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August 28, 2018

**Delivered by Email, RESS & Courier**

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
Suite 2701  
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Enbridge Gas Distribution Inc.  
Application for Renewable Natural Gas Enabling Program and  
Geothermal Energy Service Program (EB-2017-0319)  
Submissions of The Association of Power Producers of Ontario**

Pursuant to Procedural Order No. 4, please find enclosed Submissions of the Association of Power Producers of Ontario.

Yours very truly,

**BORDEN LADNER GERVAIS LLP**

Per:

*Original signed by John A. D. Vellone*

John A. D. Vellone

cc: Applicant and Intervenors of record in EB-2017-0319  
Dave Butters, APPrO  
John Wolnik, Elenchus

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended;

**AND IN THE MATTER OF** an application by Enbridge Gas Distribution Inc. for an order or orders related to its Renewable Natural Gas Enabling Program and Geothermal Energy Service Program;

**AND IN THE MATTER OF** an application by Enbridge Gas Distribution Inc. for an order or orders amending or varying the rates charged to customers for the sale, distribution, transmission, and storage of gas commencing as of January 1, 2018.

**EB-2017-0319**

**Submissions**

**of**

**The Association of Power Producers of Ontario (APPrO)**

**August 28, 2018**

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## **I. Introduction**

1. The Association of Power Producers of Ontario (“APPrO”) makes these submissions in response to Procedural Order No. 4 on the applicability of the proposed RNG Enabling Program to Section 36 of the *Ontario Energy Board Act, 1998* (the “*OEB Act*”).
2. The RNG Enabling Program that is the subject of this application has two components: (1) RNG Upgrading<sup>1</sup> and (2) RNG Injection Services.<sup>2</sup> APPrO submits that the RNG Upgrading aspect of the RNG Enabling Program does not constitute a gas distribution service and does not fit within the activities that the Ontario Energy Board (“OEB”) regulates under section 36 of the *OEB Act*. In particular APPrO’s submissions will address:
  - (a) The interpretation of section 36 of the *OEB Act* and the Minister’s Directive precludes the OEB from permitting RNG Upgrading to be part of its rate setting function;
  - (b) To allow the RNG Upgrading to be regulated under section 36 would be anti-competitive and would impermissibly shift the risk of the RNG Upgrading from Enbridge shareholders to ratepayers;
  - (c) The OEB’s prior decisions on when to refrain from exercising its power to regulate rates are instructive;
  - (d) How the Québec Régie de L’Energie (“Régie”) decision in *Société en commandite Gaz Métro*<sup>3</sup> (the “Régie Decision”) is relevant and instructive to the issues before the OEB; and
  - (e) The OEB’s prior decision in EB-2011-0242/EB-2011-0283 as it relates to “Enabling the Biomethane Market” is instructive.

## **II. Section 36 of the *OEB Act* and the Minister’s Directive**

3. The OEB does not have jurisdiction to set rates relating to RNG Upgrading as this service does not fall within section 36 of the *OEB Act*.

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<sup>1</sup> Enbridge Argument in Chief at para. 22.

<sup>2</sup> Enbridge Argument in Chief at para. 23.

<sup>3</sup> 2013-041 dated March 20, 2013; Exhibit JT1.1 Appendix D

4. The OEB derives its jurisdiction over utilities from the *OEB Act*. Under section 36, the OEB's jurisdiction to set rates is limited to setting rates for transmission, distribution, or storage of gas.
5. While the Minister's Directive has the effect of authorizing Enbridge to carry on other stipulated activities, the Minister's Directive does not amend or expand the OEB's jurisdiction nor does it mean that the costs associated with such activities can be placed in the rate base. It would remain open to Enbridge to undertake its proposed RNG Upgrading service in an affiliate that is not rate regulated.

