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Dear Sirs/Mesdames:

**EB-2022-0094 (Pricing for Ontario-Produced Gas)
Ontario Petroleum Institute Inc. - Submissions on Jurisdictional Questions**

In accordance with Procedural Order No. 2 in the above-noted proceeding, please find attached the submissions of the Ontario Petroleum Institute Inc. (“OPI”) on the jurisdictional questions. By way of this letter, we would ask the Board and parties to the proceeding to amend their service list to include myself and Isabelle Crew (icrew@osler.com) as counsel to OPI.

Yours very truly,



Richard King

RK:hi

c: All Parties to EB-2022-0094
M. Millar (OEB Counsel)
R. Murray (OEB)

ONTARIO ENERGY BOARD

IN THE MATTER OF a hearing on the Ontario Energy Board's own motion to consider the price paid by rate-regulated natural gas distributors and their customers for natural gas produced in Ontario.

**SUBMISSIONS OF ONTARIO PETROLEUM
INSTITUTE**

I. OVERVIEW

1. The Ontario Energy Board (“**OEB**”) has initiated this proceeding on its own motion to consider the price paid by rate-regulated natural gas distributors for natural gas produced in Ontario.¹

2. In Procedural Order No. 1 dated March 4, 2022, the OEB invited parties to make submissions in respect of the following draft issues (the “**Draft Issues List**”):

- (a) Is it appropriate for the OEB to fix or approve price(s) (or pricing formula(s)) that a distributor will be required to charge their system gas customers specifically for natural gas produced in Ontario and, if so, what should the price(s) (or pricing formula(s)) be?
- (b) Alternately, is it appropriate for the OEB to provide direction on the principles it will consider when assessing whether the costs of natural gas produced in Ontario that a distributor proposes to pass on to system gas customers through the [Quarterly Rate Adjustment Mechanism (“**QRAM**”)] are reasonable? If so, what should those principles and related filing requirements be?

3. In response to the Ontario Petroleum Institute Inc. (“**OPI**”) submission on the Draft Issues List, the OEB directed OPI (in Procedural Order No. 2, dated May 3, 2022) to file submissions in respect of the following two questions (the “**Jurisdictional Questions**”):

- (a) On what basis does the OEB have jurisdiction to set the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors?
- (b) On what basis can a panel of commissioners establish rules to ensure fair and transparent access for gas producers to gas distribution systems in Ontario?

4. In respect of the Jurisdictional Questions, for the reasons set out below, OPI submits that:

¹ EB-2022-0094, [Notice of Proceeding](#), dated February 7, 2022.

- (a) **The OEB has express jurisdiction, pursuant to sections 36 of the *Ontario Energy Board Act, 1998* (the “OEBAct”)² to: (a) set the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors; and (b) establish rules to ensure fair and transparent access for gas producers to gas distribution systems in Ontario.**
- (b) **In the alternative, the OEB has implied jurisdiction, by virtue of the application of the doctrine of jurisdiction by necessary implication, to: (a) set the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors; and (b) establish rules to ensure fair and transparent access for gas producers to gas distribution systems in Ontario. This jurisdiction is necessary for the effective exercise of the OEB’s mandate.**

5. For the purposes of this submission, OPI will focus its submissions on Enbridge Gas Inc. (“EGI”) (as opposed to EPCOR Natural Gas Limited Partnership (“EPCOR”)) because almost all Ontario producers connect to EGI. In addition, the OEB has previously recognized the value that producers connected to EPCOR provide to EPCOR’s distribution system, and has established a price for Ontario production that is in line with the system gas price paid by EPCOR’s customers.³

II. FACTUAL BACKGROUND

A. The Ontario Petroleum Institute

6. The OPI is an association of Ontario-based natural gas and oil producers. One of the primary objectives of the OPI is to encourage the responsible exploration and development of oil and natural gas in Ontario. The members of OPI produce and inject natural gas into the regulated gas distribution systems of EGI and EPCOR.

² *Ontario Energy Board Act, 1998*, [S.O. 1998, c. 15, Sched. B](#).

³ In EB-2010-0018, the OEB allowed Natural Resource Gas Limited (“NRG”) to purchase a certain amount of locally-produced gas at a premium price (\$8.486 per mcf) in recognition of the system pressure/integrity benefits provided by the local production to NRG’s gas distribution system. When that pricing regime came to an end, the OEB accepted the setting of the price for locally-produced gas on a formula based on the M9 rate.

