

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
CANADIAN MANUFACTURERS & EXPORTERS ("CME")**

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I. INTRODUCTION & BACKGROUND

1. In February of 2022, the Ontario Energy Board (the “**OEB**” or the “**Board**”) initiated this proceeding on its own motion to consider the price paid by rate-regulated natural gas distributors and their customers for natural gas produced in Ontario.

2. As outlined in the Board’s public notice, Ontario’s natural gas producers sell their gas to distributors, such as Enbridge Gas Inc. (“**EGI**”), through gas purchase agreements. Ontario producers receive a forward Dawn Index price. The Ontario Petroleum Institute (“**OPI**”) argued that producers should instead receive the Total Gas Supply Commodity Charge in the Union South Rate Zone.¹

3. The OEB issued procedural Order #1 regarding the draft issues list. OPI indicated that it sought the Board’s review on two questions, which included whether it was appropriate for the Board to fix prices or formulas for the distributor to charge system gas customers, and the principles it will consider when assessing whether natural gas costs are passed on to customers.²

4. The Board published Procedural Order #2 requesting submissions from parties on two questions of jurisdiction relating to the matters at issue in the proceeding. The jurisdictional questions are as follows:³

- (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?

¹ EB-2022-0094, Ontario Energy Board Notice, February 7, 2022, p. 1.

² EB-2022-0094, Procedural Order #1, March 4, 2022, p. 1.

³ EB-2022-0094, Procedural Order #2, May 3, 2022, p. 2.

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- (b) 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. CME submits that the Board does not have jurisdiction to set the price natural gas producers get paid for their gas. The OEB's jurisdiction, while broader than simply rate-setting, does not go as far as to dictate the price EGI must pay to Ontario natural gas producers.

6. The Board does have jurisdiction to set rules for access for gas producers to gas distribution systems in Ontario. A panel could make an order to that effect with respect to access to a gas distributor's distribution system under Section 36 of the *Ontario Energy Board Act, 1998* (the "*Act*").

II. The Board Does Not have Jurisdiction to Set the Price of Natural Gas Paid by EGI

7. In its submission, OPI advanced the argument that the OEB has express jurisdiction to do so under section 36 of the *Act*, as well as implicitly through the doctrine of necessary implication. CME disagrees. Section 36 does not apply to simply dictating the price received by producers, and the jurisdiction requested is not necessary to achieve the Board's statutory objectives or mandate.

8. Section 36(1) and(2) of the *Act* provide that:

- (a) 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...; and

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- (b) 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.

9. An order under section 36 may include conditions, classifications or practices applicable to the sale, transmission, distribution or storage of gas, including rules respecting the calculation of rates.⁴

10. CME agrees with OPI that the Board's jurisdiction is broader than simply setting rates or the quantum of recovery by utilities. This is further discussed below. However, the cases cited by OPI are distinguishable from the facts here. CME submits that they do not assist OPI in this instance. In this regard, for instance:

- (a) In EB-2020-0066, the Board approved a \$2 renewable natural gas fixed charge for voluntary opt-in customers.⁵ Not only was this charge voluntary and targeted towards customers rather than producers, EGI's proposal also did not fix the price it paid to producers. The \$2 charge was a fixed charge, and EGI would buy the amount of gas it could buy at prevailing market rates.⁶ It did not ask the Board to fix the price paid for gas by EGI to RNG producers.
- (b) In EB-2010-0018, the Board allowed NRG to "recover from ratepayers a maximum annual quantity of 1.0 million cubic meters of natural gas at the rate of \$8.486."⁷ There was evidence in that proceeding on a supplier's costs, but the Board was not setting the price for natural gas NRG paid the supplier (which was a near affiliate of NRG), but only the cost consequences of that decision in rates.

⁴ Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, s. 36(4).

⁵ EB-2020-0066, Decision and Order, September 24, 2020, p. 23.

