/no).

4.3 Operationally-Available Transportation Capacity

4.3.1 A transmitter (including a transmitter that is also an integrated utility) shall at each nomination cycle post its operationally-available transportation capacity on its website for each capacity segment for which the transmitter provides transportation services as follows:

i) the capacity available for transportation services under expected operating conditions;

ii) the amount of capacity scheduled for firm and interruptible transportation services; and

iii) the difference between 4.3.1i) and 4.3.1ii).

4.4 Storage Inventory

4.4.1 No later than the fifth business day of each calendar month, a storage company or an integrated utility shall post its monthly working storage inventory, as of the last day of the previous month, on its website. The storage inventory shall include the amount of working gas in storage (in PJ) by individual pool or as an aggregate quantity for all pools, provided that the storage company or the integrated utility identifies the method used (i.e., individual or aggregated).

4.5 Design Capacity

4.5.1 A storage company or an integrated utility shall post its design capacity on its website. A storage company or an integrated utility may post the design capacity by individual pool or as an aggregate quantity for all pools, provided that the storage company or the integrated utility identifies the method used (i.e., individual or pool). The design capacity shall include:

i) Total storage capacity (in PJ);

ii) Base gas quantity (in PJ);

iii) Working gas capacity (in PJ);

iv) Design peak withdrawal capacity (in GJ/day); and

v) Design peak injection capacity (in GJ/day).

4.5.2 The information in section 4.5.1 shall be updated immediately whenever any of the information changes.

5. COMPLAINT MECHANISM

5.1 Dispute Resolution

5.1.1 A storage company, a transmitter and an integrated utility shall develop a dispute resolution process and post this process on its website. The storage company, the transmitter and the integrated utility shall update its dispute resolution process immediately when revisions are made.

5.1.2 As part of the dispute resolution process as required by section 5.1.1, a storage company, a transmitter and an integrated utility shall designate at least one employee for the purposes of dealing with disputes relating to this Rule. The name and contact information for this employee shall be provided to the Board and posted on the transmitter's, the storage company's and the integrated utility's website. If the designated employee changes, the name and contact information of the new employee shall be immediately provided to the Board and posted on the transmitter's, the storage company's or the integrated utility's website.

5.1.3 If a complaint has not been resolved to the satisfaction of the complainant, the transmitter, the storage company or the integrated utility shall provide to the complainant the telephone number of the Ontario Energy Board Market Operation Hotline.

TAB 4

Ontario Energy Board

Commission de l'Énergie de l'Ontario

EB-2005-0551

NATURAL GAS ELECTRICITY INTERFACE REVIEW

DECISION WITH REASONS

November 7, 2006

In past decisions on storage, the Board has required Union to file forecasts of storage capacity and in-franchise needs to demonstrate that space being sold to ex-franchise customers is surplus to in-franchise needs. For example, in the EBRO 494-03 decision, the Board approved four long-term ex-franchise storage contracts based on Union's 10-year forecast of capacity and in-franchise needs. The Board considered, but did not require, Union to insert a clause into the contracts that would allow Union the right of recall because the Board "found that the Company's forecast of its in-franchise storage needs is reasonable."[37]

Union's storage development

During the hearing, a common argument from many parties on several different issues (particularly on the issue of sharing the premium on ex-franchise sales) was that in-franchise customers have "paid for" or "substantiated" the storage assets of the utilities. If true, is this a basis for continuing to grant in-franchise customers a perpetual call on all of Union's storage capacity at cost-based rates?

This argument breaks down on two fronts. First, Union's rate base excludes capital costs of storage that underpins long-term ex-franchise sales. Second, the sheer magnitude of the current surplus makes it unlikely that Union's expansion of its storage facilities in the recent past has been driven primarily, or perhaps even to any significant extent, by the anticipated needs of in-franchise customters. For example, since 1999 Union has added almost 18 Bcf of capacity through greenfield developments and enhancements to existing pools, capacity that was not necessary to cover in-franchise needs. This additional capacity has been directed to, and taken up by, the "ex-franchise" market, not distribution customers of Union.

Ex-franchise customers have contracted for Union's long-term surplus space and have paid market-based rates, rates that have been much higher than cost-based rates. Rather than bearing the costs of surplus Union storage space that is offered long-term

[37] EBRO 494-03 Decision with Reasons, September 26, 1997, paragraph 2.2.29.

to the ex-franchise market, Union's in-franchise customers have in fact benefited through receiving most of the premium on long-term sales.

Union's rationale

Union claims that development of new storage capacity would be undermined unless the amount of storage allocated to in-franchise customers is capped. This claim appears to have little merit. First, no party to this proceeding has opposed market rates for new storage capacity by third parties. Second, a freeze on space for in-franchise customers would have a neutral effect on the development of the competitive market. This was illustrated by LPMA/WGSPG, which put forward the following scenario in its argument: Assume the incremental storage requirement for the in-franchise customers is, say, 2 Bcf in a particular year. Under Union's proposal, Union would purchase that 2 Bcf from third-party providers. Under the existing framework, that 2 Bcf would be supplied by Union, leaving it with 2 Bcf less for ex-franchise sales. That 2 Bcf shortfall could be provided by third-party providers. The net impact on third-party providers is 2 Bcf of additional storage in either case.

Union also claims that meeting incremental in-franchise demand at market prices is consistent with a "transition to competition" and would send "better price signals to in-franchise consumers." No one in this proceeding, however, has advocated that any in-franchise customers, except for some of the largest gas customers, should be obligated to take a service that might require them to participate directly in the competitive storage market.

GMi, currently Union's largest ex-franchise customer, and Nexen expressed concerns about "claw-back" that the Board finds more compelling than Union's argument. GMi opposed any storage allocation rules that could result in "clawing back storage capacity held by ex-franchise customers for the benefit of in-franchise consumers." It said it would view any such measure as unfair discrimination. Nexen submitted that "claw-back" of storage services from ex-franchise customers would be "discriminatory and

detrimental to not only GMi but to the very existence of the secondary market that Ontario currently supports and benefits from."

Conclusion

The Board finds that there should be a cap on the amount of Union's existing storage space that is reserved for in-franchise customers at cost-based rates. In the Board's view, Union's existing storage assets are, in substance, a combination of "utility assets" required to serve Union's in-franchise distribution customers and "non-utility assets" that are not required for regulated utility operations and that are sold in the competitive storage market. This distinction is supported by the significant excess of total capacity over in-franchise needs for the foreseeable future and by the fact that development in recent years has been driven by the ex-franchise market, not in-franchise needs. The Board does not accept IGUA/AMPCO's submissions that the entire amount of Union's storage is a "utility asset" and that ex-franchise customers (such as gas marketers and utilities in the U.S. Northeast) are buying "utility services" when they purchase storage from Union. The Board has determined that the ex-franchise market is competitive and that it will refrain from rate regulation or contract approval; these will no longer be "utility" services.

The Board concludes that its determination that the storage market is competitive requires it to clearly delineate the portion of Union's storage business that will be exempt from rate regulation. Retaining a perpetual call on all of Union's current capacity for future in-franchise needs is not consistent with forbearance. As evidenced by the arguments from GMi and Nexen, two major participants in the ex-franchise market, retaining such a call is likely to create uncertainty in the ex-franchise market that is not conducive to the continued growth and development of Dawn as a major market centre.

The Board concludes that it would be inappropriate, however, to freeze the in-franchise allocation at the level proposed by Union. Union's proposal implies that a distributor with an obligation to serve would be prepared to own, or to have under contract, only the

APPENDIX E

NATURAL GAS ELECTRICTY INTERFACE REVIEW
DECISION WITH REASONS
BOARD FILE NO. EB-2005-0551

DECISION ON UNION SETTLEMENT PROPOSAL

NOVEMBER 7, 2006

APPENDIX E
Decision on Union Settlement Proposal

The Union Settlement Proposal described a nearly comprehensive settlement of Issue 1 (rates for gas-fired generators and other qualified customers), Issue III (transportation capacity bidding process and allocation) and one of the issues transferred from Union's fiscal 2006 rates case (power service – M12 service upgrades for power services).

There was one outstanding issue identified in the Union Settlement Proposal relating to priority access to Union's proposed F24-T service. The partial settlement provided for priority to parties who bid on transportation as part of Union's 2007 open season for the related Trafalgar expansion project. This in effect granted priority access to certain power generators. TCPL and Energy Probe opposed this method for priority access. All parties agreed that this issue was severable and that the Board could consider the Union Settlement Proposal separately from this discrete F24-T issue.

The Board heard testimony and submissions on this issue and rendered its decision on June 27, 2006. The Board ruled that Union's proposed allocation of F24-T capacity was not appropriate. The Board found that the ex-franchise Ontario power generator customers should receive priority access to F24-T service and provided its reasons for that determination. The Board at the same time approved the Union Settlement Proposal subject to this ruling with respect to Union's proposed allocation of F24-T capacity.

Union Settlement Proposal Decision
Excerpt from the oral hearing transcript EB-2005-0551,
Volume 11, June 27, 2006, pages 125 line 7 to page 129 line 21.

> MR. KAISER: The first matter relates to the Union settlement agreement, which is approved, subject to the following comments with respect to the F24-T matter. In that regard, the Board approves the rates, but has the following concerns with respect to the allocation that was proposed.

You will recall that Union felt there may be a requirement to ration the initial F24-T service - I think it was estimated at 500,000 gigaJoules a day - and proposed that that be allocated to those that had participated in the 2007 open season expansion.

The Board has concluded this is not the proper manner in which to allocate this capacity for a number of reasons. First, the Dawn-Trafalgar costs are rolled in; Secondly, the facilities are in place to serve all M12 customers; and, finally, the information on the open season with respect to this matter contained no indication of this additional service or that there would be a link between participation in the open season and eligibility for this new capacity.
Instead, the Board has concluded that the exfranchise Ontario Power Generator customers should receive priority. Again, there are three reasons we offer for that.

The first was, of course, that the service was designed primarily with their requirements in mind. The second is that the service is being offered on a pilot basis, and in those circumstances this Board doesn't believe that there is any unjust discrimination, or to use the words of one of the intervenors, the discrimination would be just and warranted.

A draft order has been prepared in this regard, which we would ask you, Mr. Leslie, and other interested parties to review. I don't need to read it at this point. You can review it at your leisure. It gives effect to, in greater detail, the principles that I have stated and exactly which customers will qualify, and further details. The Board can be spoken to if there are any concerns with respect to that, or you can settle it with Commission counsel.

APPENDIX F

NATURAL GAS ELECTRICTY INTERFACE REVIEW
DECISION WITH REASONS
BOARD FILE NO. EB-2005-0551

UNION SETTLEMENT PROPOSAL

NOVEMBER 7, 2006

EB-2005-0551

UNION GAS LIMITED

SETTLEMENT AGREEMENT

June 13, 2006

TABLE OF CONTENTS

List of Appendices:

EB-2005-0551

SETTLEMENT AGREEMENT

This Settlement Agreement ("Agreement") is for the consideration of the Ontario Energy Board ("the Board") in its determination, under Docket No. EB-2005-0551, whether it should order Union Gas Limited ("Union") and Enbridge Gas Distribution Inc. ("Enbridge") to provide new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other eligible customers) and whether the Board should refrain from regulating the rates for storage of gas.

By its Notice of Proceeding dated December 29, 2005, the Board, on its own motion, commenced a proceeding pursuant to sections 19, 36 and 29 respectively of the *Ontario Energy Board Act, 1998* to determine (i) whether it should order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other eligible customers); and (ii) whether to refrain, in whole or part, from exercising its power to regulate the rates charged for the storage of gas in Ontario by considering whether, as a question of fact, the storage of gas in Ontario is subject to competition sufficient to protect the public interest.

By Procedural Order No. 1 dated January 24, 2006, the Board identified three issues for consideration in the proceeding: (1) Rates for gas-fired generators (and other qualified customers); (2) Storage regulation; and (3) Transportation capacity bidding process and

allocation. The Board indicated that it would receive a settlement agreement on Issues 1 and 3, but that it did not intend to receive a settlement proposal on Issue 2.

In Procedural Order No. 2, the Board noted that it had referred matters concerning Enbridge's 300 series rates to the NGEIR proceeding and added these matters as Issue 4. This issue was added to the matters to be resolved at the Settlement Conference.

In Procedural Order No. 3, the Board moved four issues from Union's 2007 rates proceeding to the NGEIR proceeding. These issues included i) matters relating to market pricing of storage services, ii) Union's proposal to eliminate S&T deferral accounts, iii) Union's proposal to change the blanket storage order, and iv) power services – M12 service upgrades for power services.

The Board scheduled the Settlement Conference to commence May 29, 2006. The Settlement Conference was duly convened with Mr. Chris Haussmann as facilitator. The Settlement Conference was scheduled to proceed until June 2, 2006. Agreement was not reached by June 2, 2006. Settlement discussions continued through to June 13, 2006.

Given that the Board did not intend that parties settle Issue No. 2 (storage regulation) and that Issue No. 4 (Enbridge series 300 rates) is a matter exclusive to Enbridge, this Agreement addresses only matters pertaining to Issue No. 1 (rates for gas-fired generators and other qualified

customers) and Issue No. 3 (Transportation capacity bidding process and allocation). The Agreement identifies the matters for which agreement has been reached. The Agreement is supported by the evidence filed in the EB-2005-0551 proceeding.

Each of the issues identified below falls within one of the following three categories:

1. an issue for which there is complete settlement, because Union and all of the other parties who discussed the issue either agree with the settlement or take no position,
2. an issue for which there is partial settlement, agreed to by Union and a majority of parties but one or more parties do not agree with the settlement,
3. an issue for which there is no settlement.

For the purposes of this Agreement, the term "no position" may include both parties who were involved in negotiations on an issue but who ultimately took no position on that issue and parties who were not involved in negotiations on that issue at all.

It is acknowledged and agreed that none of the completely settled provisions of this Agreement is severable. If the Board does not, prior to the commencement of the hearing of the evidence in EB-2005-0551, accept the completely settled provisions of the Agreement in their entirety, there is no Agreement (unless the parties agree that any portion of the Agreement that the Board does accept may continue as a valid Agreement).

Unless otherwise indicated in this Settlement Agreement the terms and conditions for Union's services are as set out in Union's evidence, as amended in these proceedings.

It is further acknowledged and agreed that parties will not withdraw from this Agreement under any circumstances except as provided under Rule 32.05 of the Ontario Energy Board's Rules of

Practice and Procedure.

For greater certainty, the parties further acknowledge and agree that these conditions apply to settled issues in respect of which they are shown as taking no position.

It is also acknowledged and agreed that this Agreement is without prejudice to parties re-examining these issues in any other proceeding, except where a party's rights to re-examine an issue have been specifically limited in this Agreement.

The parties agree that all positions, information, documents, negotiations and discussion of any kind whatsoever which took place or were exchanged during the Settlement Conference are strictly confidential and without prejudice, and inadmissible unless relevant to the resolution of any ambiguity that subsequently arises with respect to the interpretation of any provision of this Agreement.

The role adopted by Board Staff in Settlement Conferences is set out on page 5 of the Board's Settlement Conference Guidelines. Although Board Staff is not a party to this Agreement, as noted in the Guidelines, "Board Staff who participate in the settlement conference are bound by the same confidentiality standards that apply to parties to the proceeding".

The evidence supporting the agreement on each issue is set out in each section of the Agreement. Abbreviations will be used when identifying exhibit references. For example, Exhibit B1, Tab 4, Page 1 will be referred to as B1/T4 p. 1. There are Appendices to the Agreement which provide

further evidentiary support. The structure and presentation of the settled issues is consistent with settlement agreements which have been accepted by the Board in prior cases. The parties agree that this Agreement and the Appendices form part of the record in the proceeding.

The following parties, as well as Ontario Energy Board hearing staff ("Board Staff") participated in the Settlement Conference:

Aegent Energy Advisors Inc. ("Aegent")

Association of Major Power Consumers in Ontario ("AMPCO")

Association of Power Producers of Ontario ("APPrO")

Canadian Manufacturers & Exporters ("CME")

Consumers Council of Canada ("CCC")

Direct Energy Marketing Inc. ("Direct Energy")

Enbridge Gas Distribution Inc. ("EGD")

Energy Probe Research Foundation ("Energy Probe")

Greenfield Energy Centre LP ("Greenfield")

Independent Electricity System Operator ("IESO")

Industrial Gas Users Association ("IGUA")

London Property Management Association ("LPMA")

Low-Income Energy Network ("LIEN")

Ontario Power Authority ("OPA")

Ontario Power Generation Inc. ("OPG")

Portland's Energy Centre ("Portland's")

School Energy Coalition (“SEC”)

Sithe Global Power Goreway ULC & Sithe Global Power Southdown ULC (“Sithe”)

The Corporation of the City of Kitchener (“CCK”)

TransAlta Cogeneration L.P. & TransAlta Energy Corp (“TransAlta”)

TransCanada Energy Ltd (“TransCanada Energy”)

TransCanada PipeLines Limited (“TCPL”)

Union Gas Limited (“Union”)

Vulnerable Energy Consumer's Coalition (“VECC”)

Wholesale Gas Service Purchasers Group (“WGSPG”)

OVERVIEW

Union Gas has worked with existing and prospective natural gas power generators and affected stakeholders on the development of new services or enhancement of existing services to meet the needs of power generators in a rapidly evolving natural gas power generation marketplace in Ontario. When proposing new services or modifications to existing services Union has adhered to the following guiding principles:

i) The introduction of new services or service enhancements should have no negative impact on the service to existing customers (either financial burden or reduction in service quality).

ii) Under all operating conditions, reliability and integrity of the gas system must be maintained.

iii) Customer requests for flexibility will be accommodated where possible.

iv) The principle of postage stamp rate-making will be adhered to.

v) Alignment with upstream and downstream services will be facilitated to the extent possible.

The new services and service enhancements that form the basis of this agreement are reasonably consistent with the above noted principles. These services contribute to economic efficiency and to the reliability of Ontario's power system.

The allocation of costs to rate classes will continue to be consistent with existing fully allocated cost allocation principles.

This agreement results in changes to the T1 and U7 rate schedules. Updated schedules will be circulated for review by all settlement conference participants and filed with the Board before the end of the evidentiary portion of the NGEIR proceeding.

1 RATES FOR GAS-FIRED GENERATORS (AND OTHER QUALIFIED CUSTOMERS)

Should the Board order new rates for the provision of natural gas, transmission, distribution and storage services to gas-fired generators (and other qualified customers)? If the Board does order new rates, should that order contain the following requirements:

1.1 MORE FREQUENT NOMINATION WINDOWS FOR DISTRIBUTION, STORAGE AND TRANSPORTATION THAT CORRESPOND WITH THE NOMINATIONS OF UPSTREAM PIPELINES THAT CONNECT TO THE ONTARIO GAS SYSTEM.

(Partial Settlement with the exception of Union's proposal that F24-S, UPBS and DPBS be priced at market based rates. The parties agree that the issue of market based storage pricing is within the ambit of Issue No. 2 (storage regulation) and accordingly beyond the scope of this settlement. TCPL and Energy Probe oppose Union offering new F24-T service first to 2007 transportation expansion shippers.)

The parties accept Union's proposal to develop four (4) new ex-franchise services (recognizing that it is Union's position that development of F24-S, UPBS and DPBS is contingent on the resolution of the storage pricing issue): F24T, F24S, UPBS and DPBS as described in its evidence subject to the following modifications:

- Three additional nomination windows will be provided. The additional nomination windows have nomination deadlines of 12:00, 18:00, and 07:00 with effective times of 14:00, 20:00, and 09:00 respectively. The complete nomination schedule has been attached as Appendix A. The additional nomination windows will provide more flexibility to customers such as power generators and can be provided without the implementation of hourly balancing agreements with upstream and downstream pipelines. The additional nomination windows apply to the receipt of gas from Enbridge, TCPL and Vector and to the delivery of gas to TCPL at Kirkwall and Parkway, all subject to their ability to confirm nominations.
- Union agrees to make the additional nomination windows available to U7 storage, U7 delivery services, and U7 receipts for new customers with loads greater than 1,200,000 m*3 per day.
- Union agrees to make the additional nomination windows available to T1 receipts for new customers with non obigated deliveries and loads greater than 1,200,000 m*3 per day.
- The U7 and T1 rate schedules will be modified to incorporate charges associated with making additional nomination windows available to those customers who elect to take the service. These charges will be cost-based, and will take into account the common IT capital costs and the costs associated with additional staffing associated with making additional nomination windows available for F24-T. The changes to the U7 and T1 rate schedules will be similar to the changes made to the M12 rate schedule to incorporate F24-T.

- Union agrees that it will evaluate the possibility of extending the additional nomination windows and reservation of capacity found in F24-T to the following transportation services:

  i) C1 between Ojibway and Dawn
  ii) C1 between Bluewater and Dawn
  iii) C1 between St. Clair and Dawn
  iv) C1 between Parkway and Kirkwall
  v) C1 transport within the Dawn yard (e.g. between Union Dawn and Vector Dawn)

  Union agrees to provide APPrO and other settlement conference participants with a summary of its findings no later than December 31, 2006.
- Customers may request that nomination changes become effective sooner and Union will use reasonable efforts to accommodate these requests, it being recognized that at the present time and for the foreseeable future Union does not expect to be able to make nomination changes effective sooner than two hours after the nomination.
- Union will also make reasonable efforts to allow large customers (with loads greater than 1,200,000 m3 per day) to take gas prior to a scheduled nomination. The customer will make a request for such service directly to Union's Gas Control Department, and Union will permit such early start-up provided it has no adverse impact on Union's system. Depending on the customer's location, the customer may need approval of Enbridge and TCPL's Gas Control Departments as well.
- The proposed UPBS will allow customers to deliver supply at even hourly flow rates to consume at accelerated flow rates over 4 to16 hours. The parties recognize that higher consumption flow rates will require higher levels of storage deliverability.

- Power generators that subscribe for U7 or T1 services and ex-franchise power generators that subscribe for F24-T, F24-S, UPBS, and DPBS services will provide the utility with a day ahead non-binding hourly gas consumption forecast and will use reasonable efforts to communicate changes from that forecast to assist Union in managing its system.
- Union, Enbridge and APPrO agree to convene an Industry Task Force and will invite all service providers interconnecting with Union and other parties that have expressed an interest. The purpose of the Industry Task Force is to investigate and develop, where feasible, appropriate arrangements for services that would enable Union to accept nomination changes each hour throughout the day (on a firm/reserved capacity basis) with changes becoming effective two hours later. The Industry Task Force will hold its first two meetings no later than September 30, 2006. Union, Enbridge and APPrO agree to work co-operatively and diligently to investigate and develop, where feasible, appropriate arrangements.
- Parties agree that once sufficient operating experience has been gained and in any event no later than March 31, 2009, interested customer groups and Union will convene to evaluate and discuss the experience and success of the services offered as a result of this proceeding. At that time, any party may propose further modifications to the rate schedules.

The parties accept Union's evidence that:

- To maximize the effectiveness of Union offering additional nomination windows, other pipeline operators, storage operators, marketers and producers will need to be able to manage and offer the same nomination windows and be able to confirm nominations on the same two hour schedule.

- F24-T will only be developed if there is 250,000 GJ/day or greater of customer demand (the level of demand used to determine the cost based F24-T rate). The parties are of the view that 250,000 GJ/day of demand is a realistic threshold. Union will offer the new F24-T service first to 2007 transportation expansion customers. Union will then hold an open season to determine if any other customers are interested in the service.
- The availability of F24-S, UPBS and DPBS is dependent upon Union's ability to develop assets to provide incremental storage deliverability.
- There will only be 500,000 GJ/day of F24-T available initially as a result of the 2006 and 2007 expansions of the Dawn-Trafalgar system. This capacity will not be available until the 2007 expansion of the Dawn-Trafalgar system is in service on November 1, 2007. Additional F24-T may become available as a result of future expansion of the Dawn-Trafalgar system and will be made available through an open season process.
- Union requires 12 months to develop the new IT systems required to implement F24-T, F24-S, UPBS and DPBS following a Board Decision and sufficient customer interest to develop the services. Upon the Board accepting this Settlement Agreement, Union will proceed immediately to contact 2007 expansion customers to ascertain their interest in subscribing to the F24-T service and if remaining capacity is available then hold an open season to determine if other existing M12 shippers are interested in the residual capacity. Union expects the open season process to be completed by 30 days after a Board Decision. Union will require approximately 24 months to build additional storage deliverability to provide new incremental high deliverability F24-S, UPBS and DPBS (recognizing that it is Union's position that development of F24-S, UPBS and DPBS are contingent on the resolution of the storage pricing issue).

- IT capital costs and the costs associated with additional staffing required to implement F24-T, F24-S, UPBS and DPBS will be recovered from the customers who elect the new services.

The settlement of this issue has no identifiable adverse impacts on existing customers.

The following parties agree with the settlement of this issue: APPrO, CCC, CME, IGUA, LMPA, LIEN, SEC, CCK, VECC, WPSPG, Sithe, TransCanada Energy, Portlands

The following parties take no position on this issue: Aegent

Evidence References:

1. Union Evidence - A/T4, D/T1 p.6-11 & p.15-18
2. Union Undertakings - UGL 12, UGL 28, UGL 23A, UGL 23B
3. Intervenor Evidence - APPrO May 1/06, TCPL Issue I (Section 2.2) & Appendix IB May 1/06, IGUA-AMPCO May 1/06
4. Intervenor Undertakings - APPrO 1, APPrO 2, APPrO 3, APPrO 7, TCPL 1, TCPL 2&3

1.2 FIRM HIGH DELIVERABILITY SERVICE FROM STORAGE WITH CUSTOMER OPTIONS FOR 1.2%, 5% AND 10% DELIVERABILITY.

(Complete Settlement with the exception of Union's proposal to price firm deliverability greater than 1.2% at market based rates. The parties agree that the issue of market based storage pricing is within the ambit of Issue No. 2 (storage regulation) and accordingly beyond the scope of this settlement.)

The parties agree that new T1 and U7 customers with non-obligated supply shall be entitled to contract for T1 and U7 storage service with firm storage deliverability up to 24 times the customer's peak hourly consumption and storage space up to 24 times the customer's peak

hourly consumption multiplied by 4 days. Should a customer elect to contract for firm storage deliverability that is less than the maximum entitlement, the maximum storage space that a customer is entitled to at cost shall be ten times the firm storage deliverability contracted for. In no event, shall the storage space exceed the maximum storage space entitlement previously described. Storage space with 1.2% firm deliverability will be available at cost based rates. Storage deliverability above base firm deliverability of 1.2% up to the customer's firm CD shall be made available by Union to in-franchise customers in a manner to be determined by the Board as part of Issue No. 2.

To the extent that a power generator does not contract for firm storage deliverability and chooses instead to rely on interruptible storage deliverability, there is no assurance that storage deliverability will be available on peak days.

An example of how these provisions may apply in specific circumstances is attached as Appendix B.

In the event of a conflict between the language of this section and the calculations shown on the attached examples, it is the parties' intention that the calculations shown in the examples shall govern the interpretation of this section.

