

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

No. R-4008-2017

RÉGIE DE L'ÉNERGIE

Application regarding the implementation of
measures concerning the purchase and sale of
renewable natural gas

ÉNERGIR, L.P.

Applicant

-and-

INTERVENORS

INDUSTRIAL GAS USERS ASSOCIATION ("IGUA") ARGUMENTS

I. INTRODUCTION AND PRELIMINARY REMARKS

1. Through its procedural decision D-2019-031, the Régie de l'énergie (the "**Régie**") has convened a hearing to be held May 7 and 8, 2019 to examine certain legal and other matters related to this case on the measures concerning the purchase and sale of renewable natural gas ("**RNG**").
2. As required, IGUA is submitting these arguments in response to the questions from the Régie cited *in extenso* in section II herein.
3. However, before answering the Régie's questions, IGUA would like to share with the Régie the following remarks.
4. IGUA notes at the outset that it is in favour not only of developing the RNG industry in Québec, but also the entire bioenergy industry. IGUA shares the government's objective regarding the need to increase the capacity for production and consumption of bioenergy, including RNG, in order to achieve the goals of *The 2030 Energy Policy – Energy in Québec: A Source of Growth*.¹

¹ *The 2030 Energy Policy – Energy in Québec: A Source of Growth* ("**The 2030 Energy Policy**"), p. 54, published April 7, 2016: < <https://mern.gouv.qc.ca/english/energy/strategy/pdf/The-2030-Energy-Policy.pdf> > (website consulted April 15, 2019).

5. In fact, IGUA believes that the objectives for reducing greenhouse gases in Québec targeted by The 2030 Energy Policy are laudable and it hopes that favourable, fair and equitable conditions will be implemented in Québec to enable the RNG industry to develop.
6. Moreover, IGUA feels that the RNG industry should be developed regardless in order to preserve competition and free access to the RNG market in Québec and that the natural gas distributors in Québec certainly have a role to play in the transition to less polluting forms of energy. In fact, this was IGUA's position in file R-3972-2016.²

➤ R-3972-2016, C-IGUA-0003, p. 22:

[Translation] "In that respect, IGUA believes that the regulatory framework must continue to promote free competition. The exclusive rights granted to natural gas distributors should not be extended to goods or services for which the market is naturally competitive. IGUA nevertheless recognizes the key role Québec's regulated natural gas distributors can play in developing new forms of supply involving, for example, renewable natural gas (RNG) or liquefied natural gas (LNG). Still it suggests that any support offered to natural gas distributors in their role of facilitating the transition to an economy with a smaller ecological footprint should be clearly defined in form and duration. The natural gas distributors' expertise should serve as a means for facilitating the development and integration of new technologies while promoting the establishment of competitive markets where conditions are favourable. The regulatory framework must also permit the effective co-existence of regulated and unregulated activities in the service chain and the appropriate changes to achieve that should be planned."

(Our underlining)

7. It is equally essential for IGUA that the large greenhouse gas emitters in Québec continue to have flexibility in their options for buying natural gas or RNG. In fact, IGUA believes that RNG should continue to be offered to the distributors' customers on a voluntary basis, in particular to avoid having the industrial natural gas consumers contribute doubly to the efforts to reduce greenhouse gas emissions.

² Ministre de l'Énergie et des Ressources naturelles – Avis sur les mesures susceptibles d'améliorer les pratiques tarifaires dans le domaine de l'électricité et du gaz naturel (Minister of Energy and Natural Resources – Opinion regarding the measures likely to improve rate practices in the fields of electricity and natural gas (the "Opinion to the Minister").

8. In that regard, IGUA would like to note that the industrial natural gas consumers are already making significant efforts toward energy efficiency through major investments, since they are required to comply with the *Regulation respecting a cap-and-trade system for greenhouse gas emission allowances*³ (“**CATS**”). Having to buy a mandatory volume of RNG from Énergir could impede the current state of affairs by superimposing means that would work against the objectives targeted by CATS in terms of investing in more energy efficient processes. Furthermore, natural gas consumers should not have to indirectly pay the cost of developing a new industry.

II. THE CONCERNS RAISED BY THE RÉGIE IN PROCEDURAL DECISION D-2019-031

9. In procedural decision D-2019-031 rendered on March 13, 2019, the Régie asked participants to provide additional arguments and evidence regarding the following matters:⁴
 - a) Does the Régie have the necessary authority under the *Act respecting the Régie de l'énergie*⁵ (the “**Act**”) to include costs in a tariff for the purpose of developing RNG in Québec? And if it has such authority, is it fair and reasonable to exercise it?
 - b) Would a feed-in tariff (“**FIT**”) approved by the Régie use the monopoly distribution position of Énergir, L.P. (“**Énergir**”) in a way that alters the rules of free market access for RNG in Québec?
 - c) Could an FIT approved by the Régie be perceived as fixing or controlling the supply price for an unregulated product?
10. IGUA has reviewed Énergir’s letter dated April 17, 2019, in which Énergir informs the Régie that it foresees implementing an approach different from the FIT that would be based more on a purchasing strategy similar to the one used for the traditional natural gas supply service. Despite this possible amendment to the evidence, Énergir nevertheless felt it appropriate to respond to the Régie’s questions since the potential purchasing strategy and an FIT, while distinct in their respective forms, share the same objective: enable Énergir to have approved the setting of a purchase price to offer to the RNG producers⁶ for the development of an industry.

³ CQLR, c. Q-2, r. 46.1.

⁴ D-2019-031, para 98.

⁵ CQLR, c. R-6.01.

⁶ B-0046, p. 2.

11. Consequently, like Énergir,⁷ IGUA intends to respond to the Régie's questions by approaching them from the perspective of an FIT as currently proposed, and without amended evidence.
12. That said, for the purposes of these arguments, it is important to note Énergir's contention that the FIT it is proposing is not a "tariff" as defined in the Act, subject to the jurisdiction of the Régie, but rather synonymous with a "price" granted to certain producers in an unregulated area, namely the RNG production industry in Québec. The FIT is in fact the RNG purchase price granted to subsidized RNG producers in Québec which the Régie is being asked to approve.⁸
13. Indeed, Énergir, in its application and evidence, noted several times that the objective of implementing an FIT was to develop the RNG production industry in Québec.⁹
14. Énergir now indicates, as part of its arguments, that the primary goal of its proposed measures is not to "*develop the production of RNG in Québec*" but rather simply to enable Énergir to comply with its new obligations under the *Regulation respecting the quantity of renewable natural gas to be delivered by a distributor*¹⁰ (the "**Regulation**").¹¹
15. IGUA understands that the regulatory context has changed since Énergir filed its initial application and that the present application is intended in part to enable Énergir to meet its obligations under the Regulation, but the FIT Énergir is proposing is the equivalent of direct financial assistance to the subsidized producers of RNG to produce this energy in Québec.¹² And in that respect, some could claim that a key role of the FIT, as currently proposed by Énergir, is to promote and stimulate the development of the RNG industry in Québec.
16. Furthermore, and we will have more to say about this later in our arguments, Énergir's compliance with its obligations under the Regulation and the Régie's oversight role as to sufficient supply must be done in accordance with the provisions of the Act.

⁷ B-0048, para 30.

⁸ B-0050, para 16; B-0048, paras 26 and 27.

⁹ B-0048, paras 36 and 37; B-0050, para 18; D-2019-031, paras 9, 12 and 31; Gaz Métro – 1, Document 1 (B-0022), p. 15, ll. 1 to 4; transcript from the hearing on September 4, 2018 - Volume 1 (A-0003), p. 144, ll. 1 to 17.

