EB-2013-0046

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

AND IN THE MATTER OF an application filed by Enbridge Gas Distribution Inc. for an order or orders approving the clearance or disposition of amounts recorded in certain deferral or variance accounts

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ARGUMENT OF CANADIAN MANUFACTURERS & EXPORTERS ("CME")

October 18, 2013

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INDEX

I. INTRODUCTION

1. This argument is made on behalf of Canadian Manufacturers & Exporters ("CME"). Prior to preparing these submissions, we reviewed the written arguments filed by Energy Probe Research Foundation ("Energy Probe") and Building Owners and Managers Association of the Greater Toronto Area ("BOMA"). We support those arguments. To the extent possible, we have attempted to refrain from duplicating them in these submissions on behalf of CME.

II. THE "CLASSIFICATION" ISSUE

2. The unresolved issue in this proceeding is as follows:

> ***"Is the amount proposed to be cleared in the 2012 Transactional Services Deferral Account ("TSDA") appropriate?"***

3. Enbridge Gas Distribution Inc. ("EGD") has recorded a credit amount of $13.97M in the 2012 TSDA and proposes to clear that amount to ratepayers. This credit amount relates to net revenues of $18.63M which EGD realized from 2012 FT-RAM related capacity release/exchange transactions.

4. In recording the $13.97M credit in the TSDA, EGD declined to adhere to the Board's EB-2012-0055 Decision and Order dated March 14, 2013 relating to the clearance of EGD's 2011 deferral account balances. In that Decision and Order the Board found that net revenues realized from 2011 FT-RAM related capacity release/exchange transactions are to be classified as upstream gas transportation cost reductions. EGD declined to agree to apply that Decision to its 2012 deferral accounts on grounds that it would adduce, in this proceeding, persuasive evidence to establish that the 2012 FT-RAM related capacity release/exchange transaction amounts should be classified as Transactional Services ("TS") revenues. In permitting EGD to present further evidence on the classification of

capacity release/exchange transactions in this proceeding, the Board stated at page 6 of its Decision and Rate Order in the EB-2012-0055 dated May 2, 2013 as follows:

> ***"The Board will leave 2012 capacity release net revenues to be considered in the 2012 ESM proceeding. The Board will not provide directions in this case regarding 2012 net revenues. It will be incumbent on Enbridge as it is for the applicant in every case to provide comprehensive evidence in support of its requested relief."***

5. Accordingly, a determination of the unresolved issue in this proceeding turns on whether the evidence in this case leads to the conclusion that the $18.63M amount realized for these capacity release/exchange transactions is to continue to be classified as upstream gas transportation cost reductions, as CME and others contend, or as TS revenues, as EGD contends. This "classification" issue is the only unresolved matter.

6. As the Settlement Agreement indicates, EGD and the other parties opposite in interest with respect to this "classification" issue have agreed that if the net revenues continue to be classified as upstream gas transportation cost reductions, then the $13.97M credit amount which EGD has recorded in the TSDA is eliminated and an $18.63M credit is to be recorded in the transportation component of the Purchased Gas Variance Account ("PGVA"). There is no issue in this case pertaining to any incentive payment to EGD in the event that the upstream gas transportation cost reduction classification continues to prevail.

III. <u>ARGUMENT</u>

A. <u>Prior Decisions Pertaining to the "Classification" Issue</u>

7. At the outset, it needs to be emphasized that the issue of whether net revenues from FT-RAM related capacity release/exchange transactions are to be classified as TS revenues or upstream gas transportation cost reductions has been argued and decided by the Board in three (3) previous cases namely, EB-2011-0210 being Union's 2013 Rebasing Case,

EB-2012-0087 being Union's 2011 Deferral Accounts Clearance proceeding, and EB-2012-0055 being EGD's 2011 Deferral Accounts Clearance case. In each of those proceedings, the Board has determined that the amounts are to be classified as upstream gas transportation cost reductions and not as TS revenues. Relevant extracts from each of these Decisions are set out below:

