

ONTARIO ENERGY BOARD

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| FILE NO.: | EB‑2014-0053EB-2014-0361EB-2014-0044 | Natural Resource Gas Limited |
| VOLUME:DATE:BEFORE: | Volume 1May 14, 2015Ken QuesnelleMarika Hare | Presiding Member and Vice ChairMember |

**EB 2014-0053**

**EB-2014-0361**

**EB-2014-0044**

THE ONTARIO ENERGY BOARD

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

**AND IN THE MATTER OF** an Application by Natural Resource Gas Limited, pursuant to section 36(1) of the Ontario Energy Board Act, 1998, for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission, and storage of gas as of April 1, 2014;

**AND IN THE MATTER OF** the Quarterly Rate Adjustment Mechanism;

**AND IN THE MATTER OF** an Application by Natural Resource Gas Limited, for an order or orders granting rate relief and/or a stay from the imposition of interest on any amounts due for payment to Union Gas Limited related to the application of certain penalty charges;

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

**AND IN THE MATTER OF** a hearing on the Board's own motion.

Hearing held at 2300 Yonge Street,

25th Floor, Toronto, Ontario,

on Thursday, May 14th, 2015,

commencing at 9:33 a.m.

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VOLUME 1

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 BEFORE:

 KEN QUESNELLE Presiding Member and Vice Chair

 MARIKA HARE Member

Michael Millar Board Counsel

Lawrie Gluck Board Staff

Pascale Duguay

John Campion Natural Gas Resources Ltd. (NRG)

Jennifer MacAleer

Brian  Lippold

CRAWFORD SMITH Union Gas

CHRIS RIPLEY

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**No UNDERTAKINGS WERE FILED IN THIS PROCEEDING.**

 Thursday, May 14, 2015

### --- On commencing at 9:33 a.m.

 MR. QUESNELLE: The Board is sitting today in the combined matters of EB-2014-0053, EB-2014-0361, and EB-2015-0044.

 EB-2014-0053 is a Natural Resources Gas April 2014 QRAM proceeding. On April 1st, 2014 the Board issued a decision and interim order in EB-2014-0053. In that decision the Board stated that NRG's requests had not been sufficiently evaluated during the proceeding and ordered the continued review of NRG's application.

 EB-2014-0361 is an application by NRG for interest rate relief associated with the penalty charges applied to NRG by Union Gas Limited. On December 19th, 2014 the Board issued a notice of application and interim order, which granted NRG an interim order that interest would not be charged on the penalty amount until after the Board made its final decision on the penalty charges.

 EB-2015-0044 is the Board's motion to review its October 9th, 2014 decision and order in EB-2014-0154 proceeding, with respect to the appropriate penalty charge that should be applicable to NRG.

 In the notice of motion Procedural Order No. 3, issued for this combined proceeding on March 13th, 2015, the Board stated that it was concerned that the implications of NRG's status as a natural gas distributor were not adequately addressed in EB-2014-0154 proceeding.

 On that basis the Board requested further evidence and argument in relation to the following questions:

 One, does NRG's status as a natural gas distributor warrant a different treatment from Union's other non-compliant direct purchase customers?

 Two, if so, what is the impact of this consideration on setting an appropriate penalty charge to be applied to NRG for not meeting its contractual balancing obligations?

 Three, should the costs associated with the penalty be recovered from NRG's ratepayers?

 And four, should NRG be granted rate relief and/or a stay from the imposition of interest on the amounts due for payment to Union related to the application of certain penalty charges as requested by NRG in its EB-2014-0361 application?

 The Board would like to hear argument on these issues today. NRG, Union, and Board Staff have advised the Board that they will be making arguments. The Board has also received written submissions from CME and E2 Energy Inc.

 We will now take appearances.

# Appearances:

 MR. CAMPION: Good morning, sir, my name is John Campion, and with me is Jennifer MacAleer, and Mr. Lippold, who swore the affidavit from NRG, is also with us.

 MR. QUESNELLE: Thank you very much, sir. I don't know if the microphones -- okay. The green button near your microphone will turn the microphone on, and the protocol here at the Board is you remain seated. It makes it a little easier to be picked up by the mic for the court reporter. So, okay. Thank you.

 Do you need anything repeated, or are you okay?

 MR. SMITH: Good morning, members of the Board, my name is Crawford Smith. I appear as counsel to Union Gas, and with me is Chris Ripley of Union Gas.

 MR. QUESNELLE: Good morning, Mr. Smith.

 MR. MILLAR: Good morning, Mr. Quesnelle, Ms. Hare. My name is Michael Millar, counsel for Board Staff, and with me is Lawrie Gluck and Pascale Duguay.

 MR. QUESNELLE: Thank you, Mr. Millar.

 The order today, we will hear first from NRG, and then I believe Board Staff, Union, and then reply by NRG. Is that satisfactory for everyone? No issues with that? Thank you.

 MR. SMITH: Yes.

 MR. QUESNELLE: Any procedural -- any preliminary matters, Mr. Millar, that you are aware of?

 MR. MILLAR: Not that I am aware of?

 MR. QUESNELLE: No? Anyone else? No?

 MR. CAMPION: I just have a filing, sir.

 MR. QUESNELLE: Okay, thank you.

 MR. CAMPION: If I might approach the bench, I'll just --

 MR. QUESNELLE: Certainly. Thank you. All right. Thank you very much.

 MR. CAMPION: Expensive delivery system, but here we go.

 MR. QUESNELLE: It had good lines of sight. We saw it the whole way.

 MR. CAMPION: I only need to refer to one page of this decision, but I thought that Mr. Smith is here...

 MR. MILLAR: Mr. Chair, I would suggest we mark these as exhibits.

 MR. QUESNELLE: Thank you, Mr. Millar, let's do that.

 MR. MILLAR: We have two things. One, it appears to be a written overview of NRG's submissions. We can call that K1.1.

EXHIBIT NO. K1.1: WRITTEN OVERVIEW OF NRG'S SUBMISSIONS.

 MR. MILLAR: And then we have the compendium of materials from NRG, which can be K1.2.

EXHIBIT NO. K1.2: COMPENDIUM OF MATERIALS FROM NRG.

 MR. MILLAR: Then finally, there is a decision of the Board. It appears to be RP-2001-0029. That will be K1.3.

EXHIBIT NO. K1.3: DECISION OF THE BOARD, RP-2001-0029.

 MR. QUESNELLE: Thank you, Mr. Millar.

 Okay, Mr. Campion, whenever you are ready.

 MR. CAMPION: Press the little button?

 MR. QUESNELLE: Yes, just hold it until it lights up.

 MR. CAMPION: Okay. There we go.

 MR. QUESNELLE: All right. Thank you.

# Submissions by Mr. Campion:

 MR. CAMPION: It's all very exciting. It always gives you a sense of power, but I know it is illusory.

 It is a pleasure to be here. I had the pleasure of being Board counsel from time to time over some 20 years, and so it is always a pleasure to be back. There are a few ancient ones who I knew then, the librarian in particular, although she is not ancient, but I did recognize her, and so I am very -- I am actually thrilled to be here and present what I think is an interesting argument and submission.

 I say that because it carries with it a philosophical perspective. It deals with the Board's jurisdiction and the Board's obligation. It deals with Union's obligations in the public interest. It deals with NRG's obligations in the public interest. So it seems to capture some of the issues that we dealt with in 1985 when we dealt with a Board review of the entire system, one in Canada and then in Ontario, and made recommendations to the government on philosophically how do you approach this whole perspective.

 In the interim I am amazed to see what's happened in the sophistication of the Board. It is quite awesome, so it is fun to try and fit in the gas piece into what is a very sophisticated tribunal these days as to how they conduct -- how it conducts its business, particularly having regard to the vast sea change in electricity.

 What I am going to do is I am going to give you -- you have already given the overview of the issues, and that's part 1. I will just give you a quick bird's eye view as to what the written submission looks like. That's in paragraph 1. So I don't need to repeat any of that.

 Two, I deal with the Board's jurisdiction, and I give a bit of a recitation, and again the Board has very precisely dealt with how we got here and the various decisions that impact, and I may have a little more to say on that piece, but again, I think that part 2 has largely been dealt with.

 Part 3 deals with the evidence at the hearing. And here is where I am going to refer to the restrictions on the receipt of evidence and what can be heard, having regard to the fact this Board operates under the Statutory Powers Procedure Act, so that in part 3 on the evidence piece, generally speaking, I will deal with that.

 The prior decisions of the Board, again the Board, Mr. Quesnelle has dealt with at the opening many of those decisions, but I will comment on the implications to be drawn from some of those decisions that you have mentioned, sir, and I will also draw upon and deal with the 0154, the penalty case.

 Part 5 in the submission deals with the facts, and it is split up into seven areas. And an analysis of the facts will refer back to the restrictions on the Board as to what it can rely upon on the facts.

 This is a case where I have been -- I have intentionally, and I would anyway, but I have been intentionally particular to lead the facts that I thought were necessary, and I point out that there has been no cross-examination on these -- on this evidence, and therefore it is binding on the Board, and it can't -- people can't come along and tell me, well, there are different facts. That's not allowable. I am not going to consent to any further facts; I have what I have. And in my respectful submission, the Board can only make its decision then on the record which is in front of you, and it is to be taken as true. It is not contestable, because no one has decided to cross-examine, no one has decided to put in any evidence.

 So I sit here as a counsel saying that's it, and so I am going to argue the case on the basis that the facts are true and there can't be any other finding made.

 The seven parts that I am going to -- or eight parts, I'm sorry. I am going to deal with is the contract itself, the exceptional winter conditions. And it is there, by the way, the Board has already made the finding that the exceptional winter conditions suspended a rate.

 And so two things have been accomplished. The only question is: What rate applies to NRG?

 At this point I will just say, and I think it is important, the use of word "penalty rate" is, in my respectful opinion, in this case inappropriate.

 The rate was suspended by operation of the Board in 0154. Something else was replacing it. But the notion of a penalty rate assumes impropriety, or a failure on the part of NRG. And I say no.

 Once the exceptional winter conditions have been accepted by the Board and they have changed the rate, it isn't what the penalty rate is; it is what the rate is.

 The penalty gives the notion of some form of impropriety, and has an assumption built into the psychology of using the word "penalty". And while starts off as a penalty rate -- I can't ignore that in the contract and in the rate -- once it was suspended and something else was replaced -- and it is interesting it wasn't suspended and replaced by just the operation of the Board. Union asked for this. Union asked for the suspension of the rate, and the Board granted it.

 So it is a huge gap that my friends are now unable, in my respectful opinion, to argue this notion that there is imprudence, impropriety, or anything else now available to be found by the Board.

 MR. QUESNELLE: Mr. Campion, I just want to make sure -- I don't want to go too far without getting this first step. I want to clearly understand.

 Explain the suspension, what --

 MR. CAMPION: Sure. Union, and it was surprising because it was ex parte. They made an application to this Board to change the rate that came out of a formula, 78.73 to 50.50, and the Board granted that order.

 A number of things arose from that decision. The first one was it was Union's application. So it was saying to the Board we should suspend the notion of a penalty rate, and substitute some other kind of rate.

 Now, the Board continued and we all continued to use, I think wrongly, the notion of penalty. When it comes to NRG, I just simply ask for NRG's sake it is not a penalty. And I say that because of the additional NRG evidence which is now before you.

 MR. QUESNELLE: I understand your argument now, thank you. Are you okay with it?

 MS. HARE: I don't understand it. And actually I think the use of the word "penalty" -- the charge that is in the rate is an incentive to have customers be in balance.

 MR. CAMPION: You are right. And here's where -- I'm sorry I interrupted you. I'm sorry, Your Honour.

 MS. HARE: No, I'm finished. I don't understand how, then, when the Board decided to change that incentive rate -- which effectively is a penalty -- what your argument is.

 I don't understand the flow, how the fact that the Board changed it means that now it doesn't apply.

 MR. CAMPION: For NRG, on the facts which are now before you, it is my respectful submission to you -- and it is a submission, it isn't a statement -- that the notion of "penalty", that is somehow impropriety or gaming the system, does not apply to NRG.

 MR. QUESNELLE: Okay, thank you, Mr. Campion. One moment.

 [Board Panel confers]

 MR. QUESNELLE: Thank you, Mr. Campion. Carry on.

 MR. CAMPION: And I will explain this when I come through it again.

 MR. QUESNELLE: Thank you.

 MR. CAMPION: I do apologize for jumping into it. But I wanted to make this point, because the notion of penalty carries with it a sense of a failure, not living up to your bargain.

 And the underlying rationale for this, which is why I produced this huge case that has now been marked as K1.2 or 3, I think -- I look back at Malcolm Jackson's original decision on this point back in whenever it was, 2002, and the proposition was that the penalty rate was there to avoid what I characterize -- he didn't use those words --gaming the system.

 Well, the private party who may gain and lose profits on gaming the system is, I understand, the focus of that attention. That's fair enough.

 But a utility isn't in that position. The only other utility in the system, NRG, who is going to be connected to Union, has got no reason itself to game the system. It is trying to get the lowest possible price for its consumer.

 So the whole philosophical conception about NRG being different comes to life for the first time in this part of the submission. The gaming idea doesn't apply to it. That's step one.

 Step two is that we have shown, and there is no dispute about it, that we acted prudently. We have concluded we acted prudently; nobody has tested this. So they can't argue against it now, neither the Board Staff nor Union. They can't do it.

 The evidence has been accepted. They didn't cross-examine, they didn't have any dispute; that is the end of the piece.

 So in those circumstances, not only would the gaming of the system not apply to NRG -- because why would it do it; it is just a pass-through -- it is just there as a protector of the ratepayer, which is the Board's jurisdiction.

 And so I look at this in a slightly more holistic way and that is that we have a huge emergency in the province, a huge emergency. We've had cold weather that is unprecedented. No one has ever seen it before. The Board has found that that's the case. As a result, for NRG, the notion of penalty never really applied anyway because it couldn't game the system, and didn't need to and didn't want to.

 And what happened was you had circumstances where it couldn't – and this explained the circumstances -- it couldn't meet the obligation on the day in question.

 And it is in a context. The context is Union had the gas. It wasn't as if Union said we don't have the gas in our storage. That wasn't the case. They had the gas. They never didn't buy any more to meet this February 20th obligation.

 Within two days, we could have bought for $17 as opposed to $78, and there was a weekend in between. And so the idea of imposing a penalty to stop gaming the system doesn't apply to NRG at all. It never philosophically did.

 But I can go further, because I've got all of the facts to show we did our best. And of the conclusions that precedent in the evidence, nobody tested them.

 So there we are. There is nothing left to do. The Board has agreed there were exceptional conditions. We have a huge emergency, and I want to come down to this notion of storage.

 When we were dealing with Union in all of these days, and we went through the UniCorp case and became a single owned entity, and all of those incredible hearings in the 1980s, and we did the deregulation of the entire industry across Canada, we came across -- and I was very much aware of Union's storage; it is a huge provincial asset.

 It is a huge provincial asset, and it is the only one in this whole region which gives enormous flexibility to protect the system. It is owned by Union, I will grant you. But it is regulated. It is not ownership in the usual sense; it is regulated by this Board. And this Board, to protect the consumer of Ontario, can deal with that storage.

 And if there is a huge emergency, why is it that the consumers of Ontario, in the emergency conditions that existed in that winter, would pay any more? Because where it did the money go? It went to a bunch of brokers. It didn't go to the people who were selling it out west; it went to a bunch of brokers, that whole penalty piece.

 Now that's behind me, but not for NRG. And I wasn't arguing anybody else's case. But I look at the overall. I'm sitting here in the Premier's office and I'm saying, "What do I expect of this Board?" I expect this Board is going to protect the consumer of Ontario, period. And the consumer of Ontario can be protected by a whole host of things.

 This Board has enormous power, which is why I dealt with this jurisdiction. What was expected of the Board? What was expected of the Board is -- is there any reason, did anybody really game the system this year? And I say, no, they didn't.

 I don't know how many millions of dollars went to pay some broker, that the consumer of Ontario has now paid for. It is a complete economic loss. And Union didn't need a single molecule to preserve the balancing of the system.

 Now, nobody brought this to the Board, in fairness. The Board could have moved on its own motion. So this is a huge public-interest philosophical case. The Board should have moved. People should have been screaming at the Board to move. The Board can't act alone always. It has got to have people helping them. That is why I'm here.

 In my respectful submission, the Board had an obligation to do something about this, and imposing in some blind way a contractual provision which they could change tomorrow which they, indeed, fixed at 78.73 or at the formula -- because the Board actually changed the formula. Union had a different formula, which would have led to a lower price. This is way back when -- because they wanted to stop the gaming, but there wasn't any gaming this year, at least not for NRG.

 So when I talk about the philosophical implications of this case, it is huge, because the Premier is sitting there expecting you to do something for the people of Ontario.

 So I come to NRG then. And you can't say we've not tried every route, I'll tell you, and I will tell you, because of this hearing the guts of the Divisional Court review are gone, because the guts of the Divisional Court review were exactly what the Board gave me -- or gave to NRG, and that was, we didn't get any reasons why the utility piece -- we had no reasons why there wasn't a difference between the utility and the non-utility.

 So we complained that the Board's reasons for decision were inadequate and the Divisional Court should review it. If they had reviewed it they would have sent it back here, so here I am.

 So the Board's own motion has assisted me enormously, and I think was a -- for which NRG is certainly very thankful, but it also, I think, was an extremely wise decision, for which we're very much obliged, I will say.

 So dealing with the facts and the combination of the philosophy, it comes down to this. You had a contract. You had huge emergency conditions which have now been recognized, which I have dealt with one part of the piece.

 You then have the NRG's prudent attempts, which -- unchallenged. You then have Union's sale of the shortfall gas to us at 78.73, and sent us a bill for two million bucks. We asked that the interest be held off while we dealt with all of these things.

 Again the Board in its wisdom said, Fine, we're going to deal with this when it comes to an end. This is the -- presumably the end.

 We then had, in addition to NRG's attempts to deal with the prudency piece and how it tried to buy and what happened, and it sought help from Union, basically got none. It sought help from the Board. It didn't even get a call back. Didn't even get a call back.

 That is not an exercise of the Board's jurisdiction when the entire province is in a frozen freezer and high emergency rings all bells.

 So you then have the historic norms, which is the evidence again unchallenged. And if you look at the expectations that you would have in every single February for six or seven years prior to where we had the figures, NRG was doing what it always did. It was a perfectly proper thing to do. It thought the rates were going to go down. The 78.73 was hysterical. It was off the charts.

 And so you can't just go and do it, because, you know what? There is two results. Either the ratepayers are going to pay or the company is going to pay, and we know that Union doesn't need the gas.

 So the historic norms adds to the prudence piece. What they did was a reasonable proposition in the circumstances.

 The post -- even post-February 20 we said, Look, can we deliver this on March the 3rd? Union says, No, thanks. No way.

 Union has an obligation to act in the public interest. That is not acting in the public interest. I've got a place in southwestern Ontario, which is where I happen to be from, where on both sides -- one side of the street is NRG, the other side of the street is Union.

 The only benefit for this so-called "extra rate" -- I don't even want to use the word "penalty rate" -- this extra rate money goes to the residential consumer of Union. So you take it out of the pocket of NRG on one side of the street and you give it to Union Gas on the other side of the street, and Union stands up and says, "Aren't we great to you consumers?", that is a windfall of absolutely madness technicality. Why would you ever have one neighbour paying the other neighbour across the street when no gas was needed? We know what they paid for it on average, $7.12. Why would they get any more? It's a pass-through for them. It is a pass-through for us.

 So you have got people getting money across the street, and again, if I'm sitting in the Premier's office, I say, "What? You're giving a windfall to this person, a detriment to this person. Why?"

 Or the other alternative is to say, which you can't do anymore because there's no evidence not prudent. There's no finding of prudent. We've got the evidence, and we've got the conclusion. No one has tested the conclusion, but you say, fine. You have this detriment, you have this incredible windfall. Why did it happen? Oh, we're going to charge the company instead. So you're going to destabilize NRG? Whatever this extra money is, it is somewhere between one and two million dollars, they have a return in the range of $400,000 a year. You're just wiping out the profits, or the return. That's not a wise public policy, in my respectful view.

