Ontario Energy Board | Commission de l'énergie de l'Ontario

BY EMAIL

June 21, 2022

Ms. Nancy Marconi
Registrar
Ontario Energy Board
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Toronto, ON M4P 1E4
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Dear Ms. Marconi:

Re: Ontario Energy Board (OEB) Staff Submission
Generic proceeding on the price paid by rate-regulated natural gas distributors and their customers for natural gas produced in Ontario
OEB File Number: EB-2022-0094

Please find attached OEB staff's submission in the above referenced proceeding, pursuant to Procedural Order No. 2.

Yours truly,

Ritchie Murray

Digitally signed by Ritchie Murray
Date: 2022.06.21 13:57:08 -04'00'

Ritchie Murray
Case Manager, Applications, Natural Gas

Encl.

cc: All parties in EB-2022-0094

Ontario

ONTARIO ENERGY BOARD

OEB Staff Submission

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

EB-2022-0094

June 21, 2022

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Background

The Ontario Energy Board (OEB) commenced this hearing on its own motion to consider the price paid by rate-regulated natural gas distributors (Gas Distributors)[1] and their customers for natural gas produced in Ontario.

In Procedural Order No. 1, the OEB invited submissions from parties in respect of the following draft issues:

1. 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?

2. 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] are reasonable? If so, what should those principles and related filing requirements be?

The OEB received submissions on the draft issues list from a number of parties, most of which endorsed the OEB's draft issues. The Ontario Petroleum Institute (OPI) supported the two draft issues, but also asked the OEB to add a third issue to the proceeding relating to the establishment of rules to ensure fair and transparent access for Ontario gas producers (Gas Producers) to gas distribution systems in Ontario.

In Procedural Order No. 2, the OEB directed parties to file submissions on two jurisdictional questions:

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?

2. 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?

The OEB directed that OPI file its submissions on the jurisdictional questions first, which it did on May 24, 2022. What follows are OEB staff's submissions on the jurisdictional questions.

[1] There are two rate regulated gas distributors in Ontario: Enbridge Gas Inc. (Enbridge Gas), and EPCOR Natural Gas Limited Partnership (EPCOR), which operates two separate service territories (one in the South Bruce area and one in the Aylmer area). Enbridge Gas serves the overwhelming majority of natural gas customers in the Province.

Summary of OEB staff submissions

Jurisdictional Question 1

With respect to the first question, OEB staff submits that section 36 of the *Ontario Energy Board Act, 1998* (OEB Act) does not provide the OEB with the jurisdiction to directly set the rates that Gas Producers charge Gas Distributors.

The OEB does, however, indirectly address the price that Gas Producers are paid by Gas Distributors when it approves the rates that Gas Distributors charge their system supply customers for that gas. The Gas Distributors purchase some of their gas from the Gas Producers, which the Gas Distributors then sell to their customers at a rate approved by the OEB. That rate is designed to be a "pass through" such that the Gas Distributors charge their customers exactly what the Gas Distributors themselves paid for the gas (over time). As such, the rate approved by the OEB ultimately reflects the price charged by Gas Producers. In other words, the OEB's setting of commodity rates can influence the price that Gas Distributors pay Gas Producers for their gas.

The OEB's mandate under the OEB Act is to set "just and reasonable" rates for, among other things, the sale of gas by Gas Distributors. The focus in setting "just and reasonable" rates is on the interests of consumers and of the Gas Distributor; it is not on the interests of third parties such as Gas Producers. Therefore, the OEB should only consider allowing Gas Distributors to pass on gas costs to their ratepayers that are in excess of a market rate, or creating special formulas for the same purpose, where there are demonstrated benefits to ratepayers for doing so.

To the extent OPI is arguing that the OEB has the power to actually compel Gas Distributors to pay Gas Producers a specific price (as opposed to authorizing the Gas Distributors to pass on a specific price to customers through the rates authorized in the Quarterly Rate Adjustment Mechanism (QRAM)), it is not apparent to OEB staff that this lies within the OEB's jurisdiction. However, since the OEB does set the rates charged by the Gas Distributors to customers, and these are treated as a pass through (i.e., the costs recovered by Gas Distributors for gas commodity are passed through dollar for dollar to gas producers), it is not necessary to make a determination on this issue.

