



February 2, 2018

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: EB-2017-0306 – Enbridge Gas Distribution Inc. and Union Gas Limited – MAAD
Application – Reply Argument on Issues List**

On November 2, 2017 Enbridge Gas Distribution Inc. and Union Gas Limited (collectively “the Applicants”) filed for approval to amalgamate under EB-2017-0306. The Applicants filed argument-in-chief with respect to the Draft Issues List on January 19, 2018 in accordance with Procedural Order No. 2. Board staff and intervenors filed submissions on January 26, 2018. The Applicants’ reply argument is enclosed.

If you have any questions on this matter, please contact me at 519-436-5334.

Sincerely,

[original signed by]

Vanessa Innis
Manager, Regulatory Applications

cc: Andrew Mandyam, EGD
Mark Kitchen, Union
Fred Cass, Aird & Berlis
EB-2017-0306 Intervenors

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15 (Sched. B);

AND IN THE MATTER OF an Application by Enbridge Gas Distribution Inc. and Union Gas Limited, pursuant to section 43(1) of the *Ontario Energy Board Act*, 1998, for an order or orders granting leave to amalgamate as of January 1, 2019.

REPLY ARGUMENT WITH RESPECT TO DRAFT ISSUES LIST

Introduction

1. The Applicants, Enbridge Gas Distribution Inc. (“Enbridge”) and Union Gas Limited (“Union”) filed their argument-in-chief with respect to the Draft Issues List in this proceeding (“Argument-in-Chief”) on January 19, 2018. Procedural Order No. 2 provides for submissions by intervenors and Board staff on the Draft Issues List to be filed by January 26, 2018 and reply argument to be filed by February 2, 2018.

2. The Applicants have received the following submissions or comments on the Draft Issues List that were filed pursuant to Procedural Order No. 2:

- (i) OEB Staff Submission (Staff Submission);
- (ii) Association of Power Producers of Ontario (“APPrO”) submissions (“APPrO Submission”);
- (iii) Building Owners and Managers Association Toronto (“BOMA”) comments (“BOMA Submission”);
- (iv) Consumers Council of Canada (“CCC”) submissions (“CCC Submission”);
- (v) Canadian Manufacturers & Exporters (“CME”) argument (“CME Submission”);
- (vi) Energy Probe Research Foundation (“Energy Probe”) comments (“Energy Probe Submission”);
- (vii) Federation of Rental-Housing Providers of Ontario (“FRPO”) submissions (“FRPO Submission”);
- (viii) Kitchener Utilities (“Kitchener”) comments (“Kitchener Submission”);
- (ix) Industrial Gas Users Association (“IGUA”) submissions (“IGUA Submission”);

- (x) London Property Management Association (“LPMA”) submissions (“LPMA Submission”);
- (xi) Ontario Greenhouse Vegetable Growers (“OGVG”) submissions (“OGVG Submission”);
- (xii) Ontario Association of Physical Plant Administrators (“OAPPA”) comments (“OAPPA Submission”);
- (xiii) School Energy Coalition (“SEC”) submissions (“SEC Submission”);
- (xiv) Six Nations Natural Gas (“SNNG”) submission (“SNNG Submission”);
- (xv) TransCanada PipeLines Limited (“TransCanada”) comment (“TransCanada Submission”); and
- (xvi) Vulnerable Energy Consumers Coalition (“VECC”) comments (“VECC Submission”).

3. In response to the submissions and comments set out in paragraph 2, above, the Applicants will focus reply argument on the following areas:

- (i) the Board’s statutory objectives in relation to natural gas;
- (ii) the no harm test;
- (iii) the Board’s policies for amalgamations, acquisitions, amalgamations and divestitures (“MAADs”), including the *Handbook to Electricity Distributor and Transmitter Consolidations* (“Consolidation Handbook”);¹ and
- (iv) proposed issues that are not directly related to the MAADs policies.

Statutory Objectives

4. A number of intervenors have pointed out that section 43 of the *Ontario Energy Board Act, 1998* (the “OEB Act”) does not articulate a specific test for the Board’s exercise of its jurisdiction to grant leave under that section.² Given that section 43 does not explicitly state a test, there is no better place to look for statutory guidance with respect to the exercise of the Board’s section 43 jurisdiction than section 2 of the OEB Act, which sets out objectives in relation to gas. Indeed, the legislative expectation that the section 43 jurisdiction will be exercised by reference to the section 2 objectives has been recognized in argument in this proceeding.³

5. Section 2 of the OEB Act says, among other things, that, in carrying out its responsibilities under the OEB Act, the Board “shall be guided by” the objectives set out

¹ [Handbook to Electricity Distributor and Transmitter Consolidations](#), January 19, 2016.

