



# **ONTARIO ENERGY BOARD**

## **OEB STAFF SUBMISSION**

**MR. RON TOLMIE**

**MOTION TO REVIEW AND VARY**

**EB-2015-0277**

**October 13, 2015**

## Background

To assist the OEB in considering Mr. Ron Tolmie's motion to review and vary Procedural Order No. 2 in EB-2015-0166 / EB-2015-0175, OEB staff offers the following summary of the events leading up to the motion.

The EB-2015-0166 / EB-2015-0175 proceeding concerns applications filed by Union Gas Limited (Union) and Enbridge Gas Distribution Inc. (Enbridge) for the pre-approval of the cost consequences of their respective long-term transportation contracts with NEXUS Gas Transmission commencing November 1, 2017 (the NEXUS proceeding).

Mr. Tolmie was granted intervenor status in the NEXUS proceeding. However, he was cautioned in Procedural Order No. 1 that "the scope of the proceeding will ultimately be decided by the OEB panel assigned to hear this case. It may be that one or more of the issues raised by Mr. Tolmie are determined, in due course, not to be in scope."

Procedural Order No. 1 also set out a preliminary issues list which was derived from the OEB's *Filing Guidelines for Pre-Approval of Long-Term Natural Gas Supply and/or Upstream Transportation Contracts* dated April 23, 2009. The four issues on the preliminary issues list are:

1. Has the applicant adequately demonstrated the need, costs and benefits of the proposed project?
2. Has the applicant adequately demonstrated contract diversity in regard to how the contract fits into the applicant's overall transportation and natural gas supply portfolio in terms of contract length, volume and services?
3. Has the applicant provided an adequate assessment of all risks associated with the proposed project as well as provided plans on how these risks are to be minimized and allocated between ratepayers, parties to the contract and/or the applicant's shareholders?
4. Has the applicant provided an adequate assessment of other relevant considerations associated with the proposed project (for example, other conditions, rights or obligations among the parties to the contract and the applicant's parent company and/or affiliates, retail competition impacts, and potential impacts on existing transportation pipeline facilities in the market in terms of Ontario customers)?

Procedural Order No. 1 established a timetable for the discovery process. It required intervenors to advise the OEB by September 17, 2015 if they intended to file any evidence in the NEXUS proceeding.

Mr. Tolmie was the only intervenor who declared an intention to do so. In a September 16, 2015 letter to the OEB, he discussed “exergy storage” but did not specifically identify what evidence he proposed to introduce on that topic. In another letter sent on September 22, 2015, he elaborated that he would submit “reports from the NEB, OEB, IESO and government agencies, peer reviewed papers from established science journals, data from Statistics Canada, etc., that should not require the testimony of expert witnesses.”

In Procedural Order No. 2, the OEB ordered Mr. Tolmie not to submit the evidence he had described, as it was outside the scope of the NEXUS proceeding. The OEB explained that “Mr. Tolmie’s issues relate largely to broader questions of the future of electricity supply and demand in Ontario and hence are policy matters beyond the OEB’s mandate in the context of the particular applications before it in this proceeding.”

On September 29, 2015, Mr. Tolmie filed a letter requesting an “appeal” of the OEB’s refusal to admit his proposed evidence.

On October 5, 2015, the OEB issued a Notice of Motion to Review and Vary and Procedural Order No. 1 which explained that Mr. Tolmie’s request would be treated as a motion to review and vary, and invited other parties to make submissions. The motion was given a new OEB file number, EB-2015-0277.

### **OEB Staff Submission**

OEB staff submits that Mr. Tolmie’s letters of September 16 and 22, 2015 were vague in terms of what evidence he intended to file and failed to explain clearly how that evidence would be relevant to the NEXUS proceeding. Therefore, it was reasonable for the OEB to refuse the evidence.

However, Mr. Tolmie’s letter of September 29, 2015 provided a somewhat more detailed description of the materials he wishes to file and ties the materials directly to several of the issues on the provisional issues list. Although Mr. Tolmie has not identified the particular reports or other documents he wishes to submit, he argued in his September 29, 2015 letter – and further in another letter of October 5, 2015 – that the materials relate to three of the four issues on the provisional issues list (issues 1, 3 and 4).

For the first time, in his September 29, 2015 letter, Mr. Tolmie expressed concerns about the United States regulatory risk to the NEXUS project. OEB staff submits that the issue of regulatory risk in the United States is connected to issue 3 (project risks) and is in scope for this proceeding.

The other issue on which Mr. Tolmie intends to file reports is related to local energy sources and the utilization of thermal energy storage. Mr. Tolmie argues that the use of local energy sources and thermal energy storage are an alternative to the NEXUS project. This would appear to be connected to issue 1 (need for the project). However, OEB staff supports the OEB's finding set out in Procedural Order No. 2 that this issue "relate[s] largely to broader questions of the future of electricity supply and demand in Ontario and hence are policy matters beyond the OEB's mandate in the context of the particular applications before it in this proceeding." OEB staff submits that this larger policy issue is outside the scope of this proceeding.

A different concern for OEB staff is that the materials Mr. Tolmie wishes to file do not appear to be "evidence". Mr. Tolmie proposes to file a number of reports. However, he does not propose to call the authors of these reports as witnesses, and there would be no opportunity for any party to cross-examine on their contents. Ordinarily, the OEB only accepts evidence where there is a witness that can answer questions about the evidence – whether through interrogatories, a technical conference, or cross-examination. In OEB staff's view, the reports cannot be considered evidence.

However, it is not uncommon for parties to file reports or other documents to use in their cross-examination of other witnesses. Although OEB staff has not seen the reports in question, it would likely be acceptable if Mr. Tolmie wanted to ask the companies' witness panels questions about the contents of the reports (provided the questions are in scope). The witnesses may or may not have helpful answers, but it would be open to Mr. Tolmie to ask. The reports themselves would not be evidence, but the companies' answers would be.

In summary, OEB staff submits that Mr. Tolmie should be permitted to file materials that relate to United States regulatory risk to the NEXUS project in this proceeding as this issue is in scope, though OEB staff cannot be certain whether the actual reports will be relevant to this issue until they have been reviewed. He could then refer to the materials in his cross-examination of Union and Enbridge, if there is an oral hearing.

OEB staff submits that should the OEB decide to allow Mr. Tolmie to file materials, the OEB may wish to include in its decision a proviso that despite the decision, Union and Enbridge (as well as OEB staff) are not precluded from objecting to any particular materials during the hearing, including on the ground of irrelevance.

All of which is respectfully submitted.