Jurisdictional Question 2

OEB staff submits that the OEB has the jurisdiction to establish rules to ensure fair and transparent access for Gas Producers to the Gas Distributors' distribution systems in Ontario. Although the OEB has broad powers under section 36 of the OEB Act, in OEB staff's view the appropriate mechanism through which to create such rules (assuming such rules are warranted) is through the OEB's rule-making authority under section 44 of the OEB Act. Rules created under section 44 lie within the purview of the OEB's

Chief Executive Officer, and not a panel of Commissioners (such as those conducting this hearing). Rules related to fair and transparent access for Gas Producers to the Gas Distributors' gas distribution systems in Ontario should therefore not be determined in this proceeding.

Background regarding the OEB Act, gas supply for Gas Distributors and the Quarterly Rate Adjustment Mechanism

The OEB's jurisdiction to set rates for the sale of gas and for the distribution, transmission and storage of gas, comes from section 36 of the OEB Act:

> **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.

It is clear from the wording of section 36(1) that the OEB is responsible for setting rates not just for the distribution, transmission and storage of gas, but also for the sale of gas where that gas is sold by a gas transmitter, gas distributor, or storage company. Indeed the OEB does exactly this every quarter, when it sets the rates that Gas Distributors charge their system supply customers for natural gas through the QRAM.

Gas Distributors do not produce their own gas; they obtain gas on behalf of their system supply customers from a variety of sources on the market. North America enjoys a diverse, open and extensive market for natural gas, and there are many suppliers and hubs from which gas can be purchased and (where necessary) transported to the Gas Distributors' service territories. Although a small amount of natural gas is produced in Ontario, Enbridge Gas Inc. (Enbridge Gas) (which accounts for more than 99% of the rate-regulated distribution throughput in Ontario) obtains more than 99% of its gas from outside Ontario.[2]

Through the QRAM process, the OEB in most cases authorizes the Gas Distributors to charge their customers gas commodity rates that reflect the amount that Gas Distributors themselves paid to obtain that gas (including upstream transportation costs and in some cases load balancing services). As noted by the OEB in its most recent review of the QRAM process:

> Gas consumers in Ontario who do not choose to buy their natural gas supply from a gas marketer are supplied by their local regulated gas distributor. These system supply customers pay a price for gas set by the Board through the QRAM process. Each gas distributor applies for a QRAM adjustment quarterly, and the proposed gas supply price is based on the market price for natural gas. Distributors do not make a profit on the gas commodity.[3]

Enbridge Gas has a diverse portfolio of gas supply and transportation contracts.[4] The contract costs differ based on their varying characteristics (length of term, when the contract was entered into, source of supply, amount of gas purchased/transported, etc.) Enbridge Gas therefore pays different prices for gas and transportation based on the terms of the particular contracts. However, through the QRAM process, the costs of all these contracts (as applicable to the quarter in question) are combined and passed through to Enbridge Gas's customers in the commodity rates that they pay, with no mark-up.

The OEB reviews the costs that Gas Distributors incur to provide gas to their system supply customers, and allows the Gas Distributors to recover these costs in the rates paid by those customers to the extent the resulting commodity rates are found to be just and reasonable. Although these costs are typically treated as a "pass through", that does not mean that the OEB will simply approve the recovery of whatever costs a Gas Distributor happens to incur in procuring gas on behalf of its system supply customers. As described in the OEB's Framework for the Assessment of Distributor Gas Supply Plans (Gas Supply Framework) the OEB considers three broad guiding principles in assessing a Gas Distributor's gas procurement activities: (1) cost-effectiveness, (2)

[2] For its Aylmer service territory, EPCOR procures between 25-30% of its gas from a local Gas Producer, as well as from Enbridge Gas (in this respect, EPCOR is a system supply customer of Enbridge Gas). For its South Bruce service territory, EPCOR procures its gas from the Dawn hub, which would be entirely, or almost entirely, comprised of gas from outside of Ontario.
[3] Decision and Order, EB-2014-0199, p. 1.
[4] As noted earlier, EPCOR procures its gas as a system supply customer of Enbridge, from a local Gas Producer (for the Aylmer service territory), and from the Dawn Hub (gas principally sources outside of Ontario).

reliability and security of supply, and (3) public policy.[5] As such, the price of gas is not expected to be the sole focus of the Gas Distributor's procurement activities. Rather, they are required to balance the three principles in a way that is prudent and appropriate for customers. Gas Distributors are expected to procure gas in accordance with these principles, and in cases where they do not they are at risk of not recovering all of their costs.