The settlement of this issue has no identifiable adverse impacts on existing customers because the provision of storage services to these new T1 and U7 customers does not involve the "claw back"

of storage space or deliverability from existing customers and the costs associated with new high deliverability storage services will be recovered from the customers involved.

The following parties agree with the settlement of this issue: APPrO, CCC, CME, Energy Probe, IGUA, LMPA, LIEN, SEC, CCK, VECC, WGSPG, Sithe, TransCanada Energy, Portlands

The following parties take no position on this issue: Aegent, TCPL,

Evidence References:

1. Union Evidence - A/T3 p.30, A/T4 p.42, D/T1 p.2-5, D/T2 p.10, 18, 20, Appendix B
2. Union Undertakings - UGL 3, UGL 9, UGL 12, UGL 24, UGL 28
3. Intervenor Evidence - APPrO May 1/06

1.3 GAS STORAGE AND DISTRIBUTION OFFERED AS DISCRETE SERVICES.

(Complete Settlement)

The parties acknowledge that Union's current U7 service allows for storage and distribution services to be contracted for as discrete services, and that Union's T1 service allows for distribution services to be contracted with or without storage services.

New T1 (or U7) Firm Billing Contract Demand Levels

Parties agree that effective January 1, 2007, for new T1 and U7 customers with loads greater than 1,200,000 m*3 per day, that are directly connected to i) the Dawn-Trafalgar transmission system in close proximity to Parkway or ii) a third party pipeline, Union will allow the customer's firm Billing Contract Demand level to be set at a level that recognizes the economics of the facilities used to serve the customer over the contract term (i.e., annual revenues over the term of the contract that would enable Union to recover the invested capital, return on capital and O&M

costs of the dedicated service in accordance with its system expansion policies). Daily deliveries that exceed the firm Billing Contract Demand quantity will be subject to cost related authorized overrun charges as specified in the T1 and U7 rate schedule (where authorized overrun charges are set using the demand charge of the first block of T1 and U7 rate schedule and the applicable commodity charge unitized at 100% load factor). This approach to establishing the firm Billing Contract Demand level of a new T1 and U7 customer's contract is similar to a feature approved by the Board for Enbridge's Rate 125 service.

As a result of this agreement, the parties agree that Union's proposal to redesign the T1 firm transportation service by:

i. Replacing the current two block declining demand charge structure with a four step block demand rate structure, and

ii. Replacing the two block declining commodity charge with a single commodity charge applicable to all firm T1 transportation customers,

is no longer required and is withdrawn as part of this settlement. Union's proposed T1 redesign was a response to the Board's comments and findings in the RP-2005-0022/EB-2005-0411 GEC Decision.

Delivery Obligations

a) West of Dawn: For new T1 or U7 customers and for existing customers with new firm incremental loads greater than 1,200,000 m3 per day, at the customer's option there will be no obligated DCQ requirement, subject to the facilities required to support the incremental load being economic.

b) T1 Customers East of Dawn who have their Firm Billing Contract Demand set at a level that recognizes the economics of the facilities used to serve the customer as described above (New T1 (or U7) Firm Billing Contract Demand Levels): New T1 customers and existing customers with new firm incremetal loads greater than 1,200,000 m3 per day have the following options:

i) The customer could deliver a daily obligated supply at Parkway equal to 100% of their firm CD (i.e. 24 times their peak hour firm delivery entitlement).

ii) The customer could commit to M12 Dawn-Parkway transmission capacity sufficient to meet 100% of their firm CD (i.e. 24 times their peak hour firm delivery entitlement). The customer must assign the right to use the M12 Dawn-Parkway transmission capacity to Union to allow Union to manage the firm redeliveries to the plant on a no-notice basis. For greater clarity, this allows the customer to purchase all their gas supply at Dawn on a non-obligated basis, yet operate with the no-notice benefits of the T-1 service.

iii) Any combination of the above.

c) U7 Customers East of Dawn who have their Firm Billing Contract Demand set at a level that recognizes the economics of the facilities used to serve the customer as described above (New T1 (or U7) Firm Billing Contract Demand Levels): New U7 customers and existing customers with new firm incremetal loads greater than 1,200,000 m3 per day have the following options:

i) The customer could maintain arrangments sufficient to meet their Parkway call-back provision equivalent to 100% of their firm CD.

ii) The customer could elect to deliver their supply at Parkway in the same hourly pattern as their plant is consuming. This option requires modifications to the terms and conditions of the U7 service. This option is conditional on the Industry Task Force identified in Issue 1.1 developing appropriate arrangements that will permit Union to accept hourly nominations and possibly TCPL's proposed FT-SN being approved by the NEB.

iii) Any combination of the above.

d) T1 Customers East of Dawn who have not had their Firm Billing Contract Demand set at a level that recognizes the economics of the facilities used to serve the customer as described above (New T1 (or U7) Firm Billing Contract Demand Levels): New T1 customers and existing customers with new firm incremetal loads greater than 1,200,000 m3 per day have the following options:

i) The customer could deliver a daily obligated supply at Parkway equal to 80% of their firm CD (the current firm T1 rate class average load factor).

ii) The customer could commit to M12 Dawn-Parkway transmission capacity sufficient to meet 80% of their firm CD (i.e. 24 times their peak hour). The customer must assign the right to use the M12 Dawn-Parkway transmission capacity to Union to allow Union to manage the firm redeliveries to the plant on a no-notice basis. For greater clarity, this allows the customer to purchase all their

gas supply at Dawn on a non-obligated basis, yet operate with the no-notice benefits of the T-1 service.

iii) Any combination of the above.

e) U7 Customers East of Dawn who have not had their Firm Billing Contract Demand set at a level that recognizes the economics of the facilities used to serve the customer as described above (in the New T1 (or U7) Firm Billing Contract Demand Levels section): New U7 customers and existing customers with new firm incremetal loads greater than 1,200,000 m3 per day have the following options:

i) The customer could maintain arrangments sufficient to meet their Parkway call-back provision equivalent to 80% of their firm CD.

ii) The customer could elect to deliver their supply at Parkway in an amount equivalent to at least 80% of their hourly consumption. This option requires modifications to the terms and conditions of the U7 service. This option is conditional on the Industry Task Force identified in Issue 1.1 developing appropriate arrangements that will permit Union to accept hourly nominations and possibly TCPL's proposed FT-SN being approved by the NEB.

iii) Any combination of the above.

All of the foregoing delivery obligation options avoid costs that would otherwise be incurred and that would otherwise be borne by other ratepayers.

Multiple Redelivery Points

Union will permit multiple T1 (or U7) redelivery points not under common ownership provided the deliveries are managed by a common "fuel manager". Each redelivery point will need to individually meet the minimum qualifications for the T1 (or U7) rate schedule. Management by a common fuel manager will have no impact on the calculation of delivery charges applicable to each redelivery point. In addition, a fully binding agency agreement with the fuel manager will be required for each of the redelivery points. The fuel manager will be responsible for providing the necessary required credit to Union to cover the prudential requirements of all of the redelivery points. The fuel manager will be responsible for all of the redelivery points in aggregate. The fuel manager will receive the total monthly T1 invoice. The fuel manager will be jointly liable with each of the redelivery point contracting parties for all of their obligations under the contract while the individual redelivery point contracting parties will remain severally liable for their obligations related to their individual redelivery portion of the bill.

The settlement of this issue has no identifiable adverse impacts on existing customers.

The following parties agree with the settlement of this issue: Aegent, APPrO, CCC, CME, Energy Probe, IGUA, LPMA, LIEN, SEC, VECC, WGSPG, Sithe, TransCanada Energy, Portlands

The following parties take no position on this issue: CCK, TCPL

Evidence References:

1. Union Evidence - A/T3 p.2-12, 31, Supplemental A/T3, A/T4 p.43, D/T1 p.11-15 & p.18-20
2. Union Undertakings - UGL 1, UGL 2, UGL 5, UGL 6, UGL 10, UGL 11, UGL 14, UGL 17, UGL 18, UGL 19, UGL 22, UGL 25, UGL 26, UGL 28, UGL 52D
3. Intervenor Evidence - APPrO May 1/06, APPrO May 26/06, IGUA-AMPCO May 1/06, TCPL Issue I (Section 2.2) & Appendix IB May 1/06
4. Intervenor Undertakings - APPrO 1, IGUA 1

1.4 INTER-FRANCHISE MOVEMENT OF GAS (I.E., THE ABILITY TO ACCESS SERVICES ACROSS ONTARIO, WHETHER TO A CUSTOMER'S OWN ACCOUNT OR AS A SALE TO A THIRD PARTY).

(Complete Settlement)

The parties accept Union's current range of services that permit the redirection or acquisition of gas on short notice subject to Authorization Notice. These services were described in Appendix B to Union's evidence and include in-franchise transfers, ex-franchise transfers, DCQ assignments, suspensions, diversions, incremental supplies, loans, short-term storage and the Discretionary Gas Supply Service (DGSS). Union believes that its services align with Enbridge's proposed Enhanced Title Transfer service if settlement occurs daily.

Provided that customers remain within firm contractual parameters, it is acknowledged that customer's rights to divert or redirect gas should not be constrained or impeded by Union unless there are physical constraints on Union's system.

The settlement of this issue has no identifiable adverse impacts on existing customers.

The following parties agree with the settlement of this issue: APPrO, CCC, CCK, CME, Energy Probe, IGUA, LPMA, LIEN, SEC, VECC, WGSPG, Sithe, TransCanada Energy, Portlands

The following parties take no position on this issue: Aegent, TCPL

Evidence References:

1. Union Evidence - A/T3 p.31
2. Intervenor Evidence - APPrO May 1/06, CCK May 1/06, TCPL Issue I May 1/06

1.5 REDIRECTION OF GAS TO A DIFFERENT DELIVERY POINT ON SHORT NOTICE (I.E. THE ABILITY TO REDIRECT OR ACQUIRE GAS ON SHORT NOTICE TO A DIFFERENT DELIVERY POINT).

(Complete Settlement)

The parties accept Union's current range of services that permit the redirect or acquisition of gas on short notice subject to Authorization Notice. These services were described in Appendix B to Union's evidence and include in-franchise transfers, ex-franchise transfers, DCQ assignments, suspensions, diversions, incremental supplies, loans, short-term storage and the Discretionary Gas Supply Service (DGSS).

Provided that customers remain within firm contractual parameters, it is acknowledged that customer's rights to divert or redirect gas should not be constrained or impeded by Union unless there are physical constraints on Union's system.

The settlement of this issue has no identifiable adverse impacts on existing customers.

The following parties agree with the settlement of this issue: APPrO, CCC, CCK, CME, Energy Probe, IGUA, LPMA, LIEN, SEC, VECC, WGSPG, Sithe, TransCanada Energy, Portlands

The following parties take no position on this issue: Aegent, TCPL,

Evidence References:

1. Union Evidence - A/T3 p.31
2. Intervenor Evidence - APPrO May 1/06
3. Intervenor Undertakings - APPrO 1

1.6 THE ABILITY TO TRANSFER THE TITLE OF GAS IN STORAGE (I.E. THE TITLE TRANSFER IN GAS STORAGE IS TREATED AS AN ADMINISTRATIVE MATTER INSTEAD OF A PHYSICAL WITHDRAWAL OR INJECTION OF GAS).

(Complete Settlement)

The parties agree that underground title transfers shall be permitted between in-franchise customers (T1, T3, U7 and U9) with like and similar storage services subject to an administrative fee, without the application of withdrawal and injections charges. The contract parameters that must be the same include:

- % Withdrawals
- % Injections
- Supplier of deliverability inventory (customer supplied vs. Union supplied)
- Customer inventory within the same deliverability ratchets
- Quality of service (firm versus interruptible)

In addition, Union will permit underground title transfers between in-franchise customers on a interruptible basis (T1, T3, U7 and U9) subject to an administrative fee, without the application of withdrawal and injections charges when the transfer of gas in storage is from a customer with higher withdrawal entitlements to a customer with lower withdrawal entitlements.

Title transfers will be contracted for through Authorization Notices. Approval of all transactions would be limited to the lessor of the seller's withdrawal limit and the buyer's injection limit.

The settlement of this issue has no identifiable adverse impacts on existing customers.

The following parties agree with the settlement of this issue: Aegent, APPrO, CCC, CCK, CME, Energy Probe, IGUA, LPMA, LIEN, SEC, VECC, WGSPG, Sithe, TransCanada Energy, Portlands

The following parties take no position on this issue: TCPL,

Evidence References:

1. Union Evidence - A/T3 p.32-37
2. Union Undertakings - UGL 23B
3. Intervenor Evidence - APPrO May 1/06, TCPL Appendix IA May 1/06
4. Intervenor Undertakings - APPrO 1

3 TRANSPORTATION CAPACITY BIDDING PROCESS AND ALLOCATION

3.1 SHOULD THE BOARD ALLOW A GAS TRANSMITTER TO CHARGE A PREMIUM ABOVE COSTS FOR GAS TRANSMISSION SERVICES AND, IF SO, HOW SHOULD THAT PREMIUM BE ALLOCATED?

(Complete Settlement)

On May 15th, 2006 Union submitted for the Board's review and approval a comprehensive Settlement Agreement between Union Gas and various intervenors, as part of the EB-2005-0520 proceeding. This Settlement Agreement included complete settlement of Issue 6.10 "Are the terms and conditions of M12 and C1 services, including the proposed rate schedule changes, appropriate (excluding the consideration of potential new services for power producers)?".

As part of this Agreement, Union agreed to some future actions which were anticipated to result in settlement of NGEIR Issue III. Specifically, Union proposed and the stakeholders accepted the following:

"In the event the Board approves this Settlement Agreement, Union will send a letter to the Board panel presiding over the NGEIR proceeding (supported by TCPL) providing for the following:

1. Union agrees to amend the contracts of the Parties that bid a premium in the 2006 and 2007 open seasons to remove the premium. These customers would then pay the posted M12 toll only. This would reduce Union's revenue forecast for 2007 by $150,000.
2. Union agrees to develop, prior to its next open season, an allocation procedure which defines the criteria by which Union will allocate long term firm transportation capacity for expansion, promptly post it on its web site, and notify shippers of any changes six months in advance.
3. Union will include in its allocation procedure or otherwise, a requirement that Union identify in its open season documents any anticipated capacity constraints, if a constraint is expected, and
4. Union agrees to not use bid premium as a criterion for allocating long term firm transportation capacity in the future."

The following parties agreed with the settlement of this issue in the EB-2005-0520 proceeding: CME, FONOM & the Cities, CCK, CCC, EGD, Energy Probe, IGUA, LPMA, SEC, Sithe, TransAlta, TCPL, WGSPG

The following parties took no position on this issue in the EB-2005-0520 proceeding: Coral, LIEN, OAPPA, OESLP, SEM, VECC

The settlement of this issue has no identifiable adverse impacts on existing customers other than the reduction in the 2007 revenue forecast of $150,000.

The following additional parties in this proceeding agree with the settlement of this issue:

APPrO, Sithe, TransCanada Energy, Portlands

The following additional parties in this proceeding take no position on this issue:

Evidence References:

1. Union Evidence - A/T5 p.1-3, Letter filed with Board re Settlement of Issue III dated May 15, 2006
2. Union Undertakings - UGL 52a, UGL 52d, UGL 52e, UGL 52f, UGL 52g
3. Intervenor Evidence - APPrO May 1/06, TCPL Issue III & Appendix IIIA May 1/06, IGUA AMPCO May 1/06
4. Intervenor Undertakings - APPrO 1, TCPL 4

EB-2005-0551
Appendix A

Nomination Window Schedule

June 10th Gas Day Nom Cycles	Nom #	Nomination deadline	Effective Time	Elapsed Hours	Remaining Hours
Timely Nom*	1	12:45 June 9	10:00 June 10	0	24
Evening Nom*	2	19:00 June 9	10:00 June 10	0	24
STS 1**	3	10:00 June 10	12:00 June 10	2	22
Intraday 1*	4	11:00 June 10	18:00 June 10	8	16
12:00	5	12:00 June 10	14:00 June 10	4	20
14:00	6	14:00 June 10	16:00 June 10	6	18
STS 2**	7	16:00 June 10	18:00 June 10	8	16
18:00	8	18:00 June 10	20:00 June 10	10	14
Intraday 2*	9	18:00 June 10	22:00 June 10	12	12
STS 3**	10	0:00 June 11	02:00 June 11	16	8
STS 4**	11	04:00 June 11	06:00 June 11	20	4
6:00	12	06:00 June 11	08:00 June 11	22	2
7:00	13	07:00 June 11	09:00 June 11	23	1

***NAESB Windows**
****TCPL STS Windows**
*** and**: Future changes to these common industry windows will change Union's schedule of nomination windows.**
All windows are scheduled in Ontario Clock Time.

Storage Deliverability and Space Allocation Example

100 MW Combined-Cycle Generating Plant

Firm Max Hour (GJ)	791
Firm Peak Day (GJ)	18,984
Max Firm Space (GJ)	75,816

Contracted Firm Deliverability			Max Firm Space	%	Cost-Based Deliverability		Deliverability
% Peak Day	Hours of Use	GJ/day	Entitlement	Deliverability	GJ/Day	% of Total	Days
A	B	C	D (C x 4 days)	E (C/D)	F (D x 1.2%)	G (F/C)	H (D/C)
100%	24.0	18,984	75,936	25.0%	911	4.8%	4.0
90%	21.6	17,086	75,936	22.5%	911	5.3%	4.4
80%	19.2	15,187	75,936	20.0%	911	6.0%	5.0
70%	16.8	13,289	75,936	17.5%	911	6.9%	5.7
60%	14.4	11,390	75,936	15.0%	911	8.0%	6.7
50%	12.0	9,492	75,936	12.5%	911	9.6%	8.0
40%	9.6	7,594	75,936	10.0%	911	12.0%	10.0
30%	7.2	5,695	56,952	10.0%	683	12.0%	10.0
20%	4.8	3,797	37,968	10.0%	456	12.0%	10.0
10%	2.4	1,898	18,984	10.0%	228	12.0%	10.0

TAB 5

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2007-0724
EB-2007-0725

Enbridge Gas Distribution Inc.
Union Gas Limited

NATURAL GAS STORAGE ALLOCATION POLICIES

DECISION WITH REASONS

April 29, 2008

Contract Sanctity and Settlement Agreements

The Board also does not agree with IGUA that Union's June 2006 NGEIR settlement agreement in some way bound Union to propose retaining existing allocations to T1 customers. The NGEIR settlement related solely to new storage services (to gas-fired power generators and other similar customers) and the impact of those specific proposals on Union's other customers. The Board concludes that Union's position in this proceeding is not inconsistent with its commitment in the NGEIR settlement agreement.

Similarly, the Board does not agree that there are restrictions arising from its RP-1999-0017 decision and settlement agreement. In the RP-1999-0017 decision, the Board was quite explicit about the transitional nature of the arrangements in the settlement agreement:

> This Decision should be regarded as a component of an overall, longer term transition to increased competition. It is hoped that when a more robust fluid market exists, many features in the Settlement Agreement and in this Decision will have evolved and been replaced with improved features. [RP-1999-0017, paragraph 6.3.2]
>
> The Board agrees with the many parties who indicated that Union's proposal should be viewed as a continued evolution of new services in support of a competitive market in natural gas commodity and other non-monopoly services should not be considered. [RP-1999-0017, paragraph 6.3.3]

The Board would remind parties about the fundamental nature of settlement agreements and what the Board intends when it approves such agreements. The appropriate interpretation of the Board's approval was succinctly summarized in a recent oral decision on a settlement proposal in an electricity distribution rates case:

> Settlement proposals are a result of a complex relationship of issues. One should not look for precedential value with respect to specific elements of the settlement agreement in this case.
>
> It is the overall cost consequences or rate outcome that the Board accepts, not necessarily the results of specific methodologies or proposals that may or may not deviate from the Board regulatory

> instruments that may otherwise apply. [EB-2007-0713, Transcript, January 24, 2008, page 42]

If the Board concludes that the terms and conditions of Union's contracts for cost-base storage must evolve to respond to changing circumstances, it will order such changes regardless of the rollover provision in current T1 contracts or the provisions of the June 2000 settlement agreement. The rollover provision might be an important consideration when assessing how customers could be affected by any new allocation rules, and when determining appropriate transition mechanisms. Such considerations, however, do not change the Board's overriding obligation to ensure rates and contract terms are just and reasonable.

IGUA's Proposed Excessiveness Audit

Under its excessiveness audit approach, IGUA is effectively arguing that the allocation methods should be governed by a "use it and you don't lose it" principle. For IGUA's approach to be correct, it must be true that use of the current storage allocation is good evidence of a customer's "reasonable needs." While this might appear to be a sensible conclusion at first, further consideration makes it clear that such a conclusion is incorrect:

- IGUA's analysis shows the impact of the allocation methods on customers, assuming no active storage management is undertaken. This is not an appropriate assumption. The semi-unbundled service is designed with the expectation that customers will be more active managers of their storage than they would be under bundled service. Therefore, it is inappropriate to assume a totally passive approach to storage management.

- The proposed additions of a 5% safety margin and a 15% materiality threshold have no corollary in the A/E Method, nor are they equivalent to any provisions in the bundled service.

- The evidence shows that some customers have used part of their storage allocations for market activities, unrelated to "reasonable customer needs" as defined by the Board. There is nothing inappropriate about these activities, but they are not related to "reasonable customer needs" for purposes of cost-based storage allocation.

The Board concludes that the "use it and you don't lose it" principle is not appropriate. The Board finds that a customer's past use of storage, either actual or theoretical, is not necessarily determinative of that customer's "reasonable needs". The Board will be governed by the principles underpinning the definition of "reasonable customer needs" as articulated earlier in this decision.

The Board notes that not all T1 customers object to the loss of their grandfathered position. While acknowledging that the implementation of the proposed A/E Method would reduce its storage space allocation by 60%, Innophos Canada argued for transition mechanisms which would assist all T1 customers to adapt to a reduction in storage space allocation.

Conclusion

The Board finds that it would be inappropriate to retain the roll over provisions in the current T1 and T3 contracts because that would preserve storage allocations which are not necessarily related to a customer's "reasonable needs," and would be contrary to the objective of "standardized, and consistently applied rules" set out in the NGEIR Decision.

The Board concludes that the allocation methods approved in this decision shall be applicable to all T1 and T3 customers – existing, including grandfathered customers, and future. There is no longer a compelling reason to treat similar customers differently. Indeed, now that the Board has embarked on a comprehensive examination of storage allocation methodologies, the Board concludes that there are compelling reasons to implement standardized and consistently applied rules, as contemplated in the NGEIR Decision. These rules, and the reasons for them, will be transparent and arise from an

TAB 6

Ontario Energy Board

Commission de l'énergie de l'Ontario

EB-2010-0155

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 approval of its tariffs for its M12 and C1 transportation services;

AND IN THE MATTER OF the Storage and Transportation Access Rule.

BEFORE: Paul Sommerville
Presiding Member

Paula Conboy
Member

DECISION ON TARIFFS

August 30, 2010

Background

On December 9, 2009, the Ontario Energy Board (the "Board") issued a Notice of Issuance of a New Rule, under section 44(1) of the *Ontario Energy Board Act, 1998* (the "Act"). The new rule, known as the Storage and Transportation Access Rule ("STAR") came into effect on June 16, 2010. All materials related to the STAR are available on the Board's website (EB-2008-0052).

On April 1, 2010, in accordance with sections 2.3.3 and 2.4.3 of the STAR, Union Gas Limited ("Union") filed with the Board an application seeking Board approval of tariffs for its M12, C1 and M16 transportation services to be effective as of June 16, 2010. Union

has proposed revisions to the tariffs for its M12, C1 and M16 transportation services in order for these tariffs to be compliant with the STAR.

Section 2.3.3 of the STAR applies to a transmitter that provides transportation services for a shipper while section 2.4.3 applies to a transmitter that provides transportation services for an embedded storage provider. Sections 2.3.3 and 2.4.3 of the STAR read as follows:

> *2.3.3 A transmitter shall include in its tariff the terms of service for each of its transportation services. The tariff shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.*
>
> *2.4.3 A transmitter shall include in its tariff the standard terms of service for each of its transportation services. The tariff shall be filed with the Board for approval and the approved tariff shall be posted on the transmitter's website.*

The Board issued a Notice of Application and Procedural Order No. 1 on April 9, 2010, which allowed registered participants in the development of the STAR (EB-2008-0052) and all shippers taking M12, C1 or M16 transportation service from Union to file submissions on Union's application. The Board decided to proceed by way of a written proceeding.

On April 27, 2010, the Board issued Procedural Order No. 2. In its application, Union expressed concern that there would be a two week period when it would not have Board-approved M12, C1 and M16 transportation contracts for potential shippers and/or storage providers. The Board decided to extend the implementation date for sections 2.3.3 and 2.4.3 to July 1, 2010 to coincide with the issuance of the Quarterly Rate Adjustment Mechanism ("QRAM") Rate Order.

On June 3, 2010, the Board issued a Decision (the "STAR Decision") approving Union's M16 tariff. With regard to C1 and M12 tariffs the Board directed Union to make changes as follows:

Allocation of Capacity - Section XVI

- The Board required Union to clearly define its transmitter-specific allocation methods in its M12 and C1 transportation tariffs. The definitions should include the rules that will be applied to the allocation of capacity using these methods.

- The Board directed that the phrase “but not limited to” in section XVI.5 be deleted from the M12 and C1 tariffs.

- The Board required Union to define “long-term firm transportation” in its tariffs for M12 and C1 transportation services.

Service Curtailment - Section XVIII

- The Board noted that the wording “in *Union’s sole discretion*, capacity or operating conditions” is not in the existing contracts for Union’s M12 and C1 transportation services but may be implied in Union’s Priority of Service Policy on its website. The Board required that Union should include the phrase “acting reasonably” in section XVIII.1. The sentence therefore should read “.... or when, in Union’s sole discretion, *acting reasonably*, capacity or operating conditions so require ...”.

- The Board directed that the full Priority of Service policy, namely the 11 categories of service, should be listed in Union’s M12 and C1 tariffs.

Renewal Rights – Section XVII in the C1 Tariff

- The Board required Union to modify the language in its proposed C1 Tariff. Specifically, section XVII dealing with C1 transportation should include the contracts that contain a receipt point at Parkway and a delivery point at Kirkwall in the list of contracts with renewal rights.

On June 14, 2010, the Board issued Procedural Order No. 3 requiring Union to file changes to the proposed C1 and M12 tariffs, as directed by the STAR Decision.

On July 9, 2010, Union filed its proposed changes to its M12 and C1 tariffs.

Positions of Parties

On July 23, 2010, the Board received written submissions from Canadian Manufacturers & Exporters ("CME"); Industrial Gas Users Association ("IGUA"); and Board staff ("Staff").

CME supported the changes to the proposed M12 and C1 tariffs requested by Union.

On July 30, 2010, the Board received Union's Reply. Union argued that the proposed M12 and C1 transportation service tariffs as filed with the Board on July 9, 2010 meet the requirements of the STAR.

Below, the Board will address the respective positions of the parties with respect to the Allocation of Capacity - section XVI of the tariffs proposed by Union. Excerpts of section XVI of the M12 and C1 tariffs respectively as proposed by Union may be found in Appendix A. All of the comments were directed to these sections of the respective tariffs.

