

**ONTARIO ENERGY BOARD
("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 ("NRG"), 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 NRG, 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 ("Union") related to the application of certain penalty charges;

AND IN THE MATTER OF an Application by Union for an order or orders approving a one-time exemption from Union'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.

REPLY SUBMISSIONS OF NATURAL RESOURCE GAS LIMITED ("NRG")

PART I – OVERVIEW

1. Board Staff and Union have raised matters in their answer to NRG's written and oral submissions which variously require an answer.

2. Board Staff raises eight issues and matters opposing NRG's submissions, as follows:
 - (a) NRG chose to be a direct purchaser and must manage the risk and therefore be granted no relief (p. 80; Staff);
 - (b) any special treatment undermines the intent of the contract, fails to protect Union's system and prevents a risk to Union in the future (pp. 88 – 90; Staff);
 - (c) the Board already decided that NRG's submissions were not convincing in a prior case (p. 90; Staff);
 - (d) the public interest is best served by the status quo contract obligations and no special relationship (p. 91; Staff);
 - (e) if the penalty costs are imposed on NRG's shareholders, there is no impact on ratepayers and no negative impact on the public interest (p. 92; Staff);
 - (f) no reason to change the \$50.50 penalty rate for NRG (p. 93; Staff);
 - (g) on the legal submissions regarding the prudence analysis, on the facts and inferences drawn (under NRG's objection) by the Board Staff counsel, NRG was not prudent in its actions regarding gas supply during the winter of 2013/2014 (pp. 95 – 116; Staff); and
 - (h) NRG should be granted its claim for interest relief (p. 124; Staff).

3. Union raises the following issues which require responses by NRG in this reply:
 - (a) Union said it would make no submissions on prudence (p. 124; Union) but then raised NRG prudence sixteen times in 20 pages of oral argument (pp. 124 – 144; Union). Union argues that NRG’s request that price be \$7.12 per GJ for a one-time, special circumstances basis was nothing more than an attempt to argue prudence;
 - (b) NRG and Union are equated for the purpose of analysis (pp. 130, 134; Union); and
 - (c) Union offered help to NRG before February 28, 2014 (p. 133).

PART II – NRG REPLY

NRG General Comments

4. Respectfully, counsel for Board Staff and Union misconstrued the basis of NRG’s application. This renders both parties submissions largely unhelpful. Additionally, the submissions of counsel for Board Staff and Union seek to rely upon inferences and alleged facts which are not part of any record before the Board and require either evidence and/or expert testimony which was not brought forward. Counsel did not cross-examine on the evidence put forward by Mr. Lippold for NRG. The Board must therefore make its decision on the facts actually put in evidence by the parties as identified in the record.

5. It is important for NRG to emphasize the basis of its application and the significance of the relevant prior decisions of the Board (which bind the Tribunal in this case and from which neither Board Staff nor Union ought to be permitted to resile):

(a) Weather

- (i) the weather conditions in the winter of 2013/2014 were “extraordinary” and “anomalous” and have been so found to be relevant in EB-2014-0154 (Decision, October 9, 2014, p. 6) (see paras. 15 – 18; NRG Written Submissions); and
- (ii) the weather conditions caused prices of delivered natural gas in Ontario to rise to unprecedented prices in January and February, 2014 which had no precedent in historic norms (see paras. 33 – 35; NRG Main Written Submissions).

(b) Contract Integrity

- (i) all of Union’s Direct Purchase Customers, including NRG, have been granted contractual relief due to the exceptional winter conditions of 2013/2014 based on Union’s application and the Board’s decision in EB-2014-0154 dated October 9, 2014. The decision renders moot the “sanctity of contract” submissions raised by Board Staff and Union in this case. NRG respects the sanctity of contract and the need to protect Union’s system by timely delivery of winter checkpoint quantity gas, outside the extraordinary winter conditions of 2013/2014. In

EB-2014-0154, Board Staff and Union requested and received a change in the bundled T contract rate for all of Union's direct purchasers who did not meet their contractually-mandated winter checkpoint quantity. This Board decision was based on the extraordinary weather conditions of 2013/2014 and the resulting exceptionally short term high price of transportation and therefore, the Ontario landed price of gas. These unprecedented prices justified the one-time suspension and change of the penalty rate provisions in the direct purchase bundled T contracts among Union and its customers. The sanctity of contract was set aside in the public interest in EB-2014-0154 (para. 9; NRG Written Submissions);

