

IN THE MATTER OF the *Ontario Energy Board Act, 1998*,
S.O. 1998, c. 15 (Sched. B), as amended;

AND IN THE MATTER OF an Application by Enbridge Gas
Distribution Inc. for an Order or Orders approving or fixing
rates for the sale, distribution, transmission and storage of
gas.

**WRITTEN ARGUMENT OF ENBRIDGE GAS DISTRIBUTION INC.
ON THE JURISDICTIONAL QUESTION**

Enbridge Gas Distribution Inc. (Enbridge, or the Company) filed an Application on September 1, 2009 (as amended on September 14, 2009) with the Ontario Energy Board (the OEB, or the Board) under section 36 of the *Ontario Energy Board Act, 1998* (the OEB Act)¹, for an order of the Board approving or fixing rates for the distribution, transmission and storage of natural gas, effective January 1, 2010. Enbridge's evidence was filed on October 1, 2009.

Part of Enbridge's Application seeks approval of a Y-factor related to "Green Energy Initiatives", which are projects that Enbridge plans to undertake in 2010 and subsequent years under the authority of Directives recently issued by the Minister of Energy and Infrastructure. Among other things, these Minister's Directives permit Enbridge to own and operate certain types of electricity generation facilities.

On October 23, 2009, the Board issued Procedural Order No. 1, which was titled "Preliminary Motion", stating that:

The Board has decided to determine the issue of whether electricity generation facility projects, and their associated costs, assets and revenues, are properly part of the regulated operations of Enbridge and thus under the Board's ratemaking authority (the "jurisdictional question"), as a preliminary matter.

To address this jurisdictional question, the Board invited parties to answer two questions:

1. Are the electricity generation facility projects, and their associated costs, assets and revenues properly part of the regulated operations of Enbridge and thus under the Board's ratemaking authority?

¹ S.O. c.15, Sched. B, as amended.

2. If not, does the Board have jurisdiction to deal with the electricity generation facility projects and their associated costs, assets and revenues outside of the ratemaking process?

Enbridge's response to the jurisdictional question is set out below. Rather than anticipate the positions that may be taken by other parties in their submissions, Enbridge will provide any responding submissions at or before the November 24th motion hearing on the jurisdictional question.

BACKGROUND AND CONTEXT

In the Application, Enbridge requested:

Approval of a Y-factor and regulatory framework for the offering and provision of district energy and alternative or renewable energy activities and services by the regulated utility in future years.²

Enbridge's prefiled evidence introduced this request in the following manner:

In order to assist in meeting the Ontario Government's clean energy objectives, and to meet the evolving energy needs of its customers, the Company plans to pursue initiatives and own and operate a variety of assets capable of generating and distributing alternative forms of energy to end-use customers in Enbridge's franchise areas. Through these initiatives, Enbridge would design, market, invest in, own and operate assets that will primarily focus on providing space heating and cooling and domestic hot water for its customers. Some examples of the alternate and renewable energy solutions that Enbridge plans to offer include solar, ground source heat pumps, distributed and District Energy systems, micro combined heat and power ("CHP") and heat from waste technologies, geo-thermal systems and stationary fuel cell facilities (referred to in this evidence as "Green Energy Initiatives").³

Enbridge's Green Energy Initiatives are activities that the Company is now expressly permitted to conduct as a result of recent Directives issued by the Minister of Energy and Infrastructure. These Minister's Directives, issued on August 10, 2006 and September 8, 2009, direct the OEB to dispense with Enbridge's future compliance with

² Ex. A-2-1, para. 13.

³ Ex. B-2-4, para. 1.

the restrictions on its business activities in respect of specified activities related to renewable energy sources and energy conservation.