⁶ EB-2020-0066, Exhibit B, Tab 2, Schedule 1, p. 2.

⁷ EB-2010-0018, Decision and Order, May 17, 2012 at p. 9.

Moreover, there was evidence in that proceeding that the supplier would cease to supply if the price collected dropped below \$8.486.

- (c) In EB-2005-0211, the Board, when discussing its jurisdiction, was doing so in response to the *ATCO* decision from the Supreme Court of Canada. The Board distinguished its jurisdiction from the jurisdiction of the AEUB, in part, by confirming that the case before the OEB was a rates case, rather than simply the approval of a sale of assets. The Board noted that it was “well within its powers when it encourages or discourages certain utility activities through its ratemaking powers” (emphasis added).⁸ Accordingly, EB-2005-0211 centred around the Board’s ratemaking powers, and not the scope of a broader jurisdiction to set prices paid to producers.

11. As outlined earlier, CME submits that the Board does have a broader jurisdiction than simply setting rates. However, it does not go so far as to be able to set the price paid by EGI to Ontario producers.

12. The Board opined on the breadth of its jurisdiction under Section 36 of the *Act* in RP-2001-0032 (the “**Consumers’ Gas Case**”). The Consumer’s Gas Case dealt with the systematic outsourcing of utility functions by Consumers’ Gas to third parties. Consumers’ Gas argued that the limit of the Board’s jurisdiction with respect to the outsourcing arrangements were the resulting rate impacts.

13. In its decision, the Board discussed the breadth not only of its jurisdiction under section 36(2) and its rate setting function, but also 36(1) and its broader jurisdiction regarding natural gas utilities.

⁸ EB-2005-0211, Decision and Order, p. 13.

14. The Board found that section 36(1) and 36(2) provide two separate, yet complementary sets of jurisdictions. Section 36(1) prohibits any transmitter, distributor or storage company from charging for the transmission, distribution or storage of gas except in accordance with the Board's order.⁹ This is a mandatory requirement to receive an order from the Board. Section 36(2) is permissive, and allows the Board to make orders approving just and reasonable rates. Read together, the Board determined that it had not only jurisdiction regarding rates, but also a broader jurisdiction regarding the activities of the utility.¹⁰

15. The Board also found that it had authority, pursuant to two sections of the *Act*, to order conditions or other requirements on a utility that went beyond simply setting rates. Section 36(4), which provides that an order made under that section may include "conditions, classifications or practices" on the sale, transmission, distribution, or storage of gas, and Section 23, which provides the power for the Board to order any conditions it deems proper.¹¹

16. The Board found that there were two limitations on its jurisdiction regarding the broader utility matters. First was that its jurisdiction was informed by the statutory objectives set out in Section 2 of the *Act*.¹² The second was a requirement that the conditions of the proposed order have a "reasonable nexus" between the order granted and the conditions imposed in the order.¹³ In this case, the jurisdiction to set the prices paid to natural gas producers in Ontario is outside of both of these limitations.

17. Section 2 of the *Act* sets out the Board's statutory objectives in regulating natural gas (the "**Statutory Objectives**"). The Statutory Objectives include facilitating competition in the sale of gas to users, protecting customers and protecting their interests with respect to the prices, reliability and quality of gas service, as well as conservation and energy efficiency.

⁹ Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, s. 36(1).

¹⁰ RP-2001-0032, Decision with Reason at para. 5.11.85.

¹¹ RP-2001-0032, Decision with Reason at paras. 5.11.90-5.11.91.

¹² RP-2001-0032, Decision with Reason at paras. 5.11.74-5.11.75.

¹³ RP-2001-0032, Decision with Reason at para. 5.11.92.

18. OPI argued that the Statutory Objectives are engaged in this case as a result of the environmental, reliability and economic benefits to Ontario consumers through the production of local natural gas.¹⁴ CME disagrees. The Statutory Objectives are not engaged.

