



Enbridge Gas Inc.
50 Keil Drive North
Chatham, Ontario, Canada
N7M 5M1

June 21, 2022

Ms. Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Marconi:

**Re: Price Paid by Natural Gas Distributors for Natural Gas Produced in Ontario
Ontario Energy Board File Number: EB-2022-0094**

In accordance with Procedural Order No. 2 in the above-noted proceeding, please find attached the submissions of Enbridge Gas Inc. on the jurisdictional questions.

Should you have any questions on this submission, please do not hesitate to contact me.

Yours truly,

Patrick McMahon
Technical Manager, Regulatory Research and Records
patrick.mcmahon@enbridge.com
(519) 436-5325

cc: All Parties to EB-2022-0094
Ritchie Murray, OEB
Michael Millar, 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

ENBRIDGE GAS INC.

SUBMISSIONS ON JURISDICTIONAL QUESTIONS

AIRD & BERLIS LLP
Barristers and Solicitors
Brookfield Place
Suite 1800, Box 754
181 Bay Street
Toronto, ON M5J 2T9

David Stevens
Tel (416) 863-1500
Fax (416) 863-1515

Email: dstevens@airdberlis.com

Counsel to Enbridge Gas

A. OVERVIEW

1. In February 2022, the Ontario Energy Board (OEB) initiated a hearing on its own motion, to consider the price paid by rate-regulated gas distributors for natural gas produced in Ontario. The OEB's Notice of Hearing included a draft issues list and invited interested parties to apply to participate. Enbridge Gas Inc. (Enbridge Gas, or the Company) is an approved intervenor, along with seven other parties.
2. In Procedural Order No. 1, the OEB invited participants to provide their comments on the draft issues list. After receiving the comments on the draft issues list, the OEB issued Procedural Order No. 2, asking for submissions on two jurisdictional issues that the OEB identified as being engaged by comments from the Ontario Petroleum Institute (OPI). The OEB invited OPI to provide submissions first (by May 24th), with other intervenors to respond (by June 21st) and OPI to reply (by July 12th).
3. These are Enbridge Gas's submissions on the jurisdictional questions, and in response to OPI's May 24th Submissions.
4. The OEB's jurisdictional questions and the context for those jurisdictional questions from Procedural Order No. 2 are as follows:
 - i. Section 36(1) of the *OEB Act* provides that:

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.

Question 1. 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?
 - ii. The OEB's Gas Distribution Access Rule establishes certain conditions of access to gas distribution services provided by a gas distributor. Section 44 of the *OEB Act* provides that the OEB's chief executive officer may make, amend and revoke rules, and sets out the process to be followed.

Question 2. On what basis can a panel of commissioners establish rules to ensure fair and transparent access and transparent access for gas producers to gas distribution systems in Ontario?
5. Enbridge Gas acknowledges and agrees that the OEB has broad jurisdiction over the regulated activities of gas distributors, including over the rates charged to consumers. The

Company agrees that the OEB's jurisdiction includes rulemaking powers over a variety of topic areas, including access to utility services.

6. However, Enbridge Gas submits that there are limits to the jurisdiction of a panel of OEB Commissioners determining an application.
7. The OEB's ratemaking jurisdiction governs the "just and reasonable rates" that a distributor can charge to its customers. This includes a review of the distributor's costs being recovered through rates. Those costs will include gas commodity costs, which are charged to ratepayers on a "pass-through" basis. The costs will also include items such as internal costs and costs paid to third parties for materials and services provided. The OEB will review such costs to confirm that they are reasonable and appropriate for recovery through rates. Importantly, however, the OEB will not tell the distributor what it must pay for any such items.
8. Therefore, Enbridge Gas does not agree that the OEB has jurisdiction to "set the price" that Ontario producers get paid by a distributor for gas provided to the distributor. While the OEB approves rates that recover the amounts paid by the distributor to gas producers, that is different from setting the price that must be paid by the distributor to the gas producer.
9. The OEB's powers to make new rules governing gas distributors are assigned to the "chief executive officer". Where previously those powers had been conferred on "the Board", the current version of the *OEB Act* implements the OEB's modernized structure and assigns some roles to the chief executive officer. The chief executive officer is separate from the commissioners. Therefore, while the OEB as a whole has jurisdiction to make new rules, such as those which OPI seems to advocate, the *OEB Act* makes clear that the power to make such rules does not sit with a panel of commissioners.