The Green Energy Initiatives proposed by Enbridge cover the full spectrum of activities that are now permitted under the recent Minister's Directives, which are the following:

1. Services that would assist the Government of Ontario in achieving its goals in energy conservation, including services related to:
 - a. the promotion of electricity conservation, natural gas conservation and the efficient use of electricity;
 - b. electricity load management; and
 - c. the promotion of cleaner energy sources, including alternative energy sources and renewable energy sources.⁴
2. Project development and the provision of services related to the local distribution of steam, hot and cold water in a Markham District Energy Initiative and the generation of electricity by means of large stationary fuel cells integrated with energy recovery from natural gas transmission and distribution pipelines.⁵
3. The ownership and operation of:
 - a. renewable energy electricity generation facilities each of which does not exceed 10 megawatts;
 - b. generation facilities (including stationary fuel cell facilities) that use technology that produces power and thermal energy from a single source which meet the criteria prescribed by regulation;
 - c. energy storage facilities (including stationary fuel cell facilities) which meet criteria prescribed by regulation;
 - d. assets required in respect of the provision of services by Enbridge that would assist the Government of Ontario in achieving its goals in energy conservation, including assets related to solar-thermal water and ground-source heat pumps.⁶

Procedural Order No. 1 notes that the September 2009 Minister's Directive is not intended to direct the manner in which the OEB determines rates for Enbridge's sale, distribution and storage of natural gas. The Board's Procedural Order then sets out the

⁴ August 10, 2006 Minister's Directive.

⁵ August 10, 2006 Minister's Directive.

⁶ September 8, 2009 Minister's Directive.

“jurisdictional question” about “electricity generation facility projects” that is set out above.

As can be seen from the list of activities permitted by the Minister’s Directives, the scope of the permitted activities is much broader than “electricity generation facility projects”. That is also seen in the types of potential projects that Enbridge highlighted in the first paragraph of its Green Energy Initiative evidence.

This leads Enbridge to assume that the Board acknowledges that it does have the jurisdiction to deal with those Green Energy Initiatives that would not be categorized as “electricity generation facility projects” and their associated costs, assets and revenues under the Board’s ratemaking authority. For example, Enbridge’s evidence refers to solar, ground source heat pumps, District Energy systems, heat from waste technologies and geo-thermal systems. Each of these activities is consistent with and is a direct result of the Minister’s Directives, but none of them would be considered to be “electricity generation facility projects”.

Enbridge’s submissions on Board jurisdiction address the particular issue raised in this “preliminary motion”, which relates to “electricity generation facility projects”. The Company notes, though, that most of its submissions apply equally to the Board’s jurisdiction to consider Enbridge’s other Green Energy Initiatives in the ratemaking process.

The “electricity generation facility projects” that relate to Enbridge cover a spectrum of activities, including both current utility activities and new activities to be undertaken in response to the Minister’s Directives. This includes the following (non-exhaustive) list of activities:

1. *Emergency backup generation*: gas distribution utilities depend, to some extent, on electricity supply to conduct their operations, whether it is storage injection and withdrawal, transmission and distribution or back office functions. To ensure security of supply and operations in the event of electrical outages, gas distributors have backup generation facilities
2. *Stationary fuel cell facilities*, including large stationary fuel cells that can be integrated with waste energy recovery from natural gas transmission and distribution pipelines and provide needed energy for operation of the transmission and distribution pipelines
3. *Generation facilities that use technology that produces power and thermal energy from a single source*
4. *Renewable generation facilities* of up to 10 megawatts.

Enbridge submits that any determination of this preliminary motion must take into account this spectrum of electricity generation activities.

As a final preliminary matter, the Company wishes to highlight that it is not asking the Board to set or approve rates or charges for the activities that comprise its Green Energy Initiatives. It is, however, requesting that the Green Energy Initiative assets be included in the regulated utility and would be a component of total rate base for ratemaking purposes.⁷ Operating costs and revenues associated with these projects would be included when calculating the utility revenue requirement and any deficiency/sufficiency for ratemaking purposes.

Enbridge is therefore not asserting that section 36(2) of the OEB Act confers jurisdiction to set rates for electricity generation activities. On the other hand, for the reasons set out in the balance of these submissions, Enbridge asserts that the Board does have jurisdiction to include the associated costs, assets and revenues of electricity generation facility projects such as those now permitted under the recent Minister's Directives as part of Enbridge's regulated operations.

BOARD MANDATE

(i) Broad Statutory Powers

The powers of the Board under the OEB Act are very broad.⁸ Subsection 36(2) of the statute says that the Board may make orders approving or fixing "just and reasonable" rates for the sale, transmission, distribution and storage of gas. Subsection 36(3) says that in approving or fixing just and reasonable rates, the Board may adopt "any method or technique" that it deems appropriate.

