

October 23, 2000

Ontario Energy Board
P.O. Box 2319
2300 Yonge St., Suite 2601
Toronto, Ontario
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Attention: **Kathi Litt**

Re: Union Gas Limited Comments on Draft Distribution Access Rules

The Ontario Energy Board (OEB) staff issued for comment a draft Distribution Access Rule (DAR) on September 26, 2000. This correspondence contains Union Gas Limited's (Union) comments on the draft DAR.

Union's specific comments on each clause of the draft rule are embedded in the attached draft rule document. Specific changes are black-lined in the draft text with comments and rationale following the revised clauses. In addition to the specific comments, Union's general comments on jurisdictional concerns raised by the draft rule follow below.

General Comments

The Distribution Access Rules are provided for through Sections 44(1)(b) and 44(1)(d) of the *Ontario Energy Board Act* (the *Act*). Any assessment of a proposed draft rule should start with a consideration of the enabling legislation.

In summary, 44(1)(b) provides for the Board to make rules considering the conduct of a gas distributor as such conduct relates to gas marketers, agents or brokers and 44(1)(d) provides for the Board to make rules establishing conditions of access to transmission, distribution and storage services provided by a gas transmitter, distributor or storage company.

There are a number of issues raised by the draft circulated by Board staff on September 26.

The new *Act* was revamped to include regulation for both gas and electricity sectors. Many sections of the gas parts of the *Act* have analogous sections in the electricity parts of the *Act*. However, these parts are not always identical and there are sections included

in one part that do not appear in the other. In implementing the provisions of the *Act* it must be kept in mind that the legislators had deliberate reasons for writing the *Act* the way they did. While the rules issued may seek to ensure a level playing field between the gas and electricity sectors, this does not necessarily mean that the rules need to be identical. Any rule issued pursuant to the *Act* should not try to harmonize away the differences between the electricity and gas parts of the *Act*.

Standard Supply Offer

The definition of gas distributor in the *Act* is a person who delivers gas to a consumer and “distribute” and distribution have corresponding meanings. In section 36(1) the sale of gas is identified separately from the transmission, distribution and storage of gas. The Board has required Union to seek explicit approval to provide gas sales service because it is not considered a transmission, distribution or storage service.

Where the *Act* does not include gas sales as a distribution service, rules made pursuant to that *Act* couldn't redefine gas sales as a distribution service. While the electricity parts of the *Act* (Section 70(2)(h)) permit the Board to specify retailing obligations, no analogous provision exists in the gas parts of the *Act*.

In Union's view the distribution access rule cannot deal with any conditions of access to a Standard Supply Offer because the legislative framework does not provide for it.

Further, the new *Act* explicitly removed any obligation by distributors to supply natural gas and replaced it with an obligation to distribute. An access rule for distributors cannot now re-impose an obligation not contemplated by the *Act*. This is not to say that distributors won't supply consumers not served by marketers. Union has applied to the Board for approval to provide natural gas sales service as it is in its commercial interest to ensure consumers are happy with and use natural gas. Section 42(3) of the *Act* does provide that, upon application, the Board can order any distributor to provide or cease to provide any gas sale. However, the access rules cannot be used to impose a general obligation to make any gas sale.

Emergency Response

The draft refers to Emergency Supply Planning. Distributors have for years put plans in place for dealing with emergencies. The distributors' need is more precisely for rules dealing with emergency response so that distributors can act on their emergency response plans.

The draft rule generally reflects the needs of distributors and the recommendation of the taskforce in terms of its provisions. However, as noted by the taskforce, the enactment of these rules is not possible without legislative change because they include the forced sale of gas by shippers to distributors in times of emergencies.

Expansion and Connection to Distribution System

The *Act* provides for an obligation of distributors to “provide gas distribution services to any building along the line of the gas distributor’s distribution pipe lines upon request in writing of the owner, occupant or other person in charge of the building.” No statutory obligation exists to expand a distribution system under any circumstances. System expansions are investment decisions made by the distributor. EBO 188 provided guidelines to distributors on criteria that system expansions should generally meet to be considered by the Board for later inclusion in rate base for ratemaking purposes. It is important that any access rules for system expansions not imply any obligation to expand the distribution system.

Marketer Consolidated Billing

The draft proposes a rule which would require distributors to offer marketer consolidated billing. The related provisions in sections 10 and 11 dealing with security and financial default by the marketers indicate the intention of the rule that in these circumstances the marketer would become financially responsible to the distributor for the financial obligations associated with the provision of the delivery service and would eliminate any recourse to the ultimate consumer. Union presumes this was done to parallel the provisions of the *Retail Settlement Code* and to avoid the obvious legal and policy questions raised by eliminating a billing relationship with the consumer who is responsible to the distributor financially for delivery service. Adoption of the draft rule would, in the result, require the distributor to provide a wholesale delivery service to the marketer who would in turn enter into a retail delivery contract and associated billing relationship with the ultimate consumer.

