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April 12, 2018

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Sent By Electronic Mail, Courier and RESS Electronic Filing

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

Dear Ms. Walli:

EB-2017-0108: Application for certificates of public convenience and necessity for Norfolk County, the County of Elgin, and the County of Middlesex

Re: Written Submissions of EPCOR Natural Gas LP

Further to Procedural Order No. 5 dated March 26, 2018, please find the enclosed the written submissions of EPCOR Natural Gas Limited Partnership (EPCOR) in connection with the above matter.

Please do not hesitate to contact me if you have any questions.

Yours very truly,



Patrick G. Welsh

PW:vs

c (email only): Patrick McMahon, *Union Gas Limited*
Myriam Seers, *Torys LLP*
Brian Lippold, *EPCOR Natural Gas Canada*
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Shawna Sicotte, *EPCOR Natural Gas Canada*
Azalyn Manzano, *Ontario Energy Board*
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ONTARIO ENERGY BOARD

IN THE MATTER OF the *Municipal Franchises Act*, R.S.O. 1990,
c. M.55, as amended (the “Act”);

AND IN THE MATTER OF an Application by Union Gas Limited
for certificates of public convenience and necessity for Norfolk
County, the County of Elgin and the County of Middlesex.

**WRITTEN SUBMISSIONS OF
EPCOR NATURAL GAS LIMITED PARTNERSHIP**

April 12, 2018

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OVERVIEW

1. Under the auspices of administrative clean-up, Union Gas Limited (“**Union**”) submitted an application which, among other things, sought the extraordinary relief of amending or cancelling EPCOR Natural Gas Limited Partnership’s (“**EPCOR**”) Certificates of Public Convenience and Necessity (each a “**Certificate**”). This application was submitted to the Ontario Energy Board (the “**Board**”) without conferring with, and without the consent of, EPCOR (or EPCOR’s predecessor, Natural Resource Gas Limited (“**NRG**”).
2. EPCOR submits that Union’s application is not about rectifying “overlapping” Certificates, which the Board has repeatedly stated are non-exclusive. Rather, this application is an attempt by Union to maximize its own incumbency advantage to construct as-of-right in its Certificate areas while circumscribing EPCOR’s Certificate areas.
3. EPCOR further submits that Union has failed to adduce any evidence justifying such significant intervention by the Board. In short, Union’s application presents a solution in search of a problem.
4. EPCOR submits that Union’s application should be dismissed in its entirety. In doing so, the Board should also use this as an opportunity to provide clear guidance about overlapping Certificates, including the process for and requirements of applying for and amending such Certificates.
5. In the alternative, the Board should temporarily suspend Union’s application and constitute a generic proceeding on Certificates, so as to allow all affected stakeholders to make proposals on a level playing field and with clear guidance issued by the Board.

6. In the further alternative, if the Board is inclined to grant partial relief to Union, then it should do so in an extremely narrow fashion, and EPCOR's Certificates should remain unamended.

DISCUSSION

Background

7. On June 19, 2017, Union applied to the Ontario Energy Board (the "**Board**") seeking, *inter alia*, orders cancelling and replacing the Certificates of Union and of EPCOR's predecessor, NRG (the "**Original Application**").

8. On February 16, 2018, Union submitted an updated application to the Board (the "**Updated Application**") seeking, *inter alia*, orders cancelling and replacing Union's and EPCOR's Certificates for Norfolk County, the County of Elgin, and the County of Middlesex. Union also applied for a limited Certificate for the Township of Malahide.

9. The Original Application, which included seeking the extraordinary relief of cancelling NRG/EPCOR's Certificates, was submitted to the Board without advance notice to NRG or EPCOR and without NRG or EPCOR's consent. For the reasons set out in these written submissions, EPCOR strongly opposes Union's applications.

