

April 27, 2016

RESS, COURIER & EMAIL

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

Attention: Ms. Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2016-0004 - Union Gas Limited - Natural Gas Expansion Generic Proceeding - Request for Further Information

We are counsel to Union Gas Limited ("Union") in the above-referenced proceeding. During the Pre-Hearing Conference held April 26, 2016, we expressed Union's intention to bring a motion to compel responses to certain interrogatory questions that it had posed to each of EPCOR Utilities Inc. ("EPCOR") and Southern Bruce Municipalities ("South Bruce").

To consider the request on an expedited basis, the Board asked that parties seeking further information provide (i) a list of the interrogatories for which they are seeking further information, and (ii) the reasons why the party feels that the requested information is appropriate within the context of the generic proceeding, having regard to the approved Issues List. Union's submissions on these aspects are set out below. Union also makes submissions below on a related concern with respect to the availability of an appropriate witness for EPCOR.

For the reasons set out more fully below, Union's interrogatories to EPCOR and South Bruce are relevant to the Issues List and firmly grounded in the evidence. The requested information will assist parties in considering, and the Board in determining, whether it should consider imposing conditions or making other changes to the Model Franchise Agreement (Issue #8) and by providing a real and current example of a competitive franchise process, including the terms of the franchise agreement resulting from that process (Issue #9). Union's interrogatories are also grounded in the evidence filed to date, which indicates that EPCOR and South Bruce are holding out the South Bruce competitive process, the selection of EPCOR and the resulting franchise agreements, as examples that the OEB should consider following or endorsing in the generic proceeding. Union's interrogatories seek to explore that evidence, and ensure its completeness, in light of the generic issues being considered in this proceeding.

1. REQUESTS FOR FURTHER INFORMATION

(a) Interrogatories for Which Union Seeks Further Information

Union seeks further and better answers in respect of the following interrogatories:

- Union to EPCOR 2, 3(b), 5(a) - (b), and 8(a)-(c); and
- Union to South Bruce 1(a), 2(a), 3(a) and 4(a).

(b) Nature of the Interrogatory Questions Refused

Union's interrogatories to EPCOR relate to materials recently filed by EPCOR in its applications for approval of franchise agreements and certificates of public convenience and necessity in EB-2016-0137/0138/0139. Specifically, Union asked EPCOR:

- to file copies of its applications in those proceedings, including the terms of franchise agreements with the South Bruce municipalities proposed for OEB approval;
- to confirm the extent to which it has sought terms in its franchise agreement that differ from those in the 2000 Model Franchise Agreement;
- to provide information about gas supply and demand analysis and preliminary tariffs and costs in each of the proposed franchise areas; and
- to provide copies of customer rate information provided by EPCOR to the South Bruce municipalities for their evaluation of Request for Information ("RFI") respondents.

Generally, EPCOR refused to provide the requested information on the basis that its franchise applications are beyond the scope of the issues in the present proceeding and beyond the scope of Dr. Yatchew's knowledge (on the basis he is an independent expert and not an employee).¹

Union's interrogatories to South Bruce relate to the franchise agreements recently entered into by each of the municipalities with EPCOR, as well as to the RFI responses received by the municipalities that led to their arrangements with EPCOR. More specifically, Union asked for:

- copies of the franchise agreements and summaries of the differences between them and the 2000 Model Franchise Agreement;
- a summary of the different rate design proposals included in the RFI responses received by South Bruce;
- the tariff or customer rate information provided to the municipalities by the successful proponent in the RFI process; and
- information about the ranking and scoring criteria upon which the evaluation of the RFI responses was based.

South Bruce refused to provide the requested information on the basis that it is not relevant to issues in the present proceeding and that the information relates to a confidential RFI process.

¹ Please see submissions below regarding EPCOR's strategy in proceeding to put its factual position on the record through Dr. Yatchew as a means of avoiding further examination.

(c) **Context - Objective of Generic Proceeding and Relevant Issues**

The purpose of the generic proceeding is for the Board to consider a common framework for the expansion of gas delivery to Ontario communities that would be applicable to all distributors.

