

Osler, Hoskin & Harcourt LLP
Box 50, 1 First Canadian Place
Toronto, Ontario, Canada M5X 1B8
416.362.2111 MAIN
416.862.6666 FACSIMILE

OSLER

Toronto

December 4, 2019

Evan J. Barz
Direct Dial: 416.862.4209
ebarz@osler.com
Matter No.: 1197154

Montréal

Calgary

SENT BY ELECTRONIC MAIL, FILED ON RESS & COURIER

Ottawa

Ms. Christine E. Long
Registrar & Board Secretary
Ontario Energy Board
27th Floor, P.O. Box 2319
2300 Yonge Street
Toronto, ON M4P 1E4

Vancouver

New York

Dear Ms. Long:

EPCOR Natural Gas Limited Partnership – Motion to Review and Vary the Board’s Decision and Order of October 24, 2019 in EB-2018-0336 Board File No.: EB-2019-0276

We are counsel to EPCOR Natural Gas Limited Partnership (“ENGLP”). Please find enclosed the following documentation:

- ENGLP’s Notice of Motion in respect of a Motion for, *inter alia*, a review and variance of the Board’s Decision and Order of October 24, 2019 in Board proceeding EB-2018-0336; and
- the affidavit of Brian Lippold, sworn December 4, 2019, in support of the above-noted Motion.

Yours very truly,



Evan J. Barz
EB:sv

Enclosure

c: Bruce Brandell/Vince Cooney/Dana Bissoondatt/Daniela O’Callaghan (ENGLP)
Patrick McMahon (Enbridge)
Scott Stoll (Counsel to Integrated Grain Processors Co-operative Inc.)
Paula Zarnett (BDR North America Inc.)

John Lawford (Counsel to Public to Interest Advocacy Centre)
Mark Garner (Consultant to Public Interest Advocacy Centre)
Richard King (Osler)

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

AND IN THE MATTER OF an application by EPCOR
Natural Gas Limited Partnership for approval to change gas
distribution rates and other charges effective January 1, 2020
to December 31, 2024.

NOTICE OF MOTION TO REVIEW AND VARY
EPCOR Natural Gas Limited Partnership (“ENGLP”)
EB-2019-0276
December 4, 2019

ENGLP WILL MAKE A MOTION to the Ontario Energy Board (the “**Board**” or the “**OEB**”) at its offices at 2300 Yonge Street, Toronto, Ontario on a date and time to be fixed by the Board.

PROPOSED METHOD OF HEARING: ENGLP respectfully requests that the Motion be heard in writing.

RELIEF REQUESTED:

1. This Motion is for:
 - (a) a review and variance of the Board’s Decision and Order dated October 24, 2019 in EB-2016-0276 (the “**Decision**”) wherein the Board disallowed the inclusion of the Putnam to Culloden Pipeline (as defined below) in ENGLP’s 2020 rate base,

pursuant to Rules 40 and 42 of the OEB's *Rules of Practice and Procedure* (the "**Board's Rules**");

- (b) an Order that ENGLP satisfies the "threshold test" referred to in Rule 43.01 of the Board's Rules;
- (c) an Order for a hearing of the Motion on its merits, in writing;
- (d) by no later than December 31, 2019, an Order pursuant to Rule 40.04 of the Board's Rules staying the Board's Decision and Order of November 14, 2019 in proceeding EB-2018-0336 (the "**Rate Change Order**"), pending a final determination of this Motion;
- (e) an Order:
 - (i) setting aside the OEB's decision to disallow the inclusion of the Putnam to Culloden Pipeline in ENGLP's 2020 rate base; and
 - (ii) finding that the capital cost of \$498,922 associated with the Putnam to Culloden Pipeline was prudently incurred and appropriately included in ENGLP's 2020 rate base; and,
- (f) such further and other relief as ENGLP may request and the Board may deem just.

THE GROUNDS OF THE MOTION ARE:

Background and Overview of this Motion

2. On January 31, 2019, ENGLP filed its cost of service rate application in proceeding EB-2018-0336 for approval of a rate plan to set natural gas distribution rates for the period January 1,

2020 to December 31, 2024 (the “**Application**”). This was the first rate case filed by ENGLP since acquiring the utility from its predecessor, Natural Resource Gas Limited (“**NRG**”).

3. A settlement conference was held at the OEB on May 16 and 17, 2019, which was attended by representatives from ENGLP, Integrated Grain Processors Co-operative and Vulnerable Energy Consumers Coalition. OEB Staff also participated in the settlement conference.