B. FACTUAL CONTEXT

10. OPI classifies the first several pages of its Submissions as "Factual Background". Among other things, OPI provides its perspective on the benefits and challenges faced by Ontario natural gas producers.¹
11. Enbridge Gas takes issue with several of the assertions included in this part of OPI's Submissions. However, Enbridge Gas expects that after the issues list is established, there

¹ OPI Submissions, pages 2-5.

will be an opportunity to provide evidence or responding evidence about facts relevant to this proceeding.

12. Therefore, at this time Enbridge Gas will refrain from responding to OPI's Factual Background submissions and will focus on the jurisdictional questions asked in Procedural Order No. 2.

C. GENERAL SUBMISSIONS ON THE OEB'S JURISDICTION

13. The general rule is that a statutory administrative tribunal like the OEB obtains its jurisdiction from its governing legislation - the *OEB Act* in this case.² In addition to the jurisdiction and powers expressly conferred by the governing legislation, an administrative tribunal also holds jurisdiction over matters necessary to be determined in order for the tribunal to fulfil its statutory mandate.³ This is referred to as jurisdiction by necessary implication.⁴
14. The key provisions of the *OEB Act* that are relevant to the jurisdictional questions at issue are section 2 (Objectives of the OEB in relation to gas), section 36 (Gas Regulation – rates) and sections 44-45 (Gas Regulation – rules).
15. Section 2 of the *OEB Act* states as follows:

Board objectives, gas

The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

- 1. To facilitate competition in the sale of gas to users.*
- 2. To inform consumers and protect their interests with respect to prices and the reliability and quality of gas service.*
- 3. To facilitate rational expansion of transmission and distribution systems.*
- 4. To facilitate rational development and safe operation of gas storage.*
- 5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.*

² *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 CanLII 23487 (ON SCDC), at pages 3-4.

³ *ATCO Gas and Pipelines v. Alberta*, [2006] 1 S.C.R. 169-171. See also *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board* at pages 3-4.

⁴ *Ibid.*

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.

16. In Enbridge Gas's view, these statutory objectives are aimed at protecting consumers and supporting the rational expansion and financial viability of the gas distribution system.⁵ These statutory objectives do not mention local gas producers. Enbridge Gas does not agree with OPI⁶ that these statutory objectives can be used to support an argument that granting the OEB power to set the price that local gas producers are paid is a necessary implication of the OEB's mandate and statutory framework.

17. Enbridge Gas agrees with OPI that the OEB has broad jurisdiction. However, that jurisdiction is not unlimited. The OEB's jurisdiction is derived from statutory grants of power, particularly through the *OEB Act*.

18. For the purposes of the OEB's first jurisdictional question, the key provision of the *OEB Act* is section 36, which sets out the OEB's power to fix or approve the "rates" that a distributor charges to its customers for the sale (and distribution) of gas. OPI agrees that this is the key provision.⁷

19. The relevant parts of section 36 of the *OEB Act* state as follows:

Order of Board required

36 (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

Order re: rates

(2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.

Power of Board

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

⁵ OPI's Submission fails to note that the OEB's objective of maintaining a financially viable gas industry is expressly aimed at "a financially viable gas industry for the transmission, distribution and storage of gas". See OPI Submission, para. 40.

⁶ OPI Submission, para. 54(b).

⁷ OPI Submission, para. 4(a).

