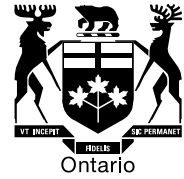


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BY E-MAIL

July 9, 2013

Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
P.O. Box 2319
Toronto, Ontario
M4P 1E4

Dear Ms. Walli,

**Re: Enbridge Gas Distribution Inc. – GTA Project (EB-2012-0451)
Union Gas Limited – Parkway West Project (EB-2012-0433) & Brantford-
Kirkwall/Parkway D (EB-2013-0074)**

In accordance with Procedural Order No. 5, please find attached Board Staff's submission on the Motion filed on behalf of Union Gas Limited and Gaz Metro Limited Partnership.

Yours truly,

Original signed by

Josh Wasylyk
Advisor, Applications & Regulatory Audit

c. All Parties

Encl.

EB-2012-0451 – Enbridge Gas Distribution Inc. GTA Project
EB-2012-0433 – Union Gas Limited Parkway West
EB-2013-0074 – Union Gas Limited Brantford-Kirkwall

**Board Staff Submission on Union Gas Limited and Gaz Metro Limited
Partnership's Motion**

Intro/Background

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

- 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.
- 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.
- 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.
- 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.
- An order that this motion be heard and disposed of on an expedited basis.

The GTA Project will be owned and operated by Enbridge, and is comprised of two segments which do not directly connect: Segment A and Segment B. Segment B is intended to be used exclusively by Enbridge to serve its distribution network. Segment A is intended to be used for both transportation and distribution.¹ Enbridge has entered

¹ EB-2012-0451, Exhibit A, Tab 2, Schedule 1, Page 4 of 12

into a memorandum of understanding (the “MOU”) with TransCanada Pipelines Ltd. (“TransCanada”) which will in effect provide TransCanada with exclusive access to capacity on Segment A that is in excess of Enbridge’s needs. Under the terms of the MOU, other third party shippers, such as Union or Gaz Metro, will not have access to Segment A.

In Procedural Order No. 5, the Board determined that it would hear the first issue raised by the Motion (i.e. the request for a declaration that STAR applies to Enbridge’s GTA Project) as a “threshold issue”, and invited submissions from parties on this question. The Board further invited submissions on what the next steps should be in the event that STAR is found to apply to the GTA Project, and in the event that STAR is found not to apply to the GTA Project.

The following are the submissions of Board staff on these issues.

Declaratory relief

As a preliminary matter, Board staff would like to briefly address the circumstances under which the Board will typically grant declaratory relief. In EB-2011-0361/EB-2011-0376² the Board determined that, while it did have the power to grant declaratory relief pursuant to Section 19 of the Act, Section 19 did not provide parties with a free-standing right of application for declaratory relief. In cases where the request for declaratory relief is not grounded in an existing application, a party cannot require the Board to provide declaratory relief, as there is no section which provides for such an application. The Board can, however, decide to hear requests for declaratory relief on its own motion if it chooses to do so.

In the current case, however, this does not appear to be an issue. Union and Gaz Metro’s request for declaratory relief has arisen in the context of applications that are properly filed before the Board. In addition, the Board has indicated through Procedural Order No. 5 that it will hear the request for declaratory relief. Board staff submits that there are no impediments to the Board granting declaratory relief under these circumstances.

² Decision with Reason and Order, OEB, Goldcorp Canada Ltd. and Goldcorp Inc. (EB-2011-0361/EB-2011-0376) January 28, 2012

Does STAR apply to Segment A?

Board staff submits that STAR does apply to Segment A of Enbridge's proposed GTA Project.

The need to ensure customer protection within the competitive storage market and ensure non-discriminatory access to transportation services for storage operators and customers was recognized by the Board in the Natural Gas Electricity Interface Review proceeding (EB-2005-0551). To meet these objectives, the Board created the Storage and Transportation Access Rule ("STAR") pursuant to section 44 of the Act.

The purpose of STAR is described in section 1.1.1:

This Rule outlines conduct and reporting requirements for natural gas transmitters, integrated utilities and storage companies. The purpose of this Rule is to:

- i) Establish operating requirements to ensure open and non-discriminatory access to transportation services for shippers and storage companies;
- ii) Establish reporting requirements for natural gas transmitters, integrated utilities and storage companies; and,
- iii) Ensure customer protection within the competitive storage market.

The purpose of STAR is consistent with the Board's statutory objectives for natural gas, in particular objectives 1, 2 and 3:

- 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.

To whom does STAR apply?

Section 1.5.1 of STAR states: “This Rule applies to all natural gas transmitters, integrated utilities and storage companies that are legally permitted to do business in Ontario.”

