

**The  
Public  
Utilities  
Board**

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**MANITOBA** | **Order No. 6/99**  
**THE PUBLIC UTILITIES BOARD ACT** | **January 20, 1999**

Before: G. D. Forrest, Chairman  
D. L. Barrett-Hrominchuk, Member

**AN APPLICATION BY THE COALITION OF EASTERN  
NATURAL GAS AGGREGATORS AND SELLERS,  
PURSUANT TO SECTION 44(3) OF THE PUBLIC  
UTILITIES BOARD ACT, TO REVIEW BOARD  
ORDER 79/98 DATED JUNE 19, 1998**

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## **Executive Summary**

In Board Order 79/98 dated June 19, 1998, The Public Utilities Board of Manitoba ("the Board") directed that certain price management losses totalling \$27.25 million be denied as a component of revenue requirement for purposes of determining the 1998 sales rates of Centra Gas Manitoba Inc. ("Centra"). As a result of that decision, Centra informed all direct purchasers of natural gas ("Brokers") that the Monthly Reference Price ("MRP") which Centra had paid the Brokers for the delivery of gas to consumers who have chosen to source their supply of gas from a Broker rather than Centra had been incorrectly calculated because of the \$27.25 million disallowed costs. Centra advised the Brokers that they had been overpaid by a total amount of approximately \$8.7 million between the period January 1, 1997 to May 31, 1998, and that this overpayment must now be repaid to Centra by the Brokers.

The Coalition of Eastern Natural Gas Aggregators and Sellers ("CENGAS") disagreed with Centra's demand for repayment and applied to the Board, pursuant to Section 44(3) of The Public Utilities Board Act ("the Act"), to review Board Order 79/98 and to direct Centra to refrain from retroactively changing the MRP and not make any further adjustments.

A public hearing was held in Winnipeg on September 15, 1998 to consider the application of CENGAS, and in particular, the following three issues:

1. the jurisdiction of the Board;
2. the merits of CENGAS' application, and
3. whether the calculation of the MRP had been changed.

CENGAS argued that the Board has jurisdiction to enforce its own orders, and that the Board has consistently exercised jurisdiction over the Gas Purchase Agreement ("GPA") and the MRP. On the merits of the application, CENGAS argued that the Board found that mismanagement by Centra's employees should lead to a sanction, to the extent of requiring Centra's shareholders to bear \$27.25 million in disallowed price management losses. In

CENGAS' view, Centra was now passing on a portion of these losses to the Brokers. The fundamental submission of CENGAS is that Centra, by this action, breached Board Order 79/98.

Centra argued that the matter is a contract dispute between Centra and the Brokers, and that the questions at issue lie outside of the jurisdiction of the Board. Centra argued that it had complied completely with Board Order 79/98, and that a previous Board Order made it clear that the MRP was to include the results of price management to maintain the principle of equivalence - the concept by which the price paid to the Brokers by Centra is the same as the Board allowed gas cost incorporated in the sales rates paid by Centra customers. Centra argued that Brokers have been overpaid and have received a windfall to which they are not entitled, and which must be paid back to Centra.

All intervenors, with the exception of CAC/MSOS, represented the Broker community or their customers and agreed with the position put forward by CENGAS. CAC/MSOS agreed with CENGAS that the Board has jurisdiction to hear the case, but disagreed with some of the reasons articulated by CENGAS in arriving at that conclusion. CAC/MSOS agreed with Centra, however, that the case put forward by CENGAS was without merit.

In its decision, the Board agreed with the case put forward by all parties, other than Centra, that the Board has jurisdiction over this application. The Board also agreed with the case put forward by Centra, and supported by CAC/MSOS, that the application put forward by CENGAS should be denied.

In arriving at its decision, the Board noted that the arguments put forward by CENGAS were not underpinned by the historic record established in the regulatory proceedings related the direct purchase arrangements. The Board further believes that its decision protects the public interest and preserves the principle that customers should not be adversely affected whether they choose to purchase their gas from Centra or a Broker.

The Board further noted that Centra is in the process of developing a Western Bundled Transportation Service which, when implemented, may eliminate some of the problems with the current buy/sell arrangements and the calculation of the MRP.

## **1.0 Appearances**

<b>R. F. Peters</b>	<b>Counsel for The Public Utilities Board of Manitoba ("the Board")</b>
<b>D. Brown</b>	<b>Counsel for the Coalition of Eastern Natural Gas Aggregators and Sellers ("CENGAS")</b>
<b>J. E. Foran, Q.C. E. R. Dawson, Q.C.</b>	<b>Counsel for Centra Gas Manitoba Inc. ("Centra")</b>
<b>B. J. Meronek, Q.C.</b>	<b>Counsel for Consumers' Association of Canada (Manitoba) Inc./Manitoba Society of Seniors ("CAC/MSOS")</b>
<b>B. Steinfeld</b>	<b>Counsel for McCain Foods Ltd. ("McCain")</b>
<b>J. Kapac</b>	<b>Counsel for Government of Manitoba, Department of Government Services, Manitoba Public Insurance Corporation, Manitoba Liquor Control Commission, Manitoba Centennial Centre Corporation, Government Services ("Government")</b>
<b>J. Edmond</b>	<b>Counsel for Westroc Inc. and Westcan Gas Inc. ("Westcan")</b>
<b>M. Ross</b>	<b>General Manager, A. E. Sharp Limited ("AESL")</b>

## 2.0 Background

Board Order 119/91 dated September 3, 1991 enabled all Manitoba natural gas consumers to participate in the direct purchase of natural gas. In that Order, the Board stated that any risks inherent in direct purchase agreements must rest with the end-users, and that a process is required to ensure that the end-users are made aware of such risks to the greatest extent possible. A document entitled "A Guide to the Direct Purchase of Natural Gas in Manitoba" was attached as Schedule A of Board Order 119/91. The Board stated in that Order that it has jurisdiction with respect to direct purchase, or Western Buy/Sell arrangements under the existing legislation. The Board also established certain generic terms and conditions to be included in contracts between Centra and direct purchasers of natural gas in Manitoba ("Brokers").