B. The Natural Gas Production Industry in Ontario

7. For over a century, Ontario natural gas producers have reliably supplied local natural gas to Ontarians. Today, the Ontario natural gas industry produces approximately 132 million cubic metres (5,155 Terajoules) of natural gas from over 1,500 land-based wells and 400 wells in Lake Erie. These 400 wells in Lake Erie account for approximately 70% of the natural gas produced in Ontario – and the provincial government receives a 12.5% royalty on all Ontario-produced gas.

8. Physically, the natural gas that Ontario natural gas producers inject into EGI’s system: (a) serves EGI’s customers close to these injection points; and (b) decreases the need for fuel gas (and associated carbon costs). Ontario gas producers bear their own connection costs and, because they do not sell directly to any EGI customers, they are not users of the EGI distribution system. They provide a benefit to the EGI distribution system and Ontario consumers, and impose no costs on EGI or Ontario consumers. Notwithstanding this, Ontario producers are treated worse than ex-Ontario producers in EGI’s service territory.

C. Natural Gas Commodity Pricing in Ontario

9. Ontario producers have two options when delivering gas into EGI’s Southern System Rate Zone: (1) the producer can sell gas directly to EGI through a standard Gas Purchase Agreement (“GPA”); or (2) the producer can transport gas to the Dawn natural gas storage hub through a M13 contract with EGI.

10. *Price Paid to Ontario Producers.* The price Ontario producers receive from EGI for their natural gas sold under a GPA is based on the Canadian Gas Price Reporter (“CGPR”) Dawn Index

price. The method used by EGI to calculate the price for gas sold under a GPA is the CGPR 28-day forward strip for the upcoming month (the “**GPA Price Model**”). In addition, Ontario producers selling to EGI under a GPA are charged \$90 per month for a station fee (and until July 2021, were also charged \$0.11 per GJ for gas balancing and transportation).

11. *Price Paid by Ontario Consumers.* The price that EGI’s system gas customers pay for the natural gas they consume (including local Ontario gas) is the “Total Gas Supply Commodity Charge”, which is essentially a 12-month forecast of EGI’s gas costs based on its entire supply and upstream transport portfolio (i.e., gas purchased from Appalachia, Chicago, Niagara, Western Canada, Dawn and U.S. Mid-continent). The Total Gas Supply Commodity Charge is updated quarterly by the OEB pursuant to QRAM applications made by gas distributors under section 36 of the OEBA Act.

12. *Impacts to Ontario Producers.* By failing to recognize the various benefits provided by local supply, and imposing distribution system costs on Ontario producers that do not apply to ex-Ontario suppliers, the current GPA Price Model results in Ontario producers being paid below-market prices for the natural gas supplied to EGI’s distribution system.

13. EGI adheres strictly to this GPA Price Model, and because Ontario producers are captive to EGI, they have no ability to negotiate a more appropriate price. This has caused significant hardship for the Ontario natural gas industry. The survival of the industry hinges on Ontario producers’ ability to obtain transparent and fair market prices for locally produced gas.

14. *Benefits of Local Production.* The supply of Ontario-produced natural gas to the distribution system provides important reliability, economic and environmental benefits to the

Ontario gas distribution system (and its consumers), and financial benefits to the Ontario energy sector.

15. The use of Ontario’s natural gas resources also provides important environmental benefits to the overall system. Natural gas in Ontario is produced by conventional means and does not utilize high-volume hydraulic fracturing techniques, which consume very large quantities of potable water. Locally-produced gas also has a reduced carbon footprint because its proximity to the customer requires less transportation, compression and therefore less fuel gas, shrinkage and losses.

16. These benefits accrue to Ontario gas distributors and consumers, and – in substance – go directly to the core of the OEB’s statutory objectives in respect of natural gas.

