EB-2009-0172

IN THE MATTER of the *Ontario Energy Board Act 1998,* S.O. 1998, c.15, Sch. B;

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.

SUBMISSIONS OF THE

SCHOOL ENERGY COALITION

ON THE JURISDICTION ISSUES

1. On October 23, 2009, the Board, by Procedural Order #1 in this proceeding, asked two jurisdictional questions relating to proposed renewable energy initiatives by Enbridge. These questions constitute a threshold issue to dealing with the Application by Enbridge for 2010 rates:

(a) 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?

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

2. School Energy Coalition has had an opportunity to review the thorough and thoughtful submissions of Board Staff, filed on November 11, 2009. In our view, those Staff Submissions demonstrate conclusively that the Board does not have jurisdiction to deal with proposed activities of Enbridge that do not involve the sale, distribution, transmission or storage of natural gas. On this fundamental point, our comments below are merely supplementary to the Staff Submissions, which we support.

3. We will also, below, comment briefly on two related issues, the first being the second of the Board's questions in the Procedural Order, and the second raised by Enbridge in its Supplementary Submissions dated November 13, 2009.

4. In our submission, if the Board did have jurisdiction to regulate these activities, which we believe is not the case, the issue of whether this is properly considered a Y factor remains to be determined. We have not commented on that issue in these submissions, for two reasons. First, it is not included in the issues put to the parties in the Procedural Order. Second, on our analysis the issue never arises, because the Board lacks jurisdiction to consider these activities in the first place.

The Board's Jurisdiction

5. In our submission, the Board's jurisdiction related to Enbridge's operations starts and ends with Section 36 of the Act. Enbridge in its submissions appears to be influenced by statements of government policy, and actions by the Minister, including the issuance of directives. None of that matters in the context of legal jurisdiction. Only the Legislature can confer jurisdiction. No announcements of government policy, no directives or other actions by the Minister, nor any other such activities have the effect of conferring jurisdiction. The Board is a creature of statute, and everything it has the right and responsibility to do is at all times based on that that statute (or, sometimes, statutes).

6. It appears to be common ground amongst all parties that section 36 of the Act, is, as Union Gas correctly points out in their submissions, solely concerned with setting rates for the sale, transmission, distribution and storage of natural gas. For the Board to have the jurisdiction to regulate other aspects of Enbridge's operations, one of the following would therefore have to be true:

(a) Some other provision of the Ontario Energy Board Act would have to confer that jurisdiction on the Board. The Applicant has proposed that the objects in Sections 1 and 2 achieve that result. As we note below, that is not the case.

(b) Some other Act of the Legislature would have to confer that jurisdiction on the Board. No Act has been identified that does so.

(c) Either the Ontario Energy Board Act, or some other Act, would have to delegate to the Minister or some other person an express power to interpret, define, or expand the jurisdiction of the Board. No such provision exists, and even if it did, there would be considerable question whether certain components of that (for example, the ability to expand jurisdiction) are even allowed.

(d) The courts must have interpreted the section 36 jurisdiction of the Board in an expansive and legally compelling way, such that the proposed activities are brought within that expansive definition. As we note in more detail below, the opposite is true.

(e) The inclusion of the proposed activities must be an incidental, collateral, or similar component of the primary activities of the regulated entity, such that the Board cannot regulate the primary activities as a practical matter without regulating the proposed activities as well.

7. Most of these possibilities are answered convincingly in the Staff Submissions. We have supplementary comments on a couple of them.

8. The Act does not purport to expand the jurisdiction of the Board beyond natural gas rate-setting. The objects, which Enbridge believes constitute such an expansion, in fact by their plain words operate only <u>within</u> the jurisdiction otherwise conferred on the Board by the Act.

*"**1.** (1) The Board, **in carrying out its responsibilities under this or any other Act in relation to electricity**, shall be guided by the following objectives:*

1. To protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service.

2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.

3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

4. To facilitate the implementation of a smart grid in Ontario.

5. To promote the use and generation of electricity from renewable energy sources in a manner consistent with the policies of the Government of Ontario, including the timely expansion or reinforcement of transmission systems and distribution systems to accommodate the connection of renewable energy generation facilities. 2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1.