 Public policy would say -- and you're exercising public policy through this tribunal. Public policy would say of course we just -- there's no benefit needed. There is no reason for the windfall. Nobody needed the gas. Why are we imposing a cost on one versus another? Why are we doing that? Why is one neighbour paying another? And could you justify it to the Premier? You can't. Could not even remotely possible to justify it.

 So I have tried my best in courts and in re-hearings and in this particular hearing on behalf of my client, who is acting for its ratepayers. It's exercising its public interest, and it has directed me to do so.

 Then you have the -- so we try after February, and they say, no, thanks. We then have NRG's continuing efforts, which are these various proceedings. So those are the facts in part 5. And they're hugely significant, because I believe this is a watershed case on the Board's jurisdiction. I believe the Board should be alive to emergency conditions and act.

 So then we have the issues. I deal with just and reasonable rates. I will come to that in due course. I then deal with the public-interest obligations of Union. This is a complicated little piece. Is Union just a private enterprise? We used to have a rule, which got blown away with the Union UniCorp case, where only 20 percent of a utility could be owned by a single party, because it was deemed, one, you wanted an active shareholding, and it was good for the investor in Ontario; and two, you wanted to ensure that this broad-level public interest was part and parcel of the public.

 Well, Union UniCorp, that all changed. Huge political efforts, and we have one owner for these utilities now. Fine. We have what we have. But it still doesn't take away the public-interest obligation of Union. It doesn't escape having to be concerned about its customers and its customers' customers.

 And I will deal with that, because it is philosophically very important. This Board can impose public-interest obligations on Union. I don't care that it is owned privately. You can impose them on NRG as well. We're all in the same boat.

 But in my respectful view, this public-interest obligation on Union was such that they shouldn't have been taking a windfall against NRG's customers or NRG. They should not have done so. It is not acting in the public interest to have done so. They didn't endure any cost, and there was no gaming of the system, and they were of zero assistance to us in getting out of it.

 So in my respectful opinion, Union failed in its public obligations.

 Public-interest implications for NRG and Union; I will deal with that as a separate piece. You then have the issues 1 and 2, which are status and rate. Those two really go together.

 I say the rate, looking at all of the public-interest obligations that are extant here, looking at the finding of emergency condition which the Board has -- everybody universally across the entire system has said this was the worst winter forever, and it was unpredictable and unpredicted, and nothing anybody could have done could have avoided the problems that were faced.

 So what should have happened? The Board called its own hearing on this, and it is huge, and I have given some of these reports. Huge and important significant people coming forward to explain how the North American context imposed all kinds of things from Chicago, from Princess Gate, from the Appalachians, on our little province, as we sit here in one of the centres of the economic activity in North America.

 So what comes out of that? Well, the implications of all these factors coming to bear, looking at NRG's status, protecting as it is its own customer base, which is what this Board is obliged to protect, which is what the Premier expects this Board to protect, is very significant.

 Status of NRG is key. And if I were arguing Union's case and I had the same problem, I would have argued it the same way.

 Then that means rate. That is why I won't use "penalty rate" in my submissions. It is what rate should anybody pay. Well, you pay Union's cost. And if there is some extra piece, some storage bill because they held it in storage for a piece, or something else like that, fine.

 But why would I pay $50.50 for something they bought for $7.12? Why would anybody do that, and impose it on a ratepayer?

 Why were we forced to go out in the marketplace and buy stuff for $26 when it was totally unnecessary? Where was Union? Where was the Board?

 So then we have status and rate; I will deal with that together. Then we have prudence. Well, there is no evidence to the contrary. There is no finding the Board can make contrary. No one has tested it, either the conclusion or the facts. That's the end of it.

 So it's going to the ratepayers on the facts. This is why I have imposed SPPA in this hearing, or asked it be imposed.

 Then you have the interest piece, which is just a follow-on. The interest, in my view, doesn't run until after this case has been finally decided. And I use the word "finally" purposively.

 So that's the nature of the argument. Let me start at the beginning, if I might.

 In paragraph 1 in Exhibit K1.1, it sets out the various issues which the Chair has very kindly dealt with this. The distributor's status has two components to it, generally its implications and, in these circumstances, on the facts.

 So there are two levels of this. I think it matters generally, but I certainly think it matters specifically on the facts of this case. So distributor status has -- when you come to considering this point, in my respectful submission, you must consider the two levels. And if I win on either of them, then that's the end of it; the status matters. How it matters, that is another issue. But I have indicated how I think it does matter, and that is we pay Union's cost of the gas as they had it in storage.

 You see that in (b) -- and I stress this again as it comes up -- I use the word NRG rate for balancing gas. I do not use "penalty rate". It has an assumption within it of impropriety or carelessness, because it has got penalty attached to it. I don't believe that that is appropriate in this case.

 Prudence review I have dealt with and interest I have dealt with. So that's fine; that is paragraph 1.

 Paragraph 36 (2) of the -- on the Board's jurisdiction, fixing just and reasonable rates. Now, I deal with that -- again, you might want to just note this beside paragraph 2, if you are trying to keep track of this shifting to and fro. I deal with the just and reasonable rates in more detail in paragraphs 40 to 43 in part 6 on issues. So just as a matter of -- I introduce it here, and if you go forward to paragraphs 40 to 43 in part 6, you will see it is given more life.

 But the important piece that I would like to deal with is the Board is not bound by any terms of any contract and, of course, that's why they could change 78.73 to 50.50. There is a formula set out, which the Board itself ordered. They rewrote the formula for the day and say no, it's not number 1; it is number 2 price in the month of February.

 There was no rational reason, by the way – well, that's not quite fair; there was a rationale given for it because there was a balance there between those who had gone out in the marketplace and those that hadn't. That was a fair balance, and I will concede that piece. But it didn't apply to NRG.

 I deal with the, in paragraph 3 -- I will dwell on this for just a moment. It is what you know and I'm sorry that it – it is common in place. But it was helpful to me, and I hope it may be helpful to the Board. If not, just tell me to move on.

 There can't be any doubt the Board exercises jurisdiction in the public interest. So the question is: what's that? And that's largely fixing rates and regulating activity that are connected to that piece.

 You are dealing with natural monopolies. You don't build a pipeline down the same street and have a competition between the two. It is too expensive.

 So natural monopolies, and what the regulatory structure tries to do is replicate some form of competitive analysis to equate Union and NRG and Enbridge to real companies, which they are not when it comes to rate-setting. There's a hypothetical system that allows us to get to the rates, and you do it this way because of natural monopolies.

 Certainly you take, obviously, information from the company, but then you have hypothetical capital structures and you fix what returns they ought to have, and you then have your system of making a system that runs for some period of years and you have the QRAM in between.

 So the entities, as natural monopolies, do not escape into the world of raw capitalism. One, their rates are fixed, but so are their activities, and the last paragraph of paragraph 3 tries to capture that notion.

 The entities and Union, NRG, and Enbridge are required to exercise their authority and power in the public interest. Because we've gone to a single owner system, Union begins to think it's a capitalist company and it can do as it sees fit. Well, it can't.

 This Board stands in between it and the public to protect. And NRG, in this case, is one of Union's public. It is obliged to protect it. It didn't.

 So in my respectful submission, the last sentence of paragraph 3 is a key component of the philosophical structure under which we have been operating, and it hasn't been invoked to date.

 Union did not act in the public interest, in my respectful view. The money that was actually raised, the 78.73 and paid out to people, which cost this province a lot of money for no reason; the gas wasn't needed. It could have been sold for $7.12. It is only in the emergency condition, but that's already been found. You wouldn't want it every year, because you don't want the gaming of the system, as Malcolm Jackson said way back when.

 So number 4; the public interest is best served by the lowest possible prices. And I add to that piece the avoidance of gratuitous and unnecessary costs to the system as a whole in Ontario. This isn't someplace else. This isn't a broker sitting in Alberta, or indeed a broker sitting in Ontario, who got massive profits out of February. An artificial deadline which could have been waived – which, by the way, if it would have been waived into March 2nd, you would be paying 17 bucks, not 78.73 and not 50.50 and not 26, which is what NRG was paying for the gas they could get.

 MR. QUESNELLE: Mr. Campion, I just want to remind us all here that a lot of what you are saying now is applicable to the arguments that the Board heard and decided on in the penalty case itself.

 MR. CAMPION: That's fair, sir, except you can't really -- and I considered that, and I appreciate your direction and will move on. But you can't really avoid those arguments with what in effect is a reopening of that case.

 MR. QUESNELLE: Oh, what it is is a consideration of the special status of NRG.

 MR. CAMPION: That's fair, sir.

 MR. QUESNELLE: It is not a reopening of the case.

 MR. CAMPION: That's fair. But the special status piece definitely --

 MR. QUESNELLE: For NRG's purposes. But if we can stay the special status -- you're speaking at a level of general principles as to whether or not anybody should have paid those penalties.

 MR. CAMPION: That's fair, sir, and I will stay away from that. I am much obliged for your direction, and I will move on.

 But I do believe that this argument -- I put it at a general level, but I am only applying it to NRG for this case. So thank you for your help, sir.

 Then you have -- number five is what is the rational response to emergency conditions, and I will say for NRG. That's paragraph 5. What was the rational response for public interest entities, the Board, and the utilities?

 And it is on that basis, then, you look to -- from NRG's perspective -- the interests of its consumers. Is there anything anybody could have done that made sense, other than imposing a so-called higher rate? And did NRG do anything that deserved the notion that it was somehow gaming the system, acting imprudently, or doing anything wrong? I say no.

 So I have come now to the SPPA and paragraph 6. And the last sentence is really what I want to deal with, and that is:

"The tribunal may treat previously admitted evidence as if it had been admitted in a proceeding before the tribunal, if the parties to the proceeding consent."

 That's the only way that any other evidence in any other part of this proceeding or these proceedings can get into the Board's consideration.

 And I am not consenting to anything. So I put the evidence in. It's uncontested. That's the end of it. You're bound.

 Let me then move on. Prior relevant decisions of the Board. I have dealt with in paragraph 8 and 9 what I have characterized as the Union penalty rate hearing. And you were right, sir, and I will move on quickly, because I will stay away from the broad sweep, but the broad sweep does apply to NRG. I didn't want to leave it that somehow I'm abandoning it, having regard to the very common sensible direction you have given me.

 So I have said this, but in paragraph -- the issue that we're dealing with of NRG's special status is -- was decided in 0154, so to that limited extent it is open, and from that will come possibly a new rate. And that's also part of the direction of the Board.

 So to that extent 0154 is completely open. There is nothing that I can't deal with, but it's only on the evidence which is before you put in by NRG.

 So when, Mr. Quesnelle, you said, well, it is only about this, it isn't, because the second part is rate, and the third part is -- fourth part is interest.

 And so those all were surely raised, in part. We didn't have the advantage, my responsibility, of an oral argument, which might have assisted, I will grant you, because these things are very complicated, and there is lots of things flipping around and --

 MR. QUESNELLE: Mr. Campion, we will only revisit rates if there is a determination that a special status exists, and it will be the revisiting on those rates given the context of a special status if one is found.

 MR. CAMPION: Very helpful, sir, and I understand that, and I hope I wasn't suggesting to the contrary.

 MR. QUESNELLE: No.

 MR. CAMPION: But to the extent that that is a helpful direction, I appreciate it.

 So what has been found and what is binding on the Board in 0154? Your point, sir. We're not raising anything else. Exceptional winter conditions, sufficient to change the rate. Emergency conditions, as I characterize them. Invoking the public interest. That's what the Board found. And it's not reviewable.

 And as you say, as I put in the bottom of -- the only issue left -- took the words out of my mouth, I guess -- the only issue left is whether NRG should be treated differently. That is the last part of 9(a), "as a utility in these provincial emergency conditions".

 The penalty rate charges are designed to encourage compliance, as I indicate here, with the contractual obligations for bundled T service customers. Fair enough.

 I have indicated, as you have indicated, that the Board in its earlier case made no distinction, but didn't give reasons why, which is why the Divisional Court was invoked. We're now invited to give those reasons and reconsider it.

 The Board found that NRG was required to pay the same reduced -- and I use the word "penalty" right here. I put brackets around the word "penalty".

 The interest payment I deal with in (f) and find I don't need to deal with that any further.

 So then I turn to the contract, and really the only important thing left about the contract, because the Board has agreed that it can change the rate and therefore change the contract, is the geographical inter-relationship in paragraph 13 of the facts.

 And I have already dealt with that. Paragraph 14 is the significant public, owned by Union, publicly available asset of storage capacity. And it is very rare in North America. Huge caverns. Huge capacity to add balance to the system. And subject to in whatever proper case it is for NRG's sake, subject to the extra capacity that it had, that it didn't need the gas and didn't buy any gas from the perspective of satisfying NRG's position.

 Exceptional winter weather, I only point that out to you in paragraphs 15 to 18 as a matter of record. I have already dealt with it. It's a finding of the Board and it is binding and that is the end of it.

 The Board then had a subsequent review, which I put in evidence here, and confirmed it in aces and spades, and drew up a number of things which I was not successful in having reviewed, but a number of factors which nobody could have known before those reports were in, not to reargue my point, I'm not, it is just there are huge issues at work in North America in these conditions, and why I characterize them as "emergency". Fine.

 The prudency attempts of -- or the prudent actions of NRG and attempts to get the gas. I deal with this issue of Union's non-action, refusal to waive rights, sticking to the contract. Not considering the plight of the customers of NRG.

 I have dealt with it in large terms. That's 19 and 20. 21, I deal with the NRG in the marketplace, going and purchasing at 26.81. Fine. That's past now. It's dealt with.

 And then the activities that Mr. Lippold and other managers at NRG went through in paragraph 22 to purchase gas. Again, asking for assistance from Union and unable to get it.

 And the proposition that the remaining -- they had 115,000, as you know, gJ that they had to obtain. They obtained, obviously, the bulk of it, but they couldn't get as delivered on February 28th no matter what they tried as they approached the end of the month the 25,496. And the total cost, as you know, was $2.4 million, and that's been dealt with at least on an interim basis in the QRAM decision already made to date, which I've mentioned earlier.

 The conclusion on the evidence put forward by Mr. Lippold, which was untested by everybody, that NRG did everything reasonably possible to meet the contractual obligations. And there is no way and no room to come to a different conclusion. It's put forward as evidence. It is not tested. And in my respectful submission, the Board is bound by it. Paragraph 25.

 Paragraph 26. Again, Union denied any assistance. It then contacted the Board to ask for assistance and intervention. They got no call-back from the Board.

 Now, in fairness, I don't want to carry this too far, query should a motion have been brought? Should there have been something else going on here? I mean, the Board can't just deal with only phone calls. I mean, it is helpful, but these things can, you know, fall between -- slip between cup and lip, and calling may or may not have invoked, but in any event, the call was made. The response was hoped for, and no response was given.

 And I only raise this in part to show that NRG tried everything. They weren't sitting around saying, I'm going to game the system. I'm going to use, you know, hearing upon hearing upon hearing after the fact to try and get it. They were trying everything they could, which is what they are expected to do, in what is now known to be the emergency conditions of 2013-14.

 Then Union sold the gas and the evidence is untested and unanswered that Union did not actually purchase gas. It just delivered what it needed from storage, which it paid $7.12 and charged $78.03, and sent a bill.

 I then deal with the invoice at paragraph 30 of $2 million invoice, for which we ask that no interest be exigible, and we know where that stands.

 Union -- and this is -- in paragraph 31, this is -- I'm sure that you captured this in one, but I found it as I was drafting this argument late last night, that there was an interesting perspective on Union's going forward. I was very surprised that Union went forward to ask for, from 78 to 50.50 on an ex parte basis. We didn't know about it.

 And we finally heard about it somehow or another. I think Mr. Lippold had his eye on something and found it. And I said, Oh, wow, so I objected, that we should have a right to have a say. And the Board obliged my request and gave us a say, turned an ex parte case into something else.

 But by Union moving forward to change its own Board-fixed rate, based on facts which they were worried about the financial condition of their customers, they were exercising a responsible public interest obligation.

 So I congratulate them on that, except they chose 50.50, when they only paid 7.12. But that's an issue about rate; fine.

 But the extra nuance was I say Union has a public interest obligation. It isn't just a capitalist enterprise. It is accepted that by doing that, by making that application, it accepting its public interest obligation. It didn't go all the way, but it accepted it itself.

 So when I make the argument that Union isn't just a capitalist enterprise which can do as it sees fit, subject to fixing rates here, I say no, that is not what happened. It accepted the broader public interest.

 And once it is there, it has to consider NRG's ratepayers as well. It isn't just free to look at the financial condition of CIL, or whatever other huge enterprise is out there, or some smaller enterprise that's paying high gas prices. It has to look at the implications for the consumer of Ontario, this Board's main concern.

 It didn't go far enough. That's why the utility status of NRG is so significant, because if it is CIL, they can raise their prices. It may be one percent of their costs. They can get profits and losses based on their activity; NRG can't. It doesn't get a profit on selling gas. Nor, in my respectful view, should it suffer a loss -- unless it is imprudent, I suppose, which is a fact the Board can consider and is considering.

 But in my respectful opinion, the circumstances are such that Union is obliged to consider if this is a reasonable public position to take when there is no cost to us. You know my view.

 Historic norms -- and I have given, by the way, in the evidence of Mr. Lippold, all of the references -- and it is a very, I think, a relatively complex affidavit in the sense of it has lots of facts in it. So I have referred to those and I am not taking you to that. I might give you a cook's tour of the affidavit in a second. But right now I don't believe -- since there is no test on it -- I have to give you the conclusions. But there has been no testing, so it has to be accepted.

 The evidence is clear of these historic norms. You can see, in paragraph 34, a summary of that. It's somewhat sophisticated; I will say only Mr. Lippold can understand this piece.

 But over the six or seven years prior to the winter of 2013-2014, you could see - in fact we got the evidence from Union itself -- you can see the, how much above, in effect, the cost that Union paid actually occurred.

 And it ranged, as you can see here, about $1.69 above the reference price. And the rates from 2006 to 2013 ranged from $5.37 to $12.45. Compare that to $78.73 or $50.50. Four times for one, eight times for another.

 It wouldn't be -- it is all part -- this is part of the prudence analysis. But you've got NRG explaining what it did. This gives support for when people base rational decisions on past events, they were looking at past events. And at no time did it ever get above the $12.45 and the average increase over Union's cost was about $1.69.

 Well, it was rational for them -- because they always had the February price stabilize and go down, it was rational for them to do that. But little did anybody know the consumers artificially – not artificially, but happen-chancely, decided to have its quantity day for February 28th, a moving target there -- Enbridge I guess -- and that there were events happening in Chicago and at Princess Gate and in the Appalachians which affected the prices here. And it gave the brokers a chance to drive a market price, and they got the money.

 So in my respectful opinion, the historic norms goes to prudence. They did what was appropriate.

 NRG didn't give up. Even though it couldn't deliver on February 28, it asked Union could they deliver on March 2nd, when the price had fallen down to $17 from $78, and the answer was no. Now they didn't need the molecules for balancing purposes; they just said no.

 I say that is artificial. And when you are considering the public interest, it is not the kind of artificiality that Union should have engaged in.

 I deal with the windfall benefits piece, and this is undisputed, that all of this money above the cost to Union of $7.12 goes to Union's residential customers. And it is an identical detriment to NRG's customers, subject to any prudence analysis.

 And in my respectful submission, the Board ought not to contemplate, and Union ought not to have asked for a windfall at the expense of a public utility down the line, because they have no reason to game the system. They aren't caught up in it, and they didn't game the system in this case. And the existence of the found emergency changes it all.

 I remember appearing before a chief justice of the trial division, who went on to the Supreme Court of Canada, called Justice Estey. And we walked in with a highly technical case at one point, and he looked down the barrel of a gun, as any common sense person would, and said, "What is this snow flurry of technicalities?"