III. JURISDICTIONAL ARGUMENTS

A. Introduction

17. Like all statutory bodies, the OEB obtains its jurisdiction over matters from two sources: (a) by express grants of jurisdiction under the OEBA Act and other statutes; and (b) by application of the doctrine of jurisdiction by necessary implication.⁴

18. The doctrine of jurisdiction by necessary implication states that a tribunal such as the OEB is granted not only the powers expressly conferred upon it by statute(s), but also “all powers which are practically necessary for the accomplishment of the object intended to be secured by the

⁴ *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, [2008 CanLII 23487](#), 238 O.A.C. 343 (Div Ct) (“*Advocacy Centre*”).

statutory regime created by the legislature”⁵. In the leading case on the doctrine of implied jurisdiction, the Supreme Court of Canada affirmed the OEB’s decision in *Re Consumers’ Gas Co.* that the OEB has implied jurisdiction when:

- (a) the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the OEB fulfilling its mandate;
- (b) the OEBA Act fails to explicitly grant the power to accomplish the legislative objective;
- (c) the mandate of the OEB is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
- (d) the jurisdiction is not one which the OEB has dealt with through the use of expressly granted powers, thereby showing an absence of necessity; and
- (e) the legislature did not address its mind to the issue and decide against conferring the power upon the OEB.⁶

19. For the reasons set out below, OPI submits that the Ontario Legislature has granted the OEB express jurisdiction under sections 36 of the OEBA Act to: (a) set the price that Ontario natural gas producers are paid for the gas they produce and provide to Ontario distributors; and (b) to

⁵ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006 SCC 4](#) (“*ATCO Gas*”) at para 51. See also *R. v. 974649 Ontario Inc.*, [2001 SCC 81](#) at para 70.

⁶ *ATCO Gas*, at para 73, citing *Re Consumers’ Gas Co.*, E.B.R.O. 410-II/411-II/412-II, March 23, 1987, at para. 4.73.

establish rules to ensure fair and transparent access for gas producers to gas distribution systems in Ontario.

20. In the alternative, even if the OEB finds that it has not been expressly granted such jurisdiction, OPI submits that the OEB has implied jurisdiction, by virtue of the application of the doctrine of jurisdiction by necessary implication, because such jurisdiction is necessary for the effective exercise of the OEB's mandate.

B. Jurisdiction to Set the Price Producers are Paid

21. Section 36 of the OEBAAct states:

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.

22. OPI submits that the OEB's rate-setting provides the OEB with jurisdiction to set the commodity price that Ontario natural gas producers are paid by distributors, for the following reasons:

- (a) Section 36 of the OEBAAct has been broadly construed by the OEB itself – both in practice and pronouncements in its own decisions.
- (b) Ontario courts have consistently recognized the OEB's broad jurisdiction over the energy sector as a whole, and rate-setting in particular.

- (c) The OEB's statutory objectives related to the natural gas sector support the OEB's broad jurisdiction over the entire natural gas sector, including the price that Ontario producers are paid for their natural gas.
- (d) The Ontario Legislature has granted the OEB extensive authority over the activities and operations of natural gas production within Ontario, pursuant to not only the OEBAAct, but also the *Municipal Franchises Act* (Ontario), the *Assessment Act* (Ontario) and the *Oil, Gas and Salt Resources Act* (Ontario).

C. OEB's Broad View of its Rate-Setting Jurisdiction

23. The OEB, in setting gas distribution rates under section 36 of the OEBAAct, approves not only the final rates charged to end-users of natural gas in Ontario, but also scrutinizes and approves the gas distributor's costs (e.g., commodity, capital, operations and maintenance) that make up final rates. And the OEB does so not solely through the narrow lens of the quantum of a utility's costs that should be reflected in rates. For instance, in EB-2010-0018, the OEB recognized that locally-produced gas provided important pressure support in the former NRG service area. The local producer advised NRG that to be profitable it required a minimum sale price of \$8.486 per mcf for its gas. The OEB ultimately recognized the value of the supply and allowed NRG to purchase gas at that price and pass that cost on to system gas customers.

24. This is what the OEB does (and has always done) in practice, as part of the rate-setting process. It is consistent with the OEB's own pronouncements about its general and rate-setting jurisdiction in past decisions. For example, in EB-2005-0211, the OEB considered the bounds of its jurisdiction under section 36 of the OEBAAct and found that:

- (a) “It is clear that the Ontario legislature intended that the Energy Board would have exclusive jurisdiction over all aspects of the gas distribution industry”;
- (b) “The Board also has the authority to incent (or disincent) utility behaviour at its discretion [...] The Board acts well within its powers when it encourages or discourages certain utility activities through its ratemaking powers”; and
- (c) “Instead of providing a detailed prescription for ratemaking, the Ontario legislature has provided the Board with the broad discretion”.⁷

25. On the basis of its expansive view of its rate-setting jurisdiction, the OEB has exercised jurisdiction in a number of areas that extend beyond solely gas distribution and commodity rates, including approval of EGI’s voluntary RNG program (which aims to provide a premium to domestic RNG producers to encourage RNG development), and the establishment of conservation programs (supported by the OEB’s statutory objectives).

