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VIA FACSIMILE AND COURIER

Mr. Paul B. Pudge
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 26th Floor
Toronto, Ontario
M4P 1E4

Dear Mr. Pudge:

RE: Proposed Gas Distribution Access Rule

Introduction

Enbridge Consumers Gas (ECG) has participated in the DAR Task Force and the Board's review of the proposed Rule through the provision of written comments on October 24, 2000 and February 26, 2001. In this submission, we restate and build on some of our earlier comments but have attempted to focus primarily on key points of concern.

ECG acknowledges that the oral consultation exceeds the minimum requirements of the *Ontario Energy Board Act, 1998* (OEB Act) for the rule-making process but, on the other hand, ECG disputes the Board's authority to implement certain substantive aspects of the proposed Rule by means of the rule-making process. The OEB Act requires the Board to hold a public hearing, after notice, for this purpose and even then, for certain provisions, amendments of the OEB Act would be required. We also believe a public hearing is required on policy grounds, as this is the proper forum for examining the dramatic implications of the proposed Rule for gas consumers and gas distributors, and other participants in the energy and energy services marketplace.

It is surprising to realize that consumer groups have been virtually excluded from this rule-making to date, despite the fact that the proposed Rule would have a significant and direct impact on low-volume gas consumers. The exclusion of consumer input leads ECG to question the extent to which the Board considered, when developing the proposed Rule, the concerns of low-volume gas consumers, their role in the retail marketplace, and their current relationship with their gas marketers (i.e., the licensed subset of gas vendors). There is also the issue of how

the costs of implementing the proposed Rule would be recovered and how this would affect low-volume gas customers.

It is equally surprising to realize that the Board has ignored the concerns of gas distributors and their relationship with their customers; that is, with gas consumers -- both low-volume and large-volume alike. The result of the proposed Rule, if finalized in its current form, would have adverse and material financial implications for gas distributors and, therefore, for their shareholders.

Instead, the Board has apparently decided to use the proposed Rule as a means of restructuring, at the retail level, the Ontario natural gas industry in favour of gas vendors. There is no cogent evidence, though, that restructuring of this scale and scope is necessary, or even desirable, at this time. In our view, certain provisions of the proposed Rule are premature; for example, the move to a wholesale distribution model. Creation of a wholesale distribution model, as a consequence of the billing options set out in the proposed Rule, as opposed to a direct and deliberate move to such a model following a thorough review of the issues, is inappropriate and beyond the Board's jurisdiction in any event.

It is clear that the Board has used provisions of the Retail Settlement Code (RSC) as a blueprint for the proposed Rule even though the Board's supervisory powers are very different for gas and electricity at the retail level. These regulatory differences, when combined with the structural differences between the two commodity markets, make the RSC an imperfect guide for the Rule and, at this point, the differences cannot be eliminated by means of provisions in the proposed Rule. Further, the RSC has not been implemented and there is absolutely no experience to help the Board determine whether its provisions foster competition, can be put in place in a cost effective way, or provide any benefit to Ontario energy consumers.

A better course of action, in ECG's view, would have the Board discard the RSC as a guide, focus on the natural gas marketplace *per se*, and focus on those aspects of a Gas Distribution Access Rule that are required at this time. The Board should not proceed to design, let alone implement, an access rule until there has been a thorough examination of the facts and circumstances surrounding the natural gas marketplace in Ontario and, as required, amendments of the OEB Act.

Specific Issues

Despite ECG's reservations as stated above, ECG wishes to provide the Board with elaboration and clarification of its position on the following matters: the Board's jurisdiction, harm to shareholders, billing options, prudential requirements, and customer mobility.

Summary

The following is a summary in this regard:

- Jurisdiction:
 - The gas vendor consolidated billing provisions of the proposed Rule are *ultra vires* the Board's powers under the OEB Act.
 - The gas vendor consolidated billing provisions of the proposed Rule are beyond the Board's powers to make rules under the OEB Act.
 - The gas vendor consolidated billing provisions of the proposed Rule violate the fundamental principles of agency and contract law.
- Harm to Shareholders:
 - A gas distributor's customer base has intrinsic value. Direct contact with gas consumers is necessary to maintain and grow the customer base as well as to continue promotion of natural gas over other fuel choices.
 - The shareholders of a gas distributor would suffer harm if gas vendors are allowed to expropriate, without compensation, the intrinsic value of the gas distributor's customer base.
 - ECG's shareholder would suffer harm if gas vendors are allowed to gain value, at the expense of the shareholder, without compensation.
- Billing Options:
 - To prevent gas distributors from billing their own customers, because of a gas vendor's desire to undertake consolidated billing, is outrageous.
 - A gas distributor's bill is not a utility service. Gas distributors should accordingly be allowed to choose a menu of billing options without interference by gas vendors.
- Prudential Requirements:
 - The prudential requirements are inadequate.
- Customer Mobility:
 - Customer mobility is necessary to create an effectively competitive market. Gas distributors, however, should not bear the consequential administrative costs.

