GOWLING WLG

January 11, 2018

VIA RESS AND COURIER

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Dear Ms. Walli:

Re: EB-2018-0331 – Enbridge Gas Distribution Inc. (EGD), Union Gas Limited (Union) and EPCOR Natural Gas Limited Partnership (EPCOR) Disposition of Cap and Trade-Related Deferral and Variance Accounts for the Period 2016-2018.

Confidential Treatment of Evidence.

We write in response to Mr. O'Leary's December 27, 2018 letter (Utilities Letter) on behalf of EGD and Union (Utilities) in respect of the submissions of School Energy Coalition (SEC), the Association of Power Producers of Ontario (APPrO) and us on behalf of the Industrial Gas Users Association (IGUA) regarding the appropriate protocol to assess requests for confidential treatment of filings in this proceeding.

Through our letter of December 13, 2018 on behalf of IGUA we supported the request filed by Mr. Rubenstein on behalf of SEC that the Board reconsider application in the current proceeding of its previously defined framework for confidential treatment of information related to cap and trade compliance activities. We supported Mr. Rubenstein's reasoning and submitted that:

1. The *Climate Change Mitigation and Low-Carbon Economy Act, 2016* (*Climate Change Act*) and Ontario Regulation 144/16 thereunder have now been repealed, and there is no legislative basis on which cap & trade related utility compliance information must be subject to confidentiality.

2. With the current lack of any carbon or other emission allowance trading activities in Ontario, there is no apparent basis upon which utility cap & trade compliance information should be subject to confidentiality.

We have considered the Utilities Letter and offer the following reply:

1. Mr. O'Leary surmises that through access to what was previously statutorily confidential information IGUA, SEC and APPrO seek to *"question the compliance instrument strategies proposed which were approved and/or reviewed by the Board for the purposes of arguing that all or certain portions of the costs incurred by such activities should be disallowed"*[1]. The Utilities Letter goes on to assert that *"[t]his amounts to an inappropriate re-opening of the earlier proceedings"* and the Utilities *"are very much concerned about parties attempting to use, with the benefit of hindsight, this prudence review proceeding as a means to in effect second guess compliance instrument purchasing activities"* which, Mr. O'Leary states *"is not only unfair, it is wholly inappropriate and contrary to the regulatory principles applicable to prudence reviews"*.

   Mr. O'Leary gives us entirely too much credit for having a fully formed position on the prudence of the Utilities cap and trade activity for the years 2016-2018 at this early stage of the current prudence review process. Based on actual positions taken we are fully confident that the Utilities will, at the end of the day and based on an appropriate record, make the appropriate arguments, in support of or against IGUA's ultimate positions on prudence. The issue at this point is what confidentiality protocols should be applied by the Board to the Utilities filings. The arguments noted above don't actually address this issue.

   We also note Mr. O'Leary's reference (as excerpted above) to *"the regulatory principles applicable to prudence reviews"*. While there is no further elaboration provided on what *"regulatory principles"* are being referred to, the only *"regulatory principles"* in play at this juncture are those related to balancing the Board's preference for transparent and public regulatory proceedings with legitimate concerns regarding confidentiality of information required for, or assistive of, proper conduct of such proceedings.

2. Mr. O'Leary asserts that the external consultants used by the Utilities provided their advice on the basis of the then applicable statutory confidentiality requirements, and that now treating such materials on the basis of the Board's *Practice Direction on Confidential Filings "would discourage certain consultants from providing the Utilities with the same level of assistance and guidance in the future, ultimately disadvantaging ratepayers"*.[2]

   Apart from it being somewhat remarkable to suggest that the Board's *Practice Direction on Confidential Filings* is insufficient protection for any consultants who are of the view that protection of their work from public disclosure is required, with all due respect, Mr. O'Leary's assertions of his view of what consultants might or might not be concerned about is insufficient basis for the Board to conclude that such is indeed the case, let alone that deference to consultants' preferences in this respect at the expense of the public interest in regulatory transparency and accessibility is warranted.

3. Mr. O'Leary asserts that *'[m]arket participants in the WCI would benefit from knowing the strategies employed by Gazifière's affiliates in Ontario"*.[3] The assertion seems to be that

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[1] Utilities Letter, page 3, first full paragraph.
[2] Utilities Letter, page 2, first full paragraph.
[3] Utilities Letter, page 2, second full paragraph.

revealing how EGD and Union approached their Ontario compliance responsibilities could tip Gazifière's hand in respect of its own auction or other commercial carbon management strategies.

There is no evidence that Gazifière's Quebec carbon compliance activities are in any way guided by or aligned with those engaged in by EGD and Union during the period 2016 through 2018. Even assuming that such were appropriate (not having considered the reach in this respect of the previous Ontario confidentiality provisions nor any relevant information restrictions in the Quebec legislation), any related concerns would be for Gazifière to raise, and they have not to date done so. In any event, were such concerns ultimately legitimized, they would not demonstrate a basis for retaining the previous, and now revoked, Ontario statutory confidentiality regime, but rather would be properly considered in determining how to address confidentiality of the Utilities historical information going forward (i.e. would the Board's standard practice be sufficient, and if not why not).

4. The Utilities Letter asserts that revocation of the Ontario *Climate Change Act* does not have retroactive effect in respect of the confidentiality requirements of that act, and does *"not provide for the release today of what was prohibited by the statute when it was in force"*.[4]

   No legal analysis for this assertion has been provided, and the asserted conclusion is not self-evident to us.

5. The Utilities have also asserted that the Board is bound by provisions in an agreement on the harmonization and integration of cap & trade programs entered into by the governments of Ontario, Quebec, and California, and that this agreement *"included provisions that specifically dealt with the protection of confidential information which clearly included information about activities relating to joint auctions"*, which provisions, according to the Utilities Letter, Ontario (and therefore the Board) have not been relieved of.[5]

   The agreement referenced has not been provided, nor have the specific provisions relied on been cited or explained. Further, no legal analysis has been advanced to support the assertion that the agreement in any manner binds the Board. The Ontario government has not made any submissions on the topic. As advanced by the Utilities these are "bald assertions" and, without more, cannot form the basis for preservation of a confidentiality regime now revoked, and one contrary to the Board's own longstanding and expressly articulated practice.

Subject to consideration of any legal analysis ultimately properly advanced by the Utilities in support of their position that the now revoked confidentiality protocols of the Ontario *Climate Change* Act still apply, we reiterate our earlier position that should the Utilities or any other affected party feel that any of the information required for proper review of the prudence of their cap & trade compliance costs should be filed in confidence, they can avail themselves of the Board's *Practice Direction on*

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[4] Utilities Letter, page 3, 2nd full paragraph.
[5] Utilities Letter, page 3, last paragraph.

Confidential Filings to assert their position and the Board can evaluate the merits of any such position as it normally does and direct parties accordingly.

Yours truly,

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