



ONTARIO ENERGY BOARD

FILE NO.: EB-2008-0273

VOLUME: Issues Day

DATE: October 15, 2008

BEFORE:	Gordon Kaiser	Presiding Member and Vice-Chair
	Cathy Spoel	Member

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 Union Gas Limited for an order granting it leave to discontinue gas transmission to Natural Resource Gas Limited.

Hearing held at 2300 Yonge Street,
25th Floor, Toronto, Ontario,
on Wednesday, October 15, 2008,
commencing at 9:46 a.m.

ISSUES DAY

B E F O R E:

GORDON KAISER

PRESIDING MEMBER and VICE CHAIR

CATHY SPOEL

MEMBER

A P P E A R A N C E S

MICHAEL MILLAR

Board Counsel

NABIH MIKHAIL
NEIL McKAY

Board Staff

MICHAEL PENNY

Union Gas

RICHARD KING

Natural Resource Gas Ltd. (NRG)

SCOTT STOLL

Integrated Grain Processors
Cooperative (IGPC)

PHILIP TUNLEY

Town of Aylmer

I N D E X O F P R O C E E D I N G S

<u>Description</u>	<u>Page No.</u>

On commencing at 9:46 a.m.	1
Appearances	2
Preliminary Matters	2
Submissions by Mr. Penny	4

Recess taken at 10:25 a.m.	26
Upon resuming at 10:43 a.m.	26
DECISION	27

Whereupon the hearing adjourned at 10:47 a.m.	28

E X H I B I T S

<u>Description</u>	<u>Page No.</u>
--------------------	-----------------

EXHIBIT NO. K1.1: LETTER FROM THAMES CENTRE DATED OCTOBER 8, 2008.	3
---	---

EXHIBIT K1.2: LETTER FROM TOWNSHIP OF MALAHIDE DATED OCTOBER 7, 2008.	3
--	---

U N D E R T A K I N G S

Description

Page No.

NO UNDERTAKINGS WERE FILED DURING THIS PROCEEDING

1 Wednesday, October 15, 2008

2 --- On commencing at 9:46 a.m.

3 MR. KAISER: Please be seated.

4 The Board is sitting this morning in connection with a
5 notice of application of a hearing issued by the Board on
6 September 16th. This relates to an application Union Gas
7 Limited filed with the Board on August 1st seeking approval
8 to discontinue service to Natural Resource Gas Limited,
9 known as NRG, pursuant to section 42(1) of the Ontario
10 Energy Board Act.

11 That relief was subsequently amended and the applicant
12 filed an amended application subsequently, on October 9th,
13 requesting alternative relief under sections 23 and 36 of
14 the Act.

15 This application relates to certain allegations by
16 Union that financial assurances requested from NRG under
17 the terms of the contract between the parties have not been
18 honoured.

19 The Board has determined, in the notice of application
20 issued on September 16th, that it would hold this issues
21 day with respect to certain matters to define the issues in
22 the hearing, and also to deal with whether the section 42
23 or section 36 properly applies to this particular
24 application.

25 And in the event we move forward, we will hold the
26 substantive hearings on October 20th and 21st in the City
27 of Aylmer.

28 May I have the appearances, please?

1 **APPEARANCES:**

2 MR. PENNY: Yes, Mr. Chairman. My name is Michael
3 Penny. I am appearing as counsel for the applicant in this
4 proceeding, Union Gas.

5 MR. KAISER: Mr. Penny.

6 MR. KING: Richard King appearing as counsel for NRG.

7 MR. KAISER: Mr. King.

8 MR. STOLL: Scott Stoll, counsel to IGPC.

9 MR. KAISER: Mr. Stoll.

10 MR. TUNLEY: Philip Tunley, counsel for the Town of
11 Aylmer.

12 MR. KAISER: Mr. Tunley.

13 MR. MILLAR: Good morning, Mr. Chair. Michael Millar
14 for Board Staff. With me are Mr. Nabih Mikhail and Mr.
15 Neil McKay.

16 MR. KAISER: Mr. Millar. Any preliminary matters, Mr.
17 Millar?

18 **PRELIMINARY MATTERS:**

19 MR. MILLAR: There are two very short things, Mr.
20 Chair.

21 We have received -- just to bring to the Board's
22 attention, I guess the Municipality of Thames Centre has
23 filed with the Board a letter indicating that it is
24 supportive of the Town of Aylmer's intervention.

25 I have had a look through and it doesn't appear that
26 they're asking for intervention status themselves, but they
27 ask that this be brought to the Board's attention through
28 this --

1 MR. KAISER: What exhibit is that?

2 MR. MILLAR: I don't believe it has an exhibit number.
3 It only came in on October 14th. It is probably in your
4 materials. We can give it an exhibit number, if that is
5 helpful to you.