In this submission ECG also responds to the position of two other parties on, respectively, emergency curtailments and system gas.

Jurisdiction

ECG instructed counsel to prepare a brief on jurisdictional issues as the means of elaborating and clarifying ECG's position on the Board's jurisdiction *vis-à-vis* the proposed Rule. A copy of the Brief on Jurisdictional Issues prepared by Fraser Milner Casgrain LLP is enclosed.

Harm to Shareholders

A commercial enterprise, even one that is regulated, has the right to organize its affairs in a manner that creates value for its shareholders. A gas distributor is accordingly entitled to make decisions of its own on the following matters: the means of billing customers for the services provided to them, choice and frequency of customer communication vehicles, measures to increase customer satisfaction, initiatives to increase brand awareness, use of service providers in lieu of employees, degree of outsourcing, and so on. In the case of a gas distributor, the cost of these initiatives, if borne in whole or part by ratepayers, is certainly subject to the Board's scrutiny but only to ensure that the cost is reasonable for rate-making purposes.

There is no doubt that customers have intrinsic value to a commercial enterprise, and thus to its owners, and that customer contact is necessary to maintain this intrinsic value. The same is true of a gas distributor, even one with no merchant function. Direct contact with consumers has value for every gas distributor; for example, through direct contact with consumers, a gas distributor has the ability to promote the benefits of natural gas usage over other fuels and, in effect, to market natural gas for a variety of end-uses. These activities would increase a gas distributor's throughput by attracting new customers, thereby enhancing the efficiency of system operations. Gas distributors cannot, and should not be compelled to, rely on gas vendors to undertake these activities. Gas vendors have no ties to one particular franchise area over another. They may also have more interest in promoting other fuel types. Both of these factors demonstrate why gas distributors will need to continue to maintain their own contacts with their customers.

In addition to the benefit to gas distributors of having direct contact with their customers, it should be recognized that direct contact is also an important benefit to customers. Gas distributors are a reliable source of unbiased information on energy services and conservation. Gas distributors also provide important safety messages to customers.

The proposed Rule would allow gas vendors to preclude gas distributors from making regular direct contact with gas consumers who are, after all, the only distribution service customers by virtue of the definition of "gas distributor" in section 3 of the OEB Act. The vendor consolidated billing option, at the vendor's option, would allow gas vendors to expropriate from a gas distributor's shareholders, without compensation, the intrinsic value of a gas distributor's customer base.

In ECG's case, the proposed Rule would also undermine ECG's shareholder in another way. Enbridge Inc. made business decisions and restructured its organization based on the regulatory framework that is now in place (Undertakings, Affiliate Relationships Code, past Board decisions etc.). To change the ground rules now would be unfair to the company's shareholder. The business decisions were consistent with the regulatory framework and guidelines in place at the time. The gas vendor consolidated billing option could reduce, by almost one-half, the number of ECG's customers for whom Enbridge Commercial Services Inc. provides billing service to ECG. This reduction, in turn, would correspond to the increase in the billing base of the gas vendor community.

The result would be that Enbridge Commercial Services Inc. would lose revenue, to the detriment of Enbridge Inc., and gas vendors would gain efficiency and marketpower. This result would be grossly unfair for two reasons. Gas vendors would control the result, by virtue of their consolidated billing option, and they would also achieve the result without the need to compensate Enbridge Inc.

Billing Options

ECG questions the Board's predisposition for the gas vendor consolidated billing option. It would be extraordinary to compel a gas distributor, against its will, to bill a gas vendor for distribution services provided to gas consumers. It is outrageous to enable a gas vendor to do so unilaterally. In effect, this results in facilitating competitors instead of competition. There is no apparent reason for such radical action.

We note that the Board has previously found that a gas distributor's bill is not a "utility service" within the meaning of the term as defined in the *Affiliate Relationships Code for Gas Utilities* (RP-1999-0058 Decision with Reasons, para. 4.7.12, p. 50). In this respect a gas distributor is no different from an unregulated commercial enterprise in terms of billing for its services. A gas distributor is entitled to choose the ways and means of billing for distribution services provided to gas consumers; that is, to the persons who are distribution service customers. The choice may include gas vendor consolidated billing, to be sure, but only when the gas distributor determines that this is an advisable billing option. Customers should only be able to choose a billing option from the menu of options that the distributor is willing to offer.