19. Currently, natural gas producers in Ontario are producing their product, and selling it to EGI at the price they can receive for it. EGI uses that gas in its system, and distributes it for Ontario consumers.

20. Ontario consumers are already benefiting from whatever environmental, reliability and other benefits may accrue from locally sourced natural gas. The current dispute is not about the ability of natural gas producers to produce, but rather the price they receive from EGI to do so. Whether or not Ontario producers receive the Dawn Index price or the Total Gas Supply Commodity Charge alone does not engage the issues of reliability of supply for instance, because EGI will continue to purchase that gas in either case. Accordingly, CME submits that the Statutory Objectives are not engaged by this case, and the Board does not have the jurisdiction to set the price paid to the TGSCC.

21. As outlined by the Board in the *Consumers' Gas* case, there needs to be a “reasonable nexus” between the conditions sought to be imposed on a utility and the order. In essence, the Board found it not only had the power to set rates, but also regulate the “activity of selling gas, transmitting, distributing or storing gas” by transmitters, distributors or storage companies.”¹⁵

22. In the *Consumer's Gas* case, the Board determined there was a nexus between the conditions and the order sought because the conditions dealt with the utility “selling gas or transmitting, distributing, or storing gas” as authorized under Section 36(1) of the *Act*.¹⁶

23. Conditions on EGI regarding the price received by Ontario natural gas producers would not have a reasonable nexus to a potential order under section 36(1) of the *Act* since it does not have to do with selling, transmitting, distributing or storing gas, but instead with purchasing gas

¹⁴ EB-2022-0094, Ontario Petroleum Institute, Submissions, May 24, 2022 at paras 40-42.

¹⁵ RP-2001-0032, Decision with Reason at para. 5.11.85.

¹⁶ RP-2001-0032, Decision with Reason at para. 5.11.92.

from producers. This is in sharp contrast to the matters at issue in the *Consumers' Gas* case, where the conditions were related to the outsourcing of vital business activities to third parties, which had a direct nexus with the utility functions outlined in Section 36(1) of the *Act*.

The Doctrine of Necessary Implication Does Not Apply

24. OPI also argued in the alternative that the doctrine of necessary implication applies to grant the OEB the jurisdiction to set prices for Ontario natural gas producers if the *Act* did not expressly grant it.¹⁷ CME submits that it does not.

25. The Supreme Court in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 outlined that the first requirement of when the doctrine of necessary implication may be applied is that the jurisdiction sought is necessary to accomplish the objectives of the legislative scheme and is essential to the Board fulfilling its mandate (emphasis added).¹⁸

26. While the jurisdiction in question does not need to be absolutely needed, the Supreme Court affirmed in the *ATCO Gas* case that it must be practically necessary to accomplish the objectives of the legislative scheme.¹⁹

27. In this case, the objectives of the legislative scheme as it relates to natural gas are set out in section 2 of the *Act* and have been outlined earlier in these submissions. The Board must therefore ask whether or not the jurisdiction to set the price paid by EGI to producers of natural gas is practically necessary to achieve, for instance, the protection of ratepayers interests for gas prices or reliability, or to promote energy conservation and efficiency.

28. To determine if jurisdiction is practically necessary, the Board must review if it has other tools at its disposal to achieve its statutory objectives. For instance, in *Market Surveillance Administrator, Re*, the Alberta Utilities Commission was called upon to determine if it had jurisdiction to order restitution. The Commission had express statutory authority to order sanctions

¹⁷ EB-2022-0094, Ontario Petroleum Institute, Submissions, May 24, 2022 at para. 4.

¹⁸ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 73.

¹⁹ *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4 at para. 51.

and administrative penalties, but not restitution. The issue before the Commission was whether it had the jurisdiction to order restitution as a result of the doctrine of necessary implication.