(i) EB-2011-0210

8. At page 39 of its Decision and Order in this proceeding dated October 25, 2012, the Board rejected Union's argument that FT-RAM related capacity release/exchange transactions should be classified as transactional services for the purposes of determining Union's rates for 2013. The Board stated as follows:

> ***"Consistent with the long-standing principle that a gas utility should not profit from the procurement of gas supply for its in-franchise customers, and to eliminate the creation of inappropriate incentives during the test year, the Board finds that the optimization activities, as defined below, are to be considered part of gas supply, not part of transactional services."***

(ii) EB-2012-0087

9. In its Decision issued less than a month later on November 19, 2012, the Board rejected Union's argument that FT-RAM related capacity release/exchanges constituted transportation optimization transactional services in which it had been engaged for years. The Board found that only those upstream transportation optimization activities that rely on capacity that is temporarily surplus to Union's utility gas transportation requirements, as a result of factors beyond Union's control, constitute transactional services.

10. At page 27 of the Decision and Order in this proceeding, the Board stated:

> ***"The Board notes that Union has classified the revenues generated from its upstream transportation FT-RAM optimization activities as transactional service revenues because it believes that these activities are no different than its traditional transactional service activities. However, the Board finds that a review of the evidence filed by Union in previous proceedings to answer the question: "what are transactional services" does not lead to this conclusion.***

> ***In RP-2003-0063 / EB-2003-0087, Union's description of its transactional services, cited below, implies that the upstream transportation assets related to the gas supply plan that are optimized are only those assets that are surplus to the needs of the gas supply plan for reasons outside of Union's control.***
>
> > ***With a balanced gas supply portfolio, which meets the forecast in-franchise and ex-franchise firm demands, there will be few, if any, firm assets available to support TS on a future planned basis.***
>
> ***The Board notes that, in the above passage, Union clearly states that the upstream transportation assets are generally only available on an unplanned basis."***

11. At page 28 of its November 19, 2012 Decision and Order, the Board stated:

> ***"The Board finds that Union's evidence in the RP-2003-0063 / EB-2003-0087 proceeding, when taken as whole, does not support the conclusion that the planned optimization of gas supply related assets would be considered a transactional service. The evidence in the above noted proceeding explicitly speaks to the fact that with a balanced gas supply portfolio there will be few, if any, firm assets available to support transactional services on a future planned basis. In the Board's view, this statement speaks to the fact that the portion of utility gas supply assets that is available to support transactional service activities is only the portion of those assets that is temporarily surplus to the gas supply plan as <u>a result of factors beyond Union's control</u>. Therefore, a clear distinction can be made between Union's transactional services (including exchanges) and Union's FT-RAM related activities."*** **(emphasis added)**

12. In its analysis of FT-RAM related capacity release/exchange transactions, the Board recognized that the temporary surplus of capacity which supports such transactions is created by the utility by refraining from using capacity which it held under contract to transport its utility gas from points upstream to its system and, instead, exchanging the temporary surplus of that capacity it has created for cheaper utility gas transportation provided by a third party.

13. At page 26 of its Reasons in that proceeding, the Board stated:

> ***"The evidence in this case supports CME's contention that Union generated revenue by creating unabsorbed demand charges or UDC on a planned basis and then either concurrently assigned or exchanged its FT contracts on the TCPL Mainline to monetize the FT-RAM credit value of the unused FT contracts.***

> ***The Board agrees with the submissions of parties that the utilization of TCPL's FT-RAM program by Union allows Union to manage its upstream transportation arrangements on a planned basis by leaving pipe empty and flowing gas on a different and cheaper path. The Board finds that the effect of this activity is that higher upstream transportation costs that are paid for by Union's customers, have been substituted with lower cost upstream transportation arrangements."***

14. Based on these findings, the Board concluded that the net revenues realized from the FT-RAM related capacity release/exchanges are properly classified as upstream gas transportation cost reductions and not as transactional services revenues.[1]

(iii) EB-2012-0055

15. The Board made findings to the same effect in its EB-2012-0055 Decision and Order which issued on March 14, 2013 less than four months after the EB-2012-0087 Decision and Order.

