

EB-2017-0306

ONTARIO ENERGY BOARD

**Enbridge Gas Distribution (“EGD”) and Union Gas Ltd.
 (“Union”)**

MAADs Application – Issues List Submission

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

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I. INTRODUCTION

1. On November 2, 2017, the EGD and Union (collectively, the “Applicants”) filed an application seeking approval to effect the amalgamation of EGD and Union pursuant to subsection 43(1) of the *Ontario Energy Board Act, 1998*.
2. At the same time the Applicants also filed a draft issues list (the “Applicants’ Issues List”).
3. Pursuant to the Ontario Energy Board’s (“OEB” or the “Board”) Procedural Order #1 dated December 22, 2017, an Issues Conference was held among the parties on January 15, 2018, in order to determine if an agreement could be reached regarding the proper scope of the issues in this proceeding.
4. As a result of the Issues Conference, the parties agreed to the addition of three issues:
 - (a) What is the status of the Undertakings given to the Lieutenant Governor in Council?
 - (b) Should the Undertakings be replaced by a condition of the approval of the proposed merger?
 - (c) If so, what should the content of the condition be?
5. No other agreement was reached with regard to the appropriate scope of the issues in this proceeding.
6. On January 16, 2018, the Board released Procedural Order #2, wherein the Board directed parties to provide written submissions regarding an appropriate issues list for the proceeding.
7. By letter dated January 17, 2018, the Industrial Gas Users Association wrote to the Board on behalf of a wide cross-section of intervenors (including CME) and provided an alternative proposed issues list (the “Intervenors’ Issues List”).

8. CME submits that the Board should adopt the Intervenors' Issues List on the basis that the Applicants' Issues List is inappropriately narrow and it assumes the answers pivotal questions that should be before the Board.

II. THE PURPOSE OF AN ISSUES LIST

9. CME submits that the purpose of an issues list is to outline what questions need to be answered as part of the proceeding.

10. This makes a determination regarding the issues list different from determining the proceeding on the merits. Rather than attempting to answer the questions posed by an application, the Board's determination on the issues list will be more fundamental – it will determine what questions will be asked in the proceeding.

11. Accordingly, the Board should review the Applicants' Issues List and the Intervenors' Issues List and inquire whether the questions posed by the issues lists are appropriate to ask as part of this proceeding.

III. TEST FOR APPROVAL OF THE MERGER

12. CME submits that it is appropriate to ask whether or not the no harm test, or a different test applies in this application.

13. As CME understands it, the Applicants, in their Argument-in-Chief, contend that the no harm test has been applied in the past, and therefore it should not be allowed to be an issue in this case. While CME acknowledges that the no harm test has been applied in the cases cited by the Applicants, and indeed the Board may, as part of its determination, ultimately find that it applies to this application, CME submits that this argument misses the point.

14. The question for determining the issues list is not whether the test has been applied in the past, or whether the Board will ultimately find it to be the appropriate test in this case. The question for determining the scope of the issues should be – Is it appropriate for the Board to ask whether the no harm test applies in this case, or start from the premise that it does?

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15. It is appropriate to ask whether the no harm test applies since the context for this case is significantly different than other cases where the no harm test was applied. The differences in this application include:
- (a) A non-arm's length transaction;
 - (b) The possibility of a near monopoly of natural gas in Ontario;
 - (c) Whether or not the companies could obtain a better deal for the transaction is not at issue.

Unfairness to the Applicants

16. The Applicants also contend that allowing other parties to put into issue other possible tests that the Applicants didn't expect would not be reasonable or fair.
17. CME submits that the true lack of fairness and reason would exist if the Board adopted the approach advocated by the Applicants.
18. If parties were unable to explore other methods of evaluating the evidence, the Applicants would be able to preclude broad areas of inquiry simply by formulating their application in a certain way.
19. The approach advocated by the Applicants would result in the Board being precluded from: considering novel arguments; weighing the impacts of individual applications; and responding to the evolution of energy regulation as a whole.
20. CME submits that this prejudice to parties would be irrevocable.
21. Contrastingly, any unfairness that the Applicants would suffer by having to meet a different test could easily be remedied by allowing the Applicants an extension of time to refile or alter their application in a manner that reflects the requirements of other tests.
22. The Applicant's approach would also lead to what is essentially a form of *stare decisis* being applied to the Board.
23. In contrast to the Courts, administrative tribunals are not bound by *stare decisis*. The Supreme Court described the difference in the following terms:

“Courts must decide cases according to the law and are bound by stare decisis. By contrast, tribunals are not so constrained. When acting within their jurisdiction, they may solve the conflict before them in the way judged to be most appropriate.”¹

24. The difference in approach is intentional. Administrative tribunals have the flexibility to expeditious and justly deal with the widely diverging circumstances that are present in their area of expertise.
25. CME submits that barring parties from exploring whether another test would be appropriate under the circumstances because the no harm test has been applied before would be removing flexibility that lies at the heart of the administrative law regime in Canada, and applying *stare decisis* inappropriately.

