Attachment A: Detailed Comments

2.1 Entire Agreement

2.1 (a)&(e) - Appendix E of the GDAR Agreement contemplates incorporation of Transportation Agreements and Information Systems Access Agreements. (At this time, the Unbundled Service Contract and associated Storage and Transportation Hub Contract category would not apply to Enbridge Gas Distribution.) The GDAR Agreement therefore contemplates incorporation of the Company's current Gas Delivery Agreement and EnTrac User Agreement. In the Company's view, it is not appropriate to incorporate its current form of Gas Delivery Agreement into the GDAR Agreement, primarily because it is a tri-partite agreement, between the Company, the customer(s), and the Gas Vendor. Similarly, the Company's Rate Handbook is drafted in the same manner, with the ultimate consumer being the customer under the Gas Delivery Agreement. Either the Gas Delivery Agreement or the Rate Handbook would have to be substantially revised in order to be consistent with the GDAR Agreement, or the reverse. In the Company's view, this is unnecessary, as the current Gas Delivery Agreement and Rate Handbook provisions can continue to exist in their current form without impairing implementation of the GDAR Agreement, and with no disruption to direct purchase services.

2.1 (f) - This Section contemplates that there will be "supplementary terms and conditions applicable to the Parties in relation to the delivery or supply of gas to consumers". It is not clear what is intended or expected for these Supplementary Terms, or how they will be negotiated or established. The Company believes that the Gas Delivery Agreement, read in conjunction with the Rate Handbook, as amended from time to time, deal with all of the terms and conditions related to the delivery or supply of gas to consumers. Therefore, Enbridge requests that the Gas Delivery Agreement remain intact. There is no need for further supplementary terms.

2.5 Existing Customers

We do not understand the reason for including this provision in the GDAR Agreement, if the customer is not a party. What rights or obligations of the Gas Vendor or Gas Distributor is this provision intending to address?

2.6 Termination

2.6(a) – Mandatory termination should also be triggered by insolvency [see 2.7(a)(iv) and (v)]. A Gas Distributor should not be compelled to incur liabilities in respect of a Gas Vendor which has become insolvent.

2.6 (a)(ii) Revise last phrase to "if the Gas Vendor has customers who are low-volume consumers", because a Gas Vendor can serve both large volume and low volume consumers, and the phrase "low-volume customer" has no defined meaning.

2.6(a)(iii) Revise last phrase to "of the Gas Distributor's right to distribute gas in the subject franchise area", to have consistency with the defined terms.

2.6(b) – The 'Events of Default' set out in Section 2.7 are improved from the previous draft , however the provisions of 2.6(b) provide for notice to be given of rectification of the Default. The defaulting party should also be required to rectify the default. The words after (ii) "unless the Defaulting Party has given notice…" should be amended to read "unless the Defaulting Party has rectified the Event of Default and has given notice…". In other words, simply giving notice is not enough. As well, the rectification and notice right should NOT apply to bankruptcy and insolvency events (Sections 2.7(a)(iii), (iv) or (v) – see additional comment below).

Lastly, by having the right to terminate be the subject of the dispute resolution mechanism (see the last sentence of Section 2.6(b)), if a Gas Distributor wishes to terminate the Agreement because (for example) the Gas Vendor is in material breach of its obligations under the Agreement and has not cured the breach), then the Gas Vendor can delay the termination of the Agreement. From a commercial perspective, a Gas Distributor should have the option to consider the effect of termination on both itself and the Gas Vendor and then terminate and accept the consequences, if it chooses. Termination should not be able to be subject to binding arbitration pursuant to Article 6.

2.7(a) – In Subsection (ii), the opportunity to cure a failure to perform a "material obligation" is appropriate for many of the parties' respective obligations. However, it is NOT normally considered appropriate for financial/payment obligations. In this case, the Gas Vendor (or a Gas Distributor with gas vendor-consolidated billing) knows when the payment obligations arise and should be expected to both plan for and make payment within the period. The other party should not be required to 'underwrite' the payment obligation of the paying party. As such, a payment obligation should not be given any opportunity for cure. In other words, payment must be made when required, or non-payment becomes an Event of Default automatically. There is already a mechanism for the Gas Vendor to dispute an amount in the invoice from a Gas Distributor. There should not be an additional grace period.

We suggest 60 to 120 days advance notification in the case of an event of termination that is within the prior knowledge of the party whose actions have given rise to the termination.

In subsections (iv) and (v) there should also be no opportunity to cure. These events are quite determinative and if they occur, could quickly and detrimentally affect a Gas Distributor. A Gas Distributor should have the ability to terminate the Agreement upon their occurrence, to the extent permitted by law.

(c) Change "Terminating Party" to "either Party" in the third line.

3 Security Arrangements

3.2 – The type of security to be provided by the Gas Vendor is stated to be "at the discretion of the Gas Vendor". This is appropriate for (a), the letter of credit, (b) a cash deposit, and (c) pre-payment. However, it is NOT appropriate for the parental guarantee. Firstly, any guarantee requires many more steps to effect enforcement. This is not the same as the cash/cash equivalents of the first three types of security. Secondly, there is no assurance that the parent is a company of any substance, the guarantee of which would provide adequate financial security. The provision of a parental guarantee should be at the discretion of the Gas Distributor.