- (ii) the integrity of contract in any future year is accepted by NRG. NRG seeks no special status under the future operation of the bundled T contract between it and Union. The NRG request in this case is made in an historical context and based on the fact that NRG is a public utility responsible for ratepayers operating in the special conditions of 2013/2014 and facing the resulting detriment to its ratepayers and windfall to Union's ratepayers;
- (iii) NRG's submissions are therefore strictly exclusively confined to the unprecedented circumstances of 2013/2014 which have already been recognized by the Board and supported by counsel for Union and Board Staff in Union's Penalty Rate case; and

(iv) the Board has therefore endorsed the concept that, in the special circumstances of 2013/2014, the bundled T contract is properly treated as flexible enough to accommodate a lower penalty rate on a basis that it was not precedent-setting. To this proposition NRG has additional issues beyond those raised by non-utility customers which are worthy of further public relief in the public interest.

(c) Windfall and Detriment Among Neighbours

(i) the evidence of windfall benefit to Union's residential customers and the equivalent detriment to NRG's residential customers or NRG's shareholders is unchallenged. It is deserving of special consideration. No other Union customer can claim the detriment to its customers who are regulated under the Board's mandate (para. 38; NRG Written Submissions).

(d) Unique Circumstances

(i) the only unique claim sought by NRG, based on its public obligation to protect its ratepayers and minimize the cost of gas, is the price for the 25,000 GJ shortfall at issue in this matter. NRG submits the price for the shortfall of gas should, in these unique special circumstance only, be based on Union's actual cost of gas. This result is in the public interest, having regard to NRG's role as a regulated utility serving customers in Ontario and to laudable public interest goal of preventing an artificial

detriment to NRG or its customers based on unearned windfall to Union's customers.

(e) Board Direction to Review

- (i) while the Board in EB-2014-0154 stated it was not convinced by the submission that NRG's status as a regulated utility in the Province of Ontario did not warrant any special price, the Board, in a subsequent decision (EB-2014-0373), altered that decision when it said:

However, the OEB does have some concerns with the narrow question of whether the implications of NRG's status as a natural gas distributor regulated by the OEB was thoroughly addressed in the EB-2014-0154 proceeding ... the OEB will hear this issue on its own motion.

PART III – NRG'S CHOICE

6. It is accepted that NRG chose to be a direct purchaser. Having made the choice to be a direct purchase customer, NRG managed the risk of being a direct purchaser for all of the years between 1996 and 2013 with a view to benefitting its ratepayers with lower prices, as approved by the Board.

7. The proposition that NRG made its choice and must therefore be held to the strict terms of the contract and bear the costs of the penalty rate fixed at \$50.50 per GJ does not survive scrutiny when assessed by several factors set out below. Firstly, NRG has successfully managed its gas purchase risks for all years between 1996 and 2013. Secondly, in that year, exceptional conditions prevailed to drive natural gas prices (driven by unexpectedly high transportation costs) to unprecedented highs and were unpredictable based on any historic norms. As set out above, Board Staff, Union and the Board itself in EB-2014-0154, have accepted the fact that the

bundled T contract must be amended and the penalty rate must be reduced in all the circumstances. Thirdly, the contract can no longer be considered sacrosanct in the face of the exceptional weather conditions and the contractual amendment already approved by the Board. This amendment was granted without doing any injustice or presenting any risk to Union's system or the known obligation to meet contractual terms in the future. Contractual certainty, Union's system integrity and its integrity in the future is therefore not undermined by a mandated change in the contract and reduction in the penalty.

8. It is submitted that NRG's proposal to reduce the penalty price of gas for 25,496 GJ to Union's actual cost does not unleash a change that exposes Union and its system to contractual and systemic uncertainty in the future. It does, however, prevent detrimental, gratuitous harm to NRG customers without causing any concomitant harm to Union or its customers.

9. It is therefore respectfully submitted that the Board should consider NRG's application without regard to the *in terrorem* arguments that, if the contract terms are amended for any reasons, Union's system would become at risk or ever put at risk based on one contractual change that had already been approved by the Board. The Board is therefore able to consider the other aspects of the public interest raised by NRG without harm to Union.

