

Interrogatory #2:

- (a) **Please explain why NRG elected to be a direct purchase customer of Union Gas Limited ("Union"). 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 purchaser 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 a 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.

Ontario Energy Board	
FILE No.	EB 2014-0053
EXHIBIT No.	K1.4
DATE	May 14, 2015
08/99	

(b) Please provide the date when NRG first elected to be a direct purchase customer.

Answer: The exact date that NRG first elected to be a direct purchaser is no longer available in the Company records. NRG was a direct purchase customer from at least 1996 forward.

spot market price prevailing in the month of contract expiry, or the month following contract expiry, whichever is higher.

2.90 There appears to be no strategic advantage to be gained by a defaulting direct purchaser. The amounts imposed as penalties would, as now, be applied to gas supply deferral accounts so as to benefit compliant customers.

2.91 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 compliant system participants at risk, and may result in additional costs.

2.92 The Board approaches proposed changes to elements of the PBR plan cautiously. As stated elsewhere, extracting discrete portions of the PBR plan for revision can be unwise, given the presumed interdependence of the components of the PBR plan as a whole.

2.93 However, the proposed changes, in the Board's view, are an improvement and enhance equity among customers. Gains in system efficiency resulting from greater compliance with contractual obligations is consistent with expectations which underlie the Board-approved PBR plan.

2.94 Some intervenors expressed concerns that such penalties ought to be limited to cost recovery related to the default.

2.95 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.

2.96 The Board does not accept the Applicant's proposal that the revised penalty be applied against defaulting direct purchasers in respect of defaults that occurred prior

- enough to alleviate pricing pressures and bring the spot price down to historic levels. (*NRG Evidence: Lippold Affidavit – para. 24*)
45. When NRG was advised by Union that there was no assistance for NRG, they were forced to purchase gas at existing spot rates. NRG was able to purchase, in six transactions, the majority of its shortfall from Shell Energy at an average price of \$26.81/GJ. (*NRG Evidence: Lippold Affidavit – para. 25*)
 46. On the days of February 26-28, NRG Managers spent their time focussed on purchasing gas in quantities sufficient to meet its' contractual requirements. NRG contacted secondary suppliers such as GoEnergy and Blackstone in attempts to purchase the remaining gas to satisfy the requirement. In addition, NRG invited match-making assistance from Union whereby Union supplied a potential contact for an in-franchise gas purchase. In spite of pursuing all avenues, NRG was unable to purchase ample gas required to completely meet its contractual obligations. NRG was advised that any further purchases of gas could not be delivered to the Dawn Hub after February 28. (*NRG Evidence: Lippold Affidavit – para. 26*)
 47. The evidence is clear that NRG took all reasonable steps to fulfill its contractual obligations, paying an average price of \$26.81 per GJ to fulfill its obligations to supply natural gas for balancing under the Union/NRG Contract. NRG was unsuccessful in being able to purchase gas to meet its residual balancing obligations at the end of February 2014. NRG unsuccessfully looked for assistance from Union to purchase the gas and pursued all avenues to purchase the remaining 25,000 GJ to complete its contractual obligations.
 48. On the basis of the facts set above, NRG was neither careless, incompetent nor seeking to strategically fail to comply with its contractual obligations. NRG acted reasonably and responsibly and only failed to meet its residual obligations to supply natural gas due to exceptional weather conditions, unprecedented costs and actual lack of supply of natural gas.

Uniqueness of NRG

49. NRG is itself a utility whose costs for gas are a “flow-through cost”. On this basis, NRG submits that special consideration should be given to NRG in fixing a penalty rate. The penalty rate should reflect Union’s out-of-pocket costs being in arrange as set out below.
50. NRG submits that the Board should take into account that NRG does not make any profit from its natural gas purchases and that the purchases are made for its customers not NRG itself.
51. The Board should avoid any artificial detriment to NRG’s customers based on a penalty rate which is not fixed based on sound rate making principles.

meet their balancing obligations. In addition, the Board notes that any bundled T-service customer that would have paid \$78.73 / GJ for natural gas to meet its contractual balancing obligations would have waited until the last day of February to purchase the gas (as the spot price of gas at Dawn was at its highest on February 28th). The second-highest spot cost of gas at Dawn (\$50.50) occurred on February 5th and customers received their Direct Purchase Status Reports on February 12th or 13th.²¹ Between the time that customers received their Direct Purchase Status Reports and February 28th, spot prices were below \$50.50. This is indicative of the choices customers had to purchase gas, in order to meet contractual obligations, at prices below \$78.73 / GJ (and, in fact, below \$50.50).