 Well, the snow flurry of technicalities is in paragraph 39, and all of the steps that NRG has taken: appealing to the Divisional Court, brought a motion for review, is here today, asked that the interest rate be dealt with.

 With all of these steps, you might think, well, what is this snow flurry of technicality? Well, it has an obligation on behalf of the public, its ratepayers, and it is exercising it. It is obliged to do so.

 MR. QUESNELLE: I don't know if this is a good time, Mr. Campion, but I was hoping somewhere I would have the opportunity to ask you why, if your client hasn't already put it in evidence, what options they have being a direct purchase customer or not, and why did they choose to be a direct purchase customer.

 MR. CAMPION: It's not in evidence, so it would be speculation by me. If you are putting it to me and you would like an answer, I will get it for you and deliver it to you, sir.

 MR. QUESNELLE: Thank you.

 MR. CAMPION: The understanding I have is that this was -- and all of this direct purchase piece came as a result of the hearing which we did when we deregulated the gas industry. That is where direct purchase -- I remember hearing about it, and people were bringing it in. I was Board counsel at this point in time, and I thought, wow, what a crazy business that is, this direct purchase thing. And of course, it's turned out to be a spectacular business, and we have had huge success in lowering the price.

 MR. KAISER: If you could get that from your client then, as to what choices they have, and why they chose to be a direct purchaser?

 MR. CAMPION: To get the lowest price; that is the reason.

 MR. QUESNELLE: Is that something, Mr. Millar, you would like to have an answer for before your submissions?

 MR. MILLAR: In fact, Mr. Chair, we do have an answer to that. There are interrogatories on this very question in this proceeding, in 0044 -- pardon me, 0053.

 MR. QUESNELLE: Okay, thank you. I hadn't seen it.

 MR. CAMPION: They can't use that. They can't use evidence from any other hearing --

 MR. MILLAR: I completely disagree with that, but we can get to that later.

 MR. QUESNELLE: Thank you.

 MR. CAMPION: In any event, I will look at that and see what it says, and tell you whether I agree with it or not.

 MR. QUESNELLE: Prior to hearing other submissions, I was going to ask that exact point that I expect hear argument on –

 MR. CAMPION: No, it's the –-

 MR. QUESNELLE: Mr. Campion, can I just finish here?

 MR. CAMPION: Oh, sorry, sir.

 MR. QUESNELLE: I just wanted to make sure that we are going to receive arguments -- submissions on Mr. Campion's argument that anything else cannot be brought in.

 MR. MILLAR: Certainly, we will. But for these interrogatories, they are filed in this proceeding, not in a previous proceeding.

 MR. QUESNELLE: Thank you.

 MR. CAMPION: But it can't be used in this part of the hearing under the SPPA.

 MR. QUESNELLE: I would like it to be used here, so we're going to figure out how we're going to do that.

 MR. CAMPION: You know something? I am going to consider that direction, and I will have an answer for you after the break, sir, without hesitation. If that's what you'd like, I am sure my client will give me permission to do it.

 I am much obliged, sir. We don't need to have an artificial argument about the evidentiary piece that is of interest to the Board.

 MR. QUESNELLE: Thank you.

 MR. CAMPION: So just and reasonable rates; paragraph 40. This notion of reasonableness has been considered, and it deals with the existence of justification, transparency, and intelligibility in the decision-making process.

 And I cite some cases there, but I don't think there is any doubt about what you are trying to capture in the word. And the decision must fall within a range of possible and acceptable outcomes that are defensible.

 Well, the reason why I took so much time to put this into a philosophical concept, to detail the public obligations and interests that are at stake here, which are extremely complex and philosophical, I grant you, is that 50.50 leading to a windfall and a concomitant detriment is simply not an acceptable or defensible outcome.

 Imposing it on the shareholder of NRG -- assuming you could even get there -- which I say you can't on the evidence, but assuming you could get there, there is no reason to do it. There never was. This is an artificial proposition.

 There was no gaming of the system. That's for sure. 50.50, 78.73, wholly artificial. What is real? What they paid. That's the only real thing. It is the only defensible proposition.

 Paragraph 42. I state that point. Why? One, the winter conditions, in the second sentence. They have been found so extreme that they warranted a change. Everybody agreed and did it. It just was the wrong rate. Once the emergency conditions were found and so extreme, the notion of penalty became irrelevant for NRG. It ended.

 What's the rate the people of Ontario should be paying? NRG and Union are monopoly entities, and they should be seeking the lowest possible price, not a windfall for one set of customers over another. It should not be permitted by this Board.

 Three, the lowest possible price in the next sentence is $7.12. Anything above this is the windfall piece and the detriment, and I say in 4, no utility is permitted to profit from the purchase of natural gas. Union shouldn't be profiting. Its customers shouldn't be benefiting. And it shouldn't be a detriment. Again, it is on these special circumstances, and NRG is a utility.

 The rational, as I say in the sixth point in paragraph 42 -- the rationale for the penalty rate was the desire on the Board to ensure that Union was made whole and to provide a disincentive for a direct purchaser to default on its obligation as a purposive matter. Nobody was acting purposively, and certainly not NRG, and that is why I referred to Malcolm Jackson's decision.

 NRG has no incentive to default because it can't gain or lose. NRG, the corporate entity, has no reason to game the system. And certainly not in this case, and didn't.

 So the seven points that I have as to why the 50.50 is not acceptable and the cost is the only acceptable one are set out in paragraph 42. And I conclude that in paragraph 43.

 I then deal with the public-interest obligations on Union, and I have largely dealt with this at some length, and I commend paragraphs 45 to 49 to your attention, but in my respectful submission, Union recognized the public interest when it made the application, which lowered the rate, having accepted it, and I don't have to argue the philosophical point, and the only acceptable public interest is not to create this windfall detriment in the piece when they didn't have a cost.

 Paragraph 50. The public-interest implications for NRG and Union Gas from the penalty rate cost of gas. I have largely dealt with this in paragraphs 50 to 59, and I am not sure that I need to go through my detailed argument here for you. You have heard me on the point, but in my respectful submission, the public interest cries out for this Board to protect the consumers of Ontario, all of them, avoid a windfall, deal with the issue that these were already found to be emergency conditions which required exceptional orders and care for the consumers of Ontario, and everybody should have been pulling together, NRG, Union, and the Board, to avoid any possible payments rather than looking to what effectively was an argument that really didn't make it for NRG, and that is, somehow we have to avoid them gaming the system at some other time. They weren't doing it. They didn't do it. You can't come to that conclusion in this case, and that's the end of it.

 NRG had its public-interest obligations for its ratepayers. Union had it for its own customers, which included NRG and, indirectly, the ratepayers of NRG. It didn't have an eye to either, and is sitting here asking for a windfall benefit. In my respectful opinion, it should be denied.

 Issues 1 and 2, beginning at paragraph 60. Distributor status issue, rate for balancing gas issue. Those two, I think, are properly dealt with together, and obviously issue 1 lies in effect at the centre of my broad-based public-policy issue and the -- as it affects the utility and as it affects NRG. And I state, I think, a series of propositions here, which I have largely stated. And that is the difference between NRG and a private-enterprise customer buying gas either for heating or for a production input. Take Ford or Toyota.

 In the emergency conditions NRG can't stop purchasing gas. It has got to supply it to heat homes. It stands in a different position than Ford, who can shut down a line. It isn't a matter of survival. There is no -- there's no issue in -- at Ford.

 At hospitals and universities they have co-generation facilities, giving them the ability to switch to hydro if natural gas comes down so they can still heat their units. It is not the same for homes and residential customers, who lie at the centre of this on both sides of Union and NRG.

 So in my respectful submission, the issue of NRG stands entirely different. There is nothing they can do. If they have an extra-high cost, it is either going to go to their shareholder or to -- if there is imprudence, or to the residential customers, and it is expected to go to the residential customer, and everybody should have been moving and think about what the implications of their actions or inactions were when it came to that.

 Ford isn't sitting around worrying about a residential customer, which is at the base of this Board's jurisdiction.

 And so the differences among the institutional, who might be direct purchase customers, and a utility, which is a direct purchase customer, is significant.

 NRG has an obligation at law, and it doesn't escape the public-interest obligation, to have the lowest possible price. A non-utility does not. They have means, as I say, in paragraph 62 to either avoid using it or to recover additional costs and higher prices as they see fit. So if it is 1 percent of their cost for production, fine. They just increase their costs if they deem it necessary. That is not the options that NRG as a utility has.

 I deal with the smaller -- the natural gas being a smaller component of the overall manufacturing and production costs and therefore something that can be impacted. They can change it by changing their prices to the public, again, without any permission needed from anybody.

 Paragraph 63, this complication of different marketers in -- they actually can pool their gas contracts and make some provision to protect themselves if indeed they face the same kind of conditions. NRG doesn't have that.

 Paragraph 64, I ask the Board to conclude that NRG does not have the flexibility of its industrial customers and, therefore, makes no profit. In my respectful view, that is a fundamental difference, public obligations.

 Capacity to move, obligation to make sure the gas is there, recovery of cost, lowest possible price; all of those features, in my respectful opinion, made a fundamental difference between NRG and the private customer who might be a direct purchaser.

 I indicate the conclusion that I would ask the Board to draw in paragraph 65, on the rate side of that piece. Assuming that I have made out the case of difference, what rate should you have?

 In my view, it is Union's cost. Union doesn't have a profit or a loss, nor should it, nor should its customers, on the sale of the product. It's a principle that we have adopted here at the Board, and so be it.

 So in my respectful opinion, if that's the principle that ought to apply across the Board, you start with Union's cost, $7.12.

 Whatever decision you make, issue 3 is dealt with in paragraphs 67 to 70.

 And there is simply no answer to the prudence, no factual answer, and there is no cross-examination on the point. Mr. Lippold's evidence has to be accepted in full. And in that case, the prudence has been met with actions in February and January, seeking help from Union, seeking help from the Board, seeking a right to deliver on March 2nd, and all of these proceedings in order to protect its ratepayers' interest.

 If there is a prudence award, they ought to be given it.

 The interest issue, I believe, follows the outcome of the other pieces. And as I said, until it is final, there ought not to be any interest.

 I deal with this notion of the use of the word "penalty" in this case, which carries with it an assumption of either gaming the system on one side, or imprudence on the other. And I say -- and I ask the Board to treat that word with great care in these circumstances, because if I am right on all of the evidence and the Board adopts my submissions on the evidence as led, then there shouldn't be an inherent underlying assumption of impropriety in the use of a word. I therefore deal with section 73.

 Before I complete, you asked me a question and that is: Why did NRG go direct purchase?

 My first -- and I will go and see what that answer was, and see if there is something I should be saying more or less, because I have forgotten what we did indeed say. It is my respectful submission that it is not relevant.

 As you quite rightly said to me, Mr. Quesnelle, get to the point. Not quite so directly, but I took it that way. And the point is set out here; you have read them.

 This isn't a review of adopting direct purchase and, in my respectful opinion, it is unavailable to the Board as a rationale for doing anything. Nor should it be made the subject of comment on the basis of an answer given in an interrogatory.

 If we're here to look at the purchasing history, and some direction the Board may give NRG regarding its purchasing policy, fine. We will come here and put in proper evidence to deal with it.

 But whatever the reasons are, acceptable or not to the Board as it presently stands, I -- if I had to argue it, I would say this. This is an emergency condition case found by the Board. This isn't a case of, "You shouldn't be doing direct purchase. Give us your rationale, NRG."

 I say it is not relevant. And even if it is, it's not in the scope of this hearing. So in no uncertain terms, sir, I am willing to hear what my friend has to say and I will look to see what the answer is -- I don't have it readily available. But I assume my friend does, and he will give it to me before he tries to submit it to the Board.

 So in my respectful submission, it is not relevant. We're not here to answer that issue. If my friends wanted to raise it as an issue, they should have asked for an additional issue before the Board. They didn't. The Board should have directed it, if they wanted to hear about it, in which case I would have come armed not with a quick off-the-cuff answer on a telephone call, but with a full, considered view.

 MR. QUESNELLE: Mr. Campion, what drove me to the question -- and if it's there, it's there. If the answer is there, it is available to us.

 A lot of what you were talking about just in your final argument back a few paragraphs, or your submissions here, were that the Board should be cognizant of characteristics that you have as a direct customer, which are different than other direct customers.

 MR. CAMPION: Yes, sir.

 MR. QUESNELLE: And how is it that your choice to become a direct customer is not relevant?

 MR. CAMPION: In my respectful view, it is a taken given going into the winter of 2013-2014.

 MR. QUESNELLE: Okay.

 MR. CAMPION: We are a direct purchase customer. Decisions were made years before. I haven't plumbed the depths of why that was done, and who said what to whom.

 Answering something this off-the-top, I always found as a barrister, is very dangerous because I don't know what the Board sees in the question.

 The question is: Is it relevant why, years before it made the decision -- and by the way, it was reviewed by the Board in each year it had a rate case, and the Board could have at any time said we don't think NRG should, for some reason -- should explain position as to why it is a direct purchaser.

 MR. KAISER: I don't want to get into the submissions we're going to hear, Mr. Campion. But if there was a question of relevance to the response to an IR, it should have been raised then.

 MR. CAMPION: No, it is not in this case. It is not in this hearing.

 You started this case off and you gave, in writing, and you gave me oral --

 MR. QUESNELLE: I want to hear arguments as to whether or not the evidence in other cases can be and will be used here. So let's hear that, and we will hear that and we will hear your reply to that subsequently. I understand from Mr. Millar that he's not in agreement with this, and I would expect that we will hear some argument on that and you will have your opportunity to reply to that.

 MR. CAMPION: That's fair. Now, what I have offered to do, if I get the IR answer given to me, is to look at it and if the Board questioned the point --

 MR. QUESNELLE: Why don't we do this? Why don't you take a look at it over the break, and we will allow you to complete or supplement any more -- we will not complete your argument in-chief at this point. We will let you do that after the break.

 MR. CAMPION: Much obliged, sir.

 MS. HARE: I would like you to confirm for me that the contract that NRG has with Union has the same clause about balancing that every other direct purchase customer has.

 MR. CAMPION: It does.

 MS. HARE: And did NRG ever try to argue then that that clause should not apply to it?

 MR. CAMPION: It didn't need to.

 MS. HARE: And I also quickly looked at the decision where you referred to "emergency conditions" that it was unanimously accepted.

 MR. CAMPION: Yes.

 MS. HARE: I don't actually see the words "emergency conditions" anywhere.

 MR. CAMPION: That's fair. I did say it was my characterization of a short form.

 Once the Board made the decision that it would change a rate on the basis of the unprecedented, unpredictable and harshest winter in the history of keeping records -- which is Union's testimony, which is the Board's finding, and which was everybody's testimony at the case that we put in evidence from the Board's December review -- in my respectful opinion, the words "emergency conditions" is a short form.

 I will take the other synonyms, which I put in my submissions, and call them fairly unprecedented and unpredictable and – "exceptional" was the word used by the Board.

 So if it makes the member more comfortable, I will use the word "exceptional". I certainly took that as an emergency condition. Prices going up and people freezing in the dark doesn't sound to me like a happy circumstance.

 MS. HARE: Thank you.

 MR. QUESNELLE: Okay, let's break until a quarter after eleven, and we will hear from you then, Mr. Campion.

### --- Recess taken at 10:55 a.m.

### --- On resuming at 11:20 a.m.

 MR. QUESNELLE: Thank you. Please be seated.

 Okay. Mr. Campion, before the break you were going to take a look at a response to an IR and determine --

 MR. CAMPION: Yes, I am, sir -- my only exercise of power in the day, and I've missed it.

 So what I would like to in answer to that question is, in answer to Member Hare's request of me about the contract, it's obvious that you didn't have an opportunity to read Mr. Lippold's affidavit.

 So I am going to take you to it. I think that is the best way to do it, because I think it is very important that, since I have taken the position on the evidence, if you didn't understand that we had a contract, then it was very important that I --

 MS. HARE: I understood you had a contract.

 MR. CAMPION: Then why did you ask the question? I didn't understand why.

 MS. HARE: I wanted to ask whether or not you ever tried to delete that clause if you thought that NRG was different from every other direct purchase customer. That was the intent of the question.

 MR. CAMPION: I see. I think it best to put my proposition in answer to you in this way, Member Hare. I am not here seeking a generalized exception, and nor was I invited to by the Board.

 So in my respectful submission, the question about, did we go and seek a generalized exception, now that you raise it, it might be interesting to do. It hadn't been done in the past, but it was never needed.

 And so it is only -- this case only arises in what the exceptional circumstances I characterize as emergency conditions. And I don't wish to take it any further than that. But the broader base in analyzing the position of NRG as a utility takes us to some extent slightly broader afield, but I always want to bring it back for this case to the emergency conditions. I do not wish and I am not looking for a generalized order about NRG and its contract with Union. If it were going to raise that, then it would raise it in Union's case, because it is a standard form piece, or it would raise it on its own hook as an exceptional piece. It didn't. And it never has. And nor was it ever necessary, and I will tell you why.

 I am going to consent to the answer to Interrogatory 2, Mr. Quesnelle and Ms. Hare, going in, but under objection. Much the same as I do not believe the generalized notion, why didn't we go and do something, it's sort of -- the context of this is, when did you stop beating your wife or some such other feature. It is a question that leads to and presumes an answer, which is why I am so careful about it.

 There is no reason to raise the generalized piece ever, and the reason is this.

 So I'm putting this in under objection. Here is the question and here is the answer:

"Please explain why NRG elected to be a direct purchase customer of Union Gas Limited. Please provide any analysis that was undertaken at the time that NRG made the decision to become a direct purchase customer.

"Answer: NRG elected to be a direct purchase customer of Union Gas Limited to obtain the least costly and most secure supply of natural gas for its own customers. Indeed, some of NRG's own direct purchase customers themselves chose to have direct purchase arrangement with NRG. This arrangement was and has been approved by the Ontario Energy Board since its inception. All purchases of gas under the direct purchase program have been passed on to NRG consumers after Board approvals. There is no available written analysis made at the time that the direct purchase program was first available and undertaken."

 But I can advise the Board -- although I don't believe it to be relevant, but since the Board has taken us down this path, I am going to have to answer it -- that over this last year NRG and Union have had discussions about the very topic. And they have tried together to analyze what are the factors, and the decision is NRG's to make, and they are still in the process of discussion with Mr. Boyer (ph) of NRG -- of Union, who figures in the evidence about the conversations between Union and NRG during the critical period.

 So in my respectful submission, it is not relevant, either the generalized notion why didn't we go and prevent this happening when there was no problem. We got less costly gas. We got more secure gas. And only in the emergency conditions did it turn out to be, having regard to a formula which was changed by the Board anyway at Union's instance, did it somehow come to this point. I don't seek to go any further. I wasn't invited to go any further. The Board didn't direct me to go any further.

 And with respect to then why do we do it in the first place, it's not relevant. Are we having ongoing discussions? Yes. Does it seem that direct purchase is the least costly way? Yes. Is there any reason to change your mind? No. Has Union attempted to change your mind? No. Has the Board ever suggested we change your mind? No.

 There is plenty of opportunity in due course in organized circumstances where you can put in proper evidence to do it. But when you ask the question the way you did, it's got a focus to it, and it doesn't feel like it is in favour of the position I am taking.

 When you asked me whether I had a contract, when it is sitting here in front of you, I wonder why.

 MR. QUESNELLE: Mr. Campion, that isn't what Ms. Hare asked, and she clarified exactly what the intent was, even though she wasn't really required to. She --

 MR. CAMPION: I'm much --

 MR. QUESNELLE: Mr. Campion --

 MR. CAMPION: I am much obliged, sir.

 MR. QUESNELLE: Thank you. Mr. Millar?

 MR. CAMPION: I am not done yet, sir. I was answering your question. I was in the middle of my argument, and I am going to complete my submissions, if you don't mind, sir.

 MR. QUESNELLE: Carry on.

