February 26, 2001

Mr. Paul Pudge
Board Secretary
Ontario Energy Board
2300 Yonge Street
P.O. Box 2319
Toronto, Ontario
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Via Fax: (416)440-7565

Dear Mr. Pudge,

Re: Notice of Proposal To Make A Rule: Gas Distribution Access Rule

This submission by ECG ("ECG") responds to the Ontario Energy Board's ("OEB" or "Board") invitation, dated February 6, 2001, to comment on the proposed *Gas Distribution Access Rule* ("Rule"). ECG supports the development of a rule that delineates "conditions of access" to distribution services. The Rule, however, appears to mirror the electric *Retail Settlement Code* ("RSC") and accordingly obscures or ignores distinct differences in the gas and electric industries and in the statutory provisions of the *Energy Competition Act, 1998*, S.O. 1998, c. 15 ("EC Act") that distinguish the two industries. The Rule assumes, erroneously, that facilitation of a competitive retail market in gas requires restrictions on the gas distributor.

Of equal concern, moreover, is the fact that the Rule, in its current form, goes well beyond the Board's rule-making power in section 44 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B ("OEB Act"). Quite apart from the legal consequences of this jurisdictional overreach are the practical effects on the ability of a distributor to undertake activities in a manner that meets consumer expectations and addresses concerns around safety issues. Furthermore, the Rule threatens the financial viability and value of the distributor.

The first part of ECG's submission addresses our concerns around the impact of the draft Rule on consumers[1] and on the distributor. We then comment on the effect of the Board's over-reliance on the RSC as a template in developing the Rule. Lastly, ECG expresses its reservations about the OEB's jurisdiction to use its rule-making powers to prescribe and restrict the services provided by gas distributors. ECG's previous

[1] Although ECG would normally use the terms "consumer" and "customer" interchangeably to reference those who purchase gas distribution services from the utility, the definitions of the two terms in the Rule have drawn a distinction that is recognized in these submissions by the use the term "consumer".

submission on the OEB Staff draft Rule contained similar arguments concerning jurisdictional and policy issues, and is attached for the Board's consideration as Appendix 1.

Impact on Consumers

Ontario has the highest proportion of consumers who take gas under direct purchase agreements of any Canadian jurisdiction. Within the ECG franchise, approximately 600,000 consumers have entered into direct purchase agreements. In large part, this penetration has been achieved through marketer programs which promise that "you will continue to receive your bill from the utility" and "nothing will change". Similar marketing is taking place on the electricity retailing side, despite the issuance of the RSC. This point is illustrated by Appendix 2, which is a copy of Direct Energy's marketing brochure to electricity retail consumers. (See page 5 of Appendix 2, which shows that marketers are still listing continued billing from the utility as a benefit to retail consumers.)

ECG's market research shows that consumer confusion is still prevalent among those who take gas under direct purchase agreements. These consumers remain unaware that they are purchasing their gas from a marketer. ECG submits that marketer consolidated billing that can be initiated at the marketer's option (as provided for under sections 8.1.1 and 8.3.1 of the Rule), will significantly add to consumer confusion without conveying a benefit on the consumer.

The title of section 8.1 of the Rule, "Customer Choice", is a misnomer in that section 8 does not allow consumers to choose the billing option they prefer. Rather that choice is given to "the customer, or the gas vendor" who can (and, in practice, will) dictate to the consumer the billing option they will receive for bills from the distributor. ECG's market research indicates a strong consumer preference for maintaining the gas distributor consolidated bill even among those consumers who have chosen a gas marketer (see Appendix 3, ECG Customer Billing Preference Study). In this respect the Rule does not meet its stated purpose which is to "facilitate competition in the sale of gas" but, rather, eliminates consumer choice in billing and provides the gas vendor with an undue competitive advantage in dictating to both the consumer and the distributor, the billing option. Moreover, the fact that the vast majority of the 600,000 consumers that ECG serves via direct purchase are served by only one marketer, will only hamper competition in the retail gas market by giving an unfair competitive advantage to the dominant marketer.

ECG is also very concerned that by receiving a consolidated marketer bill, consumers may be confused about who to call in the event of an emergency. Although the distributor emergency response number could be clearly indicated on the marketer consolidated bill, precious time could be lost as the consumer calls the marketer rather than the distribution company, which no longer has on-going direct contact with the customer. This confusion will be compounded if both gas and electricity are provided on the same bill.