IV. REBASING DEFERRAL

26. The Applicants’ Issues List begins from the premise that the Board’s *Handbook to Electricity Distributor and Transmitter Consolidations* (the “Electricity MAADs Handbook”) applies wholesale to their natural gas application.
27. CME disagrees with this approach, and submits that it is appropriate as part of the issues in this proceeding to ask whether or not the Electricity MAADs Handbook applies, and if so, on what basis?

The Electricity MAADs Handbook Does Not Apply on its Face

28. The Electricity MAADs Handbook does not apply to natural gas applications on its face. In addition to what is set out in its title, the Electricity MAADs Handbook defines what entities it applies to as part of its introduction. It states:

“While the Handbook is applicable to both electricity distributors and transmitters, most of the OEB’s policies and prior OEB decision have related to distributors. Transmitters should consider the intent of the

¹ *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at para 14.

Handbook and make appropriate modifications as needed to reflect differences in transmitter consolidations.”² [emphasis added]

29. As CME understands it, the Applicants contend in their Argument-in-Chief that the Electricity MAADs Handbook applies to gas transactions because the Board’s Handbook for Utility Rate Applications (the “Rate Handbook”) applies to both electricity and gas entities, and has a section that references the Electricity MAADs Handbook.
30. The section in the Rate Handbook dealing with MAADs however, only explains that rate setting (the subject of the Rate Handbook) and mergers, acquisitions, amalgamations or divestitures (the subject of the Electricity MAADs Handbook) are to be dealt with through separate applications. It does not provide or suggest that the Electricity MAADs Handbook applies to natural gas transactions.
31. The Applicants also argue that because the Electricity MAADs Handbook references the Renewed Regulatory Framework (“RRF”), formerly the Renewed Regulatory Framework for Electricity (“RRFE”) that this also supports their position that the Electricity MAADs Handbook applies to gas transactions.
32. This ignores the Board’s practice of informing parties when its policies apply to new stakeholders. For example, in the Rate Handbook, the Board states:
- “This Handbook outlines how the RRFE will be applied to all regulated utilities going forward. The framework will be referred to as the Renewed Regulatory Framework (RRF) in this document and by the OEB going forward to reflect this transition.”³*
33. Similarly, when previous Board policies on consolidation only dealt with electricity distributors, their titles were indicative of that. This can be seen in policies such as “Report of the Board regarding Rate-making Policies Associated with Distributor Consolidation”.

² Ontario Energy Board, *Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016, p. 2.

³ Ontario Energy Board, *Handbook for Utility Rate Applications*, October 13, 2016, p. 4.

When the Board's consolidation policy grew to include transmitters, the report's title was changed to indicate that, as evidenced by the title "Handbook to Electricity Distributor and Transmitter Consolidations".

34. In the past, the Board has been very clear what entities their policies apply to. Not only do they update the title of the policies to reflect the change in scope, but they also place corresponding information in other documents to indicate to stakeholders that the scope of the policy has changed.⁴
35. The Board has given no indication in this case, either through a change in the Electricity MAADs Handbook, or as supplementary information in other policies, that the scope of the Electricity MAADs Handbook's policy has changed. Accordingly, CME submits that it is appropriate that the question of whether or not the Electricity MAADs Handbook applies to in this case, and if so, on what basis.

The Electricity MAADs Handbook Does Not Apply to this Case on a Principled Basis

36. CME submits that there is no principled basis for why the Electricity MAADs Handbook would apply wholesale to this case.
37. The Electricity MAADs Handbook sets out the context for the policy. The Board states:
- "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."⁵*
38. The bodies listed by the Board were all reviewing the state of electricity distribution in the province, and came to the conclusion that consolidation was desirable due to the multiplicity of small distributors in the province.

