October 24, 2000

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

Dear Ms. Litt,

Re: Comments on the Staff Draft Rule

I am writing to provide you with the comments of Enbridge Consumers Gas on Staff's draft for consultation of the proposed *Gas Distribution Access Rule*. Our introductory comments address the OEB's jurisdiction to make a rule that purports to govern the conduct of gas marketers and consumers as well as gas distributors. We then comment on Staff's draft on a section-by-section basis, in the light of our jurisdictional concerns, *vis-à-vis* both policy and text. Finally, we provide our responses to the questions posed in Ms. Powell's letter.

Introduction

Our initial comment is that Staff's draft goes well beyond the OEB's rule-making authority under section 44 of the *Ontario Energy Board Act, 1998* (Act). This is so, moreover, even when the draft is viewed as a means "[t]o facilitate competition in the sale of gas to users" pursuant to paragraph 1 of section 2 of the Act. To be sure, the OEB has the authority under other sections of the Act, such as subsection 36(4) and 42(3), to regulate a gas distributor's rates and services but, nevertheless, these sections cannot be imported into section 44 as the means of validating an otherwise invalid rule. Instead, the proposed rule must fall squarely within the OEB's rule-making authority under clauses 44(1)(b) and 44(1)(d) of the Act.

Clause 44(1)(b) empowers the OEB to make rules governing the conduct of a gas distributor as such conduct relates to a gas marketer, in effect, and here the term "gas marketer" is not restricted by section 47. It is the gas distributor's

conduct in relation to a gas marketer, and no one else, that the OEB is empowered to regulate by means of a rule.

Clause 44(1)(d), on the other hand, empowers the OEB to make rules establishing conditions of access to distribution services provided by a gas distributor. A condition of access, in ordinary as well as industry parlance, is something that a gas distributor can require of a person seeking to procure a distribution service, as a prerequisite of providing the service, rather than *vice versa* such that clause (44)(1)(d) is not analogous to clause 44(1)(b). The OEB cannot, in consequence, use clause 44(1)(d) to make a rule governing the conduct of a distributor as such conduct relates to a consumer or, indeed, to any other person.

Staff's draft seems to be premised on the assumption that section 44(1)(d) is drafted analogously to section 44(1)(b) with wording such as "governing the conduct of a distributor as such conduct relates to a consumer".

Nor can the OEB use its rule-making process to amend, in effect, the meaning of the terms that are defined in section 3 of the Act, such as "gas distributor" and "distribution", as a means of validating provisions in the proposed rule that are otherwise invalid. A "gas distributor" is "a person who delivers gas to a *consumer*" (emphasis added) and, in consequence, "distribution" and thus a "distribution service" each comprises the delivery of gas to a consumer.

It is likewise invalid for the OEB to use its rule-making process as a means of establishing a regulatory framework for the sale of gas by a gas distributor. The OEB cannot create, by making a rule, the counterparts of subsection 26(1) and section 29 of the *Electricity Act, 1998*. The former speaks of "generators, retailers and consumers", whereas the term "distribution" speaks only of consumers, and the latter governs the sale of electricity by a distributor rather than the conduct of a distributor in relation to a marketer or conditions of access to distribution service. There are, in short, no counterparts within the OEB's rule-making authority.

The OEB's objectives in relation to natural gas are also relevant here. Staff has ignored these objectives and substituted alternative objectives. In reviewing the

draft Rule, it is hard to escape the conclusion that Staff has not taken into account that the OEB is a creature of its statutes. We are astounded that neither Ms. Powell's letter of September 26, 2000 nor the draft Rule include any reference to section 44 of the Act. It is our belief that Staff's draft Rule has been in effect developed in a vacuum, as if Staff were responding to a direction from the OEB to draft a rule related to gas distributors. The OEB has very broad powers but it is not within the OEB's or Staff's purview to re-write the Act and the other statutes under which the OEB operates. As discussed below, a number of the provisions in the draft Rule go beyond the Act and some, in fact, would frustrate the operation of the Act. We encourage Staff when it provides its comments to the OEB to place their recommendations within the context of the legislation which governs the OEB.