16. Like the previous Decisions, the Board's Reasons in this proceeding recognize that, unlike base exchanges, FT-RAM related capacity release/exchanges do not rely on assets which are, for reasons beyond EGD's control, temporarily surplus to its utility gas transportation needs. FT-RAM capacity release/exchanges rely on temporary surpluses which EGD itself creates. At page 6 of its Decision, the Board stated:

> ***"The essential characteristic of transactional services is that they are arrangements made to generate revenue from unplanned, temporary surplus transportation capacity that Enbridge may have, from time to time, as part of its gas supply arrangements. The portion of utility gas supply assets that is available to support transactional services activities is only the portion of those assets that are temporarily surplus because of factors beyond Enbridge's control (e.g. weather, market demand)."***

And, at page 13 of this Decision, the Board found:

> ***"Base exchanges rely on assets which are, for reasons beyond Enbridge's control, surplus to the needs of Enbridge's gas supply plan."***

[1] EB-2012-0087 Decision and Order dated November 19, 2012, at page 28.

17. In describing FT-RAM related capacity release/exchanges, the Board stated at page 14 of the Decision and Order as follows:

> ***"The Board notes that in a capacity release, the gas purchased by Enbridge at Empress is required to serve its customers. Enbridge could use the underlying assets, which support the capacity release transaction, to transport the purchased gas to its customers. Instead, Enbridge utilizes an exchange to ensure that the gas purchased for its customers is delivered to the location where it requires that gas; these transactions are not relying on temporarily surplus assets."***

18. And further, when comparing capacity release/exchanges to Enbridge's own use of STS-RAM credits (which EGD accepts are properly classified as upstream gas cost reductions), the Board stated:

> ***"In the case of the capacity releases, Enbridge reduces the cost of the delivered gas through the capacity release transaction. The outcome of both situations is that the landed price of the gas to be used by Enbridge's ratepayers is reduced. Therefore, the Board finds that similar treatment of the gas cost reductions from both of these types of activities is warranted."***

19. In the Decision, the Board found that the fact that EGD did not include FT-RAM capacity release/exchanges transaction in its advance gas supply planning at the outset of a particular year was irrelevant. At page 14 of the Decision and Order, the Board stated:

> ***"The Board notes that, in this proceeding, there is no evidence that Enbridge generated revenue by managing its upstream transportation arrangements on a truly planned basis. Rather, they are a function of circumstances that arise, and factors taken into account by Enbridge's Gas Control group, as the gas supply plan is implemented.***
>
> ***<u>Regardless of the Board's conclusion that Enbridge's capacity releases occur on an unplanned basis</u>, the outcome of these transactions is that gas, which is required by Enbridge's customers, is delivered to these same customers at a reduced cost."*** **(emphasis added)**

20. Based on this analysis, the Board concluded, at page 14, that:

> ***"...it is clear to the Board that the revenues generated from capacity release transactions should be treated as gas cost reductions."***

B. Board's Rationale for Classifying Capacity Release/Exchange Net Revenues as Upstream Transportation Cost Reductions

21. Based on the findings made in its prior Decisions, we submit that the Board's rationale for concluding that the amounts realized from capacity release/exchange transactions are not TS revenues but upstream gas transportation cost reductions can be summarized as follows:

(a) Net revenues or "savings" realized from "optimizing" upstream gas transportation capacity only qualify as TS revenues if they stem from the use of capacity which is temporarily surplus by reason of factors beyond the utility's control. The revenues must arise from the use of capacity which has become temporarily idle because of factors beyond the utility's control, which capacity would otherwise remain idle if it were not used to support an exchange or other transactional service; (emphasis added)

