Ontario Energy Board

Gas Distribution Access Rule

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Submissions on behalf of The Convergence Group ("TCG") consisting of

Ontario Hydro Energy Inc. ("OHE"),

Sunoco Inc. ("Sunoco"), and

Toronto Hydro Energy Services Inc. ("THESI")

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Introduction and Summary of Position

1. Two problems have plagued the development of an effective retail market in natural gas: the lack of customer mobility, and the lack of a transparent retail relationship between marketers and customers. The Board has learned from this experience and, in creating the rules for the retail electricity market, sought to avoid these problems through the Retail Settlements Code which clearly sets out that end use customers will decide from whom they will be served and billed. The Board has proposed a Distribution Access Rule ("DAR") which will apply these principles in the gas sector.

2. These submissions are filed for one purpose: To urge the OEB to maintain this position and apply the same principles for the development of the retail natural gas market as it already adopted for the retail electricity market. If this is done, the OEB will be establishing a retail energy market that will be, open and transparent. If not, the retail gas market will be stifled, and a converged retail energy market will be still-borne.

3. The parties to these submissions are Ontario Hydro Energy Inc ("OHE"), Sunoco Inc. ("Sunoco"), and Toronto Hydro Energy Services Inc.("THESI") ("The Convergence Group", or "TCG"). All of these parties are licenced gas and electricity marketers; all of these parties have a major stake in the development of a converged retail energy market; and all of these parties have contributed significantly to the development of fair and competitive rules in both gas and electricity. Most importantly, all of these parties believe that the Board has adopted the right approach in developing rules for electricity and that if the Board wants to establish an effectively competitive retail energy market, it should apply this model across both sectors.

4. These submissions address customer mobility and marketer consolidated billing. These have proven to be the most controversial issues in the DAR. The letter accompanying Board Staff's draft DAR indicated that, these issues were resolved

in a manner that favours customer protection and parity between electricity and gas. The Convergence Group supports this approach.

5. In summary, with respect to customer mobility, it is submitted that the *status quo* of distributors not following a customer's directions as to his or her choice of supplier is unacceptable. For several years the Board has recognized that this approach is inconsistent with the principles of competition, and deliberately ensured that this problem would not arise in electricity. The Board now has the opportunity to fix this problem in gas as well so that the retail energy sector operates on principles of customer choice.

6. Customer choice should also be the operative principle for marketer consolidated billing. Gas customers do not have a choice over who supplies a single gas bill. The gas utilities want to maintain their monopoly and are requesting the Board to order that customers must receive a bill from distributors whether the customer wants it or not. In other words, a bill from the distributor is proposed to be a condition of access to the monopoly distribution service. The Board has not taken this approach in electricity. In the electricity sector, customers will have the choice over their bill provider. Customer research undertaken by the Convergence Group indicates that a majority of customers want this choice. As well, despite the utilities' objections, the Board has the authority to provide customers with this choice.

7. The Convergence Group's detailed submissions are set out below.

Customer Mobility

8. Ontario natural utilities do not follow the direction of customers as to the customer's choice of a supplier. Once a customer has signed with a marketer, the distributors will not follow a customer's direction to "fire" the marketer. As a result, marketers have been immune from the ultimate discipline of a competitive market: the need to keep the customer.

9. The OEB has never expressly given marketers this immunity. To the contrary, the OEB has consistently recognized that the lack of customer mobility has been a hindrance to the development of a workably competitive market. As far back as its September, 1996 *Report on the Ten Year Market Review*, the OEB stated that the "ability to switch suppliers" is one of the "requirements of an ideal competitive market" (at p.9). In the five years that has passed since that Report, the Board has continued to recognize the customer mobility problem, and has tried to find an industry solution through DPIC, OEMA, and the Market Design Task Force. Those attempts have failed.