26. Moreover, the OEB’s view of its rate-setting jurisdiction has never been a narrow one. In E.B.R.O. 410/411/412, the OEB found that it had jurisdiction over the contracts between a gas distributor and its customers:

9.24 The Board finds that it has the jurisdiction to approve all contract carriage, buy/sell, and CMP agreements.

9.25 In the event of a dispute between a utility and a customer of proposed customer, either party may apply to the Board to fix the disputed term or terms with or without a public hearing.

9.26 The Board also finds that to the extent the terms and conditions impact directly on the rate or rates included in an agreement, or in-directly on the rate or

⁷ EB-2005-0211, [Decision and Order](#), dated June 28, 2006 at pp. 11, 13 and 14 [emphasis added].

rates through quality of service, its approval of terms and conditions will be required.

It is important to note that this was the OEB's view of its jurisdiction at a point in time when it would have been carefully considering the extent of its jurisdiction in a newly liberalized Ontario natural gas sector.

27. The OEB has always considered a wide variety of factors in setting gas commodity and distribution rates, including issues of discrimination, fairness and cross-subsidy. These are precisely the issues that OPI wants addressed in this proceeding – fairness in commodity pricing, the cross-subsidization of Ontario consumers by Ontario natural gas producers – and ultimately the gas cost consequences that flow into rates.

D. Ontario Courts Have Acknowledged the OEB's Broad Jurisdiction

28. Ontario courts have also consistently recognized that the OEB has very broad jurisdiction over the energy sector in Ontario, and rate-setting in particular.

29. In *Union Gas Ltd. v. Township of Dawn*, the Ontario Divisional Court described the broad scope of the OEB's jurisdiction as follows:

In my view the statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board.

[...]

It is clear that the legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario “in the public interest”.⁸

30. In *Reference re Ontario Energy Board Act*, the Ontario Divisional Court again held that “[t]he jurisdiction of the Ontario Energy Board is very broad. It is charged with the regulatory and quasi-judicial functions covering the entire field of energy within the Province of Ontario.”⁹

31. The Ontario Court of Appeal has also confirmed the breadth of the OEB’s jurisdiction. In *Toronto Hydro-Electric System Ltd. v. Ontario Energy Board*, the Court of Appeal held that the OEB has “broad authority to regulate the energy sector in Ontario and to balance competing interests”.¹⁰

32. In *Natural Resource Gas Ltd. v. Ontario Energy Board*, that Ontario Court of Appeal again found that the Ontario Legislature’s intent was for the OEB to have “broad authority to regulate the energy sector in Ontario”.¹¹

33. Moreover, the Court of Appeal has found that it is an error for the OEB’s jurisdiction to be interpreted narrowly. In *Toronto Hydro*, the Court of Appeal held that a narrow reading of the OEB’s grant of jurisdiction under the OEBA Act would be inconsistent with the broad purpose of

⁸ *Union Gas Ltd. v. Township of Dawn*, [1977 CanLII 1042](#), 15 O.R. (2d) 722 (Div. Ct.) (“*Union-Dawn*”) at paras 28 – 29, and 42 [emphasis added].

⁹ David M. Brown, Glenn Zacher & Patrick Duffy, *Energy Regulation in Ontario* (Toronto: Thompson Reuters Canada, 2021) at [§ 2:20](#) (“*Energy Regulation in Ontario*”) [emphasis added], citing *Reference re Ontario Energy Board Act*, 51 O.R. (2d) 333 (Div. Ct.), leave to appeal to S.C.C. refused September 30, 1985.

¹⁰ *Toronto Hydro-Electric System Ltd. v. Ontario (Energy Board)*, [2010 ONCA 284](#) (“*Toronto Hydro*”) at para 12.

¹¹ *Natural Resource Gas Ltd. v. Ontario (Energy Board)*, [2006 CanLII 24440](#), 214 O.A.C. 236 (“*Natural Resource-CA*”) at para 18 (CA).

the OEBA Act, which is “to regulate all aspects of the gas distribution business, not simply those aspects that involve a direct business relationship with gas vendors.”¹²

34. In addition to recognizing the OEB’s broad jurisdiction over the Ontario energy sector generally, Ontario courts have also held that the OEB’s rate-setting jurisdiction is to be interpreted broadly.

