

ONTARIO ENERGY BOARD

IN THE MATTER OF the Draft Gas Distribution Access Rule

SUBMISSIONS

of ONTARIO GREENHOUSE VEGETABLE GROWERS MARKETING BOARD

June 18, 2001

Introduction

1. The Ontario Greenhouse Vegetable Growers Marketing Board (the "Marketing Board") wishes to respond to the request of the Ontario Energy Board (the "OEB") dated February 6, 2001 for comments on the draft Gas Distribution Access Rule (the "draft Rule").

2. In making these submissions, the Marketing Board represents the greenhouse vegetable growers of Ontario, many of whom rely upon natural gas for the heating of their greenhouses. In general, while greenhouse vegetable growers are not low-volume consumers of natural gas, they are small businessmen who lack the financial resources and access to legal and other consulting services necessary to deal as equals with the gas distribution companies, and are in need of protection from the potential abuse of the monopoly power inherent in the franchise held by gas distributors.

3. The Marketing Board supports the draft Rule and the objectives of the OEB in bringing it into effect as a rule pursuant to Section 44 of the *Ontario Energy Board Act*. The submissions of the Marketing Board suggest changes to the draft Rule which would, in the opinion of the Marketing Board, improve the balance of the protection provided by the draft Rule to customers such as greenhouse vegetable growers.

Australian Access Code

4. In the course of preparing this submission, counsel for the Marketing Board has reviewed the provisions of rules adopted in other jurisdictions to achieve the purposes stated in the draft Rule. The Marketing Board has been impressed by the National Third Party Access Code for Natural Gas Pipeline Systems developed in Australia to regulate third party access to natural gas transmission and distribution pipelines throughout Australia (the "Australian Access Code"). The Australian Access Code was developed through the co-operation of the federal and state governments of Australia and has been adopted by all of the states thereby establishing a national regulatory framework which is in effect throughout Australia but administered in each state by the authorities having jurisdiction in that state. The introduction to the Australian Access Code contains a statement of the objective of the Code, which is:

“to establish a framework for third party access to gas pipelines that:

- (a) facilitates the development and operation of a national market for natural gas; and

- (b) prevents abuse of monopoly power; and
- (c) promotes a competitive market for natural gas in which customers may choose suppliers, including producers, retailers and traders; and
- (d) provides rights of access to natural gas pipelines on conditions that are fair and reasonable for both Service Providers and Users; and
- (e) provides for resolution of disputes.”

The Australian Access Code is more comprehensive in its scope than the draft Rule in that it provides the regulatory structure for gas transmission pipelines as well as gas distribution systems and governs rates, and in the course of this broad regulation stipulates rules that deal with many of the matters dealt with in the draft Rule. The Marketing Board recommends that the OEB give consideration to the Australian Access Code as a general source document in considering policy and drafting alternatives for the draft Rule. A copy of the Australian Access Code is attached as a schedule to this submission. Further information with respect to the Australian Access Code is available on an Australian government website the URL address of which is <http://www.coderegistrar.sa.gov.au>.

Purpose of the draft Rule

5. The Marketing Board supports the inclusion in the draft Rule of a statement of the purpose of the Rule. The purpose of the draft Rule stated in Section 1.1.1 thereof is to:

- facilitate competition in the sale of gas;
- preclude discriminatory or preferential conduct by gas distributors;
- establish the principles for and standardize the conduct of business between distributors and gas vendors, and distributors and customers;
- establish performance levels governing the conduct of distributors when providing or facilitating access to distribution services; and
- provide balanced protection to all affected parties.

While not disagreeing with any of these specific purposes, the Marketing Board questions whether they go far enough to achieve the goal stated in the February 6, 2001 letter from the OEB inviting comments on the draft Rule, namely, to standardize the conduct of business between distributors and marketers and distributors and customers and to increase the openness, fairness and fluidity of the commodity gas supply market.

