



**BY EMAIL and RESS**

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June 21, 2022  
Our File: EB20220094

**Attn: Nancy Marconi, Registrar**

Dear Ms. Marconi:

**Re: EB-2022-0094 – Generic Proceeding on Ontario NG Pricing – SEC Submissions**

We are counsel to the School Energy Coalition ("SEC"). Pursuant to Procedural Order No.2, this letter constitutes SEC's submissions on the preliminary jurisdiction questions raised by the OEB.

**Overview and Summary**

The OEB commenced a hearing on its own motion to consider the price paid by rate-regulated natural gas distributors and their customers for natural gas produced in Ontario. Ontario natural gas producers, represented by the Ontario Petroleum Institute ("OPI"), maintain that Enbridge Gas Inc. ("Enbridge") should pay for their product at an amount higher than the current price, which is based on the forward Dawn Index.<sup>1</sup> OPI has also raised concerns regarding Ontario producer's access to Enbridge's distribution system.

The OEB issued Procedural Order No.1, which included a proposed issues list. After reviewing parties' comments the OEB issued Procedural Order No. 2, and sought submissions on two preliminary jurisdictional questions.

SEC submits, that based on the information available at this time, the OEB lacks jurisdiction to set the price that Ontario natural gas producers get paid for the gas they produce and provide (i.e. sell) to Ontario producers (Question 1). The OEB's jurisdiction is limited to approving the rates for the sale of gas, by gas transmitters, distributors and storage companies, under subsection 36(2) *Ontario Energy Board Act* (the "*OEB Act*"). Although subsection 36(1) of the *OEB Act* provides the OEB with the authority to regulate the activities of these entities regarding the sale of gas, interpreting this subsection to include the authority to set the price a distributor pays for their gas supply would be

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<sup>1</sup> See EB-2020-0094, Notice

inconsistent with the role of the OEB as a monopoly regulator meant to protect the interest of customers, not gas producers.

In contrast, SEC believes OEB Commissioners likely have the authority to establish rules to ensure fair and transparent access for gas producers to the gas distribution systems in Ontario and to address most of the underlying concerns raised by OPI (Question 2). Although section 44 of the *OEB Act* grants the CEO of the OEB broad powers to make formal rules regarding the conduct of natural gas utilities, the authority is not exclusive.

**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?**

Based on the issues that have given rise to this proceeding, and the information available on the record, SEC submits that the *OEB Act* does not provide the OEB with jurisdiction to set the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors.

***Scope of Sections 36(1) and (2)***

The OEB's natural gas rate-setting authority is set out in section 36 of the *OEB Act*. It is made up of two key components. First, subsection 36(1) 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."<sup>2</sup> The OEB has interpreted this to mean that it "has authority to regulate the activity of selling gas, transmitting, distributing or storing gas, not merely to regulate the fees charged for performing these activities."<sup>3</sup>

Second, subsection 36(2) provides that the "[t]he 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."<sup>4</sup> The statutory language means that the OEB only has the authority to regulate the rates (i.e. prices) charged for the sale of gas, by transmitters, distributors, and storage companies, not gas producers. While the OEB regularly inquires into gas distributors procurement activities in rate proceedings, it is for the purposes of determining the appropriateness of approving recovering costs in rates. In doing so, the OEB is not setting the price that a gas distributor pays for gas from a producer, only what can be recovered from ratepayers. This distinction is critical. This is true even when the OEB through the QRAM process treats gas supply costs as a pure pass-through.

In its decision in RP-2001-0032, the OEB commented on the interplay between these two subsections, noting that the activities regulation component of subsection 36(1) is distinct from subsection 36(2), and if not, then "an order under subsection 36(1) [would be] meaningless, since the Board would in

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<sup>2</sup> [Ontario Energy Board Act, 1998, s. 36\(1\)](#)

**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.

<sup>3</sup> [Decision with Reasons \(RP-2001-0032\), December 13, 2002](#), para. 5.11.85

<sup>4</sup> [Ontario Energy Board Act, 1998, s. 36\(2\)](#)

**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.

fact be limited only to granting rate orders under subsection 36(2).<sup>5</sup> Moreover, the OEB noted that to “interpret this provision otherwise would lead to the absurd conclusion the utility would be able to sell gas or transmit, distribute or store gas in any manner that it chose and the Board’s only recourse would be to limit the cost recovery in rates.”<sup>6</sup>

***Authority to Regulate Sale of Gas by Distributors Does Not Encompass the Price Paid to Producers***

The OEB’s authority to regulate the activities of gas distributors in the sale of gas raises the question of whether it has the authority to set the price that Ontario natural gas producers get paid for the gas they produce, and provide to Ontario distributors. SEC submits that based on the information available regarding the issues faced by OPI that have given rise to this generic proceeding, the OEB does not.