35. In *Toronto Hydro*, the Ontario Court of Appeal found that: “[t]he case law suggests that the OEB’s power in respect of setting rates is to be interpreted broadly and extends well beyond a strict construction of the task”.¹³

36. Similarly, the Divisional Court has repeatedly emphasized that the OEB’s mandate to fix just and reasonable rates “is unconditioned by directed criteria and is broad”.¹⁴

37. As observed by Brown, Zacher and Duffy in their leading text, *Energy Regulation in Ontario*, “[i]n construing [section 36], courts have observed that it is evident from the broad language used that the legislature intended to confer on the Board a mandate of wide proportion when exercising its core rate setting function to safeguard the public interest.”¹⁵

38. This approach taken by Ontario courts (and the OEB itself) is consistent with the principles of statutory interpretation, which require statutory wording to be considered using a “fair, large

¹² *Toronto Hydro*, at para 27.

¹³ *Toronto Hydro*, at para 25.

¹⁴ *Natural Resource Gas Ltd. v. Ontario Energy Board*, [2005 CanLII 12864](#), 197 O.A.C. 310 (Div. Ct.); and *Advocacy Centre*.

¹⁵ *Energy Regulation in Ontario* at [§ 2:20](#).

and liberal interpretation”, in conjunction with the purposes of the governing statute, the tribunal’s statutory objectives and expertise, and the nature of the issue before the tribunal.¹⁶ A narrow view of the OEB’s rate-setting jurisdiction would be inconsistent with these fundamental principles of statutory interpretation.

39. In summary, OPI submits that it is not only reasonable, but necessary, to interpret section 36 of the OEBAAct as granting the OEB jurisdiction to set the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors.

E. Consistency with the OEBAAct Purposes

40. In exercising its jurisdiction to set commodity and distribution pricing under sections 36 of the OEBAAct, the OEB must do so in a manner consistent with its objectives established by section 2 of the OEBAAct, including: (a) to protect the interests of consumers in respect of prices, reliability, and quality of gas service; (b) to promote energy conservation and energy efficiency; and (c) to facilitate the maintenance of a financially viable gas industry.¹⁷ These objectives define the public interest which the OEB must take into account when exercising any power.¹⁸

41. Ensuring that the Ontario natural gas production industry is treated fairly and remains viable fulfills all of these objectives. As noted above in Part II of these submissions, locally-produced natural gas:

¹⁶ *Advocacy Centre*, at paras 10 – 14, citing *ATCO Gas*, at paras 37 – 38.

¹⁷ OEBAAct, section 2.

¹⁸ *Energy Regulation in Ontario* at [§ 2:19](#).

- (a) provides reliability and economic benefits to Ontario consumers;
- (b) is more energy efficient, by reducing the need for the construction of additional distribution facilities (compressors, etc.) and fuel gas (i.e., reduction of carbon emissions); and,
- (c) is in need of more appropriate pricing, reflective of production costs, and the price paid by Ontario consumers.

42. These considerations (which would be elaborated upon in evidence on the merits in this proceeding) go to the very core of the OEB's statutory objectives. To interpret section 36 narrowly to exclude these considerations on jurisdictional grounds would require the OEB to: (a) effectively ignore its own statutory objectives; (b) repudiate how it has practically approached rate-setting in the energy sector; and (c) disregard what it and Ontario courts have said about the OEB's general and rate-setting jurisdiction.

43. In light of its objectives under section 2 of the OEBA Act and the broad scope of its authority under section 36, the OEB and the courts have found that, in the absence of specific language, section 36 grants the OEB the power to, among other things, require the implementation a low income affordability program;¹⁹ to determine cost responsibility for capital projects;²⁰ and, of

¹⁹ *Advocacy Centre*.

²⁰ EB-2020-0198, [Decision and Order](#), dated January 22, 2021 at p. 2.

particular interest, to approve the cost consequences of renewable natural gas enabling programs, which is in effect a specific type of gas production initiative.²¹

F. Legislative Jurisdiction over Ontario Natural Gas Producers

44. The Ontario Legislature has given the OEB extensive jurisdiction over the activities of Ontario natural gas producers, including jurisdiction over:

- (a) the recovery of gas and the drilling of wells, under the *Oil, Gas and Salt Resources Act* (Ontario);²²
- (b) the construction of gathering lines from wells, under the *Municipal Franchises Act* (Ontario)²³ and the OEBAAct;²⁴
- (c) determinations as to whether producer lines are taxable under the *Assessment Act* (Ontario);²⁵
- (d) the allocation of production from Ontario wells under the OEBAAct;²⁶ and,

²¹ EB-2017-0319, [Decision and Order](#), dated October 18, 2018.

