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Dear Sirs/Mesdames:

**EB-2022-0094 (Pricing for Ontario-Produced Gas)  
Ontario Petroleum Institute Inc. - Reply Submissions on Jurisdictional Questions**

In accordance with Procedural Order No. 2 in the above-noted proceeding, please find attached the reply submissions of the Ontario Petroleum Institute Inc. (“OPI”) on the jurisdictional questions.

For parties that have not yet done so, please amend your internal service/distribution list to include myself and Isabelle Crew ([icrew@osler.com](mailto:icrew@osler.com)) as counsel to OPI.

Yours very truly,



Richard King

RK:hi

c: All Parties to EB-2022-0094  
M. Millar (OEB Counsel)  
R. Murray (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.

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**REPLY SUBMISSIONS OF  
ONTARIO PETROLEUM INSTITUTE**

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## **I. OVERVIEW**

1. The two jurisdictional questions set out in Procedural Order No. 2 (the “**Jurisdictional Questions**”) go to the very heart of the purpose and mandate of the Ontario Energy Board (“**OEB**” or “**Board**”), namely:

- (a) the conditions impacting the production of natural gas from locations within Ontario’s boundaries;
- (b) the financial viability of Ontario’s natural gas production industry;
- (c) constraining the exercise of monopoly power by an Ontario natural gas utility;
- (d) ensuring that local natural gas is competitive with sources of gas from outside Ontario; and,
- (e) the environmental attributes and pricing of natural gas in Ontario.

2. The average Ontarian would look at the list above and think that these are precisely the types of things that Ontario’s energy regulator should exercise authority over. Further, in OPI’s view, all of them are either explicitly or implicitly tied to the Board’s statutory objectives with respect to natural gas.

3. Yet the majority of submissions from Board Staff and intervenors have taken an overly narrow, technical approach to interpreting the Board’s jurisdiction to arrive at the implausible conclusion that the Board cannot do anything related to the price and access conditions for Ontario-produced natural gas.

4. Not only is this counter-intuitive and at odds with the Board’s statutory objectives, but it flies in the face of what Ontario courts have consistently said about the OEB’s jurisdiction – that it has “the widest powers to control the supply and distribution of natural gas to the people of Ontario ‘in the public interest’”.<sup>1</sup>

5. OPI’s initial submission on May 24, 2022 in respect of the Jurisdictional Questions (the “**OPI Submissions**”),<sup>2</sup> include a number of examples where Ontario courts have reinforced the expansive approach to the Board’s jurisdiction under the *Ontario Energy Board Act, 1998* (“**OEB Act**”).<sup>3</sup>

6. OPI relies on the OPI Submissions and will not repeat those submissions in this Reply Argument. Rather, these submissions will focus on responding to certain matters raised by Board Staff and the intervenors in their submissions.

7. Before setting out our reply, OPI notes that a number of submissions use as their starting point an explanation of the current commodity rate-setting process – i.e., that the Board’s existing QRAM process sets the price that consumers pay distributors but not the price distributors pay to their suppliers, and that distributors such as Enbridge have a diverse portfolio from a wide variety of producers. OPI understands this – that is precisely the problem and rationale for this proceeding. To be clear, OPI’s position is that not only does the OEB have jurisdiction to set the price paid by gas distributors to Ontario producers (either directly or indirectly), but that in failing to do so, the

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<sup>1</sup> *Union Gas Ltd. v. Township of Dawn*, 1977 CanLII 1042, 15 O.R. (2d) 722 (Div. Ct.).

<sup>2</sup> EB-2022-0094, [Submissions of Ontario Petroleum Institute](#), dated May 24, 2022.

<sup>3</sup> *Ontario Energy Board Act, 1998*, [S.O. 1998, c. 15, Sched. B](#).

Board is failing to fulfil its statutory mandate. Distributors may have a diverse supply portfolio from a variety of producers, but this proceeding is about the producers located geographically within Ontario, and the pricing of that Ontario gas and conditions of access to Ontario distribution systems.

## **II. REPLY**

### **A. OEB Jurisdiction to Set Prices Paid to Ontario Natural Gas Producers**

8. OPI agrees with Board Staff that in approving the gas commodity price paid by Ontario consumers, the Board does “influence the price that Gas Distributors pay Gas Producers for their gas”.

