Comments of Union Gas Limited
on the
Draft Gas Distribution Access Rule

Compliance Costs

The Board's correspondence of February 6, 2001 notes that distributors may incur costs to comply with the proposed Rule. Union considers that any costs incurred to comply with a rule issued under Section 44 of the Ontario Energy Board Act (the Act) are appropriately recoverable from customers. The recovery of these compliance costs from customers is equally appropriate whether utilities are under traditional cost of service regulation, or under a form of performance based regulation. In Union's specific case, should the Board approve Union's performance based regulation plan, Union will seek recovery of the costs associated with complying with the distribution access rule through a non-routine adjustment to rates, over and above the price cap and other adjustments allowed for under the plan. The specific non-routine adjustment that these compliance costs fall under is the non-routine adjustment for Federal or Provincial regulatory legislation, rules or decisions. Union's evidence concerning non-routine adjustments was found at Exhibit B, Tab 2, pages 34-38 of the prefiled evidence filed in respect of RP-1999-0017. The referenced evidence is attached as Appendix A.

Jurisdictional Impediments

In several important respects, the proposed Rule is beyond the jurisdiction as set out in the Act. Union has submitted the specifics of each jurisdictional impediment to the Rules so that the Board may amend the rule to be consistent with the jurisdiction conferred under the Act.

Specific Comments

Union's comments on specific sections of the Rule follow below.

1.2 Definitions and 1.3 Interpretation

Section 1.3 indicates that unless otherwise defined, phrases that have not been defined shall have the meaning ascribed to them in the Act or in the licenses issued by the Board. The rule then contains among its definitions, definitions of; Board, distributor, rate, and low-volume consumer, all of which are defined by the Act.

The Rule, which is issued pursuant to the Act, cannot expand or modify the Board's jurisdiction through the modification of the definitions contained in the Act. It is also undesirable for definitions to be repeated in the Rule that are identical wording to that in the Act because such duplication risks divergence between the Act and the Rule over time as either the Rule or the Act are amended.

The definition of "distribution services" contained in the draft Rule purports to expand the definition of "distribution" contained in the Act. The Act defines distribution as the delivery of gas to a consumer. Pursuant to the Act, therefore, "distribution services" can only be services comprised of the delivery of gas to consumers. Section 44(1)(d) provides for rules establishing conditions of access to distribution services. There is no provision of rules for services which are not distribution services pursuant to the Act, or which are related to the delivery of gas. Therefore, the definition in the Rule cannot be modified by including, as the Act does not permit the Board to make rules of access for services which are not distribution services as the rule purports to do by expanding the definition to include "services related to the delivery of gas and services the Board allows distributors to carry out, for which a charge or rate can be approved by the Board".

The modifying phrase suggests that gas sales services by distributors are included in the definition of "distribution services". However, gas sales by distributors are provided for in the Act, and they are not included in the Act's definition of distribution.

Definitions are provided in the rule for “emergency leak response service”, “inspection service”, “line locate service” and “safety information service”. Union does not provide these three functions as discrete services. No tariffed rate exists for these functions to be priced separately. They are simply components of the distribution service. The definition suggests these are offered as services separate from distribution. They are not, nor could the Board so require pursuant to its rules-making power.

To suggest they are separate services is to suggest they could be provided separately from distribution service. It is beyond the jurisdiction of the Board to require the provision of these as separate services and particularly to do so pursuant to a rule.

The definition of Service Level Agreements (SLA) indicates that it is an agreement that establishes the relationship between a distributor and either a customer or a gas vendor. Section 5.3 makes it clear that the SLA is to be between a gas vendor and the distributor, and requires that it deal with provisions that are only the concern of distributors and gas vendors. The definition’s inclusion of SLAs being applicable to the distributor-customer relationship is confusing. The definition of customer includes consumers and may inadvertently requires distributors to enter into SLAs with all customers including consumers. It also requires that these SLAs be consistent with a standard form, or reviewed separately by the Board.

It is Union’s understanding that the intent of the Rule is that a SLA is put in place between gas vendors and distributors. If the SLA encompassed all customer relationships, standard form contracts would be required for each rate class, an unnecessary burden for the general service rate classes whose relationship with the distributor is governed by the rate schedule. This requirement would also add an unnecessary burden for the contract (industrial) rate classes which could expose these customers proprietary energy arrangements to the public record, and thus to their competitors. The definition of SLA should be revised to be applicable only to gas vendors and distributors so that it does not inadvertently capture the distributor’s other contractual relationships with consumers and customers.

2.2.2 Distributor Provided Services

As identified above, Union does not provide separate emergency gas leak response, line locates, appliance inspection, or safety information as discrete services. These functions are provided today as functions included in distribution service. No rate schedule exists to provide these functions as separate services, and Union is not proposing to provide these functions as separate services.

These functions are provided in compliance with other legislation or regulations, or, as in the provision of safety information, as part of due diligence in the operation of a safe distribution system. Inclusion of these items in the rule is an unnecessary duplication of requirements of other legislation, regulations or regulatory bodies and should be removed from the Rule. Provision in the Rule risks future conflict between the rule and the applicable legislation or regulations as the legislation or regulations are amended over time.

