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November 18, 2009

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th floor
Toronto, ON M4P 1E4

Dear Ms Walli,

Enbridge Gas Distribution Inc.
Submission on Jurisdictional Question
Board File No.: EB-2009-0172
Our File No.: 339583-000054

Pursuant to the Board's Procedural Order No. 1 dated October 23, 2009, please find attached the Submission of Canadian Manufacturers & Exporters ("CME") on the Jurisdictional Question. The required paper copies will follow shortly.

Yours very truly,

Peter C.P. Thompson, Q.C.

\slc
enclosure
c. Norm Ryckman (EGD)
Fred Cass (Aird & Berlis)
Intervenors EB-2009-0172
Paul Clipsham (CME)

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EB-2009-0172

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B);

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas commencing January 1, 2010.

ARGUMENT OF
CANADIAN MANUFACTURERS & EXPORTERS ("CME")

November 18, 2009

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I. INTRODUCTION

1. These are the submissions of Canadian Manufacturers & Exporters ("CME") pertaining to the two (2) questions the Board poses in its November 9, 2009 Procedural Order No. 2. The questions are:

> 1. Are the Green Energy Initiatives described in Enbridge's Application (Ex. B, Tab 2, Sch. 4), their associated costs, assets and revenues properly part of the regulated operations in Enbridge and thus under the Board's ratemaking authority?
>
> 2. If not, does the Board have jurisdiction to deal with the Green Energy Initiatives, their associated costs, assets and revenues outside of the ratemaking process?

2. For reasons that follow, CME submits that the answer to Question 1 is no. The owning and operating costs associated with the Green Energy Initiatives in which Enbridge Gas Distribution Inc. ("EGD" or "Enbridge") proposes to engage are not properly part of EGD's regulated operations subject to OEB ratemaking authority. These activities and their associated owning and operating costs are properly classified as "non-utility" or "non-jurisdictional".

3. CME submits that the answer to the second question the Board poses is also no. EGD provides regulated natural gas transmission, distribution and storage services. The Board's ability to examine the owning and operating costs associated with Green Energy Initiatives undertaken by EGD is limited to determining the amount of the "non-utility" owning and operating costs associated with these activities and their exclusion, on a fully allocated cost basis, in order to determine the rates to be charged by EGD for the regulated services that it provides.

4. The need for the Board to consider the potential issue of whether the cost consequences of EGD's proposed Green Energy Initiatives are eligible for Y Factor treatment under EGD's approved Incentive Regulation Mechanism ("IRM") plan is contingent upon the Board's responses to the questions it poses. The Y Factor eligibility issue is moot and need not be decided if the Board agrees that EGD's proposed Green Energy Initiatives are properly classified as "non-utility". CME reserves its rights to demonstrate, if necessary, that the cost consequences of EGD's proposed

Green Energy Initiatives are not eligible for Y Factor treatment under EGD's five year IRM plan.

II. CME'S ANALYSIS

5. The principles and other factors that inform our answers to the questions the Board poses are, in large measure, those described in the thorough and well reasoned analysis provided by Board counsel in the Board Staff Submission on Preliminary Motion (the "Board Staff Submission") circulated on November 11, 2009. We are indebted to Board counsel for her careful analysis of the issues that the Board's questions raise. The principles and other factors that inform our responses to the questions the Board poses are described below.

A. The Board's responsibilities and its jurisdiction stem from its governing statute, *The Ontario Energy Board Act, 1998*, as amended (the *"OEB Act"* or the *"Act"*)

6. We disagree with EGD's contention that the *OEB Act* does not compartmentalize the Board's jurisdiction between gas and electricity. That submission is incompatible with sections 1 and 2 of the *Act* that treat electricity and gas separately, as well as with the adoption in the *Act* of separate Parts addressing Gas Regulation and Electricity Regulation separately. To a substantial degree, the provisions of the *Act* pertaining to the regulation of Gas and Electricity are in separate compartments.[1]

7. Part III of the *Act* deals with "Gas Regulation". With respect to the transmission and distribution of gas, the Board's jurisdiction is to set rates. With respect to gas storage, the Board has jurisdiction to set rates, as well as jurisdiction over the designation of storage areas, the payment of compensation to landowners where such facilities are located, and the injection and withdrawal of gas from storage facilities.

