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Ontario Energy Board
P.O. Box 2319
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2300 Yonge Street
Toronto Ontario
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Attention: Kirsten Walli,
Board Secretary

Dear Ms. Walli:

Re: EB-2012-0451/EB-2012-0433/EB-2013-0074

Please find attached the Submission on Union Motion of Building Owners and Managers Association - Greater Toronto (BOMA), in the above noted proceedings.

Two hard copies will be mailed to the Board.

Yours truly,

FOGLER, RUBINOFF LLP

A handwritten signature in dark ink, appearing to read "Tom Brett", written over the printed name.

Thomas Brett

TB/dd

Encls.

cc: All Parties

IN THE MATTER OF an application by Enbridge Gas Distribution Inc. for: an order or orders granting leave to construct a natural gas pipeline and ancillary facilities in the Town of Milton, City of Markham, Town of Richmond Hill, City of Brampton, City of Toronto, City of Vaughan and the Region of Halton, the Region of Peel and the Region of York; and an order or orders approving the methodology to establish a rate for transportation services for TransCanada Pipelines Limited;

AND IN THE MATTER OF an application by Union Gas Limited for: an Order or Orders for pre-approval of recovery of the cost consequences of all facilities associated with the development of the proposed Parkway West site; an Order or Orders granting leave to construct natural gas pipelines and ancillary facilities in the Town of Milton; an Order or Orders for preapproval of recovery of the cost consequences of all facilities associated with the development of the proposed Brantford-Kirkwall/Parkway D Compressor Station project; an Order or Orders for pre-approval of the cost consequences of two long term short haul transportation contracts; and an Order or Orders granting leave to construct natural gas pipelines and ancillary facilities in the City of Cambridge and City of Hamilton.

BOMA Submission on Union Motion

Introduction

"On, June 21, 2013 Union Gas Limited ("Union") and Gaz Metro Limited Partnership ("Gaz Metro") filed a motion with the Board requesting the following:

- 1) A declaration that the Board's Storage and Transportation Access Rule ("STAR") applies to Segment A of the Enbridge Gas Distribution Inc.'s ("Enbridge") GTA Project, as defined in Enbridge's application for leave to construct in EB-2012-0451.
- 2) An order declaring the Memorandum of Understanding between Enbridge and TransCanada dated January 28, 2013, as amended, fails to comply with STAR and is unenforceable and of no effect.

- 3) An order requiring that Enbridge hold an open season in respect of the new capacity on Segment A of the GTA Project, in accordance with STAR, as soon as commercially possible, and in any event no later than June 30, 2013.
- 4) An order staying the GTA Project until such time as Enbridge has initiated an open season pursuant to STAR in respect of the new capacity on Segment A of the GTA Project.
- 5) An order that this motion be heard and disposed of on an expedited basis.
- 6) Such further relief as the Board may deem just."

In Procedural Order No. 5, the Board stated that:

"The Board will hold an oral hearing to consider the portion of the motion seeking a declaration regarding the applicability of STAR to Segment A prior to hearing any other portions of the motion. The Board regards the applicability of STAR to Segment A as a "threshold" issue for the other components of the motion. The Board asks that parties be prepared to make submissions on the threshold issue, and also to make submissions on what process should follow the hearing of the threshold issue in the event of either outcome, i.e. how should the Board proceed if STAR is found to apply, and how should the Board proceed if STAR is found not to apply".

BOMA provides the following comments on the issues the Board wishes parties to address:

The Applicability of STAR to Segment A

BOMA agrees with Union, Enbridge, and Gaz Metro that Enbridge's proposed Bram West to Albion pipeline is, with respect to its capacity in excess of Enbridge's requirements, a transmission facility, and that Enbridge is a natural gas transmitter. Section 1.21 of the Board's Storage and Transportation Access Rule (the "Rule") states that:

"“natural gas transmitter” or “gas transmitter” or “transmitter” means a person who provides transportation services pursuant to the Act, other than gas distribution services as defined in the Gas Distribution Access Rule".

Segment A, if built, only uses a part of its capacity to provide distribution services. The balance is used to provide transmission services to TransCanada. Section 1.5 states that:

"This Rule applies to all natural gas transmitters, integrated utilities, and storage companies that are legally permitted to do business in Ontario".

Enbridge is both a natural gas transmitter and an integrated utility.

These definitions, read together, confirm that the STAR Rule applies to that part of Segment A that is used to transport gas for TCPL.

Section 2.12 of the Rule provides that:

"Firm transportation service that becomes available as a result of a facility expansion (i.e. new capacity) shall be offered through an open season. Existing capacity that is available or becomes available for long-term firm transportation services shall be offered through an open season".