9. OPI further agrees with Board Staff that the Board has jurisdiction to “fix or approve ... [price] 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”. In other words, the Board can establish a price-setting formula applicable to any Ontario-produced supply component of a distributor’s portfolio of supply. This would indirectly establish what Ontario producers are paid for their Ontario-produced gas.

10. OPI submits that the Board has authority to do this for all of the reasons set out in its initial submission – i.e., the Board’s broad jurisdiction over Ontario’s energy sector (which the Board itself and Ontario courts have consistently affirmed), the broad purposes in the OEB Act, the critical function of any economic regulator to ensure fair access to monopoly resources, and the environmental and economic efficiency benefits provided by local gas production).

11. Curiously though, Board Staff states that the Board can only consider exercising that jurisdiction (to set a pricing formula for Ontario-produced gas) based on a single criteria: “[T]he 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**” (emphasis added).

12. Based on OPI’s reading of Board Staff’s submission, it seems as though Board Staff is suggesting that the “demonstrated benefits” to ratepayers must be **monetary**. OPI disagrees. Nowhere in the OEBA Act is the Board’s jurisdiction so constrained. The rest of the Board’s statutory mandate and purpose does not fall by the wayside in the exercise of its rate-setting jurisdiction. If that were the case, the Board would be precluded from considering any social or public policy objectives – e.g., low-income rates, renewable natural gas programs, etc.

13. OPI believes that the example put forward by Board Staff (Enbridge’s Low Carbon Energy Project) makes this precise point. That program (brought forward by Enbridge) established a rate-mechanism that resulted in certain Enbridge ratepayers compensating others for blending hydrogen with existing gas supply. In its submission, Board Staff stated that: “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.”

14. The bottom line here is that the Board used its rate-setting jurisdiction to facilitate the achievement of non-monetary benefits for ratepayers. In doing so, it sought to overcome any cross-subsidy among ratepayers. This is exactly what OPI is requesting in this proceeding – that the

Board exercise its rate-setting jurisdiction to fulfill its statutory objectives, and eliminate the cross-subsidy currently being provided by Ontario suppliers to Ontario gas consumers.

15. Board Staff's submission on the Low Carbon Energy Project offers further support to OPI's position:

- (a) The fact that this pilot project was "small ... with limited ratepayers costs" is of no consequence. The Board either had or did not have jurisdiction to approve this program – a tribunal is either exceeding its jurisdiction or not – it cannot validly exceed its jurisdiction "just a bit". Further, the volume of Ontario production as an overall percentage of Ontario's consumption is also extremely small.
- (b) The fact that these non-monetary benefits come to the Board's attention solely through an application by the utility is one of the chief concerns of OPI. That cannot be the sole avenue that dictates what policy initiatives come before the Board.

16. The submissions of Enbridge on this point are similar. Enbridge states that "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, Enbridge goes on to say "[I]t is incumbent on the distributor to establish the reasonableness of the different (higher) costs before cost recovery is approved/permitted."

17. What that is saying, in essence, is that it is solely up to Enbridge to decide whether the benefits (monetary or otherwise) are reasonable and should be brought forward for the Board's consideration and approval. OPI strongly disagrees. Enbridge is a monopoly utility. It should not be in a position of having the deciding (or even leading) voice in determining Ontario's natural

gas supply mix. Locally-produced natural gas has distinct environmental and economic efficiency benefits – why should the consideration and determination of the value of such supply be left as a matter for Enbridge to decide?

18. Put another way – if the OEB declines to take jurisdiction over the issues in this proceeding, it effectively confers upon Enbridge not only the power to determine what Ontario producers get paid for their gas, but also to determine important issues of public policy related to the Ontario’s natural gas sector (e.g., environmental matters and issues of economic efficiency to name a few). OPI submits that these issues are for the Board to determine – not a monopoly utility. It is the purview of the OEB, as an economic regulator, to both: (a) establish mechanisms to guard against the exercise of monopoly power; and (b) minimize cross-subsidies in rates. Declining to exercise its lawful jurisdiction in this case would leave Enbridge’s monopoly power over Ontario producers largely unchecked, and perpetuate the cross-subsidy provided by Ontario producers to consumers.