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[1] See Board Staff Submission at page 11.

8. Part V of the *Act* deals with the "Regulation of Electricity". EGD is not an electricity transmitter or distributor subject to the provisions of Part V of the *Act*.

9. The portion of the *Act* that combines matters pertaining to gas and electricity regulation is Part VI entitled "Transmission and Distribution Line". Under Part VI of the *Act*, the Board has Leave to Construct ("LTC") jurisdiction with respect to hydrocarbon and electricity transmission and distribution lines.

10. In the context of the *Act* and EGD's role as a company providing gas transmission, distribution and storage services, EGD's proposed Green Energy Initiatives must be found to fall within the ambit of section 36(2) of the *Act* if they are to be classified as utility activities subject to regulation. Section 36(2) of the *Act* provides as follows:

> *"The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas."*

11. The object of the statutory regime in the *Act* with respect to the setting of rates for gas transmission, distribution and storage under section 36(2) and for electricity transmission and distribution under section 78(3) of the *Act* is to regulate the pricing of gas and electricity monopoly services. The conclusion that the object of the rate regulation sections of the *Act* is to regulate charges for monopoly services is apparent from the existence of the forbearance power in section 29(1) of the *Act* which provides as follows:

> *"The Board shall refrain from exercising its powers under the* Act *if it finds that sufficient competition exists with respect to the heretofore regulated services being provided to protect the public interest.*

12. Under section 29(1) of the *Act*, when a monopoly situation ceases to exist, then the Board shall cease to regulate prices. The Board's ratemaking powers apply to monopoly services.

13. The Board recently exercised its forbearance power in the Natural Gas Electricity Interface Review ("NGEIR") proceeding.[2] As a result, the owning and operating revenues and costs associated with the assets being used by Union Gas Limited ("Union") to provide competitive storage services were classified as "non-utility" revenues and costs, and, as such, were excluded by the Board when determining the rates to be charged by Union for the regulated monopoly services that it provides.

14. For the purposes of this particular proceeding, the section of the *Act* which defines the Board's responsibilities in relation to gas is section 36(2). The object of the statutory regime is not the "regulation of energy matters" as EGD contends at page 16 of its November 4, 2009 Argument. The Board's regulatory jurisdiction is limited to the regulation of prices charged for monopoly services related to the transmission, distribution or storage of gas.

15. The object of the *Act* is not described in sections 1 and 2 of the *Act* as EGD appears to suggest at pages 5 and 6 of its November 4, 2009 Argument. What is described in sections 1 and 2 of the *Act* are the objectives that shall guide the Board in carrying out its "responsibilities" in relation to electricity (section 1) and in relation to gas (section 2). In relation to gas, the Board's ratemaking "responsibilities" are prescribed in section 36(2) of the *Act*. Section 2 of the *Act* does not operate to alter the limits of the Board's jurisdiction specified in section 36(2) in relation to the fixing of just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.

16. The objectives in section 2 that are to guide the Board in its fixing of just and reasonable rates under section 36(2) do not operate to broaden the Board's ratemaking jurisdiction beyond the regulation of rates for monopoly services related to the transmission, distribution and storage of gas.

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[2] EB-2005-0551 Decision with Reasons dated November 7, 2006.

17. Similarly, the use of the word "energy" in the title to the *Act* and in section 2 of the *Act* cannot reasonably be relied upon to broaden the limits of the Board's ratemaking jurisdiction specified in section 36(2) of the *Act* to the extent EGD suggests. While the Board's jurisdiction is broad, it is not any broader than the interpretation that can reasonably be ascribed to the words that appear in section 36(2) of the *Act*. In interpreting the scope of the Board's jurisdiction, the focus must be on the words of the enabling statute. The words in section 36(2) circumscribe the Board's statutory ratemaking jurisdiction.

