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Our File: EB20170307

Attn: Kirsten Walli, Board Secretary

Dear Ms. Walli:

Re: EB-2017-0307 – Enbridge/Union Rate Framework – 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 in EB-2016-0306 to amalgamate (the "MAADs Application"). In the MAADs Application they are seeking to defer rebasing for 10 years. In this application, the Applicants are seeking approval under section 36 of the *Ontario Energy Board Act, 1998* ("*OEB Act*") for the rate framework during that rebasing period. 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 Applicants have proposed a rate framework which, if approved, will determine how rates will be set for approximately 3.6M[1] natural gas distribution customers in Ontario for the next 10 years. Based on its forecast, over its rate plan, it expects to collect over $29Bn in revenue from distribution ratepayers.[2]

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."[3] 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."[4]

Similar to the concerns addressed in SEC's submissions on the Applicants' proposed EB-2017-0306 issues list, the Applicants' proposed issues list is both unduly narrow in scope, and almost entirely

[1] Combined Enbridge and Union Gas customers as of December 31, 2016: 3,589,985. (See OEB 2016 Natural Gas Yearbook, p.12)

[2] See EB-2017-0306, Exhibit B, Tab 1, p.20, Table 3

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

[4] *Ibid*

premised on non-binding Board policies that either do not apply, or have yet to be addressed, in the context of a gas utility proceeding. The Applicants' position appears to be an interpretation of the *Handbook to Electricity Distributor and Transmitter Consolidations* ("Electricity MAADs Handbook")[5], and the Board's *Handbook for Utility Rate Applications*[6] which refers to the Electricity MAADs Handbook that connects them in a new and unique way, and creates a new Board policy.

On the face of the Electricity MAADs Handbook, it simply does not apply to natural gas distributors. The Electricity MAADs Handbook is about the consolidation of electricity distributors and transmitters. The Rate Handbook does refer to the MAADs Handbook, but does not say, whether directly or by implication, that gas rates should be set based on a document that is entirely premised on the unique attributes of the electricity sector.[7]

Regardless, both documents are non-binding policy statements that do not control the decisions of 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 the Board does not make that determination, and makes it expressly based on the evidence before it, then it is impermissibly fettering its own discretion.[8] 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."[9]

One thing that makes this Application unique is that, after 2018, neither Union nor Enbridge will have an approved rate-setting framework. Both utilities' previous incentive-regulation plans, which are very different from each other, will end. The Applicant seeks to rely on the policy documents cited to deem RRFa new rate-setting framework to be applicable. At issue, clearly, is whether that is appropriate.

There is no precedent for the Applicants' rate framework proposal. No gas utility so far has had rates approved based on the Rate Handbook, nor even on the *Filing Requirements for Natural Gas Rate Applications.* The latter, in fact, only considers the implementation of an incentive rate-making proposal in the context of first year base rates set on a cost of service basis.[10] It does not consider what rate-setting framework is appropriate where a rebasing has not occurred.

Unlike the electricity distribution context, where there is an 'off the shelf" IRM framework, and the Board has had over a decade of experience with it, in gas, there is no default methodology. Historically, rate-setting has always been customized to the individual distributor.

Moreover, gas distribution is simply much more complicated, since the Board has significantly broader jurisdiction, and the rates for Enbridge and Union include a much broader array of costs and activities. The Board should be very careful in limiting the rate-setting issues that arise at this stage of the proceeding.

The Applicants' proposed issues list assumes that the Board will grant their proposed deferred rebasing proposal for 10 years as proposed in the MAADs Application. In their minds, all that is at issue in this proceeding is determining the parameters of the Applicants' proposed Price Cap IR that it believes is required by the Electricity MAADs Handbook.

