

333 Bay Street, Suite 2400
Bay Adelaide Centre, Box 20
Toronto, Ontario, Canada M5H 2T6

416 366 8381 Telephone
416 364 7813 Facsimile
1 800 268 8424 Toll free



John A. Campion
Direct 416.865.4357
jcampion@fasken.com

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