 MR. CAMPION: Thank you. If you would look at the affidavit of Mr. Lippold, since I am concerned that the Board have a full understanding of the evidence and since I have asked it to be so, I would ask you to turn to it, please.

 MR. QUESNELLE: Hmm-hmm.

 MR. CAMPION: It is at tab 19. First of all, Mr. Lippold has indicated his status and place in paragraph 1. He is the only person to provide evidence in this entire hearing. And he is the only person to provide evidence in circumstances where it has not been cross-examined or challenged in any way, shape, or form.

 In the part 1 of the introduction, paragraphs 1 to 13, he deals with NRG and its relationship with Union, including, in paragraph 3, the contract and the clauses in the contract. There has never been any doubt about it.

 He then goes on to deal with the winter checkpoint balancing process and the circumstances that have led to this hearing. His evidence is put in for this hearing purposively knowing that the Board has to have evidence upon which to act, and it can only act on the evidence that is here.

 So I wasn't saying, look backwards in time. If I wanted you to look backwards in time, I took you there.

 Part 2 deals with the Union and NRG geography, which, of course, leads to the conclusions drawn in paragraph 19 about the windfall characterization among residential consumers between the two utilities. That is untested and not in any way opposed.

 So artificial negative result that one group suffers a detriment and the other group suffers a windfall between neighbours, in my respectful submission, is the only evidence before you on the point.

 Historic norms. Paragraphs 20 to 25. That deals with the -- in a more complex way, why the past experience, including being a direct purchaser that Ms. Hare enquired upon --

 MR. QUESNELLE: Ms. Hare asked you if there was a clause in a contract, Mr. Campion. And the answer was yes. She didn't ask anything -- sorry, carry on.

 I am interrupting. But your characterizations, I think you could be a little more accurate with them. It is just going to be confusing on the transcript when we go back, Mr. Campion.

 MR. CAMPION: Oh, certainly. I wouldn't intend to have any confusion, sir.

 MR. QUESNELLE: I recognize that is not your intent.

 MR. CAMPION: I will be very cautious to be as simple and clear as I possibly can. And I apologize if I haven't been able to do that to date, sir.

 MR. QUESNELLE: Thank you.

 MR. CAMPION: So historic norms we deal with in some detail. Again, there is no suggestion that this is not so, and paragraph 23 is possibly instructive.

 The average penalty paid per customer was $23,800 prior to February 2014. The average paid in 2014 was $400,000 per customer.

 And it really is the sort of result of what I characterized as the exceptional conditions, or what the Board characterized as exceptional and I characterized as emergency.

 Then part 5, the extreme and unprecedented winter conditions. And this goes on at some length to deal with the remarkable set of circumstances where you've got press reports that country's worst winter on record in North America, and the fact that it had a 1.7 percent impact on the GDP.

 This is not – "exceptional" is a word which is fair, but it is probably light. This is not heard of, that weather would have this kind of impact, and never happened before.

 And so the historic norms and the weather conditions, which the Board has accepted and then led a whole hearing on, in my respectful submission, is detailed from paragraphs 22 to 41, led to Union's invocation of the public interest to get a lower rate. They just didn't go far enough.

 I have dealt with, in page 8, paragraphs 42 to 49, about the calculation of the windfall amount and the QRAM.

 On page 9, paragraphs 50 through to 61, I deal with the Union penalty rate application, 0154. And while it is not expressly here -- and therefore, presumably its evidence can't be used -- plainly you must be guided by the findings in it.

 Mr. Quesnelle has said, well, it's here or it's not here. And you said 0154 wasn't here, and I take you at your direction. But it does have some relevance for your consideration, sir.

 Then paragraphs 62 and 63, the subsequent steps; I think that that is of some importance in the prudence piece.

 And I should take you back, if I might, to paragraph 39. I may have misinformed the Board, and I just want to correct it.

 This deals with, after Union was denied assistance to NRG, the utility contacted the Board to ask for assistance and intervention, and no response was received. I think I'd suggested that was a telephone call; it was not. It was a letter to the secretary on February 20th.

 It is not here, but I think I had misunderstood myself, and I was corrected by the client. So it was a formal letter written to the Board seeking assistance, and no response was ever received. It was sent to the secretary.

 MR. QUESNELLE: But it's not been filed?

 MR. CAMPION: It is not, sir.

 MR. LIPPOLD: It was submitted in an earlier case.

 MR. CAMPION: So it will be on the Board record, sir.

 MR. QUESNELLE: Thank you.

 MR. CAMPION: That would a reference point, I suppose, just to be sure that we're absolutely accurate. But it is not evidence in this hearing, and I have taken my point on that.

 The public interest implications is a matter of evidence. It is described in paragraphs 64 to 73. And then the differences among Union's private sector customers and NRG as a utility is detailed in 74 to 78 and, in my respectful submission, there's simply no answer to all of that.

 In answer to -- and I take your point, sir, that Ms. Hare had a much larger question than I had asked about the contract. The contract is at Exhibit A, if that's of assistance, Ms. Hare.

 And I don't need to deal with a lot of these exhibits, but I just note for the record that the Natural Gas Market Review which was extremely valuable and helpful, I will say, and all of the extraordinary reports that were prepared at the direction of the Board -- D, E, F and G -- all of those exhibits are the filings, including Union's own filing about the circumstances, all of which accord with the circumstances that I have characterized to the Board as emergency conditions -- although, again, it is my word.

 The relevant decisions and orders; obviously 0154 is here in evidence, and indeed the two of you were presiding on this, and page 7 is obviously the point at which NRG's arguments were reviewed. As I've indicated, we appealed this decision to the Divisional Court because of the -- one of the reasons was the nature of the reasons and the fact there were no reasons; in effect, they were conclusions.

 And we're now back here, so be it, to explain the circumstances. And I can't tell you how much we are obliged to have the opportunity, sir.

 That renders the -- then we have the Divisional Court piece, which is just mentioned in tab J, and the notice of motion to stay pending the outcome of all of these proceedings. And then the decision and order on March 13th in 0375.

 Finally, the interrogatories of NRG, and there are some important points. If I could ask you to turn to tab 20?

 Union – sorry, Board Staff put a question in Interrogatory No. 1. None of these questions are simple, I will say, and seem to have a point in them.

 So question number 1 is: Please confirm the monthly purchases referenced are the regular contracted purchases and do not reflect spot purchases.

 Well, I suppose this -- at least, as I saw that question, it was indirectly trying to get at, have you ever done the spot purchase before? Are you just imprudent, inadequate, any of that? Do you not know this market at all?

 This is what I took from this question. I may be wrong, but that is what I took from it. So it is answered.

 NRG -- and it is important on this prudence piece. NRG does purchase all the time in the spot market. That is how it gets its lowest price, Member Hare. That's what it is obliged to do. And this is the only time it didn't work, and it didn't work for others.

 But this is a utility, not a private enterprise customer.

 So it went forward on the material that I have now consented to, as far as it goes, for the least costly and most secure, and it has all of the experience in purchasing the spot market because that is how it lowers its price when it has to. And as we know – well, I won't deal with that.

 So Interrogatory 2; this is somewhat the same as what Member Hare put to me, and that is direct purchaser and the contract, what's the nature of it -- so that's fine.

 Board Staff was asking why is Union obliged to protect energy NRG ratepayers, and does NRG accept its obligation to protect its own ratepayers.

 Well, these are right in the essence of the Philosophy, which is why I raised it in the first place. So the Board Staff has raised these questions. It wasn't me raising them at the beginning, I will say. So they found it to be relevant. And I answered it.

 And the important part of all this is that NRG is, indeed, a direct purchaser but with a difference, Member Hare. It is a direct purchaser for all of its system customers, not for itself. It receives no profits and should suffer no loss, subject to the prudence analysis. And it has the same obligations as Union itself.

 I then dealt with the, what is the rationale about Union having the public-interest obligation? Well, Union recognized it and acted upon it in 0154. So it's got the obligation, and if it's got the obligation to protect the interests of its own customers, it surely has the obligation when you are dealing with the public interest, because this is a public-interest entity, and ultimately we are responsible to this Board for making sure it did. It has to look to other consumers of customers in this case, another utility.

 So I explain all of that and go through the question, because it was obviously very important. And then as a "when did you stop beating your wife" question again, does NRG accept it has an obligation to protect its own ratepayers? Of course we do. Why do you think we're here?

 Interrogatory 3. Those are mere corrections of numbers. I don't need to spend any time on it.

 Interrogatory 4. I suppose that there are two questions inherent in issue 1: Why is there a difference between the two? And there plainly is a difference. One is the public-interest obligation, one does not. One is acting for others, one is not. It is acting for itself, so fine.

 There's a fundamental difference between a private-enterprise direct purchaser and utility, and NRG is the only utility in the position. That's number 1.

 But there is inherent in all of that another character of it. And -- no, I don't think I need to go any further on that point.

 In my respectful view -- sorry, interrogatory 5. Right. Board Staff or somebody has put forward some -- oh, yes, staff proposal is splitting costs here, there, and everywhere. 50 percent disallowance.

 I will be interested to hear why, but it really isn't in a position to argue the point because it has accepted the evidence on prudence. There is no room for a 50 percent cut on the facts. And the continuous concern that NRG has shown from the beginning to the end before Union, before the Board, in seeking assistance of the Board before the event, all of those pieces deal with this staff proposal here which they have just given us. They say, Oh, no, let's have 50 percent. Well, there is no factual ground and capacity to do it.

 One of the reasons why the first decision was the subject of a review in the Divisional Court was that there was no reasons given, it was a mere statement.

 If you go to reasons in this case, you've got no evidence but the evidence before you upon which to rely, which is not cross-examined upon or objected to.

 The Board Staff is not in a position to make the submission that somehow there be a 50 percent disallowance. It can't do it. It had to cross-examine Mr. Lippold. It had to have other evidence to show why it was imprudent.

 So in my respectful opinion, this here is -- interrogatory answer number 5 is somewhat the same, but there is no ability in the Board, no factual basis, upon which to make such a decision. I am much obliged.

 MR. QUESNELLE: Thank you, Mr. Campion.

 MR. CAMPION: Thank you, sir.

 MR. QUESNELLE: Mr. Millar.

# Submissions by Mr. Millar:

 MR. MILLAR: Mr. Chair, I am wondering how you would like to proceed. There is obviously an issue between the parties on what is evidence in this proceeding and what isn't. I am going to be referring in my argument to many -- not many, but a number of documents that if I hear Mr. Campion correctly he thinks are not before you in this proceeding.

 My suggestion is that we would deal with that at the outset so we don't have to have objections as every document comes up. I have had some words with my friend, Mr. Smith, as well. I think he would have some submissions on this issue as well, because he may be referring to some other documents. But I am in your hands on that.

 MR. QUESNELLE: So you're suggesting you would provide some arguments on that narrow issue?

 MR. MILLAR: Yes.

 MR. QUESNELLE: Mr. Smith, you would also have submissions on it?

 MR. SMITH: I would, thank you.

 MR. QUESNELLE: Yes. And I take it that -- and we have heard your initial submissions, Mr. Campion, and then you would have response, obviously.

 MR. CAMPION: I am much obliged.

 MR. QUESNELLE: Thanks, Mr. Millar. Let's proceed on that basis.

 MR. MILLAR: Okay. Why don't we start with that, then.

 I think at the outset it is very important to look at what this proceeding is and how we got here. Mr. Campion has taken you through this, but I want to run through them once again.

 You can see many of the file numbers right on the style of cause for this proceeding, but just to refresh the Board's memory, the first one is 2014-0053. That is NRG's April 2014 QRAM, where the penalty amount initially appeared before the Board, and in that case the Board still has not made a decision. It made an interim rate order and decided that that issue would be explored later.

 And I should point out it is not just the penalty amount that was in dispute there. There are submissions from the parties on this. This is all on the record.

 NRG also made a late spot purchase in February 2014 at, I think it was $27 or something like that. Staff and I think some other parties thought that was excessive and was challenging that number as well. So it wasn't just the penalty. It was the amount of gas that Union had -- or, pardon me, NRG had been able to purchase just before the checkpoint.

 The Board has never reached a decision on that. That hearing is still open, and it hasn't -- it hasn't turned its mind to that.

 Indeed, you will see the point at which we do look at that is today. It is right on the style of cause. The first number you see on the sheet issued by the Board EB-2014-0053. That's the 2014 QRAM.

 You can see it further when the Board describes what today's proceeding is about. You see the third in the matter, in the matter of a quarterly rate adjustment mechanism. That is 0053. That's within -- that is today's proceeding.

 The next proceeding was 0154, 2014-0154. That is the reduction of the penalty amount that Union actually proposed from $78 to about $50. You will see again if you look on the style of cause, the second-last "and in the matter of", "an application by Union Gas Limited for an order or orders approving a one-time exemption". That's 0154.

 Now, you'll notice you don't see 0154 up above. The reason for that is 2015-0044, that is the Board's own motion on 0154. So 0154 is clearly part of today's proceeding.

 The third was the -- you will see there 0361. That is the stay of interest charges. Again, you will see that in the fourth "and in the matter of". That is the interest charges piece. So that is clearly before you today.

 And then what you don't see here is 0375, and you may recall that was actually the initial motion to review brought by NRG on the 0154 proceeding, and you will recall what happened there was the Board rejected that motion, but in its place did a motion to review on its own motion for what I would characterize as a subset of that 0375 proceeding.

 So in my submission, all of these proceedings are before the Board today and the evidentiary record from all those proceedings is before the Board today.

 And the Board has every power to do this. This is simply a combined proceeding. What you have done very clearly on the first page of the documents issued by the Board is combine all of these proceedings, because there's been no decision rendered in any of them.

 And I don't believe this is subject to any dispute, but clearly the Board has the power to do that. At section 21 of the OEB Act -- and I apologize, I don't have a copy of it here because I didn't realize I would have to make this argument, but I can read it in fullness.

 So consolidation of proceedings. This is 21, section 21(5) of the OEB Act:

"Despite section 9.1 of the Statutory Powers Procedure Act, the Board may combine two or more proceedings or any part of them, or hear two or more two or more proceedings at the same time without the consent of the parties."

 Which is clearly what has happened here. Frankly, I wasn't aware there was any question; I didn't know that was in dispute. That's what is on the style of cause, these proceedings.

 And just on a related point, I think Board Staff -- I am not sure if Union will do this or not, but Board Staff plans to refer to a couple of documents that were filed in other proceedings, in particular NRG's most recent QRAM application.

 In fairness to my friend, that is not on the list here. That is not part of the combined proceeding. But I do want to point out that, first of all, that is not uncommon at all. It is NRG's own evidence in that case, and the Board clearly has the power to do that, and I will read from section 21(6.1) of the act:

"Despite section 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."

 Clearly you have this power, and this is actually quite commonplace. So just to be clear on this point, first, this is a combined proceeding. There is no need to even go to section 21(6.1), except possibly for this tiny reference Staff may make to NRG's most recent QRAM. It is simply a combined proceeding.

 All of the evidence is before you. It is not simply Mr. Lippold's most recent affidavit; it is everything that has been filed.

 And again, I don't want to get off topic here, but I am not sure this is my opportunity to speak to this or not, so I will put it in.

 There have been a number of statements by Mr. Campion that, since Mr. Lippold's affidavit has not been challenged, then every word of it must be accepted by the Board. And that is simply not the case. The Board does not have to accept any evidence that is presented to it. I accept that it wasn't challenged, in the sense it wasn't cross-examined, but it is for you to decide what you accept and what you don't accept.

 And that is not to say that I am disputing -- you know, Mr. Lippold says he filed letters on date X, Y and Z. I am not disputing any of that. Most, though perhaps not all of the facts he says, I think we can easily accept.

 But Mr. Campion goes further than that. He states that it is not even open to the parties now to challenge prudence, because Mr. Lippold's evidence essentially says NRG was prudent.

 Prudence, of course, is not a fact. Prudence is a conclusion one draws after reviewing the facts. So although the facts may be largely agreed to and they haven't been challenged, that's fine.

 Their conclusion that their activities were prudent is not a fact that Mr. Lippold is actually able to speak to.

 NRG can't make that determination. Board Staff can't make that determination, and neither can Union.

 That is your job to decide what is prudent. And in fact, if you look at question 3 for what was presented to the parties today, that's the very question: Should NRG's ratepayers have to pay any of the penalty amounts or the overpayments that staff alleges NRG made with respect to its 2013-2014 gas purchases.

 So prudence is --

 MR. QUESNELLE: Can I stop you there at that point?

 MR. MILLAR: Yes, absolutely.

 MR. QUESNELLE: Is the only test available to the Board on that particular point: should the costs associated with the penalty to be recovered from NRG's ratepayers.

 It seems to be the consensus of the parties, or at least from the NRG and how you just phrased it, that then that would be a test of prudence.

 But there could also be -- we may have a protocol or an approach to things that would go to risk-taking, and irrespective of whether or not all activities taken may be prudent to avoid that penalty, just by the fact that it is a penalty doesn't go to the ratepayers. It's not a test of everything it did.

 I am just -- and I am obviously not there, but I am getting -- what I want to know is, is the Board locked into a notion of applying a prudence test to this question? We didn't ask if it was prudent. We asked should it be; is that the only test available to it?

 MR. MILLAR: I can't think of another test. Maybe I could take a step back and -- look, this all came up first in the QRAM, where NRG says these are the costs that we actually incurred, and then the penalty amount was in there, too. We are seeking the Board's approval to put those through rates.

 Now I understand there was -- also at that time, the reduction proceeding was going on. So there was some question as to what the penalty would actually be.

 But NRG's ask there was to pass on the costs to its ratepayers. So in any case like that, it's were the utility's actions prudent or were they not?

 Again NRG clearly feels they were. Mr. Lippold is entitled to say he thinks it is prudent. But that is your decision, not theirs.

 MR. QUESNELLE: I was wondering if there was -- okay, thank you.

 MR. MILLAR: I think on this point, that concludes my submissions, Mr. Chair.

 MR. QUESNELLE: Yes, thank you, Mr. Millar. Mr. Smith?

# Submissions by Mr. Smith:

 MR. SMITH: Just very briefly, I agree with Mr. Millar. This is a proceeding obviously under the Statutory Procedures Act, but it is equally a proceeding under the Ontario Energy Board Act; and the Ontario Energy Board Act, in certain circumstances, provides for exceptions to what would normally be the rules under the SPPA, under the Statutory Power Procedures Act.

 Two places are section 21(5) and section 21(6.1), and Mr. Millar referred you to the first page of the procedural order. But I would direct you to page 3 of the procedural order, because none of this could have come as a surprise to NRG because you will see, after the four stated questions are referred, to what the Board indicates is that pursuant to section 21(5), which is the section Mr. Millar read to you, the OEB has determined that it will combine the motion to review with NRG's interest rate relief proceeding and phase 2 of NRG's ongoing QRAM proceeding.

 So it was abundantly clear to NRG, and to everybody who received the procedural order, that this was a combined proceeding. And of course, in a combined proceeding, all evidence received in the proceeding is admissible.

 So I don't think -- or I don't agree with my friend, Mr. Campion, that only Mr. Lippold's affidavit is before you.

 All of the evidence going back to NRG's initial QRAM filing to all of the interrogatories which were asked in relation to that are before the Board.

 And of course, I also agree with Mr. Millar that other open proceedings are also available to you. The words used in the Ontario Energy Board Act is "proceedings heard at the same time". I don't want you to fall into the trap that heard at the same time means being heard simultaneously in a different hearing room.

 Of course, that's not the case. The Board may hear matters orally and also in writing. You have open proceedings before you. So I agree with Mr. Millar in that respect.

 I also agree with respect to his comments about the status of Mr. Lippold's affidavit, and what you are entitled or not entitled to do with that.

 The weight to be ascribed to any piece of evidence is a matter for the Board to decide.

 It can ascribe considerable weight to a statement, or no weight to a statement. And it is open to reach that conclusion on the basis of cross-examination, your own experience with respect to the weight to be accorded, or the strength of any particular assertion, and equally entitled to weigh that evidence against other documents that are contained in the record.

