

**EB-2014-0053**

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

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

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

**Natural Resource Gas Limited (“NRG”) Reply Argument to Board Staff Submissions**

**November 19, 2014**

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## **PART I – CONTEXT, PRELUDE AND INTRODUCTION**

### **PUBLIC REGULATORY CONTEXT OF THIS REPLY**

1. By notice dated November 17, 2014, the Board has announced its 2014 NGMR Market Gas Review Consultation, which includes a Stakeholder Conference to be held at the Board's offices commencing December 3, 2014. "The purpose of the Conference is to provide a forum for discussing issues raised in two reports prepared by consultants engaged by Board Staff on how the underlying drivers of QRAM were affected by market conditions and prices over the winter 2013/2014 and on the key factors affecting North American and Ontario natural gas markets to 2020, including implications for further development of Board policy."
2. There is a complex array of issues raised by the Board's notice. These issues are being played out in several cases either decided or to be decided by the Board, namely the "Union Penalty Application"; the "NRG QRAM Application and Prudence Review"; and the "Enbridge Prudence Review" [these cases are described and referred to below].
3. The three relevant Board hearings require and required careful regulatory, legal, jurisdictional, strategic and factual analyses that are being applied in the unique environment and impacting a number of bedrock regulatory assumptions extant in the province:
  - (a) should a utility's ability to earn a return on assets be eliminated or diminished in a manner that affects the financial viability of the entity through disallowance based on unique extreme weather conditions, unpredictable transportation costs and other relevant market factors that could not be anticipated or known;
  - (b) in Ontario's complex marketplace, factors which must be considered in fixing just and reasonable rates in the unique circumstances of the winter of 2013/2014, namely elimination of windfall gains, role of Union's storage to protect the Ontario consumer generally, suspension of contractual obligations to protect consumers and utilities, utility obligation to consider the public interest, Board obligations to require flexible procedures to eliminate hardship before it occurs;
  - (c) the Board's jurisdiction to fix a rate in the Union Penalty Application and then assess its prudence in the NRG QRAM and Prudence Review;
  - (d) the Board's jurisdiction to fix just and reasonable rates and the factors necessary in so doing;
  - (e) the issue of a stay of any payment of a penalty amount pending final determination of whether the utility or the utility's consumers are required to pay;
  - (f) the obligation of Board Staff to disclose to NRG reports prepared by consultants described above before the NRG QRAM Application is decided; and
  - (g) the proper application of the legal requirements for a Prudence Review and unique issues arising in the NRG QRAM Application, namely the requirement

that the Board apply the events which occurred after the original NRG gas purchase decisions were made (the Board's own fixing of a penalty gas rate).

## **THE PRELUDE**

4. The fundamental regulatory, legal and jurisdictional issues arise in high relief in this NRG QRAM Application.
  - (i) **NRG as a Utility**
5. NRG itself is an Ontario utility.
6. Natural gas purchases of another Ontario utility were reviewed by the Board after the "Extreme Winter Conditions of 2013/2014", namely Enbridge Gas Distribution Inc. ("Enbridge").
7. The Board Reasons were published March 27, 2014 in EB-2014-0039 and recognized the following principles:
  - (a) the cost and risk of trade-offs of different gas supply planning parameters were complex and required a generic proceeding to discuss;
  - (b) a natural gas distributor is not allowed to profit from the sale of the natural gas commodity;
  - (c) the actual cost of the gas purchased by a utility for its customers is passed on to utility customers without any mark-up or added costs; and
  - (d) consumers benefit from decrease in the cost of the natural gas commodity and reductions are passed on to consumers.
8. The principles set out above apply equally to NRG. Its customers have benefitted from the lower prices achieved in the direct purchase context. NRG itself has neither lost nor gained as a result of its management of the costs of natural gas supply to its customers.
  - (ii) **Board Staff Answer: A Summary Critique**
9. In its written submission, Board Staff do not refer to the legal presumption of prudence. Board Staff failed to produce any evidence to displace the presumption. When Board Staff did refer to facts, it raised a faulty syllogism and relied upon a narrow partisan view of the facts themselves. The conclusions drawn are not supported by law, fact or logic. Board Staff do not come to grips with the important public issues listed above.
10. On the law, Board Staff made no attempt to articulate and apply the principles set out by the Ontario Court of Appeal regarding the proper analysis in a legal prudence review. Board Staff appears to ignore the presumption of prudence as a rebuttable presumption of law requiring evidence to displace the presumption.
11. Regarding logic, Board Staff argued as follows: NRG had knowledge of a potential deficit in its banked gas account prior to February 2014; NRG delayed in making up that

