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John A. Campion
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E-MAIL and DELIVERED

December 1, 2014

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

**Re: Union Gas Limited ("Union")
Reduction of Certain Charges Applied to Direct Purchase Customers
Natural Resource Gas Ltd. ("NRG") Application for Stay: Section 33(4) of
the *Ontario Energy Board Act* (the "OEB Act")
-- Board File No.: EB-2014-0154 (the "Penalty Rate Hearing")**

**Re: Application by NRG under Sections 3, 19(1), 20, 21(1), 36(2), (3), (4), (5) of
the OEB Act**

Urgent Request for Interest Rate Relief/Stay

NRG files these Applications seeking rate relief and/or a stay from the imposition of interest on any amounts due from NRG to Union for payment for certain Winter Checkpoint Banked Gas purchases by NRG on February 28, 2014, namely for 25,496 GJ and a Declaration that NRG pay only \$205,130.62 for the Gas pending final Order of the Divisional Court and/or the Board.

Filed with this letter is the Affidavit of Cheryl-Anne Robinson, attaching correspondence between counsel for NRG and Union (Exhibits B, C and E), an invoice from Union to NRG dated October 31, 2014 (Exhibit A), and the Notice of Appeal (Exhibit D) filed by NRG in the Penalty Rate Hearing matter.

Chronology

The Board made its Decision and Order in the Penalty Rate Hearing on October 9, 2014 (the "Board Order"). At Union's request in that application, the Board lowered the penalty rate for payment of Winter Checkpoint Gas deliverable by NRG to Union on February 28, 2014 from \$78.73 per GJ to \$50.50 per GJ. The rate for the Winter Checkpoint Gas was derived from a formula. On a one-time basis, the Board changed the formula from the highest daily spot rate at Dawn in the month of February 2014 to the second highest spot rate at Dawn. NRG was an intervenor in the Penalty Rate



Hearing and had sought a penalty rate equivalent to Union's actual costs, being \$4.87 per GJ.

By letter/invoice from Union to NRG dated October 31, 2014 (Exhibit "A" to the Affidavit), Union noted that the original penalty rate formula led to a requested payment by NRG in the amount of \$2,007,250.00 for 25,496 GJ at \$78.72805 per GJ as at March 2014. Union further noted that it had applied to the Ontario Energy Board (the "Board") on April 3, 2014 to reduce the purchase price of the Winter Checkpoint Gas. Union further noted that the Board reduced the Banked Gas Purchase charge to \$50.50 per GJ. Union therefore requested payment in the reduced amount of \$1,287,548.00. Union removed late payment charges accumulating since March 2014 (\$249,149.45) (NRG has accepted this Union proposal) but added interest to October 31, 2014 totalling \$12,652.54. The interest rate inherent in this amount is 1.5% per month or 19.5% per annum. Union noted that the total charge of \$1,300,200.54 was due within 30 days of the letter/invoice, namely October 31, 2014.

On November 6, 2014, NRG commenced an appeal of the Board Order to the Divisional Court (Exhibit "D").

In order to avoid this request for a stay or any equivalent motion before the Divisional Court, NRG, by letter dated November 21, 2014 (Exhibit "B"), sought an agreement from Union regarding payment of interest for the Winter Checkpoint Gas. Pending the appeal, Union did not agree.

By letter dated November 26, 2014 (Exhibit "C"), NRG tendered partial payment for the Winter Checkpoint Gas in the amount of \$205,130.62 by way of a certified cheque. NRG noted that this was payment for 24,496 GJ at \$7.12 per GJ plus HST. The price was Union's average weighted cost of spot purchases as at February 28, 2014. This payment was tendered pending NRG's appeal to the Divisional Court and any further Order of the Board. Union informed NRG through counsel by e-mail dated November 28, 2014 that Union refused to accept partial payment (Exhibit "E").

In the same letter of November 26, 2014, NRG sought Union's agreement that no interest be payable on the money as tendered (\$205,130.62) and no interest be chargeable on any other payment amount for the Winter Checkpoint Gas (if any) until after the appeal had been finally heard and the Board made any further Order requested. That request is apparently rejected.

Jurisdiction of the Board: Stay

The Board has the power to grant a stay or some other direction regarding every Order made by it which is the subject of an appeal pursuant to section 33(6) of the OEB Act.

As a result of the submissions hereinafter made, it is respectfully requested that the Board grant a partial stay Order that no interest be exigible on any payment for Winter



Checkpoint Gas for the 25,496 GJ delivered by Union to NRG's account on February 28, 2014 until the appeal is finalized by the Divisional Court and/or the Board.

There are two components of interest affected by this request. The Union letter/invoice charges interest at 1.5% per month on the amount it says is due and owing for the Winter Checkpoint Gas. That interest charge runs from October 9, 2014 to November 1, 2014 totalling \$12,652.54. This interest charge is unreasonable because the invoice itself was not due until November 30, 2014 pursuant to its terms. The second component of interest is more significant in that there is a continuing dispute as to the appropriate rate for the Winter Checkpoint Gas in the appeal to the Divisional Court. Any interest that might run on the disputed amount at 1.5% per month is either payable from NRG's customers or from NRG (depending on the outcome of the NRG QRAM decision). In the circumstances, it is respectfully submitted that until the price has been finally fixed, it is not appropriate that interest be charged by Union against any balancing owing.

NRG tendered to Union \$205,130.62 before the due date of November 30, 2014. NRG remains willing to make this payment. It is respectfully submitted that Union should have accepted this money. NRG proposed the payment based on Union's actual averaged weighted cost of spot purchases, being \$7.12 per GJ and expected that no interest would be due on this amount upon payment or in the future (if the payment were not accepted).