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

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

[7] *Handbook to Electricity Distributor and Transmitter Consolidations* (January 19 2016), p.1-2

[8] *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198, para. 66,68; *Jackson v. Ontario (Minister of Natural Resources)*, 2009 ONCA 846, para 51; *Decision and Order on Motion to Review and Vary* (EB-2014-0155 - KWHI Motion to Review) July 31 2014, p.7; Brown & Evans, Judicial Review of Administrative Action in Canada, loose-leaf at p.12-42:

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

[10] *Filing Requirements for Natural Gas Distributor Rate Applications (*February 16 2017), p.4

As demonstrated by the intervenors' and the Board Staff's submissions on the EB-2016-0306 issues list, the appropriateness of applying the Electricity MAAD Handbook mechanically to natural gas consolidation is a central issue in that proceeding. The Board in that proceeding may ultimately a) agree with the Applicants and authorize a 10 year deferred rebasing, b) allow a period less than 10 years, c) order a deferral of some aspects of rebasing and not others, or d) entirely reject the deferred rebasing request.

Interestingly, the Applicants themselves – despite relying on non-binding policy as if it were law - are not actually proposing a strict Price Cap IR model as defined by, and compliant with, the Rate Handbook. They are seeking a number of primarily one-sided adjustments to the going-in rates which would have the effect of increasing base rates.[11] These include adjustments[12] to reverse the changes the Board ordered in Enbridge's 2018 rate proceeding[13], which appeared to be done to ensure that base rates are appropriate going into a potential 10 year IRM plan.[14]

In contrast, SEC and most of the other intervenors, working together, have proposed a more appropriate issues list ("Intervenor Issues List").[15] The Intervenor Issues List is consistent with the purposes of an issues list as described by the Board. It articulates, in a logical fashion, the questions the Board will need to consider in adjudicating this rate application. It does not make any assumptions on what Board policy documents do or do not apply. That is an issue to be determined by the Board, not by the Applicants. Then, even if the Board determines that one or more of the cited policies do apply, the Intervenor Issues List recognizes that the Board must determine how they should apply to the unique circumstances of this case.

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

Rate Framework

The Intervenor Issues List sets out the questions the Board will need to consider in setting a post amalgamation rate framework.

Issue A1 asks, if the Board grants the request for approval of the merger and deferral of rate rebasing, what is the appropriate type of framework to be used to set rates during that period? The Applicants contend that there is only one option - IRM - as set out in the Electricity MAADs Handbook.[16] But that is the overarching issue of this Application that the Board needs to address.

It may be that the Board agrees with the Applicant and determines that the policies in the Electricity MAADs Handbook referenced in the Rate Handbook *should* apply to the rate setting during any deferred rebasing period. This is not the time for that debate. It is a question to be answered by the Board after hearing the evidence, and thus has to be on the issues list.

[11] See Exhibit B1, Tab 1, p.16-20; Evidence Addendum, filed January 11 2018

[12] Evidence Addendum, filed January 11 2018

[13] EB-2017-0086, Oral Decision, Transcript p.46

[14] EB-2017-0086, Oral Decision, Transcript p.20-22

[15] See Appendix

[16] Argument-in-Chief on Draft Issues, p.6-7

Issue A2 asks how any rate framework addresses the main principles the Board has for natural gas rate-setting under the Rate Handbook[17], RRFE[18], and the objectives for gas under the *OEB Act*.[19] The Applicants' issues list doesn't even address this.

If the Board does adopt an IRM formula as the appropriate rate-setting framework, Issue A3 on the Intervenor Issues List addressed each of the main components. Each of the sub-parts (a-f) addresses the various components of such a rate-setting framework, and encompasses the first 5 issues of the Applicants' Issues List.

The Applicants oppose the Intervenors' encapsulation in issue A3 of the IRM components on two bases.