deficit; the delay led to a compression of time within which the gas could be purchased; the delay increased the risk of higher prices, and was therefore imprudent.

12. The fundamental break in logic arises in the theory put forward by Board Staff in support of its submission that NRG was imprudent. The Board Staff theory is that the NRG delay in purchasing spot gas was directly responsible for the higher prices and the unavailability of gas (leading to the penalty rate for 29,496 GJ) and that NRG ought to be responsible for some of those costs. The facts do not support Board Staff theory. The increased prices were not for natural gas, but for the transportation component of the cost of delivering natural gas to Union. While the cost of the natural gas itself is a transparent market, the cost of transportation is not. There were factors listed below that were unpredictable and unknown by NRG which increased the transportation cost. NRG did not have and could not have had the transportation cost factors.
13. The transportation costs increased for at least three major reasons. Each one of the reasons increased the TCPL delivery obligations from the West. The first is the increased demand of Union's customers for Winter Checkpoint Quantity. The second was Union's own activities in purchasing spot gas in the marketplace. This second set of purchases could not have been known by NRG. NRG was competing with Union's own activity in causing a spike in the transportation cost. The third reason is the surprising and unpredictable decision by Enbridge to fix its "floating" winter checkpoint date and fixing it for February 28, 2014. This added enormous demand on TCPL's pipeline capacity and drove the delivered cost of gas to a very short term spike and a month-long increase in prices that were unpredictable and extraordinary in the month of February 2014.
14. Because the limitations on TCPL's pipeline and the increased pressures for transportation were unique on the Ontario system they, along with the "Extreme Winter Weather", caused the plight of higher prices and resulting high penalty rates for NRG and other Union customers that cannot reasonably be used to argue that NRG was imprudent or, more appropriately, that Board Staff met the evidentiary burden of displacing the legal presumption of prudence as hereinafter discussed.
15. Regarding the facts, it is respectfully submitted that Board Staff did not give a balanced review of the facts in its analysis of the necessary evidence to displace the presumption of prudence. Board Staff referred only to NRG evidence. It did not file any contrary evidence or opinions. Board Staff did not cross-examine NRG on the evidence and Answers to Interrogatories that it did file. In the public interest, Board Staff has an obligation to analyze all of the facts in order to present a balanced review. It did not do so. The opinions expressed by NRG must be accepted.
16. What follows is an introduction and description of the relevant terms referred to above, an analysis of the legal test and submissions concerning the facts led by NRG, submissions concerning jurisdiction and financial viability.