Union's Application is an attempt to maximize its incumbent advantage for expansion into unserved areas

10. Section 8 of the *Municipal Franchises Act* (the "**MF Act**") prohibits the construction of any works to supply natural gas in any municipality without the approval of the Board in the form

of a Certificate.¹ In this regard, a Certificate is the primary means by which the Board can control and supervise the construction and growth of a gas distribution system in a particular municipality. The Board recognized this fact in the *Ontario Energy Board Generic Proceeding on Community Expansion* (the “**Generic Proceeding**”), noting that its practice has been to not require any further approvals for an incumbent distributor to expand the gas system in a municipality where a Certificate has already been issued:

In some areas without gas service, there is already a franchise agreement and a Certificate of Public Convenience and Necessity as historically these often apply to an entire municipality even if a portion of it has not received gas service. In these cases, the OEB’s practice has been not to require any further approvals for the incumbent distributor under the Municipal Franchises Act to expand the gas system in a municipality (emphasis added).²

11. The Board is also able to control and supervise the construction and growth of a gas distribution system through the leave-to-construct process. Section 90 of the *Ontario Energy Board Act, 1998* (the “**OEB Act**”) prohibits the construction of a hydrocarbon line without first obtaining an order from the Board granting leave to construct such a hydrocarbon line if the hydrocarbon line meets specific thresholds.³ However, if the proposed hydrocarbon line does not meet any of the criteria listed in Section 90, then a utility *may*, but is not required to, apply to the Board for leave to construct under Section 91 of the OEB Act. As the commentators Glenn Zacher

¹ *Municipal Franchises Act*, R.S.O. 1990, c. M.55.

² Ontario Energy Board, Decision with Reasons, Generic Proceeding, EB-2016-0004 (November 17, 2016)[“Generic Proceeding”], p. 8

³ Namely, (a) the proposed hydrocarbon line is more than 20 kilometres in length; (b) the proposed hydrocarbon line is projected to cost more than the amount prescribed by the regulations; (c) any part of the proposed hydrocarbon line, (i) uses pipe that has a nominal pipe size of 12 inches or more, and (ii) has an operating pressure of 2,000 kilopascals or more; or (d) criteria prescribed by the regulations are met. 2003, c. 3, s. 63 (1).

and Patrick Duffy have observed, utilities typically do not make such an application unless they require the Board's assistance:

Although utilities generally do not seek Board approval prior to constructing a distribution line, they may seek a leave-to-construct order where they require certain ancillary authorities in order to construct a facility; *e.g.*, the authority to expropriate property, enter land, or cross highways or utility lines.⁴

Consequently, a utility has an as-of-right ability to construct gas distribution lines and expand a distribution network within a Certificate area, including in unserved areas, so long as it has a Certificate and the line falls below the leave-to-construct threshold.

12. The Board has repeatedly recognized that Certificates are not exclusive, and that distributors can apply to serve certificated areas where there is no service, all of which may foster competing bids for service that ultimately benefit consumers:

The OEB notes that neither Franchise Agreements nor Certificates are exclusive. While it would be inappropriate to have more than one gas distribution system serve any specific location, there are a number of unserved areas for which Certificates have been issued. The practice in the past appears to have been to issue a Certificate for an entire municipality even if only a portion would be served. In the OEB's view, where a Certificate has been issued for an area but there is currently no distribution service, another distributor can apply for a Certificate to serve that area. This may result in competing bids.⁵

13. However, notwithstanding the fact that other distributors may apply for a Certificate even if a Certificate has already been issued that covers a particular area, there is a significant incumbent's advantage because the Certificate-holding incumbent already "occupies the field" and can expand into unserved areas without Board supervision, thereby pre-empting any alternative proposal or specific application for a Certificate. EPCOR is gravely concerned that Union's

⁴ Glenn Zacher and Patrick G. Duffy, *Energy Regulation in Ontario* (Thomson Reuters Canada: Toronto)(*Looseleaf*, Release No. 14, December 2016) at 4-62

⁵ Generic Proceeding at p. 20

application is an attempt to maximize Union's incumbency advantage while circumscribing EPCOR's Certificate rights and ability to expand.

14. It is worth noting that Union has attempted to narrow the Certificate rights of EPCOR's predecessor, NRG, on numerous occasions, and the Board has dismissed Union's request each time.⁶ Viewed in this light, EPCOR submits that Union's application is merely the latest iteration of a longstanding campaign by Union to enclose its competitor.

