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January 26, 2018

Delivered by Email, RESS & Courier

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
Suite 2701
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: Issues List Submissions
Enbridge Gas Distribution Inc. ("Enbridge") and Union Gas Limited ("Union", and collectively the "Applicants") application for approval to amalgamate, Board File No.: EB-2017-0306 (the "Application")

We are writing on behalf of the Association of Power Producers of Ontario ("**APPrO**") in accordance with Procedural Order No. 2 to make these written submissions on the issues list proposed by the Applicants in respect of the Application (the "**Applicants' Issues List**").

On September 6, 2016, Enbridge's parent company (Enbridge Inc.) announced a planned merger with Union's parent company (Spectra Energy Corp).[1] On December 8, 2016, the Ontario Energy Board (the "**Board**") confirmed its view that this merger transaction did not require OEB approval under section 43 of the *Ontario Energy Board Act, 1998* (the "**OEB Act**"). The merger closed on February 27, 2017. [2]

On November 2, 2017, Enbridge and Union filed the Application with the Board under section 43 of the OEB Act for approval to amalgamate. The merger of Enbridge and Union would create a combined gas distribution utility with a $10.667 billion rate base, and $2.186 billion in operating revenue, serving 3,583,403 customers.[3]

In this context, the Applicants have proposed the Applicants' Issues List which assumes that:

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[1] https://www.enbridge.com/~/media/Enb/Documents/Investor%20Relations/2016/ENBS_Sept62016_Presentation.pdf
[2] http://www.enbridge.com/media-center/news/details?id=2126823&lang=en&year=2017
[3] Exhibit B, Tab 1 at page 12.

(i) the appropriate test for approval under Section 43 of the OEB Act is the "no harm" test; and

(ii) the policies established in the *Handbook to Electricity Distributor and Transmitter Consolidations* dated January 16, 2017 (the "**Handbook**") apply, without further consideration or modification, to the Application.[4]

On this basis, the Applicants' argue that the OEB's approved issues list in respect of Enersource / Horizon / Powerstream MAADs application under Section 86 of the OEB Act (Board File No. EB-2016-0025) forms an appropriate basis for the issues list for this Application.

APPrO submits that the Applicants' Issues List is overly narrow. It presupposes the outcome of a number of questions that are legitimately issues which this Board panel should make determinations on - after having had an opportunity to hear all of the relevant evidence and arguments.

For the reasons that follow, APPrO supports the alternative issues list filed by counsel to IGUA on January 17, 2017, which was indicative of a notional consensus among a number of parties to this proceeding (the "**Alternative Issues List**").[5]

(i) The appropriate test for approval under Section 43 of the OEB Act

"The Board set out its policy on mergers and acquisitions in its decision in EB-2005-0234/0254/0257 (the "Combined Proceedings"). However, as discussed below, the current Applications contemplate consolidation transactions that are made in different circumstances and structured differently than was the case in the Combined Proceedings.

In applying the Board's policy in this proceeding, the Board needs to take these differences into account in performing its analysis." [6]

The Applicants' have assumed that the appropriate test for approval under Section 43 of the OEB Act is the "no harm" test. To support this assumption, the Applicants cite:

- the Combined Proceeding Decision dated August 31, 2005 (the "**Combined Proceeding**"),[7]
- the November 3, 2005 NRG Decision and Order in EB-2005-0445 (the "**First NRG Decision**"),[8]
- the August 3, 2017 EPCOR/NRG Decision and Order in EB-2016-0351 (the "**Second NRG Decision**"),[9] and

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[4] The Applicants' position on this issue is inconsistent with their actions. If the Handbook did in-fact apply without modification to the Applicants, then there would be no need for the Applicants to file a Rate Framework Application. The Handbook would simply establish the rate framework. However, the Applicants did file a Rate Framework Application (EB-2017-0307). Which leads on to ask why?

[5] http://www.rds.oeb.ca/HPECMWebDrawer/Record/597234/File/document

[6] Decision and Order dated July 3, 2014 at pg. 2 in EB-2013-0196/EB-2013-0187/EB-2013-0198

[7] Combined Proceeding Decision dated August 31, 2005 in RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257

[8] http://www.rds.oeb.ca/HPECMWebDrawer/Record/41332/File/document

- a variety of other electricity MAADs decisions made under Section 86 of the OEB Act (the "**Other Decisions**").

APPrO submits that this Board panel, not the Applicants, will be in the best position to determine what the appropriate test should be after a full factual discovery and upon hearing all arguments.

The statutory wording under Section 43 of the OEB Act does not prescribe a particular test, and there are no appellate court rulings that prescribe a particular legal test.

In the Combined Proceeding the Board was only asked to decide between the "no harm" test and the "best deal" test for the purposes of electricity mergers under Section 86 of the OEB Act.[10]

A decision on the appropriate legal test under Section 86 of the OEB Act should not be determinative of what the appropriate legal test should be under Section 43 of the OEB Act. The Application contemplates a consolidation transaction that is made in different circumstances and is structured differently than the cases in the Combined Proceedings or any of the subsequent decisions cited by the Applicants.

The Board has never been asked to consider a legal test other than the "no harm" test under Section 43 of the OEB Act.[11] For example, the Board has never had an opportunity to consider the applicability of the "net benefits" test to Section 43 of the OEB Act, even though the "net benefits" test is commonly used as the threshold for merger cases throughout the US.

In this context, APPrO supports the inclusion of issues 1-3 in the Alternative Issues List.

These issues ask, at the most general level: What is the appropriate test? How should it be applied to the Application? And has the test been met?

