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Toronto, November 18, 2009

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street, Suite 2700  
Toronto, ON M4P 1E4

Dear Ms. Walli:

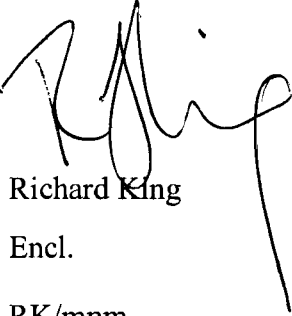
**RE: EB-2009-0172 – Enbridge Gas Distribution Inc. – 2010 Rates  
Preliminary Motion on Jurisdictional Question**

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We are counsel to the Association of Power Producers of Ontario (“APPrO”). Please find enclosed the written submission of APPrO in respect of the above-referenced matter. The written submission is being filed on the Board's RESS system today.

Please do not hesitate to contact me should you have any questions or concerns.

Yours very truly,



Richard King

Encl.

RK/mnm

cc: All Parties to 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.

**SUBMISSIONS ON PRELIMINARY MOTION**

**ASSOCIATION OF POWER PRODUCERS OF ONTARIO**

**November 18, 2009**

## **Introduction**

1. The Association of Power Producers of Ontario (“APPrO”) is a provincial non-profit corporation established to represent the interests of Ontario electricity generators. APPrO members represent more than 95% of Ontario’s generating capacity, and are active in all forms of generation technology (natural gas, wind, cogeneration, district heat and power, nuclear, hydroelectric, coal, solar, geothermal, energy from waste, and fuel cells).
2. APPrO makes these submissions in response to the two questions set out by the Ontario Energy Board (“OEB” or “Board”) in Procedural Order No. 2 (Preliminary Motion) dated November 9, 2009.

## **Overview of APPrO’s Submissions**

3. With respect to the Board’s specific questions, APPrO’s position is as follows:
  - (a) *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?*

APPrO submits that the Board’s statutory authority to set rates does not permit the Green Energy Initiatives described in Enbridge’s Application to be included and treated as part of Enbridge’s regulated operations.
  - (b) *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?*

APPrO submits that the Board has no jurisdiction to deal with Enbridge’s Green Energy Initiatives outside of the Board’s ratemaking process.
4. APPrO has reviewed and supports the November 11<sup>th</sup> submissions of Board Staff in response to the Preliminary Motion.

5. The Board's ratemaking authority is derived solely from subsection 36(2) of the *Ontario Energy Board Act, 1998* (as amended) ("OEB Act"). That subsection restricts the Board's ratemaking authority to the sale, transmission, distribution or storage of natural gas. None of the Green Energy Initiatives described in Enbridge's application relate to the sale, transmission, distribution or storage of gas. As such, the Board has no authority to deal with the Green Energy Initiatives within the Board's statutory ratemaking jurisdiction.

### **Jurisdiction of the OEB**

6. The OEB obtains its jurisdiction over matters from two sources: (a) express grants of jurisdiction under various statutes; and (b) by application of the doctrine of jurisdiction by necessary implication. Each of these is discussed in turn.

### **Express Statutory Grants of Jurisdiction**

7. The primary source of the OEB's jurisdiction rests in the provisions of the OEB Act and the *Electricity Act, 1998* ("Electricity Act"), and their associated Regulations.
8. Taken as a whole, the OEB Act and Electricity Act (and their associated Regulations) grant the Board jurisdiction over a wide variety of matters relating to the natural gas and electricity markets in Ontario, including the authority to, *inter alia*:
- approve the construction of new natural gas pipelines and electricity transmission lines (section 96, OEB Act);
  - monitor markets in the electricity sector for any abuse or potential abuse of market power (section 87, OEB Act);
  - approve the province's Integrated Power System Plan ("IPSP") as prepared by the Ontario Power Authority ("OPA") (section 25.30, Electricity Act);
  - license certain participants in the electricity and natural gas industries (sections 48 and 57, OEB Act);