## **INTRODUCTION**

17. NRG respectfully replies to the submissions made by Board Staff under the following issues:

- (a) Board Staff did not apply the proper test at law in its prudence analysis, and therefore erred in its conclusions. As is set out in paragraphs 17 to 22 of NRG's Argument in Chief the test at law commences with a legal presumption of prudence (the "*Prudence Test*");
- (b) as will hereinafter be discussed, a rebuttable presumption of law can only be displaced upon sufficient evidence filed or identified for the purpose of rebutting the presumption of prudence. Board Staff did not analyze the evidence that is available or give a balanced view of that evidence in its written submissions. Board Staff made only narrow reference to the evidence led by NRG, ignoring facts on one side and drawing unsupported conclusions on the other. In so doing, Board Staff failed to provide or identify sufficient evidence to rebut the legal presumption of prudence. On this ground alone, the NRG Application should be allowed as requested (the "*Rebuttal Requirement*");
- (c) Board Staff sought to impose a disallowance of recovery of gas costs and to impose costs on NRG's shareholders, in one of two alternatives, in the amounts of \$1,160,518 or \$870,555. These putative disallowance amounts are determined in part by reference to the penalty rate fixed by the Board of \$50.50 per GJ for 29,496 GJ. The penalty rate was fixed by the Board in a Union Gas Limited ("Union") application, EB-2014-0154 in the Board decision rendered on October 9, 2014. The Board had earlier decided on May 8, 2014 to refuse NRG's request that this matter, EB-2014-0053 (the "NRG QRAM Phase 2" or the "Prudence Review") and EB-2014-0154 (the "Union Penalty Rate Hearing") be heard together. By Board letter dated May 18, 2014, the Board decided to hear the two matters separately, one after the other (the "*Joinder Refusal*");
- (d) the Board did accept that the winter conditions of 2013 to 2014 were "... exceptional; extraordinary and anomalous ..." and were such that it justified a reduction to the penalty rate charges (the "*Extreme Winter Weather*");
- (e) in the Union Penalty Rate Decision, the Board analyzed the requirement for a penalty rate in normal circumstances, but decided to reduce the rate "... while at the same time reducing the potential for the penalty to **unduly impair the financial viability of those required to pay it**". This latter factor foreshadowed the serious consequences that this prudence review has on NRG and on regulatory fairness in the province (the "*Financial Viability Factor*");
- (f) in its evidence and submissions in the Union Penalty Rate Hearing, NRG sought to have the Board consider all relevant individual factors affecting NRG. The Board did fix the Penalty Rate based on Extreme Winter Weather and the Financial Viability Factor. It refused to consider other NRG individual factors, namely (i) uncontested evidence of historic norms of the relationship between the average gas cost and the cost of gas arising from the penalty rate formula; (ii) NRG's special status as the only direct purchase utility customer of Union where the cost of its gas purchases are incurred solely for the benefit of NRG's ratepayers and in a regulatory framework where the cost of gas is normally a pass-through cost to the ratepayers; (iii) Union's actual cost of supplying NRG's balancing shortfall of 25,496 GJ was the price Union paid for gas in the ordinary course, namely \$4.49 per GJ; \$12.31 per GJ for spot purchases and

\$20.156 per GJ for spot purchases in January and February; (iv) the windfall gain achieved by Union and its customers at the penalty rate of \$50.50 per GJ (the “*NRG Special Factors*”);

- (g) the evidence is uncontradicted that Union did not require any natural gas to meet its balancing needs on February 28, 2014 to operate its system. The evidence is clear that Union has received a gratuitous windfall benefit of approximately \$43.00 per GJ for the 25,496 GJ made the subject of the penalty cost of \$50.50 (*NRG Interrogatory Answer 1(a) page 4*); and
- (h) the disallowance proposed by Board Staff would have a negative impact on NRG’s profits by eliminating the last two or three years of earnings. It is submitted that this is not a reasonable conclusion in the circumstances (the “*Financial Viability Issue*”).

## PART II – PRUDENCE TEST

18. The relevant test to analyze prudence has been consistently articulated by the Board, the Ontario Divisional Court, and the Court of Appeal, as follows:

- (i) decisions made by utility management should generally be presumed to be prudent unless challenged on reasonable grounds;
- (ii) 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;
- (iii) 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 (and presumably used to support the prudence of action);
- (iv) 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 a decision *at the time*.

*Enbridge Gas Distribution Inc. v. Ontario Energy Board* [2005] 75 O.R. (3d) 72 (Div.Ct.) at p.5, para.10

*Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2006), 210 OAC 4 (OCA) at p.4, para.10

*Powerworkers Union (Canadian Union of Public Employees, Local 1000) v. Ontario Energy Board*, (2013) ONCA 539 (CanLII) (OCA) at p.4, para.16

19. The presumption of prudence is a rebuttable presumption of law. A rebuttable presumption of law is a legal assumption that a court will make if insufficient evidence is adduced to displace the presumption. The presumption shifts the burden of persuasion to the opposing party (Board Staff) who must rebut the presumption with evidence.