 And here, I have no doubt that Mr. Millar will be referring to, and I may refer to a number of documents which are, for example, answers to interrogatories which, in my submission, undermine some of what my friend has said. So that's my submission.

 MR. QUESNELLE: Thank you, Mr. Smith. Mr. Campion.

 MR. CAMPION: Yes, sir. So I think it is appropriate just to look at your order and to carefully deal with the issue, because there are points for and against, and I will give both for and against my position. That is my obligation. This is a procedural matter, and I don't want -- I am not in a position here to -- this isn't an advocate's role. This is to make sure the Board is properly directed on how it should go.

 And I believe it is important for all of us, and it is my obligation to make sure that I give you, whether the points are for or against me, whatever they might be.

 So I think my friends are right, that we should start with the notion of page 3 of the order as to what we're doing here and, in fairness, the Board directed the OEB would like to receive further evidence. So plainly they're looking to -- and further argument in relation to the following questions.

 So as a starting point, the invitation is: Look, if you want to put in evidence and we're going to argue these points, you can refer to the further evidence and have it come in.

 But you've got to refer to it. You've got to put it in. You can't say, all right let's roll backwards so the Board now goes and look at prior records and says, all right I am going to go now and rely on this piece and that piece, because I am not in a position to argue it.

 This isn't a -- this is an exercise in advocacy where the parties are plainly opposed one to the other. So that if you are going to rely upon evidence you've got to bring it forward in the hearing. Not say, let's look backwards in some smoky past and the Board's invited to go back and look at it by itself alone in the room. No.

 It's got no procedural fairness attached to it. I don't know what case I am here to meet. I was very -- some of Mr. Lippold's -- a great portion of Mr. Lippold's evidence has been previously put before the Board. So --

 MR. QUESNELLE: When you refer to the smoky past, are you referring to the ones that are the cases cited that we have combined? Is that part of the smoky past? I just want to make sure I understand.

 MR. CAMPION: I am going to come to that, but it is a very good question, Mr. Quesnelle, and I have got to be very careful in my answer.

 The question is, are you reasonably invited to go and look at something that my friends did not put in evidence before we got here this morning and say, here's what somebody said in 0053 in March? I say no. If you want to put in that March affidavit, lead it here so that when we walk into the room we know what we're dealing with.

 It isn't a matter of saying I am going to reach into some past piece and I don't know the implication. I've got to understand what position they're taking on this motion today.

 MR. QUESNELLE: What would be the utility of the Board exercising its authority under section 21(5), then? Why would it do that if it wasn't the expectation that we would be looking at the evidence there?

 MR. CAMPION: I think what was not contemplated when you are looking at that is the restrictions in the Statutory Powers Procedure Act, which was binding on the Board.

 My proposition is this, and, you know, I have been on both sides of this question for an awful lot of years, 43 as it turns out, and when you come into court and when you come before a tribunal of this significance with an issue that has this many complexities to it, counsel are required to put forward what they're going to rely upon, not walk into the room and say all of a sudden, Here's a piece of paper; agree to it.

 The reason is this: I don't want to be obstructionist, I don't want to be foolish about this, I just want to know the case I had to meet today.

 And anytime somebody on the opposite side who doesn't hold my view -- which is everybody else in the room but me and my colleagues -- I know they're not putting it in to help me. So I might have put a different case if I knew what they were going to refer to. If I knew this was going to be an issue, then I would have come here prepared to assist the tribunal in analyzing what it is has been said, and was it in a context? A different context than here? Was there a different issue being reviewed? I have no idea.

 And I can't -- I can't go tumbling backwards. I met my obligation by redoing Mr. Lippold's affidavit, much of which is previously on the record. I didn't need to file again A to K. I didn't need to file it. They had already been filed, but I wasn't going to rely on that, because my friends would have been surprised. They had the affidavit for a long time. I had my obligations.

 This Board made an order, and it said: Give us your evidence, gentlemen and ladies, and we did. And so, in my respectful opinion, my friends could have come forward and said, We're going to now rely upon this past evidence and now we're putting it back in today so we know what -- so Campion knows what he is going to meet and my colleagues know what they're going to argue. Fine.

 But that's not the way we proceeded. We proceeded on the basis of, you were invited in these three cases, two of which are narrowly encompassed, one on interest, which there is no evidence other than the broad record, because it is really a conclusion to be drawn there. It's a full argument. On the costs to be covered from NRG's ratepayers. That is purely and simply the prudence test. The Board has made it very plain that there is nothing else but that. That is what we came to meet. And there is no other risk-taking component, which I now see where the issue may be that you were raising, did you deal with this or why are you a direct purchase customer.

 So presumably the analysis might be, well, Mr. Campion and NRG is a -- was taking too big a risk, and we're going to find that. Well, that is a huge issue. The Board is not free to grab something out of the air and say that's a risk that NRG was taking they ought not to have ever taken.

 That is why I raised indirectly the proposition, look at -- this is a subject of discussion, Board order and all kinds of things in the past. Why else would you be a direct purchaser but to have the lowest cost and the most flexibility?

 And so, I mean, you could answer the question yourself. But you can't then turn that into a risk component without me knowing about it.

 So the reason why these rules of evidence are here and why you are bound by the Statutory Powers Procedure Act -- and I know that it's ignored at the Board. It has been ignored for 40 years that I have been around here.

 MR. QUESNELLE: Mr. Campion, a little caution on that, thank you very much. We're hearing submissions, and if you want to make a submission, but if you are making an accusation that the Board turns its back on the law, I would ask you to rethink that.

 MR. CAMPION: No, no, no. No, absolutely not. My proposition is the evidence has been casually dealt with at times because people don't raise these issues. In the olden days it was exactly the same, but when Blakes rolled in we knew we were going to be facing the law and a review every time. They acted for Union in those days.

 And it was interesting to see that that rigour isn't always imposed because it isn't needed.

 MR. QUESNELLE: Is your submissions on the protocols that we're expected to follow today and the procedural matters as you described them, Mr. Campion --

 MR. CAMPION: Yes. Yes. So further evidence my friends are half right. If you want to rely upon it, put it out forward so that I knew whether I would be cross-examining it, whether I would be answering it with my own extra evidence, or whatever it might be.

 But you can't just say it is all in now, because you have only got four issues here. So they are half right and half wrong, and that is why the Statutory Powers Procedure Act I decided to invoke. It is not normally done.

 And I say without my consent you can't refer to any evidence which hasn't been brought to the court's attention so that all the parties can be fairly treated.

 And we're now so far past the point they can put in any new evidence, section 15.1 of the Statutory Powers Procedure Act binds the Board. Nothing further can go in.

 So -- and I can't be faced with new arguments that's never been raised. So what am I here to do? I am here on the evidence I led and whatever else they led at the appropriate time. Not now, but later -- earlier. One, is NRG different? Two, what's the impact on the charge, which I call it, or the rate, or if it is indeed different than anybody else. You heard me on it.

 Costs. How do they get recovered? Well, whatever you decide in issues 1 and 2 will affect 3. Because if we're paying costs, Union's costs of $7.12, there is nothing but to recover it from the ratepayer. There is no reason to do anything else.

 MR. QUESNELLE: Thank you.

 MR. CAMPION: That means that we, in this proceeding, having brought it, acted prudently, which is why I said part of our prudence analysis is what we're doing here today.

 And then finally the interest which flows.

 So when I look at all of this and I look at the Statutory Powers Procedure Act, I am absolutely convinced -- and I didn't mean to suggest anything improper in the past or anything else -- is that you have to, from an evidentiary perspective, if you want to rely upon it, file it in advance so the parties know, and then I can cross-examine on it.

 MR. QUESNELLE: I am going to ask you one more time, Mr. Campion. Given what you have just told me, what was your client's interpretation of the significance of the inclusion in Procedural Order No. 3 of the Board relying on the authority of section 21(5)? Are you saying that that was improper and that that --

 MR. CAMPION: It was bound up by Statutory Powers Procedure Act. It's the governing statute.

 MR. QUESNELLE: So it -- so this has no significance.

 MR. CAMPION: It has significance. If I don't raise it, I don't need to raise it or give my consent, but I'm not.

 MR. QUESNELLE: Thank you. Okay. The Panel is going to take a few moments and deliberate on this, and we will -- we anticipate it will be about ten minutes or so. Okay, thank you.

### --- Recess taken at 12:11 p.m.

### --- On resuming at 12:20 p.m.

 MR. QUESNELLE: Thank you. Please be seated.

# DECISION

 Thank you for your submissions, everyone. The Panel has come to a determination on this matter and we have determined, Mr. Campion, that we don't accept your arguments on the supremacy of the SPPA over the OEB Act on this, that is a long standing practice of the Board.

 The utility of putting in that exact clause into the PO is to do exactly what we consider the authority to be, and this Panel is putting that in place.

 So any evidence that is contained in any of the cases that have been combined are available to parties today for reference and in argument. And, as Mr. Millar said, we have other provisions of the act that might be relied upon as well to bring in other cases which are before the Board, and has Mr. Smith has also alluded to in his discussion.

 But it is clear to the Panel as well, given your arguments, that it is likely you are not prepared today to carry on and address and in reply arguments what they might be bringing in in their submissions.

 And we do not want to continue today, unless at your urging to do so. So we could give you lunch to think about that and confer with your client. But it would be at your request that we would be continuing today, if you are not prepared.

 MR. CAMPION: Could you assist me, sir, on one point, if you can.

 In making this decision, are you suggesting that -- what would happen in the interim? Would my friends be required to give me a list of things they're going to refer to in the past?

 Are they required to give me argument, or are we just taking a break in order to then come back to the same magical mystery tour?

 MR. QUESNELLE: It is not really a magical mystery tour, Mr. Campion. It is exactly how the Board operates when we put forward an order that says pursuant to section 21(5) of the OEB Act, we're combining certain other hearings. It is incumbent on you to understand that anything in those hearings can be used and will be used, and the Board has decided to do this.

 The Board has decided to do this because it would be of assistance to the Board to bring all of these pieces of evidence together in making its determination.

 So it flows from that that it is open to any party to be able to use any of those pieces of evidence in making its arguments.

 MR. CAMPION: Well, I don't believe it is appropriate to ask me to request the Board to proceed. But I will give you my submissions in that regard, if I might.

 In my respectful opinion, I would like to hear what my friends have to say. And if I need time before my reply, in order to formulate an answer or to get other evidence, it would be my proposal that I would ask the Board's permission and you would make your decision then, based on substantial argument.

 I will not request the Board to proceed or not proceed. I have no detriment presently that I am aware of. My friends haven't told me what their arguments are, so I couldn't even begin to suggest that it would be difficult for me to proceed. And really, it is really difficult for me to reply.

 I can object to things going in. I have made a broad objection that has been refused. I respect the Board's decision, that's fine.

 So I am not in a position to request the Board to proceed. If you believe it is unfair to proceed, to me, well that is your decision.

 I am willing to sit and listen to my friend's submissions. They will be guided by your direction. I am guided by your direction.

 I was part of the earlier proceeding, so I -- to the extent I have to go and find the material, I can. And if I am disadvantaged as a result of your ruling, I think the best thing for me to do is to make my submissions having regard to the fact that it won't change anything, because I am not going to get any advance notice of what they're going to do later. So it is of no consequence to have an adjournment.

 So it is my respectful submission that we should proceed. I am not requesting it, but I will submit that I am. And we should -- at the end of the positions taken by my friend, I will be in a position to know. And if I require a request, I will make it and you can decide.

 MR. QUESNELLE: Any other comments, submissions on that, Mr. Millar?

 MR. MILLAR: I am in the Board's hands. Certainly if the Board requests, we can give Mr. Campion a list of all of the evidentiary references.

 MR. QUESNELLE: I wasn't asking for that to occur, Mr. Millar.

 MR. MILLAR: I am in the Board's hands.

 MR. QUESNELLE: I think -- why don't we take the lunch break? Why don't we return at 1:30 and, Mr. Millar, then you will be continuing with the main elements of your submissions.

 MR. MILLAR: Thank you.

 MR. QUESNELLE: And then, Mr. Smith. And at that point, Mr. Campion, we will hear from you as to whether or not you need to better prepare for today.

 MR. CAMPION: I am much obliged, sir. I think that is very helpful. Thank you.

 MR. QUESNELLE: Thank you.

### --- Luncheon recess taken at 12:25 p.m.

### --- On resuming at 1:31 p.m.

 MR. QUESNELLE: Thank you. Please be seated.

 The plan, Mr. Millar, was for you to continue with your -- with the main of your argument.

 MR. MILLAR: Thank you very much, Mr. Quesnelle.

# Submissions by Mr. Millar:

 MR. MILLAR: Before I begin, Board Staff has prepared a compendium of documents. These are by and large documents that are already on the record in this combined proceeding. I have provided copies to my friends, and I believe the Panel already has a set. Is that right?

 MR. CAMPION: That's right.

 MR. MILLAR: So I propose to call this Exhibit K -- I guess we're at 3 -- K1.4.

EXHIBIT NO. K1.4: BOARD STAFF COMPENDIUM OF DOCUMENTS.

 MR. CAMPION: Sorry to interrupt. Can you help me, where is this compendium?

 MR. MILLAR: These are just the documents that we circulated to the parties yesterday, and I think your colleague may have a full set there. If not, we have spare copies here. I'm sorry, the word "compendium" was a little grandiose. It is a bunch of sheets of paper.

 MR. QUESNELLE: We have that file here.

 MR. CAMPION: No one has ever accused me of being grandiose, so I'll let you go on that one.

 MR. MILLAR: I have already been caught in a misstatement, so hopefully that is the last one for this submission.

 I do apologize, when we put together these sheets of paper they weren't necessarily in the order that I will now refer to them in my argument, so I may have to make you jump around a little bit, but I think they are all there.

 MR. QUESNELLE: Just for my assistance, Mr. Millar, when we get to identify the first one --

 MR. MILLAR: Yes.

 MR. QUESNELLE: -- that's the one I will mark.

 MR. MILLAR: For your reference, the first one is marked in the top in pen as 0053. That's the first one I will get to. I don't think that is the first one as you have them presented to you.

 MR. QUESNELLE: All right, thanks.

 MR. MILLAR: But with that unpleasantness out of the way, let me move to my submissions, Mr. Chair.

 In the notice of motion in Procedural Order No. 3, the Board set out four questions that it wanted parties to make further submissions on. And I am going to address these questions in order. But before I get into that, I just want to state that I don't think there should be any surprise in anything the Board Staff is going to say today.

 First of all, we're simply answering the four questions that the Board Panel put to everyone to make submissions on in this proceeding, in this combined proceeding. And furthermore, Staff has already made all of these submissions.

 As you know, we've already heard -- at least started hearing 0053, 0361, 0154. Board Staff made submissions in all of those cases, and by and large my submissions today are no different.

 So it may be a synthesis and there may be a slightly different take on a few things, but nothing I am going to say in substance today is anything that the Board or the other parties haven't heard before.

 So let me move to question 1. And just to refresh the memory of the Board and the parties, the question is: Does NRG's status as a natural gas distributor warrant a different treatment from Union's other non-compliant direct purchase customers?

 Union first -- or, pardon me, NRG first raised this argument in the 0154 proceeding, which was the proceeding to lower the penalty amount. They wanted something less than the $50 that was ultimately decided upon by the Board.

 And in that case NRG noted -- I don't think I have to take you to the references, but this was the thrust of their argument -- that a gas distributor does not make any profit from the sale of gas commodity, and therefore it should only be required to pay Union's actual costs of gas. I think you heard that again today from Mr. Campion.

 Now, in evidence that NRG filed in that proceeding, it made these statements. It reiterated its position that because it does not earn a profit from the sale of natural gas it is different from other direct purchase customers. And it also raised the fact that it cannot control the consumption of its customers and pointed at this as another difference between NRG and most of the other direct purchase customers who may or I guess may not be able -- have more control over the amount of gas that they're required to consume.

 Board Staff respectfully disagrees with the arguments made by NRG. Our position on this issue remains unchanged from the position we took in the penalty reduction proceeding in the first instance. In our view, there hasn't been any new evidence or really any new argument raised by NRG in any of the -- that would change Staff's position.

 So as you have heard, as I understand NRG's arguments, there is really two prongs to it. The first is they don't make any profit off the sale of gas, and the second relates -- I guess I would combine a few things, sort of a public-interest argument that it is required to serve its customers different from other direct purchase customers in that sense, and that they can't shut off if they want to.

 So let's first look at the profit from the sale of gas issue. And in our argument the fact that NRG does not earn a profit from the sale of natural gas or that it has no mechanism to shut off its customers does not remove the responsibility that NRG has to manage its gas supply portfolio in a prudent, cost-effective manner.

 In fact, NRG as a natural gas distributor that provides natural gas service to its own small and largely low-volume customers has at least an equal responsibility to manage its gas supply portfolio and the associated contractual obligations as any other bundled T service customer served by Union.

 NRG, as you have heard in its submissions and in its interrogatory responses, has confirmed that it does have a responsibility to its customers, and I don't think anybody would dispute that.

 But certainly prudently managing its gas supply arrangements is part of that responsibility. The importance of NRG effectively managing the procurement of gas supply is directly linked to protecting its customers from excessive gas costs that can arise if contractual obligations are not met.

 I should throw in one other point here. Mr. Campion compared NRG -- he suggested there was a difference between NRG and Ford and some other for-profit companies.

 Of course, I shouldn't have to state this, but NRG is a private, for-profit company. It is a utility and it has certain responsibilities that other private enterprises may not have, but NRG is not a government agency or anything like that. It earns a healthy ROE on its invested capital. So it is a for-profit enterprise.

 We also note -- and this was discussed a little bit in your questions, Mr. Quesnelle -- that it was NRG's decision to be a bundled T service customer of Union. And we went through some of the interrogatories on that. They were discussed by Mr. Campion earlier.

 But NRG has been a direct purchase customer of Union since at least 1996. And it elected to do that because in its view, as Mr. Campion stated earlier, that was the best way for it to get a lower price for gas to pass on to its customers, which I suppose, at least if it is done properly, is a laudable goal.

 However, in order to fulfil the purpose of being a direct purchase customer, in other words to get those lower prices, it has to manage its supply procurement in an effective manner in all situations, including extreme weather events.

 NRG made an explicit decision to move to direct purchase and, as such, it has a responsibility to manage gas supply procurement for its customers in a cost-effective manner. It doesn't have to be on direct purchase. It could move to system supply, in which case, well, we wouldn't be here today, I suggest. But again, this was NRG's decision. NRG is a for-profit company. It is a utility. They're big boys, if I can use that word, their decision to move to direct purchase, and they're responsible to manage it prudently.

 I would further add that if the Board were to grant NRG special treatment through the acceptance of a penalty charge that are lower than the already reduced charge approved by the Board in the penalty reduction proceeding, this would undermine the intent of the penalty charge.

 Mr. Campion spoke to this, but I take a slightly different take on it, though I do agree with some of what he said. The intent of the penalty charge applicable to bundled T service customers that don't meet their contractual balancing obligations was set out by the Board in RP-2001-0029, the RP-2001-0029 decision. And I misled you again, because that is in fact the first document I will take you to.

 You will see it is written in hand at the top, "2001-0029, Decision with Reasons". It is a very lengthy decision, so we didn't reproduce the entire thing, but if you look starting at paragraph 2.91 of that decision, this is the Board's language:

"The Board accepts the premise that it is important to encourage compliance with contractual obligations to balance in a system such as Union's where a wide variety of users are dependent on such balancing to ensure the integrity, security, and efficient operation of the system. The failure to balance can place compliance system participants at risk and may result in additional costs. In the Board's view, the penalty must be sufficiently costly to defaulters to strongly discourage strategic non-compliance with balance obligations, and the careless or incompetent acceptance of contractual obligations which are not reasonably achievable. The Board is concerned that parties wishing to engage in the market, either directly or through agents, must be appropriately encouraged to manage their obligations responsibly. The system as a whole requires that.

