ONTARIO ENERGY BOARD

OEB STAFF SUBMISSION

Enbridge Gas Distribution Inc. and Union Gas Limited
Amalgamation Application
EB-2017-0306

January 26, 2018

1. Background

Enbridge Gas Distribution Inc. (Enbridge Gas) and Union Gas Limited (Union Gas), jointly referred to as the applicants, filed an application dated November 2, 2017 with the Ontario Energy Board (OEB) under section 43(1) of the *Ontario Energy Board Act, 1998* (the OEB Act), for approval to effect the amalgamation of Enbridge Gas and Union Gas into a single company referred to as Amalco. The applicants have also requested a deferred rebasing period of 10 years in the application.

Enbridge Gas and Union Gas are currently operating under multi-year incentive rate frameworks that expire at the end of 2018. Enbridge Gas currently operates under a five-year Custom Incentive Rate-setting (IR) framework approved by the OEB in EB-2012-0459. Union Gas is currently operating under a five-year price cap Incentive Rate-setting Mechanism (IRM) approved by the OEB in EB-2013-0202. In the absence of amalgamation, Enbridge Gas and Union Gas would be required to apply for rebasing for 2019.

Pursuant to Procedural Order No. 1, an Issues Conference was held on January 15, 2018, with the objective of developing a proposed issues list for presentation to the OEB. However, there was no consensus on the issues list proposed by the applicants. The parties did agree on the addition of three issues that were proposed by the Municipality of Chatham-Kent concerning undertakings that were provided by the applicants to the Lieutenant Governor in Council.

By letter dated January 17, 2017, the Industrial Gas Users Association on behalf of a number of intervenors submitted an alternative issues list.

The main difference between the applicants' proposed issues list and the intervenors' alternative list is that the applicants presuppose that the OEB's established framework for evaluating mergers, acquisitions, amalgamations and divestitures (MAADs) in the electricity sector applies equally to MAADs in the gas sector. In particular, the applicants say that the OEB should not consider in this proceeding whether the OEB's policy of allowing a merged entity to defer rebasing for up to 10 years, nor whether any test other than the "no harm" test should be used to assess the application. The intervenors, on the other hand, wish to make both the length of the rebasing deferral and the applicability of the "no harm" test issues in this proceeding.

For the reasons that follow, OEB staff's view is that the framework for electricity MAADs is an appropriate starting point for this proceeding, and in staff's view much of the

content of the *Handbook to Electricity Distributor and Transmitter Consolidations* (MAADs Handbook) could very well be appropriate to apply in this proceeding. However, it is clear from the title of the MAADs Handbook that it was drafted for the electricity sector. The OEB may well determine that applying the MAADs Handbook would make sense in this proceeding. But the OEB has not previously stated that gas applications must proceed under the same consolidation framework that was developed for electricity. Accordingly, the alternative issues list proposed by the intervenors is an appropriate starting point. The applicability of the MAADs Handbook should be open for discussion, and therefore part of the issues list.

2. Staff Submission

The purpose of an issues list

Prior to discussing the appropriate issues in this proceeding, it is important to understand the purpose of an issues list. The issues list serves to scope the parameters of the hearing. It establishes the matters that can be considered by the OEB in making its ultimate decision. In effect it sets out the broad questions that are at issue in the proceeding. It does not serve to provide "answers" to any of those questions, it simply sets out the matters that parties are permitted to discuss as part of the hearing.

The fact that a party believes that the "answer" to a particular question is clear does not mean that it should not form part of the issues list. If something is not on the issues list, that generally means parties cannot ask any questions about it or make any submissions on it. Issues should only be excluded from the issues list, therefore, if the panel is certain that the matter has no relevance to the proceeding.

As discussed in further detail below, OEB staff generally prefers the draft issues list proposed by a number of intervenors to that of the utilities. The intervenors' list is broader and includes issues that OEB staff believes to be legitimate areas of enquiry in the hearing.

The MAADs Handbook and the "no harm" test

The Applicability of the Handbook to Electricity Distributor and Transmitter Consolidations

The OEB issued the MAADs Handbook on January 19, 2016. The MAADs Handbook provides guidance on how to prepare an application for a MAADs approval, and

discusses the factors that the OEB will consider when reviewing such an application. In particular, it reaffirms that the OEB will continue to apply the "no harm" test, and provides that, in order to encourage consolidation, the OEB will allow consolidating entities to defer rebasing for up to 10 years.