This formulation of the issues does not prejudge the outcome of any of these questions. Rather it would remain open to any party, including the Applicants, to take what position they believe is appropriate on the basis of the surrounding circumstances and the specific facts of this Application. And this Board panel can then make an informed decision on the basis of complete facts, and relevant arguments.

(ii) The application of the Handbook to the Application

"*Consolidation of the electricity distribution sector has been the subject of much discussion since the late 1990s when the sector was first restructured under the Energy Competition Act, 1998.*"[12]

The same cannot be said to be true for natural gas distributors.

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[9] http://www.rds.oeb.ca/HPECMWebDrawer/Record/579710/File/document
[10] Pages 6-7 of the Combined Proceeding Decision.
[11] No party in either the First NRG Decision or the Second NRG Decision argued that a legal test other than the "no harm" test should apply. The Board was not asked to consider the issue.
[12] Decision and Order dated July 3, 2014 at pg. 2 in EB-2013-0196/EB-2013-0187/EB-2013-0198

The Handbook includes a lengthy pre-amble which frames the context in which the Handbook was released:

> "*The Commission on the Reform of Ontario's Public Services, the Distribution Sector Review Panel and the Premiers Advisory Council on Government Assets have all recommended a reduction in the number of local distribution companies in Ontario and have endorsed consolidation. According to these reports, consolidation can increase efficiency in the electricity distribution sector through the creation of economies of scale and/or contiguity. Consolidation permits a larger scale of operation with the result that customers can be served at a lower per customer cost. Consolidations that eliminate geographical boundaries between distribution areas result in a more efficient distribution system.*
>
> *Consolidation also enables distributors to address challenges in an evolving electricity industry. This includes new technology requirements to meet customer expectations, changing dynamics in the electricity sector with the growth of distributed energy resources and to undertake asset renewal. Distributors will need considerable additional investment to meet these challenges and consolidation generally offers larger utilities better access to capital markets, with lower financing costs.*
>
> *Distributors are also expected to meet public policy goals relating to electricity conservation and demand management, implementation of a smart grid, and promotion of the use and generation of electricity from renewable energy sources. Delivering on these public policy goals will require innovation and internal capabilities that may be more cost effective for larger distributors to develop or retain.*"[13]

There is a similar, and even more detailed, pre-amble framing the context of the Board's consultation process and policy at pages 3-4 of the Report of the Board on Rate Making Associated with Distributor Consolidation dated March 26, 2015 (EB-2014-0138) (the "**2015 Report**").[14]

This context included evidence of predicted cost savings of $1.2 billion associated with electricity distributor consolidation.[15] There is no similar evidence confirming that there will be net benefits arising from the consolidation of two natural gas distributors.

APPrO does not debate that the Handbook applies to Section 86 consolidation transactions for electricity distributors and transmitters. This is clear from the title and content of the Handbook, which focuses exclusively on Section 86 of the OEB Act and the objectives under Section 1 of the OEB Act.

However, the Handbook also includes a disclaimer:

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[13] Handbook at pg. 1.

[14] Report of the Board on Rate Making Associated with Distributor Consolidation dated March 26, 2015 (EB-2014-0138

[15] The report of the Ontario Distribution Sector Review Panel, December 2012.

> *"While the Handbook is applicable to both electricity distributors and transmitters, most of the OEB's policies and prior OEB decisions have related to distributors. Transmitters should consider the intent of the Handbook and make appropriate modifications as needed to reflect differences in transmitter consolidations."*[16]

In this context, the Applicants' Issues List assumes that the Handbook should be applied to the Application **without** considering the intent of the Handbook, and **without** making appropriate modifications as needed to reflect differences in the proposed consolidation of two natural gas distributors.

APPrO disagrees.

In this context, APPrO supports the inclusion of issues 4-6 in the Alternative Issues List.

These question ask whether a deferred rebasing is appropriate (rather than assuming that it is). If the answer is yes, these questions ask how long should it be (rather than assuming 10 years). These questions also ask whether an ESM is appropriate, and if yes what would the mechanism be and when should it apply (rather than assuming after 5 years, and only if ROE exceeds the deadband). These questions also ask what considerations and requirements should apply to protect the interests of customers pending rebasing (rather than assuming none).

Finally, question 6 asks how the commitments the utilities have previously made are impacted, and when and how those commitments would be addressed as a result of the merger.

(iii) Other impacts of the merger

Finally, APPrO supports the inclusion of issues 7-11 of the Alternative Issues List.

Issues 7 asks whether any the proposed merger could result in some unintended outcomes with regards to existing OEB policies, rules or prior order. For example, would the merger of Enbridge and Union reduce competition to a level where it might impact the Board's determination on the regulation of gas storage (NGEIR) or the Storage and transmission Access Rule (STAR)?

Issue 7 does not suggest the Board must address all such issues as part of this Application. Rather it creates a framework pursuant to which this Board panel could identify potential concerns, which the Board could then analyze and assess in the future. The intent is to avoid unintended consequences.

Issue 8 ask a general question - if leave is granted, what conditions should be attached. It is simply a more general formulation of issues 9-11 which all parties agreed to include.

The merger of Enbridge and Union is a novel event, dissimilar in impact to an LDC merger. Given the potentially wide-ranging effects on the natural gas consumers of Ontario, APPrO submits that it is more appropriate to use the Alternative Issues List which is of broader range. By

[16] Ibid. at pg. 2.

engaging with a more diverse set of questions, the Board will have at its disposal a more fulsome record on which to evaluate the merger.

Yours very truly,

BORDEN LADNER GERVAIS LLP

Per:

Original signed by John A.D. Vellone

John A.D. Vellone

cc. Applicant and Intervenors of record in EB-2017-0306