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October 18, 2000

Ms. Kathi Litt  
Regulatory Officer  
Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, 26<sup>th</sup> Floor  
Toronto ON M4P 1E4

Dear Ms. Litt

**Distributor Access Rule Task Force  
Our File: 2701-333**

We are the solicitors for the Industrial Gas Users Association (IGUA®). This letter is provided in response to the Board's letter of September 26, 2000 seeking comments on the Board Staff's Draft Gas Distributor Access Rule (the Draft Rule®) dated September 25, 2000.

**I INTRODUCTION**

The provisions of the Draft Rule appear to be designed to incorporate the recommendations of the majority on each of the topics covered in the final report of the Distribution Access Rule Task Force (DARTF®) to Ontario Energy Board Staff dated June 8, 2000 (the DAR Report®). IGUA was an active participant in the DARTF. The recommendations contained in the DAR Report on which IGUA took a position are noted therein.

**II SCOPE OF THE RULE**



## **Purpose and Objectives**

IGUA did not take a position on the recommendations in the DAR Report pertaining to the scope of the Gas Distributor Access Rule.

The Draft Rule includes provisions which purport to describe the purposes and objectives of the Rule. IGUA believes that in using the phrases "business dealings", "business practices", and "business relations" in paragraphs 1.1.2, 1.1.5 and 1.2.1 respectively, the Draft Rule defines its scope too broadly. IGUA suggests that the use of the phrases "business dealings", "business practices" and "business relationships" in the General and Administrative Provisions of the Draft Rule transcends the Board's rule-making power under Section 44 of the *Ontario Energy Board Act, 1998* (the *OEBA*).

IGUA suggests that the Board rule-making power is confined to matters pertaining to the conduct of gas distributors in conjunction with their relationships with affiliates, gas sellers and gas marketers under Part IV of the *OEBA*, and matters pertaining to the establishment of conditions of access to distribution services provided by a gas distributor. In IGUA's view, the word "conduct" should be substituted for each of the phrases "business dealings", "business practices" and "business relations" contained in Articles 1.1.2, 1.1.5 and 1.2.1 of the Draft Rule.

## **Emergency Supply Planning**

IGUA member companies are particularly concerned with the "Emergency Supply Planning" ("ESP") provisions of the Draft Rule because, in an emergency, it is firm service to industrial gas users that will likely be curtailed. It is gas owned by industrial users which is likely to be expropriated. The extent to which gas owned and supplied by marketers will be subject to curtailment and confiscation has not yet been clearly articulated.

In the portions of this letter which follow, we elaborate on why, in IGUA's view, the Board currently lacks the jurisdiction to impose the provisions of an ESP regime on users of gas distribution services in Ontario. However, recognizing that it is desirable for a province-wide ESP regime to be established by the provincial government, we describe in this letter those items which IGUA regards as the essentials of such an ESP regime. The letter of comment concludes by suggesting certain revisions to the Draft Rule.

### **III EMERGENCY SUPPLY PLANNING**

#### **Proposed Rule**

The ~~A~~Emergency Supply Planning section of the Draft Rule assumes that the Board has jurisdiction under its rule-making power contained in Section 44(1) of the *OEB Act* to:

- a) Confer a discretionary right on a distributor to curtail some firm deliveries in an emergency situation;
- b) Define the classes of firm customers which can be curtailed in an emergency and the priorities to be followed when curtailing these classes of firm services customers;
- c) Empower a distributor in an emergency situation to expropriate or confiscate gas belonging to another party;
- d) Define the classes of customers subject to expropriation and the priorities to be followed when expropriating or confiscating the gas supplies of these classes of customers;
- e) Limit the financial consequences to a distributor for expropriating or confiscating gas supply of another in an emergency situation to a particular purchase price for the gas; and
- f) Decree that, in an emergency, the curtailment by a distributor of firm services and/or the taking of gas owned by a third party shall not constitute acts in breach of contract.

#### **Limits of the Board's Emergency Supply Planning Jurisdiction**

If the Board has the power to impose the provisions of the Draft Rule pertaining to ESP, then the legislature has empowered the Board to override the contractual right of a gas user to firm service from a distributor; to override the rights of an owner of gas to the title thereof; to confer on a distributor the power to expropriate the property of another; and to establish limits on the compensation payable by an

expropriating distributor acting in an emergency. The *OEB Act* does not yet confer such extraordinary powers on the Board.

The recommendations of the majority and minority contained in the Emergency Supply Planning section of the DAR Report recognized that the *OEB Act* would need to be amended before the Board could impose an ESP regime on the users of gas distribution services. The Draft Rule does not appear to recognize the unanimous consensus amongst members of DARTF that amendments to the Board's enabling legislation were necessary before the Board could impose an ESP regime.