 So essentially, at least how I read that is that the intent of the penalty is to protect the integrity of Union's system -- and by connection, all of Union's customers -- by ensuring that direct purchase customers have the necessary disincentive from defaulting on their contractual balancing obligations.

 The type of direct purchase customer is not relevant to the protection of Union's system. Union needs all of its gas -- pardon me, all of its direct purchase customers to deliver sufficient gas to meet their contractual balancing obligations in order to ensure the security of its system.

 The fact that NRG is a gas distributor and a direct purchase customer does not change the fact that its delivery shortfall at the winter checkpoint could have put Union' system at risk. That is why the penalty exists; that is why the balancing obligation exists.

 Now, although it is true gaming the system is one of the activities that the penalty aims to avoid, the ultimate purpose of the penalty is to ensure that Union is able to keep its system balanced.

 Whether the customer can't achieve that balance because it tried to game the system, or simply that it waited too long to make its purchases, that is irrelevant.

 And if the Board were to approve the penalty charge for NRG at Union's cost -- at Union's cost of gas, the seven dollars I think Mr. Campion has referenced -- the Board would be sending a message to NRG that in the future, if the price of natural gas is high nearing the time for checkpoint balancing, and it is short significant quantities of gas like it was in the winter of 2013-2014, then NRG would be best served in protecting its customers by not purchasing gas and defaulting on its contractual obligations with Union.

 This squarely undermines the intent of the penalty and puts Union's system at future risk.

 NRG would be incentivised towards contractual default and after-the-fact litigation to reduce the penalty charge to a lower price.

 Further, the Board has already considered this exact issue and already come up with a decision on that. NRG requested this very relief, obviously, in the 0154 proceeding. And one of the arguments NRG raised at that proceeding was that they're different because they are a distributor.

 So if I could take you to page 7 of that decision, that is the 0154 decision, you will see -- I think there are two documents marked 0154, but one has page 7 at the bottom.

 This is what the Board said, this is part of this proceeding obviously. This is now the combined proceeding that includes 0154.

 But if you look at about the middle paragraph there, this is what the Board says:

"The Board does not find NRG's arguments concerning a different method to setting the penalty convincing. Neither is the argument concerning NRG's special situation accepted. The Board finds setting the penalty charge that is to be applied to NRG on the basis of historic norms or Union's gas costs is not appropriate, and not consistent with the intent of the penalty. In addition, the Board is of the view that in this matter, NRG's status as a distributor does not warrant any different treatment. As such, the Board finds that the same reduced penalty as proposed by Union which will be applied to all non-compliant customers shall also be applied to NRG."

 Now, NRG makes one other argument that I would like to address under this question, and that is that as a natural gas distributor they should be applied a different penalty charge than other customers on some public interest grounds, if I could put it that way.

 NRG argues that the public interest needs to be protected here by reducing the penalty charge applicable to NRG. And NRG believes that the public interest can best be served by reducing the penalty charge to avoid benefiting one set of customers to the detriment of another set of customers.

 And you heard Mr. Campion speak to that, what he described as the absurd situation where people on different sides of the streets are transferring money one from the other, and NRG argued the Board should weigh this in its analysis of this issue.

 But in Staff's view, the intent of the penalty should prevail for the reasons previously discussed. And I point out it is an obvious matter, because it is question 3 of this very proceeding. But it has not yet been determined if NRG's customers will actually pay any portion of the penalty or of the incremental spot gas prices that Union -- pardon me, NRG made over the winter of 2013-14.

 If the Board wants to completely shield NRG's ratepayers from harm, then the Board can order that the entirety of the penalty amount and the incremental purchases above what NRG would otherwise have paid, had they made the purchases earlier in the year, they can have that all paid by the shareholder and not the ratepayer.

 So there is no certainty here that ratepayers will be out-of-pocket at all from this; that will be up to the Board.

 If the Board decides it's not in the public interest to pass those costs on to ratepayers, presumably the Board won't do so.

 So for all of these reasons, Staff submits that NRG should not be granted a different treatment with regard to the price or applicability of the penalty charge than Union's other non-compliant direct purchase customers.

 I am going to move on to the next question, unless the Panel had any questions on that particular area at this moment.

 MR. QUESNELLE: No. Thank you, Mr. Millar.

 MR. MILLAR: If questions arise or come to you later, don't hesitate to ask.

 Question 2; I don't have to answer because it asks what penalty should be applied if the 50.50 doesn't. In our view, there is no reason to change the penalty amount for NRG, so there is no need for us to answer that question.

 So I will move on to question 3: Should the costs associated with the penalty be recovered from NRG's ratepayers?

 Now again, Staff has already made a submission on this issue in the QRAM proceeding when it originally came before the Board. As I explained earlier, that proceeding is still open. We're still hearing that proceeding today.

 So what I am going to say to you today is essentially a -- I don't like to repeat myself, but this is more or less what we said the first time around.

 So in Staff's first submission on the 2014 QRAM -- in other words, the 0154 proceeding -- we argued that the Board should order a full prudence review of the gas purchases made by NRG over the 2013-14 winter.

 And then the Board in its decision on that case, and in an interim order that went out with it that was dated April 1, 2014, it stated that it would establish further process to consider the matters that arose in NRG's April 2014 QRAM.

 So the Board -- as you are aware, a QRAM has to be decided in something like -- I forget now -- fifteen days or something. Obviously, there is no time in an ordinary QRAM to address an issue of this complexity.

 So what the Board did was said okay we have to approve some rate for the QRAM. What it did it approved on an interim basis the $27 per gigajoule that NRG had spent on its incremental spot purchases. It applied that across the board to include the penalty, the amounts that were purchased by Union on NRG's behalf as well. And then it said essentially we will sort it out later, and here we are.

 And I think I could take you in that regard to a letter dated May 8, 2014, from the Board. This is again on the 0154 proceeding, and you will find that in your materials. It is a letter from the Board, again dated at the top May 8, 2014, addressed to Mr. Campion.

 And if you have that, if you could flip over to page 2 of that letter, I just want to take you to the last paragraph where the Board explains how it is going to actually address this whole prudence issue. It states:

"In the EB-2014-0053 proceeding, the Board will review the prudence of NRG's incremental gas purchases made over the past winter. As part of the 2014-0053 proceeding, the Board will also review the costs associated with the penalty and whether they should be recovered from ratepayers. The quantum of the penalty charge, however, will be set by the Board in the 2014-0154 proceeding."

 So to be clear -- and I will get into the details of this a little bit later -- it's not just the penalty amount that Staff thinks NRG should be at risk for.

 As you may recall, and again we will go over the details, NRG actually did make some spot purchases at the very end of February, just before the checkpoint. They were short 115,000 gigajoules, and this is all taken from the record of that proceeding. They were able to buy about 90 on the spot market at $27.00 at the very end of February.

 They were still short about 25,000 gigajoules. That's what Union had to make up for, if I can put it that way, and it is those 25,000 gigajoules that the 50.50 penalty applied to, $50.50.

 However, the Board has also clearly stated in that letter that paying $27, which is a very high rate compared to what could have been achieved at an earlier date, that's also on the table. So paying the $27 for the 90,000 gigajoules is also something that the Board intended to have a look at to see if that was reasonable or not.

 So I am sorry to take you through some of that complex background but, again, there is no shortage of paper in this case and no shortage of process, and I just want to make sure we try to keep things straight.

 Anyways, that is how we got here, and that is why all of this is an issue in the current proceeding.

 Okay. So staff wants to comment on both the costs that arose from the gas that NRG was able to purchase prior to the checkpoint -- that is the gas they purchased at $27 -- and the costs that arose due to NRG not meeting its contractual balancing obligations and being applied the penalty charge by Union. And again, we have already done all this commenting when it was first before the Board in the QRAM.

 Before I get into that exactly, I don't take this to be a contested point any more, but I do want to make sure I state that the Board certainly does have the necessary power to order NRG's shareholder to pay some or all of the penalty amount or for the gas at $27 amount.

 In some of the previous proceedings, the way I read some of NRG's materials, they seem to be questioning that as a matter of jurisdiction. I didn't hear that today, so I don't think that is still their position. But allow me to very briefly go over why I think the Board would be well within its powers to do that, and then I will get into how we think the Board should deal with it.

 So I think there is little question that section 36 of the act gives the Board the power to make disallowances related to gas commodity costs.

 The gas commodity costs paid by ratepayers are a rate within the meaning of the act. And of course, as you are aware, all rates approved by the Board under section 36 must be just and reasonable.

 There is no special carve-out for commodity costs. Even though as a matter of practice they are usually passed on dollar for dollar, there is no requirement that the Board do so, especially in cases where it finds that those costs were incurred imprudently.

 So the Board, as I have already referenced, has heard a fair amount of argument about NRG not profiting from the sale of gas commodity. And NRG has used this fact largely as a basis to argue that it should be treated differently from the other non-compliant customers.

 But NRG has also argued previously that the gas supply costs resulting in the spike in natural gas prices in '13/'14 were -- I'm taking a quote here from the 0053 decision, but I think Mr. Campion said as much in his submissions today, that this was never meant to be part of the risk that a utility was to undertake pursuant to the Ontario Energy Act regime.

 Again, while it is true that gas commodity costs are generally passed directly through to sales service customers without any reduction or markup for that matter, this general rule does not mean that the prudence of these costs can never be tested.

 The Board may deny recovery of gas supply costs where those costs are found to be imprudently incurred, just like any other cost.

 So the question is not whether NRG was able to earn a profit off the sale of natural gas commodity. The question is whether NRG acted prudently when it incurred those additional costs.

 The fact that gas commodity is usually a pass-through and that NRG earns no profit from this is irrelevant to this consideration.

 Let me give you an example. NRG doesn't earn any profit or return from its O&M expenses either. Staff salaries. So at least in theory. I know under IRM costs and revenues can be disconnected, but at least in a cost-of-service application NRG's staff salaries are $500,000, $500,000 goes into the revenue requirement. There is no profit earned on that. The only return they earn is on their invested capital.

 But of course, that doesn't relieve NRG of the obligation to act prudently and to not overpay its staff. Indeed, if the Board found that NRG paid its staff too much, it would make disallowances for that, irrespective of the fact that NRG did not earn any profit or any return from this conduct.

 There is in fact precedent for this as well. The Board has made disallowances related to gas commodity costs in past cases. If I could take you to the EBRO-486-04 decision -- and you should find that in your package of materials. It is marked -- handwritten at the top, 486-04.

 This is an older decision, granted, but it is -- in fact, Union Gas was the culprit, if I can call them that, in this instance. You will see there is a paragraph headed "Board findings", and in about, I'd say halfway down that paragraph, you will see a sentence starting "the Board would have expected", and what the Board says there is:

"The Board would have expected Union to have undertaken a plan to spread its spot gas purchases more evenly over the winter period. The Board is of the view that once Union had identified the 12-billion-cubic-foot shortfall, it should have taken immediate steps to purchase at least 3-billion cubic feet of spot gas in December to accomplish a more even spreading of the gas purchases."

 And then a little further down it states:

"The Board finds that the amount of $5.14 million is the most -- is most appropriately borne by the shareholder and directs that this amount be removed from the purchase gas variance account debit."

 So there is a clear case -- not a penalty in this case, but it is a finding by the Board that Union in that case acted imprudently in securing its -- the gas that it needed, and it made a disallowance of more than $5 million for what it found to be an imprudent purchase.

 And then I will also speak -- in your materials you will also see the Alliance/Vector decision. This is the Court of Appeal decision. And you will see that in your package of materials. It is the only Court of Appeal case. It is marked at the top.

 This was an Enbridge case, in fact. Slightly different circumstances here, but this was a case in which the Board made disallowances for some of Enbridge's upstream transportation costs related to the Alliance/Vector pipeline.

 So that's not commodity, per se, I suppose, but that is part of their gas supply plan and their portfolio of contracts that they used to secure gas commodity and, in this case, gas transportation.

 So I don't want to take you to any particular passages, but that is another instance where the Board found that a utility had acted imprudently and made disallowances on that basis.

 And the issue before the Court of Appeal was something I will get into in a moment, but the Court of Appeal ultimately upheld the Board's decision.

 So again, I think, although it is unusual, I don't think there can be any question that the Board does have the power to make disallowances for gas commodity costs, or transportation, for that matter, and it has done so in the past.

 Where a utility acts imprudently the Board can and, indeed, in Staff's argument, should make disallowances, for the simple reason that the Board should not pass imprudent expenses on to ratepayers.

 So with that, if I can call it jurisdictional issue out of the way, I would like to spend some time discussing the prudence of what -- of NRG's conduct over the winter of 2013-14.

 And as we have already stated in the previous proceeding -- actually, it is not really the previous proceeding, in the first iteration of this combined proceeding -- we submit that NRG did not act prudently with regard to its gas supply procurement over the winter of 2013-14.

 Now, NRG discussed originally in the 0053 proceeding -- which is the QRAM when this first came up -- they set out the prudence test. And that is actually the reason I had the case there from the Court of Appeal. It was referenced first by Mr. Campion in NRG's original materials.

 I don't think there are any surprises here. Before I discuss that in any more detail, obviously this Panel and Mr. Smith will be aware that exactly what the presumption of prudence means and what it applies to is a matter that is currently before the Supreme Court, and we're waiting for a decision that hopefully will address that issue, but regardless, there is still some dispute over exactly what it means.

 But in terms -- for the purposes of our argument -- and the question there being, just so I am not obscure, is does it only apply to capital expenditures, does it apply to O&M as well? For the purpose of today's discussion I don't have to get into any of that. I am happy to accept for the purposes of today's discussion, and I will put it as a worst-case scenario, at least from Board Staff's perspective, but that everything that was said in the Court of Appeal applies in this situation.

 And that is simple. The Board will have heard this before. It is set out in the decision, but what does prudence mean, essentially? It is that decisions made by utility management should generally be presumed to be prudent unless challenged on reasonable grounds, and I suggest to you that they have been challenged here. To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.

 Hindsight cannot be used in determining prudence, and prudence must be determined in a retrospective factual enquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could have or did enter into the decision at the time.

 So none of that is a surprise to the Board I think, but I think that is useful in framing our discussions on the prudence of NRG's actions.

 Now, I haven't heard Mr. Campion repeat this today, so perhaps he is not pursuing this point. I will deal with it very quickly.

 When this matter was first before the Board, NRG stated that the presumption is rebuttable, and that the onus rested on Staff to not merely raise reasonable and probable grounds of imprudence, but to prove that NRG had acted imprudently.

 I haven't heard him repeat that today, so I am --

 MR. CAMPION: You can I assume that that argument stands.

 MR. MILLAR: I will deal with it, then. I hadn't heard him repeat it today.

 MR. CAMPION: Sorry to interrupt.

 MR. MILLAR: No, I thank you for that, because that will allow me to address it more fully than I otherwise would.

 So Mr. Campion's position today is that because of the presumption of prudence, it is now Staff's or Union's -- it is someone else's onus to show you that NRG acted imprudently.

 And my submission is that that is clearly false. We strongly disagree with that assertion.

 The Court of Appeal itself said that actions are presumed to be prudent unless challenged on reasonable grounds, at which point the onus reverts back to the applicant -- where it always is, frankly.

 And you need go no further than the Ontario Energy Board Act itself to see that.

 At section 36 (6) -- I know Mr. Campion, somewhere in his materials -- yes. In fact, if you look at Exhibit K1.1, Mr. Campion has helpfully reproduced portions of the Ontario Energy Board Act at paragraph 40 or page 14.

 So you need look no further than section 36 (6), which hopefully the very point I am about to make is bolded, subject to subsection 7 which relates to Ministerial directives I believe and is not relevant for today's discussion.

"In an application with respect to rates for the sale, transmission, distribution, or storage of gas," which this clearly is; it is the QRAM, "the burden of proof is on the applicant."

 That is the statute which, frankly, takes precedence over common law in any respect. But the common law is on our side as well.

 The presumption of prudence simply prevents a party from lying in the weeds until final argument, and then kind of hopping out at the last moment and saying, oh, by the way you should have done X or Y.

 If a party feels that a utility has acted imprudently, it does have a responsibility to state that to the utility, let them respond and make that squarely at issue before the Panel.

 But once it's been raised as an issue -- and there is something to it, in other words it is not something completely spurious thrown at the wall to see what will stick -- the onus reverts to the applicant, and the act is very clear on that.

 So there can be no question, in my view, that first of all, Board Staff's -- and perhaps Union's; I'm not sure what their view on this is exactly -- has raised the prudence of NRG's conduct as an issue, has given you some reasonable grounds, and therefore the onus rests squarely with the applicant.

 So let's turn now to what NRG actually did over the winter of 2013-2014.

 As you have seen in this case and as documented on the record -- in particular, in 0053, but of course all of that is before you today -- NRG essentially waited until the very end of February to try and make good its deficit for its balancing obligations.

 NRG was aware, as early as November 2013, that it was expected to be short of gas at the time of the winter checkpoint. The winter checkpoint is not until the end of February, you will recall. This is evidenced by the fact that NRG receives a direct purchase status report from Union each month, which sets out the expected balance in its banked gas account with Union at the time of the next balancing checkpoint.

 In this case, it was the winter checkpoint of February 28th.

 So NRG's December 2013 direct purchase status report, which NRG would have had early in 2014 -- again, all of this was set out in the 0053 proceeding -- it indicates that beginning in October 2013, NRG's actual monthly consumption was higher than its contracted forecast monthly consumption, which would lead to a deficit in the banked gas account at the time of the winter checkpoint, if no incremental gas purchases were made.

 In fact, NRG started its contract year -- which starts in October 2013 -- with a negative balance in its banked gas account. The direct purchase status reports indicate that for each month through the winter period, NRG's expected shortfall at the time of the winter checkpoint was growing larger.

 NRG would have received direct purchase status reports in November, which would be for October, December which was for November, and January for December, and then in February for January, each showing that NRG was expected to be short of gas at the time of the winter checkpoint.

 NRG knew it was in a deficit position and could have taken steps to balance its account at virtually any time over this period. However, at no point during the 2013-2014 winter period did NRG take any pre-emptive action to mitigate its balancing shortfall.

 It only purchased gas during the last couple of days of February, when the prices were extremely high. And even then, at least according to NRG, it was simply unable to purchase the whole amount that was owing for the banked gas.

 Okay. Secondly, the 2013-2014 winter started off colder than normal, and the weather forecast throughout the winter continued to indicate that it was going to be a long, cold winter. And we have heard very thoroughly from Mr. Campion on this.

 I am not sure I agree with his characterization that it was a weather emergency; almost all of the other direct purchase customers were able to balance, though again a couple were not. But I don't disagree with him it was a very cold winter and the evidence clearly supports that.

 Indeed, Union's 2014 QRAM application included evidence which states that weather was colder than normal, and Mr. Campion referred to this.

 But Board Staff expects that NRG would have sought, or at least should have been aware of the same information. They know they have to make good on February 28th for any deficit, and clearly weather is one of the biggest drivers of the cost of gas. So they should have been monitoring the weather.

 If NRG did not seek out this information, this would show a further lack of oversight by NRG with regard to its gas supply planning.

 Given the weather forecast, NRG should have been aware that the price for natural gas was, if not likely to be higher, then at least there was no guarantee prices were going to fall.

 This, as Mr. Campion says, was very unusual weather and just because in the past, well, prices go up, prices go down, it is not, in Board Staff's view, reasonable to just kind of cross your fingers and hope gas prices will fall at the end of February. In this case, clearly they did not.

 So NRG chose to delay its purchases until the end of February 2014, so that it had to attempt to purchase its entire shortfall in a very compressed time period which, in Staff's view, increased the risk borne by ratepayers.

 The result of NRG's actions – or, more accurately, their inaction -- was that near the end of February, it was short of its balancing obligation by about 115,000 gigajoules. Again, all of this is taken from the 0053 proceeding.

 Now, it did manage to purchase about 90,000 gigajoules of that shortfall at a very high price of $27 a gigajoule. And it was simply unable to purchase the balance of 25,000 gigajoules, and that's what resulted in the penalty charge.