6 MR. KAISER: Why don't we?

7 MR. MILLAR: We will call it Exhibit K1.1, and it is a
8 letter from Thames Centre and it appears to be dated
9 October 8th, 2008, though I see our date stamp has October
10 14th.

11 **EXHIBIT NO. K1.1: LETTER FROM THAMES CENTRE DATED**
12 **OCTOBER 8, 2008.**

13 MR. TUNLEY: Can I just indicate, Mr. Chair, the Town
14 of Aylmer has actually received two such letters, one as
15 indicated from Thames Centre, the other from the
16 Municipality of Malahide. If that is not already filed
17 with the Board, I would propose to file it at some point
18 that is convenient to --

19 MR. KAISER: Let's reserve a number for that, Mr.
20 Millar, the Township of Malahide letter.

21 MR. TUNLEY: It is dated October 7th. It's a letter
22 from the Township of Malahide.

23 MR. MILLAR: We will call that Exhibit K1.2.

24 **EXHIBIT K1.2: LETTER FROM TOWNSHIP OF MALAHIDE DATED**
25 **OCTOBER 7, 2008.**

26 MR. KAISER: Thank you.

27 MR. MILLAR: Finally, Mr. Chair, just last night a
28 letter came in, in fact, through our compliance office, to

1 Mr. Hewson. However, it does relate to this file, and it
2 appears to be from a consumer group in NRG's service
3 territory. In fact, it doesn't even have a name on it.

4 So what I would propose is, over the break, perhaps I
5 could speak with Mr. Hewson. I am a little reluctant to
6 circulate it without having a little bit more information,
7 but a letter of comment has come in and they have asked
8 that it be considered in this proceeding.

9 MR. KAISER: Well, also show it to counsel.

10 MR. MILLAR: Absolutely, I will do that. So maybe
11 this will serve as a heads up. I will get some copies on
12 the break and we can decide what to do with it.

13 MR. KAISER: Thank you. Mr. Penny.

14 **SUBMISSIONS BY MR. PENNY:**

15 MR. PENNY: Thank you, Mr. Chairman. As I understand
16 it, there are two matters to be dealt with today. One is
17 to determine the issues for the hearing, and I believe,
18 although it is unclear to me what the status of this
19 request is, but I believe Mr. King filed a letter Friday
20 seeking an adjournment, and the Board -- seeking an
21 adjournment of today and of the hearing.

22 The Board has indicated -- and the correspondence
23 received yesterday -- that it would proceed with, today but
24 it was unclear to me what the status of the -- of Mr.
25 King's request for an adjournment was.

26 MR. KAISER: Let's get through today, and then we will
27 deal with tomorrow at the end of today.

28 MR. PENNY: Then we can deal with the issues list,

1 then.

2 MR. KAISER: Yes.

3 MR. PENNY: So what we have before you, I think - I am
4 not sure if the Board has copies from the others, but we
5 filed a draft issues list; Union did. Then we have an
6 issues list from Mr. King on behalf of NRG, and then Mr.
7 Millar provided me the other day with a draft issues list,
8 but then this morning provided me with a further revised
9 issues list.

10 My preference would be to go with the Union form of
11 issues list, and I can say, subject to one reservation of
12 rights, that the issue -- that the additional issues
13 proposed by Mr. King on his draft are acceptable to Union.

14 The reservation that I want to make clear is that with
15 respect to -- and this relates to the -- do you have that,
16 first of all, Mr. Chairman, Mr. King's draft?

17 MS. SPOEL: I am not sure. I only have two draft
18 issues list. One I know is the Board Staff one, and the
19 other one is not entirely clear to me.

20 MR. PENNY: We can probably tell -- the draft issues
21 list from Union went with our original package that
22 accompanied my letter of October 9th.

23 MS. SPOEL: Oh, okay. It is in the package with --

24 MR. PENNY: With my letter of October 9th, 2008, which
25 had the amended application and the evidence, as well.

26 MS. SPOEL: Yes, I have it. Thank you.

27 MR. PENNY: Then I don't know -- if you compare, for
28 example, paragraph 6 of the two you have, just to be clear,

1 in our original one paragraph 6 said, "alternatively should
2 the Board issue an order requiring NRG", et cetera, et
3 cetera.

4 And in Mr. King's revision to that, paragraph 6 reads:

5 "What are the rate impacts to NRG's customers
6 associated with issues 4 and 5 above?"

7 Do you have both of those?

8 MS. SPOEL: Yes, I do.

9 MR. PENNY: What I was about to say is that my -- that
10 Union does not take any issue with Mr. King's draft issues
11 list, but I was just about to say that there is one
12 reservation of rights on that which ties back to this
13 question of an adjournment, and that relates to item 6 that
14 I was just -- on Mr. King's list that I was just making
15 reference to.