- approve the OPA's procurement processes for managing electricity supply, capacity and demand (section 25.31, Electricity Act);
  - make rules relating to the establishment of a uniform system of accounts applicable to any class of gas transmitters, gas distributors or gas storage companies (subsection 44(1)(g), OEB Act);
  - exempt an electricity distributor from the obligation to supply electricity to consumers, where sufficient retail competition exists (section 29, Electricity Act); and,
  - approve the sale by an electricity distributor of its electricity distribution system (section 86, OEB Act).
9. The paragraph immediately above sets out only a few of the many statutory provisions granting the Board jurisdiction in respect of the natural gas and electricity sectors. One of the most significant powers of the Board is its power to regulate rates charged for certain important energy services.
10. When taken in total, the Board has broad jurisdiction in relation to the Ontario energy sector. When considered individually, the statutory provisions granting the Board authority vary significantly. Some provisions deal with broad subject matters (e.g., approval of the IPSP) while others deal with very specific subject matters (e.g., establishing rules related to uniform system of accounts for the natural gas sector). Some provisions deal solely with the electricity sector (e.g., approval of the OPA's procurement processes for electricity supply) while others deal solely with the natural gas sector (e.g., approval of gas storage agreements).
11. In order to determine whether a specific matter falls within the jurisdiction of the Board, it is necessary to examine the specific wording in the statute in order to determine whether the authority granted by that provision encompasses the matter at issue.

**(a) Ordinary Meaning of the Statutory Rate-Making Provision**

12. In this case, the specific matter being dealt with is whether the Board's natural gas ratemaking jurisdiction extends to include Green Energy Initiatives (and their associated costs, assets and revenues) undertaken by Enbridge.
13. The Board's ratemaking powers in respect of gas distributors is dealt with very directly in section 36 of the OEB Act. The language of section 36 of the OEB Act is unambiguous:

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.

(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.

(3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

(4) An order under this section may include conditions, classifications or practices applicable to the sale, transmission, distribution or storage of gas, including rules respecting the calculation of rates.

(emphasis added)

14. Subsection 36(1) of the OEB Act prohibits the sale of gas by gas distributors such as Enbridge, unless Enbridge has an Order from the Board. Subsection 36(1) of the OEB Act also prohibits gas distributors such as Enbridge from charging for the transmission, distribution or storage of natural gas without a Board Order. The Orders that overcome these prohibitions are issued pursuant to subsection 36(2) of the OEB Act (i.e., the "orders" referred to in subsections 36(1) and 36(2) of the OEB Act are one and the same).
15. Subsection 36(2) of the OEB Act is the specific provision that provides the Board with its ratemaking authority in the gas sector, which is limited to approving rates for the sale, transmission, distribution and storage of gas by gas transmitters, gas distributors or storage companies.
16. In terms of the methodology to establish those rates, subsection 36(3) of the OEB Act confers broad discretion on the Board to establish the appropriate "method or technique

that it considers appropriate”. However, this broad discretion is specifically in relation to the subject matter over which the Board may exercise its ratemaking authority in the first place (i.e., the activities set out in subsection 36(2) of the OEB Act).

17. Subsection 36(4) of the OEB reinforces the fact that the Board’s ratemaking authority is limited to the sale, transmission, distribution and storage of natural gas.
18. Consequently, the Board may exercise its broad discretion when fixing rates for the sale, transmission, distribution or storage of gas by gas transmitters, gas distributors and storage companies. However, the Board *only* has rate-making authority over these four activities when engaged in by a gas distributor.
19. In considering whether the Board’s jurisdiction under section 36 of the OEB Act was intended to cover Enbridge’s “Green Energy Initiatives”, it is imperative to consider what Enbridge defines as its Green Energy Initiatives. In Ex. B, Tab 2, Sch. 4 of its evidence, Enbridge states that it “plans to pursue initiatives and own and operate a variety of assets capable of generating and distributing alternative forms of energy to end-use customers”. Enbridge lists as examples, “solar, ground source heat pumps, distributed and District Energy systems, micro combined heat and power (“CHP”) and heat from waste technologies, geo-thermal systems and stationary fuel cell facilities”.
20. These initiatives are all “alternative forms of energy” and by their very definition are not related to the sale, transmission, distribution or storage of gas.
21. The Board’s rate-setting jurisdiction with respect to Enbridge is limited to Enbridge’s sale, transmission, distribution and storage of gas. The Board does not have rate-setting jurisdiction with respect to any other activities undertaken by Enbridge, including the Green Energy Initiatives.

