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Ontario Energy Board
2300 Yonge Street
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January 26, 2018
Our File: EB20170306

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2017-0306 – Enbridge/Union MAADs Application – Issues List Submissions

We are counsel to the School Energy Coalition ("SEC"). Enbridge Gas Distribution ("Enbridge") and Union Gas Ltd. ("Union", collectively the "Applicants") have brought an application pursuant to section 43(1) of the *Ontario Energy Board Act, 1998* ("OEB Act") for leave to amalgamate. Pursuant to Procedural Order No. 2, these are SEC's submissions on the appropriate issues list the Board should adopt in this proceeding.

Overview

The Board has previously stated that an "Issues List has two purposes: 1) it defines the scope of the proceeding; and 2) it articulates the questions which the Board must address in reaching a decision on the application."[1] It is not about making a determination on those issues at this point, just determining what is at issue in the proceeding. It is also not about unduly constraining the Board's inquiry since in many cases "[i]t is not possible to identify all of those detailed issues now so early in the process."[2]

This application is unique. The Board has never considered an amalgamation of two gas utilities under section 43(1) of the *OEB Act*.[3] It is also different because it is a merger of two non-arm's length affiliates. While legally they remain two distinct utilities, because their parents (Enbridge Inc. and Spectra Energy) have already merged in a transaction that did not require Board approval[4], their relationship is already unlike any other gas or electricity utilities the Board regulates.

The Applicants' proposed issues list is both unduly narrow in scope, and, as its submissions make clear, entirely premised on the assumption that the Board is required to mechanistically apply the Board's *Handbook to Electricity Distributor and Transmitter Consolidations* ("Electricity MAADs

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[1] *Decision with Reasons* (EB-2007-0707 - IPSP Issues List), March 26 2008, p.3

[2] *Ibid*

[3] As far as SEC is aware the last amalgamation application of natural gas distributors before the Board was that brought by Westcoast Energy Inc to amalgamate Union Gas Ltd. and Centra Gas Ontario Inc. pursuant to section 26 of the than in force *Ontario Energy Board Act, 1990*.(see E.B.O. 195, Report of the Board, March 7, 1997)

[4] Letter from Kristen Walli (Board Secretary) To: All Interested Parties, Re: Enbridge Inc. and Spectra Energy Corp. (December 8, 2016)

Handbook")[5]. The handbook is a Board policy document that on its face does not apply to natural gas and, like any other Board policy or decision, is not binding on any individual panel. The Board must determine on the facts of each individual case whether a policy or past decision should be applied, or not. If it does not, then it is impermissibly fettering its own discretion.[6] As the Board previously commented, "the extent to which and the manner in which its policies are applied is always determined based on the specifics of the applications before it."[7]

Regardless, on the face of the Electricity MAADs Handbook, it simply does not apply to natural gas utilities. It is about consolidation of electricity distributors and transmitters. That is not just clear from the title, but it becomes even clearer when one reviews its contents. Not only does it not make any reference to natural gas or section 43 of the *OEB Act*, but as described in the Electricity MAADs Handbook itself, the policy evolution that led to the policies it described was based solely on consolidation in the electricity distributor sector.[8]

The Applicants' argument appears to be that since the Board's Rate Handbook[9] applies to both electricity and natural gas, and the Rate Handbook makes reference to the Electricity MAADs Handbook, therefore the Electricity MAADs Handbook must apply equally to natural gas.[10]

This is an odd argument, since the reference to the Electricity MAADs Handbook in the Rates Handbook is to reiterate the comments within that document that rates are generally not considered within a MAADs proceeding.[11] While the Rates Handbook does mention the Electricity MAADs Handbook, it does so only to remind readers that they are to be dealt with separately. Rates are generally not considered in MAADs applications. Nothing in the Rates Handbook is about the application of the Electricity MAADs Handbook to natural gas.

The Applicants' attempt to graft onto natural gas MAADs applications the entirety of the electricity MAADs framework is a contested legal and factual question that has never been considered by the Board before, and something it should not endeavor to decide without a full record. The Applicants' issues list seeks to have the Board make that determination at this point, in essence, by default. That is not appropriate.

In contrast, SEC as well as most of the other intervenors have proposed a more appropriate issues list ("Intervenor Issues List").[12] The Intervenor Issues List is consistent with the purposes of an issues list as described by the Board, as it articulates, in a logical fashion, the questions the Board will need to consider in adjudicating the application.

It is the Intervenor Issues List that the Board should adopt.

Leave to Amalgamate

The starting point for the Board's determination in this application is the statutory language under which relief is being sought. Section 43(1)(c) of the *OEB Act* does not articulate a specific test, simply that leave is required from the Board.