16 As I read Mr. King's letter the other day requesting
17 an adjournment, he seemed to be saying that one of the
18 reasons he was asking for that was that they needed to get
19 expert evidence to deal with the rate impacts. So while I
20 am not going to argue that the rate impacts to NRG's
21 customers are irrelevant to this proceeding, I think it
22 would be difficult to argue that, and, therefore, we're
23 prepared to see that on the issues list.

24 I do not concede that that is any ground for an
25 adjournment. NRG has known about what the -- you know,
26 what the content of this application, the substantive
27 content of this application, is all about, i.e., the
28 financial assurances or the restructuring of their bundled

1 T contract, since at least June, and so I don't want it to
2 be -- I don't want to hear from Mr. King that because we
3 agreed that that went on the issues list, then therefore it
4 must follow that he gets his adjournment.

5 But other than that, we don't take issue with Mr.
6 King's revised list.

7 MR. KAISER: All right.

8 MR. PENNY: As I said, I do prefer the form of this
9 list to the one Mr. Millar circulated, because it seems to
10 be more precise to the issues that we face here.

11 MR. KAISER: Mr. Millar, do you think you can meet
12 with counsel and merge these lists and --

13 MR. PENNY: Sorry, I should have said, Mr. Chairman, I
14 don't believe there is anything on Mr. Millar's list, in
15 substance, that isn't on Mr. King's revised list.

16 MR. KAISER: That was my impression.

17 MR. MILLAR: I think, in substance, Mr. Penny is
18 right. There is not a lot of difference between these
19 issues list.

20 If I could give you Board Staff's view on this, it is
21 that Board Staff's list is a little bit broader. If you
22 read through the issues list that Mr. Penny and Mr. King
23 have provided, I think he is right it is more precise. But
24 to some extent, that may limit the Board's scope for
25 providing remedies in this case, so in that light we tried
26 to make things a little bit more open-ended.

27 I will just give you some examples. If you look
28 through the Union list, what it more or less does is, it

1 runs through the relief Union is seeking and it takes you
2 through the contract it currently has with NRG, and it
3 essentially would have the Board, I think, acting sort of
4 as almost an enforcement authority for the existing
5 contract.

6 I think that is within your right to do. Your section
7 36 powers to review and look at alternate contracts are
8 very broad, but you're not necessarily limited to those
9 remedies. So Union has asked for two specific -- well,
10 three things technically; maybe we will get to the third
11 one in a moment -- but they have asked that you either
12 order NRG to provide certain financial assurances, or in
13 the alternative, to change the renewal date which would
14 apparently make this problem disappear. They have also
15 asked in the further alternative that you cut them off
16 under section 42, if you are not willing to consider either
17 of those two options.

18 But it is possible that the Board might consider
19 additional remedies. You are not necessarily limited to
20 the provisions of the contracts and the remedies under the
21 contracts, and maybe there are no other better ideas but
22 just by way of example, maybe the Board would consider
23 maybe it will say, We're not going to provide an order of
24 the provision of financial assurances but we will, I don't
25 know, increase Union's allowance for bad debt or something
26 like that.

27 It may be --

28 MR. KAISER: I don't think, Mr. Millar, the issues

1 list limits the relief the Board may grant in this
2 application. We will hear evidence and take it from there.

3 MR. MILLAR: If that's the case, I can live with that.

4 MR. PENNY: I will say in response, perhaps Mr. Millar
5 hasn't had the opportunity to review Mr. King's list in
6 detail, but item 7 on Mr. King's revision actually poses
7 the question: Are there further alternatives? So I think
8 we have covered that off.

9 We are agreeable, if there are other alternatives that
10 solve the problem, we would consider them. It is just
11 we're not aware of any today, otherwise we would propose
12 them but we have no problem with posing the question as one
13 of the issues, whether there are other alternatives that
14 deal with this. So I think that is covered off.

15 MR. KAISER: Maybe at the break you could meet with
16 counsel and merge these lists.

17 MR. MILLAR: Frankly, Mr. Chair, if that is understood
18 I don't think we have a problem with the list.

19 MR. KAISER: All right. Let's go through the
20 mechanics and merge them. You can meet with Mr. King at
21 the break. It sounds like there is no big dispute here.
22 All right. What is next?

23 MR. PENNY: Well, from my perspective, that's it on
24 the issues, although Mr. Millar had alerted me to a
25 question about section 42, and I don't know if you want to
26 hear me on that, or not. Mr. Millar posed a concern about
27 whether Union was really seeking to cut NRG off and whether
28 that was properly in the application and properly on the

1 issues list.

2 MR. KAISER: As I read your amended application, you
3 were reserving the right to proceed under either section.

4 MR. PENNY: Yes. And I think our evidence makes clear
5 that we regard the termination of service as a last resort.
6 We are clearly, clearly proposing as our first option the
7 restructuring of the contract; as our second option, the
8 provision of the financial assurances; and only as a last
9 resort, the cessation of service.