6. The Marketing Board believes that there should be incorporated into the statement of the purposes of the draft Rule three of the objectives of the Australian Access Code, namely, (i) to prevent the abuse of monopoly power, (ii) to provide rights of access to distribution services on conditions that are fair and reasonable for both distributors and gas vendors/consumers/customers and (iii) to provide for resolution of disputes. For interpretative purposes, the Marketing Board feels that it is important that the draft Rule recognizes specifically the

monopoly power inherent in the franchise held by gas distributors and that one of the important purposes of the draft Rule is to prevent the abuse of this power. Secondly, the Marketing Board is of the view that the Rule should establish a "fair and reasonable" standard in respect of the conditions of access to distribution services and in respect of the conduct of all dealings between distributors and customers. Thirdly, the Marketing Board believes that the draft Rule should provide an effective mechanism for the resolution of disputes regarding matters falling within the draft Rule.

Distributor Provided Services

7. Section 2.2.1 of the draft Rule requires that a distributor "shall provide access to distribution services on a non-discriminatory basis and in accordance with this Rule and the applicable rate orders issued by the Board...". In contrast, other statements which establish general obligations on parties governed by the Rule require those parties to act "in a non-discriminatory, non-preferential manner". See Section 4.2.1 which requires a distributor to apply its financial contributions policy on a non-discriminatory, non-preferential manner, Section 5.1 which requires a distributor to conduct all commercial relations with gas vendors on a non-discriminatory, non-preferential basis and Section 9.2.1 which requires the distributor security policy to be non-discriminatory and non-preferential. The Marketing Board believes that the draft Rule should require a distributor to provide access to distribution services on a non-preferential as well as non-discriminatory basis. It may be that there should be some exceptions to the requirement of non-preferentiality where expansions of existing distribution systems are required to facilitate access or in other circumstances which will be identified by the distribution companies, but the general principle that access should be provided on a non-preferential basis should form part of the obligation unless an exception can be appropriately justified in specific circumstances.

Emergency Supply Planning

8. The Marketing Board supports the submissions of the Industrial Gas Users Association contained in its letter of February 21, 2001 to the OEB relating to Section 3 of the draft Rule regarding Emergency Supply Planning.

Expansion and Connection to a Distribution System

9. Section 4.1.1 of the draft Rule requires a distributor whose rates are regulated by the OEB to file with the OEB written policy statements associated with a number of topics as specified therein. Section 9.1.1 also requires the distributor to file with the OEB a written policy describing its security arrangements. While the Marketing Board supports these provisions, the Marketing Board submits that rather than relying on a specific list of matters in respect of which policy statements must be filed, which specific list may or may not include all that is relevant and important, the draft Rule should require a distributor to file with the OEB a statement of all of the policies and all of the terms and conditions that apply to access to the distribution services offered by the distributor.

10. The Marketing Board further submits that the draft Rule should require that all policy statements filed by the distributor and all terms and conditions of access to distribution services

be fair and reasonable and be subject to public comment, the hearing process and final approval by the OEB.

11. The definition of "Service Level Agreement" contained in the draft Rule includes an agreement that sets out the relationship between a distributor and either a customer or a gas vendor. While Section 5.3.1 of the draft Rule requires a distributor to enter into a standard Service Level Agreement with gas vendors, no similar obligation applies with respect to standard service level agreements between distributors and customers/consumers. The Marketing Board submits that distributors should be required to file standard service level agreements with the OEB applicable to each of the services offered by the distributor and that such agreements should be subject to public comment, the hearing process and approval by the OEB. Customers and distributors should be free to enter into service level agreements on terms other than the standard form of service level agreement which would then govern their relationship, but if they do not, the standard service level agreement should then apply.

12. The Australian Access Code requires a distributor to establish an access arrangement to the satisfaction of the relevant state regulator in respect of the distribution services offered by the distributor. The access arrangement must include a statement of the policies and the basic terms and conditions that apply to customer access to the distribution services. The distributor and a customer or prospective customer are free to agree to terms and conditions that differ from the standard access arrangement offered by the distributor, but in the absence of such an agreement, the standard access arrangement provisions will apply. The terms and conditions in respect of each service offered by the distributor must, in the relevant regulator's opinion, be reasonable. An access arrangement must be submitted to the relevant regulator for approval. The relevant regulator may approve an access arrangement only if it satisfies certain minimum requirements stated in the Australian Access Code, but otherwise the relevant regulator has a broad discretion to refuse or accept an access arrangement. The relevant regulator is required to publish a public notice in respect of an access arrangement submitted for approval and to receive and consider submissions from interested parties. The Marketing Board recommends that the OEB review and consider these provisions of the Australian Access Code in the finalization of its approach to these issues in the draft Rule.