A natural gas transmitter is defined by STAR as “a person who provides transportation services pursuant to the Act, other than gas distribution services as defined in the Gas Distribution Access Rule.” Gas distribution services are defined by the Gas Distribution Access Rule as “services related to the delivery of gas to a consumer, including related safety functions such as emergency leak response, line locates, inspection and provision of safety information”.

Although Enbridge primarily provides gas distribution services, it is also a gas transmitter. Currently the only gas transmission service it provides is on a section of pipeline between Dawn and Tecumseh, where it serves a single customer through Rate 331. More importantly, there appears to be little question that Segment A itself is intended to provide gas transportation services. The terms of the MOU between Enbridge and TransCanada clearly contemplate that Segment A will be used in part to provide firm transportation service to TransCanada. The service being provided to TransCanada is not a distribution service.

Section 2.1.2 of STAR requires that “firm transportation service that becomes available as a result of facility expansion (i.e. new capacity) shall be offered through an open season.” The proposed Segment A is a facility expansion which will provide new capacity. If this were not the case then Enbridge would not be able to offer firm transportation service to TransCanada through the MOU.

There may be some dispute as to whether firm transportation service has “become available” yet, as Segment A has not yet been approved, let alone built. However, section 2.2.1 ii) of STAR clearly contemplates that an open season for new capacity can be held prior to the facility being built. 2.2.1 ii)(d) in particular requires that an open season notice provide the expected in-service date of the expansion. Indeed one of the purposes behind an open season is to assess the demand for system expansions.³ If

³ Technical conference transcript, June 12, 2013, p. 22.

parties were permitted to avoid the requirements of section 2.1.2 by assigning new capacity without an open season prior to the completion of construction, one of the key objectives of STAR – non-discriminatory access to transportation services - would be circumvented.

Enbridge has suggested that Segment A could be exempt from the provisions of STAR.⁴ Section 1.7 of STAR does allow the Board to grant exemptions to any provision of the rule on a case-by-case basis. However, the Board has not granted any exemptions in relation to Segment A, nor, to date, has Enbridge formally requested any exemptions. In an undertaking response to Union, Enbridge referred to the Board's decision in Union's most recent cost of service rates case (EB-2011-0210), in which the Board encouraged Union, Enbridge, and TransCanada to work together to build new transportation infrastructure (in particular with regard to the Parkway-Maple corridor). Enbridge also described how the MOU between Enbridge and TransCanada in many ways mimics the joint ownership structure that had originally been contemplated between the parties. Enbridge suggested that the terms of the MOU reflect the intent of STAR, which is to provide for non-discriminatory access.⁵ Board staff submits that nothing in the Board's EB-2011-0210 decision can reasonably be construed as providing any exemption from STAR, nor even to suggest that any exemptions are needed or appropriate.

Board staff therefore submits that STAR applies to Segment A.

Next Steps

If the Board declares that STAR does in fact apply to the GTA Project, it should consider Union's request for a stay of Enbridge's application pending resolution of this matter, at least with respect to Segment A. It is Board staff's understanding that Segment B does not rely entirely on Segment A, so it may be possible to proceed with that part of the application.

If the GTA Project (or just Segment A) are stayed, the Board might also consider ordering a stay for Union's Brantford-Kirkwall/Parkway D application. It is Board staff's

⁴ Technical conference transcript, June 12, 2013, p. 15.

⁵ Undertaking JT 1.2, p. 2.

understanding that these projects are intended to support Segment A. If Segment A is stayed, it may be advisable to stay these applications as well.

With respect to the other relief requested by the Motion, Board staff offers the following comments. Regarding request for an order declaring the MOU to be “unenforceable”, Board staff is not certain that the Board has the power to issue such an order. The MOU is essentially a contract between two parties. It is not directly subject to Board oversight. Certainly the Board has powers to require parties to comply with STAR (see below), but it is not clear that it can cancel a private contract.

With respect to the request for an order requiring Enbridge to hold an open season in accordance with STAR, Board staff submits that this type of order may require a compliance proceeding under Part VII.1 of the Act. Section 112.3(1) of the Act (which is part of Part VII.1) allows the Board to require a person to comply with an “enforceable provision”, which includes the provisions of STAR. However, a proceeding under Part VII.1 of the Act can only be initiated on the Board’s own motion. In addition, there are certain procedural requirements that do not apply to other proceedings under the Act. Board staff recommends that the panel of the Board seized with the current application not make any orders that can only be made through Part VII.1 of the Act.

- All of which is respectfully submitted -