PART IV – PUBLIC INTEREST AND PRIVATE CONSUMERS

10. The Board, acting in the public interest, has already decided that the bundled T contracts as they existed prior to the winter of 2013/2014 should not be binding in the special circumstances extant in that winter. The Board has already declared that the Union contracts should be amended for the purpose of fixing the penalty rate for natural gas for a number of Union's customers in these special circumstances. Union and Board Staff must accept that the

public interest is the basis for the Board's decision to reduce the penalty rate. In this case, the Board is now asked to weigh the issue of whether \$50.50 per GJ rate or some lesser rate should be imposed upon NRG. Based on the fact that NRG has a broad public interest to protect its ratepayers and to protect its own financial integrity as a public utility, NRG's request ought to be granted and the price fixed at Union's cost.

11. It is submitted that the central public interest advanced by granting NRG's request is reducing ratepayer costs for those customers served by NRG. This is the Board's central mandate.

12. The public interest is also served by eliminating a windfall to Union's residential customers and a concomitant detriment to NRG's residential customers. A decision in favour of NRG's request avoids unfairness in the exercise of the Board's public interest mandate without riding any future system difficulties.

13. By advancing these public interest submissions, NRG is fulfilling its own public obligations. At the same time, NRG is requesting that the Board exercise its own central mandate to provide protection of the public interest where there is no cost imposed on Union or anybody else in the Ontario system. There is no danger that its decision will be precedent-setting and there is a broad acceptance that the unique circumstances at play in the winter of 2013/2014 justify the NRG rate reduction to Union's actual costs, as requested.

14. It is significant to note that no other customer of Union except NRG has a similar, utility public interest regulated by the Board. The other customers of Union who (having not appealed or sought further relief) are paying \$50.50 per GJ for a penalty rate are not governed by the public regulatory framework and do not have the same regulated public interest obligations to

protect their customers. Contrary to the submissions made by Board Staff and Union, it is submitted that there is a profound difference between a private company which can pass on the cost of its energy and heating inputs and NRG which cannot make a profit on the sale of natural gas and may not be able to pass on the costs of natural gas purchases at the penalty rate because of the approval required by the Board. Private companies require no such approval for their rates, profits or treatment of pass-through costs.

15. The difference between NRG and non-utility customers of Union is highlighted by the fact that no private consumer of Union, who was required to pay the penalty rate, has continued its request for a lower rate.

16. Board Staff's statement that NRG is in fact a "for profit" company is also in error. If, by that statement, Board Staff attempts to persuade the Board that NRG should be treated the same as an unregulated business enterprise, it is not a sustainable argument. The issue in this case involves the recovery of gas costs (as affected by high West/East transportation costs). These costs cannot be the subject of profits to NRG. In regard to the central issue in this hearing, NRG is not a "for profit" enterprise.

PART V – PRUDENCE

17. NRG submits generally that there is an evidentiary issue which negatively impacts Board Staff's submissions regarding NRG prudence. Additionally, there is an internal conflict in Union's submissions concerning prudence. The submissions will be dealt with in turn below.

Board Staff's Submissions on Prudence

18. As set out in paragraphs 67 to 70 of NRG's written submissions, the only evidence led on the issue of prudence is that put forward by NRG.

(a) The “Game Changer” Factors

19. Counsel to Board Staff entirely disregarded the exceptional events that have led to this case, namely: the existence of the exceptional weather conditions and the existence of historic prices that had never previously been experienced at \$78 or \$50 per GJ. These are factors that led to the Board approved change to the bundled T contract terms and are plainly relevant and possibly determinative of NRG’s application. These factors remain relevant to NRG’s submission that the gas costs that it must bear under the penalty clause should be fixed at Union’s cost and not at a rate of \$50.05 per GJ, causing a wholly avoidable detriment to NRG ratepayers or NRG where Union has suffered no loss justifying the windfall and the future of Union’s system remains secure.

(b) Lack of Board Staff Evidence in Support of its Submissions

20. Counsel to Board Staff improperly placed submissions before the Board that were not supported by evidence or by expert evidence. Evidence is necessary to render the Staff submissions acceptable that NRG was: (a) aware of the shortage of gas in November 2013; (b) that it waited to the end of February to make good its deficit; (c) that it took an inappropriate risk in not purchasing gas before February; (d) that a more conservative approach to gas supply should have been made; (e) if NRG had acted in November to purchase gas, it would have avoided risks in February 2014; and (f) had NRG used a layering approach to gas purchases its risk would have been managed. All of these statements and opinions are unsupported by any testimony. It is submitted that all of the propositions must be rejected.

