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Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, ON M4P 1E4

Attention: Ms. Kirsten Walli, Board Secretary

Re: Reply Submissions and Other Procedural Matters in EB-2016-0004

REPLY SUBMISSIONS

We make these written submissions on behalf of the Municipality of Kincardine, the Municipality of Arran-Elderslie and the Township of Huron-Kinloss (“Southern Bruce”)¹ in response to the submissions of the School Energy Coalition (“SEC”), Union Gas Limited (“Union”), Enbridge Gas Distribution (“Enbridge”), and GreenField Specialty Alcohols Inc. (“GreenField”), made on April 27, 2016 requesting that the Ontario Energy Board (the “Board”) order that Southern Bruce provide full and adequate interrogatory responses pursuant to Rule 27.03 of the *Rules of Practice and Procedure* for the following interrogatories:

- Exhibit S13.South Bruce.Enbridge.1(b);
- Exhibit S13.South Bruce.SEC.3;
- Exhibit S13.South Bruce.SEC.4;
- Exhibit S13.South Bruce.Union.1(a);
- Exhibit S13.South Bruce.Union.2(a);
- Exhibit S13.South Bruce.Union.3(a); and
- Exhibit S13.South Bruce.Union.4(a).

¹ We are intentionally using the nomenclature “Southern Bruce” rather than “South Bruce” to avoid confusion. There is a different municipality, called the Municipality of South Bruce, which is located adjacent to, but does not form part of, the Southern Bruce group.

As described in the responses to each of these interrogatories, and for the reasons more fully described below, the Southern Bruce municipalities submit that disclosure of the information requested is not relevant to the issues in this generic proceeding. In addition, disclosure of this information would not be in the public interest.

1. Exhibit S13.South Bruce.Enbridge.1(b)

Enbridge argues that the municipalities must be required to disclose all six (6) of the proposals that they received in response to their RFI process because they are relevant to issue number 9 and are necessary “[i]n order for the Board to have a reliable, factual evidence upon which to base its consideration of Request for Proposal processes in this proceeding [...]”.

We respectfully disagree.

This is not the first time that intervenors have attempted to use the Board’s processes to seek detailed information related to a competitive tender process that led to a particular outcome that certain intervenors have wanted to challenge.

The Board considered, and ultimately rejected, similar arguments in its Combined MAADS Decision (RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257) at pages 8-10. In that decision, when considering whether to approve or deny specific transactions, the Board determined that the “how” and the “why” that led to those specific transactions were not relevant considerations. In this generic proceeding, there is no specific transaction under consideration.

The Southern Bruce municipalities have produced detailed information related to their RFI process for the benefit of the Board panel in consideration of issue number 9. In addition to a comprehensive report documenting the RFI process, the municipalities have produced the actual RFI as well as numerous supporting business cases and studies.

The RFI proposals submitted are not relevant to this Generic Hearing and would contribute nothing to the Board’s determination in respect of issue number 9.

The only apparent benefit of producing the RFI responses would be to Enbridge who would benefit directly from obtaining the confidential proposals submitted by its competitors. The Board's process should not be used as some form of discovery mechanism to bestow an advantage to Enbridge or others who may wish to participate in future competitive processes for gas expansion.

Disclosure of these proposals in this proceeding would have several other detrimental effects.

First, certain parties may wish to obtain access to the proposals so that they can use this generic proceeding as a means to attempt to challenge the assessment or decisions made by the municipalities to select EPCOR as the preferred proponent and to award respective franchise

agreements to EPCOR. Certainly the municipalities have the authority to award these franchise agreements in accordance with the *Municipal Franchises Act*.²

The decision of the municipalities to select EPCOR is not an issue in this generic hearing. There would be no benefit to the Board's broader public policy determinations in respect of its issues list by disclosing the RFI requests. Also, it would delay this proceeding since Southern Bruce would need to contact all respondents to advise them and some or all may wish to make submissions to the Board on this matter. All this would only serve to distract from the broader province wide policy orientation of this generic proceeding.

Second, disclosure of the proposals would undermine the integrity of the confidential RFI process that was undertaken by the municipalities. Proponents only participated in the RFI process after negotiating binding confidentiality agreements which obligated the municipalities to hold their bids in confidence and not disclose them to third parties or their competitors.

Given this, it is reasonable to conclude that proponents may simply choose not to participate in any future RFI process if the Board requires municipalities to make the bids they receive public. In effect, by ordering disclosure of the proposals now, the Board may unintentionally undermine the effectiveness of a decision it later may make to encourage competitive tender processes pursuant to issue number 9.

2. Exhibit S13.South Bruce.SEC.3

SEC argues in its specific submissions that the Board should order the disclosure of the RFI proposal from the successful proponent, EPCOR, on the basis that it is relevant to issue 9.