²² See *Oil, Gas and Salt Resources Act* (Ontario), section 11 (permits for recovery of gas) and section 13 (licensing of wells).

²³ See *Municipal Franchises Act* (Ontario), section 8 (certificate of public convenience and necessity).

²⁴ See OEBAAct, section 90 (leave-to-construct a hydrocarbon line).

²⁵ See *Assessment Act* (Ontario), section 25. Also see *Tribute Resources Inc. v. Ontario Energy Board*, 2018 ONSC 265 (Div. Ct.), and EB-2019-0166, Decision and Order, *Lagasco Inc. – Classification of Certain Natural Gas Pipelines under the Assessment Act*, April 15, 2021.

²⁶ See OEBAAct, section 41 (allocation of a just and equitable share of the market demands for gas or oil to the several sources from which the gas or oil is produced).

- (e) the pricing of Ontario gas supply through the OEB's rate-setting jurisdiction under section 36 of the OEBA Act.

45. Given the OEB's extensive statutory authority over the activities of Ontario gas producers, and in light of the above submissions on the OEB's rate-setting jurisdiction and statutory objectives, it would be extraordinary to suggest that one of the few elements that the OEB (an economic regulator) cannot consider is the price that producers get paid for their gas.

G. Jurisdiction to Ensure Fair and Transparent Access to Distribution Systems

46. For all of the reasons set out above in this Part III, OPI submits that the OEB's rate-setting jurisdiction (as interpreted by the OEB itself and Ontario courts, and supported by the OEB's mandate and the OEB's broad statutory authority over Ontario gas producers) provides the OEB with authority to establish rules to ensure fair and transparent access for gas producers to gas distribution systems in Ontario.

47. It has always been the OEB's view that terms and conditions of services fall within the OEB's rate-setting jurisdiction. For instance, in E.B.R.O. 410/411/412, the OEB stated:

The Board is of the view that 'rates' include more than monetary terms and do, in fact, include many conditions of service. Special Counsel and others called these conditions rate-related. The Board will not define rate-related but, will look at each case on its merits to decide what is rate-related. As noted earlier the Board has concluded that if the matter is directly or indirectly rate-related, the Board has the jurisdiction to decide that term of the contract.

48. That a gas distributor's conditions of service fall within the OEB's rate-setting jurisdiction appears to be beyond dispute:

- (a) The OEB's *Filing Requirements for Natural Gas Rate Applications*²⁷ require gas distributors to file a reference to the utility's Conditions of Service, confirm that it is the current version, and provide a description of any changes that have been made since the last cost of service application.

- (b) EGI typically provides a copy of its Conditions of Service in evidence filed with its cost-of-service application.²⁸ These Conditions of Service set out EGI's commitments and policies regarding all aspects of the utility's gas services, including gas supply and delivery, customer interruption/curtailment, force majeure events, main extensions and service installations, metering, inspection, customer obligations, security deposits, payment plans, discontinuance of supply, and service charges.

- (c) EGI's Handbook of Rates and Distribution Services, which includes the terms and conditions applicable to all services, is typically attached to EGI's final rate orders as an Appendix.

49. The manner in which the second Jurisdictional Question is worded suggests that the OEB is querying whether a panel of commissioners (assigned to this particular proceeding) should be prevented from establishing rules with respect to customer access to distribution systems, given recent changes to section 44 of the OEBA Act. Specifically, in 2019 (as part of the amendments to

²⁷ See Chapter 2, Cost of Service Applications (February 16, 2017), section 2.1.3, items 16 and 17.

²⁸ For example, see EB-2012-0459, Exh A1/5/1, Appendix A.

the OEBA Act made via the *Fixing the Hydro Mess Act, 2019*²⁹), the wording of section 44 of the OEB Act was changed to transfer rule-making authority from “The Board” to “The chief executive officer”. The concern may be that the recent governance changes made to the OEB draw a hard line between the executive function of rule-making and the adjudicative function of the commissioners.

