

**MANITOBA** ) **Order No. 43/14**  
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**THE PUBLIC UTILITIES BOARD ACT** ) **April 23, 2014**

**BEFORE:** Régis Gosselin, B ès Arts, M.B.A., C.G.A., Chair  
Larry Soldier, Member  
Marilyn Kapitany, B.Sc. (Hons.), M.Sc., Member

**ORDER IN RESPECT OF SWAN VALLEY GAS CORPORATION'S APPLICATION  
TO REVIEW & VARY BOARD ORDER 29/14**

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## TABLE OF CONTENTS

1.0	Executive Summary .....	2
2.0	Swan Valley Gas' Application to Review & Vary Board Order 29/14 .....	3
3.0	Board Findings.....	5
	3.1 Overall Disposition .....	5
	3.2 The Board's Jurisdiction.....	6
	3.3 Fairness of the Decision.....	9
4.0	IT IS THEREFORE ORDERED THAT: .....	11

## **1.0 Executive Summary**

By this Order, the Public Utilities Board of Manitoba (Board) dismisses the Swan Valley Gas Corporation's (Swan Valley Gas) Application to Review & Vary Board Order 29/14.

Swan Valley Gas applied to vary two aspects of Board Order 29/14, namely the Board's decision not to approve the sale of Swan Valley Gas' assets to Centra Gas Manitoba Inc. ("Centra") unless the purchase price was reduced from \$200,000 to no more than one dollar, and the Board's decision not to approve Centra's concurrent Application to charge a four-year rate rider to customers in the Swan Valley Gas franchise area to recover this \$200,000 purchase price. Swan Valley Gas further has advised the Board that it intends to close the transaction on the terms approved in Board Order 29/14 if its Application is not granted.

In support of its Application to Review & Vary Board Order 29/14, Swan Valley Gas argued that the Board did not have jurisdiction to deny the negotiated \$200,000 purchase price, that it was not fair to allow Swan Valley Gas customers to obtain, for one dollar, the benefit of gas infrastructure that had previously been approved as prudent, and that when the Province of Manitoba allowed Swan Valley Gas' largest customer, Louisiana-Pacific Corporation (Louisiana-Pacific), to discontinue the operation of gas-fueled regenerative thermal oxidizers, it stranded a significant portion of Swan Valley Gas' assets.

The Board dismisses Swan Valley Gas' Application to Review & Vary Board Order 29/14 pursuant to subsection 36(5)(d)(i) of the Board's Rules of Practice and Procedure on the ground that that Board is of the opinion that Swan Valley Gas has not raised a substantial doubt as to the correctness of Board Order 29/14. Specifically, the Board is of the view that it had jurisdiction to not approve the contemplated sale unless the purchase price was reduced, and that the fairness arguments raised by Swan Valley Gas were adequately considered in Board Order 29/14.

## **2.0 Swan Valley Gas' Application to Review & Vary Board Order 29/14**

On April 11, 2014, the Swan Valley Gas Corporation (Swan Valley Gas) applied to the Board for an Order pursuant to section 36 of the Board's Rules of Practice and Procedure and section 44 of *The Public Utilities Board Act* to Review & Vary Board Order 29/14. Board Order 29/14 arose out of two concurrent applications by Swan Valley Gas and Centra Gas Manitoba Inc. ("Centra") to approve the sale of Swan Valley Gas' assets to Centra. The Board conditionally approved the sale. Among the conditions were the following:

1. That the \$200,000 purchase price proposed by Swan Valley Gas and Centra be reduced to no more than one dollar; and
2. That a rate rider to be charged to gas customers in the Swan Valley Gas franchise area to recover this \$200,000 purchase price over four years was disallowed.

Swan Valley Gas is now applying to the Board to Review & Vary these two conditions and have both the proposed purchase price and rate rider reinstated. The latter condition relates to an item in Centra's original Application rather than in Swan Valley Gas' Application.

Swan Valley Gas' submissions are three-fold:

1. Pursuant to the Supreme Court of Canada's "*Stores Block*" decision (*ATCO Gas and Pipelines v. Alberta*, [2006] 1 S.C.R. 140), the PUB does not have jurisdiction to set the price of or decide how to distribute the proceeds of a sale of utility assets. Specifically, the PUB cannot confiscate gains.

