

Toronto

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Ontario Energy Board  
2300 Yonge Street, 27th Floor  
P.O. Box 2319  
Toronto, ON M4P 1E4  
Attention: Ms. K. Walli, Board Secretary

Dear Ms. Walli:

**RE: EB-2017-0307**  
**Amalgamation of Enbridge Gas Distribution Inc. and Union Gas Limited**  
**Kitchener Utilities Issue List Submission**

This letter sets out the submission of Kitchener Utilities with respect to the Issues List for the application of Enbridge Gas Distribution Inc. (“EGD”) and Union Gas Limited (“Union”), collectively referred to herein as the “**Applicant**”, in EB-2017-0307 for the approval of its rate setting mechanism.

Kitchener Utilities has reviewed the Argument-in-Chief submitted by the Applicants in relation to the Issues List (the “**Applicant Argument**”), which included a draft Issues List as Attachment 1 to that document (the “**Applicant Issues List**”).

Counsel for the Industrial Gas Users Association submitted an alternative issues list on January 23, 2018 (the “**Intervenor Issues List**”), which included Kitchener Utilities as an “Endorsing Party”. Kitchener Utilities submits that the Intervenor Issues List is the appropriate Issues List for this proceeding, as it provides the framework for a thorough assessment of the Applicant’s submission. Kitchener Utilities submits that the Applicant Issues List has been designed by the Applicant to incorporate implicit assumptions that, if accepted, would fetter the OEB’s inquiry into the proposed merger of EGD and Union and the deferred rate rebasing of the amalgamated entity.

This submission focuses on several discrete aspects of the Intervenor Issues List that are particularly relevant to Kitchener Utilities, and sets out the basis upon which Kitchener Utilities advocates for these issues to be included in the final Issues List of the Board.

**Deferred Rate Rebasing (Intervenor Issues A.1 and A.4)**

A threshold question that must be determined in order to ascertain the appropriate rate making framework is whether deferred rebasing is appropriate. Issue A.1 of the Intervenor Issue List provides:

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?)

Issue A.1 becomes operative *if* the Board approves the merger and deferral of rate rebasing. If the merger is not approved, then the question of deferred rate rebasing becomes moot, but consideration must be given to the possibility that the Board approves the merger but does not approve the deferral of rate rebasing.

This issue of whether deferred rebasing is appropriate has been raised in the related EB-2017-0306 matter, and therefore requires consideration of the relationship between these two proceedings, which is addressed below.

*a) The Relationship Between EB-2017-0306 and EB-2017-0307*

Kitchener Utilities submits that the interrelationship between EB-2017-0306 and EB-2017-0307 is a relevant consideration that is expressly recognized in the Intervenor Issues List at Issue A.4, which provides:

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 determinations on each of the two applications?

The Applicant's response to Issue A.4 is that they "find it inconceivable that the Board will make determinations in respect of the merger application and then reconsider those determinations in its conclusions with respect to this application",<sup>1</sup> proceeding to advocate that the Applicant's approach would remove a risk of inconsistent findings.<sup>2</sup>

The Applicant's response appears to be based on the assumption that EB-2017-0306 and EB-2017-0307 will be decided consecutively, with a corresponding risk that final determinations in EB-2017-0307 could necessitate a re-opening of EB-2017-0306. Kitchener Utilities trusts that the Board will address the proceedings in whatever manner it deems most appropriate. However, Kitchener Utilities submits that the Applicant's assumption regarding consecutive sequencing is unfounded, and Issue A.4 (and the conduct

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<sup>1</sup> Applicant Argument at para 42.

<sup>2</sup> Applicant Argument at para 42.

of the proceedings to date) contemplates the Board considering the two proceedings contemporaneously.

The implications of the Applicant's approach extend beyond mere procedural questions. The result of compartmentalized proceedings, if taken to the extreme that the Applicant presumes, would mean that the proposed merger and deferred rebasing would be considered and decided upon without sufficient consideration given to the ratemaking mechanism of the merged utility. Such bifurcation is artificial and clouds the analysis required for EB-2017-0306. To the extent that inconsistent findings are to be avoided, as advocated by the Applicant, such consistency is achieved through the recognition of the relationship between these proceedings.

More alarming is that the Applicant's structuring of the Issues Lists for both proceedings, when viewed together, suggests that deferred rebasing *is not an issue in either proceeding*. Kitchener Utilities submits that it is untenable for the Applicant to propose two separate Issues Lists, neither of which address what in practical terms will be ratepayers' fundamental issue with any consolidation.

The approach of the Applicant appears anchored in their view of deferred rebasing as a right that cannot be contested by the Board or the Intervenor. The Applicant is wrong on this point.