It is therefore respectfully requested that no interest be payable from NRG to Union for Winter Checkpoint Gas pending the finalization of the appeal to the Divisional Court and any subsequent Order of the Board arising from that appeal.

Jurisdiction of the Board: Rates

In addition, and as an alternative to the Board's jurisdiction to grant a stay, the Board has jurisdiction to fix just and reasonable rates under sections 19, 21 and 36 of the OEB Act.

Under section 3 of the OEB Act, 'Rate' means "A rate, charge or other consideration that includes a penalty for late payment". This includes interest and penalties for late payment.

The Board has jurisdiction to eliminate the interest payment requested by Union in the circumstances. NRG asks the Board to grant rate changes necessary to eliminate the payment of interest for any Winter Checkpoint Gas pending finalization of the appeal process and any subsequent Order of the Board.

Just and Reasonable Rates

It is respectfully submitted that commercial fairness is a significant factor in determining just and reasonable rates in the circumstances set out above.



The issues arising in the Union Penalty Rate Hearing and the NRG QRAM case have their genesis in the cold weather experienced in the winter of 2013/2014 which was "... widespread, persistent and extreme ..." (Navigant Consulting Ltd. report November 25, 2014, p. 1).

In these circumstances, NRG submits that those distributors (that is, Union and NRG) serving the public interest in unprecedented circumstances should be guided by principles of commercial fairness. If the parties refuse to be guided by such principles, the Board should fix just and reasonable rates or grant a stay imposing commercial fairness.

NRG has recognized that it must pay a reasonable amount for the Winter Checkpoint Gas that it was unable to deliver to Union. Pending the appeal to the Divisional Court, NRG tendered \$205,130.62 being payment for all of the gas delivered (25,496 GJ) at \$7.20 per GJ plus HST, being Union's own average weighted cost of gas spot purchases as at February 28, 2014. NRG actually seeks a cost of Winter Checkpoint Gas at \$4.49 per GJ in its appeal. Pending the appeal, NRG proffered the higher amount as a matter of commercial reasonableness on its part.

Union's failure to accept a partial payment is commercially unreasonable. Union is seeking an interest rate of 1.5% per month on amounts owing. By refusing to accept a partial payment and refusing to waive any future interest until the penalty rate has been finally fixed, Union will potentially receive 19.5% interest per annum on the entire unpaid amount, despite NRG's offer to pay Union's actual costs and where the commercial interest rate on the money would be approximately 1% to 2%. In this regard, Union seeks a commercially unreasonable advantage over NRG and its customers. This does not lead to just and reasonable rates in the circumstances. In any event, NRG has an obligation to protect its customers and is doing so by this application.

Union itself has recognized in its letter/invoice that any interest in the period when a rate was not finally fixed was not properly payable. Union specifically waived (and NRG has accepted) the fact that late payment charges accumulating from March 2014 in the amount of \$249,149.45 was waived. NRG's request set out below is a reasonable extension of the principle that late payment charges should be waived until any final determination by the Divisional Court.

In the unique circumstances of the winter of 2013/2014 and the particular circumstances of the appeal and relationship between NRG and Union (both being utilities seeking to act in the public interest), NRG seeks to protect its customers and pay for the gas provided by Union at Union's cost pending the appeal. This avoids any detriment to Union's customers and shareholders while at the same time eliminating possibility of a further windfall for Union and its customers at the expense of NRG and its customers through the interest rate of 19.5% per annum.

Order Sought

As a result of the above, NRG seeks a Direction from the Board granting a stay or an Order that: (a) no interest be payable by NRG to Union for Winter Checkpoint Gas until after the above-captioned appeal is final; and (b) an Order pending appeal that NRG pay only \$205,130.62 for the Winter Checkpoint Gas supplied by Union on February 28, 2014. The Orders are sought until the appeal has been finalized, the Board has rendered any further Order necessary and Union has sent its final invoice to NRG based on the final price of gas.

Yours very truly,



John A. Champion

JAC/car

cc: Lawrie Gluck, Ontario Energy Board
Brian Lippold, Natural Resource Gas Limited
Laurie O'Meara, Natural Resource Gas Limited
Robert Hutton, Natural Resource Gas Limited
Chris Ripley, Union Gas Limited
Crawford Smith, Torys

Court File No. 521/14

(Ontario Energy Board)
File No. EB-2014-0154

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

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

AND IN THE MATTER OF a Decision and Order of the Ontario
Energy Board dated October 9, 2014 on the Application by Union Gas
Limited for an order or orders approving a one-time exemption from
Union Gas Limited's approved rate schedules to reduce certain penalty
charges applied to direct purchase customers who did not meet their
contractual obligations;

AND IN THE MATTER OF the Intervenor – Natural Resource Gas
Limited

B E T W E E N:

NATURAL RESOURCE GAS LIMITED

Appellant

- and -

THE ONTARIO ENERGY BOARD and UNION GAS LIMITED

Respondents

**AFFIDAVIT OF CHERYL-ANNE ROBINSON
(Sworn December 1, 2014)**

I, Cheryl-Anne Robinson, of the Municipality of Clarington, MAKE OATH AND
SAY AS FOLLOWS:

1. I am a legal assistant with the law firm Fasken Martineau DuMoulin LLP,
solicitors herein for Natural Resource Gas Limited ("NRG") and, as such, have knowledge of the
matters herein deposed.

2. I have reviewed the file with a view to producing the correspondence, Notice of Appeal and Board Orders regarding the application by NRG for a stay and for an Order for just and reasonable rates affecting the payment of interest and payment of natural gas for certain Winter Checkpoint Gas sold by Union Gas Limited ("Union") to NRG on February 28, 2014.

