

B-2016-0296
EB-2016-0300

ONTARIO ENERGY BOARD

**Union Gas Limited
Enbridge Gas Distribution Inc.**

Application for Approval of the Cost Consequences
of Cap and Trade Compliance Plans

**ARGUMENT OF
CANADIAN MANUFACTURERS & EXPORTERS (“CME”)**

May 19, 2017

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I. INTRODUCTION

1. CME's constituents, which include over 1,400 Ontario based companies, operate energy intensive businesses.
2. Their continued competitiveness in their respective industries is tied directly to how much energy costs them and, as a result, the dramatically increasing cost of energy in Ontario has made it much more difficult for CME constituents to be competitive in the market, compared with business from other jurisdictions where energy costs less.
3. The cost consequences arising from the Cap and Trade Compliance plans which are the subject of this hearing are substantial and are therefore of significant interest to CME's members.
4. CME does not oppose Union Gas Limited's ("Union") request for approval of interim rates and the establishment and amendment of two deferral accounts in connection with Cap and Trade compliance nor does it oppose Enbridge Gas Distribution Inc.'s ("EGD") request for a determination that its proposed compliance plan is reasonable.
5. Nevertheless, as described in more detail in these submissions, CME submits that the Board should exercise its authority to ensure that the utilities bear a continuing onus to demonstrate reasonableness, not only in the development of Cap and Trade compliance plans, but also in the execution of the plans.
6. CME also urges the Board to improve the transparency of proceedings relating to Cap and Trade compliance in order to provide for fuller participation by intervenors and to consider measures which may mitigate the rate impact on ratepayers of Cap and Trade compliance, particularly with respect to the clearance of variance accounts.

II. THE BOARD SHOULD REJECT ANY PRESUMPTION OF REASONABLENESS IN THE CONTEXT OF COMPLIANCE PLANS

7. CME submits that the Board should reject the proposition advanced by EGD in their Argument in Chief that, to the extent that the Board determines that its proposed Compliance Plan is reasonable, "the actual cost consequences of following that plan should also be considered reasonable and give rise to a presumption of prudence."¹
8. The establishment of a presumption of prudence in this instance would remove the onus on EGD to respond prudently and in a timely manner to changing circumstances. This is inappropriate in the context of Cap and Trade compliance and would deprive ratepayers of an important safeguard at a time when increased energy costs are producing significant hardship for ratepayers.
9. EGD acknowledges in its evidence that there are significant uncertainties relating to the Ontario carbon market:

"Given that the carbon market is nascent in North America, and particularly in Ontario, there is an obvious and recognized learning curve for all parties involved regarding aspects of carbon market strategy design and implementation. There are also a number of market uncertainties including whether Ontario will link with the California and Québec carbon markets in 2018 and whether the Cap and Trade program will continue in California post 2020."²

10. This theme is also reflected the Arguments in Chief filed by both utilities.³
11. The uncertainties cited by the utilities may produce material changes in circumstances which could render a reasonable compliance plan drafted in 2016 completely unreasonable to implement. EGD conceded on cross-examination that it would be reasonable for the Board to consider EGD's response to changing circumstances:

"I guess in light of changing circumstances it would be reasonable for the Board to consider those changing circumstances and then view our plan and how we've reacted to them."⁴

¹ EGD AIC, para 70.

² EGD Application, Exhibit A, Tab 1, Schedule 2, p.1.

³ EGD AIC, para 31-32, Union AIC, para 9.

⁴ Transcript Volume 1, p.74.