10 MR. MILLAR: Mr. Chair, if I could put Board Staff's
11 view on the record and Mr. Penny can be -- can respond to
12 that.

13 I think it is Board Staff's view that the section 42
14 element of the application should be discontinued.

15 If you look at what NRG -- pardon me, what Union is
16 really after here, their first two prayers for relief for
17 either provision of financial assurances from NRG or to
18 have the renewal date of the contract revised to eliminate
19 the problem.

20 The Board has the powers under section 36 to offer
21 either of those forms of relief and I don't think there is
22 much question about that.

23 So if Union can get what it wants under section 36, I
24 am not sure what is left for section 42, frankly. Because
25 what would happen is, if you keep section 42 on -- if you
26 allow that portion of the application to go forward, what
27 you would be saying is it is possible that the Board would
28 deny the first two forms of relief, i.e., say financial

1 assurances are not required and we're not going to alter
2 the date, the renewal date for the contract, but we will
3 still keep 42 alive. So we may just cut you off entirely
4 instead.

5 It seems to me that would be an absurd result and
6 frankly a result that simply isn't going to happen. So a
7 notice has gone out to the Town of Aylmer and the customers
8 of NRG stating that there is a risk that their gas service
9 will be terminated. Frankly, I am sure that was a notice
10 that caused some concern to the people of Aylmer.

11 If we can -- if that is not a legitimate issue in this
12 case, if that is not going to happen, it would be Board
13 Staff's preference that the section 42 part of this
14 application simply not continue so that the people of
15 Aylmer don't have to be concerned about having their gas
16 service terminated as winter approaches.

17 So that is Board Staff's view and I am happy to hear
18 the views of the other parties, but we would like to see
19 the 42 element discovery continued.

20 MR. KAISER: Do you need section 42, Mr. Penny?

21 MR. PENNY: Well, Mr. Chairman, I agree with what Mr.
22 Millar has said but only as far as it goes. There is a
23 second side of the equation.

24 Let me put it this way. As I have said, we recognize
25 it is a remedy of last resort and I certainly recognize as
26 a trial lawyer that -- the consistent logic of my own
27 position, and clearly the consistent logic of my position
28 is that we should be restructuring the contract to avoid

1 the problem, or receiving financial assurances to cover off
2 the increased credit risk. And obviously if you were not
3 inclined to grant either of those remedies, then the remedy
4 of section 42 to cease service would clearly, as a matter
5 of logic, not be available to us, I mean, you wouldn't do
6 that.

7 The flip side, however and that is why -- I say it is
8 the remedy of last resort and I mean that in more than one
9 way. It is not only our least desirable alternative, but
10 it is the kind of end of the road, bottom-line remedy that
11 one has in this circumstance and we could be in a situation
12 where the Board agrees that the contract should be
13 restructured or agrees that the customers should post some
14 form of additional financial assurances and the customer
15 doesn't comply with those directions. In which case, then
16 where are we?

17 So the reason for the --

18 MR. KAISER: Well, we could deal with that in, let's
19 suppose that was the issue we could deal with that in how
20 the order is worded. In other words, we could deal with
21 what might happen in the event of the NRG failing to comply
22 with the order.

23 MR. PENNY: As long as our rights to come back before
24 the Board in those eventualities to seek the 42 remedy,
25 then we would be content for it not to be pursued in the
26 immediate hearing that we are dealing with.

27 Perhaps the way I might put it then is that we would
28 be content, I think, to have it removed from the issues

1 list for the purposes of this hearing, but I would like to
2 have the application still contemplate that relief in the
3 event that it became necessary to seek it.

4 MR. KAISER: Mr. King.

5 MR. KING: I am not sure what that means, to remove it
6 from the issues list, but leave it in the application. I
7 am glad to hear Mr. Penny has clarified the relief he is
8 seeking, because even his amended application, sent as
9 recently as last Thursday in paragraph 12, identifies
10 discontinuance of service as the first option, in the
11 alternative, the second option being requesting financial
12 assurance, and in the third option rejigging the contract
13 start date to April 1st. The evidence doesn't jive with
14 that. So there was a discrepancy between the application
15 where what Union was asking for is the opposite of what we
16 heard this morning.

17 Practically speaking, there is no reason for section
18 42 relief to remain in the application. I think as you
19 have said, should the Board deem it necessary to mitigate
20 Union's risk, if there in fact is any, then there are two
21 alternatives, at least.

22 There may be others. I'm not sure yet. The first
23 being, to rejig the contract date. The second being to
24 request financial assurance, and that would come in the
25 form of an order of the Board, and if NRG, for some reason
26 didn't comply and thought it prudent to cut off service to
27 its entire customer base, you would have all of the powers
28 that you have under the act to deal with non-compliance,

1 but that is just not going to happen.