Facilitation of integrated power system plans

(2) In exercising its powers and performing its duties under this or any other Act in relation to electricity, the Board shall facilitate the implementation of all integrated power system plans approved under the Electricity Act, 1998. 2004, c. 23, Sched. B, s. 1.

***2.** The Board, **in carrying out its responsibilities under this or any other Act in relation to gas**, shall be guided by the following objectives:*

1. To facilitate competition in the sale of gas to users.

2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

3. To facilitate rational expansion of transmission and distribution systems.

4. To facilitate rational development and safe operation of gas storage.

> *5. 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.*
>
> *5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.*
>
> *6. To promote communication within the gas industry and the education of consumers. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4 (2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2; 2009, c. 12, Sched. D, s. 2." [emphasis added]*

9. On the plain reading of these words, the Legislature is saying to the Board "In the course of exercising the jurisdiction we have otherwise conferred on you, take the following goals into account." Thus the objects apply, and are operative, only within the Board's jurisdiction.

10. Section 36(3) of the Act is of no more assistance to the Applicant. It is true that section 36(3) gives the Board broad discretion in how to determine rates, but that broad discretion assumes that there is a service to be regulated. Section 36(3) does not confer on the Board either the right or the responsibility to determine *whether* a particular service should be regulated.

11. So what have the courts said about this? Have the courts taken the rate-setting jurisdiction and given it an expansive meaning, to go beyond what is normally thought of as the setting of just and reasonable rates?

12. Enbridge in its submissions referred to the LIEN decision.[1] In that case, the issue was whether the OEB had jurisdiction - in the context of a rate application by Enbridge - to implement a rate affordability assistance program for low income consumers. It was, at its root, a question of how to set rates. There was never any doubt that the question was about natural gas ratemaking. The program would arise directly out of, or be incidental to, to the Board's ratemaking powers: if implemented, it would amount to a redistribution of the gas distributor's revenue requirement from one group of consumers to another.

13. In fact, in the LIEN decision the Divisional Court explained the basis for the Board's jurisdiction to regulate rates:

> *"The majority opinion in the Board Decision correctly states that the Board's mandate for economic regulation is "rooted in the achievement of economic efficiencies, the establishment of fair returns for natural monopolies and the development of appropriate costs allocation methodologies".. However, that does not answer the question as to the full scope of the Board's jurisdiction in approving or fixing "just and reasonable rates" and adopting "any method or technique that it considers appropriate" in so doing.*

[1] Advocacy Centre for Tenants-Ontario v. Ontario Energy Board, 2008 CanLII 23487 (Ont. Div. Ct.).

> *[39] The Board's regulatory power is designed to act as a proxy in the public interest for competition in view of a natural gas utility's geographical natural monopoly.* ***Absent the intervention of the Board as a regulator in rate-setting, gas utilities (for the benefit of their shareholders) would be in a position to extract monopolistic rents from consumers, in particular, given a relatively inelastic demand curve for their commodity****. Clearly, a prime purpose of the Act and the Board is to balance the interests of consumers of natural gas with those of the natural gas suppliers.* ***The Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service."*** *[emphasis added]*

See also para. 49: "rate-setting is at the core of the Board's jurisdiction."

14. In the result, the Court found that the Board did have the jurisdiction to take into account the ability to pay in setting rates.[2] However, the Court positioned that finding within the context of the Board's overall statutory objective of regulating the rates charged by natural monopolies:

> *"As we have said, cost of service is the starting point building block in rate setting, to meet the fundamental concern of balancing the interests of all consumers with the interests of the natural monopoly utility.[3]"*

Forebearance

15. We note as well that even if one or more of the routes above were found to result in the Board having jurisdiction over the proposed electrical generation activities of Enbridge, that is not the end of the matter. Section 29 of the OEB Act specifically states that the Board should not exercise its power under the Act if the class of product or service is "subject to competition sufficient to protect the public interest."

16. Not only are renewable energy providers not able to exercise market power, the price they receive for their services has already been determined by government policy. The FIT program is itself a built-in "rate setting" scheme. There is therefore no basis upon which the Board could or should exercise jurisdiction over the costs or revenues of renewable energy providers. The fact that one of them happens to be owned by a regulated entity should not put it in a different position from similar developers in the province.