The details of the open season procedures must be approved by the Board as part of the transmitter's tariff. Section 2 goes on to provide a detailed set of standards for conducting open seasons. "Open Season" is defined in section 1.2.1 to mean:

"an open access auction or bidding process that meets the minimum standards set out in section 2.2 of this Rule".

In EB-2010-0177, Enbridge sought and received Board approval for its 331 transportation rate, effective July 12, 2010.

Exemptions to the Rule

Section 1.7 of the Rule provides:

"The Board may grant an exemption to any provision of this Rule. An exemption may be made in whole or in part and may be subject to conditions or restrictions. In determining whether to grant an exemption, the Board may proceed without a hearing or by way of an oral, written, or electronic hearing".

The section does not set any criteria to assist the Board to decide whether or not to grant an exemption, so BOMA presumes that the Board will grant an exemption if it concludes that it is in

the public interest to do so. However, on December 9, 2009, in its Notice under section 44(1) of the Ontario Energy Board Act, of the issuance of the STAR, the Board stated, in reply to the gas utilities' earlier expressed concerns about the use of open seasons for existing long term transportation capacity (our emphasis):

"To clarify, a transmitter does not need to wait until the capacity is unsubscribed to hold an open season, but may schedule an open season in anticipation of the long-term existing firm transportation capacity becoming available at a known later date (e.g., as a result of a contract expiration). As long as the transmitter holds an open season and is unable to allocate all of its capacity through that process, the transmitter may offer the residual capacity to shippers by other allocation methods (such as first come, first served) as outlined in its tariff. Furthermore, a transmitter is not required to conduct an open season for capacity whenever the transmitter receives a request for these services if that capacity was previously made available in an open season.

The Board notes that if the arrangements described above are not suitable, a transmitter may apply to the Board for an exemption from holding open seasons for existing long-term firm transportation services on capacity segments that are not fully subscribed or contracted. Without any substantiating information at this time, the Board cannot define when an open season would be too burdensome or otherwise not appropriate. The Board will consider exemption requests on a case-by-case basis."

The Board makes no mention of the use of an exemption for allocation of new transmission capacity (our emphasis), likely because no utility raised the matter. In its submissions to the Board, during the EB-2008-0052 (STAR) proceeding, Enbridge states:

"In general, as a transportation customer of Union, EGD does not object to the notion that capacity for new and existing transportation that is being offered for a period of more than one year should be offered through open season" (p4).

While BOMA is of the view that the Rule is applicable to that part of Segment A that will transport gas for TCPL, BOMA is also of the view that it is in the public interest that the Board should require Enbridge to hold an open season to allocate the capacity that it does not require on its proposed Bram West to Albion line, and that if the Board finds any ambiguity as to whether

the Rule applies literally, it should resolve that ambiguity in favour of its applicability for three reasons:

First, as a representative of commercial customers, on both the Enbridge and the Union franchises, it would seem reasonable to maintain as open a gas transmission system in Ontario as possible. BOMA finds it hard to imagine circumstances where customers would be advantaged by contracts between transmission owners or an owner and one shipper (the present case) to share capacity amongst themselves, and exclude access to others. In BOMA's view, all else equal, the greater access shippers have to transmission in Ontario, the more distribution customers should benefit.

In the present case, Enbridge's evidence suggests that it decided to build Segment A as one step to implement its strategy to increase its reliance on short haul deliveries from Dawn and Marcellus relative to long haul firm transportation on TransCanada, and to alleviate bottlenecks in its distribution system east of Parkway (existing takeaway capacity from Parkway at full capacity).

Second, regulators have generally favoured the use of open seasons to allocate new capacity even before STAR came along. The OEB, the NEB, and FERC have all followed this approach.

Third, notwithstanding earlier discussions about co-ownership of the pipeline, under the current proposal, Segment A is Enbridge's pipeline, to be precise, Enbridge Gas Distribution Inc.'s pipeline. It is being constructed and financed on the strength of EDGI's credit and the fact that Enbridge will take a significant part of the throughput for its own needs. It will become a part of Enbridge's rate base and revenue requirements. It is a critical part of Enbridge's proposed GTA project, to the point that Enbridge has stated that the benefits accruing from Segment B, the other

half of the GTA project would be much less, without Enbridge Segment A (Ex1.A4.EGD.BOMA.29).

Finally, both Enbridge and TCPL have suggested that discussions are ongoing between themselves and Union to try to arrive at a negotiated solution to the problem of expanding capacity in the "Parkway/Maple corridor" (See, for example, Enbridge at JT1.2 and TCPL Evidence, p6).