Union's Application offers a solution in search of a problem

15. At its core, Union's application appears to be driven by a concern that non-exclusive or "overlapping" Certificates are in-of-themselves problematic. This concern is contrary to the Board's clear guidance that Certificates are non-exclusive. Further, Union's application is entirely bereft of any evidence of problems relating to the Certificates it wishes to amend or cancel.

16. As the Board stated in its *Generic Proceeding*, the only problematic or "inappropriate" situation occasioned by non-exclusive Certificates is where more than one gas distribution system serves any specific location.⁷ Union has provided no evidence of such a situation justifying Board intervention.

17. The alleged pretext for the present application was a request from the Board, dated August 19, 2016, to confirm that Union had obtained Certificates covering the geographic areas in which its facilities are located, failing which Union was to advise the Board as to where such

⁶ See, e.g., EB-2014-0207; EB-2015-0205; EB-2016-0145

⁷ *Generic Proceeding*, Supra note 5

infrastructure was located and provide a plan to rectify the situation.⁸ Nowhere in the Board's direction to Union did the Board identify non-exclusive or "overlapping" Certificates as an issue for rectification.⁹ Instead, Union appears to have taken up this issue on its own and has attempted to characterize this application, and the alleged "overlap issue", as core element of its response to the Board's direction.

18. With these facts in mind, it is clear that there is no real issue before the Board requiring a remedy. In other words, Union's application offers a solution in search of a problem.

Union's Application is not the appropriate forum for significant changes to the Certificate process or to EPCOR's Certificates

19. EPCOR recognizes that the Board has made statements, including in the *Generic Proceeding*, that it intends on making "changes to its processes relating to the granting of Municipal Franchise Agreements and Certificates of Public Convenience and Necessity that it expects will facilitate competition for gas distribution to new communities."¹⁰ EPCOR submits that if the Board wants to take on the issue of Certificates, including issues of "overlap", then the Board should constitute a specific generic proceeding regarding Certificates or, alternatively, that the Board should dismiss Union's application in its entirety and provide more substantive guidance through a Decision and Order regarding the parameters of the processes relating to Certificates.

⁸ Original Application (June 19, 2017) at p.2

⁹ Letter of the Board dated August 19, 2016; Union Gas Limited, Answers to Interrogatories dated March 2, 2018 ["**Union IRRs**"], Attachment 1, Exhibit B, EPCOR 1

¹⁰ Generic Proceeding at p. 4

20. EPCOR maintains that this proceeding is not the appropriate forum for significant changes to the Certificate process or to EPCOR's Certificates because Union's application, and the issues arising from the application, have been framed in a way strictly to Union's advantage. First, Union's application presupposes that "overlapping" Certificates are causing a problem that must be rectified. EPCOR fundamentally disagrees with this foundational proposition. Second, Union's proposed framework for "utility-specific Certificates" in fact are only EPCOR-specific. That is, anything not specifically designated to EPCOR defaults to Union.

21. Given EPCOR's fundamental disagreement over whether there is a legal or practical basis to amend or cancel EPCOR's Certificates solely on the basis of "overlap", and given the absence of a clear finding by, or substantive (as opposed to procedural¹¹) direction from, the Board that Union's requested relief was granted, the parties were unable to reach a settlement on how to best amend EPCOR and Union's Certificates. EPCOR notes that these written submissions have been EPCOR's first and only opportunity to dispute the underlying premise of Union's application.

22. In sum, EPCOR will be prejudiced from a procedural perspective, as Union has framed the issue of "overlapping" Certificates being problematic as a proven fact rather than as a matter of opinion. If the Board agrees with Union that "overlapping" Certificates need to be rectified, then it should issue a clear finding to that effect and provide the parties with a further opportunity to rectify the issue with the benefit of Board guidance.

¹¹ EPCOR notes that the Board's statement in Procedural Order No. 2 dated October 16, 2017 that "as each of the existing certificates of Union Gas and NRG do not sufficiently delineate the areas currently being served by each of the utilities and do not address the potential overlap of unserved areas within the three Counties, I find it appropriate to make provision for a settlement conference between the parties" is a procedural statement as opposed to a substantive finding.