Allocation of Capacity - Sections XVI (1) and XVI (4) in the M12 and C1 Tariffs

Staff submitted that Union should clearly define the terms "proposed payment" and "proposed per-unit rate" in its tariffs. Also, staff proposed as part of this definition that Union should explain whether these terms mean that Union may accept a premium or a discount on the regulated firm transportation rate.

In Reply, Union clarified that the "proposed per unit rate" referenced in section XVI (4) is potentially a different rate than the "proposed payment" in the customer's request outlined in section XVI (1). Union indicated that a customer's "proposed payment" may not always meet the requirements of Union's regulated rate schedule or be in consistent units to allow a meaningful net present value (NPV) comparison (e.g., Cdn $/GJ/month).

Union noted in its Reply that under the Board approved Settlement Agreement in its 2007 rate case (EB-2005-0520), any premium offered would not be used as a factor to allocate firm transportation capacity greater than one year, and that for the purposes of the NPV calculations, the proposed per unit rate will be the regulated rate. Union also commented that neither the M12 or C1 rate schedules allow Union to accept a discount rate.

Board Findings

The Board is satisfied with Union's clarification with respect to the terms "proposed payment" and "proposed per unit rate".

Allocation of Capacity - Section XVI (5) (c) in the M12 and C1 Tariffs

Staff submitted that the "offer to supply the Available Capacity to the potential shipper" provision is currently included in the sub-section that sets out the reasons for Union to reject an offer. For clarity, Staff proposed that this provision should be set out in a separate sub-section that comes before XVI (5) (c) i) and after (5) (b) i).

Union, in its Reply, argued that this provision is placed in the list of reasons for rejecting a request for service because "insufficient capacity" is one of several possible reasons for rejecting a request for service. Also, Union disagreed with staff's suggestion of a separate section because there may be other reasons why Union cannot offer the service (even if there is sufficient capacity) such as the reasons listed in sub-sections XVI (5)(c) ii) to iv).

Board Findings

The Board accepts Union's tariffs as filed in this regard, and will not require any modifications.

Allocation of Capacity - Section XVI (5) (c) iii) in the M12 and C1 Tariffs

Staff submitted that Union should provide clarification on the process and the length of time it takes Union to accept a request for long-term firm transportation services and short-term firm transportation services. Staff also sought clarification as to why the allocation of available capacity (not in an open season) is triggered when the requests are accepted and not when the requests are received.

In Reply, Union indicated that due to the complexity of its services as well as other market activities happening at the time of the request, Union cannot outline the process or length of time for accepting requests. However, Union stated that it is mindful of the requirement for a timely response to requests for service and acknowledged that it is prudent to respond to all requests for service in a prompt manner.

Board Findings

The Board is concerned with the lack of specificity with respect to the length of time it takes Union to process and accept a customer's request for transportation services. This uncertainty with respect to Union's acceptance process may lead to the potential for Union to treat shippers differently or to appear to do so. The Board believes that this uncertainty does not meet the STAR requirement of ensuring that the allocation of capacity is consistent, predictable and transparent.

Union commented that it cannot outline the process or length of time for accepting a request because of the complexities of its services. However, the Board notes that the STAR requires Union to post on its website "Operationally-Available Transportation Capacity" at each nomination cycle. Also, the STAR requires Union to have a standard transportation contract for each of its transportation services. STAR also requires that all transportation contracts containing negotiated variations from the standard form of contract and/or standard terms of service must be posted on Union's website. At this time, no negotiated contracts have been posted. Therefore, the Board concludes that available capacity for Union's transportation services are known and that a standard contract is available for Union's transportation services.

The Board is of the view that to ensure non-discriminatory access, customer requests for transportation services must be accepted on a timely basis. Therefore, the Board finds that Union will be allowed up to five (5) calendar days to process and accept a customer's request for transportation services.

The Board finds that this time limit is necessary to ensure that the allocation of capacity is done fairly.

Allocation of Capacity - Section XVI (5) (d) in the M12 and C1 Tariffs

Staff submitted that Union's requirement for resubmission of service requests when multiple requests are received is inconsistent with industry practice and may lead to unfair treatment of potential shippers. Staff commented that industry practice for allocating limited available capacity is typically on a pro-rata basis. Therefore, staff suggested that the process for resubmission is not required.

IGUA submitted that Union did not indicate on what basis it would choose between the "open season" response and the "opportunity for resubmission" response.

Union submitted in its Reply that customers are not required to resubmit their requests; rather, they have the option to do so. Union stated that allowing interested customers to submit new bids with the knowledge that their service requests will be considered along with a competing bid provides more transparency, since customers may be willing to bid for a longer term if they knew that would have a better opportunity to obtain the capacity.

Union also indicated that because of the wide variety of possible circumstances and factors for consideration, no firm criteria can be listed in the tariffs for choosing between the "open season" response and the "opportunity for resubmission".

Board Findings

The Board notes that Union indicated that the "situation of competing bids would occur very rarely because Union would likely initiate an Open Season if there was a lot of interest in a service".

The Board agrees with Union that it would be difficult to outline the criteria for choosing between the "open season" response and the "opportunity for resubmission" in its tariffs. Accordingly, the Board finds that the criteria for choosing between the "open season" response and the "opportunity for resubmission" does not need to be included in Union's revised tariffs.

THE BOARD ORDERS THAT:

1. Union Gas Limited shall amend its M12 and C1 tariffs to allow up to five (5) calendar days to process and accept a customer's request for transportation services, subject to Union's conditions precedent (as outlined in section XVI (5) (c) v)), if necessary.

2. Intervenors eligible for a cost award shall file with the Board and forward their respective cost claims for the proceeding to Union no later than **21 days** of the issuing of this decision.

3. Union shall file with the Board and deliver to the applicable intervenor any objections to the claimed costs no later than **14 days** upon receipt of cost claims.

4. The intervenors shall file with the Board and forward to Union any responses to any objections for cost claims no later than **7 days** upon receipt of objection by the Union.

All filings to the Board must quote the file number, EB-2010-0155, be made through the Board's web portal at www.errr.oeb.gov.on.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and email address. Parities must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.oeb.gov.on.ca. If the web portal is not available parties may email documents to the address below. Those who do not have internet access are required to submit all filings on a CD or diskette in PDF format, along with two paper copies. Those who do not have computer access are required to file 7 paper copies. All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

DATED at Toronto, August 30, 2010

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

EXCERPTS FROM THE M12 ANC C1 TARIFF
AS PROPOSED BY UNION GAS LIMITED

EB-2010-0155

Union's peak day requirements for such facilities, and Shipper's service entitlement during such period of impairment, shall be pro-rated. This pro rationing shall be determined by multiplying the daily capability of such facilities, as available downstream of the impairment, by a fraction, the numerator of which is Shipper's firm Contract Demand and the denominator of which is the total of all such firm contract demands, including the firm Contract Demand hereunder and Union's said peak day requirements downstream of the impairment. For the purposes of this Article XI, firm contract demand shall mean all firm services provided by Union ,including firm service under Rate Schedules M2, M4, M5A, M6A, M7, M9, M10, M12, C1, T1, T3, U2, U5, and U7, plus any new firm service that may be created in the future.

XII. DEFAULT AND TERMINATION

In case of the breach or non-observance or non-performance on the part of either party hereto of any covenant, proviso, condition, restriction or stipulation contained in the Contract (but not including herein failure to take or make delivery in whole or in part of the gas delivered to/by Union hereunder occasioned by any of the reasons provided for in Article XI herein) which has not been waived by the other party, then and in every such case and as often as the same may happen, the non-defaulting party may give written notice to the defaulting party requiring it to remedy such default and in the event of the defaulting party failing to remedy the same within a period of thirty (30) days from receipt of such notice, the non-defaulting party may at its sole option declare the Contract to be terminated and thereupon the Contract shall be terminated and be null and void for all purposes other than and except as to any liability of the parties under the same incurred before and subsisting as of termination. The right hereby conferred upon each party shall be in addition to, and not in derogation of or in substitution for, any other right or remedy which the parties respectively at law or in equity shall or may possess.

XIII. AMENDMENT

Subject to Article XV herein and the ability of Union to amend the M12 Rate Schedule with the approval of the OEB, no amendment or modification of the Contract shall be effective unless the same shall be in writing and signed by each of the Shipper and Union.

XIV. NON-WAIVER AND FUTURE DEFAULT

No waiver of any provision of the Contract shall be effective unless the same shall be in writing and signed by the party entitled to the benefit of such provision and then such waiver shall be effective only in the specific instance and for the specified purpose for which it was given. No failure on the part of Shipper or Union to exercise, and no course of dealing with respect to, and no delay in exercising, any right, power or remedy under the Contract shall operate as a waiver thereof.

XV. LAWS, REGULATIONS AND ORDERS

The Contract and the respective rights and obligations of the parties hereto are subject to all present and future valid laws, orders, rules and regulations of any competent legislative body, or duly constituted authority now or hereafter having jurisdiction and the Contract shall be varied and amended to comply with or conform to any valid order or direction of any board, tribunal or administrative agency which affects any of the provisions of the Contract.

XVI ALLOCATION OF CAPACITY

1. ~~Any Shipper~~A potential shipper may request firm ~~Transportation Services~~transportation service on Union's system at any time. Any ~~such~~ request for firm M12 transportation service must include: ~~Shipper~~potential shipper's legal name, Receipt Point(s), Delivery Point(s), Commencement Date, Initial Term, ~~and~~ Contract Demand and proposed payment. This is applicable for M12 service requests for firm transportation service with minimum terms of ten (10) years where Expansion Facilities are required ~~and~~or a minimum term of five (5) years for use of existing capacity.

2. If requests for firm ~~Transportation Services~~transportation services cannot be met through existing capacity such that the only way to satisfy the ~~request~~requests for transportation service would require the construction of Expansion Facilities which create new capacity, Union shall allocate any such new capacity by open season, subject to the terms of the open season, and these General Terms and Conditions.

3. If requests for long-term firm transportation service can be met through existing facilities upon which long-term capacity is becoming available, Union shall allocate such long-term capacity by open season, subject to the terms of the open season, and these General Terms and Conditions. "**Long-term**", for the purposes of this Article XVI, means, in the case of a transportation service, a service that has a term of one year or greater.

4. Capacity requests received during an open season shall be awarded starting with those bids with the highest economic value. If the economic values of two or more independent bids are equal, then service shall be allocated on a pro-rata basis. The economic value shall be based on the net present value ~~("**NPV**") using the effective rate at the time the capacity is allocated~~ which shall be calculated based on the proposed per- unit rate and the proposed term of the contract and without regard to the proposed Contract Demand ("**NPV**").

5. ~~If Shippers request firm Transportation Services where the firm Transportation Services requested were previously offered in an open season but were not awarded, then the allocation of such capacity shall be carried out by one of Union's methods for allocation of such capacity, which methods include, but are not limited to, "first come, first served" basis, open season, or direct negotiations, provided any such requesting Shipper meets all conditions in Article XXI herein, subject to the remaining Available Capacity.~~ Union may at any time allocate capacity to respond to any M12 transportation service request through an open season. If a potential shipper requests M12 transportation service that can be provided through Available Capacity that was previously offered by Union in an open season but was not awarded, then:

(a) Any such request must conform to the requirements of Section 1 of this Article XVI;

(b) Union shall allocate capacity to serve such request pursuant to this Section 5, and subject to these General Terms and Conditions and Union's standard form M12 transportation contract;

(c) Union may reject a request for M12 transportation service for any of the following reasons:

i) if there is insufficient Available Capacity to fully meet the request, but if that is the only reason for rejecting the request for service, Union must offer to supply the Available Capacity to the potential shipper;

ii) ~~6. Union is not obligated to accept requests for service where~~if the proposed monthly payment is less than Union~~"~~s monthly demand charge plus fuel requirements for the applicable service~~.~~;

iii) if prior to Union accepting the request for transportation service Union receives a request for transportation service from one or more other potential shippers and there is, as a result, insufficient Available Capacity to service all the requests for service, in which case Union shall follow the procedure in Section 5(d) hereof; -

iv) if Union does not provide the type of transportation service requested; or

v) if all of the conditions precedent specified in Article XXI Sections 1 and 2 herein have not been satisfied or waived.

If Union rejects a request for service, Union shall inform the potential shipper of the reasons why its request is being rejected; and

(d) If Union has insufficient Available Capacity to service all pending requests for transportation service Union may:

i) Reject all the pending requests for transportation service and conduct an open season; or

ii) Union shall inform all the potential shippers who have submitted a pending request for transportation service that it does not have sufficient capacity to service all pending requests for service, and Union shall provide all such potential shippers with an equal opportunity to submit a revised request for service. Union shall then allocate the Available Capacity to the request for transportation service with the highest economic value to Union. If the economic values of two or more requests are equal, then service shall be allocated on a pro-rata basis. The economic value of any request shall be based on the NPV.

XVII. RENEWALS

For contracts with an Initial Term of five (5) years or greater, the Contract will continue in full force and effect beyond the Initial Term, automatically renewing for a period of one (1) year, and every one (1) year thereafter, subject to notice in writing by Shipper of termination at least two (2) years prior to the expiration thereof.

XVIII. SERVICE CURTAILMENT

~~1. Union shall have the right to curtail or not to schedule part or all of Transportation Services, in whole or in part, on all or a portion of its pipeline system at any time for reasons of Force Majeure or when, in Union sole discretion, capacity or operating conditions so require or it is desirable or necessary to make modifications, repairs or operating changes to its pipeline system. Union shall provide Shipper such notice of such curtailment as is reasonable under the circumstances.~~

1. Union shall have the right to curtail or not to schedule part or all of Transportation Services, in whole or in part, on all or a portion of its pipeline system at any time for reasons of Force Majeure or when, in Union sole discretion, acting reasonably, capacity or operating conditions so require or it is desirable or necessary to make modifications, repairs or operating changes to its pipeline system. Union shall provide Shipper such notice of such curtailment as is reasonable under the circumstances. If due to any cause whatsoever Union is unable to receive or deliver the quantities of Gas which Shipper has requested, then Union shall order curtailment by all Shippers affected and to the extent necessary to remove the effect of the disability. Union has a priority of service policy to determine the order of service curtailment. In order to place services on the priority of service list, Union considers the following business principles: appropriate level of access to core services, customer commitment, encouraging appropriate contracting, materiality, price and term, and promoting and enabling in-franchise consumption.

The ~~priority of service guidelines~~Priority ranking for all services utilizing Union~~'s Transportation Services shall be as follows, with detailed policies and procedures available on Union's website. The highest ranked service has~~ Gas' storage, transmission and distribution system as applied to both in-franchise and ex-franchise services are as follows; with number 1 having the highest priority and ~~is curtailed last and the lowest ranked service has the lowest priority and is curtailed first:~~the last interrupted.

~~a. Any firm ex-franchise transportation service(s), firm in-franchise transportation and distribution service(s)~~

~~b. Interruptible in-franchise distribution service(s)~~

~~c. C1/M12 interruptible transportation and exchange(s), balancing activity (ex-franchise/in-franchise), overrun (ex-franchise/in-franchise)~~

1. Firm In-franchise Transportation and Distribution services and firm Ex-franchise services (Note 1)
2. In-franchise Interruptible Distribution services
3. C1/M12 IT Transport and IT Exchanges with Take or Pay rates
4. Balancing (Hub Activity) < = 100 GJ/d; Balancing (Direct Purchase) < = 500 GJ/d; In-franchise distribution authorized overrun (Note 3)
5. C1/M12 IT Transport and IT Exchanges at premium rates
6. C1/M12 Overrun < = 20% of CD (Note 4)
7. Balancing (Direct Purchase) > 500 GJ/d
8. Balancing (Hub Activity) > 100 GJ/d; C1/M12 IT Transport and IT Exchanges
9. C1/M12 Overrun > 20% of CD

-This page was left blank intentionally-

9. If due to the occurrence of an event of force majeure as outlined above, the capacity for gas deliveries by Union is impaired, making it necessary for Union to curtail Shipper's gas receipts to Union hereunder, then Union agrees that the firm Contract Demand for Transportation Services under the Contract shall be combined with the firm contract demand set out in other Union contracts then in effect with Union's customers utilizing such facilities as well as quantities set out in Union's peak day requirements for such facilities, and Shipper's service entitlement during such period of impairment, shall be pro-rated. This pro rationing shall be determined by multiplying the daily capability of such facilities, as available downstream of the impairment, by a fraction, the numerator of which is Shipper's firm Contract Demand and the denominator of which is the total of all such firm contract demands, including the firm Contract Demand hereunder and Union's said peak day requirements downstream of the impairment. For the purposes of this Article XI, firm contract demand shall mean all firm services provided by Union ,including firm service under Rate Schedules M2, M4, M5A, M6A, M7, M9, M10, M12, C1, T1, T3, U2, U5, and U7, plus any new firm service that may be created in the future.

XII. DEFAULT AND TERMINATION

In case of the breach or non-observance or non-performance on the part of either party hereto of any covenant, proviso, condition, restriction or stipulation contained in the Contract (but not including herein failure to take or make delivery in whole or in part of the gas delivered to/by Union hereunder occasioned by any of the reasons provided for in Article XI herein) which has not been waived by the other party, then and in every such case and as often as the same may happen, the non-defaulting party may give written notice to the defaulting party requiring it to remedy such default and in the event of the defaulting party failing to remedy the same within a period of thirty (30) days from receipt of such notice, the non-defaulting party may at its sole option declare the Contract to be terminated and thereupon the Contract shall be terminated and be null and void for all purposes other than and except as to any liability of the parties under the same incurred before and subsisting as of termination. The right hereby conferred upon each party shall be in addition to, and not in derogation of or in substitution for, any other right or remedy which the parties respectively at law or in equity shall or may possess.

XIII. AMENDMENT

Subject to Article XV herein and the ability of Union to amend the C1 Rate Schedule with the approval of the OEB, no amendment or modification of the Contract shall be effective unless the same shall be in writing and signed by each of the Shipper and Union.

XIV. NON-WAIVER AND FUTURE DEFAULT

No waiver of any provision of the Contract shall be effective unless the same shall be in writing and signed by the party entitled to the benefit of such provision and then such waiver shall be effective only in the specific instance and for the specified purpose for which it was given. No failure on the part of Shipper or Union to exercise, and no course of dealing with respect to, and no delay in exercising, any right, power or remedy under the Contract shall operate as a waiver thereof.

XV. LAWS, REGULATIONS AND ORDERS

The Contract and the respective rights and obligations of the parties hereto are subject to all present and future valid laws, orders, rules and regulations of any competent legislative body, or duly constituted authority now or hereafter having jurisdiction and the Contract shall be varied and amended to comply with or conform to any valid order or direction of any board, tribunal or administrative agency which affects any of the provisions of the Contract.

XVI ALLOCATION OF CAPACITY

1. ~~Any Shipper~~A potential shipper may request ~~Transportation Services~~transportation service on Union's system at any time. Any ~~such~~ request for C1 transportation service must include: ~~Shipper~~potential shipper's legal name, Receipt Point(s),

Delivery Point(s), Commencement Date, Initial Term, Contract Demand, proposed payment, and ~~Type of Transportation Service~~and type of transportation service requested.

2. If requests for firm ~~Transportation Services~~transportation services cannot be met through existing capacity such that the only way to satisfy the ~~request~~requests for transportation service would require the construction of Expansion Facilities which create new capacity, Union shall allocate any such new capacity by open season, subject to the terms of the open season, and these General Terms and Conditions.

3. If requests for long-term transportation service can be met through existing facilities upon which long-term capacity is becoming available, Union shall allocate such long-term capacity by open season, subject to the terms of the open season, and these General Terms and Conditions. "**Long-term**", for the purposes of this Article XVI, means, in the case of a transportation service, a service that has a term of one year or greater.

4. Capacity requests received during an open season shall be awarded starting with those bids with the highest economic value. If the economic values of two or more independent bids are equal, then service shall be allocated on a pro-rata basis. The economic value shall be based on the net present value ~~("**NPV**") using the effective rate at the time the capacity is allocated~~ which shall be calculated based on the proposed per- unit rate and the proposed term of the contract and without regard to the proposed Contract Demand ("**NPV**").

5. ~~If Shippers request Transportation Services where (a) the Transportation Services requested were previously offered in an open season but were not awarded, or (b) the requests for Transportation Services may be served on existing facilities for a term no greater than one year, then the allocation of such capacity shall be carried out by one of Union's methods for allocation of such capacity, which methods include, but are not limited to, "first come, first served" basis, open season, or direct negotiations, provided any such requesting Shipper meets all conditions in Article XXI herein, subject to the remaining Available Capacity.~~ Union may at any time allocate capacity to respond to any C1 transportation service request through an open season. If a potential shipper requests C1 transportation service that can be provided through Available Capacity that was previously offered by Union in an open season but was not awarded, then:

(a) Any such request must conform to the requirements of Section 1 of this Article XVI;

(b) Union shall allocate capacity to serve such request pursuant to this Section 5, and subject to these General Terms and Conditions and Union's standard form C1 transportation contract;

(c) Union may reject a request for C1 transportation service for any of the following reasons:

i) if there is insufficient Available Capacity to fully meet the request, but if that is the only reason for rejecting the request for service, Union must offer to supply the Available Capacity to the potential shipper;

ii) ~~6. Union is not obligated to accept requests for service where~~if the proposed monthly payment is less than Union~~'~~s monthly demand charge plus fuel requirements for the applicable service~~.~~;

iii) if prior to Union accepting the request for transportation service Union receives a request for transportation service from one or more other potential shippers and there is, as a result, insufficient Available Capacity to service all the requests for service, in which case Union shall follow the procedure in Section 5(d) hereof; -

iv) if Union does not provide the type of transportation service requested; or

v) if all of the conditions precedent specified in Article XXI Sections 1 and 2 herein have not been satisfied or waived.

If Union rejects a request for service, Union shall inform the potential shipper of the reasons why its request is being rejected; and

(d) If Union has insufficient Available Capacity to service all pending requests for transportation service Union may:

i) Reject all the pending requests for transportation service and conduct an open season; or

ii) Union shall inform all the potential shippers who have submitted a pending request for transportation service that it does not have sufficient capacity to service all pending requests for service, and Union shall provide all such potential shippers with an equal opportunity to submit a revised request for service. Union shall then allocate the Available Capacity to the request for transportation service with the highest economic value to Union. If the economic values of two or more requests are equal, then service shall be allocated on a pro-rata basis. The economic value of any request shall be based on the NPV.

XVII. RENEWALS

For contracts with an Initial Term of five (5) years or greater, with (a) a Receipt Point of Parkway or Kirkwall and a Delivery Point of Dawn (Facilities), or (b) a Receipt Point of Dawn (Facilities) and a Delivery Point of Parkway or Kirkwall, or (c) a Receipt Point of Parkway and a Delivery Point of Kirkwall, the Contract will continue in full force and effect beyond the Initial Term, automatically renewing for a period of one (1) year, and every one (1) year thereafter, subject to notice in writing by Shipper of termination at least two (2) years prior to the expiration thereof.

For all other contracts, the Contract will continue in full force and effect until the end of the Initial term, but shall not renew.

XVIII. SERVICE CURTAILMENT

1. Union shall have the right to curtail or not to schedule part or all of Transportation Services, in whole or in part, on all or a portion of its pipeline system at any time for reasons of Force Majeure or when, in Union sole discretion, acting reasonably, capacity or operating conditions so require or it is desirable or necessary to make modifications, repairs or operating changes to its pipeline system. Union shall provide Shipper such notice of such curtailment as is reasonable under the circumstances.
If due to any cause whatsoever Union is unable to receive or deliver the quantities of Gas which Shipper has requested, then Union shall order curtailment by all Shippers affected and to the extent necessary to remove the effect of the disability. Union has a priority of service policy to determine the order of service curtailment. In order to place services on the priority of service list, Union considers the following business principles: appropriate level of access to core services, customer commitment, encouraging appropriate contracting, materiality, price and term, and promoting and enabling in-franchise consumption.

The ~~priority of service guidelines~~Priority ranking for all services utilizing Union~~'s Transportation Services shall be as follows, with detailed policies and procedures available on Union's website. The highest ranked service has~~ Gas' storage, transmission and distribution system as applied to both in-franchise and ex-franchise services are as follows; with number 1 having the highest priority and ~~is curtailed last and the lowest ranked service has the lowest priority and is curtailed first:~~the last interrupted.

~~a. Any firm ex-franchise transportation service(s), firm in-franchise transportation and distribution service(s)~~

~~b. Interruptible in-franchise distribution service(s)~~

~~c. M12/C1 interruptible transportation and exchange(s), balancing activity (ex-franchise/in-franchise), overrun (ex-franchise/in-franchise)~~

1. Firm In-franchise Transportation and Distribution services and firm Ex-franchise services (Note 1)
2. In-franchise Interruptible Distribution services
3. C1/M12 IT Transport and IT Exchanges with Take or Pay rates
4. Balancing (Hub Activity) < = 100 GJ/d; Balancing (Direct Purchase) < = 500 GJ/d; In-franchise distribution authorized overrun (Note 3)
5. C1/M12 IT Transport and IT Exchanges at premium rates
6. C1/M12 Overrun < = 20% of CD (Note 4)
7. Balancing (Direct Purchase) > 500 GJ/d

TAB 7

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
27th Floor
Toronto ON M4P 1E4
Telephone: 416-481-1967
Facsimile: 416-440-7656
Toll free: 1-888-632-6273

Commission de l'énergie de l'Ontario
C.P. 2319
2300, rue Yonge
27e étage
Toronto ON M4P 1E4
Téléphone: 416-481-1967
Télécopieur: 416-440-7656
Numéro sans frais: 1-888-632-6273

Ontario

BY E-MAIL AND WEB POSTING

March 31, 2015

TO: All Rate Regulated Natural Gas Distributors
All 2014 Natural Gas Market Review Consultation Participants
All Other Interested Parties

RE: Staff Report to the Board on the 2014 Natural Gas Market Review
Board File No. EB-2014-0289

The Board has posted on its web site a *Staff Report to the Board on the 2014 Natural Gas Market Review* (the "Staff Report"). The Staff Report summarizes the information collected in the course of the 2014 Natural Gas Market Review consultation process, including written comments received from stakeholders, and sets out Board staff's recommendations for the Board's further consideration.

Background

On September 19, 2014, the Board issued a letter announcing the launch of the 2014 Natural Gas Market Review (the "Review") and describing the consultative process to help the Board to review and examine recent developments in North American natural gas supply markets to consider any potential implications for the Ontario natural gas market.

On November 27, 2014, the Board posted on its web site two reports prepared for Board staff by Navigant Consulting Inc. The purpose of the *2014 Natural Gas Market Review Preliminary Report* was to help identify emerging market trends and to provide context for the issues to be considered at the stakeholder conference (Navigant's *2014 Natural Gas Market Review Final Report* was posted on December 23, 2014). The *Winter 2013/14 Natural Gas Price Review* examined the supply and demand-related factors that contributed to the unusually high and volatile Ontario natural gas prices experienced over the period from November 2013 through March 2014.