In consequence, a mandated marketer consolidated bill removes an important vehicle presently utilized by the distributor to communicate to consumers. Section 8.6.1 of the Rule attempts to fill this void by stipulating that the "distributor shall ensure, through the Service Level Agreement ("SLA") with each gas vendor, that relevant safety information is included in bills to customers"[2]. There are a number of problems associated with this approach. The first problem is that restricting the distributor to "relevant safety information" means that other important messages, typically communicated by the distributor with respect to energy efficiency, conservation, energy restructuring and other regulatory matters, will be precluded. The second problem is that in ECG's view, the most reasonable and effective means of ensuring that relevant safety information is, in fact, included in bills regularly and at the appropriate time periods, (i.e. seasonal safety messages - e.g. hypothermia, call before you dig, etc.) is to do so oneself. Sub-delegation of this responsibility to the gas distributor through means of the SLA is not in the public interest in that the gas distributor has no supervisory or regulatory authority over the gas vendor. By what means does the OEB propose that the distributor ensure that the vendor honors its obligations under the SLA to communicate relevant safety information?

There is at least one other way in which the Rule, in its current form, will adversely affect distribution customers. Section 6 of the Rule entitles a distributor to put a marketer's customers back on system gas in circumstances where the marketer is in arrears, vis-à-vis the distributor. Although this mitigates the marketer's exposure, it does so at the expense of the distributor's other customers. This is so because the cost of procuring gas supplies to meet the incremental demand of "new" system customers will, in all probability, be born by ratepayers through the Purchased Gas Variance Account or otherwise.

In conclusion, ECG submits that with close to half of the consumers in our franchise area already purchasing gas directly, a marketer mandated consolidated bill option is not necessary, will only serve to create consumer confusion, and will diminish the effectiveness of safety and regulatory information being provided to consumers. Further, the marketer mandated consolidated bill will not convey any corresponding benefit to consumers and will hamper, rather than facilitate, the competitive market by conveying an undue competitive advantage on already dominant gas vendors. All of these factors are of particular concern to ECG given the lack of opportunity consumers and consumer groups have had to comment on or participate in the development of the Rule.

Impact on Distributors

The proposed Rule, if implemented in its current form, would have significant impacts on the distributor – impacts in terms of communication with consumers (discussed above), the services it provides, and the fundamental means by which the distributor's value is assessed by the financial community. It is the distributor who has built up a relationship of trust with its customers (the majority of whom are "consumers"), and removal of this

[2] *Quaere* whether the term "customer" should be replaced with the term "consumer" in this and other provisions of section 8 of the Rule.

relationship cannot be undertaken without consideration of the financial impact that will ensue.

There are direct and indirect cost consequences associated with the marketer consolidated billing. Accordingly, the inefficiency of, potentially, multiple billing systems could increase costs to all consumers. The indirect costs of marketer consolidated billing include the financial fallout from the loss of the direct relationship between the utility and consumers, which relationship is facilitated and maintained through the billing function. In consequence, the intrinsic value of Enbridge Inc. ascribed by the financial community will be adversely affected by the loss of the utility's direct relationship with its customers. It should be noted that no other commercial enterprise is forbidden from billing for its own product or services.

Failure to recognize and take into account the cost and financial implications of the distributor-consumer relationship and the commercial interest that underpins the marketers' desire for marketer consolidated billing, will irreparably damage the distribution sector in Ontario. If these factors are not taken into account, distributors will be denied the opportunity to earn a fair rate of return. This would be contrary to the fundamental principles of rate-making vis-à-vis the maintenance of just and reasonable rates.

The obligations and timelines imposed in the Rule in serving notice to the consumers or vendors will not be without additional administrative costs. It appears that the Board has determined that distribution ratepayers should bear these additional costs as no other alternative has been provided in the Rule, or to ECG's knowledge, has been considered by the Board.

Reliance on the Retail Settlement Code

It is clear that in the development of the Rule, the OEB has relied on provisions of the RSC. As with the development of a gas distribution access rule, the OEB created a task force to advise on the Code and make recommendations on provisions to be included in the RSC. In its Notice of Proposal to Make a Rule ("Notice"), the OEB also refers to "parity in the regulation of the electricity and gas sectors". Nonetheless, there are several important differences between the gas and electric industries that make the RSC an imperfect guide for the Rule.

There are several differences between the gas and electric commodity markets in Ontario, not the least of which is the difference in the OEB's oversight of these markets. In electricity, the OEB licenses all market participants. On the gas side, the OEB does not regulate producers, federally-regulated transmission companies or marketers who do not transact with small volume consumers. The RSC applies to electricity marketers and electricity distributors and compliance with it is a condition of license. The Rule applies only to gas distributors.

