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November 18, 2009

BY COURIER (7 COPIES) AND EMAIL

Ms. Kirsten Walli
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Dear Ms. Walli:

Re: Pollution Probe – Written Submissions on Jurisdictional Questions
EB-2009-0172 – Enbridge Gas – 2010 Rates

Pursuant to Procedural Order Nos. 1 and 2, please find enclosed Pollution Probe's written submissions on the jurisdictional questions.

Yours truly,

Murray Klippenstein

MK/ba

Encl.

cc: Applicant and Intervenors per Appendix A to Procedural Order No. 1 by email

EB-2009-0172

ONTARIO ENERGY BOARD

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. (the "Enbridge 2010 Rates Application").

POLLUTION PROBE SUBMISSIONS

ON BOARD JURISDICTION

REGARDING ENBRIDGE GREEN ENERGY INITIATIVES

November 18, 2009

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POLLUTION PROBE SUBMISSIONS ON BOARD JURISDICTION REGARDING ENBRIDGE GREEN ENERGY INITIATIVES

PART I: OVERVIEW

1. Pollution Probe submits that the Ontario Energy Board (the "Board") has legal jurisdiction to consider (and potentially approve) Enbridge's Green Energy Initiatives in this Application, as part of its statutory powers for setting "just and reasonable rates" for gas. Such approval could make the initiatives part of the regulated operations of Enbridge.

2. The Board's jurisdiction arises from the Board's broad statutory authority under s. 36(2) of the *Act* to set "just and reasonable rates", for which s. 36(3) allows the Board to use any method or technique it considers appropriate. Further, this power in s. 36(2) must be interpreted and exercised in accordance with Ministerial directives issued pursuant to s.

27.1 of the statute, as well in accordance with the Board's statutory policy objectives related to gas in s. 2 of the *Act*.

3. In response to Board Staff's submissions, Pollution Probe agrees that the Board's jurisdiction is derived from and limited by statute, and that the key jurisdictional source for its power is s. 36 of the *Ontario Energy Board Act, 1998*. However, Pollution Probe submits that Board staff is legally mistaken with respect to the characterization and extent of the Board's jurisdiction.

4. According to Board Staff, the key point is that s. 36(2) of the *Act* requires that activities "must be related to the sale, transmission, distribution, or storage of gas" in order to be included in rates.[1] Pollution Probe submits that this reading of s. 36(2) is legally mistaken.

5. Further, Pollution Probe submits that the statute instead broadly empowers the Board to set "just and reasonable rates" for these gas activities, using any method or technique it sees fit. The focus should thus be on "just and reasonable rates", which furthermore must be set in accordance with both s. 27.1 Ministerial directives and the Board's statutory policy objectives in s. 2 of the *Act*. Enbridge's Green Energy Initiatives properly relate to these requirements, and the Board thus has jurisdiction to consider them as part of setting "just and reasonable rates".

6. Pollution Probe also suggests that Board Staff mistaken about the effect of s. 78(3) of the *Act* as an aid to statutory interpretation for this particular issue relating to gas. S. 78(3) must be read together with s. 71. That section creates statutory restrictions on the business activities for electricity transmitters and distributors. However, the gas utilities have no statutory section similar to s. 71, because their restrictions on business activities were instead created through undertakings with the Government. No modification to the statute similar to the change to s. 78(3) was therefore necessary for gas. The restrictions in the undertakings have now been waived in accordance with the Ministerial Directives.

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[1] This point is central for Board Staff, and appears in their submissions at p. 2 (in the Overview), at p. 10, and at p. 16 (in the Conclusion).

S. 78(3) of the *Act* and its changes therefore *support*, rather than undermine, the argument that the Board's jurisdiction in s. 36(2) in relation to gas is broad rather than narrow.

7. For clarity, these submissions focus only on whether the Board has legal *jurisdiction* to deal with the Green Energy Initiatives as part of this Application. While Pollution Probe strongly supports in principle Enbridge's Green Energy Initiatives, the actual *merits* of the Green Energy Initiatives are not before the Board at the time of these submissions, and those merits should be properly dealt with later as part of the Application.

PART II: SUMMARY OF KEY FACTS FOR JURISDICTIONAL QUESTION

8. In order to understand the Board's jurisdiction with respect to the Green Energy Initiatives, certain key details need to be reviewed.

9. Section 36 of the *Ontario Energy Board Act, 1998* provides for the Board's authority to set rates in relation to gas. The key parts of the section state that:

> **Order of Board required**
>
> 36. (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.
>
> ...
>
> **Order re: rates**
>
> (2) **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.
>
> **Power of Board**
>
> (3) In approving or fixing just and reasonable rates, **the Board may adopt any method or technique that it considers appropriate. [emphasis added]**
>
> ***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, ss. 36(1), 36(2) & 36(3)**

10. As a result of these subsections, the Board has the exclusive authority to set "just and reasonable rates" for gas activities, and the Board has a broad authority with respect to how and what the Board considers in determining "just and reasonable rates".

11. However, as argued later in these submissions, this broad authority must be read in accordance with two other key sections of the *Ontario Energy Board Act, 1998*.

12. First, section 27.1(1) of the *Ontario Energy Board Act, 1998* provides that:

> The Minister may issue, and **the Board shall implement, directives** that have been approved by the Lieutenant Governor in Council **that require the Board to take steps specified in the directives** to promote energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources. [emphasis added]
>
> ***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, s. 27.1**

13. Accordingly, when a directive is issued under this section (and assuming for now that the directive is within the Minister's legal jurisdiction under that section) the Board is statutorily required to carry out the directive. The Board has no discretion with respect to implementing what the directive requires.

14. Two directives have been issued by the Minister under this section that are relevant for the Board's jurisdictional questions. The first directive was issued on August 10, 2006 by Order in Council No. 1537/2006 (the "2006 Directive"), and the second directive was issued on September 8, 2009 by Order in Council No. 1540/2009 (the "2009 Directive").

15. Prior to these directives, Enbridge Gas Distribution Inc. ("Enbridge") was required to comply with certain "Restrictions on its Business" due to specific undertakings previously entered into by the company, unless the Board granted permission otherwise. The 2006 and 2009 directives collectively changed these Restrictions by requiring the Board to allow the regulated Enbridge to engage in certain specified activities.