3. NRG received from Union the Final Charge for Winter Checkpoint Banked Gas Purchased dated October 31, 2014. Attached hereto and marked as Exhibit "A" to this my Affidavit is a copy of the October 31, 2014 letter.

4. Fasken Martineau DuMoulin wrote to Crawford Smith of Torys Law firm LLP, counsel to Union Gas Limited on November 21, 2014 enclosing our client's Notice of Appeal. Attached hereto and marked as Exhibit "B" to this my Affidavit is a copy of our letter to Crawford Smith dated November 21, 2014.

5. Faskens wrote further to Crawford Smith on November 26, 2014 enclosing our client's certified cheque payable to Union Gas Limited in the amount of \$205,130.62 represents payment in full of NRG's calculation of the cost of the Winter Checkpoint Gas to Union. This payment was made on a with prejudice basis, pursuant to the October 31, 2014 invoice. Attached hereto and marked as Exhibit "C" to this my Affidavit is a copy of our letter dated November 26, 2014. Also attached hereto and marked as Exhibit "D" to this my Affidavit is a copy of the Notice of Appeal.

6. On November 28, 2014, Crawford Smith communicated to us that Union does not accept NRG's payment of a lesser amount. Attached hereto and marked as Exhibit "E" to this my Affidavit is a copy of Crawford Smith's e-mail communication dated November 28, 2014.

[illegible]


Cheryl Anne Robinson



October 31, 2014

Natural Resource Gas Limited
39 Beech St. E.
P.O. Box 307
Aylmer, ON
N5H 2S1

Attn: Brian Lippold, General Manager

Re: Final Charge for Winter Checkpoint Banked Gas Purchase

Dear Mr. Lippold:

On the February invoice issued in March for SA918, NRG had been billed \$2,007,250 (25,496 GJ @ \$78.72805/GJ) for the purchase of gas in relation to its failure to meet its contractual February checkpoint balancing obligation. This charge was based on the Banked Gas Purchase rate as outlined in the Rate R1 rate schedule as the higher of the daily spot cost at Dawn in the month of or the month following the month in which the gas is sold (but not less than Union's approved weighted average cost of gas).

On April 3, 2014, Union applied to the Ontario Energy Board ("OEB") to use the second highest spot price as a one-time exception to the rate outlined the Rate R1 rate schedule. The second highest daily spot price at Dawn in February was \$50.50/GJ:

On October 9, 2014, the OEB issued its decision approving Union's application.

As a result, the Banked Gas Purchase charge has been reduced to \$1,287,548.00 (25,496 GJ @ \$50.50/GJ).

Union has also removed the late payment charges that have been accumulating since March (\$249,149.45) and added interest to October 31, 2014 (\$12,652.54).

The charge with interest is now \$1,300,200.54 (\$1,287,548 + \$12,652.54) and is due within 30 days.

Should you have any further questions, please contact your account manager, Patrick Boyer.

Sincerely,

Tom Byng
Manager, Contracting and Customer Support

Copy:
Patrick Boyer, Union Gas

P.O. Box 2001, 50 Keil Drive North, Chatham, ON, N7M 5M1 www.uniungas.com
Union Gas Limited

This is Exhibit "A" referred to in the
affidavit of Cheryl-Anne Robinson
sworn before me, this 1st
day of December, 2014.
M. P. Lippold
A COMMISSIONER FOR TAKING AFFIDAVITS

Fasken Martineau LLP
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Federal and Provincial Agents

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FASKEN
MARTINEAU

John A. Campion
Direct 416.865.4357
jcampion@fasken.com

November 21, 2014

File No.: 297298.00001

Crawford Smith
Torys Law Firm LLP
79 Wellington Street West, 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2

Dear Mr. Smith:

**Re: Natural Resource Gas Limited ("NRG") and Union Gas Limited ("Union")
- Payment of Invoice for 29,496 GJ due November 30, 2014**

Union supplied 29,496 GJ to NRG on February 28, 2014. A subsequent application by Union to the Ontario Energy Board (the "Board") reduced the price from \$73.83 per GJ to \$50.50 per GJ (the "Union Penalty Hearing"). That decision was made on October 9, 2014. NRG has appealed the Board's decision made in EB-2014-0154.

Pending the appeal, NRG recognizes that it did receive the natural gas and that it should pay the fair price for the gas which NRG suggests respectfully is Union's cost of gas. As you know, NRG does not make any profit from the sale of its gas and believes that this principle should apply to Union, particularly in the circumstances of the Extreme Winter Weather of 2013/2014.

NRG assesses Union's cost of gas at \$4.49 per GJ. NRG recognizes that this may not be Union's average cost of gas, and would be willing to consider that cost pending the appeal. NRG proposes that it will pay Union's cost of gas pending the appeal on the agreement by Union that no interest will accrue on the remaining payment (if any) until after the appeal has been finally determined and a proper invoice has been sent by Union to NRG. Would you please indicate Union's average cost of gas held in storage as at February 28, 2014 and give NRG an invoice recognizing that cost. Any invoice sent by Union for any payment by NRG will be without prejudice to any position the parties may take, except regarding interest.

This is Exhibit B referred to in the
affidavit of Cheryl Anne Robinson
sworn before me, this 1st
day of December, 2014
M. Reiland
A COMMISSIONER FOR TAKING AFFIDAVITS

NRG respectfully makes this proposal on the understanding that, if this does not meet Union's approval, NRG will seek a stay of any interest payment or interest accrual from the Board.