The Board's powers to make rules pertaining to the conduct of a distributor and others dealing with a distributor along with the power to make rules establishing conditions of access to distribution services set out in Section 44 of the *OEB Act* do not authorize the Board to grant a distributor, acting in an emergency, a discretion to curtail firm services or to expropriate the gas supply of a third party. The Board is clearly not yet empowered to establish the compensation regime which is to be applicable in the event of an expropriation of gas supply, nor to declare whether any conduct by a distributor acting in an emergency does or does not amount to a breach of contract.

If the legislature intended to confer jurisdiction on the Board to impose an ESP regime, then the provisions empowering the Board to take such action would be contained in Part VIII of the *OEB Act* which deals specifically with Gas Priorities and Allocation. According to Section 113 of the *OEB Act*, the purpose of Part VIII is to provide for the fair allocation of gas where there is an existing or impending shortage of gas. Having regard to the existence of Part VIII of the *OEB Act* and its stated purpose, it is unreasonable to conclude that the Board's rule-making power under Section 44 extends to matters pertaining to gas priorities and allocation where there is an existing or impending shortage of gas caused by an emergency or otherwise.

In IGUA's view, the responsibility for establishing an ESP regime for users of gas distribution services in Ontario rests with the provincial government. Because of the integrated nature of gas transmission and distribution systems in Ontario, the provincial government ought to consult with other federal and provincial governments and their energy regulators, and with federal and state authorities in the United States before finalizing the details of any ESP regime for users of gas distribution services.

### **Essentials of a Reasonable Emergency Supply Planning Regime**

Notwithstanding the fact that the Board is not currently empowered to impose an ESP regime, IGUA accepts that it is desirable for the essentials of a reasonable ESP regime to be established by the provincial government.

In IGUA's view, the topics which should be carefully considered before the essentials of a reasonable ESP regime are formulated by the provincial government include:

- a) What constitutes an emergency;
- b) What rights of curtailment and expropriation should exist in a legitimate emergency situation; and
- c) Whether breach of contract claims should be prohibited.

#### **A. Emergency Situations**

It is essential that any ESP regime precisely describe the objectively demonstrable criteria that need to exist before any emergency powers become operative. Distributors cannot have a discretion to declare a state of emergency. The actions of any distributor which declares a state of emergency should always be subject to scrutiny. If the distributor is unable to objectively demonstrate that the prerequisite criteria existed, then the distributor should be held responsible for the harm caused by an inappropriate exercise of emergency powers.

For example, a distributor should not be able to rely on emergency powers, rights and remedies in any situation where the distributor has either caused or contributed to the situation which has given rise to the alleged emergency. A distributor could not reasonably resort to its emergency powers where its own poor supply planning or its failure to make adequate backstop supply arrangements for reasonably foreseeable supply shortages have caused or contributed to the situation which the distributor alleges is an emergency situation.

Further, in IGUA's view, an essential feature of any province-wide ESP regime is an obligation on all natural gas utilities operating in the Province of Ontario to curtail their interruptible customers and offer any available curtailed supply to a distributor

finding itself in a legitimate emergency situation to enable the distributor in the emergency situation to either prevent or mitigate the curtailment of firm services customers.

It is only in narrowly defined emergency situations which have arisen as a result of acts beyond the control or influence of the distributor and where there remains insufficient gas to serve all firm customers, despite the curtailment of all interruptible customers in the province, that a distributor ought to be permitted to curtail firm services customers.

### **B. Emergency Powers - Curtailment and Expropriation**

Given the many tools that are available to distributors to contractually guard against supply shortages, the conferring of emergency powers on distributors to curtail firm services customers and/or to expropriate the gas supply of another ought to be limited to the maximum extent possible.

The classes of firm customers subject to a curtailment and/or expropriation and the priorities to be followed when curtailing or expropriating should be precisely defined.

Provided all interruptible customers in the Province of Ontario have been curtailed and the available supply offered to the distributor in the emergency situation to mitigate the curtailments of firm services customers, IGUA accepts that the classes of firm customers subject to curtailment and/or expropriation ought to be prioritized as described in the provisions of Article 3.1.1 of the Draft Rule.

IGUA accepts that the ESP regime to be established by the provincial government should specify that the first class of firm customers facing curtailment and/or expropriation will consist of those who are able to utilize alternative fuels. If curtailments of firm customers who are unable to utilize alternative fuels are insufficient to remediate the emergency, then the next class of firm customers to be curtailed and/or expropriated will be those who are able to shut down non space heating applications. The last class of firm customers to be curtailed and/or expropriated should be those who do not provide heat essential to the well-being of individuals (including but not limited to schools, community centres, and other public buildings which are not used to provide emergency shelter or other emergency services).

Within each class of firm customers subject to curtailment and/or expropriation, the curtailment or expropriation ought to be pro rata amongst all members of the class.

There should be no confiscation or expropriation without compensation. The compensation to be paid to those whose property is expropriated in an emergency situation should provide complete indemnity and include, not only the cost of gas taken, but also all other cost consequences of the taking, with the compensation paid to be recovered from all those customers who continued to receive firm service during the emergency.