Even if these functions could be provided as new, discrete distribution services, this could not be accomplished by a mandatory prescription of a Rule under Section 44. New distribution services must be approved after a hearing pursuant to either Section 36 or 42(3).

3 Emergency Supply Planning

3.1.2

It is impossible for distributors to conduct the required assessments and report compliance with section 3.1.1 within five days. It will take in excess of 30 days to

determine what gas flowed, and where, on the system given the impacts of meter reading cycles, nomination and delivery imbalances, etc.

3.2

While this section attempts to deal with an issue of significant importance to distributors, it presumes a distributor has the ability and right to take gas for which it does not have title, and to reallocate that gas from some firm customers to other firm customers. Union remains of the view that legislative amendments are necessary before the Emergency Supply Planning and Response issue can be fully resolved.

3.2.1

There may be emergencies where a distributor will not need to purchase gas. The problem may be a delivery issue not a molecule issue. In such circumstances, the distributor should not be required to reallocate gas and incur a deemed purchase.

3.2.4

This clause lacks clarity as to what costs may be claimed. It will be much clearer if the claimed costs include:

- transportation and commodity costs of gas landed at the distributor if reallocated, and
- any demand charges owing the distributor for firm service curtailed by the distributor

4 Expansion and Connection to a Distribution System

The inclusion of a rule requiring the filing of distributors' policies concerning system expansion, contemplating review by the Board of those policies, and containing directions with respect to the terms upon which distributors should expand the

distribution system can only be appropriately contained in the Board's Gas Distribution Access Rule if these are "conditions of access to . . .distribution . . . services provided by a . . . gas distributor" (section 44(1)(d) of the Act).

The Board does not have the jurisdiction under section 44(1)(d) to set conditions for access to distribution services not yet provided on a distribution system not yet built. The Board is, of course, not without jurisdiction with respect to system expansion. In particular, the Board may consider applications from distributors for leave to construct distribution expansions. It is therefore appropriate for the Board to concern itself with the policies pursuant to which leave will or will not be granted in the manner in which the Board has traditionally done, and outside the terms of the current Rule.

But the Board does not have the jurisdiction to require the distributor to expand the system. Still less does it have the jurisdiction to do so pursuant to the rule-making power under section 44(1)(d).

5 Distributor-Gas Vendor Relations

Union understands that the intent of this section is to apply to the small volume market.

5.2

This section requires the distributor to provide gas vendors with changes in consumer information within five days of an account number change. This clause will appropriately ensure that gas vendors are informed if, for its own reasons, the distributor changes the account number of a consumer, but the service to the customer is remaining unchanged at the same service address. However, a consumer changing premises may or may not wish to continue its direct purchase arrangement at the new address. The requirement to notify the gas vendor of the consumer's new account number and service address is contrary to the increased consumer mobility provided for in other sections of the Rule. The provision of a new account number and service address should not be provided by a distributor to any gas vendor without the consent of the consumer, given at the time the consumer advises the distributor that it requires distribution service at a new address.

5.3.2

This clause requires that any co-operative marketing programs between a gas vendor and a distributor shall be subject to a SLA. Marketing programs may vary from year to year, and distributors may have such programs in some years and not others. It is impractical for these programs to be considered in advance within the SLA, other than to say that the gas vendor will be offered participation in any cooperative marketing program offered to gas vendors on the same terms without discrimination. If ensuring such nondiscriminatory access were the Board's intent, it would be more desirable to have such general requirement in the Rule, and leave the specifics of programs to the distributors and gas vendors to contract for when applicable. All gas vendors will have access to the Board through the complaint handling process provided by the Rule if any gas vendor considers that the Rule has been broken.

5.3.4

This clause indicates that the Board may issue directions regarding the terms of the SLA. If the Board is going to require that the SLA contain certain clauses, or permit or prohibit certain actions by the distributor, these requirements should be imposed through the rule making process. Issuing directions on the terms of the SLAs amounts to rule making outside of the procedural requirements required by the Act.

6 Service Transaction Requests

Union understands that the intent of this section is to apply to the small volume market.

The notification requirements imposed on distributors at several stages during the STR processing will result in additional costs being imposed on all consumers. There is little point in notifying the consumer of actions taken by a gas vendor when that gas vendor is the consumer's agent. Such notifications should be the gas vendor's obligation as the notifications concern the commodity services provided by the gas vendor and not distribution service.

Requirements for the distributor to notify the consumer of what a gas vendor has requested amounts to using the distributor for the systematic surveillance of every gas vendor's compliance with the Board's Code of Conduct for Gas Marketers, dated March 2, 1999 (the Marketer Code). Gas vendors, and their customers, should bear the costs of enforcement of compliance with the Marketer Code. These costs should not be borne by all gas distribution customers.

6.2.2

This clause indicates that a STR may include credit information. This should more properly be identified as payment history. Credit information is broader and would include credit reports that were purchased from credit agencies. Such reports, to the

extent that the distributor has obtained them, are available to gas vendors through the normal channels. The distributor should not be used to circumvent the process or cost of obtaining credit information available to all commercial enterprises.

6.2.3

Both 6.2.2 and 6.2.3 presume that gas vendors will have a choice of timing of finalization and transfer of accounts to a direct purchase contract. This presumption ignores the practical reality of managing large gas distribution systems. Efficient and cost effective management dictates the use of meter reading and billing cycles. It is impractical for gas vendors to choose if they want finalize an account through a special meter read, last actual read, next read etc. A distributor faced with differing preferences by gas vendors would incur unnecessary and unreasonable costs maintaining a capability to deal with all preferences requested. These costs would then be visited upon all consumers.

