

**ONTARIO ENERGY BOARD**

**Enbridge Gas Distribution Inc. (EGD)**

**Application for approval of the cost consequences of  
the proposed Renewable Natural Gas Enabling Program**

**Industrial Gas Users Association (IGUA)**

**Written Submissions**

**Introduction & Position Summary**

1. IGUA supports the development of cost effective Renewable Natural Gas (RNG), and the injection of RNG into gas delivery streams. IGUA's membership includes companies interested in using RNG, and those interested and active in producing it, including the activity of upgrading biogas into pipeline quality RNG).
2. EGD has proposed an RNG Enabling Program in respect of which it has sought approval from the Board for;
  - (a) a rate (Rate 400) for an RNG Upgrading Service; and
  - (b) a rate (Rate 401) for a Renewable Natural Gas (RNG) Injection Service.
3. RNG injection is an activity with sufficient nexus to the "*delivery*" of gas to require approval of an RNG Injection rate by the Board, and the Board can, and should, approve EGD's proposed Rate 401, and can, and should, retain jurisdiction over the customer-specific rate and injection contract terms to be offered by EGD.
4. However, consideration of the legislative parameters of the OEB's rate making authority, the current "market" for RNG Upgrading Services, and the salient views expressed to date by other Canadian regulators, all indicate that RNG upgrading is not properly considered

an element of regulated natural gas “distribution”, and thus that the Board does not have the jurisdiction under section 36 of the *OEB Act* to approve EGD’s proposed Rate 400.

5. While we conclude that EGD can provide a biogas upgrading service from within the regulated gas distribution entity, on an unregulated basis, in that event the Board should ensure that costs of such a service are excluded from regulated rates, the activity is undertaken at EGD’s shareholder’s risk, and ratepayers and competitors are protected from potential resulting harm.

### **Applicable Legislative Parameters**

6. The Board’s mandate to approve rates for EGD arises under section 36(1) of the *Ontario Energy Board Act, 1998 (OEB Act)*, which reads:

*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...*

7. EGD takes the position that the proposed RNG Injection Service and RNG Upgrading Service are both part and parcel of the “distribution” of natural gas. Gas distribution is defined in the *OEB Act* to mean the “delivery” of gas.
8. EGD has stated that “injection” of RNG into EGD’s distribution system will include; gas and moisture analysis, metering, compression or regulation and odourization.<sup>1</sup>
9. EGD takes the position that it must exercise responsibility over the activity of injection of gas - from whatever point that gas is delivered to its system (i.e. whether by way of a gate station connected to an upstream pipeline or an RNG injection facility) – to properly fulfill its function to safely and cost effectively deliver gas to its customers.
10. IGUA agrees with this position. RNG injection is an activity with sufficient nexus to the “delivery” of gas to require approval of an RNG Injection rate by the Board.

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<sup>1</sup> ExB/T1/S1/p15, figure 1 and TC Transcript page 90, lines 2-6.

11. If EGD did not accept the gas into its system it could not deliver the gas, and it is reasonable and appropriate for EGD to maintain control over the process of accepting gas into its system (which is the other side of the "injection" coin). IGUA agrees that all of the functions which EGD has stated are part of an RNG Injection Service are directly related to accepting gas into EGD's distribution system for distribution, and thus are part of "distributing" gas.
12. EGD similarly takes the position that RNG upgrading - the process by which biogas is upgraded into natural gas quality methane for blending with the natural gas stream in EGD's distribution system - is part and parcel of its regulated distribution function. IGUA disagrees with this position.
13. While RNG must be upgraded in order to be injected into the natural gas stream, a functional consideration of the matter indicates that it is not necessary for the gas distributor, as part of the activity of distributing gas, to do the upgrading:
  - (a) EGD has acknowledged that it is "*aware of other organizations that are capable of providing the design of RNG upgrading facilities and supplying the necessary equipment and installing this equipment and operating it*".<sup>2</sup>
  - (b) EGD has also indicated that in carrying out RNG upgrading activities it will rely on equipment and expertise of third parties.<sup>3</sup>
  - (c) EGD itself has proposed that its regulated RNG Upgrading Service be optional. RNG suppliers would be free to choose to have EGD provide the upgrading service, to retain a third party to provide the upgrading service, or to undertake RNG upgrading themselves.
  - (d) EGD has further indicated that it would not necessarily constrain its RNG Upgrading Service offering to its own gas distribution territory.<sup>4</sup>
  - (e) It is through the injection function that EGD will verify that the RNG sought to be injected meets EGD's pipeline quality standards. EGD need not be engaged in RNG upgrading in order to monitor and protect the integrity of its system or the gas stream delivered through it.
  - (f) In both of the jurisdictions that EGD cites as providing precedent for regulatory treatment of RNG – Quebec and British Columbia – third parties are already