23. The Board did state in the *Generic Proceeding* that overlapping certificates “can be amended.” But the Board did not say that such overlapping certificates should or must be amended. Rather, the Board explained that the appropriate time or context for doing so would be in a situation where there is a proposed expansion to unserved areas:

There is nothing in the Municipal Franchises Act that ensures that the Certificate gives the utility exclusivity (i.e. its monopoly). The Municipal Franchises Act does not appear to prevent the Board from issuing multiple Certificates for the same municipality. As a result of municipal reorganizations and amalgamations since Certificates were issued, there are several municipalities that have Certificates for more than one utility. These typically describe a geographic area within the municipality. The OEB agrees with Union and Enbridge that they can be amended. This seems to be an appropriate approach to allow new entrants in areas where there is currently no service. One of the issues to be determined by the OEB at the time of the approval of the new Certificate will be the geographic boundaries within which each utility can operate, based on a rational future expansion of the distribution system.¹²

Again, Union has not provided any evidence in its application regarding an expansion to unserved areas or evidence regarding a “rational future expansion of the distribution system.”

24. As explained in more detail below, the case for dismissing Union’s application is even stronger when reviewed on a request-by-request basis.

Norfolk County

Certificate Overlap

25. In the Updated Application, Union requested that the Board address an alleged Certificate overlap area in Norfolk County, specifically Lot 1 in Concessions 9, 10, 11 and 12, by removing this geographic area from EPCOR’s Certificate and granting it exclusively to Union. EPCOR submits that this request should be dismissed.

¹² Generic Proceeding at p. 27.

26. On its face, Union's stated rationale militates against granting Union's request. Union asserts that:

Allowing the area to be covered by a Union CPCN will allow Union to respond quickly to new requests for service. Removing the area from EPCOR's CPCN would eliminate the overlap problem without causing any prejudice to EPCOR since EPCOR does not appear to be in a position to serve customers in this area. Providing Union with CPCN rights within these areas does not prevent any other party from requesting CPCN rights in the future to serve customers within these areas.¹³

27. First, Union's request is premature because Union has provided no evidence of any specific request for new service. Nor has Union provided any evidence that any new requests for service have been hindered by the Certificate "overlap". Finally, Union acknowledges that no one is prevented from requesting Certificate rights at the appropriate time.

28. It is understandable why Union would want to pre-emptively exclude EPCOR from potential growth in Norfolk County, but EPCOR submits that this reason, and the other reasons provided by Union, are not sufficient to justify shrinking EPCOR's Certificate area in Norfolk County, especially where the Board has already stated that overlapping Certificates are not, in of themselves, problematic. It is worth noting that while Board Staff asked Union whether it expected "further growth of its distribution system in this area of Norfolk County over the next five years", Union only answered that it did not anticipate "significant growth",¹⁴ suggesting that Union anticipates some growth in the area.

¹³ Updated Application, p 4, lines 13-18.

¹⁴ Union IRRs, Ex B, Staff 1.

Uncertificated Territory within Norfolk County

29. Union has requested a Certificate that includes a currently “uncertificated” area in Norfolk County, namely the north half of Lots 2, 3, 4, and 5 in Concession 7 and all of Lots 2, 3, 4 and 5 in Concession 8. For the reasons set out below, EPCOR submits that Union’s request should be dismissed.

30. First, Union’s application for a Certificate is premature because there is no evidence whatsoever before the Board regarding expansion into the uncertificated lots in Norfolk County. Union has not provided any evidence of any service request or any justification beyond the bald assertion that these uncertificated lots are “in close proximity to Union’s existing facilities and can be provided service upon request without undue delay.”¹⁵ Union further states that “leaving these areas excluded from Union’s [Certificate] would only serve to unnecessarily delay providing requested services, contrary to the public interest.”¹⁶ However, Union has provided no evidence of an undue delay impacting potential customers who have requested service.

