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November 18, 2009

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: EB-2009-0172

Enclosed with this letter is Union's submission on the "jurisdictional" question which is being filed in accordance with the Board's Procedural Order No. 1 in this matter. It is not Union's current intention to attend the oral hearing scheduled for November 24, 2009 or to make any oral submissions.

Yours very truly,

A handwritten signature in black ink, appearing to read "Michael A. Penny", with a stylized flourish at the end.

Michael A. Penny

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MAP/ed
Encl.

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 just and reasonable rates and other charges for the sale,
distribution, transmission and storage of gas commencing
January 1, 2010.

**WRITTEN ARGUMENT OF UNION GAS LIMITED ON THE
“JURISDICTIONAL QUESTION”**

PART I – FACTS

Overview

1. Enbridge Gas Distribution Inc. (“Enbridge”) filed an Application (as amended on September 14, 2009) with the Ontario Energy Board (“Board”) under section 36 of the *Ontario Energy Board Act, 1998* (the “Act”)¹, for an order approving or fixing rates for the distribution, transmission and storage of natural gas, effective January 1, 2010. As part of its submission, Enbridge sought approval of a Y-factor related to “Green Energy Initiatives”² it plans to undertake in 2010 and subsequent years.
2. The Board determined that a preliminary motion was necessary to determine whether the Green Energy Initiatives, 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 issue”).
3. The Board asked parties to address two questions in their arguments on the jurisdictional issue. These questions and the essence of the answers of Union Gas Limited (“Union”) are:
 - (1) Are the Green Energy Initiatives described in Enbridge’s Application (Ex. B, Tab 2, Sch. 4), their associated costs, assets and revenues properly part of the regulated operations of Enbridge and thus under the Board’s ratemaking

¹ S.O. c. 15, Sched. B, as amended.

² Enbridge’s Green Energy Initiatives are listed and described at Ex. B, Tab 2, Sch. 4 of its Application.

authority? In Union's submission the answer to this question must turn on whether the Green Energy Initiatives are related to the sale, distribution, transmission or storage of natural gas.

- (2) If not, does the Board have jurisdiction to deal with the Green Energy Initiatives, their associated costs, assets and revenues outside of the ratemaking process? In Union's submission, the answer to this question is "No."

Enbridge and Union Undertakings

4. Both Enbridge and Union gave Undertakings to the government (which took effect on March 31, 1999). In particular, each company, in section 2.1 of its respective Undertakings, agreed not to carry on any business activity other than the transmission, distribution or storage of gas (except through an affiliate or affiliates), without the prior approval of the Board.

The Minister's Directive, September 8, 2009

5. Under section 27.1 of the Act, on September 8, 2009 the Minister directed the Board to dispense with each company's compliance with section 2.1 of its respective Undertakings in respect of ownership and operation of certain renewable energy electricity generation facilities and other assets and facilities that would assist the Government in achieving its goals in energy conservation and replacement. The dispensation applies to the Green Energy Initiatives.

6. The final paragraph of the Directive stated:

This directive is not in any way intended to direct the manner in which the Ontario Energy Board determines, under the *Ontario Energy Board Act, 1998*, rates for the sale, transmission, distribution and storage of gas by Enbridge Gas Distribution Inc. and Union Gas Limited.

Enbridge's Proposed Green Energy Initiatives

7. In its filed evidence, Enbridge stated that it plans to "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... 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[.]"

8. With respect to Enbridge's electricity generation facility projects, Enbridge stated that it plans to undertake the following activities: emergency backup generation, stationary fuel cell facilities, certain generation facilities and renewable generation facilities.

PART II - ISSUES

9. As stated above, there are two issues on this preliminary motion:

- (1) Are the Green Energy Initiatives described in Enbridge's Application (Ex. B, Tab 2, Sch. 4), their associated costs, assets and revenues properly part of the regulated operations of Enbridge and thus under the Board's ratemaking authority?
- (2) If not, does the Board have jurisdiction to deal with the Green Energy Initiatives, their associated costs, assets and revenues outside of the ratemaking process?

PART III - ARGUMENT

10. The Board's rate making authority over natural gas distributors, transmitters and storage companies arises solely from section 36 of the Act. Subsection 36(2) provides:

The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.

11. It is only through the exercise of its rate making power that the Board has the authority to determine what forms part of utility revenue requirement and rate base.

12. In order for the Board to exercise rate making authority over the Green Energy Initiatives, therefore, (in the sense of including assets in rate base and operations and maintenance costs in revenue requirement), they must relate to the sale, transmission, distribution or storage of gas. Simple characterizations, such as "electricity generation," are not dispositive of the issue. Whether a given project can be said to "relate to" the sale, transmission, distribution or storage of gas must be determined on a case by case basis following a thorough review of the nature and purpose of the particular project.

13. Ministerial directives under section 27.1 of the Act are subordinate legislation and cannot alter the clear definition of the Board’s statutory jurisdiction under section 36. The September 8, 2009 Directive of the Minister specifically acknowledged this limitation when it noted:

This directive is not in any way intended to direct the manner in which The Ontario Energy Board determines, under the *Ontario Energy Board Act, 1998*, rates for the sale, transmission, distribution and storage of natural gas by Enbridge Gas Distribution Inc. and Union Gas Limited.

14. The “objects” under section 2 of the Act, in addition, do not confer jurisdiction. Rather, the Board’s “objects” merely inform the exercise of jurisdiction the Board otherwise has.

15. In Union’s submission, the operation of its former ancillary businesses, including the rental of water heaters and the financing of gas burning appliances, was related to the sale, transmission, distribution and storage of gas because these activities all related to the increased use of natural gas as an energy source. Similarly, Union’s DSM activities are related to the sale, transmission, distribution and storage of gas by promoting efficient use of the natural gas commodity. Any extension of such activities to electricity applications, such as fluorescent light-bulbs, is purely incidental to the gas-related initiatives which make up the core of Union’s DSM plans.

PART IV - CONCLUSION

16. In Union’s submission, therefore, in order for the Green Energy Initiatives to be properly part of Enbridge’s regulated operations and thus be under the Board’s rate making authority, they must relate to the sale, transmission, distribution or storage of gas.

17. If the Green Energy Initiatives do not relate to the sale, transmission, distribution or storage of gas, the Board does not have jurisdiction to deal with the Green Energy Initiatives (and their associated costs, assets and revenues) outside of the rate making process.

All of which is respectfully submitted

A handwritten signature in black ink, appearing to read 'Michael A. Penny', written over a horizontal line.

Michael A. Penny
Torys LLP

Of Counsel to Union Gas Limited