First, they say – as if the question on the issues list is whether the Applicants' list is wrong – that some of the sub-issues are simply duplicative of their own and "nothing of value is added by re-wording these issues".[20] If that is true, it of course begs the question why the Applicants oppose them. The Intervenor issues in A3 do differ in one important way. They are neutrally worded, asking for example, "What is the appropriate inflation factor"[21], as compared to "Is the proposed inflation factor appropriate?"[22]

Second, some of the sub-parts of Issue A3 involve a "reopening and re-examination of the Board's policies with regards to appropriate rate models".[23] This includes issues such as should the IRM framework be rate cap or revenue cap (Issue A3a), and the availability and parameters of any earning sharing mechanism or z-factor (Issue A3f), or advanced or incremental capital module (Issue A3h). As discussed earlier, those policies do not bind individual panels of the Board. Many parties will likely argue, based on the evidence, that some or all of those policies should not apply to the unique circumstances of this amalgamation or, if they apply, they should apply in a different manner as in electricity cases.

The Applicants clearly have acceded to the fact that some of the proposed sub-issues they raised regarding components of any IRM plan are appropriate, as they have agreed to adopt some of them. But even in doing so, they have twisted the issue into only addressing the parts they want to discuss. For example, they have accepted that some of the issue regarding the proposed ICM is appropriate, but have proposed to limit the Board's scope within that issue to reviewing two aspects of their proposal. Their proposition is that the Board has no choice but to give them an ICM, and can only consider a) a separate materiality threshold calculation using rate base and depreciation expense last approved by the Board, and b) using incremental cost of capital to calculate the revenue requirement to fund the capital (Issue 5). The relevant issue on the Intervenor Issues List, much like all the others, is clear, natural, and addresses the full question the Board will have to address, "[s[hould the capital module (ICM & ACM) mechanisms be available, and if so under what parameters" (Issue A3h).

The Applicants' unreasonable approach to the issues list is well demonstrated by its objection to the wording on the Intervenor Issues List to the proposed issue regarding Y-factors (A3e). The Intervenor

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[17] *Handbook for Utility Rate Applications*, (October 13 2016), p.2-3

[18] The Board has explicitly adopted the principles under the Board's RRFE for gas. See *Handbook for Utility Rate Applications*, (October 13 2016), p.3; RRFE principles, see *Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach* (October 18 2012), p.6

[19] *Ontario Energy Board Act, 1998*, s. 2

[20] Argument-in-Chief on Draft Issues, p.5

[21] Interenor Issues List A3(b)

[22] Revised Draft Issues List (Attachment 1 to Argument-in-Chief on Draft Issues List), Issue 1

[23] Argument-in-Chief on Draft Issues, p.8

Issues List adds to the list of the Applicants' proposed Y-Factors, "other factors". This would allow other potential Y-factors to be considered.

The Applicants' object, stating that it is "very unlikely…that intervenors will propose other factors for Y-factor treatment" and so including it is "unnecessary and inappropriate in the circumstances of the case".[24] Depending on the nature of the rate-setting framework, it is likely that the Board will have to consider the appropriateness of other pass-throughs, and it is likely that parties will propose some. In any case, the response begs the question, what is the harm in including it if the only objection is that in the Applicants' view, it does not think any party will propose an additional Y-factor. While SEC disagrees, at this stage, more importantly, all that is being decided is what questions the Board may need to consider. The Applicants' primarily one-sided approach to the issues list is entirely inappropriate.

The Applicants also oppose issue A5 of the Intervenor Issues List as being "unnecessary and inappropriate" or "does not arise as legitimate issues in the circumstances of this case".[25] This is an odd statement considering the wording of the issue is taken directly from the application itself, which states that "Amalco may propose changes to regulated service offerings, cost allocation and rate design during the deferred rebasing period to address identified issues, make improvements and respond to changing business needs."[26] Clearly, as the Intervenor Issues List proposed, an appropriate issue is what changes to the items are appropriate during rate plan period, and what process should be required for such changes to be made.

The Intervenor Issues List also includes issues related to how gas costs, transportation and related delivery rate adjustments should be made post-merger (Issue A6), and the implications of the merger on gas supply planning and costing (Issue A7). Both issues are clearly relevant and will need to be considered by the Board.