¹⁰ Order in Council 233-2019 concerning the *Regulation respecting the quantity of renewable natural gas to be delivered by a distributor*.

¹¹ B-0048, paras 38 to 42.

¹² D-2019-031, para 85.

17. In our opinion, there are legitimate questions regarding the Régie's jurisdiction to approve an FIT whose main objective is to develop a new energy industry in Québec.
18. In that respect, IGUA submits that the Régie's approval of a possible FIT whose primary objective is to promote investments aimed at RNG production in Québec, or any other method of setting the purchase price for RNG,¹³ should be based on enabling powers clearly granted by the legislator.
19. For the reasons stated herein, IGUA is of the opinion, respectfully submitted, that the Régie does not have the required authority under its enabling legislation to approve the FIT proposed by Énergir.
20. Should the Régie conclude differently, IGUA further submits that the development of the RNG industry in Québec should not result in a rate impact on Énergir's existing customers and that this industry's development should entail competitive pricing to preserve competition and free access to the RNG market in Québec. Otherwise, IGUA feels that it would not be fair and reasonable for the Régie to exercise its authority to approve the FIT proposed by Énergir.
21. And again, should the Régie conclude that it is authorized to approve an FIT aimed at stimulating the RNG industry in Québec, IGUA feels that to reduce as much as possible any impact on rates, competition and free access to the RNG market in Québec, the FIT proposed by Énergir must be modified. It would be equally essential for IGUA that the RNG offered to the natural gas distributors' customers remain on a voluntary basis, as mentioned in the introduction.
22. Consequently, should the Régie conclude it has the authority, IGUA is immediately informing the Régie that it reserves the right to propose certain changes to Énergir's FIT, not only to preserve competition and free access to the RNG market but also to ensure that the FIT is fair and reasonable for all RNG producers in Québec.

¹³ B-0048, paras 29 and 30.

III. APPLICABLE LEGISLATIVE AND REGULATORY FRAMEWORK

23. Énergir, in its arguments, states that in its analysis regarding jurisdiction, the Régie should consider the regulatory context applicable to the matter of RNG in Québec and in particular The 2030 Energy Policy and the Opinion to the Minister file. While the context can provide some clarity when it comes to interpreting the legislative and regulatory texts, we submit that this interpretive approach is not required since, in this particular case, the provisions of the Act and Regulation are clear. As previously noted, IGUA is of the opinion that the Régie does not have the required authority under its enabling legislation to approve the FIT proposed by Énergir, for the following reasons.

3.1 The Act

24. Section 1 of the Act states that the Act applies to the supply, transmission, distribution and storage of natural gas delivered or intended for delivery by pipeline to a consumer:

“1. This Act applies to the supply, transmission and distribution of electric power and to the supply, transmission, distribution and storage of natural gas delivered or intended for delivery by pipeline to a consumer.

This Act also applies to any other energy matter to the extent provided for herein.”

25. IGUA submits to the Régie that the production of natural gas or RNG is not among the activities listed in section 1 of the Act. The production of natural gas or RNG is an unregulated activity and this is not a matter open to interpretation.
26. IGUA feels that given the exhaustive list of activities in this section, the Régie does not have any authority regarding the inclusion, in Énergir’s tariffs, of an additional cost for the purpose of stimulating the RNG production industry in Québec.
27. Furthermore, section 5 of the Act states the following:

“5. In the exercise of its functions, the Régie shall reconcile the public interest, consumer protection and the fair treatment of the electric power carrier and of distributors. It shall promote the satisfaction of energy needs in a manner consistent with the Government’s energy policy objectives and in keeping with the principles of sustainable development and individual and collective equity.”

(Our underlining)

28. Although one of the Régie's functions is indeed to promote the satisfaction of Québec consumers' natural gas or RNG energy needs in accordance with the government's energy policy objectives, and in particular The 2030 Energy Policy, through which the government intends to increase RNG production, section 5 of the Act does not empower the Régie to act outside of the authority granted to it by the legislator under its enabling legislation.
29. We note as well that section 5 of the Act also specifies that the Régie, in carrying out its duties, must also reconcile the public interest and consumer protection, including the protection of existing consumers so that they pay a fair and equitable tariff.
30. It is also worth mentioning that the Régie has indicated several times that section 5 of the Act is an interpretive provision that does not confer authority and simply represents a backdrop it takes into account in performing its duties.

➤ D-2017-007, para 92:

[Translation] “[92] The Régie has reiterated on several occasions in its decisions that section 5 of the Act does not confer authority, but that this provision must be taken into consideration when it carries out its duties, including its power to authorize provided for in section 73 of the Act.

[93] This section has often been described as a backdrop to the Régie's decisions. In its decision D-2010-061, the Régie further explained the interrelation between sections 5 and 73 of the Act: [...]

[...]

[95] As part of case R-3960-2016, beginning with procedural decision D-2016-043, the first panel clearly indicated how it would apply section 5 of the Act in analyzing the Project. In this decision, fully in keeping with its rulings, the Régie noted that section 5 of the Act sets out how it will exercise its authority:

[58] The Régie also notes that section 5 of the Act serves as a guide in exercising its authority, but it does not confer this authority. Indeed, this section presents factors that the Régie bears in mind in exercising its duties, but does not grant it jurisdiction relative to the application of specific laws and regulations in environmental or sustainable development matters. [...]

[...]

[96] During the hearing on June 8, 2016, the first panel stated the following:

[...] However, the Régie has no jurisdiction with respect to applying specific laws in environmental or sustainable development matters [Régie's underlining] and the participants must keep that in mind when presenting their evidence and during their cross-examination.'

[...]"

(Our underlining and references omitted)

31. However, the Régie's authority is clearly specified in section 31 of the Act as follows:

"31. It is within the exclusive jurisdiction of the Régie to

(1) fix or modify the rates and conditions for the transmission of electric power by the electric power carrier or the distribution of electric power by the electric power distributor, and the rates and conditions for the supply, transmission or delivery of natural gas by a natural gas distributor or for the storage of natural gas;

(2) monitor the operations of holders of exclusive electric power or natural gas distribution rights to ensure that consumers are adequately supplied;

(2.1) monitor the operations of the electric power carrier, the electric power distributor and natural gas distributors to ensure that consumers are charged fair and reasonable rates;

[...]

(5) decide any other application filed under this Act.

[...]"

(Our underlining)

32. Subparagraph 1 under paragraph 1 of section 31 of the Act is similar to section 1 of the Act and indicates that the Régie's authority to fix or modify rates and conditions of service is limited to the supply, transmission, delivery and storage of natural gas and does not include the production of RNG or any rate whose stated objective is to promote an industry by establishing above-market prices.

33. As for subparagraph 2 under paragraph 1 of the same section, it grants the Régie a specific power to monitor the operations of the holders of exclusive distribution rights to ensure that Québec natural gas and RNG consumers are adequately supplied. In IGUA's opinion, this power to monitor cannot be extended to giving the Régie the authority to approve a rate whose main objective is to develop the RNG industry in Québec.