*Pecore v. Pecore*, [2007] 1 S.C.R. 795 (SCC)

*Re Mailman Estate*, [1941] S.C.R. 368 (SCC)

*Niles v. Lake*, [1947] S.C.R. 291 (SCC)

*Rothwell and Rothwell*, [1978] 2 S.C.R. 436, at p.451 (SCC)

*The Law of Evidence in Canada* (2d) Sopinka, Letterman and Bryant, at p.115 and pp. 105-106

20. Board Staff characterized their analysis of the Prudence Test on page 4 of their submission as "... there are reasonable grounds to challenge the prudence of the decisions made by NRG's management over the 2014 winter ...". This is an incorrect statement of the test and has led Board Staff into fundamental error in its conclusions.

The onus on Board Staff is not merely to raise “reasonable and probable grounds”, but is to prove that NRG acted imprudently on the entire record and in the regulatory context in which NRG made its purchases, namely with no gains or losses for commodity purchase over all the years. In this context, NRG cannot be considered imprudent. At best, it can only be characterized as in error. It had no incentive to permit higher natural gas costs.

21. At no time has Board Staff led its own evidence to rebut the legal presumption of prudence. Additionally, Board Staff has not fairly analyzed all relevant portions of the evidence filed by NRG in asking the Board to draw its conclusions. Board Staff conclusions are therefore unreliable and incorrect.
22. On a fair and balanced reading of the NRG evidence filed in this proceeding, Board Staff has not met the burden necessary to rebut the presumption of prudence of NRG’s management of its gas supply in the Extreme Winter Weather conditions.

#### **NRG PRUDENCE: A BALANCED VIEW OF THE EVIDENCE**

23. NRG filed an Affidavit sworn under oath by Brian Lippold, General Manager of NRG, who was involved in the issues and gas purchases of NRG to meet its winter check-point quantity under its contract with Union Gas Limited leading up to February 28, 2014. No cross examination was made of this Affidavit. Mr. Lippold deals with the relevant factual issues in the following manner:
  - (a) the cold weather conditions in the winter of 2013 to February 2014 were extreme, exceptional and unpredictable (paragraphs 6, 7, 8, 9 and 10);
  - (b) NRG has 7,800 residential customers and several industrial customers in a predominantly rural and small town area of the province. The Board is required to consider the impact on NRG’s consumers in setting rates (paragraph 11);
  - (c) based on the emergency conditions, the Board should consider an analysis of the historic norms for gas pricing in the province and in particular the difference between the reference price and the penalty rate over prior years, indicating that there was very little difference between the two prices historically (paragraph 17);
  - (d) NRG recognized that the high prices for “delivered” natural gas in February 2014 were such that it sought Union’s help to deal with the matter but received no satisfaction (paragraphs 21 and 22);
  - (e) NRG did “... everything reasonably possible to meet its contractual obligations to provide the Winter Checkpoint Quantity and did nothing unreasonable in the circumstances in failing to meet 25,496 GJ of its outstanding 115,000 GJ obligation ...” (paragraphs 23, 25, 26 and 27); and
  - (f) Union Gas did not purchase any gas for NRG to satisfy the 25,496 GJ. It took the gas from storage (paragraphs 28, 29 and 30).
24. In addition, NRG answered questions put by Board Staff. The answers form part of the evidence the Board must consider in its own analysis of prudence. The following evidence of NRG’s actions is relevant to the issue of its prudence in purchasing Winter Checkpoint Gas:



- (a) NRG has a complex and unique relationship in Ontario with natural gas vendors, TCPL transmission, Union transportation, Union storage and the nature of its own customers a system supply and direct purchase customers (*NRG Interrogatory Answer 1(a) page 2*);
- (b) throughout the year, NRG has a complex set of gas purchase obligations with its own gas suppliers, with Union under the bundled direct purchase contract and under NRG's own contracts with its customers. In doing so, NRG diversifies its gas purchasing risk throughout the year. NRG purchases 80% of its natural gas one and two years in advance of its required delivery to Union. Under this arrangement, NRG is required to deliver gas to Union on a daily basis (approximately 2,380 GJs per day). This amount varies throughout the year dependant upon usage. The gas supply required for NRG's own direct purchase customers (197 GJs) is supplied directly by them. These purchases represent the baseline for natural gas purchases that are adjusted throughout the year to accommodate variations in usage and weather (*NRG Interrogatory Answer 1(a) page 2*);
- (c) NRG's existing contractual commitments for gas supply, namely its daily contract quantities ("DCQ"), showing contract, direct and spot purchases for the periods November 2014 to November 2015 and November 2015 to November 2016 in the amounts of 2,380 GJ are indicative of NRG's overall purchasing program (*NRG Interrogatory Answer 1(d) page 11*);
- (d) Mr. Lippold, the general manager of NRG, works with Shell Canada's natural gas purchasing department in making its gas purchasing decisions. Shell is a well-known international conglomerate with world-level expertise in the purchase of natural gas. NRG also subscribes to Platt's Financial which gives subscribers market data for natural gas pricing, analysis and reporting for all North America natural gas markets (*NRG Interrogatory Answer 3(a) page 14*).
- (e) the price of natural gas was not the issue that led to the NRG QRAM Application in February 2014. The price of natural gas at the wellhead in Alberta remained in a five-year average range of approximately \$4 to \$6 per GJ. The spike in delivered gas prices in February 2014 to Ontario occurred because of the cost of transportation in getting the gas from the Alberta wellhead to Union's hub at Dawn. The increased transportation cost was affected by two factors: (i) the Extreme Winter Weather; and (ii) the decision by Enbridge to fix its normally flexible winter balancing date to the same date as Union's fixed winter balance date, namely February 28, 2014 (*NRG Interrogatory Answer 1(a) page 2*);
- (f) the cost of transportation cannot be predicted by NRG management as it depends upon the availability of pipeline space on TCPL's system and on the usage of all Ontario natural gas customers;
- (g) NRG has an OEB approved gas purchasing policy that has been in place since January 31, 2011. That policy states: "In the past, NRG Limited gas purchases were weighted with fixed-base seasonal strips – 30% to 40% allocated to spot. Going forward NRG will implement a more diverse strategy with a blend of both fixed and indexed positions in order to capitalize on the current and projected

lower prices while allowing flexibility to adjust to market trends". The evidence is uncontradicted that NRG has followed that Board-approved policy (*NRG Interrogatory Answer 1(a) pages 2 and 3*);

- (h) NRG elected to be a direct purchaser from at least 1996 forward and has continued to be so with regulatory oversight from the Board from that day to this, including approval of its gas purchasing policy set out above (*NRG Interrogatory Answer 1(c) page 10*);
  - (i) there was no prior experience to the Extreme Winter Weather conditions. NRG had no expectation of profit in its purchasing decisions. The evidence is uncontradicted that NRG pursued all reasonable options to purchase natural gas at reasonable prices having regard to its desire to purchase the lowest cost natural gas for its customers. This includes waiting for the expected decline in prices at the end of February, seeking the advice of Shell Canada, Union and relief from the Board, without success during February 2014. NRG was able to purchase 90,027 GJ for delivery to Union before February 28. These prices were less than other purchasers paid in the extreme market conditions extant at the time (*NRG Interrogatory Answer 1(a) pages 2 and 3*).
25. From the above evidence, it is respectfully submitted that NRG's management was prudent in its purchases of natural gas such that this Application should be allowed without any disallowance. NRG's actions must be seen in the context of its larger gas purchase and delivery to Union obligations. NRG had the requisite internal experience and external support to make sound purchasing decisions. The pricing issue for Winter Checkpoint Quantity was not related to the cost of the gas itself, but to the far less predictable and knowable cost of transportation from Alberta to Ontario. At the time the decisions were made by NRG management in the winter of 2014, it was not known that Enbridge would designate February 28 as its date for delivery of Winter Checkpoint Quantity gas. The decision not to buy natural gas during the months of January and February, 2014 was not based on a decision to delay, but it was based on a decision to achieve the lowest possible prices for its own customers based on historical experience. NRG's historical pricing experience is that prices varied no more than \$3 and \$5 per GJ in January and February 2010, 2011, and 2012. This historical experience of prices was relied upon in 2014.
26. NRG can be criticized for purchasing high priced gas on an early basis as much as it can be criticized for purchasing high priced gas at the latter end of the purchasing period.
27. As set out above, NRG is a utility. NRG had nothing to gain by attempting to achieve the lowest possible prices for its customers except for the benefit of its customers. This is an important distinction in analyzing prudence for flow-through costs. Anyone seeking to show that the presumption of prudence should be challenged and rebutted must do so on actual evidence and in the context of NRG as a utility acting in extreme circumstances. NRG was not alone, but was unique as a utility.
28. In these circumstances, NRG has made out a strong and unanswered case of prudence.
29. In any event, the law is clear that there is a presumption of prudence.