With respect to TCE's proposal that the penalty charge applicable to T2 customers should be calculated on the basis of Enbridge's methodology for calculating the charges associated with Unauthorized Supply Overrun for Rate 125 customers, the Board rejects this proposal on the basis that it reflects a fundamental change in the manner in which the penalty charge is calculated. The Board does not believe that a fundamental change of this nature is appropriate in the context of Union's request for a one-time reduction of the penalty charge.

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 that 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 of the non-compliant customers, shall also be applied to NRG.

The Board will not make any findings regarding the appropriate allocation of the excess amounts arising from the application of the penalty charges in this proceeding. The Board notes that this allocation issue is currently before the Board in Union's 2013 Deferral Account Disposition proceeding (EB-2014-0145).

The Board directs Union to implement the outcome of this decision as soon as reasonably possible.

²¹ Union Interrogatory Responses, EB-2014-0154, June 19, 2014 at Exhibit B / Staff IRR #1.

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

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



BY E-MAIL

May 8, 2014

John A. Campion
Fasken Martineau
333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto ON M5H 2T6

Dear Mr. Campion:

**Re: Natural Resource Gas Limited
April 1, 2014 QRAM – Phase 2 Proceeding
Board File No. EB-2014-0053
Request for Board Direction**

The Board has received your request that both the EB-2014-0053 (NRG QRAM Phase 2) and EB-2014-0154 (Union Penalty Reduction) matters be heard together or that the EB-2014-0053 matter be heard after the EB-2014-0154 proceeding concludes.

The Board would like to clarify its intentions for all parties involved in the two proceedings. In the interest of expediency, the Board plans to hear both proceedings at the same time.

In the EB-2014-0154 proceeding, the Board will determine whether to grant Union a one-time exemption from the use of its approved tariffs with respect to certain penalty charges applied to direct purchase customers who did not meet their contractual obligations during the months of February and March 2014. The outcome of this proceeding will be the Board setting a final penalty charge that Union will be allowed to apply to those customers who did not meet their contractual obligations during the months cited above.

The Board intends to hear, as part of the EB-2014-0154 proceeding, arguments as to whether the exemption should be granted and if so, what penalty charge should be applied in its place having regard for the intended purpose of the penalty charge and its efficacy. The penalty charge set in the EB-2014-0154 proceeding will be utilized for Phase 2 of NRG's QRAM proceeding (EB-2014-0053). Therefore, the Board intends to

make a final decision in this proceeding prior to making a final decision in NRG's QRAM proceeding.

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 EB-2014-0053 proceeding, the Board will also review whether the costs associated with the penalty should be recovered from ratepayers. The quantum of the penalty charge, however, will be set by the Board in the EB-2014-0154 proceeding.

Yours truly,

Original signed by

Kirsten Walli
Board Secretary

c: Brian Lippold, Natural Resource Gas Limited
Laurie O'Meara, Natural Resource Gas Limited
Chris Ripley, Union Gas Limited
Crawford Smith, Torys

cating that Union's shareholders should retain the amount of the credit in the PGVA resulting from such purchases.

Board Findings

- 3.2.14 The Board has previously found that Union's gas supply planning process was adequate. However, the Board considers that Union's implementation of the gas supply plan was deficient. Only $183 \times 10^3 \text{m}^3$ (0.006 Bcf) was purchased for delivery in December. The Board notes Union's evidence that to retain flexibility to react to changes in price and weather and to avoid disturbing the gas supply market, it planned to make the purchases over time as needed. The metaphor Union used was that it would take slices off the salami as winter progressed. While the Board understands Union's need to maintain a degree of flexibility in its gas purchasing, the Board is of the view that maintaining maximum flexibility in the circumstances that faced Union in December does not justify a decision to purchase virtually no spot gas in December. Union's implementation of its gas supply plan appears to the Board to have been designed to minimize the risk to Union's shareholders resulting from the possibility of excess gas supplies in storage at the end of the winter season in the event of warmer than normal weather in the remainder of the winter. **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 Bcf shortfall, it should have taken immediate steps to purchase at least 3 Bcf of spot gas in December to accomplish a more even spreading of spot gas purchases. Union's failure to acquire this gas in December resulted, in the Board's view, in additional costs of at least \$5.140 million when this gas was acquired in January (based on the difference between December and January prices for purchases of 2.994 Bcf). The Board notes that Union's gas supply plans and their implementation were subject to review and approval at the executive level. The Board finds that the amount of \$5.140 million is most appropriately borne by the shareholder and directs that this amount be removed from the PGVA debit.