In Board Order 146/91 dated November 19, 1991, the Board stated that it would be inappropriate and impractical to review and approve each and every individual contract among the parties to a direct purchase transaction. The Board approved the generic form of the Gas Purchase Agreement ("GPA") between Centra and a Broker or customer, which was attached as Appendix "A" of Board Order 146/91. Clause 4(a) of the generic GPA defined the Monthly Broker Reference Price ("MRP") to be the cost of natural gas, exclusive of any transportation charges, "included in Centra's sales rates and recovered by Centra from time to time in accordance with an Order of the Board."

In response to a subsequent application by Centra, Board Order 8/94 dated January 28, 1994 authorized Centra to purchase its Western Canadian gas supplies using the New York Mercantile Exchange ("NYMEX") index pricing mechanism. The Board also accepted Centra's proposals as to the methods, volumes and costs which were to be employed in establishing the MRP for purposes of payment to Brokers for Broker supplied natural gas. Pursuant to that Order, Centra calculated the MRP on the basis of weighted gas costs paid

under its long-term contract with Western Gas Marketing Ltd., now Trans Canada Gas Services and spot purchases from Western Canada. Because it was not an issue at that time, Board Order 8/94 did not address how Centra's price management program should be reflected in the calculation of the MRP.

In Centra's 1995 general rate application, a number of Brokers requested that the Board instruct Centra to change its method of calculating the MRP to include the costs and revenues of Centra's price management program. In Board Order 49/95 dated May 5, 1995, the Board stated that it would not order a change in the calculation of the MRP at that time, but directed Centra to meet and consult further with Brokers with a view to resolving this matter prior to November 1, 1995.

After further meetings with Brokers and interested parties, Centra accepted the Broker's position that a direct purchase transaction was a transportation arrangement to facilitate competition in gas supply. All parties agreed that the method of calculating the MRP should include the impacts of Centra's price management activities and that Centra should not be allowed to hedge Broker supplied volumes.

On November 10, 1995, Centra applied to the Board for, amongst other things, approval of a revised methodology for the calculation of the MRP. All of the Brokers present at the hearing, namely Direct Energy Marketing Ltd., ECNG Inc., Enron Capital Resources, Municipal Gas Company Ltd., and Novagas Clearinghouse Corp Ltd., requested that the Board approve Centra's revised proposal for calculation of the MRP payable for Broker supplied gas. All parties agreed that in this methodology, the buy price and the sell price would be equivalent and would therefore not disadvantage either system customers or direct purchase customers. This proposed methodology was also consistent with clause 4(a) of the generic GPA approved in Board Order 146/91.

The Board's findings relative to the November 1995 application were set out in Board Order 3/96 dated January 3, 1996. In that Order the Board stated in part that:

"The Board agrees with the consensus reached by all interested parties and advanced by Centra at this hearing calculating the reference price which Centra will pay for its ABM gas supplies. The Board considers the proposal to be fair - the buy price and the sell price should be equal. By not hedging ABM supplied volumes all volumes are effectively priced the same. Hedging results impact the cost of gas included in the sales rates through the PGVA mechanism. The Board will order Centra to calculate the reference price payable to ABMs as the weighted average cost of gas flowing under Centra's gas supply arrangements with TCGS and the volumes purchased by Centra from Western Canada on the spot market. The reference price will include the results of Centra's price management activities for volumes flowing under the TCGS supply contract but ABM supplied volumes will not be eligible for hedging by Centra."

Board Order 79/98 dated June 19, 1998, directed that certain price management losses totalling \$27.25 million be denied as a component of revenue requirement for purposes of determining 1998 sales rates. Leave to appeal this decision sought by Centra was subsequently denied by the Court of Appeal on November 12, 1998. As a result of the decision in Board Order 79/98, Centra wrote to the Brokers on July 16, 1998, enclosing a calculation of the MRP for June 1998. That letter stated that the MRP for June purchases included an adjustment for the disallowed portion of the price management program pertaining to that month's cost. The letter also stated that Centra would provide further details to the Brokers regarding "the payment requirement resulting from the price management overpayment for the period January 1997 to the end of May 1998."

On July 24, 1998, Centra wrote the Brokers advising them of Centra's calculation of the net overpayment by Centra under the MRP as a result of the Board's decision in Board Order 79/98 to disallow certain price management losses for rate setting purposes. Centra advised the Brokers of the total amount that allegedly was owing to Centra. Centra also

demanded immediate payment of the amount, and stated that it expected to charge interest on the unpaid amount from June 19, 1998.

On August 14, 1998, Centra wrote to all Brokers advising that, as a result of Centra's recalculation of the MRP payable under the GPA, Centra will be making adjustments in subsequent monthly statements, commencing in the month of August 1998, to recover the alleged overpayments for the period January 1997 to May 1998. By taking this position, Centra reduced, or in some cases eliminated totally the amount it would otherwise pay to the Brokers under the GPA. The total amount for which Centra alleges it has overpaid the Brokers is approximately \$8.7 million.