2 MR. KAISER: Well, I think all Mr. Penny is saying if
3 we look at his amended paragraph 12, he's relying
4 principally now on the alternative relief, but wants it
5 understood that in the event -- in the event, number 1, the
6 Board orders that relief, and number 2, that NRG fails to
7 comply, he would be at liberty to bring an application
8 under section 42. Is that right?

9 MR. PENNY: That's correct.

10 MR. KAISER: Which seems reasonable.

11 MR. KING: Well, my sense is he is seeking to leave
12 this in his application.

13 MR. KAISER: No, I think he is prepared to withdraw it
14 on that basis. He is just putting us on notice that he
15 will proceed in this case on the basis of his alternative
16 relief as his principal relief. But he reserves his rights
17 to come back in the event that that relief -- in the event
18 -- in the event that that relief were granted and the
19 applicant -- rather, NRG didn't comply, he reserves his
20 right to come back to the Board under section 42.

21 MR. PENNY: That's correct. That's fine. I guess
22 maybe I confused the issue by saying I wanted it to stay in
23 this application. That is actually not -- as long as --
24 again, as long as it is understood that there is no waiver
25 of the right to seek that relief in the event of non-
26 compliance.

27 MR. KAISER: Then it becomes necessary.

28 MR. PENNY: So I am content, actually, if it makes a

1 difference to my friend, we can advise you here on the
2 record that we will withdraw that relief from the
3 application, as well as from the issues list.

4 MR. KAISER: Is that satisfactory, Mr. Millar?

5 MR. MILLAR: Yes. Thank you, Mr. Chair.

6 MR. KAISER: All right. Let's move on. What is next?

7 MR. PENNY: Then I think there is only the outstanding
8 issue of Mr. King's request, whether that is still a live
9 request, and to deal with it, I think.

10 MR. KAISER: All right. Mr. King.

11 MR. KING: It's still a live request. The reality is
12 we got an application on August 1st and we got evidence for
13 the first time telling us what Union's case was on October
14 9th, presumably filed in response to the notice of
15 application that the Board issued, suggesting that evidence
16 might be helpful.

17 And from my perspective, I actually didn't understand
18 nor did my client understand the gist of the complaint from
19 Union. When financial assurance is requested under gas
20 contracts, it is typically requested on one of two bases.
21 Either the party you are contracting with has become
22 financially materially worse off and you are seeking
23 financial assurance, or, in the alternative, some
24 combination of the volumes being purchased, coupled with
25 the price being purchased, has moved in a direction that
26 exposes the seller to a greater delta, essentially.

27 I honestly thought that it was the latter. I wasn't
28 aware that the nub of their complaint dealt with

1 essentially a GAAP reporting issue. So on that basis, I
2 will need to talk to an accountant and get some accounting
3 evidence.

4 The rate impact evidence we have started working on,
5 but the accounting evidence is something that I hadn't
6 contemplated having to prepare. But I am certainly within
7 my right to ask for the ability to file evidence in reply
8 to the applicant's evidence.

9 MR. KAISER: When was the applicant's evidence filed?
10 I guess you filed an outline?

11 MR. PENNY: Well, no, we filed evidence. It was -- it
12 went with my letter of October the 9th.

13 Let me back up and respond to Mr. King.

14 This is the second request that NRG has made for an
15 adjournment. The first request was made on September 19th,
16 and while the principal request there had to do with Mr.
17 Marks' unavailability on October 20th and 21st, there was
18 also a concern raised about the short period of time
19 between today, issues day, and the contemplated date of the
20 hearing.

21 And the Board rejected that request. So in a sense,
22 this request has already been made and rejected, and what
23 we understood from the Board's notice of application and
24 schedule was that it was contemplated that perhaps the
25 hearing would proceed next week without any prefiled
26 evidence, that we would just -- that you would say, well,
27 we need -- there has to be evidence on this, and we will
28 hear it next week.

1 So from our perspective, NRG is, under that scenario,
2 actually better off, because they've got notice of our
3 evidence in advance of next Wednesday.

4 The suggestion that the request is based on natural
5 justice grounds or not understanding Union's case, in my
6 submission, is not sustainable.

7 Mr. King, in response to Union's requests to NRG for
8 the financial assurances and in response to Union's
9 requests to NRG with respect to restructuring the contract
10 to an April 1 commencement date, were both -- we never
11 heard from NRG on either of those requests. All we got
12 were lawyers' letters, and we got lawyers' letters from Mr.
13 King, and those letters refute Union's right to have
14 financial assurances and refute any suggestion that there
15 should be any terms -- change to the terms and conditions
16 of the bundled T contract until the Board decides this
17 issue.