3.3 Storage

- 3.3.1 The gas supply plan filed in E.B.R.O. 486 showed the need to shed $372 \times 10^6 \text{m}^3$ of gas (approximately 13 Bcf) in order to allow Union's March 31, 1996 inventory targets to be realized. A reduction in Ontario production was incorporated in the Zero Quarter supply plan to shed this volume. Union explained that, because this supply reduction occurred in the summer rather than the winter as originally planned, peak storage space became available last summer, which Union then sold in order to utilize the assets as efficiently as possible.
- 3.3.2 Union noted that there was a storage space shift of $92 \times 10^6 \text{m}^3$ to bundled-T customers and a further $21 \times 10^6 \text{m}^3$ to T1 customers. This left $251 \times 10^6 \text{m}^3$ of storage available for release to Storage and Transportation customers. The first sale of $85 \times 10^6 \text{m}^3$ of storage space was made on June 12, 1995, the next sale was $113 \times 10^6 \text{m}^3$ on September 21, and a further $10 \times 10^6 \text{m}^3$ was released a week later. The final release of $42 \times 10^6 \text{m}^3$ took place on October 20, 1995.

Positions of the Parties

[2] Enbridge is a gas distributor and seller of gas to consumers in Ontario. The OEB is charged with the responsibility of fixing the rate that Enbridge can charge consumers for its gas. Enbridge applied for a rate increase. The OEB refused that request in part and Enbridge appealed to the Divisional Court. The Divisional Court unanimously held that the OEB erred in law in its application of the legal test to be used when deciding whether Enbridge was entitled to a rate increase to reflect higher transportation costs incurred by Enbridge as a result of certain agreements it had entered into. In reaching its conclusion, the Divisional Court read a passage from the reasons of the OEB as demonstrating, contrary to statements made earlier in the reasons of the OEB, that the OEB had improperly used hindsight when deciding whether the added transportation costs incurred by Enbridge justified a rate increase.

[3] I would allow the appeal and restore the order of the OEB. When the impugned passage is read in the context of the entire judgment, it can and should be read in a manner that is consistent with the rest of the reasons of the OEB. When read in that way, the passage demonstrates no error in law.

II

FACTUAL BACKGROUND

[4] Prior to 1996, Enbridge shipped gas from western Canada along the TransCanada pipeline system to Ontario. Beginning in 1996, Enbridge entered into four agreements to acquire transportation services on other pipelines. The first two agreements, Alliance 1 and Alliance 2, provided for transportation along the Alliance pipeline running from Alberta to Chicago. The third agreement, Vector 1, related to transportation along the Vector pipeline running from Chicago to southwestern Ontario. The fourth agreement, Vector 2, also related to a pipeline running from Chicago to southwestern Ontario but contemplated the transportation of gas sourced in Chicago.

[5] The new routes became operational in 2000. They proved more costly than the TransCanada pipeline route. In 2000, Enbridge applied to the OEB for an increase in its rates effective in 2001. That increase was said to reflect, in part, the added costs attributable to the Alliance and Vector contracts.

[6] Enbridge's application for a rate increase did not proceed to a hearing in 2000. Enbridge entered into a provisional settlement, conditional upon various contentious issues being deferred to a hearing at a later date. As a term of the 2000 settlement, Enbridge agreed to set up what was described as a "notional deferral account". This account was to record the difference between Enbridge's actual transportation costs using the Alliance/Vector pipelines and its notional costs had it used the TransCanada pipeline system.

[7] Enbridge's rate increase application proceeded to hearing in June 2002. It was common ground that Enbridge had added costs as a result of the Alliance/Vector contracts. The issue was whether Enbridge was entitled to recover these costs by increasing its rates.