16. As noted in the 2006 Directive, these formerly prohibited but now allowed activities include:

> ... the provision of services by [Enbridge and Union Gas] **that would assist the Government of Ontario in achieving its goals in energy conservation, including** services related to:
>
> (a) the promotion of electricity conservation, natural gas conservation and the efficient use of electricity;
>
> (b) electricity load management; and
>
> (c) **the promotion of cleaner energy sources, including alternative energy sources and renewable energy sources.** [emphasis added]
>
> **Directive dated August 10, 2006 by Order in Council No. 1537/2006**

17. The 2009 Directive details other certain specific activities that the regulated Enbridge company was now allowed to engage in. These permitted activities are largely the basis

for Enbridge's Green Energy Initiatives. In addition, the 2009 Directive explicitly states that "[t]he Government also wants to encourage initiatives that will reduce the use of natural gas and electricity."

Directive dated September 9, 2009 by Order in Council No. 1540/2009

18. In Enbridge's submissions dated November 13, 2009, Enbridge notes that it is not prepared to pursue various potential energy efficiency and conservation opportunities, given their impact on gas use or system load, unless the investments are included as part of Enbridge's regulated operations. Enbridge also expresses its view that it would not be appropriate to make some of these energy opportunities involving "turboexpanders" available to third parties, due to "operational integrity and safety reasons" (that is, they must be pursued, if at all, by Enbridge itself).

Enbridge Submissions dated November 13, 2009 at pgs. 3, 5, & 6

19. Second, section 2 of the *Ontario Energy Board Act, 1998* also requires the Board to be guided by certain objectives when dealing with matters in relation to gas. This section states that:

> **The Board**, in carrying out its responsibilities under this or any other Act in relation to gas, **shall be guided by the following objectives**:
>
> 1. To facilitate competition in the sale of gas to users.
>
> 2. To protect **the interests of consumers with respect to prices** and the reliability and quality of gas service.
>
> 3. To facilitate **rational expansion** of transmission and distribution systems.
>
> 4. To facilitate rational development and safe operation of gas storage.
>
> 5. To promote **energy conservation and energy efficiency in accordance with the policies of the Government of Ontario**, including having regard to the consumer's economic circumstances.
>
> 5.1 To facilitate **the maintenance of a financially viable gas industry** for the transmission, distribution and storage of gas.
>
> 6. To promote communication within the gas industry and the education of consumers.
>
> ***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, s. 2**

20. Accordingly, as will be argued below, when the Board sets "just and reasonable rates" related to gas, the Board needs to account for any Ministerial directives issued pursuant to s. 27.1 as well as the Board's statutory policy objectives in s. 2.

PART III: ISSUES AND THE LAW

21. Pollution Probe submits that the Board has jurisdiction to consider, and if it so chooses to approve, Enbridge's Green Energy Initiatives as part of setting "just and reasonable rates" for gas, in which case they are properly part of the regulated operations of Enbridge.

The Core of the Board's Legal Jurisdiction – S. 36(2) of the Act

22. Pollution Probe accepts that the "core" of the OEB's jurisdiction for considering and potentially approving Enbridge's Green Energy Initiatives, if such jurisdiction exists, lies in s. 36(2) of the *Act*. That section states:

> (2) 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.
>
> ***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule A, s. 36(2)**

23. Pollution Probe's view is similar, on this initial or preliminary point, to the position taken by Board Staff and Union Gas. Board Staff's submissions state that "the ratemaking authority of the Board can only be engaged under s. 36(2) …". The submissions of Union Gas state that "The Board's rate making authority over natural gas distributors, transmitters and storage companies arises solely from section 36 of the Act."

> **Board Staff Submissions on Preliminary Motion at pg. 2**
>
> **Written Argument of Union Gas Limited on the "Jurisdictional Question" at pg. 3, para. 10**

24. However, Pollution Probe submits that words such as "only" and "solely" should be used with caution. While s. 36 is the "core" of the Board's rate making jurisdiction, it is essential that s. 36 be "read together" with other parts of the statute and regulations, so that the statute can be interpreted in a consistent and coherent manner. This important factor in interpreting s. 36 will be dealt with more later in these submissions.

25. Further, Pollution Probe's submissions differ sharply from the position of Board Staff and Union Gas regarding what s. 36 (and in particular s. 36(2)) actually means or empowers as the core source of rate making jurisdiction. Specifically, Board Staff goes

on to say that "To come within the Board's ratemaking authority [under section 36(2)], the Green Energy Initiatives *must be related to the sale, transmission, distribution or storage of gas*" [emphasis added].[2] Similarly, Union Gas's submissions state that "In order for the Board to exercise rate making authority over the Green Energy Initiatives … they *must "relate to" the sale, transmission, distribution or storage of gas*." [emphasis added]

Board Staff Submissions on Preliminary Motion at pg. 2
Written Argument of Union Gas Limited on the "Jurisdictional Question" at pg. 2, para. 12

26. This "must be related to gas" test for interpreting s. 36(2) raises a fundamental legal issue. Pollution Probe submits that this interpretation of s. 36(2) is legally mistaken, as detailed in the rest of these submissions.

27. Neither Board Staff's nor Union Gas's submissions refer to any court case that supports this "must be related to" interpretation of s. 36(2).

28. Board Staff's and Union Gas's position requires one, at least as a starting point, to look closely at the words and structure of s. 36(2). Does that section have the restrictive meaning suggested by Board Staff? Must everything included in gas rates "be related to" the sale or distribution of gas?

29. While a first quick glance, or initial impression, could lead one to assume that the rates described in s. 36(2) are "for gas", in other words that the rates are for the physical molecules of gas, it is important to begin by recognizing that this is not in fact what the words of the statute say.

30. Instead, the statute says that the rates set by the Board are for "the *sale of*" gas, or "the *distribution of* gas". That is, the rates are set for a function or service.

31. One could alternatively assume or conclude on reading the specific words of s. 36(2) that the rates are "related to" gas. This is the position taken, and the words used, by Board Staff. However, before jumping to that conclusion, it is again important to look at the

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[2] As noted earlier in footnote 1, this point appears to be Board Staff's central jurisdictional point.

words of the statute, and significantly, that is not what the statute says. It does not use the words "related to" in s. 36(2).

32. Instead, s. 36(2) phrases the question in terms of whether the rates to be charged for "the sale of gas" or "the distribution of gas" are "just and reasonable". The rates in question are *for* certain services, being the sale of gas or the distribution of gas, but the level at which the rates are to be set by the Board is a distinct and separate question in the section, a question which is to be determined by criteria that are specified in that section, namely, whether the proposed rates are "just and reasonable".