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[5] *Handbook to Electricity Distributor and Transmitter Consolidations* (January 19 2016)

[6] *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, para. 66,68; *Decision and Order on Motion to Review and Vary* (EB-2014-0155 - KWHI Motion to Review) July 31 2014, p.7

[7] *Decision on Issues List* (EB-2016-0025 - Enersource, Horizon, and PowerStream MAADs), June 30 2016, p.5

[8] *Ibid*, p.1-2

[9] *Handbook for Utility Rate Applications* (October 13 2016)

[10] Argument-in-Chief on Draft Issues List, p.2-4

[11] *Handbook for Utility Rate Applications* (October 13 2016), p.21

[12] See Appendix

Most of the Applicants' proposed issues list is premised on the Board applying the "no-harm" test as set forth in the *Electricity MAADs Handbook* and other Board policies and decisions. The "no-harm' test considers whether the proposed transaction will have an adverse effect on the attainment of the Board's statutory objectives. The Applicants' proposed issues list structures individual questions related to the transactions' impacts on individual objectives for natural gas in section 2 of the *OEB Act* (Issues 1, 6-8, 9 and 10).

SEC recognizes that the Board has previously applied the "no-harm" test in the natural gas MAADs context, most recently in the EPCOR acquisition of NRG.[13]

However, this is a unique application for a number of reasons, and the Board must allow parties, on a full factual record, to propose a different or more nuanced test, if they so choose. Since there is no statutory test, nor binding precedent from an appellate court, mandating the use of the "no-harm" test, the Board would be fettering its own discretion if it refuses to consider a different test if one is proposed.[14]

The Intervenor Issues List (Issues 1-3) sets out in sequence the questions the Board needs to consider. It asks, in essence: what is the test, how should it be applied in this case, and have the Applicants met it?

Each of those questions is separate, but important. It may ultimately be that the Applicant is correct (and SEC may agree) that the "no-harm" test applies, but that is not a question that can be decided at the issues list stage of the proceeding. Moreover, it ignores what are likely unique nuances to the application of the test to natural gas more broadly, and specifically to this situation.

Deferred Rebasing Period

The Applicants' other issues are related to its proposed deferred rebasing period and its earning sharing mechanism ("ESM") proposal. Specifically, the Applicants' issues ask if they have identified the number of years for which they have chosen to defer rebasing (Issue 2), if so, have they identified an ESM in accordance with the Electricity MAADs Handbook (Issue 3), and does it protect the interests of customers during the rebasing period (Issue 4).

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[13] *Decision and Order* (EB-2016-0351 - NRG-EPCOR MAADs) August 3 2017, p.3

[14] See for example:

> *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, para 66:
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> "Nonetheless while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the grounds that the decision maker's exercise of discretion was unlawfully fettered: example, Maple Lodge Farms at 7. This level of compliance may only be achieved through the exercise of a statutory power to make "hard law", through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure." [emphasis added]
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> *Jackson v. Ontario (Minister of Natural Resources)*, 2009 ONCA 846, para 51:
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> "Decision makers fetter their discretion when they fail to genuinely exercise discretionary power in an individual case, and instead automatically apply an existing policy or guideline: see David J. Mullan, Administrative Law (Toronto: Irwin Law 2001) at 115-116."
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> Brown & Evans*, Judicial Review of Administrative Action in Canada*, loose-leaf at p.12-42:
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> "… the issue is not whether the rule, guideline, precedent, policy, or contract was a factor, or even the determining factor, in the making of a decision, but whether the decision-maker treated it as binding or conclusive, without the need to consider any other factors, including whether it should apply to the unique circumstances of the particular case."

These issues are based entirely on the supposed application of the Electricity MAADs Handbook as if it were applicable to natural gas, and binding. In their submissions, the Applicants do not even attempt to provide any independent rationale for why they have proposed these issues in the way they have. They say only that they are following the Electricity MAADs Handbook, and its application in recent electricity MAADs cases. It is as if they think that the Board will not notice that the Applicants are natural gas, not electricity distributors.

The Intervenor Issues List appropriately sets out the broader questions the Board needs to consider, while encompassing all of the Applicants' proposed relief.

It asks if a deferred rebasing period is appropriate (Issue 4), and if so, how long should it be (Issue 5a). It also asks, if a deferred rebasing period is appropriate, should there be an ESM, if so, what should it look like and when should it apply (Issue 5b), and also what other considerations and requirements are appropriate to protect the interests of customers pending rebasing (Issue 5c).