The Stakeholder Conference, held on December 3 and 4, 2014, comprised five

discussion sessions, including

- an overview of recent North American natural gas market developments;
- winter 2013/14 natural gas prices
- the natural gas/electricity market interface
- North American and Ontario natural gas markets to 2020; and
- market and regulatory implications of key natural gas market trends.

Thereafter, the Board posted on its web site:

- Navigant's *2014 Natural Gas Market Review Final Report*, which included additional price forecast scenarios, configured in response to Stakeholder Conference discussions; and
- written comments received from stakeholders on issues raised in Stakeholder Conference discussions and in Navigant's reports.

All materials in relation to the consultation are available on the Board's web site.

Next Steps

In consideration of the *Staff Report* and Board staff's recommendations, the Board will initiate a stakeholder consultation to review Board policy in relation to gas procurement, including the Board's assessment and approval of distributor gas supply plans. The Board will further consider the scope, activities and schedule for this proceeding and provide additional information in due course.

The Board is committed to facilitating ongoing stakeholder dialogue in order to stay abreast of Ontario energy sector market developments and to engage sector stakeholders at the appropriate levels on matters impacting the sector. Starting in 2015, the Board will convene an annual combined Natural Gas and Electricity *'Energy Sector Forum',* focussed on energy market issues and emerging energy sector developments. More information on the forum and engagement activities will be provided in coming weeks.

The Board will also review its regulatory instruments in relation to the disclosure by gas distributors of information on pipeline and storage operations for the purposes of gas/electricity market coordination and provide further direction as warranted.

Conclusion of the 2014 NGMR and Cost Awards

The issuance of the *Staff Report* marks the conclusion of the 2014 NGMR consultation. The Board thanks all consultation participants for their input through the Stakeholder Conference and written comments.

Cost-eligible activities related to this consultation are complete. A *Notice of Hearing for Cost Awards* will be issued separately.

Dated at Toronto, March 31, 2015

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Ontario Energy Board

Staff Report to the Board on the

2014 Natural Gas Market Review

EB-2014-0289

March 31, 2015

intentionally blank

Table of Contents

ACRONYMS

Bcf/d	billion cubic feet per day
CAD	Canadian dollars
GDAR	Gas Distribution Access Rule
MMBtu	million British thermal Units
QRAM	Quarterly Rate Adjustment Mechanism
STAR	Storage and Transportation Access Rule
Tcf	trillion cubic feet
USD	U.S. dollars
WCSB	Western Canadian Sedimentary Basin

Summary

This Report has been prepared by staff to summarize the information provided to the Board's 2014 Natural Gas Market Review ("the Review") consultation, identify the implications and key issues arising from this information, and make recommendations for the Board's consideration in relation to further steps.

In its September 19, 2014 letter to stakeholders, the Ontario Energy Board (the "Board") described the context for the Review and initiated a consultation process to consider:

- the key factors affecting North American and Ontario natural gas markets, changes in these since the 2010 Review, and forecast natural gas demand, supply, and prices to 2020;
- natural gas market conditions and prices in Ontario over the 2013/14 winter months;
- the underlying drivers of the Quarterly Rate Adjustment Mechanism ("QRAM"[1]), highlighting the cost and risk trade-offs of different gas supply planning parameters; and
- any regulatory implications arising from the Review and any other key issues that should be considered by the Board.

North American and Ontario Markets

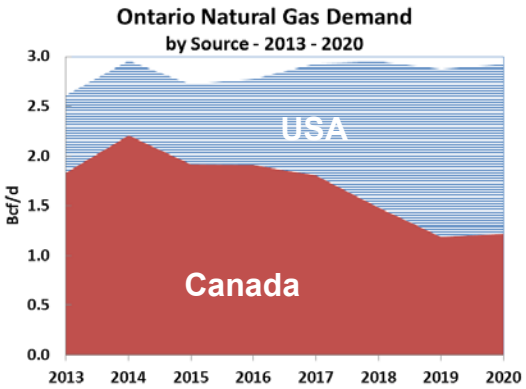
The objective of the Review overall is to identify and explain key influences on the Ontario natural gas sector over the next 3 to 5 years, highlighting any implications there may be for the Board's consideration. To this end, North American natural gas ("gas") market trends were the focus of a report prepared for Board staff by Navigant Consulting Ltd. entitled *2014 Natural Gas Market Review Final Report* (the "*NGMR Report*").

The *NGMR Report* identified a number of current trends likely to affect North American and Ontario markets to 2020:

Supply – Continued growth in North American natural gas production – 'shale gas' in particular – will be a moderating influence on market prices. The share of total Ontario

[1] Discrepancies between forecast vs. actual gas sales and/or wholesale gas prices result in variances (+ or –) between the revenue collected from consumers to recover the cost of gas supplied and the actual cost of gas procured. Each quarter, distributors use a QRAM application to adjust the price consumers pay for gas supply over the next quarter by an amount that will recover (or refund) the variance.

gas demand met from shale gas originating in the U.S. Marcellus region is expected to rise from 13% in 2013 to 41% in 2020.[2]



Source: Navigant data

Demand – Gas-fired electricity generation and Canadian industrial (mainly oil sands) gas consumption will be key factors affecting North American and Ontario markets to 2020 and beyond. Compared to 2013 levels, Ontario natural gas consumption will rise about 11% by 2020, from 2.65 Bcf/d to 2.95 Bcf/d.[3] Notably, Ontario power sector gas demand is expected to rise significantly thereafter as, among other things, portions of Ontario's nuclear capacity are temporarily removed from service for refurbishment.[4]

Pipeline flows – Despite higher expected Canadian gas output, gas flows into Ontario on the TCPL system originating from the Western Canadian Sedimentary Basin (WCSB) will increasingly be replaced by Marcellus and Utica (U.S. Northeast) shale gas carried on expanded U.S./Ontario pipelines.

Storage – With the expected rise in Ontario gas consumption and increased shift toward power generation use, storage will play an increasingly important role in ensuring gas supply is available to meet gas-fired electric generation requirements as and when needed.[5]

Prices – While expected to be "relatively less volatile"[6] relative to recent years, Dawn Hub prices are expected to rise over the period to 2020 by about 18% in inflation-adjusted terms, climbing from an estimated annual average price of $4.80/MMBtu in 2014 to $5.68/MMBtu in 2020.[7]

The *NGMR Report* also identified recent market developments not fully anticipated in the 2010 Review, including much higher shale gas production; a more rapid and substantive reversal of U.S./Ontario pipeline flows into Ontario; and prospectively more LNG exports from North America than previously envisaged.[8]

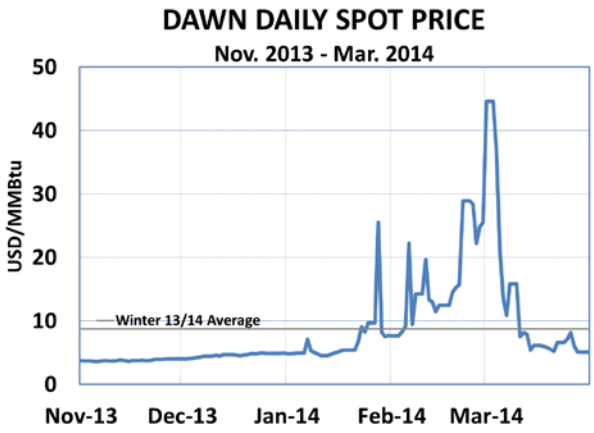
---

2 *NGMR Report*; p. 1.
3 Navigant data; see *NGMR Report*; Figure 33; p. 33.
4 See *NGMR Report* pp. 30; 33.
5 *NGMR Report*; p. 40.
6 *NGMR Report*; p. 40. This is due to the rising share of readily produced shale gas in total supply. For more details see *loc. cit.* pp. 5 – 6.
7 In the 'Reference' or base case forecast scenario; see *NGMR Report*; p. 41. All prices are USD unless otherwise indicated. Forecast prices are expressed in constant 2013 USD.
8 *NGMR Report*; p. 1

Winter 2013/14 Natural Gas Prices

Also of interest to the Board were Ontario market conditions over the winter (Nov. – Mar.) of 2013/14. Navigant's *Winter 2013/14 Natural Gas Price Review* report (the "Winter Report") examined the supply and demand-related factors that contributed to the unusually high and volatile prices experienced over that period.

Record demand – Extreme cold over an extended period and broad geographic market area drove Ontario gas consumption over the winter of 2013/14 almost 13% above the previous 5-year average, with industrial, residential and commercial demand up 7.8%, 17.6%, and 19.4% respectively. Notably, gas consumed for electric power generation purposes was 4% lower. Demand in the interconnected U.S. market was also high, at almost 15% above the previous 5-year average.



Source: Navigant data

Regional market competition – Dawn prices rose in response to competition for gas from U.S. Midwest markets which, combined with U.S. Northeast sources provided Ontario with incremental supply over the winter.[9]

Storage capacity limitations – Increased storage withdrawals in November through January to meet rising Ontario demand led to rapid reserve depletion, and increasing reliance on imports to meet demand.[10]

Contractual obligations – Consumer purchases to meet contractually scheduled stored gas obligations coincided with already elevated spot market prices.[11]

Pipeline tolls: The landed cost of gas supplied from western Canada was, with interruptible long-haul transportation tolls added in, uncompetitive with the cost of gas from nearby U.S. supply points.[12]

Implications for gas supply planning – the gas price drivers listed above are managed through a distributor's gas supply plan, which matches levels of expected risk with the costs of planned purchases of gas supply, transportation and storage.[13]

[9] *Winter Report*; p. 1.
[10] *Winter Report*; pp. 15 – 18.
[11] *Winter Report*; pp. 22 – 23.
[12] *Winter Report*; pp. 20 – 21.
[13] See examples provided in the *Winter Report*; p. 27 (bottom of page).

Stakeholder Input

This report summarizes the information and perspectives shared by stakeholders in presentations to and remarks during the 2014 NGMR Stakeholder Conference, and as provided to the Board in written comments.[14]

Summary of Board Staff Recommendations

Based on the information collected in the course of the consultation, Board staff recommends that the Board consider:

- initiating a proceeding to review Board policy in relation to gas procurement and the assessment and approval of distributor gas supply plans, including but not limited to:
  - an analysis of the risk/cost trade-offs considered in the determination of each plan element;
  - the minimum information required for the Board's review of a distributor's gas supply plan;
  - the implications of the Board's approval of a gas supply plan in relation to a distributor's discretion in implementing the plan; and
  - the merits of the current (Alberta-based) 'reference price' relative to alternatives (including a Dawn Hub related price) when considered in the context of the west to east shift in Ontario's gas supply mix.
- providing, as a basis for future sector stakeholder discussions information on:
  - the further development of the natural gas and electricity market relationship and the implications for the overall Ontario energy sector;
  - the adequacy of and access to the market information required to meet the needs of bulk gas purchasers; and
  - infrastructure developments that may affect Ontario access to gas supplies over the near or longer term.
- reviewing and providing further direction in relation to the Board's regulatory instruments pertinent to the disclosure by gas distributors of information on pipeline and storage operations that may be required to facilitate gas/electric market coordination.

[14] Stakeholder Conference presentations and transcripts can be accessed on the consultation web page.

1 The 2014 NGMR Consultation

Purpose & Objectives

On September 19, 2014, the Ontario Energy Board (the "Board") announced the commencement of its second *Natural Gas Market Review* ("NGMR")[15]. As was the case for the previous (2010) NGMR, the purpose of this initiative is to review North American and Ontario natural gas market conditions and applicable natural gas related regulatory policies with a view to considering any potential implications for Ontario.

Increasing North American shale gas production, rising power sector demand for natural gas and changing inter-regional pipeline flows were some of the key trends identified in the 2010 NGMR as significant drivers of Ontario's natural gas sector over the near term. At the conclusion of that consultation, the Board indicated its intention to reconvene stakeholders for NGMR purposes every fourth year to better track important gas market developments and gauge their implications for Ontario.[16] The Board's decision to hold an annual *Natural Gas Forum* (NGF) in between NGMRs beginning in 2015 was announced in opening remarks to the 2014 conference by Board Chair and CEO Rosemarie T. Leclair.

The scope of the 2014 NGMR includes:

- key factors affecting North American and Ontario natural gas markets, and forecast natural gas demand, supply, and prices to 2020;
- Ontario natural gas market conditions and prices over the winter 2013/14 period, during which Ontario market prices for natural gas were unusually high and volatile;
- the underlying drivers of the Quarterly Rate Adjustment Mechanism ("QRAM"[17]) and the cost/risk trade-offs inherent in different gas supply planning parameters; and
- key issues and implications arising from the consultation that should be further considered by the Board.

[15] See the Board's *2014 – 2017 Business Plan*; August 21, 2014 p. 14.
[16] See Board's January 31, 2011 Cover Letter issued with the *Staff Report to the Board on the 2010 Natural Gas Market Review* (EB-2010-0199).
[17] Discrepancies between forecast vs. actual gas sales and/or wholesale gas prices result in variances (+ or –) between the revenue collected from consumers to recover the cost of gas supplied and the actual cost of gas procured. Each quarter, distributors use a QRAM application to adjust the price consumers pay for gas supply over the next quarter by an amount that will recover (or refund) the variance.

Information and insight gained through this consultation will assist the Board to identify the potential need for modifications to the Board's regulatory framework/policies; and to review utility applications that affect the rates and quality of service to customers.

Stakeholder Engagement

The focal point of the consultation was a *Stakeholder Conference*, held in the Board's offices and webcast on December 3rd and 4th, 2014.[18] At the Board's invitation, stakeholders provided input on the conference agenda. Navigant Consulting Ltd. was engaged by Board staff to prepare two expert reports, which were posted in advance of the conference to provide participants with information on, respectively:

- market conditions and prices over the winter (Nov – Mar) of 2013/14; and
- market developments since the 2010 NGMR and key factors affecting demand, supply, and prices to 2020.[19]

Some 100 participants attended the conference, which included presentations by representatives of stakeholder groups, utilities, agencies and Board staff's consultants. Written comments were received from 16 stakeholders following the Conference.

This *Report to the Board* – which represents the final planned step in the 2014 NGMR – summarizes the information provided through the consultation process on the main subject areas within the scope of the 2014 NGMR noted above, including stakeholder views on the issues raised as conveyed in conference remarks and written comments.[20]

Outline

The balance of this paper consists of five parts:

- Section 2 highlights recent North American natural gas market developments
- Section 3 looks at the roots of gas price fluctuations over the winter of 2013/14
- Section 4 examines the natural gas / electricity market relationship
- Section 5 focusses on the further development of natural gas markets to 2020
- Section 6 provides staff's recommendations for the Board's consideration.

---

[18] Transcripts of Stakeholder Conference proceedings are available on the Board's web site.

[19] *Winter 2013/14 Natural Gas Price Review* (the "*Winter Report*"), and *2014 Natural Gas Market Review Final Report* (the "*NGMR Report*"). A preliminary version of the latter was posted prior to the conference. Unless indicated otherwise, market information provided here is from the Navigant reports, which should be considered authoritative in the event of any inconsistency.

[20] Stakeholder views on the 'Energy East' project proposal are being considered by the Board through the *Energy East Consultation* and are not addressed here.

2 Recent Market Developments

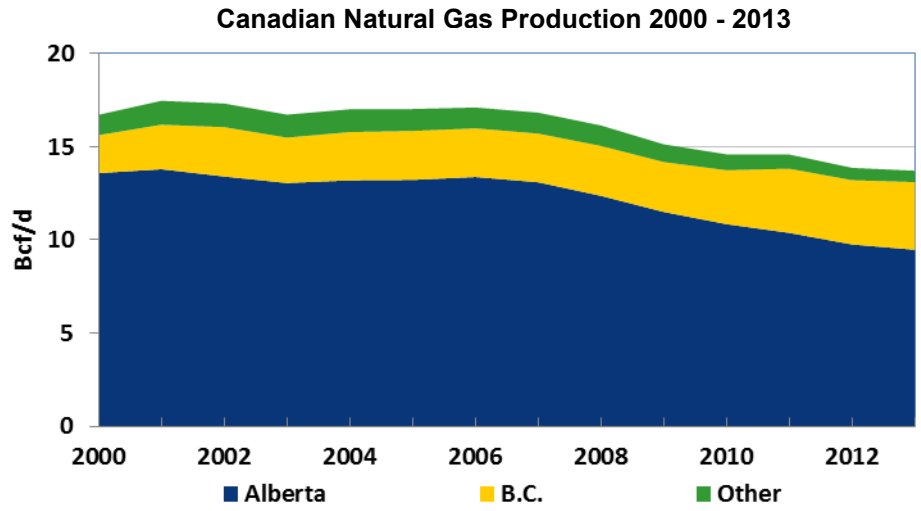
2.1 Supply

Ontario is a significant net importer of natural gas, historically reliant on the availability of supplies originating thousands of kilometers away, delivered by pipelines that traverse multiple jurisdictions *en route*.

Session 1 of the Stakeholder Conference presented and discussed information highlighting how a number of North American natural gas market developments in recent years have begun to alter significantly the historical pattern of supply to Ontario, with concomitant effects on prices, even while Ontario consumption patterns have remained relatively stable.

2.1.1 Production

Canadian gas production, primarily from the Western Canadian Sedimentary Basin (WCSB), peaked at 17.5 Bcf/d in 2001 and has continued the gradual but steady decline begun in 2007 and noted in the 2010 NGMR. As shown in the graph, total



Source: *NGMR Report* (Figure 3; p. 6)

Canadian production declined to 13.7 Bcf/d in 2013, almost 22% below 2001 output.[21] The reverse is true for U.S. natural gas output, which rose more than 30% between 2006 and 2013, led primarily by shale gas production.[22] The 2010 NGMR anticipated

[21] Calculated from Navigant data; *NGMR Report*; p. 6.
[22] See *NGMR Report*; Figure 5; p. 8.

increased U.S. shale gas output, but actual growth has far exceeded expectations, with 2013 production surpassing levels forecast to be achieved in 2020.[23]

The *NGMR Report* also notes that, compared to conventional gas, the characteristics of shale gas reduce the risk and time associated with finding and producing new gas.[24] The important implication for markets is that shale gas production can therefore be likened to a "manufacturing" process: "managing the drilling and production process potentially allows supplies to be produced in concert with market demand requirements and economic circumstances."[25]

2.1.2 Pipelines and Storage

Shifts in Canadian and U.S. supply patterns have resulted, among other things, in increased 'gas-on-gas' price competition, which have in turn affected the direction and volume of gas flows to and through Ontario.[26]

For example, gas volumes moved on TransCanada PipeLines' (TCPL) Mainline continued the decline noted in the 2010 NGMR[27], dropping up to 41% between 2008 and 2013 on some line segments.[28] Over the same period, net flows into Ontario on various U.S. pipelines increased.[29]

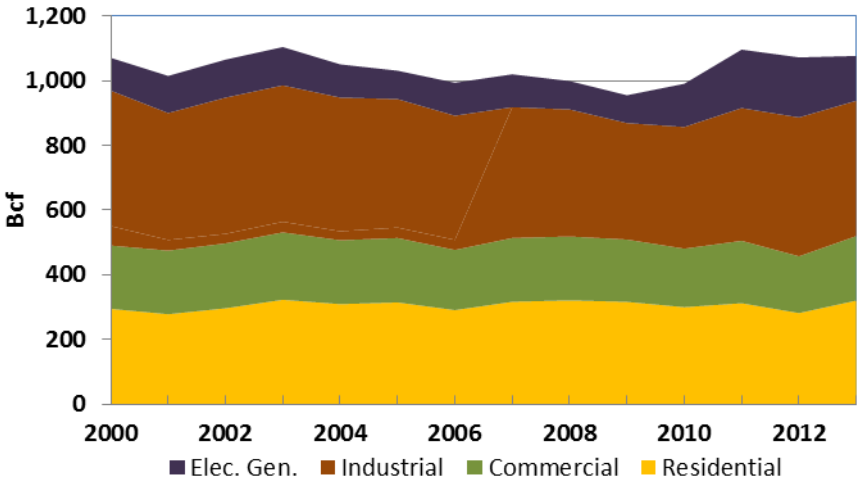
Observed declines in overall long-haul pipeline capacity utilization rates notwithstanding, a stakeholder pointed out in written comments that changes in supply sources have resulted in Eastern shippers using existing long-haul pipelines to ship gas over shorter distances, resulting in some segments of otherwise under-utilized long-haul pipelines being more fully utilized.

[23] *NGMR Report*; p. 8. See also *2010 Natural Gas Market Review* ("2010 Report"); ICF International Inc.; August 20, 2010.
[24] *NGMR Report*; p. 9.
[25] *NGMR Report*; p. 10. Navigant notes (p. 8) that this production manageability is the basis for their modelling assumption "that natural gas supply will respond dynamically to demand in a reasonably short time - months, not years."
[26] *NGMR Report*; p. 35.
[27] See *2010 Report*; pp. 25 – 26.
[28] Calculated from Navigant data; see *NGMR Report*; Figure 18; p 17.
[29] *NGMR Report*; Figure 39; p. 37. WCSB gas also enters Ontario through U.S. pipelines. Monthly flows at Niagara flipped from net imports to the U.S. to net exports to Canada as of late 2012. See *NGMR Report*; Figure 38; p. 36.

2.2 Demand

Annual natural gas consumption in Ontario – which at 1.1 Tcf in 2013 accounted for about 1/3 of national demand – has been comparatively stable for a number of years, with residential and commercial demand relatively flat and industrial demand declining over the period from 2000 to 2013.

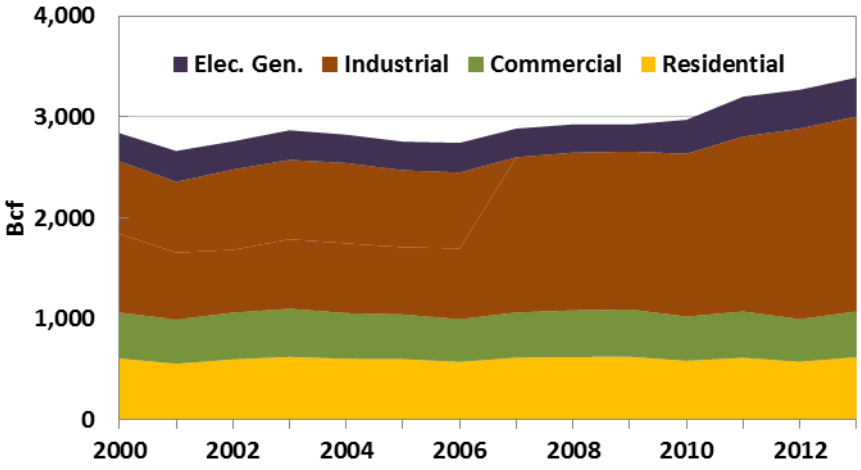
Ontario Natural Gas Demand by Sector 2000 - 2013



Source: *NGMR Report* (Figure 12; p. 13)

Electric power sector gas demand, on the other hand, has grown with the rising contribution of gas-fired generation to Ontario's electricity supply mix. As electricity generated using gas rose from 7% of Ontario's generation mix in 2008 to 11% in 2013,[30] gas demand for electricity generation rose from 87.6 Bcf to 138.7 Bcf over the period, an increase of 58%.[31]

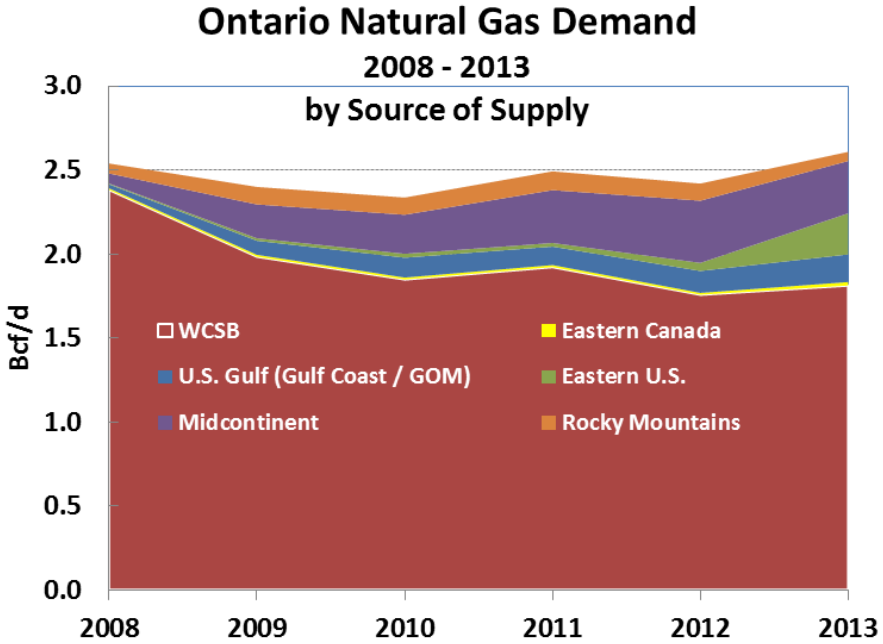
Canadian Natural Gas Demand by Sector 2000 - 2013



Source: *NGMR Report* (Figure 15; p. 15)

[30] Calculated from Navigant data; see also *NGMR Report*; Figures 13 & 14; p. 14.
[31] Calculated from Navigant data; see also *NGMR Report*; Figure 12; p. 13.

Nationally, demand for natural gas grew to 3.4 Tcf in 2013, driven primarily by Alberta oil sands-led industrial sector consumption. Alberta industrial demand accounted for about 1/3 of total Canadian gas consumed in 2013.



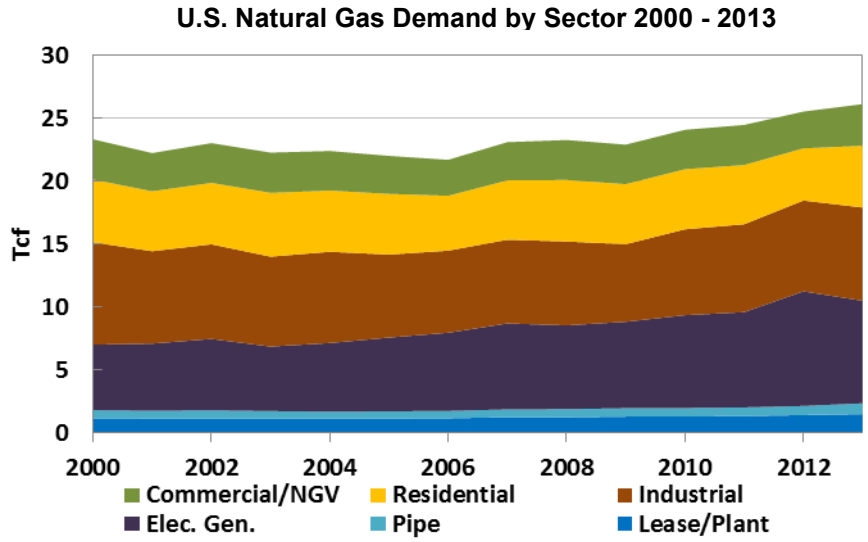
Source: Navigant data; see *NGMR Report* (Figure 39; p. 37)

This trend has contributed to the declining supply of gas from the WCSB to Ontario – Alberta has absorbed local gas that, including the cost of transportation to U.S. delivery points with access to shale gas supplies, is decreasingly price-competitive.[32]

While U.S. overall natural gas demand is about 25 times that of Ontario's, U.S. consumption growth by sector is similar to Ontario in recent years, with the U.S. electric power sector even more distinctly leading growth over relatively stagnant industrial, commercial and residential demand.[33]

For various reasons, including the supply growth-induced price competitiveness of gas over coal in recent years, the share of gas-fired electricity generation in total U.S. electricity output rose from about 22% to almost 28% between 2008 and 2013. The overall change in the contribution of gas-fired generation to U.S. energy output is about 26%, significant but somewhat less notable than the change in Ontario gas-fired output over the same period (see above).[34]

[32] *NGMR Report*; p. 15.
[33] *NGMR Report*; p. 11.
[34] *NGMR Report*; Figure 9 (p. 12).