III

THE DECISION OF THE OEB

[8] On Enbridge's application for a rate increase, the OEB was obliged by s. 36 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, to decide whether the rate increase sought was "just and reasonable". In making that decision, the OEB was required to balance the competing interests of Enbridge and its consumers. That balancing process is achieved by the application of what is known in the utility rate regulation field as the "prudence" test. Enbridge was entitled to recover its costs by way of a rate increase only if those costs were "prudently" incurred.

[9] The OEB concluded that the added costs associated with the Alliance 1 and Alliance 2 contracts were not prudently incurred and therefore could not be recovered by way of a rate increase. The OEB did, however, hold that the added costs associated with Vector 1 were prudently incurred and therefore could be recovered. Finally, the OEB held that it had insufficient information to decide whether any added costs associated with the Vector 2 contract were prudently incurred by Enbridge. On its appeal to the Divisional Court, Enbridge challenged the OEB's findings with respect to the Alliance 1 and Alliance 2 contracts.

[10] The approach of the OEB to the "prudence" inquiry is captured in the following extract from its reasons:

While the parties described it in somewhat varying terms, in the Board's view they were in substantial agreement on the general approach the Board should take to reviewing the prudence of a utility's decision.

The Board agrees that a review of prudence involves the following:

- ◆ Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.

- ◆ 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 should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.
- ◆ Prudence must be determined in a retrospective factual inquiry, 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 or did enter into the decision at the time.

[11] Neither the Divisional Court nor either party to this appeal takes issue with the correctness of the above quoted passage from the OEB's reasons. The "prudence" inquiry described by the Board has two stages. At the first stage, the decision of Enbridge is presumed to have been made prudently unless those challenging the decision demonstrate reasonable grounds to question the prudence of that decision. At the second stage of the inquiry, reached only if the presumption of prudence is overcome, Enbridge must show that its business decision was reasonable under the circumstances that were known to, or ought to have been known to, Enbridge at the time it made the decision.

[12] In the above quoted extract from its reasons, the OEB expressly alluded to the limited role played by hindsight. Hindsight, that is knowledge of facts relevant to the prudence of the business decision gained after the decision was made, could not be used at the second stage of the "prudence" inquiry to determine the ultimate question of whether the decision was prudent. Those facts could, however, be taken into consideration at the first stage in determining whether the presumption of prudence had been rebutted.

[13] The records from the notional deferral account kept by Enbridge demonstrated that, during the ten-month period for which the account operated, Enbridge's transportation costs were significantly higher under the Alliance contracts than those costs would have been had Enbridge used the TransCanada pipeline system. The amount of the added transportation costs could not have been known to Enbridge when it entered into the relevant contracts, but became known to Enbridge only after the ten-month period with the benefit of hindsight. Consequently, the OEB could use the fact of the increased transportation costs incurred by Enbridge to decide whether the presumption of

prudence was rebutted, but could not use that fact in making the ultimate determination of whether Enbridge's decision to enter into the contracts was prudent.

[14] After the OEB accurately described the "prudence" inquiry, it proceeded to apply that inquiry individually to the Alliance 1, Alliance 2, and Vector 1 contracts. The OEB then turned to the Vector 2 contract. That contract was somewhat different than the other three in that it provided for the transportation of gas sourced in Chicago and not Alberta. Accordingly, it was not part of the alternative transportation path created by the other three contracts.

[15] In considering the Vector 2 contract, the OEB said:

The Board notes that the Vector 2 decision was independent from its previous decisions to enter into the Alliance 1 and 2 and Vector 1 contracts and was not required in order to complete the single continuous transportation path from the western Canada supply basin to southern Ontario. In addition, the Board notes that the cost consequences of the Vector 2 contract were not included in the calculation of the Notional Deferral Account, which is a key element of the Board's prudence review of the Alliance and Vector arrangements [emphasis added].