(b) A temporary surplus in contracted capacity which the utility itself creates by deciding to refrain from using that capacity in order to be able to sell that capacity to a third party and to concurrently acquire from that third party a substitute and effectively a cheaper form of transporting its utility gas to its system from points upstream is not a capacity surplus which arises as a result of factors beyond the utility's control. The decision to create such surpluses, from time to time, may not be "planned" at the outset of a particular year. Notwithstanding the absence of such advance planning, the periodic decisions to create these temporary surpluses, when made, are, nevertheless, matters within the utility's control. The utility "controls" the decision to make a utility gas transportation switch so as to acquire a cheaper means of carrying its utility gas to its system from points upstream just as the utility controls decisions it makes to buy gas commodity at prices lower than those embedded in rates.

(c) The absence of advance planning at the outset of a particular year to create surpluses to support capacity release/exchange transactions is irrelevant to the appropriate classification of the revenues or "savings" arising from such transactions. Regardless of the absence of such advance planning, revenues arising from transactions based on capacity surpluses created by a utility, as a component part of a decision to acquire utility gas transportation at a price cheaper than the amount embedded in rates, do not fall within the ambit of transactional services; and

(d) Utility revenues derived from utility gas transportation "switching" are properly classified as upstream gas transportation cost reductions. Utility gas transportation switching transactions do not arise from circumstances beyond the control of the utility. Amounts derived from upstream gas transportation switching to achieve savings in costs embedded in the gas transportation component of rates do not fall within the ambit of TS revenues. They are upstream gas transportation cost reductions.

C. <u>Heavy Burden of Proof Facing EGD in this Proceeding</u>

22. As already noted in paragraph 4 of these submissions, when finalizing the order stemming from its EB-2012-0055 Decision, the Board declined to require EGD to adhere in this case to its upstream gas transportation cost reduction classification ruling made in EGD's 2011 Deferral Accounts case. It did so because of EGD's representations that it could lead evidence in this case to demonstrate that the conclusions which the Board had reached on the basis of evidence lead in the prior proceeding were inappropriate.

23. The Board's willingness to allow EGD to revisit the issue in this case with further evidence should not be construed as a Board decision to either disregard or ignore the findings made in its prior decisions as EGD appears to argue.[2] We submit that the comments made by the Chair at Transcript pages 54 and 55 cannot reasonably be construed in that manner as EGD appears to contend. Rather, interpreted reasonably, the comments convey, or are intended to convey, that the decision with respect to the classification issue in this case will be made on the evidence led in this proceeding. That said, the evidentiary burden EGD faces in this proceeding is significant and, we submit, at the very least as significant as the burden faced by a moving party seeking to review and vary a prior Board Decision under Rule 44 of the Board's Rules of Procedure. In such a proceeding, a party seeking to change a prior Board Decision on a matter of fact, such as the "classification" of revenues or "savings", must adduce evidence establishing materially changed circumstances or facts which were not placed in evidence in the prior proceeding and could not have been discovered by reasonable diligence at the time. The evidence which EGD has led in this proceeding falls far short of discharging the significant burden of proof it faces.

24. As events have unfolded, EGD has led no evidence to demonstrate any facts other than those which were established or could have been established in the 2011 Deferral Account Clearance proceeding. EGD witnesses acknowledged that the facts summarized by the Board in its EB-2012-0055 Decision and the facts pertaining to EGD's involvement in FT-RAM related capacity release/exchanges in 2011 are the same.[3] There is no evidence to demonstrate that FT-RAM related capacity release/exchange

[2] EGD Argument-in-Chief, para. 3.
[3] Transcript, pages 29 to 34.

transactions are anything other than the same utility gas transportation switching transactions that they were in 2011.

D. Capacity Release/Exchanges are Not Analogous to Base Exchanges

25. EGD attempts to justify its proposed classification of 2012 net revenues related to FT-RAM capacity release/exchange transactions as TS revenues on the grounds that capacity release/exchanges are analogous to base exchanges. We submit that utility gas transportation switching transactions are not analogous to base exchanges, as EGD argues.