Issue A8 of the Intervenor issues List deals with the appropriate annual rate adjustment process. The Applicants oppose the issue, even though they have filed pre-filed evidence regarding what their plan is for the annual adjustment under the section titled "Annual Adjustment Process".[27] Apparently they believe that their evidence should be accepted without review by the Board,

Issues A9, A10 and A11 set out clearly the three specific issues the Board will need to address regarding deferral and variance accounts: what accounts should continue, which ones should not continue, and what additional accounts are appropriate? It is a much better formulation than the two issues that the Applicants have proposed (Should the following [listed] deferral accounts be discontinued as proposed, and are the deferral and variance accounts appropriate).

2019 Rates

Section B of the Intervenor Issues List specifically discusses setting rates in 2019.

Issue B1 asks how rates should be set for 2019 given the "timing, prior commitments, and the determination of the appropriate rate setting mechanism". This issue is important for a number of reasons. Due to the likely timing of any decision in this Application, the Board may need to treat 2019 differently than other years. If the Board approves a rate plan but orders certain adjustments to be made to rates, or evidence to be filed to address a specific issue, those may not be able to be put in place for 2019. For example, in Union's 2018 rates application, the Board commented that in the

[24] Argument-in-Chief on Draft Issues, p.5

[25] Argument-in-Chief on Draft Issues, p.10

[26] Exhibit B, Tab 1, p.29

[27] Exhibit B, Tab 1, p.26

context of the proposed amalgamation, "Union and Enbridge could be required to file evidence dealing with some components of rebasing applications", even if they do not rebase.[28] In the decision in the proceeding, the Board ordered that the issue of cost allocation of the Panhandle Reinforcement Project will be dealt with in the 2019 rate proceeding.[29] If the Board in 2019 orders a revised cost allocation, it likely cannot be done for 2019 rates.

It also addresses the question, what happens if the Board does not agree that there should be any deferred rebasing period. In that scenario, as was expected to be the case under the status-quo for Enbridge and Union, would they have come to the Board to set rates by way of cost of service rebasing or Custom IR Application? Considering the timing of the possible Board MAADs decision, it is unlikely that either type of application could be brought for 2019 rates. That raises the question what should happen then, until a full application can be brought. This issue addresses this question.

Issue B2 asks what adjustments are appropriate in setting 2019 rates. It is a broader question than those set out in issues 7-10 of the Applicants' Issues List. Whereas the Applicants have proposed four specific one-sided adjustments in setting 2019 rates (i.e. adjustments to the base rates in the proposal), the Intervenor Issues List sets out the broader neutral question, and then lists the various general categories of adjustments that could be made (costs, revenues, cost allocation, rates, etc.). It is the Applicant that is proposing a form of non-rebasing, in which existing rates are adjusted and then used as the basis for an IRM. If the Board is willing to consider their conceptual approach, then one necessary result is a review of what those adjustments should be, if any.

Other Issues

The Applicants have not agreed to all but one of the 'other' issues (C) in the Intervenors Issues List. The only issue they have specifically objected to is the question "should rates/conditions of service be harmonized, and if so, when and how" (Issue C1). As with many of the other objections, the Applicants point to various Board policies regarding harmonization post amalgamation in which the Board has commented that harmonization should occur at the time of the amalgamating utilities' first cost of service.[30]

The Board may agree with the Applicants that there should be no rate harmonization during any deferred rebasing period, but due to the unique nature of the amalgamation, including what will now be scattered non-contiguous rate zones (Enbridge's Ottawa, GTA, and Niagara service territory) within another rate zone (Union South), the Board may choose to do something else. At the very least, the Board has to determine whether its general approach to harmonization is appropriate on the specific facts of this merger.

In addition, Issue C1 addresses the harmonization of conditions of service. Separate from the question of rates is that the two utilities have different conditions of service, not just for distribution, but also for transportation services.

Summary

The Applicants' proposed issues list assumes the answer to many of the questions the Board needs to consider, and unduly narrows the scope of this very unique proceeding. The Intervenor Issues List allows for those questions to be determined by the Board based on the evidentiary 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.

All of which is respectfully submitted.