The application of the Electricity MAADs Handbook is even more inappropriate in the case of a deferred rebasing period than it is with respect to the amalgamation test. The purpose of the deferred rebasing period, and the introduction of the Board's 2015 policy[15] to allow for electricity distributors to select up to a 10 year deferred rebasing period, was to "incent consolidation".[16] The reason there was a need to encourage consolidation in the electricity sector was that a number of government commissions and panels had recommended a reduction in the number of local distribution companies, which even today is above 60. The government had expressed a policy in favour of consolidation, and the Board was seeking to move in the same direction.[17]

The gas distribution sector is very different from the electricity distribution sector. There are currently only 3 distribution utilities (Enbridge, Union, and EPCOR) in the province regulated by the Board, with Enbridge and Union making up approximately 99.8% of all natural gas customers.[18] There is no similar requirement for consolidation. If anything, consolidation creates problems rather than benefits. That does not mean it should be discouraged, but it does mean that the context is entirely different from electricity.

In addition, in this specific case there is no need to incent consolidation because the parent companies have already amalgamated. The Applicants are affiliates, and even without this application, they would have been expected by the Board to run their operations prudently, including finding efficiencies through shared services.

In fact, if anything, the Board's policy has been to encourage competition, not consolidation. For example, in its recent Generic Community Expansion Decision, the Board sets out a framework that facilitates the entry of new participants and allows for competition.[19] Additionally, section 2 of the OEB Act, specifically has as one of the objectives for gas, "to facilitate competition in the sale of gas to users."[20]

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[15] *Report of the Board Rate-Making Associated with Distributor Consolidation* (March 2016 2015)

[16] *Handbook to Electricity Distributor and Transmitter Consolidations* (January 19 2016), p.12

[17] *Handbook to Electricity Distributor and Transmitter Consolidations* (January 19 2016), p.1

[18] See OEB 2016 Natural Gas Yearbook, p.12

[19] *Decision with Reasons* (Community Expansion - EB-2016-0004) November 17, 2016, p.19

[20] *Ontario Energy Board Act, 1998*, section 2(1)

This is not to say that the Board should discourage amalgamations, but that unlike electricity, there is no need for policy tools that explicitly encourage it, such as those set out in the Electricity MAADs Handbook.

Ultimately, this question is one for a final argument, not for the issues list. The Applicants' issues list assumes a particular determination on these issues. The Intervenor Issues List sets out, in a neutral way, the issues the Board will need to consider, but does not assume a result.

The Intervenor Issues List also includes an issue regarding what commitments to future actions have Enbridge and Union made during their respective rate plans that require attention now regardless of any deferred rebasing, and how and when those commitments are addressed (Issue 6).

This issue is appropriate since, through both, commitments made in various settlement agreements, as well as Board decisions, the Applicants individually were required to take various actions at their scheduled 2019 rebasing. Obviously, the settlement agreements and decisions did not contemplate a merger of the two utilities and a potential ten year deferral period. How those issues should be addressed, if at all, is an issue in this proceeding. Admittedly, it is not clear if this is more appropriately an issue in this proceeding or the rate framework application (EB-2017-0307). The Applicants have filed evidence regarding their agreed upon commitments and Board directions in the rate framework application, but, for example, counsel to Union in its 2018 application stated that the Board order requiring some type of cost allocation study to be undertaken in 2019, arising from the its Panhandle application, will be addressed in this MAADs application.[21]

Impacts of the Merger

Issue 7 on the Intervenor Issues List asks about the impact of the potential merger on Board policies, rules and orders. While that may fall within the broader issue of the application of any amalgamation test, it should still be listed as a distinct issue, because it gets at specific unique features of the natural gas sector.

The business and scope of the Board's regulation of Enbridge and Union is significantly broader than any single electricity distributor. The Board regulates the rates and services of their distribution, transmission, storage, commodity, conservation, and cap and trade costs. The merger raises significant questions regarding the impact on other existing Board instruments.

For example, in the area of storage, the Board's NGEIR decision de-regulated certain aspects of the storage market.[22] An amalgamation of Enbridge and Union, who combined own the vast majority of gas storage in Ontario, may result in a significant lessening of competition in that market. If that is the case, while the Board may reject the merger on that basis, even under the "no-harm" test, it may also choose to re-regulate some or all aspects of storage, add conditions to any order it makes in this proceeding, or determine that a review is necessary.[23]

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[21] EB-2017-0087, Tr.2, p.80:

> MR. SMITH:
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> … But I don't think you need to know the outcome of Union's proposal to know that whether or not Union is ordered to do a limited cost allocation study, no cost allocation study, or a full cost allocation study is absolutely going to be decided by the Board, <u>either in the context of the MAADs application</u> which is already well underway and in which there is a comprehensive procedural order, and issues day next week, as I understand it. [emphasis added]
>
> …