3.4 – The 'gross maximum' amount of security is based only on the maximum forecast debit banked gas account. It does not include upstream pipeline demand charges or distribution charges. It is not clear what is intended by Subsection 3.4(b) or what is the effect of this provision.

3.4(a) - Using the NYMEX Dawn Basis to value the Banked Gas Account is only appropriate in cases of non-Distributor Consolidated Billing. Where the Vendor is availing itself of Gas Distributor Consolidated Billing, the relevant commodity price is the weighted average price billed by / paid by the Distributor for / to the Vendor. For example, Direct's current offering of $0.42 / m3 bears no resemblance to the current Dawn price.

3.4(c) - This clause needs to distinguish between the billing options and commodity versus distribution charges. The main principle that needs to be upheld in the Service Agreement is that the party responsible for collection of the receivable should have the right to hold the security. In the case of Gas Distributor Consolidated Billing, the Distributor takes the risk of collecting the entire bill (distribution and commodity). As such, there should be no reduction in security provided by the Vendor in respect of security that may be provided to the Distributor by the Vendor's customer. In a worst case scenario the Distributor could incur the cost of a default by the Vendor to return gas to the Banked Gas Account and not be paid by the Vendor's customer for commodity and distribution.

A clause should be added that states that the security provisions of the Agreement will need to be amended in the event that Vendor Consolidated Billing is implemented.

3.6 – A review of the amount of security once every three months is too often, simply from an administrative standpoint. It seems more reasonable and practical that the security must be *required* to be reviewed annually, but *may* be reviewed at the option of either party at any other time.

3.7 – Delete the word "financial" in the phrase "financial obligations".

4 Financial Arrangements

4.1(b) There should also be a statement, as a default if the parties cannot agree otherwise, that where there is to be gas vendor-consolidated billing "The Gas Vendor shall bear the risk of consumer non-payment for the entire bill, including gas distribution charges". This would ensure at least some fairness on risk with the similar obligation on the Gas Distributor for gas distributor-consolidated billing.

4.3 Add "with" between "accordance" and "Chapter 4" in the first line.

5 Confidential Information

Change "Applicable Law" to "Applicable Laws", to be consistent with the defined terms.

5.1 – (a) (iii) Revise "permitted by" to "permitted or required by" in the third line, to accommodate the fact that Applicable Laws are not usually permissive.

(vi) delete "the" between "other" and "Party" in the second line.

5.2 – The requirement for a party to comply with "all Applicable Law" is not sufficient to permit consumer information collected by one party to be used by the other party. There should be a requirement that each party obtain the consent of the consumer to the delivery of the consumer's personal information to the other party for purposes of this Agreement.

5.3 – This Section is entirely duplicative of the mutual confidentiality obligations set out in Section 5.1. It should be deleted. If it is not, it begs the question as to why it is included, or what additional protection the Gas Vendor information should receive. This would not be appropriate. The definition of "Confidential Information" includes Gas Vendor information.

6 Dispute Resolution

The Company suggests adopting a non-binding mediation dispute resolution provision similar to that set out in the proposed Enbridge GDAR Agreement, at article 7. Especially in the context of what may be a long-standing relationship with a Gas Vendor, Enbridge prefers to have the option to mediate disputes, rather than arbitrate them. Arbitration tends to be much more litigious than mediation, and can be just as costly as litigation itself. As in the Company's proposed article 7, Enbridge recommends retaining the "duty to negotiate" the dispute before any alternative dispute resolution mechanism is applied.

Also, because this is an OEB-mandated agreement, and the Board has reserved for itself the right to amend the agreement, it is not clear in what instances disputes should be

brought to the Board for resolution and what disputes should be brought to an arbitrator for resolution. Would it be necessary to obtain the Board's approval for any amendments dictated by an arbitrator? In the Company's view, the GDAR Agreement should contain dispute resolution mechanisms similar to other current commercial agreements between the parties, i.e. non-binding mediation.

7 General

7.1 - The Gas Vendor's representations and warranties should be expanded to include all of the provisions in the Company's "Reliance on Agent" clause on page 6 of its Collection Service Agreement, filed in the Company's June 13th submission to Board Staff. Those provisions are reproduced in italics below:

Reliance on Agent

In addition to any other representations and warranties given to the Company under this Agreement, the Agent represents and warrants to the Company, and acknowledges and agrees that the Company is relying on the accuracy of each of such representations and warranties in entering into this Agreement, that at the date hereof and at all times during the Term:

> *the Agent is the duly appointed agent of each Customer and, in such capacity, is entitled to enter into this Agreement on behalf of each such Customer and to act on behalf of each such Customer under this Agreement;*
>
> *the Agent has entered into a valid and binding Purchase Agreement with each Customer, and such Purchase Agreement shall be in full force and effect during the term of this Agreement;*
>
> *the Agent has associated a Price with each Customer pursuant to a valid Purchase Agreement in accordance with the Transaction Rules;*
>
> *the Agent is solely responsible to provide the Company all the necessary and correct information required by the Company to fulfill its obligations under the Agreement; and*
>
> *the Company is entitled to rely solely on the information provided by the Agent in that regard; and for these purposes, without limitation, where the Agent utilizes the EnTRAC System, the Company may rely on all actions taken, and information set out, by the Agent in the EnTRAC System.*

The Company must be assured that the Gas Vendor has entered into a valid and binding Purchase Agreement with each customer it purports to represent. The Company takes on the collection risk based on the giving of and truth of their representations.