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12. CME submits that, particularly in times of such significant uncertainty, the appropriate time for the Board to evaluate the reasonableness of the cost consequences of a utility's compliance plan would be after these costs have been incurred, when the Board could have full disclosure of the circumstances that prevailed when the costs were incurred, and was in a position to decide on the basis of a full record whether the costs that were incurred, as a product of both the compliance plan, and the execution of that plan, were reasonable and prudent.
 13. CME also submits that a presumption of prudence runs contrary to the burden of proof set out in the *Ontario Energy Board Act, 1998* (the "**Act**")⁵ which provides at Section 36(6) that: "Subject to subsection (7), in an application with respect to rates for the sale, transmission, distribution or storage of gas, **the burden of proof is on the applicant.**"⁶
 14. The Supreme Court has had cause to consider whether a presumption of prudence is permissible under the Act. In *Ontario (Energy Board) v. Ontario Power Generation Inc.*,⁷ the Supreme Court held that "it would ... seem inconsistent with the statutory scheme to presume that utility decision to incur costs were prudent."⁸
 15. While the section at issue in that case was 78.1(6), regarding payments to a prescribed generator, rather than section 36(6) that deals with rates for the sale, transmission, distribution or storage of gas, the provisions are very similar and both expressly assign the burden of proof to the applicant.
 16. CME therefore submits the presumption of prudence recommended by EGD is contrary to the Act and should be rejected by the Board.

⁵ S.O. 1998, Chapter 15, Schedule B.

⁶ Subsection 7 deals with instances where the Board or minister commences a proceeding, but still establishes the burden on the gas transmitter, distributor or storage company.

⁷ 2015 SCC 44, (**OEB and OPG**).

⁸ OEB and OPG at para.79.

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17. In addition, broad principles of fairness should influence which party bears the burden of proof. When one party has access to the vast majority of evidence regarding the subject matter at issue, fairness dictates that the burden of proof should be allocated to that party.
 18. This principle is particularly applicable in the context of Cap and Trade compliance where intervenors have very limited access to information underlying EGD's applications and all of the evidence is in EGD's possession.
 19. To require intervenors or Board staff to have to rebut a presumption, while only having access to limited production of EGD's information is, in our submission, unjust and misplaces the burden of proof. It is EGD's application, it is EGD's compliance plan, and it is how EGD ultimately executes their plan and how they react to changing circumstances which will determine whether their incurred costs are reasonable. The burden should remain on EGD to show that the actual cost consequences of their compliance plan were prudent.
 20. Finally, CME submits that the Board should treat EGD and Union in a uniform manner. Comparing the relief sought by EGD and Union, Union seeks an order approving the just and reasonable final rates and other charges effective January 1, 2017; however, Union does not appear to be seeking the establishment of a presumption of reasonableness for their actual costs incurred if the Board finds that the compliance plan is reasonable.
 21. To give both parties the relief that they seek would leave EGD in a relatively advantageous position as compared to Union in terms of their evidentiary burden in future proceedings. We submit that this would be inappropriate, and that both Union and EGD should have the same burden to prove their incurred costs were prudent, without the benefit of a presumption.
 22. CME submits that the Board, in a future proceeding, should engage in a full prudency review of all costs associated with EGD and Union's 2017 compliance plans, not only the variance amounts recorded in the Cap and Trade related accounts. Furthermore, the

burden should be on EGD and Union to show why their compliance costs were prudently incurred.

III. TIMING OF THE DISPOSITION OF THE VARIANCE AND DEFERRAL ACCOUNTS & OTHER MITIGATION MEASURES

23. The amounts which may be captured in the proposed Cap and Trade variance accounts are likely to be substantial. In this regard, we share the concerns of other intervenors that, these balances, if allocated as a onetime adjustment, will create financial hardship for some of CME's members.
24. CME has had the benefit of reviewing the submissions of APPrO with respect to this issue and supports the proposal advanced by APPrO that the disposition of an annual true-up amount should be completed on a prospective basis, with a volumetric charge administered over a twelve month period.
25. CME also submits that other mitigation methods may be required depending on the actual balance of the variance accounts, and should be dealt with by the Board in subsequent proceedings.
26. The foregoing measures will assist CME's constituent businesses create more accurate and stable budgets, avoid issues due to large onetime adjustments, and allow for the more predictable business operations on a monthly basis.

IV. INFORMATION TO BE MADE AVAILABLE TO INTERVENORS

27. The review of the cost consequences arising in the context of Cap and Trade compliance plans will necessarily require an appropriate balancing between the need to protect the integrity of the carbon market in Ontario and the importance of providing for a reasonable degree of transparency which will permit intervenors, whose constituents make up large segments of the rate paying public, to actively participate in these matters.

