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BY EMAIL

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27thFloor
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Natural Resource Gas Limited Proceeding
EB-2008-0273

I am responding on behalf of Union Gas Limited ("Union") to the December 22, 2008 letter of Mr. Thacker making certain submissions as to costs on behalf of Natural Resource Gas Limited ("NRG").

This response deals solely with matters raised in the first three pages of Mr. Thacker's letter, which are directly to Union. Union takes no position on the balance of the letter, which addresses the quantum of intervenor costs which ought to be assessed against NRG's shareholder.

Mr. Thacker has fallen into a familiar trap of many litigants who, having lost on the merits, use the opportunity to make responding submissions on costs as a way of trying to re-argue their case. For the reasons outlined below, the Board should reject Mr. Thacker's submissions as being out of time, foreclosed by express findings already made by the Board in its Decision and completely inconsistent with the facts and circumstances described in the record of these proceedings.

As it relates to Union, Mr. Thacker's letter is internally inconsistent. The letter begins "NRG respectfully submits that no costs should be ordered because..." Yet later on page 3, NRG submits that, "In the circumstances, if any costs are to be paid to IGPC and the Town of Aylmer, they should be paid by Union who [sic] was unsuccessful on the application." In either case, however, Mr. Thacker's submissions are ill founded and must be rejected.

Mr. Thacker's submissions seeking to avoid NRG shareholders' liability for intervenor costs or to off-load liability for intervenor costs onto Union are directly contrary to express findings made by the Board. The Board, in its November 27, 2008 Decision, found, among other things, that:

> The intervenors participating in this hearing shall be entitled to the reasonably incurred costs which costs are to be paid by NRG ...
>
> Union's concern with the financial stability of NRG was well founded, given NRG's reclassification of the retractable shares ...
>
> In the case of Union's request for security, NRG did not act in a timely manner. The record suggests that NRG essentially stonewalled Union. This resulted in significant costs for Union, the Board, the Town of Aylmer and the Integrated Grain Processors Cooperative. This type of brinksmanship is not helpful where 6,500 customers and a recently activated ethanol plant supported by substantial Federal and Provincial funding are involved. The Board also directs that costs being paid by NRG shall be paid by NRG's shareholder and not passed on to the NRG ratepayers.

If NRG wished to challenge the Board's disposition, it was obliged to bring a motion to vary or to appeal the Decision. The Board's rules provide that a motion to vary must be brought within 20 days of the order sought to be reviewed. Accordingly, NRG had until December 17, 2008 to move to vary the Board's order. It did not do so. (It had 30 days to appeal, and also did not do so.) Thus, even if Mr. Thacker's December 22, 2008 submissions could be viewed as a motion to vary in disguise, they are out of time and do not in any event address any of the matters that must be addressed (new evidence, evidence not available at the time of the hearing, etc.) in order for a motion to vary even to be heard, much less to be allowed.

The Board's December 8, 2008 letter merely sets out the process to be followed for intervenors to file costs claims and for NRG to comment on the quantum of those claims. The costs process set out in the Board's December 8, 2008 letter did not provide NRG with the ability to challenge the Board's November 27, 2008 Decision in any way, including the Board's disposition as to costs. In this regard, Union agrees with the submission of Mr. Tunley, counsel to the Town of Aylmer, that, to the extent NRG's submissions ignore or seek to vary the Board's Decision, they are improper.

NRG's submissions on liability for costs are, in any event, completely unsupported by the record and the Board's findings. They are ill-founded and ill-considered and should be summarily dismissed.

NRG claims that it was "successful in defeating" Union's application. This is a preposterous submission.

The Board agreed that "Union's concerns are serious" and that "Union's concern with the financial stability of NRG was well founded." The Board went on to say, "In the Board's view, disclosure of retractable shares as a liability significantly increases the financial risks associated with NRG." The Board found, and evidence in the record supported that finding, that "NRG did not act in a timely manner" in respect of Union's requests for a restructured arrangement to deal with these financial security concerns. Indeed, the Board found that "NRG essentially stonewalled Union," which "resulted in significant costs for Union." NRG's conduct was characterized by the Board as "brinksmanship" and "not helpful." Union was driven to bring the application it did as a result of NRG's refusal to discuss the matter, constant cancellation of meetings and failure to return Union's telephone calls.

The suggestion that the hearing was unnecessary because NRG offered to "settle" the matter by offering to give Union a postponement agreement, which offer was "refused" by Union, is highly misleading. This "offer" was not made until after lunch on the day of the hearing, by which time all preparation and hearing costs had already been incurred and the Board had already telegraphed some of its concerns. Further, it is incorrect for NRG to suggest that the only relief granted to Union's as a result of the application was the postponement agreement. In fact, the Board went on to express concern "that NRG's financial reporting is invariably late." The Board, therefore, imposed as a condition of its order that NRG not only file its 2008 audited financial statements within the four-month deadline imposed by the Board's RRR for gas utilities but ordered NRG to provide Union with its "unaudited quarterly statements within 60 days of the end of each quarter." The Board went on to say:

> NRG should understand that these filing requirements will form part of the contract with Union and failure to provide these Statements to Union in the timeframe specified would constitute a breach of the Agreement in which case Union would be entitled to pursue any remedies under the Contract related to the breach including an application under section 42 of the *Act*.

This additional remedy is significant because, as the Board said, it "will allow Union to protect its interests and the Board to monitor the situation more closely."

There is no basis for the suggestion that Union was unsuccessful in the application or that Union refused to discuss the matter beforehand. Mr. Thacker's submission turns the facts on their head. These ill-considered submissions are completely without merit.

For these reasons, Union submits that the Board's November 27, 2008 order as to costs must stand and that, under no circumstances can Union be found liable for any intervenor costs.

Yours very truly,

Michael A. Penny

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cc: Larry Thacker (Lenczner Slaght)
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