On August 20, 1998, CENGAS applied to the Board, pursuant to Section 44(3) of The Public Utilities Board Act ("the Act") for:

- "a) an Order setting a hearing date for this application on an expedited and urgent basis; and
- b) an order reviewing the Board's Order 79/98 dated June 19, 1998, in particular paragraph 10.10 thereof, and directing Centra:
  - i) to refrain from retroactively changing the Monthly Reference Price, for the period January 1, 1997 to June 30, 1998, in Gas Purchase Agreements entered into with direct purchasers of natural gas in Manitoba for the purpose of recovering disallowed gas costs relating to price management impacts which the Board ordered to be borne by Centra's shareholder; and
  - ii) to readjust any changes made by Centra to the Monthly Reference Price since June 1998 to the date of the Board's order for the purpose of recovering gas costs disallowed by the Board in Order 79/98."

On August 21, 1998, Centra responded to the CENGAS application by way of letter to the Board, and in particular, took the position that it was beyond the jurisdiction of the Board to

entertain the application. Subsequently, the Board issued its Notice of Hearing, and outlined three issues to be considered at the hearing, being:

- a) the jurisdiction of the Board;
- b) the merits of the CENGAS application; and
- c) whether the calculation of the MRP had been changed.

A public hearing was held at the Delta Hotel in Winnipeg on September 15, 1998.

A complete record of this public hearing process and copies of all exhibits are on file and are available for inspection or review at the Board's office during normal business hours. The Board has summarized the evidence and submissions of the participants at the hearing in this Order only to the extent deemed necessary to explain the Board's findings and conclusions.

### **3.0 The Position of The Coalition of Eastern Natural Gas Application and Sellers ("CENGAS")**

#### **3.1 General**

The application was made by CENGAS under Section 44(3) of the Public Utilities Board Act ("the Act") for an Order reviewing the decision made in Board Order 79/98 dated June 19, 1998. CENGAS is asking the Board to supervise and enforce Board Order 79/98 in which the Board, in CENGAS' view, made specific directions regarding certain price management costs. The fundamental submission of CENGAS is that Centra breached Board Order 79/98. CENGAS argued that the Board found that mismanagement on behalf of Centra's employees should lead to a sanction, to the extent of requiring Centra's shareholders to bear \$27.25 million in disallowed price management losses. In CENGAS' view, Centra is now passing on losses which it caused through its own negligence to Brokers. This, in CENGAS' view, constitutes a breach of Board Order 79/98.

#### **3.2 The Jurisdiction of the Board**

CENGAS submitted that the Board has jurisdiction to enforce its own Orders, and that the Board has jurisdiction over the MRP contained in the GPA. CENGAS further submitted that the Board's jurisdiction to enforce its Orders includes the jurisdiction to direct a utility to refrain from a practice which is contrary to a Board Order, a practice that if continued would render the Board Order nugatory.

CENGAS argued that the Board has general supervisory jurisdiction over all public utilities, of which Centra is one. An effort by a utility to circumvent the findings and Order of the Board and to engage in practices which are contrary to that Order is the adoption of a practice that is unjust, unreasonable or otherwise in violation of law. Under the Act, the Board has the power to take appropriate action. It was therefore CENGAS' conclusion that on the face of the language in Sections 97(1), 74(10), and 82(1) of the Act, the Board has

sufficient jurisdiction, not only to consider CENGAS' request, but also to grant the relief requested.

CENGAS referred to a decision of the Manitoba Court of Appeal dated April 8, 1997, wherein the Manitoba Court of Appeal gave direction to the Board as to the general approach it should take when confronted by parties before it that it lacks jurisdiction. CENGAS argued that the test is to take a realistic appraisal of the facts and the issues and determine whether what the Board has been asked to do furthers the legislative policy, i.e., the protection of the public interest. CENGAS argued that the relief requested was consistent with the Court of Appeal decision, was within the public interest, reasonably appraised and pursuant to the legislative objective.

CENGAS argued that since 1991, the Board has consistently exercised jurisdiction over the GPA and specifically, over the MRP, and that these are the means by which Centra has breached the Order. In Board Order 119/91, the Board not only considered that it had jurisdiction to deal with GPAs and their terms, but actively directed Centra to file a contract for approval by the Board. Board Order 146/91 subsequently approved the GPA, which is substantially the form of the contract that is in effect in 1997 and 1998.

CENGAS argued that this is not a purely private contractual dispute. What is at issue is the enforcement and integrity of Board Order 79/98. Therefore, the Board does have jurisdiction to hear the application, and does have jurisdiction to grant the relief sought.

### **3.3 The Merits of the CENGAS Application**

CENGAS stated that the Board has to answer two questions in dealing with the issue of the merits of the application. The first question is whether Centra breached Order 79/98 in terms of the shareholders failing to bear all of the \$27.25 million disallowed by the Board. The second question is whether Centra has a legal justification for breaching the Board's Order. In the opinion of CENGAS, the answer to the first question is an unequivocal yes. CENGAS argued that the legal justification that Centra has used is a term of the GPA which has been approved by the Board. The question posed by CENGAS is whether the terms of the GPA clearly show that it was the intention of the parties to the GPA to permit Centra to pass on costs disallowed by the Board because of Centra's negligence and mismanagement. In CENGAS' submission, the core of the issue on the question of merit is who assumes the risk of loss associated with Centra's negligence or mismanagement.

CENGAS dealt with four sub-issues in their argument on merit being:

1. the commercial context of the GPA;
2. the plain and ordinary language of the GPA regarding price;
3. the effect of Board Order 3/96 which directed that price management issues be included in the MRP calculation; and
4. the issue of retroactive adjustment.

Dealing with the commercial context of the GPA, CENGAS noted the hedging losses which Centra seeks to recover from the Brokers are not related to hedging activities on direct purchase volumes, and that GPAs are viewed simply as transportation contracts. CENGAS therefore concludes that the two commercial facts weigh heavily against Centra's position that the losses can be passed on to the Brokers.