² See for example, SEC Submission, at page 2 and VECC Submission, at page 5, paragraph 15.

³ VECC Submission, at page 5, paragraph 15.

in that section. The Applicants submit that the clearly-stated and broadly-based “guide-posts” for the exercise of the Board’s jurisdiction set out in section 2 provide the framework for the issues list in a proceeding under section 43 of the statute. The objectives are cast at an over-arching level and encompass many or most of the considerations that are relevant when the Board comes to a decision on a section 43 application.

6. The Draft Issues List is framed by reference to the statutory objectives and, in particular, the objectives that the Board has identified to be of most relevance in the context of a section 43 application.⁴ More broadly, the Draft Issues List is structured around the objectives that have been of particular interest to the Board in section 43 and section 86 proceedings,⁵ namely, the interests of consumers with respect to price, reliability and quality of gas (or electricity) service and the maintenance of a financially viable gas (or electricity) industry.⁶

7. In addition, the Applicants proposed in Argument-in-Chief that issues be added to the Draft Issues List to reflect two other statutory objectives. As stated in Argument-in-Chief, the Applicants accept that certain objectives in section 2 that were not considered to be of the most direct relevance in the EB-2016-0351 case⁷ may potentially give rise to appropriate issues in this proceeding.⁸ Thus, the Applicants proposed a Revised Draft Issues List (the “Revised Issues List”) that includes issues with respect to the rational expansion of transmission and distribution systems (objective 3) and the rational development and safe operation of gas storage (objective 4).⁹

8. In short, one need look no further than section 2 of the OEB Act to find the framework that guides the Board’s exercise of its jurisdiction under section 43 and the Revised Issues List is a direct and purposeful reflection of the statutory framework (the “Section 2 Framework”) for the Board’s consideration of the Applicants’ request that leave be granted under section 43.

9. Further, the Revised Issues List captures the statutory guide-posts for a Board decision under section 43 with broad and inclusive wording. The Revised Issues List puts no limitation on the scope of matters relevant to the Board’s consideration of the application in relation to the over-arching statutory objectives. For example, Issue 1 in the Revised Issues List (“Does the proposed consolidation protect the interests of

⁴ See Argument-in-Chief, pages 4-5, paragraph 17, which addresses the objectives that are the focus of the Board’s review on a section 43 application.

⁵ As to the Board’s approach to applications under sections 43 and 86 of the OEB Act, see Argument-in-Chief, pages 6-8, paragraphs 24-31 and, particularly, footnote 26 on pages 7-8.

⁶ Draft Issues List, Procedural Order No. 1, December 22, 2017, Schedule A; Argument-in-Chief, pages 4-5, paragraphs 15-21.

⁷ [EB-2016-0351 Decision and Order](#), (Natural Resource Gas Limited application for approval to sell natural gas distribution system to EPCOR Natural Gas Partnership), August 3, 2017.

⁸ Argument-in-Chief, page 5, paragraphs 20-21.

⁹ Argument-in-Chief, Attachment 2, items 9 and 10.

consumers with respect to price?") and Issue 5 ("Does the proposed consolidation protect the interests of consumers with respect of adequacy, reliability and quality of gas service?") both open up for consideration, in a broad and inclusive way, matters that are relevant to objective 2 in section 2 of the OEB Act.

10. The Applicants therefore submit that the Revised Issues List incorporates the Section 2 Framework for a Board decision under section 43 in a comprehensive and inclusive manner. To the extent that the submissions and comments referred to in paragraph 2, above, contend for the addition of issues to the Section 2 Framework, the Applicants respectfully submit that the Board should consider whether such issues are already subsumed within the Section 2 Framework and, if they are not within the Section 2 Framework, whether they are appropriate issues at all.

The No Harm Test

11. Intervenors have proposed an issue regarding the test for approval of this application under section 43 of the OEB Act. The no harm test, however, has been firmly established as the test to be applied in applications under both sections 43 and 86 of the statute.¹⁰ The MAADs policies have consistently reiterated the no harm test, but this test has existed quite independently of the MAADs policies. As noted by Board staff, the no harm test was discussed in a 1996 Board decision,¹¹ a number of years before the Board began to develop the MAADs policies as we now know them.