31. Further, Union has admitted that it “has facilities in place within the north half of Lots 2, 3 and 5 in Concession 7 and all of Lots 4 and 5 in Concession 8,” and that “it put services in place in error not realizing that the [Certificate] for Norfolk County did not cover these specific lots.”¹⁷ In other words, these facilities were constructed contrary to Section 8 of the MFA. Union characterizes its request as a rectification of an “inadvertent error”, which EPCOR finds surprising

¹⁵ Updated Application, p 5, lines 16-18.

¹⁶ Updated Application, p. 6, lines 8-10.

¹⁷ Updated Application, page 5, lines 5-7.

given how zealously Union has addressed matters where there is a potential territorial overlap with NRG or EPCOR.¹⁸

32. Additionally, this is not an isolated incident. The Board's August 19, 2016 letter to Union outlined a litany of non-compliance with Section 8 of the MFA across Ontario.¹⁹

33. Even giving Union the benefit of the doubt, the fact remains that Union acted contrary to the MFA and ought not to be rewarded with an *increase* in their Certificate area. The Board should provide clear guidance in this regard so as to discourage future contraventions of the MFA.

34. If the Board is inclined to rectify Union's Certificate for Norfolk County, EPCOR submits that the Board should do so in a very narrow way, and that Union should not be granted the balance of the uncertificated lots in Norfolk County.

35. Finally, with respect to the area currently being reviewed as part of OMLP's EB-2017-0289 application (i.e., the north half of Lot 2 in Concession 7), EPCOR agrees with Union that this area should remain uncertificated until the Board hears and renders a decision on OMLP's application in EB-2017-0289.

¹⁸ See above re former proceedings

¹⁹ The letter states that "on June 21, 2016, Union Gas filed an application with the Ontario Energy Board (OEB) seeking a certificate of public convenience and necessity (Certificate) to serve natural gas to residents in the Township of Van Horne. In the application, Union Gas acknowledged that it had been serving three customers without a Certificate since December 2015. A similar issue was addressed by the OEB in Union Gas' application for a municipal franchise agreement and Certificate for the City of Kitchener (EB-2015-0296). The OEB approved the application, but sent a letter to Union Gas dated January 25, 2016 stating that Union Gas was not in compliance with sections 8 and 9 of the Municipal Franchises Act (MFA), having served an area within the City of Kitchener with neither a franchise agreement nor a Certificate since 1959. [...] The OEB notes that this is the second occurrence of non-compliance with the MFA reported to the OEB in the last 12 months. The OEB reiterates its expectation that Union Gas carry out a review of its entire service territory to ensure all of its customers are served pursuant to the MFA," (emphasis added).

County of Elgin

36. Union has requested that Union and EPCOR's respective Certificates for the County of Elgin be cancelled and replaced with upper-tier, utility-specific Certificates that pertain only to areas within the County of Elgin for which each utility holds lower-tier Certificates. EPCOR submits that Union's request should be dismissed.

37. Union has provided no rationale for interfering with EPCOR's valid Certificate, other than vague "concerns" regarding the fact that EPCOR's Certificate is "unlimited". This "concern" fails to acknowledge that Union's Certificate is also "unlimited", and that the Board has acknowledged that "the practice in the past appears to have been to issue a Certificate for an entire municipality even if only a portion would be served."²⁰ Union has argued that there is a risk of "interference" or "conflict" between Union's Certificate and EPCOR's Certificate, but has provided no evidence whatsoever of any actual interference, conflict, nor of any actual harm or prejudice to Union or to the public in having overlapping upper-tier Certificates. EPCOR submits that Union's request is a clear case of offering a solution in search of a problem, and that what Union is trying to do is pre-emptively circumscribe EPCOR's Certificate area. If Union is truly concerned about uncertainty, then EPCOR has no objections to the Board modifying Union's Certificate to state specifically the lots or locations where Union's assets are located in the County of Elgin, but EPCOR does not consent to, and objects to, any efforts to modify the EPCOR Certificate in any way.

²⁰ Generic Proceeding, p. 20

Township of Malahide

38. Union requested a Certificate for the Township of Malahide, limited to Lot 24 in Concession 11. This limited Certificate appears to be required because Union constructed facilities at four locations outside of its Certificate area, contrary to Section 8 of the MFA.