IV

THE REASONS OF THE DIVISIONAL COURT

[16] The Divisional Court fastened upon reference by the OEB to the notional deferral account as "a key element of the Board's prudence review" in concluding that, despite the earlier proper description of the "prudence" inquiry by the OEB, it had improperly used hindsight gained by reference to the notional deferral account in deciding that the Alliance 1 and Alliance 2 contracts were not prudent.¹

[17] The Divisional Court applied a correctness standard of review in determining whether the OEB conducted a proper "prudence" inquiry. In this court, counsel for the

¹ The Divisional Court referred to another passage from the OEB's reasons (para. 3.12.20) and suggested that the OEB had also misused hindsight in that passage. I do not propose to refer to it in detail, as the Divisional Court ultimately determined that this reference alone did not raise "serious concerns" that the OEB had misapplied the "prudence" test. It is sufficient to say that I think it raises no concerns about the misuse of hindsight. The passage indicates that subsequent events validated the risk of higher costs associated with potential in service delays. Enbridge was advised of that risk before it entered into the contracts. The nature and extent of the risk flowing from potential delays was, therefore, properly factored into the second stage of the "prudence" inquiry. The fact that the risk came to pass is some indication of the validity of the risk.

OEB advanced a forceful argument that the standard of review should, at the highest, be one of reasonableness. It is unnecessary to decide the correct standard of review. Assuming without deciding that correctness is the proper standard of review, the reasons of the OEB clear that standard.

[18] The Divisional Court acknowledged that the OEB's reasons must be read as a whole. The court also accepted that the OEB had correctly described the "prudence" inquiry and that the Board was well aware of a distinction which had to be drawn between the use of hindsight in the first and second stage of the inquiry. Despite the OEB's clear statement of the proper test, the Divisional Court ultimately held that the reference to the notional deferral account as a "key element of the prudence review" indicated a misuse of hindsight in respect of all of the contracts, including the Alliance contracts. This single sentence demonstrated to the Divisional Court that, despite the earlier passages from the reasons, the OEB had "slipped in its application of the test and did allow hindsight to creep into its consideration of prudence".

[19] In reaching this conclusion, the Divisional Court must have read the words "prudence review" in the impugned passage as referring only to the second stage of the "prudence" inquiry. On that reading, the OEB had improperly used information provided in the notional deferral account to determine the ultimate question of the prudence of the contracts.

[20] The Divisional Court erred in reading the words "prudence review" as referable only to the second part of the "prudence" inquiry. Taken as a whole, the reasons indicate that the phrase "prudence review" and similar phrases (*e.g.* "review of prudence") were used throughout the reasons, not as terms of art with a fixed single meaning but in different ways in different parts of the reasons. Sometimes the phrase "prudence review" or an equivalent phrase was used to refer to the entire "prudence" inquiry. Sometimes the OEB used the phrase "prudence review" to refer only to the second stage of that inquiry at which the ultimate question of the prudence of the contracts had to be decided. For example, when describing the submissions of Enbridge at para. 3.1.1, the OEB used the phrase "prudence review" to describe the entire process, including the first stage at which the presumption of prudence operated and during which the information provided in the notional deferral account was clearly relevant. Similarly, under the heading "Board Comments and Findings" (para. 3.12) the OEB used the subheading "Review of Prudence" to describe the entire "prudence" inquiry, including the first stage. Other references to the same phrase in the reasons (*e.g.* para. 3.12.5) used the phrase in the narrower sense to refer only to the second stage of the "prudence" inquiry.

[21] Considered in isolation, the phrase "prudence review" in the impugned passage from the reasons of the OEB may be open to the interpretation provided by the Divisional Court. However, the words viewed in isolation can also be taken as referring to the entire

“prudence” inquiry. This latter reading is consistent with earlier usage of similar terminology in the reasons and, more significantly, is consistent with earlier statements describing the “prudence” inquiry and the limited role played by hindsight in that inquiry. I read the phrase “prudence review” as referring to the entire inquiry, which avoids creating a flat out contradiction between that passage and the rest of the judgment insofar as it described the “prudence” inquiry.

[22] Reasons are sometimes internally inconsistent and that inconsistency can demonstrate an error in law. However, the requirement that the reviewing court read reasons as a whole dictates that, where different parts of the same reasons can reasonably be read so as to maintain consistency within the reasons, that reading must be preferred over one which sends the reasons careening off in different directions and creates an error in law.

[23] The reasons of the OEB, read as a whole, do not reveal any legal error in the “prudence” inquiry conducted by the OEB in respect of the Alliance 1 and Alliance 2 contracts.

