

ONTARIO ENERGY BOARD

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 on Jurisdictional Issues

Industrial Gas Users Association (IGUA)

1. On behalf of IGUA these submissions address 2 questions of jurisdiction posed in Procedural Order No. 2 herein.
2. We have had the benefit of reviewing the submissions filed by Enbridge Gas Inc. (EGI) earlier today, and are in general agreement with those submissions.
3. In particular, on behalf of IGUA we submit that:
 - (a) 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 natural gas distributors.
 - (b) A panel of commissioners does not have the jurisdiction to establish (or amend) rules under section 44 of the *Ontario Energy Board Act, 1998 (OEB Act)*.
4. Whether an OEB Hearing Panel has the authority, as a component of its rate making and/or additional gas regulation jurisdiction¹, to direct development and application by a particular gas distributor of conditions of service that meet standards of non-discriminatory, just and reasonable access by its customers to regulated gas distribution services, is a distinct issue. Whether that issue is potentially engaged in the circumstances before the OEB in this matter is not clear at this time, pending more specific articulation

¹ See, for example, section 42 of the *OEB Act* related to service obligations of a gas distributor.

by the Ontario Petroleum Institute (OPI) of the concerns that it seeks to address and the relief that it proposes in order to address those concerns.

Rate Setting Jurisdiction

5. The OEB's rate setting jurisdiction in respect of natural gas is established by section 36 of the *Ontario Energy Board Act, 1998 (OEB Act)*. That section applies to gas transmitters, gas distributors and storage companies, all of which are defined in section 3 of the act. There are no provisions in the *OEB Act* which grant the OEB authority to establish rates for the sale of gas by gas producers, or by corollary the price to be paid by a gas distributor for gas supplied to it by a gas producer, in Ontario or otherwise.
6. While the OEB does establish the rates for the supply of gas to consumers by gas distributors, and thus the quantum of gas supply costs that gas distributors recover through those rates, the OEB does not have the authority to set the price that gas distributors pay to gas suppliers, nor to suppliers of any other good or service procured by gas distributors for use in the activity of selling or distributing gas. The 2012 OEB Interim Decision related to a proposal to procure RNG cited by EGI in its submission on jurisdiction aptly defines the scope of OEB's rate making authority, and bears repeating² (our emphasis):

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

² EB-2011-0242/EB-2011-0283 Interim Decision and Order, July 12, 2012.

7. We further agree with EGI that none of the examples given by OPI at paragraph 43 of its submissions on jurisdiction involve a scenario where the OEB has in any manner directed the price that must be paid by a distributor to a gas supplier or other third party.
8. The reference by EGI in its submissions to the OEB's approach to pre-approving the cost consequences to distributors of long-term gas supply contracts is also apt. That pre-approval framework recognizes the value to Ontario gas customers of long-term gas supply contracts which support the development of new natural gas infrastructure, improve security of gas supply to Ontario consumers, or enhance the diversity of gas supply sources to serve Ontario.³ On the basis of such advantages the OEB has been prepared to provide pre-approval for recovery of costs associated with longer-term gas supply commitments, in order to support the gas distributor entering into such contracts and achieving such benefits for Ontario gas consumers. That is not the same thing as setting the contract price. Rather it entails a finding that the contract price is prudent, given the associated customer benefits, and thus appropriate for recovery in rates.
9. OPI refers in its submissions to section 2 of the *OEB Act*, which section establishes the objectives that shall guide the OEB "*in carrying out its responsibilities*" under the *OEB Act* or any other act. These objectives for consideration do not confer on the OEB any incremental responsibilities. They merely direct the OEB in considerations to be taken, as warranted, in the discharge of those otherwise established legislative responsibilities. In particular, they cannot establish rate making or price setting authorities not otherwise legislatively provided for.
10. Nor do the OPI's references to the judicially endorsed breadth of the OEB's statutorily granted jurisdiction assist. Those judicial findings do not confer new or expanded jurisdiction on the OEB not otherwise provided for in specific legislative provisions, and none of these authorities speak to the assertion that the OEB has any jurisdiction to set prices to be paid to Ontario gas producers.
11. OPI has set out in its jurisdictional submissions (at paragraph 44) the express legislative authorities that the legislature has granted to the OEB in respect of Ontario natural gas producers, and proceeds to assert that:

³ EB-2008-0280, *Filing Guidelines for the Pre-Approval of Long-Term Natural Gas Supply and/or Upstream Transportation Contracts*, April 23, 2009.

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

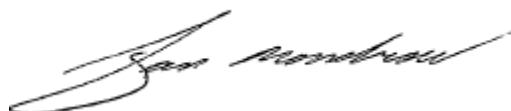
12. We offer two observations regarding this assertion:
 - (a) OPI's list of 5 legislative authorities includes "*the pricing of Ontario gas supply through the OEB's rate-setting jurisdiction under section 36 of the OEBA Act*". The existence of such an authority is, of course, the very issue at hand at present, and this circular reference in support of such an authority should be disregarded.
 - (b) The other 4 specific legislative authorities granted to the OEB with respect to Ontario gas production underscores the fact that that the legislature has turned its attention to OEB regulation of Ontario gas supply and determined not to grant the OEB authority with respect to pricing of that supply.
13. Finally in respect of the topic of rate setting jurisdiction, while OPI references the legal doctrine of implied jurisdiction, OPI does not actually articulate the basis upon which an OEB authority to set prices to be paid for Ontario natural gas supply is necessarily implied by the authorities expressly granted. General assertions about judicial findings on the breadth of the OEB's authority and the various things that the OEB can and does regulate cannot, without convincing illustration of a specific nexus to one of these other express authorities, ground a finding of authority by necessary implication. Put another way, unless OPI can explain how the OEB not having the authority to set prices to be paid for Ontario gas supply undermines one or more of the other specific authorities legislatively granted to the OEB, there can be no "necessary implication" that such a price setting authority is legislatively intended and required. Despite ample opportunity to illustrate such a nexus, OPI has been unable to do so.

Rule Making Authority

14. The OEB's authority to make or amend rules, such as the *Gas Distribution Access Rule*, in respect of gas distribution activities, now resides with the OEB's Chief Executive Officer, under section 44 of the *OEB Act*. More importantly, however, that authority carries with it notice provisions and the requirement to afford interested parties with an opportunity to make representations in respect of a proposed rule or amendment, pursuant to section 45 of the *OEB Act*.

15. These provisions provide a framework for the making of rules of general application to gas distribution activities, by way of action of the OEB as a whole, and do not lie within, or extend, the authority of particular Hearing Panels. Further, they appropriately require broad notice and comment requirements, and as such are not properly engaged in the context of any particular proceeding, even one convened by the OEB on its own motion.
16. As noted at the outset of this submission, whether an OEB Hearing Panel has the authority, as a component of its rate making and/or additional gas regulation jurisdiction⁴, to direct development and application by a particular gas distributor of conditions of service that meet standards of non-discriminatory, just and reasonable access by its customers to regulated gas distribution services, is a distinct issue. Whether that issue is engaged in the matter presently before the Hearing Panel will, we assume, be revealed in the fullness of time when OPI's substantive position on the matters engaged in this proceeding is articulated.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:



GOWLING WLG (CANADA) LLP, per:
Ian A. Mondrow
Counsel to IGUA

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⁴ See, for example, section 42 of the *OEB Act* related to service obligations of a gas distributor.