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<sup>2</sup> Exhibit I.1. EGDI.STAFF.1, p.2, part a) iii).

<sup>3</sup> TC Transcript, page 111, line 25 through page 112, line 7, page 163, line 17 through page 164, line 11.

<sup>4</sup> TC Transcript, page 178, lines 3 through 11.



performing biogas upgrading services outside of regulation. That is, upgrading services are already competitively available.

- (g) Ontario RNG projects are already in place (in Hamilton) or advancing (Walker Industries in Niagara, StormFisher Environmental Ltd. near London<sup>5</sup>) in Ontario without the engagement of EGD (or Union Gas Limited in the case of the Hamilton RNG production facility) in biogas clean-up activities.
  - (h) EGD recognizes as a “practical reality” that RNG customers will just take the proposed RNG injection service from EGD and procure RNG upgrading from someone else.<sup>6</sup>
14. The upgrading of biogas into RNG is already a competitively available service and is not a necessary part of the monopoly distribution function.
15. EGD's proposed RNG Upgrading Service has, at present, one customer; the City of Toronto. It appears that customer may not require EGD's proposed RNG Upgrading Service in order to proceed with its RNG project.<sup>7</sup>

#### **Regulatory Consideration in Other Jurisdictions**

16. When asked by Board Staff<sup>8</sup> to identify any other regulators that have approved RNG upgrading and injection services similar to those proposed by EGD, EGD referred to regulators in Quebec and British Columbia. In response to a Technical Conference undertaking<sup>9</sup> EGD added reference to a National Energy Board (NEB) decision related to Trans-Quebec and Maritimes Pipeline (TQM). While these regulators have approved RNG injection services, they have not (with a limited exception in British Columbia discussed below) approved regulated biogas upgrading services.
17. The Régie de l'énergie in Quebec found in its decision D-2013-041 in respect of (then) Gaz Métro's proposal to put RNG upgrading facilities into regulation that biomethane

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<sup>5</sup> TC Transcript, pages 161-163.

<sup>6</sup> TC Transcript, page 59, lines 23 through 28; page 132, lines 13 through 17; page 133, line 27 through page 134, line 6.

<sup>7</sup> TC Transcript, page 96, lines 10 through 19; and page 121, lines 1 through 12.

<sup>8</sup> Exl.1.EGDI.Staff.1, part d)

<sup>9</sup> ExJt1.1.

upgrading is an operation which does not fall under the exclusive distribution right of Gaz Métro and that the associated upgrading facilities should not be placed under regulation.<sup>10</sup> EGD acknowledged during the Technical Conference that upgrading services in Quebec are not regulated gas distribution services (though surprisingly, EGD had not investigated the regulatory framework found to be applicable.<sup>11</sup>

18. The position of the British Columbia Utilities Commission (BCUC) on the issue has been less clear, and remains so.
19. In December, 2010 the BCUC approved<sup>12</sup> a 2 year test program proposed by Terasen Gas Inc. (Terasen) for procuring RNG through two models; one in which Terasen owns and operates upgrading facilities, and one in which it does not. The RNG supplies were proposed to be procured for Terasen's customers at large (similar to the EGD and Union Gas Limited RNG procurement proposals currently on hold).
20. In approving, *inter alia*, the Terasen upgrading activity, the BCUC expressly declined to make a finding on the acceptability of Terasen's role in the upgrading process, instead directing that the upgrading business be sufficiently distinct so as to be severable if the BCUC were to determine that this function should be conducted through a separate entity in the future.<sup>13</sup> The following comments from the BCUC are instructive<sup>14</sup>:

*Assuming, without necessarily deciding, that the upgrading processes are subject to regulation by the Commission, the Commission Panel remains concerned about Terasen's entry into a new area of business. The Commission Panel is not convinced that Terasen must be involved in the upgrading process to ensure the quality of the product, the reliability of delivery, and safety of the operation. The Commission Panel is of the view that Terasen's testing and control of the product in its interconnection facilities, prior to its inclusion in the distribution system, which will happen under either proposed business model, will provide that measure of protection. However, the Commission Panel is prepared to allow the CSRD Project to proceed considering grants have been obtained to reduce the cost (and risk) of the project.*

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<sup>10</sup> ExJT1.1/AppD/p.20, paras. 77-81.

<sup>11</sup> TC Transcript, page 11, line 26 through page 13, line 6.

<sup>12</sup> ExJT1.1/AppA/pp. 89 *et seq.*

<sup>13</sup> *Ibid*, p.5, bottom.

<sup>14</sup> *Ibid*, p.41, middle through 42, middle.



*The Commission Panel makes no finding on the acceptability of Terasen's involvement in performing the upgrading at this time, particularly as there may be an industry developing which might result in a competitive business environment for future upgrading projects.*

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*...The use of a separate entity, owned by Terasen, will maintain the advantages Terasen's [sic] cites in terms of its reputation, experience and expertise. Accordingly, the Commission Panel directs that Terasen's costs of the upgrading project be segregated so they may be compared with costs of other potential upgrading operations by other industry participants in future. The Commission Panel further directs that the upgrading business be kept sufficiently distinct so as to be severable, should the Commission determine that this business ought to be conducted through a separate entity in the future.*

21. Two years later, following consideration of a post implementation report on Terasen's RNG test program, the BCUC rendered a further decision.<sup>15</sup> While in this 2013 decision the BCUC did accept the continuation of some activity by Terasen's regulated affiliate (FortisBC Energy Inc. (FEI)) in providing biogas upgrading as part of a the continuation of Terasen's broader RNG procurement program, it did so;
  - (a) on a tentative basis, approving FEI engaging in biogas upgrading only for municipalities;
  - (b) in recognition of the existing upgrading facilities invested in by FEI as a result of the Commission's 2010 decision; and
  - (c) based on the express representation by FEI that FEI did not anticipate many future instances where it would own upgrading facilities.
22. Thus, the context in which the BCUC's regulatory treatment of Terasen's biogas upgrading facilities has to date been developed is important to consider, and, as stated above, indicates a relatively undefined regulatory policy view of the matter.
23. It is noteworthy that in the 2013 decision (in the context of considering the allocation of costs for Terasen's overall RNG procurement program) the BCUC found that the biogas upgrader and the pipe connecting the upgrader to the FEI metering/interconnection facilities were "outside the traditional gas distribution utility configuration" (and thus, in the

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<sup>15</sup> ExJt1.1/AppC.

context of the BCUC's specific cost allocation considerations, part of the cost to acquire supply).<sup>16</sup>