V

THE OEB’S STANDING TO APPEAL

[24] I will make brief reference to one additional argument made by Enbridge. It submitted that the OEB had no standing to appeal the decision of the Divisional Court to this court. Enbridge contends that the *Ontario Energy Act, 1998* gives the OEB authority to participate in an appeal taken to the Divisional Court under the right of appeal provided in that statute. Enbridge argues however, that the *Ontario Energy Act, 1998* does not give the OEB any authority to seek leave to appeal a decision of the Divisional Court in this court.

[25] I agree with counsel for the OEB that, as a party to Enbridge’s appeal in the Divisional Court, the OEB had standing to seek leave to appeal to this court. That standing flows not from the *Ontario Energy Act, 1998* but from s. 6(1)(a) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[26] Enbridge blended its argument that the OEB did not have standing to appeal the order of the Divisional Court with submissions that the OEB should not be allowed to advance arguments on appeal in support of the correctness of its own decision. In *Children’s Lawyer for Ontario v. Goodis* (2005), 75 O.R. (3d) 309 (C.A.), this court held that the extent to which a tribunal will be allowed to make submissions in a proceeding involving a decision of that tribunal is a matter for the discretion of the court in which the proceedings are being conducted. The court also considered the factors relevant to the

exercise of that discretion in the context of a judicial review application. As this is an appeal and not a judicial review application, it may be that the *Goodis* analysis is not applicable. However, assuming in Enbridge's favour that the analysis does apply, I am satisfied that the factors identified in that analysis do not support Enbridge's contention that the OEB should not have been allowed to participate in this appeal.

[27] The OEB advanced essentially two arguments on this appeal. It submitted that the Divisional Court should have used a reasonableness standard of review, and it argued that the reasons of the Board, read as a whole, did not reveal the legal error found by the Divisional Court. The OEB was the only appellant in this court. Its submissions were essential to a proper hearing of both issues.

[28] I do not share Enbridge's concern that the participation of the OEB in this appeal could harm the appearance of the OEB's impartiality in any future proceedings involving Enbridge. This appeal came down to a very narrow point. Everyone agreed that the OEB had outlined the proper approach to be taken on Enbridge's application for a rate increase. The narrow question was whether the OEB had "slipped" in one part of its analysis. There is no reason to think that the Board arguing that the reasons reveal no such "slip" should cause any legitimate concern about the impartiality, real or apprehended, of the OEB in its future dealings with Enbridge. Enbridge is after all a sophisticated entity that has a long standing relationship with the OEB. Like all regulated bodies, I am sure Enbridge wins some and loses some before the OEB. I am confident that Enbridge fully understands the role of the regulator and appreciates that each application is decided on its own merits by the OEB.

VI

[29] I would allow the appeal and restore the order of the OEB. The OEB has not asked for costs and I would make no order as to costs.

RELEASED: "DD" APR 07 2006"

"Doherty J.A."

"I agree: M.J. Moldaver J.A. "

"I agree: E.E. Gillese J.A."

1 **Unaccounted For Gas Variances**

2 Union purchased 1.5 PJ of incremental supply to manage Unaccounted for Gas (“UFG”)
3 variances. Union is not requesting recovery of the price variance associated with the UFG
4 purchase in this QRAM application. Union will bring forward a proposal for disposition of these
5 costs as part of the 2013 annual non-commodity deferral account disposition application to be
6 filed in April 2014.

7
8 **Union North Rate 25 Variance**

9 Union manages the costs of serving Rate 25 customers within the rate class and, as such, is not
10 seeking recovery of costs to purchase spot gas to manage Rate 25 consumption variances.

11

12 Union Purchasing Decisions

13 Union began purchasing additional gas supplies based on actual weather variances early in the
14 winter period. For example, the first four purchases in December and early January (as shown in
15 Table 1) were based on actual variances experienced. This has been Union’s traditional method
16 of managing incremental demand. For example, Union was aware of increased winter demands
17 in early December once November actual information became available. Union therefore
18 purchased 4.0 PJ of incremental supply to cover these needs starting December 12, 2013.