10. It is not surprising that in the electricity context, the Board was sure to avoid a repetition of the gas experience. Thus, when the issue of customer mobility was discussed in the Electricity Retail Settlements Code Task Force, Board Staff, who have participated in the many forums that addressed this issue in gas, brought the benefit of their experience to bear. According to the minutes of the meeting where this issue was addressed, the Task Force was apparently prepared to impose rules which would not allow customer mobility, but was advised that this was against the Board's view of public policy:

> "The issue was reconsidered in light of advice from Board staff that the Board would likely interpret this recommendation as going against the right of customers to choose their electricity supplier, which is one of the Act's primary goals and the most important responsibility of the Board. Board staff advised the Task Force that electricity supply and delivery are separate businesses and that LDCs should not be allowed to use control of the delivery business to deny customers access to supply. In the opinion of Board Staff, customer mobility is fundamental to a successful market. The Board has made its opinion clear on this issue in recent decisions in the gas industry and there is little reason to believe that their opinions will differ in electricity. Furthermore, Board staff feels that it is inappropriate to design a market around the belief that customers will break contracts. In the opinion of Board staff, most customers will not, without just cause, knowingly break a contract and if they do, the appropriate remedy is through the courts, not through a refusal by LDCs to transfer a customer to another supplier upon request.
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> After rebuttal by retailer representatives and further discussion, the Task Force voted in favour of the recommendations presented below, which allow customers to transfer over the protests of current retailers but only after sufficient notice and time for retailers to contact customers apprising them of their contractual

obligations and the potential legal consequences of changing suppliers prior to contract termination."

11. As a result, the negative experience with a lack of customer mobility in gas led the Board and Board Staff to conclude that this practice was inconsistent with the development of a competitive market. In other words, this practice was not adopted in electricity because it would frustrate competition; it should not be maintained in gas for the same reason.

12. Some marketers have argued that the Board should "grandfather" existing customers, so that only new customers get mobility rights. The rationale for this approach is apparently that marketers have taken on obligations in the expectation that the current rules will continue. This approach is extremely unsatisfactory: the Board should not discriminate against customers on the basis of when they signed their contracts.

13. Furthermore, there is no need for the Board to protect these marketers from their customers. The current lack of mobility has been criticized by the Board for at least the last five years. Marketers should have recognized that this practice was vulnerable. If marketers believe that they have a contractual right to prevent customers from choosing other suppliers (i.e., a right to specific performance of their contracts), then they should apply to the courts for that remedy. Marketers should rely on good service, not regulatory restrictions to keep their customers.

14. To conclude on this point, the Board has perceived the lack of customer mobility to be a barrier to competition. It now has jurisdiction to facilitate competition. It is respectfully submitted that the Board should exercise that jurisdiction by requiring utilities to follow customer's direction over who will supply gas. As will be argued immediately below, the Board should also require utilities to follow the customer's direction over who will issue a bill.

Marketer Consolidated Billing

15. The Retail Settlements Code for electricity requires electric distributors to allow marketers to send customers a single bill for electricity commodity and non-

competitive charges. The proposed DAR would allow marketers to include gas commodity and non-competitive charges to that bill. This would allow customers to benefit from being provided with a single bill for their energy charges, and would provide economies of scope which would justify marketers taking on the billing relationship with customers. Taking on this relationship would go along way towards normalizing marketer-customer relations. In other words, marketers could provide energy services as a normal product, where the marketers have a profile and an accountability to customers.

16. Allowing marketers to build customer relationships through Marketer Consolidated Billing ("MCB") has been the end state vision for the natural gas retail market for a considerable time. The MDTF Report Contemplated MCB no later than April 1, 2001. As recently as early 2000, both the utilities have acknowledged this and began the process of establishing rules which would allow marketer billing. However, in Spring, 2000, the distributors changed course and have gone to extra-ordinary lengths to prevent MCB. They have commissioned surveys which purport to show that customers do not want the option of being served by a marketer, and they have implicitly threatened litigation by arguing that the Board lacks jurisdiction to impose MCB. The utilities' position on both of these fronts is misguided.