24. In specifically reconsidering the topic of the ownership of biogas upgrading facilities, the BCUC quotes from an earlier Commission inquiry (Alternative Energy Services (AES) Inquiry), including the following findings from the inquiry report:<sup>17</sup>
- *Extension of Ownership Principle: The ownership of facilities by a regulated utility outside of the bounds of the traditional gas distribution utility is not recommended where there are viable alternative options and should only be allowed in exceptional circumstances, or where required by legislation (AES Inquiry Report, p.32)*
  - *To reduce the likelihood of cross-subsidization, ownership of facilities by a utility outside the bounds of the traditional utility system should not be allowed unless there are extenuating circumstances that make such ownership to be in the public interest. The onus is on the utility to provide that extenuating circumstances exist (AES Report, p.32)*
25. The BCUC in its 2013 decision went on to consider whether “exceptional circumstances” for FEI owning and operating biogas upgrading facilities exist, and, on the express basis of FEI submission that “*there will likely be relatively few projects where it may own the upgrader*” the Commission accepted that FEI may own and operate a biogas upgrader “*when dealing with regional or municipal governments*”.
26. We have only reviewed the BCUC decisions produced by EGD in this proceeding, and have not reviewed the broader AES Inquiry materials or, for that matter, the particular legislation under which the BCUC operates and the particular corporate structure of the Terasen/FEI group of companies. Based on what we have reviewed, as summarized above, we submit that this Board should be very cautious in extrapolating from the limited BCUC materials on the record herein a general regulatory fiat for inclusion of biogas upgrading facilities within EGD's regulated gas distribution business.
27. EGD has also produced a NEB decision which, as EGD notes, was limited to approval of a toll for TQM to transport refined biogas. This decision provides no insight in respect of

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<sup>16</sup> Ibid, p.65, bottom through 66, top.

<sup>17</sup> Ibid, p.105, top.



the matter at hand; the inclusion of EGD's proposed RNG Enabling Program services in EGD's *OEB Act* section 36 approved rates.

28. In summary on this point, the weight of the regulatory precedent considered in this matter indicates that it would be inappropriate for the Board to accept EGD's proposed RNG Upgrading Service as a regulated service and to approve EGD's proposed Rate 401.

### **Relevance of Ontario LGIC Orders-In-Council and Associated Documents**

29. While we conclude that RNG Upgrading is not properly considered an element of regulated natural gas "*distribution*", and thus that the Board does not have the jurisdiction under section 36 of the *OEB Act* to approve EGD's proposed Rate 401, the next question in respect of the proposed RNG Upgrading Service is whether EGD can engage in this service at all.
30. The answer to the question of whether EGD can engage in the proposed RNG Upgrading Service, albeit outside of regulation, lies in consideration of EGD's Undertakings given to the Ontario Lieutenant Governor in Council as a condition of EGD's Ontario gas distribution franchise. Those Undertakings provide<sup>18</sup>:

*[EGD] shall not, except through an affiliate or affiliates, carry on any business activity other than the transmission, distribution or storage of gas, without the prior approval of the Board.*

31. The Board can, then, approve of EGD undertaking the RNG Upgrading Service within the regulated entity pursuant to the Undertakings. However, nothing in the Undertakings trumps the legislative limits which preclude the Board from setting a regulated rate for such a service, as discussed above.
32. Further, qualifying the restriction in the Undertakings on EGD engaging in non-distribution (transmission or storage) business activities, there are Ministerial Directives which specifically provide that EGD can undertake the provision of energy services that would assist the Government of Ontario in achieving its goals in energy conservation. These

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<sup>18</sup> ExB/T1/S1/App1, p.4, section 2.1.



directives were issued on August 10, 2006 (2006 Directive<sup>19</sup>) and September 8, 2009 (2009 Directive<sup>20</sup>).

33. Though removing the restriction on business activities set out in the Undertakings in respect of the provision of services by EGD that would assist the Government of Ontario in achieving its goals in energy conservation, the 2006 Directive also specifically provides:

*To the extent that any activities undertaken by Enbridge Gas Distribution Limited or Union Gas in reliance on this Directive are forecast to impact upon their regulated rates, such activities are subject to the review of the Ontario Energy Board under the Ontario Energy Board Act, 1998.*

34. The 2006 Directive thus clearly contemplates that newly permitted activities in support of the Government's energy conservation goals would not necessarily be rate regulated. The 2006 Directive further indicates that any regulated rate impact from such activities remains in the discretion of this Board.