18 So there was, in the original request, no complaint
19 that they didn't understand what Union's case was about,
20 and, indeed, Mr. King's own conduct, in writing these
21 refutations of Union's right to the relief, there was no
22 suggestion that NRG didn't understand what it was Union was
23 asking for. In fact, they refuted Union's right to it.

24 So in my submission, NRG understood perfectly well
25 what Union was after, and that is clearly evident from that
26 correspondence, which is in the evidence we filed -- we
27 filed in the evidence.

28 It is also -- as I have just said, it is also hard to

1 understand the request in light of the prior request that
2 was made, because the prior request on September 19th
3 focussed on the need for more time between issues day and
4 the hearing to develop evidence, and that request was
5 rejected. And now we are just hearing that that request,
6 again.

7 In my submission, the amendment to the application
8 effects no substantive change. It merely accepts the
9 Board's suggestion in its -- again, going back to September
10 16th, the Board's suggestion that section 36 of the Act
11 might well be applicable to some of the relief sought, and
12 the prefiling of Union's evidence, as I have said, actually
13 puts NRG in a better position than they would have been if
14 we just proceeded with the hearing next week.

15 So -- and the content of the evidence, frankly, is
16 just setting out the background and more of the detail.
17 But to suggest that NRG didn't understand what Union's case
18 was about, it seems to me, is not sustainable in terms of
19 their behaviour.

20 So they have had plenty of notice and plenty of time,
21 in my respectful submission, and we ought to just carry on.
22 If they can't prefile before next week, that's fine. They
23 can bring their witnesses and testify, and we will deal
24 with it at the time.

25 MR. KAISER: Mr. King, the letter the Board received
26 from, I guess it is Mark Kitchen -- well, this is a Union
27 Gas letter to Board secretary, August 1st. It says:

28 "NRG's failure to provide financial assurances

1 has been a persistent source of disagreement for
2 nearly a year. In September 2007, Union
3 requested financial assurances from NRG prior to
4 the contracts renewing on October 1st. NRG did
5 not provide the financial assurances, stating
6 that it needed to meet with Union to discuss the
7 issue. Union arranged two meetings in October
8 2007, both of which NRG failed to attend.
9 "Union e-mailed and called NRG in February of
10 2008 to again request a meeting to discuss the
11 provision of financial assurances. NRG did not
12 respond."

13 Are those accurate statements, to your knowledge?

14 MR. KING: I am told they're partially accurate. I am
15 also told that in each circumstance we asked Union to
16 explain how our financial circumstances have changed to
17 warrant the provision of financial assurance for the first
18 time.

19 Even as recently as my July 2nd letter, where Mr.
20 Penny talks about me refuting the request to provide
21 financial assurance -- keep in mind this is a \$10 million
22 utility just getting a one-page letter saying, Post \$1.5
23 million of financial assurance -- even in my reply to that,
24 I say specifically:

25 "Although you have not provided NRG with any data
26 supporting Union's calculation of its anticipated
27 maximum exposure, we are skeptical that your
28 figures represent a reasonable forecast."

1 We still don't know how they come up with \$1.5
2 million.

3 MR. KAISER: Is that the issue in your mind as to
4 whether the security is in the right amount?

5 MR. KING: No. We don't think the security is
6 warranted at all. We don't think --

7 MR. KAISER: Is that the issue in your mind? Your
8 position will be that security is not necessary?

9 MR. KING: Yes. They're relying on a change in the
10 way our financial statements were presented from 2005 to
11 2006, and nothing materially has happened.

12 MR. KAISER: Would I be right to say that that is the
13 issue as to whether financial assurance is required and
14 whether Union is reading your financial statements in the
15 proper manner?

16 MR. KING: In my view, that is the threshold issue.
17 If I am unsuccessful in persuading the Board that no
18 financial assurance or other risk mitigation measure is
19 necessary, then we have to move to the secondary issue,
20 which is, How do you mitigate that risk through one of
21 these other two tools, either the change of the contract
22 date or financial assurance?

23 I am still going to have to provide evidence on this.

24 MR. KAISER: Just before you...

25 What -- evidence on what?

26 MR. KING: There are rate impacts associated with
27 either option. Any move from the status quo, whether it is
28 posting financial assurance or moving the contract date,

1 has adverse rate impacts to NRG's customers.

2 MR. KAISER: Well, of course it would, but are you
3 suggesting -- let's suppose there is a legitimate argument
4 that Union is entitled to financial assurance; under the
5 usual rules they are entitled to it. Do you say we would
6 not grant that financial assurance just because there might
7 be rate consequences?

8 MR. KING: No. But I think in -- you will be
9 presented with various options to mitigate the risk, at
10 least two at this point.