34. Énergir, in its arguments, mentions that it is only asking the Régie to hear evidence concerning measures to ensure compliance with its obligation to deliver RNG specified by the Regulation and therefore that this it is part of the Régie's exclusive jurisdiction.
35. With respect for the contrary opinion, the "proposed measures" involve the Régie fixing or determining a price or rate for an unregulated activity.
36. This activity is not listed in section 1 of the Act and Énergir's application is equivalent to asking the Régie to do indirectly that which it cannot do directly through its power of monitoring to ensure adequate supply.
37. Moreover, we note that under subparagraph 2.1 of the first paragraph of section 31 of the Act, the Régie's power to monitor natural gas distributors also includes ensuring that consumers are charged fair and reasonable rates.
38. While the Régie has the power to decide any other application under subparagraph 5 of the first paragraph of section 31 of the Act, IGUA believes that this power must nonetheless be exercised within the framework of its areas of authority.
39. Section 48 of the Act reiterates that the Régie's role is to fix the rates and conditions under which a distributor supplies, transmits or delivers natural gas to its customers or stores it:

"48. The Régie shall, on the application of an interested person or on its own initiative, fix or modify the rates and conditions for the transmission of electric power by the electric power carrier or for the distribution of electric power by the electric power distributor or the rates and conditions for the supply, transmission or delivery of natural gas by a natural gas distributor or for the storage of natural gas. The Régie may in particular require the electric power carrier, the electric power distributor or a natural gas distributor to file a modification proposal.

Applications must be filed with the documents and fees prescribed by regulation. Applications filed by the electric power distributor or a natural gas distributor must include a document describing the impact a rate increase would have on low-income earners."

(Our underlining)

40. The principle of fair and reasonable rates mentioned in subparagraph 2.1 under paragraph 1 of section 31 of the Act is reiterated in subparagraph 7 under paragraph 1 of section 49 of the Act, as follows:

“49. When fixing or modifying rates for the transmission of electric power or for the transmission, delivery or storage of natural gas, the Régie shall, in particular,

[...]

(7) ensure that the rates and other conditions for the provision of the service are fair and reasonable;

[...]”

41. IGUA is concerned by the fact that adopting the FIT proposed by Énergir would result in an unfair and inequitable rate for Énergir’s existing customers and for RNG producers in Québec, which runs counter to the public interest. Indeed, the moment a premium is added to develop an industry that is open to a limited number of players without allowing the free market to take its course and the end consumers are saddled with the cost for developing this industry, there is reason to doubt that these principles are being followed.

42. Just as the Régie itself notes in paragraph 91 of procedural decision D-2019-031, IGUA also contends that the question of the Régie’s jurisdiction concerning the adoption of an FIT is all the more relevant since section 51 of the Act clearly states that a natural gas transmission or delivery tariff may not impose higher rates or more onerous conditions than are necessary to cover capital and operating costs or to maintain the stability of a natural gas distributor and the normal development of a distribution system:

“51. No electric power transmission tariff or natural gas transmission or delivery tariff may impose higher rates or more onerous conditions than are necessary to cover capital and operating costs, to maintain the stability of the electric power carrier or a natural gas distributor and the normal development of a transmission or distribution system or to provide a reasonable return on the rate base.

The same applies to the storage of natural gas by the operator of a natural gas storage facility insofar as it is warranted by the rate determination method employed by the Régie.”

(Our underlining)

43. However, the evidence submitted by Énergir shows that the objective of the FIT the company proposes is to “develop the industry” of RNG in Québec.¹⁴ IGUA believes that this tariff, or rather this price granted to certain producers, exceeds the objectives of a natural gas transmission or delivery tariff and makes it possible to cover more elements than the legislator had in mind when adopting section 51 of the Act.

¹⁴ *Supra*, nn. 8 and 9.

44. In IGUA's opinion, the Régie cannot set a tariff that is higher or more onerous than necessary, even if this tariff is essentially intended to develop a new energy industry in Québec.

45. This principle for the transmission and delivery of natural gas also applies to the tariff for supplying natural gas, as indicated in the first paragraph of section 52 of the act, which states:

"52. In any tariff for the supply of natural gas, the rates and other conditions applicable to a consumer or class of consumers must reflect the actual cost of acquisition to the distributor or any other terms granted to the distributor by producers of natural gas or their representatives in consideration of the consumption of that consumer or class of consumers.

A tariff may also reflect any other acquisition-related cost of the natural gas to the distributor."

(Our underlining)

46. In IGUA's opinion, the FIT proposed by Énergir does not reflect the subsidized producers' actual RNG acquisition cost, but instead artificially establishes a price in order to stimulate the RNG industry's development in Québec, something that the Act does not appear to provide for.

47. As for section 72 of the Act, IGUA submits that this section grants the Régie the power to approve a supply plan describing the characteristics of the contracts Énergir intends to enter into in order to meet the natural gas or RNG needs of the Québec market in its exclusive service area, after implementing the energy efficiency measures:

"72. With the exception of private electric power systems, a holder of exclusive electric power or natural gas distribution rights shall prepare and submit to the Régie for approval, according to the form, tenor and intervals fixed by regulation of the Régie, a supply plan describing the characteristics of the contracts the holder intends to enter into in order to meet the needs of Québec markets following the implementation of the energy efficiency measures. The supply plan shall be prepared having regard to

(1) the risks inherent in the sources of supply chosen by the holder;

(2) as concerns any particular source of electric power, the energy block established by regulation of the Government under subparagraph 2.1 of the first paragraph of section 112; and

(3) as concerns natural gas supply,

(a) the excess transmission capacity the holder considers necessary to facilitate the development of industrial activities, which shall not be greater than 10% of the quantity of natural gas that the holder expects to deliver annually; and

(b) the quantity of renewable natural gas determined by regulation of the Government under subparagraph 4 of the first paragraph of section 112.

When examining a supply plan for approval, the Régie shall consider such economic, social and environmental concerns as have been identified by order by the Government.”

(Our underlining)

48. While the Régie has the authority to approve Énergir’s supply plan under section 72 of the Act, this authority does not go as far as requiring the Régie to approve all of the characteristics of the contracts Énergir intends to enter into with producers (subsidized or not) to meet the natural gas or RNG needs of the Québec market, nor does it grant the Régie the power to approve the purchase price for RNG, including the production costs, which are not regulated.
49. Section 72 of the Act states that the Régie must approve the supply plan and that the plan must contain, among other things, a description of the characteristics of the contracts that Énergir intends to enter into in order to meet the needs of the Québec market, but it in no way indicates that the Régie has the duty or the power to approve the setting of a production price or tariff that is not regulated. The Régie must examine the characteristics of the contracts to ensure that the natural gas distributors’ customers have an adequate supply of natural gas or RNG, but always within the limits of its powers conferring authority. This interpretation of section 72 of the Act is consistent with the Régie’s powers as set out in section 31 of the Act, in particular the power to monitor the natural gas distributors to ensure that Québec consumers have an adequate supply of natural gas or RNG.
50. This interpretation appears in keeping with the Régie’s previous decisions, in particular D-2011-011 in which the Régie mentions that the characteristics of the contracts or agreements that Hydro-Québec intends to enter into in its electricity distribution activities (“**HQD**”) must be examined as part of the approval of the supply plan:

- D-2011-011, paras 54, 55 and 56:

[Translation] “[54] Section 72 of the Act states that:

‘a holder of exclusive electric power [...] shall prepare and submit to the Régie for approval, according to the form, tenor and intervals fixed by regulation of the Régie, a supply plan describing the characteristics of the contracts the holder intends to enter into in order to meet the needs of Québec markets [...]’

[our underlining]

[55] Furthermore, section 1 of the Regulation respecting the tenor of a supply plan states that the Distributor's supply plan shall describe:

'(3) the objectives that the holder of rights [the Distributor] intends to achieve and the strategy he intends to apply, over the next 3 years [...], with respect to the additional supplies required [...], and the characteristics of the contracts he intends to enter into, indicating, among other things:

- a) the various products, tools or measures contemplated;
- b) the risks inherent in the sources of supply chosen by the holder;
- c) the measures he intends to take to mitigate the impact of these risks;
- d) if applicable, the measures he intends to take to have at his disposal an adequate transmission capacity; [our emphasis]

[56] It is clear from these provisions that the characteristics of the contracts or agreements that the Distributor intends to enter into shall be examined within the framework of the Plan. (...)"