There have been a number of cases in which the OEB did not permit a Gas Distributor to recover all of the costs it incurred to procure gas on behalf of its customers.

For example, in 2016 the OEB did not allow Natural Resource Gas Limited (NRG, which was a rate regulated natural gas distributor that was the predecessor to EPCOR in the Aylmer service territory) to recover a penalty that NRG incurred under its transportation contract for failing to balance its injections and withdrawals at one of the pre-determined "check-point" times during the year. The OEB determined that NRG had not acted prudently in incurring the penalty, and that it would therefore not be just and reasonable to require ratepayers to pay for the penalty.[6]

In another case, the OEB denied Enbridge Consumers Gas' (ECG, another predecessor to Enbridge Gas) recovery through rates of certain transportation costs it had incurred to bring gas to its service territory on behalf of system gas customers. The OEB held that ECG had not adequately considered alternative and potentially less expensive transportation options, and that therefore a portion of these costs had been imprudently incurred.[7]

Question 1: On what basis does the OEB have the jurisdiction to set the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors?

As discussed above, it is clear that the OEB has the jurisdiction to set the rates that Gas Distributors charge their system supply customers for natural gas, and does so every quarter through the QRAM process. What requires further explanation is the source of any OEB authority to set the prices that Gas Distributors pay to Gas Producers.

The OEB does not set rates that Gas Producers charge Gas Distributors

It does not appear that section 36 provides the authority for the OEB to set rates that Gas Producers must charge in selling their gas. The requirement in section 36 to obtain an order from the OEB to sell gas applies only to gas transmitters, gas distributors and storage companies. Ontario's Gas Producers are not, to OEB staff's knowledge, gas

[5] Gas Supply Framework, pp. 7-8.
[6] EB-2014-0053/0361, Decision and Order, January 14, 2016.
[7] RP-2001-0032, Decision with Reasons, December 18, 2002, pp. 62-73.

transmitters, gas distributors, or storage companies as defined in the OEB Act in respect of gas that they sell to Gas Distributors. They therefore do not require, nor have they ever obtained, a rate order setting the rates they charge for gas to the Gas Distributors.[8]

As directly setting the rates charged by Gas Producers to Gas Distributors (or any other party) is not a mechanism through which the OEB can set the price that Gas Producers get paid for their gas, OEB staff will explore whether other bases exist in relation to the setting of the price that Gas Producers get paid for their gas.

The OEB does set rates that Gas Distributors are allowed to charge their customers for gas

The OEB does have the authority (and responsibility) to set the rates that gas distributors (among others) charge their system supply customers for the gas that they sell to these customers. These rates are set through the QRAM process. As discussed above, this cost is treated as a "pass through" – the OEB sets the rates for gas commodity charged by Gas Distributors to their customers to match the costs (over time) that the Gas Distributors have prudently incurred to procure that gas. Although the OEB does not directly set the rate charged by Gas Producers for the sale of their gas to Gas Distributors, those costs are reflected in – and can therefore be influenced by – the setting of rates that allow Gas Distributors to pass through to their customers the costs that they incurs to procure gas on their behalf. There is therefore a close relationship between what Gas Producers (whether in Ontario or elsewhere) are paid for their gas and what ratepayers in Ontario pay for that gas. The former is not directly approved by the OEB, but the latter is.

OEB staff submits that the OEB has the jurisdiction to fix or approve prices or formulas that Gas Distributors would be required to charge their customers for gas produced in Ontario, or alternately to provide direction on the principles it will consider when assessing the reasonableness of the pass through of costs for gas produced in Ontario. Gas Distributors can only sell gas in accordance with an order of the OEB under section 36, and the OEB is empowered under that section to adopt whatever method or technique it chooses in setting just and reasonable rates. As noted above, the OEB already reflects the price that Gas Distributors pay for Ontario sourced gas when they authorize the recovery of those costs through the QRAM.

[8] The Ontario Court of Appeal made a related conclusion in *Enbridge Gas Distribution Inc. et al. v. Ontario Energy*
Board, [2005] O.J. No. 33 where it observed that gas vendors (who sell gas commodity directly to consumers): "Although the Board regulates the price customers pay for gas distribution services, it does not regulate the price customers pay to gas vendors for the gas itself. That price is set by the marketplace." (para. 7).

