

September 4, 2013

**BY EMAIL AND FILED VIA RESS**

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street  
Suite 2700  
Toronto, ON M4P 1E4

Dear Ms Walli:

**Re: EB-2012-0459: Enbridge Gas Distribution  
2014 to 2018 Customized IR Application  
Submissions in response to Procedural Order No. 1**

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We represent Enbridge Gas Distribution Inc. (Enbridge, or the Company).

In Procedural Order No. 1, the Ontario Energy Board (the Board) noted that it has received a letter from the School Energy Coalition (SEC) proposing that the Board should hold a preliminary process to decide if it should proceed to hear the Customized IR application as filed by Enbridge. As noted in the Procedural Order, SEC submitted, among other things, that the ratemaking methodology within Enbridge's Customized IR application is inconsistent with Board Policy. Enbridge filed a letter in response to SEC, explaining why no preliminary process is necessary or appropriate, and the Board acknowledged that letter. There was then a further exchange of correspondence on the same items.

Given these exchanges of correspondence, the Board has determined that it wishes to receive submissions on whether there is a need for the hearing of a preliminary issue, and if so, to properly scope the issue. The Board has invited parties to make written submissions on two questions.

1. Is there a need to determine a preliminary issue and if so, what is the issue and what is the rationale for determining the issue prior to hearing the full application?
2. What evidence is required to hear the preliminary issue which is in addition to the evidence already filed (for example, interrogatories, oral testimony, etc.)? Why is this additional evidence necessary?

In the Procedural Order, the Board indicated that all parties shall make submissions on these questions at the same time (September 4<sup>th</sup>) and then shall make responding submissions at the same time (September 11<sup>th</sup>).

As noted in the Procedural Order, Enbridge has already responded to SEC's letter. Enbridge has also responded to subsequent letters from other parties. Copies of Enbridge's letters, dated July 25, 2013 and August 22, 2013, are attached. Taken together, those letters set out Enbridge's position about why no preliminary issue is necessary or appropriate in this case.

The Company is mindful, though, that the Board has provided specific questions to be addressed about whether a preliminary issue is required. At the risk of repeating submissions already made in the attached letters (upon which Enbridge continues to rely), the following are Enbridge's responses to the Board's questions. These submissions are based on Enbridge's understanding of the proposed preliminary issue raised by SEC. It is important to note that Enbridge is yet not aware of the positions that other parties may take on the Board's questions, and will respond as appropriate on September 11<sup>th</sup>.

Response to Question #1

Enbridge submits that there is no need to determine any preliminary issue about whether its application should proceed to a full hearing, and that it would be inappropriate to do so.

As highlighted in the Procedural Order, SEC's primary objection to Enbridge's Customized IR application appears to be that the application somehow fails to comply with Board policy. Tellingly, though, SEC does not identify any specific Board policy that applies. To Enbridge's knowledge, the only Board policy governing gas distributor IR plans comes from the Natural Gas Forum Report. However, even within that Report, the Board does not prescribe any particular formulation of an IR plan, choosing instead to set out three "criteria" which the IR plans must satisfy<sup>1</sup>:

- i establish incentives for sustainable efficiency improvements that benefit customers and shareholders;
- ii ensure appropriate quality of service for customers; and
- iii create an environment that is conducive to investment, to the benefit of customers and shareholders.<sup>2</sup>

As explained within Enbridge's evidence<sup>3</sup>, the Customized IR plan satisfies each of these criteria.

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<sup>1</sup> Natural Gas Regulation in Ontario: A Renewed Policy Framework, March 30, 2005, at pp. 2 to 3.

<sup>2</sup> In the EB-2007-0615 Decision (February 11, 2008) that approved the Settlement Agreement which included Enbridge's 1<sup>st</sup> Generation IR Model, the Board specifically noted the three criteria above in finding that the IR Model was in the public interest. These same three criteria were also used as a basis of evaluation by the OEB Staff's expert, PEG-R, in its Assessment of Union Gas and Enbridge Gas Distribution Incentive Regulation Plans Report, filed in September 2011 in the EB-2011-0052 proceeding. On August 30, 2013, Board Staff filed the PEG-R report in this proceeding, as Exhibit L, Tab 1.