33. The actual wording of s. 36(2) suggests therefore that the interpretation of this section should focus on whether the rates are "just and reasonable", not on whether or not they are "for" gas or "for" distribution. The latter is a given. The former is the real question. The rates are what will be charged for the sale or distribution of gas to those who want those services. The question to be answered is what is a "just and reasonable" level for those rates.

34. This wording of s. 36(2) has important implications for a consideration of the jurisdiction of the Board. The Board unquestionably has jurisdiction to set the rates at which gas will be sold or distributed. The jurisdictional question is what are the methods or factors by which those rates can be or should be set.

35. Therefore, when Board Staff (and similarly Union Gas) state in relation to s. 36(2) that "to come within the Board's ratemaking authority, the Green Energy Initiatives must be related to the sale, transmission, distribution or storage of gas", they have missed the real question in s. 36(2), which is what does "just and reasonable" means. They have instead "read in" a restriction on rate setting which does not exist in s. 36(2).

36. Pollution Probe is not suggesting that this preliminary analysis of the wording of s. 36(2) is sufficient by itself to determine the jurisdiction of the Board on this particular question. It is not. Indeed, much of Pollution Probe's submissions to follow point to other parts of the *Act* which, it is submitted, are of assistance, and necessary, in interpreting the bare words of s. 36(2).

37. The point is that s. 36(2) is not as restrictive in its creation of Board jurisdiction as Board Staff and Union Gas would suggest.

38. The jurisdictional interpretation of s. 36(2) suggested by Board Staff and Union Gas might have been somewhat more plausible twenty years ago, given the provisions of other sections of the overall *Act* at the time. However, the *Act* has been changed dramatically over the years, for example by the inclusion of the present s. 2 and s. 27.1, and these changes help determine what is now the best and proper interpretation of s. 36(2), if the *Act* is to be read in a consistent and coherent manner.

39. These changes also reflect, in Pollution Probe's submission, the reality that government policy has changed over the years, in part to reflect our increased understanding of the effects of fossil fuels in contributing to global climate change. Similarly, there have been major changes over the years in the technological feasibility of various renewable energy sources, including solar, geothermal, and biogas.

40. In submitting that the real jurisdictional question in s. 36(2) is what is "just and reasonable", Pollution Probe is not suggesting that the Board's jurisdiction is unlimited, or that "anything goes". On the contrary, Pollution Probe agrees that the Board's jurisdiction in setting rates *is* limited, and that if the Board strays beyond those limits, it will be acting without jurisdiction and without legal authority.

41. The contours of the jurisdiction granted to the Board in s. 36(2), most importantly in the words "just and reasonable", are illuminated by various other well-recognized legal sources and principles, containing various aids to interpretation, including specifically other sections of the *Act*. These are described in later sections of these submissions.

Why Enbridge's Green Energy Initiatives are Prima Facie "Just and Reasonable" Inclusions in Rates

42. Pollution Probe's submissions below consider in more detail the legal principles applicable to the interpretation of the jurisdiction bestowed on the Board by s. 36(2), as illuminated by other parts of the *Act*, and applicable legal principles, but it may be useful

to give a broad outline of how the proposed Green Energy Initiatives as presently proposed may fit within that framework.

43. Pollution Probe submits that the Initiatives may fit within the Board's jurisdiction in relation to setting rates for gas sales and distribution because the Initiatives can potentially be valuable to Ontario society as a whole, and to gas users in particular, in ways that make it "just and reasonable" to include the Initiatives in gas rates.

44. For example, in Enbridge's submissions of November 13, 2009, Enbridge describes its potential investment in "turboexpanders", which are special turbines that capture the energy from gas flows at the points where gas pipeline pressures are reduced. This energy is then used to produce electricity. This is an example of using a part of the existing gas distribution system to produce clean electrical energy that is available for public use.

45. Pollution Probe submits that as a matter of legal jurisdiction (that is, based on s. 36(2) and the various other legal provisions reviewed below), it may well be that it is "just and reasonable" (and therefore within the Board's jurisdiction) to include the cost of such measures in gas rates, because of the broad public interest in capturing energy that is otherwise wasted in the operation of the gas system. Of course, whether the Board should exercise that jurisdiction in this particular case would remain to be determined on the specific evidence presented later in this Application.

46. Another of the Initiatives described by Enbridge involves the attachment of solar technology to natural gas water heaters to increase their efficiency.

47. Pollution Probe submits that as a matter of jurisdiction, it may well be that it is "just and reasonable" to include in gas rates the cost of various solar and other technologies which, while not specifically using gas as an energy source, can be integrated or co-ordinated with physical gas system equipment to increase the efficiency of overall energy use.

48. Another example of a proposed Initiative of Enbridge is the capture and use of biogas from landfills or digesters. This gas is similar to natural gas and would be injected into the natural gas pipeline system.

49. Pollution Probe submits that such a measure could well be a cost that it would be "just and reasonable" to include in gas rates, because it captures a presently wasted energy source and integrates it into the existing gas system.

50. A fourth example of a proposed Enbridge Initiative is District Energy projects, which would use thermal energy to heat homes. Such projects would in fact reduce or even eliminate the use of natural gas in those settings.

51. Pollution Probe submits that such a project would also potentially constitute a cost which it would be "just and reasonable" to include in gas rates, as a matter of jurisdiction. It could be fair and rational (and thus jurisdictionally proper as being "just and reasonable") for the Board to include such costs in gas rates if the reduction of gas usage, or even the elimination of gas usage, or the substitution of other more beneficial energy sources for gas use, create various benefits that flow to Ontario society, the environment, and present gas users.

52. Pollution Probe submits that all of these measures, and probably many more, can in principle meet the legal jurisdictional test presently set out in the *Act*, that is, whether their inclusion in rates is "just and reasonable".

53. The details of deciding *how* that jurisdiction is to be exercised are for another day. Certainly, Pollution Probe maintains that it is a social and moral and policy imperative, broadly recognized by governments and the public, that such measures be urgently and diligently and aggressively pursued. Their inclusion in rates is therefore "just and reasonable" in the broadest terms. Many other factors and arguments can of course be considered when that jurisdictional decision eventually comes to be made.

54. As an aside, even though Pollution Probe's submission is that Board Staff's and Union Gas's jurisdictional interpretation of s. 36(2) (the "must relate to" test) is mistaken, it is

probably true that measures or assets that reduce the use of gas, or make the use of gas more efficient, or even eliminate the use of gas, can in fact be seen to "relate to" the sale or distribution of gas. In other words, it may be that the Green Energy Initiatives meet even Board Staff's and Union Gas's erroneous legal test.