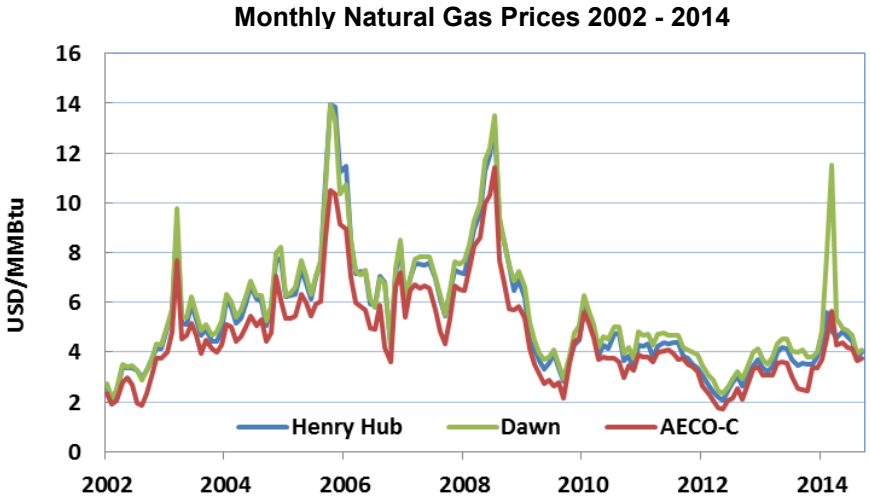


Source: *NGMR Report* (Figure 7; p. 11)

2.3 Prices & Tolls

2.3.1 Market Prices

As noted in the *NGMR Report*, with occasional exceptions North American natural gas price movements tend to be synchronized across market hubs, "reflecting the interconnected nature of the North American market".[35] Accordingly, the ups and downs – or 'volatility' – of prices at the Dawn Hub in Ontario closely track those at Louisiana's Henry Hub and albeit less so, Alberta's AECO-C Hub.



Source: Navigant data; see *NGMR Report* (Figure 2; p. 5)

[35] *NGMR Report*; p. 5.

With the exception of the 2013/14 period, when Dawn prices in particular spiked upwards over the winter, price volatility has dampened in recent years, reflecting the rising share of shale gas in overall supplies (see section 2.1.1).[36]

One of the implications of this trend for present purposes is that the greater the contribution of shale gas to North American supply, the more predictable especially longer-term market prices should be at any given location. Reduced uncertainty could have an impact on pipeline infrastructure investment, which in turn could lead to an expansion of the natural gas market more generally.[37]

2.3.2 Pipeline Tolls

While prices in different markets tend to move together, as noted above, gas prices differ between market centres at any given time. Industry refers to this differential as the 'basis' between two market locations. Generally, the higher pipeline charges are between two locations relative to the basis, the less financially attractive it is to purchase and move gas from one point to the other. Consequently, charges for pipeline services can have an impact on a shipper's choice of gas supply source location, as well as the delivery route.

According to the *NGMR Report*, due to declining capacity utilization (see section 2.1.2 above), TCPL Mainline tolls "increased steeply, further impacting the Mainline's competitiveness in a worsening spiral."[38] More recent NEB decisions on toll adjustments include:

- a March 2013 decision to fix tolls from Empress to Dawn through 2017 at a rate 45% below what otherwise would have applied and grant TCPL discretion over prices for interruptible and short-term firm service products;[39] and
- a November 2014 decision to approve Mainline rates for the 2015 – 2020 period that raised long and short-haul tolls by 18% and 52%, respectively.[40]

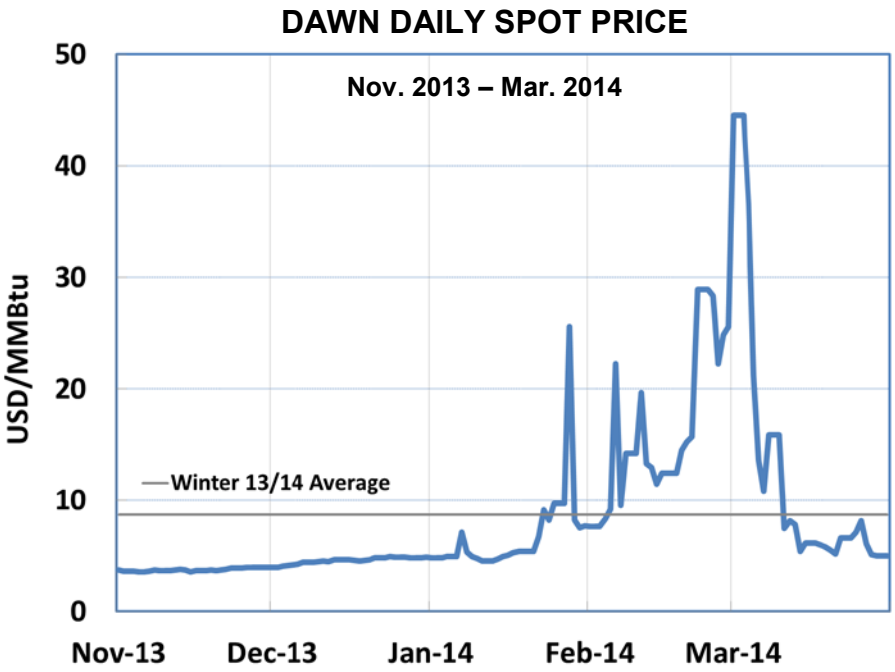
[36] Dawn Hub prices, specifically the unusual market conditions experienced over the Winter 2013/14 period are the subject of section 3 (below).
[37] The *NGMR Report* discusses the impact of shale gas on these inter-relationships; see pp. 5 – 6.
[38] *NGMR Report*; p. 17.
[39] NEB case number RH-003-2011. See *NGMR Report*; p. 17. The influence of tolls on winter 2013/14 prices is considered in the *Winter Report*; pp. 20 – 21. See also section 3.2 below.
[40] NEB case number RH-001-2014, commonly referred to as "the Settlement Agreement". See *NGMR Report*; p. 18.

3 Winter 2013/14 Natural Gas Prices

3.1 Introduction

Session 2 of the Stakeholder Conference focussed on natural gas prices over the winter of 2013/14 – what happened and why – and on how the parameters of distributor natural gas supply plans manage the risks and costs of gas supply, transportation and storage purchases that are reflected in the 'system gas' rate smaller consumers are charged for distributor-supplied natural gas.

Average Dawn Hub natural gas spot prices over the November 2013 to March 2014 period were more than double levels registered over the same 5 months the previous winter, and more than 90% higher than the average over the previous four winters.[41] As the *Winter Report* notes, other market centres experienced similar price behaviour over the winter, reflecting the inter-related nature of North American markets.[42]



Source: Navigant data

Given the impact of market prices on consumers – including both those who purchase gas directly from the market as well as 'system supply' customers who pay a rate based

[41] Calculated from data provided in *Review of Ontario Natural Gas Markets During the 2013-2014 Winter* (November 24, 2014); 2014 NGMR Stakeholder Conference presentation by ICF International on behalf of Union Gas Ltd. (slide 13).
[42] See *Winter Report*; Figure 22 for U.S. northeast, Dawn Hub, Henry Hub and AECO-C prices; p. 19.

on forecast gas prices which are later trued-up to actual prices through the Board's QRAM[43] – there was considerable stakeholder interest in examining the factors that may have contributed to the behaviour of gas prices over the winter; and in how distributor gas supply plans account for risk associated with these factors on an ongoing basis.

3.2 Contributing Factors

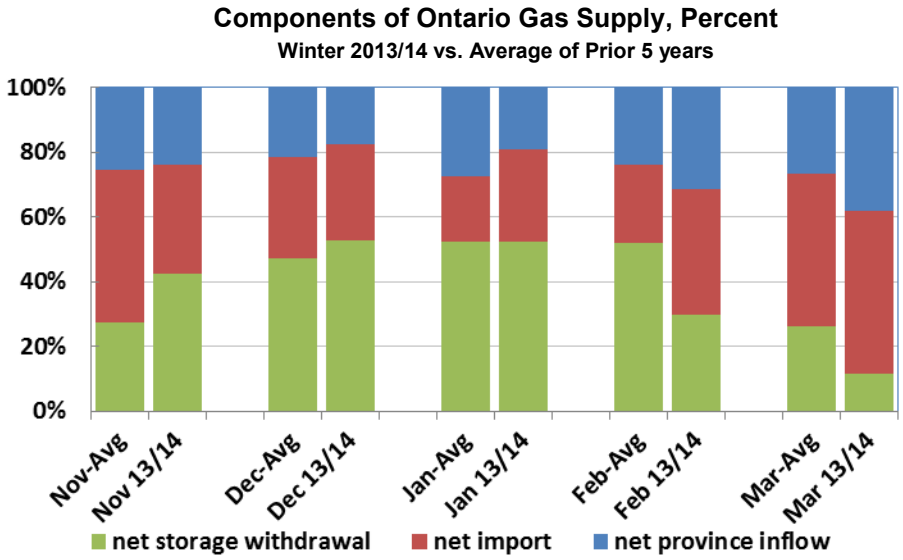
As summarized below, the *Winter Report* identified the main factors that affected Ontario natural gas supply, demand and prices over the 2013/14 winter period.

Record demand – Extreme cold temperatures over an extended period and broad geographic market area drove Ontario gas consumption over the November – March period nearly 13% above the average for the previous five winters.[44] Ontario industrial, residential and commercial gas demand were, respectively, about 8%, 18%, and 19% higher than previously (gas use for electric power generation was the exception, declining 4%).[45] Demand in the interconnected U.S. market was also high, at almost 15% above the previous 5-year average.[46]

Regional market competition – Interconnected, mainly U.S. Midwest markets subject to the same weather system were competing with Ontario for supply. In the first two winter months, imports from the U.S. were far below normal, with Dawn storage providing incremental supplies.[47] Declining storage levels in February and March raised Dawn prices, drawing above-average monthly flows from the U.S. and TCPL Mainline (see 'Pipeline tolls' below).[48]

Use of storage – U.S. storage facilities serving markets inter-connected with Ontario were under-filled in early November relative to average levels over the previous 5 years – a gap that widened as gas withdrawals exceeded normal drawdowns over the winter.[49] Ontario storage levels were normal going into November, but rapid withdrawals to meet rising Ontario demand led to early depletion of reserves.[50]

[43] Small-volume distribution customers who do not buy gas from a gas marketer receive 'system supply' gas from their distributor. See the "QRAM Discussion" in the *Winter Report*; p. 24.
[44] *Winter Report*; p. 6.
[45] *Ibid*.
[46] *Winter Report*; p. 9.
[47] *Winter Report*; Figure 19, p. 17; and Figure 20, p 18.
[48] *Winter Report*; p. 1 and Figures 20 and 21, p. 18.
[49] *Winter Report*; p. 12 and Figure 14 (p. 13).
[50] *Winter Report*; pp. 13 - 14 and Figure 15 (p. 14).



Source: from *Winter Report* (Figure 21; p. 18)

Pipeline tolls – Higher than previous interruptible tolls on TCPL's Mainline raised the potential landed cost (gas plus delivery) of incremental supply from Empress on the Mainline, which "limited the competitiveness of [Mainline supplies from] Empress as an economic source of supply, leading incremental gas for Ontario to be drawn from the Midwest and Northeast, further exacerbating Dawn prices."[51]

Contractual obligations *('checkpoint balancing')* – to meet a contractual obligation to true up their Banked Gas Accounts, some larger gas customers put additional pressure on prices by purchasing gas close to the late February deadline when market prices were already elevated due to high demand, low storage volumes and costly incremental pipeline supply.[52]

3.3 Gas Supply Planning Parameters

The *Winter Report* classifies the factors that can have an impact on gas prices into two categories: "independent" factors (like weather) over which a distributor has no control; and factors "more directly influenced" by a distributor or the regulator; i.e. a distributor's gas supply planning tools.[53]

The discussion below focusses on the latter, each of which involves balancing the cost of managing both the expected and unexpected, highlighting the plan elements

[51] *Winter Report*; p. 24.
[52] *Winter Report*; pp. 22 – 23.
[53] *Winter Report*; pp. 24 - 25.

emphasized by stakeholders in written comments and/or in the context of the Stakeholder Conference.[54] Note, however, that the "independent" factors (e.g. gas supply development; gas demand growth) are the subject of the market outlook to 2020, which is the focus of section 5 below.

3.3.1 Weather Assumptions

Noting that Union and Enbridge both now use the same (20 year declining trend) approach to the weather assumptions underlying their respective gas supply plans, the *Winter Report* asserts that weather assumptions "help drive the range of potential weather outcomes that would need to be planned for", cautioning that regarding the weather, "it should be remembered that predictions are inherently risky and cannot be made with anything approaching certainty."[55]

3.3.2 Design Day

The design day criterion helps determine the distributor's assumption for peak day gas demand. The higher (colder) the value (measured in heating degree days, or HDD) of the 'design day' parameter, the more a supply plan must rely on higher cost elements like extra storage or peaking supplies to meet expected peak day demand.[56] For a given QRAM period, the difference (+ / -) between actual and design day HDD will be used in determining (in combination with the actual vs. forecast price differential) the amount and direction of system supply price adjustment required for the next period.

3.3.3 Storage Level Targets

Stakeholders highlighted both in Stakeholder Conference remarks and in written comments the important role that storage plays in managing demand fluctuations and price risk. The two distributor's approaches to setting both the levels and timing of pre-determined storage targets were also explained in written comments.[57]

Generally, the lower the level of actual stored gas compared to the planned 'target' amount for a given point in time, the greater the risk that stored supplies will run out ahead of schedule and have to be replaced at a potentially higher price. Under both

[54] Enbridge set out its gas supply planning parameters and approach in written comments (pp. 2 – 9) and in its Stakeholder Conference presentation and remarks (Transcript V.1; pp. 90 – 99). Union details their approach in written comments (pp. 4 – 8) and describes how it was applied in its Stakeholder Conference presentation and remarks (Transcript V.1; pp. 52 – 62).

[55] *Winter Report*; p. 25 and p. 28, respectively. Staff notes that several gas supply planning parameters are involved in mitigating the risk around weather assumptions, including incremental supply (spot and forward) procurement and storage level planning. See *Winter Report*; pp. 26 – 27.

[56] *Winter Report*; p. 25.

[57] Union; p. 4 and Enbridge; p. 6.

distributor's regimes, as a storage target date approaches, decisions are made as to when and how much gas to purchase so as to ensure target levels are met on schedule.

3.3.4 Incremental Supply Procurement

When actual demand significantly exceeds planned demand over a given gas supply plan period, unscheduled gas purchases are an option for making up the difference. Stakeholders commented to the effect that how and when such gas and transportation purchases are made will affect the unit cost of the gas needed to meet requirements.

The incremental supply procurement approaches embedded in Enbridge and Union's respective gas supply plans were not the same. While Enbridge's gas supply plan included incremental supply purchases on the daily and intra-month markets, Union's plan called for month-ahead supply procurement.[58]

3.4 Implications for Distributor Gas Supply Plans

A number of stakeholders expressed views on what can been learned from the winter 2013/14 experience that might better inform and enhance the Board's review of distributor gas supply plans and applications for QRAM adjustments going forward. These implications generally involved either the content of distributor gas supply plans, or the context in which they are reviewed by the Board.

3.4.1 Gas Supply Plans

Some stakeholders suggested that the Board provide guidance to distributors on gas supply plans, including by articulating the Board's role with respect to such plans; or by establishing the principles upon which the strategy underlying a plan should be based.

A number of stakeholders expressed the view that gas supply plans should be evaluated in the context of a broader 'integrated resource plan'. One explained that this approach could integrate reviews of supply related matters otherwise conducted in rate cases, deferral account cases and leave-to-construct proceedings.

Context or timing of reviews notwithstanding, a number of stakeholders made suggestions as to the topics that should be covered in a gas supply plan review process. These included, in no particular order:

- sales and throughput forecasts that match the terms of the respective underlying transportation contracts to show capacity utilization over the life of the commitment

[58] *Winter Report*; p. 27

- forecasts of peak day, winter season and annual requirements
- the results of gas supply plan scenario/sensitivity analyses over a range of demand and price combinations, including abnormal conditions such as severely colder or warmer than normal weather ('stress tests')
- storage fill targets
- contingency plans
- price and toll differentials
- supply diversity
- deviations from plan
- retrospective gas supply plan performance.

Several stakeholders commented in support of distributors exercising discretion when responding to unexpected market developments, including considering options not specifically contemplated in a plan that has been subject to the Board's review.

By way of example, one stakeholder ventured that in effect, the concept of 'storage' could be broadened to include the practice of meeting pre-set, dated gas storage targets with purchases of 'landed gas' at Dawn timed to account for current and expected market price levels over the relevant time horizon.

In fact, stakeholders generally did not favour the establishment of a more mechanistic or standardized approach to gas supply plans and the implementation thereof, variously citing differences across distributors in terms of service territory, mix of tools available to adjust supply; etc. as precluding a 'pro-forma' approach.

3.4.2 Gas Supply Plan Review Process

Some stakeholders commented that the Board's existing approach to gas supply plan reviews is appropriate, individually supporting some or all aspects of the Board's August 14, 2014 Decision on EB-2014-0199 to enhance consumer information and education regarding gas cost changes and to allow for a more detailed review in the case of significant bill impacts.

Others expressed the view that plans should be reviewed yearly (currently the reviews take place during a cost of service rates proceeding, but changes can be included in an annual Incentive Rate-setting Mechanism application). The rationale expressed in written comments for favouring more frequent gas supply plan reviews varied:

- as last winter's experience showed, distributor gas supply plans are becoming more complex;
- the implications for distributor gas supply plans and large 'direct purchase' gas consumers of the ongoing shift in Ontario gas supply sources from west to east; and
- the potential for unutilized TCPL Mainline pipeline capacity to Dawn to be removed service, restricting access to WCSB gas.

3.4.3 Gas Supply Reference Price

In the course of the Stakeholder Conference, stakeholders commented to the effect that during winter 2013/14 peak demand periods, spreads between AECO-C, Empress and/or Dawn hubs were often inexplicably outside historical norms. The issue was raised as to whether the reference price used for rate-setting and QRAM adjustment purposes – currently based on the Empress price – should be replaced with a Dawn Hub price.

In written comments, a number of stakeholders variously expressed support for the Board's further examination of the merits of replacing the existing reference price with an alternative. Stakeholder preferences ranged from a single pricing point to a distributor-specific 'price basket', or a service area-specific reference price approach. Given the potential implications of changing the reference price for both distributors and consumers, one stakeholder commented that the Board should engage all stakeholders to review the matter.

4 Natural Gas | Electricity Market Interface

4.1 Background

The 'natural gas/electricity market interface' – the focus of Stakeholder Conference Session 3 – refers to the market relationship between the price of natural gas used for electricity generation on the one hand and the wholesale price of electricity set in the IESO administered market on the other. In essence, the higher the price of natural gas purchased by gas-fired generators, the higher the wholesale price of electricity when gas-fired generation is needed to meet Ontario electricity demand.[59]

As Stakeholder Conference participants heard, this pricing relationship was examined in the Board's 2005 Natural Gas Electricity Interface Review ("NGEIR"). NGEIR addressed the potential mismatch between relatively unpredictable demand for gas by gas-fired generators and then-existing storage and pipeline transportation rates and service offerings to generators.[60] New types of natural gas storage and transportation services and associated rates and market prices were the result.[61]

Market conditions in the winter of 2013/14, especially periods marked by high demand for both gas and electricity, highlighted the natural gas/electricity pricing relationship. The conference discussion and some stakeholder written comments included views on how well the arrangements put in place following NGEIR worked and the potential implications going forward.

4.2 The Evolving Gas/Electricity Relationship

There were two elements of the relationship between the gas market and the electricity market raised in the consultation. One was the relationship between gas and electricity market prices arising directly from the fact that electricity is produced by consuming gas. The other was the relationship between the gas and electricity sectors arising from the potential for one to substitute for the other or be deployed in combination with the other. Each is discussed in turn below.

---

[59] "For a variety of reasons, gas is setting the price in the Ontario market for about half the time, but most of the peak periods." OEB MSP; Transcript V.1; p. 130.

[60] See the *Natural Gas Electricity Interface Review – a Report by Ontario Energy Board Staff* (EB-2005-0306); November 21, 2005.

[61] The NGEIR consultation was followed by a generic hearing. See Natural Gas Electricity Interface Review - Decision with Reasons (EB-2005-0551); November 7, 2006. An industry-led process that took place at about the same time resulted in improved operational coordination between the IESO and gas pipeline operators.

4.2.1 The Gas/Electricity Price Relationship

Stakeholder Conference participants heard that high natural gas prices put "significant" upward pressure on wholesale electricity prices over the 2013/14 winter, but high electricity demand, intertie (import) prices and import curtailments ordered by adjacent system operators also played a role.[62]

Stakeholders representing bulk purchasers of gas at wholesale, especially those who rely on the secondary gas market when necessary, remarked at the conference and/or in written comments on how these consumers were significantly affected by elevated winter gas prices.

Some stakeholders observed that the Board's NGEIR framework had a stabilizing impact on natural gas/electricity market dynamics over the winter.[63] Staff further observes that comparatively low gas use for electricity generation relative to the average over the five previous winters may also have played a stabilizing role.[64]

Information provided to the consultation suggests to staff that a number of factors will contribute to the evolution of the gas/electricity price relationship going forward, of which the most significant are:

1) the growing contribution gas-fired electricity generation will make to Ontario's electricity mix going forward; and
2) the impact on the use of Ontario gas storage and transportation infrastructure of shifting supply sources and regional demand patterns.

Dawn Hub was singled out in stakeholder comments as particularly important, since gas-fired generation contracts currently specify natural gas priced at Dawn. On a related note, a stakeholder expressed the view that the anticipated transition from 'energy' to 'capacity' based contracts would have no impact the gas-fired generators' practice of relying on shorter-term gas (and therefore higher cost) gas supply arrangements.

[62] See OEB MSP; Transcript V.1; p. 129; ln 3 – 9 and Stakeholder Conference Presentation; slide 16.
[63] While the effect on wholesale prices (HOEP) was significant, stakeholders were reminded that 1) the impact was muted for consumers paying a commodity price that combines a relatively high wholesale electricity price and the comparatively stable 'Global Adjustment'; and 2) RPP prices had a price smoothing effect for low volume electricity customers; see OEB MSP; Transcript V.1; pp. 132 – 133.
[64] See *Winter Report*; p. 6; as noted in section 3.2 above.

4.2.2 The Gas/Electricity Synergistic Relationship

Several stakeholders remarked in the Stakeholder Conference on how both gas and electricity markets might benefit from reinforcing one another, or might otherwise operate in a more integrated fashion.

Some stakeholders' written comments indicated support for further stakeholder discussions on gas and electricity sector optimization. On this subject, individual stakeholders advised that:

- such a discussion would best take place after the role of DSM in natural gas distribution system planning has been clarified;
- because the commodity markets are competitive, regulatory involvement would only add unnecessary costs; and
- discussions on related matters are already taking place at the local and regional levels (in the context of community energy plan development) and in formalized multi-stakeholder working groups and institutions organized around specific themes or subject areas.

Other stakeholders offered suggestions on how the Board might facilitate such a discussion, including:

- constituting a 'stakeholder advisory committee' along the lines employed by IESO to engage stakeholders on wholesale electricity market development matters;
- convening a forum similar to the *Natural Gas Forum*; and
- participating in an inter-agency stakeholder forum on the LTEP.

4.3 Implications

Depending on market developments over the intervening period, electricity generator 'as and when needed' purchases of storage and especially pipeline services for ever larger volumes of gas – particularly under peak demand conditions – may as early as 2019 begin to test the market for pipeline capacity and storage services and by extension, the regulatory arrangements currently serving gas-fired generators.

Accordingly, stakeholders advised that the Board keep abreast of developments affecting both gas and electricity markets through timely cross-sector communication. The sentiment was also expressed that better coordination between the electricity and gas sectors could help mitigate the risk of market imbalances. Stakeholders commented on how the Board might achieve both, as summarized below.

4.3.1 For Cross-sector Communication

Gas distributors noted in written comments that their electricity sector customers are engaged on an ongoing basis on issues as they arise and that existing information sources – including the distributor information reporting called for under the Storage and Transportation Access Rule ("STAR") can be used to keep abreast of gas/electric market developments.

Acknowledging that gas and electricity market counterparts engage one another directly, one stakeholder commented that there may be a role for the Board on matters involving barriers to cross-sector communication and coordination. A number of stakeholders variously supported the idea that regular cross-sector communication would be valuable, and that the Board's recently announced annual Natural Gas Forum would be an appropriate venue for doing so.

4.3.2 For Cross-market Coordination

In relation to gas/electricity market coordination – for example suitable opportunities for gas-fired generators to 'nominate' (i.e. book) pipeline capacity to deliver gas as and when dispatched – one stakeholder expressed the view that while further enhancement is welcome, sufficient mechanisms are currently in place to facilitate timely, cost-effective generator transactions.

Improved access to pipeline and storage market operational information to facilitate electricity wholesale market operations was also raised as an issue in the Stakeholder Conference. In written comments, one stakeholder expressed the view that any such information sharing should be authorized by the Board and/or customers. Another suggested that the Board review its regulatory instruments to ensure information sharing opportunities are not unduly restricted.

5 Outlook to 2020: Trends & Implications

As noted in section 1, the objective of the 2014 NGMR is to identify and explain key influences on the Ontario natural gas sector over the next 3 to 5 years and highlight any implications there may be for the Board's consideration. This section provides an overview of market development trends expected to affect prices in the near term and summarizes stakeholder comments as to the potential implications of those trends for Ontario.

5.1 Trends Affecting Markets & Prices to 2020

According to the *NGMR Report*, prices at Dawn over the period to 2020 are expected to be reasonable and competitive and relatively less volatile than experienced previously.[65] In the 'Reference' gas demand forecast scenario, annual average Dawn Hub prices over the period from 2014 to 2020 are expected to rise from an estimated $4.80/MMBtu to $5.68/MMBtu, an overall increase of about 18%. This compares to forecast Dawn Hub price increases in the 'Low' and 'High' gas demand scenarios of 2.7% and 27.8% respectively.[66]

Continued growth expected for North American natural gas output will exert a moderating influence on market prices over the period to 2020.[67] In Canada, gas production is expected to rebound from the gradual decline observed from 2006 to 2014, thanks to B.C. shale gas output and gas associated with oil production. By 2020, overall North American natural gas output is expected to rise by 24% from current levels, led by shale gas which by then is forecast to account for over 50% of total continent-wide gas output.

