

PRIME MINISTER

GAS PRIVATISATION

Mr. Walker has discussed with the Treasury and Mr. Brittan
the regulatory regime for gas following privatisation.
They have agreed that any further restrictions on gas should
be put in the licence rather than in the legislation. This
gives a little more time to sort out the differences between
the Departments. They have made some progress in resolving
their differences, but are not quite there yet.

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D. Brittan
Deputy Clerk
R DN

21 November, 1985.



(11) ecBG

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JU721

Secretary of State for Trade and Industry

21 November 1985

S E C R E T

The Rt Hon Peter Walker MBE MP
Secretary of State for Energy
Department of Energy
Thames House South
Millbank SW1

NBPM.

GAS PRIVATISATION: RESTRICTIVE TRADE PRACTICES ACT

Thank you for your letter of 15 November about the implications of the Restrictive Trade Practices Act (RTPA) for BGC's gas purchase agreements.

It is regrettable that BGC and the gas producers seem to have behaved so irresponsibly in this matter. Their non-observance of the RTPA has placed the Government and the Director-General of Fair Trading (DGFT) in a very difficult position. Indeed in such cases the DGFT would normally feel compelled to seek an Order of the Restrictive Practices Court effectively making it a contempt of Court for BGC and the gas producers concerned to enter into any similar unregistered agreement in the future. Fortunately, I understand that the DGFT is unlikely to wish to use the resources of the Office of Fair Trading to take proceedings against BGC's agreements provided that the Government makes clear at an early stage its intention to exempt the agreements concerned retrospectively and prospectively. It is, however, important to bear in mind that action to exempt the agreements retrospectively would impinge on the rights of third parties to seek redress through the Courts for the effects of the restrictions in BGC's agreements to which BGC and the other parties have given effect unlawfully. I understand that the Solicitor General is advising on this aspect of the problem.

Your timetable for the Gas Bill does not permit me fully to consider the pros and cons of an exemption but, on the basis of the advice so far received from your officials, I am satisfied that any benefit from the continued application of the RTPA to BGC's gas purchase agreements is unlikely to be such as to outweigh the risks to the flotation. I can therefore agree to an



S E C R E T

exemption that is retrospective and prospective in effect and sufficiently wide to cover BGC's existing gas purchase agreements. I am prepared to take a similar view of a retrospective exemption for agreements ancillary to the gas purchase agreements insofar as this is necessary to safeguard the flotation.

I should not wish the exemption to go wider than is necessary. I appreciate that if the exemption is to be included in the Gas Bill it will as a precaution have to be widely drawn at the outset but I would wish to have the opportunity during the passage of the Bill to narrow the provision, particularly as it relates to BGC's future agreements, if this proves to be desirable in the light of further study of the gas producers' marketing and supply arrangements.

In deciding how best to introduce the exemption, one of my major concerns is to minimise the damage to the credibility of the RTPA. I tend to the view that while an emergency Restrictive Trade Practices Bill would expose the problem over a shorter period than the Gas Bill, it would also bring the exceptional treatment to be provided for BGC and the gas producers into sharper focus and is more likely to attract justified criticism from those companies - some of them small - that have had to pay the normal penalty for non-observance of the Act. I therefore agree with your view that provision for exemption should be made in the Gas Bill itself.

I am copying this to the Prime Minister, the Chancellor of the Exchequer, the Solicitor General and the Leader of the House.

Handwritten signature/initials

LEON BRITTAN

NAT IND : Gas & elec : P11





10 DOWNING STREET

Prime Minister

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To note that BGC's
agreements with the gas
producers probably amount to
unregistered restrictive
practices. The Gas Bill will
have to grant exemption
retrospectively and
prospectively.

DRS

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cc 66

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Secretary of State for Trade and Industry

20 November 1985

Rt Hon Peter Walker MBE MP
Secretary of State for Energy
Department of Energy
Thames House South
Millbank
London SW1

NBPN

Dear Peter,

GAS PRIVATISATION: REGULATORY REGIME

ATTACHED

You, John Moore and I are to meet on Thursday to discuss possible changes to your proposals for gas regulation as requested by E(A) on 14 November. I understand that our officials met on 18 November but that this did not take matters much further forward. I thought therefore it might be helpful if I wrote before we met outlining my concerns about your proposals - in particular the exclusion of the Director General of Gas Supply (DGGS) from the industrial market.

Let me say at the outset that I agree with your wish for lighter regulation of this market than the tariff market, both to encourage competition and to preserve flexibility. I am, however, concerned about whether your proposals for voluntary "assurances" coupled with the existing provisions of the Competition and Fair Trading Acts will provide effective safeguards against monopoly abuse. I am also concerned about the public perception - and hence implications for future privatisations - of the exclusion of the DGGS.

On safeguards, I am doubtful whether the existing competition and monopoly legislation - which was not designed for privatised natural monopolies - will be adequate. The Competition Act can only apply where there are practices which 'distort, prevent or restrict' competition: but in many areas of BGC activity there will, by definition, be no competition to be distorted. Monopoly references under the Fair Trading Act would have wider scope; but there is a problem here about speed of remedy. There are no powers to impose a time limit on monopoly references to the MMC



and these tend to be lengthy - two years is about average, not including time for preliminary investigation and for implementation. I think this is too slow to provide an adequate safeguard in the gas contract market. But I would not support taking powers to shorten references just for gas. If, as I believe, the industrial gas market needs special treatment, then it should be brought within the DGGS's ambit. A licence modification reference would be a quick route to remedying an abuse. It would also be more precisely targeted than a monopoly reference which can only be made in respect of the whole of a particular market.

This leads me to the presentational aspects of excluding DGGS. John Moore drew attention at E(A) to the differences between the DGGS's proposed role and that given to the Director General of Telecommunications. I am also not convinced that there is any real risk of over-zealous regulation - the normal concern is of 'agency capture', not the reverse. Much will depend on the regulator - whom you will appoint. And I think the outside world would see it as counter to common sense to set up a special regulator because of worries about monopoly power but to exclude the regulator from part of the market where that power is held.

I am sending a copy of this letter to the Prime Minister and Members of E(A).

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LEON BRITTAN