(Underlined by the Régie)

51. The Régie reiterated those remarks in decision D-2011-029:

➤ D-2011-029, paras 21 to 23:

[Translation] "[21] As the Régie indicated in its decision D-2011-011, in accordance with section 72 of the Act and section 1 of the Regulation, the characteristics or the contracts or agreements the Distributor intends to enter into shall be examined within the framework of the Plan. Also, any future contract, such as the Agreement, will be subject to a specific examination by the Régie following the submission of the Distributor's application for approval under section 74.2 of the Act.

[22] Consequently, the characteristics of future contracts and agreements contemplated by the Distributor must be described by the latter within the framework of the Plan, and the examination of the Plan by the Régie is the appropriate forum for debating these characteristics. In this regard, the Régie points out that it is important that the Distributor be clear on its preferred objectives and strategies, on the costs and risks associated with these strategies, and on their impact on the energy and capacity balances over the period covered by the Plan.

[23] The Régie reiterates that when an agreement is entered into, and following an application for approval by the Distributor in this regard, this application will be examined under section 74.2 of the Act."

(Our underlining and references omitted)

52. The fact that the examination of Énergir's supply plan can be the appropriate forum for examining and discussing the characteristics of the contracts that Énergir intends to enter into with its suppliers does not necessarily mean, in IGUA's opinion, that this automatically grants the Régie authority over an unregulated activity such as the determination of the purchase price for RNG that Énergir intends to propose to the subsidized, and ultimately unsubsidized, Québec RNG producers.
53. We note that decisions D-2011-011 and D-2011-029 were repeated with approval by the Régie in decision D-2012-142.¹⁵
54. We also note that under subparagraph 3(b) under paragraph 1 of section 72 of the Act, Énergir's supply plan must take into account the quantity of RNG determined by government regulation under subparagraph 4 of the first paragraph of section 112 of the Act. This section is discussed in the following section.
55. In light of the foregoing, it seems that the enabling provisions of the Act, even when interpreted in a broad, liberal manner, do not appear to authorize the Régie to adopt the FIT proposed by Énergir, since it is not a "tariff" as defined in the Act but rather a "price" granted to certain producers in an unregulated area, namely RNG production.¹⁶

3.2 The Regulation respecting the quantity of renewable natural gas to be delivered by a distributor¹⁷

56. Subparagraph 4 under paragraph 1 of section 112 of the Act states:

"112. The Government may make regulations

determining [...]

(4) the quantity of renewable natural gas to be delivered by a natural gas distributor and the terms and conditions according to which it is to be delivered."

(Our underlining)

57. It is interesting to note in this respect that subparagraph 3(b) under paragraph 1 of section 72 of the Act does not stipulate that the supply plan must take into account the terms and conditions of delivery. This regulatory power is left to the discretion of the government, through regulations.

¹⁵ See in particular paragraphs 80 to 94 of the decision.

¹⁶ B-0050, para 16.

¹⁷ Order in Council 233-2019 concerning the *Regulation respecting the quantity of renewable natural gas to be delivered by a distributor*.

58. Yet the government, in its Regulation published in the *Gazette officielle du Québec*, Part 2, on April 3, 2019, clearly adopts only measures concerning the quantity of RNG to be delivered by a natural gas distributor and none regarding the terms and conditions of its delivery, even though subparagraph 4 under paragraph 1 of section 112 of the Act authorizes it to adopt such terms and conditions through regulations.
59. In the absence of such terms and conditions, does it fall to the Régie to approve measures aimed at promoting and stimulating the development of the RNG industry in Québec, such as the purchase price for RNG, an unregulated product, even though the government could have done so under the regulatory power conferred on it by subparagraph 4 under paragraph 1 of section 112 of the Act?
60. In other words, does it fall to the Régie to approve an FIT that is equivalent to direct financial assistance for RNG producers in Québec?
61. Although IGUA is in favour of developing the RNG industry in Québec, it respectfully submits that it does not believe the Régie has the authority to do so.
62. IGUA is of the opinion that an interesting parallel can be drawn with file R-3780-2011¹⁸ in which the Régie approved the terms of the HQD program to purchase electricity produced by cogeneration from residual forest biomass (the “**Program**”). HQD also asked the Régie to take note of the standard contract that would be used in the Program.
63. Indeed, it is interesting to note that the Régie, in this case, pronounced itself satisfied with the electricity purchase price proposed by HQD. According to the Régie, the purchase price offered by HQD is a fair, reasonable and appropriate price for the facilities eligible for the Program.¹⁹

¹⁸ HQD - Demande d’approbation du programme d’achat d’électricité produite par cogénération à base de biomasse forestière résiduelle (HDQ - Application for approval of the program to purchase electricity produced by cogeneration from residual forest biomass).

¹⁹ D-2011-190, para 89.

64. In this case, the purchase price for electricity produced by cogeneration from residual forest biomass was set at a level comparable to the average price obtained during tender solicitation TS 2009-01.²⁰ This price was indexed annually until the guaranteed delivery start date, and then, for the term of the contact, based on the Canadian Consumer Price Index (CPI).²¹
65. We note that, initially, eligibility for the Program was based on a five-step contract awarding process monitored by an independent firm.²²
66. We also note that this Program's implementation derived from a clear enabling provision, namely section 74.3 of the Act, which states:

“74.3. Despite sections 74.1 and 74.2, the electric power distributor may, under a program to purchase electric power from a renewable energy source, the conditions of which have been approved by the Régie, purchase electric power from a client whose production exceeds the client's own consumption or from a producer, without having to solicit tenders.

This section applies only to electric power produced at a facility whose maximum production capacity is set by government regulation.”

(Our underlining)

67. The Régie also benefited from two orders in council, namely:
- Order in Council 1085-2011 concerning the maximum production capacity targeted in a program to purchase electricity produced by cogeneration from residual forest biomass (i.e. the regulation provided for in paragraph 2 of section 74.3 of the Act);²³ and
 - Order in Council 1086-2011 regarding the economic, social and environmental concerns indicated to the Régie de l'énergie with respect to a program to purchase

²⁰ D-2011-190, para 23: *[Translation]* “Tender solicitation TS 2009-01, launched by the Distributor in 2009, for the purchase of 125 MW of electricity produced by cogeneration from biomass. Following this tender solicitation, six contracts to supply electricity were signed, for a total of 52.9 MW of contractual power. The discounted unit cost of the electricity delivered as a result of these contracts is between 8.8¢/kWh and 12.0¢/kWh, for an average price of 10.6¢/kWh, excluding transmission costs and loss.”

²¹ *Idem*, para 24

²² *Idem*, paras 8 and 9

²³ Order in Council 1085-2011 concerning the maximum production capacity targeted in a program to purchase electricity produced by cogeneration from residual forest biomass.

electricity produced by cogeneration from residual forest biomass (the “**Concerns O.C.**”).²⁴

68. In contrast to file R-3780-2011, here, the Régie seems unable to base itself on an enabling provision as clear as section 74.3 of the Act and does not have a Concerns O.C. to guide it in making its decision.