Gas vendor consolidated billing is also problematic from a jurisdictional perspective. This billing option would create, in effect, a wholesale distribution service that would supplant, at a gas vendor's choice, a gas distributor's existing contractual arrangements with distribution service customers by default. The enclosed Brief on Jurisdictional Issues explains why the Board lacks jurisdiction in this regard and why, in order to acquire jurisdiction, an amendment of the OEB Act would be required.

The Board should not look to billing practices employed in the United States as a guide, for policy purposes, without a careful examination of the enabling state legislation *vis-à-vis* the OEB

Act. The references to billing practices in New York and elsewhere, which the Coalition for Efficient Energy Distribution (CEED) has provided, accordingly have little merit on their own.¹

Prudential Requirements

The prudential requirements prescribed in the proposed Rule are inadequate to mitigate the risk of gas default from a gas distributor's perspective. Earlier submissions have stressed the need to re-examine the specifics of these requirements.

Customer Mobility

Many parties take the position that customer mobility is necessary to create an effectively competitive market for natural gas, at the retail level, and ECG is no exception. The Board must recognize, though, that the obligations and timelines for a service transfer request (STR), which are imposed in the proposed Rule, create additional administrative costs. ECG's distribution service customers or their gas vendors, or both, should bear these costs.

CEED is wrong in asserting that gas distributors are precluding customer choice by refusing to process transfers of gas consumers from one gas vendor to another.² ECG's position is that gas distributors are now placed in the middle of disputes between two gas vendors and, as a result, they must try to resolve these disputes in some fashion. However, this is not a role that gas distributors should be forced to undertake for a competitive marketplace.

Direct Energy Marketing Limited (Direct Energy) takes the position that section 7.6.3 of the Rule should prohibit customers from terminating unilaterally a STR submitted by a gas vendor to transfer the customer to system gas.³ Direct Energy states that the RSC, by contrast, does not give a gas consumer the right to terminate unilaterally such a STR. ECG cannot agree with Direct Energy's position. To the contrary, Direct Energy would impede customer mobility by restricting a gas consumer's ability to switch gas vendors.

Emergency Curtailment

The Industrial Gas Users Association (IGUA) is concerned about the financial consequences of curtailment to industrial gas consumers.⁴ As IGUA sees it, section 3.2.4 would prevent industrials from recovering, in certain circumstances, upstream transportation costs. IGUA has a point but, in ECG's view, an equally valid point is that the financial consequence of curtailment is a rate-making issue and, as such, it that does not belong in the proposed Rule.

IGUA further proposes to amend the definition of "emergency" due to a concern that a gas distributor's discretion to declare an emergency is too broad. We disagree with this position. A

¹ Submission of CEED, Feb. 26, 2001, paras. 52-56.

² Submission of CEED, Feb. 26, 2001, para. 11.

³ Submission of Direct Energy, Nov. 6, 2000, page 3.

⁴ Submissions of IGUA, Feb. 21, 2001, pages 1-3; Oct. 18, 2000, pages 6-7.

gas distributor is the only party in a position to know when an emergency situation occurs or is pending.

System Gas

As stated in previous submissions, ECG does not understand why references to system gas belong in a rule about distribution access. Nevertheless, we comment on a specific aspect of Ontario Hydro Energy Company Inc.'s (OHE) recommendation with respect to system gas.

OHE states that section 6.6.5 of the proposed Rule should "include clear instruction that the LDC must not promote system gas".⁵ ECG disagrees because, in a competitive market, system gas will be an option for as long as gas distributors provide sales service. The proposed Rule cannot be used as an instrument to force gas distributors, against their will, to exit the merchant function by attrition. OHE's recommendation would operate to the detriment of gas consumers by depriving them of information on one option that is available to them. This does not make sense and will only serve to create further consumer confusion in the marketplace. Further, it would preclude the expansion of gas distribution systems, and potentially throughput, should gas vendors not find it profitable to promote natural gas as an energy form.

Conclusion

ECG's representatives look forward to the opportunity to clarify our position on the proposed Gas Distribution Access Rule at the Board's oral consultation session. We trust that this written submission, together with our previous submissions, convey to the Board the seriousness of our concerns with the proposed Rule, in its present form. We look forward to working with all interested parties to achieve a Gas Distribution Access Rule that is fair and addresses the needs of an effective and competitive natural gas market in Ontario.

Yours truly,

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⁵ Submission of OHE, Feb. 2001, page 2.