On the plain and ordinary meaning of the GPA language, CENGAS argued that in 1991, clause 4(a) of the contract clearly tied the MRP to the Board approved sales rates. However, the wording of clause 4(a) changed as of November 1, 1996 to exclude the linkage to the Board approved sales rate with respect to the MRP. CENGAS therefore concludes that the plain and ordinary meaning of the language in clause 4(a) does not permit Centra to use the MRP in the GPA as the means to recover disallowed gas costs.

In commenting on the effect of Board Order 3/96, CENGAS acknowledged that the Broker community asked the Board to include the results of price management in the calculation of the MRP. However, until July of 1998, Centra had not suggested that the price management impacts included in the MRP would only be those allowed by the Board. Centra has always calculated the MRP based on its actual cost. CENGAS argued that the motion of equivalency is based on the assumption that the utility acted in a prudent manner, which Centra did not.

On the issue of retroactive adjustments, CENGAS referred the Board to Order 3/96 which dealt in part with the issue of retroactive adjustment. In that Order, Centra remained neutral on the issue of retroactivity, but took the position that any such payment would have to be recovered from system customers. The Board, in that decision, did not allow any retroactive payment to the Brokers. CENGAS acknowledged that the circumstances are slightly different in terms of the reasons, but argued that when the language of the GPA directs calculating the MRP one way, Centra cannot change that calculation and seek to recover a retroactive adjustment.

**3.4 Has the Calculation of the MRP Been Changed?**

CENGAS argued that for all of the reasons previously mentioned, the adjustments made by Centra to the MRP, going back to January 1997, are contrary to the plain and ordinary language of Section 4(a) of the GPA, and are therefore impermissible changes. CENGAS further argued that clause 5(b) of the GPA allows Centra to make retroactive adjustments under certain circumstances, but does not apply to this situation because the calculations have been correct all along.

#### **4.0 The Position of Centra Gas Manitoba Inc. ("Centra")**

##### **4.1 General**

Centra argued that it was absolutely in compliance with Board Order 79/98, and had acted fairly and reasonably in taking steps to implement the Board's decisions set out in that Order. Centra argued that in Board Order 3/96 the Board made it clear that the MRP was to include the results of price management to give effect to "equivalence", being the concept that the price paid to the Brokers is the same price that is incorporated in the sales rates paid by customers. Centra argued that Brokers have been paid more than equivalence because they have been paid certain costs which are not included in sales rates. As a result, the Brokers have received a windfall and an overpayment to which they are not entitled. If Centra had not engaged in any price management, the Brokers would not have received any payment related thereto. Centra contends that the Brokers were overpaid, and Centra is simply seeking a refund of that overpayment. Centra argued that the refund being requested is specifically provided for in clause 5(b) of the GPA. Centra has also given all Brokers an opportunity to come forward with alternate repayment arrangements. The Brokers have not suffered a loss, they have simply been overpaid, and Centra is seeking a refund of that overpayment. Otherwise, the Brokers will have received an inappropriate subsidy.

##### **4.2 The Jurisdiction of the Board**

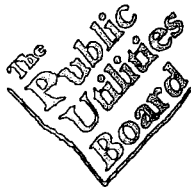
Centra believes that according to the price calculation formula agreed to by the parties, the amounts claimed by Centra constitute an overpayment under the GPA. Paragraph 5(b) of the GPA expressly provides for recovery of such overpayment from Brokers through a price adjustment. Centra further argues that the matter is a contract dispute between Centra and the Brokers, and that the questions at issue lie outside the jurisdiction of the Board. The matters at dispute involve the interpretation of a commercially negotiated contract that should be heard and determined by a court of law.

Centra referred to Order 119/91 where the Board refrained from regulating all of the contractual terms between Centra and the Brokers. Centra argued that Board approval of the generic contract was limited to the five required generic terms. The Board did not get into the details of the contract on the basis that the contractual terms and conditions were a matter of negotiation between Centra and the Brokers. Centra further argued that although the Board addressed the manner in which the MRP should be calculated, the Board has never enforced contractual rights and obligations in respect of the MRP. The Board has dealt with the MRP in the context of its jurisdiction over gas sales rates, and to the extent that the GPA provisions, such as the MRP, affect the total utility cost of service, then the Board has jurisdiction. However, the Board does not have jurisdiction to interpret other provisions of the GPA.

Centra stated that the Board is a creature of statute and can exercise only such jurisdiction as flows from the statute. Centra argued that the Act does not confer any express power on the Board to interpret the provisions of the GPA, or to resolve any contractual disputes. Neither the Board's supervisory jurisdiction nor its jurisdiction under Section 114 of the Act gives it such express grant of jurisdiction.

Centra argued that the application of CENGAS invites the Board to assume the role of watchdog for the financial interest of the Brokers. Centra submitted that this is neither the function of the Board contemplated by the Act, nor a step that would reasonably promote the legislative intent. In Centra's view, the fundamental issue involved in this proceeding is Centra's entitlement to recover monies from the Brokers which it has overpaid through the MRP during 1997 and 1998. It is accordingly an issue relating to the recovery of a debt owing by the Brokers to Centra, and is not a matter for the Board to adjudicate.

Centra acknowledged that the Board has the authority to enforce its own Orders, but that principle is inapplicable in the current situation. In Centra's view, Order 79/98 disallowed



the inclusion of certain gas costs for the purpose of determining sales rates. What the Order did not do is alter the terms of the GPA, or preclude Centra from taking steps legally available to it under the GPA or other contractual arrangements. CENGAS is asking the Board to disregard a provision of the GPA, being paragraph 5(b), which specifically relates to the MRP being changed retroactively for any reason.

