

April 21, 2014

**EMAIL**

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Dear Mr. Campion:

**Re: Natural Resources Gas Limited (“NRG”) and Union Gas Limited (“Union”)  
Banked Gas Purchase Commodity Charge**

We refer to your letter of April 11, 2014 in which you appoint Mr. William G. Horton as arbitrator in an arbitration to determine whether the Banked Gas Purchase Commodity Charge to Bundled T customers is payable by NRG to Union.

In our view, the claim that NRG purports to advance before an arbitral tribunal is, in substance, an attempt to circumvent the exclusive jurisdiction of the Ontario Energy Board in fixing rates. The Board has exclusive jurisdiction to approve or fix just and reasonable rates.<sup>1</sup> The *Ontario Energy Board Act, 1998* defines a rate as “a rate, charge or other consideration and includes a penalty for late payment.”<sup>2</sup> As the Board recently noted, this definition is extremely broad. It covers “virtually any payment from a customer to a utility for the provision of distribution service.”<sup>3</sup>

The amount of the Banked Gas Purchase Commodity Charge to Bundled T customers, of which NRG complains, is a “rate” reflecting a payment from Bundled T customers to Union where the customers fail to meet their Winter Checkpoint requirement. Indeed, the Banked Gas Purchase Commodity Charge is part of Union’s Board-approved R1 Rate Schedule. Therefore, the determination of that amount falls within the exclusive jurisdiction of the Board.

Further, the Winter Checkpoint requirement which gives rise to the Banked Gas Purchase Commodity Charge was approved by the Board in EB-2008-0106, with NRG’s support. In its Amended Decision with Reasons, the Board stated:

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<sup>1</sup> *Ontario Energy Board Act, 1998*, ss. 19 and 36

<sup>2</sup> *Ontario Energy Board Act, 1998*, s. 3

<sup>3</sup> Decision with Reasons in EB-2012-0396 dated February 7, 2013, p. 14

[T]o the extent that a BT customer fails to meet the Winter checkpoint, the quantity below the checkpoint is billed the higher of the daily spot gas at Dawn in the month or the month following the occurrence.<sup>4</sup> [...]

The Board finds that the current load balancing mechanisms of Union and EGD are appropriate.<sup>5</sup>

The Board explained the system-wide benefits of Union's (then-proposed) load balancing mechanism in its decision in RP-2003-0063, in which it noted that:

Under the current practice, Union accounts for and provides for shortfalls and surpluses in the gas accounts of direct purchase customers. All of the costs associated with procuring spot gas for direct purchase customers overusing in the winter period and the costs associated with the shedding of surplus gas in the Fall, have previously been allocated to the rate class to which the imbalanced direct purchase customers belong. This has the effect of burdening all members of the class with increased costs, whether or not they had operated within their contractual obligations and forecasts. ***This violates the principle that those who cause costs ought to bear them.*** The notable virtue of [Union's] proposal is that it places the responsibility for balancing costs with the direct purchase customers.<sup>6</sup>

The determination of the Banked Gas Purchase Commodity Charge, and the appropriateness of the broader load balancing mechanism of which the charge is an integral part, is therefore squarely within the Board's exclusive jurisdiction to fix just and reasonable rates.

Matters that fall within the exclusive jurisdiction of the Board are outside the jurisdiction of the courts and, by extension, are not arbitrable. NRG cannot avoid the Board's exclusive jurisdiction in fixing rates by characterizing its claim as a declaration that the Banked Gas Purchase Commodity Charge is not payable because it is unconscionable at common law.<sup>7</sup> In substance, NRG seeks a determination that Union is not entitled to charge the Board-approved Banked Gas Purchase Commodity Charge. This goes to the core of the Board's jurisdiction to fix just and reasonable rates. Therefore, NRG's complaints are within the exclusive jurisdiction of the Board and are not arbitrable.

Union has today communicated its position set out above to the Board in a letter copied to you. In that letter, Union requests that NRG's complaint concerning the Banked Gas Commodity Charge be dealt with as part of the second phase of NRG's current QRAM application.

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<sup>4</sup> Amending Decision and Order in EB-2008-0106 dated September 21, 2009, p. 24

<sup>5</sup> Amending Decision and Order in EB-2008-0106 dated September 21, 2009, p. 28

<sup>6</sup> Decision with Reasons in RP 2003-0063 dated March 18, 2004, p. 119 (emphasis added)

<sup>7</sup> *Snopko v. Union Gas Ltd.*, 2010 ONCA 248 at para. 24

In light of the above, we trust that NRG will take no further steps to advance its complaint before an arbitral tribunal and will rescind its appointment of Mr. Horton as arbitrator.

Yours truly,

A handwritten signature in black ink, appearing to read 'C/S' followed by a stylized flourish.

Crawford G. Smith

MS

cc. Kirsten Walli, Ontario Energy Board Secretary  
Myriam M. Seers, Torys LLP  
All Parties in EB-2014-0053

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