Between 2013 and 2020, North American gas demand is forecast to increase by about 16% to just over 101 Bcf/day. Over the same period, gas demand is expected to rise about 17% in Canada, led by increased oil sands-related WCSB gas use; and by 11% in Ontario, driven mainly by gas-fired electricity generation. North American LNG exports, forecast at 7.5 Bcf/d by 2020, are also expected to be a demand side factor affecting market prices.[68]

[65] See *NGMR Report*; p. 41. Navigant explains the reason for reduced price volatility in some detail; see *loc. cit.* pp. 5 – 6.
[66] Calculations based on Navigant data. Annual average 2020 prices are $4.94 and $6.15/MMBtu for the low and high demand scenarios respectively; see *NGMR Report*; p. 44 and Figure 47.
[67] *NGMR Report*; pp. 27 – 29
[68] See *NGMR Report*; pp. 30 – 34; Figs. 31 and 34; and discussion; pp. 1, 12.

5.2 Implications

5.2.1 For Pipeline Development & Storage

Despite higher expected Canadian gas production mentioned above, the *NGMR Report* suggests that the combination of rising U.S. shale gas output; oil sands and B.C. LNG exports claiming an increasing share of Canadian gas output; and gas on gas competition at Dawn Hub will result in U.S. gas flows to and through Ontario continuing to replace gas from the WCSB.[69]

The *NGMR Report* also indicated that Ontario storage will play an increasingly important role in the coming years, including by ensuring gas supply is available to meet demand from gas-fired electricity generators during peak gas demand periods.[70]

In that general context, stakeholders variously expressed concerns over the implications of these trends on:

- 'short-haul' pipeline capacity;
- pipeline capacity and storage sufficiency to meet future 'peak day' Ontario demand;
- distributor gas supply plans based on historical (west to east) flow patterns; and
- meeting uncertain and potentially significant future demand for gas for gas-fired electricity generation.

As to whether these trends and potential implications call for an urgent or cautious approach to new infrastructure development, stakeholder written comments included that:

- committing early to new or expanded pipeline infrastructure connections to U.S. shale gas basins is called for in view of pending competition from numerous U.S. markets;
- improved intra-provincial flows and/or access to U.S. shale gas would result from several Ontario pipeline enhancement projects currently in development;
- U.S. shale gas supply growth alone can be expected to drive incremental cross-border infrastructure development;
- overly hasty efforts to secure access to increased U.S. shale gas are not called for, since concerns over peak delivery capacity can be alleviated by contracting for long-haul transportation on existing pipelines;

[69] *NGMR Report*; pp. 1; 18; 46.
[70] *NGMR Report*; p. 40.

- the potential risk to ratepayers of newly built pipeline facilities quickly becoming under-utilized suggests caution, especially where multiple paths become available to deliver gas from essentially the same source basin, or where actual shale gas production is less than expected; and
- pipeline expansions or new developments should be considered in the context of a distributor's 'integrated resource plan'.

5.2.2 For Access to Market Information

Some stakeholders included in their Stakeholder Conference remarks references to the important role played by secondary markets for pipeline capacity and storage services during the winter 2013/14 peak demand periods. Many stakeholders, notably those representing consumers that buy directly from the market, expressed views in written comments on pipeline capacity and storage market transparency.

Two stakeholders commented to the effect that improved market transparency was not needed, given the types of market information sellers currently make available to buyers, including in response to the disclosure requirements set out in STAR.

Most written comments on the matter, however, suggested that greater access to market information would be helpful. One stakeholder cited the information IESO makes available on the electricity market as an example of the level of transparency that would be appropriate. Others were more specific; variously indicating that information on the Dawn Hub price index, intra-Ontario gas flows, receipts and deliveries by delivery point, pipeline capacity availability and storage levels would be useful.

Stakeholder suggestions as to how the Board might further address the matter included by conducting a review of the information requirements set out in STAR; by adding it to upcoming *Natural Gas Forum* discussions; and by commissioning a study of the types of information that might best provide the required market insights.

5.2.3 For Regulatory Processes

The trends and issues mentioned above have implications for the Board's processes, including its consideration of natural gas utility applications. In staff's view, there is a consensus among stakeholders that the next few years will be marked by more or less continuous adjustment to changes on both the supply and demand sides of the Ontario natural gas market.

A number of stakeholders supported the Board's forward-looking orientation of annual *Natural Gas Forums*; many included written comments in the form of suggestions on the form or content of the NGF. Some stakeholders took the opportunity to propose or recommend specific activities that, based on issues raised in the 2014 NGMR, they believed should be considered by the Board including:

- a review of the Board's distributor *Filing Guidelines for Pre-Approval of Long Term Natural Gas Supply and/or Upstream Transportation Contracts* to determine whether they contemplate the kind of long term commitments that might be needed to enable Ontario access to new supply sources; and
- a review of the efficiency of the Board's facilities application assessment process.

5.2.4 For the Board's Role

Some conference participants remarked that the continued development of U.S. shale gas production over the next few years may have implications for the Board in terms of its role and the dominant regulatory themes emerging from market developments, and in terms of how the Board might engage with other regulatory and/or sector-related agencies to maintain an awareness of activities and processes that may affect Ontario gas sector development. Some stakeholders elaborated on these implications in written comments.

A number of stakeholders offered views on the Board's role in relation to the natural gas market, among which were that Board should ensure:

- just and reasonable rates in the public interest;
- the market operates efficiently including by limiting unnecessary barriers;
- investments are appropriate and costs are allocated with a view to risk and benefits;
- that market developments are in the public interest;
- that stakeholders are provided with a forum for information exchange and discussion; and
- that the Board's role evolve with changes in the market.

A majority of stakeholder written comments expressed views on the issue of inter-regulatory communication and coordination. Some focussed on the rationale for communication and coordination mechanisms, including

- the impact on Ontario consumers of the adequacy, reliability and pricing of supply and infrastructure upstream of Ontario;
- the effect of one regulatory decision on projects in other regulatory jurisdictions;

- avoiding regulatory approvals conditional on decisions of other regulators; and
- rising electricity market dependence on gas-fired generation.

One stakeholder acknowledged in written comments the practical difficulty of coordinating regulatory proceedings. A number of stakeholders shared their views on approaches to inter-agency coordination that might be considered, such as:

- joint reviews of applications before another regulatory body;
- informal communications with other regulatory agencies such as through CAMPUT;
- informal dialogue at the Board member and staff levels;
- Ontario-based intervenors coordinating their participation in federal or other hearings that have a ramifications for Ontario markets and include the impacts of related regulatory decisions in their evidence; and
- increased communication on Ontario electricity supply planning among government and regulatory agencies.

6 Recommendations

Based on the information provided in Navigant's *Winter Report* and *NGMR Report*, Stakeholder Conference discussions and in stakeholder written comments, staff's recommendations for the Board's consideration are set out below.

6.1 Review of Board Policy on Gas Procurement

Distributor gas supply plans were the focus of much of the discussion in Session 2 of the Stakeholder Conference. In particular, the different ways distributors manage the cost/risk trade-offs of the various plan parameters were touched upon, providing useful information on distributor planning strategies and implementation decisions.[71]

In view of the potential impact on consumers of distributor gas supply plans and of the impact on those plans of an expected increased reliance on gas sourced from U.S. gas supply basins, staff recommends that the Board consider initiating a proceeding, by way of either a generic hearing or policy consultation, to examine the Board's policy in relation to gas procurement and the assessment and approval of distributor gas supply plans, including but not limited to:

- an analysis of the risk/cost trade-offs considered in the determination of each plan element, such as:
  - the demand forecast underlying procurement decisions
  - design day criteria
  - firm transportation planning
  - storage level planning
  - incremental supply procurement (i.e. spot vs. forward purchases)
- the minimum information required for the Board's review of a distributor's gas supply plan; and
- the implications of the Board's approval of a gas supply plan, particularly in relation to a distributor's discretion in implementing the plan.

Stakeholders also addressed the implications for the 'reference price' used for QRAM and system gas rate setting purposes of the continued Ontario gas supply shift from the WCSB to mid- and eastern U.S. supply basins. Specifically, the more gas consumed in Ontario is sourced from the U.S., the less a 'reference price' based on an Alberta

[71] Staff notes that gas distributors have committed to providing stakeholders with an annual review of their respective gas supply plans.

market hub can be expected to reflect the cost of landed gas in Ontario. Staff therefore recommends that the Board consider including within the scope of the above-mentioned proceeding an examination of:

- the role of the 'reference price' in setting the rate charged for system gas supply;
- the criteria that a 'reference price' must meet in order to be appropriate for this purpose; and
- the merits of the current (Alberta-based) 'reference price' relative to alternatives (including a Dawn Hub related price) when considered in relation to these criteria in the context of the aforementioned shift in Ontario's gas supply mix.

6.2 Facilitating Gas/Electricity Market Coordination & Communication

Board staff believes that many stakeholders could benefit from the regular exchange of information pertinent to both natural gas and electricity market stakeholders. Staff therefore recommends that the Board consider including in the context of its next meeting of sector stakeholders information on issues related to the gas/electricity market interface, including but not necessarily limited to such topics as:

- the timing of gas purchase/delivery options and electricity supply commitments;
- relevant service offerings and prices for gas-fired generator customers; and
- potential future cross-sector synergies.

With a view to fostering gas/electricity market coordination, staff also recommends that the Board consider reviewing and providing further direction in relation to the Board's regulatory instruments pertinent to the disclosure by gas distributors of information on pipeline & storage operations.

6.3 Information Access & Market Monitoring

Based on the information and stakeholder views provided in the consultation, staff recommends that the Board consider incorporating into its next meeting of sector stakeholders information on:

- the adequacy of and access to the market information required to meet the needs of bulk gas purchasers; and
- infrastructure developments that may affect Ontario access to gas supplies over the near or longer term.

APPENDIX

Appendix

References

ICF International Inc.	*2010 Natural Gas Market Review*; prepared for the Ontario Energy Board (EB-2010-0199); August 20, 2010
Navigant Consulting Ltd.	*Winter 2013/14 Natural Gas Price Review*; prepared for the Ontario Energy Board (EB-2014-0289); November 25, 2014
	2014 Natural Gas Market Review Final Report; prepared for the Ontario Energy Board (EB-2014-0289); December 22, 2014

Links to Transcripts

Ontario Energy Board	2014 Natural Gas Market Review – Stakeholder Conference (EB-2014-0289); Volume 1
	2014 Natural Gas Market Review – Stakeholder Conference (EB-2014-0289); Volume 2

Links to Stakeholder Written Comments

- Association of Major Power Consumers in Ontario
- Association of Power Producers of Ontario
- Building Owners and Managers Association of the Greater Toronto Area
- Canadian Manufacturers and Exporters
- Consumers Council of Canada
- Enbridge Gas Distribution Inc.
- Energy Probe
- Independent Electricity System Operator
- Industrial Gas Users Association
- London Property Management Association
- Natural Resource Gas Limited
- Ontario Greenhouse Vegetable Growers | Federation of Rental-housing Providers of Ontario
  - Attachment
- School Energy Coalition
- TransCanada PipeLines Ltd.
- Union Gas Limited
- Vulnerable Energy Consumers Coalition

TAB 8

2013 ONSC 318
Ontario Superior Court of Justice (Divisional Court)

Summitt Energy Management Inc. v. Ontario (Energy Board)

2013 CarswellOnt 4037, 2013 ONSC 318, 228 A.C.W.S. (3d) 306, 309 O.A.C. 85

Summitt Energy Management Inc., Appellant and Ontario Energy Board, Respondent

Kiteley J., Ducharme J., Daley J.

Heard: December 11, 2012
Judgment: April 9, 2013
Docket: Toronto 624/10

Counsel: W. Burden, S. Selznick, J.I. Knol, for Applicant
M. Philip Tunley, A. Gonsalves, M.A. Helt, for Respondent

Subject: Public; Civil Practice and Procedure; Contracts; Natural Resources; Torts

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Public law --- Public utilities — Regulatory boards — Practice and procedure — Judicial review — Apprehension of bias

Board found numerous contraventions by retail energy marketer of Ontario Energy Board Act and Codes of Conduct — Board imposed administrative penalties, directed company to make restitution to consumers, and issued compliance order — Company appealed — Appeal dismissed — There was no reasonable apprehension of bias because law firm of independent legal counsel for board acted on behalf of company's competitors in unrelated proceedings and was member of Ontario Energy Association (OEA) — Reasonable, right minded, and informed person would not assume that board ignored duty to base decision on evidence before it or that counsel acted unethically in advising board — Such person would also understand that in choosing counsel, board would look for person with experience in this sector of energy industry likely to be member of OEA — Any knowledge firm gained about company's marketing methods was irrelevant to board's decision.

Public law --- Public utilities — Regulatory boards — Practice and procedure — Statutory appeals — Grounds for appeal — Error of law

Board found numerous contraventions by retail energy marketer of Ontario Energy Board Act and Codes of Conduct — Board imposed administrative penalties totalling $234,000, directed company to make restitution to consumers, and issued compliance order — Company appealed — Appeal dismissed — Board did not err in applying civil standard of proof to contraventions — Company was not charged with offences but with non-compliance with regulatory scheme for consumer protection — Actual penalties imposed did not have penal consequences making proceedings quasi-criminal — Defence of due diligence was not available and board erred in company's favour in considering it.

Public law --- Public utilities — Regulatory boards — Practice and procedure — Judicial review — Procedural fairness

Board found numerous contraventions by retail energy marketer of Ontario Energy Board Act and Codes of Conduct — Board imposed administrative penalties, directed company to make restitution to consumers, and issued compliance order

— Company appealed — Appeal dismissed — Board did not deny company procedural fairness — Company had full opportunity to make submissions on remedies, and separate penalty hearing was not required — Disclosure was adequate, schedule was compressed but not unreasonable, and board did not rely on any inadmissible evidence — Claim of abuse of process was not argued before board and should not be raised for first time on appeal — There was in any event no abuse of process in conduct of proceedings.

Public law --- Public utilities — Regulatory boards — Practice and procedure — Statutory appeals — Grounds for appeal — Lack of jurisdiction

Board held hearing into consumer complaints against retail energy marketer — Board found numerous contraventions of Ontario Energy Board Act and Codes of Conduct — Board imposed administrative penalties totalling $234,000, directed company to make restitution to complainants, and issued compliance order — Company appealed — Appeal dismissed — Board did not exceed its jurisdiction by ordering restitution — Section 112.3(1)(a) of Act grants board remedial powers in clear and broad terms — Board's interpretation of its authority to make specific remedial orders was reasonable based on its specialized expertise and was entitled to deference from court — Interpretation also met standard of correctness.

Table of Authorities

Cases considered:

Baker v. Canada (Minister of Citizenship & Immigration) (1999), 1 Imm. L.R. (3d) 1, [1999] 2 S.C.R. 817, 14 Admin. L.R. (3d) 173, 174 D.L.R. (4th) 193, 1999 CarswellNat 1124, 1999 CarswellNat 1125, 243 N.R. 22 (S.C.C.) — referred to

Blencoe v. British Columbia (Human Rights Commission) (2000), 2000 SCC 44, 2000 CarswellBC 1860, 2000 CarswellBC 1861, 3 C.C.E.L. (3d) 165, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe)* 38 C.H.R.R. D/153, 81 B.C.L.R. (3d) 1, 190 D.L.R. (4th) 513, [2000] 10 W.W.R. 567, 23 Admin. L.R. (3d) 175, 2000 C.L.L.C. 230-040, 260 N.R. 1, (sub nom. *British Columbia (Human Rights Commission) v. Blencoe)* 77 C.R.R. (2d) 189, 141 B.C.A.C. 161, 231 W.A.C. 161, [2000] 2 S.C.R. 307 (S.C.C.) — referred to

C.A.S.A.W., Local 4 v. Royal Oak Mines Inc. (1996), (sub nom. *Royal Oak Mines Inc. v. Canada (Labour Relations Board))* 96 C.L.L.C. 210-011, 36 Admin. L.R. (2d) 1, [1996] N.W.T.R. 1, 193 N.R. 81, 133 D.L.R. (4th) 129, [1996] 1 S.C.R. 369, 1996 CarswellNat 2942, 1996 CarswellNat 2941, [1996] L.V.I. 2745-1 (S.C.C.) — considered

C. (R.) v. McDougall (2008), [2008] 11 W.W.R. 414, 83 B.C.L.R. (4th) 1, (sub nom. *F.H. v. McDougall)* [2008] 3 S.C.R. 41, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 2008 SCC 53, 60 C.C.L.T. (3d) 1, (sub nom. *H. (F.) v. McDougall)* 297 D.L.R. (4th) 193, 61 C.P.C. (6th) 1, 61 C.R. (6th) 1, (sub nom. *F.H. v. McDougall)* 380 N.R. 82, (sub nom. *F.H. v. McDougall)* 439 W.A.C. 74, (sub nom. *F.H. v. McDougall)* 260 B.C.A.C. 74 (S.C.C.) — considered

Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115, 1976 CarswellNat 434, 1976 CarswellNat 434F (S.C.C.) — considered

Garland v. Consumers' Gas Co. (2004), 2004 CarswellOnt 1558, 2004 CarswellOnt 1559, 2004 SCC 25, 72 O.R. (3d) 80 (note), 237 D.L.R. (4th) 385, 319 N.R. 38, 43 B.L.R. (3d) 163, 9 E.T.R. (3d) 163, 42 Alta. L. Rev. 399, 186 O.A.C. 128, [2004] 1 S.C.R. 629 (S.C.C.) — considered

Gordon Capital Corp. v. Ontario (Securities Commission) (1991), 14 O.S.C.B. 2713, 1 Admin. L.R. (2d) 199, 50 O.A.C. 258, 1991 CarswellOnt 947 (Ont. Div. Ct.) — considered

Hutterian Brethren Church of Starland v. Starland (Municipal District) No. 47 (1993), 14 Admin. L.R. (2d) 186, 135 A.R. 304, 33 W.A.C. 304, 9 Alta. L.R. (3d) 1, 1993 CarswellAlta 313 (Alta. C.A.) — referred to

Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Ltd. Partnership (2008), 2008 ONCA 463, 2008 CarswellOnt 3475, 237 O.A.C. 81, 90 O.R. (3d) 561 (Ont. C.A.) — considered

May v. Ferndale Institution (2005), 343 N.R. 69, 34 C.R. (6th) 228, [2005] 3 S.C.R. 809, 2005 SCC 82, 2005 CarswellBC 3037, 2005 CarswellBC 3038, 261 D.L.R. (4th) 541, 204 C.C.C. (3d) 1, 49 B.C.L.R. (4th) 199, 220 B.C.A.C. 1, 362 W.A.C. 1, 38 Admin. L.R. (4th) 1, 136 C.R.R. (2d) 146, [2006] 5 W.W.R. 65 (S.C.C.) — considered

Mitchell v. Institute of Chartered Accountants (Manitoba) (1994), [1994] 3 W.W.R. 704, 91 Man. R. (2d) 138, 22 Admin. L.R. (2d) 182, 1994 CarswellMan 108 (Man. Q.B.) — referred to

Mitchell v. Institute of Chartered Accountants (Manitoba) (1994), [1994] 10 W.W.R. 768, 97 Man. R. (2d) 66, 79 W.A.C. 66, 1994 CarswellMan 97 (Man. C.A.) — referred to

R. v. Justices of Sussex (1923), [1924] 1 K.B. 256, 93 L.J.K.B. 129, 27 Cox C.C. 590, [1923] All E.R. Rep. 233 (Eng. K.B.) — referred to

R. v. McQuaid (1998), *(sub nom. R. v. Dixon)* [1998] 1 S.C.R. 244, *(sub nom. R. v. Dixon)* 166 N.S.R. (2d) 241, *(sub nom. R. v. Dixon)* 498 A.P.R. 241, *(sub nom. R. v. Dixon)* 50 C.R.R. (2d) 108, *(sub nom. R. v. Dixon)* 222 N.R. 243, 1998 CarswellNS 7, 1998 CarswellNS 8, 13 C.R. (5th) 217, *(sub nom. R. v. Dixon)* 122 C.C.C. (3d) 1 (S.C.C.) — referred to

R. v. Palmer (1979), 1979 CarswellBC 533, 1979 CarswellBC 541, [1980] 1 S.C.R. 759, 30 N.R. 181, 14 C.R. (3d) 22, 17 C.R. (3d) 34 (Fr.), 50 C.C.C. (2d) 193, 106 D.L.R. (3d) 212 (S.C.C.) — followed

R. v. Rajaeefard (1996), 1996 CarswellOnt 73, 46 C.R. (4th) 111, 104 C.C.C. (3d) 225, 87 O.A.C. 356, 27 O.R. (3d) 323 (Ont. C.A.) — referred to

R. v. S. (R.D.) (1997), 161 N.S.R. (2d) 241, 477 A.P.R. 241, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 1997 CarswellNS 301, 1997 CarswellNS 302, 10 C.R. (5th) 1, 218 N.R. 1, 1 Admin. L.R. (3d) 74, [1997] 3 S.C.R. 484 (S.C.C.) — referred to

R. v. Sault Ste. Marie (City) (1978), 1978 CarswellOnt 24, [1978] 2 S.C.R. 1299, 85 D.L.R. (3d) 161, 21 N.R. 295, 7 C.E.L.R. 53, 3 C.R. (3d) 30, 40 C.C.C. (2d) 353, 1978 CarswellOnt 594 (S.C.C.) — followed

R. v. W. (W.) (1995), 1995 CarswellOnt 983, 43 C.R. (4th) 26, 100 C.C.C. (3d) 225, 84 O.A.C. 241, 25 O.R. (3d) 161 (Ont. C.A.) — referred to

R. v. Wigglesworth (1987), 1987 CarswellSask 385, 1987 CarswellSask 519, [1988] 1 W.W.R. 193, [1987] 2 S.C.R. 541, 45 D.L.R. (4th) 235, 81 N.R. 161, 24 O.A.C. 321, 61 Sask. R. 105, 28 Admin. L.R. 294, 37 C.C.C. (3d) 385, 60 C.R. (3d) 193, 32 C.R.R. 219 (S.C.C.) — followed

R. v. Young (1984), 46 O.R. (2d) 520, 13 C.C.C. (3d) 1, 3 O.A.C. 254, 40 C.R. (3d) 289, 10 C.R.R. 307, 1984 CarswellOnt 57 (Ont. C.A.) — referred to

Rowan, Re (2012), 2012 ONCA 208, 2012 CarswellOnt 3909, 110 O.R. (3d) 492, (sub nom. *Rowan v. Ontario Securities Commission)* 290 O.A.C. 159, 350 D.L.R. (4th) 157 (Ont. C.A.) — considered

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006 (S.C.C.) — followed

Shooters Sports Bar Inc. v. Ontario (Alcohol & Gaming Commission) (2008), 2008 CarswellOnt 3189, 238 O.A.C. 9 (Ont. Div. Ct.) — referred to

Summitt *Energy Management Inc., Re* (2010), 2010 CarswellOnt 10638 (Ont. Energy Bd.) — referred to

Therrien c. Québec (Ministre de la justice) (2001), (sub nom. *Therrien, Re)* 200 D.L.R. (4th) 1, (sub nom. *Québec (Ministre de la Justice) v. Therrien)* 270 N.R. 1, 43 C.R. (5th) 1, (sub nom. *Therrien, Re)* 155 C.C.C. (3d) 1, 30 Admin. L.R. (3d) 171, (sub nom. *Therrien, Re)* 84 C.R.R. (2d) 1, (sub nom. *Therrien, Re)* [2001] 2 S.C.R. 3, 2001 SCC 35, 2001 CarswellQue 1013, 2001 CarswellQue 1014 (S.C.C.) — considered

Toronto Hydro-Electric System Ltd., Re (October 14, 2009), Doc. EB-2009-0308 (Ont. Energy Bd.) — referred to

Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board) (2010), 261 O.A.C. 306, 2010 CarswellOnt 2353, 2010 ONCA 284, 68 B.L.R. (4th) 159, 317 D.L.R. (4th) 247, 99 O.R. (3d) 481 (Ont. C.A.) — considered

Statutes considered:

Canada Labour Code, R.S.C. 1985, c. L-2
Generally — referred to

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11
s. 11 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 134(4)(b) — considered

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to

Law Society Act, R.S.O. 1990, c. L.8
Generally — referred to

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B
Generally — referred to

Pt. V.1 [en. 2002, c. 1, Sched. B, s. 11] — referred to

Pt. VII.1 [en. 2003, c. 3, s. 76] — referred to

Pt. VIII — referred to

Pt. IX — referred to

s. 33 — pursuant to

s. 88.4 [en. 2002, c. 1, Sched. B, s. 11] — considered

s. 88.4(2)(c) [en. 2002, c. 1, Sched. B, s. 11] — referred to

s. 88.4(3) [en. 2002, c. 1, Sched. B, s. 11] — referred to

s. 88.9 [en. 2002, c. 1, Sched. B, s. 11] — considered

s. 88.9(1) [en. 2002, c. 1, Sched. B, s. 11] — referred to

s. 88.9(4.1) [en. 2003, c. 3, s. 59(2)] — considered

s. 112.1 [en. 2003, c. 3, s. 76] — referred to

s. 112.2 [en. 2003, c. 3, s. 76] — referred to

s. 112.2(1) [en. 2003, c. 3, s. 76] — considered

s. 112.2(2) [en. 2003, c. 3, s. 76] — considered

s. 112.3 [en. 2003, c. 3, s. 76] — considered

s. 112.3(1) [en. 2003, c. 3, s. 76] — considered

s. 112.3(1)(a) [en. 2003, c. 3, s. 76] — considered

s. 112.4 [en. 2003, c. 3, s. 76] — considered

s. 112.5 [en. 2003, c. 3, s. 76] — considered

s. 112.5(1.1) [en. 2010, c. 8, s. 38 (31)] — considered

s. 126 — considered

s. 126(1) — considered

Regulated Health Professions Act, 1991, S.O. 1991, c. 18
Generally — referred to

Securities Act, R.S.O. 1980, c. 466
s. 26(1) — referred to

Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

Regulations considered:

Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B
Administrative Penalties, O. Reg. 331/03

Generally — referred to

Consumer Protection, O. Reg. 200/02

Generally — referred to

s. 2 — referred to

APPEAL by retail energy marketer from decision of Ontario Energy Board issuing compliance order, imposing penalty, and directing restitution.

Decision of the Board:

I. Introduction

1 Pursuant to s. 33 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Schedule B (the "Act") **Summitt** Energy Management Inc. ("**Summitt**") appeals from an order of the Ontario Energy Board ("Board"), dated December 14, 2010, in which a Hearing Panel of the Board ("Hearing Panel") assessed and imposed an administrative mandatory penalty, issued a compliance order and directed that compensation and restitution be made by **Summitt** in favour of certain consumer complainants. **Summitt** requests that the Court quash the order of the Board and stay any further proceedings by it.