11 There are different rate impacts, we think, associated
12 with either, and presumably the Board would want to
13 consider the rate impacts on NRG's customers before
14 choosing one or the other, if it gets to that point.

15 MR. KAISER: So the first issue is whether any
16 security, if I can use that word, is necessary. The second
17 issue would be what form that security might take?

18 MR. KING: Correct.

19 MR. KAISER: All right. Mr. Penny.

20 MR. PENNY: Well, I have only two things in response,
21 Mr. Chairman. The first is just on the question of the
22 issues themselves.

23 I would put it slightly differently. I would
24 certainly agree that both the financial assurances and the
25 restructuring of contract are issues.

26 I don't see them necessarily in the sequential way
27 that Mr. King has put it, and I say that for the reason
28 that the contract, the bundled T contract that we are

1 talking about came to an end on September 30th, and so
2 right now there are effectively -- so that contract is
3 over. Union indicated it was not prepared to renew it on
4 the same terms and conditions i.e., with a March 30 end
5 date and with the existing DCQ.

6 MR. KAISER: Is that right, we're living in a period
7 where there is no contract?

8 MR. PENNY: I think legally what we've got is, we are
9 supplying them with the same service. They're paying the
10 same amount. So I think we would be like in a real estate
11 lease situation, overholding tenant, and we're on a month-
12 to-month arrangement. I mean, we are providing them
13 service and they are paying for it, just as they did
14 before. But it is not a full-fledged contract in the
15 normal sense of the word.

16 MR. KAISER: Did they ever fail to pay you?

17 MR. PENNY: No, that's not the issue. I mean, we
18 certainly agree that whether there has been default in the
19 past is a relevant consideration, but it is certainly not
20 the only consideration. The issue here is -- but Mr. King
21 put it that it is a change in their financial reporting.
22 That is really not the way we see it at all.

23 The issue is that they've got security, bank security
24 against all of their assets, and if there is a default then
25 as at March 30, they've borrowed over, almost \$2 million
26 worth of gas from us, and that's their --

27 MR. KAISER: That security issue has been the case for
28 some time, has it not? That is not a new issue?

1 MR. PENNY: No. That is new. Relatively new. I mean
2 we discovered it in 2007 and that's when we started the
3 correspondence that you read about. And I will say that
4 our evidence certainly will be that notwithstanding Mr.
5 King's assurances -- or representations to the contrary,
6 that this has been an exercise of avoidance and delay.

7 We have never received any response to meetings being
8 cancelled. Never sat down with us to talk about this.

9 MR. KAISER: Mr. Millar, do you have anything?

10 MR. MILLAR: No, Mr. Chair.

11 MR. KAISER: Mr. King, anything further?

12 MR. KING: No.

13 MR. KAISER: All right, gentlemen. Well, the panel is
14 of the view that this is not going to improve with age. We
15 should get on with it. And proceed as the notice said,
16 with a hearing of evidence on -- when is it, next Monday?
17 In Aylmer?

18 MR. KING: How am I supposed to file evidence? I now
19 have evidence from the applicant for the first time, filed
20 two business days ago. I have had no opportunity to test
21 that evidence. I can do that in cross-examination, but I
22 certainly -- I think it would be exceptional to proceed
23 with a proceeding where the applicant is enabled to file
24 evidence and no party responding to is able to. I just
25 think it is exceptional.

26 MR. PENNY: Well, Mr. King, of course, is able to file
27 evidence. He can bring his witnesses to the hearing and we
28 will hear from them.

1 MR. KAISER: Exactly. These are not overly
2 complicated issues. You know the position of Union. If
3 you tell us that there is something in that evidence that
4 you are unable to respond to -- frankly, the rate impact
5 issue seems to me to be a collateral issue.

6 There is a contractual issue here which we have to get
7 through in the first instance. If it turns out that the
8 Board's finding, with respect to that, would have rate
9 consequences, that seems to me to be a second step. There
10 may be things that could be done, yes, that would be -- you
11 would have to know the result before you could figure out
12 what the rate consequences are. That's number 1, it seems
13 to me, the result in this application.

14 Then that would be a question of how it got dealt
15 with. It might be a second step. I don't know how you are
16 going to prepare evidence on the rate consequences without
17 knowing what the Board's decision is.

18 MR. KING: I would prepare rate impact evidence on two
19 scenarios. One is shifting the contract date, which I can
20 do. And the second thing that I can do is, I would use the
21 rate impact associated with having to post a 1.5, whatever
22 the number is, letter of credit, which I can do.

23 But I also have to come up with an accountant to give
24 evidence, as well. Because the nub of the issue, although
25 contractual, the nub issue is an accounting issue.

26 MR. KAISER: Well, the accounting issue you are
27 speaking of is what the rate consequences of a letter of
28 credit might be?