Yours very truly,



John A. Campion

JAC/car

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Patent and Trade-mark Agents

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**FASKEN
MARTINEAU** 

VIA COURIER

WITH PREJUDICE

November 26, 2014

Crawford Smith
Torys Law Firm LLP
79 Wellington Street West, 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2

Dear Mr. Smith:

**Re: Natural Resource Gas Limited ("NRG") and Union Gas Limited ("Union")
-- Winter Checkpoint Balancing Natural Gas Requirement as at
February 28, 2014 ("Winter Checkpoint Gas")**

Payment for Winter Checkpoint Gas (Union Invoice: October 31, 2014)

Enclosed is a payment for the Winter Checkpoint Gas provided by Union to NRG. It is a certified cheque for \$205,130.62. It represents payment in full of NRG's calculation of the cost of the Winter Checkpoint Gas to Union. It is calculated on the basis of 25,496 GJ at \$7.12 per GJ plus HST. Union's average weighted cost of gas spot purchases as at February 28, 2014 was \$7.12 per GJ. Union supplied the Winter Checkpoint Gas to NRG from its own storage and incurred no costs above its average weighted cost of spot purchase gas. This represents the justification for the payment enclosed.

The payment is made with prejudice.

The payment is made pursuant to an invoice dated October 31, 2014 from Union to NRG, a copy of which is enclosed. As the invoice notes, the payment was due within 30 days of the date of the invoice, which on NRG's calculation is November 30, 2014. Payment of that invoice is made by NRG pursuant to the enclosed certified cheque.

John A. Campion
Direct 416.865.4357
jcampion@fasken.com

"C"
This is Exhibit.....referred to in the
affidavit of.....Cheryl Anne Robinson
sworn before me, this.....1st
day of.....December.....20.....14
M. Ralston
A COMMISSIONER FOR TAKING AFFIDAVITS

Union Purported Interest Charges and Waiver of Late Payment Charges

In the invoice, Union purports to charge interest but to waive late payment charges. Both the interest charges and the proposition that any late payment charges were ever due is not accepted by NRG. On the other hand, NRG accepts the waiver of late payment charges. While the Winter Checkpoint Gas was provided from Union's storage on February 28, 2014, it was Union's subsequent application to the Ontario Energy Board (the "Board") seeking to change the pricing formula and therefore the price of the Winter Checkpoint Gas (the "Union Penalty Rate Application"), which renders the interest charge inapplicable.

NRG was an Intervenor in the Union Penalty Rate Application and sought to have the price of Winter Checkpoint Gas reduced to \$4.49 per GJ. Until the Board made its decision on October 9, 2014, the entire transaction was inchoate until that decision was made because the amount of gas was known, but the price was not. All parties had to await the outcome of Union's own application before a final price cost could be fixed and a proper invoice be sent. As a result, no invoice was payable by NRG for the Winter Checkpoint Gas until an invoice was delivered by Union after the Board's decision.

That invoice was dated October 31, 2014 and was expressly declared to be due within 30 days. No interest was exigible and no late payment charge was permitted until at least November 30, 2014 (subject to the appeal of the Board decision and any further direction and Order of the Board).

NRG Appeal of the Union Penalty Rate Application Board Decision

NRG appealed the decision of the Board pursuant to its appeal rights recognized under the *Ontario Energy Board Act*. The Notice of Appeal was delivered on November 6, 2014. Until the outcome of the appeal, the request for payment for Winter Checkpoint Gas at a price per GJ above Union's weighted average cost of spot purchase gas remains inchoate.

Enclosed is a copy of the Notice of Appeal.

NRG Rate, Interest and Payment Proposal Pending Outcome of Appeal

On November 21, 2014, we wrote to you on behalf of NRG proposing to pay \$4.49 per GJ for the Winter Checkpoint Gas. In that letter, we noted that the invoice payment was due on November 30, 2014 and offered to pay for the Winter Checkpoint Gas based on Union's cost of gas at \$4.49 per GJ on the understanding that no interest would accrue

on the alleged remaining balance for Winter Checkpoint Gas, pending conclusion of the appeal and any further direction of the Board.

Enclosed is a copy of the letter dated November 21, 2014.

Union refused to accept the suspension of any interest costs pending the appeal. NRG had indicated in the letter that it would seek a Direction concerning and stay of any interest accrual on the invoice from the Board if Union did not agree with NRG's proposal.

NRG will rely upon this correspondence (including the enclosures) in its letter request to the Board.

Context: NRG's QRAM Application

NRG has also brought its own application ("NRG QRAM Application") dealing with the issue of whether the payment for the Winter Checkpoint Gas was payable in full by its customers or payable in part by NRG's customers and NRG itself (thereby imposing a financial burden on NRG's shareholders).

NRG sought to have the Union Penalty Rate Application heard together with the NRG QRAM Application in May 2014. The Board rejected this application.

There are only two parties in the NRG QRAM Application: NRG and Board Staff. Final argument has been filed in writing. By letter dated November 21, 2014, the Board directed that two consultant reports are to be delivered to NRG and that NRG is to make further submissions on the appropriate regulatory process within seven days of receiving those reports.

Request of Union

NRG hereby requests that Union agree that no interest be payable on the money as tendered and that no interest is chargeable on any other payment amount for the Winter Checkpoint Gas (if any) until after the appeal has been finally heard, the Board has made any further Order requested and a proper invoice for any additional amount (with 30 days to pay) is sent by Union to NRG.

This request will be open for acceptance until Thursday, November 27, 2014 at 5:00 p.m.

Letter of Request to the Board

This letter and the attachments will be delivered to the Board on Friday, November 29, 2014 with a request to formally suspend any interest payments until after the appeal has been finally determined by the Divisional Court or any further Order of the Board in the Union Penalty Rate Application is decided.

