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Our File No. 161734

July 6, 2016

VIA EMAIL, RESS AND COURIER

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

Attention: Kirsten Walli,
Board Secretary

Dear Ms. Walli:

Re: EB-2016-0004: BOMA's Reply Submission

Pursuant to Procedural Order No. 3, please find enclosed BOMA's Reply Submission.

Yours truly,

FOGLER, RUBINOFF LLP

Thomas Brett
TB/dd
Encls.
cc: All Parties *(by email)*

EB-2016-0004

ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sch. B, as amended;

AND IN THE MATTER OF a Generic Proceeding on Natural Gas Expansion in Communities that are not served.

REPLY SUBMISSION OF

BUILDING OWNERS AND MANAGERS ASSOCIATION, GREATER TORONTO ("BOMA")

July 6, 2016

Tom Brett
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Counsel for BOMA

Submission

A. INTRODUCTION

1. Given the number of parties and the length of their submissions, BOMA will not attempt to enumerate all issues on which it agrees or disagrees with the position of each party. Instead, it will focus on major points of agreement or disagreement with some parties. After some preliminary comments, for convenience, BOMA will proceed issue by issue. It will first summarize its position under its Original Submission, indicate any modification to its position based on the initial submissions of others, and then deal with arguments of other parties with which it disagrees. BOMA stated its own position on the issues in considerable detail in its initial submission, so it will attempt to avoid duplication.

2. Preliminary Comments

BOMA is of the view that Union, in its initial submission, has misstated the range of positions parties took at the hearing, and certainly in their initial submissions, by leaving out the positions taken by the major ratepayer groups (Union page 3, paragraph 9). Most of the ratepayer groups, including BOMA, IGUA, CCC, LPMA, and Schools, opposed Union's and EGD's "internal utility subsidy" proposals, their exemptions from EBO-188, and EPCOR's proposed Reserve Fund, while, in some cases, agreeing to some modest adjustments to EBO-188. They did not support the status quo, and suggested various improvements.

B. SUMMARY ON ISSUE BY ISSUE BASIS

Issue 1: What is considered a community in the context of this proceeding?

BOMA does not agree with the utilities' definition of community, because it is not complete and does not ensure that customers in different places in relation to the existing gas infrastructure will be treated equally for expansion purposes. It needs more work before being incorporated in a framework. BOMA would support changes including those suggested by LPMA at pages 3-4 of its brief.

Issue 2: Does the OEB have the legal authority to establish a framework whereby the customers of one utility subsidize the expansion undertaken by another distributor into communities that do not have natural gas service? What, if any, changes to the OEB's jurisdiction would be helpful in allowing the OEB to foster the rational expansion of natural gas service in Ontario?

BOMA believes that the OEB does not have the authority to require ratepayers of one distributor to subsidize the expansion of another distributor, to establish a Reserve Fund as proposed by EPCOR, or to approve the utilities' proposals in this case. See section C below for a further discussion of jurisdiction.

Issue 3: Based on a premise that the OEB has the legal authority described in Issue #1, what are the merits of this approach? How should these contributions be treated for ratemaking purposes?

(a) BOMA does not support the approach described in this question. It does not believe that ratepayers of existing utilities should be required to subsidize uneconomic expansion proposals, be they for Union, EGD, or new entrants such as EPCOR, for the reasons outlined in its initial submission. BOMA does not agree with EPCOR's, and the utilities' proposals that existing utility customers should subsidize uneconomic expansion of the distribution system to new

customers, either directly through cross-subsidization within a utility (Union and EGD), or indirectly through the vehicle of the EPCOR proposed Expansion Reserve fund, which is collected by the Board from all existing gas customers and disbursed to uneconomic expansion proposals from either Union, EGD, or new entrants, such as EPCOR. However, as noted in its initial submission, BOMA is of the view that if the Board were to decide that it had the jurisdiction to, and wanted to support the cross-subsidy of uneconomic expansion plans, it should do it in such a manner that new entrants are not disadvantaged relative to Union and EGD.

(b) If the Board authorizes such subsidies, they should be treated as a Contribution-in-Aid of Construction (CIAC), not as revenue, as proposed by the utilities. LPMA's analysis (pages 11-13 of its initial submission) has demonstrated that ratepayers are better off with CIAC treatment, contrary to the utilities' suggestions. Moreover, the utilities have offered no other evidence as to why the Board should characterize these payments as anything other than CIAC. EPCOR agrees with this position. The proposed "surcharges" on rates paid by the new customers should also be treated as CIACs for the same reasons.

Issue 4 (General): Should the OEB consider exemptions or changes to the EBO-188 guidelines for rural, remote and First Nation community expansion projects?