21. Even if the Board reviews all of the records of the cases involving NRG and Union and NRG and its ratepayers, there is no evidence or expert evidence that supports the above

submissions, facts and opinions regarding prudence made by Board Staff. If NRG had made gas purchases in advance that were in excess of its customers' needs, then its gas purchasing policies would also be under review and subject to possible criticism if the prices achieved were too high. In short, the proposition that early purchases were the "proper purchasing strategy" in the circumstances has not been supported on the facts or with expert evidence. In any event, these conclusions require the support of expert testimony, which was not placed before the tribunal.

(c) Unchallenged Evidence of NRG

22. The evidence is clear that high and erratic pricing for natural gas prevailed during the months of January and February 2014. There was always a concern that purchasing gas, well above the historic market prices that prevailed in the January and February 2014, would itself lead to high prices and/or be subject to a prudence review. NRG relied upon its own internal expert advice on pricing and that of independent market dealers such as Shell Canada. NRG was a sophisticated market purchaser of natural gas. It developed and executed a reasonable strategy that the prices of natural gas would normalize before February 28, 2014. The fact that they did not normalize, consistent with reasonable historical standards, is not evidence of NRG imprudence.

23. It should be noted that the price of gas was not the driver of high prices during the winter of 2013/2014. The high price of natural gas purchases was driven by the short term high price of transportation from the West to Ontario on TCPL. The high price of transportation was not predicted by any Ontario purchasers and could not have therefore been predicted by NRG or any other market participant. With others, NRG acted reasonably in relying upon historical prices of

a much more modest type and cannot now be fairly criticized or penalized as imprudent for failing to see the unforeseeable.

24. NRG has shown, through the evidence of Mr. Lippold, that it was constantly aware of the need to monitor gas purchases and gas prices during January and February 2014, that it based its actions on historic norms of prices, that the extreme cold weather was not predictable, that it stayed in close contact with the natural gas market, having regard to the needs of its customers and that the winter weather conditions, that it pursued all avenues, including using secondary suppliers of natural gas, to attempt to meet all of its contractual obligations, and that it sought out real assistance from Union, which was not forthcoming until Union's application in April 2014. In the penalty rate application, Union sought to lower the penalty rate to \$50.50 per GJ. Based on the above, NRG did everything reasonable to meet its obligations to supply its winter checkpoint quantity of natural gas on February 28, 2014 and acted prudently before and after February 28, 2014.

25. There is no evidentiary response to NRG's evidence. Neither Board Staff nor Union sought to cross examine Mr. Lippold on his testimony. In the result, on the record in this hearing, the Board must accept the testimony filed by NRG. There is no factual or expert evidence upon which the Board can make a finding that NRG acted imprudently.

(d) Union as an Inapt Comparison to NRG

26. Board Staff counsel referred to a case where Union was held to have acted imprudently. Union's shareholders were required to absorb the cost of approximately \$5 million. This amount is compared to Union's net income of \$208-million. This amounts to approximately 2.5% of net income.

27. Board Staff propose a figure of \$870,000 to be assessed against NRG's shareholders. This amounts to approximately 3 years of NRG net income.

28. In any event, the Board directed in Procedural order No. 3, page 3, paragraph 3 that only the payment for 25,000 GJ was being reviewed in this hearing for prudence. The total of \$870,000 requested by Board Staff includes an analysis of 115,000 GJ, most of which is not before this Tribunal.

29. The extraordinary size of the proposed assessment on NRG's shareholders plainly negatively impacts the Corporation financially to an extent that it renders regulation highly unprofitable and unfair in the unusual circumstances extant during the winter of 2013/14. While the penalty must be sufficiently costly to defaulters to strongly discourage strategic noncompliance with balance obligations and careless or incompetent acceptance of contractual obligations which are not reasonably achievable, there is no suggestion that NRG was involved in such behavior of strategic noncompliance, carelessness or incompetent acceptance of contractual obligations which were not reasonably achievable. NRG's failure to supply 25,000 GJ of gas arose in exceptional circumstances of a unique and unprecedented kind. The solution should match the circumstances in the broad public interest. NRG should pay Union's costs of \$7.20/GJ for the 25,000 GJ of natural gas supplied to it by Union.

(e) Conclusion

30. It is respectfully submitted that NRG has met all of the unproven allegations and suggestions made against it by Board Staff. NRG has put forward its own evidence that can lead to only one conclusion: namely, that NRG was prudent in its gas purchasing strategy and

policies in the winter of 2013/14, justifying a pass through of the costs of the commonality to NRG's ratepayers.