The structure of the two commodity markets is also quite different. Leaving aside the fact that electricity markets are not yet open, the primary wholesale market for electricity will be in Ontario, and will be operated by the Independent Electricity Market Operator, a not-for-profit corporation which is overseen by the OEB. As well, the Board is given explicit monitoring responsibilities over all aspects of the electricity market. Natural gas, on the other hand, is purchased in wholesale markets in Alberta, Ontario and throughout North America. The OEB oversees none of these markets.

Instead of recognizing the regulatory and structural differences between the gas and electricity markets, it appears the OEB has attempted to eliminate them through provisions in the Rule. Accordingly, the Rule is fundamentally flawed and, as discussed below, beyond the OEB's jurisdiction in a number of significant ways. In this regard, we find it significant that the OEB in its discussion of the costs and benefits of the Rule in the Notice, describes the benefits as "increased openness, fairness, and fluidity of the commodity gas supply market". This statement is further evidence of the fact that the Board has failed to take into consideration the impacts of the Rule on the market for distribution services.

Some of the definitions used in the Rule also appear to have been modified to conform to the provisions of the RSC. These changes result in definitions of ABC T-service and the Banked Gas Account that are at odds with the current ABC service and with the definition of Banked Gas Account in the ECG Rate Handbook, as approved by the Board with the ECG's approved rate schedules. The definition of ABC T-service in the Rule is:

> "ABC T-service or Agent, Billing and Collection T-service means the provision of the following services by a distributor to a gas vendor: gas commodity billing and accounts receivable collections, transportation and delivery of gas purchased outside of Ontario, and requisite storage and load balancing".

This definition confuses the two separate services that are being provided. ECG provides Agent Billing and Collection service to gas marketers and it separately provides bundled transportation services that marketers control as agent for a consumer. It is the marketer who combines the two services into the ABC-T package.

The definition of Banked Gas Account shows a similar misunderstanding of the current role of marketers vis-à-vis consumers. The definition of the Banked Gas Account in the Rule provides:

> "Banked Gas Account" means the account which captures the volumetric variances between deliveries by a gas vendor on behalf of a customer and actual consumption by that customer.[3]

The definition of the Banked Gas Account in the Rate Handbook recognizes that it is the applicant for distribution services who is making deliveries, and who may be utilizing a marketer as agent in making those deliveries.

[3] Should the definition use the term "consumer" in the place of "customer"?

The modification of the above definitions suggests to ECG that the OEB believes that the distributor is already providing wholesale distribution services to marketers, when at the current time, the only service provided to marketers is Agent Billing and Collection service. Losing sight of this fundamental difference means that the implementation of the Rule will serve to create rights for marketers that they currently do not enjoy and to eliminate rights for consumers that they currently have. For the reasons stated below, the OEB cannot do this under the purview of its rule-making powers in section 44 of the OEB Act.

Jurisdiction and Procedure

It is trite law to say that the Board is a "creature of statute" and, as such, only has the powers that are conferred upon it by its enabling legislation. The Board's jurisdiction with respect to the Rule must fall within its rule-making authority under section 44 of the OEB Act and the procedures used to enact the Rule are prescribed in section 45. Although the Board has not identified what subsections of section 44 it is relying upon in the Rule or the Notice, the Rule appears to attempt to "establish conditions of access" to distribution services pursuant to section 44(1)(d), and also (pursuant to section 44(1)(b)) to govern the conduct of gas distributors as such conduct relates to any person or agent selling or offering to sell gas to a consumer. Accordingly, each provision of the Rule must fall within the bounds of this specific rule-making authority, unless another of the Board's rule-making provisions can justify it.

The rules that the Board enacts pursuant to section 44 or any other section are "subordinate legislation", i.e. subordinate to the provisions of the OEB Act itself. Therefore, the rules enacted cannot contradict or supercede any of the existing legislative provisions. Indeed, the rule-making power is granted to regulatory tribunals in order to allow the tribunal to clarify technical details, within the tribunal's legislated mandate and expertise, around the intention and purpose of the existing statutory provisions. The Board cannot expand its stated jurisdiction through the use of its rule-making powers. In this regard, the Board is directed to Appendix 1, ECG's submissions on the OEB Staff draft Rule for further jurisdictional arguments that apply equally to the Rule itself.