The wide scope of the jurisdiction conferred on the Board by these words was recently confirmed by the Ontario Divisional Court. As the Board is aware, an appeal to the Divisional Court was taken in respect of the decision by the Board that it did not have jurisdiction to implement the rate affordability program proposed by the Low Income Energy Network (LIEN). The Divisional Court recognized the traditional "cost of service" approach to the determination of rates, but emphasized that the Board is authorized to employ "any method or technique that it considers appropriate" to fix "just and reasonable rates".⁹ The Court went on to say that, although cost of service is a "starting point", the Board must determine what are just and reasonable rates within the context of the objectives set forth in section 2 of the OEB Act.¹⁰

⁷ Ex. B-2-4, para. 16.

⁸ In a very recent decision, the Supreme Court of Canada discussed at some length the breadth of similar powers given to the Canadian Radio-television and Telecommunications Commission by the *Telecommunications Act*, S.C. 1993, c. 38: see *Bell Canada v. Bell Aliant Regional Communications*, 2009 SCC 40, at paras.30-48.

⁹ *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 CanLII 23487 (ON S.C.D.C.), para. 53 (the LIEN case).

¹⁰ The LIEN case, at para. 55.

There are seven objectives set out in section 2 of the OEB Act that apply when the Board carries out its responsibilities in relation to gas. The fifth of these objectives is as follows:

To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

It is important to note the use of the word “energy” in this statutory objective. The wording of the objective does not refer to “gas” conservation or “gas” efficiency; it refers to “energy” in both contexts, namely, conservation and efficiency.¹¹ In order for the Board to give due consideration to the most efficient utilization of energy resources, as well as to conservation of energy, it must be the case that the Board has jurisdiction to consider, in a gas utility proceeding, initiatives such as those proposed by Enbridge.

The objectives set out in section 1 of the OEB Act apply when the Board carries out its responsibilities in relation to electricity. They too shed light on the general mandate of the Board. The fifth of these objectives is, in part, as follows:

To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario

Obviously, this statutory objective is a clear statement of the Legislature's intention that the Board should look to promote the use and generation of electricity from renewable energy sources when the Board carries out its responsibilities in relation to electricity. The significance of this objective has been reinforced by recent initiatives of the provincial government, including the enactment of the *Green Energy and Green Economy Act, 2009*¹² (GEGEA) and the issuance of the September 2009 Directive regarding the activities of gas distributors. That being so, it can hardly be the expectation of the Legislature that, by reason of some perceived jurisdictional impediment, the Board will shut its mind to this important objective when it carries out its responsibilities in relation to gas.

(ii) Statutory Powers Expanded by Necessary Implication

The recent decision of the Supreme Court of Canada in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*¹³ addressed the approach to statutory interpretation that is to be taken in determining the jurisdiction of a regulatory tribunal. The Court

¹¹ The use of the word “energy” in this statutory objective can be contrasted with the wording of the corresponding objective in section 1, which refers more specifically to “electricity conservation and demand management”.

¹² S.O. 2009, Chapter 12, Schedule A

¹³ *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140 (S.C.C.)

made clear that a tribunal's jurisdiction is not limited to the powers explicitly conferred by the governing legislation. Rather, as stated by the Supreme Court, "the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime".¹⁴ This is the doctrine of jurisdiction by necessary implication.

As set out in these submissions, the Board is given jurisdiction to regulate Enbridge's Green Energy Initiatives by the express statutory powers in the OEB Act. Nevertheless, it should not be overlooked that, when appropriate according to the doctrine of jurisdiction by necessary implication, the Board's mandate will extend beyond the explicit powers. Further submissions with respect to necessary implication are made below.

(iii) Broad Interpretation of Express Statutory Powers

The Board's express statutory powers have been interpreted broadly, both by the Courts and by the Board itself. A recent example of the expansive interpretation given to the Board's statutory mandate is the decision of the Divisional Court in *Natural Resource Gas Limited v. Ontario Energy Board*.¹⁵ There, the Court said:

The Board's mandate to fix just and reasonable rates under section 36(3) of the *Ontario Energy Board Act, 1998* is unconditioned by directed criteria and is broad; the Board is expressly allowed to adopt any method that it considers appropriate¹⁶

In the LIEN case referred to previously, the majority of the Board took an approach to jurisdiction that, in light of the outcome of the appeal to the Divisional Court, ultimately proved to be too narrow. But even in taking that relatively narrow approach to jurisdiction, here is what the majority of the Board had to say:

The Board was created and made operational through legislation. The Board has a responsibility to operate to the full depth and breadth of the authority granted to it in its governing statute. The limits or boundaries of its authority need not, nor should, be a bright line. This would require near unachievable foresight by the legislators to consider all of the possible eventualities. The objectives provided in the

¹⁴ ATCO case, para. 51.