**(b) Interpretation of OEB Act’s Rate-Making Provisions**

22. Enbridge refers to two cases as support for its application – *Natural Resource Gas Limited v. Ontario Energy Board*<sup>1</sup> (the “NRG Case”) and *Advocacy Centre for Tenants-*

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<sup>1</sup> 2005 CanLII 12864 (Ont. Div. Ct.), upheld on appeal to the Ontario Court of Appeal, 2006 CanLII 24440.

*Ontario v. Ontario (Energy Board)*<sup>2</sup> (the “LIEN Case”). With respect, these cases do nothing to support Enbridge’s application. The NRG Case dealt with recovery of unrecorded costs related to the sale of natural gas, which clearly falls within the explicit wording of section 36(2) of the OEB Act. The LIEN Case dealt with whether the Board had jurisdiction to establish special rates for the distribution of natural gas for low-income customers, which also falls within the types of rate-regulated activities in section 36 of the OEB Act.

23. Neither case expands the scope of the Board’s ratemaking authority in subsection 36(2) of the OEB Act. The two cases do confirm that the Board has broad discretion and authority under subsection 36(3) of the OEB Act when it comes to setting the rates, but they still must be rates related to either the sale, transmission, distribution or storage of natural gas (i.e., the Board can only set rates in relation to the activities noted in subsection 36(2) of the OEB Act).
24. As noted above, Enbridge’s Green Energy Initiatives are unrelated to gas sales, gas distribution, gas transmission or gas storage. Nor are Enbridge’s Green Energy Initiatives necessary or ancillary to any of these four activities. Consequently, the assets, costs and revenues associated with the Green Energy Initiatives do not fall within the scope of the Board’s ratemaking authority in section 36 of the OEB Act.

**(c) Context and Purpose of the Legislation**

25. This interpretation of section 36 is supported by section 2 of the OEB Act, which states that in carrying out its responsibilities in relation to natural gas, the Board shall be guided by the following principles:

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.

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<sup>2</sup> 2008 CanLII 23487 (Ont. Div. Ct.).



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. [Emphasis added]
26. These seven objectives of the OEB Act related to natural gas repeatedly refer to the “sale”, “transmission”, “distribution” and “storage” of gas. This language is consistent with that found in section 36(2) of the OEB Act. In only one of the seven objectives does the word “energy” appear (and even then, only in relation to the promotion of “energy conservation and energy efficiency”).
27. At various points in its written argument, Enbridge points out that Ontario’s energy regulatory and policy framework does not support a “compartmentalized approach” to electricity and gas matters. Enbridge claims that this supports their application to bring the assets, costs and revenues associated with the Green Energy Initiatives within the natural gas rate-making authority in section 36 of the OEB Act.
28. There are two problems with this. First, the position that Ontario’s energy regulatory and policy framework does not support a “compartmentalized approach” to electricity and gas matters is simply incorrect. Second, simply because Ontario’s regulatory and policy framework includes broad references to “energy” does not mean that the Board’s ratemaking authority under section 36 of the OEB Act is somehow expanded to include matters wholly outside the explicit and precise wording of that provision.
29. With respect to the first point, Ontario’s energy and regulatory policy framework is in fact highly compartmentalized:
- Some parts of the statutory regime deal exclusively with natural gas matters (e.g., Parts III and IV of the OEB Act relate to “Gas Regulation” and “Gas Marketing”, respectively), while other parts of the statutory regime deal exclusively with electricity (e.g., Part V of the OEB Act covers “Regulation of Electricity”, and the