Staff's approach seems to be that of designing a general oversight power for utilities. This leads to an approach to rule-making based on the assumption that there should be little or no discretion exercised by the utility. This is highlighted, for example; by the way in which "non-discriminatory" is always followed by "non-preferential". As Staff is aware, the Task Force adopted the terminology of "Distribution Access Rule" as being more consistent with section 44 of Act than Staff's terminology of "Distributor Access Rule". This distinction may not appear significant, but it is at the heart of Staff's approach to the Rule.

<u>Section 1 – General and Administrative Provisions</u>

Section 1.1 and 1.2 should be deleted. We note that there are no corresponding objective or purpose sections in the Electricity Retail Settlement Code. In addition, as discussed above, the purposes and objectives do not correspond well with the objectives of the OEB for gas. The objectives quoted here, particularly "to provide customer protection", are more consistent with a view that places gas distributors in a position of responsibility for policing the natural gas commodity market. Under the old *Ontario Energy Board Act*, the OEB proceeded in this fashion due to its limited powers over market participants in the natural gas commodity market. For example, in deciding upon the introduction of ABC service by Enbridge Consumers Gas and Union, the OEB required the development of a Gas Marketer Code of Conduct and compliance with that Code as a condition of its approval. The OEB now has direct powers over market

participants in the natural gas commodity market. Continuation of the indirect approach is inconsistent with the *Energy Competition Act* and is likely to be more costly and less effective than the direct approach.

The definitions in section 1.3 should be reviewed. Some of them contradict the definitions in the Act itself (see comments above on "distributor" and "distribution services"). The definition of "business day" is unconventional. "Service transfer request" should be "service transaction request". The "balanced gas account" should read "banked gas account" (BGA). The definition also does not account for the use of BGAs by large volume customers that do not use marketers. The current definition in Enbridge Consumers Gas' Rate Handbook is "a record of the volume of gas delivered by the Applicant [i.e. consumer] to the Company [Enbridge Consumers Gas] in respect of a Terminal Location (credits) and of the volume of gas taken by the Applicant at the Terminal Location (debits). This reflects the fact that under current direct purchase arrangements, deliveries are not made by a marketer on behalf of a customer, but as agent for the customer.

We also recommend the deletion of a number of the definitions. Several definitions in the draft Rule (e.g. "emergency gas leak response service") treat certain activities of the distributor as if they were services provided pursuant to a rate schedule (see comments on section 2). Since we are recommending the deletion of section 5 (see below), the definition of "Standard Supply Offering" should also be deleted.

<u>Section 2 – Distribution Services</u>

This section is relevant to section 44(1)(d) of the Act. We recommend that the final Rule include a reference stating this.

Section 2.1 raises some of the same issues as section 4 in relation to the rights of unconnected customers. It would also appear to preclude the ex-franchise services currently offered by Enbridge Consumers Gas and for which rate schedules have been approved by the OEB (Rates 200, 325, 330 and 331 - see page 4 of Enbridge Consumers Gas' Rate Handbook).

Paragraph 2.2.2 should be deleted or revised to refer to the corresponding legislation requirements to avoid differences in interpretation. This revision would need to eliminate the description of these activities as services.

With respect to paragraph 2.3.1 (record-keeping responsibilities), we do not believe that this relates to conditions of access to distribution services and we recommend that it be deleted.

Section 4 – Expansion and Connection to a Distribution System

This section is relevant to section 44(1)(d) of the Act. We recommend that the final Rule include a reference stating this.

We question the rationale for including section 4.1 within the Rule. It would create rigidity, could delay or prevent the implementation of best practices, and could lead to instances where Staff, in discussions with customers, mis-interprets or misunderstands a distributor's policies.

Section 4.1 also requires the filing of policies and implementation guidelines associated with these policies. These policies have been filed by some distributors in relation to their rates cases under what is now section 36 of the Act. Most of these policies do not have implementation guidelines and thus this section would, if implemented, lead to significant resource commitments to develop such guidelines. As well, the Energy Returns Officer can require filing of any such material.