**III. Approval of the RNG Upgrading would be anti-competitive and would shift risk to ratepayers**

6. Even if the OEB has the jurisdiction to approve rates for RNG Upgrading, it should not approve the RNG Upgrading program as to do so is unfair to other market participants and is anti-competitive.
7. The RNG Upgrading is not part of Enbridge's monopoly franchise. Enbridge admits in undertaking JT1.8 that the RNG Upgrading service is an optional service "because it could potentially be undertaken by RNG producers".<sup>4</sup>
8. In EB-2009-0172, Enbridge brought a similar application arguing that due to Green Energy Act changes Enbridge ought to be permitted to own and operate assets capable of generating and distributing renewable energy resources. The OEB ruled in EB-2009-0172 that to allow Enbridge to subsume a competitive market activity into its monopoly franchise would be unfair to market participants:

Permitting a well financed public utility to include its costs of participation in this market into its rate base, thereby transferring risk to the ratepayer, is unfair to other market participants.<sup>5</sup>

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<sup>4</sup> Exhibit JT1.8

<sup>5</sup> Decision on a Preliminary Motion dated December 22, 2009, Enbridge Gas Distribution Inc. EB-2009-0172 at p. 6.

9. Even if other producers are not interested in performing the necessary upgrades, this does not mean that ratepayers should subsidize and carry the risk of this activity.
10. In the EB-2009-0172 Decision the OEB declined to approve the activities as part of the asset base, in part, because “placing the assets in rate baes not only impacts directly the gas rates but dramatically shifts the risk from shareholder to ratepayer.”<sup>6</sup>
11. Ratepayers should not bear the risk and subsidize market transformation. Enbridge admits that RNG Upgrade is not necessarily economic to upgrade on its own. There is no reason that ratepayers should be subsidizing (whether directly or indirectly) this upgrading service.

Q. (...) So when you are saying market transformation you're really talking about – is it a chicken-and-egg problem here? RNG is not necessarily economic to upgrade on its own, but if the utility invest in these upgrade facilities you can help bring it along? Is that what you are saying market transformation is?

A. Yes, so there are several barriers that prevent solutions from becoming commonplace (...)

Q. Would RNG upgrading service be economic in the absence of a regulated service offering at this time, if you were to do it in your competitive affiliate, for example?

A. I think it depends. To the extent that we are able to offer a service, a levellized service, at a lower cost of capital, we are obviously reducing the cost of upgrading relative to doing it an affiliate. (...)<sup>7</sup>

12. Enbridge admitted that the benefit of reducing Enbridge's carbon tax allowance would be the same whether the upgrading forms part of Enbridge's regulated or unregulated affiliate.<sup>8</sup> APPrO further notes that the eventual passage of Bill 4, Cap and Trade Cancellation Act would make this issue moot.

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<sup>6</sup> Green Energy Decision at p. 7.

<sup>7</sup> Technical Conference at p. 75-76

<sup>8</sup> Technical Conference at p. 74.

13. It would appear that the principal advantage of this component falling within Enbridge's regulated activity is that it allows Enbridge to spread costs out over a longer duration of time.<sup>9</sup> This is not a valid reason for the OEB to regulate this activity.

**IV. Lessons from the NGIER decision**

14. APPrO notes at the outset that no party has brought a forbearance motion with regards to RNG Upgrading service at this time. That said, the case law with respect to when the OEB will forebear from regulating an aspect of the energy market is instructive. When considering whether the Board should refrain from regulating an aspect of the energy market, the Board has set out the following key components<sup>10</sup>:
- (a) Identification of the product market;
  - (b) Identification of the geographic area;
  - (c) Calculation of market share and market concentration measures;
  - (d) An assessment of the conditions for entry for new suppliers, together with any dynamic efficiency considerations (such as the climate for innovation and the likelihood of attracting new investment).
15. Section 29(1) provides that the OEB has a positive obligation to forebear from regulation where it finds that there is or will be competition sufficient to protect the public interest.
16. Enbridge admits that RNG Upgrading is a competitive service:

Q. In relation to the separation of the two aspects of the RNG service, as I understand it --- correct me if I'm wrong -- the upgrading service effectively you deemed as a competitive service, ie. you're not obliged to go to Enbridge to update, is that right?

A. We are offering upgrading as an optional service. As I think I indicated earlier, I don't believe that there's anyone offering something comparable to what we're proposing at this point in time.

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<sup>9</sup> Technical Conference at p. 74.

<sup>10</sup> Natural Gas Electricity Interface Review, Decision with Reasons dated November 7, 2006 (EB-2005-0551)

There's equipment providers and contractors that install the equipment, but I don't know of anyone that's considering offering it is sort of package service, as we are proposing to do.