Union currently transfers customers on the first of the month, and uses estimates rather than meter reads for determining any split between billing at the new gas vendor rate, or at the previous service rate, when moving a customer to a new gas vendor arrangement. It is important that there be one process for dealing with STRs so that they may be effected in a timely and cost effective manner. The Rule should not allow multiple options in the process of effecting a customer transfer.

6.2.5

Consumers and gas vendors should not be allowed to pick any specific date on which to effect a change in billing options. A distributor's meter reading, billing cycles and process for effecting customer transfers will determine the date on which a change in billing option could be effected. To require that the distributor accommodate any date preferred by the gas vendor or the consumer will impose an unnecessary and unreasonable cost that will be borne by all consumers.

6.3 Processing and Verification of STRs

6.3.2

This clause provides the ability of distributors to request a copy of the written authorization of the consumer from the gas vendor (ie. "if requested by the distributor"). This clause is inconsistent with the increased customer mobility provided for in the rule. Distributors should have no requirement or option to request this information.

The Rule requires distributors to take direction from the consumer or its agent. The gas vendors serving small small-volume consumers are prohibited by paragraph 2.1.4 of the Marketer Code from submitting a STR to a distributor unless they have the written permission of the consumer. Paragraph 2.3.2 of the Marketer Code requires that such written permissions be maintained on file. Compliance with the Marketer Code is a matter between the gas vendor, the affected consumer and the Board. Distributors have no obligation and no desire to exercise a delegation of the Board's authority to police the conduct of gas vendors with respect to the Marketer Code. Additionally the Rule does not provide for distributors (which are private companies) to be compensated for performing this governmental/societal function.

The sentences requiring gas vendors to provide a copy of the written authorization of the consumer "if requested by the distributor" should be removed from the Rule (at clauses 6.3.2 and 6.8.3) so as not to imply that the distributor has any obligation to ensure, or liability arising from not ensuring, that gas vendors are complying with the Marketer Code.

6.4.3, 6.4.4 and 6.4.5

These clauses allow for the consumer or the gas vendor to request a special meter read. It is not necessary to conduct a meter read to accomplish an STR. Estimated consumption provides a reasonable method to accomplish billing on transfer, and requiring a special

read will result in an unnecessary cost and time delay. Distributors should be able to have one method for accomplishing finalization of accounts prior to affecting a STR.

In any event, when a consumer or gas vendor requests a special meter read, distributors should be able to charge for the cost of deviating from the established meter reading schedule. Otherwise all consumers will bear additional costs for which they receive no benefit.

6.5.7

This clause is inconsistent with clause 6.4.3, which provide for STRs to take effect on the first day of the month following STR processing. It should be amended to read, " Where the consumer, or gas vendor, and the distributor agree, a transfer may take effect on a date other than the first of the month following the completion of STR processing."

6.6 Change from a Gas Vendor to System Gas

This section requires distributors to accept consumers' return to system gas by gas vendors. The Board needs to consider related rules to be included in the Marketer Code to prevent the return to system of consumers when economically advantageous for the gas vendor and which may amount to breaking a commercial arrangement.

Further, in an unbundled service environment as proposed in Union's RP-1999-0017 case, Union might not be able to accept return to system in a timeframe entirely at the discretion of the gas vendor. Gas vendors returning consumers served under either a bundled or unbundled service to system gas will no longer have an obligation to provide the distributor with sufficient upstream transportation capacity to ensure that sufficient gas can be delivered to Union's system. Union will need to arrange sufficient upstream transportation and supply before it will be in a position to accept large numbers of customers returning to system gas. At the same time, Union will have to ensure that its delivery obligations at the east end of its system can be met and will not be jeopardized

by the gas vendor's return of consumers to system gas without the necessary east end transportation. Significant costs could be incurred if large numbers of consumers were returned to system simultaneously and without sufficient notice. Union's evidence on its east end delivery requirements is found at Exhibit B, Tab 1, pages 30-38 and at Exhibit B, Tab 1 supplemental of the RP-1999-0017 proceeding. Union's evidence on return to system for both bundled and unbundled direct purchase consumers was provided at Exhibit B, Tab 1, pages 75-87. These evidence excerpts are provided as Appendix B.

6.6.2

This clause needs to be clarified with the following additional sentence:

"The requirement to process an STR concerning a non-paying consumer to system gas shall not impact or delay any shut-off action by the distributor of the consumer's distribution service for non-payment of amounts owed by the consumer to the distributor."

6.7.1

This section presumes that gas vendors are in default when they fail to make payments to the distributor. Default by a gas vendor can also occur by failure to deliver gas to the distribution system. Depending on the balance in the banked gas account, failure to deliver gas can impose a greater financial cost to the distributor. The final sentence of this clause should read:

"The distributor shall not transfer the consumer to system gas until 10 days have elapsed from the date on which payment was due from the gas vendor or from the date the gas vendor failed to deliver gas according to a direct purchase contract."