39. Because Certificates are not exclusive, EPCOR has no objection in principle to Union's request for a limited Certificate, however EPCOR submits that Union's Certificate should be limited to those four locations within Lot 24 in Concession 11.

40. Additionally, while Board Staff asked Union whether it "expects any further growth of its distribution system in the Township of Malahide" (emphasis added), Union responded that it did "not anticipate significant growth within the Township of Malahide or in the area of Lot 24 in Concession 11" (emphasis added),²¹ suggesting that some growth is anticipated. As such, Union's request extends beyond regularizing the *status quo* and is actually an expansion request. Therefore EPCOR submits that the Board should consider whether Union has submitted sufficient information and evidence to enable the Board to assess the appropriateness of granting this expansion request. In EPCOR's view, Union's application is deficient in this regard. EPCOR suggests that the Board dismiss Union's application at this instance, provide clear guidance in terms of evidentiary and substantive expectations, and then invite Union to reapply at an appropriate time.

²¹ Union IRRs, Ex B, Staff 3.

Municipality of Central Elgin

41. In the Updated Application, Union identified a number of uncertificated areas in the Municipality of Central Elgin. Union argued that “leaving these areas of the Municipality of Central Elgin as uncertificated areas will unnecessarily delay providing requested services since [Certificate] applications would need to be submitted to and processed by the [Board] prior to the provision of service.”²² Again, Union has provided no evidence of any delayed provision of requested services or any prejudice to the public, even stating that “Union is not aware of any pending requests for service in these specific areas.”²³

42. Union suggested to the Board that “it may be worthwhile to ensure that all areas within the County of Elgin are covered by lower and upper-tier [Certificates].”²⁴ In EPCOR’s view, there is no specific request before the Board, and that it is only appropriate to issue a Certificate where there is a proper and fulsome application before the Board.

County of Middlesex

43. Similar to Union’s submission regarding the County of Elgin, Union has requested the Board to cancel Union’s and EPCOR’s valid Certificates for the County of Middlesex and replace them with upper-tier, utility specific Certificates pertaining only to the areas within the County of Middlesex for which each utility holds lower-tier Certificates. EPCOR submits that Union’s request should be dismissed.

²² Updated Application, page 11, lines 11-13.

²³ Updated Application, page 11, lines 14-15.

²⁴ Updated Application, page 11, lines 15-16.

44. Again, Union has provided no rationale or evidence justifying such drastic intervention by the Board. Union has provided no evidence whatsoever of any actual interference, conflict, nor of any actual harm or prejudice to Union or to the public in having overlapping upper-tier Certificates. EPCOR submits that Union's request is a clear case of offering a solution in search of a problem, and that what Union is trying to do is pre-emptively circumscribe EPCOR's as-of-right Certificate area. If Union is truly concerned about uncertainty, then EPCOR has no objections to the Board modifying Union's Certificate to state specifically the lots or locations where Union's assets are located in the County of Middlesex, but EPCOR does not consent to, and objects to, any efforts to modify the EPCOR Certificate in any way.

CONCLUSION AND SUGGESTED BOARD ACTIONS

45. EPCOR respectfully submits that Union's application should be dismissed in its entirety. Union has failed to adduce any evidence justifying Board intervention into EPCOR's valid Certificates. Union has failed to adduce any evidence of "confusion" or of any prejudice to the public.

46. Rather, EPCOR submits that Union's application is an attempt to maximize and expand its own as-of-right Certificate areas while pre-emptively circumscribing EPCOR's own Certificate areas, and that this attempt has been packaged as a harmless administrative "clean-up" exercise.

47. Consequently, EPCOR submits that Union's application should be dismissed in its entirety. In doing so, the Board should also use this as an opportunity to provide clear guidance about overlapping Certificates, including the process for and requirements of applying for and amending such Certificates

48. In the alternative, the Board should temporarily suspend Union's application and constitute a generic proceeding on Certificates, so as to allow all affected stakeholders to make proposals on a level playing field and with clear guidance issued by the Board.

49. In the further alternative, if the Board is inclined to grant partial relief to Union, then it should do so in an extremely narrow fashion, and EPCOR's Certificates should remain unamended.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

April 12, 2018



Patrick G. Welsh
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