Centra argued that the statement in Board Order 79/98 at page 102 that \$27.25 million of price management losses is to be excluded from gas costs to be borne by the shareholder is made in the context of a GRA dealing with sales rates. Centra argued that the Board could not have intended to preclude Centra from making MRP adjustments with Brokers pursuant to the GPA. The entitlement of Centra to adjust the MRP arises from a commercially negotiated contract with the Brokers and is governed by the terms and conditions of the contract. The Board does not have jurisdiction to override the contract in making its decision as to the price management losses for rate setting purposes, and its terminology was solely directed for the purpose of setting sales rates for the 1998 test year.

Centra argued that CENGAS is requesting the Board to retroactively repeal or vary Board Order 3/96 for 1997 and 1998 respecting the implementation of the equivalency principle in the MRP. Equivalency contemplates that the buy price, as paid by Centra to the Brokers, and the sell price, as paid by the customers for the gas commodity cost portion in sales rates, are ultimately the same. Centra is seeking to recover excess payments made to Brokers in the MRP in 1997 and 1998. Centra argued that CENGAS is requesting the Board to retroactively modify Board Order 3/96 for the purpose of providing the Brokers with a windfall payment.

### **4.3 The Merits of the CENGAS Application**

Centra referred to evidence of Direct Energy in the 1995 hearing where Direct argued that the buy/sell transaction should be viewed as a specialized form of transportation arrangement, and from that concept, it follows that the cost of the gas commodity in the customer rates, as adjusted by the Purchased Gas Variance Account ("PGVA") from time to time, must be the same as the price the Broker receives from Centra for the commodity in the MRP. Centra argued that the two prices have to be the same. Otherwise, Centra's customers will be adversely affected if they choose the direct purchase option. Centra has always maintained that the existence of the buy/sell should not change the overall cost of gas to Centra's system gas customers. Centra argued that clause 5(b) specifically contemplates retroactive adjustments to the MRP, and specifically contemplates the time lag in disposing of the PGVA balances, including the PGVA disallowance in Board Order 79/98 related to price management losses. Centra argued that any endeavour by the Brokers to back away from that position in the present circumstances is opportunistic rather than consistent.

Centra referred to page 37 of Board Order 3/96 where the Board agreed with the consensus reached by all parties to include the results of price management in the calculation of the MRP, and that the buy price and the sell price should be equal. Centra argued that the principle of equivalence was fundamental to the inclusion of the price management results in the MRP. In Centra's view, the Board is being asked to modify the principle of equivalence which was the fundamental and basic driver for the inclusion of price management in the MRP paid by Centra to the Brokers.

Centra argued that since 1996, the MRP has been calculated to give effect to the principle of equivalence. However, there is a time lag because of the mechanism for disposing the PGVA. Centra paid the Brokers a MRP based on the actual monthly price management effects. Subsequently, the Board disallowed a portion of these costs. Consistent with the



principle of equivalency, Centra has now adjusted the MRP so that the amount paid to the Brokers is the same as with the price paid by customers. Centra argued that the brokers are seeking a windfall payment by retaining a MRP that exceeds the commodity cost paid by customers in the sales rates.

Centra argued that the CENGAS position that actual price management results as opposed to approved price management results should be used for purposes of calculating the MRP is contrary to the position that Brokers took before the Board in 1994 and 1995. The CENGAS position is also contrary to the basis on which Centra reached a commercial agreement with the Brokers that was subsequently ratified in Board Order 3/96.

#### **4.4 Has the Calculation of the MRP Been Changed?**

Centra pointed out that clause 5(b) of the GPA specifically contemplates retroactive adjustments to the MRP for a mistake or for any other reason. That wording contemplates a time lag in disposing of the PGVA balances, and is referable to the PGVA disallowance in Order 79/98. Centra argued that it is not changing the calculation of the MRP at all.

Centra referred to clause 4(a) of the GPA, and stated that the issue is whether the clause should be interpreted to apply to Centra's actual price management results, or approved price management results. Centra maintains that this matter was clearly determined in Board Order 3/96 which stipulated that the buy price and the sell price should be the same. Centra further argued that clause 5(b) is consistent with the intentions of the parties as to the meaning of the MRP insofar as it contemplates a retroactive adjustment to the MRP, recognizing the time lag between the monthly payments of the MRP and the subsequent PGVA approvals. Centra argued that the adoption by the Board of the principle of equivalence in Board Order 3/96 made it unnecessary to have the words "included in Centra's sales rates" in clause 4(a). At any rate, there is no evidence before the Board as to how or why those words were deleted from clause 4(a).

Centra argued that notwithstanding the arguments related to clause 4(a) and 4(b), there is still the requirement to give effect to clause 5(b), in accordance with the plain and ordinary meaning of the words in that clause. Centra argued that equivalence required the MRP to be adjusted, and that is precisely what clause 5(b) contemplates and permits.

## 5.0 The Position of the Consumers' Association of Canada (Manitoba) Inc. ("CAC/MSOS")

### 5.1 The Jurisdiction of the Board

CAC/MSOS subscribed to the position that the Board has jurisdiction to hear the application, but disagrees with some of the reasons articulated by CENGAS in arriving at that conclusion.

CAC/MSOS agreed with the statement that the Board has jurisdiction to enforce its Orders, but disagreed with the suggestion that there has been a breach of an Order because the Board ordered that the disallowed price management results be borne by the shareholders.

CAC/MSOS stated the view that the jurisdiction of the Board is to determine what goes into rates. The Board does not have jurisdiction to indicate that the shareholder of a public utility has to bear those costs. Centra viewed the reference to shareholders in the body of the Order as "obiter remarks" or remarks not necessary to be made for purposes of the decision. The ultimate decision is simply that the customers should not bear the costs of the disallowed price management results through sales rates.