Customer Choice

17. The utilities have sought to demonstrate that the Board should not allow the option of marketer billing by commissioning surveys which purportedly demonstrate that customers do not want to be billed by marketers. These surveys ask customers (whose entire history as gas consumers has been marked by a single utility bill) whether they want to be billed by the utility or by the marketer. Not surprisingly, a majority responded that they wanted to be billed by the utility. The reason for this preference is obvious: this is what customers are familiar with.

18. However, the issue for the Board to decide is not whether the marketer or the utility provides a consolidated bill. Under its mandate to facilitate competition, the Board should not make that decision for customers. Rather, the Board should allow this option to be available so that customers may make the decision themselves. The relevant question for the end use consumer is therefore not whether he or she prefers to receive a single bill from a marketer or from a distributor, the question is whether the customer would like to have the *choice* over who sends a bill.

19. This is the one question which neither Enbridge nor Union asked customers; however it is the very question being addressed in these proceedings. TCG commissioned a survey to ask customers whether they wanted the ability to choose who provides a single gas bill. A majority of customers (54%) answered that they wanted that choice. By contrast, only 12% of customers indicated that they did not want a choice over whether the distributor or a marketer provides a single bill.(A copy of the survey results is at Tab A). Yet denying customers choice over this question is precisely what the utilities are urging the Board to do.

20. Furthermore, it is again important to emphasize the importance of converged retail energy services. If MCB is not permitted in the gas sector, then the value of its availability in the electricity sector is diminished. So long as gas distributors can prevent MCB, then gas customers will necessarily not be allowed to have one marketer bill them for all of their commodity and non-commodity gas and electricity services. The TCG survey indicates that a strong majority of customers (84%) would prefer to have the ability to receive a single bill for all of these services. Again, a majority (62.5%) of customers would prefer to have a choice over who sends them that bill, and only 18% would endorse the position that Union and Enbridge are advocating here, which would not allow customers that choice.

21. Furthermore, even if the question is posed to customers about the person from who they prefer to receive a bill (as opposed to the opportunity to make that

choice), the Enbridge and Union surveys indicate that more customers would prefer to receive a combined bill from a marketer (45.7% Enbridge and 34% Union) than would prefer to receive one additional bill from the utility (29.3% Enbridge and 32% Union).

22. The fact is that customers do want the ability to choose the source of their bill. This is not to say that customers will actually choose to have a marketer provide that bill. That choice should be made through the market place. In other words, the Board has the responsibility to make rules that facilitate competition in the sale of gas. That responsibility is not met by the Board deciding whether customers should be billed by marketers or distributors. Competition is facilitated by allowing customers to make that choice themselves.

Jurisdiction

23. The gas utilities also argue that the Board lacks jurisdiction to provide customers the option of MCB.

24. Union argues that the Board does not have jurisdiction to impose MCB because, under MCB, distributors charge marketers, not consumers, for distribution services. As a result, marketers become customers of that service. Because the Act defines a gas distributor as "a person who delivers gas to a consumer", according to Union, the Board is incapable of requiring distributors to bill anyone other than consumers for that service. Furthermore, according to Union, a marketer who bills for distribution services under MCB becomes, by that fact alone, a distributor under the Act.

25. The simple answer to Union's argument is that it fails to distinguish the *delivery* of gas from *billing for* the delivery of gas. Union will continue to be responsible to deliver gas to consumers. However, it will not bill consumers for delivery, it will bill suppliers. In this way, Union Gas will continue to deliver gas to consumers. However, they will bill marketers for providing delivery. In much the same way, Union receives gas through long haul pipelines and passes on

transportation charges. That does not make Union a long haul transporter; like the marketers in its franchise, it is a shipper on the system.