Union notes that, if a gas vendor is in default, and fails to remedy the situation within the required ten days, there will be incremental costs of carrying the consumers served by the

defaulting gas vendor during that period. These costs will need to be recovered in some way and Union should have no risk from providing this default supply function.

6.8.2

Where a consumer notifies a distributor of a change of address, the distributor's notification to a gas vendor should be limited to the notification that the consumer will no longer be taking service at the current address if that consumer does not want to take the direct purchase arrangement to the new address. The distributor should not provide the new address, account number or telephone number of the consumer without the consumer's express consent to do so. Otherwise, the distributor may be violating the confidentiality of the consumer's information. The gas vendor has the current address and telephone number of the consumer and is able to contact the consumer directly should the consumer decline to authorize the distributor to forward the new information.

7 Customer Information

Union understands that the intent of this section is to apply to the small volume market.

7.1.1

This clause is too restrictive. Union gas provides integrated commodity, distribution, transmission and storage services. Additionally the Board may authorize Union to engage in non-utility businesses upon application. One such service is the Natural Gas Vehicle service for which there is a pending request (in RP-1999-0017) for approval before the Board. This clause needs to be broad enough so that Union may use the information it obtains from its customers to conduct any business, which Union is authorized by the Board to conduct.

7.1.2

This clause is unclear in that it allows provision of customer information to the customer's gas vendor, without restriction, but requires the customer's agent to have written authorization from the customer prior to the provision of customer information. Both gas vendors and customer agents, to the extent they are not the same, require written customer consent before customer information can be provided. This should be clarified in this clause.

Union interprets this clause as allowing the provision of customer information by a distributor to suppliers of services to the distributor, necessary to conduct the business of the distributor, provided those suppliers are contractually restricted in the use of such information for the provision of the contracted services and no other purpose. Examples of such suppliers and service providers include external auditors, consultants and meter reading contractors and billing service providers. If this clause restricts the distributor's ability to contract externally for services in any way, it should be amended to expressly permit such provision of information.

7.4 Meter Accessibility

Union considers that the provision of the meter is an integral part of distribution service and should remain so for safety and economic reasons. The most efficient way to provide meters and meter reading is through the distributor, where the distributor then provides gas vendors with the information necessary for the gas vendor's business.

Presumably a gas vendor or consumer would not avail themselves of this option unless they wanted a distribution service which excluded metering. The effect of this rule will be the unbundling of metering and meter reading without a hearing.

Any device attached to the distributor's custody transfer meter will have to be attached by a qualified gas technician. This requirement will be part of meeting the distributor's technical requirements. Directionally, third party access to the meter will require Union to inspect any devices and to seek cost recovery from the gas vendor or consumer for any cost it incurs to ensure that devices are compliant and are installed properly.

If gas vendors are provided the ability to read the distributor's gas meter for billing on a split bill basis as proposed in this section of the rule, this will result in irreconcilable distribution and commodity bills unless the gas vendor reads the meter at the same time that the distributor does. The differing bills will result in customer confusion and costs that neither the distributor nor the gas vendor will be able to resolve.

The provision of the meter and meter reading by the distributor also facilitates competition in the sale of the commodity by avoiding a barrier to customer mobility. If multiple providers of meters were allowed to change out meters when gas vendors changed, this would create a practical barrier to customer choice when contracts were up for renewal. Consumers may be restricted in their choice if, once having selected a gas vendor, the cost of changing meters on changing gas vendors became prohibitive resulting in Consumers being forced to stay with their initial gas vendor selection indefinitely.

This section should be removed in its entirety to make clear that the Rule in no way allows supplanting the distributor's custody transfer meter by any device allowed by this Rule.

8 Billing

8.1 Customer Choice

Even if the compulsory billing provisions of this section of the Rule were within the jurisdiction of the Board (which Union disputes, as discussed below) it will achieve the customer choice objective expressed in the Rule.

The premise of this part of the Rule appears to be that customers should have a choice of bill providers for a consolidated commodity and distribution bill. While customer choice might be both achievable and desirable in a robust competitive commodity market, the market in Ontario is far from robust. The overwhelming majority of consumers on a direct purchase arrangement in Union's service area (and in Ontario for that matter) are with one gas vendor. The majority of consumers were told at the time that they signed on with a gas vendor that nothing would change other than the supplier of the gas commodity. The distributor would still deliver the gas and the distributor would still bill the consumer. The contracts signed by many of these consumers give the gas vendor the right to determine the bill provider (despite the fact that the regulatory framework and customer communication were centred on the utility continuing to be the billing entity). The majority of customers would clearly be surprised to find out that their commodity agreement would result in them ceasing to receive a bill from Union for the services provided by Union. Therefore there will be little customer choice if gas vendor consolidated billing becomes an option in Ontario. Consumers will be shifted to gas vendor consolidated billing despite assurances that nothing would change. This would happen despite the fact that consumers do not want gas vendor consolidated billing. That consumers do not want gas vendor consolidated billing is evident from the market survey

filed by Union in RP-2000-0078 at Exhibit B, Tab 4, including Appendix C, all of which is appended to this submission as Appendix C.

The Market Design Task Force recommendations were premised on a competitive market with many gas vendors. This situation does not exist today. The mandatory provision of gas vendor consolidated billing risks removing customers from the protection of a regulated distributor and exposing them to a largely unregulated market where one firm is the dominant provider.