Paragraphs 4.2.1 and 4.2.2, as currently drafted, are unclear in that they do not distinguish whether the request for system expansion pertains to customers connected on main or customers who are off-main. Staff's suggestions ignore the legislation and the Task Force recommendations, and will be difficult to make work in practice. The Task Force recommended that the Rule should not create a right to connection for persons not on main, but would address the rights of persons located on a distribution main and the rights of persons to distribution service once attached.

Staff's suggestions could place an obligation on the utility to invest depending on how the phrase "when the distributor is able to expand service" is interpreted. The Task Force recommendations addressed the implications of the EBO 188 Report and its use by the OEB in the ratemaking process. The Report does not obligate the utility to invest in system expansion that are economic or meet any other system expansion criteria. The Task Force agreed that the ratemaking process affects the utilities' economics of system expansion but does not directly determine which currently non-connected customers will be attached to the distribution system.

We recommend that section 4.2 should be revised to follow the recommendations of the Task Force or replaced by a provision such as "the distributor shall apply its system expansion and connection policies in a non-discriminatory manner".

Section 5 – Standard Service Offering

Staff's suggestions in this section appear to represent a paralleling of the corresponding provisions of the Electricity Act, 1998. When issues relating to the electricity and gas were discussed at the Task Force, the Task Force took the approach that there should be consistency between the two energy forms except where there were reasons for the differences. In this case, Staff's recommendations ignore several major differences between the treatment of gas and electricity in the legislation.

The legislation does not create an obligation to provide a standard service offering for natural gas. It lays out that if a distributor sells gas, it must do so subject to an OEB order, except for Kitchener and Kingston, which are grandfathered from this provision. This distinction makes sense when the differences in the natural gas and electricity markets are considered. There is no analogy to the Independent Market Operator (IMO) on the natural gas side. In addition, purchasing natural gas, for example in Alberta or at Dawn, Ontario would require arranging for the transportation of that gas to a distributor's franchise area. Again, this differs from the way the electricity market in Ontario will be structured.

The Task Force made no such recommendations on system gas because it recognized that the legislation distinguishes between sales services and distribution services (see introductory comments). The OEB's powers over distribution services are different than those over sales service provided by a distributor. Section 44(1)(d) is restricted to distribution services and therefore it is beyond the OEB's jurisdiction to include this section in the Rule. Staff's re-definition of "distribution services" in the draft Rule cannot override the legislative definition and thus cannot be used to create a right of access to system gas. In addition, as drafted, the provisions of the Rule would appear to contradict section 42(3) of the Act, and would act to frustrate any application under the subsection seeking an order to compel a distributor to cease providing gas sale service.

Including this section in the Rule would represent a giant step backward in the evolution of the natural gas market. Staff seems to envision that Ontario natural gas distributors would be required to provide, as a public service, the sale of natural gas to customers that the marketers did not wish to serve. The likely effect, particularly given the current level of concentration in the residential natural gas marketplace, would be to create a marketplace with only two "choices". These "choices" would be the regulated distributor supply based on a pass-through of market prices and whatever products and services the dominant supplier(s) chose to make available.

Section 6 – Distributor-Marketer Relations

This section is relevant to section 44(1)(b) of the Act. We recommend that the final Rule include a reference stating this.

While we agree with the premise of providing the retailer with relevant information to the distributor for change in customer accounts, the required time limit would be unnecessarily costly and burdensome. The Task Force reached a consensus to provide the information outlined in the Rule but without imposing a time constraint. Staff's suggestions deviate from current distributor-marketer practices and do not provide distributors with the flexibility required in processing such requests.

Section 7 – Service Transaction Requests

This section is relevant to section 44(1)(b) of the Act. We recommend that the final Rule include a reference stating this.

Staff's recommendations have generally followed the report of the Task Force, but deviate from them in one major respect. This deviation is the requirement that transfers would take place on billing dates, rather than following the current gas industry practice of generally occurring on the first of the month. A move to billing dates was not discussed at the Task Force. Transfers in the natural gas industry typically take place on the first of the month since that corresponds to the arrangements for gas purchasing and transportation. A move to billing date could avoid some of the need for pro-rating bills, which causes some customer confusion at this time, but would also require substantial changes in the current direct purchase processing and arrangements. We currently read customers' meters on a bi-monthly basis, which could create a need for a large number of special meter reads. If a major change in direct purchase processing such as this is to be implemented, we recommend that Staff highlight this change in its next draft so that an industry consensus can be reached on this issue.