<sup>3</sup> See Exhibit A2, Tab 1, Schedule 1, at pp. 9 to 12 and 38 to 39.



A close review of SEC's objection shows it to be premised on the argument that Enbridge's application is not in the form of an IRM methodology. However, as explained at length within Enbridge's July 25<sup>th</sup> letter, the Customized IR plan is an IR model. This is seen in many respects, including:

- i. the various components of the Customized IR plan that continue and enhance Enbridge's 1<sup>st</sup> Generation IR model (such as a five year term, the revenue cap model, annual review of expenses and revenues, earnings sharing, Z-factors, and off-ramp protection)<sup>4</sup>;
- ii. the new components of the Customized IR plan that further promote productivity and efficiency gains through the IR term (such as the Sustainable Efficiency Incentive Mechanism, and the enhanced reporting and performance measurement)<sup>5</sup>;
- iii. the similarities between the Customized IR plan, and the "building blocks" IR methodologies used in other jurisdictions (as explained within the expert evidence from London Economics accompanying Enbridge's application<sup>6</sup>); and
- iv. the similarities between the Customized IR plan, and the Custom IR model that the Board has endorsed for electricity distributors through its Report on a Renewed Regulatory Framework for Electricity Distributors (RRFE Report).

In light of the foregoing, Enbridge submits that there is no necessary or appropriate preliminary issue to be determined in relation to the Customized IR application. Moreover, as there is no specific definition of an IR model for use by a natural gas distributor in Ontario, there is no reference point to be used to address a preliminary question of whether this application is inconsistent with Board Policy.

Going further, Enbridge submits that it would be inefficient, and unfair, to require the determination of a preliminary question of whether the Customized IR application should proceed before the Board hears the entire case.

As explained within Enbridge's July 25<sup>th</sup> letter, the Customized IR plan contains a number of inter-related components that are best considered in a context where the entire case is before the Board. Enbridge's Customized IR plan has been created to take account of significant extraordinary capital spending requirements over the IR term. Therefore, if a determination is to be made about whether the Customized IR Application may proceed to a full hearing, then it is only fair that this be done with a complete understanding of the context and details of the entire application. In other words, a full review of all of the evidence supporting the Customized IR application is necessary. Of course, such an approach will not enhance the efficiency of this proceeding. It will lead to a scenario

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<sup>4</sup> See, for example, Exhibit A2, Tab 1, Schedule 1, at pp. 30 to 38.

<sup>5</sup> See, for example, Exhibit A2, Tab 1, Schedule 1, at pp. 36 to 38, and Exhibit A2, Tab 11, Schedule 2 and Exhibit A2, Tab 11, Schedule 3.

<sup>6</sup> Exhibit A2, Tab 10, Schedule 1.

where the Board will hear much of the detail of Enbridge's application before deciding whether the case should proceed. Assuming that the decision is that the case should proceed, then much of the process will have to be repeated, to allow for a full and fair hearing on the specifics of the Customized IR application.

The need for different IR ratemaking approaches to accommodate significant extraordinary capital spending requirements was acknowledged and addressed by the Board through the "Custom IR" model within the RRFE Report. Enbridge has taken that into consideration within the Customized IR plan that it has developed. Enbridge believes that the Board and all parties will benefit from a full review of the Company's Customized IR application.