IV. **THE SAINT-HYACINTHE CASE**

4.1 **Decision D-2015-107 (component B of Gaz Métro’s application)**

69. Énergir is submitting to the Régie that following file R-3909-2014, the Régie has, through decision D-2015-107, notably approved the formula for purchasing RNG produced by the City of Saint-Hyacinthe.²⁵
70. Énergir claims that by rendering decision D-2015-107, the Régie recognized it was the right time to examine the formula for purchasing RNG produced by the City of Saint-Hyacinthe and that Énergir does not see why it would not be timely to examine the FIT for the purposes of this file, especially considering that when the Régie rendered decision D-2015-107, the regulatory framework was identical to the one that exists now (with the exception of the Regulation).²⁶
71. Énergir further asserts that decisional and institutional consistency should guide the Régie in these deliberations and that this principle supports recognizing the timeliness of examining the FIT.²⁷ Furthermore, Énergir submits that the formula presented in this case would not make it possible to develop the RNG industry and requires the Régie’s intervention.²⁸

²⁴ Order in Council 1086-2011 regarding the economic, social and environmental concerns indicated to the Régie de l’énergie with respect to a program to purchase electricity produced by cogeneration from residual forest biomass.

²⁵ B-0050, para 2.

²⁶ B-0043, paras 17 and 18.

²⁷ *Idem*, para 17 d).

²⁸ D-2019-031, paras 28 to 31; B-0014, p. 14, ll. 15 to 19.

72. IGUA believes that decision D-2015-107 should be distinguished from this case and cannot serve as a precedent authorizing the Régie to approve the FIT proposed by Énergir. Indeed, the formula to purchase RNG produced by the City of Saint-Hyacinthe that was approved by the Régie in file R-3909-2014 is essentially based on market prices and avoided costs. This formula does not enable the emergence of an industry in Québec for the production of RNG and its injection into Énergir's distribution network, unlike the objective targeted by Énergir's proposed FIT.

73. It would appear from the following excerpts that the objective of the formula to purchase the RNG produced by the City of Saint-Hyacinthe was not to develop the RNG industry in Québec or to establish an additional premium that is equivalent to direct financial assistance for the subsidized RNG producers in Québec. In fact, the formula was intended to be neutral in terms of the costs for Gaz Métro's entire clientele and the agreement was that the City would assume all of the costs for the project, which is not necessarily the case with the FIT proposed by Énergir.

➤ D-2015-107, paras 57, 59, 61, 62, 66, 72 and 73:

[Translation] “[57] According to Gaz Métro, the price offered is a determining factor in the producer customers’ decision whether or not to proceed with their project. In this context, Gaz Métro feels it is desirable to offer the municipalities a purchase price derived from a formula equivalent to the market price for supplying natural gas plus the avoided costs. Gaz Métro notes that the proposed formula is intended to be simple and equitable for all of the RNG producing customers and neutral in terms of the costs for Gaz Métro’s entire clientele.

[...]

[59] [...] Returning the avoided cost to the RNG producer creates neutrality in terms of the costs for the entire clientele. Indeed, Gaz Métro does not have to acquire the emission allowances for the quantities of natural gas purchased from RNG producers.

[...]

[61] Gaz Métro concludes that this formula for establishing the purchase price for RNG enables equity between the fair price to pay to the producers and the purchase price for its customers. Lastly, Gaz Métro explains that this formula will have the advantage of being simple and neutral in terms of the costs for its entire clientele.

[62] Gaz Métro would like to apply this formula to the City and is asking the Régie to approve it **solely for the purposes of the project presented in this case**.

[...]

4. OPINION OF THE RÉGIE

[66] The Régie is satisfied with the information provided by Gaz Métro to justify extending its existing distribution network to the receipt point on the City's land.

Furthermore, it notes that the City will assume all of the project costs by means of the receipt rate and that the project's implementation will have no impact on the Distributor's rates.

[72] According to the formula to establish the purchase price for the RNG produced by the City, Gaz Métro will buy the gas at the market price for supplying natural gas, to which will be added the avoided costs relative to the transmission, compression and acquisition of the emission allowances specified under CATS. It explains that by procuring RNG locally, it will avoid the costs it would have had to pay at Dawn.

[73] Gaz Métro maintains that the proposed formula is intended to be simple, equitable and neutral in terms of the costs for its entire clientele.”

(Our underlining, references omitted and emphasis added)

74. In light of the above, IGUA believes that decision D-2015-107 can be distinguished from this case and cannot serve as a precedent justifying the adoption by the Régie of the FIT proposed by Énergir.
75. IGUA also wonders about the impact of such a tariff on Énergir's clientele. Unlike file R-3909-2014, can we really talk about cost neutrality for all of Énergir's customers in this case? And can we also assert in this particular case that the subsidized RNG producers will assume all of the costs related to their projects when the very objective of the FIT is to financially assist those producers? Énergir in its evidence concerning the RNG tariff indicates that: *[translation]* “*The RNG price would be set so that the RNG purchase cost could be recovered. The price would be determined at the same time as the other prices set as part of the rate case.*”²⁹
76. As for decisional and institutional consistency, IGUA notes that the Régie explained in decision D-2015-107 that it was rendered solely for the purposes of the project presented in that specific case.
77. IGUA would also add that even though decisional consistency is a principle established before the Régie, the Régie is nevertheless not bound by *stare decisis* and that its decisional independence has precedence over decisional consistency.
- D-2014-018, paras 58 and 59:

[Translation] “[58] Even though decisional consistency is a principle established before the Régie, the Régie is nevertheless not bound by *stare decisis*, or the rule of precedent whereby a court renders decisions in keeping with its prior decisions. The Régie must instead aim to respect established case law which, in contrast to *stare decisis* and under which a single decision is sufficient to form a rule of law, requires instead several consistent decisions to establish a legal

²⁹ Gaz Métro-1, Document 1 (B-0022), p. 34.

trend. The Régie notes as well that the Supreme Court stated, in the Domtar Inc. decision, that the decisional independence of administrative tribunals has precedence over the objective of decisional consistency.

[59] Moreover, decision D-2008-020 is the first decision concerning in particular investments related to the replacement of radio links and modernization of optical links.”

(Our underlining and references omitted)

- D-2012-136, paras 77 and 78:

[Translation] “[77] The Régie cannot subscribe to the distributor’s view that the principle of decisional consistency should prevail in this case and accept its invitation to take the approach followed historically with respect to applications for a confidentiality order.

[78] The Régie believes that it is not necessarily bound by previous decisions, especially when the applications to which they apply were not open to intervenor comments.”

4.2 Decision D-2013-041 (component A of Gaz Métro’s application)

78. Still with respect to file R-3909-2014, it is interesting to note that the Régie, in decision D-2013-041, rejected component A of Gaz Métro’s application. We note that this component essentially concerned investing in the necessary facilities to ensure the interchangeability, composition and pressure of the biomethane produced by Saint-Hyacinthe so that the biomethane could be injected into Gaz Métro’s natural gas distribution network. It was planned that this equipment would ultimately be given to the City no longer than 20 years after being installed. Gaz Métro proposed recovering the costs of the component A assets through the distribution service rates and thus that they would be paid by all of the distribution clientele.

79. The Régie rejected this application as follows.

- D-2013-041, paras 79, 81 and 85:

[Translation] “[77] This panel is of the opinion that the component A-type facilities are biomethane production and commercialization facilities that a producer must absolutely install if it wishes to inject biomethane into the Gaz Métro network. Furthermore, in decision D-2011-108 (paragraph 24), the Régie decided that these types of facilities are not regulated. Therefore, the processing of biomethane by component A-type facilities is an operation that does not fall within Gaz Métro’s exclusive right of distribution.

[...]

[79] Thus, wanting to have Gaz Métro and natural gas consumers pay the costs of the component A facilities for the Project which do not fall within Gaz Métro’s exclusive right is equivalent to having customers of the regulated activity finance an unregulated activity.