2. It is not fair that Swan Valley Gas ratepayers receive the benefit of a physical gas system for \$1.00 without any further cost recovery. The Board has previously determined that Swan Valley Gas' investment in plant was prudent. As such, the infrastructure forms part of Swan Valley Gas' rate base, and Swan Valley Gas and subsequently Centra should be allowed to recover these prudently incurred costs.
3. The Government of Manitoba caused a large portion of Swan Valley Gas' assets to be stranded when it allowed Louisiana-Pacific, Swan Valley Gas' "anchor" customer, to shut down its gas-fueled regenerative thermal oxidizers by granting an amendment to Louisiana-Pacific's *Environment Act* licence.

### **3.0 Board Findings**

#### ***3.1 Overall Disposition***

For the reasons set out below, the Board dismisses Swan Valley Gas' Application to Review & Vary Board Order 29/14 pursuant to Rule 36(5)(a)(i) of the Board's Rules of Practice and Procedure on the basis that the Board is of the opinion that Swan Valley Gas has not raised a substantial doubt as to the correctness of Order 29/14.

The Board notes that Board Order 29/14 does not require the parties to close the transaction based on the conditions imposed by the Board if they do not find it to be in their mutual commercial interest to do so. However, Swan Valley Gas has advised the Board that it intends to close the transaction on the terms approved in Board Order 29/14 if its Application to Review & Vary is not granted.

As a preliminary matter, the Board notes that the second part of Swan Valley Gas' Application, namely its request to Review & Vary the Board's decision to deny a four-year rate rider to be charged to customers in Swan Valley Gas' area, relates to an item that did not form part of Swan Valley Gas' original application. The entity that applied for a rate rider was Centra, not Swan Valley Gas. While the Board understands that the purchase price and rate rider are related, in the Board's view this should have been addressed through a joint Application with Centra, as Swan Valley Gas provided no indication that it had Centra's consent or authority to apply for a variance of a ruling with respect to relief originally applied for by Centra.

### **3.2 The Board's Jurisdiction**

The Board's jurisdiction to approve or disapprove the disposition of the assets of a regulated utility arises by virtue of subsection 82(1)(h) of *The Public Utilities Board Act*, which states that:

*82(1) No owner of a public utility shall*

*...*

*(h) without the approval of the board, sell, lease, mortgage, or otherwise dispose of or encumber its property, franchises, privileges, or rights, or any part thereof, or merge or consolidate its property, franchises, privileges, or rights, or any part thereof, with that of any other public utility or its owner.*

Swan Valley Gas argues that the Supreme Court of Canada's "*Stores Block*" decision (*ATCO Gas and Pipelines v. Alberta*, [2006] 1 S.C.R. 140) stands for the proposition that public utilities boards cannot impose conditions that reduce the proceeds received by a utility upon a sale of assets, notwithstanding broadly worded statutory powers.

The Board is of the view that the *Stores Block* decision relied on by Swan Valley Gas does not apply to the current situation as it is based on substantially different facts. Specifically, *Stores Block* involved an application to the Alberta Energy and Utilities Board (AEUB) by ATCO Gas and Pipelines Ltd. (ATCO) for approval to sell surplus real estate known as the "Stores Block" to a private non-utility entity. Applying its previously developed "no harm" test, the AEUB determined that the proposed sale would not harm ATCO's ratepayers and approved it. In a separate decision, the AEUB then determined that some of the proceeds from the sale should flow to ratepayers. The issue of whether or not the AEUB had jurisdiction to make the second decision was appealed first to the Alberta Court of Appeal, and then to the Supreme Court of Canada. The majority of the panel hearing the decision at the Supreme Court level found that the

AEUB had no jurisdiction to determine how the proceeds from this sale should be allocated. The AEUB's jurisdiction to make the first decision, i.e., reach a determination as to whether there would be an adverse ratepayer impact and approve or disapprove the sale on that basis, was not impugned.

In contrast, the Applications giving rise to Board Order 29/14 involved a sale of assets not to a non-regulated private entity, as was the case in *Stores Block*, but rather from one rate-regulated utility to another. This required the Board to assess the impact not just on Swan Valley Gas ratepayers, but also on Centra ratepayers. In Order 29/14, the Board made an explicit finding that the transaction would have an impact on Centra ratepayers, holding, at page 12 of 26:

*Nonetheless, the Board is of the opinion that there are significant financial challenges in the operation of this distribution system due to the low number of customer connections, resulting in a forecasted revenue deficiency each and every year. That revenue deficiency must be funded by Centra's existing ratepayers, who do not receive a benefit from this transaction.*