12. The Applicants submit that there is no legitimate issue in this case about the appropriate test to be applied in the Board's consideration of the application¹² and that, as far as the application of the no harm test is concerned, there is no reason to depart from, or to revisit, a settled question. Even the IGUA Submission supports the Applicant's argument that there is no legitimate issue in this case about the appropriate test. More specifically, the IGUA Submission offers the following comment about the no harm test:

IGUA does agree with the applicants that the Board should reject departure from the "no harm" test as an issue in the current section 43 amalgamation approval proceeding unless some reasonable (perhaps not "very compelling" as asserted by the applicants) rationale is put forward.¹³
(Emphasis in original.)

13. As to whether there is a reason to depart from the no harm test in this case, the IGUA Submission goes on to say that:

¹⁰ Argument-in-Chief, pages 6-8, paragraphs 24-33.

¹¹ Staff Submission, page 6.

¹² Argument-in-Chief, pages 6-8, paragraphs 24-33.

¹³ IGUA Submission, page 11, paragraph 45.

IGUA is not at present aware of such a rationale. As a matter of principle, IGUA believes that utility shareholders should be, and are as a matter of regulatory law, free to organize their businesses and business affairs in the manner in which they choose. That is a principle that the “no harm” test essentially codifies.¹⁴

14. CCC’s submission that the Issues List for this proceeding should allow parties to propose alternatives to the no harm test encapsulates, in a general way, the position taken by a number of intervenors with respect to the “appropriate test” for the application.¹⁵ The Applicants submit, though, that adding an issue about the appropriate test to the Issues List will serve only to reopen a settled question and to introduce uncertainty and inefficiency into the regulatory process where the Board has already provided a clear and effective path to evaluating the relevant issues.

MAADs Policies

15. The Applicants disagree with many of the submissions and comments made by others about the Board’s MAADs policies. A response to all of these submissions and comments would divert reply argument far into a discussion of the substantive issues in this case and the Applicants do not believe that this would assist the Board with the determination of the Issues List for the proceeding. To illustrate how a response to points made by intervenors and Board staff quickly becomes a discussion of substantive issues, the Applicants will address only two examples of the many areas where it disagrees with submissions and comments made about the MAADs policies.

16. BOMA says that the MAADs policies were developed in the context of Ontario government policy that supported the consolidation of the electricity distribution industry into fewer large utilities and BOMA asserts, in essence, that the applicability of the policies should be limited by reference to the objective of electricity distributor consolidation.¹⁶ However, the application by Hydro One Inc. for approval to acquire Great Lakes Power Transmission Inc. did not advance the objective of electricity distributor consolidation and the Board’s decision¹⁷ approving that application followed the guidance of the Consolidation Handbook. Further, the MAADs policies are designed to achieve an effective and appropriate balancing of the interests of consolidating utilities with those of ratepayers and the manner in which this balancing is achieved does not depend on the form of energy involved in a particular case.

¹⁴ IGUA Submission, page 11, paragraph 46.

¹⁵ CCC Submission, page 2.

¹⁶ BOMA Submission, pages 3-6.

¹⁷ [EB-2016-0050 Decision and Order](#), October 13, 2016.

17. VECC refers to a statement in the Consolidation Handbook about consolidation of electricity distributors and adds the following assertions on the subject of efficiency:

The Board must consider whether that policy is applicable outside of that sector. In a sector operating at below an efficient scale, they would support consolidation. In a sector which has reached or exceeded an efficient scale of operations, they would not. In VECC's view, the different structures of the electricity and gas sectors necessitate different approaches.¹⁸

18. There surely can be no dispute that efficient and cost-effective operation of utilities is an important goal of Board policies generally and of the MAADs policies, including the Consolidation Handbook. VECC tries to turn the efficiency objective into a reason why the MAADs policies should not apply to gas distributors (because the gas distribution sector has already reached or exceeded an efficient scale of operations), but, in fact, VECC's argument confirms the driving force behind the Applicants' proposal for an amalgamation with a 10 year deferred rebasing period.

19. As stated in the evidence, both Enbridge and Union have successfully delivered benefits to ratepayers over 15 years of Incentive Regulation ("IR") and both utilities have limited individual opportunities to continue to deliver benefits under new IR plans.¹⁹ The deferred rebasing period will allow the integrated utility to tackle larger, more complex systems and processes and to seek to drive out efficiencies that could not be achieved by the individual utilities alone. The evidence in support of the application sets out a number of specific areas where the Applicants expect that, if the proposed amalgamation is approved by the Board, an increased scale of operations will yield cost efficiencies.²⁰

20. Of course, the Board is not at this time making a decision about efficiencies or the merits of the proposed amalgamation; the matter to be resolved at this time is the content of the final Issues List for the proceeding. The Applicants submit that, in its determination of an appropriate Issues List, the Board can and should focus on core components of the MAADs policies.