As its full title (the *Handbook to Electricity Distributor and Transmitter Consolidations*) suggests, the MAADs Handbook was directed towards electricity distributors and transmitters. There is no mention of the gas sector in the document.

Furthermore, the document explains on the first page that it was developed in the specific context of growing support for consolidation in the electricity sector: "The Commission on the Reform of Ontario's Public Services, the Distribution Sector Review Panel and the Premier's Advisory Council on Government Assets have all recommended a reduction in the number of local distribution companies in Ontario and have endorsed consolidation." In that context, the MAADs Handbook explains, "the OEB is committed to reducing regulatory barriers to consolidation." There has not been the same policy momentum towards consolidation in the gas sector, where there are only two large players – the applicants – plus a smaller third player, EPCOR.

On its face, then, the MAADs Handbook does not apply automatically to MAADs applications in the gas sector. Nor has the OEB ever said expressly in any decision or policy document that the MAADs Handbook must apply to gas.

The applicants are correct that the OEB has said that the principles underlying the Renewed Regulatory Framework (RRF), although initially developed for electricity distributors, now apply equally to gas utilities, electricity transmitters and Ontario Power Generation. Nevertheless, the RRF is a high-level framework that does not speak specifically to MAADs: the OEB's October 18, 2012 report establishing the RRF, the *Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach*, is silent on consolidation.

There has been only one gas MAADs application since the MAADs Handbook was issued: the sale by Natural Resource Gas Limited (NRG) of its gas distribution system to EPCOR Natural Gas Limited Partnership. In its decision approving the transaction, the OEB did not refer to the MAADs Handbook, but did state that it applied the no harm test.

It is therefore OEB staff's view that the MAADs Handbook (as a single policy document) does not automatically apply to gas cases, and that the utilities cannot fairly claim that all of the individual elements of the MAADs Handbook are already decided and therefore need not be issues in this proceeding. That is not to say that the MAADs Handbook is not a relevant document in this proceeding, and it does in fact provide

useful guidance to the OEB in its consideration of the application. It should not be used, however, to limit the issues that parties are permitted to address in the proceeding.

No Harm Test

The OEB considered the applicability of the "no harm" test in the NRG/EPCOR decision. The OEB noted:

> In the assessment of consolidation transactions in the electricity sector, the OEB has consistently applied the "no harm" test since 2005. The no harm test considers whether the proposed transaction will have an adverse effect on the attainment of the OEB's statutory objectives; where a proposed transaction has a positive or neutral effect on the attainment of these objectives, the OEB will approve the application. The OEB has applied the no harm test in assessing the current application.[1]

The applicants point to two other decisions where the "no harm" test was applied in the gas context (both preceding the MAADs Handbook).

In its short 2005 decision approving the acquisition of more than 20% of the voting securities of NRG by the Wilsher Trust, the OEB concluded that there would be no "adverse impact": "Based on the Applicant's evidence, the Board finds that the subject transaction has no adverse impact on the factors identified in the Board's objectives as set out in section 2 of the Act."[2] As in the NRG/EPCOR decision, there was little discussion of why that should be the test.

There was a somewhat more detailed, though still brief, analysis, of what test to apply in the OEB's decision approving the sale of certain gas distribution assets by Union Gas. The OEB referred to the 2005 Combined Proceeding Decision where it had adopted the "no harm" test (in the electricity context),[3] and concluded that it did "not see any reason to depart from the "no harm" test."[4] That decision addressed a relatively minor transaction: the sale of 11.7 km of pipeline.

In OEB staff's view, the gas MAADs cases since the 2005 Combined Proceeding Decision have consistently applied the "no harm" test. It would therefore be a departure from past practice for the OEB to apply any other test to the current application. Nevertheless, in OEB staff's view, it would be open to the OEB to do so if it were

[1] EB-2016-0351, Decision and Order, August 3, 2017, p. 3 (internal footnote omitted).
[2] EB-2005-0445, Decision and Order, November 3, 2005, p. 3.
[3] RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257, Decision, August 31, 2005.
[4] EB-2008-0411, Decision and Order, November 27, 2009.

persuaded that the circumstances warranted it. There have been very few gas MAADs decisions since the Combined Proceeding Decision and they do not say very much about why the "no harm" test is appropriate, nor do they contain sweeping statements that the "no harm" test must apply in every case.