The OEB should not consider exemptions from EBO-188 for expansion projects to serve uneconomic rural, remote and rural and remote First Nations communities. Exemptions from EBO-188 would remove a very valuable discipline for utility expansion that has worked well for many years. The EBO-188 Guidelines ensure that very few uneconomic

expansion projects get funded due to the need for such projects to meet the rolling project portfolio and investment portfolio tests.

However, BOMA would support consideration of modest adjustments to EBO-188 to provide somewhat more flexibility for the Board. In particular, BOMA would support the Board considering the adjustments proposed by LPMA (pages 20-21), namely the reduction of the investment portfolio index from 1.1 to 1.0, and investigation of the feasibility of using a three year rolling project portfolio index rather than one year. BOMA suggests the Board direct the utilities to conduct and file on the public record, an analysis of the impact on their proposals and the additional flexibility it would have provided over the past five years, of applying the rolling portfolio index on a three year basis, rather than the current one year basis. The emphasis should be on determining how many additional projects with P/Is between 0.8 and 1.0 would be implemented, if the change were made. BOMA would also accept Union's three proposals to modify EBO-188 parameters at pages 13-14 of their evidence (Exhibit A, Tab 1, Pages 13-14).

Issue 4(a): Should the OEB consider projects that have a portfolio profitability index (P/I) less than 1.0 and individual projects within a portfolio that have a P/I lower than 0.8?

No, they should not. The project threshold should not be reduced from 0.8. Projects with a P/I from 0.8 to 1.0 are already uneconomic over their lives, and are being carried by projects with P/Is of greater than 1.0.

Issue 4(b): What costs should be included in the economic assessment for providing natural gas service to communities and how are they to be determined and calculated?

The costs should remain the costs that are currently used in the EBO-188 guidelines. Forecast normalized reinforcement costs should be included per EBO-188.

Issue 4(c): What, if any, amendments to the EBO-188 and EBO-134 guidelines would be required as a result of the inclusion of any costs identified above?

For amendments to the EBO-188 guidelines, see 4 and 4(a). Since this proceeding is dealing with distribution system expansions, EBO-134 has no application. BOMA has provided substantial analysis of the issue in its initial submission (pages 8-9). Union holds the same view (see Union, Exhibit A, Tab 1, pages 15-16).

Issue 4(d): What would be the criteria for the projects/communities that would be eligible for such exemptions? What, if any, other public interest factors should be included as part of this criteria? How are they to be determined?

In BOMA's view EBO-188, with modest adjustments, should continue to apply to all utility distribution expansions, not just the rural and remote program expansion. There should be no discrimination among ratepayers based on their location.

Issue 4(e): Should there be exemptions to certain costs being included in the economic assessment for providing natural gas service to communities that are not served? If so, what are those exemptions and how should the OEB consider them in assessing to approve specific community expansion projects?

No other public or private interest factors should be considered in making the EBO-188 calculation, including the benefits of the to-be-attached customers in the expansion area. These savings are a local, private benefit restricted to the customers served, rather than a public interest factor. There would be modest environmental benefits obtained from proceeding with the projects, namely the reduction of GHGs currently emitted from propane and fuel oil combustion, but there are better alternatives from an environmental point of view. The economic (job creation) benefits appear to be very few, and the proponents have not defined them at this point.

Issue 4(f): Should the economic, environmental and public interest components in not expanding natural gas service to a specific community be considered? If so, how?

The proposed expansion projects may preclude more economically efficient and environmentally beneficial alternatives, such as energy efficiency retrofits and heat pumps. These alternatives must be assessed by the applicant(s) prior to expanding pipeline gas service to new communities.

Issue 5: Should the OEB allow natural gas distributors to establish surcharges from customers of new communities to improve the feasibility of potential community expansion projects? If so, what approaches are appropriate and over what period of time?

Yes, the Board should allow surcharges, which are, in our view, leave to construct payments, from customers in new communities. They should be for the lesser of the forty year life of the project or a term necessary to bring the project to a P/I of 1.0. Under the utilities' proposals, the new customers are not contributing enough relative to the benefits they receive. The CIAC should be increased.

Issue 6: Are there other ratemaking or rate recovery approaches that the OEB should consider?

There may be other ratemaking or rate recovery approaches that the OEB should consider but there has not been sufficient time in this proceeding to develop such proposals. Any new proposals for dealing with the expansion of natural gas for home heating and water heating in rural and remote communities should take into account the government's GHG policy, new technologies and the possibilities of linking gas with other greener heating/cooling resources. The Board may wish to examine alternative approach in a separate generic proceeding at some point, perhaps once the GHG program is more fully flushed out. BOMA would agree with Union and several ratepayer groups that project-

specific rates should be considered to allow new customers to be charged rates more commensurate with the costs the utility has incurred to serve them, subject to Board approval in individual cases. Such rates would eliminate the need to seek cross-subsidies from existing ratepayers, directly or indirectly, through a reserve fund.