BOMA supports these discussions and BOMA urged such discussions in its final submissions in EB-2011-0210, as did others. The Board, in its decision in that case, directed the utilities to do so. Moreover, the Board recently amended filing guidelines for transmission leave to construct proposals to provide that:

"Any project brought before the Board for approval should be supported by an assessment of the potential impacts of the proposed natural gas pipelines on the existing transportation pipeline infrastructure in Ontario, including an assessment of the impacts on Ontario consumers in terms of cost, rates, reliability, and access to supplies" (Filing Guidelines on the Economic Tests for Transmission Pipeline Applications, EB-2012-0092, February 21, 2013, paragraph 14).

However, these discussions have not been successful to date and, in any event, the fact they are ongoing is not relevant to the question of the applicability of STAR. The discussions can and should continue (see answers to other Board questions below).

BOMA is of the view that it would not be in the interests of either Enbridge's or Union's commercial customers to have restrictions on access to the Segment A pipeline.

As an aside, the fact that Segment A will be connected to TransCanada system's existing pipe at Bram West, and, if it ever is constructed, the TransCanada line from Albion to near Maple, is not an argument against the applicability of STAR. Nor is the fact that TCPL is not required to

nominate daily volumes on the pipe. For its part, Enbridge will nominate its daily requirements at Bram West and TransCanada will have access to the remaining space for its needs. Enbridge will be responsible for maintenance and will, for that and safety reasons, have the ability to isolate the flow on Segment A through valves (TCPL Written Evidence, p4). While TCPL and Enbridge have each provided a few details about the TBA arrangements, we have far from a complete picture of how the arrangement will work. Enbridge has stated (JT1.2) that the TBA Agreement is still a work in progress, and gave no indication of when the definitive Agreement would be filed. While a schematic rate is provided in evidence, many of the detailed commercial terms are not. What was provided (in Enbridge's response to A1, CME #6) was the Memorandum of Understanding, which included a one page (and a bit) summary of high level commercial principles underlying the future TBA contract. Moreover, it is not clear, continuing discussions notwithstanding, that TCPL's assertion at p6 in its evidence, that it will build a line from Albion to Maple, is definitive. TransCanada noted earlier in its evidence that:

"TransCanada will invest capital in the mainline, as long as doing so does not expose the company to increased risk that it will not recover its revenue requirements" (p6, lines 2-3).

It also stated:

"As a result of the RH-003-2011 Decision: (1) TransCanada requires greater assurances than it has had in the past that it will recover its investment in any new facilities and its existing rate base from customers; and (2) TransCanada must recover its investment in the Mainline in a way that does not exert a negative pressure on the TSA balance and, by doing so, put the recovery of the entire Mainline revenue requirement in issue" (p5).

Put another way, what tolls do TCPL intend to charge on such a line?

Had the original joint ownership plan been implemented, and TCPL sought NEB approval for leave to construct, it is highly unlikely that it would have suggested, let alone persuaded the NEB

to approve, the construction of the line on any other premise than it would have been open access.

Process if STAR is Applicable

First, the Board should require the full disclosure of any resolution of the ongoing discussions among the parties, and/or the completion of the open season well before the Settlement Conference. The results of the open season should also be filed in the proceeding well before the Settlement Conference.

The Board may wish to allow TCPL and the LDCs a further period of time, after its decision that STAR applies, perhaps two weeks, to try to conclude a negotiated settlement, prior to requiring that Enbridge commence its open season. Any agreement(s) reached during that period needs to be filed well in advance of the Settlement Agreement. If the parties cannot reach a settlement within that period, Enbridge would proceed with its open season. STAR requires a minimum thirty day period between Notice and completion of the open season. The company would require another week to make a decision and prepare precedent Agreements. Presumably, all the bids would be contingent on the completion of a party's obtaining transportation on a future Albion to Maple pipeline. Union has stated that it (and perhaps Gaz Metro) will apply for a leave to construct a line from Albion to Maple, in the event they obtain capacity on an open season on the Bram West to Albion line, and that it will be in operation no later than November 2016 (our emphasis).

How should the Board proceed if STAR is found not to apply

The next steps the Board should take may depend on the reasons it concluded that STAR does not apply.

First, the Board would need clarity from Enbridge on whether the fact that TCPL has decided not to build the Albion-Maple line, on the assumption that no agreement is reached by parties, including TCPL, which would permit TCPL to agree to build and charge tolls acceptable to the LDCs, would mean that it would terminate the MOU with TCPL. Enbridge, more or less, stated that was their view in JT.1. However, it is not clear on what terms the pipeline would be built. In its current open season, TCPL is proposing tolls for the Albion-Maple line equivalent to the tolls from Empress to the CDA.