B. Ministerial Directives cannot alter the Board's Statutory Jurisdiction

18. EGD relies heavily upon the Minister's power to issue directives to the Board and the Board's obligation to follow such directives in section 27.1 of the *Act* to support its contention that the Board is empowered to treat the cost consequences of EGD's proposed Green Energy Initiatives as regulated activities.[3]

19. We agree with counsel for Board Staff that the Minister's power to issue Directives and the Board's obligation to follow them cannot either separately or in combination operate to alter the limits of the Board's statutory jurisdiction under section 36(2) of the *Act*.[4] Alterations of the Board's statutory jurisdiction under section 36(2) can only be made by the Legislature.

C. Government Policy and Ever-Changing Environment

20. EGD also contends that expressions of "Government policy" and aspects of the "ever changing environment" can operate to alter and broaden the limits of the Board's statutory jurisdiction under section 36(2) of the *Act*.[5] Expressions of Government policy and aspects of the ever changing environment that are not reflected in the provisions of

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[3] See EGD's November 4, 2009 Argument at page 9.
[4] See Board Staff Submission at page 10.
[5] See EGD's November 4, 2009 Argument at pages 6, 7, 14 and 15.

section 36(2) of the *Act* cannot operate to alter the limits of the Board's statutory ratemaking jurisdiction with respect to monopoly services provided by gas transmitters, distributors and storage operators.

D. Business Activity Restrictions

21. EGD relies on the provisions of the September 8, 2009 Ministerial Directive to dispense with certain aspects of the business activity restrictions on EGD reflected in the Undertaking between the Ontario Government and EGD dated December 7, 1999, to support its contention that the Board has regulatory jurisdiction over the proposed Green Energy Initiatives.

22. The business activity restrictions, to which EGD was subject prior to the issuance of the August 10, 2006 and the September 8, 2009 Ministerial Directives, do not purport to affect the ambit of the Board's statutory ratemaking jurisdiction. The ambit of that jurisdiction remains prescribed by the words in section 36(2) of the *Act* in the case of gas. Moreover, the business activity restrictions do not relate to the Board's jurisdiction and functions; they relate to functions performed by the corporate entity providing monopoly services subject to rate regulation by the Board.

23. Prior to the Ministerial Directives dispensing with certain aspects of the business activity restrictions, EGD could not engage in business activities other than the transmission, distribution or storage of gas without the prior approval of the Board.

24. Similarly, there were business activity restrictions applicable to electricity transmitters and distributors. These restrictions were not expressed in Undertakings between the Government and each utility company providing such services. They were expressed in section 71 of the *Act* which was amended with the passage of the *Green Energy & Green Economy Act, 2009* (the *"GEA"*).

25. Section 71 of the *Act* was amended by adding a new sub-section 3 which provides as follows:

> *"(3) Despite subsection (1), a distributor may own and operate,*
>
> *(a) a renewable energy generation facility that does not exceed 10 megawatts or such other capacity as may be prescribed by regulation and meets the criteria prescribed by regulation;*
>
> *(b) a generation facility that uses technology that produces power and thermal energy from a single source that meets the criteria prescribed by regulation; or*
>
> *(c) an energy storage facility that meets the criteria prescribed by regulation."*

26. As noted in the Board Staff Submission, the *GEA* made no amendments to section 36(2) of the *Act*, even though it did alter the jurisdictional limits set out in section 78(3) of the *Act* pertaining to the Board's jurisdiction to set rates for the transmission and distribution of electricity.