Finally, it should be noted that there is nothing within Enbridge's response that would prevent parties from fully pursuing questions about the appropriateness of the Company's Customized IR plan within this proceeding. Enbridge has already recognized that such questions and issues are within scope of the proceeding, as seen in the draft Issues List filed at Exhibit A1, Tab 4, Schedule 1. The first issue proposed within the draft Issues List makes specific use of the Board's criteria for a gas distributor IR plan and asks:

*Is Enbridge's proposal for a Customized IR plan for a 5 year term covering its 2014 through 2018 fiscal years appropriate ?*

- a. Does Enbridge's Customized IR plan include appropriate incentives for sustainable efficiency improvements ?*
- b. Does Enbridge's Customized IR plan ensure appropriate quality of service for customers ?*
- c. Does Enbridge's IR plan create an environment that is conducive to investment, to the benefit of customers and shareholders ?*

If parties believe that different issues/questions should be pursued around whether the Board ought to approve this new IR methodology, then they can raise such issues to be included within any final Issues List. If they choose, parties may also propose different approaches or methodologies. However, these issues can only be properly evaluated and determined in the context of the entire proceeding.

*Response to Question #2*

As explained above, and in Enbridge's July 25<sup>th</sup> letter, if the Board decided to hear a preliminary issue, then it would be important to ensure that a full record was available to allow the Board to completely understand the nature and workings of Enbridge's Customized IR Application. Enbridge cannot speak to what discovery process might be required from intervenors to allow this to happen, though SEC's letter seems to contemplate an interrogatory process. In any case, the Company would most likely seek the opportunity to present witnesses (including expert witnesses from London Economics and/or Concentric) to explain the Customized IR plan, and would also most likely provide supplementary written and/or oral evidence to address the particular preliminary issue stated by the Board.



This approach, while necessary for a preliminary issue of the type described in the SEC letter, would not improve the efficiency of the hearing process. It would potentially lead to a scenario where a lengthy preliminary hearing process would do little more than determine that the full application should be heard. Indeed, it may be the case that proceeding immediately with the whole application would not take substantially more time than determining any preliminary issue.

As noted, Enbridge will review the submissions of other parties to the Board's questions, and will provide its responding submissions on September 11<sup>th</sup>, in accordance with Procedural Order No. 2.

Yours very truly,

AIRD & BERLIS LLP



David Stevens

cc. Enbridge Gas Distribution  
All parties registered in EB-2012-0459

# AIRD & BERLIS LLP

Barristers and Solicitors

Fred D. Cass  
Direct: 416-865-7742  
E-mail: fcass@airdberlis.com

July 25, 2013

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
PO Box 2319  
2300 Yonge Street  
Toronto, Ontario  
M4P 1E4

Dear Ms. Walli:

**Re: EB-2012-0459; Enbridge Gas Distribution Inc. 2014-2018  
Customized IR Application**

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We are writing on behalf of Enbridge Gas Distribution Inc. (Enbridge) to respond to a letter dated July 20, 2013 that has been sent to the Board by Mr. Shepherd, counsel for the School Energy Coalition, in connection with this matter.

In his letter, Mr. Shepherd requests that the Board "designate the question of whether Enbridge should be allowed to proceed with a cost of service application" as a "Preliminary Issue". Since Enbridge has not actually made a cost of service application to the Board, it would be a meaningless exercise for the Board to entertain a question about whether Enbridge should be "allowed" to make such an application. For this and other reasons, as set out below, Enbridge urges the Board to reject Mr. Shepherd's request and instead to proceed in the normal course to the development of an Issues List without adding delay through the creation of a separate process for consideration of any so-called "Preliminary Issue".

The reasons for Enbridge's position that the Board should give no effect to Mr. Shepherd's letter are elaborated upon under the headings that follow.

## **Not a Cost of Service Application**

In his letter, Mr. Shepherd repeatedly refers to Enbridge's filing as a cost of service application, as if he can make it so simply by reiterating a bald and unsupported assertion. At no point in his letter does Mr. Shepherd make any effort to address

the numerous features of the proposed Customized IR plan that differentiate it from a cost of service application, nor does he address Enbridge's evidence<sup>1</sup> and the expert evidence<sup>2</sup> that explain how the Customized IR plan meets the objectives of the Board for an IR plan for gas distributors.