2 For the reasons that follow, the appeal is dismissed.

II. The Hearing

3 **Summitt** is a retail energy marketer that offers fixed-priced natural gas and electricity programs to homeowners and businesses in Ontario. As such, it is licensed and regulated by the Board.

4 On June 17, 2010, following its investigation of several consumer complaints regarding **Summitt's** business activities, the Board issued a Notice of Intention to make an Order for Compliance, Suspension and Administrative Penalty against **Summitt**.

5 In the Notice of Intention, the Board alleged that 5 of **Summitt's** sales agents had contravened various sections of the Act, Ontario Regulation 200/02 (the "Regulation") and the Code of Conduct of Gas Marketers and the Electricity Retailer Code of Conduct (the "Codes") in relation to 28 consumer contracts.

6 These consumer complaints were the subject of a hearing before a two member Panel of the Board. Compliance Counsel called Christine Marijan to give evidence about the investigation that had begun in the fall of 2009 and which included direct communication with complainants who had contacted the Board to complain about their contact with **Summitt**. In addition, 19 of the 28 complainants listed in the Notice of Intention were called with respect to the contraventions alleged including the allegations against 5 salespersons.

7 In the course of the hearing, Compliance Counsel sought to establish that from August, 2008 to January, 2010 **Summitt** had contravened:

> Subsection 88.4(2)(c) and 88.4(3) of the Act in 19 instances through the actions of 5 of its sales agents by engaging in unfair practices as defined in Section 2 of Ontario Regulation 200/02;
>
> Sections 2.1 of the Code of Conduct for Gas Marketers and the Electricity Retailers Code of Conduct respectively (the "Codes") through the actions of 5 of its sales agents who engaged in unfair marketing practices as defined in section 2.1 of the Codes; and

Subsection 88.9(1) of the Act in 10 instances by failing to deliver a written copy of the contract to the consumer within the time prescribed by regulation.

8 It was also urged by Compliance Counsel that **Summitt** would likely contravene the above-mentioned provisions again in respect of its ongoing door-to-door sales activities.

9 **Summitt** called as witnesses each of the five sales agents whose conduct was the subject of the complaints as well as the supervisor of the agency who provided one of those agents and **Summitt's** own Director of Compliance and Regulatory Affairs.

III. The Decision of the Board

10 The Board issued its Decision and Order on November 18, 2010 [2010 CarswellOnt 10638 (Ont. Energy Bd.)], which was followed by a clarifying Order on December 13, 2010. In its Decision and Order, the Hearing Panel noted that the proceeding was the Board's first opportunity to hear, under oath, testimony of customers of an energy retailer with respect to the practices of door-to-door retail sales persons in the energy retail market.

11 In its reasons, the Board expressed the view that the investigation was carried out in such a fashion as to ensure that no person at the Board, "who might be engaged in the adjudication of any compliance action would be exposed in any manner whatsoever to conduct or the fruits of the investigation."

12 It was also noted that the Board's staff had no knowledge of any aspects of the investigation leading up to the filing of the Notice of Intention, and that the Hearing Panel had no knowledge of any aspect of the investigation prior to the publication of the Notice. Rather, from the time of the publication of the Notice of Intention, all of the information that was available to, or was considered by the Board, was on the public record.

13 In considering the allegations made against **Summitt** in the Notice of Intention, the Board examined several key components of **Summitt's** door-to-door sales activity namely: (a) the nature of **Summitt's** sales force; (b) **Summit's** two-part contract; (c) the representations regarding comparative pricing; (d) the representation of the "Provincial Benefit"; and (e) the nature of and the role of the "reaffirmation" call.

A. The nature of Summitt's sales force

14 The Board noted that **Summitt's** retail sales staff was made up of employees and/or independent contractors or subcontractors. **Summit** provided its subcontractors with training materials but left the actual training of the salespersons to the subcontractor. It was noted that in most cases, the retail salespersons were given scarcely a few hours of training and mentoring before they were sent out to meet customers. The Board concluded that it was clear from the testimony of **Summitt's** salespersons that a few hours of training was not adequate training for sales persons expected to sell very significant contracts to relatively uninformed consumers.

B. Summitt's two-part contract

15 The Board noted that it was beyond the scope of the proceeding to make any specific determination with respect to the actual contractual effect of the sales effort engaged in by **Summitt's** retail sales persons; however, the Board did find that the presentation of the two-part contract document to the customer, referred to by its retail sales persons as a "brochure," fell short of reasonable notice of the contents and the significance of the contractual documents.

16 The Board considered the ambiguity it found in the two-part contract form used by **Summitt** when considering the evidence of the consumer complainants in this proceeding.

C. The representations regarding comparative pricing

17 The Board had serious concerns with respect to representations made by **Summitt's** retail salespersons and in **Summitt's** brochures. In particular, it found that the brochures misrepresented the actual market price of the commodities at the time the sale was being made and illustrated a fixed price that was lower than what the customer was actually being offered under the **Summitt** program. As a result, the price comparison dramatically overstated the potential benefit of a fixed price contract.

D. The representation of the Provincial Benefit

18 The Board also found that **Summitt's** comparative pricing information was misleading. It did not adequately inform electricity consumers that when a customer, who is supplied electricity by the local distribution company, changes to an electricity supplier such as **Summitt**, the Provincial Benefit, established by the provincial government for the purpose of collecting a variety of costs from consumers, is added to the energy retailer's contract price as a separate line item on the bills. Further, the comparative pricing information did not take into account the additional charge payable by a customer in respect of the Provincial Benefit.

E. The nature of and the role of the reaffirmation call

19 Section 88.9(4.1) of the Act provides for a cooling off period for retail energy contracts, which consists of a 10 day period after which the customer can "reaffirm" the original contract.

20 The Board concluded that the reaffirmation call method used by **Summitt**, as a genuine consumer cooling-off device, was fatally undermined. The retail salespersons represented to the customers that the calls were for the purpose of confirming that the retail salesperson had in fact attended at their home or that the calls were for the purpose of quality assurance.

21 The Board also addressed the standard of proof imposed on Compliance Counsel. During the hearing the Board and counsel referred to the alleged violations and non-compliance by **Summitt** as "offences". The Board concluded that it was dealing with strict liability offences and accordingly the standard of proof was the balance of probabilities. The Board also held that the defence of due diligence was available with respect of the alleged violations and with respect to penalty.

22 The Board considered the testimony of the consumer complainants, and assessed their credibility and reliability. The Board concluded that the evidence offered by the complainants and the tendered documentary evidence satisfied the Board that compliance counsel had proven the contraventions by **Summitt** on a balance of probabilities.

23 In its reasons for decision, the Board examined the investigation of **Summitt's** business practices. **Summitt** had expressed concerns with respect to the fairness of that investigation; however, the Board concluded that there was no evidence that the compliance staff had acted inappropriately in the manner in which they investigated the consumer complaints.

24 The Board held that **Summitt** was liable for the acts of 5 agents in respect of 43 distinct contraventions of the Act and the Codes in their dealings with 17 of the 28 consumer contracts.

25 In considering the evidence of the consumer complainants, the Board did so with regard to the statutory provisions contained in Part V.1 of the Act, which generally deal with unfair practices by a retail electricity or gas marketer.

26 Contraventions of these provisions trigger the Board's authority under ss. 112.1, 112.2, 112.3, 112.4, and 112.5 of the Act to impose penalties. These include suspension or revocation of licenses, and the imposition of monetary penalties. The Board concluded that its authority to impose these penalties flowed from s. 112.5 and Ontario Regulation 331/03.

27 Having found that **Summitt**, through its retail salespersons, had contravened the Act and the Codes, the Board also considered its authority in respect of legislative compliance found in ss. 112.3 and 112.4 of the Act. The Board ordered **Summitt** to thereafter take all necessary steps to ensure compliance with ss. 88.4 and 88.9 of the Act, and s. 2.1 of the Codes.

28 Although Compliance Counsel sought an order suspending **Summitt's** door-todoor sales activities pending the completion of an audit of its operations and processes relating to these activities, the Board determined that a suspension order was not appropriate. It required that **Summitt** undertake a review and audit of its sales practices on terms specified by the Board.

29 Compliance Counsel also sought compensatory and restitutionary orders as a result of **Summitt's** violations. It was **Summitt's** position that compensatory or restitutionary orders were beyond the jurisdiction of the Board.

30 The Board concluded that its statutory jurisdiction was sufficiently broad and clear to permit it to make orders to remedy a contravention by providing compensation and restitution in accordance with the provisions of s. 112.3 (1) of the Act.

31 The Board ordered that **Summitt** cancel, without penalty or cost, the electricity or natural gas supply contracts entered into by 17 of the complainants, and to compensate those customers in accordance with the formula set forth in the Decision. **Summitt** was also ordered to repay 17 customers any liquidated damages relating to the cancellation of their electricity or natural gas supply contracts. **Summitt** was also directed to provide to 2 of the customers a letter indicating unequivocally that **Summitt** had no claim with respect to them and to take steps necessary respecting any collection agency and credit rating issues with respect to those 2 customers.

32 As to the imposition of administrative penalties, the Board concluded that **Summitt** committed the contraventions with a view to economic gain, both on the part of the retail salespersons and the organization. The Board concluded that the contraventions fell into the high end of the moderate category of contraventions. The unfair practices achieved a higher level of turpitude: the nature of the contraventions fell within the major category and the effect into the moderate category.

33 Further, the Board concluded that the 8 contraventions of s. 88.9 of the Act fell into the moderate category and the administrative penalty for these violations was set at $9,000 for each contravention.

34 The Board concluded that the 15 violations of s. 88.4 of the Act were in the moderate category and warranted an administrative penalty of $9,000 per contravention while 2 major contraventions of s. 88.4 resulted in a penalty of $13,500.

35 In the result, **Summitt** was ordered to pay administrative penalties totalling $234,000.

IV. Issues in the Appeal

36 The following issues are raised on this appeal:

(a) Applicable standard of review - Certain grounds of appeal call for a standard of review of correctness while others call for a reasonableness standard;

(b) Motion for the admission of fresh evidence on appeal - and if granted, whether a reasonable apprehension of bias is established. **Summitt** brought a motion at the appeal hearing seeking an order allowing for the admission of fresh evidence, and for leave to file an Amended Notice of Appeal asserting that there was a reasonable apprehension of bias on account of the Board's choice of independent legal counsel;

(c) Standard of proof - the Board applied the civil standard of proof. It is **Summitt's** position that the criminal standard of proof beyond a reasonable doubt was the standard that ought to have been applied;

(d) Due diligence — whether due diligence is available as a defence to the allegations or in the penalty phase;

(e) Requirement of separate penalty hearing - **Summitt** contends that the liability and penalty phases of the hearing before the Board should have been kept separate, so that matters relating only to penalty were not known or considered by the Board prior to determination of **Summitt's** liability;

(f) Restitution — **Summit** takes the position that the Board does not have jurisdiction to grant the equitable remedy of restitution in favour of the complainants;

(g) Abuse of process - **Summitt** argues that the proceeding was an abuse of process because the Board had led **Summitt** to believe that it was compliant with its regulatory obligations;

(h) Procedural Fairness — **Summitt** submits that it was denied procedural fairness in the conduct of the proceeding by the failure to disclose all relevant documents, including the 2009 Retail Compliance Plan; by the compressed timetable; and by reliance on a binder offered by Compliance Counsel to the Board that contained additional complaints which binder was not properly in evidence.

V. Standard of Review

37 Various standards apply. First, if the Appellant establishes bias, an abuse of process or a breach of procedural fairness then there must be a new hearing. Second, the Board's ruling on the standard of proof and its treatment of due diligence are subject to a standard of review of correctness. They are issues of general law that are both central to the legal system as a whole and outside the Board's specialized area of expertise. Third, as for the failure to have a separate penalty hearing and whether the Board had jurisdiction to order restitution, the appropriate standard of review is reasonableness.

VI. Fresh Evidence

38 In its motion, **Summitt** seeks leave to: (i) adduce fresh evidence on its appeal; and (ii) revise its Amended Notice of Appeal to include as an additional ground of appeal a reasonable apprehension of bias by reason of Patrick Duffy of Stikeman Elliott LLP ("Stikeman Elliott") having acted as the independent legal counsel ("ILC") retained to advise the Board in the compliance proceeding. The fresh evidence is relevant only to the ground of bias.

39 Section 134(4)(b) of the *Courts of Justice Act*, RSO 1990, c C.43 permits this Court to admit fresh evidence on appeal in a proper case. It provides:

134 (4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case, ...

(b) receive further evidence by affidavit, ... or in such other manner as the court directs;...

to enable the court to determine the appeal.

40 In its written submissions, the Board argues that we should apply the four-part test for admission of fresh evidence on appeal as set out by the Supreme Court of Canada in *R. v. Palmer* as follows:

(a) The evidence should generally not be admitted if, by due diligence it could have been adduced at trial; (this general principle will not be applied as strictly in a criminal case as in civil cases);

(b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

(c) The evidence must be credible in the sense that it is reasonably capable of belief; and,

(d) It must be such that, if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. [1]

41 Their position is that the fresh evidence is inadmissible because **Summit** was not duly diligent; because the evidence is not relevant as it does not relate to bias on the part of the Board; and because the admission of the new evidence cannot affect the result unless it gives rise to a reasonable apprehension of bias.

42 In response, **Summitt** relies on the decision of the Ontario Court of Appeal in *Leader Media Productions Ltd. v. Sentinel Hill Alliance Atlantis Equicap Ltd. Partnership* [2] for the proposition that the *Palmer* test does not apply where, as here, the material "is not directed at a finding made at trial, but instead challenges the very validity of the trial process."

43 In his oral submissions, Mr. Tunley indicated that he was not opposed to the Court considering the fresh evidence and we shall do so. This evidence would be admissible under *Leader Media Productions Ltd.* as it is directed at the validity of the hearing process itself.

VII. Reasonable Apprehension of Bias

44 As mentioned above, **Summitt** seeks leave to revise its Amended Notice of Appeal to include as an additional ground of appeal a reasonable apprehension of bias by reason of Patrick Duffy of Stikeman Elliott LLP ("Stikeman Elliott") having acted as the independent legal counsel ("ILC") retained to advise the Board in the compliance proceeding below. **Summitt** bases its argument of reasonable apprehension of bias entirely on the following two facts:

> (a) Stikeman Elliott's representation of certain of the Appellant's competitors during the period 2008 - 2011, including involvement by Stikeman Elliott in other proceedings before the Board and/or other regulatory agencies on behalf of such parties; and
>
> (b) Stikeman Elliott's Membership in the Ontario Energy Association (OEA), of which the Appellant and Appellant's counsel are also members, and involvement by Stikeman Elliott in certain OEA Committees.

Having admitted the fresh evidence with respect to this issue, we also granted leave to **Summitt** to revise its Amended Notice of Appeal to include as an additional ground of appeal a reasonable apprehension of bias.

45 Bias is "a state of mind that is in some way predisposed to a particular result or that is closed with regard to particular issues." [3] In this case there is no allegation of actual bias and there is no suggestion of reasonable apprehension of bias on the part of the decision-maker itself. Rather the submission is that there is a reasonable apprehension of bias because of the participation of the ILC for the two reasons set out above. We accept that an apprehension of bias can be created by issues that relate only to those assisting the actual decision-maker. [4]

46 The test for reasonable apprehension of bias was set out in the dissent of Justice de Grandpré in *Committee for Justice & Liberty v. Canada (National Energy Board)*, and has since been confirmed by the Supreme Court, as follows:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. According to the Court of Appeal, the test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly?"
>
> (Emphasis added) [5]

47 This means that the reasonable person would understand: (1) the role of a member of the Ontario Energy Board, a quasi-judicial function. In particular, she would understand the obligation of Board Members to base their decisions on the evidence before them and the applicable law; (2) the ethical restraints and rules of professional conduct that govern lawyers and the fiduciary relationships they have with their clients. In particular, she would understand the rules relating to a lawyer's relationship to clients, quality of service, confidentiality, avoidance of conflicts of interest; [6] and encouraging respect for the administration of justice; (3) the nature of the industry, in particular the nature of the retail energy marketing sector; (4) the nature of the Ontario Energy Association, including its scope of activities and membership.

48 We shall consider the two bases for the allegation of a reasonable apprehension of bias separately. At the outset we note that the factual record is understandably sparse given the ruling of Perell J. quashing the subpoenas obtained by **Summitt** against Marika Hare, a member of the Board and Patrick Duffy, the ILC. We also must take note of the Board's comment at pg. 3 of the decision that since the publication of the Notice of Intention to Make an Order for Compliance, Suspension and

Administrative Penalty against **Summitt** "all of the information that has been made available to or considered by the Board *has been on the public record*." [Emphasis added.]

A. The fact that the ILC's law firm had acted for competitors of Summitt

49 Here **Summitt** raises two concerns about the fact that Stikeman Elliott, the ILC's law firm, was acting for **Summitt's** competitors at the same time that the ILC was advising the Board. First, they point out that **Summitt** operates in a very small and highly competitive industry sector. Its competitors stood to benefit from any difficulties encountered by **Summitt**, such as large monetary fines, suspension of its license, and/or loss of reputation. They submit that the ILC, as a result of his duty of loyalty to other clients, would have an incentive to encourage an adverse result for **Summitt** in order to benefit his other clients. Second, they point out that they had brought a motion for an order providing for the exchange and filing of written interrogatories. They suggest that if this motion had been granted they would have sought information about their competitors, including other clients of the ILC.

50 We conclude that neither of these arguments supports a finding of a reasonable apprehension of bias. The other cases relating to legal advisers to decision-makers are readily distinguishable as the adviser has a direct association or interest with one of the parties in the actual *lis*. In this case, all we have is the fact that the ILC's law firm acted for competitors in the same industry in completely unrelated matters.

51 To find a reasonable apprehension of bias would require the reasonable, right minded and informed person mentioned in *Committee for Justice & Liberty v. Canada (National Energy Board)* to assume that (1) the members of the Board ignored their duty to base their decision on the evidence before it and the applicable law; and (2) that Mr. Duffy, the ILC, acted unethically in advising the Board. At a minimum, he would be breaching his duty of honesty and candour to his client, the Board; his obligation to avoid conflicts of interest and his obligations to the administration of justice. We also reject the submission that a reasonable, right minded and informed person would think that his duty of loyalty to other clients would move the ILC to seek an outcome in this case that would comparatively advantage his other clients by encouraging a result that negatively affects **Summitt**. This submission is based on a misunderstanding of a lawyer's duty of loyalty to a client.

52 It should also be emphasized that **Summitt** does not claim that the ILC actually did anything improper. While the factual record is understandably sparse there is no basis to assume that the ILC did anything improper. Moreover, given the Board's statement that "all of the information that has been made available to or considered by the Board has been on the public record" there can be no suggestion that the ILC surreptitiously gave information to the Board that worked to **Summitt's** detriment.

53 Finally, the reasonable, right minded and informed person would understand that when the Ontario Energy Board retains independent legal counsel it should retain counsel with relevant experience and expertise. There is no question that Mr. Duffy had that expertise and given that fact, it is not a surprise that he or his firm may have acted for other parties in the same sector of the energy industry. Indeed, the only surprise is the claim by **Summitt** and its counsel that they were unaware of this fact. Given the small size of this particular sector of the energy industry, the pool of counsel with relevant experience is likely to be small. This is another factor that rebuts any suggestion of reasonable apprehension of bias.

B. The fact that the ILC was a member of the OEA

54 Here **Summitt** claims that, as a result of their involvement in the OEA, Stikeman, Elliott was in a position to know, prior to the hearing, (1) the strengths and weakness of the training materials used by **Summit** and others in the industry, as well as details concerning the manner in which the training materials had been prepared; and (2) the strategic comments submitted by industry, including **Summitt**, concerning the new government regulations governing the industry, and of **Summitt's** interpretation of the new regulations.

55 Of course, we do not know what Stikeman, Elliott did know. But accepting for the sake of argument that they might have had access to the foregoing information, it does not create a reasonable apprehension of bias. As for the strengths and weaknesses of the training materials, the Board made the determinations it did based on the record before it and expressly affirmed that everything it considered was on the public record. Therefore, while we do not regard any prior knowledge of

(1) the strengths and weaknesses of these materials or (2) the development of these materials to be particularly significant, we reject the suggestion that any such prior knowledge created a reasonable apprehension of bias. As for the industry's lobbying with respect to the new regulations or **Summitt's** understanding of them, this is irrelevant. The Board did not consider the new regulations but based its decision on **Summitt's** procedures and their sufficiency with respect to each of the various infractions.

56 Here again, the Board's need for qualified independent legal counsel would be understood by the reasonable, right minded and informed person. Thus, it would be no surprise that the Board's ILC or his firm might be active in the OEA. It would be more surprising if they were not. In this regard we note that **Summitt's** counsel are also members of the OEA.

C. A closing observation on bias

57 Given the Board's need for expertise it is likely that any ILC retained by a Board will have had prior practice experience in the energy sector. Parties before the Board can take comfort from the fact that any lawyer retained as an ILC has a duty under Rule 2.04 of the *Rules of Professional Conduct* to avoid conflicts of interest. However, should any party or their counsel have any concerns about the scope of the proposed ILC's prior practice or her membership in professional or industry organizations, etc. they would be well-advised to raise them at the outset. The ILC can respond in a manner consistent with his or her professional responsibilities as directed by the Board. Where this is not done, this type of allegation of bias will likely not be well received on appeal. We do not make this observation because of any concern with bias in this case. Rather we do so as a means of lessening the number of similar allegations of bias arising for the first time on appeal.

VIII. Standard of Proof: Was Summitt Convicted of "Strict Liability Offences"?

58 **Summitt** submits that the matters before the Board are strict liability offences and, relying on *R. v. Sault Ste. Marie (City)*[7] counsel argue that the prosecution has the burden of proving beyond a reasonable doubt that the defendant committed the *actus reus* of the offence. In the present case, the Board applied the civil standard of a balance of probabilities. Therefore **Summitt** submits that it was improperly convicted on a lower standard of proof than the law requires.

59 Counsel for the Board, relying on *R. v. Wigglesworth*,[8] rejects the contention that these are quasi-criminal, strict liability offences. Instead they submit these are merely regulatory compliance proceedings. Thus, this is a civil matter, where proof is on the civil standard.

60 The resolution of this question is complicated by how the matter was dealt with before the Board. All counsel at the hearing referred to these matters as offences and seemed to accept that the classification of offences in *Sault Ste. Marie (City)* as "absolute liability", "strict liability" and full "mens rea" applied to these compliance proceedings. **Summitt** argued that these were strict liability offences while Compliance Counsel argued that they were absolute liability offences. Relying on the presumption of strict liability in *Sault Ste. Marie (City)*, the Board concluded that the "enforceable provisions engaged in this proceeding" were strict liability offences. In reaching this conclusion the Board expressed the view that the overall legislative regime and the subject matter of the Act were not amenable to an absolute liability regime. The Board also considered that the imposition of absolute liability would be unjust given: (1) the fact that **Summitt** was vicariously liable for the actions of its sales persons; and (2) the potential size of the monetary penalties as well as the possibility of suspension or revocation of **Summitt's** licence. Consequently the Board concluded, "The Board will apply a strict liability standard, and will consider the due diligence defence advanced by **Summitt** as a defence to liability per se."

61 Despite this apparent acceptance of *Sault Ste. Marie (City)* before the Board neither counsel for **Summitt** nor Compliance Counsel made any reference to the requirement in *Sault Ste. Marie (City)* that, for strict liability offences, "the prosecution must prove beyond a reasonable doubt that the defendant committed the prohibited act."[9] Instead Compliance Counsel referred the Board to *C. (R.) v. McDougall* [2008 CarswellBC 2041 (S.C.C.)] where the Supreme Court confirmed that the balance of probabilities standard applies in all civil cases, and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test." At para 49 of *McDougall* the Court clarified that:

> in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

During the hearing, **Summitt** did not dispute this reliance on *McDougall* nor the applicability of the civil standard for proof, but rather endorsed this position. Consequently, the Board noted that it was "not controversial that Compliance Counsel has the obligation to prove on a balance of probabilities each of the allegations upon which it seeks a finding of non-compliance."

62 Despite the fact that all parties agreed at the hearing that the appropriate standard of proof was the civil standard of balance of probabilities, the appropriate standard of review on this question of law is correctness and, if the Board applied the incorrect standard of proof, the decision cannot stand.

63 Not surprisingly, given how this matter unfolded before the Board, in their written submissions counsel for **Summitt** offered little in the way of argument to support the conclusion that *Sault Ste. Marie (City)* applies to these proceedings. However, that matter was squarely raised before this Court by the Respondent. In considering this issue we will review: (a) the language and scheme of the Act; (b) the nature of the proceedings; and (c) the available penalties.

A. The scheme of the Act

64 Section 126 of the Act sets out the offences as follows:

> 126. (1) A person is guilty of an offence who,
>
> (a) undertakes an activity without a licence for which a licence is required under this Act and for which a person has not been granted an exemption from the requirement to hold a licence;
>
> (b) knowingly furnishes false or misleading information in any application, statement or return made under this Act or in any circumstances where information is required or authorized to be provided under this Act;
>
> (c) fails to comply with a condition of a licence or an order of the Board made under this or any other Act;
>
> (c.1) fails to comply with an assurance of voluntary compliance given under section 112.7;
>
> (c.2) fails to comply with an assurance of voluntary compliance entered into under section 88.8 before that section was repealed;
>
> (d) contravenes this Act, the regulations or a rule made under section 44; or
>
> (e) contravenes the *Energy Consumer Protection Act, 2010* or the regulations made under it.

65 **Summitt** was not charged with any of the foregoing offences. Rather the proceeding before the Board was commenced by a Notice of Intention to Make an Order for Compliance, Suspension, and Administrative Penalty issued on the Board's own motion, as authorized by ss. 112.2(1) and (2) of the Act. The Notice of Intention sought remedies under ss. 112.3, 112.4 and 112.5 of the Act. All of these provisions appear in Part VII.1 of the Act, entitled Compliance. Section 126 of the Act is in Part IX of the Act entitled Miscellaneous.

66 Thus, the language and scheme of the Act suggest that these are not offences but rather are compliance proceedings.

B. The nature of the proceeding

67 That conclusion is further supported by the nature of the proceedings. These proceedings are neither criminal nor quasi-criminal. Rather, they are protective and preventative rather than penal in nature. They concern economic, contractual activity with a focus on regulatory compliance and consumer protection. We accept the Respondent's submission that these proceedings

are "private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited private sphere of activity." [10] They are also "proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute." [11] This is supported by the language of s. 112.5(1.1) of the Act which provides that "The purpose of an administrative penalty is to promote compliance with the requirements established by this Act and the regulations." These proceedings are analogous to disciplinary or regulatory proceedings under the *Law Society Act*, R.S.O. 1990, c. L.8; the *Securities Act*, R.S.O. 1990, c. S.5 or the *Regulated Health Professions Act*, 1991, S.O. 1991, c. 18. According to the analysis in *Wigglesworth*, these are not offences within the meaning of s. 11 of the *Canadian Charter of Rights and Freedoms*. This is another reason to reject **Summit's** contention that they were convicted of quasi-criminal offences.