21. At least for the purposes of this case, the core components of the MAADs policies are the no harm test, the deferred rebasing period, the type of rate mechanism that applies during the deferred rebasing period and the Earnings Sharing Mechanism ("ESM") required for a deferred rebasing period beyond five years. The no harm test is

¹⁸ VECC Submission, page 4, paragraphs 11-12.

¹⁹ Exhibit B-1, pages 2-3.

²⁰ Exhibit B-1, pages 25-37.

addressed above. The rate mechanism during the deferred rebasing period is addressed in the Applicants' proposal that the Board will consider in EB-2017-0307.²¹

22. The Applicants submit that issues about the proposed ESM really are a sub-set of the over-arching issues that comprise the Section 2 Framework and fit easily within the scope of the Revised Issues List. One of the over-arching issues in the Section 2 Framework is whether the proposed consolidation protects the interests of consumer with respect to price and the scope of this issue encompasses consideration of the extent to which the proposed ESM protects the interests of consumers with respect to prices.

23. The Applicants note, though, that the guidance in the Consolidation Handbook with respect to the ESM includes the following discussion:

In the 2015 Report,²² the OEB determined that under the ESM, excess earnings are shared with consumers on a 50:50 basis for all earnings that are more than 300 basis points above the consolidated entity's annual ROE. ... No evidence is required in support of an ESM that follows the form set out in the 2015 Report.

There are numerous types and structures of consolidation transactions, and there can be significant differences between utilities involved in a transaction. The ESM as set out in the 2015 Report may not achieve the intended objective of customer protection for all types of consolidation proposals.²³

24. In line with this guidance, the Applicants have proposed an ESM that follows the form set out in the 2015 Report²⁴ and the Revised Issues List includes an issue about whether the proposed ESM does indeed follow the form of the 2015 Report.²⁵ As well, in view of the Board's indication that the ESM may not achieve the intended objective of consumer protection for all types of consolidation proposals, the Revised Issues List includes an issue about whether the proposed ESM achieves the objective of protecting customer interests during the deferred rebasing period.²⁶

25. In short, the Applicants submit that issues with respect to the ESM are subsumed under the broad issues that comprise the Section 2 Framework. The specific ESM issues included in the Revised Issues List (and the Draft Issues List), while perhaps

²¹ EB-2017-0307 application for approval of a rate-setting mechanism and associated parameters, filed November 23, 2017.

²² [Report of the Board: Rate-Making Associated with Distributor Consolidation](#), March 26, 2015.

²³ Consolidation Handbook, page 16.

²⁴ Exhibit B-1, pages 42-43.

²⁵ Revised Issues List, item 3.

²⁶ Revised Issues List, item 4.

unnecessary, reflect the ESM discussion set out above from the Consolidation Handbook.

26. It appears to the Applicants that the Revised Issues List – which incorporates both the broad scope of the Section 2 Framework as well as specific ESM issues – would not restrict questions and arguments that are intended to be within the scope of the ESM issue proposed by intervenors. But, given that the ESM issue proposed by intervenors is indeed subsumed in the Revised Issues List, the Applicants have no objection to the inclusion of the intervenors’ wording in the final Issues List, should the Board consider that this additional wording would improve the Issues List.

27. It also appears to the Applicants that the Revised Issues List would not restrict questions and arguments that are intended to be within the scope of the issues proposed by intervenors with respect to rebasing deferral. For example, questions and arguments with respect to the 10 year deferred rebasing period are within the scope of the issue in the Revised Issues List about whether the proposed consolidation protects the interests of consumers with respect to prices, as well as the issue about whether the proposed consolidation protects the interests of consumers with respect to adequacy, reliability and quality of gas service.

28. However, there is a critical difference between the issue proposed by intervenors with respect to the ESM and the issues proposed with respect to the deferred rebasing period. As the Applicants have made clear in evidence²⁷ and in argument,²⁸ they were guided, in the filing of this application, by the MAADs policies, including the Consolidation Handbook. An important consideration for the Applicants was the provision of the Consolidation Handbook indicating that the extent of the deferred rebasing period (up to 10 years) is at the option of the distributor and that no supporting evidence is required to justify the selection of the deferred rebasing period.²⁹

29. The issues proposed by intervenors with respect to the deferred rebasing period imply that the Applicants do not have the option of selecting a deferral period (up to 10 years) and, further, that not only the length of the period, but the deferred rebasing period itself, needs to be justified.