Setting the price paid to natural gas producers has little to do with selling gas to consumers by gas distributors. This proceeding is all about regulating the price that gas producers receive, not because of some benefit to customers, but because OPI members believe that Enbridge is harming their economic interests by paying a low price. This is a legitimate interest for gas producers to pursue, but not one that engages the interests of the OEB.

OPI is correct to reference the objectives for natural gas under section 2 of the *OEB Act*, which the OEB is required to be guided by when carrying out its responsibilities.<sup>7</sup> But those objectives make clear that the OEB’s interest in natural gas only pertain to customers, transmitters, distributors and storage companies, not gas producers. For example, the objectives include, among others, “facilitate[ing] competition in the sale of gas to users”<sup>8</sup>, “inform[ing] consumers and protect their interests with respect to prices and the reliability and quality of gas service”<sup>9</sup>, “facilitate[ing] rational expansion of transmission and distribution systems”<sup>10</sup>, and “facilitate[ing] the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.”[emphasis added].<sup>11</sup> Not a single objective references gas production.

SEC accepts that some of the objectives may tangentially implicate Ontario gas production. For example, it may be more cost effective<sup>12</sup> (on a landed cost basis) to purchase Ontario produced natural gas, or that purchasing Ontario produced natural gas promotes energy conservation<sup>13</sup> since less fuel is required to transport supply, but this has little to do with setting a price to be paid to producers. These issues are more appropriate to consider in determining the quantum of gas that Enbridge (or another distributor) should acquire as part of the approval of its gas supply portfolio.

OPI refers to several decisions that have referenced the OEB’s broad jurisdiction in regulating the Ontario natural gas sector, and rates specifically.<sup>14</sup> Yet, the OEB’s jurisdiction is not limitless and is

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<sup>5</sup> [Decision with Reasons \(RP-2001-0032\), December 13, 2002](#), para. 5.11.87

<sup>6</sup> [Decision with Reasons \(RP-2001-0032\), December 13, 2002](#), para. 5.11.87

<sup>7</sup> [Ontario Energy Board Act, 1998, s. 2](#)

<sup>8</sup> [Ontario Energy Board Act, 1998, s. 2\(1\)](#)

<sup>9</sup> [Ontario Energy Board Act, 1998, s. 2\(2\)](#)

<sup>10</sup> [Ontario Energy Board Act, 1998, s. 2\(3\)](#)

<sup>11</sup> [Ontario Energy Board Act, 1998, s. 2\(5.1\)](#)

<sup>12</sup> [Ontario Energy Board Act, 1998, s. 2\(2\)](#)

<sup>13</sup> [Ontario Energy Board Act, 1998, s. 2\(5\)](#)

<sup>14</sup> OPI Submissions on Jurisdictional Questions, March 24, 2022, para. 23, 30-36

constrained by the specific powers given to it by statute. In the context of the underlying issues which have given rise to this generic proceeding, SEC submits 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.

SEC recognizes that as a matter of policy, it might be preferable that there was some form of regulation of the price paid to Ontario natural gas distributors because of the potential monopsony position that Enbridge has over the purchase of their supply. Unfortunately for OPI, the OEB does not have the jurisdiction to be the entity to deal with any claimed imbalance in bargaining power. OPI must look elsewhere to the Competition Bureau or the Ontario government to resolve their pricing dispute with Enbridge.

**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?**

This jurisdictional question stems from OPI's intention for the OEB to address the difficulties it claims to have encountered when trying to access Enbridge's distribution system. Depending on the specifics of those concerns, and the proposed rules, a panel of Commissioners likely can establish certain rules to ensure fair and transparent access for gas producers to gas distribution systems in Ontario.

In Procedural Order No. 2, in asking this question, the OEB referenced section 44 of the *OEB Act* which gives the CEO formal rule-making authority to issues and rules on a broad range of topics related to the regulation of natural gas utilities, including the conduct of a gas distributor.<sup>15</sup> SEC submits the power to address the issues for which the formal rules under section 44 promulgate, are not the exclusive jurisdiction of the CEO. Nothing in the wording of section 44, indicates that the powers to create formal rules to address the broad range of issues under that section, is to the exclusion of a panel of Commissioners ability to address similar issues using their authority.

A panel of Commissioners can exercise its own authority, for example under section 36 of the *OEB Act*, to address the same issues as those under section 44, even by creating rules, albeit in the more colloquial sense.

***Issues Regarding Access to the Distribution System***

In its submissions on the draft issues list, OPI proposed the additional issue regarding ensuring "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."<sup>16</sup> It noted that it had previously raised concerns regarding being denied access on the basis of local capacity constraints and unreasonable construction costs, with no ability to mitigate or contest such costs.<sup>17</sup>

SEC submits a panel of Commissioners has the authority to establish rules regarding fair access to the distribution system, but only if the purpose of the access is for the producer to transport gas (e.g.