*b) Deferred Rebasing is Not a Right for a Natural Gas Distributor*

The Applicant views deferred rebasing as an election that it may exercise in its sole discretion:

In light of the guidance provided by the Board for consolidation applications, **there is no legitimate issue in this case about the deferred rebasing period**. The Board's policy is that the extent of the deferred rebasing period is at the option of the distributor and that no supporting evidence is required to justify the selection of the deferral period.<sup>3</sup>

[emphasis added]

This assertion of the Applicant boldly states that if a merger is approved, then deferred rebasing is a right that is beyond the scrutiny of the Board or others. The purported authority for this right is the Board's *Handbook to Electricity Distributor and Transmitter Consolidations*, January 19, 2016 (the "**Consolidation Handbook**").<sup>4</sup>

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<sup>3</sup> Applicant's Argument-In-Chief on Issues List in EB-2017-0306 at para 38.

<sup>4</sup> Applicant's Argument-In-Chief on Issues List in EB-2017-0306 at para 34.

Kitchener Utilities submits that the Applicant has misinterpreted the applicability of the Consolidation Handbook to the amalgamation under consideration. As a starting point, the Consolidation Handbook is, by its very title, applicable only to *electricity distributors and transmitters*.

The convoluted path by which the Applicant attempts to bring itself within the scope of the Consolidation Handbook (for the purposes of deferred rebasing) originates in the Board's *Handbook for Utility Rate Applications*, October 13, 2016 (the "**Rate Handbook**").<sup>5</sup> The link between the Rate Handbook and the deferred rebasing provisions of the Consolidation Handbook is tenuous at best, and its weaknesses are self-evident when one attempts to follow the Applicant's logic. One only need to look at the stated purpose of deferred rebasing (as set out in the portion of the Consolidation Handbook that the Applicant relies on as authority for deferred rebasing) to demonstrate that deferred rebasing as of right is not appropriate for gas distributors:

**To encourage consolidations**, the OEB has introduced policies that provide consolidating distributors with an opportunity to offset transaction costs with any achieved savings. The 2015 Report permits consolidating distributors to defer rebasing for up to ten years from the closing of the transaction... The extent of the deferred rebasing period is at the option of the distributor and no supporting evidence is required to justify the selection of the deferred rebasing period subject to the minimum requirements set out below.<sup>6</sup>

[emphasis added]

The opening words of this excerpt are instructive – the purpose of deferred rebasing is to *encourage consolidations*. This is clearly meant for electricity distributors and not gas distributors. It has long been a provincial and OEB policy to encourage electricity distribution consolidation. There has been no policy aimed at merging EGD and Union.

The passage from the Consolidation Handbook excerpted above flows from prior OEB processes – all aimed at electricity distributor consolidation. The "2015 Report" noted in the excerpt (which "permits consolidating distributors to defer rebasing for up to ten years...") is a reference to the *Rate-making Associated with Distributor Consolidation* Report of the Board, (EB-2014-0138) March 26, 2015. That Report focused on incentivizing *electricity* consolidation, noting:

The report of the Ontario Distribution Sector Review Panel, issued in December 2012, set out a vision for **consolidation resulting in**

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<sup>5</sup> Applicant's Argument-In-Chief on Issues List in EB-2017-0306 at paras 8-9.

<sup>6</sup> Consolidation Handbook at 11-12.

the less costly and more efficient delivery of electricity, with a predicted cost savings of \$1.2 billion over the next ten years. When the Minister of Energy responded to the Panel's report, he indicated that he expected that the sector would find ways to achieve those savings through more efficient service delivery, including negotiated consolidations.<sup>7</sup>

[emphasis added]

The 2015 Report specifically notes that “[t]he OEB’s current policy with regards to issues associated with MAADs transactions was developed in 2007, and is found in its *Report of the Board regarding Rate-making Policies Associated with Distributor Consolidation*”,<sup>8</sup> dated March 5, 2007 (the “**2007 Policy**”). The 2007 Policy specifically notes:

Consolidation may take a number of forms. The proposals set out in this paper apply only to transactions where two or more distribution companies come together through a transaction (such as an amalgamation) that results in a single, rate-regulated licensed electricity distributor. References in this paper to “distributor consolidation” should be interpreted accordingly.<sup>9</sup>

[emphasis added]

The 2007 Policy was a precursor to the *Rate-making Associated with Distributor Consolidation* Report of the Board, July 23, 2007 (the “**2007 Report**”), which notes:

Earlier this year, the Board initiated a consultative process focusing on the regulatory treatment of certain rate-related issues associated with consolidation in the electricity distribution sector.<sup>10</sup> ... The policy set out in this Report applies to transactions between electricity transmitters that result in a single, rate-regulated licensed electricity distributor (the “consolidated entity”).<sup>11</sup>

[emphasis added]

The consistent policy demonstrated by the 2007 Policy, 2007 Report, 2015 Report, and the Consolidation Handbook is that the purpose of deferred rebasing is to incentive the

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<sup>7</sup> 2015 Report at 3.