With respect to procedure, ECG recognizes that a party's procedural rights are different in the rule-making context when compared with a hearing procedure that will result in a Board order in a specific case or with respect to a specific application. On the other hand, the procedures prescribed by section 45 of the OEB Act recognize certain of the common law rules of procedural fairness in that the section provides for a reasonable opportunity to interested persons to make written representations with respect to proposed rules and mandates that the Board shall consider all representations made as a result of this process. ECG submits that in the present case, the interests of all parties would best be heard and canvassed through the process of a full public hearing with written submissions, cross-examination and argument afforded to all participants. The written submissions procedure contemplated by section 45 does not appear, in ECG's view, to have elicited the best evidence to date, in part because many of the issues that

the Rule raises are issues in other OEB proceedings, such as ECG's current rates proceeding (RP-2000-0040) or Union's Enabling Unbundling application. ECG therefore urges the Board to consider holding a generic public hearing to gather and consider all of the relevant evidence pertaining to the Rule in one forum.

Specific Jurisdictional Issues

In addition to the general comments ECG has made in Appendix 1 in respect of the Board's jurisdiction, there are a number of provisions in the Rule that raise specific jurisdictional concerns, beginning with the section 1.2 - Definitions.

Definitions

There are several definitions in section 1.2 that duplicate or contradict the definitions in the OEB Act. The definitions that duplicate those found in the Act include the definitions of "Board", "rate" and "low-volume consumer". Duplication of these definitions is unnecessary and is not normal legislative practice for subordinate legislation. In addition to the unnecessary repetition, the duplication confuses interpretation by raising questions as to the correct source of the definition in the event there is a legislative amendment.

The definitions that contradict definitions given in the OEB Act are as follows:

> "distributor" means a person who delivers gas to customer or a consumer;
>
> "distribution system" means the system used to deliver gas to a customer or a consumer;
>
> "consumer" means a person who uses gas for that person's own consumption;
>
> "customer" means a person who purchases distribution services.

"Gas distributor" is defined in the OEB Act as follows:

> "gas distributor" means a person who delivers gas to a consumer and "distribute" and "distribution" have corresponding meanings.

The "gas distributor" definition in the OEB Act contemplates the distributor delivering gas to a consumer, unless it can be argued that "distributor" is intended to mean a distributor other than a gas distributor. The Rule, on the other hand, expands this definition by adding delivery to a "customer" into the mix, which arrangement the Act does not contemplate and therefore precludes the Rule from prescribing. Also, the fact that the words "consumer" and "customer" are defined differently in the Rule leads to a legal interpretation that a consumer is not a customer and vice versa, or else the difference in definition would not have been expressed. The OEB Act, on the other hand, contemplates that a consumer is indeed a "customer" in that they purchase distribution services.

In the Act, the rate for the sale of distribution services (which the Act contemplates as the "delivery of gas to a consumer") must be approved by the Board under section 36 of the OEB Act. The exception to this rule applies to municipal gas distributors in Kitchener and Kingston who were selling gas prior to the proclamation of the Act. Section 36 distinguishes the sale of gas by a distributor from the delivery of gas and prescribes that a distributor would also need a section 36 order in order to sell gas. The Rule, on the other hand, uses a much wider definition of "distribution services" as follows:

> "distribution services" means services related to the delivery of gas and the services the Board allows distributors to carry out, for which a charge or rate can be approved by the Board or where the distributor is not subject to s. 36 of the Act, the relevant rate making authority.

The Rule's definition fails to maintain the distinction in the Act between distribution services and the sale of gas by distributors. It is also wider than the definition in the Act in that it now includes "services related to the delivery of gas".

Finally, the OEB Act defines "gas marketer" in section 47 of the Act to mean, inter alia, "a person who sells or offers to sell gas to a low-volume consumer". The Rule defines a "gas vendor" as "as person who sells or offers to sell gas to a consumer…". It appears from these very confusing definitions that "consumer" and "low-volume consumer" represent two different classes of consumers. This contradicts the OEB Act by changing the statutory definitions and by implying that the OEB has some authority over consumers or customers who are not low-volume consumers by virtue of the Rule, an authority not conferred on the Board by the legislation itself. This is a clear jurisdictional error that is manifest throughout the Rule.

<u>System Gas</u>

As noted above, the Rule includes the sale of system gas in the definition of distribution services by including "services the Board allows distributors to carry out, for which a charge or rate can be approved by the Board…". Under section 2.2.1 of the Rule, the effect of this definition is to require the distributor to provide the sale of gas on a non-discriminatory basis. Section 8.5 of the Rule restricts the material to be provided to system gas customers. Section 44(1) of the OEB Act does not refer to the sale of gas by a distributor and hence these provisions are beyond the jurisdiction of the OEB.