¹⁵ *Natural Resource Gas Ltd. v. Ontario Energy Board*, 2005 CanLII 12864 (ON S.C.D.C.), upheld on appeal to the Ontario Court of Appeal, 2006 CanLII 24440 (ON C.A.).

¹⁶ *Natural Resource Gas* case, at para. 13. In the LIEN case, at para. 35, the Divisional Court said that this broad mandate has been "emphasized" by the Court.

[OEB] Act are intended to be broad enough to allow the Board to operate with discretion in an ever changing environment and focused enough to ensure that the Board operates within the government's policy framework. Determinations on jurisdiction should be guided solely by the question of what can reasonably be considered to have been intended by the legislators in the scoping and crafting of the Board's mandate. There should be no predestining bias based on a desire by the regulator to include or exclude any particular issue.¹⁷

These comments by the Board are so directly applicable to Enbridge's Green Energy Initiatives that they virtually could have been written for this case. A number of these comments stand out as particularly telling when put into the context of the issue now before the Board: these include the statement about the Board's responsibility to operate to the full depth and breadth of its legislative mandate; the reference to the manner in which the Board takes direction from the statutory objectives,¹⁸ the recognition that the statute allows scope for the Board to operate in "an ever changing environment" and the importance attached to "the government's policy framework". Enbridge submits that the comments of the majority in the LIEN case, on their own, put to rest any doubts about the Board's jurisdiction to address Enbridge's Green Energy Initiatives.¹⁹

(iv) Board's Authority Linked to Government Policy

The majority Board decision in the LIEN case brought out an important aspect of the Board's mandate when it referred to the statutory intention "to ensure that the Board operates within the government's policy framework". The Board's jurisdiction is inextricably linked to government or public policy and this linkage arises in a number of ways.

First, as already stated above, the objectives set out in the OEB Act explicitly make the connection between the role of the Board and government policy. In carrying out its responsibilities with respect to electricity, the Board is to be guided by the objective of promoting the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the government of Ontario. In carrying out its responsibilities with respect to gas, the Board is to be guided by the objective of promoting energy conservation and energy efficiency in accordance with the policies of the government of Ontario.

¹⁷ EB-2006-0034, Decision – Rate Affordability Programs, April 26, 2007, at p. 5.

¹⁸ As for the direction provided to the Board by the objectives, in the *Bell Canada* case referred to above, the Supreme Court of Canada affirmed the CRTC's treatment of statutory objectives as "guiding principles in the exercise of its rate-setting authority": see para. 74 of the Supreme Court decision.

¹⁹ The majority decision of the Board was overruled by the Divisional Court, but, in taking a wider view of jurisdiction than the Board, the Court said nothing to cast any doubt on the foregoing passage from the decision of the majority.

Second, the Minister of Energy and Infrastructure is empowered to issue directives to the Board under sections 27.1, 27.2, 27.3, 28, 28.1, 28.2, 28.3, 28.4, 28.5 and 28.6 of the OEB Act. The September 2009 Directive with regard to activities of gas distributors was issued under section 27.1 of the OEB Act.²⁰ Section 27.1 provides as follows:

The Minister may issue, and the Board shall implement, directives that have been approved by the Lieutenant Governor in Council that require the Board to take steps specified in the directives to promote energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources.