The Régie believes that this is not appropriate.

[...]

[81] Developing biomethane results from laudable public objectives but the costs should not be imposed on natural gas consumers.

[...]

[85] From the perspective of the public interest and the reciprocal roles of gas producers and natural gas distributors, the Régie shares the OEB's position."

(Our underlining)

80. In IGUA's opinion, an FIT intended as direct financial assistance for the production of RNG in Québec is the equivalent of having Énergir's consumers assume the costs for an unregulated activity, namely those related to production and commercialization facilities aimed at developing the RNG industry in Québec.
81. IGUA feels it relevant to refer to the following passages in decision D-2011-108, which is in fact cited with approval by the Régie in decision D-2013-041.

➤ D-2011-108, para 20:

[Translation] "[20] In this context and given that the Régie is an autonomous, independent multifunctional economic regulatory body, which supports giving its authority the greatest latitude possible so it can fulfill its role of regulation with respect to the regulated activities and assets of Gaz Métro, the Régie believes that to the extent that the assets necessary for the receipt service are used in whole or in part for the transmission of natural gas intended to be delivered by pipeline to the consumers located in Gaz Métro's exclusive territory, it has the jurisdiction to set a rate for said activity."

(Our underlining and references omitted)

82. In IGUA's opinion, the Régie does not have the required authority to adopt the FIT proposed by Énergir, in particular for the reasons raised by the Régie in decisions D-2011-108 and D-2013-041. Indeed, the RNG production facilities that would benefit from a possible FIT, would not be used in whole or in part for the transmission of RNG intended to be delivered by pipeline to the consumers located in Énergir's exclusive territory.
83. Furthermore, IGUA shares the point of view of intervenor Canadian Federation of Independent Business, which stated the following regarding component A of Gaz Métro's application in file R-3909-2014. In IGUA's opinion, its comments apply in this case.

- D-2013-041, paras 79, 81 and 85:

[Translation] “[47] CFIB submits that it is not the distributor’s role to set up the biomethane market. In this respect, it refers to the following passage from an Ontario Energy Board (OEB) decision concerning a project similar to that of Gaz Métro:

[...]

[50] CFIB insists that the Act applies, and that the Régie cannot consider the assets of component A of the Project to be destined for the distribution of natural gas, under the pretext that the development of biomethane would be in the public interest.

[51] In CFIB’s opinion, should the Régie accept the distributor’s application, it would be equivalent to forcing natural gas consumers to assume costs that should normally be assumed by the City of Saint-Hyacinthe and its taxpayers.”

(References omitted)

V. THE RECENT DECISIONS OF THE ONTARIO ENERGY BOARD

5.1 Decision EB-2017-0319 of October 18, 2018

84. In paragraphs 82 and 83 of decision D-2019-031, the Régie wondered about the possible parallel between the purification activity that Enbridge Gas Distribution (“**EGD**”) wanted to set up to promote RNG production and the FIT that Énergir wants to implement for similar reasons.
85. In that situation, EGD wanted to offer its suppliers, on a voluntary basis, a biogas pre-treatment service in order to obtain network-quality RNG. As with the FIT proposed by Énergir, the objective of that service was to promote the development of the RNG production industry in Ontario.
86. In decision EB-2017-0319, the Ontario Energy Board (the “**OEB**”) essentially concluded that while the service EGD wanted to set up was a permitted activity for EGD, that did not mean the activity should be considered a regulated activity, since it did not constitute a natural gas supply, transmission, distribution or storage activity. And the OEB consequently refused to allow the costs of that service to be socialized across EGD’s entire clientele.

- EB-2017-0319, pp. 2, 8, 11 and 12:

TAB 1

“For the reasons that follow, the OEB has made the following key determinations:

1. The OEB finds that the RNG Upgrading Service is not the sale, transmission, distribution or storage of gas. Therefore, the OEB is not setting rates for this service under Section 36 of the OEB Act. However, the OEB finds that the proposed RNG Upgrading Service is a permitted business within Enbridge (the utility).

[...]

Section 36 of the OEB Act requires an order from the OEB for a gas transmitter, gas distributor or storage company to 'sell gas or charge for the transmission, distribution or storage of gas.' Activities for which the OEB issues an order under Section 36 are generally referred to as rate-regulated activities.

[...]

While agreeing that Enbridge is permitted to provide the RNG Enabling Program, the majority of intervenors stated that the 2006 and 2009 Directives do not alter the OEB's ratemaking powers. The OEB can only set regulated rates (or regulated service fees) for the sale, distribution, transmission and storage of gas.

[...]

However, most other parties (APPrO, CCC, Energy Probe, IGUA, SEC and OEB staff) did not support Enbridge's position. These parties submitted that the RNG Upgrading Service is not the sale, transmission, distribution or storage of gas, and therefore should not be considered part of Enbridge's regulated business for which the OEB can set rates. Therefore, Enbridge could undertake the RNG Upgrading Service but at its own risk.

[...]

RNG Upgrading Service

The OEB finds that the RNG Upgrading Service is not the sale of gas or the transmission, distribution or storage of gas. Rates will not be set for this service under Section 36 of the OEB Act. While Enbridge is permitted to undertake this program within the utility, it must be done as a non rate-regulated activity.

RNG Upgrading is about changing raw biogas into RNG that is interchangeable with conventional natural gas. It is not about the sale of gas, the delivery of gas to a consumer (distribution), the transportation of gas by hydrocarbon transmission line (transmission) or the storage of gas (storage).

Even if RNG Upgrading had been found to be a distribution activity, the OEB concludes that it is not appropriate for the RNG Upgrading Service to be a rate-regulated activity for two reasons. **First, RNG Upgrading Service is potentially a competitive activity in Ontario.** Enbridge itself acknowledges that the RNG Upgrading Service can also be done by RNG producers. This is the reason that Enbridge has proposed this to be an optional service.

Enbridge has argued that there is 'no evidence of any current market players who will be adversely impacted by EGD offering a regulated RNG Upgrading service.'

The OEB notes that the effect on competitors is only one consideration. Second, the OEB must also consider whether natural gas customers should bear any risk for this competitive service. The OEB finds that they should not.

In 2009, the OEB issued a Decision on a Preliminary Motion (2009 Decision) with respect to the plan by Enbridge to pursue certain Green Energy Initiatives.

Enbridge provided details of those initiatives which were included as Appendix D to the 2009 Decision. One initiative was described as follows:

[...]

There are many aspects of this Green Energy Initiative in common with the current proposed RNG Enabling Program.

The OEB panel for the 2009 Decision specifically found it unnecessary to make any finding on whether these green energy initiatives were distribution activities. However, the OEB panel determined that these activities would be non rate-regulated. The OEB panel expressed concern that the Green Energy Initiatives took place in the broad competitive market and rate regulating these initiatives would be unfair to other market participants, and would shift risk to natural gas ratepayers. There are the same concerns in this proceeding, and the 2009 Decision supports the OEB's determination that the RNG Upgrading Service will not be rate-regulated.

Following the 2009 Decision, the OEB established the G-2010-0030 Guidelines: Regulatory and Accounting Treatments for Natural Gas Utility-Owned Qualifying Facilities or Assets (the 2010 Guidelines). Under these 2010 Guidelines the natural gas utilities are required to segregate activities pertaining to qualifying facilities or assets from the utility's rate-regulated activities. Detailed regulatory and accounting guidance was provided. The OEB finds that if Enbridge intends to pursue RNG Upgrading Services within the utility as a non rate-regulated activity, it must follow a similar approach to that set out in these 2010 Guidelines. This will ensure a ring-fencing between the utility's rate-regulated and non rate-regulated activities. The 2010 Guidelines are attached as Appendix B for ease of reference."