19 However, given the persistent colder than normal weather forecast, the impact the weather
20 forecasts were having on prices, inventory levels and market intelligence, Union began to
21 purchase supply to respond not only to known variances but also future forecasted demands
22 related to both weather and consumption variances. This is represented by purchases five

1 through ten shown on Table 1. In late January, Union was receiving consistent forecasts that the
2 remainder of the winter was going to be much colder than normal. Union responded by
3 diversifying its purchases (i.e. not buy all of the winter spot at Dawn only) and was able to
4 contract for TCPL STFT capacity from Empress to Dawn to bring additional volumes to Dawn
5 for the period January 28 to March 31, 2014 (Table 1, Line 7). A more detailed description of
6 each purchase and the environment in which those decisions were made is included in Appendix
7 A.

8
9 Union's decisions related to these spot gas purchases have been driven by actual weather and
10 forecast weather, increasing gas price volatility, especially in the day market, supply availability
11 concerns and other market factors. Each of these factors is described in more detail below.

12 • Weather

13 Heavy snowfall and frigid temperatures swept across Canada and the northern US during the
14 winter of 2013/14. Colder than normal temperatures were experienced early in the winter
15 and are currently forecast to continue through April. Union experienced weather that was
16 15.5%, 16.5% and 18.4% colder than normal in November, December and January,
17 respectively. The combined actual and forecast weather for February was 25.1% colder and,
18 as shown in Table 6 below, the March forecast reflects weather that is expected to be 23.7%
19 colder than normal.

20
21 There has also been variability in the forecast from week to week although it has been
22 consistently cold. For example, throughout February, the forecast for March weather

1 changed significantly. As shown in Table 6, the weather forecast for March on February 3,
2 11 and 18 changed from 10.3 %, to 17.1% to 23.7% colder than normal. This was an
3 important signal to proactively purchase incremental supply on a prospective basis.

4 **Table 6**

5 **March Forecast Weather Variances**

Month	% variance to Normal	Warmer / colder than Normal	Actual / Forecast
March Forecast Weather			
on Feb 3rd	10.3%	colder	Forecast
on Feb 11th	17.1%	colder	Forecast
on Feb 18th	23.7%	colder	Forecast

6
7 • **Natural Gas Price Volatility**

8 Table 7 shows the forecast natural gas prices at Dawn for January, February and March on
9 each day starting December 1, 2013. The lines represent both the forward prices (ahead of
10 the month) and the cash market prices (within the month). Up to the end of December, the
11 January price was the forward price for gas purchases made in December for the entire
12 month of January. For example, if Union were to buy gas in December for delivery in
13 January the deliveries would be firm even deliveries each day of the month of January. Once
14 in January, Union could still buy gas for the day or for the rest of month however, prices
15 tended to get more volatile intra-month in the cash market which Union attempted to avoid.
16 Once January actually begins, the short dashed line is the settle price of gas at Dawn (Settle
17 Price refers to the price that natural gas for delivery tomorrow closed at the end of the day)

1 2015 and February 2015. The amounts purchased were based on the Direct Purchase
2 Status Report received from Union Gas for each of the months noted above.

3

4 This shortfall was due to the colder than normal weather experienced in December,
5 January and February of the 2014/2015 winter. In addition, volumes associated with
6 grain drying in the fall of 2014 were higher than forecast, primarily due to the late
7 growing season.

8

9 As shown in Schedule 3 on the Ontario Delivered Gas line, NRG purchased 25,320 GJ
10 (650,813 m³) in December 2014, 34,784 GJ (900,214 m³) in January 2015 and 8,846 GJ
11 (228,644 m³) in February 2015. The cost of this gas, also shown in Schedule 3 was
12 \$115,712 in December 2014, \$135,310 in January 2015 and \$31,580 in February 2015.
13 The price paid for this gas is shown in Schedule 4 on the Ontario Delivered Gas line and
14 was \$4.57/GJ, \$3.89/GJ and \$3.57/GJ, respectively over the three months.

15

16 Obligated Deliveries

17 Obligated deliveries to Union by NRG on behalf of both system gas customers and direct
18 purchase customers has been forecast at 2,380 GJ/day effective October 1, 2014, an
19 increase from the previous level of 2,294 GJ/day. The increase reflects growing volumes
20 at NRG.

21

22 The direct purchase customer assignment was increased to 197 GJ/day in November,
23 2014, where it is forecast to remain through March, 2016. These levels allow direct
24 purchase customers to bring their supplies in line with their actual and projected
25 consumption. This results in deliveries for system gas customers of 2,183 GJ/day in
26 April, 2015 through March, 2016.