The compensation provisions of most expropriation regimes include provisions requiring a prompt payment by the expropriating party of an estimate of the damages caused, with any residual amount to be determined by a compensation review tribunal. In IGUA's view, such provisions are necessary and reasonable in order to assure that the party harmed by an expropriation is not out-of-pocket for all of its cost consequences, during the time that it takes for a final decision with respect to compensation to be either negotiated or determined by the compensation review tribunal.

### **C. No Immunity from Breach of Contract Allegations**

Any party harmed by the actions of a distributor purporting to exercise emergency powers should not be prohibited from asserting remedies for breach of contract.

As already noted, the ESP regime to be established by the provincial government ought to precisely specify the prerequisites which give rise to certain precisely described emergency powers to curtail and/or expropriate, with the compensation payable to be determined in accordance with principles and procedures that are normally applied in expropriation and compensation cases. The provisions of a reasonable ESP regime ought not to attempt to specify whether any acts of a distributor do or do not constitute a breach of contract.

The rights of those who wish to contend that they were harmed by a distributor purporting to exercise emergency powers because the situation was not one where the emergency powers, became operative, or because the distributor improperly exercised its powers should not be constrained. If a party harmed by actions of a distributor

purporting to exercise emergency powers wishes to assert remedies for breach of contract, the party should be free to do so. If such claims are made, then the distributor which purported to exercise emergency powers will need to establish objectively that the situation was in fact a legitimate emergency situation, failing which the distributor will be held responsible to the party harmed for all of the damages caused by the breach of contract. Provisions in an ESP regime which purport to declare, in advance, that a situation does or does not constitute a breach of contract are inappropriate.

#### **D. Deficiencies in the ESP Regime in the Draft Rule**

In the context of the foregoing, IGUA suggests that the ESP regime described in the Draft Rule is unreasonable in the following respects:

- a) The conferring on a distributor of a discretion to curtail certain firm customers in a legitimate situation of emergency is unacceptable. Objectively demonstrable criteria that must exist before any emergency powers become operative should be precisely defined;
- b) The situations that could give rise to an emergency are too broadly defined in that the definition of emergency does not exclude situations which have been caused or contributed to by the particular distributor's inappropriate contracting or planning practices or other actions within the distributor's direct or indirect control. In addition, a right to curtail certain firm customers in a situation of an emergency should not be exercisable before all interruptible customers in the province have been curtailed;
- 3) The priorities to be followed when curtailing firm services customers or expropriating the gas supply of customers, described in Article 3.1.1 of the Draft Rule, should specify that any curtailment or expropriation within each class will be allocated pro rata amongst all members of each class of customers;
- d) The power to expropriate the gas of a third party in a situation of emergency should only be exercisable when all of the gas supply available to a distributor finding itself in a legitimate emergency situation, including the gas supply to be made available from the curtailment of all interruptible customers in the province and the gas supply available to the distributor under its own



contractual arrangements, is insufficient to meet all of the distributor's firm service obligations;

- e) Compensation for an expropriation of gas supply should not be limited to the purchase price of the gas taken, but should include all of the cost consequences of the expropriation, with the compensation to be recovered from all customers whose firm deliveries were sustained for the duration of the emergency; and
- f) The ESP regime ought not to specify whether any acts of a distributor do or do not constitute a breach of contract.

#### **IV SUGGESTED REVISIONS TO THE DRAFT RULE**

##### **Revisions to the ~~A~~General and Administrative Provisions~~@~~**

For the reasons outlined earlier, the phrases ~~A~~business dealings~~@~~, ~~A~~business practices~~@~~ and ~~A~~business relations~~@~~ ought to be removed from Articles 1.1.2, 1.1.5 and 1.2.1 of the Draft Rule and replaced with the word ~~A~~conduct~~@~~ so that Articles 1.1.2, 1.1.5 and 1.2.1 read:

- A1.1.2. *to provide the principles which govern the conduct of gas distributors with respect to marketers and customers;*
- 1.1.5. *to preclude discriminatory or preferential conduct by gas distributors;*
- 1.2.1. *The principal objectives of the Rule are to standardize conduct between distributors and marketers and customers, and to provide customer protection~~@~~.*

##### **Revisions to the Emergency Supply Planning Section**

Because the Board lacks jurisdiction to impose the provisions of an ESP regime, the whole of Section 3 entitled ~~A~~Emergency Supply Planning~~@~~ should be excluded from the Gas Distributor Access Rule which the Board establishes.

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If the Board wishes to provide its views on the essentials of a reasonable ESP regime, then it should do so in a communiqué which is separate and apart from the Gas Distributor Access Rule.

IGUA urges the Board to consider the matters which IGUA regards as essentials to a reasonable Emergency Supply Planning regime before finalizing any views which it expresses with respect to the ESP issue.

Yours very truly

Peter C.P. Thompson, Q.C.  
PCT/mcd

c Mr. Peter Fournier  
Mr. Brian Howell

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