26. Union is apparently prepared to acknowledge that the Board has jurisdiction to order marketer consolidated billing in the electricity sector, but not in the gas sector. According to Union, this is because the definition of "distribute" in the context of electricity under s. 56 of the Act is different from the definition of "distribute" in the context of gas. Section 56 provides that "distribute" with respect to electricity means to convey electricity at voltages of 50 kilovolts or less". Thus, according to Union, distribution services in the electricity sector are not limited to the provision of electricity services to a "consumer".

27. It is true that the Act provides different definitions for gas and electricity distribution, but that is because the two services are provided differently. Electric distributors provide a bi-directional delivery service from the IMO controlled grid to loads and from embedded generators (who may also be loads) to wholesale and retail customers. They therefore *convey* electricity for both producers and loads. However, gas distributors provide unidirectional delivery services to consumers. Gas distributors do not have producers within their franchise from whom they receive and deliver gas upstream. There is therefore a good reason why the two types of distributors are defined differently under the Act.

28. It would be remarkable if this difference in the definition of delivery results in a conclusion that the Board has jurisdiction to require electric distributors to provide marketer consolidated billing, but lacks jurisdiction to require gas distributors to provide marketer consolidated billing. According to the *Interpretation Act*, "Every Act shall be remedial… and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit." If the Board accepts Union's argument, then it is effectively concluding that the Ontario Legislature, by using the definitions of delivery discussed above, demonstrated an intent, meaning and spirit that the Board be authorized to require

electrical distributors to provide MCB, but not be authorized to do so in the gas context. This seems unlikely.

29. Union's next argument is that, even if the Board does have jurisdiction to require MCB, it cannot do so under s. 44 of the Act. According to Union, because MCB is currently not available, any order concerning the terms and conditions of that service must be made by way of an order following a hearing under ss. 36 of the Act, or s. 42 of the Act.

30. Union's argument that s. 44 is not adequate to allow MCB is not clear. Section 44 is one of the most important additions to the Board's jurisdiction brought about by Bill 35. Under s. 44, the Board has authority to make rules which are industry wide. It also has authority to bind gas distributors who are otherwise not subject to rate orders (i.e., municipally owned distributors). Rules under s. 44 can be more responsive and fine tuned than rate orders. Furthermore, the Board's exercise of authority under s. 44 is as .legitimate as its orders under other section of the Act. As the Divisional Court noted in *Alliance Gas Management v. Ontario (Energy Board)*, [1999] O.J. No. 4852, "Section 44…is not subordinate in any way to other sections of the Act and must be given its full meaning. Like all legislation it is deemed remedial." (at p. 2 of 3)

31. It is true that s. 44 does not require a hearing, but that is a reflection of the creation of a more expedited Board process. The days when the gas utilities could rely on the Board to set aside time for massive rates hearings are over. The Board now has the electricity sector under its regulatory jurisdiction as well as the gas utilities. Indeed, the entire electricity sector has seen several critical market components determined without hearings (including customer mobility and marketer billing). There is no reason why the gas sector cannot follow a similar process.

32. Union argues that only a hearing under ss. 36 or 42 could allow the Board to order MCB because this service, which it calls a "wholesale distribution service" "is a service not heretofore available". In other words, because MCB is not now in

place, it cannot be put in place through a rule under s. 44. If this were the case, s. 44 could only codify existing practices; it could not set up new requirements. There is no basis in the legislation or regulatory theory for this conclusion. Section 44 empowers the Board to make rules, rules are by their nature normative: they set out how things *should be*, not just how they are currently. This is not to say that s.44 rules are the only piece of the regulatory puzzle which has to be in place for marketer billing. Marketer billing will require implementation through rate orders, but that is an implementation issue. The policy issue respecting billing is properly brought within s. 44 because only .44 can provide an industry-wide solution.

33. Indeed, prior to Union's and Enbridge's recent about face on this issue, there was no doubt that the policy on MCB was to be addressed on an industry-wide basis in the DAR and the rate implementation was to be addressed on a utility specific basis in a rates process.