 But for comparative purposes -- and this is all stuff that is on the record in 0053 -- the highest spot price that Union paid over the winter of 2014 was $12.31.

 That is the highest spot price Union paid. And if you take the average price of gas at dawn, based on the highest daily traded price from the period January 1 to February 28th where it was extremely cold, and you take the average high of every day, that works out to $17.33. Again, we documented all of this in 0053.

 So the outcome of NRG's strategy, to wait until the end of February to make purchases to rectify the imbalance in its banked gas account with Union, was that gas purchase costs incurred by NRG, including the penalty, over the winter of 2013-2014 were exorbitant; they were extremely high.

 The wait-and-see strategy undertaken clearly ignored information that was available to NRG at the time the purchasing decisions were being made, or the decisions not to purchase.

 On the basis of the record, the Board can find that NRG's decision to wait until the end of February to attempt to rectify the imbalance in its banked gas account was not reasonable under the circumstances that were known, or ought to have been known by the utility at the time the decisions were made.

 Again, I want to be clear. We're not seeking to use hindsight here. This was all information that was available to NRG at the time it made its decisions.

 So Staff submits that the prudence strategy would have been to heed the weather forecast or at least be cognizant, to be cautioned, to take a conservative approach to gas supply management, and begin to mitigate the very incident, banked gas account, earlier in the winter by making incremental gas purchases over the winter.

 You will recall they were in a deficit position as early as November. This would have spread the spot gas purchases over the winter period and thereby diversified the risk associated with the incremental purchases.

 If NRG had done so, it would have avoided the risk of high prices or at least mitigated the risk of high prices and, indeed, the risk of not being able to buy gas at all, which is what happened to it, and at the end of February it could have -- so it could have avoided some of those costs.

 It also would have avoided incurring the penalty because, as you heard, apparently there wasn't gas available on the 27th and 28th to make good on their deficit.

 So a layering approach to incremental gas purchases over '13-'14, over that winter, was a lower-risk option for the management of the variances in the banked gas account.

 Indeed, you don't really have to take my word for it. You can actually look at what NRG did the next winter, in other words last winter. You will recall last winter was extremely cold as well.

 MR. CAMPION: I'm sorry, I have no idea where my friend is going this far. As you know, I raised my objection to literally all the facts he has done, but now to come into new facts? Unheard of in any hearing? In my respectful submission, he's not free to have done what he has done so far, but he certainly isn't free to go any further.

 MR. QUESNELLE: Well, let's take the first one first, Mr. Campion.

 You say you have raised an objection to everything he has brought so far?

 MR. CAMPION: I will. I didn't interrupt him. It's not my -- I will -- I have raised the objection. I have been overrule -- I have been ruled on, and, you know, it will be decided someplace else or not as the case may be.

 But the --

 MR. QUESNELLE: I want to clean that up. I think we have ruled on it.

 MR. CAMPION: You have ruled on that, but in my respectful submission, there are elements which I haven't had the opportunity to object because I didn't want to be rude. There are elements of what he has said which is entirely his view, expert testimony, with no support. And I will deal with it point for point and tear it apart and show you why. This isn't based on evidence in 0053.

 So there is a very important distinction. My friend is basically writing reasons for decision as if he were the decider of fact and he can tell you whatever he wants to be drawn from these. He can't do that. He has to give expert testimony. That is why I took the objection I did, and I will continue to hold it for the purposes of the record, knowing that you have ruled. Fine, I am not going to interfere. But what he can't do now is come and say, All right. Now we're going to look and see what they did in another year.

 MR. QUESNELLE: On that particular point I would like to ask Mr. Millar, on the observations you are going to make on what happened last winter, Mr. Millar, how would you expect us to consider that --

 MR. MILLAR: I am happy to respond to that, Mr. Chair. All I was going to take the parties to is NRG's own evidence in its most recent QRAM, which I provided to my friend yesterday. There can't be any question that they know what -- it is only for the purpose to show that they have made incremental purchases over the last winter. They spread out their purchases. That is my only point. It is NRG's own evidence, albeit in a different proceeding, which is why I provided it to my friend in advance.

 Second, I took you earlier today when we were arguing on the jurisdictional matter, I suppose you would call it, that the Board does have the power to admit evidence from other proceedings.

 Again, it is not a huge point for me. My point is that NRG should have been spreading out its gas purchases. I don't really have to say anything more than that. I was going to take you just to NRG's own filing from its QRAM to show that that is what it did last winter, but I don't have any further point to make on that.

 MR. QUESNELLE: Okay. I take it you will be responding to that, Mr. Campion?

 MR. CAMPION: I do object, and I will be responding, sir, but it is not -- my friend will do what he will, and I will tell you why it cannot be considered as relevant, not the least of which, it is hardly facts which were available at the time. There are many, many, many concerns that I have about my friend's submissions. I believe that they are so far beyond the pale, in terms of expert testimony and other pieces, that -- not so much what the facts were, because I take the Board's ruling, and I am not going to make any further objection in the proceeding, but the conclusions he wishes to draw can't be drawn by him --

 MR. MILLAR: I don't disagree with that, actually, Mr. Chair. These are Board Staff's submissions. Board Staff has reviewed the facts, and in our view this is what a reasonable conduct would be, but Mr. Campion is exactly right. It is for you to decide what is reasonable, not for me, or him for that matter, but I propose to move on.

 MR. QUESNELLE: Okay. Thank you, Mr. Millar.

 MR. MILLAR: Okay. Perhaps I can move now to the unpleasant matter of mathematics. I won't take you through everything I had proposed to, because -- let me preface these remarks by saying, you know, as Staff already said in 0053, we are suggesting a disallowance from NRG, and it is actually important how the math works out to some extent.

 Now, some of this will turn on the Board's decision, so originally I had proposed to give a few examples of how the math would work. I think, frankly, that's going to be a waste of time, especially given how much time I have already been.

 So I am going to walk through the math on Board Staff's main proposal. My only other point would be, to the extent the Board decides something different -- which you may well -- you will probably have to get further submissions from the parties just on how the math works.

 So we may have to return to this at a future point, but I don't want to waste everyone's time by going through hypothetical mathematical situations, largely because I am not really qualified to do that in any event.

 So as we recommended in the original QRAM proceeding, 0053, it's Staff's recommendation that the Board disallow recovery of approximately $870,000 from ratepayers. In other words, we suggested a 50-50 split of the, what we regard as excessive costs of the incremental gas purchases, so split halfway between the shareholder and the ratepayer.

 I just want to walk you through how we got there. You will see in the materials that we provided to you, there is an intimidating-looking sheet that has a whole bunch of figures and calculations on. It is called NRG's gas costs. That is what it says at the top.

 I just want to walk you through how we got to the $870,000, because it is a bit complex.

 So as the Board is aware and we have heard in this proceeding and in 0053, as it approached the winter checkpoint NRG was short about 115,000 gigajoules of gas. They were able to purchase 90,000 gigajoules at $27. You will see that at the, essentially the first line.

 So they spent $2.4 million to purchase a large chunk of the 115,000, but they couldn't get it all.

 So the balance remaining was 25,000 gigajoules. That's the amount that was subject to the penalty proceeding and the reduction proceeding. Ultimately the costs for that was $50.50, which confusingly when you say it comes out as 50.50 and leads to confuse -- it actually matches what we're recommending anyways, but just don't be confused. It is $50.50. That was an additional $1.2 million.

 So the total cost, as you will see underneath, from all of NRG's incremental gas purchases at the end of February, plus the penalty, was $3.7 million. That's what they -- they haven't actually paid it all yet, but that is what they're responsible for as things currently stand.

 So if you do the math on that overall what they paid was about $32.40 a gigajoule, if you combine the $27 on 90,000 and the $50 on 25,000.

 So what Staff did in 0053 -- and again I am simply repeating it here today -- is we went back and looked at the highest Dawn daily traded price between January 1st, 2014 and February 28th, 2014. We averaged that, and that cost was $17.33.

 So -- and again, in Staff's view, that is a reasonable proxy for what NRG probably could have got had they made purchases over, you know, November for that matter, but had they made regular purchases over January and February and not waited until the very end of February to make all of these purchases.

 Again, you could argue whether that is the right number or not. I don't know if it is or if it isn't, but that was what Staff thought was a reasonable way of looking at that. And again, recall that is the highest -- that is the highest spot price every day.

 So some might argue an appropriate number is even lower, but we are content with 17.33.

 So had NRG been able to make those purchases at that price, you will see 115,000 gigajoules, at $17.33, the cost there is about $2 million.

 And just simple mathematics, the difference between 3.7 and two is about $1.7 million. As you will see, Staff is recommending that half of that be covered by the ratepayer and half be covered by the shareholder, and the simple math leads you to $870,000 -- pardon me, $870,555.

 So I didn't want that number to just sit out there without some support. That is how we got to that.

 If you decide something else, of course, which you may well, all of that changes and those calculations would all have to be run and -- I guess my suggestion to the Board would simply be to set out the principles you want to use in the decision, and then the parties will probably have to go away and do the math and come back to you. But I just wanted to give you a sense of how we got to that.

 I should also point out you will recall that ratepayers really did already pay for this. Your interim -- the interim amount in the QRAM that you approved was $27. So they have already paid. That is money NRG has already recovered from ratepayers, because even though it was an interim order, that is what they collected from ratepayers. That is obviously well north of the $17 the Board Staff recommends.

 So again, there is a whole bunch of moving pieces there that will have to be sorted out, depending on the Board's decision.

 Okay. We're getting close here.

 The issue was raised before about, you know, why is NRG on direct purchase instead of system supply. And again, I am not sure if it is for Board Staff to suggest this or not. If NRG wishes to remain on direct purchase and pay the consequences of that when something goes wrong, then I guess that is -- maybe that is for NRG to decide.

 But something we wanted to at least raise was whether the Board should consider requiring -- or maybe "encouraging" is a better word -- encouraging NRG to transition to system supply.

 Staff submits that its performance related to gas supply management over the 2013-2014 winter suggests that NRG may not be well equipped to act as a direct purchase customer.

 NRG, they don't have to be a direct purchase customer, as you know.

 And again some of the things that NRG has said in this very proceeding -- this was from 0053 as well in a submission of March 27th from NRG -- NRG is not a highly sophisticated purchaser of gas by itself, but relies upon its market purchasers and suppliers.

 That is not, again, surprising. NRG is not a large operation. It doesn't have an awful lot of staff. Doubtless they do their best with this sort of thing. But as they say, they're not a gas purchasing outfit. That is not their raison d'être, and they don't really have to do that. So I guess it is puzzling to Staff that they choose to do so.

 MR. CAMPION: As I have indicated earlier, and I just don't want this to pass, I just don't believe Board Staff has any business in this territory. There is no evidence. There is no notice.

 It is an attack that is irresponsible, in my respectful submission, on NRG without us having even the remotest opportunity, with experts or otherwise. And in the attack, they're attempting to dictate the outcome of the split.

 In my respectful submission, Board Staff has a public obligation. They should know better, their counsel does know better, that this is wholly irrelevant.

 He brought this up in the most hesitating fashion, saying, "I don't know whether I should, but I am going to go and do it anyway."

 It is highly prejudicial, with no capacity to reply. It is in the face of, and in the very eye storm of my original objection and, in my respectful submission opinion, he should not be permitted to proceed and you should ignore his comments.

 MR. QUESNELLE: Mr. Millar?

 MR. MILLAR: Mr. Chair, I propose to continue. This is exactly what we have already said on the record in this proceeding. There is not one new word here.

 We cut and paste most of this argument from things we had already filed in this very proceeding.

 Now, if NRG disputes our suggestion that they might at least want to consider being on system supply, have at it. I expect they will, and the Panel can come to whatever conclusion it wants.

 But the evidence there is a problem with them being on direct purchase is self-evident. That is why we're here today. They incurred a very large penalty and it is well within the mandate of Board Staff to question it as to why did that happen, was it prudent, and what can be done in the future to prevent it from happening again.

 Again, the Board can take or leave our suggestions in the end, but there is absolutely nothing improper about what Board Staff has done today.

 MR. QUESNELLE: I take it, Mr. Millar, that your submissions on these points are in response to, for today's purposes, question number 3?

 MR. MILLAR: Yes, that's right.

 MR. QUESNELLE: Thank you.

 MR. CAMPION: May I have a right of reply, sir?

 MR. QUESNELLE: Hmm-hmm.

 MR. CAMPION: If my friend previously raised it -- and I take him at his word that he did -- it was irrelevant then, and it remains irrelevant now.

 There is also a component of this never having been an issue raised. I will deal with his proposition. The Board can come in and argue whatever it will without any evidence, and without giving NRG or anybody else the opportunity to answer it with evidence.

 This Board, in my respectful opinion, cannot make decisions outside the evidence.

 MR. QUESNELLE: We haven't made any decisions.

 MR. CAMPION: No, we can't even hear him on this point; that is my point.

 I'm not suggesting what you can do, sir. You will do what you believe you can do, and I can only make submissions to you. I am not challenging you.

 MR. QUESNELLE: This is the Board's question, so let me just remind you what the Board -- and I mentioned this earlier today that these are the types of things we need to hear.

 This is the submissions on this very point; should the costs associated with the penalty be recovered from NRG's ratepayers.

 It is not a yes or no answer that we were expecting. This wasn't a show of hands.

 MR. CAMPION: No. But your own counsel, the Board's own counsel has told you that you can only look at prudence. And this is not engaged in prudence.

 This is not -- you shouldn't be involved in, when the Board has already blessed them on direct purchase. This is reviewing prior decisions of the Board. If this is going to be raised, it isn't going to be raised here, and it is not going to be raised without apply in evidence from NRG and the experts.

 MR. QUESNELLE: Mr. Millar's --

 MR. CAMPION: It may be it turns out the evidence will be that for years, we have benefited by being on direct purchase.

 MR. QUESNELLE: I think, Mr. Campion, what you are doing here -- and this is the way I'm hearing it -- is taking the context of Mr. Millar's submissions, and I wasn't receiving it the way that you are presenting it.

 Now, how I perceive it the way Mr. Millar is presenting was on the point of whether or not they should be -- costs should be recovered, but was laying out what would happen if they are standard supply, and what happens when they are a direct purchase.

 And to the extent that the Board can consider that, you will have the opportunity to put that into context as to what weight we should put on that, whether or not that is a valid argument, and we're certainly open to all of those -- and you are making some of them now.

 But I think that the routine order would be Mr. Millar, then we will hear from Mr. Smith, and then we will hear from you, all of those things that you are saying now.

 MR. CAMPION: Sir, my objection at this point is simply this: There is no evidentiary base for what he is talking about, and he is now trying to create an issue.

 And there is no suggestion we're going to be arguing what somebody has characterized as a risk factor on being a direct purchase customer and, therefore, ought that to be reviewed within this hearing.

 In my respectful submission, if that were going to be the issue, I would have had notice, not some proposition --

 MR. QUESNELLE: Mr. Campion, the reason they're not in issue is because of your characterization of them. Nobody was saying, okay, let's measure the risk factors involved in this.

 What we're talking about here is the obligations of a direct purchase customer, squarely on point, squarely within --

 MR. CAMPION: I don't disagree with that.

 MR. QUESNELLE: They'll flip to that, if you want to put it at a risk analysis --

 MR. CAMPION: No, I don't. No, I don't.

 MR. QUESNELLE: I can read the transcript back to you; you're disadvantaged in that. But we are not looking at the risk factors on this.

 But it is squarely within the ambit of the questions asked, and what the Board needs to hear today, as to what is the obligations of a direct purchase customer. Talking about prudence, prudence is a measure of what are the expected activities, what should the incumbent in a certain role, roles and responsibilities, that is what we're hearing.

 And you are certainly open to -- and I hope to hear from you as to why you think it differently from what we're hearing.

 MR. CAMPION: And my answer back to you, sir, is I hear what you're saying. I am going to be guided by what you are telling me, what you're directing me; I've got the point.

 But, he's got no evidence, and there was no notice that we're going to be dealing with this as evidence. And he can't sit here, and nor can the Board decide, without it.

 This case is so fraught with exactly where I started. There is --

 MR. QUESNELLE: Mr. Campion, that is a very legitimate -- if you want to make that in argument, that there is no evidentiary base for the submissions we're hearing, but the submissions are the submissions, and they're made off observations of the evidence that is here. There is nothing unusual about what we're hearing from Mr. Millar. And it is not unanticipated by the questions that we are asked. For me to limit Mr. Millar on this, this would be to saying we asked the question and, no, no, that sounds like an answer to what we asked, so don't hold that. You can argue with his submission on it, but it is in response to the questions that were asked.

 MR. CAMPION: In my respectful submission, it couldn't possibly be, and I will make my submissions in due course.

 MR. QUESNELLE: Thank you.

 MR. MILLAR: Thank you, Mr. Quesnelle. Frankly, I was almost done on this point. It was again, if Mr. Campion disagrees with what I say, I am happy to hear it, and as you say, I think his opportunity to do that is after I'm finished and after Mr. Smith is finished. If he thinks I haven't set the evidentiary record for that, then that's fine as well. He is entitled to make that argument. I've made the arguments on the facts that are on this record, and if people don't like my interpretation of them they can respond to that and the Board can take it or leave it, but frankly, I don't have much more to say on that, just that the natural question arises is if NRG has difficulty in managing as a direct purchase customer then maybe NRG or the Board should consider encouraging them to get off, in the future. I'm not talking about the past. The past is done. But going forward, maybe they should be a system supply customer. I didn't mean to say anything more than that.

 Mr. Chair, I am going to move on to the final question, which my submissions will be very brief. Did you have any questions about question 3?

 MR. QUESNELLE: No, thank you.

 MR. MILLAR: Okay. For question 4 I think we will have an easier ride of this. For once Mr. Campion and I are likely to be in agreement, I think. The question is should NRG be granted rate relief and/or a stay from the imposition of interest on amounts due for payment to Union related to the application of certain penalty charges. And we think that is fine.

 To make a long submission short, it doesn't appear Union was actually out of pocket any money for much of this, and I don't want to belabour this, but on this point I didn't hear Mr. Campion make any argument on it in his initial submissions, although it is one of the four questions. I expect he and I are on the same page for that, and that is that interest should not be owing.

 Mr. Chair, thank you for the time you have provided me. Those are my submissions, unless you have any questions.

 MR. QUESNELLE: No, thank you very much, Mr. Millar.

 Mr. Smith?

# Submissions by Mr. Smith:

 MR. SMITH: Thank you, members of the Board. To assist, Union's submission will be directed to the first and only the first question that's been asked. Union is obviously not a ratepayer of NRG and does not propose to make any submissions in relation to the question of prudence, nor in relation to the question of interest. So I hope to be brief.

 I agree, and adopt Mr. Millar's submission, which I also hope will shorten my own submissions, with respect to whether or not NRG should be treated differently because it is a natural gas distributor than other non-compliant direct purchase customers.

 In Union's submission, the answer to that question is no. In Union's submission, there is no -- there was no reason in 0154 for NRG to be treated differently and, in Union's submission, nothing new has materialized which changes that view.

 The starting point in my submission is NRG's direct purchase contract, which you have in a number of places in the record. What I would say is the observation that Member Hare raised: That contract is the same for NRG as it is with respect to all direct purchase customers. There is nothing in the contract that refers to NRG's position as a natural gas distributor as warranting different treatment as it relates to the winter checkpoint or, frankly, any other term of the contract.

 It chose to be a direct purchase customer, and whatever the reasons are for that choice -- and we needn't revisit them -- there are obligations that go along with that choice, and Union's position is simply that NRG ought to be obliged to meet those obligations, including the winter checkpoint balancing obligation.

 And if it fails to meet those obligations -- which it knew and took on willingly -- it should suffer the same consequences as any other non-compliant direct purchase customer.

 I agree with Mr. Millar in particular that the intent of the penalty -- as reflected in the 0029 decision and continued in decisions thereafter -- does not depend on the nature of the DP customer.