*At the current agreed upon terms the purchase price is not prudent. In the Board's view it is inappropriate for Swan Valley Gas to receive a purchase price greater than \$1 for these assets, considering the negative net present value of the forecasted revenue deficiencies. In the Board's view, the net book value of Swan Valley Gas' assets is neither determinative nor indicative of what the purchase price should be, as these assets cannot readily be used for purposes other than delivering gas in the existing service area. Accordingly, the Board's approval of the sale of the assets to Centra is conditional on the renegotiation of the Agreement such that the purchase price is \$1, without the additional recovery of \$200,000 over four years.*



It is apparent not just from the *Stores Block* decision itself, but also from decisions released after *Stores Block* that utility tribunals may take into account ratepayer impacts when approving or disapproving a sale. For example, in the “*Harvest Hills*” decision (*ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2009 ABCA 171), the Alberta Court of Appeal stated that:

*[31] The [Alberta Energy and Utilities] Board’s “no harm” test is well established and has been acknowledged by this Court in its Stores Block decision (ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board), 2004 ABCA 3, 339 A.R. 250 (at para.18) and by the Supreme Court (Stores Block para. 13). ...*

*[32] In Stores Block, the Board found that there would be no harm to customers as a result of the sale. In the Supreme Court, Bastarache J. observed that even by the Board’s own reasoning, it should only exercise its discretion to act in the public interest when customers would be harmed or would face some risk of harm (at para. 84). In our view, the harm contemplated by the Supreme Court must be harm related to the transaction itself.*

It also bears noting that in Order 29/14, the Board did not make a ruling on how the proceeds of a sale of utility assets should be distributed, as was the case in *Stores Block*, but rather disallowed a sale to proceed at a certain price. The Board has not been presented with any law that would suggest that a determination of whether a sale of utility assets from one regulated utility to another is prudent at a certain price is outside the Board’s jurisdiction.

Accordingly, in the Board’s opinion, Swan Valley Gas’ Application has not raised a substantial doubt as to the correctness of Order 29/14 at law.

### **3.3 Fairness of the Decision**

Regarding Swan Valley Gas' submission that a sale price of one dollar for the utility assets and a denial of the temporary rate rider provide an unfair benefit to Swan Valley Gas ratepayers, who receive the benefit of a physical gas system for \$1.00 without any further cost recovery, the Board acknowledges that Swan Valley Gas' approved rate base is higher than \$1.00, but is of the view that this does not change the Board's analysis of the matter.

While subsection 127(1) and section 61 of *The Public Utilities Board Act* require the Board to establish a rate base for utilities based on assets that are "used, useful, and prudently acquired", and to determine a return on equity, the establishment of a rate base is not a guarantee of the permanent financial viability or the continued market value of utility infrastructure. Swan Valley Gas applied to sell assets to another utility regulated by the Board. The Board must consider the interest of Centra ratepayers and balance those against the interests of Swan Valley Gas and its ratepayers. As the Board noted in Order 29/14 (at page 12 of 26):

*In the Board's view, the net book value of Swan Valley Gas' assets is neither determinative nor indicative of what the purchase price should be, as these assets cannot readily be used for purposes other than deliver gas in the existing service area.*

Given the Board's findings that Centra ratepayers would be responsible for funding a forecasted revenue deficiency each and every year, the Board remains of the view that a \$200,000 sale price is not prudent and that Swan Valley Gas' submission on this issue has not raised a substantial doubt as to the correctness of the Board's decision in Order 29/14.

Regarding Swan Valley Gas' submission that it was a decision of the Province of Manitoba that resulted in the stranding of a significant portion of Swan Valley Gas' assets, the Board acknowledges the challenges to Swan Valley Gas' operations posed by the decommissioning of Louisiana-Pacific's regenerative thermal oxidizers. However, the fact that the *Environment Act* licence amendment that allowed for a change in Louisiana Pacific's operations was authorized by a Provincial government department does not raise a doubt as to the correctness of the Board's decision in Order 29/14.

**4.0 IT IS THEREFORE ORDERED THAT:**

1. The Swan Valley Gas Corporation's Application to Review & Vary Board Order 29/14 **BE AND HEREBY IS DISMISSED.**

Board decisions may be appealed in accordance with the provisions of Section 58 of The Public Utilities Board Act, or reviewed in accordance with Section 36 of the Board's Rules of Practice and Procedure.

THE PUBLIC UTILITIES BOARD

"Régis Gosselin, B ès Arts, MBA, CGA"

Chair

"Kurt Simonsen, P.Eng."

Acting Secretary

Certified a true copy of Order No. 43/14  
issued by The Public Utilities Board

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Acting Secretary