EB-2012-0459

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Sched. B);

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. for an order or orders approving or fixing rates for the sale, distribution, transmission and storage of gas commencing January 1, 2014.

Written Submission of Building Owners and Managers Association - Greater Toronto (BOMA) on Need for a Preliminary Issue

1. BOMA is writing in response to the Board's invitation in Procedural Order No. 1 for parties to make submissions on whether there is a need for a hearing of a preliminary issue and, if so, to properly scope that issue.

The Board specifically asked parties to address two questions:

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

BOMA is of the view that the public interest would be better served by hearing the Enbridge case, as filed, without first establishing another proceeding to consider a threshold issue. BOMA believes that to be the case for two reasons.

2. Board's policy is clear.

First, the Enbridge application is already very complex. As the Board noted in its RRFE report, "The adjudication of an application under the Custom IR method will require the expenditures of significant resources by the Board, and the applicant" (p19), to which

BOMA would add "and the intervenors". Even without a separate hearing on a preliminary issue, suggested by some intervenors, the Board will not likely be able to make a decision on this application until well into 2014.

Clearly, Enbridge's current proposal is not like Enbridge's and Union's previous (2008-2012) incentive ratemaking proposals in that it does not use the inflation, less a productivity factor approach, either for price increases (Union) or revenue increases (Enbridge) as a basis to set rates. As noted by Mr. Shepherd, each of those proposals, as approved by the Board, have been recently judged by Pacific Economic Group ("PEG"), the Board's IRM expert, to be by and large successful in achieving their objectives (with the exception of the Enbridge's customer service record). BOMA would note that PEG placed an important caveat on their analysis, namely that PEG's report only covered the first three years of the plan, 2008, 2009, 2010. The Board and parties have not yet received an assessment of the last two years, and, in particular, whether the cost reduction and increased efficiencies were captured and sustained in the rebasing proceeding of 2013 (hopefully, we will have that soon). Nor did the study address the Board's recent decisions on Union's inappropriate characterization of gas savings as regulated revenues.

On the other hand, the Board, in its October RRFE Report, has, at least with respect to electricity regulation, made allowance for Custom Incentive Ratemaking proposals from applicants, which may not employ the inflation minus a productivity factor approach. To the contrary, the Board states that:

> "In the Custom IR method, rates are set based on a five year forecast of a distributors revenue requirement and sales volumes" (RRFE, p18).

The Board further noted that:

> "The Custom IR method will be most appropriate for distributors with significantly large multi-year or highly variable investment commitments that exceed historical levels" (p19).

The Board stated that the term for Custom IR should be a minimum of five years.

In addressing the Annual Adjustment Mechanism, the Board stated:

- "The allowed rate of change in the rate over the term will be determined by the Board on a case-by-case basis informed by empirical evidence, including the distributor's forecasts (revenues and costs, including inflation and productivity).
- The Board's inflation and productivity analysis.
- Benchmarking to assess the reasonableness of the distributor forecasts.
- Expected inflation and productivity gains will be build into the rate adjustment over the term" (p20).

Finally, the Board noted that:

> "This Report provides the general policy direction for the rate-setting method, but the Board expects that the specifics of how the costs approved by the Board will be recovered through rates over the term will be determined in individual rate applications. This rate-setting method is intended to be customized to fit the specific applicant's circumstances. Consequently, the exact nature of the rate order that will result may vary from distributor to distributor" (p19).

While the Board's statements above are directed to regulation of electricity distributors, BOMA sees no reason why the Board would or should take a markedly different approach to the gas distributors.

Assuming that to be the case, BOMA notes that Enbridge's Allowed Revenue (based on costs and sales values, as adjusted) looks a lot like the "five year forecast of a distributor's revenue requirement and sales volumes", requested by the Board in the Custom IR part of its RRFE.

Moreover, Enbridge's Allowed Revenue, which it proposes for each of 2014, 2015, and 2016, "is to be determined by summing together, for each year (2014, 2015, 2016), the appropriate forecast level of operating costs, depreciation costs, taxes, and cost of capital (our emphasis). These annual amounts are what Enbridge will be entitled to collection rates each year" (Enbridge, A2, T1, Sch 1, p4).

In BOMA's view, Enbridge's application is consistent with the Board's expressed policy for the IRM in the electricity industry, so there is no reason from a policy point of view to have a separate hearing on a preliminary issue of whether the proposal is appropriate. It is clear that the Board policy contemplates custom IR proposals which do no directly use the inflation less a productivity factor approach. The issue before the Board is rather whether in all of its particularity, the Enbridge IR plan meets the objectives the Board has set down for IRM (in the Natural Gas Forum, and the RRFE and elsewhere) and the objectives of gas regulation as set out in the Ontario Energy Board Act. This issue can be better adjudicated in the main hearing.

3. Efficiency of Hearing Process

In the Procedural Order, the Board stated:

> "In determining whether to hear a preliminary issue the Board will consider, among other things, whether hearing the preliminary issue will improve the overall hearing efficiency. In other words, the issue would need to be sufficiently narrow and the process would need to be sufficiently focused that the Board could be confident that the approach would be more efficient than proceeding immediately with the entire application" (pp3-4).

A proceeding within a proceeding to decide a "preliminary issue" would likely seriously delay the main proceeding, and lead to a less efficient hearing.

First, it would be very difficult to control the scope (and length) of a preliminary hearing, and it would be difficult to frame an appropriate preliminary issue. The issue would have to be along the lines of whether the Enbridge IR plan in its entirety meets the criteria for a custom IR plan and that it offers an opportunity to meet the Board's IRM objectives and statutory objectives, and is consistent with the Board's characterization of a custom IR plan in its RRFE report (see above). But this is the issue to be determined in the main hearing.

Second, Enbridge relies heavily on the expert testimony of Concentric and London Economics to support its custom IR. In order to deal effectively with that testimony, it would likely be necessary for intervenors to hire our own expert.

Third, time would be required for:

- parties to define threshold issue that was satisfactory to the Board and parties
- the applicant to prepare its case for the preliminary hearing
- parties to ask interrogatories on both the applicant's evidence on the preliminary issue, especially their experts, as well as on the evidence prepared by intervenors' expert(s)
- some intervenors would need to hire an expert and have that expert prepare evidence on the preliminary issue

- the cross-examination of experts for both sides would be time consuming and complex. The Board may require conference(s) of experts. This activity would likely have to be repeated in the main hearing

- parties to make submissions and the Board to adjudicate.

The activities would add several months to a proceeding which is already somewhat late starting (compared to, for example, the Union IR plan).

The preliminary hearing in the recent Toronto Hydro rates case demonstrates the degree to which a preliminary hearing can delay the main case (a delay of about one year), notwithstanding that the Board's view of the preliminary issue was rather narrow and clearly stated, namely whether Toronto Hydro had complied with the Board's instructions in its letter of April 10th, setting out the required grounds for an "early rebasing". There is no such clear directive in this case. The Toronto Hydro preliminary hearing was a very special situation, in that the Board felt that it had given very explicit instructions in its April 10th letter that Toronto Hydro had ignored.

In any case, the Toronto Hydro process, in BOMA's view, was not very satisfactory. Parties' views of the issue before the Board were very disparate. While the senior executives provided oral testimony, it covered only a portion of the written evidence and was as much argument as evidence. Intervenors were encumbered by not being able to deal with other aspects of the written evidence, which was voluminous, in the time available. Moreover, the Board's thinking on IRM has evolved since the preliminary Toronto Hydro case, as evidenced by the RRFE.

For these reasons, in BOMA's view, the Board should go directly to the main hearing, and not interpose another hearing to deal with a "preliminary issue".