On paragraph 7.3.4, a caveat needs to be added "unless the marketer so advises", as there may be instances where the marketer is delayed in providing the relevant information to complete the process or in providing gas supply. Otherwise the distributor would be placed in the position of advising the marketer that it must re-submit the entire request to avoid the distributor being in violation of the Rule.

On paragraph 7.5.1, the sentence which starts "if the customer requests that processing be terminated" should be replaced with the corresponding sentence from paragraph 7.6.4 "If the request to cease processing is received from a marketer". These changes would make the treatment of marketer to marketer transfers the same as the treatment of marketer to system gas transfer. Otherwise, an obligation is placed on the customer in the marketer to marketer transfer that is not placed on the customer in the marketer to system gas transfer.

Section 8 – Customer Information

This section is relevant to section 44(1)(b) of the Act. We recommend that the final Rule include a reference stating this.

Enbridge Consumers Gas is concerned that this section may conflict in practice with the provisions of the Affiliate Relationships Code. The consensus recommendation of the Task Force (recommendation 7.2) is consistent with the relevant provisions of the Affiliate Relationships Code. In our view, it should therefore replace section 8.1 of the draft Rule.

With respect to the provisions of sections 8.2 and 8.3, we currently provide marketers with some of this information. Our comments are as follows:

- Paragraph 8.2.2.2 "method of bill calculation" needs to be clarified.
- The information in paragraphs 8.2.2.3 and 8.2.2.4 is not currently reported and therefore there will be costs associated with complying with these provisions.
- The five-day time limitation in paragraphs 8.3.1 and 8.3.2, to provide the customer data to the marketer, will create higher costs. It is also unclear as to how these provisions will work together with 8.3.4.
- Paragraph 8.3.3 will mean that use of standard reports will be strictly limited. The need for custom reports will have significant cost implications.
- A process will need to be put in place to support the validation process proposed in paragraph 8.3.4.
- Paragraph 8.3.5 should be clarified as follows: "if a distributor assigns new account numbers to the customers of a marketer", so that there is no obligation for the distributor to report this information to other marketers.

Section 9 – Billing

This section is relevant to section 44(1)(b) of the Act. We recommend that the final Rule include a reference stating this.

While Staff's draft recommendations on billing closely parallel those of the Retail Settlement Code, they are inconsistent with the process agreed to by the Market

Design Task Force and with the approach taken by the OEB in its ruling on the CENGAS motion. They are also inconsistent with the OEB's rulings on ABC service and the Undertakings of Enbridge Consumers Gas and Union Gas with the Ontario government. ABC service was developed through a consensus of the industry as an option that would provide greater clarity to consumers in direct purchase and greater flexibility to marketers. It was classified by the OEB as a non-utility service and the OEB's approval was required for Enbridge Consumers Gas and Union to continue to provide such service.

Staff's recommendations on billing represent a significant shift in this approach. First, either ABC, or a similar service, and marketer-consolidated billing are assumed to be obligations of the distributor. These provisions are inconsistent with the Undertakings.

The obligation to provide marketer consolidated billing is problematic for a number of other reasons. First, unlike the development of all other direct purchase arrangements in Ontario, it is not being done by consensus of the parties. ABC service was developed as an option for marketers. The introduction of marketer consolidated billing by fiat on a mandatory basis is the antithesis of this approach. Second, this shift will have significant implications on the market, on customers and on the distributors. Ontario has the highest proportion of direct purchase of any Canadian jurisdiction. In large part, this penetration has been achieved through marketer programs such as "you will continue to receive your bill from the utility" and "nothing will change". Our customer research continues to show that, while declining, the proportion of direct purchase customers that are unaware that they are purchasing their gas from a marketer is still unacceptably large.