The Board appears to be of the view that vendor consolidated billing is "required" to transform the retail/small volume marketplace into one that is more competitive. With due respect, this will result in a marketplace that is less competitive and one where end use customers will be more confused and offered little protection.

8.3.1 Billing Options

Distributor Consolidated Billing

This section requires distributors to offer gas vendors distributor consolidated billing. This mandatory offering of distributor consolidated billing is inconsistent with the Board's previous decisions that distributor consolidated billing (known as ABC service) is a non-utility service. Union has sought explicit approval to continue to provide ABC service because such service was deemed by the Board as not distribution, transmission or storage as defined by the Act. The Board's decision on Union's request to provide ABC service is pending in Union's RP-1999-0017 case. Union's request in RP-1999-0017 is found at Exhibit B, Tab 6, Addendum, including Appendices A and B all of which are included as Appendix D of this submission. Distributors cannot be required by a rule under section 44 to provide a non-utility service for which explicit approval of the Board is required before such service can be provided.

Union currently offers, and anticipates continuing to offer, distributor consolidated billing. However, the Rule as drafted appears to contemplate that the Board could order such a service even if it did not exist. As more fully developed below, the Board's jurisdiction to order the provision of services exists pursuant to section 42 of the Act. Such orders can only be made following a hearing, and may only be made with respect to gas sales, transmission, distribution or storage services. Distributor consolidated billing is none of these. Given that distributor consolidated billing is in fact offered by both Union and Enbridge, it appears to Union that the Board's objectives with respect to the content of such bills can be met by specifying the content of the distribution portion of the bill, and the requirement that that portion of the bill be separate from the portion which relates to the gas vendor service.

Gas Vendor Consolidated Billing

Union has earlier provided Board Staff with submissions concerning the jurisdiction and the propriety of a rule purporting to require the provision of what was then described as "marketer consolidated billing". The Rule continues to contemplate a similar requirement, now entitled "gas vendor consolidated billing". Because Union does not have access to the Board's reasoning in its apparent conclusion that the jurisdictional and policy issues raised by Union in the first instance ought not to stand in the way, Union approaches its submissions on the Rule on the basis that the Board's conclusions have been informed in part by the comments made by other parties to Board Staff.

The Importance of Union's Right to Bill Consumers

It is important to begin by emphasizing the significance of Union's until now unquestioned right to bill consumers for the distribution services it provides to them. Union's bill to consumers for the distribution services it provides is:

- a fundamental and necessary aspect of its contractual relationship with them; (for the small-volume market, an implied contract governed by the OEB approved tariff)

- a necessary element of its ability to earn its allowed rate of return;
- its primary and essential means of customer communication; and
- the fundamental means by which it achieves, maintains, and employs the valuable good will in its relationships with distribution consumers.

The bill is an essential element of Union's ability to enforce the payment obligations owed by distribution consumers since it crystallizes the amount and the timing of those payment obligations. That fact is recognized in the rate schedules pursuant to which Union operates. Amongst other things those rate schedules confirm the contractual reality that the amounts to be charged must be set out in monthly bills, and that late payment charges will depend upon the timing of the rendering of those bills.

Because the bill both triggers the contractual obligation to pay and permits the enforcement of that obligation, it is a necessary element of Union's ability to earn its allowed rate of return. This is fundamental to the Board's obligation to allow Union's shareholder the reasonable return to which it is entitled.

As set out more fully in the evidence which Union has filed in Board Proceeding RP-2000-0078 (appended to these submissions at Appendix C) the bill is the primary and essential means by which Union communicates with its customers not only in respect of the contractual payment obligations, but also with respect to important safety and natural gas promotion matters.

Finally, and significantly, that communication is the means by which Union identifies itself with the reliable distribution service it provides and thereby creates, maintains, and builds its goodwill. The Board has recently recognized the significance of the goodwill associated with customer relationships (RP-1999-0058 at para. 4.7.10). Such goodwill is particularly important in relation to Union's ability to negotiate franchise renewals and its ability to influence consumers in relation to their usage of natural gas (as opposed to other energy sources which may be promoted by gas vendors appropriating Union's goodwill to a new billing relationship). Indeed, as described more fully in the Union

evidence noted above the capital markets currently ascribe value to that customer relationship.

The Board's statutory objective of facilitating the rational expansion of the distribution system requires the distributor be able to encourage the use of natural gas, benefit from the goodwill associated with the service it provides, and be able to bill for the resulting service. The adverse economic impact associated with the destruction of the distributor billing relationship stands to significantly undermine this objective.

On the other hand, the question raised by Union's right to bill for the services it provides is not, as suggested by Direct Energy in their correspondence commenting on the Board Staff Draft Distribution Access Rule dated September 25, 2000, a question of monopoly access to information. The information concerning the customers' deliveries is available to those customers and to the gas vendors authorized by them. The issue raised is the ability to bill and hence to achieve the necessary objectives described above.

Nor does the ability to bill for distribution service represent a separate non-monopoly service as Direct Energy has also suggested. As Direct Energy notes, the Board has held, correctly, that "the gas bill is not 'utility service' because it is not a service provided by a utility for which a regulated rate, charge, or range rate has been approved by the Board" (RP-1999-0058). But the conclusions Direct Energy seeks to extract from this finding do not follow. Union's ability to charge and collect from consumers effectively is not a separate service. Rather it is a necessary and integral part of the provision of the delivery service. It is no more a separate "service" than any of the other necessary activities undertaken pursuant to the delivery contract. Still less is it service for which, as the Board has noted, a separate rate, charge or range rate as been approved by the Board.