55. It is further noteworthy that Board Staff's and Union Gas's submissions never actually analyze whether the Initiatives do in fact "relate to" the sale or distribution of gas, that is, whether they meet the jurisdictional test they propose. In fact, while Board Staff submissions state that "Board Staff submits that the Board's ratemaking powers do not permit such inclusion in ratebase" their submissions nowhere explain why they believe that the Initiatives do not meet the test they set out. The same applies to Union Gas's submissions.

Board Staff Submissions on Preliminary Motion at p. 16 (Conclusion)

56. In fact, a good argument could be made, based on the descriptions set out in the previous section, that the Initiatives do in fact meet Board Staff's and Union Gas's test, that is that the Initiatives do, as a matter of reasonable interpretation, "relate to the sale or distribution of gas", for example by *reducing* such sales or distribution. Thus, even if the Board agrees with Board Staff's and Union Gas's legal test (which Pollution Probe respectfully suggests is mistaken), the Initiatives may still be within its jurisdiction.

Legal Principles for Interpreting The Various Key Provisions in the Act – The Need To Interpret Sections Together and in Their Proper Context

57. Pollution Probe submits that in order to understand the Board's jurisdiction arising from its power in s. 36(2) to set "just and reasonable rates", the Board must look at various key provisions of the *Ontario Energy Board Act, 1998* together and in their proper context. That is, s. 36(2) and other portions of the *Act* must be "read together".

58. The Supreme Court of Canada and other courts have cited with approval numerous times the following passage from Elmer Driedger's *Construction of Statutes*, 2nd ed., regarding the modern approach to statutory interpretation:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> **See *e.g. Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21**

59. This approach is reinforced by section 64 of the *Legislation Act*, which states:

> **Rule of liberal interpretation**
>
> 64. (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.
>
> **Same**
>
> (2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act.
>
> ***Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, s. 64**

60. As a result, the key provisions of the *Ontario Energy Board Act, 1998* related to the Board's power to set "just and reasonable rates" (which Pollution Probe submits specifically include s. 36, s. 2 and s. 27.1) need to be interpreted by examining the provisions together and in their proper context within the statute as a whole in order to provide the interpretation that best ensures the attainment of the *Act*'s underlying objects.

Section 27.1 References To Renewable Energy Sources and How They Affect the Interpretation of the Board's S. 36(2) Rate Making Jurisdiction

61. It would appear to be potentially significant that "renewable energy sources" are specifically referred to in the *Act*. Section 27.1 refers to "the use of cleaner energy sources, including … renewable energy sources." Pollution Probe submits, as will be detailed below, that as a matter of ordinary legal interpretation Enbridge's Green Energy Initiatives fit within the words of that section of the statute, that is, that they are "renewable energy sources" as described in the statute.

62. However, the relevance of this section to the Board's rate making power under s. 36(2) is questioned by Board Staff and Union Gas. Section 27.1 authorizes the Minister to issue certain directives that are binding on the Board. But according to Union Gas's submissions, "Ministerial directives under section 27.1 of the Act are subordinate legislation and cannot alter the clear definition of the Board's statutory jurisdiction under

section 36." Similarly, Board Staff state that "the Board's ratemaking powers cannot be altered by the issuance of Ministerial Directives ..."

Written Argument of Union Gas Limited on the "Jurisdictional Question" at p. 4, para. 13
Board Staff Submissions on Preliminary Motion at pg. 10

63. It is legally correct that a Ministerial directive cannot "alter" the wishes of the Legislature as expressed in a statute. However, there is nothing preventing the Minister from issuing directives that "implement" the *Act*, or that are "consistent with" the *Act*. Board Staff and Union Gas have stated a valid legal principle, but have not explained why it applies, that is, how a Minister's directive regarding renewable energy sources should be seen as "altering" the *Act* rather than "implementing" it.

64. The assumption of Board Staff and Union Gas seems to be that a Ministerial directive would contradict the alleged test in s. 36(2) that jurisdiction depends on components of rates being "related to" gas sales or distribution. As noted earlier, s. 36(2) does not in fact state that rates must be "related to" gas. That is, the words that are the essence of Board Staff's and Union Gas's position do not in fact appear in the statue. Further, even assuming that that test is the correct one (which Pollution Probe asserts is not the case), Board Staff and Union Gas have not explained how a Ministerial directive propounding renewable energy sources would of necessity not "relate to" gas. As noted above, many of the Initiatives "relate to" gas, albeit in non-traditional ways.

65. More importantly, as noted above, various sections of the statute must be "read together". The fact that s. 27.1 – that is, the statute itself – specifically refers to "renewable energy sources" should be legally taken as a signal that the Legislature intended such sources to be taken seriously in the overall legislative scheme or framework of the *Act*. Further, s. 27.1 is a general section, applicable to both the gas and electricity sectors.

66. The specific wording and effect of s. 27.1 authorizes the Minister to issue directives that "require" the Board to "promote" the use of "renewable energy sources". Presumably the Legislature meant what it said, and the Minister has in fact been granted that power.

67. What then is the connection between the Minister's powers under s. 27.1 and the Board's rate making jurisdiction arising from s. 36(2)? In short, Pollution Probe submits that the two sections should be "read together", in accordance with ordinary principles of statutory interpretation.

68. If s. 36(2) and s. 27.1 are "read together", the Board's consideration under s. 36(2) of what is "just and reasonable" to include in gas rates would take into consideration what the Minister has (with the explicit authority of the Legislature) directed regarding "renewable energy sources".

69. For example, if the Minister has issued a directive under s. 27.1 (in accordance with legislative and statutory authorization) which allows certain renewable energy projects to be carried out by a gas utility, that would seem to be a *prima facie* reason to consider those projects as potentially costs that would be "just and reasonable" to include in gas rates. The details of the "justness" and "reasonableness" of such inclusion would have to be reviewed in detail by the Board in the merits of the Application, but as a matter of initial legal jurisdiction, it would seem that authorization under s. 27.1 would indicate that the Board could properly at least consider such inclusion in rates, as part of its s. 36(2) ratemaking authority.

70. In short, if the Minister, in the use of his or her powers under the *Act,* permits and promotes the carrying out of renewable energy source projects by a gas utility, the *Act* allows the Board to consider whether it would be just and reasonable to include those costs in gas rates.