17. In the Natural Gas Electricity Interface Review ("NGEIR") proceeding, the Board discussed the legal test for forbearance under section 29 of the OEB Act.

> *"The concept of forbearance and light-handed regulation first surfaced in the late 1970s and early 1980s. In 1979, the Economic*

[2] LIEN, supra, at para. 61.
[3] LIEN, supra, at para. 58.

> *Council of Canada issued its interim report entitled Responsible Regulation and a final report two years later, entitled Reforming Regulation[21] with specific recommendations. The McDonald Commission in 1985 concluded that it would be appropriate to adopt "selective deregulation" in Canada. Regulators in Canada and the United States offered two related grounds for forbearance. The first was that markets were being redefined by new technology and, therefore,* ***competition rather than regulation could produce better outcomes in terms of the quantity and prices of goods and services, all of which would maximize social welfare.****"*[4] *[emphasis added]*

18. The Board went on to discuss the benefits of forbearance in promoting economic efficiency:

> *"It is important to remember that the public policy rationale for forbearance is not limited to the belief that competition provided adequate safeguards in workably competitive markets. The second ground for forbearance is based on concerns related to regulatory costs. Those costs are not limited to the financial burden on utilities and ultimately consumers. As the Federal Communications Commission noted, the costs include reducing the firm's ability to react rapidly to the changing market conditions, dampening incentives to innovate and wasting resources through the regulation of firms that have no market power.*[5]*"*

19. What Enbridge proposes, however, is for the Board to assume regulatory authority over a service - renewable energy development- that is not a monopoly and which does not need to be regulated. Indeed, none of the other renewable energy developers in the province are regulated in that fashion. Thus, interpreting the Act as including the regulation of competitive electricity generation activities by a gas distributor would directly contradict the main goals of the Act, i.e. the regulation of monopoly activities.

20. In our submission, these indisputable facts make clear that the Legislature could not have intended the Board to regulate the proposed activities and, in the alternative, if that intention was expressed, the Board would be under a statutory obligation to forebear from regulating those activities in any case.

Treatment of Unregulated Activities

21. Assuming that the proposed activities are not part of the regulated activities of the Applicant, but they are carried out in the regulated entity, what is the Board's responsibility? We have had an opportunity to review a draft of the submissions of CME on this point, and we agree with those submissions. The Board's role in respect of unregulated activities carried out in the

[4] NGEIR, at p. 23-24.
[5] NGEIR, supra, at p. 24-25.

utility is to determine correctly the amounts of unregulated revenues, expenses, assets and liabilities that have to be excluded in determining the regulated revenue requirement.

The Applicant's Supplementary Submissions

22. The Applicant has provided additional information in their November 13, 2009 submissions suggesting that some of the proposed activities will in fact be related to the sale, transmission, distribution and storage of natural gas.

23. Whether a particular activity is related to the Board's jurisdiction in that fundamental way is a mixed question of fact and law, to be determined on the evidence applicable to the specific situation. The Applicant's November 13th letter provides some general information on some proposed activities, but does not provide sufficient detail for us to express any opinion as to their relationship to the regulated activities of the Applicant.

24. For those activities in which Enbridge submits that they are in essence for the purpose of natural gas load-building, or in essence for the purpose of natural gas DSM, in our submission the Board is not at this time in a position to make a determination on jurisdiction. The Board first must hear evidence on those activities, to determine their relationship, if any, to the regulated activities. Then it can determine

(a) whether it has jurisdiction relative to those activities,

(b) if so, whether it should forebear to regulate those activities, and

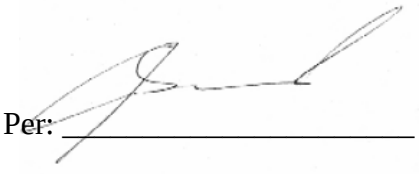
(c) if not, whether the relief requested by the Applicant – a Y factor – is in fact permitted or appropriate in the circumstances.

Conclusion

25. We hope our submissions are of assistance to the Board. It is our intention to be in attendance on November 24, 2009 to provide such further input as may be useful.

Respectfully submitted on behalf of the School Energy Coalition this 18th day of November, 2009.

SHIBLEY RIGHTON LLP



Per: _____

Jay Shepherd