⁴ Such as the reference in the Rate Handbook to why the RRFE had been changed to the RRF.

⁵ Ontario Energy Board, *Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016, p. 1.

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39. As a result of the bodies' recommendations, the Board determined that they would permit a longer rebasing period in order to incent consolidation.⁶
 40. The applicants do not exist in the same market as the one described by the Board. The Applicants are two of the three gas distribution entities regulated by the Board in Ontario, and they serve the vast majority of the natural gas consumers in Ontario.
 41. Furthermore, they have no need for extra incentives to merge, as the parent companies are already amalgamated.
 42. Under the circumstances, CME submits that it is appropriate for the issues list to include inquiries as to whether a longer rebasing period is appropriate, and if so, on what basis since there are significant doubts, both on its face, as well as on a principled basis, that it does not.

Even if the Electricity MAADs Handbook Applies, the Intervenor's Issues List Should Still be Preferred

43. In the Electricity MAADs Handbook, the Board specifically notes that most of the OEB's policies and prior OEB decision have related to electricity distributors. As a result, the OEB cautions that "Transmitters should consider the intent of the Handbook and make appropriate modifications as needed to reflect differences in transmitter consolidations".⁷
44. Even if the Electricity MAADs Handbook applies to natural gas entities, CME submits it is reasonable that the same caution should apply. In other words, if the Electricity MAADs Handbook applies, it would still be necessary for natural gas entities to consider the intent of the Handbook and make appropriate modifications as needed to reflect differences in natural gas consolidations.

⁶ Ontario Energy Board, *Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016, p. 12.

⁷ Ontario Energy Board, *Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016, p. 2.

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45. If that were true, the Board would need to decide what modifications (if any) were appropriate in natural gas transactions. To do that, it would need to ask questions such as:
- (a) Are the modifications (or lack thereof) made by the utility in its application appropriate?
 - (b) If not, what are the appropriate modifications that the utility needs to make?
46. CME submits that this would lead the Board to require the same or similar issues to the ones provided for in the Intervenor's Issues List. Accordingly, even if the Electricity MAADs Handbook applies to natural gas transactions, the Intervenor's Issues List should still be preferred.

V. IMPACTS OF THE MERGER

47. CME submits that the Intervenor's Issues List also includes a number of other appropriate questions surrounding the impacts of the merger on other Board policies, rules or orders.
48. Under the Applicants' Issues List, the merger's impact on issues such as natural gas storage would either go unexamined, or be subsumed as part of the larger no harm test.
49. To the extent that these issues would go unexamined as part of the Applicants' Issues List, CME submits that it would be inappropriate for the Board to ignore these concerns in the context of this application. The amalgamation of Union and EGD is a transformational change in Ontario's natural gas landscape, and the Board should be made aware of, and consider all of the far reaching impacts that it entails with the benefit of a complete record.
50. To the extent that the test for consolidation would include these sub-issues, CME submits that it is appropriate to elucidate several issues, even if they could be categorized as part of the broader test in order to help focus and guide the parties and the Board to issues that are of concern to the rate-paying public. If a minor duplication in the issues list is the price of ensuring that the Board considers all of the appropriate inputs before making a determination, CME believes this is an appropriate trade-off.

VI. CONCLUSION

51. CME believes that the proposed amalgamation between Union and EGD is a critical moment in natural gas distribution in Ontario, and it has the potential to be great news for the ratepayers of Ontario.
52. It is because of CME's belief in the importance of this amalgamation and its possible benefits to ratepayers that it submits that the Intervenor's Issues List should be preferred.
53. The Applicants' Issues List assumes the answers to some of the pivotal questions that are engaged by this proceeding.
54. Specifically, the Applicants' Issues List assumes that the Electricity MAADs Handbook applies wholesale to natural gas transactions. The automatic application of the no harm test, the 10 year rebasing deferral without justification, and the lack of consideration for other impacts of the merger flow from this assumption.
55. In CME's view, the application of the Electricity MAADs Handbook to natural gas transactions is far from clear. As a result, it would be inappropriate for the issues in this proceeding to assume that it does.
56. The Intervenor's Issues List more appropriately scopes the issues engaged by the application, and allows the Board a more complete record in order to come to the proper determination of what gas regulation in Ontario should look like for the next decade.
57. Accordingly, CME submits that the Board should adopt the Intervenor's Issues List.

VII. COSTS

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of January, 2018.

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