This provision of the OEB Act repeatedly uses the word “energy” and its scope is in no way limited to one or the other of gas or electricity. It plainly contemplates that the Minister may issue a directive to “require” the Board to take steps as specified in the directive. It is aimed at driving some action from the Board, not in relation to either gas or electricity taken in isolation, but in relation to broad “energy” matters, such as energy efficiency, cleaner energy sources and renewable energy sources. Section 27.1 would not have given the Minister the power to issue directives to the Board with respect to cleaner energy sources and renewable energy sources if it was the statutory intention that the Board’s jurisdiction would not extend to these energy sources. Similarly, the statute would not have given the Minister the power to issue directives to the Board with respect to broad “energy” matters if it was the statutory intention that the Board’s jurisdiction would be compartmentalized into gas and electricity or generation and distribution.

The third linkage between the Board’s mandate and government or public policy arises from the Board’s statutory power to fix or approve just and reasonable rates. The decision of the Divisional Court in the LIEN case repeated the following statement previously made by the Court about the Board’s rate-making role:

...[T]he legislation involves economic regulation of energy resources, including setting prices paid for energy which are fair and reasonable to the distributors and the suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy.²¹

²⁰ The earlier August 2006 Directive was also issued under section 27.1.

²¹ *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 CanLII 23487 (ON S.C.D.C.), para. 53, at para. 35.

Thus, while the setting of just and reasonable rates certainly involves a balancing of ratepayer and shareholder interests, it also involves considerations of “broad public policy”.

GOVERNMENT POLICY

Given the strong connection between the Board’s mandate and government or public policy, the jurisdictional issue raised by the Board cannot be addressed without consideration of the policies of the Ontario government. It bears note that the government’s policies reflect its view of what is in the best of interest of all Ontarians, of whom gas ratepayers comprise a substantial number. There are two sources of government policy that are of particular relevance to the jurisdictional issue, namely, the GEGEA and the Minister’s Directives. These are addressed under the headings that follow, as are more general sources of guidance regarding Ontario government policy.

(i) GEGEA

The preamble to the GEGEA provides a very clear indication of the Ontario government’s policies in respect of green energy. The specific wording of the preamble is as follows:

The Government of Ontario is committed to fostering the growth of renewable energy projects, which use cleaner sources of energy, and to removing barriers to and promoting opportunities for renewable energy projects and to promoting a green economy.

The Government of Ontario is committed to ensuring that the Government of Ontario and the broader public sector, including government-funded institutions, conserve energy and use energy efficiently in conducting their affairs.

The Government of Ontario is committed to promoting and expanding energy conservation by all Ontarians and to encouraging all Ontarians to use energy efficiently.

The policy objectives that emerge with absolute clarity from these words include the following:

- ~ Fostering renewable energy and cleaner energy sources;
- ~ Removing barriers and promoting opportunities;
- ~ Promoting a green economy; and
- ~ Promoting energy conservation and energy efficiency.

Suffice it to say that each and every one of these policy objectives is relevant to the Board's consideration of Enbridge's Green Energy Initiatives. Not one of the policy objectives supports the notion that the government's policies are compatible with a compartmentalized approach to electricity and gas matters.

(ii) Minister's Directives

According to the Order in Council that accompanied it, the impetus for the August 2006 Directive was the existence of "opportunities" for Enbridge and Union Gas Limited to carry on business activities that could assist the government of Ontario in achieving its goals in energy conservation. The effect of the Directive is to authorize Enbridge to provide services that advance these "energy" conservation goals, including services related to matters that include electricity conservation, the efficient use of electricity and electricity load management. This Directive exemplifies the integrated nature of the Ontario government's energy policy. The Directive was issued in respect of the business activities of gas distributors; it was aimed at advancement of the government's goals with respect to "energy" conservation, and it specifically authorized activities in relation to electricity matters, such as conservation and efficiency.

The September 2009 Directive followed upon the enactment of the GEGEA. It refers to the GEGEA as legislation by which the government of Ontario embarked upon an "historic series of initiatives" related to promoting renewable energy and enhancing conservation. The reference to an historic series of initiatives reveals the significance that attaches to the policy underpinning the GEGEA. It also reveals that the GEGEA, as groundbreaking as it may have been, is just the beginning of the steps that need to be taken to fulfill government policy. Another step was the Directive itself, which authorized Enbridge to engage in the business activities that comprise the Green Energy Initiatives. Much like the August 2006 Directive, this Directive reveals that government policy is based on an integrated approach to "energy" and that the government considers the gas distributors to be an important source of assistance in fulfilling government energy policy.