13. The Marketing Board submits that customers are in need of protection from the monopoly powers of the distributors in respect of all aspects of their relationship, including policies and the terms of the agreements that a customer must enter into as a condition of access to gas distribution services, and that its submissions set forth above, if adopted, will provide a more balanced protection for all parties.

Distributor-Gas Vendor Relations/Service Transaction Requests

14. Although the Marketing Board has no specific comment on the provisions of the draft Rule dealing with Distributor-Gas Vendor Relations (Section 5) or Service Transaction Requests (Section 6), the Marketing Board supports the efforts of the OEB in establishing effective rules regarding these matters, as the rules governing these matters and the effectiveness thereof will significantly impact the ability of customers to obtain the full benefits of a deregulated marketplace on a non-discriminatory, non-preferential basis.

15. Union Gas Limited, in its submission to the OEB of March 9, 2001, states at page 6, item 5 and page 8, item 6 that it understands that the intent is that the provisions of the draft Rule governing Distributor - Gas Vendor relations and Service Transaction Requests will apply only to the small volume market. The Marketing Board believes that these provisions should apply to all markets.

16. The submission in respect of the draft Rule of the Coalition for Efficient Energy Distribution ("CEED") dated February 26, 2001, in its comments on Service Transaction Requests argues persuasively for the need for customer mobility as a necessary condition for competition. The Marketing Board supports the comments of CEED in this regard. In addition, the Marketing Board submits that an equally persuasive case can be made for the need for customer mobility between alternate energy sources, i.e. from natural gas to oil, or from natural gas to electrical power if an effectively competitive market for energy services is to develop in Ontario. As a result of recent high prices for natural gas, many greenhouse growers have incurred significant expenditures to add the capability to burn oil to heat their greenhouses, and are now in a position to switch between oil and gas at the flick of a switch and to heat partly with oil and partly with gas should they choose to do so. Although the draft Rule perhaps need not contain any specific provision with regard to mobility between alternate energy sources, the Marketing Board submits that a requirement for approval by the OEB and public hearings in respect of the terms and conditions upon which access to distribution services is granted will provide a procedure to deal appropriately with contractual provisions and policies that would otherwise allow the use of the distributor's monopoly powers to unduly restrict this mobility.

Security Policy

17. The security policy which each distributor is required to file with the OEB pursuant to Section 9 of the draft Rule should be subject to the standard that it be fair and reasonable to the effective parties and should be subject to public comment, the hearing process and final approval by the OEB as is the case with any other aspect of the access arrangement.

18. The security value of positive balances in a consumer/customer banked gas account should be recognized in the provisions regarding security arrangements.

19. Section 9.3.5 of the draft Rule provides that the maximum amount of security provided by a customer is to be determined on the basis of the value of the goods or services which are provided by the distributor and consumed by the customer before payment for those goods or services has been made, and for which the distributor has assumed a risk of either partial or full default in payment. The Marketing Board submits that the draft Rule should require that, for purposes of determining the amount of security, it is the prospective value of goods and services which are to be provided, rather than the value of goods or services which may have been provided to the customer in the past, which should form the basis of the determination of the amount of security required. The Marketing Board is aware of a recent case in which a greenhouse grower who is engaged in a dispute with his distributor regarding the termination of his Bundled Transportation Agreement ceased to be a direct purchase customer and returned to system gas. The greenhouse grower had converted his heating system from natural gas to oil, and as a result, as a system gas customer, would be using approximately 90% less gas than the customer had been using as a direct purchase customer under his Bundled T agreement before

installing the oil burning equipment. The distributor nevertheless requested security from the customer as a condition of providing system gas service to the customer based on the value of the gas supplied to the customer during the customer's two highest consuming months in the preceding year. This resulted in a requirement for a letter of credit for hundreds of thousands of dollars when the anticipated consumption by the customer was a fraction of this amount.

Complaint Procedures

20. Section 11 of the draft Rule should establish a mechanism whereby disputes between distributors and customers which fall within the ambit of the dispute resolution process are finally determined by the OEB after an appropriate hearing.

ALL OF WHICH IS REPECTFULLY SUBMITTED

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