SEC argues that "seeing the actual response will allow parties and the Board to have a sense of what information can realistically be provided at such an early stage in the process. For example, what type of granularity in costs and rates did EPCOR provide South Bruce (if at all), did it offer to provide a revenue stream back to the municipalities, did it say it required a subsidy to undertake the expansion at all."

It is unclear exactly what additional information SEC is attempting to obtain by seeing EPCOR's proposal. The original Union Gas proposal that was made to the municipalities in 2012 is already attached as Appendix B to the municipalities' evidence. This Union proposal provides a very clear sense of the types of information that can realistically be provided at such an early stage in the process, the type of granularity in costs and rates that can be provided, and the level of contribution in aid of construction (or subsidy) that was required. Disclosure of the EPCOR proposal is not required for this purpose.

² The franchises agreements that have been issued by the municipalities have since been filed with the Board in separate applications: EB-2016-0137, EB-2016-0138, and EB-2016-0139. The agreements will be the subject of detailed consideration by a Board panel in these applications.

If, on the other hand, SEC actually wants to see is the EPCOR proposal so that they can dissect and impugn the rationale the municipalities used to select EPCOR as the preferred proponent, please refer to the submissions made above with respect to Exhibit S13.South Bruce.Enbridge.1(b).

3. Exhibit S13.South Bruce.SEC.4

Through this interrogatory, SEC sought disclosure of the key competitive aspects from the proposals submitted in response to the RFI process. Specifically, SEC seeks information about the proposed system design and costs, the scope and certainty of customer rate estimates, and the role of subsidies from each of the proposals submitted in response to the RFI process.

This is akin to asking for a copy of the actual proposals. There is very little that is left to the imagination once this information has been disclosed. In this regard, please refer to the submissions made above with respect to Exhibit S13.South Bruce.Enbridge.1(b).

SEC argues that it needs this information to assess the benefits identified at pages 9-10 of the pre-filed evidence of the municipalities. However, the benefits identified on pages 9-10 are benefits that the Southern Bruce municipalities gained from the RFI process. That is to say, the benefits identified are subjective. They are not objective.

Given this, disclosure of the requested information will not help SEC validate whether or not the Southern Bruce municipalities gained the stated benefits. Even if some conclusions may have been apparent to industry experts and insiders – the municipalities are neither insiders nor experts. The benefits listed are real benefits that the municipalities identified after testing the market through the RFI process.

4. Exhibit S13.South Bruce.Union.1(a)

Union argues that it requires a copy of the existing franchise agreements between the Southern Bruce municipalities and EPCOR on the basis that it is relevant to issues 8 and 9 of the Board's approved issues list.

In almost the same breath, in response to Exhibit S15.Union.EPCOR.4, Union refuses to provide any of the requested information about any of Union's existing franchise agreements stating that "[t]his question is too specific and not relevant to the Board-approved Issues List for the generic proceeding. The scope of the generic proceeding does not include the requested information."

The presence of competitors in regulatory processes can produce some strange behavior. Union argues that the Southern Bruce franchise agreements will assist parties in considering and the Board in determining whether it should make changes to the model franchise agreement (issue 8). For some unknown reason, the same argument does not also apply to Union's franchise agreements.

Contrary to the unsupported assertion of Union, the Southern Bruce municipalities are not proposing their franchise agreements as illustrative of changes which the Board should consider making to its model agreement. In-fact, the opposite is true. The Southern Bruce franchise agreements reflect a negotiated arrangement between commercial parties that is intended to best manage risk in light of very specific facts.

If Union wishes to challenge the specific commercial arrangement arrived at between the Southern Bruce municipalities and EPCOR, it already has a forum to do so. EPCOR has filed its franchise agreements with the Board in EB-2016-0137, EB-2016-0138, and EB-2016-0139 and is seeking Board approval and issuance of certificates of public convenience and necessity.

For the same reasons, there is no need for the Board to treat the materials filed by EPCOR in its franchise applications as evidence in this proceeding pursuant to Section 21(6.1) of the *Ontario Energy Board Act, 1998*.

It is not at all clear how the requested information is relevant to issue 9. Union does not provide any specific submissions in this regard.

Finally, CPA has chosen to file the franchise agreements in Exhibit S2.CPA.Union.1. The CPA has filed these agreements in support of certain assertions that the CPA, not the Southern Bruce municipalities, has made in its evidence. Given this, the Southern Bruce municipalities submit that it is important that the Board provide clear guidance to all of the parties about the appropriate scope of cross-examination on this CPA evidence. We are concerned parties may attempt to use this CPA filing in an attempt to put questions to the Southern Bruce witnesses that are contrary to the Board's determination on relevance.

5. Exhibit S13.South Bruce.Union.2(a)

Union argues that it requires a summary of a key competitive aspect of the proposals received in response to the Southern Bruce the RFI process - the different rate design proposals - on the basis that the information is relevant to issues 8 and 9.