1 MR. KING: No. Not at all.

2 MR. KAISER: What is it?

3 MR. KING: Their issue is that there has been an
4 accounting change, and that on our financial statements we
5 are actually in a negative shareholder equity position.
6 That is their position. So it has nothing -- the
7 accounting evidence that I would need to provide has
8 nothing to do with rate impacts. It has to do with how we
9 report in our financial statements our equity.

10 MR. KAISER: What's your response to that, Mr. Penny?

11 MR. PENNY: Well, I am not sure what the response is.
12 The issue of the need for the financial assurances has been
13 on the table since at least June and with prior calls
14 attempting to resolve this going back to February of this
15 year.

16 It is hard to imagine what this evidence is going to
17 be. Mr. King has just given you what the issue is. That's
18 one of them. They have negative shareholder equity. That
19 wasn't the case in the prior financial statements. That
20 has an effect on the assessment of a party's credit risk
21 when they have negative shareholder equity. The reason
22 they have negative shareholder equity is because the so-
23 called \$13 million of shareholder equity is retractable
24 shares at the option of the shareholder. So it is treated
25 as debt, not as equity. We found out about that in late
26 2006 or early 2007. And so that --

27 MR. KAISER: When is the first time you raised the
28 question, this question with NRG?

1 MR. PENNY: February of 2007.

2 MR. KING: That is untrue.

3 MR. KAISER: What time?

4 MR. KING: It is October 9th. They raised the issue
5 of requesting financial assurance a long time ago, I will
6 concede that; they never, ever, at any point prior to
7 October 9th said it had to do with an accounting issue
8 related to how our equity appears in our financial
9 statements.

10 MR. PENNY: Well, if under that scenario, Mr. King's
11 position is that they didn't know because they cancelled
12 meetings at which we would have explained it and didn't
13 return our phone calls, they're the author of their own
14 misfortune, if that is the case.

15 MR. KING: I mean, that is also untrue. Our July 2nd
16 letter is essentially asking them for evidence.

17 MR. KAISER: Anything further, gentlemen?

18 All right. We will take 15 minutes.

19 MR. PENNY: No, thank you.

20 --- Recess taken at 10:25 a.m.

21 --- Upon resuming at 10:43 a.m.

22 MR. KAISER: Mr. King, I have a statement from your
23 client's auditors dated December 20th, 2006, and I believe
24 this was filed by Mr. Penny.

25 This is Messrs. Neal, Pallett and Townsend. Is that
26 the latest one or is there a more recent one?

27 MR. KING: Do you have the 2006?

28 MR. KAISER: December 20th, 2006 is the date. Is

1 there a more recent one?

2 MR. PENNY: The 2007 one.

3 MR. KAISER: Is that part of your package?

4 MR. PENNY: No, but we -- the evidence makes a
5 notation that Union has looked at the 2007 and it doesn't
6 have any impact on the analysis, but we actually have it.
7 If you would like it filed, we can file it.

8 MR. KAISER: That would be helpful.

9 **DECISION:**

10 MR. KAISER: Well, gentlemen, the Board is always
11 concerned when there are allegations, founded or not,
12 regarding the financial stability of a utility.

13 That concern has been expressed here. We believe it
14 is best to move on with this matter. These things
15 generally don't improve with age.

16 Our goal next week will be to determine if additional
17 security is necessary and what the amount is. There may be
18 rate consequences of that. But these can be dealt with as a
19 second order of business, possibly in the applicant's next
20 rate case. Who would bear the cost of additional security
21 is always an issue, in any event. It doesn't necessarily
22 mean that it is covered by the ratepayers. It may be
23 covered by the shareholders. But that strikes us as a
24 second order question.

25 The first issue that the Board must deal with is
26 whether additional security is required, given the changed
27 financial circumstances.

28 With respect to that, Mr. King, we would appreciate it

1 if you would make your auditors available. I presume
2 they're the same people, Neal, Pallett and Townsend. These
3 are the auditors?

4 MR. KING: That's right.

5 MR. KAISER: If you have a problem with that, the
6 Board will consider issuing a subpoena, but it would be
7 better if you call them. We will likely have some
8 questions on the financial statements that they have filed.
9 I guess they haven't filed them, Mr. Penny has filed them.
10 And we will obtain the more recent one as part of this
11 record.

12 So we will proceed, as indicated in the Notice with a
13 hearing in Aylmer. It would be of assistance if you could
14 advise the parties and the Board of any witnesses you
15 intend to call, and perhaps a brief outline of the evidence
16 they wish to give.

17 Does Board counsel have anything further?

18 MR. MILLAR: No.

19 MR. KAISER: All right. Thank you, gentlemen.

20 MR. PENNY: Thank you, sir.

21 --- Whereupon the hearing adjourned at 10:47 a.m.

22

23

24

25

26

27

28