19. The Board has in the past recognized and considered the public interest considerations related to Ontario gas supply. For instance, in a previous Union Gas rate proceeding,<sup>4</sup> the Board considered, *inter alia*, the impact of Union’s Parkway delivery commitment on Ontario natural gas production and sales. The Board clearly indicated that this policy matter could be addressed in a rate proceeding:

Regarding the concerns of Energy Objective related to both Union’s spot purchases of Ontario gas and the policy of a Parkway delivery commitment for Ontario gas producers, the Board is of the view that Energy Objective has not provided sufficient support for the positions it is advancing. **The Board considers the production and marketing of Ontario natural gas to be an important policy issue in the province’s energy supply plan.** The Board invites Energy Objective to participate in the Natural Gas Forum to have its concerns considered

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<sup>4</sup> EB-2003-0063, *Union Gas M16 Rates, Decision with Reasons*, May 19, 2005, page 50.



in a broader policy context. **Alternatively, the Board would welcome further evidence touching on this subject in subsequent proceedings.**

20. Various other intervenors suggest that the interest at stake is simply the price paid to Ontario natural gas producers. OPI submits that what is at stake is the viability of the Ontario natural gas production sector in its entirety and, by extension, the benefits of Ontario-produced gas on the natural gas system and rate payers.

21. As set out in the OPI submissions, while Ontario-produced natural gas makes up a small percentage of total gas supply, Ontario-produced gas plays a vitally important role in ensuring the viability of the system. The supply of Ontario-produced natural gas to the distribution system provides crucial environmental and economic efficiency benefits to the Ontario gas distribution system and its consumers.

22. In conclusion, to interpret section 36 in the manner suggested by certain intervenors would require the OEB to: (a) effectively ignore its own statutory objectives; (b) repudiate how it has practically approached rate-setting in the energy sector; and (c) disregard what it and Ontario courts have said about the OEB's general and rate-setting jurisdiction. OPI agrees with Board staff that 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. OPI submits that it is appropriate for the Board to hear complete submissions on these content of these principles, but that such principles must necessarily include recognition of the benefits that Ontario-produced natural gas provides to the provincial distribution system and its customers, as well as the existential risk EGI's anti-competitive conduct poses to the sector.

**B. The OEB has Jurisdiction to Make Rules in Respect of a Gas Distributor’s Conditions of Service including Fair and Transparent Access**

23. OPI agrees with the submissions of Canadian Manufacturers & Exporters (“CME”) and School Energy Coalition (“SEC”) that a panel of commissioners has jurisdiction to make rules in respect of a gas distributor’s conditions of service (including fair and transparent access).<sup>5</sup>

24. The alternative suggestion—that rule-making authority is exclusively vested in the chief executive by virtue of section 44—is entirely contrary to both the past practice of the Board and its obligations to carry out its statutory mandate.

25. As set out in the OPI Submissions, the knock-on effects of such an interpretation would have profound consequences to the regular operation of the Board. For example, parties could elect to challenge rate-related issues in gas distribution rate proceedings and argue that any issues going beyond “pure rates” are solely for the executive arm of the OEB to determine. This cannot have been the intention of the legislature in amending section 44, as such an interpretation is directly contrary to the Board’s mandate as established in section 2 of the OEB Act.

26. An interpretation of the recent amendments to the OEB Act in this proceeding that strips the Commissioners and Board of its core functions would significantly limit the Board’s consistent practice going forward and should not be an interpretation adopted in this case.

**III. CONCLUSION**

27. In conclusion, for the reasons set out herein and in the OPI Submissions, OPI submits that the Board has jurisdiction, pursuant to sections 36 of the OEB Act, to fix or approve prices or

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<sup>5</sup> EB-2022-0094, [Submissions of Canadian Manufacturers & Exporters](#), dated June 21, 2022 at pp 11 – 12; EB-2022-0094, [Submissions of School Energy Coalition](#), dated June 21, 2022 at pp 2, 5.

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 and to establish rules to ensure fair and transparent access for gas producers to gas distribution systems in Ontario.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**

July 12, 2022



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Counsel for Ontario Petroleum Institute