Yours very truly,



John A. Campion

JAC/car

Court File No. 521/14

(Ontario Energy Board)
File No. EB-2014-0154

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

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

AND IN THE MATTER OF a Decision and Order of the Ontario
Energy Board dated October 9, 2014 on the Application by Union Gas
Limited for an order or orders approving a one-time exemption from
Union Gas Limited's approved rate schedules to reduce certain penalty
charges applied to direct purchase customers who did not meet their
contractual obligations;

AND IN THE MATTER OF the Intervenor – Natural Resource Gas
Limited

BETWEEN:

NATURAL RESOURCE GAS LIMITED

Appellant

- and -

THE ONTARIO ENERGY BOARD and UNION GAS LIMITED

Respondents

NOTICE OF APPEAL

NATURAL RESOURCE GAS LIMITED ("NRG") appeals to the Divisional Court
from the Decision and Order (the "Order") of the Ontario Energy Board (the "Board") dated
October 9, 2014 granting Union Gas Limited ("Union") a one-time exemption from its approved
tariffs with respect to the penalty charges applied to direct purchase customers who did not meet

"D"
This is Exhibit referred to in the
affidavit of Cheryl Anne Robinson
sworn before me, this 1st
day of December 2014
M. R. O'Connell
A COMMISSIONER FOR TAKING AFFIDAVITS

their contractual obligations during the months of February and March 2014 and setting the reduced penalty at \$50.50 GJ for February and \$52.04 GJ for March.

THE APPELLANT ASKS that the Order of the Board be set aside and that an Order be granted as follows:

1. Suspending the application of a penalty charge to NRG;
2. In the alternative, granting Union the one-time exemption from its approved tariffs with respect to the penalty charge applied to NRG for the month of February 2014, but setting the reduced penalty at \$4.87 per GJ to \$7.12 per GJ ;
3. In the further alternative, sending the matter back to the Board for a rehearing with respect to the penalty to be applied to NRG;
4. Its costs of this appeal and of the proceedings before the Board; and
5. Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS OF APPEAL are as follows:

The Penalty Rate Hearing

6. NRG is an Ontario utility that carries on the business of distributing and selling natural gas in southern Ontario. NRG supplies natural gas to 8,000 residential and industrial consumers in a predominantly rural and small town area of the province.
7. NRG is regulated by the Board under the *Ontario Energy Board Act, 1998*, S.O. 1998 C. 15 Sched B. (the "Act").

8. NRG is a customer of Union. NRG receives gas from Union pursuant to a southern bundled T gas contract (the "Contract"). NRG must annually fix with Union the amount of gas which is predicted to be consumed by NRG customers and then fix the amount of DCQ gas which must be delivered to Union on a monthly basis. If NRG does not meet its monthly contractual balancing obligations, penalty charges based on the highest daily spot cost of gas at Dawn in the month of or the month following the month in which the gas was sold are applied.

9. NRG, among other Union customers, was not able to meet its monthly balancing obligations for February 2014.

10. Union brought an application to the Board to change the penalty rate contained in the Contract (and other penalty rates for other customers) from the highest daily spot rate at Dawn to the second highest daily spot rate at Dawn (the "Penalty Hearing"). Union proposed a change from \$78.73 per GJ to \$50.50 per GJ for the month of February 2014.

11. Union's position was that what it characterized as "exceptional weather conditions in 2014" caused high gas prices. Union also stated that it sought to reduce the penalty rate based on the individual characteristics of four of the eleven direct purchase customers who failed to supply balancing gas to Union, namely that the penalty rate would or could cause financial impairment or even bankruptcy of one or more of these four customers.

12. By way of Procedural Order No. 1, dated May 27, 2014, NRG was granted leave to intervene in the Penalty Hearing.

13. NRG agreed that the weather conditions were exceptional, and that they justified a change in the penalty rate. NRG also agreed that the Board should consider individual

characteristics of each customer affected by the change in the penalty rates when determining the appropriate change in the penalty rate.

14. NRG, however, sought to reduce the penalty rate to Union's average cost of \$7.12 per GJ. In so doing, NRG urged the Board to consider four issues: (i) uncontested evidence of historic norms for 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 for NRG's ratepayers; (iii) Union's actual costs of purchasing the gas used to make up NRG's balancing shortfall of 25,496 GJ ranging from \$4.94 per GJ to \$12.31 per GJ and \$20.156 per GJ; and (iv) the windfall gain achieved by Union and its customers at the penalty rate of \$50.50 per GJ.

15. NRG submitted that Union's choice of \$50.50 per GJ or the second highest price for spot gas in February 2014 was arbitrary, and not founded in either fact or principle.

16. Union did not provide any evidence of what other compliant customers had paid for their natural gas to meet their balancing obligations on or before February 28, 2014. The only evidence of cost to Union was what it paid for natural gas as indicated either by its Ontario Landed Reference Price or its purchases in the spot market from December 2013 to March 2014.

17. NRG submitted that the Board should fix a penalty rate based on historic norms and costs incurred by Union to supply the natural gas to NRG. It was submitted that the historic norms were one indication of what NRG's reasonable expectations were in February 2014, namely that the penalty rate was never greater than the Ontario Landed Reference Price and never more than \$12.45 per GJ. The costs incurred by Union reflected in its Ontario Landed Reference Price for February 2014 or reflected in its own spot purchases during the winter of

2013/2014 were another measure of reasonable expectation for NRG, namely that the penalty rate would not be above Union's average weight cost of spot purchase gas, \$7.12 per GJ.

18. NRG asked the Board to consider a penalty rate for NRG in a range between \$4.87 per GJ to \$7.12 per GJ.

Board Decision

19. On October 9, 2014 the Board rendered its Order in the Penalty Rate Hearing. The Board granted Union's request for a one-time exemption and set the reduced penalty at \$50.50 GJ for February.