34. The Director's letter establishing the DAR process stated the following:

> "The Rule will deal with matters such as customer transfers, mobility, obligations of distributors to provide access to customer information, billing and metering service requirements. The Rules would also establish principles and policy direction regarding the unbundling of utility services. Individual service matters and costs, charges and fees for services would be the subject of each utility's rates proceeding."

35. Both utilities relied upon this direction to defer the Board's review of marketer consolidated billing in rates proceedings until the DAR process was complete.

36. In Union's RP-1999-0017 Evidence (dated December, 1999), it outlined the implementation of MCB as requiring both a DAR process and a rate design process. With respect to the DAR, Union stated: "The OEB has recently began [sic] discussions related to the development of a distribution access code. This process, which will involve stakeholder input, will establish access rules as required and will address issues related to parties other than the regulated utilities billing end use customers." (Exhibit B, Tab 1, p. 86 of 87). As for rate design,

Union stated that, after the DAR process, "A separate application will be required in order to address the development of a wholesale billing rate." (Exhibit B, Tab 1, pp. 86-87 of 87).

37. Enbridge took the same approach. In February, 2000, Enbridge wrote to the Board with respect to the process for addressing marketer billing. In response to a request to the Board by CENGAS to have marketer billing addressed in Enbridge's 1999-0001 Rates case, Enbridge stated the following to the Board:

> "Matters being addressed in the establishment of a Distribution Access Rule have a direct bearing on many of the unbundling issues that would be considered in a second phase of Enbridge Consumers Gas' Fiscal 2000 Rates Proceeding, including those issues of particular interest to CENGAS. For example, CENGAS has specific interests related to the provision by gas marketers of billing, collection and accounting services. It is anticipated that the Distribution Access Rule task force will be dealing with issues such as billing requirements and access to customer information, both of which are linked to the noted interests of CENGAS"

38. As a result, Enbridge requested the Board to defer the rate treatment of marketer billing until the DAR process was complete. In this regard, Enbridge referred the Board to the Director's outline of the DAR process described above and stated: "Utility specific matters would then be addressed in each utility's rate proceeding."

39. Thus, all parties, including the utilities and the Director of Licensing, proceeded on the basis that the DAR will address the substantive issues relating to, among other things, billing options available to customers on an industry-wide basis. It was always anticipated that the implementation of these services on a utility specific basis would require amendments to tariffs through rate proceedings. The role for s.44 was to address substantive policy issues, such as the availability of MCB. This is what all parties expected, and this is what happened. The utilities may not like the outcome of the process, but the process was still proper.

40. Furthermore, this is the same process as was followed in the electricity sector. The RSC contains a number of policy directions (including MCB) which apply to

all utilities which require rate design implementation through the Distribution Rates Handbook and subsequent utility rate applications.

41. What this demonstrates is that, for both the electricity and gas sectors, the various instruments available to the Board – rules, rates, licences, and other orders – are less hierarchical than the gas utilities would have it: these instruments complement each other, they do not conflict with each other.

42. For the foregoing reasons, it is submitted that the Board has jurisdiction under s. 44 to require distributors to provide consumers with an MCB option. MCB is consistent with the definition of "distribution" under the Act, because a gas distributor who provides MCB is still delivering gas to a consumer. It simply bills the marketer for that service. Furthermore, rules under s.44 are not subordinate to orders made under any other section of the Act. Although these rules will require implementation through tariffs, the substantive policy issues respecting MCB are properly addressed on an industry-wide basis through s. 44 rules.

Summary and Conclusion

43. In summary, with respect to customer mobility, the proposed DAR requires distributors to follow a customer's directions as to his or her choice of supplier. This reflects a level of maturation in the retail natural gas market which is long overdue. Similarly, the proposed DAR ensures that gas customers will have a choice over who supplies a single gas bill. This will allow the convergence of natural gas and electricity offers, and the development of a competitive retail energy market in Ontario.