4. A settlement was reached on all issues in the proceeding and on June 3, 2019, ENGLP filed a settlement proposal along with draft rate schedules and an accounting order. An updated settlement proposal was subsequently filed by ENGLP on June 10, 2019.

5. In its Decision and Interim Rate Order dated July 4, 2019 (the “**July Decision**”),¹ the Board accepted the settlement proposal filed by ENGLP on June 10, 2019 (the “**Settlement**”).²

6. The Settlement and July Decision deferred the determination of a single issue – namely, the prudence of four projects completed by NRG in 2016 and 2017 to address system integrity issues (the “**Four System Integrity Projects**”).³

7. The Board scheduled Phase 2 of the EB-2018-0336 proceeding to review the prudence of the Four System Integrity Projects. In the interim, the Board allowed ENGLP to include the Four System Integrity Projects in ENGLP’s 2020 rate base (for inclusion in distribution rates commencing January 1, 2020), but ordered ENGLP to establish a Deferral and Variance Account

¹ Decision and Interim Rate Order, EB-2018-0336, July 4, 2019 (the “**July Decision**”).

² The Settlement is attached to the July Decision as Schedule “A”.

³ July Decision, p. 4.

(“**DVA**”) to track the revenue requirement impact of the Four System Integrity Projects pending the prudency review.⁴ If one or more of the Four System Integrity Projects were disallowed, the Board would determine a mechanism for ENGLP to refund to ratepayers the revenue requirement for the relevant project(s) for the remaining term of the 2020-2024 application.⁵

8. The Four System Integrity Projects and their associated 2020 net book (rate base) values are:

- (a) \$402,639 for the Enbridge Gas (formerly Union Gas) Bradley Station Project;
- (b) \$748,383 for the pipeline from the Bradley Station to the Wilson Line project;
- (c) \$498,922 for the pipeline from the existing Putnam Station to Culloden Line project (the “**Putnam to Culloden Pipeline**”); and
- (d) \$265,015 for the extension of the Springwater Road pipeline from south of Orwell to John Wise Line project (the “**Springwater Pipeline**”).

9. On October 24, 2019, the Board issued the Decision, which, *inter alia*, disallowed the inclusion of the Putnam to Culloden Pipeline in ENGLP’s 2020 rate base. In support of this determination the Board provided, among others, the following reasons:

⁴ July Decision, p. 7, para 3. The July Decision Defines the DVA as the System Integrity Capital Deferral Account (“**SICDA**”). ENGLP was ordered to record monthly, in accordance with the Settlement, as of January 1, 2020 one twelfth of the revenue requirement associated with the 2020 net book value of the Four System Integrity Projects.

⁵ July Decision, Schedule “C” (Accounting Orders), Appendix “G”, Accounting Order – 2016-2017 System Integrity Capital Deferral Account.

- (a) ENGLP did not provide “*sufficient information on how NRG prioritized system integrity capital spending for the distribution system and the system it used to prioritize spending*” on the Putnam to Culloden Pipeline.⁶
- (b) ENGLP “*provided insufficient evidence on what other options were, or should have been considered to address system integrity issues*”, which evidence is necessary to assess what other options were available, including whether the Putnam to Culloden Pipeline could have been deferred or replaced with higher priority projects.⁷
- (c) ENGLP should have given greater priority to reducing or eliminating dependence on locally produced premium priced natural gas that ENGLP purchases (and its predecessor NRG purchased) from NRG Corp.⁸ More specifically, the Board was “*not convinced that there were other greater priorities in the past seven years that precluded NRG or EPCOR Natural Gas from taking concrete steps to address the issue of locally produced premium priced gas and the incremental cost to ratepayers for such premium gas.*”⁹

⁶ The Decision at p. 11.

⁷ The Decision at p. 12.

⁸ The Settlement, which was approved by the OEB, provided that ENGLP would continue purchasing one million cubic metres of natural gas until the end of the term of the gas purchase agreement between ENGLP and NRG Corp, which expires on September 30, 2020.

⁹ The Decision at p. 11.

10. ENGLP brings the within Motion pursuant to Rules 40 and 42 of the Board's Rules to review and vary the OEB's decision to refuse to allow the Putnam to Culloden Pipeline to be included in ENGLP's 2020 rate base. ENGLP bring this Motion on the following basis:

- (a) facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time are now available to ENGLP and should be considered by the Board; and
- (b) the Board committed errors of fact that raise doubts as to the correctness of the Decision.