7.2 – The Company believes that indemnification is more appropriately addressed in its underlying agreements with Gas Vendors rather than through a generic indemnity that

has not taken into account the unique and varied commercial relationships that do exist between a Gas Distributor and a Gas Vendor. At present the Company has balanced the commercial realities of those relationships with the need to provide fairness to Gas Vendors in the legal contracts. This has resulted in a number of approaches to indemnification in the different agreements with Gas Vendors. These approaches have been carefully considered having regard to the particular risks and issues raised by the particular relationships addressed by each of the underlying agreements. To incorporate a blanket form of indemnity into the GDAR Agreement will result in a mismatch between the parties' legal rights and remedies and their commercial relationships. Therefore, the Company recommends that indemnification be removed from the GDAR Agreement as this is an area that is more appropriately addressed in the service specific agreements.

If there *is* to be an indemnity in the GDAR Agreement, the Company's view is that the Board should, in consultation with the Gas Distributors and Gas Vendors, consider the existing indemnities (or lack thereof in certain circumstances) in the existing commercial agreements between Gas Distributors and Gas Vendors in order to: (i) understand the rationale for the current varying indemnities in each relationship; and (ii) ensure that gaps, inconsistencies and ambiguities are addressed to the collective satisfaction of all parties.

Additionally, the Company is of the view that if an indemnity is included in the GDAR Agreement, it should be limited in all cases to claims that arise as a result of a third party claim. To the extent that one party has a claim against the other with respect to contractual non-performance or breach of a representation or warranty, the parties should not be relying upon indemnification but rather should seek remedy through legal action for breach of contract.

The Company also suggests that if an indemnity is included in the GDAR Agreement, it should also: (i) exclude certain types of damages such as: indirect or consequential losses, including loss of profits, business interruption losses, or any losses as a result of claims by third parties; and (ii) provide an overall limitation of the quantum of damages that would be recoverable.

The Company also recommends that if an indemnity is included in the GDAR Agreement, it should include a process for dealing with third party claims that would require an indemnified party to provide prompt notice of third party claims to an indemnifying party. Such a process could also confirm the right of the indemnifying party to settle such third party claims and to ensure that the indemnified party is aware of the terms of such proposed settlement.

7.4(a) - The Company is concerned about Gas Vendors' ability to unilaterally veto necessary amendments to agreements that the Company must have with all Gas Vendors, and to delay amendments through the lengthy dispute resolution process that the agreement contemplates.

7.4(b) - It is not clear what process the Board would contemplate for making amendments to the GDAR Agreement, or how this process would coincide with the Dispute Resolution mechanism. Further, if the Board is contemplating amendments that will have rate-making consequences, the effects of these consequences ought to be determined simultaneously with the amendments themselves.

7.5 Assignment and Delegation

The Company should not have to obtain the consent of the Gas Vendor to assign its rights and obligations under the Agreement, because the Company would have to obtain OEB approval for any such assignment. This regulatory oversight should suffice.

(b)(ii) - "exercise" in the first line is misspelled.

7.7 - In subsections (c), (d) and (e), the phrase "with confirmation of receipt by the party" should be clarified – which Party?, what constitutes confirmation?

Appendix B

B.5 - Last phrase "to other persons at arm's length to the Gas Distributor" discriminates against affiliates, contrary to the Affiliate Relationships Code.

B.6 - Rather than "delivery of gas to the Gas Vendor's customers", the words should be "delivery of gas by the Gas Vendor to the Gas Distributor on behalf of the Gas Vendor's customers", or less correctly, but more succinctly "delivery of gas to the Gas Vendor's customers by the Gas Vendor.

Add the phrase "The Gas Distributor shall remit to the Gas Vendor an amount calculated in accordance with the Gas Distributors customary practice**."**

B.7 – Replace with the phrase "The Gas Distributor shall deliver to the Gas Vendor a statement for the relevant billing period in accordance with the Gas Distributors customary practice."

B.10 – Replace with the phrase "The Gas Distributor and Gas Vendor shall make any necessary Payment Mechanism Set-Off in accordance with the Gas Distributors customary practice."

B.12(b)-The prime rate should be more specifically referenced, for example, TD prime plus 1% on the 15th of each calendar month.

B.15 – Add the phrase "The Gas Vendor shall make any Price Revisions in accordance with the Gas Distributors customary practice."

B.16 - Why does a gas distributor have to provide written notification to the vendor of changes to approved rates - is this limited to the customer / delivery charges or does this also include changes to the gas supply charge?