CAC/MSOS argued that the issue is one of jurisdiction over rates, and the Act is replete with such provisions. After examining the Act, CAC/MSOS concludes that the Board has jurisdiction over the issue as to what is included in the MRP.

In CAC/MSOS's view, the issue is whether what is being sought by CENGAS is consistent or otherwise with the Board's decision on equivalency, and that is a matter within the Board's jurisdiction. CAC/MSOS also stated the view that the issue of retroactivity now being considered is not the same as the retroactive issue dealt with by the Board in Order 3/96.

CAC/MSOS took no position relative to the jurisdiction of the Board concerning contracts between the Broker and the end-user.

## **5.2 The Merits of the CENGAS Application**

CAC/MSOS agreed with the articulation of the case on merits put forward by Centra.

CAC/MSOS questions the sense in Centra including any more than the prudently incurred hedging impact in the MRP. That is the same result as borne by the sales customer. The intent of the MRP is for Centra to pay the same for buy/sell gas as it pays for system gas.

CAC/MSOS agreed with labelling the overpayment to the Broker as a windfall that should be repaid to Centra.

CAC/MSOS expressed the view that the financial hardship and urgency arguments should be viewed in the context that, if Centra's price management results were consistent with that allowed by the Board, the Brokers would be in exactly the same position. CAC/MSOS did not comment on the refund issue.

## **5.3 Has the Calculation of the MRP Been Changed?**

CAC/MSOS argued that the methodology or formula has not changed. The calculation has simply added an extra step that was not necessary before.

CAC/MSOS agreed with Centra that the issue of equivalency was a major theme in the first place, advocated by all parties. The position of CENGAS in this application violates the principle of equivalency and fairness. The fact that the price management results were the responsibility of Centra is, in CAC/MSOS's view, not relevant to the argument.

## **6.0 The Position of McCain Foods Ltd. ("McCain")**

McCain stated that their position is to support the application of CENGAS.

## **6.1 The Jurisdiction of the Board**

McCain did not accept the position of Centra on jurisdiction, and put forward the position that the Board has the jurisdiction to deal with the matter.

## **6.2 The Merits of the CENGAS Application**

With respect to the merits, McCain again supported the position of CENGAS.

## **6.3 Has the Calculation of the MRP Been Changed?**

McCain argued that Centra has unilaterally redefined the MRP. McCain also argued that the retroactive nature of the adjustment by Centra has had an adverse business effect on them.

## **7.0 The Position of A. E. Sharp Limited ("AESL")**

### **7.1 General**

AESL submitted written argument by letter dated September 14, 1998. AESL argued that under any circumstance where Centra will be permitted to recover the \$8.7 million from the Brokers, that those funds be recovered over the same time period the Board has approved for recovery of the PGVA balance from customers.

### **7.2 Jurisdiction of the Board**

AESL submitted that the only issue of jurisdiction raised by the application is the jurisdiction of the Board to fix or approve either the MRP, or the method of calculating the MRP. AESL argued that the Board has clearly stated in previous Board Orders that it considers it has the jurisdiction to approve or fix the MRP or the method of calculating the MRP. AESL noted that Centra did not appeal the Board Orders, and has calculated the MRP, including the impact of price management activities, since the Orders were issued. It was the view of AESL that since the Board has found that it has jurisdiction over the MRP, unless a higher authority overturns that finding, the Board should continue to exercise that jurisdiction, certainly to decide this application.

### **7.3 The Merits of the CENGAS Application**

AESL is convinced that the application is justified since the actions taken by Centra subsequent to Order No, 79/98 being issued appear to be directed towards circumventing one of the Board directives given in that Order. AESL also believes that Centra is in violation of Order 3/96 by retroactively changing the Board approved method of calculating the MRP. AESL stated that Order 79/98 includes a clear direction that, since Centra acted imprudently in its price management activities, Centra's shareholders must bear \$27.25 million of the \$45.5 million balance in the PGVA. In AESL's view, Centra's subsequent action, to

retroactively change the calculation of the MRP, is clearly intended to reduce the loss amount borne by the shareholder and as such, appears to be an attempt to at least partially circumvent the Board Order.

#### **7.4 Has the Calculation of the MRP Changed?**

AESL argued that Centra has been calculating the MRP for at least two years using the methodology approved by the Board, and did not apply to the Board for a change in methodology during that period. Therefore, it is apparent Centra accepted that the methodology was appropriate. AESL submitted that the accepted general principle is that the total cost of gas, including the impact of price management, should equal the cost of gas in rates. However, the finding of the Board overrides this general principle, and must result in an imbalance between the cost of gas and the cost of gas recovered through rates. It follows therefore, in AESL's view, that the actions by Centra subsequent to the issuance of Board Order 79/98, constitutes a change in the calculation in the MRP.

**8.0 The Position of Westroc Inc. and West Can Gas Inc.  
("Westcan")**

In opening comments, Westcan spoke in support of the application, and further stated that the consequences of the decision of Centra to collect the amounts that are alleged to be owing is having the effect of potentially putting Westcan out of business. Westroc's position was much the same as McCains. Westroc supported the application put forward by CENGAS. Westcan argued that one of the reason they participated in the proceeding was because they were small operators, and have a unique position in the marketplace.

**9.0 The Position of the Government of the Province of Manitoba  
("The Government")**

The Government indicated it was maintaining a watching brief throughout the proceedings, and took no position on any of the issues.

## **10.0 Board Findings**

### **10.1 Jurisdiction**

The application before the Board is an application pursuant to Section 44(3) of the Act which provides that "the Board may review, rescind, change, alter, or vary any decision or order made by it." The Board has been asked to review an order made by it, and as a result of that review, direct Centra to do certain things which, in the opinion of CENGAS, have been directed by the Board in Order 79/98.

