



BY EMAIL and RESS

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Our File: EB20200066

Ontario Energy Board
2300 Yonge Street
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Toronto, Ontario
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Attn: Christine Long, Registrar & Board Secretary

Dear Ms. Long:

Re: EB-2020-0066 – Enbridge VRNG – SEC Submissions

We are counsel to the School Energy Coalition (“SEC”). Pursuant to Procedural Order #3 in this matter, this constitutes SEC’s Submissions on the merits of the Application.

Overview

Ontario’s schools have been consistent, and determined, in their support over many years of environmentally positive projects and initiatives by utilities. SEC has sought to lead customer groups in supporting not only DSM activities generally, but also regulatory rules that motivate the utility to deliver better results, and more long term benefits. SEC’s mandate also includes strong and continuing support for IRP, even when it means opposing pipeline expansions that could benefit schools in the short term. As SEC has often pointed out, school boards have a long term perspective.

It is therefore unusual that SEC would be opposing approval of a project that is presented as an “environmental” initiative. However, in this case SEC believes that the harms that may result from the proposed Voluntary Renewable Natural Gas program exceed any potential benefits. For essentially *de minimis* reductions in carbon emissions, acquired at an excessively high cost, the utility risks dampening the public appetite for much better carbon reduction activities, and may also impede the development of a competitive market for this technology.

SEC therefore submits that the Board should deny approval of the program as a regulated activity. In the alternative, if the Board determines that it should be allowed within the regulated utility, it should be approved only as a pilot program, to be reviewed in detail at the next rebasing.

Background

The Program. The Applicant has proposed that it be allowed to carry out, as a regulated activity with a regulated rate¹, a program in which residential customers make a voluntary monthly payment of \$2, over and above their monthly gas bill, and the Applicant will use that money to purchase renewable natural gas, whether in Ontario or elsewhere².

Administrative Costs. The administrative costs of the program will, during the current IRM period, reduce earnings sharing, so 50% will be covered by customers generally (including non-participants), and 50% will be covered by the shareholders³.

Charitable Nature of the Activity. Customers that choose to participate in the program do not get anything for their money. Instead, the Applicant agrees to acquire RNG, which provides a public interest benefit by reducing carbon emissions⁴, and provides a tiny benefit to all customers (including non-participants) through reduced federal carbon tax. The combination of a voluntary donation by participants, and a generalized public interest benefit, meets the indicia of a charitable activity, in this case an unregistered charity. The Applicant denies this⁵, but it is obviously true.

Customer Preferences. The Applicant has filed evidence showing that its customers have a willingness to make such contributions⁶, although it appears from that evidence the Applicant did not disclose to its customers the very high cost of carbon emissions reductions under this program, nor the fact that their payments would not result in RNG being directed to them (as opposed to everyone). SEC believes that, if these things had been disclosed, the number of customers who would be willing to pay \$24 per year would decline, perhaps materially. There is no evidence on this.

Minimal Impact. The impact of the program on the Applicant's carbon emissions is almost zero. After ten years, it is still expected to be less than one-two-hundredth of 1% of the Applicant's throughput⁷.

Real Rationale for the Program. The Applicant is proposing to pursue this initiative without profit⁸, and with almost no impact on carbon emissions. This should lead the Board to ask why the Applicant is proposing this new regulated activity.

SEC believes that answer is that Enbridge is carrying on a legacy business, in which it can see that over the medium and long term carbon emitting fuels will be increasingly unacceptable. While the main goal of its regulated business is to add as much as possible to rate base each year, to grow profits⁹, it has to be seen to be taking steps to reduce its carbon footprint. It is not,

¹ AIC p. 13.

² JT2.6, Attach 2.

³ I.LPMA.10(a). AIC p. 8.

⁴ JT2.6, Attach 1, p. 9.

⁵ I.SEC.1.

⁶ Ex. C/4/1.

⁷ JT1.13, Attach 1, p. 10.

⁸ AIC p. 1.

⁹ JT1.13, Attach 1, p. 5. The current growth target is \$1 Billion per year, and the mandate is to "Generate growth by investing over \$1B per year in infrastructure renewal, growth, and low risk lower carbon initiatives". The rate base increases from low carbon initiatives are a small fraction of the total.

however, willing to put any shareholder money at risk to do so. Instead, it is proposing that the Board treat as regulated an activity that is in no way a natural monopoly.

The problem with this is twofold. First, the utility is “reducing carbon” in very tiny ways while spending large amounts of ratepayer money to build new, forty year assets that require a carbon emitting fuel¹⁰. Second, the utility is selling customers on the notion that, for \$2 a month, they are doing something good for the environment. This creates the risk that customers will think they have “done their bit”, and will thus ignore DSM, heat pumps, and other alternatives that are environmentally far superior to RNG.

Government “Directive”

Government Direction. Four times in the Applicant’s Argument-in-Chief there is reference to the “government direction” to Enbridge to implement this program¹¹.

There is no government directive, and the Applicant knows this to be the case¹². In fact, the government’s environment plan is just that, a plan. It says¹³ that the government will “require natural gas utilities to implement a voluntary renewable natural gas option for customers”. The government has not yet implemented this requirement, and the Board has no evidence on the the terms of that requirement, including, for example, a) which customers, b) quid pro quo to participants, etc.¹⁴

Government policy is expressed in legislation, regulations, and other definitive actions. The Ontario Environment Plan is simply a notice of things the government is planning to do in the future. This is clearly set out in the Minister’s Statement, where he says “*Our plan describes the actions Ontario is proposing to take and the ways we will enable industry, business, communities and people to continue to do their part*”. [emphasis added]¹⁵. In fact, the government is clear in its plan that the “Next Steps” are more consultation, an advisory committee, etc.¹⁶ In short, the policies described in the plan are not set in stone.