 In other words, it doesn't matter whether or not NRG is a gas distributor or a car company or anything else. The penalty is there in order to protect Union's system.

 And Mr. Millar took you to the 0029 decision. I would like to take you to one other place, just to further make the point. I had handed up, and I hope you have a copy, a copy of NRG's answers to undertakings -- answers to interrogatories in 0053. I would ask Mr. Gluck to pass it to you. I have given a copy to my friend.

 MR. MILLAR: Actually, I just gave the 0145 decision, Mr. Smith. What -- where are you referring to?

 MR. SMITH: Oh, I'm sorry, I thought I had distributed it.

 MR. MILLAR: Okay, Mr. Smith has copies.

 [Mr. Smith passes copies to participants]

 MR. MILLAR: Mr. Chair, we will mark that as an exhibit. I guess we are at K1.5.

EXHIBIT NO. K1.5: COPY OF NRG'S ANSWERS TO INTERROGATORIES IN 0053.

 MR. MILLAR: Mr. Smith, will you be referring to 0145 while we have it?

 MR. SMITH: I will be referring to the 0145.

 MR. MILLAR: Then I just suggest we mark that as well, since we just handed it out. That would be K1.6.

 MR. CAMPION: K1.6 is what, I'm sorry?

 MR. MILLAR: That's the 2014-0145 decision that I think Mr. Smith circulated over the lunch hour.

EXHIBIT NO. K1.6: 2014-0145 DECISION.

 MR. MILLAR: And yesterday too, I believe.

 MR. SMITH: Sorry, in fact, before we go to NRG's answers in 0053, if you have Mr. Campion's large compendium, which I believe was the first exhibit today, and turn to tab 19(b), and this is Exhibit B to Mr. Lippold's affidavit, and I may refer to this more than once.

 But it is important, because it reflects what Union's planning assumptions are, and you will see that Union's planning assumptions -- when it comes to its direct purchase customers -- are independent of the type of customer.

 So if you look in the third paragraph, Union's responding to a proposition about the amount of gas Union purchased. You will see in the third sentence what Union indicates in answer to the interrogatory is:

"Union did not plan for, nor proactively purchase, any gas supply to make up the default for any direct purchase customers not meeting their contractual obligation, including NRG. Union's planning assumptions when purchasing spot gas was that all direct purchase customers would meet contractual obligations at expiry and checkpoint."

 And that is the basis upon which Union makes its decisions. That is, it expects all customers -- regardless of the type of the customer -- to meet their checkpoint balancing obligations, and as I say, NRG should be treated no differently.

 The other point I would like to make by reference to 0029 -- and I agree with Mr. Millar's emphasis on paragraph 2.91, and the intent is to ensure compliance with contractual obligations to balance a system such as Union's -- are broad.

 And I agree with his submission with respect to paragraph 2.95. Mr. Campion, in his submissions, focussed on the narrow question, in my submission, as to whether or not -- whether or not NRG has an incentive to game the system. And that is reflected in paragraph 2.95, the issue of strategic non-compliance with balancing obligations.

 But the sentence referred to continues, and it goes on to say:

"And the careless or incompetent acceptance of contractual obligations which are not reasonably achievable. The Board is concerned that parties wishing to engage in the market, either directly or through agents, must be appropriately encouraged to manage their obligations responsibly. The system as a whole requires that."

 And that harkens back to my original submission, which is the Board, in making direct purchase an available option, is saying to parties that it is a choice. But if you are going to make that choice, you are expected to meet your obligations because Union's system requires that.

 And, in my submission, you have to look at the entire paragraph 2.95 to understand the full intent of the penalty, and not simply the question of strategic non-compliance.

 The third reason that I would offer for the fact that NRG should not be treated differently is really the nature of the cost that we're looking at. What we are talking about here -- although we're focussing on the penalty, the penalty is nothing more than a component of NRG's overall cost of gas supply.

 And we know that, because that's exactly where it is found in their QRAM application. Indeed tab 1 of my friend's compendium is the application in 0053, and this cost is reflected in the purchase gas cost variance account. It is just a cost of gas, and it is being cleared through the QRAM.

 Costs that are cleared through the QRAM, the landed cost of gas, are subject to a prudence review. And that is consistent with Mr. Millar's reference to the Court of Appeal decision in Enbridge.

 There the court had to consider the prudence of Enbridge's costs on the Alliance/Vector pipeline, its landed cost of gas, and the Board disallowed some of those costs.

 And it followed the prudence review, and the court said what it said about the steps in the prudence review, and I needn't take you to it.

 In Union's submission, if you view NRG's cost and the penalty through the lens of a gas cost, a gas supply cost, then it follows that they shouldn't be treated differently.

 In other words, what NRG is actually asking for is a different prudence review. It's asking for an initial step that some part of its gas costs should actually be disallowed – sorry, should not be included, because it is a gas distributor, and then prudence should follow after that.

 In my submission, it is all part and parcel of prudence. If it was prudent for NRG to have incurred the penalty, then that cost should be borne by ratepayers. And if it's imprudent, it should not.

 And I put it this way; take Union's example. If Union did what NRG did, and did not buy gas as it did throughout the winter, and tried to buy the gas at the end of February and incurred a large cost of gas, it would reflect that in its QRAM. And the Board would make a decision whether that was prudent.

 Here, what NRG did -- as a gas distributor, just like Union -- it didn't buy all of the gas that in fact it was supposed to buy. It incurred a gas cost, which was the charge from Union. And now that gas cost -- just as it would for Union -- should be subject to prudence, and it shouldn't be treated differently because it happens to be a penalty.

 In other words, the fact that it is a penalty doesn't mean it should be treated differently than if it had successfully bought the gas for $78 or $50, or any other cost.

 So, in my submission, Union simply believes that NRG should be treated exactly the same way Union is with respect to its own gas supply purchasing decisions.

 MR. QUESNELLE: Just for clarity, Mr. Smith, your comments just now on the prudence are related to the status, not the prudence?

 MR. SMITH: I don't make a submission as to whether they're prudent or not. I'm just saying the same analytical framework should apply --

 MR. QUESNELLE: Right.

 MR. SMITH: -- to NRG as it would to Union. So Union Gas costs are cleared through the QRAM, and the Board makes a decision.

 If Union sat on its hands and didn't buy gas until the eleventh hour, then it would obviously be open to parties to question that.

 Here, NRG went one further. It didn't buy some gas, it incurred a penalty, and the analytical framework should be identical.

 And it shouldn't be relieved of, in effect, the prudence test by virtue of the fact that it is a gas distributor, any more than Union gets relieved of its gas costs by virtue of a gas distributor, or Enbridge, whose only QRAM was the subject of review by the Board is subject to a prudence review.

 I agree they are a distributor, and I agree that all distributors should be treated the same with respect to gas supply costs.

 MR. QUESNELLE: Thank you.

 MR. SMITH: Let me turn to NRG's specific arguments as to why it should be treated differently. They're reflected in Mr. Lippold's affidavit, but you can find them in my friend's memorandum or written submissions beginning at paragraph 60.

 You heard Mr. Millar with respect to this question of NRG not being -- or not selling gas for profit. And I agree with him, that that's true and that it is a cost of production, just as it is a cost of production for Ford or Toyota.

 Let me say this, though, in addition to adopting Mr. Millar's submissions.

 When you look at my friend's submissions, there's two observations I want to make. The first is they don't go to whether or not the penalty ought to be different for NRG. What they go to is what I just said, which is prudence.

 So my friend's argument, as I understand it, at paragraph 60 is: NRG's daily inputs are fixed well in advance, but its output overall franchise consumption is variable, the argument being that NRG is unable to control its consumed volume.

 That's fine so far as it goes. But that doesn't tell you anything about whether it should be relieved of the penalty, or, frankly, anything about what the penalty ought to be.

 It's an argument for the prudence of the gas supply purchasers, assuming the underlying facts are correct. And so in other words, if the facts were that NRG could not have forecast that its customers would continue to over-consume in February, I agree that that would be an argument that would go to the question of prudence.

 But I don't agree that it goes to the amount of the penalty, or being relieved of the penalty at all, for the reasons I have previously articulated.

 And so I think it is an important paragraph for you to think about when you come to your prudence analysis. But I think what you will have to do is ask yourselves at the time NRG incurred the penalty, was it the product of the fact that its customers were consuming late in the day more than forecast. That, I think, would be a legitimate position to take on prudence, and I do think it is an important consideration when it comes time to prudence.

 With respect to paragraph 61 and the question of the fact that gas costs are a pass-through, I don't think that that changes the analytical framework at all, for the reasons I have previously articulated.

 But I disagree with my friend in addition, in this respect.

 MR. CAMPION: Which friend?

 MR. SMITH: You, Mr. Campion, in this respect, because unlike a for-profit enterprise, Mr. Campion's submission suggests that those costs can simply be passed on.

 In fact, regulated utilities, being on the receiving end of this submission many times -- regulated utilities are in arguably an advantaged position, in that they have a mechanism -- i.e., regulation and the QRAM -- in order to pass on higher costs provided they're prudently incurred.

 Market participants may have no such ability. In a market where all of the competitors are price-takers, you have no ability to pass on costs at all.

 So I disagree with the comparison.

 So for all of those reasons, it is Union's position that NRG should be treated no differently than the other 98 percent of its DP customers, and certainly no different than those other non-compliant customers.

 There are two additional matters that I think I should refer to. The NHL playoffs are on, and I take from Mr. Campion's submission that he's a fan of Al Arbour, who used to be the coach of the New York Islanders, who said a good defence is good offence. There were two submissions that were made that I think I should refer to.

 The first is that Union refused to assist NRG. And the second is that Union did not need the gas. I don't think it's important for your decision today to make any conclusion with respect to either of those, but I don't agree with either. And I will just give you the evidentiary reference.

 So if you have Mr. Lippold's affidavit still, in my friend's large compendium, on the first proposition that Union refused to assist NRG. If you turn to tab H, which is tab 19H, you should have there an answer to an interrogatory from Union, and there Union directly responds to the proposition that it refused to assist NRG. And I don't propose to read it, but what you will see there is that through January and February Union frequently communicated with NRG to notify it of its balancing obligation, responded to e-mails and telephone calls, provided a written response on the 24th.

 The other thing it did -- and you will see this in the second full paragraph -- Union also communicated to NRG that it could have supplied gas to NRG as part of the discretionary gas supply service, which is a supplementary service, and it is available to South direct purchase customers who are unable to access market supplies.

 And in those cases the customer simply plays (sic) an administrative charge plus Union's cost of gas of procuring the supplies, and the evidence is that NRG did not take Union up on that offer.

 The other piece of evidence I would refer you to is the package I just gave to you, and I can't remember the exhibit numbering. It is the March 19, 2014 answers to responses from Board Staff on NRG's underlying QRAM application.

 MR. CAMPION: What is the exhibit number? Can we have it, please, because I don't --

 MR. SMITH: K1.5.

 MR. CAMPION: Thank you. And the mathematical calculation by Newton, what number is that one? Your mathematical calculation by Newton.

 MR. SMITH: 1.4.

 MR. CAMPION: Thank you.

 MR. SMITH: You will see the very -- you will see in the very first question (ii), the question is asked:

"Please explain whether NRG could have requested authorization from Union to deliver incremental gas to Union in advance of the winter checkpoint in order to reduce banked gas account imbalances. Did NRG make such request to Union? If so, please document the response. If not, why not?"

 So this goes, again, to the question of whether Union refused in some way to assist NRG.

 What you will see in the answer to 1(ii):

"Yes, NRG could have requested authorization from Union to deliver incremental gas to Union in advance of the winter checkpoint, but this was not a reasonable or prudent thing to do, having regard to past experience. Union did not -- sorry, NRG did not make a request from Union."

 And then it goes on to explain why. But the simple point is, it could have asked to bring in more gas. And it didn't ask Union. So there can't be any implication that Union somehow refused such a request.

 And if you go a little bit later in this package to schedule 3, and you should get the direct purchase status report. It looks like this. (Indicating)

 Mr. Millar referred to these, but this is the direct purchase status report that is delivered by Union to all of its direct purchase customers on a monthly basis, which shows the customer where they are relative to forecast.

 And so you understand how to read the document, if you look in the upper right-hand corner -- so the first document is as of month ending December 2013, members of the Board. Do you have that?

 MR. QUESNELLE: Hmm-hmm.

 MR. SMITH: In the upper right-hand corner you have DCQ breakdown, gJs per day, and it tells you where NRG is obliged to deliver gas to Parkway and the western delivery at Dawn. And the total is 2,294.

 If you multiply 2,294 times 31, you get 71,114. That's the amount of gas NRG is required to bring in on a monthly basis in a 31-day month.

 And you will see, if you look on the right-hand side -- the left-hand side under "total receipts", you will see the second column, "total receipts, gJs". So in December NRG brought in 71,114 gJs per its contract.

 If you look at the right-hand side, you will see position at checkpoint, minus 276,999 gJs. That number needs to be compared to the checkpoint quantity, which is down in the middle, of 205,227.

 So what that tells you is as at the end of December NRG was being told that it was going to be roughly 72,000 gJs short. So when Mr. Millar refers to the direct purchase status report, saying there was a forecast that NRG was going to be short, that is what he's referring to.

 If you look over the next page, you will see the Direct Purchase Status Report for January. And you will have seen in Mr. Lippold's affidavit that he refers to the fact that Union communicated at the end of January that NRG was going to be short 115,000 gJs. That number is the result of subtracting 205,227 from 327,050.

 And I wanted to take you to this document just for that reason, but also to show you that you will see in January 2014 that NRG continued to bring in 71,114 gJs of gas. So consistent with the answer given earlier, that they did not seek authorization to bring in additional quantities of gas.

 The last document that I would take you to is, turning back in K1.5, is the answer to question 2. So just go back to the second page. And what you will see there -- and this just goes again to Mr. Campion's suggestion that Union refused to assist NRG.

 If you look at question 2(ii), and what you will see is NRG is asked:

"Please discuss the systems that NRG has in place to monitor imbalances in its banked gas account with Union."

 And what you will see under the heading "standard practice", the second sentence: "If gas is required to be purchased," which it was here, "NRG is e-mailed on a daily basis commencing February 1."

 So in my submission, to the extent it has any relevance at all, there could be no reasonable argument that NRG failed to assist -- Union failed to assist NRG in any meaningful way.

 It is correct to say that Union's position was that NRG ought to live up to its contractual obligations, and when it sought a waiver of those contractual obligations, Union didn't grant that waiver. So I do agree with that.

 The last submission or proposition that I want to respond to is my friend said any number of times that Union did not need the gas.

 I must say, I don't understand -- I don't understand that submission. But allow me to respond to it, because I don't understand the basis for it, or the implication of it.

 But if you turn to Exhibit B of the Lippold affidavit -- and I did take you to this earlier -- Union's planning assumption is unquestionably that all of its customers will meet their contractual obligations, and that it plans accordingly.

 If my friend's proposition is simply that if the additional -- with the benefit of hindsight, if the additional 24,000 gJs of gas had not been delivered, there would not have been a system failure, then I agree; with hindsight, that's true.

 But from a planning perspective, Union absolutely needs direct purchase customers to meet its obligations.

 And Member Hare will recall, but I have passed up the decision in EB-2014-0145, and I have given my friend a copy of that, but --

 MR. CAMPION: Did you give that a number?

 MR. SMITH: K1.6, Mr. Millar?

 MR. MILLAR: Yes.

 MR. SMITH: And this was a decision, a recent decision of the Board dealing with Union's year end deferral account balances.

 And one of the deferral accounts which was at issue was Union's south bundled direct purchase load balancing cost, or spot gas variance account. And the Board considered there -- and it starts on page 3:

"The Board considered there the prudence of Union's spot gas purchases through the winter, including the spot gas purchases it had to make for direct purchase customers, and concluded that Union had acted prudently and the costs were included for recovery in the deferral account."

 The reason for taking you to the decision is that at the bottom of page 4, the Board comments that an argument was made that Union ought to have dipped into system integrity space. And this is, I think, what my friend is saying, which is: You have storage. You have gas there which is system integrity gas. You, Union, should use that gas in order to balance the system.

 And as the Board rightly concludes here, system integrity is intended to address unforeseen, unplanned circumstances. And what we are dealing with here was a forecast shortfall. And that is exactly the situation that NRG found itself in, as reflected in the direct purchase status reports.

 Everybody knew where they were relative to the banked gas account. Union was forecasting a shortfall, and it went into the market and it bought gas for its own system gas customers.

 And as the Board concludes there, you don't use system integrity space to manage forecast situations, because if you do that, if something unforecast happens, you don't have system integrity space left to deal with it.

 And so that's the conclusion that the Board dealt with there.

 So subject to any questions, those are my submissions.

# Procedural Matters:

 MR. QUESNELLE: Mr. Campion, before lunch we talked about the process we would run today. You have heard the submissions from Board Staff and from Union.

 You mentioned earlier, partway through Mr. Millar's submissions, that you were taking objections to some of the things -- to the nature of the types of arguments that he was providing.

 Two things, I guess. I would like to keep them separate. If you have issues around the process or the appropriateness of the types of things, the arguments that have been made, I would like to hear those first.

 But earlier, we also talked about whether or not you would -- you reserved on whether or not you need more time to prepare, given you hadn't heard the submissions from Mr. Millar or Mr. Smith yet.

 And I would ask you to consider that as well, as to whether or not you can tell us now, or whether or not you would like to take a break and consider that.

 MR. CAMPION: In my respectful submission, I think the most efficient and I think the most helpful to the Board -- which is really in the end the guideline; if I'm not helpful to you, then I'm not helpful to anybody -- is that I would like to reply in writing.

 MR. QUESNELLE: Okay.

 MR. CAMPION: And I will fix some date that I will reply by in seven days or whatever it might be, ten days if it is not unreasonable with the holiday weekend in between, and that way my friends don't have any right of rejoinder, so it gives me a chance to think through the processes, which I think are complicated, and I would like to assist the Board as best I can.

 And I will have a transcript, I assume, and I would like to see really what objections I do have that are real as opposed to theoretical. Theoretical is useless to us all, in my respectful view.

 This isn't to make a point. This is to -- is there something real here that I feel there has been some prejudice, and I would like to have a chance to think about it. I think it will be more efficient and better, and the Board will find it, I think, more helpful if I do.

 As regards the other pieces, I do have some submissions. But I think it best to put them in the same document rather than separate the two, put it in writing and I think it will be more helpful to the Board, and clearer as to what I have by way of reply. I won't abuse it, of course. I have a reply and it is meant to be brief, and only deal with points that have been raised against me, and I will honour that as you would expect me to do.

 MR. QUESNELLE: Okay. I think that would be fine, Mr. Campion.

 Just for clarity, if you are raising matters of procedural fairness or issues, the Board will look at those and to the extent that you are asking us to put weight on certain things based on any objections you have, we will give opportunity to other parties to weigh-in on that in some fashion procedurally.

 MR. CAMPION: If that happens, and they're given an opportunity and something is raised, I will -- I am shy, but I will try to make my submissions known, if I need a little bit of answer to something that is completely new if they raised it.

 But other than that, I am what perfectly happy that be the case, of course.

 MR. QUESNELLE: Understood. I think the Board is fine with letting us know within the next couple of days when to expect this.

 MR. CAMPION: That would be very kind, sir, thank you. I would certainly not go past June 1 in any circumstance, but I think that I am closer to that. I just want to have a chance to consult with my colleagues and ensure that I can get it done. I just don't want to be worried about it too much over this long weekend if I can help it. But I think in the four days next week, I will be able to get something together.

 MR. QUESNELLE: Comments, Mr. Millar? Any more submissions, or you're fine?

 MR. MILLAR: No, thank you, Mr. Chair.

 MR. QUESNELLE: Mr. Smith?

 MR. SMITH: Nothing further.

 MR. QUESNELLE: Okay, thank you. Thank you very much for your submissions today, and we are adjourned. Thank you.

### --- Whereupon hearing adjourns at 3:10 p.m.