(Our underlining and emphasis added)

87. In IGUA's opinion, a parallel can actually be drawn between the facts of decision EB-2017-0319 and Énergir's current application. Indeed, despite the fact that purchasing RNG is part of a natural gas distributor's normal activities, it remains that the production of natural gas or RNG is not a regulated activity and that the normal activity of a natural gas or RNG distributor with respect to purchasing its commodity should not go so far as to artificially stimulate the development of an industry by means of direct financial assistance to certain RNG producers.
88. IGUA also reiterates that, under the Act, developing the RNG industry in Québec is not the role of a natural gas distributor.

5.2 The provisional decisions EB-2011-0242 and EB-2011-0283 of July 12, 2012

89. It should be remembered that in that situation, EGD and Union Gas Limited (“**Union Gas**”) were looking for an OEB order aimed at, on the one hand, setting a rate that would include the costs of purchasing biomethane and, on the other, approval of a price structure for procuring biomethane from Ontario producers at fixed prices over a 20-year period in particular to stimulate the biomethane production industry in Ontario.
90. In this provisional decision, the OEB concluded that the role of EGD and Union Gas as distributors is not to develop the biomethane industry in Ontario.

➤ EB-2011-0242 and EB-2011-0283, pp. 12 and 13:

TAB 2

“CME and LPMA each argued that there is evidence of an emerging market for biogas and biomethane already. LPMA further submitted that the market’s development should be left to market forces and not be artificially stimulated. Shell argued that rather than fostering future competitive trade in biogas and environmental attributes, there is the potential with 20-year contracts for the programs to stifle future market evolution by removing this local supply from the mix of alternatives available to large commercial and industrial consumers, as well as marketers. Enbridge responded that the program would not take biomethane producers out of the competitive market, because in Ontario there is no biomethane production market to begin with.

In the Board’s view the applicants established the wrong goal for their programs. Their purpose in bringing the applications was expressly to create or enable a market for biomethane in Ontario. With respect, that is an objective which is beyond the scope of the distributor’s role. It is appropriate for the distributors to consider the conditions and pricing necessary to accept biomethane into their respective distribution systems, but it is not appropriate for them to use system gas customers as a means of subsidizing a variety of biomethane producers in the hope of developing a viable biomethane supply market. In addition, the companies provided no evidence where such a program has been successful in stimulating market development, and therefore the achievement of this benefit is almost entirely speculative in any event. The Board concludes that this benefit should have no weight in the assessment of the program.

Much of the design of the program was rooted in the applicants’ objective of trying to create a market. The plan to purchase from a variety of producers – large and small – landfill and agricultural – is a key example. This approach undermines the overall cost effectiveness of the program, as discussed further below.

None of this is to say that it is entirely inappropriate for the distributors to purchase biomethane; rather this finding is specific to the stated objective and claimed benefit of enabling the biomethane market through compulsory ratepayer subsidies.”

(Our underlining and emphasis added)

91. As previously mentioned, it is clear from the evidence on file that the difference between the purchase cost that would be set by means of the FIT and the purchase price set by the formula established in decision D-2015-107 (Saint-Hyacinthe case) is a premium for the sole purpose of stimulating the RNG production industry in Québec.³⁰
92. However, in IGUA's opinion, it is not the role of a natural gas distributor to financially help an industry develop.
93. Even though the OEB's decision was provisional and the OEB did not render a final decision in that case (the parties withdrew their application on September 7, 2012 and the case was therefore closed on September 17, 2012), it still remains that the OEB's determination regarding the matter of authority was final and unequivocal.
94. Consequently, IGUA feels that the OEB's conclusion in that case is applicable in this situation.

VI. OTHER RELEVANT CONSIDERATIONS REGARDING THE RÉGIE'S QUESTIONS B) AND C)

6.1 The commodity price: an unregulated price left to free market forces

95. IGUA submits to the Régie that the commodity price of natural gas and RNG is unregulated and freely determined in the market based on supply and demand.
96. In IGUA's opinion, and as is evident from the decisions cited below, one of the Régie's roles is to preserve the proper functioning of the competitive commodity market for natural gas and RNG.

➤ D-2001-214, pp. 19, 20, 21, 26, 29 and 30:

[Translation] "**2.3 OPINION OF THE RÉGIE**

The application for a new fixed rate for system gas customers comprises fundamental issues particularly with respect to established case law and the role of a distribution monopoly in the free market for natural gas supply.

³⁰ D-2019-031, para 84.

Before ruling on the application, the Régie first briefly examines the evolution of the distributor's role in gas supply and the current market situation in terms of natural gas prices.

[...]

The western accord reached between the Government of Canada and the western provinces in 1985 significantly altered the method of supplying natural gas in Canada. In it, the federal government and the provinces agreed to deregulate the sale of natural gas and let market forces determine the commodity prices.

[...]

The *Act respecting the Régie du gaz naturel* adopted in 1988 comprised in this respect a two-part obligation for the distributor, namely to supply natural gas to all customers who requested it, except where exempted by the Régie, and to ensure transmission and delivery of natural gas acquired from a third-party by a customer.

The primary effect of natural gas deregulation was to distinguish the trade of the commodity from its transmission and distribution. The commodity prices have since been freely determined in the market based on supply and demand. The monopolistic activities, such as transmission and distribution, have for their part remained regulated.

At present, GMLP offers two primary methods for purchasing natural gas, namely distributor-provided supply service (system gas) and direct purchase, which includes resale and delivery.

[...]

The Régie believes, as stated in decision D-94-19, that the distributor must be active in supplying natural gas in order to fulfill its obligations under the Act. The Régie also feels that it is in the interest of all consumers to preserve the proper functioning of the competitive natural gas market.

[...]

[...] In decision D-94-01, the Régie felt that the rate should reflect the purchase price:

'[...] if there is cross-subsidization of the gas commodity cost from one level to the next, obviously the rates proposed at each of those levels cannot reflect the actual acquisition cost.'

[...]

2.3.3.7 Distribution monopoly and deregulated supply market

Several decisions have addressed the determination of prices in a deregulated market.

[Translation] “The Régie feels that although the proposal targets only system gas customers, it would substantially modify the balance of power between the distributor and the other suppliers in the deregulated commodity market. Indeed, since the distributor is proposing to offer the fixed rate to all customers, the movement of direct purchase customers to system gas already under way will only increase significantly if the distributor offers fixed-price options under conditions that are more advantageous than those available from brokers and other suppliers in the market.

In this respect, CFIB/ACAGNEQ point out that the proposal constitutes an unjustified transfer of risk from shareholders to variable-rate customers. When the suppliers or brokers make offers to customers, they must assume the related risks themselves. As for the distributor, it is proposing to use the variable-rate clientele to make fixed-price offers to its customers with conditions that are possibly more advantageous than those the brokers could offer, particularly with respect to the handling of volume imbalances. The Régie believes there would be a disproportion of means between the distributor and the brokers or suppliers operating in the deregulated commodity market. The Régie therefore shares the point of view of CFIB/ACAGNEQ that the proposal in its current form could lead to a type of gas/gas competition in the market that would eventually have the effect of limiting the amount of market competition.