References To Renewable Energy Sources in the S. 2 Objects of the Act and How They Affect the Interpretation of the Board's S. 36(2) Rate Making Jurisdiction

71. The *Ontario Energy Board Act, 1998* includes in s. 2 a variety of "objectives", which that section states the Board "shall be guided by" "in carrying out its responsibilities".

***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, s. 2**

72. One of those statutorily mandated objectives is "to promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario…"

***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, s. 2, para. 5**

73. "Energy conservation and energy efficiency" are fairly general terms. However, it is often the case that the Legislature, in laying out various powers and authority granted by a statute, will in the statute delegate to Cabinet the power to define certain terms in the Act. Such delegation was built into the *Ontario Energy Board Act, 1998*, by s. 127(1)(g).

***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, s. 127(1)(g)**

74. The result has been that the objective of promoting energy conservation and energy efficiency, set out in s. 2, which the Board is required to be guided by, includes the promotion of renewable energy sources and specifically solar, geothermal, and biogas energy sources. The legal steps in that definition process are slightly complicated, and are set out in detail in Schedule "A".

75. The legal effect of these definition provisions is that promotion of solar, geothermal, and biogas energy sources is one of the statutory objectives that must guide the Board in its responsibilities.

76. One of those responsibilities is, of course, setting gas rates under s. 36(2), specifically, by determining what is "just and reasonable" to include in gas rates.

77. Pollution Probe submits that once again the important applicable principle of legal interpretation is that various sections of the statute should be "read together". While s. 2 creates only "objectives" which shall "guide" the Board, rather than hard and specific details, those objectives are applicable as part of the consideration of what is "just and reasonable" in the Board's consideration of gas rates in s. 36(2).

78. Board Staff and Union Gas make the point that "the Board's ratemaking powers cannot be altered by … the Act's objectives", and that "[t]he 'objects' under section 2 of the Act … do not confer jurisdiction".

Board Staff Submissions on Preliminary Motion at pg. 10

Written Argument of Union Gas Limited on the "Jurisdictional Question" at p. 4, para. 14

79. Pollution Probe agrees. However, in Pollution Probe's submission, the s. 2 requirement that the Board be guided by the specified objectives (in this case, the objective of promoting energy conservation and energy efficiency, and specifically renewable energy sources such as solar, geothermal, and biogas) does not alter, add, or take away from the s. 36(2) jurisdiction to consider what is "just and reasonable" to include in gas rates, but simply informs and guides the exercise of that jurisdiction.

80. As noted earlier, there is no wording in s. 36(2) which says that all components of gas rates "must be related to gas" as Board Staff and Union Gas suggest. Instead, that section says that the Board must consider what is "just and reasonable" to include in such rates. The s. 2 objectives give the Board the authority or jurisdiction to consider the specified factors in exercising its broad discretion under s. 36(2).

The Supreme Court of Canada's Binding Precedent in the Bell Canada Case Regarding the Jurisdiction to Set "Just and Reasonable Rates"

81. Pollution Probe submits that the Supreme Court of Canada's recent unanimous decision in *Bell Canada v. Bell Aliant Regional Communications* is a binding precedent regarding how to approach and determine the Board's statutory jurisdiction arising from the Board's power to set "just and reasonable rates".

***Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40**

82. The *Bell Canada* case discusses and analyzes the jurisdiction of the Canadian Radio-television and Telecommunications Commission (the "CRTC") when setting "just and reasonable rates" for telecommunication services. Although the CRTC deals with different subject matters than the Board, the CRTC and the Board have extremely similar statutory schemes, language, and roles with respect to setting "just and reasonable rates".

83. The chart attached as Schedule "B" shows the large number of key similarities between the statutes governing the CRTC and the Ontario Energy Board, and in particular with respect to their statutory powers to set "just and reasonable rates". The *Bell Canada* case

is therefore of very close relevance to the Board's jurisdiction under the *Ontario Energy Board Act*.

See *e.g. Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, at paras. 28-32, 36, 39, and 41-43.

84. According to the Supreme Court in *Bell Canada*, the "problem is whether the CRTC, **in the exercise of its rate-setting authority**, appropriately directed the allocation of funds to various purposes [emphasis added]." Further:

> ... the **issues** raised in these appeals **go to the very heart of the CRTC's specialized expertise**. In the appeals before us, the core of the quarrel in effect is with the methodology for setting rates and the allocation of certain proceeds derived from thoese rates, **a polycentric exercise with which the CRTC is statutorily charged and which it is uniquely qualified to undertake**. ...
>
> **This brings us to the nature of the CRTC's rate-setting power** in the context of this case. ...
>
> ***Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, at paras. 2 & 38-39**

85. In other words, the key underlying question was the extent of the CRTC's jurisdiction as a result of its power to set "just and reasonable rates". Pollution Probe submits that the same considerations apply to the Board and this case. Thus, *Bell Canada v. Bell Aliant Regional Communications* is a binding precedent on how to approach and determine the Board's jurisdiction as a result of the Board's power to set "just and reasonable rates". Some of the principles of *Bell Canada* are applied in more detail in the next section.

The Board's Power to Set "Just and Reasonable Rates" and the Corresponding Broad Jurisdiction

86. Applying the Supreme Court of Canada's reasoning in *Bell Canada*, Pollution Probe submits that the Board's jurisdiction due to the Board's power to set "just and reasonable rates" must be interpreted: 1) broadly; 2) in accordance with the Minister's directives pursuant to the statute; and 3) in accordance with the Board's statutory objectives in relation to gas.

87. First, while the Board previously may have had a broad discretion to set "just and reasonable rates" under its former enabling legislation, this former legislation specified that such rates were to be determined by using a "rate base". Accordingly, under the

current legislation, the Board's broad discretion regarding the setting of "just and reasonable rates" has been enhanced by the Board now being able to "adopt any method or technique that it considers appropriate."

***Ontario Energy Board Act*, R.S.O. 1990, c. O.13, s. 19**
***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, s. 36(3)**
***Bell Canada v. v. Bell Aliant Regional Communications*, 2009 SCC 40, at para. 41**

88. Second, since the Board's former legislation did not include statutory policy objectives, the addition of specific statutory policy objectives in the Board's current enabling legislation is significant. These additions contradict a restrictive interpretation of the Board's rate-making authority, and the Board is instead entitled (and required) to consider its statutory policy objectives when setting "just and reasonable rates".