50. OPI’s response to this is two-fold. First, for the reasons outlined above, it is clear that the OEB’s rate-setting jurisdiction (which is routinely and properly exercised by its commissioners) is broad enough to encompass a gas distributor’s conditions of service (including fair and transparent access). Indeed, to find otherwise could lead the OEB down a path where parties might be keen to challenge rate-related issues in gas distribution rate proceedings – arguing that any issues going beyond “pure rates” are solely for the executive arm of the OEB to determine. Second, given EGI’s dominance in the sector, a determination by a panel of commissioners in respect of EGI’s conditions of service is nearly equivalent to an industry rule – and from Ontario gas producers’ perspective, the issues in this proceeding only pertain to EGI.

H. Express vs. Implied Jurisdiction

51. If the OEB finds that sections 36 does not grant it the requisite express jurisdiction, OPI submits that the OEB has implied jurisdiction to: (a) set the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors; and (b) establish rules to

²⁹ S.O. 2019, c.6, Schedule 2, section 18.

ensure fair and transparent access for gas producers to gas distribution systems in Ontario, as such jurisdiction is necessary for the effective exercise of the OEB's mandate.

52. OPI makes this submission on the basis of the reasons above, as well as the following:

- (a) The jurisdiction sought is necessary for the OEB to meet the objectives of the OEB Act as established in section 2, and is essential to the OEB fulfilling its mandate to “control the supply and distribution of natural gas to the people of Ontario ‘in the public interest’”.³⁰ As noted in Part II.C of this submission, a viable Ontario natural gas production provides a number of benefits to the Ontario energy sector and Ontario consumers (reliability, environmental and economic), all of which go directly to the core of the OEB's statutory objectives in respect of natural gas.
- (b) The decisions of the Court and the OEB itself make clear that the mandate of the OEB is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction. These decisions are detailed at length earlier in this submission, but include findings that:
 - (i) “[t]he jurisdiction of the Ontario Energy Board is very broad. It is charged with the regulatory and quasi-judicial functions covering the entire field of energy within the Province of Ontario”;³¹

³⁰ *Union-Dawn*, at para 29.

³¹ *Energy Regulation in Ontario* at [§ 2:20](#) citing *Reference re Ontario Energy Board Act*, 51 O.R. (2d) 333 (Div. Ct.), leave to appeal to S.C.C. refused September 30, 1985.

- (ii) the OEB has “broad authority to regulate the energy sector in Ontario and to balance competing interests”;³²
 - (iii) the OEB has jurisdiction over “all matters relating to or incidental to the production, distribution, transmission or storage of natural gas”;³³ and
 - (iv) “It is clear that the Ontario legislature intended that the Energy Board would have exclusive jurisdiction over all aspects of the gas distribution industry”.³⁴
- (c) The Ontario Legislature did not address its mind to the issue and decide against conferring these powers upon the OEB. OPI has conducted a detailed review of Hansard evidence from both 1998 when the modern OEBA Act was passed, and 1964 when the statute was originally passed. In none of the legislative debates did the Legislature decide against granting the OEB jurisdiction to set the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors or to establish rules to ensure fair and transparent access for gas producers to gas distribution systems in Ontario.

53. For these reasons, OPI submits that, even if the OEB finds that it does not have express jurisdiction (which OPI says that it clearly does), it has the requisite implied jurisdiction.

IV. CONCLUSION

54. For the reasons above, OPI submits the OEB should answer the Jurisdictional Questions as follows:

³² *Toronto Hydro*, at para 12; *Natural Resource-CA*, at para 18 (CA).

³³ *Union-Dawn*, [1977 CanLII 1042](#), 15 O.R. (2d) 722 at para 28 (Div Ct).

³⁴ EB-2005-0211, [Decision and Order](#), dated June 28, 2006 at p. 11.

- (a) On the basis of section 36 of the OEBAAct, the OEB has express jurisdiction to: (i) set the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors; and (ii) establish rules to ensure the fair and transparent access for gas producers to gas distribution systems in Ontario.
- (b) In the alternative, the OEB has all powers which are practically necessary for the accomplishment of the objects of the OEBAAct, as set out in section 2 of the OEBAAct. Such powers include: (i) setting the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors; and (ii) establishing rules to ensure fair and transparent access and transparent access for gas producers to gas distribution systems in Ontario.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

May 24, 2022



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