In decision D-94-19, the Régie indicated that the distributor should maintain an active role in supplying natural gas **but at no time should use its monopoly distribution position to alter the rules of the game in terms of free access to the gas markets either for suppliers or for consumers.** Furthermore, in that same decision, the Régie stated that one of the responsibilities of GMLP’s sales representatives was to provide customers with a list of the suppliers or brokers active in the sale of natural gas in Québec. **The Régie believes those remarks are still relevant** and considers it to be in consumers’ interest that the distributor increase its efforts to inform them of the brokers and suppliers operating in the market.

The Régie’s acceptance of the proposal would likely accelerate the movement of customers from direct purchase to system gas and **significantly increase the distributor’s role in the deregulated natural gas commodity market with it benefiting from the advantages conferred by its monopoly situation. The Régie shares the opinion of several intervenors that such interference is not justified under the circumstances and risks eventually being contrary to consumers’ interest by reducing competition for the commodity.**

The Régie believes that accepting the current proposal would run counter to the efforts of the past several years to promote the emergence of a free, efficient market for the commodity and could eventually be to the disadvantage of all customers.”

(Our underlining, emphasis added and references omitted)

97. Like the Régie in this case, IGUA is wondering and greatly concerned about the impact of Énergir's proposal on competition and free access to the RNG market in Québec. In IGUA's opinion, Énergir's proposal could have the effect of limiting competition in Québec's RNG market. The imbalance of power between Énergir and the other suppliers in the deregulated RNG commodity market could only increase substantially if Énergir were to offer an FIT with more favourable conditions than those available in the market. However, in decisions D-2001-214 and D-94-19, the Régie clearly states that a gas distributor cannot at any time use its monopoly distribution position to alter the rules of the game in terms of free access to the natural gas market either for suppliers or for consumers.
98. Consequently, IGUA feels that the FIT proposed by Énergir would significantly increase Énergir's role in the RNG purchasing market and would interfere with the sound operation of the competitive RNG commodity market in Québec, in that:
- Setting an FIT under the current production conditions (limited number of producers) would give Énergir a monopoly position for the commercialization of the RNG produced. With the proposed FIT, producers would surely want to deal with Énergir exclusively to sell their production. Consequently, Énergir would hold all production in its portfolio and thus be the sole RNG supplier for its entire clientele. The proposed FIT provides for the possibility of buying directly from the producers, but in the absence of an RNG market and given the conditions of the proposed FIT, IGUA wonders about customers' ability to find suppliers, other than Énergir, to procure RNG.
 - The proposed FIT would also not motivate producers to solicit new customers. The proposed FIT already ensures them an outlet for their production and they have no financial incentive to increase their production capacity.
 - IGUA would also like to add that the proposed FIT greatly favours the subsidized producers. The unsubsidized producers would be included through feed-in tariff negotiations on a case by case basis. IGUA wonders about the risk of the dominant position Énergir would have over the unsubsidized producers. IGUA also wishes to add that implementing price discrimination is contrary to a free market and could have a counterproductive impact on achieving the government's objectives as well. Indeed, it is important to remember that the unsubsidized producers could represent a substantial production source able to satisfy consumption and help achieve the goals set by The 2030 Energy Policy. Additionally, we emphasize that the emergence of a competitive market is only possible if the principle of free entry and exit is maintained.

99. In fact, Énergir could effectively use its monopoly distribution position to alter the rules of access to the RNG free market in Québec.
100. Énergir would also have some control over the supply price for an unregulated product, namely RNG, in that:
- The FIT as proposed must, in practice, enable the market to have a price signal to spur the production of renewable energy, whose production costs are higher than those of fossil fuels. However, the proposed FIT, by virtue of its determinants, risks causing price control over a long period (5 to 20 years).
 - The FIT in its current form risks altering the price signal by creating a rent effect whose main consequence would be to slow production development for the exclusive benefit of subsidized producers.
 - Over such a long period, the FIT risks not encouraging innovation and would not promote the decrease in the marginal production costs necessary for the emergence of a dynamic, attractive market.
 - It should also be noted that the FIT, as currently structured, will set RNG prices in such a way as to not allow actual market prices to be reflected. This price setting will result in an under-allocation of the production factors that will impede the industry's development and make the Québec market uncompetitive.
 - The proposed FIT will also create a type of information asymmetry for market players and the Régie. Indeed, setting prices for such a long period of time and without free market access will produce a situation where information on the marginal production costs will no longer be available to the Régie and the government. Lacking this information will make it difficult, if not impossible, for the government to access reliable information in order to adapt or correct its energy policies.
101. With respect to paragraph 98 of procedural decision D-2019-031 in which the Régie asks participants to provide it with additional arguments as well as evidence concerning its questions, IGUA informs the Régie that it is ready to present to the Régie evidence in support of paragraphs 98 and 100 should the Régie conclude that it has the required authority to approve an FIT aimed at developing the RNG industry in Québec.

6.2 Opinion to the Minister³¹

102. As Énergir has done for the purposes of this application,³² IGUA notes that the Régie, in its Opinion to the Ministère de l'Énergie et des Ressources naturelles (MERN), recommends in particular considering *[translation]* “the implementation of an FIT that could be higher than the avoided supply costs in order to stimulate the development of the RNG industry in Québec” (potential solution 14) and *[translation]* “that a voluntary RNG purchase rate be offered to the gas distributors’ customers” (potential solution 15).
103. We note at the outset that the Régie, in its Opinion to the MERN, in no way rendered an opinion on the matter of jurisdiction and the scope of its authority regarding the approval of a possible FIT.
104. We also point out that an opinion from the Régie is not a decision.
105. That said, IGUA notes that the Régie also recommends that any significant difference between a possible FIT and the avoided costs involve government support in order to avoid any large rate increases for natural gas consumers.
106. This confirms to some extent that the Régie felt when it drafted its Opinion to the MERN that the development of the RNG industry was partly the government’s responsibility and should not be entirely assumed by natural gas consumers.
107. Consequently, should the Régie conclude that it has the authority to approve the FIT proposed by Énergir, IGUA respectfully submits that the FIT be modified to protect free access to the RNG market in Québec and avoid in any way altering free competition in this market. In fact, and as the Régie mentioned in its Opinion to the MERN, an FIT should be calibrated based on each project’s specific costs and returns and adjusted project by project to ensure reasonable feasibility and profitability in every case. Thus, several FIT levels could be required based on the type of project, the project’s performance, its location, etc.³³
108. Furthermore, and again should the Régie conclude that it has the authority to approve the FIT proposed by Énergir, IGUA reiterates that it is essential that purchasing the RNG offered to gas distributors’ customers continue to be voluntary in order to avoid that the acquisition of a minimum volume of RNG at a price higher than the avoided cost result in significant rate impacts for the distributors’ overall clientele, and also to avoid forcing the

³¹ R-3972-2016, Exhibit A-0038.

³² B-0050, para 11.

³³ R-3972-2016, Exhibit A-0038, potential solution 14, p. 21.

industrial natural gas consumers to contribute doubly to the efforts to reduce GHG emissions.

109. Should the Régie conclude it has authority in the matter, IGUA reserves the right to propose certain changes to the FIT or to any other method proposed by Énergir.
110. One option could be to have a tender solicitation process for the purchase of a quantity of RNG over a defined period in order to allow the market to take its course.

CONCLUSION

111. In conclusion, IGUA respectfully submits that, for the reasons stated herein, the Régie does not have the jurisdiction to include costs in a tariff to develop the production of RNG in Québec.
112. If the Régie has such authority, IGUA believes it would be unfair and unreasonable to exercise it since the FIT proposed by Énergir would enable Énergir to use its monopoly distribution position to alter the rules for accessing the RNG free market in Québec and control the supply price for an unregulated product.

RESPECTFULLY SUBMITTED.