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[28] *Procedural Order No. 3* (EB-2017-0087 - Union 2018), November 29 2017, p.2

[29] *Decision and Rate Order* (EB-2017-0087 - Union 2018), January 18 2018, p.8

[30] Argument-in-Chief on Draft Issues, p.8-9, footnote 29

Yours very truly,
Shepherd Rubenstein P.C.

Original signed by

Mark Rubenstein

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

APPENDIX

Enbridge Gas Distribution Inc.
and Union Gas Limited

Application for approval of a rate setting mechanism and associated parameters from January 1, 2019 to December 31, 2028

PROPOSED ISSUES LIST

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

A. THE APPROPRIATE RATEMAKING FRAMEWORK

1. If the Board grants the Applicants' request for approval of a merger and deferral of rate rebasing, what rate making framework (the "Framework") should be used to set rates during the deferral period? (An IRM formula, a Custom IR plan, or another rate setting mechanism?)

2. How should the framework ensure:

   (a) Customer engagement, and the reflection of customer interests and preferences through the provision of "value for money" services which are responsive to customer preferences?

   (b) Operational effectiveness through ongoing continuous improvement in productivity and cost performance while delivering system reliability, quality of service and "value for money"?

   (c) Public policy responsiveness?

   (d) Financial performance which demonstrates continuing financial viability, sustainable efficiency improvements and returns that are not excessive?

   (e) Rational expansion of gas transmission and distribution systems and rational development and safe operation of gas storage?

3. If the Framework is an IRM formula:

   (a) Should it be a rate cap or a revenue cap?

   (b) What is the appropriate inflation factor [I]? ***[1]***

   (c) What is the appropriate productivity factor [X]? ***[2]***

   (d) Should there be a productivity stretch expectation and if so what should it be?

   (e) Should there be pass through (Y factor) treatment for: ***[3]***

      (i) Gas commodity and upstream transportation costs?

(ii) Demand side management (DSM) costs?

(iii) A lost revenue adjustment mechanism (LRAM) for the contract market?

(iv) Cap-and-trade costs?

(v) Changes to normalized average consumption/average use?

(vi) Other factors?

(f) Should there be a Z factor, and if so what are the appropriate parameters and materiality threshold? ***[4]***

(g) Should there be an earnings sharing mechanism and if so what are the appropriate parameters?

(h) Should capital module (ICM & ACM) mechanisms be available, and if so under what parameters?

4. Are there determinations requested in the merger approval application which will have to be reconsidered in light of the Board's determinations on the appropriate rate framework to be applied post-merger (e.g. deferral period, earnings sharing parameters, other), and how should the Board address these in its determinations on each of the two applications?

5. What changes to rates, regulated services, cost allocation or rate design should be permitted or required during the rate plan period and what process should be required for such changes to be made?

6. How should gas cost, gas transportation and related delivery rate adjustments be made post-merger, and what process should be required for such adjustments to be made?

7. What are the implications of the merger for gas supply planning and costing and how will those impact cost allocation and rates?

8. What should the annual rate adjustment process be?

9. What deferral and variance accounts should continue?

10. What deferral and variance accounts should not continue? ***[8]***

11. What additional deferral and variance accounts are appropriate? ***[7]***

B. SETTING 2019 RATES

1. Given the timing, prior commitments and determination of the appropriate rate setting mechanism, how should rates be set for 2019?

2. What adjustments, if any, are appropriate in setting 2019 rates, including:

(a) Adjustments to costs? ***[5] [6] [Addendum filed 2018-01-11]***

(b) Adjustments to revenues?

(c) Adjustments to cost allocations?

(d) Adjustments to rates?

(e) Other adjustments?

C. OTHER

1. Should rates/conditions of service be harmonized, and if so when and how?

2. How should past Board directives and utility commitments be addressed (including those listed at ExB/T1/Att5)?

3. Is the proposed scorecard appropriate? ***[9]***

4. What reporting should be required during the rate plan period?

5. What stakeholder engagement should be required during the rate plan period?