Issue 7: Should the OEB allow for the recovery of the revenue requirement associated with community expansion costs in rates that are outside the OEB-approved incentive ratemaking framework prior to the end of any incentive regulation plan term once the assets are used and useful?

No, the OEB should not provide Y-factor treatment in this instance. The utilities' proposed capex are commencing late in the IRM cycle. In the current circumstances, with only two and one-half years left in the utilities' five year IRMs, it would not be appropriate. Moreover, Union agreed that neither proposal would likely be deemed a major capital project under the Union Settlement Agreement approved by the Board in EB-2013-0202. EGD's only recourse under EB-2012-0459 is to claim Z-factor treatment, which this clearly is not. On this point, BOMA endorses the analysis of Schools at pages 48-50 of its initial submission.

Issue 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? Should the Municipal Franchise Agreement approval process be accompanied by a selection process? Who should conduct the process and what should the selection criteria be? How would the needs of large users be considered? Submissions on the current purpose and use of the Municipal Franchise Agreement would also be of assistance.

The Board should continue to approve all Municipal Franchise Agreements. The Board should oversee a selection and approval process if there is more than one bidder for a franchise, pursuant to Guidelines that it should develop. Proponents should propose interim rates as part of the franchise submission. The selection criteria should include

technical competence, utility business experience and financial resources. For more detailed discussion, see BOMA's initial submission (pages 25-30). Municipal Franchise Agreements should remain more or less as is, as they are internal documents between the utility and the municipality. However, the Board approval process needs to deal with broader ranges of issues, more akin to the issues in an electricity licence application. The Board should consider amending the Ontario Energy Board Act to permit the licensing of natural gas distributors.

Issue 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 (eg. Issuance of Request for Proposals to enter into franchise agreements)?

The Board should maintain and publish a list of proposals to acquire franchises, so parties other than the proponent have an opportunity to apply. Unlike the utilities' position, BOMA's view is that new entrants need not demonstrate that they can provide any service or other advantage to ratepayers beyond that provided by the existing utilities to their customers. Adherence to this principle should remove what would otherwise be a barrier to entry. BOMA supports the participation of new entrants in the Ontario gas distribution market, provided they participate without a subsidy from existing ratepayers. They should be eligible for Ontario government rural and remote grants/loans program.

Issue 10: How will the Ontario Government's proposed cap and trade program impact an alternative framework that the OEB may establish to facilitate the provision of natural gas services in communities that do not currently have access? With respect to Issue #10, in addition to submissions on how to incorporate the loan and grant programs into the economic feasibility analysis, the OEB would welcome submissions on how the disbursement of these funds might relate to the OEB's approval of expansions. The OEB recognizes that ultimately the government will decide how this money is best used, but the OEB would like to hear the parties' views on the optimal use of these funds.

The government's loan and grant program should be fully integrated into the OEB's approval process for expansions. The grants and loans (the latter in the form of a revolving loan fund) should apply to reduce the project capital costs (subsidize the utility) and perhaps help pay for conversion costs (loan) or new customers' CIAC (loan) for the project. Use of a loan fund would mean the repayment of the loan amount would be exempt from HST. The need to pay HST on the new customer utilities' surcharges or CIAC is a substantial disadvantage of the utilities' schemes. The proponent, whether new entrant or existing utility, with no subsidy from existing ratepayers, could apply to the government for a grant to make the project feasible. These customers would include residential, commercial, and industrial customers. Larger customers should be treated on the same basis as smaller customers.

Issue 11: What is the impact of the Ontario Government's proposed cap and trade program on the estimated savings to switch from other alternative fuels to natural gas and the resulting impact on conversion rates?

The impact of the Ontario government's Cap and Trade program on the estimated savings will probably increase the fuel savings by the people not using propane and fuel oil for home heating. The result for those using wood and electricity is not clear.

Issue 12: How should the OEB incorporate the Ontario Government's recently announced loan and grant programs into the economic feasibility analysis?

See discussion under Issue 10 above. BOMA is of the view that the government loan/grant rural and remote expansion program, and the various GHG Action Plan energy conservation programs should be integrated to ensure gas distribution system expansion only occurs in the context of a least cost framework, and the Ontario government's GHG policy framework (see BOMA's initial submission, pages 31-35).

C. FURTHER LEGAL ANALYSIS

The Legality of Reserve Fund

Like the utilities, BOMA noted in its initial submission that the fact that the Ontario Energy Board Act (the "Act") and Regulations contained provisions establishing a subsidy for rural and remote electricity ratepayers, but did not do the same for rural and remote natural gas customers, notwithstanding the fact that natural gas service in Ontario has been regulated for sixty-five years, is telling. The legislature has had ample opportunity to mandate a subsidy for natural gas rural expansion, and has chosen not to.