Fundamentally, the obligation to provide marketer consolidated billing is a direction to develop a wholesale distribution service. This raises two jurisdictional concerns. First, section 36 or subsection 42(3) or both is (are) the only means of implementing wholesale distribution service. Thus, including this provision within a section 44 rule could serve to frustrate section 42(3). More fundamentally, wholesale distribution service does not fit well within the Act. It would appear that any marketer using wholesale distribution would become a distributor within the meaning of the term "distributor" as defined in the Act and

would therefore be subject to section 36 of the Act, including the requirement to obtain an OEB order for the sale of the commodity (see introductory comments).

A shift to marketer consolidated billing would increase customer confusion, would in practice restrict customer choice, and would increase the distributor's risks. We believe that, before proceeding with such a major shift, the OEB needs an evidentiary basis to determine whether such a change is in the public interest. This is particularly so when it will be difficult, if not impossible, for the OEB to reverse direction after it is faced with the consequences of such a shift.

Paragraph 9.4 relates to system gas supplied by the distributor. It should not be included in this section which relates to the distributor's conduct in relation to marketers. As discussed above (see introductory section and comments on section 5), system supply is not a distribution service and provisions related to it are beyond the scope of the Rule.

This section also includes a number of provisions which are to apply directly to marketers (e.g. paragraphs 9.1.1, 9.2.1, 9.3.1.2, and 9.5.1). Unlike the Retail Settlement Code (for electricity), the Rule applies only to distributors. Putting these into the Rule would put the distributor in a policeman role. The discussions at the Working Group and the Market Design Task Force have highlighted the issues which are raised by placing the distributor in the role of policing the obligations of other parties. It would appear that if Staff wishes to recommend such provisions to the OEB, their only route would be to recommend a new rulemaking for the Gas Marketer Code (section 44(1)(c) of the Act).

<u>Section 10 – Security Arrangements</u>

This section covers matters related mainly to section 44(1)(b) of the Act. Since section 44(1)(d) does not read "conduct of the distributor in relation to a consumer", we would recommend that the references to consumers should be deleted. If this is done, the remaining provisions would be relevant to section 44(1)(b) of the Act. We recommend that the final Rule include a reference stating this.

For paragraph 10.1.1, we have already commented above on policy filing requirements. (See comments on paragraph 4.1.1) Similar comments would apply to sections 10.1 and 10.2.

Paragraph 10.2.2 needs to be revised so that it fits within section 44(1)(b) and also to recognize that distributors are at risk of non-payment from marketers for other than distribution services. We would substitute for both paragraph 10.1.1 and 10.1.2 the following: "A distributor, in requiring a marketer to provide security arrangements, shall treat like credit risks in like fashion."

The references in paragraph 10.3.1 to customers and embedded distributors should be deleted as these do not fit within section 44(1)(b) of the Act.

The provisions in paragraph 10.3.2 need to be more clearly defined. For example the reference to "irrevocable line of credit" should be replaced by wording such as "irrevocable letter of credit from an accredited financial institution". Similar comments would apply to other provisions, such as "credit rating". Otherwise the distributor would be placed in the position of being required to accept lines of credit or credit ratings issued by a party that is not creditworthy or reliable and objective.

On paragraph 10.3.6, we note that these provisions are based on the Task Force recommendation, which it agreed to in the Task Force Report. This recommendation was based on the principle that the distributor should be held whole to default by a marketer. Recommendation 5.1 of the Task Force Report includes this by providing that "distributors should be permitted to require security from retailers as a protection against payment default by the retailer". Since the completion of the Task Force Report, CanEnerco Energy Marketing Limited ("CEML") experienced failures to deliver and subsequently was petitioned into bankruptcy. Our experiences with CEML's difficulties have demonstrated that the provisions in paragraph 10.3.6.1 are insufficient. In particular, CEML did not pay TransCanada in relation to upstream capacity which was assigned on a short-term basis (one year or less) and Enbridge Consumers Gas may be liable to TransCanada.

We recommend that Staff should consult with distributors to revise this provision. If the provision is implemented in its current form, it will create an increase in risk to the utility.