(iii) Government Policy is "Energy" Policy

Other sources of government policy confirm that the government's energy policy is an integrated approach and not one that compartmentalizes electricity and gas matters. An example is section 8 of the *Ministry of Energy and Infrastructure Act*²², which sets out the objectives of the Ministry. Section 8 includes the following provisions:

The Minister or the Deputy Minister, subject to the direction and control of the Minister, shall,

- (a) review energy and infrastructure matters on a continuing basis with regard to both short-term and long-term goals in

²² R.S.O. 1990, Chapter M. 23.

relation to the energy and infrastructure needs of the Province of Ontario;

...

(d) make recommendations for the effective co-ordination of all energy matters within the Government of Ontario with a view to ensuring the consistent application of policy in every area of concern regarding energy ...

...

(h) do any one or more of encouraging, promoting, developing or participating in such activities, projects and programs as the Minister considers appropriate,

(i) to increase the availability of energy in Ontario,

(ii) to increase the availability of renewable energy in Ontario and to increase the use of renewable energy sources in Ontario,

(iii) to stimulate the search for and development of sources of energy, including those that utilize waste and those that are renewable, as alternatives to the sources of energy available for use in Ontario,

(iv) to stimulate energy conservation, through the establishment of programs and policies within the Ministry or such agencies as may be prescribed, load management and the use of renewable energy sources throughout Ontario,

(v) to encourage prudence in the use of energy in Ontario... .

Like the GEGEA and the September 2009 Directive, these objectives indicate that government policy is based on an integrated approach to “energy” and that a special focus of the government’s policy in this area is increased use of renewable energy sources in the Province.

JURISDICTIONAL ANALYSIS

(i) Effect of Government Policy on Board Jurisdiction

Subject to the doctrine of necessary implication that is discussed elsewhere in this argument, the jurisdiction of the Board is defined by the governing legislation. The governing legislation in this case is the OEB Act, which, through several different routes,

creates a strong link between government policy and Board jurisdiction. At the forefront of the Ontario government's energy policy are initiatives that generally are thought of as being "green energy" matters; these include in particular, energy conservation, energy efficiency and use of renewable energy sources.

Government policy takes an integrated approach to "energy" and it is apparent that this integrated approach is particularly important insofar as green energy matters are concerned. In other words, initiatives to advance conservation, efficiency and increased use of renewable energy sources are most effective if applied on an integrated basis to the energy sector. This is recognized generally in the Province's energy policy and more specifically in the GEGEA and the Directives.

Enbridge submits that it is the expectation of the OEB Act that the Board will be guided by the government's integrated "energy" policy and, accordingly, it must have been the intention of the Legislature that the Board itself would have jurisdiction to take an integrated approach. For example, it could not have been intended that the Board would be unable to give effect to government policy with respect to renewable energy sources because of a lack of jurisdiction to deal with renewable electricity generation. It could not have been intended that the Board's jurisdiction would be compartmentalized, such that generation cannot even be looked at in a distribution case or that electricity cannot even be looked at in a gas case. Indeed, the Board's own practice is to the contrary.

The Natural Gas Electricity Interface Review is an example of a proceeding where the Board took an integrated approach that did not compartmentalize, from a jurisdictional perspective, either generation and distribution or electricity and gas. The same integrated approach is seen in Demand Side Management (DSM) programs, where energy savings is the goal even if those energy savings are not exclusively in gas or electricity use. For example, certain of Enbridge's Board-approved DSM programs aim to promote conservation in gas, electricity and water usage.²³

(ii) Board Jurisdiction is Different from Board Policy

While the governing legislation creates a strong link between government policy and Board jurisdiction, there is no such link between Board policy and Board jurisdiction. Thus, for the purposes of this motion, it is critical to differentiate between Board jurisdiction and Board policy. The extent to which a particular activity or proposal either follows or diverges from Board policy has no bearing on the Board's jurisdiction to consider the activity or proposal.