27

28 The composition of these obligated system gas deliveries over this period is as follows.
29 Parkway deliveries are 989 GJ/day in April, 2015 through March, 2016. Obligated
30 deliveries for system gas customers at AECO are 366 GJ/day over the same period.

1 Union system to within +/-4% at the end of the contract year. This may entail NRG
2 purchasing gas or shedding excess gas.

3

4 The bundled transportation contract year-end corresponds with the end of NRG's fiscal
5 year (September 30). NRG purchases additional balancing gas or sells gas and/or reduces
6 deliveries such that total demand on the Union system is offset by the supply provided to
7 Union Gas to remain within the contract parameters.

8

9 As shown in Schedule 3 on the Ontario Delivered Gas line, NRG purchased additional
10 gas in June, 2014, in the amount of 1,040,722 m³ (39,999 GJ) at a cost of \$192,395. This
11 additional gas was needed to ensure the NRG was within its contractual parameters with
12 Union Gas as of the year-end of the transportation contract, as noted above. The price for
13 this gas was \$4.81/GJ, as shown in Schedule 4.

14

15 NRG is currently forecasting the need to purchase 1,419,736 m³ in September, 2015 to
16 ensure that it is within its contractual parameters with Union Gas as of the year-end of the
17 transportation contract in 2015. This gas is shown on the Ontario Delivered Gas line in
18 Schedule 6 at a cost of \$190,263. The forecast price for this gas is \$3.55/GJ, as shown in
19 Schedule 7. This is the forecast price for gas purchases at Dawn.

20

21 February Balancing Gas

22 Additional gas may be purchased in the period leading up to the end of February of each
23 year if required for NRG to meet its forecast banked gas account winter balancing
24 checkpoint on the Union Gas system if consumption is greater than forecast. The Board
25 approved this requirement for Bundled-T customers on Union's system in RP-2003-0063
26 (Decisions with Reasons, dated March 18, 2004).

27

28 In order to meet its forecast banked gas account winter balancing checkpoint on the
29 Union Gas system, NRG purchased additional gas in each of December 2014, January

NRG Gas Costs – 2013-2014 Winter – Incremental Purchases & Penalty Charges

Purchased Gas

90,027 GJ @ \$27.276 / GJ = \$2,455,576

Penalty Charges

25,496 GJ @ \$50.50 / GJ = \$1,287,548

Total

\$2,455,576 + \$1,287,548 = \$3,743,124

Total Cost / GJ

\$3,743,124 / 115,523 GJ = \$32.40 / GJ

Staff Proposal

Average of Highest Dawn Daily Traded Price (January 1, 2014 to February 28, 2014)

\$17.33 / GJ

Total Cost for Incremental Gas @ Dawn Daily Traded Price

115,523 GJ @ \$17.33 / GJ = \$2,002,014

Difference between NRG's Cost of Gas and Dawn Daily Traded Price

\$3,743,124 - \$2,002,014 = \$1,741,110

50% Disallowance of the Difference between NRG's Cost of Gas and Dawn Daily Traded Price

\$1,741,110 / 2 = \$870,555

Payments to Union (5 years)

Amount Collected from Ratepayers related to Penalty (Pay to Union Now)

25,496 GJ @ \$27.276 / GJ = \$695,428

Penalty Charges

25,496 GJ @ \$50.50 / GJ = \$1,287,548

Difference (Pay to Union over 5 years)

\$1,287,548 - \$695,428 = \$592,120 / 5 = \$118,424

Bill Impacts of Staff Proposal

Total Amount to Recover

\$3,743,124

Recovery Approved on an Interim Basis

115,523 GJ @ 27.276 / GJ = \$3,151,005

Disallowed Amount

\$870,555

Total Allowed for Recovery

\$3,743,124 - \$870,555 = \$2,872,569

Difference between Interim Recovery and Final Recovery

\$3,151,005 - \$2,872,569 = \$278,436

Estimate of Residential Bill Impact

NRG IR Response #5 notes that a \$513,897 credit results in a \$50.27 credit to a residential customer.

\$278,436 / \$513,897 = 54%

\$50.27 * 54% = \$27.23 credit

Alternative Staff Proposal

Difference between NRG's Cost of Gas and Dawn Daily Traded Price

\$3,743,124 - \$2,002,014 = \$1,741,110