C. Nature of the penalties

68 As was made clear in *Wigglesworth*, one indicia of a quasi-criminal offence is that a conviction may lead to a "true penal consequence." [12] The relevant provisions in this case are ss. 112.3, 112.4 and 112.5 of the Act. Section 112.3 empowers the Board to order a person to comply with an enforceable provision of the Act and to take such action as necessary to remedy a contravention or prevent a future contravention. Section 112.4 empowers the Board to suspend or revoke the licence of a person who has contravened an enforceable provision. Section 112.5 empowers the Board to impose an administrative penalty. The Board ordered **Summitt**, among other things, to procure a review and audit of the sales practices of its retail sales persons, to pay an administrative penalty in the amount of $234,000, and to make restitution to certain of the complainants.

69 **Summitt** points to the size of the fine and the fact that its licence could have been suspended or revoked which would have effectively put it out of business. The size of the fine does not constitute a true penal consequence. First, the highest administrative penalty assessed against **Summit** for an act of non-compliance was $13,500. [13] Second, and more importantly, as the Court of Appeal in *Rowan, Re* held, much greater administrative monetary penalties are not *prima facie* penal. [14] Also, *Rowan* makes clear that the nature of the penalty is to be assessed on the basis of the penalty imposed rather than on penalties that are theoretically possible. [15] Thus, the mere possibility of the suspension or revocation of **Summit's** license is not a true penal consequence and does not make these proceedings quasi-criminal.

D. Conclusion

70 For all of these reasons, we conclude that these compliance proceedings are not quasi-criminal offences. Rather these are regulatory compliance matters that aim to regulate professional standards within the limited private sphere of energy retailing. Thus, the classification of criminal and quasi-criminal offenses into categories of "absolute liability", "strict liability" and full "mens rea" as defined in *Sault Ste. Marie (City)* is irrelevant to compliance proceedings under Part VII.1 of the *Act*. [16] These are not quasi-criminal offences and do not require proof beyond a reasonable doubt. Rather, they are a civil matter, where proof is on the civil standard of a balance of probabilities.

IX. Due Diligence Defence

71 **Summitt** submits that the Board made several errors in law with respect to **Summitt's** "due diligence defence." First, the Board unreasonably rejected **Summitt's** due diligence defence before it determined whether the *actus reus* of the offences had been proven. Second, the Board unreasonably put **Summitt's** training and compliance programs as a whole on trial rather than assessing whether **Summitt** was duly diligent with respect to the specific charges at issue. Third, the Board improperly relied on **Summitt's** "14 Point Compliance Program" when it determined **Summitt** was not duly diligent.

72 The short answer to all of these complaints is that the only error the Board made was to accept that the defence of due diligence was available to **Summitt** at the liability phase of these proceedings. As explained in Part VIII, *supra*, this was not a quasi-criminal standard of proof and hence no such defence is available for compliance proceedings such as this. Due diligence is only relevant to the determination of penalty. Obviously, however, this error redounded to the benefit of **Summitt**

and does not assist them on appeal. While it is not necessary to consider **Summitt's** other complaints, we can do so briefly as they are without merit.

73 The Board did not improperly consider and reject **Summitt's** due diligence defence before determining whether the alleged non-compliant acts had occurred. In the Decision and Order, it simply made sense, "[b]efore dealing with the specific allegations" of non-compliance, to first describe the organization of **Summitt's** door-todoor sales activities. This provided context to explain and understand the testimony of the individual complainants about their encounters at the door with the sales agents, and why each complainant felt he or she was misled. The Board's review of the evidence in this order was reasonable. It does not mean that the Board assessed the issues in the same order. To the contrary, the Board clearly heard the evidence of the complainants and found their evidence sufficient to establish the contraventions and then called on **Summitt** to establish its due diligence defence.

74 Similarly, the Board did not unreasonably put **Summitt's** training and compliance programs as a whole on trial. Rather the Board considered **Summitt's** general program and related it to the individual infractions that had been established.

75 **Summitt's** complaint about the Board's references to its "14 Point Compliance Plan" is that the Board should not have considered it with respect to liability because: (1) it was tendered by **Summitt** only with respect to penalty; and (2) this plan was developed after the issuance of the Notice by the Board and was not relevant to the standard of care required at the time of the contraventions. Neither complaint has merit. The Board said the following about the plan:

> **78** To this point we have described what we have found to be deficiencies in the **Summitt** due diligence program. It is perhaps as important to provide our opinion on what we consider to be a conforming due diligence approach.
>
> **79** To identify the components of such a program we need look no farther than the proposal made by **Summitt** at the conclusion of the hearing, referred to as its "14 Point Program". In the Board's view with the exception of the deficiency highlighted above with respect to the retail salespersons' obligation to state that **Summitt** is not the consumer's natural gas or electricity distributor, it is the Board's view that the 14 points represent a reasonable and comprehensive due diligence program. Of course as also noted above, a due diligence program is only as good as it is effective. And the components of the program are of no independent value unless they form part of an operational due diligence activity.
>
> . . .
>
> **81** The timing of the implementation of the 14 Point Program is noteworthy. None of it was adopted prior to the issuance of the Notice in June 2010. It cannot therefore serve in any degree as a defence to the allegations made in this proceeding. Quite to the contrary, the adoption of this comprehensive due diligence program after the Notice was issued really highlights the deficiencies of the system existing at the relevant time. This is even more telling when one considers that **Summitt** was involved in the development of better and more comprehensive practices through its involvement in the Ontario Energy Association working group from about 2008. The system in place governing the actions of the retail salespersons described in this proceeding was, or should have been, known to **Summitt** to be deficient in its content and its operationality.
>
> **82** It is also to be noted that the Board's acceptance of the 14 Points as a viable due diligence program is rooted in the current regulatory regime and its requirements. Changes to the regulatory requirements, as are expected to be implemented in the near future will require a reexamination and possible re-calibration of the due diligence program.

76 It is clear from the foregoing that the Board's findings of deficiencies in **Summitt's** compliance plan were made independently of their consideration of the 14 Point Compliance Plan. Contrary to **Summitt's** submission, their "due diligence defence" was not rejected because it did not comply with the later standards reflected in the 14 Point Compliance Plan. The Board's subsequent reference to the 14 Point Compliance Plan was illustrative only and meant to "provide [the Board's] opinion on what we consider to be a conforming due diligence approach." In that context, this reference to the Plan was a proper exercise of the Board's function as a proactive regulator, offering guidance to the industry and the public, generally. The references to

the Plan played no part in their determination of liability. With one exception,[17] all of the other references to the 14 Point Compliance Plan were all in the part of the decision dealing with the appropriate penalty just as **Summitt** anticipated.

X. Lack of a Separate Hearing on Penalty

77 The Supreme Court has made it clear that a separate penalty hearing is not required as an element of procedural fairness in administrative proceedings. In *Therrien*, the Court held that the Quebec Conseil de la Magistrature "was fully justified, out of concern for efficiency, in refusing to hold a separate hearing."[18] Where the tribunal gave the appellant an opportunity to be heard on the issue of sanctions, the requirements of procedural fairness were met.

78 Here, the Board did give **Summitt** the opportunity to be heard on the issue of the appropriate remedies. That included the opportunity to make submissions as to whether further evidence *or submissions* should be received on that issue. **Summitt** did not object when that approach was proposed at the conclusion of the hearing, or when it was confirmed in Procedural Order No. 4. Rather, **Summitt** made submissions on remedy without objection, and even tendered additional evidence on that issue, in the form of its "14 Point Compliance Plan".

79 Given the foregoing facts it is not surprising that Mr. Burden abandoned most of this argument in oral argument. However, Mr. Burden maintained that the Board improperly used the "14 Point Compliance Plan," which **Summitt** had tendered with respect to possible penalties, on the liability phase.

80 The excerpt from the decision in paragraphs 78 — 82 above makes it apparent that this assertion is incorrect.

XI. Did the Board Have Jurisdiction to Order Restitution to Certain Complainants?

81 In the Decision and Order, the Board ordered **Summitt** to make restitution to the complainants in respect of whose contracts the Board made a finding of noncompliance. Despite the Board's statement that it was making "no finding" as to whether the contracts were enforceable[19] the Board ordered **Summitt** to, among other things:[20]

> (a) Cancel without penalty or cost the electricity or natural gas supply contracts entered into by the complainants, in those cases where **Summitt** had not already done so;
>
> (b) Compensate the complainants who were subject to the contracts in an amount equivalent to the difference between the sums paid by them pursuant to the contracts and the prevailing prices, together with interest; and
>
> (c) Repay any liquidated damages that were paid by the complainants who canceled their contracts and pay such liquidated damages to **Summitt**, together with interest.

Summit submits that the Board exceeded its jurisdiction in making the restitutionary orders.

82 In this regard Mr. Burden relies on *Garland v. Consumers' Gas Co.*[21] in which the plaintiff brought a class action for the recovery of late payment amounts charged by Consumers' Gas under a Board Order, which the courts found to be in violation of the criminal interest rate provisions of the *Criminal Code*. The Supreme Court stated that the plaintiff's claim for restitution was "a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought." This statement relates to the nature of the suit in that case, being a civil claim for recovery of monies based on unjust enrichment. The Court's analysis does not apply where the Board clearly has jurisdiction in a compliance proceeding initiated on its own motion against one of its own licensees, and exercises the express remedial authority under s. 112.3 of the Act.

83 Mr. Burden argues that the Board erroneously relied on the Supreme Court of Canada's decision in *C.A.S.A.W., Local 4 v. Royal Oak Mines Inc.*[22] in holding that section 112.3(1)(a) of the Act gave it the jurisdiction to make a restitutionary order. He notes that the *Canada Labour Code*, the statute being considered in that case, specifically gave the Labour Board the

jurisdiction to order an equitable remedy. As the Act does not specifically give the Board the jurisdiction to order an equitable remedy, he submits that the Board exceeded its jurisdiction when it ordered restitution.

84 It is certainly correct that the Act does not expressly speak of equitable remedies. Section 112.3(1)(a) of the Act provides that the Board "*may make an order* requiring the person to comply with the enforceable provision and to *take any such action* as the Board may specify to remedy a contravention that has occurred." By any measure this is a clear and broad grant of remedial powers.

85 In *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*[23] the Ontario Court of Appeal has confirmed the Board's statutory power to determine the scope of its own jurisdiction in circumstances such as those raised in this case, stating that:

> Courts should hesitate to analyze the decisions of specialized tribunals through the lens of jurisdiction unless it is clear that the tribunal exceeded its statutory powers... **If the decision of a specialized tribunal aims to achieve a valid statutory purpose, and the enabling statute includes a broad grant of open-ended power to achieve that purpose, the matter should be considered within the jurisdiction of the tribunal**. Its substance may still be reviewed for other reasons — on either a reasonableness or correctness standard — but it does not engage a true question of jurisdiction and cannot be quashed on the basis that the tribunal could not "make the inquiry" or "embark on a particular type of activity".
>
> [Emphasis added]

86 The Board should be able to interpret its own statute in deciding remedies appropriate to ensure compliance, under the broad discretion given to it. **Summitt's** argument, which relies on the distinction between equitable and common law remedies, is a technical point that runs counter to the principle of deference to the tribunal, and contrary to the purposes of the *Act*. It also ignores the clear instruction in *Rizzo & Rizzo Shoes Ltd., Re* that:

> the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.[24]

87 In our view the Board had express authority under s. 112.3 of the Act to "remedy a contravention" of any of the enforceable provisions in issue, which the Board found had occurred. The Board's interpretation of this authority to include the specific remedial orders made in this case was a reasonable one, based upon the Board's specialized expertise in the regulation of retail energy marketing, and is entitled to deference on this appeal. Even if a standard of correctness is applied, that standard affords no basis to read down the plain wording of s. 112.3 of the Act to preclude such remedies, as **Summitt** suggests on this appeal.

XII. Abuse of Process

88 In its factum, **Summitt** submitted that the entire proceeding was an abuse of process and as a result, the order should be quashed and the charges should be stayed. **Summitt** took the position that the Board led **Summitt** to reasonably believe that it was in compliance with its regulatory obligations and that it would work with **Summitt** if any perceived deficiencies arose. **Summitt** based this assertion on the following:

> (1) The settlement on January 30, 2009 of a prior Notice of Intention against **Summitt** in connection with allegations that **Summitt's** reaffirmation calls were non-compliant and that **Summitt** was thereby engaging in unfair marketing practices;
>
> (2) On August 11, 2009, the Board released its RCP. In this report the Board inspected and assessed sales agent training and monitoring and contract management of the five most active licensed energy retailers in Ontario, including **Summitt**. Part of the Executive Summary included the following statement "[T]he inspections completed as part of Phase 1 provided validation that the licensees operating in the gas and electricity retail markets of Ontario are, for the most part, doing so in accordance with applicable legal and regulatory requirements pertaining to consumer protection;

(3) The Board had previously closed the files in relation to 17 of the 19 consumer complaints for which it led evidence at the hearing; and

(4) The Board previously concluded that the complaint by K.S. and R.S. was without merit.

89 Further **Summit** submitted that while it was working co-operatively with the Board on compliance-related issues, the Board commenced a secret investigation of **Summitt**, and then issued the Notice of Intention without any warning and without giving **Summitt** a reasonable opportunity to address any concerns and, if relevant, rectify any perceived deficiencies. The Board led **Summitt** to believe that its programs and materials were compliant with the Act, the Regulation and the Codes and that they met the standards required. To then commence fresh enforcement proceedings was vexatious, unfair and oppressive such as to constitute an abuse of process.

90 During oral submissions, counsel for **Summitt** observed that he was not advancing the issue of abuse of process because he conceded that the circumstances did not meet the requisite threshold but he observed that it gave context to his other submissions. When pressed as to whether abuse of process was or was not an issue in this appeal, counsel for **Summitt** said that he was not abandoning it but he would make no oral submissions.

91 **Summitt** raised the issue of abuse of process with Compliance Counsel at various times prior to the hearing, but never brought a motion or otherwise sought relief from the Board in that regard. In anticipation of such a motion, Compliance Counsel called Ms. Christine Marijan, whose investigation led to the proceeding. Counsel for **Summitt** cross-examined her at length, but in closing submissions did not argue abuse of process. **Summitt** raised that issue for the first time on appeal.

92 Having raised the issue with Compliance Counsel and having cross-examined the Board's witness, we conclude that **Summitt** deliberately did not argue any abuse of process during the proceedings before the Board. It thereby denied the Board any opportunity to lead evidence in response to such allegations. It also denied the Board any opportunity to rectify the alleged abuse before the conclusion of its proceedings. The Board made no ruling on any alleged abuse of process, from which appeal can be taken under s. 33 of the Act. As such, these issues should not now be raised for the first time on appeal.

93 In any event, we are not persuaded that the enforcement proceedings constituted vexatious, unfair or oppressive conduct. We agree with Compliance Counsel that the earlier proceedings did not, and could not, limit the Board's ability to seek compliance remedies in respect of **Summitt's** door-to-door sales activities, or the ability of a duly constituted Hearing Panel to make findings in that regard. Furthermore, this is not one of those "clearest cases" where a stay would be an appropriate remedy. It cannot be said that anything done in this case "would violate those fundamental principles of justice which underlie the community's sense of fair play and decency" or where the proceedings are "oppressive or vexatious". [25]

XIII. Procedural Fairness

94 In its factum and in submissions, **Summitt** raises four issues which it says undermined procedural fairness: (a) inadequate disclosure; (b) the Board's use of the 2009 Retail Compliance Plan; (c) the compressed schedule of the proceeding; and (d) reliance by the Board on the binder that contained complaints from additional consumers.

95 Counsel agree that a duty of fairness applies to administrative decisions that affect the rights, privileges or interests of a defendant. The following factors are relevant to a determination of the content of the duty of procedural fairness: the nature of the decision being made; the nature of the statutory scheme; the importance of the decision to those affected by it; the legitimate expectations of the person challenging the decision; and the choices of procedure made by the tribunal. [26] Based on those factors, **Summitt** argues that the doctrine of legitimate expectations supports its assertion that the content of the duty of fairness owed to it was at the high end of the spectrum, akin to a judicial proceeding.

A. Inadequate Disclosure

96 After receiving the Notice of Intention and before the hearing date was set, **Summitt** asked Compliance Counsel to agree to a procedural timetable that included disclosure and written interrogatories. In the absence of agreement, **Summitt** brought a motion before the Hearing Panel. The motion to set a timetable (including an "issues conference" and a "technical conference") as well as for specific disclosure was dismissed with reasons, except for one item to which Compliance Counsel consented.

97 In dismissing **Summitt's** motion, the Board followed recent appellate decisions holding that the strict *Stinchcombe* standard, developed in the context of true criminal proceedings, does not apply to regulatory proceedings, because

(a) no individual rights are at stake;

(b) the sanctions available are administrative rather than penal in nature; and

(c) "To require a Board to disclose all possibly relevant information gathered in the course of regulatory activities could easily impede its work from an administrative standpoint." [27]

98 Furthermore, the Supreme Court held in *May v. Ferndale Institution*:

The *Stinchcombe* principles do not apply in the administrative context. In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon. [28]

99 As Compliance Counsel pointed out, on June 24, 2010 **Summitt** was given an extensive disclosure package and further disclosure was made over time. Counsel has failed to persuade us that **Summitt** was prejudiced as a result of the inability to obtain the increased disclosure. Simply because the motion was dismissed does not constitute inadequate disclosure. The decision by the Board was reasonable. **Summitt** has failed to establish that the lack of further disclosure constituted a denial of natural justice or led to a failure of procedural fairness.

B. The Board's use of the 2009 Retail Compliance Plan ("RCP")

100 In August 2009, the Board released its Retail Compliance Plan which was a non-binding Board staff report, based on an inspection of the offices, records and compliance systems of **Summitt** and four other retail energy marketers. Its express purpose was to focus Board Staff's future compliance activities.

101 **Summitt** objects to the fact that the RCP was not disclosed to it until the day before the hearing commenced. Furthermore, counsel argues that if **Summitt** had known that the Board was going to use the RCP, **Summitt** would have sought disclosure of all the data underlying the Report.

102 **Summitt** concedes it did not ask for a copy of the RCP when it was referenced in the first witness statement and never requested the underlying data. It submits that a failure to request does not excuse a failure to disclose.

103 When counsel for **Summitt** objected to the request to make the RCP an exhibit at the hearing, Compliance Counsel redacted objected parts. However, as Compliance Counsel pointed out, in cross-examination of **Summitt's** Compliance Manager on the issue of due diligence, the Panel accepted that the RCP had broader relevance and admitted the whole Report. **Summitt** claims that any reliance on the RCP was unfair because it is hearsay and because **Summitt** was denied the chance to test the contents.

104 We are not persuaded that the approach by the Board to the RCP constituted procedural unfairness. **Summitt** was aware of the 2009 Report because it was mentioned in a witness statement, but more importantly, because it had been one of the subjects of the survey and analysis. Yet **Summitt** made no request for disclosure when it was referred to in an early witness statement, nor was it included in its motion for disclosure. When the Board asked for an unredacted copy and thereby showed interest in its contents, **Summit** made no request for an adjournment. **Summitt's** lack of due diligence is a significant factor in determining whether the earlier non-disclosure affected the fairness of the hearing process. [29]

C. Compressed schedule

105 **Summitt** referred to the Board's Rules of Practice and Procedure in sections 14, and 27 to 33 to support its contention that it had legitimate expectations that it was entitled to make written interrogatories, access alternative dispute resolution procedures and technical, issues and pre-hearing conferences. Instead, the Board forced **Summitt** to an early hearing without the opportunity to explore those expectations.

106 On June 17, 2010, the Board issued the Notice of Intention which provided 15 days within which **Summit** could request a hearing, failing which the Board could proceed with making an order. Also on June 17, 2010, the Board issued an Interim Order for Compliance which required **Summitt** to take all necessary steps to ensure that its sales agents complied with the Act, the Regulation and the Codes. On June 24, 2010, **Summitt** requested an extension of time to request a hearing. On June 28th, the Board issued Procedural Order No. 1, in which it extended the time for **Summitt** to request a hearing to July 9 and ordered **Summitt** to provide written assurance that it would take steps to ensure its sales agents were complying with the Interim Compliance Order. On June 30th and July 7th, **Summitt** wrote letters to the Board detailing the response to the Interim Compliance Order. On July 8th, **Summitt** requested a hearing. On July 9th, the Board ordered an oral hearing to commence the week of August 23rd.

107 On August 4th, **Summitt** served a notice of motion seeking disclosure, written interrogatories, an order directing that the parties participate in a technical conference, an issues conference, facilitated mediation or alternative dispute resolution and a pre-hearing conference; a timetable that would incorporate the pre-hearing steps; and an adjournment of the hearing. On August 23rd, the Board denied **Summitt's** motion in its entirety, with the exception of ordering Compliance Staff to produce some consumer data that had been requested by **Summitt's** expert, and the Board ordered that the hearing commence on August 30th.

108 The hearing occurred over the six days of August 30 to September 3 and September 8, 2010.

109 In comparison with the typical course of litigation, that does represent a compressed schedule. However, that is not the proper comparison. The Board has its own Rules of Practice and Procedure and has experience in their application. As counsel agree, this was a matter of first instance in that it was the first hearing of the Board at which consumer complainants would give evidence. But that does not mean that **Summitt** was entitled to expect that all of the Rules of Practice and Procedure would be available. All of the decisions challenged by **Summitt** are within the discretion of the Board. The Appellants have not demonstrated that any of these decisions were unreasonable or that they adversely affected the procedural fairness of the hearing.

D. Use of the binder

110 At the conclusion of the oral hearing, Compliance Counsel submitted to the Board a binder containing allegations of additional consumer complaints against **Summitt**. Compliance Counsel asked the Board to consider the additional allegations when imposing penalty. **Summitt** strongly objected to the admission of these additional allegations. The Board directed the parties to make submissions concerning the admissibility of the binder of additional complaints as part of its written closing submissions. In the Decision and Order the Board made no mention of whether it decided to admit the binder of additional allegations into evidence, or whether it relied on any of the additional allegations in its determinations that violations had been established and/or penalty.

111 **Summitt** submits that the Board's broad sweeping comments and conclusions concerning **Summitt's** due diligence program strongly suggest that the Board did consider the additional allegations in its determinations that violations had been established and penalty, as such comments and conclusions extended well beyond the conduct of the 5 agents in respect of the 28 consumer contracts that formed the subject of the charges in the Notice of Intention.

112 We reject that contention. The Board's findings about the deficiencies in **Summitt's** systems were based on the evidence before it. Nothing in the reasoning suggests that the evidence was buttressed by the other allegations in the binder.

113 The Board made no mention of the binder in their reasons. There is no reason to consider that this was an oversight. Compliance Counsel and **Summitt** made written submissions on the admissibility of that material. The Board could not have considered the materials without first ruling on their admissibility. As the Board made no such ruling, the only proper inference is that it did not admit, consider, or in any way rely on that material.

E. Conclusion on procedural fairness

114 We are not persuaded that the doctrine of legitimate expectations supports **Summitt's** submission that it was owed a duty of fairness at the high end of the spectrum. Without establishing precisely where on the spectrum the duty lay in this case, none of the grounds for challenging the procedural fairness of the hearing have been established.

ORDER TO GO AS FOLLOWS:

115 The appeal is dismissed. As confirmed by counsel in correspondence dated January 17, **2013**, the Appellant shall pay to the Board costs on a partial indemnity scale in the amount of $25,000 all inclusive.

Appeal dismissed.

Footnotes

1 *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), at 13

2 (2008), 90 O.R. (3d) 561 (Ont. C.A.); see also *R. v. Rajaeefard* (1996), 27 O.R. (3d) 323 (Ont. C.A.), at p. 325 and *R. v. W. (W.)* (1995), 25 O.R. (3d) 161 (Ont. C.A.), at p. 169.

3 *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.) at para. 105

4 *R. v. Justices of Sussex* (1923), [1924] 1 K.B. 256 (Eng. K.B.); *Hutterian Brethren Church of Starland v. Starland (Municipal District) No. 47* (1993), 9 Alta. L.R. (3d) 1 (Alta. C.A.); *Mitchell v. Institute of Chartered Accountants (Manitoba)*, [1994] M.J. No. 65 (Man. Q.B.) at para. 17, 18, 24; aff'd [1994] M.J. No. 551 (Man. C.A.)

5 *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.). *R. v. S. (R.D.)*, *supra*, note 3.

6 The Law Society of Upper Canada, *Rules of Professional Conduct*, in particular rules 2.02, 2.03, 2.04 and 4.06.

7 [1978] 2 S.C.R. 1299 (S.C.C.)

8 [1987] 2 S.C.R. 541 (S.C.C.) at para. 23.

9 *Sault Ste. Marie (City)* at p. 1325

10 *Wigglesworth*, at para. 23.

11 *Supra*, at para. 23.

12 *Supra*, at para. 21.

13 The Board set the administrative penalties as follows: (1) $9,000 for each of 15 moderate violations of s. 88.4 of the *Act*; (2) $13,500 for two major contraventions of s. 88.4 of the *Act*; (3) $9,000 for each of eight moderate violations of s. 88.9 of the *Act*.

14 2012 ONCA 208 (Ont. C.A.) at para. 52.

15 *Supra*, para. 46.

16 A similar conclusion was reached in *Gordon Capital Corp. v. Ontario (Securities Commission)* (1991), 50 O.A.C. 258 (Ont. Div. Ct.) at p. 265 with respect to regulatory proceedings under s. 26(1) of the *Securities Act*, R.S.O. 1980, c. 466.

17 At para. 112, the Board mentioned the 14 Point Compliance Plan when discussing the dealings that Retail Salesperson, M.G. had with J.G. However, the Board simply noted that the failings they had identified were addressed in the 14 Point Compliance Program implemented by **Summitt** in June 2010. The Board did not base any finding of liability on this fact.

18 *Therrien c. Québec (Ministre de la justice)*, [2001] 2 S.C.R. 3 (S.C.C.) at para. 89.

19 Decision and Order, p. 8 [AB & C, Tab 3]

20 Decision and Order, p. 52 [AB & C, Tab 3]

21 [2004] 1 S.C.R. 629 (S.C.C.)

22 [1996] 1 S.C.R. 369 (S.C.C.)

23 (2010), 99 O.R. (3d) 481 (Ont. C.A.) at para. 24

24 *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21

25 *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307 (S.C.C.) at para. 118, adopting *R. v. Young* (1984), 40 C.R. (3d) 289 (Ont. C.A.).

26 *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.) at paras. 23 to 28; *Shooters Sports Bar Inc. v. Ontario (Alcohol & Gaming Commission)*, [2008] O.J. No. 2112 (Ont. Div. Ct.) at para. 40.

27 *Toronto Hydro-Electric System Ltd., Re* (October 14, 2009), Doc. EB-2009-0308 (Ont. Energy Bd.) at paras. 12-21.

28 *May v. Ferndale Institution*, [2005] 3 S.C.R. 809 (S.C.C.) at paras. 91-92.

29 *R. v Dixon* [N.S.C.C. sub nom *R. v. McQuaid*, [1998] 1 S.C.R. 244 (S.C.C.)]

End of Document