In Procedural Order No. 2, the Board approved the Issues List for the proceeding. Two of the approved issues are of particular relevance to the information Union has requested from each of EPCOR and South Bruce:

8. Should the OEB consider imposing conditions or making other changes to Municipal Franchise Agreements and Certificates of Public Convenience and Necessity to reduce barriers to natural gas expansion? (emphasis added)
9. What types of processes could be implemented to facilitate the introduction of new entrants to provide service to communities that do not have access to natural gas. What are the merits of these processes and what are the existing barriers to implementation? (e.g. Issuance of Request for Proposals to enter into franchise agreements). (emphasis added)

(d) **The Interrogatory Questions Seek Relevant Information**

The interrogatory questions posed by Union to each of EPCOR and South Bruce are directly relevant to Issues #8 and #9 of the approved Issues List. In asking for materials relating to EPCOR's franchise/certificate applications, and related materials from South Bruce's RFI process, Union seeks materials that will assist parties in considering, and the Board in determining, whether it should consider imposing conditions or making other changes to the Model Franchise Agreement. In no way is Union asking or suggesting that the Board should consider the merits of EPCOR's applications at this stage. The materials will also assist parties and the Board by providing a real and current example of a competitive franchise process and the franchise agreement terms resulting from that process. Moreover, as discussed below, based on the evidence filed to date South Bruce and EPCOR are holding out the South Bruce RFI process and the selection of EPCOR, as well as the resulting franchise agreements, as examples that the OEB should consider following or endorsing in the generic proceeding.

We further note that certain of the refusals from South Bruce were made on the basis that the RFI process was confidential.² Confidentiality is not a bar to disclosure. Whether or not certain information should be treated confidentially can be evaluated by the Board at a later date.

(e) **Union's Questions are Grounded in the Evidence**

In addition to being relevant to the approved issues in the generic proceeding, the information requested by Union from each of EPCOR and South Bruce is grounded in the evidence that has been filed in the generic proceeding to date. Union's interrogatories seek to explore that evidence, including in particular evidence that has been led by each of EPCOR and South Bruce.

EPCOR and South Bruce are connected parties in this proceeding by virtue of the fact that South Bruce conducted a competitive process for gas distribution in its applicable municipalities, that EPCOR was selected through that process, and that franchise agreements have been entered into. In the context of the generic proceeding, the evidence of both South Bruce and EPCOR is focused on the benefits of a competitive process and the resulting franchise agreement. In

² See for example South Bruce responses to Union 2, 3, 4(a)-(d).

particular, the South Bruce process and EPCOR selection, and the resulting franchise agreements, are held out as examples that the OEB should follow.

In its evidence South Bruce states:

The Municipality of Kincardine, the Municipality of Arran-Elderslie and the Township of Huron-Kinloss (the “Municipalities” or “Southern Bruce County”) and Henley International Inc. have prepared this report to assist the Board in its consideration of Issue 8 (*sic – correct reference should be to Issue 9*) given that the Municipalities themselves have already undergone a lengthy and thorough process to identify and evaluate potential new entrants to provide natural gas services to their respective communities.

This report describes the process pursued and exploratory work undertaken by the Municipalities and their advisors over a 5 year period which ultimately resulted in the selection of EPCOR Utilities Inc. (“EPCOR”) as the preferred provider. On February 22, 2016, each of the three Municipalities signed a Franchise Agreement with EPCOR.

The Municipalities submit that their collective approach to exploring different options, developing a business case that supported natural gas expansion, and the subsequent competitive Request for Information (“RFI”) solicitation for potential natural gas providers delivered significant benefits for these communities through testing the marketplace and obtaining multiple competing proposals for expanding natural gas service.³ (emphasis added)

Likewise, EPCOR’s evidence asserts the benefits of a competitive model as the basis for expansion of natural gas service in Ontario. This is a major thrust of the evidence of Dr. Yatchew that EPCOR has submitted and appears to adopt.⁴

With respect to franchise agreements resulting from the application of competitive processes, South Bruce has already acknowledged that the franchise agreements signed by the three municipalities and EPCOR depart from the 2000 Model Franchise Agreement⁵ and that one of the ways it does so is through the introduction of terms that provide for payment by EPCOR to each municipality of an annual fee equal to 1% of gross revenues.⁶ In EPCOR’s pre-filed evidence, the Yatchew report states that the recently signed franchise agreements between the South Bruce municipalities and EPCOR provide a clear indication of the feasibility of competition and that the distribution of risk should be an outcome of the negotiation process and embedded in the franchise agreement.⁷ Similarly, in response to CCC Interrogatory 10(d), EPCOR has stated that risk sharing would depend on the specific characteristics of the franchise and would be an outcome of the franchise negotiation process.