11. The standard of review on this Motion is correctness, as indicated in Rule 42.01(a) of the Board's Rules.

Facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time are now available to ENGLP

12. Brian Lippold, the General Manager of ENGLP (who was formerly employed in that capacity by NRG) returned to work on November 12, 2019 following an extended medical leave of absence. Mr. Lippold's leave extended through a portion of the pre-filing period and assembly of evidence for the Application, as well as the entirety of discovery and the submission process with respect to the Application. During the medical leave, ENGLP was not authorized to contact Mr. Lippold.

13. As a result of Mr. Lippold's leave, ENGLP was unable to obtain critical information from Mr. Lippold and, therefore, was unable to place that information into evidence in proceeding EB-

2018-0336. Given that ENGLP was not authorized to contact Mr. Lippold, ENGLP could not have discovered Mr. Lippold's information through "reasonable diligence".

14. Mr. Lippold was deeply involved in the Four System Integrity Projects, including the Putnam to Culloden Pipeline. As part of his gradual return to work at ENGLP, Mr. Lippold has provided critical additional information regarding the manner and extent to which the Putnam to Culloden Pipeline has a material impact on system integrity issues, addressed system reliability issues, facilitated future unsubsidized growth of the distribution system in southwestern Ontario, and was a high priority project that should not and could not have been reasonably deferred.

15. Mr. Lippold's evidence regarding the prudence of the Putnam to Culloden Pipeline is provided through his affidavit sworn on December 4, 2019 (the "**Lippold Affidavit**").

16. The Lippold Affidavit provides, *inter alia*, the following additional critical information regarding the prudence of ENGLP's capital expenditure on the Putnam to Culloden Pipeline:

- (a) particulars regarding the system integrity issues presented by the low gas pressures in the Northeast quadrant of the gas distribution system (in an around the Brownsville area), which necessitated the construction of the Putnam to Culloden Pipeline;
- (b) NRG's significant efforts to secure a solution to the low pressure issues with Union Gas in 2014 and 2015;

- (c) details regarding the March 2016 SNC-Lavalin study (the “**SNC Study**”) which recommended projects to address pressure issues experienced in the Northeast and Southwest quadrants of NRG’s distribution system;
- (d) the rationale for NRG’s decision to construct the Putnam to Culloden Pipeline in preference to the option recommended in the SNC Study;
- (e) details regarding the Putnam to Culloden Pipeline’s impact on system integrity issues;
- (f) information that supports the conclusion that the Putnam to Culloden Pipeline should not have been deferred;
- (g) specifics regarding the secondary benefits of the Putnam to Culloden Pipeline, namely (i) improved system reliability and (ii) the facilitation of future unsubsidized growth; and
- (h) NRG’s and ENGLP’s considerable efforts to reduce reliance on locally produced premium natural gas.

17. In light of the critical additional information contained in the Lippold Affidavit, ENGLP respectfully requests that the Board review and vary the Decision to allow ENGLP to include the costs of the Putnam to Culloden Pipeline in ENGLP’s 2020 rate base.

Errors of Fact in the Decision

18. The Board made the following three (3) principal errors in reaching the Decision:

- (a) The OEB erroneously found that ENGLP provided insufficient information on how “*NRG prioritized system integrity capital spending for the distribution system and the criteria that it used to prioritize the spending.*” The Decision is not appropriately informed by the facts raised in Phase 1 and Phase 2 of this proceeding, and the records of imported proceedings.¹⁰ The record reflects the fact that NRG appropriately studied and considered two pipeline route options in order to address the severe low pressure issues in the northeast of NRG’s distribution system near Brownsville: (i) the route option that was ultimately implemented by NRG, namely the Putnam to Culloden Pipeline; and (ii) an alternative option that was put forward in the SNC Study, which recommended that Glencolin Line and Wilson Line be extended and the Ostrander loop be added to the distribution system.¹¹
- (b) The Decision’s failure to address NRG’s critical examination of the recommended solution presented by SNC-Lavalin raises doubts as to the correctness of the OEB’s determination that ENGLP failed to provide sufficient “*evidence on what other options were, or should have been considered to address system integrity issues*” and the OEB’s ultimate decision to disallow the inclusion of the Putnam to Culloden Pipeline in ENGLP’s 2020 rate base. The record clearly demonstrates that NRG appropriately studied the SNC-Lavalin proposal before NRG’s management exercised its discretion to proceed with the Putnam to Culloden Pipeline to ensure

¹⁰ For example, paragraph 7 of ENGLP’s Phase 2 evidence indicated that ENGLP would rely on the record of the proceedings in EB-2000-0018, EB-2015-0308, EB-2016-0236 and EB-2018-0336 for the purposes of its submissions and argument. The Decision makes several references to each of these noted proceedings.