26. In a base exchange, a third party who does not have any means of transporting its gas from Point A to Point B gives its gas to EGD at Point A and, in exchange, EGD gives the third party gas at Point B. EGD uses temporarily surplus transportation capacity, <u>caused by factors beyond its control</u>, to support the base exchange transaction. The Board recognized this critical distinction in its EB-2012-0055 Decision. The transportation capacity supporting the transaction is temporarily surplus because of variations in day-to-day and month-to-month system gas supply and demand. The temporarily surplus capacity would remain surplus if it were not used to support the base exchange transaction. The transportation surplus which supports base exchanges is not "created" by EGD's gas supply management decision to temporarily refrain from using and then temporarily assigning its utility gas transportation, the costs of which are embedded in its rates, and concurrently acquiring from the assignee a cheaper alternative for temporarily transporting its utility gas. There is no assignment of any transportation capacity held by EGD to the third party in a base exchange. In a base exchange, EGD effectively provides the third party with a "virtual" transportation service.

27. In contrast, in a FT-RAM related capacity release/exchange transaction, EGD "creates" the temporary surplus capacity which it assigns and concurrently acquires substitute gas utility transport from the third party assignee. Unlike base exchanges, these transportation switching transactions are "combined" transactions. In the FT-RAM related capacity release/exchange transaction, the "virtual" transportation service to carry EGD's utility gas from Point A to Point B is provided by the third party. Unlike an EGD base exchange, the "virtual" transportation service provider is the third party and not EGD. EGD swaps the utility gas transportation it holds for cheaper "virtual" transportation provided by the third party under the capacity release/exchange. The combined transaction is clearly a capacity switching transaction, and transportation switching gives rise to gas transportation cost reductions rather than transactional services revenues.

E. Advance Planning, Invoicing Practices, and "Unlocking" Value are Irrelevant to the "Classification" Issue

28. As already noted, in paragraph 19 of these submissions, the Board determined in its EB-2012-0055 Decision that EGD's inability to foresee and budget these types of transportation switching transactions at the time it develops its gas supply plan for an ensuing year is irrelevant. Regardless of the absence of such advance planning, the TS classification does not apply to these transactions because the temporarily surplus capacity which EGD creates and assigns to support these transactions is not the outcome of factors beyond its control. We submit that the outcomes of all capacity switching transactions are properly classified as upstream gas transportation cost reductions in the same way that commodity switching transactions would lead to a flow through to ratepayers of any commodity cost reductions achieved as a result thereof. The invoicing

which EGD and the counterparty choose to adopt does nothing to alter the utility gas transportation switching nature of the transactions.

29. Similarly, we submit that characterizing the transactions as the “unlocking” of the spread that exists between the value to the third party of the capacity which EGD acquires and holds at the expense of its ratepayers, and would otherwise use to transport utility gas to its system from points upstream, and the costs to EGD of acquiring from that third party a substitute service for transporting the same utility gas is irrelevant with respect the issue of “classification”. The net amount the utility receives from switching transactions with respect to flow through items of expense are properly characterized as cost reductions. The utility switches one form of utility gas transportation paid for by ratepayers for another and, as a result, spends less on transportation than the amounts embedded in rates. Such “savings” are properly classified as flow through cost reductions in the same way as the savings achieved by switching gas commodity purchases from one source to another are flowed through to ratepayers.

IV. CONCLUSION

30. Based on the foregoing, we submit that there is no evidence to justify EGD’s contention that the $18.63M of net revenues realized from the 2012 capacity release/exchange transactions are TS revenues. There is no evidence to justify a 2012 decision on the unresolved classification issue any different from the Decision rendered in 2011 with respect to that issue. Savings in 2012 upstream gas transportation costs embedded in rates, which EGD achieved under the auspices of FT-RAM related capacity release/exchange transactions being utility gas transportation switching transactions are properly classified as upstream gas transportation cost reductions.

V. COSTS

31. CME requests that it be awarded 100% of its reasonably incurred costs in participating in this Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of October, 2013.

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