Electricity Act covers the electricity sector broadly). Far fewer components of the statutory regime are applicable to both gas and electricity (e.g., Part V.1 of the OEB Act, which covers consumers' rights issues, and of course the generic portions of the OEB Act dealing with process, compliance, inspections, etc.). Indeed, the OEB Act even has separate and distinct statutory objectives with respect to electricity and gas (sections 1 and 2 of the OEB Act, respectively). This significant statutory "compartmentalization" is also reflected in the Regulations made pursuant to the OEB Act and Electricity Act, and in the various Codes, Rules, Guidelines and policies promulgated by the Board itself.

- The fact that the regulatory and policy framework is compartmentalized to a significant extent makes sense. The Ontario natural gas and electricity sectors share some similarities, but there are also important differences. The natural gas industry in Ontario is focused on distribution, minor transmission and storage, with almost no domestic production. The electricity industry in Ontario is focused on production, transmission and distribution (with obviously no storage). Because of these differences (and in particular, the fact that there is domestic production of electricity and not natural gas in Ontario), the regulatory and policy framework governing electricity is much broader than the regulatory and policy regime governing natural gas. The regulatory and policy framework governing electricity covers issues related to electricity supply mix and long-term power system planning, which have no corresponding issues on the natural gas side of the sector. The Green Energy Act amendments relate almost entirely to Ontario's electricity sector. They are not aimed at revising the natural gas regulatory regime (including the ratemaking powers) in Ontario.
30. With respect to the second point, the mere fact that the Ontario Government pursues energy policy broadly and that there are regulatory provisions that deal with "energy", does not mean that individual statutory provisions with a specific purpose and function are somehow expanded to encompass matters that go beyond the statutory provision – particularly where the statutory provision is precisely worded:

- Section 36 of the OEB Act is found in Part III of the OEB Act (entitled “Gas Regulation”). Together with Part IV of the OEB Act (and portions of Part VI of the OEB Act governing the construction of gas pipelines), the bulk of the natural gas statutory framework is set out. These statutory provisions cover specific matters related to the natural gas sector, including *inter alia*: (a) rate-setting for the sale, distribution, transmission and storage of gas; (b) authorizing the injection, storage and withdraw of natural gas from designated storage; (c) a gas distributor’s “obligation to serve”; (d) regulation of corporate transactions involving gas distributors; (e) rule-making in respect of certain gas-related matters; (f) the licensing of gas marketers; and (g) approvals for the construction of natural gas pipelines. All of these activities relate to those portions of the natural gas sector that the provincial Legislature has determined require regulation. Collectively, the provisions are in large part aimed at ensuring the gas sector in Ontario operates in a manner that (notwithstanding the natural monopoly features that characterize the gas market) is akin to a competitive market. That is certainly one of the main purposes of the Board’s ratemaking power conferred by section 36 of the OEB Act.
- The flaw in Enbridge’s proposal is that it fails to respect this existing regulatory framework. Enbridge’s argument, if accepted, would allow broad government policy pronouncements and objectives to effectively re-write very carefully considered, and precisely-worded, statutory powers. Not every governmental objective, pronouncement, Directive or initiative should operate to expand every single statutory provision. For example, the fact that the Ontario Government is promulgating policies, enacting regulatory provisions, and issuing Ministerial Directives related to green energy initiatives would be appropriate considerations by the Board within its statutory authority to review and approve the IPSP. These considerations clearly fall within the Board’s statutory authority in that context. The same considerations do not fall within section 36 of the OEB Act, which serves a different purpose and which precisely circumscribes the types of activities to which rate-making can apply.