Burden of proof

(6) Subject to subsection (7), in an application with respect to rates for the sale, transmission, distribution or storage of gas, the burden of proof is on the applicant.

Order, motion of Board or at request of Minister

(7) If the Board of its own motion, or upon the request of the Minister, commences a proceeding to determine whether any of the rates for the sale, transmission, distribution or storage of gas by any gas transmitter, gas distributor or storage company are just and reasonable, the Board shall make an order under subsection (2) and the burden of establishing that the rates are just and reasonable is on the gas transmitter, gas distributor or storage company, as the case may be.

20. As can be seen, section 36 of the *OEB Act* is directed at fixing or approving the “rates” that a distributor charges to its customers for the sale (and distribution) of gas.
21. As confirmed by the items listed in OPI’s submission⁸, the OEB only has limited jurisdiction over gas producers. Section 36 of the *OEB Act* does not give the OEB jurisdiction over the amounts charged by gas producers. The OEB cannot, and does not, regulate the prices at which natural gas producers (whether in Ontario or elsewhere) sell natural gas commodity.
22. The OEB’s jurisdiction under section 36 of the *OEB Act* is to set “just and reasonable rates” for a distributor’s regulated activities. That is not a power to tell the distributor what it must pay for particular items, but rather what overall amounts can be recovered from consumers through rates.
23. In general, cost of service rates approved by the OEB under section 36 of the *OEB Act* include recovery of the utility’s prudently incurred costs. Determining those rates requires the OEB to review the reasonableness (or prudence) of the utility’s forecasts of costs (and actually incurred costs for rate base additions). The OEB’s review does not tell the utility what it must pay third parties for specific commodities, products or services. Instead, the OEB determines whether the costs (individually and as a whole) are reasonable/prudent and should be recoverable from consumers. Where the OEB decides that certain third-party costs are not reasonable/prudent, then those costs are not recoverable in rates. However, the utility remains free to pay whatever amount it chooses to the third party – the impact of the OEB decision is that some of those costs may not be included and recovered in rates.

⁸ OPI Submission, para. 44(a) to (d).

24. In the specific circumstance of gas costs, the OEB has several mechanisms or processes for its cost review. None of these involve setting the price that the distributor must pay to a gas supplier. The Five-Year Gas Supply Plan (and Annual Updates) set out a gas supply plan that is designed, updated and implemented by a distributor to meet the requirements of its customers. As required by the OEB's Framework for the Assessment of Distributor Gas Supply Plans (Gas Supply Framework)⁹, this includes information about the various supply sources that make up the gas supply portfolio. Distributors are reimbursed for supply and transportation costs on a pass-through basis through the Quarterly Rate Adjustment Mechanism (QRAM). The QRAM process reflects the result of the distributor's implementation of gas supply planning activities and any near-term actions taken to respond to market conditions.¹⁰

25. The relevant parts of sections 44 and 45 of the *OEB Act* read as follows:

Rules

44 (1) *The chief executive officer may make rules,*
(d) establishing conditions of access to transmission, distribution and storage services provided by a gas transmitter, gas distributor or storage company;

Proposed rules, notice and content

45 (1) *The chief executive officer shall ensure that notice of every rule he or she proposes to make under section 44 is given in the manner and to the persons that the chief executive officer considers appropriate.*

Opportunity for comment

(3) On giving notice under subsection (1), the chief executive officer shall give a reasonable opportunity to interested persons to make written representations with respect to the proposed rule within such reasonable period as the chief executive officer considers appropriate.

Making the rule

(8) If notice under this section is required, the chief executive officer may make the rule only at the end of this process and after considering all representations made as a result of that process.

26. Until 2019, the preamble of sections 44 and 45 of the *OEB Act* referred to "The Board", rather than "The chief executive officer" as the "rulemaker". In 2019, amendments were made to the *OEB Act* to implement the OEB's new administrative structure. This was explained in the

⁹ <https://www.oeb.ca/sites/default/files/Report-of-the-Board-Gas-Supply-Plan-Framework-20181025.pdf>.

