

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

RÉGIE DE L'ÉNERGIE

R-4008-2017

GAZ MÉTRO
LIMITED PARTNERSHIP (Énergir)

Applicant

and

ACEF de Québec

Interested Person

Application from Énergir regarding the implementation of measures
concerning the purchase and sale of renewable natural gas

ARGUMENTS

Hearing of May 7 and 8, 2019

1- The Régie de l'énergie is submitting three questions concerning the development of NRG production, the potential emergence of a monopoly and the impact of an FIT set by the Régie;

2- Question 1.

Does the Régie have the necessary authority under the *Act respecting the Régie de l'énergie* to include costs in a tariff for the purpose of developing RNG in Québec? And if it has such authority, is it fair and reasonable to exercise it?

3- Section 3 of the *Act to implement the 2030 Energy Policy and to amend various legislative provisions (2016, c. 35)* amended section 5 of the *Act respecting the Régie de l'énergie*:

section 5- In the exercise of its functions, the Régie shall reconcile the public interest, consumer protection and the fair treatment of the electric power carrier and of distributors.

It shall promote the satisfaction of energy needs in a manner consistent with the Government's energy policy objectives and in keeping with the principles of sustainable development and individual and collective equity.

4- Section 15 of the Act to implement the 2030 Energy Policy and to amend various legislative provisions (2016, c. 35) amended section 112 of the *Act respecting the Régie de l'énergie* with the addition of subparagraph 4 at the end of its first paragraph:

112. The Government may make regulations determining

(...)

(4) the quantity of renewable natural gas to be delivered by a natural gas distributor and the terms and conditions according to which it is to be delivered.

5- On March 20, 2019, the Government issued by order in council the *Regulation respecting the quantity of renewable natural gas to be delivered by a distributor*, O.C. 233-2019;

6- Section 1 of this order defines the quantity of renewable natural gas that a natural gas distributor must deliver annually;

7- The Régie has the necessary authority to set a tariff supporting the development of RNG production in Québec;

8- Section 31, subparagraph 1 of the *Act respecting the Régie de l'énergie* grants the Régie exclusive jurisdiction to fix or modify the rates and conditions for the transmission or distribution of electric power and natural gas;

9- Subparagraph 2 of that same section gives the Régie the capacity to monitor the operations of holders of exclusive distribution rights to ensure that consumers are adequately supplied;

10- This jurisdiction is also justified by the government objective to develop RNG production in Québec:

[Translation] "The 2030 Energy Policy targets a 25% increase in the production of renewable energies, notably through a 50% increase in the production of bioenergy (RNG 1, renewable fuels, wood pellets, etc.). Achievement of these goals will help to position Québec as a North American leader in the renewable energy sector and to build a new, strong economy with a low-carbon footprint in compliance with the target to reduce GHG emissions to 37.5% below their 1990 level by 2030 adopted by the Québec government in November 2015." (Regulation respecting the quantity of renewable natural gas to be delivered by a distributor, *Ministère de l'Énergie et des Ressources naturelles*, February 2019, page 3);

11- Insofar as this tariff will help to boost production of RNG in Québec, it will also bring stability to RNG production in Québec (Regulation respecting the quantity of renewable natural gas to be delivered by a distributor, *Ministère de l'Énergie et des Ressources naturelles*, February 2019, page 9) and enable delivery of the RNG volumes indicated in subparagraph 4 of section 112 of the *Act respecting the Régie de l'énergie*;

12- ACEF de Québec (ACEFQ) finds that the Régie de l'énergie has both the jurisdiction and an obligation to promote the development of the RNG industry;

13- The intervention of the Régie de l'énergie in setting a tariff for the purpose of developing RNG production is, in ACEFQ's opinion, the necessary solution for expanding this production across Québec due notably to the stability it brings to production as noted in paragraph 11 and the obligation to deliver a certain quantity of RNG (section 112, subparagraph 2);

Would an FIT approved by the Régie use the monopoly distribution position in a way that alters the rules of free market access for RNG in Québec?

Could an FIT approved by the Régie be perceived as fixing or controlling the supply price for an unregulated product?

14- On pages 22 and 23 of its decision, the Régie wonders whether *[translation]* "establishing an FIT would result in significantly expanding the Distributor's role in this market and interfere with the well-functioning competitive market for natural gas and RNG commodities" (paragraph 93);

15- In other words, *[translation]* "The Régie wonders whether this proposal would correspond to using a monopoly distribution position to alter the rules of free access to gas markets. It also questions the compatibility of this proposal with the spirit of Canadian law governing competition, which generally prohibits setting or controlling the supply price of an unregulated product" (paragraph 96);

16- The questions concerning a distribution monopoly, a competitive market and free market access should be analyzed in the context of the *Competition Act (R.S.C., 1985, c. C-34)*;

17- Subsection 78(1) of the *Competition Act*, titled "Abuse of Dominant Position: Definition of *anti-competitive act*," provides benchmarks that may assist in responding to the question submitted by the Régie:

anti-competitive act includes any of the following acts:

- (a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;
- (b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

- (c) freight equalization on the part of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;
- (d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;
- (e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;
- (f) buying up of products to prevent the erosion of existing price levels;
- (g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;
- (h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and
- (i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

18- According to ACEFQ, the examples provided in subsection 78(1) of the *Competition Act* cannot be used as benchmarks for concluding as to the existence of a monopoly or altered free market access.