30. To elaborate on this key point, the issue proposed by intervenors about whether the deferral of rebasing is “appropriate” arises only after the Board has ruled that the Applicants do not actually have the option of selecting the deferral period (without need for supporting evidence). Putting such an issue on the final Issues List implies that the Board has already ruled against the Applicants on an aspect of the Board’s MAADs policies that was an important consideration guiding the Applicants when they prepared their proposal for Board consideration.

²⁷ Exhibit A-3 and Exhibit B-1, pages 3-4.

²⁸ Argument-in-Chief on Draft Issues List, paragraph 2.

²⁹ Consolidation Handbook, page 12; Exhibit B-1, pages 2-3 and pages 41-42.

31. Moreover, the implication that the Board has already ruled against the Applicants on this aspect of the Board's policies would cast doubt on the applicability of all aspects of the MAADs policies from which the Applicants took guidance from for the purposes of this application.

32. The Section 2 Framework that forms the basis of the Revised Issues List allows a broad scope for this case and does not imply any pre-judgment, one way or the other, on specific features of the Applicants' proposal, such as the deferred rebasing period. And, again, it appears to the Applicants that the Revised Issues List would not restrict questions and arguments intended to be within the scope of the issues proposed by intervenors with respect to rebasing deferral.

33. For these reasons, the Applicants submit that the addition of wording to the Revised Issues List with respect to the deferred rebasing period is not necessary.

Issues Not Related to MAADs Policies

34. Intervenors have proposed a general issue asking "what conditions should be attached" to the Board's order, if leave to amalgamate is granted. Of course, section 23 of the OEB Act clearly states that the Board, in making any order, may impose such conditions as it considers proper.

35. There can be no doubt that the Board has the power to attach conditions to an order in this case, just as it can attach conditions to an order in any case. The Board does not, though, include a general issue about conditions in the final issues list for every proceeding. Given the clear provisions of section 23 of the OEB Act and the broad scope that the Section 2 Framework brings to the Revised Issues List, the question that arises is why the final Issues List for this proceeding should include a general issue about conditions to be attached to a Board order.

36. In considering this question, the Applicants recognize, of course, that the Revised Issues List includes issues about whether there should be a specific condition of approval of the proposed amalgamation.³⁰ While the Applicants do not see a need for a general issue about conditions, given that the Revised Issues List includes issues about a specific condition, the Applicants have no objection to the inclusion of a general issue about conditions, should the Board consider that this change would improve the Issues List.

37. The submissions and comments by intervenors contend for the inclusion of an issue on the final Issues List about the impact of the amalgamation on "other OEB policies". Consistent with the points set out above, the Applicants submit that, so far as

³⁰ Revised Issues List, items 12 and 13.

an issue about “impact” on “other OEB policies” is relevant to the Board’s assessment of the application by reference to the statutory objectives in section 2 of the OEB Act, then the issue is subsumed in the Revised Issues List, because the Revised Issues List is based on the Section 2 Framework. So far as an issue about impact on other OEB policies is not relevant to the Board’s assessment of the application by reference to the statutory objectives, it is not within the scope of this case.

38. Intervenors have also argued in support of an issue about commitments that Enbridge and Union have made during their 2013-2018 rate plan terms. In their argument-in-chief with regard to the Draft Issues List for the rate mechanism proceeding, EB-2017-0307, the Applicants agreed that an issue about commitments and directives from past proceedings should be included in the final Issues List for the rate mechanism case.³¹ The Applicants submit that the issue they accepted in the EB-2017-0307 case is the appropriate issue for the Board to consider with respect to prior commitments and directives and that the rate mechanism case is the appropriate forum for the Board to consider this issue about commitments and directives from rate plans in place up to the end of 2018.

Conclusion

39. In summary, the Applicants submit that, because it is based on the Section 2 Framework, the Revised Issues List allows the appropriate scope for consideration of the matters relevant to a determination of this application and, further, that the scope of the Revised Issues List subsumes certain of the issues proposed by intervenors. In the specific instances discussed above,³² the Applicants have no objection to additional wording in respect of proposed issues already subsumed in the Revised Issues List, should the Board consider that such wording would improve the Issues List. Otherwise, the Applicants respectfully submit that the Revised Issues List should be approved as the final Issues List for this proceeding.

All of which is respectfully submitted.

February 2, 2018

[original signed by]

Fred D. Cass
Counsel for the Applicants

³¹ EB-2017-0307 Argument-in-Chief on Draft Issues List, page 6, paragraph 27(iii) and Attachment 1, Revised Draft Issues List, item 16.

³² ESM issue (paragraph 26 above) and general conditions issue (paragraph 36, above).