20. The Board noted at page 3 of its Order:

"NRG also agreed that a reduction to the penalty charges is warranted given the exceptional weather conditions experienced over the 2014 winter. However, NRG argued for an alternative penalty charge that would only be applicable to NRG, as it is a distributor and unlike the other customers who purchase their own gas. NRG stated that the Board should consider setting a penalty rate for NRG in the range of \$4.87/GJ to \$7.12/GJ. NRG stated that the penalty rate should be fixed on the basis of historic norms, Union's actual costs and facts specific to NRG (i.e. that NRG is a distributor and that it did everything it could to meet its contractual obligations)".

21. The Board dealt with NRG's arguments at page 7 of its Order and dismissed NRG's arguments as follows:

"The Board does not find NRG's arguments concerning a different method to setting the penalty convincing. Neither is the argument concerning NRG's special situation accepted. The Board finds that setting the penalty charge that is to be applied to NRG on the basis of historic norms or Union's gas costs is not appropriate and not consistent with the intent of the penalty. In addition, the Board is of the view that, in this matter, NRG's status as a distributor does not warrant any different treatment. As such, the Board finds that the same reduced penalty, as proposed by Union, which will be applied to all of the non-compliant customers shall also be applied to NRG".

22. The Board did not provide any other reasons for its dismissal of NRG's position.

Board Errors of Law and Jurisdiction

23. The Board erred in law and exceeded its jurisdiction by failing to consider adequately or at all whether, given the particular circumstances, a penalty was “just and reasonable” under section 36 of the Act;

24. The Board erred in law and exceeded its jurisdiction by failing to consider adequately or at all whether the rate of \$50.50 proposed by Union was “just and reasonable” under section 36 of the Act;

25. The Board erred in law and exceeded its jurisdiction by failing to fix a rate that was “just and reasonable” under section 36 of the Act;

26. The Board's decision to set the reduced penalty rate at \$50.50 GJ for February was arbitrary;

27. The Board exceeded its jurisdiction by failing to give adequate reasons for its decision; and

28. Such further and other grounds as counsel may advise and this Honourable court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

29. An appeal lies to the Divisional Court from the Order of the Board pursuant to section 33(1)(a) of the Act.

30. Leave to appeal is not required.

31. Such further and other grounds as counsel may advise and this Honourable Court may permit.

The Appellants request that this appeal be heard at Toronto.

November 6, 2014

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Email: jmcaleer@fasken.com

Fax: 416 364 7813

Lawyers for Appellant,
National Resource Gas Ltd.

TO: ONTARIO ENERGY BOARD
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Toronto, ON M4P 1E4

Kirsten Walli
Tel: 416 440 7677
Email: kirsten.walli@ontarioenergyboard.ca
Fax: 416 440 7656

Board Secretary for Respondent, The Ontario Energy Board

AND TO: TORYS LLP
Barristers and Solicitors
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Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada

Crawford G. Smith
Tel: 416 865 8209
Email: csmith@torys.com
Fax: 416 865 7380

Lawyers for the Respondent, Union Gas Limited

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

AND IN THE MATTER OF a hearing of the Ontario Energy Board on its own motion in order to determine the Application by Union Gas Limited for an order or orders approving a one-time exemption from Union Gas Limited's approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations.

Court File No. 521/14

(Ontario Energy Board)
File No. EB-2014-0154

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

NOTICE OF APPEAL

FASKEN MARTINEAU DuMOULIN LLP

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John A. Campion / Jennifer McAleer

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Fax: 416 364.7813

Email: jcampion@fasken.com / jmcaleer@fasken.com

**Lawyers for Appellant,
National Resource Gas Ltd.**

Cheryl-Anne Robinson

From: Smith, Crawford <csmith@torys.com>
Sent: November-28-14 3:53 PM
To: John A. Campion
Cc: Laurie O'Meara (lomeara@cpirentals.com); Brian Lippold; Smith, Crawford
Subject: RE: Letter and Certified Cheque

Categories: #297298 : 00001 : 0

Dear Mr. Campion,

I received your letter and package. It is Union's position that the amount invoiced by it to NRG is due and payable. I have been instructed not to accept NRG's payment of a lesser amount and therefore have returned your package (and the included certified cheque) to you, unopened.

Regards,

Crawford Smith

P. 416.865.8209 | F. 416.865.7380 | 1.800.505.8679
79 Wellington St. W., 30th Floor, Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada | www.torys.com

TORYS
LLP

From: John A. Campion [<mailto:jcampion@fasken.com>]
Sent: November-26-14 5:22 PM
To: Smith, Crawford
Cc: Laurie O'Meara (lomeara@cpirentals.com); Brian Lippold
Subject: Letter and Certified Cheque

Dear Mr Smith

Enclosed is a copy of a letter and attachments delivered to you by hand this afternoon. One of the attachments is a certified cheque payable from NRG to Union Gas.

Yours very truly,

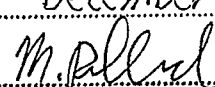
John Campion

John A. Campion | Partner

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jcampion@fasken.com | <http://www.fasken.com/en/john-campion>
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**FASKEN
MARTINEAU** 

VANCOUVER CALGARY TORONTO OTTAWA MONTREAL QUEBEC CITY LONDON PARIS JOHANNESBURG

This is Exhibit "E" referred to in the
affidavit of Cheryl-Anne Robinson
sworn before me, this 1st
day of December 2014.