**PART V – FINANCIAL VIABILITY**

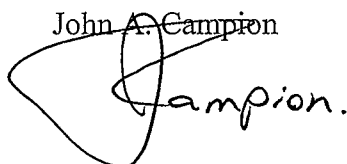
30. The Board itself designated financial viability of a Union customer as the only individual factor affecting the Union Penalty Decision. Board Staff has raised the issue of NRG's financial viability if certain costs were disallowed, thereby imposing costs on NRG of the amount set out above.
31. NRG has given testimony that over the years 2011 to 2013 NRG has been entitled to earn 9.85% on its deemed equity. This amounts to \$452,608, \$459,718 and \$465,146. The two alternative disallowance figures would eliminate two-thirds or all of the above profits (*NRG Interrogatory Answer 4(a) page 16*).
32. The evidence is that this creates a financial hardship to NRG (*NRG Interrogatory Answer 4(a) page 16*).
33. It is respectfully submitted that on this ground alone the Board should adopt the usual practice of permitting natural gas costs as a flow-through cost.

## PART VI – CONCLUSION

34. As set out above, in a recent decision of the Board concerning Enbridge Gas Distribution Inc., EB-2014-0039, the Board said in part as follows: "... the Board notes that Enbridge, as a natural gas distributor, is not allowed to profit from the sale of the natural gas commodity. The actual cost of gas purchased by Enbridge for its customers is passed on to Enbridge's customers without any mark-up or added costs ...". With respect to the first Feature of the QRAM described above, Enbridge noted that it develops a gas supply plan as part of its budgeting process. Enbridge adheres to that gas supply plan, while at the same time managing for changes in demand throughout the year to provide safe and reliable supply to its customers. The plan also includes identifying the necessary transportation and storage contracts as well as developing a forecast need for peaking supplies and their curtailment of interruptible customers. The planning criteria for 2013/2014 assumed that the winter could be as severe as any winter in five years, while the winter actually proved to have a severity of 1 in 25 years ...".
35. It is respectfully submitted that the Board's analysis in the Enbridge case is directly applicable to NRG's QRAM Application. Board Staff has not displaced the presumption of prudence on a balanced analysis of the evidence.
36. It is submitted that the usual course is that the accepted regulatory principle is to permit a natural gas distributor to pass through costs of purchasing gas to its customers, subject to a prudence review, if imposed. In this case, there are exceptional reasons for the increased transportation costs that led to the costs for natural gas incurred on behalf of NRG's customers by NRG. NRG did its best to ameliorate the costs through its purchasing decisions and analyses. It actively sought a penalty rate related to Union's actual costs for the benefit of its customers. In all of these circumstances, it is submitted that the Board can fairly conclude that NRG has acted prudently. In any event, Board Staff have not met the evidentiary burden to displace the presumption.
37. In any event, any decision that NRG was imprudent in its purchases of natural gas will have a negative financial impact of denying a utility of its profits of at least two or three years. This is an unwarranted financial hardship on NRG and its shareholders.
38. It is respectfully submitted for all of the above reasons that the NRG QRAM Application be permitted without any disallowance.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

John A. Champion



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