There is one other earlier case that OEB staff would draw the OEB's attention to. In 1996, the OEB heard an application for the amalgamation of Union Gas and Centra Gas Ontario Inc. The question arose of whether to apply the "no harm" test or a "positive benefit" test when assessing whether the proposed deal was in the public interest. The OEB did not have to answer the question, because it found on the facts that the proposal satisfied the more stringent positive benefit test: "In view of the Board's positive conclusion regarding the benefits of the proposed merger, it is unnecessary for the Board to consider how confidently it would have recommended approval to the LGIC had the Board found the proposal met only the less stringent test."[5] Although the case was heard under a different statutory scheme – it was before the OEB Act was enacted, and the OEB's mandate at the time in proposed amalgamations was to make a recommendation to the Lieutenant Governor in Council (LGIC) on whether to approve the transaction or not – it may still be of some interest to the OEB in this matter.

The applicants say in their Argument in Chief that it would be unfair to apply another test, since they have structured their application on the assumption that the "no harm" test would apply. In OEB staff's view, it is not apparent how the application would have been prepared differently. For instance, even if the OEB determined that the positive benefit test applies – and again, at this point OEB staff expresses no opinion on the appropriate test – it would appear that there is already evidence on the record going to the benefits of the merger. By the same token, even if the OEB were to determine that some elements of the MAADs Handbook should not apply, the applicants have already provided sufficient information as a starting point to explore options during the course of the proceeding.

Summary

In OEB staff's view, the review above of the OEB's policies and decisions in respect of MAADs leads to the conclusion that the MAADs Handbook – including the endorsement of the "no harm" test – does not apply automatically to proposed gas mergers.

At this point in the proceeding, OEB staff is not expressing a position on whether the electricity MAADs framework (including the "no harm" test) should apply equally to gas applications. For present purposes, the point is that the OEB has not in the past made it clear that that framework automatically applies, and therefore debate about the appropriateness of the framework should not be foreclosed. The OEB may well

[5] E.B.O. 195, Report of the Board, March 7, 1997, p. 35.

determine that the framework is perfectly suitable for this application. That is a question better left for final argument, to the extent the final OEB-approved issues list permits.

Other issues proposed by the intervenors

For the reasons above, OEB staff supports the first two parts of the alternative issues list proposed by the intervenors, i.e. the issues under the headings "Test for Approval of the Merger" and "Rebasing Deferral". OEB staff would add the following comments on the third part of the intervenors' list, entitled "Impacts of the Merger".

The intervenors' proposed issue #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?* – is appropriate. OEB staff would add that matters such as accounting policy changes and how they will be handled during any deferral period should be subsumed within this issue. The issue would also cover certain other matters that OEB staff may wish to explore in this proceeding, and which arguably are not captured by the broader issue #3 (*Have the applicants met the appropriate test?*), including, but not limited to: whether changes should be made to how former Enbridge Gas customers pay storage charges, and how obligations connected to past orders (such as leave to construct reporting obligations that were tied to the next rebasing application) should be treated.

OEB staff agrees with the addition of issue #8 (*If leave is granted, what conditions should be attached?*). Conditions might include reporting requirements or a timeline for the completion of the merger. OEB staff also agrees with issues #9 to #11 concerning the undertakings to the Lieutenant Governor in Council, which were proposed by the Municipality of Chatham-Kent and agreed to by the intervenors and the applicants, subject to one comment in the following section.

Issues Proposed by the Municipality of Chatham-Kent

The Municipality of Chatham-Kent has proposed that the following three issues be added to the Issues List (issues #9 to #11 on the intervenors' list):

9. What is the status of the Undertakings?
10. Should the Undertakings be replaced by a condition of the approval of the OEB of the merger?
11. If so, what should the content of that condition be?

OEB staff has no comments on issues 9 and 11. OEB staff has a small concern about issue 10, as it appears to assume that the OEB has the unilateral right to replace the

Undertakings. The Undertakings are from the utility to the Lieutenant Governor in Council. They are not Undertakings to the OEB, and in OEB staff's view, the OEB has no power to unilaterally terminate these Undertakings (although under the terms of the Undertakings, the OEB "may dispense, in whole or in part, with future compliance by any of the signatories hereto with any obligation contained in an undertaking"). The utilities' position appears to be that if the merger is approved, Union's Undertakings will cease to exist because Union itself will cease to exist. This may well be correct; however it would not be the OEB that directly terminates the Undertakings. For greater clarity, OEB staff suggest that issue 10 be re-worded to state: *To the extent that the Undertakings are impacted by this application, should any of the provisions of the Undertakings be replaced by a condition of any OEB approval*?

– All of which is respectfully submitted –