27. The Board Staff Submission, at page 11, refers to the Guidelines the Board issued on September 15, 2009, entitled "Regulatory and Accounting Treatment for Distributor-Owned Generation Facilities". While guidelines the Board issues are not binding, the contents of this document support the conclusion that activities falling outside the ambit of the Board's statutory ratemaking jurisdiction under the *Act* are properly classified as "non-utility" or "non-jurisdictional" functions. These Guidelines support the conclusion that one looks to the words of the enabling provision of the legislation to determine the "legislative limitation" on the Board's rate regulation powers.[6]

28. The point is that dispensing with certain of the business activity restrictions that applied to corporate entities providing monopoly services subject to rate regulation by

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[6] See Board Staff Compendium, Tab 9, Guidelines: Regulatory and Accounting Treatments for Distributor-Owned Generation Facilities, G-2009-0300, September 15, 2009, at page 2.

the Board does not alter the scope of monopoly services that are subject to rate regulation under section 36(2) of the *Act*.

E. Interpretation of the September 8, 2009 Ministerial Directive (the "Directive")

29. The Directive should be interpreted in a manner that is compatible with its express terms, as well as with the principle that only the Legislature can alter the OEB's statutory jurisdiction specified in section 36(2) of the *Act*.

30. The Directive states as follows:

> *"This directive it is not in any way intended to direct the manner in which the Ontario Energy Board Act, 1998, determines, under the Act, rates for the sale, transmission, distribution and storage of natural gas by Enbridge Gas Distribution Inc."*

31. Having regard to the principle that only the Legislature can alter the Board's statutory jurisdiction under section 36(2) of the *Act*, the only reasonable interpretation that one can ascribe to the above-quoted portion of the Directive is that it is not intended to have any effect on the exercise by the Board of its jurisdiction under section 36(2) of the *Act*. This is the plain meaning of the words. However, EGD appears to contend that the paragraphs of the Directive preceding this paragraph dispensing with certain aspects of the prior business activity restrictions operate to broaden the Board's ratemaking jurisdiction under section 36(2) of the *Act*.[7] EGD's interpretation of the Directive is in conflict with the express words of the Directive.

32. Accordingly, when properly interpreted, the Directive is of no assistance to EGD with respect to the questions the Board poses. Reasonably interpreted, the Directive simply allows EGD, as a utility company engaged in the provision of monopoly services subject to regulation under section 36(2) of the *Act,* to also engage in its proposed Green Energy Initiatives.

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[7] See EGD's November 4, 2009 Argument at page 11.

F. The Doctrine of Necessary Implication

33. The doctrine of necessary implication cannot trump the principle that alterations to the Board's statutory jurisdiction can only be made by the Legislature. Powers that fall outside the reasonable parameters of the words used to circumscribe the Board's statutory ratemaking jurisdiction cannot be implied.

34. The Divisional Court in *Toronto Hydro-Electric Systems v. Ontario (Energy Board*) [2008] O.J. No. 3904, 298 D.L.R. (4th) 231, 169 A.C.W.S. (3d) 208, 93 O.R. (3d) 380, 53 B.L.R. (4th) 48, 2008 Carswell Ont. 5372 recently considered the elements of the common law doctrine of jurisdiction by necessary implication. One prerequisite is that "the legislature did not address its mind to the issue and decide against conferring the power to the Board." In the context of the amendments that were made to section 78(3) of the *Act*, but not made to section 36(2) of the *Act*, it is clear, we suggest, that the legislature decided against broadening the Board's ratemaking jurisdiction under section 36(2) with respect to the provision of monopoly services by gas transmitters, distributors and storage operators. The doctrine of necessary implication provides no support for EGD's contention that the Board is empowered to classify EGD's proposed Green Energy Initiatives as utility functions.

G. Proper Classification for EGD's Proposed Green Energy Initiatives is Non–Utility or Non-Jurisdictional

35. The Board is empowered to determine whether a particular service that is provided by a company engaged in the provision of rate regulated gas transmission, distribution and/or storage services does or does not fall within the ambit of section 36(2) of the *Act*. In an exercise of this power, the Board determines whether an activity in which a utility company engages is either "utility" or "non-utility".

