Cinergy's Suggested Changes to Proposed GISB Canadian Addendum

1. Revise Section 2.30 to read as follows:

2.30 "Termination Currency Equivalent" shall mean, in respect of any amount denominated in a currency other than the Termination Currency (the "Other Currency"), the amount in the Termination Currency that the Non-Defaulting Party or the party that is owed a past due amount (the "Converting Party") would be required to pay, on the Early Termination Date or the setoff date, as the case may be, to purchase such amount of Other Currency for spot delivery, as determined by the Converting Party in a commercially reasonable manner.

Comment: This change should be read in conjunction with the suggested change to Section 7.6. We believe that if past due amounts are involved, then the owed party should have the right to convert the amount into a single currency. As such, we thought it would be good to use the procedures described in the "Termination Currency Equivalent" provision for the conversion.

2. Add the following sentence prior to the last sentence in Section 7.6

Notwithstanding anything herein to the contrary, if a past due amount is involved or an Event of Default has occurred, the party that is owed a past due amount or the Non-Defaulting Party may convert all amounts due from one party to the other into the Termination Currency in the manner described in Section 2.30 and net or setoff all such amounts against each other.

Comment: We are concerned with the insertion of the phrase, "in the same currency," because it limits a party's rights under Section 7.6. We assume that a bankruptcy court will require that a contract contain an express right of setoff in order for a setoff to occur. (We are of the opinion that "netting" involves current amounts that are due while "setoff" involves a past due amount, however, we are viewing the terms as interchangeable particularly since Section 7.6 covers past due amounts and currently due amounts.) The same currency restriction is acceptable if we are simply talking about the netting of amounts due on the same day, however, it is unacceptable if a past due amount is involved or another Event of Default has occurred. If a past due amount is involved or another Event of Default has occurred, we want the express right to net or setoff all amounts, regardless of currency.

A couple of hypothetical situations will illustrate the point.

A. If Party A owes Party B $100,000 in past due amounts with $50,000 being in US dollars and $50,000 in Canadian dollars and Party B owes Party A US$200,000 in current billings, Party B should have the option of converting the Canadian dollars to US dollars in order to setoff the entire $100,000 that Party A owes to it, rather than just the $50,000 in the same currency, prior to paying Party A. Without the language change, Party B may only be entitled to setoff the US$50,000.

B. If Party A purchases gas from Party B in September for C$100,000 and Party B purchases gas from Party A in September for US$150,000, and Party A files for bankruptcy on October 24 (day before the payment due date), Party B may not be able to setoff the C$100,000 against what it owes Party A, unless the language is changed. The bankruptcy filing will be an Event of Default, but the transaction may be over so a liquidation under Article 10 may not occur.

Our suggested language does not require currency conversions; it just gives the parties the right to do them.

While Section 10.2 does give a Non-Defaulting Party the right to withhold payments if there is a past due amount under clause (viii), it does not specify how long you can withhold the payments and it does not affirmatively say you can setoff. We could also be in a situation where a non-defaulting party decides, for whatever reason, to not liquidate transactions under Section 10.3. Section 10.6 says that each party reserves the right to setoff, but the language does not affirmatively give a party a contractual right to setoff. Since a bankruptcy court could insist on having language in the contract that expressly allows a setoff before it will honor the setoff, the GISB form should have stronger language regarding the right to setoff past due amounts, regardless of currency, and the proposed changes should accomplish this goal.

In most cases, if a party is owed a past due amount, it will want to have the contractual right to net or setoff the past due amount against the amounts it owes the other party, regardless of the currency.

3. Make the following revisions to page one of the Base Contract of the Canadian Addendum:

   Number the various sections, as listed below:

   (1) Term should be numbered as item I
   (2) The paragraph under "Term" should be numbered as item 2
   (3) "Spot Price Publication" should be numbered as sub-item "A" under item 2
   (4) "Termination Currency" should be numbered as sub-item "B" under item 2
   (5) "Choice of Law" should be numbered as sub-item "C" under item 2
   (6) Section 2.3 should be numbered as item 3
   (7) Section 2.28 should be numbered as item 4
   (8) Section 2.29 should be numbered as item 5.
   (9) Section 2.30 should be numbered as item 6
   (10) Section 2.7 should be numbered as item 7
   (11) Section 5 should be numbered as item 8
   (12) Section 6 should be numbered as item 9
   (13) Section 7.3 should be numbered as item 10
   (14) Section 7.6 should be numbered as item 11
   (15) Section 7.7 should be numbered as item 12
   (16) Section 10.3.4 should be numbered as item 13
   (17) Section 10.4 should be numbered as item 14
   (18) Section 10.5 should be numbered as item 15
   (19) Exhibit A should be numbered as item 16

Comment: This is more an issue of style and formatting. On page one of the Base Contract, even though the items are not numbered, it is very easy to follow everything because of the boxes. For the Canadian Addendum, it is our preference to number the various items to make it easier to read and discuss with other people.