Moreover, section 27 of the Act requires the Board, upon the direction of the government, to collect from the electricity distributors and the IESO, who in turn must collect from their consumers in a manner prescribed by regulations, funds which the distributors and the IESO would pay to the government to offset expenditures by the Ministry of Energy, on energy conservation and renewable energy. In this case, the government thought it necessary to legislate to allow the utilities to collect funds from ratepayers for a purpose other than maintaining and growing their own distribution

businesses. Similar legislation would be required to require the distributors to collect funds to fund an OEB-administered reserve fund which would provide subsidies to other, existing utilities, and new entrants to build uneconomic expansion projects to rural and remote communities.

Finally, having the utilities collect funds for a reserve fund from which the Board would pay out funds to subsidize the uneconomic projects of utilities, and new entrants, is simply an indirect way of doing something that cannot be done directly.

Some parties argued that the regulatory regime already includes cross subsidies. However, the fact that a utility groups ratepayers with similar characteristics together for ratemaking purposes through cost allocation and class rate design is not a cross-subsidy, but an attempt to match the costs and revenues imposed by, and generated by, groups of customers with similar characteristics in order to develop class rates, in order to ensure that rates roughly reflect costs on a class basis. Within each class, there will be some individual customers whose costs to serve will exceed the revenues they generate, but these differences are subsumed within the class; they are accepted as part of ratemaking. These differences are minimized through good rate design which allows for postage stamp ratemaking on a class basis for that utility. But those are not cross-subsidies from existing customers to new customers to underpin uneconomic projects built to serve those new customers. Nor is the fact that many projects, economic over their lifetime (an "economic project" with a P/I of 1.0 or greater), will not be self-supporting on a standalone basis in its early years, when costs will exceed revenues does not constitute a subsidy to an uneconomic project. In other words, neither of these phenomena are either

a legal or practical argument that uneconomic expansion projects should be subsidized by existing ratepayers.

EPCOR seems to suggest that incentive ratemaking of the type currently used in Ontario for gas and some electricity utilities means that cost causation and cost-relatedness is no longer the prerequisite for just and reasonable rates. That is not the case. Incentive ratemaking whether of the price cap, or "custom IR" variety is still closely linked to costs in that, in both cases, the rates are anchored by an initial cost of service determination, to which adjustments are made throughout a five year IRM period, followed by a rebasing proceeding when the rates are in effect trued up to a new cost base. In the case of custom IRM, the rates reflect five year capital and OM&A cost forecasts. While the annual rates during the IRM period are determined differently than in annual cost of service proceedings, the underlying long-term relationship to costs is maintained, and thus the rates remain just and reasonable. To be just and reasonable, a utility's rates, on an overall basis, must remain linked to costs. The Supreme Court of Canada recently reaffirmed this position when it stated:

> "In order to ensure that the balance between utilities' and consumers' interests is struck, just and reasonable rates must be those that ensure consumers are paying what the Board expects it to efficiently provide the services they receive, taking account of both operating and capital costs. In that way, consumers may be assured that, overall, they are paying no more than what is necessary for the service they receive, and utilities may be assured of an opportunity to earn a fair return for providing those services" [Ontario (Energy Board) v. Ontario Power Generation Inc. 2015 SCC 44, para. 20].

BOMA believes that the Board has the jurisdiction to implement EBO-188 because, in order to preserve just and reasonable rates, it needs a method to preclude the subsidy of grossly uneconomic projects by existing ratepayers. The OEB can also make modest

amendments to EBO-188, as they do not amount to requiring existing ratepayers to underwrite such uneconomic expansions. However, the utilities propose to set aside EBO-188 altogether, and to create portfolios of uneconomic projects which would be paid for largely by existing customers. The result is that benefits and costs incurred by the utility to serve new customers and the rates they pay for that service are completely divorced. Conversely, the rates for existing customers will now increase by up to seven percent (Transcript Volume 6) without any concurrent benefits and with no responsibility for the increased costs. For existing customers, the extra costs incurred provide no additional benefits. A rate which has these impacts is not just and reasonable as it does not reflect the vastly different costs of serving rural and remote, and existing customers. The average costs of serving existing and potential new customers are very different on a per customer basis. The average cost of serving new customers are much higher than serving existing customers, and reflects in the degree to which the projects are uneconomic. For EGD, the new customers cost an average of about $25,625 to connect, for Union $7,500 for new customers versus approximately $3,500 for existing customers. The result is that the postage stamp rates proposed by the utilities are no longer just and reasonable, since they bear no relationship whatsoever to the costs to serve new rural and remote customers.

As BOMA noted in its initial submission, in virtually all the other jurisdictions studied, rural and remote expansion schemes, whether for gas, electricity, or telecoms, were underpinned by legislation, which is not the case here.

All of which is respectfully submitted, this 6th day of July, 2016.

Tom Brett,
Counsel for BOMA