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**FASKEN
MARTINEAU** 

E-MAIL and DELIVERED

December 1, 2014

Ms. Kirsten Walli, Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

**Re: Union Gas Limited ("Union")
Reduction of Certain Charges Applied to Direct Purchase Customers
Natural Resource Gas Ltd. ("NRG") Application for Stay: Section 33(4) of
the Ontario Energy Board Act (the "OEB Act")
-- Board File No.: EB-2014-0154 (the "Penalty Rate Hearing")**

**Re: Application by NRG under Sections 3, 19(1), 20, 21(1), 36(2), (3), (4), (5) of
the OEB Act**

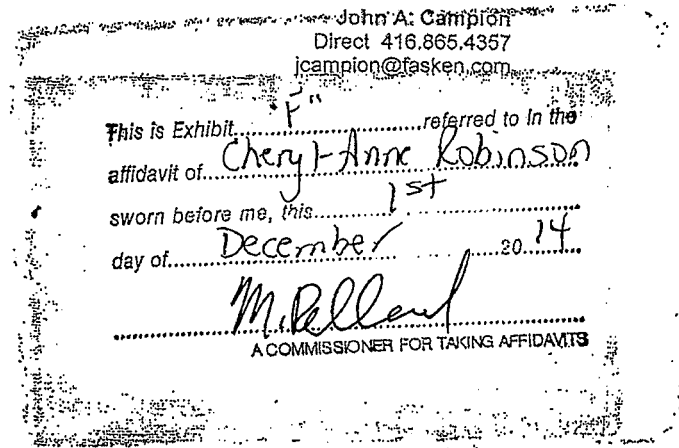
Urgent Request for Interest Rate Relief/Stay

NRG files these Applications seeking rate relief and/or a stay from the imposition of interest on any amounts due from NRG to Union for payment for certain Winter Checkpoint Banked Gas purchases by NRG on February 28, 2014, namely for 25,496 GJ and a Declaration that NRG pay only \$205,130.62 for the Gas pending final Order of the Divisional Court and/or the Board.

Filed with this letter is the Affidavit of Cheryl-Anne Robinson, attaching correspondence between counsel for NRG and Union (Exhibits B, C and E), an invoice from Union to NRG dated October 31, 2014 (Exhibit A), and the Notice of Appeal (Exhibit D) filed by NRG in the Penalty Rate Hearing matter.

Chronology

The Board made its Decision and Order in the Penalty Rate Hearing on October 9, 2014 (the "Board Order"). At Union's request in that application, the Board lowered the penalty rate for payment of Winter Checkpoint Gas deliverable by NRG to Union on February 28, 2014 from \$78.73 per GJ to \$50.50 per GJ. The rate for the Winter Checkpoint Gas was derived from a formula. On a one-time basis, the Board changed the formula from the highest daily spot rate at Dawn in the month of February 2014 to the second highest spot rate at Dawn. NRG was an intervenor in the Penalty Rate





Hearing and had sought a penalty rate equivalent to Union's actual costs, being \$4.87 per GJ.

By letter/invoice from Union to NRG dated October 31, 2014 (Exhibit "A" to the Affidavit), Union noted that the original penalty rate formula led to a requested payment by NRG in the amount of \$2,007,250.00 for 25,496 GJ at \$78.72805 per GJ as at March 2014. Union further noted that it had applied to the Ontario Energy Board (the "Board") on April 3, 2014 to reduce the purchase price of the Winter Checkpoint Gas. Union further noted that the Board reduced the Banked Gas Purchase charge to \$50.50 per GJ. Union therefore requested payment in the reduced amount of \$1,287,548.00. Union removed late payment charges accumulating since March 2014 (\$249,149.45) (NRG has accepted this Union proposal) but added interest to October 31, 2014 totalling \$12,652.54. The interest rate inherent in this amount is 1.5% per month or 19.5% per annum. Union noted that the total charge of \$1,300,200.54 was due within 30 days of the letter/invoice, namely October 31, 2014.

On November 6, 2014, NRG commenced an appeal of the Board Order to the Divisional Court (Exhibit "D").

In order to avoid this request for a stay or any equivalent motion before the Divisional Court, NRG, by letter dated November 21, 2014 (Exhibit "B"), sought an agreement from Union regarding payment of interest for the Winter Checkpoint Gas. Pending the appeal, Union did not agree.

By letter dated November 26, 2014 (Exhibit "C"), NRG tendered partial payment for the Winter Checkpoint Gas in the amount of \$205,130.62 by way of a certified cheque. NRG noted that this was payment for 24,496 GJ at \$7.12 per GJ plus HST. The price was Union's average weighted cost of spot purchases as at February 28, 2014. This payment was tendered pending NRG's appeal to the Divisional Court and any further Order of the Board. Union informed NRG through counsel by e-mail dated November 28, 2014 that Union refused to accept partial payment (Exhibit "E").

In the same letter of November 26, 2014, NRG sought Union's agreement that no interest be payable on the money as tendered (\$205,130.62) and no interest be chargeable on any other payment amount for the Winter Checkpoint Gas (if any) until after the appeal had been finally heard and the Board made any further Order requested. That request is apparently rejected.

Jurisdiction of the Board: Stay

The Board has the power to grant a stay or some other direction regarding every Order made by it which is the subject of an appeal pursuant to section 33(6) of the OEB Act.

As a result of the submissions hereinafter made, it is respectfully requested that the Board grant a partial stay Order that no interest be exigible on any payment for Winter

Checkpoint Gas for the 25,496 GJ delivered by Union to NRG's account on February 28, 2014 until the appeal is finalized by the Divisional Court and/or the Board.