The fact that Enbridge's proposal is an IR model is apparent from many aspects of the Customized IR approach. One way this is seen is through the similarities between Enbridge's proposal and "building blocks" IR methodologies used in other jurisdictions.<sup>3</sup> Another way is through the similarities between Enbridge's proposal and the Board's new "Custom IR" model for electricity distributors. At a more detailed level, a review of the components of Enbridge's proposal makes clear that it follows a Customized IR approach rather than a cost of service approach. This is seen in the features of the proposal, such as:

- ~ the use of a revenue cap model (to set "Allowed Revenue" amounts for each year of a five year term), with annual adjustments for pass-through items;<sup>4</sup>
- ~ the opportunity for annual review of Enbridge's revenues and expenses, and for sharing of earnings above a set threshold, through the proposed Earnings Sharing Mechanism;<sup>5</sup>
- ~ the ongoing reporting and monitoring of performance measures and productivity initiatives, through the proposed performance measurement framework and annual reporting of productivity initiatives;<sup>6</sup>
- ~ the creation of new incentives for Enbridge to find and implement productivity and efficiency measures that will result in long-term savings for ratepayers and the utility, through the proposed Sustainable Efficiency Incentive Mechanism;<sup>7</sup> and

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<sup>1</sup> See Exhibit A2, Tab 1, Schedule 1 (e.g., pages 3-7 and pages 38-39).

<sup>2</sup> See Exhibit A2, Tab 9, Schedule 1 (e.g., pages 68-69) and Exhibit A2, Tab 10, Schedule 1 (e.g., page 21).

<sup>3</sup> See Exhibit A2, Tab 1, Schedule 10 (e.g., pages 3-7 and pages 38-39).

<sup>4</sup> See Exhibit A2, Tab 1, Schedule 1 (e.g., pages 4-7 and pages 30-33).

<sup>5</sup> Exhibit A2, Tab 7, Schedule 1.

<sup>6</sup> Exhibit A2, Tab 11, Schedule 2.

<sup>7</sup> Exhibit A2, Tab 11, Schedule 3.



~ the proposed continuation of Z-factor and off-ramp mechanisms that are very similar to those in Enbridge's 1<sup>st</sup> Generation IR model.<sup>8</sup>

We submit, with respect, that the Board should not accede to the notion that an application can be delayed and made subject to additional procedural steps simply because a prospective party to the proceeding adopts the expedient of characterizing the application in a manner that is not supported by the evidence. Mr. Shepherd asserts that it is "within the Board's power to determine the methodology to be used to set rates in any given situation", but surely it is not appropriate to add a preliminary phase to the Board's application process whenever a prospective intervenor seeks to put forward issues about the methodology proposed by the applicant. Instead, if an intervenor objects to a particular methodology, the objection is properly addressed in the ordinary course of the proceeding, through the Issues List, intervenor evidence (potentially putting forward alternatives), cross-examination and argument.

#### **No Legitimate Preliminary Issue**

In his letter, Mr. Shepherd refers to decisions made by the Board in cases involving electricity distributors, specifically EB-2011-0144 (Toronto Hydro) and EB-2010-0131 (Horizon Utilities). These decisions do not support Mr. Shepherd's position that the Board should proceed to consider a Preliminary Issue in this case and, indeed, an understanding of these decisions helps to make clear that there is no legitimate Preliminary Issue in this case.

On April 20, 2010, the Board issued a letter to all electricity distributors indicating that a distributor seeking to have rates rebased in advance of its next regularly scheduled cost of service proceeding will be expected to justify the early rebasing. Specifically, the Board said, the distributor must clearly demonstrate why and how it cannot adequately manage its resources and financial needs during the remainder of its IRM plan term.<sup>9</sup>

In its letter of April 20, 2010, the Board provided guidance with respect to a test to be met by electricity distributors seeking early rebasing. The issue as to whether this test has been met by applicants proposing early rebasing has been considered by the Board in a number of proceedings involving electricity distributors and the Horizon Utilities case, EB-2010-0131, is one such proceeding. The test was also applied by the Board in the Toronto Hydro proceeding referred to by Mr. Shepherd. In fact, the Board's decision in that case, EB-2011-0144,

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<sup>8</sup> Exhibit A2, Tab 4, Schedule 1 and Exhibit A2, Tab 6, Schedule 1.