28. It is therefore unsurprising that a significant focus of the written interrogatories filed in these proceedings, as well as the cross examinations which took place in the public portion of the hearing, was with respect to the amount and quality of information that would be available to intervenors when the Board proceeds to review the costs incurred by the utilities in accordance with their compliance plans.

29. The issue is nicely summarized in SEC Interrogatory No. #11 which asked:

“Please explain what information Union believes it will be able to provide to all parties (i.e. not just the Board panel and Board Staff), when it seeks a review of its actual compliance plan costs, that it otherwise is not able to provide in this application.”

30. Based on answers to interrogatories provided by Union, as well the evidence of both Union and EGD in the oral proceedings,⁹ the following table, produced by Union in their response to LPMA Interrogatory #15, appears to represent the best summary of the information which the utilities proposed to make available to intervenors in future proceedings to assess the reasonableness of costs incurred by the utilities in connection with Cap and Trade compliance:

Union Gas Limited										
Schedule 1: Actual vs Forecasted Compliance Cost										
for activity in the 12 month period ending December 31, 2017										
	(a)	(b)	(c) = (a) x (b)	(d)	(e)	(f) = (d) x (e)	(g) = (a) - (d)	(h) = (b) - (e)	(i) = (g) x (h)	
	Forecast			2017 Actual			Variance			
	Volume procured (tonnes of CO2e)	Price (CAD/tonne of CO2e)	Cost (CAD)	Volume procured (tonnes of CO2e)	Price (CAD/tonne of CO2e)	Cost (CAD)	Volume procured (tonnes of CO2e)	Price (CAD/tonne of CO2e)	Cost (CAD)	
Line										
No.	Compliance Option									
Compliance Instruments										
1	Emission Allowances									
2	Options									
3	Derivatives									
4	Financing Costs									
5	Total/Weighted Average - Compliance Options									
Abatement										
6	Customer Abatement Programs									
7	Facility Abatement Programs									
8	Total Abatement									
9	Total/Weighted Average									

⁹ Transcript Volume 1, pp.29-31; Transcript Volume 2, pp. 95-96.

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31. The chart can be described of as containing inputs and outputs where the inputs are the individual compliance instruments and abatement programs that the utility could undertake and the outputs represent total weighted averages, on a forecast and actual basis, of:
- (a) Volume procured (in tonnes of CO₂e);
 - (b) Price (in CAD/Tonne of CO₂e); and
 - (c) Cost (CAD)
32. As illustrated in the chart, all of the 'inputs' are coloured red, indicating that these would not be available to intervenors (though, when pressed on cross-examination, Union's witnesses stated that abatement activities, though largely confidential, may be made public on a case by case basis.¹⁰)
33. It would be extremely difficult, if not impossible for intervenors to investigate and test what costs were incurred reasonably and prudently by the utilities on the basis of the above described information.
34. This is especially true since the individual drivers of variance between forecast and actual costs, i.e. which instrument or activity caused the variance, will not be known. Intervenors will not even know what areas to probe for prudence, much less satisfy themselves and their constituents that the costs were prudently incurred.
35. In our submission, the Board should try to establish a mechanism for intervenors, whether that be for intervenors as a whole, or a smaller subset of intervenors, to receive greater access to information regarding the costs incurred relating to Cap and Trade including the "inputs" described in the response to LMPA Interrogatory #15. This would, of course, have to be done while having regard for information sensitivity and potential impacts of disclosure of such information on the carbon market.

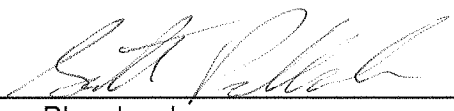
¹⁰ See Transcript Volume 2, pp. 96-97 for an example of Union suggesting abatement could be made public on a case by case basis, and Transcript Volume 2, p. 58 for EGD's witnesses also suggesting that abatement could be made public on a case by case basis.

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36. We submit that such a mechanism is necessary so that the public can have full confidence that the regulatory process is protecting all stakeholder's interests as they relate to the utilities' Cap and Trade compliance plans.

V. COSTS

37. CME requests that it be awarded 100% of its reasonably incurred costs in connection with this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of May, 2017.



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