There are two components of interest affected by this request. The Union letter/invoice charges interest at 1.5% per month on the amount it says is due and owing for the Winter Checkpoint Gas. That interest charge runs from October 9, 2014 to November 1, 2014 totalling \$12,652.54. This interest charge is unreasonable because the invoice itself was not due until November 30, 2014 pursuant to its terms. The second component of interest is more significant in that there is a continuing dispute as to the appropriate rate for the Winter Checkpoint Gas in the appeal to the Divisional Court. Any interest that might run on the disputed amount at 1.5% per month is either payable from NRG's customers or from NRG (depending on the outcome of the NRG QRAM decision). In the circumstances, it is respectfully submitted that until the price has been finally fixed, it is not appropriate that interest be charged by Union against any balancing owing.

NRG tendered to Union \$205,130.62 before the due date of November 30, 2014. NRG remains willing to make this payment. It is respectfully submitted that Union should have accepted this money. NRG proposed the payment based on Union's actual averaged weighted cost of spot purchases, being \$7.12 per GJ and expected that no interest would be due on this amount upon payment or in the future (if the payment were not accepted).

It is therefore respectfully requested that no interest be payable from NRG to Union for Winter Checkpoint Gas pending the finalization of the appeal to the Divisional Court and any subsequent Order of the Board arising from that appeal.

Jurisdiction of the Board: Rates

In addition, and as an alternative to the Board's jurisdiction to grant a stay, the Board has jurisdiction to fix just and reasonable rates under sections 19, 21 and 36 of the OEB Act.

Under section 3 of the OEB Act, 'Rate' means "A rate, charge or other consideration that includes a penalty for late payment". This includes interest and penalties for late payment.

The Board has jurisdiction to eliminate the interest payment requested by Union in the circumstances. NRG asks the Board to grant rate changes necessary to eliminate the payment of interest for any Winter Checkpoint Gas pending finalization of the appeal process and any subsequent Order of the Board.

Just and Reasonable Rates

It is respectfully submitted that commercial fairness is a significant factor in determining just and reasonable rates in the circumstances set out above.



The issues arising in the Union Penalty Rate Hearing and the NRG QRAM case have their genesis in the cold weather experienced in the winter of 2013/2014 which was "... widespread, persistent and extreme ..." (Navigant Consulting Ltd. report November 25, 2014, p. 1).

In these circumstances, NRG submits that those distributors (that is, Union and NRG) serving the public interest in unprecedented circumstances should be guided by principles of commercial fairness. If the parties refuse to be guided by such principles, the Board should fix just and reasonable rates or grant a stay imposing commercial fairness.

NRG has recognized that it must pay a reasonable amount for the Winter Checkpoint Gas that it was unable to deliver to Union. Pending the appeal to the Divisional Court, NRG tendered \$205,130.62 being payment for all of the gas delivered (25,496 GJ) at \$7.20 per GJ plus HST, being Union's own average weighted cost of gas spot purchases as at February 28, 2014. NRG actually seeks a cost of Winter Checkpoint Gas at \$4.49 per GJ in its appeal. Pending the appeal, NRG proffered the higher amount as a matter of commercial reasonableness on its part.

Union's failure to accept a partial payment is commercially unreasonable. Union is seeking an interest rate of 1.5% per month on amounts owing. By refusing to accept a partial payment and refusing to waive any future interest until the penalty rate has been finally fixed, Union will potentially receive 19.5% interest per annum on the entire unpaid amount, despite NRG's offer to pay Union's actual costs and where the commercial interest rate on the money would be approximately 1% to 2%. In this regard, Union seeks a commercially unreasonable advantage over NRG and its customers. This does not lead to just and reasonable rates in the circumstances. In any event, NRG has an obligation to protect its customers and is doing so by this application.

Union itself has recognized in its letter/invoice that any interest in the period when a rate was not finally fixed was not properly payable. Union specifically waived (and NRG has accepted) the fact that late payment charges accumulating from March 2014 in the amount of \$249,149.45 was waived. NRG's request set out below is a reasonable extension of the principle that late payment charges should be waived until any final determination by the Divisional Court.

In the unique circumstances of the winter of 2013/2014 and the particular circumstances of the appeal and relationship between NRG and Union (both being utilities seeking to act in the public interest), NRG seeks to protect its customers and pay for the gas provided by Union at Union's cost pending the appeal. This avoids any detriment to Union's customers and shareholders while at the same time eliminating possibility of a further windfall for Union and its customers at the expense of NRG and its customers through the interest rate of 19.5% per annum.

Order Sought

As a result of the above, NRG seeks a Direction from the Board granting a stay or an Order that: (a) no interest be payable by NRG to Union for Winter Checkpoint Gas until after the above-captioned appeal is final; and (b) an Order pending appeal that NRG pay only \$205,130.62 for the Winter Checkpoint Gas supplied by Union on February 28, 2014. The Orders are sought until the appeal has been finalized, the Board has rendered any further Order necessary and Union has sent its final invoice to NRG based on the final price of gas.

Yours very truly,



John A. Campion

JAC/car

cc: Lawrie Gluck, Ontario Energy Board
Brian Lippold, Natural Resource Gas Limited
Laurie O'Meara, Natural Resource Gas Limited
Robert Hutton, Natural Resource Gas Limited
Chris Ripley, Union Gas Limited
Crawford Smith, Torys

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

AND IN THE MATTER OF a Decision and Order of the Ontario Energy Board dated October 9, 2014 on the Application by Union Gas Limited for an order or orders approving a one-time exemption from Union Gas Limited's approved rate schedules to reduce certain penalty charges applied to direct purchase customers who did not meet their contractual obligations;

AND IN THE MATTER OF the Intervenor – Natural Resource Gas Limited

ONTARIO ENERGY BOARD

AFFIDAVIT of Cheryl-Anne Robinson

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