It is important to discuss, however, whose interests the OEB is considering when it sets rates for the sale of gas by Gas Distributor to its customers. Section 36 requires the OEB to set just and reasonable rates, but the question remains: just and reasonable for whom?

OEB staff submits that, in setting just and reasonable rates, the OEB's focus is on the customers of the Gas Distributors (i.e., ratepayers), and the Gas Distributors themselves. In considering this issue, it is helpful to review both the OEB Act and the relevant case law.

As noted above, section 36 empowers the OEB to set "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. The term "just and reasonable" is not defined. OEB staff agrees with OPI's position that section 36 confers a broad authority on the OEB. However, the power to set just and reasonable rates is not limitless, and is confined by both the statute and the relevant case law.

In addition to the wording of section 36, the starting point for considering the scope of "just and reasonable" should be the OEB's statutory objectives with respect to gas:

> **Board objectives, gas**
>
> **2** 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.
>
> 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.

It is noteworthy that while several of the objectives relate either directly or indirectly to the interests of ratepayers (1, 2, 5) or gas distribution, transmission or storage utilities

(3, 4, 5.1, 6), none of them appear to relate directly to the interests of Gas Producers. Objective 5.1 refers to the facilitation and maintenance of a financially viable gas industry, but specifically with reference to transmission, distribution and storage of gas and notably not to production. Arguably, objective 1 could encompass gas production, in that a strong local gas production industry could, all else being equal, increase competition in the sale of gas to users by providing additional options for the supply of gas. As noted above, however, less than 1% of the gas consumed in Ontario is produced in Ontario.

As noted by OPI, the OEB does have some regulatory oversight over gas production and related activities in Ontario: for example in relation to the issuance by the Minister of permits for the recovery of gas and licensing of wells under the *Oil, Gas and Salt Resources Act* and leave to construct approvals for associated gathering lines under the OEB Act (provided that the thresholds established in the OEB Act and regulations are met).[9] It is notable, however, that none of these powers relate to the price payable by Gas Distributors for the gas that they procure for their customers. Moreover, the fact that the OEB has been given these responsibilities does not, in OEB staff's view, lead to the conclusion that the OEB's jurisdiction under section 36 should be interpreted in the manner suggested by OPI. The clear focus of section 36 is the sale of gas by Gas Distributors and the associated rates, and not the price that Gas Producers are to be paid for their gas.

OEB staff's position that the driving purpose of section 36 is to protect the interests of ratepayers and those of the Gas Distributors is also consistent with the case law and the principle of the "regulatory compact" which underlies the setting of just and reasonable rates in Canada. The primary exercise in rate setting is to balance the interests of the utility (for example by allowing a reasonable rate of return for prudently incurred investments) and the ratepayer (by ensuring, for example, that they are not charged excessive rates by the utility monopoly service provider). As noted by the Supreme Court of Canada:

> Rate regulation serves several aims – sustainability, equity and efficiency – which underlie the reasoning as to how rates are fixed […] These goals have resulted in an economic and social arrangement dubbed the "regulatory compact", which ensures that all customers have access to the utility at a fair price – nothing more. […] Under the regulatory compact, the regulated utilities are given exclusive rights to sell their services within a specific area at rates that will provide companies the opportunity to earn a fair return for their investors. In return for this right of exclusivity, utilities assume a duty to adequately and reliably serve all customers in their

[9] See OPI submission, para. 44.

> determined territories, and are required to have their rates and certain operations regulated. […] The object of the statutes is to protect both the customer and the investor.[10]

The OEB's own jurisprudence further supports this position. There has been at least one occasion where the OEB approved rates for the sale of gas by a Gas Distributor which included costs that exceeded the "market price" for gas. In its 2011 rates application, NRG applied for an order setting just and reasonable rates for (amongst other things) the sale of gas to its system supply customers.[11] NRG procured gas on behalf of its customers from two sources: through the Union Gas distribution and transmission network (NRG was fully embedded in Union Gas' service territory, and the same is true of EPCOR in relation to its Aylmer service territory), and from a number of local gas production wells operated by NRG Corp. (which was a related company to NRG). NRG stated that NRG Corp. was unwilling to produce gas at the then prevailing market prices (which were at historic lows), and NRG applied to charge its customers a significant premium for this locally produced gas. NRG further stated that its distribution system was unable to maintain system pressure throughout its entire system on days when demand was particularly high if it took gas only from Union Gas' system, and that there could be a partial system shutdown absent gas supply from NRG Corp. The capital cost to upgrade its system to fix the pressure issues were estimated at between $8 million and $23 million, which was well in excess of the amount that would be passed on the ratepayers through the premium charged on NRG Corp. gas.