Union's Submissions on Prudence

31. Counsel for Union disavowed making any submissions regarding prudence at the outset of his submissions. Inconsistently, he then proceeded to raise the issue of prudence 16 times in his oral argument which covered less than 20 pages. It is respectfully submitted that the majority of the argument and all of the submissions of Union regarding prudence should be ignored.

32. Union rejects the important public obligations that are imposed upon public utilities in the province of Ontario to protect their ratepayers. Union argues that the requirement that a utility make no profit on the sale of natural gas and passes through those costs in the normal course to the ratepayers is not a distinguishing feature between a utility customer of Union and a private industrial customer of Union. In this submission, Union ignores a fundamental regulatory impediment that falls on NRG as a utility and the absence of any regulatory obligation imposed on a private industrial customer. Union's argument in this regard undermines its own submissions and raises self-interest as a concern having regard to the windfall benefits it seeks to obtain for its own ratepayers at the expense of NRG's ratepayers.

33. Union submits that it offered assistance to NRG in February 2014 to assist it in meeting its gas supply obligations to Union. The argument is fallacious because there was no timely and meaningful price offered for any gas supply service. The first time that Union provided any prospect of relief was in its application to reduce the penalty rate in April 2014. It is respectfully submitted that, in the circumstances, Union did not offer a reasonable rate to NRG. Union's claim of offering meaningful assistance should be rejected.

34. Union takes the position that NRG should have lived up to its contractual obligations. This position ignores the circumstances recognized by the Board in the winter of 2013/14 and the Board's decision to grant relief to amend the contract. In short, the Board has already decided that NRG and other customers who failed to meet their Winter Checkpoint Quantities were not required to live up to their contractual obligations because of exceptional circumstances. Union's attempt to reargue that point should be rejected as it has already achieved a decision of the Board to the contrary.

35. The issues raised in this hearing are unusual in that they are based on entirely historical circumstances. Union suffered no loss. Union's system was not compromised. Union did not need to purchase extra gas to balance its system. No customer has been shown to have acted irresponsibly or attempted to "game the system". The evidence is unchallenged that NRG did everything possible to meet its obligations including involving independent market players, Union and the Board. NRG showed no lack of industry, focus or poor judgment in attempting to meet its obligations under the bundled T contract. NRG was not alone in failing to meet those obligations but was the sole utility/customer of Union in this plight.

36. It is respectfully submitted that Union's suggestion that there is no difference between it and NRG in purchasing natural gas is incorrect. At minimum, Union has one of the finest and largest storage facilities in North America, permitting Union significant flexibility in purchasing natural gas at the lowest prices. Union purchases gas in much greater quantities than does NRG, giving it a market power and pricing advantages. On the facts of the case before the Board, these are important differences which should be taken into account when considering the NRG submissions that, as a utility, operating in the difficult circumstances of winter 2013/14, it should be granted additional relief to that granted to industrial customers through the fixing of a price

for the Winter checkpoint quantity amount (not supplied on February 28) at Union's cost. This is a one-time request.

37. Finally, some comment is necessary regarding Union's remarkable submission that the Board should consider whether NRG should be precluded from being a direct purchaser of natural gas. There was no notice that this was an issue before the Board. There was no evidence led that would support such a proposition. The argument casts aspersions on the operations of NRG's purchasing department, management policies and independent gas purchase contractors without either being relevant to the case before the tribunal or being fairly advanced on evidence, or giving NRG a fair chance to get the Board's direction on the issue and, if appropriate, meet the allegations in evidence and in law. It is submitted that the proposition put forward by Union should be rejected.

PART VI – CONCLUSION

38. For the reasons set out above, it is respectfully submitted that: (a) NRG's status as a natural gas distributor and utility regulated by the Board warrants additional relief from that already granted to Union's non-compliant natural gas customers in the winter conditions and circumstances of 2013/14; (b) that the rate for balancing gas to be paid for and NRG should be fixed Union's actual costs, namely \$7.12 per GJ; (c) all of NRG's gas costs associated with the penalty should be recovered from NRG's ratepayers; (d) any calculation of a shareholder assessment must be based solely upon 25,000 GJ (which should be assessed as against NRG's shareholders); and (e) NRG should be granted rate relief from any interest amounts due for

payment to Union related to the application of certain penalty charges (as requested by NRG in its EB-2014-0361 application).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of June, 2015 by



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