The distinction between Board policy and Board jurisdiction emerges clearly from the decision that resulted from the generic proceeding to address DSM activities by gas

²³ For example, the Energy Savings Kit for Residential New Construction, which is part of Enbridge's approved 2010 DSM Plan (see EB-2009-0154, Ex. B, Tab 2. Sched. 1, p. 3). In the electricity context, the Board has noted that "certain CDM programs may have other benefits, including savings of other energy sources and/or water savings" (see EB-2008-0037: Guidelines for Electricity Distributor Conservation and Demand Management, at p. 8).

utilities. In the DSM decision, the Board discussed electricity conservation activities that are included in the DSM programs of gas distributors and, in this context, the Board considered the extent to which the gas utilities may undertake “stand-alone” electricity Conservation and Demand Management (CDM). The Board’s comment on this issue was as follows:

This would alter the regulatory construct of a gas distribution utility which would necessitate a review under the Undertakings and the Board’s regulatory policies.²⁴

This statement by the Board raises no issue whatsoever about the *jurisdiction* of the Board to consider stand-alone electricity CDM activities within gas utilities (subject to the applicable wording of the Undertakings). In fact, it does just the opposite: it makes clear that the Board *must* have jurisdiction to consider such matters. The Board can only review its “regulatory policies” in areas that are within its jurisdiction, so the reference to a review of regulatory policies is the clearest possible indication that the issue is one of Board policy rather than jurisdiction and that these matters must be within the Board’s jurisdiction.

(iii) “Ever Changing Environment”

As discussed above, the Board majority in the LIEN case recognized that the objectives in the OEB Act allow the Board to operate with discretion in an “ever changing environment”. The fact is that a momentous shift has been occurring in the energy environment (hence, the reference to the GEGEA as one of an historic series of initiatives). The shift in policy of the Ontario government towards green energy objectives reflects a change in the world-wide energy environment as green energy has become an area of high priority to governments across the country and around the world. There are a number of reasons for this change in the energy environment, but the primary driver is international concern about climate change. The reasoning of the Board majority in the LIEN case highlights that the OEB Act allows the Board ample flexibility to adapt to this new energy environment. By no means does it strain credulity to suggest that, in the current energy environment, the OEB Act gives the Board jurisdiction to consider the appropriate role of one of North America’s largest gas distributors in Green Energy Initiatives.²⁵ To the contrary, the Company contends that it would have been a monumental legislative oversight if the government’s milestone energy policy objectives could not be acted upon by the electric and gas utilities which

²⁴ EB-2006-0021 Decision with Reasons, at p.51.

²⁵ In a recent speech, the Board Chair made the following comments about the Board’s role in green energy matters: “...Each of our initiatives is intended to facilitate the implementation of projects that will further the government’s policy goals, while at the same time promoting economically efficient outcomes to ensure that ratepayer interests are protected. We are using our expertise and experience to put forward approaches that we believe are well-suited to the green energy and green economy movement.” – speech to Osgoode Hall Professional Development Programme, June 15, 2009, at p. 6: http://www.oeb.gov.on.ca/OEB/Documents/Speeches/speech_osgoodehall_wetston_20090615.pdf

collectively are the largest and, respectfully, most influential participants in Ontario's energy industry.

Further, climate change is an issue that cuts across all aspects of the energy industry and the response to climate change is and must be a comprehensive one, rather than an approach that looks at different parts of the energy industry in isolation. This, of course, is apparent from the green energy policy of the Ontario government. Thus, the new energy environment requires an integrated approach to energy issues and, in particular to green energy initiatives, such as conservation, efficiency and use of renewable resources. As discussed elsewhere in this argument, an integrated approach to energy issues is not something that is new to the Board – but in the current environment, it has taken on a heightened importance. Enbridge submits with respect that the Board cannot properly exercise its jurisdiction in the new energy environment if it limits its deliberations such that generation and distribution, or electricity and gas, are considered in isolation from each other.

The Board has many years of experience in mandating socially beneficial activities by the companies that it regulates. When the energy environment and public policy began to move towards an increased emphasis on conservation, the Board acted as a catalyst and used its powers as regulator of the utilities to foster the development of DSM programs. Now, the Board is in a position to use the same powers to give support to a new direction taken by the energy environment and public policy, namely, the advancement of green energy initiatives. The Board's experience in using its regulatory powers to foster DSM programs by the utilities has shown the significant social and cost effectiveness that can be achieved through the involvement of the utilities in green energy activities.