The OEB permitted NRG to charge its customers through their rates the premium for NRG Corp. gas subject to a total annual volume cap and certain other conditions. The OEB authorized the premium not because it was beneficial to NRG Corp., but because it would be beneficial to ratepayers based on the available alternatives (i.e.x, an expensive system reinforcement). The OEB's review focused on the needs of customers and on means to ensure that they would not need to pay a premium above market prices in excess of what was required to maintain system integrity.[12]

In its Low Carbon Energy Project application, Enbridge Gas applied for leave to construct and rate orders to support a small pilot project to blend small amounts of hydrogen with the existing natural gas supply in the City of Markham.[13] Enbridge Gas proposed to pay the same amount for hydrogen as it did for natural gas, and to pass the cost of this hydrogen on to ratepayers through the QRAM. However, blended gas has a lower heat value than ordinary natural gas, and therefore more gas is required to

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[10] ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board), [2006] 1 SCR 140, paras. 62-64. See also *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, para. 20.
[11] EB-2010-0018
[12] Ibid., pp. 8-11.
[13] EB-2019-0294

provide the same amount of heat. To account for this, the OEB approved a small annual credit to Markham ratepayers ($10 per customer) to ensure that their bills did not increase on account of using the blended gas. This credit was funded by Enbridge Gas's other ratepayers.

It is important to note, however, that in both cases the higher rates were authorized because they benefitted ratepayers (or were at least to some extent supported by ratepayers). In the NRG case, the alternative to higher priced locally produced gas was an expensive system reinforcement, and the OEB placed strict limits on how much above market price gas the distributor could purchase on behalf of customers. The Enbridge Gas case was a small pilot program with very limited ratepayer costs, and the OEB noted that Enbridge Gas had provided customer survey results which indicated some support for initiatives to reduce carbon emissions.

It is OEB staff's submission, therefore, that the OEB's responsibilities in setting just and reasonable rates lie with protecting and balancing the interests of ratepayers on the one hand, and utilities on the other. This position is consistent with the OEB Act and the relevant jurisprudence from both the courts and the OEB. When setting rates, the OEB does not have a mandate to protect the interests of other parties.

What is the OEB's jurisdiction to set the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors?

To the extent that OPI is arguing that the OEB has the express or implied jurisdiction to fix the price that Gas Distributors *must pay* to Gas Producers, it is not apparent to OEB staff that this is the case. OEB staff submits, however, that it is not necessary for the OEB to specifically decide this point as there exists a clear basis on which the OEB can allow Gas Distributors to pass a specific price through to their system supply customers even if it exceeds the lowest available "market price" for gas. That said, to be clear OEB staff does not accept that there is express or implied jurisdiction to directly set the rates that Gas Producers are allowed to charge Gas Distributors.

OEB staff submits that it is open to the OEB to set rates that allow Gas Distributors to recover gas costs that are higher than alternative sources of supply. The question remains whether it is appropriate for the OEB to do so, as stated in issue 2 on the draft issues list set out in Procedural Order No. 1. The OEB should be guided in this analysis by the principles set out in the Gas Supply Framework. If there is a demonstrated benefit to ratepayers that accords with the OEB's mandate and objectives, then the OEB can authorize Gas Distributors to recover higher costs for locally produced gas. However, if the benefits of such an arrangement would be solely for the local producers and not for ratepayers, the OEB should not do so. To OEB staff's knowledge, there are no rate cases in which the OEB's decision was driven by the interests of Gas

Producers.

Question 2: 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?

The draft issues list circulated with Procedural Order No. 1 focused on the price that distributors and their system gas customers should pay for Ontario produced natural gas. In its submission on the draft issues list dated March 11 2022, OPI suggested that the proceeding should also consider the issue of what terms and conditions should govern Gas Producers' access to the gas distribution system. OPI asked that the following issue be added to the issues list:

> What rules should be established in order to ensure fair and transparent access for Ontario gas producers to gas distribution systems in Ontario, including requirements related (but not limited) to: available capacity disclosure, system impact assessments, offer to connect requirements, construction contestability, etc.