³ Pre-filed Evidence of South Bruce, filed March 21, 2016: *The approach & competitive solicitation process undertaken by the Municipalities to facilitate the expansion of Natural Gas services to Southern Bruce County*, prepared by the Municipalities of Kincardine, Arran-Elderslie and Huron-Kinloss, and Henley International Inc., p. 2.

⁴ Pre-filed Evidence of EPCOR, filed March 21, 2016: *Expert Evidence*, Adonis Yatchew, para. 16-18.

⁵ Exhibit R13.South Bruce.BOMA.83.

⁶ Exhibit R13.South Bruce.SEC.8.

⁷ Pre-filed Evidence of EPCOR, filed March 21, 2016: *Expert Evidence*, Adonis Yatchew, para. 18 and 57.

(f) **Board May Include Franchise Applications on Record Without Consent**

As an alternative to requiring EPCOR to file copies of its franchise applications in response to Union's Interrogatory #2 to EPCOR, Union notes that under section 21(6.1) of the *Ontario Energy Board Act* the Board has the authority to treat the materials filed in EPCOR's three franchise application proceedings as evidence in the present proceeding without consent from EPCOR or any other party in this proceeding. We assume that this is the same authority on which the Board relied in determining that Union's community expansion application and evidence would form part of the record in the generic proceeding. Section 21(6.1) provides:

(6.1) Despite subsection 9.1 (5) of the *Statutory Powers Procedure Act*, the Board may treat evidence that is admitted in a proceeding as if it were also admitted in another proceeding that is heard at the same time, without the consent of the parties to the second-named proceeding.

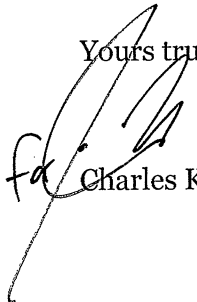
2. **NEED FOR EPCOR WITNESS**

Union is concerned that no representatives of EPCOR will be presented as witnesses in this proceeding, thereby rendering it impossible for parties to cross examine on various statements of fact that have been made by EPCOR and which parties have a right to cross examine on.

It appears that EPCOR only intends to present Dr. Adonis Yatchew as an expert witness. EPCOR appears to be trying to avoid having to appear in the proceeding by asserting that it can only rely on expert evidence and by indirectly putting its position on the record in a manner that would preclude cross-examination by repeatedly stating in interrogatory responses that Dr. Yatchew is "advised by EPCOR . . ." For example, in response to Union Interrogatory #1, EPCOR states that "Dr. Yatchew is advised by EPCOR his written evidence also reflects EPCOR's views" and in response to Union Interrogatory #3, EPCOR states "Dr. Yatchew is advised that EPCOR has not researched the history of the current Model Franchise Agreement." Similar language is used in numerous other interrogatory responses.⁸

It is apparent from these answers that Dr. Yatchew has no direct knowledge of any of the factual matters asserted by EPCOR. In Union's submission, EPCOR should be required to formally identify an appropriate EPCOR witness, who will be made available for cross-examination, by no later than Friday, April 29, 2016. Allowing EPCOR to proceed without presenting a suitable witness would be unfair to the Board and all interested parties. If EPCOR is not prepared to put a witness forward then EPCOR's evidence should be struck, together with any submissions made on the basis of that evidence.

Yours truly,



Charles Keizer

cc: C. Ripley, Union Gas
All Intervenors (EB-2016-0004)

⁸ See: Board Staff 1, 4, 5, 6, 9, 14; BOMA 1, 3; CCC 3.