***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, ss. 27.1 and 2**
***Bell Canada v. v. Bell Aliant Regional Communications*, 2009 SCC 40, at paras. 42-43**

89. Third, with respect to setting "just and reasonable rates", the "rate base rate of return" approach is not necessarily the only basis for setting a "just and reasonable rate" given that the Board can "adopt any method or technique" to set "just and reasonable rates". In short, the Board is not required to confine itself to balancing only the interests of consumers and gas companies. Instead, rates may engage far-reaching public interests (such as those in s. 27.1 and s. 2), and it is part of the Board's duty to take these interests into account when setting "just and reasonable rates".

***Bell Canada v. v. Bell Aliant Regional Communications*, 2009 SCC 40, at paras. 45 & 47**

90. As a result, the Board may set "just and reasonable rates" in relation to gas through a diverse range of methods that take into account a variety of different constituencies and interests. When exercising this broad authority, the Board is particularly required to take into account statutory policy considerations with a view to implementing them (particularly when specifically required to do so by its enabling statute).

***Bell Canada v. v. Bell Aliant Regional Communications*, 2009 SCC 40, at paras. 48 & 50**

91. Further, the Board's authority to set "just and reasonable rates" is at the core of the Board's competence, and it is statutorily authorized to adopt *any* method in determining

"just and reasonable rates". In addition to requiring the consideration of statutory objectives when exercising its authority, the Board's enabling legislation displaces many of the traditional restrictions on rate-setting. The Board thus has the ability (and mandate) to balance many interests in the broader context of Ontario's energy sector when setting "just and reasonable rates" for gas.

***Bell Canada v. v. Bell Aliant Regional Communications*, 2009 SCC 40, at para. 53**

92. The Board must therefore set "just and reasonable rates" for gas using the statutory policy objectives as guides or by actually pursuing statutory policy objectives in accordance with s. 27.1 and s. 2. The logical result is that the Board's corresponding jurisdiction as a result of setting "just and reasonable rates" must be interpreted broadly in accordance with statutory policy objectives. As noted by Abella J. on behalf of a unanimous Supreme Court of Canada in *Bell Canada*:

> In my view, the CRTC properly considered the objectives set out in s. 7 when it ordered expenditures for the expansion of broadband infrastructure and consumer credits. In doing so, **it treated the statutory objectives as guiding principles in the exercise of its rate-setting authority. Pursuing policy objectives through the exercise of its rate-setting power is precisely what s. 47 requires the CRTC to do in setting just and reasonable rates.**
>
> ...
>
> I would therefore conclude that the CRTC did exactly what it was mandated to do under the *Telecommunications Act*. **It had the statutory authority to set just and reasonable rates**, to establish the deferral accounts, and to direct the disposition of the funds in those accounts. **It was obliged to do so in accordance with the telecommunications policy objectives set out in the legislation and, as a result, to balance and consider a wide variety of objectives and interests.** It did so in these appeals in a reasonable way, both in ordering subscriber credits and in approving the use of the funds for broadband expansion.

***Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, at paras. 74 & 77**

93. Pollution Probe thus submits the Board's jurisdiction as a result of the Board's power to set "just and reasonable rates" is broad and must interpreted in accordance with s. 27.1 and s. 2 of the *Ontario Energy Board Act, 1998*.

Section 78(3) Suggests The Opposite Interpretation to That Suggested by Board Staff

94. Board Staff has suggested in its submissions that section 78(3) of the *Ontario Energy Board Act, 1998* is useful in interpreting s. 36(2), that is, in interpreting the Board's jurisdiction in relation to setting rates for gas. The suggestion is that s. 78(3), dealing

with electricity rates, was amended to broaden its scope, whereas s. 36(2), dealing with gas rates, was not so amended, and therefore an inference can be drawn that the Legislature did not intend to broaden jurisdiction in relation to gas.

Board Staff Submissions on Preliminary Motion at pg. 10-11

95. Section 78(3) applies to electricity transmitters and distributors, but it is important to note that these companies have an additional restriction on their business activities placed directly in the statute at section 71. There is no comparable restrictive section relating to gas in the statute itself.

***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, ss. 71 and 78(3)**

96. These provisions in the statute make sense in relation to electricity, given the large total number of electricity transmitters and distributors in Ontario.

97. Although gas utilities do not have a similar *statutory* provision to restrict their business activities, similar restrictions had earlier been put in place for the gas sector through undertakings entered into with the Government. This difference in mode of implementing the restrictions (statutory section versus undertakings) makes sense considering that there are only two major gas companies in Ontario, which obviates the need for specific legislation.

See *e.g.* Directive dated August 10, 2006 by Order in Council No. 1537/2006 and Directive dated September 9, 2009 by Order in Council No. 1540/2009

98. Therefore, the change in wording in s. 78(3) that is relied on by Board Staff does not support its suggested inference. No equivalent change was made to s. 36(2) of the *Act* in relation to gas, because no such change was needed, since there was no equivalent in the statute to s. 71, for the gas sector.

99. In fact, the change to s 78(3) that is highlighted by Board staff *supports* rather undermines a broad interpretation of the Board's s. 36(2) jurisdiction for gas. While Board Staff is correct that the change to s. 78(3) broadens jurisdiction for electricity, Board Staff has failed to notice that a functionally equivalent change was made for the

gas sector through the Minister's directives under s. 27.1, to allow gas companies a wider range of activities.

The Board Staff's Selective and Incomplete Policy Submissions Regarding "Ancillary Services" Are Not Applicable

100. Pollution Probe submits that Board Staff has put forth selective and incomplete "policy" submissions regarding "ancillary services" that are in any case of little weight when determining the Board's legal jurisdictional questions in the present context. These submissions should accordingly be given little or no weight.

101. Board Staff arguments in relation to ancillary services are "policy" arguments, not jurisdictional in a legal sense. Such arguments should be used with caution in determining the legal jurisdictional questions posed by the Board.

102. In addition, Board Staff's policy analysis is selective and incomplete. The analysis essentially ends as of 1999 and does not account for significant developments as well as policy and contextual changes since then. For example, the Government recently enacted the *Green Energy and Green Economy Act, 2009*, which has changed the policy context considerably. Significant changes also have been made to the *Ontario Energy Board Act, 1998*, particularly allowing the Minister to issues directives on certain topics that the Board is required to implement. In addition, the key focus now is on energy conservation and efficiency, including cleaner fuels and reduced natural gas consumption. Finally, the submissions do not account for the fact that the Minister has chosen to dispense with key restrictions on Enbridge's business activities through a directive requiring the Board to allow Enbridge to conduct these activities. Collectively, these and other factors all indicate a now broadening perspective of what should be included as part of the Board's analysis regarding "just and reasonable rates" for gas.