<sup>8</sup> 2015 Report at 5.

<sup>9</sup> 2007 Policy at 1.

<sup>10</sup> 2007 Report at 1.

<sup>11</sup> 2007 Report at 3.

consolidation of electricity distribution companies. There is no evidence, indication or support that gas distributors are eligible for deferred rebasing, for the simple reason that the government has not been seeking the consolidation of gas distributors. Based on the foregoing, the Applicant is either mistaken or engaging in obfuscation when it states:

In light of the guidance provided by the Board for consolidation applications, there is no legitimate issue in this case about the deferred rebasing period. The Board's policy is that the extent of the deferred rebasing period is at the option of the distributor and that no supporting evidence is required to justify the selection of the deferral period.<sup>12</sup>

Kitchener Utilities submits that merging natural gas distributors are not entitled to deferred rebasing as of right.

This is supported not only by the Board's own documents, but also by recent precedent. The Applicant notes that in developing the Applicant Issues List that it was guided by the Board decision in EB-2016-0351,<sup>13</sup> which approved the sale of Natural Resource Gas Limited's distribution system to EPCOR Natural Gas Limited Partnership (the "**NRG/EPCOR Decision**"). This has been the only recent MAAD application in the natural gas sector to speak of. At the time of the MAAD application, NRG had come to the end of its incentive rate-making term and had recently filed a re-basing application. It is noteworthy that the NRG/EPCOR Decision did not consider deferred rebasing. Indeed, part of the Board's decision to approve the transaction was based upon EPCOR's commitment to file an amended rate application within 6 to 9 months of the closing of the transaction.<sup>14</sup> As such, the NRG/EPCOR Decision supports Kitchener Utilities' position (and that of other Intervenor) that deferred rebasing is not an entitlement in this case.

Instead, the issue for this proceeding is whether it is appropriate to defer rebasing of the merged utility (assuming approval is granted) for ten years, some other period of time, or at all. It is Kitchener Utilities' position that the Applicant bears the burden of demonstrating that such deferral is warranted having regard to, *inter alia*, ratepayer protection, the fact that the Applicant's current proposal would allow for a fifteen year period between rebasings, and the Board's statutory objectives with respect to gas.

The Intervenor Issues List allows for the Board to scrutinize any proposal to defer rebasing. The Applicant Issues List does not.

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<sup>12</sup> Applicant's Argument-In-Chief on Issues List in EB-2017-0306 at para 38.

<sup>13</sup> Applicant's Argument-In-Chief on Issues List in EB-2017-0306 at para 17.

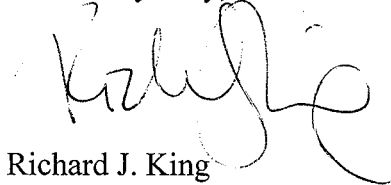
<sup>14</sup> NRG/EPCOR Decision at 4.

**Adjustments to Cost Allocations – Intervenor Issue B.2(c)**

Kitchener Utilities has a particular interest in adjustments to cost allocation being addressed in a timely manner. Several years ago, in facilities proceedings before the Board (EB-2012-0451/EB-2012-0433/EB-2013-0074), Kitchener Utilities raised the allocation of costs of those facilities, and was advised that the issue would more appropriately be raised at Union's next cost-of-service proceeding. Deferring re-basing would significantly postpone Kitchener Utilities' ability to raise these issues for a further ten years.

Union's cost allocation was raised as recently as last month in EB-2017-0087 (Union's 2018 rates application). In the course of oral argument Board Member Frank noted that the Board would take comfort in knowing that a full cost allocation study would be completed prior to the next 10 year period being established.<sup>15</sup> In response, Union's counsel noted that the Board could take this comfort because the issue of cost allocation "will come to a head in the context of Union's 2019 application ... or the MAADs application".<sup>16</sup> Intervenor Issue B.2(c) is properly an issue in this proceeding.

Yours very truly,



Richard J. King

Copy: All Intervenors in EB-2017-0307

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<sup>15</sup> EB-2017-0087, Hearing Transcript, Day 2, p.79, lines 3 to 9.

<sup>16</sup> EB-2017-0087, Hearing Transcript, Day 2, p.79, lines 10 to 14.