The Enbridge Gas 5-Year Plan is found at EB-2019-0137.

¹⁰ Gas Supply Framework, pages 4-5.

“explanatory note” accompanying the schedule to the *“Fixing the Hydro Mess Act, 2019”* that amended the *OEB Act*:

*The amendments to the Act made by the Schedule provide that, generally speaking, the board of directors exercises the powers of the Board with respect to its administrative functions, and panels of commissioners assigned by the chief commissioner for the purpose exercise the powers of the Board with respect to its adjudicative and regulatory functions. The chief executive officer is granted specific powers, including the power to make rules under section 44 of the Act and the power to issue codes under section 70.1 of the Act.*¹¹

27. It is thus clear from the *OEB Act* that it is now the “chief executive officer” who has the rulemaking powers conferred by the legislation. The OEB as an administrative body/tribunal maintains rulemaking jurisdiction, but that is now exercised through the chief executive officer.¹²

D. THE OEB’S RATEMAKING JURISDICTION DOES NOT INCLUDE SETTING PRICES DISTRIBUTORS MUST PAY GAS SUPPLIERS

28. The OEB’s jurisdiction to set rates comes from section 36 of the *OEB Act*.

29. The words of section 36(1) of the *OEB Act* confirm that the OEB’s ratemaking jurisdiction is directed at regulated distributors and their customers. Under section 36, “just and reasonable” rates are fixed for the sale (and distribution) of gas by distributors to consumers. This is different from fixing the prices that the distributor pays to third parties for the services (including gas commodity) that the distributor then provides to consumers.

30. When exercising its ratemaking powers, the OEB does not tell distributors what they must pay to third parties for gas supply or for other goods or services, or for the distributor’s own internal costs. That is not what is required or permitted by section 36 of the *OEB Act*. The OEB’s ratemaking powers instruct and permit the OEB to determine what amount is “just and reasonable” for distributors to charge to consumers for the sale and distribution of gas.

¹¹ <https://www.ontario.ca/laws/statute/S19006#sched2s1> – under the heading “SCHEDULE 2 ONTARIO ENERGY BOARD ACT, 1998 (GOVERNANCE)”.

¹² This stands in contrast with exemptions to established rules such as the GDAR, where the power to grant exemptions continues to lie with “the Board” – see GDAR, section 1.5: <https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2020-06/gas-distribution-access-rule-gdar-20200301-corrected.pdf>

31. Through the ratemaking process, as described above, the OEB reviews the distributor's forecast or actual costs to determine if they are reasonable/prudently incurred and then determines whether those costs can be recovered in rates.¹³
32. As part of the OEB's review and approval of the rates charged by Ontario gas distributors, the OEB approves the amounts charged by distributors to their customers for natural gas. Those amounts are charged to consumers on a "pass-through" basis, where the approved rates reflect the price paid by the distributor, with no mark-up.¹⁴ Where the OEB does not agree with the prudence or reasonableness of particular forecast or actual costs, the OEB does not have the power to tell the distributor what must be paid instead (or to "set the price"). Instead, in that circumstance the "just and reasonable rates" fixed by the OEB will not include recovery of costs that the OEB considers to be unreasonable/imprudent.
33. The fact that the OEB does not have jurisdiction to set the price that a distributor pays for local gas production does not mean that there is no opportunity for different prices to be paid to local producers.
34. In appropriate circumstances, the OEB can approve costs for particular sources of gas supply where those costs are higher than would be the case for other sources of supply. However, it is incumbent on the distributor to establish the reasonableness of the different (higher) costs before cost recovery is approved/permitted. This was explained in a 2012 OEB Interim Decision related to a proposal to procure RNG:

The Board concludes that it does have the jurisdiction to approve the cost consequences of the purchase of biomethane by the gas distributors, in the same way it has the authority to approve the cost consequences of any other purchase of natural gas, or the purchase of any other service or material that is used in distribution service. The Board has a broad mandate to set rates that are just and reasonable, and to set those rates using a mechanism that it finds most appropriate. If the Board determines that the costs of biomethane are reasonable and that its inclusion in the supply portfolio is appropriate, then it is open to the Board to approve the recovery of those costs through rates, even if they are in excess of market prices for natural gas. Having determined that the Board has the jurisdiction to approve recovery of biomethane costs, it does not necessarily follow

¹³ None of the examples given by OPI at paragraph 43 of its Submission involve a scenario where the OEB has set the price that must be paid by the distributor to a gas supplier or other third party. The OEB's approval in the RNG Enabling Programs Application of a new cost-recovery rate for RNG producers to connect to the EGD distribution system is not analogous to a request for the OEB to set the prices that a gas distributor must pay for local gas supply.

¹⁴ <https://www.oeb.ca/consumer-information-and-protection/natural-gas-rates>

*that the Board should do so. Any approval would be dependent upon the strength of the evidence in support of the proposal.*¹⁵

35. Notably, the OEB did not indicate in its 2012 Interim Decision that the OEB had or would exercise jurisdiction to set the prices to be paid to biomethane producers. Instead, the OEB indicated that it would consider the reasonableness of biomethane costs in light of all relevant circumstances.
36. This is consistent with the OEB's approach to the approval of the cost consequences of long-term contracts. Since 2008, OEB has made it available for gas distributors to seek "pre-approval" of the cost consequences of long-term gas supply and transportation contracts.¹⁶ Through this process, the OEB can approve costs that will be paid by the distributor in future years for long-term gas supply arrangements that would support the development of new natural gas infrastructure. It is important to note, however, that the OEB's "pre-approval" is not equivalent to setting the price that a distributor must pay a particular supplier. Instead, it is a determination that the forecast or proposed costs of the long-term contract are prudent and reasonable and may be recovered when they are incurred.¹⁷
37. Taking all of this together, Enbridge Gas submits that the OEB does not have jurisdiction to set the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors. However, the OEB can approve the costs paid by a gas distributor to acquire Ontario natural gas, even if those costs are relatively high, if it can be established that the proposed or actual costs are reasonable in all the circumstances.

¹⁵ EB-2011-0242/EB-2011-0283 Interim Decision and Order, July 12, 2012, at page 7 :

<https://www.rds.oeb.ca/CMWebDrawer/Record/353233/File/document>

¹⁶ EB-2008-0280 - Filing Guidelines for the Pre-Approval of Long-Term Natural Gas Supply and/or Upstream Transportation Contracts -

<https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2019-01/Filing-Guidelines-LTC-20090423.pdf>.

¹⁷ See December 17, 2015 Decision and Order for the Pre-Approval of NEXUS Contracts with EGD and Union Gas – EB-2015-0166/2015-0175, pages 3 and 23 :

<https://www.rds.oeb.ca/CMWebDrawer/Record/510156/File/document>

E. THE OEB'S RULEMAKING JURISDICTION SITS WITH THE CHIEF EXECUTIVE OFFICER

38. As explained above, sections 44 and 45 of the *OEB Act* confer rulemaking powers on the “chief executive officer”. That is distinguished from “the Board”, or “commissioners”.

39. Among the areas where the chief executive officer is expressly permitted to make rules is “establishing conditions of access to transmission, distribution and storage services provided by a gas transmitter, gas distributor or storage company.”

40. Thus, while there is no question that the OEB has express jurisdiction to “establish rules to ensure fair and transparent access and transparent access for gas producers to gas distribution systems in Ontario”, this power is to be performed through the chief executive officer.

All of which is respectfully submitted this 21st day of June 2022.

A handwritten signature in blue ink, appearing to read 'David Stevens', is written over a horizontal line.

David Stevens, Aird & Berlis LLP
Counsel to Enbridge Gas