¹¹ Reply Submissions of ENGLP, EB-2018-0336, September 20, 2019 at para 75 [“**ENGLP Reply Submissions**”]; and refer to response to Phase 2 interrogatory 1-Staff-6.

that the greatest benefits would accrue to its ratepayers. Indeed, building the Putnam to Culloden Pipeline benefitted the system by prioritizing the resolution of the serious low pressure system integrity issue in the Brownsville area, as well as by providing additional secondary benefits such as: (i) establishing a more direct route for gas to the Brownsville area through larger diameter sections of pipeline than would have been provided by the SNC-Lavalin alternative; and (ii) enabling the connection of additional customers, which could not have been achieved by the alternative proposed by SNC-Lavalin.¹²

- (c) The Board erred in its determination that ENGLP should have given greater priority to reducing or eliminating ENGLP's dependence on locally produced premium priced natural gas, rather than constructing the Putnam to Culloden Pipeline. The Decision's emphasis on prioritizing the reduction or elimination of locally produced premium gas ahead of other criteria distorts the test to be applied on a prudence review and improperly suggests that a local pricing issue should be prioritized over safety to customers. The record clearly demonstrates that the Putnam to Culloden Pipeline addressed low system pressures in the Brownsville area and thereby met NRG's first priority of ensuring a safe and reliable distribution system.¹³ Moreover, the record further shows that NRG considered several alternatives to reduce reliance on premium priced gas in the southeast of ENGLP's

¹² ENGLP Reply Submissions, paras 63-65.

¹³ ENGLP Reply Submissions, at paras 19 and 43-44; Application and Evidence, EB-2018-0336, Exhibit 1, Tab 4, Schedule 2, page 22-23; and ENGLP's Additional Evidence, EB-2018-0336, p. 12, para 13.

distribution system, but none of these options were economically viable. In fact, the cost of the purchase of premium natural gas was several times less expensive than a capital solution in the south which could have reduced purchased volumes of premium gas.¹⁴

19. In light of the foregoing, ENGLP submits that the OEB committed errors which raise doubts as to the correctness of the Decision. ENGLP respectfully requests that the OEB review and vary the Decision to allow ENGLP to include the costs of the Putnam to Culloden Pipeline in its 2020 rate base.

The Threshold Test to Review the Decision is Satisfied

20. Rule 43.01 of the Board's Rules provides that, in respect of a motion brought under Rule 40.01 to review and vary a decision, the OEB may determine, with or without a hearing, a threshold question of whether the matter should be reviewed before conducting any review on the merits. In making a determination pursuant to Rule 43.01, the OEB applies the following tests (the "Threshold Tests"):

- (a) The grounds must raise a question as to the correctness of the order or decision;
- (b) The issues raised that challenge the correctness of the order or decision must be such that a review based on those issues could result in the Board deciding that the decision should be varied, cancelled or suspended;

¹⁴ See NRG Argument-in-Chief Phase 2, EB-2010-0018, December 23, 2011, p. 3, as referenced in the OEB's Decision, EB-2018-0336, p. 4.

- (c) The motion must show that there is an identifiable error in the decision, as a review is not an opportunity to reargue the case;
- (d) In demonstrating that there is an error, the party bringing the motion must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature; it is not enough to argue that conflicting evidence should be interpreted differently; and
- (e) The error must be material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.¹⁵

21. The grounds for this motion raise a number of material questions as to the correctness of the Board's decision to disallow the inclusion of the Putnam to Culloden Pipeline in ENGLP's 2020 rate base, and should therefore be corrected by granting the requested relief. The Board's findings, which underlie its determination to disallow the inclusion of the Putnam to Culloden Pipeline in the rate base, are, for the reasons set out above, contrary to the evidence that was before the OEB. Moreover, the evidence proffered in the Lippold Affidavit provides additional important information to the Board regarding the prudence of constructing the Putnam to Culloden Pipeline and supports the conclusion that the Board should review and vary the decision as requested.