36. We agree with Board Counsel that, to be properly classified as utility activities, the functions being performed must be capable of being characterized as gas transmission, distribution or storage-related services. The services must be materially

and substantially linked to the monopoly services of transmitting, distributing or storing gas, and the derivation of regulated prices for such services.

37. The Green Energy Initiatives that EGD proposes to undertake have little or nothing to do with the setting of prices for monopoly gas transmission, distribution or storage services. This point is underscored by considering the four (4) examples EGD provides in its November 13, 2009 Additional Argument.

38. The first example is for waste energy from pressure let down stations to be captured and converted into electricity. This constitutes electricity generation which is not a monopoly service and certainly not a service that falls within the ambit of section 36(2) of the *Act*. This service cannot possibly be classified as a utility service under section 36(2).

39. EGD's second example pertains to attaching a solar thermal unit to a natural gas water heater to increase efficiency. Water heater equipment and services pertaining to water heaters have already been determined by the Board to be "non-utility" services. Accordingly, the proposal to attach another item of equipment to a water heater cannot possibly be classified as a utility service. This service, like electricity generation, is not a monopoly service that falls within the parameters of section 36(2) of the *Act.*

40. The same can be said for EGD's third and fourth examples being the capture and use of bio-gas from landfills, which is essentially a non-monopoly gas production activity, and the geothermal projects that EGD describes at page 5 of its November 13, 2009 Additional Argument, which are services provided by many competitive market participants.

41. Taking, at its face value, all of the evidence that EGD has provided with respect to the initiatives in which it proposes to engage, there is no reasonable basis for finding that these activities are gas transmission, distribution or storage-related services falling within the ambit of section 36(2) of the *Act*.

42. EGD argues that an analysis of whether the particular Green Energy Initiatives that it proposes are utility or non-utility services cannot be done on a preliminary motion at the outset of a rate proceeding and that each proposed initiative must be considered at a hearing on an activity-by-activity basis.[8] We disagree. Any tribunal exercising quasi-judicial functions is empowered to determine, on a preliminary motion, whether the case presented by an applicant discloses a reasonable cause of action. For the reasons we have outlined, EGD's Application discloses no reasonable basis to justify the "utility" classification it seeks. There is no reasonable basis upon which anyone can find that the Green Energy Initiative activities in which EGD proposes to engage fall within the ambit of the legislative limitation on rate regulation set out in section 36(2) of the *Act*.

43. Moreover, it would be inappropriate to embark upon an activity-by-activity analysis at hearing because that exercise, in and of itself, would provoke detailed scrutiny of the economic feasibility of each project in order to identify the cross-subsidy burdens that EGD is attempting to impose upon ratepayers acquiring regulated monopoly services.

44. Our paraphrase of the first question the Board poses in Procedural Order No. 2 is as follows:

> *"Are the Green Energy Initiatives in which EGD proposes to engage properly or appropriately classified as utility activities?"*

45. For the reasons we have outlined, we submit that the answer to this question is no. The Green Energy Initiatives in which EGD proposes to engage are properly classified as "non-utility" activities.

46. In support of its argument that the services it proposes to provide as part of its Green Energy Initiatives can be classified as "utility" services falling within the ambit of

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[8] See EGD's November 13, 2009 Additional Argument at page 6.

section 36(2) of the *Act*, EGD draws an analogy between the proposed services and the Demand Side Management ("DSM") activities in which it engages under the auspices of rate regulation. This analogy does not apply and is inappropriate for the reasons outlined by counsel for Board Staff at pages 14 and 15 of their Submission. The focus of DSM activities is the reduction of natural gas usage which, in turn, affects rates that the Board fixes for the monopoly services EGD provides. There is a material and substantial linkage between DSM and an exercise by the Board of its ratemaking power under section 36(2).