103. Accordingly, Pollution Probe submits that the Board Staff's submissions regarding ancillary services should be given little or no weight as they are policy arguments that are selective and incomplete.

Enbridge's Green Energy Initiatives Are Within the Minister's Directives and S. 2 Objectives and Therefore Within the Board's Broad Jurisdiction to Set "Just and Reasonable Rates"

104. Pollution Probe submits that Enbridge's Green Energy Initiatives fall within the Board's broad jurisdiction to set "just and reasonable rates" for gas as the Initiatives are in accordance with s. 27.1 Ministerial directives and the Board's statutory policy objectives related to gas.

105. First, the Green Energy Initiatives are pursuant to Ministerial directives under s. 27.1 that the Board is *required* to implement, so it follows that the Board is required to allow the regulated Enbridge to engage in these activities. The Board thus has jurisdiction to determine any rate impact as result of these activities, and the directives themselves reinforce this interpretation. For example, the first directive specifies that any rate impact as a result of the activities is subject to Board review, and the second directive specifies that it is not intended to direct *how* the Board determines rates (i.e. the activities *may* have a rate impact).

> **Directive dated August 10, 2006 by Order in Council No. 1537/2006 at pg. 3**
> **Directive dated September 9, 2009 by Order in Council No. 1540/2009 at pg. 3**

106. Pollution Probe also notes that these directives are a significant Government policy change regarding the restrictions on the business activities of regulated gas companies. The regulated Enbridge is now once again allowed to engage in many more activities than just the direct sale, transmission, distribution, and storage of gas similar to when they had significant water heater businesses. The Green Energy Initiatives should accordingly be considered once again in determining "just and reasonable rates" for the regulated gas company just as the water heater business was.

107. Second, the Green Energy Initiatives are in accordance with the Board's statutory objectives under s. 2. In particular, similar to other conservation efforts like DSM (which the Board has long since allowed and encouraged), the Green Energy Initiatives are fundamentally related to reducing the amount of gas used by consumers and transported by Enbridge. The Green Energy Initiatives thus directly relate to: 1) "protect[ing] the interests of consumers with respect to prices", particularly since the Green Energy

Initiatives will directly reduce consumers' net bills (similar to DSM); 2) "promot[ing] energy conservation and energy efficiency in accordance with the policies of the Government of Ontario", particularly since such policies explicitly include reducing natural gas use and the promotion of cleaner energy sources; and 3) "facilitat[ing] the maintenance of a financially viable gas industry" since Enbridge will not be willing to pursue various opportunities given the impact on gas use and system load as well as for other reasons. In addition, the Green Energy Initiatives are also related to "facilitat[ing] rational expansion of transmission and distribution systems" as there is a District Energy opportunity where "[t]here would be no natural gas system to the community and [direct] natural gas consumption would be eliminated."[3]

Enbridge Submissions dated November 13, 2009 at pg. 5

108. Pollution Probe also notes the key difference between the use of the terms "gas" and "energy" in the Board's enabling legislation. In short, "energy" is a much broader and undefined term unlike "gas", and the Board's statutory objectives in relation to gas requires the board to be guided by promoting *energy* (not necessarily "gas") conservation and efficiencies in accordance with the policies of the Government of Ontario (which includes cleaner energy sources such as alternative and renewable energy sources as listed in the first directive). Thus, while not all of Enbridge's Green Energy Initiatives may directly relate to "gas", they do relate to "energy", which is the key statutory policy objective that the Board must consider in its enabling legislation.

109. Pollution Probe thus submits that Enbridge's Green Energy Initiatives relate to s. 27.1 Ministerial directives and various statutory policy objectives that the Board is required to implement or consider. The Green Energy Initiatives accordingly fall within the broad jurisdiction of the Board to set "just and reasonable rates" for gas, the Initiatives are properly part of the regulated operations of Enbridge.

110. In light of this conclusion, Pollution Probe submits that it is not necessary for the Board to determine whether the Board has jurisdiction to deal with the Green Energy Initiatives

[3] Pollution Probe submits there would still be indirect and more efficient natural gas consumption through other methods, including gas-fired electricity generation.

outside of the Board's broad jurisdiction to set "just and reasonable rates" for gas. Pollution Probe accordingly makes no submissions on this point.

PART IV: PROPOSED ANSWERS TO JURISDICTIONAL QUESTIONS

111. In light of all of the above and the submissions of counsel, Pollution Probe respectfully submits that the Board should provide the following answers to the questions it posed:

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 of Enbridge and thus under the Board's ratemaking authority?

   Answer: Yes.

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?

   Answer: It is not necessary to answer this question.

All of which is respectfully submitted this 18th day of November, 2009.

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SCHEDULE "A"

HOW THE S. 2 OBJECTIVES IN THE *ONTARIO ENERGY BOARD ACT, 1998* LEGALLY INCLUDE SOLAR, GEOTHERMAL, AND BIOGAS RENEWABLE ENERGY SOURCES

112. According to section 2 of the *Ontario Energy Board Act, 1998*, the Board's statutory objectives in relation to gas include "promot[ing] **energy conservation** and energy efficiency in accordance with the policies of the Government of Ontario, … [emphasis added]". However, the *Ontario Energy Board Act, 1998* does not define what "energy conservation" means.

***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, s. 2, para. 5**

113. The 2006 Directive and the 2009 Directives, on the other hand, contain the following wording definitional wording directly related to "energy conservation":

2006 Directive

…

in respect of the provision of services by [Enbridge] and Union Gas Limited that would assist the Government of Ontario in achieving its goals in **energy conservation, including** services related to:

(a) the promotion of electricity conservation, natural gas conservation and the efficient use of electricity;

(b) electricity load management; and

(c) the promotion of cleaner energy sources, including alternative energy sources and **renewable energy sources**. [emphasis added]

…

In this directive, "alternative energy sources" and "renewable energy source" have the same meanings as in the *Electricity Act, 1998*.