Q. But theoretically, someone else could upgrade and just take the injection service?

A. Yes.

Q. And how theoretical is that? Is that a practical reality?

A. Oh, it's a practical reality, yes.<sup>11</sup>

17. Enbridge's statement in response to undertakings that other RNG producers are generally not able to or interested in performing their own upgrading service is vague and without particularized evidentiary support. On examination, Enbridge admitted that there is a site in Hamilton that employs this technology.<sup>12</sup>
18. Enbridge provided an undertaking to provide an analysis of how the RNG market evolved in Quebec and in British Columbia (JT1.13). While Enbridge provided the regulatory decisions in those two markets, it did not provide an analysis of how the RNG market evolved in them. Based on this lack of information, the Board cannot be satisfied that it would not be allowing Enbridge to assert its monopoly upon a potentially competitive market.

## V. The Régie Decision

19. In response to Undertaking JT1.1, Enbridge filed two decisions of the Régie de L'énergie (JT1.1\_Appendix D and JT1.1\_Appendix E) that are instructive on the issues before the Board. Unfortunately, Enbridge elected not to file translated version of the two decisions. APPrO submits that the Board should consider ordering Enbridge to produce properly translated version of these two decisions pursuant to Rule 37.04 of the Rules of

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<sup>11</sup> Transcript from technical conference at p. 59.

<sup>12</sup> Transcript from technical conference at p. 76-77.

Practice and Procedure. As described below, a proper understanding of these decisions by all parties is necessary for a fair disposition of this matter.

20. Similar to the case at bar, the Régie had to decide whether to approve two aspects of Gaz Metro's project at the city of Saint-Hyacinthe, being (1) the investments necessary to install and update existing facilities for the exchange of biomethane and (2) the investments necessary to extend the pipeline between the installations and the gas distribution line. The Régie declined to approve the first aspect of the project. It approved the second aspect of the project in a separate decision.<sup>13</sup>
21. The Régie declined to approve the first aspect of the project for the following reasons (see paragraph 77 to 85 of the Régie Decision):
  - (a) The treatment of biomethane is not an activity that exclusively belongs to Gaz Metro. In other words, it is an activity that is not regulated and can be engaged in a competitive market;
  - (b) As such, to allow Gaz Métro and the ratepayers of Gaz Métro to assume the costs of installing the necessary facilities is tantamount to allowing ratepayers to subsidize a non-regulated activity. The Régie held that this would be inappropriate;
  - (c) While the use of biomethane may constitute good public policy, the costs associated with upgrading facilities to engage in this activity should not be charged to rate payers.
22. In coming to its decision, the Régie relied upon the OEB's Interim Decision and Order from EB-2011-0242.

## **VI. Enabling the RNG Market**

23. In EB-2011-0242/EB-2011-0283, the OEB issued an Interim Decision and Order denying Enbridge and Union Gas request that rates be set to include the cost consequences of the

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<sup>13</sup> Régie de L'Énergie, *Société en commandite Gaz Metro*, D-2015-107



purchase of biomethane, also referred to as renewable natural gas. In its Interim Decision and Order, the OEB noted that:

It is appropriate for the distributors to consider the conditions and pricing necessary to accept biomethane into their respective distribution systems, but **it is not appropriate for them to use system gas customers as a means of subsidizing a variety of biomethane producers in the hope of developing a viable biomethane supply market.**

**VII. Conclusion**

24. APPrO objects to subsuming RNG Upgrading under Enbridge's regulated activities. To do so would run contrary to the OEB's legislation and decisions. The OEB's role is not to enable market transformation by permitting a monopoly to enter into a competitive business area and to have ratepayers subsidize capital contributions. This is both unfair to competitors and to ratepayers as it shifts the risk of transforming the market away from market participants, and on-to ratepayers. Even when reducing carbon emissions is a laudable public policy goal, this does not override the legislative imperative that the OEB only regulate matters related to distribution of gas and forebear from regulating a competitive aspect of the business.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28<sup>TH</sup> DAY OF AUGUST, 2018

**BORDEN LADNER GERVAIS LLP**

**Per:**

*Original signed by John A. D. Vellone*

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John A.D. Vellone