Union does offer a billing service--the service it provides gas vendors who wish to have their charges incorporated in what will now be called a distributor consolidated bill. They can choose to take the service or not. This is entirely distinct from the circumstance of a consumer who takes distribution service from Union. Having taken the distributions

service, the consumer takes on the obligation to be billed and to pay for that service. That obligation is not a severable service, which the consumer can decline.

The Board does not have the jurisdiction to make a rule requiring gas vendor consolidated billing.

As described below, the combined effect of the provisions in the Rule associated with gas vendor consolidated billing is to change the contractual relationships, which currently exist between Union and gas consumers. The result of the Rule is the creation of a wholesale distribution service. Presumably this model was chosen because of the impossibility of requiring gas vendor consolidated billing on any other basis. However, the resulting Rule is beyond the jurisdiction of the Board for at least three reasons.

1. Wholesale gas distribution service is contrary to the provisions of the Act.
2. In any event, the Board cannot direct the provision of a new service and set the terms and conditions of that service other than by order following a hearing.
3. In any event, gas vendors could only provide the retail distribution service contemplated by the proposed Rule following appropriate orders by the Board pursuant sections 36(1) and (2) of the Act.

<u>The Rule Purports to Create a Wholesale Delivery Service</u>

The relationship between Union and its distribution consumers is one of contract. Union's obligation is to provide distribution service. The consumer's obligation is to pay for that service at rates determined by the Board. In a contract between Union and a consumer the obligation to pay for the service remains with the consumer. The nature of that obligation does not change even if the consumer appoints an agent, for example a gas vendor, to deal with the distributor on its behalf.

The rule-making authority granted to the Board does not extend to re-writing the laws of contract and agency, which apply to the contractual relationship between Union and its distribution consumers.

However, the proposed Distribution Access Rule purports to create a different contractual relationship than the one currently in place. Firstly it purports to shift the obligation to pay for the service to the gas vendor. In the terms of the proposed Rule, the gas vendor, not the consumer, becomes the "customer" (Rule 1.2). The gas vendor may require the distributor to provide gas vendor consolidated billing (Rules 8.1.1 and 8.3.1)[*]. In those circumstances, the distributor may require security, but from the gas vendor, not from the consumer (Rule 9.3.6). For as long as the gas vendor pays for that service, the distributor is obliged to continue it, regardless of the extent to which the gas vendor is or is not recovering revenues from the consumers to whom the delivery service is being provided. If the gas vendor does not pay for the service, the distributor may cease to provide service to the gas vendor, though not to the ultimate consumer, and may cease providing gas vendor consolidated billing (Rule 6.7). The remedy neither turns on whether the consumer has been paying for its distribution service or not, nor does it deprive that consumer of service. It could not be clearer that the financial obligations for the service rest entirely on the gas vendor. The gas vendor's obligations are not discharged by any actions of the consumers, nor is the distributor entitled to look to the consumers for the discharge of those obligations. The contract between the distributor and the consumer has been supplanted by a contract between the distributor and the gas vendor. This is a wholesale gas distribution service.

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[*] The Rule contemplates that this direction can come from either the gas vendor or the consumer. The gas vendor's right to require the service does not depend on consumer authorization. In fact any argument that "consumer choice" will play any significant role in a decision to move to gas vendor consolidated billing is belied by the terms required by gas vendors in Union's franchise area. Gas vendors require consumers to grant it the right to decide to change the consumers' billing arrangements to gas vendor consolidated billing. In light of the consumer preference to the contrary expressed in the survey results appended at Appendix C, there is no reason for any illusion that consumer choice is the basis upon which vendor consolidated billing would proceed. An example standard consumer agreement is appended at Appendix E.

It may be that the reason the Rule proposes a wholesale contractual relationship is because of the impossibility of effecting gas vendor consolidated billing in a manner, which left the payment obligation with the consumer. The Board could not, and indeed has not, directed distributors to outsource the billing for their services to an unknown number of gas vendors with unknown and undemonstrated capacities to process the necessary information, with appropriate content, in a timely fashion, and to collect and remit funds. The complete impracticality, inefficiency and risk associated with requiring a distributor to outsource such a vital function in such an unreliable and inefficient manner is manifest. Any attempt to do so would fundamentally disrupt the distributor's ability to earn a fair and reasonable return. It would amount to the very kind of management of the business, which is beyond the jurisdiction of the Board (B.C. Hydro Power Authority v. B.C. (Utilities) (1996), 20 B.C.L.R. (3d) 106 (B.C.C.A.)). Indeed the Board has as recently as October of last year recognized that a distributor "has the right to organize its financial affairs in an efficacious manner and to contract to perform customer care services, including billing and the operation of the call centre." (In the matter of a Complaint referred by the Heating, Ventilation and Air-conditioning Contractors Coalition, RP-1999-0058, para. 4.7.4).