Directive dated August 10, 2006 by Order in Council No. 1537/2006

2009 Directive

(d) assets required in the provision of services by [Enbridge] and Union Gas Limited that would assist the Government of Ontario in achieving its goals in **energy conservation** and **includes** assets related to **solar-thermal water and ground-source heat pumps**; [emphasis added]

Directive dated September 9, 2009 by Order in Council No. 1540/2009

114. The *Electricity Act, 1998* further provides that:

> **"renewable energy source"** means an energy source that is renewed by natural processes and **includes** wind, water, biomass, **biogas**, biofuel, **solar energy**, **geothermal energy**, tidal forces and such other energy sources as may be prescribed by the regulations, but only if the energy source satisfies such criteria as may be prescribed by the regulations for that energy source
>
> ***Electricity Act, 1998*, S.O. 1998, c. 15, Schedule A, s. 2(1)**

115. Pollution Probe submits that these s. 27.1 directives, which are approved by the Lieutenant Governor in Council, define the phrase "energy conservation" in the Board's objectives by specifying that "energy conservation" includes activities related to renewable energy sources (such as biogas, solar, and geothermal). This definition occurs as a result of section 127(1)(g) of the *Ontario Energy Board Act, 1998*, and such a definition also maintains coherence between the Act and its regulations as well as between the Act and other statutes.

116. Section 127(1)(g) of the *Ontario Energy Board Act, 1998* provides that "[t]he Lieutenant Governor in Council may make **regulations** defining any word or expression used in this Act that is not defined in this Act".

> ***Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, s. 127(1)(g)**

117. Accordingly, if s. 27.1 "directives", which are approved by the Lieutenant Governor in Council, are legally "regulations", they would have the legal effect of defining words or phrases in the *Ontario Energy Board Act, 1998* that are not otherwise defined (such as "energy conservation"). Whether such "directives" are "regulations" is in turn determined by examining the relevant provisions of the *Legislation Act, 2006.*

118. Section 87 of *Legislation Act, 2006* provides that a "regulation" in every Act, including the *Ontario Energy Board Act, 1998*, has the meaning as defined in Part III of the *Legislation Act, 2006.* Section 17 of Part III in turn provides that:

> "regulation" means a regulation, rule, **order** or by-law of a legislative nature **made or approved under an Act of the Legislature by the Lieutenant Governor in Council, a minister of the Crown,** an official of the government or a board or commission all the members of which are appointed by the Lieutenant Governor in Council, but does not include,
>
> (a) a by-law of a municipality or local board as defined in the Municipal Affairs Act, or
>
> (b) an order of the Ontario Municipal Board.
>
> ***Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, ss. 17 and 87**

119. One must therefore examine the relevant definitions of "directive" and "order" as part of this analysis, and the *Oxford Dictionary of English*, 2nd ed. provides the following key definitions:

> **directive** – noun – an official or authoritative instruction
> **order** – noun – 2. an authoritative command or instruction
> ***Oxford Dictionary of English*, 2nd ed., *s.v.* "directive" and "order"**

120. Pollution Probe thus submits that a "directive" issued pursuant to s. 27.1 of the *Ontario Energy Board Act, 1998* is an "order" within the meaning of s. 17 of the *Legislation Act, 2006*. S. 27.1 directives are thus "regulations" in accordance with the *Legislation Act, 2006*, and they therefore have the effect under s. 127(1)(g) of the *Ontario Energy Board Act, 1998* of defining any word or expression that is not defined in the *Ontario Energy Board Act, 1998*.

121. Accordingly, Pollution Probe submits that "energy conservation" must be interpreted to include solar and geothermal activities, particularly since such activities are also "in accordance with the policies of the Government of Ontario". Such an interpretation also maintains coherence within the Act and its regulations as well as between the Act and other statutes.

SCHEDULE "B"

CRTC (unless otherwise indicated, sections in brackets refer to the *Telecommunications Act*, S.C. 1993, c. 38)	**Ontario Energy Board** (unless otherwise indicated, sections in brackets refer to the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B)
No carrier shall provide a telecommunications service except in accordance with a tariff filed and approved by the CRTC (s. 25(1)).	Companies may not sell gas or charge for transmission, distribution or storage of gas except with an Order of the Board (s. 36(1)).
Rates shall be just and reasonable (s. 27(1))	The Board may make orders approving or fixing just and reasonable rates (s. 36(2)).
In determining whether a rate is just and reasonable, the CRTC may adopt any method or technique that it considers appropriate, whether based on a carrier's return on its rate base or otherwise (s. 27(5))	In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate (s. 36(3)).
Traditionally, rates under the previous *Railway Act* were based on a balancing between a fair rate for the consumer and a fair return on the carrier's investment (which would include ratebase) (*Bell Canada* at para. 39).	Predecessor legislation specified method to determine rates (including using ratebase) (*Ontario Energy Board Act*, R.S.O. 1990, c. O.13, s. 19).
The Governor in Council may issue to the CRTC directions of general application on broad policy matters (s. 8), and the CRTC shall exercise its powers accordingly (s. 47(b)).	The Minister may issue and the Board shall implement various policy and other directives that have been approved by the Lieutenant Governor in Council (s. 27-28.6).
The governing statute sets out various guiding objectives (s. 7), and the CRTC must consider these objectives in the exercise of all its powers (s. 47(a)).	The Board, in carrying out its responsibilities in relation to gas, shall be guided by various statutory objectives (s. 2).
Predecessor statute did not include statutory objectives or requirement to be guided by those objectives (*Railway Act*, R.S.C. 1985, c. R-3).	Predecessor statute did not include statutory objectives or requirement to be guided by those objectives (*Ontario Energy Board Act*, R.S.O. 1990, c. O.13).
CRTC may determine questions of law or fact, and its determination on a question of fact is binding and conclusive (s. 52). Appeals on questions of law or jurisdiction are to the Federal Court of Appeal with leave of the Court (s. 64).	The Board has authority to determine all questions of law and of fact, and appeals only to lie to Divisional Court on questions of law or jurisdiction (ss. 19 & 33)
The CRTC may impose any conditions (s. 61(1)).	The Board may impose any conditions (s. 23(1)).
Petitions can be made to the Governor in Council to vary, rescind, or refer back all or part of a decision (s. 12).	Petitions can be made to the Lieutenant Governor in Council to require the Board to review all or part of a decision (s. 34).
The CRTC has other broad powers which	The Board has other broad powers which

further demonstrate the comprehensive regulatory powers Parliament intended to grant (see *e.g.* ss. 35(1), 42(1), 46.5(1)).	further demonstrate the comprehensive regulatory powers the Legislature intended to grant (see *e.g.* Parts III-VI of the *Ontario Energy Board Act, 1998*).