<u>Creation of New Services</u>

A further jurisdictional issue with respect to "distribution services" as contemplated in the Rule is that the Board is attempting, in section 2 of the Rule, to create new distribution services, something the Board cannot do within the context of its rule-making authority. The Board's rule-making authority is confined to creating a rule that establishes conditions of access to distribution services (that are already in existence). The determination of what distribution services entail specifically is normally the subject

of rate hearings under section 36 of the OEB Act, for which a public hearing is held and the issues fully debated. Another avenue the Board may utilize to prescribe distribution services is section 42(3) of the OEB Act, which reads:

> 42. (3) Upon application, the Board may order a gas transmitter, gas distributor or storage company to provide any gas sale, transmission, distribution or storage services or cease to provide any gas sale service.

Section 42(3) contemplates an application to the Board (and therefore, usually a hearing pursuant to section 21 of the Act), and the Board is precluded, in section 42(4), from commencing a proceeding under subsection (3) on its own motion. Therefore, any attempt by the Board to create new distribution services under the guise of its rule-making is beyond its jurisdiction.

For example, section 2.2.2 of the Rule defines and requires distributors to provide the following: emergency gas leak response service; line locate service; appliance inspection service; and safety information service. Although ECG does not currently provide these services, it performs these functions in order to comply with certain of its legislative obligations as a public utility and to maintain the safe delivery of natural gas. Notably, these functions are not within the purview of the OEB Act at all, but are administered by the Ministry of Consumer and Commercial Relations primarily under the *Energy Act*, R.S.O. 1990, c. E16. Accordingly, these provisions of the Rule are *ultra vires* the OEB as is section 4.2.4 of the Rule that attempts to re-enact sections of the *Energy Act* via the Rule.

Emergency Supply Planning

Although ECG is in support of issuance of emergency supply planning guidelines, Part VIII of the OEB Act, which deals with the matters discussed in section 3 of the Rule, precludes the Board from making such rules without an amendment to the Act itself. ECG recognizes that the Part VIII provisions have not been proclaimed, but even in the absence of such proclamation, the OEB cannot, through the rule-making process, grant itself extensive powers such as those included in section 3 of the Rule.

Expansion and Connection to a Distribution System

The OEB also cannot through its rule-making powers under section 44 of the OEB Act, determine the criteria for expansion of the distribution system. In this regard, section 4 of the Rule extends well beyond the notion of establishing conditions of access to distribution services. Distribution system expansion is the subject of several of the provisions of the OEB Act and other relevant statutes such as the *Municipal Franchises Act*, R.S.O. 1990, c. M.55 and the *Public Utilities Act*, R.S.O. 1990, c. P.52. There is no rule-making authority granted to the OEB under which it can justify expanding upon these legislative provisions.

Marketer Billing

We have previously provided in our submissions to OEB Staff on the draft Rule, at Appendix 1, our views as to why the OEB cannot include a provision mandating marketer consolidated billing in the Rule. We concur with the conclusion of Union Gas that the OEB cannot use its rule-making powers to mandate the provision of a wholesale distribution service.

Conclusions

In conclusion, ECG urges the OEB to consider the impact of the Rule on customers and distributors. A consolidated marketer bill, at the marketer's option, is based on a hypothetical and untried electricity retailer model. There is no evidence that consumers want this option; in fact, market research proves the contrary. ECG believes many aspects of the Rule will be detrimental to the market and most participants in it, with the exception of a handful of mass-market gas marketers.

ECG is concerned that the OEB appears to be forging ahead with implementing the Rule at this time. ECG's impression of the Board's urgency to enact the Rule is supported by the fact that our request to the Board on February 23, 2001 for a short extension to complete the filing of these submissions was denied, to date without reasons. The complexity of the issues raised by the Rule is evidenced by our evidence filed in RP-2000-0040 (see Appendix 4 for ECG's evidence and associated interrogatory responses) with respect to system gas, which suggests that the OEB should first direct its attention to the commodity market before proceeding with further changes to the distribution sector.

It is for these reasons that ECG recommends that the OEB delay implementation of a marketer consolidated bill (and never provide for implementation at the marketer's option alone) until it can be ascertained whether ECG's recommendations will improve current conditions in the market. ECG further believes that other parties, such as the consumer groups, who were not represented in the development of the Rule, will have views on how the lack of competitiveness in the retail market can be improved and we look forward to hearing their views.

Lastly, the OEB is urged to consider the limits on its jurisdiction vis-à-vis recommending substantive changes to the functioning and service offerings of distributors, particularly in light of adverse effects on consumers as well as the financial integrity of the distribution sector. It is ECG's opinion that the limits on the OEB's jurisdiction in this regard preclude rules with this effect.

Yours truly,

Marika Hare
Director, Regulatory Affairs

c.c. J.C. Allan, Director, Unbundling Policy