<sup>9</sup> See EB-2010-0131 Decision on the Preliminary Issue of Early Rebasing and Procedural Order No. 4, pages 1-2.



indicates that Toronto Hydro "agreed that the test as to whether or not an early rebasing application is justified is as outlined in the Board's letter of April 20, 2010".<sup>10</sup>

There is no such test that applies generally to natural gas distributors and there is no such test that applies specifically to Enbridge's application. There is indeed no issue for consideration in this case as to whether the Customized IR methodology proposed by Enbridge does or does not meet a test or standard set forth by the Board. To the extent that parties seek to raise "methodology" issues about Enbridge's Customized IR proposal, they can do so in the usual way through a Board-approved Issues List. Any such "methodology" issues can be addressed at appropriate points in the proceeding, including the Settlement Conference and the hearing. There is no "Preliminary Issue" regarding "methodology" in this case that stands apart for consideration by the Board in the manner of the test for electricity distributors set out in the Board's letter of April 20, 2010.

### Delay

It is clear that Mr. Shepherd expects that the so-called "Preliminary Issue" will be considered by means of a process that essentially amounts to a proceeding in and of itself. This "proceeding within a proceeding" would include interrogatories and answers to interrogatories; a Board hearing with at least one witness panel followed by argument-in-chief, intervenor arguments and reply argument; and then a Board decision. If this process were to conclude with a decision that Enbridge's application should proceed, there would be little or no value added to the proceeding and yet there can be no doubt that considerable cost and delay would result from the additional process.

Mr. Shepherd suggests that, if the Board were to decide after consideration of the so-called Preliminary Issue that the application should proceed, then there would be some value added because "[p]arties will focus on a review of the costs". It surely cannot be the case, though, that, after the Board's consideration of the Preliminary Issue as described by Mr. Shepherd, all issues about "methodology" would disappear, leaving the parties to focus only on a review of costs. This implies that there would be no issues with respect to the many different components of the Customized IR proposal, such as the proposed Sustainable Efficiency Incentive Mechanism and the proposed Z-factor referred to above.

Indeed, regardless of the outcome of the Board's consideration of the so-called Preliminary Issue, it is not realistic to think that issues about "methodology" will simply disappear. That being so, the most efficient and effective approach is to proceed with the case in the usual fashion, such that all issues, including issues

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<sup>10</sup> EB-2011-0144 Decision with Reasons and Order on the Preliminary Issue, page 7.

about "methodology", are addressed together in accordance with a Board-approved Issues List.

### **Importance of Hearing the Entire Application**

Not only is it most efficient for the Board to proceed to hear all issues together in the usual manner, there are also other reasons why it is important for the Board to hear the entire application rather than dealing with a so-called Preliminary Issue in isolation.

First, Enbridge's Customized IR proposal consists of a number of inter-related components that are best considered in a context where the entire case is before the Board.

Second, the "methodology" of the Customized IR proposal should be considered in the full context of the entire application, because the proposal was structured specifically to accommodate significant extraordinary capital investment requirements over the term of the proposed IR plan. The need for a "Custom IR method" to take account of "significantly large multi-year or highly variable investment commitments that exceed historical levels" was explicitly recognized in the Board's Report on a Renewed Regulatory Framework for Electricity Distributors.<sup>11</sup> It is only reasonable that, when a "custom" IR model has been proposed specifically to accommodate extraordinary spending requirements, the Board's consideration of the proposal should occur with the full context and details of the entire application.

Third, in developing the Customized IR proposal, Enbridge has been very mindful of the Board's decisions and guidance and Enbridge believes strongly that it is of real value to the Board and future "custom" IR applicants for the Board to give the entire application its full consideration.