If the Board were to decide that STAR did not apply, it should insist that any agreement reached among TCPL and the eastern LDCs be filed with the Board and made available to intervenors well in advance of the commencement of the Settlement Agreement.

Assuming a decision by the Board on the motion by July 18, 2013 or thereabouts, the parties should be required to file any agreement they were to reach, at least ten days before the Settlement Agreement so as to give the intervenors time to fully digest the agreement and, if necessary, ask additional interrogatories on the arrangement.

If part of the Agreement involved TransCanada building the Albion to Maple line with a toll different than the one derived from the RH-001-2011 decision, but acceptable to the LDCs, the full implementation of the agreement would necessitate TCPL obtaining approval from the NEB. Note that as part of the RH-003-2011 decision, the NEB has introduced a new "streamlined

procedure" for the introduction of changes to Mainline tolls, and promised a decision within ten weeks of an application.

In any event, an agreement involving TransCanada would likely require the approval of the NEB, and the Board could condition its ultimate approval of Enbridge's Segment A on the NEB's approval of TCPL's requested toll/tariff for an Albion-Maple line.

Any agreement filed in the proceeding should also contain some key supporting documents that are mentioned in evidence but not yet produced, for example, the "segmentation proposal" made by TCPL in a May 17, 2013 letter to Union, mentioned by Mr. Johannson's letter to Union dated June 17, 2013, a letter from Ms. Brochu of GM to TCPL dated June 7, 2013, and an executed copy of the agreement between Enbridge and TransCanada and more definitive information on TCPL's proposed oil east project. These documents will have important consequences for Enbridge ratepayers, and perhaps Union ratepayers, for example, the details of the proposed take-or-pay provision in the TBA arrangement.

As noted above, any agreement among the TCPL, Union, Gaz Metro, and Enbridge, or any of them, should be filed and made available to intervenors well before the Settlement Conference commences. It may be necessary for intervenors to file interrogatories on such a document, as it is likely to have significant impacts on ratepayers, including cost impacts. So the time for the settlement conference and the hearing would have to be rescheduled, whatever the Board decides on applicability. Assuming a one month period after the Board's decision that the STAR applies, and assuming the Board were in that decision to advise TCPL and the LDCs that they had two weeks to reach an agreement and that they would prefer a negotiated settlement, rather than an open season to take place, and assuming the Board were to make its decision by July 20, 2013, if


an agreement were to be reached, it would be filed by about August 5, 2013. If the intervenors were permitted a week to review the agreement(s) and interrogatories, if necessary, and four days for responses, the Settlement Conference could start by about August 15, 2013. Assuming a one week Settlement Conference, and a week for final preparation, the hearing could commence immediately after Labour Day, a change of about three weeks from the current schedule.

If the parties could not reach a settlement, and Enbridge proceeded with its open season, the STAR requires a minimum thirty day period between Notice and completion of the open season. The company would require a week to prepare the open season documentation, and another week to make a decision and prepare precedent Agreements. Presumably, all the bids would be contingent on a party's obtaining transportation on a future Albion to Maple pipeline. A total of about six weeks would be required for these activities, which would mean the Settlement Conference would start about the fourth week in August, and the hearing in mid-September.

While BOMA understands the rationale for the Board setting a "threshold" issue in response to Union's motion, BOMA believes that, as it did in EB-2011-0210, the Board should ultimately take a broad view of this case. There are utility customers, including commercial customers of both Union and Enbridge in geographically disparate parts of the province, which may be affected in different ways by the projects. While the focus of the Enbridge proposal is the GTA, the combined projects, and TCPL's responses thereto, not to mention the NEB's recent decision, and TransCanada's apparent intention to launch the oil east project, have implications for Enbridge customers in the Ottawa area and Union customers in Eastern/Northern Ontario. The Board adopts needs to allow time for intervenors to fully assess these developments and others, once the final configuration of the settlement and/or results of the open season is known.

Finally, it would appear to BOMA that there is sufficient flexibility in Enbridge's schedule, as set out in EB-2012-0451, A, 3, 8, pp 1-5 to accommodate the activities described above without compromising the November 2015 in operation date. For example, the pull-forward engineering activity could be increased. In addition, targeted DSM projects beginning in the next few months on selected downtown commercial and apartment facilities would assist in modestly reducing anticipated demand in downtown Toronto, to alleviate the expected pressure drop at Station No. 3.

Submitted by the Building Owners and Managers Association - Greater Toronto, this 9th day of July, 2013.



Tom Brett,
Counsel for Building Owners and Operators
Association - Greater Toronto