47. Similarly, EGD's step back in time to rely upon the ancillary services analogy is inappropriate for reasons outlined at pages 13 and 14 of the Board Staff Submission. Moreover, it should be remembered that the ancillary services approach that the Board discontinued many years ago was an approach that prevailed before the mandatory forbearance provision found in section 29(1) of the *Act* was added to the Board's governing legislation. The addition of this provision operates to eliminate services available in competitive markets from the ambit of the Board's regulatory jurisdiction. The ancillary services analogy is of no assistance to EGD.

48. The facts of the *Advocacy Centre for Tenants - Ontario v. Ontario Energy Board* (2008), 293 D.L.R. (4th) 684, 238 O.A.C. 343 (Ont. Sup. Ct.) (the "LIEN case"), upon which EGD relies in its Argument, are distinguishable from the facts in this Application pertaining to EGD's proposed Green Energy Initiatives. The LIEN case involves a request by a subset of ratepayers for lower rates for the regulated monopoly services they obtain from EGD. The subject matter of the case was rate levels for monopoly services for a particular customer class.

49. The subject matter of EGD's Green Energy Initiatives has nothing to do with EGD's provision of monopoly transmission, distribution or storage services. The subject matter of these initiatives fall well outside the ambit of the Board's ratemaking jurisdiction under section 36(2) of the *Act*. The LIEN case is of no assistance to EGD.

H. Rate Making Consequences of a Non-Utility or Non-Jurisdictional Classification

50. The second question the Board asks in Procedural Order No. 2 is whether it has jurisdiction to deal with costs and revenues associated with the proposed Green Energy Initiatives outside the ratemaking process. For the reasons we have outlined herein, our answer to this question is also no in that the Board can only deal with the owning and operating costs associated with non-utility assets for the limited purpose of exercising its ratemaking jurisdiction under section 36(2) of the *Act*.

51. In this context, our paraphrase of the second question the Board asks in Procedural Order No. 2 is as follows:

> *"To what extent can the Board deal with owning and operating costs associated with non-utility assets in an exercise of its ratemaking jurisdiction?"*

52. Where EGD, as a company providing regulated gas transmission, distribution and storage services also provides "non-utility" unregulated services, then, in an exercise of its ratemaking jurisdiction, the Board can and does consider the revenues and costs associated with the ownership and operation of assets used in the provision of the non-utility services in order to exclude them, on a fully allocated cost basis, from the utility company's total owning and operating revenues and costs before fixing just and reasonable rates for utility services.

53. If EGD, as a utility service company, provides services pertaining to its proposed the Green Energy Initiatives, then, in an exercise of its ratemaking jurisdiction, the Board can and should consider the revenues and costs associated with such non-utility activities to the extent necessary to determine the amount to be excluded for the purposes of setting rates for utility services. If EGD provides services pertaining to the Green Energy Initiatives, then revenues and costs associated therewith are to be excluded on a fully allocated cost basis. If EGD decides to provide the services through an affiliate, then, subject to any allocation of common corporate costs between EGD and its affiliate, the revenues and costs associated with the Green Energy Initiatives that

EGD has included in its 2010 Application should be excluded on an incremental cost basis when determining the just and reasonable rates to be charged for the regulated monopoly services EGD provides.

III. CONCLUSION

54. For all of these reasons, we submit that the responses to the questions posed in Procedural Order No. 2 are as follows:

(a) The Green Energy Initiatives, their associated costs, assets, and revenues are not properly part of the regulated operations of EGD and are not under the Board's ratemaking authority; and

(b) The Board does not have the jurisdiction to deal with the Green Energy Initiatives, their associated costs, assets and revenues outside of the ratemaking process.

IV. COSTS

55. CME requests that it be awarded 100% of its reasonably incurred costs of participating in this preliminary motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of November, 2009.

Peter C.P. Thompson, Q.C.
BORDEN LADNER GERVAIS LLP
Counsel for CME