With respect to sections 10.4.2 and 10.4.3, we believe that these paragraphs should be deleted. As it stands, an increase of less than ten percent depending on the dollar amount could result in an increase in risk to the utility with no ability for the distributor to mitigate this risk. This provision could also result in different treatment for different marketers, for example, if one is required to provide a greater level of security for the same credit risk, solely because the distributor is precluded from adjusting the level of security for one of the marketers. We believe that paragraphs 10.4.1 and 10.4.4, together with the requirement to treat like credit risks in like fashion would be a more efficient way to proceed.

Section 11 – Financial Default by Marketers

This section is relevant to section 44(1)(b) of the Act. We recommend that the final Rule include a reference stating this.

The Task Force did not make recommendations on these issues. We are concerned that the provisions here mix the concepts of application of security and transfer to system supply. These are two different issues. We are also concerned that these provisions may impede the legal right to set-off in the collection service agreements under ABC service and will therefore increase the utility's risk level.

Section 12 - Complaint Procedures

We note that this section parallels the relevant provisions of the Affiliate Relationships Code but are concerned that this may not be appropriate for end-use customers. This section may be appropriate for complaints relative to section 44(1)(b) of the Act. For complaints relative to section 44(1)(d) of the Act, the time limitations in paragraphs 12.4 and 12.5 should be extended and a more appropriate referral process be put in place in lieu of paragraph 12.7.

On paragraph 12.1, a caveat needs to be added “that the complainant describe the nature of the complaint including identification of the specific rule which is considered violated.”

Response to specific Staff questions

Staff specifically requested comment on the following:

1) Is the Rule easy to understand? Is the draft Rule open to interpretation?

As noted above, in a number of areas, the wording in the draft Rule does not correspond well to the legislation. This raises questions as to differences in interpretation. We believe that, in such cases, the Rule should correspond to the legislation, word for word, if possible, to avoid such interpretation difficulties. It should also be made clear whether provisions of the Rule relate to section 44(1)(b) or section 44(1)(d) of the Act.

2) Are there implementation issues, either transitional or long-term, that the Board should be aware of? If so, what are they?

We have already discussed a number of implementation issues above. The processing of service transaction requests represents a substantial change in current direct purchase processing. We have begun the process of reviewing the changes necessary and will advise the OEB in our submissions on the final Rule, so that any changes from this round of comments can be included.

3) Does the draft Rule serve the needs of stakeholders? If not, what objectives should be achieved what paragraphs should be amended, and what are the required changes?

No. See comments above.

4) Are the standards adequately prescriptive?

The standards are overly prescriptive and are based on the assumption that restricting the distributor's discretion is an appropriate approach. See the comments below in response to question 8.

5) How can compliance with the Rule be facilitated?

We understand this question to relate to the requirements placed on marketers by some of the provisions of the draft Rule. As discussed above, we do not believe that it is appropriate to use a rule-making power applicable only to distributors in this manner.

6) Are the processes and conditions relating to the expansion of service adequate? Are they capable of accommodating all situations?

The processes and conditions relating to the expansion of service, in particular the five-day requirement for response will be difficult and costly to make work in practice. Also, as discussed above, these provisions may contradict the legislation.

7) Are the conditions surrounding service transfers reasonable?

We believe that the service transfer protocols included in this Rule are very resource-intensive and may not accomplish the goals laid out for them. We supported alternative A for the reasons discussed in the Task Force report. As the market continues to evolve, we believe that less resource-intensive alternatives should be put in place and the Rule will therefore need to be flexible and to evolve.

8) Should small gas distributors be subject to the Rule?

On the electricity side, one of the impetuses for rule-making is the large number of small and medium-sized electricity distributors. Thus the approach has been to have “one size fits all” rules with limited discretion. From this point of view, small gas distributors should be subject to the Distribution Access Rule. We believe, if exemption on the basis of size is to be considered, it should be for the large gas distributors, who have demonstrated over the last ten years that they are willing to work with the OEB and industry participants to move the market forward.

Yours truly,

J.C. Allan
Director, Unbundling Policy