(iv) Narrow Focus on an Activity is Inappropriate

In its pre-filed evidence Enbridge referred to a number of Green Energy Initiatives that would advance the Province of Ontario's energy goals. These include solar energy systems, distributed and district energy systems, "micro" combined heat and power and geo-thermal systems. Out of the group of Green Energy Initiatives permitted by the two Directives, the issues raised by the Board focus on electricity generation. With respect, Enbridge submits that the jurisdictional analysis should not focus on any particular proposed activity, but should take into account the objective, outcome or effect of the activity.

For example, in the context of DSM, the Board has allowed within gas utility operations various programs that involve provision of low-flow showerheads and aerators to homeowners and efficient spray rinse nozzles to commercial kitchens.²⁶ The Board has also allowed within gas utility operations programs that offer compact fluorescent light

²⁶ For example, the Residential Water Conservation TAPS program, the Multi-residential Shower/Aerators program and the Spray N Save program, which are part of Enbridge's approved 2010 DSM Plan (see EB-2009-0154, Ex. B, Tab 2. Sched. 1, pp. 7, 41 and 45.

bulbs to homeowners and programs that enhance ventilation in commercial spaces.²⁷ In the context of the ancillary businesses formerly operated by Enbridge, the Board allowed merchandise sales and a protection program for heating equipment within gas utility operations. The Board did not set the prices to be charged by the ancillary businesses, but it included the results of the businesses in utility operations. Similarly, Enbridge is not proposing that the Board fix or approve charges for the Green Energy Initiatives, but that these initiatives be included in utility operations.

If one were to focus (inappropriately) on the nature of the particular activity, one might question the Board's jurisdiction to allow provision of showerheads or fluorescent light bulbs within gas utility operations. Similarly, one might question the Board's jurisdiction to allow merchandise sales or an equipment protection program within gas utility operations. However, the jurisdictional analysis requires a broader perspective. It is the objective, effect or outcome of the particular activity that provides the basis for the Board's jurisdiction.

The same broader perspective must be applied to the Board's question about jurisdiction with respect to electricity generation. To the extent that any electricity generation is at issue in this proceeding, it is in the context of Enbridge's Green Energy Initiatives. The objective, effect or outcome of these Green Energy Initiatives is to advance the government of Ontario's green energy policy in accordance with the Directives. The jurisdiction of the Board to consider initiatives that are intended to advance government policy arises from the express wording of the OEB Act.

(v) "Energy" Regulation by Necessary Implication

For the reasons already given, the Board's jurisdiction arises from the powers explicitly granted to the Board by the governing legislation. Even if that were not so, the Board would in any event have jurisdiction by reason of the doctrine of necessary implication. According to this doctrine, the Board has, in addition to its express mandate, all powers that are practically necessary for the accomplishment of the object intended to be secured by the statutory regime. The object intended to be secured by the statutory regime is the regulation of energy matters: after all the Board is the Ontario "Energy" Board; it is not the Ontario "Electricity" Board or the Ontario "Gas" Board. The statute guides the Board to regulate in accordance with the public interest and public policy. In order for this mandate to be fulfilled, it is practically necessary that the Board have jurisdiction to regulate energy in an integrated fashion, rather than looking at generation and distribution, or electricity and gas, in isolation from each other.

²⁷ For example, the Energy Savings Kit for Residential New Construction and the Commercial Kitchen Ventilation and Warehouse programs, which are part of Enbridge's approved 2010 DSM Plan (see EB-2009-0154, Ex. B, Tab 2. Sched. 1, pp. 3, 32 and 35).

CONCLUSION

There can be no doubt about the marked shift in the energy environment, in societal views and in provincial government policy towards the advancement of green energy goals. There can be no doubt that the Board has the power, if not the responsibility, to consider the appropriate role of Ontario's electricity and natural gas distributors in the advancement of green energy goals. Electricity generation, and, in particular renewable electricity generation, is at the centre of green energy goals, both in provincial government policy and in the wider energy environment. The Board's jurisdiction to consider the role of electricity and natural gas distributors in the advancement of green energy goals must include power to consider the part to be played by (renewable) electricity generation in green energy programs or activities. In answer to the Board's questions, Enbridge submits that the Board does have authority to allow electricity generation that is part of the Green Energy Initiatives (including associated costs, assets and revenues) within Enbridge's regulated operations.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4th DAY OF NOVEMBER
2009**



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