19- Additionally, ACEFQ notes that subsection 78(1) and all other provisions of the *Competition Act* refer solely to competitive businesses and behaviours potentially affecting, limiting or preventing competition from other businesses. The scheme of this act essentially targets suppliers of products and services and makes no mention whatsoever of customers, including customers finding themselves in a dominant position;

20- The Régie cannot conclude from this as to the existence of a monopoly or altered free market access. ACEFQ finds that application of the *Competition Act* must not serve to prevent the creation of an FIT on the grounds indicated in paragraph 19 and set out below;

21- The *Competition Act* is a law of public order under federal jurisdiction, whereas the *Act respecting the Régie de l'énergie* is a law of public order under provincial jurisdiction;

22- ACEFQ respectfully submits to this court that it may exercise its jurisdiction notwithstanding the existence of a law under federal jurisdiction;

23- The role of the *Competition Act* is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy,

expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and provide consumers with competitive prices and product choices (section 1.1, underlining added by ACEFQ);

24- The *Act respecting the Régie de l'énergie* stipulates that in the exercise of its functions, the Régie reconciles the public interest, consumer protection and the fair treatment of the electric power carrier and of distributors. It promotes the satisfaction of energy needs in a manner consistent with the Government's energy policy objectives and in keeping with the principles of sustainable development and individual and collective equity (section 5);

25- ACEFQ finds that these two laws are not in conflict with one another but rather fulfil specific roles without impeding one another;

26- The *Competition Act* is purely economic in scope and exclusively targets commercial enterprises and their activities in terms of supplying products and services;

27- The *Act respecting the Régie de l'énergie* defines the Régie as an administrative tribunal existing for the purpose of economic regulation (section 31 of the Act) and grants specific and unique jurisdiction to the Régie with respect to reconciling the public interest, protecting consumers and ensuring fair treatment of the electric power carrier and of distributors as well as promoting the satisfaction of energy needs in a manner consistent with the Government's energy policy objectives and in keeping with the principles of sustainable development (section 5);

28- In *Bank of Montreal v. Marcotte*, 2014 SCC 55, [2014] 2 SCR 725 (*Marcotte*), the Supreme Court was asked to rule concerning the paramountcy of a federal law over a provincial law:

(...) "Paramountcy is engaged where there is a conflict between valid provincial and federal law. In such cases, the federal law prevails, and the provincial law is rendered inoperative to the extent of the conflict. Conflict can be established by impossibility of dual compliance or by frustration of a federal purpose (*Marcotte* at para 70);

(...) "However, care must be taken not to give too broad a scope to paramountcy on the basis of frustration of federal purpose. The mere fact that Parliament has legislated in an area does not preclude provincial legislation from operating in the same area" (*Marcotte* at para 72);

(...) "The party seeking to invoke paramountcy (...) [bears] the burden of proof and 'must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose'" (*Marcotte* at para 73).

(...) "Sections 12 and 272 do not provide for 'standards applicable to banking products and banking services offered by banks', but rather articulate a contractual norm in

Quebec. (...) If the Banks' argument amounts to claiming that the federal scheme was intended to be a complete code to which no other rules at all can be applied, that argument must also fail as the federal scheme is dependent on fundamental provincial rules such as the basic rules of contract. Just as the basic rules of contract cannot be said to frustrate the federal purpose of comprehensive and exclusive standards, if indeed such purpose exists, so too do general rules regarding disclosure and accompanying remedies support rather than frustrate the federal scheme." (*Marcotte* at para 79; underlining added by ACEFQ);

29- Section 31 of the *Act respecting the Régie de l'énergie* grants the Régie exclusive jurisdiction to:

(1) fix or modify the rates and conditions for the transmission of electric power by the electric power carrier or the distribution of electric power by the electric power distributor, and the rates and conditions for the supply, transmission or delivery of natural gas by a natural gas distributor or for the storage of natural gas;

(2) monitor the operations of holders of exclusive electric power or natural gas distribution rights to ensure that consumers are adequately supplied;

30- The exclusive jurisdiction of the Régie does not hinder application of the *Competition Act*, since its purpose is not to control all actions of businesses in a competitive context;

The two subparagraphs of section 31 cited above limit the intervention of the Régie with respect to fixing or modifying rates, defining conditions for transmission and distribution, and monitoring the operations of holders of exclusive distribution rights to ensure that consumers are adequately supplied.

31- In ACEFQ's opinion, adoption by the Régie of an FIT proposed by Énergir is compatible with the plan that Énergir is required to submit with regard to maintaining the quantity of renewable natural gas determined by regulation (section 72 of the Act), and the FIT will not alter rules governing free access to the RNG market in that there is no conflict between the provincial standard it imposes and the *Competition Act*;

32- Approving an FIT does not place the Régie in a situation where it is controlling the supply price of an unregulated product. The intervention of the Régie in defining an FIT is to be interpreted in terms of the objective sought, which is to satisfy energy needs in a manner consistent with the Government's energy policy objectives and in keeping with the principles of sustainable development, and does not conflict with the federal objective to eliminate anti-competitive practices;

Respectfully submitted at

Québec City on April 23, 2019

Denis Falardeau, Attorney
ACEF de Québec