Partially in response to this suggestion, the OEB sought submissions on the basis upon which a panel of commissioners can establish rules to ensure fair and transparent access for Gas Producers to gas distribution systems in Ontario.

In its submission dated May 24, 2022, OPI argued that the OEB's broad section 36 rate setting jurisdiction provides the OEB with authority to establish rules to ensure fair and transparent access for Gas Producers to gas distribution systems in Ontario.

The OEB's rule making authority for the natural gas sector is set out in section 44 of the OEB Act. Section 44(c) clearly provides the authority to create rules to establish "conditions of access to transmission, distribution and storage services provided by a gas transmitter, gas distributor or storage company." Section 44 is also clear that the authority to make rules lies with the Chief Executive Officer of the OEB, and not with the commissioners of the OEB. The question, therefore, is not whether the OEB has the jurisdiction to establish rules related to access to the distribution system. Instead, the question is through what mechanism should the OEB establish such rules (to the extent new rules are appropriate)?

OEB staff submits that, to the extent additional rules or guidance are required to ensure fair and transparent access for Gas Producers to gas distribution systems in Ontario, this should be done under the OEB's section 44 rule making authority. OEB staff does not disagree with OPI's submissions that the OEB's section 36 rate making authority is broad. OEB staff also agrees that the OEB's section 36 powers are not limited to "pure rates" issues. As OPI noted, Enbridge Gas's Conditions of Service are in some cases reviewed in rate proceedings. The OEB has also approved frameworks and filing requirements through its rate making authority, for example in the Enbridge Gas Integrated Resource Planning proceeding.[14] Depending on what policies are actually proposed, it could lie within the OEB's jurisdiction under section 36 to establish requirements related to fair and transparent access to gas distribution systems, at least in respect of the utility that is the subject of a section 36 proceeding.

Despite this, OEB staff submits that the more appropriate home for any requirements regarding access for Gas Producers to gas distribution systems in Ontario would be in a rule or rules enacted under section 44 of the OEB Act. As noted above, section 44 specifically authorizes the OEB to create rules relating to access to transmission, distribution, and storage services. As a general matter, rules (as opposed to adjudication) are a preferable forum through which to establish policies of general application. Although OPI has specified that for the most part they are interested only in Enbridge Gas's policies, there are numerous individual members of OPI, and a policy of general application established through a rule would be preferable to an order set out through an adjudicative process.[15]

It is noted that in proposing this issue OPI itself used the term "rules" (though it did not specifically state a rule under section 44). Many of the precedents that OPI provides of similar rules are either rules under section 44 (such as the Gas Distribution Access Rule (GDAR)) or codes issued under section 70.1 (such as the Distribution System Code (DSC)).[16] The Storage and Transportation Access Rule (STAR) is another example of a section 44 rule that addresses access to natural gas services, in this case largely transmission and storage services. STAR has provisions relating to access to the gas utilities' transmission systems for customers (in many case shippers) and storage companies; in other words access to the system for parties that are not themselves consumers of gas (similar to the Gas Producers).

As its name implies, the GDAR in particular appears to be a natural home for any new rules related to access to gas distribution systems by Gas Producers in Ontario. The GDAR already establishes a number of rules with respect to accessing gas distribution services. Although the exact scope of the rules that OPI would propose is not currently

[14] EB-2020-0091
[15] In J.M. Evans, H.N. Janisch, David J. Mullan and R.C.B. Risk, *Administrative Law: Cases, Text and Materials* (Toronto: Emond Montgomery, 2003), at 675 the authors commented: "The essence of a rule, as opposed to an adjudication, is that the former lays down a norm of conduct of general application while the latter deals only with the immediate parties to a particular dispute."
[16] Electricity Codes under section 70.1 of the OEB Act are similar to rules enacted under section 44, however they apply to the electricity sector. They follow a similar approval process to gas rules, and are issued by the Chief Executive Officer.

known to OEB staff, its proposed issue referred to requirements related to available capacity disclosure, system impact assessments, offer to connect requirements, and construction contestability. These types of rules are broadly consistent with the types of rules that are already in place through the GDAR and STAR and, on the electricity side, the DSC and the Transmission System Code.

OEB staff therefore submits that, while there may be some matters with respect to fair and transparent access to a gas distribution system that can be addressed in a section 36 proceeding, the proper home for these kinds of policies (to the extent they are warranted) is through rules created under section 44.

~All of which is respectfully submitted~