**(d) Plain Reading of the Green Energy Act and the Ministerial Directives**

31. Prior to the *Green Energy and Green Economy Act, 2009*<sup>3</sup> (“Green Energy Act”) coming into force, electricity distributors were precluded from carrying on any business activity other than “distributing” electricity by virtue of subsection 71(1) of the OEB Act. The Green Energy Act’s amendments to the OEB Act authorized electricity distribution companies to directly own and operate renewable energy electricity generation facilities with a capacity of ten megawatts or less, facilities that generate heat and electricity from a single source, or facilities that store energy.
32. Unlike electricity distributors, the business activities of natural gas distributors were not restricted by statute, but rather by undertakings provided by Enbridge and Union Gas Limited to the Lieutenant Governor in Council in 1998 (which came into force on March 31, 1999). The key undertaking provided by Enbridge was to not, except through an affiliate or affiliates, “carry on any business activity other the transmission, distribution or storage of gas, without the prior approval of the Board.”<sup>4</sup> (emphasis added)
33. Because the restriction on Enbridge’s business activities was found in an undertaking to the provincial Cabinet (as opposed to legislation), the lifting of such restrictions was effected via Ministerial Directives issued on August 10, 2006 (the “2006 Directive”) and September 8, 2009 (the “2009 Directive”). By way of these two Ministerial Directives, Enbridge was provided with the ability to undertake activities that go well beyond the transmission, distribution and storage of natural gas. The 2006 Directive included the following activities:
- the promotion of services relating to electricity conservation, natural gas conservation and the efficient use of electricity;
  - electricity load management;
  - the promotion of cleaner energy sources, including alternative energy sources and renewable energy sources;

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<sup>3</sup> *Green Energy Act*, 2009 S.O. 2009, c. 12, Schedule A

<sup>4</sup> Union signed an identical undertaking.

- generation of electricity by means of large stationary fuel cells integrated with energy recovery from natural gas transmission and distribution pipelines; and
  - researching, reviewing, preliminary investigation, project development and the provision of services related to the local distribution of steam, hot and cold water in a Markham District Energy initiative.
34. The 2009 Directive further expanded the scope of permissible activities that Enbridge (and Union) could carry out to include the ownership and operation of:
- renewable energy electricity generation facilities each of which does not exceed 10 megawatts or such other capacity as may be prescribed from time to time;
  - generation facilities that use technology that produces power and thermal energy from a single source which meet the criteria prescribed from time to time;
  - energy storage facilities which meet the criteria prescribed from time to time; and
  - assets required in respect of the provision of services which 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.
35. While these undertakings broadened the types of business activities that natural gas distributors could undertake, the Board's rate-making authority in section 36 of the OEB Act was not amended in any way.
36. In fact, the 2009 Directive explicitly states that:
- This directive is not in any way intended to direct the manner in which the Ontario Energy Board determines, under the *Ontario Energy Board Act, 1998*, rates for the sale, transmission, distribution and storage of natural gas by Enbridge Gas Distribution Inc. and Union Gas Limited.
37. This could not be any clearer. Not only should these activities not implicitly be brought within the scope of section 36 of the OEB Act (as Enbridge suggests), but the Ontario Government has explicitly stated that they ought to remain outside the Board's natural gas ratemaking powers.

### **The Doctrine of Necessary Implication**

38. The doctrine of necessary implication is not applicable to the determinations to be made on this Preliminary Motion.

39. The Supreme Court of Canada adopted the Board's interpretation of this doctrine in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* when it held:<sup>5</sup>

The Ontario Energy Board in its decision in *Re Consumers' Gas Co.* (1987), E.B.R.O. 410-II/411-II/412-II, at para. 4.73, enumerated the circumstances when the doctrine of jurisdiction by necessary implication may be applied:

1. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the Board fulfilling its mandate;
  2. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;
  3. when the mandate of the Board is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
  4. when the jurisdiction sought is not one which the Board has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
  5. when the legislature did not address its mind to the issue and decide against conferring the power to the Board.
40. The doctrine of necessary implication operates to permit implicit powers (i.e., powers not expressly conferred by statute) to be read into legislation where such implicit powers are "practically necessary" for the accomplishment of the object intended to be secured by the statutory regime created by the legislature. With respect to section 36 of the OEB Act, inclusion of the assets, costs and revenues associated with Enbridge's Green Energy Initiatives is not necessary to make section 36 operational or to allow the government to achieve its statutory objectives of energy conservation or efficiency.
41. Enbridge misunderstands the doctrine. In order for the Board to exercise its explicit statutory power to set rates for the sale, distribution, transmission and storage of natural

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<sup>5</sup> *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)* [2006] S.C.J. No. 4 at para. 73-74.

gas, there are a number of implicit powers that the Board must have, including the ability to determine all of the components and elements that go into setting such rates.

42. The Divisional Court recently dealt with the powers implicit in the Board's rate-making authority in the electricity sector in *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*<sup>6</sup>. At issue was whether the Board had implicit jurisdiction to impose a condition on an electricity distributor in an electricity distribution rates decision.
43. The condition the Board imposed would have required a majority of independent directors of the distributor to approve any dividend declared by the Board. The Board's stated rationale for the imposition of the condition was to protect the interests of consumers, as set out in the Board's statutory objectives related to electricity. Ultimately, the Divisional Court found that the jurisdiction to impose restrictions on the process for the declaration of dividends by directors is not necessary or essential to the rate-setting function of the OEB. The Divisional Court also found that the statutory objective motivating the Board (i.e., consumer protection) was satisfied via other statutory requirements.
44. APPrO submits that the same logic and principles apply to Enbridge's Green Energy Initiatives:
- inclusion of the costs, assets and revenues of the Green Energy Initiatives within the scope of section 36 of the OEB Act is neither necessary nor essential to the rate-setting authority conferred upon the OEB; and
  - the statutory objectives of energy conservation and efficiency can be achieved via a multitude of other statutory mechanisms in the OEB Act and Electricity Act (and associated Regulations, Codes, Rules, Guidelines and policies).

### **Conclusion**

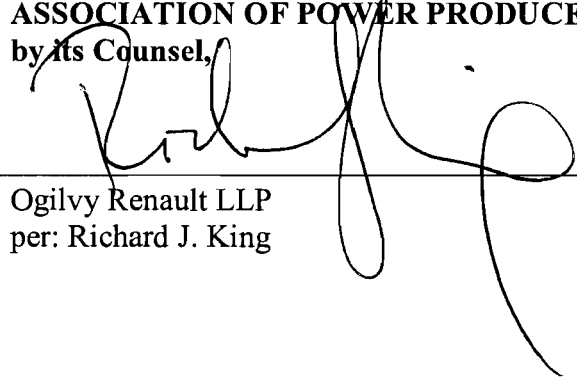
45. For all of the above reasons, APPrO submits that both questions posed by the Board in its Preliminary Motion ought to be answered in the negative.

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<sup>6</sup> (2008), 298 D.L.R. (4th) 231.

46. The “Green Energy Initiatives” that Enbridge wishes to pursue in light of the 2006 Directive and 2009 Directive fall outside the rate-setting jurisdiction of the Board. While expanding the permitted business activities of Enbridge, they do not expand the scope of the Board’s ratemaking authority in section 36 of the OEB Act. In fact, the 2009 Directive expressly states that it is not intended in any way to direct the manner in which the Board determines rates for the sale, transmission, distribution and storage of gas.
47. Further, there is no case law, government policy or statutory objective that operates to expand the scope of section 36 of the OEB Act beyond its ordinary meaning and purpose. The grant of authority in section 36 is unambiguous. The doctrine of necessary implication is inapplicable to the issues considered in this Preliminary Motion.
48. APPrO submits that the associated costs, assets and revenues of Enbridge’s “Green Energy Initiatives” are outside of the Board’s specific ratemaking authority found in section 36 of the OEB Act.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED,  
ASSOCIATION OF POWER PRODUCERS OF ONTARIO,  
by its Counsel,**



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Ogilvy Renault LLP  
per: Richard J. King