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<sup>15</sup> [Ontario Energy Board Act, 1998, s.44](#)

<sup>16</sup> Petroleum Institute (OPI) Submission on Draft Issues List, March 11, 2022, p.2

<sup>17</sup> Petroleum Institute (OPI) Submission on Draft Issues List, March 11, 2022, p.1

use Enbridge's distribution and transmission system to transport gas to Dawn), as opposed to selling the gas to distributor at the point of interconnection to its system. This distinction is important.

As discussed earlier, the OEB does not have the authority to regulate the price to be paid to producers for the sale of natural gas, and so equally does not have the authority to regulate access to a distributor's system for the purpose of their ability to sell them natural gas.

If the purpose of access to the distribution system is with respect for producers to transport natural gas, the OEB does have authority to regulate that activity under subsection 36(1), and so can create rules regarding access. It also can do so by way of its gas transmission rate-setting authority under subsection 36(2), to include such rules as "conditions, classifications or practices applicable to the....transmission... of gas" under subsection 36(4).<sup>18</sup> This subsection has been interpreted broader than the general condition power in section 23 of the *OEB Act*.<sup>19</sup>

The OEB regularly approves terms and conditions in rate proceedings through approval of changes to Enbridge's Rate Handbook, and even specific contract templates.<sup>20</sup> This sometimes includes significant rules regarding the terms of service and the obligations of both the customer and the distributor.<sup>21</sup>

### ***Issues Regarding Connection and/or Construction Costs***

In contrast to rules regarding access to the distribution system, based on past practice, a panel of Commissioners has authority to address connection and construction costs issues under authority in section 36 of the *OEB Act*, regardless of the purpose.

In EB-2017-0319, Enbridge sought approval of its Renewable Natural Gas Injection Service which would "build the pipeline attaching the producer to the broader distribution system, odourize the bio-methane, measure the gas volumes and energy content of the gas, manage pressures and ensure that the gas meets required specifications".<sup>22</sup> The OEB determined that this was a distraction activity and approved a rate-setting methodology under section 36 of the *OEB Act*.<sup>23</sup>

If the connection and construction costs that OPI members are concerned about are of a similar type, such as connection from their production facilities and feeder pipelines to the distributor's distribution system, then the OEB has the authority to regulate.

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<sup>18</sup> [Ontario Energy Board Act, 1998, s. 36\(4\)](#)

**Contents of order**

(4) An order under this section may include conditions, classifications or practices applicable to the sale, transmission, distribution or storage of gas, including rules respecting the calculation of rates.

<sup>19</sup> [Decision with Reasons \(RP-2001-0032\), December 13, 2002](#), para. 5.11.91; [Ontario Energy Board Act, 1998, s. 23](#)

<sup>20</sup> [Decision and Order \(EB-2017-0319\), October 18, 2018](#), para. 17

<sup>21</sup> See for example, [Decision and Rate Order \(EB-2022-0089\)](#), Schedule A, EGD Rate Zone Handbook of Rates and Distribution Services

<sup>22</sup> [Decision and Order \(EB-2017-0319\), October 18, 2018](#), para. 21

<sup>23</sup> [Decision and Order \(EB-2017-0319\), October 18, 2018](#), para. 12

Costs that are required to be paid to a gas distributor to enable this type of access, regardless of what they are called, are a “rate” under the *OEB Act*.<sup>24</sup> This includes capital contributions,<sup>25</sup> to which the OEB has confirmed it has the ability to intervene to settle disputes.<sup>26</sup> Subsection 36(4) of the *OEB Act* is explicit regarding the ability for the OEB in an order under that section to include “rules respecting the calculation of rates”.<sup>27</sup> Each of these are within the powers that are granted to a panel of Commissioners.<sup>28</sup>

### **Conclusion**

SEC submits that the OEB does not have the jurisdiction to set the price that Ontario natural gas producers get paid for the gas they produce and provide to Ontario distributors (Question 1). In contrast, SEC does believe that a panel of Commissioners likely can establish rules to ensure fair and transparent access for gas producers to gas distribution systems in Ontario, but only if the purpose of the access is for the producer to transport gas (Question 2). Additionally, a panel of Commissioners can also establish rules to address connection and construction costs through its authority under section 36 of the *OEB Act*.

All of which is respectfully submitted.

Yours very truly,  
**Shepherd Rubenstein P.C.**

Mark Rubenstein

cc: F. Zheng, SEC (by email)  
Ted Doherty, SEC (by email)  
All parties (by email)

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<sup>24</sup> [Section 3](#) of the [OEB Act](#) defines a “rate” as a “rate, charge or other consideration and includes a penalty for late payment”.

<sup>25</sup> [Decision with Reasons \(EB-2012-0396\), February 7, 2013](#), p.14

<sup>26</sup> [Decision with Reasons \(EB-2012-0396\), February 7, 2013](#), p.15

<sup>27</sup> [Ontario Energy Board Act, 1998, s. 36\(4\)](#)

<sup>28</sup> [Ontario Energy Board Act, 1998, s. 4.3\(8\)](#)