¹⁵ *Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision* in EB-2006-0322/-0338/-0340 at p. 18.

22. The regulatory disallowance of hard assets (i.e., pipelines) that are currently being used to serve customers is extraordinary, and the financial consequences of such disallowance are material to ENGLP. Over the five year period from January 1, 2020 to January 1, 2025, the revenue requirement impact to ENGLP would be approximately \$226,433. For a small utility, the impact is significant – denying ENGLP the ability to earn a fair return on an asset that is currently serving customers.

23. Once the Decision is corrected, the amounts that ENGLP would have the opportunity to recover through natural gas distribution rates for the period January 1, 2020 to December 31, 2024 would be materially different than the amount provided for in the Decision and the Rate Change Order.

24. As such, ENGLP has satisfied the Threshold Tests and the OEB should proceed to hear this Motion on its merits.

The Board Should Stay the Rate Change Order Pending a Final Determination of this Motion

25. On November 14, 2019, the OEB issued the Rate Change Order, which established the rates for ENGLP's distribution system effective January 1, 2020 on the basis that the capital expenditures on the Putnam to Culloden Pipeline and Springwater Pipeline are excluded from ENGLP's 2020 rate base.

26. Given the pendency of the within Motion to review and vary the Board's determination to disallow the Putnam to Culloden Pipeline in ENGLP's 2020 rate base, ENGLP respectfully requests that the Board stay the operation of Rate Change Order until a final decision on the Motion is reached by the Board.

27. In support of this request, ENGLP notes that no party will suffer any prejudice if the Board grants the requested stay, since ENGLP has established a DVA to track the revenue requirement impact of the Four System Integrity Projects pending the prudency review. If ENGLP is successful on this Motion, the DVA will be redundant vis-à-vis the Putnam to Culloden Pipeline because ENGLP will be able to include that project in its 2020 rate base. Conversely, if ENGLP is unsuccessful on the Motion, ENGLP will already have the DVA established and will record the cost of including the disallowed Putnam to Culloden Line in the 2020 rates and can adjust the DVA accordingly.

28. If the Board does not stay the Rate Change Order, and ENGLP is subsequently successful on the Motion, the customers of ENGLP will see a positive rate rider at some point following the Motion decision.

29. In the event that the relief requested in this motion is denied, and ENGLP is not able to even bring forward reconsideration of the Putnam to Culloden Pipeline until ENGLP's next rebasing application (for rates commencing January 1, 2025), ENGLP seeks the Board's guidance on the following:

- (a) Test for Prudence in 2025: It is not clear the basis upon which the Board would evaluate the asset's inclusion in ENGLP's rate base in 2025. The asset is currently in service and being used to supply natural gas to nearly 70 customers. It is currently "used and useful" – and will not be "more" used and useful in 2025. The capital cost of the Putnam to Culloden Pipeline was not in issue in the Decision. In essence,

the status of the asset in 2025 will be exactly as it is today – constructed to solve a significant reliability issue, and serving numerous customers.

- (b) Rate Base Amount in 2025: The Decision did not specify whether the amount to bring forward for inclusion in rate base in 2025 is the undepreciated amount or the depreciated amount of the Putnam to Culloden Pipeline. On the one hand, it seems inappropriate and unfair to require ENGLP to depreciate the asset given that the Board has denied its inclusion in rate base. On the other hand, ENGLP cannot temporarily decommission the asset because the effect would be to cut service to nearly 70 customers, so the asset is currently used and useful.

30. If the Board agrees that a stay is warranted, ENGLP respectfully requests that a stay order be issued no later than December 31, 2019, to accommodate the fact that ENGLP will commence billing in January 2020.

Rules and Other Grounds

- 31. Rules 8, 40 and 42 of the Board's Rules.
- 32. Such further grounds and material as counsel may advise and the Board may permit.

THE FOLLOWING DOCUMENTARY MATERIAL AND EVIDENCE WILL BE RELIED UPON AT THE HEARING OF THE MOTION:

33. Materials from the record in Board proceeding EB-2000-0018, EB-2015-0308, EB-2016-0236 and EB-2018-0336;
34. The Decision and the Rate Change Order;
35. The affidavit of Brian Lippold, sworn December 4, 2019;
36. Such further and other material as counsel may provide and the Board may permit.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

December 4, 2019



EPCOR Natural Gas Limited Partnership
by its counsel, Osler, Hoskin & Harcourt LLP
Per: Evan J. Barz