It is indisputable that the Board has jurisdiction to enforce its own Orders, and that the Board's jurisdiction to enforce its Orders includes the authority to direct a utility under its jurisdiction to refrain from a practice which is contrary to a Board Order. This Board has also consistently exercised jurisdiction over both the GPA and the MRP, which are the principal means by which it is alleged by CENGAS that Centra breached the Board Order. In addition, the Board has general supervisory jurisdiction over all public utilities which provides authority to the Board to take appropriate action against any effort by a utility to engage in a practice which is contrary to an Order. As further guidance on the matter of jurisdiction, the Board has reviewed the April 1997 decision of the Manitoba Court of Appeal.

The issue before the Board is a request to determine if Centra's actions are consistent with the direction in Board Order 79/98. The Act contains a number of specific sections which clearly establish the Board's jurisdiction over rates and other matters. These sections were reviewed in considerable detail during the course of the hearing. As part of its rate-approval authority, the Board has in the past reviewed the buy-sell arrangements between Centra and the Brokers, and will continue to do so. Consistent with the Board's position on jurisdiction in previous Board Orders, including Board Orders 119/91, 146/91, 8/94, and 3/96, all of

which relate to the buy/sell arrangements, the Board agrees with the case put forward by all parties, other than Centra, that the Board has jurisdiction over this application.

Centra argued that the matter is a contract dispute between Centra and the Brokers, and relates to the interpretation of a commercially negotiated contract, which should be heard and determined in a court of law. The Board does not agree with that view. The application requires a review of Board Order 79/98 and a review of previous Orders relating to the buy/sell arrangements between Centra and Brokers. With the characterization of the issue as a review of Board Order 79/98 to determine if Centra has complied, and not as an interpretation of the contract, the matter is clearly within the Board's jurisdiction.

## 10.2 The Merits of the Application

CENGAS stated that the Board has to answer two questions in dealing with the issue of the merits of the application. The first question is whether Centra breached Board Order 79/98 in terms of the shareholders failing to bear all of the \$27.25 million. The second question is whether Centra has a legal justification for breaching the Board's Order. The Board has considered these two questions, as well as the material referred to by all counsel, in arriving at its decision relative to the merits of the application.

Under Section 127 of the Act, the Board must approve rates charged by a public utility. In respect of that authority the Board stated, on page 102 of Board Order 79/98, that disallowed price management costs would be excluded from gas costs to be borne by the "shareholder". By saying this, the Board was referring to a rate setting context in which disallowed costs are not to be included in determining revenue requirements for rate setting purposes. The distinction made in Board Order 79/98 between costs to be borne by customers or ratepayers as opposed to costs to be borne by the shareholder is for rate-setting purposes only. The decision, as set out on page 145 in the operative section of Board Order 79/98, very clearly

states that certain price management losses, in the aggregate of \$27.25 million, will not be allowed as a component of revenue requirement for rate setting purposes.

The Board has reviewed Board Order 79/98, and in particular paragraph 10.10 of that Order, and finds that all matters within the Board's jurisdiction have been complied with by Centra. The Board's answer to the first question posed by CENGAS, therefore, is that Centra has not breached Board Order 79/98. Having arrived at this conclusion for the answer to the first question, a response to the second question is, in the Board's view, not relevant or required.

One of the additional arguments put forward by CENGAS is the Board's obligation to protect the public interest. The Board acknowledges this obligation and, in an effort to ensure that its decision on this matter does in fact protect the public interest, reviewed the history on the evolution of the MRP. In doing so, the Board's objective was to preserve the principle that customers should not be adversely affected whether they choose to purchase their gas from Centra or from a Broker. The Board believes that this principle has been preserved.

At the inquiry into the direct purchase of natural gas by Manitoba consumers held in July 1991, Centra proposed, and the major intervenors agreed, that the Board should approve a generic form of western buy/sell agreement between Centra and the Brokers, and that approval or review of any specific arrangement between a Broker and any other party was unnecessary. In Board Order 119/91, the Board stated that it would be inappropriate and impractical to review and approve each and every individual contract among the various parties to a direct purchase transaction. The Board further stated that any risks inherent in direct purchase agreements must rest with the end-users. Board Order 119/91 set out certain generic requirements for any contract between Centra and a Broker.

Board Order 146/91 approved a form of generic contract between Centra and a Broker. Clause 4(a) of that contract defined the MRP to be equal to the cost of natural gas, exclusive of any transportation charges "included in Centra's sales rates and recovered by Centra from

time to time in accordance with an Order of the Board." That clause clearly set out the understanding of all parties at the time regarding equivalency so that the buy price and the sell price should always be the same.

In Centra's 1995 GRA, the Brokers asked the Board to instruct Centra to change the calculation of the MRP by including the results of price management. The Brokers argued at that time that including price management revenues and costs in the calculation of the MRP would result in the proper pricing signals being sent, and would not prejudice customers who enter into a direct purchase agreement.

Centra eventually adopted the position of the Brokers as set out in Centra's supplementary evidence dated November 23, 1995, filed as part of the December 1995 hearing. That evidence clearly sets out the argument that the inclusion of price management results in the calculation of the MRP "supports the theory of equivalency in that the buy price as paid by Centra to the Broker and the sell price as paid by the customer in the sales rate are ultimately the same, since all cost of gas items including hedging results are collected in the PGVA and disposed of in some future period." That position was supported by the Brokers and it was on that basis that the Board agreed with the consensus reached by all interested parties, and issued its decision in Board Order 3/96. In its findings, the Board considered the consensus proposal to be fair - the buy price and the sell price should be equal.