The proposed Rule attempts to avoid this impossible situation by making the gas vendor solely responsible for the payment for the distribution service. The result is a wholesale gas distribution service, which the distributor must provide to any gas vendor who requests consolidated gas vendor billing. In turn, the consumer's obligation to pay for the distribution service is one owed to the gas vendor who becomes responsible for the provision of the service. While the ownership of the means for the provision of that service remains with the distribution company, its capacity is in effect leased by the gas vendor whose obligation to its paying consumer is to ensure that that service is provided.

For the reasons described below, the Rule is beyond the jurisdiction of the Ontario Energy Board (the "Act").

Wholesale Distribution Services Contrary to the Act

Pursuant to the Act a gas distributor is a person who delivers gas to a "consumer" (ie. end use consumer who consumes the gas and not any other customer). Gas is distributed to a consumer (not any other customer) and gas distribution services are provided to a consumer (not any other customer) (s.3 of the Act). Unlike the proposed Rule, the Act does not contemplate the provisions of distribution service other than to consumers. The proposed Rule requires someone other than a consumer, namely a gas vendor, to pay for the delivery of distribution service, and hence, as a matter of contract, requires that the distribution service be delivered to that customer. The Rule purports to authorize this by contemplating, unlike the Act, that distribution service may be delivered to a "customer" (ie. gas vendor). The Board cannot, in the guise of exercising its rule-making power, enlarge on the definition in the Act and authorize something the Act does not contemplate. The Act does not contemplate making rules which conflict with the Act.

It is notable that the definitions of "distributor", "distribute" and "distribution system" insofar as they relate to electricity (Section 56 of the Act) do not contain this restriction. An electricity distributor is not someone who is limited to the provision of distribution services to a "consumer".

In other words, the Act contemplates that gas distribution service will be provided only to consumers, not, as contemplated by the Rule, to other customers such as gas vendors. In this respect, the provisions of the Act applicable to gas distribution are distinctly and intentionally different from those that apply in the case of electricity. They not only indicate the legislature's intention that these markets be treated separately in this respect, they require it.

Gas Services, and Associated Terms and Conditions, Cannot be Imposed by Rule

A wholesale gas distribution service is a service not heretofore available. A direction that Union provide that service and any orders concerning the terms for the provision of that service, even if permitted under the Act, must be by way of order pursuant to sections 36

and 42 of the Act. Section 21 of the Act requires that, subject to limited exceptions, which are inapplicable here, such order may only be made following a hearing.

It is not open to the Board to circumvent these requirements by the exercise of the rule-making power in section 44.

The importance of the hearing requirement is underlined by the significance of the impact of requiring gas vendor consolidated billing. The evidence currently before the Board--both in RP-2000-0078 and in this submission indicates that the financial impact on Union of directing gas vendor consolidated billing is likely to be very significant. It will affect Union's ability to manage asset utilization risk, its ability to negotiate franchise renewals, its shareholder value, its cost of capital and its credit risk. Even if the Board had the jurisdiction to direct these changes, it could and should do so only after considering their impact, and the implications of that impact for just and reasonable rates.

Any determination of whether gas vendor consolidated billing is appropriate should also have regard to whether the result would be to lessen gas vendor competition (by creating barriers to market entry) and the economic waste necessarily associated with allowing gas vendor consolidated billing while requiring the distributor to be able to resume billing at the discretion of the consumer or gas vendor. Appended to these submissions at Appendix F is a letter from Professor Richard Schwindt outlining the reasons why gas vendor consolidated billing gives rise to these concerns and their significance.

Gas Vendor Consolidated Billing Requires Gas Vendor Regulation Pursuant to Section 36 of the Act

Even if the Board could direct the provision of a wholesale distribution service, the result would be that the gas vendors would become the providers of distribution service and hence "distributors" under the Act. The Act defines a "gas distributor" as a person who delivers gas to a consumer, and "distribute" and "distribution" to have corresponding meanings (Section 3 of the Act). In the case of gas distribution, therefore, the distributor is the person who is legally responsible for the distribution service, not the person who owns the means by which the service is provided. Again, the contrast with the definition of distributor in the electricity context is striking. An electricity distributor is a person "who owns or operates a distribution system" (Section 56 of the Act).

It is clear from the analysis of the structure of the obligations in the Rule (see the discussion above) that the gas vendor is acting as principal, not as agent, in the provision of the distribution service. It is entirely inconsistent with an agency relationship that the gas vendor's obligations to pay for the distribution service and the distributor's right to terminate that service to the gas vendor are independent of the extent to which the consumer does or does not discharge its obligations to pay the gas vendor. In the result, if the consumer has paid for the service, it is to the gas vendor to whom it looks for the distribution service for which the gas vendor has been paid.

The gas vendor therefore is the entity entirely responsible for the provision of the distribution service in return for the payment received. The gas vendor is a "distributor". As such, its rates for distribution and sales service must be set pursuant to section 36 of the Act. The Rules contain no requirement that a gas vendor requesting gas vendor consolidated marketing meet these necessary requirements. Moreover, Union has been advised that the Board does not intend to exercise this necessary regulatory jurisdiction.

The exercise of this jurisdiction is not only required by the Act, but also necessary to the achievement of the objectives underlying those requirements. Unless the distribution

rates charged by gas vendors in consolidated bills are regulated, there is no effective means by which the Board or gas consumers, can be satisfied that whatever mark-up is charged by gas vendors in connection with their administration of these gas distribution arrangements is understandable and is just and reasonable.