35. The 2009 Directive (which further expanded the scope of permitted activities under the Undertakings to include small renewable energy electricity generation facilities) reiterated the permission for EGD to engage in activities in support of the Government's energy conservation goals, and even more clearly provided concomitant direction on the nexus between such activities and rate regulation in the following passage:

*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.*

36. Thus to the extent that anything in the 2006 Directive left uncertain the matter of the impact of the directive on the OEB's section 36 rate making jurisdiction, the 2009 Directive clarifies. There is nothing in the Ministerial Directives that purport to expand the Board's section 36 rate making authority, even if that could be done by Ministerial Directive (which we don't believe is the case in any event).

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<sup>19</sup> ExB/T1/S1/App1, pp. 8-10.

<sup>20</sup> ExB/T1/S1/App1, pp.11-13.

## Regulatory Implications of EGD RNG Upgrading Service

37. It thus appears to us that, if the Board accepts EGD's characterization of RNG Upgrading as an "energy conservation" initiative of the type which supports the Government in achieving its goals in energy conservation, EGD does not require Board approval to conduct an RNG Upgrading Service within the regulated utility entity.
38. It also remains clear, however, that such activity should not, and cannot, be subject to rate regulation. EGD will have to undertake such activity at its own risk.
39. Should EGD pursue such an activity outside of regulation, the Board should ensure that the fully allocated costs associated with such activity are excluded from EGD's revenue requirement, both to protect EGD's ratepayers and to protect EGD's upgrading services competitors.
40. In respect of protecting utility ratepayers:
  - (a) The OEB should ensure that the risks associated with any EGD biogas upgrading services be "ring fenced". For example, if one of the RNG producers who have contracted for an EGD upgrading service fails, any resulting stranded costs should accrue to EGD's shareholder.
  - (b) Any costs associated with the fixing and "levelizing" of a biogas upgrading rate should be to the account of EGD's shareholder, and there should be no variance account treatment afforded for such activities.
41. In respect of protecting RNG Upgrading Services competitors:
  - (a) EGD has cited the financial advantage of access to a regulated cost of capital, which is lower than the cost of capital faced by EGD's RNG Upgrading Services competitors.<sup>21</sup> The Board should ensure that no such advantage is permitted to accrue to a competitive EGD business activity. EGD should be precluded from accessing regulated capital except on (unregulated) market based terms. (The Board could consider applying Affiliate Relationships Code (ARC) type standards in respect of any financial dealings as between EGD's regulated and unregulated

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<sup>21</sup> TC Transcript, page 123, line 4 through page 124, line 8; page 157, line 25 through page 158, line 7; and page 7, line 22 through page 8, line 19.

business activities, pursuant to the Board's broad *OEB Act* section 36 rate making authority.)

- (b) Similarly, to the extent that EGD offers a fixed, "levelized" biogas upgrading services rate, any levelizing should be undertaken without the support of ratepayer funded variance accounts.

#### **Approval of Injection Service and Rate 401**

42. In respect of the proposed RNG Injection Service rate (Rate 401), EGD has stated that it seeks approval for a rate setting methodology, but not approval of each customer-specific rate or contract.<sup>22</sup>
43. In rendering any approval in this matter, the Hearing Panel should be clear that it retains authority in respect of customer-specific rates and the terms and conditions under which such rates are offered (i.e. the contract).
44. As the Board has previously found<sup>23</sup>:

*[e]nsuring that the contract properly reflects and implements an OEB-approved rate schedule is an aspect of the OEB's jurisdiction to set rates.*

...

*The OEB finds that parties cannot contract out of any aspect of the OEB's regulatory oversight, which includes not only the setting of rates but also ensuring that they are properly assessed to customers.*

**ALL OF WHICH IS RESPECTFULLY SUBMITTED by:**



**GOWLING WLG (CANADA) LLP, per:**  
Ian A. Mondrow  
Counsel to IGUA

August 28, 2018

<sup>22</sup> EGD Argument in Chief, paragraph 31.

<sup>23</sup> EB-2014-0363, Decision and Order, May 7, 2015, page 3.