The Board views the principle of equivalency to be of paramount importance in establishing the relationship of the buy/sell agreement between Brokers and Centra. In the Board's view, the issue of equivalency was clearly stated in the generic contract approved by the Board in Board Order 146/91. The issue of equivalency was further endorsed by Brokers and Centra when the MRP was changed to include the results of price management in Board Order 3/96. At that time, all parties agreed that price management results must be included in the MRP to

conform with equivalency, and the MRP is to be calculated based on costs allowed in rates as opposed to actual costs. To do otherwise would violate the equivalency principle.

Recognizing that there could be a discrepancy between actual costs incurred and costs allowed in sales rates as approved by the Board, paragraph 5(b) of the GPA provides for adjustments resulting from timing differences such as delays in clearing the PGVA balances. This provision of the GPA appears to take into account the principles of the regulatory regime established by Board Orders 119/91, 146/91 and 3/96, and provides further support for Centra's actions.

In arguing the merits of the application, CENGAS addressed four sub-issues being:

1. the commercial context of the GPA;
2. the plain and ordinary meaning of the GPA;
3. the effect of Board Order 3/96; and
4. the retroactive adjustment.

In dealing with the commercial context of the GPA, CENGAS made the point that the hedging losses that Centra is seeking to recover against direct purchase customers are not related in any way to the direct purchase volumes, which are not price managed. In the Board's view this argument is not relevant. What is being determined is the MRP, which is computed based on Centra's cost of gas included in sales rates. The issue of volumes is simply not relevant, and the Board has placed little weight on this argument. Centra is not seeking to recover losses from direct purchase customers. Rather, the calculated cost of gas has been overstated and overpaid, and must now be refunded to Centra.

CENGAS argued that the plain and ordinary meaning of the GPA does not support Centra's actions. CENGAS acknowledges that the wording of the GPA prior to 1996 clearly linked the calculation of the MRP to Board approved sales rates, but that linkage is not included in

the GPA for 1996 and 1997. CENGAS further acknowledged that Centra would have a very good case if the linkage continued to exist. The Board approved a generic form of contract in 1991 that clearly linked the MRP to the Board approved sales rates. This linkage is consistent with the principle of equivalency, which is fundamental to the buy/sell arrangement. The Board heard no evidence throughout the proceeding as to why the wording in clause 4(a) of the 1996 and 1997 agreement was changed to delete the linkage to Board approved rates. However, the absence of this reference in the GPA in and of itself does not in any way change the requirement for the continuation of the fundamental principle of equivalence.

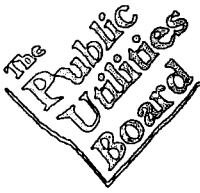
CENGAS argued that since the issue of Board Order 3/96 and until July of 1998, Centra had not included, nor suggested, that the price management impacts would only be those allowed by the Board. CENGAS argued that because Centra had always calculated the MRP based on actual costs, they should not be allowed to change the calculation. The Board is of the view that until July 1998, Centra could do nothing else but calculate the MRP based on actual costs. The adjustments proposed by Centra are simply a result of a delay in clearing the PGVA. This type of adjustment is, in the Board's view entirely, consistent with the adjustment provisions of the GPA as set out in clause 5(b), and consistent with the principle of equivalence.

The fourth sub-issue argued by CENGAS in support of the merits of the case is the issue of retroactivity. In the Board's view, the retroactive issues considered in Board Order 3/96 are not the same as the issue currently before the Board. In the current instance, the Board views the adjustment to the MRP, not as a retroactive adjustment, but rather as an adjustment resulting from a delay in clearing the PGVA, in accordance with the provisions of clause 5(b) of the GPA.

CENGAS made the argument that Centra was negligent in the administration of its price management program, and as a consequence, the costs arising from Centra's imprudent actions are to be borne by the shareholder. The Board agrees that certain price management costs were imprudent, and should therefore not be included in rates, which is exactly the decision as set out in Board Order 79/98. Failure to extend that decision to the calculation of the MRP would result in an inappropriate overpayment to the Brokers. The Board also agrees with the position of CAC/MSOS that it makes no sense for Centra to include disallowed costs in the payment to Brokers. The basic principle that the existence of the buy/sell arrangements should not prejudice any customer would be compromised if the CENGAS argument was accepted.

On balance, the arguments put forward by CENGAS are not underpinned by the historic record established in the regulatory proceeding as contained in Board Orders 119/91, 146/91 and 3/96. In addition, the Board is of the view that Centra's adjustment to the MRP as a result of Board Order 79/98 is specifically provided for in paragraph 5(b), and is consistent with the principle of equivalency which was previously supported by all parties. It is the Board's conclusion, therefore, that Centra is not in breach of Board Order 79/98, and the application of CENGAS should be denied.

The Board further notes that Board Order 15/98 ordered Centra to develop a Western Bundled Transportation Service which, when implemented, will eliminate the need for the current buy/sell arrangements and the calculation of the MRP. The Board expects to hear this application in 1999 for implementation by November 1, 1999. Accordingly, the Western Bundled Transportation Service will allow the Brokers to manage their supply separately from that of Centra.



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January 20, 1999  
Board Order 6/99  
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**11.0 It Is Therefore Ordered That:**

The application of CENGAS dated August 20, 1998 BE AND IS HEREBY DENIED.

THE PUBLIC UTILITIES BOARD

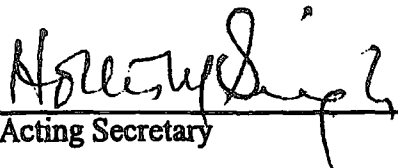
"G. D. Forrest"

Chairman

"Hollis Singh"

Acting Secretary

Certified a true copy of Order No.6/99  
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Acting Secretary