[22] *Decision with Reasons* (Natural Gas Electricity Interface Review - EB-2005-0551), November 7 2006, p.3

[23] Similar to CRTC's ability to re-regulate after it has made forbearance decisions under the similarly worded section 34(1) of the *Telecommunications Act*, the Board has the authority to 're-regulate' all aspects of gas storage if competitive circumstances has changed since its decision to forebear pursuant to section 29 of the OEB Act in NGEIR. (See for example Telecom Decision CRTC 2006-16, para. 474-480)

Similar issues arise with respect to the impact of amalgamation on franchise agreements, the Storage and Transmission Access Rule, cap and trade compliance plans and framework, and the DSM Framework and decisions. This issue allows for a specific determination of the amalgamation impact in these areas.

Lastly, issue 8 on the Intervenor Issues List asks, if leave is granted, what conditions should be attached? The Board has broad authority pursuant to section 23(1) of the *OEB Act* to impose conditions as it sees proper when making an order.[24] Parties are likely to request them if the Board grants leave to amalgamate. This issue is simply a broader formulation of the issue agreed on by all parties specific to that of the replacing the undertakings with conditions of approval as proposed by the Municipality of Chatham-Kent.[25]

Summary

The Applicants' proposed issues list assumes part of the answer to the question the Board is going to be required to grapple with in this proceeding.

The reason the Electricity MAADs Handbook, and the policies behind it, do not mention nor apply to natural gas utilities, is that the Board has simply never turned its mind to that possibility.

Whereas consolidation of the electricity sector is something that has been discussed in some form or another since the Board started regulating electricity distribution rates, the idea that the two large distribution utilities would merge was not on anyone's radar. In the consolidation that led to the 2005 policy[26] that underlies the Electricity MAADs Handbook, no party raised the issue of natural gas mergers, and none of the gas utilities even filed comments.[27]

The Intervenors Issue List allows for that question to be determined by the Board with a full factual record, and more fully sets out the range of issues that this application engages. In doing so it meets the purpose the Board itself has articulated for an issues list.

SEC submits the Board should reject the Applicants' proposed issues list and adopt the more neutral and fair Intervenors Issues List.

Yours very truly,
Shepherd Rubenstein P.C.

Original signed by

Mark Rubenstein

cc: Wayne McNally, SEC (by email)
Applicant and interested parties (by email)

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[24] *Ontario Energy Board Act, 1998*, section 23(1)

[25] Procedural Order No. 2, p.2

[26] *Report of the Board Rate-Making Associated with Distributor Consolidation* (March 2016 2015)

[27] See the record of SAA and MAADs Rate-Making Policy Review (EB-2014-0138)

APPENDIX

Enbridge Gas Distribution Inc.
and Union Gas Limited

Application for approval to amalgamate Enbridge Gas Distribution Inc. and Union Gas Limited

PROPOSED ISSUES LIST

[Bold & italicized numbers reference utilities' proposed issues list.]

TEST FOR APPROVAL OF THE MERGER

1. What is the appropriate test for approval of the merger under section 43(1)(c) of the Ontario Energy Board Act, 1998; "no harm", "net benefits", other?

2. How should the test for approval be applied in this case, including in consideration of the Board's statutory objectives in relation to gas? ***[Utilities Issues 1, 5, 6, 7 and 8]***

3. Have the applicants met the appropriate test?

REBASING DEFERRAL

4. Is deferral of rebasing appropriate in the context of this application?

5. If so:

   (a) What is the appropriate deferral period?

   (b) Is an earnings sharing mechanism [ESM] appropriate and if so what should that mechanism be and when should it apply? ***[Utilities Issues 3 & 4]***

   (c) What additional considerations and requirements are appropriate to protect the interests of customers pending rebasing?

6. What commitments to future action have the utilities made during their respective 2013-2018 rate plan terms, what other rate setting issues merit attention now (including cost allocation issues), and when and how are these commitments and issues to be addressed?

IMPACTS OF THE MERGER

7. Would the proposed merger impact any other OEB policies, rules or orders (e.g. regulation of new storage, Storage and Transmission Access Rule (STAR))? If so, what are those impacts and how should the Board address them?

8. If leave is granted, what conditions should be attached?

9. What is the status of the Undertakings to the Lieutenant Governor in Council of Ontario?

10. Should the undertakings be replaced by a condition of the approval of the OEB of the proposed merger?

11. If so, what should the content of the condition be?