29. The Commission found that it did not have jurisdiction to order restitution as it had the ability to achieve its objectives through its existing powers of administrative penalties and sanctions. Accordingly, the Commission found that “the authority to order restitution was not a “practical necessity” to accomplish its objectives.²⁰

30. Similarly, the Board has consistently exercised its existing authority to accomplish the statutory objectives using other tools. In this regard, the existing tools the Board uses to accomplish the statutory objectives include, *inter alia*:

- (a) setting just and reasonable rates, thereby protecting ratepayer’s interests with respect to the price of natural gas;
- (b) reviewing gas supply planning, leave to construct applications; integrated resource planning frameworks, and other mechanisms in order to ensure reliability of the gas system; and
- (c) demand-side management proceedings to help further conservation and energy efficiency.

31. Moreover, as previously outlined, CME submits that an order setting the price provided to natural gas distributors would not further the Board’s objectives, as consumers already enjoy whatever benefits are provided by Ontario-produced natural gas. All that would change through the Board’s order would be a higher price paid by EGI to producers. It already receives locally produced natural gas, and the benefits such a supply may bring.

32. The Board’s mandate is closely related to the statutory objectives set out in the act. The Board defines its own mandate as being to “regulate Ontario’s energy sector as required under

²⁰ *Market Surveillance Administrator, Re*, 2015 CarswellAlta 1766 at para. 45.

provincial legislation.”²¹ The Board therefore has all of the necessary powers to accomplish its statutory objectives and its mandate without resorting to the doctrine of necessary implication, which has no application to the current case.

III. The Board Can Order Conditions On Access to EGI’s Distribution System

33. CME submits that the panel has the power to provide for access to EGI’s distribution system. While the panel may no longer be able to set rules pursuant to section 44 of the *Act*, that power having been moved to the Chief Executive Officer of the OEB, the panel can regulate access to EGI’s distribution system through its authority in Section 36. As a result of EGI’s near monopoly on gas distribution in Ontario, CME agrees with OPI that a decision under Section 36 regarding conditions of access to the distribution system would have a similar effect as a market-wide determination.

34. Section 44 of the *Act* provides that the chief executive officer may make market rules about a wide variety of circumstances, including, *inter alia*, “establishing conditions of access to transmission, distribution and storage services provided by a gas transmitter, gas distributor or storage company.”²² Prior to 2019, that power had been provided to “the Board”.²³

35. However, as previously outlined, section 36(1) provides that no transmitter, distributor or storage company shall charge for transmitting, distributing or storing gas except in accordance with an order of the Board. As outlined by the Board in the *Consumer’s Gas Case* the breadth of 36(1) while not unlimited, is broader than simply setting rates.²⁴

36. Section 36(4) permissively provides for certain types of requirements that the Board can mandate as part of an order under section 36. These include “conditions, classifications or

²¹ Ontario Energy Board, “Mission & Mandate”, accessed online on June 19, 2022 at <https://www.oeb.ca/about-oeb/mission-and-mandate#:~:text=The%20OEB%27s%20mandate%20is%20to,acts%20in%20the%20public%20interest>.

²² Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, s. 44(1)(d).

²³ Fixing the Hydro Mess Act, 2019, c. 6 – Bill 87.

²⁴ RP-2001-0032, Decision with Reason at para. 5.11.85.

practices applicable to the sale, transmission, distribution or storage of gas, including rules respecting the calculation of rates.”²⁵

37. CME submits that “conditions” applicable to the distribution of gas includes conditions of access to the distribution network. Unlike fixing prices between EGI and suppliers, which is not connected to the sale, transmission, distribution or storage of gas, but rather the purchase of gas, conditions regarding access to the distribution network have a reasonable nexus to the power of the Board to regulate the distribution of gas.

38. Accordingly, CME submits that a panel could establish conditions for EGI regarding transparent access for gas producers to its gas distribution systems in Ontario through the use of Section 36 of the *Act*.

IV. COSTS

39. CME requests that it be awarded 100% of its reasonably incurred costs in connection with this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of June, 2022.



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²⁵ Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, s. 36(4).