8.4.1 Information Disclosed on Bills

The only services which the distributor is able to disclose on bills are services for which a rate or charge has been approved by the Board. It is not practical, nor reasonable, to expect that a distributor to disclose components of service for which the Board has not set a rate on its bill. For the distributor to do so would amount to usurping the Board's rate-making authority. However, the draft Rule seeks to impose a regime where different consumers or different gas vendors could demand differing degrees of disclosure on their bills. This is simply not practical. The requirement of this clause cannot be implemented because it amounts to creating new distribution services, at the election of the consumer or the gas vendor, while circumventing the requirement that such distribution services can only be provided when, after a hearing, they are approved by the Board pursuant to sections 36 or 42(3) of the Act.

The Board needs to consider related rules on information disclosure that would apply to gas vendors through the Marketer Code. In the absence of any such requirement in the Marketer Code, gas vendors will be able to bundle or unbundled charges as they see fit, and be able to charge any price for distribution service regardless of the distributors regulated rate. Considering that there are really only three gas vendors of any size one of which has an overwhelmingly share of the market, the Rule risks exposing consumers to unregulated service providers with sparse competition. Union is somewhat perplexed as to why the Board, which has long been an advocate of customer protection and communication around direct purchase, ABC service and unbundling is now proposing a Rule, which as currently drafted, will lead to exposing consumers to significantly more risk, confusion and no assurance regulated distribution services will be provided and charged at rates regulated by the Board.

9 Security Arrangements

9.3.2

This clause restricts the security taken from low-volume consumers to cash deposits. Distributors also accept third party guarantees for low volume customers. Such guarantees are used when the Provincial Government through the Social Services department guarantees a consumer's payment.

The security held for gas vendors should include gas in inventory.

9.3.6

This clause allows for the maximum security of a gas Vendor, under distributor consolidated billing, not to exceed:

- The maximum anticipated exposure in the banked gas account(s) in accordance with the provisions of the relevant approved rate schedules.

This statement should read:

- The maximum exposure in the banked gas account(s) in accordance with the provisions of the relevant direct purchase contract.

The banked gas account exists pursuant to the direct purchase contract between the distributor and the gas vendor. There is no provision for a banked gas account in Union's rate schedule.

This clause related to the banked gas account is equally applicable irrespective of what billing option is used. The financial exposure faced by distributors under the banked gas account arises from the existing structure of direct purchase arrangements. Currently, gas vendors typically deliver gas into Union's system at an even Daily Contract Quantity

(DCQ). That is they deliver 1/365th of the consumers annual normalized gas consumption each day. The gas vendors are required to balance deliveries with their customers' actual consumption annually at contract expiry. This results in gas vendors delivering more than is consumed by their customers in low consumption months and less than is consumed by their customers in high consumption months. Depending on the contract commencement date, a direct purchase arrangement can experience significant negative balances in the banked gas account during the year.

For example, on April 30, 2000 the imbalance in the banked gas accounts of gas vendors serving consumers on Union's system amounted to approximately 32 million GJ. At the currently approved WACOG this exposure would amount to in excess of $243 million. Unless distributors are allowed to consider the banked gas account exposure for all billing options, Union will not have sufficient security. The current wording of the Rule is neither accurate or appropriate.

9 Revision of Security

9.4.2

The significant exposures in the banked gas account mean that even a 10% shortfall in security can be material. The Rule should not restrict when a revision to security arrangements may be made if the required security calculated conforms to the reasonable security defined in the Rule under section 9.3.6. The Rule should simply ensure that any changes in security arrangements be applied fairly and is a non-discriminatory fashion.

10 Financial Default By Gas Vendors

This section only deals with financial default by gas vendors. The greater exposure arises from failure to deliver in the event that a significant negative balance exists in the banked gas account. The precise defaulted amounts in the event of a failure to deliver may not be known for up to 47 days after the failure to deliver began because of the use of billing cycles. Therefore it is impossible for a distributor to know whether any revenue retained is in excess of the defaulted amount until all gas flows have been verified, placing the distributor in a position of having to withhold revenue and risk violating the rule or to continue remitting revenue to the gas vendor but risk not having retained sufficient security.

11 Complaint Procedures

11.2

Complaints that are resolved are private matters between a complainant and the distributor, unless the resolution of the complaint required the intervention of the Board. While the distributor's complaint file may be made available at the distributor's offices to the Board for inspection from time to time, it should not be a requirement for the distributor to make that file available for inspection by the public. The only complaint documentation that the public should have access to is documentation filed with the Board concerning complaints adjudicated by the Board.

List of Appendices

Appendix A	Exhibit B, Tab 2, pp. 34-38, RP-1999-0017
Appendix B	Exhibit B, Tab 1, pp. 30-38, 75-87, RP-1999-0017
Appendix C	Exhibit B, Tab 4, including Appendix C, RP-2000-0078
Appendix D	Exhibit B, Tab 6 Addendum, pp. 1-6, Appendix A (5 pages), Appendix B, RP-1999-0017
Appendix E	Direct Energy Customer Agreement Source: www.energyshop.com
Appendix F	Letter of R. Schwindt dated February 23, 2001.