There are a number of jurisdictional impediments to the use of the rule-making power contained in sections 44(1)(b) and (d) of the *Act* as a means for requiring the provision of a wholesale delivery service. Many of the relevant statutory provisions are significantly different than those that apply with respect to electricity.

In the first place, the *Act* requires that a Board decision, that a gas distributor provide a distribution service, should be done upon application and by order (section 42(3)) and hence, subject to limited exceptions, only after a hearing (section 21). The rule-making power cannot be used to avoid the statutorily mandated procedure for a determination of this sort.

Secondly, a requirement to provide a wholesale delivery service is not a matter which falls within the scope of the matters which may be the subject of a rule pursuant to section 44(1)(b) and (d) of the *Act*.

Thirdly, the *Act* (unlike the proposed rule, which of course cannot be used to override the provisions of the *Act*) defines a “gas distributor” as “a person who delivers gas to a consumer” and attributes corresponding meanings to “distribute” and “distribution”. In

other words the *Act* evidently describes distribution as an inherently retail, rather than wholesale activity.

Finally, if a marketer were permitted to purchase wholesale delivery service from the distributor and enter into a retail delivery service contract (and billing relationship) with the consumer, the marketer would become a gas distributor in the definition noted above. In the result, even if all of the other obstacles were overcome, the provision of such service to a consumer would require the marketer to obtain an authorizing order from the Board both with respect to its distribution, and also with respect to its sale of gas, by virtue of the provisions of section 36(1) and (2).

For all of these reasons, the proposed rule is outside the scope of what is permitted pursuant to the *Act*.

In addition to the jurisdictional problems, the proposal for marketer consolidated billing, if taken up, would fundamentally alter the nature of the distributors' business, risk and returns. Even if this were done pursuant to a valid exercise of Board jurisdiction, it represents a fundamental change, which should only occur after a hearing. The Board should hear and consider evidence as to the nature of the consequences of the fundamental change and the steps, which would be necessary to address the implications of that change.

One of the objects of the Board included in the *Act* is to facilitate competition in the sale of gas to users. It appears that a move to require marketer consolidated billing is intended to further this object. However, with the availability of Agency Billing and Collection Service from the distributors and Union's proposal to facilitate direct billing by marketers for the services they provide, the addition of marketer consolidated billing does nothing additional to facilitate the competition of the sale of gas to users.

Exhibit B, Tab 4 of Union's evidence in RP-2000-0078 outlines the substantial impacts on the distributor and its customers of a move to marketer consolidated billing. In summary, the impacts outlined in the evidence are:

1. Union's ability to manage asset utilization risk

Union has \$2.9 billion invested in Ontario gas distribution assets. Union, and not REMs, has an interest in ensuring that these assets remained used at the high utilization rates that exist today. REMs may encourage consumers to substitute electric equipment for natural gas equipment and will not face the financial impact of the under-utilized natural gas distribution assets that results

2. Union's ability to negotiate franchise renewals

Union must negotiate franchise renewals with municipalities, many of which own electric utilities, which compete with Union. Union's ability to maintain

its relevance and importance to consumers in the municipalities is critical to the successful renewal of franchises and to efficient and cooperative operating relationships with municipal officials.

3. Shareholder value and the cost of capital

Markets currently ascribe value to the customer relationships that utilities have. The impairment of these relationships by the introduction of marketer consolidated billing can negatively affect the value of the distribution companies and have a negative impact on the cost of capital available to utilities.

4. Union's ability to communicate public safety information

Union has an obligation to ensure that the natural gas distribution system is operated in a safe manner. Part of meeting that obligation is the provision of public safety information. The natural gas bill is the most effective and desired communication channel for receiving these messages. Marketer consolidated billing would remove Union's unfettered access to the use of this communications channel.

5. Credit risk faced by Union

Union currently faces a credit risk reflecting the diversification of its revenue stream across over a million customers. The introduction of marketer consolidated billing will concentrate 40% of its revenue stream among a few marketers.

6. Customer understanding of the energy market

A number of changes are occurring in the Ontario energy market. In 2001 Consumers will have to deal with competition in the electricity industry and with the introduction of unbundled services in the natural gas market. There are limits to the amount of change consumers can effectively absorb and customers have not expressed a desire for marketer consolidated billing. Customer preference and readiness to deal with such a significant change in the natural gas market should also be considered before moving to a regime of marketer consolidated billing. As shown under Exhibit B, Tab 4, Appendix C of Union's evidence in RP-2000-0078, customer preference research shows that customers prefer distributor consolidated bills and there is little demand for marketer consolidated bills.

Union's specific comments on each clause of the draft rule are embedded in the attached draft rule document.

Thank you for the opportunity to comment on the draft rule. If you have any questions concerning Union's comments on this draft Distribution Access Rule please call me at (519) 436-4515.

Yours truly,

Marcel Reghelini
Manager, Regulatory Affairs

cc: T. Jackson, Torys