### **Conclusion**

According to Mr. Shepherd's letter, his intent is to make a "recommendation" to the Board. For all of the reasons set out above, we respectfully submit on behalf of Enbridge that the Board should take no action on the recommendation. On the contrary, the most efficient, fair and appropriate course of action is for the Board to proceed to consider the application in accordance with its usual process and without establishing any procedure for consideration of a so-called "Preliminary Issue".

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<sup>11</sup> *Report of the Board Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, October 18, 2012, page 19.

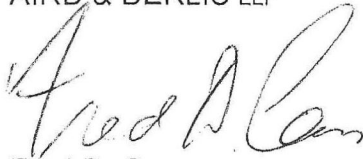
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If you have any questions in this regard, please do not hesitate to contact us.

Yours truly,

AIRD & BERLIS LLP

A handwritten signature in dark ink, appearing to read "Fred D. Cass". The signature is fluid and cursive, with the first name "Fred" being more prominent.

Fred D. Cass

FDC/

c.c. Enbridge Gas Distribution Inc.  
J. Shepherd  
All EB-2011-0354 Intervenors



# AIRD & BERLIS LLP

Barristers and Solicitors

Fred D. Cass  
Direct: 416-865-7742  
E-mail: fcass@airdberlis.com

August 22, 2013

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
PO Box 2319  
2300 Yonge Street  
Toronto, Ontario  
M4P 1E4

Dear Ms. Walli:

**Re: EB-2012-0459; Enbridge Gas Distribution Inc. 2014-2018  
Customized IR Application**

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On July 25, 2013, we wrote to the Board on behalf of Enbridge Gas Distribution Inc. (Enbridge) to respond to a letter dated July 20, 2013 in which counsel for the School Energy Coalition (SEC) requested that the Board create a separate process for consideration of a "Preliminary Issue" in this proceeding.

Subsequent to our letter of July 25<sup>th</sup>, Mr. Quinn, on behalf of the Federation of Rental-housing Providers of Ontario (FRPO), and counsel for the Vulnerable Energy Consumers Coalition (VECC) sent letters to the Board that supported the request made by SEC. The FRPO letter, dated August 2, 2013, refers to a determination regarding the "acceptability" of Enbridge's proposed Customized IR plan and the VECC letter, dated August 20, 2013, refers to a decision regarding the "validity" of Enbridge's proposal.

Our letter of July 25<sup>th</sup> sets out in some detail the reasons why the most efficient, fair and appropriate course of action is for the Board to proceed to consider Enbridge's application in accordance with the Board's usual process and without establishing any procedure for consideration of a so-called "Preliminary Issue".

As stated in our July 25<sup>th</sup> letter, the need for a "Custom IR method" for electricity distributors to take account of "significantly large multi-year or highly variable investment commitments that exceed historical levels" is explicitly recognized in the Board's Report on a Renewed Regulatory Framework for Electricity

August 22, 2013

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Distributors (RRFE Report).<sup>1</sup> While Enbridge of course has not applied for approval of a Custom IR plan in accordance with the RRFE Report, it has developed a customized approach to IR in order to accommodate significant extraordinary capital investment requirements.

Surely, it is not to be expected that, when an applicant develops a customized approach to IR in order to address extraordinary multi-year investment commitments, the Board will establish a separate process for consideration of a "Preliminary Issue" as to whether the customized proposal is "acceptable" or "valid". The notion that such a proposal must be put through a separate process to confirm its acceptability or validity is inconsistent with the basic premise of the RRFE Report, applying to the electricity sector, that the Board intends there to be an option for applicants to customize a rate-setting method in order to fit their particular circumstances.<sup>2</sup>

Yours truly,

AIRD & BERLIS LLP



Fred D. Cass

FDC/

c.c. Enbridge Gas Distribution Inc.  
All EB-2012-0459 Intervenors

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<sup>1</sup> *Report of the Board Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, October 18, 2012, page 19.

<sup>2</sup> RRFE Report, pages 18-19.