It is not at all clear how the requested information is relevant to issue 8. Union does not provide any specific submissions in this regard.

To the extent Union argues that the information is relevant to issue 9, the party asking the question is relevant. Certainty, Union would benefit directly from obtaining the rate design proposals used by its competitors in a procurement that led to the selection of EPCOR as the preferred proponent.

Please also refer to the submissions made above with respect to Exhibit S13.South Bruce.Enbridge.1(b).

6. Exhibit S13.South Bruce.Union.3(a)

Union argues that it requires a summary of a key competitive aspect of winning proposal – specifically it sought the tariff or customer rate information provided to the municipalities by the successful proponent to the RFI process - on the basis that the information is relevant to issues 8 and 9.

It is not at all clear how the requested information is relevant to issue 8. Union does not provide any specific submissions in this regard.

To the extent Union argues that the information is relevant to issue 9, the party asking the question is relevant. Certainly, Union would benefit directly from obtaining the tariff or customer rate information used by its competitors in a procurement that led to the selection of EPCOR as the preferred proponent.

Please also refer to the submissions made above with respect to Exhibit S13.South Bruce.Enbridge.1(b).

7. Exhibit S13.South Bruce.Union.4(a)

Union argues that it requires access to a variety of information about the ranking and scoring criteria upon which the RFI proposals that were received were assessed by the Southern Bruce municipalities on the basis that the information is relevant to issues 8 and 9.

It is not at all clear how the requested information is relevant to issue 8. Union does not provide any specific submissions in this regard.

To the extent Union argues that the information is relevant to issue 9, the party asking the question is relevant. Certainly, Union would benefit directly from obtaining this information for the purposes of challenging the results of a procurement that led to the selection of EPCOR as the preferred proponent.

Please also refer to the submissions made above with respect to Exhibit S13.South Bruce.Enbridge.1(b).

8. GreenField Submissions and Time Estimates

GreenField has filed submissions in support of the SEC and Union motions on the basis that the information will be valuable in assessing issues 3, 4, 5, 6, 7, 8 and 9. GreenField has not attempted in any meaningful way to go beyond its bald assertion of relevance of the requested information to almost every issue on the Board's approved issues list. As described in detail above, each of the 'Subject IRs' are not relevant to the matters at issue in this generic proceeding.

Rather, GreenField has identified a list of complaints that one industrial consumer has with the decision taken by the Southern Bruce municipalities to select EPCOR as the preferred proponent following its RFI process. This, in-turn, appears to be reflected in **2-hours** of planned cross-examination of the Southern Bruce panel proposed by GreenField.

In this context, we submit that it would be helpful for the Board to provide guidance to the parties as to its expectations regarding appropriate scope of cross-examination.

In the submission of the Southern Bruce municipalities, this generic proceeding is not the appropriate forum for a single industrial customer to vent their frustration about, or attempt to second guess or challenge the results of, the Southern Bruce RFI process. Process does matter. And the appropriate forum to debate the details of the Southern Bruce RFI process is the municipal council chambers. It is not as part of the Board's generic hearing.

OTHER PROCDURAL MATTERS

Further to our correspondence of April 27, 2016, we can confirm the following:

- Mayor Sayeau of the Township of Edwardsburg Cardinal has written and informed us that their failure to respond to R14.South Bruce.Edwardsburgh.1 was an unintentional oversight, and that they intend to correct this over the weekend and file a response with the Board on Monday. We would like to thank the Mayor for his prompt attention to this matter and his cooperation.
- We anticipate requiring approximately 40 minutes to complete the in-chief examination for the Southern Bruce panel. This will include a brief summary from the mayors of the Southern Bruce municipalities, a description of the benefits of their RFI process, qualifying Mr. Todd and Mr. Bacon as experts, and having those experts provide a brief summary of their respective reports.
- We currently anticipate limited cross-examination being required in this proceeding. Our specific time estimates are as follows:
 - CPA – 10 minutes;
 - EGDI – 5 minutes;
 - GreenField – 30 minutes;
 - VECC – 5 minutes; and
 - Union – 15 minutes.
- These estimates may changes as a result of:
 - The Board's determination of relevance of certain matters that are in dispute;
 - Any guidance the Board may provide on appropriate scope of cross-examination; and
 - The results of other parties' cross examinations, including attempting to avoid duplication to the extent possible.

Yours truly,

BORDEN LADNER GERVAIS LLP

Original signed by John A.D. Vellone

John A.D. Vellone

Copy to: Michael Millar, OEB Counsel
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Mayor Mitch Twolan, Township of Huron-Kinloss
Dr. Lawrence Murphy
Mr. John Todd
Mr. Bruce Bacon
Intervenors of Record