Legal Status of Government Policy Statements. Further, the government has the ability to direct the Board to approve such a program, but has not exercised that power. In fact, on the evidence before the Board the government has done nothing with respect to this planned initiative. It is still just something for the future.

SEC notes that, as a result of this, this Board is not permitted as a matter of law to treat the government’s statement of intent as binding on the Board. The government has the ability to fetter the Board’s discretion on this point. It has not done so. It has left it up to the Board to determine, within the Board’s normal mandate, whether the VRNG program is appropriately a regulated activity and, if so, whether it should be allowed on the terms proposed. It is therefore, we think, common ground that no part of the Board’s approach to this program can be “We should approve this because the government wants us to do so”.

¹⁰ RNG will never be more than a small percentage of the total, because the feedstock is not sufficient. See e.g. JT1.15.

¹¹ AIC, p. 1, 4, 8, 10.

¹² I.Staff.2; Tr.1:47-8.

¹³ Ex. C/4/2, p. 33.

¹⁴ See e.g. JT1.13, esp. p. 3.

¹⁵ Ex. C/4/2, p. 3.

¹⁶ Ex. C/4/2, p. 52-3.

Not a Natural Monopoly. The problem this presents for the Applicant, however, is that the provision of RNG is not a natural monopoly, and is not prima facie a regulated activity. In fact, gas marketers can today offer customers RNG as a green option for their gas use. Some do¹⁷, and they do so without the benefits of a regulated utility.

Further, we note the arguments of Summit¹⁸ with respect to the Consumer Protection Act and the Energy Consumer Protection Act. What Summit demonstrates is that the Applicant seeks in the VRNG program to become a gas marketer, competing with other gas marketers, but without the consumer protections that gas marketers are required to follow. The effect of the Applicant entering this market is dealt with further below.

Public Interest Benefits of the Program

Justifications of the Program. The Applicant justifies the program on the basis that a) it responds to government policy, b) in the future Enbridge will be required to follow the federal clean fuel standard, and c) it is in the public interest because it reduces carbon emissions¹⁹.

As to the first justification, SEC has dealt with that above. The second justification, which won't arise at the earliest until 2023²⁰, has some of the same problems as the first. It is responsive to a federal government policy that will be implemented in the future²¹.

Not Shown to be in the Public Interest. As to the third justification, the evidence before the Board does not establish that the VRNG program is in the public interest. While there is an expected reduction in carbon emissions, that does not equate to a public interest benefit unless two other issues are dealt with:

1. What is the cost of reducing the carbon emissions?
2. What are the other uses of the feedstock, and is this the highest and best use?

Cost of Emission Reductions. There are many ways to reduce emissions, but some of them are too costly to be realistic. Carbon capture and storage could in theory be installed on every piece of equipment that emits carbon, even furnaces. The cost would be astronomical, and as a result no-one would suggest that CCS is a broad solution. It may one day have cost-effective niches, but you will never have CCS in your basement. There are numerous examples like this.

In this case, RNG has a cost of \$300 per tonne of carbon or more²². The federal carbon tax, even if it reaches the \$50 per tonne level by 2022 as originally planned, will still be 15-20% of the cost of RNG planned by the Applicant²³. Today, RNG costs fifteen times the federal carbon tax, or more. No evidence was provided by the Applicant that the cost of RNG under the program is a reasonable cost for reduction of carbon emissions.

¹⁷ AIC p. 11.

¹⁸ Final Argument of Summit.

¹⁹ AIC p. 10.

²⁰ AIC p. 12.

²¹ I.VECC.4.

²² I.SEC.15, JT1.6, and JT1.7.

²³ No-one will suggest the the federal carbon tax is intended to reflect the full "value" of a tonne of carbon. However, it is the most reliable benchmark available right now, and it is significantly lower than the cost of RNG.

Highest and Best Use. Further, it is not like the feedstocks for RNG are new. Landfill gas, one of the major near term feedstocks²⁴, has been generating electricity in Ontario for decades, often at competitive rates.

Asked whether they had studied the various uses of the feedstocks, Enbridge says they have not²⁵. There is thus no evidence before the Board that upgrading landfill gas, for example, to inject it into the natural gas system is the best, most environmentally friendly, or most cost-effective use of that methane. The only information the Applicant provides is comparisons to the prices of older FIT contracts.

Public Interest Conclusion. What we know for sure is two things. First, the total amount of the gas supply that can come from biogas is very small. Second, to inject that biogas into the gas system comes at a very high cost.

The Applicant has provided no evidence to demonstrate that displacing other uses of this feedstock, to produce a very small reduction in carbon emissions, at a very high cost, is in the public interest.

Impact on Competition

Asked about the impact of Enbridge entering this competitive market, the Applicant makes clear that it has not done sufficient market analysis to know if there are gas marketers that can offer this service²⁶. However, the Applicant admits that there is some market activity by unregulated companies²⁷, but claims that the Enbridge service will not be competitive with them because it is different²⁸.

Board Guidance. In EB-2011-0242/0283, the Board thought differently when it came to competition, saying the following²⁹:

“The Board concludes that the voluntary approach would be inappropriate. Such an approach would effectively place the utilities in the position of competing directly with marketers, as opposed to their current role, which is essentially that of default supplier. The Board concludes that this would be an inappropriate distortion to the competitive market.”

Asked about this³⁰, Enbridge admits that gas marketers could offer this service, but doesn't believe they will, and the Enbridge program is too small to affect the market anyway. In effect, Enbridge disagrees with the above conclusion of the Board.

Seeding the Market. Enbridge goes on to argue³¹ that their VRNG program will “enhance demand for RNG”, and thus “support a more robust RNG market”.

It is a perfectly legitimate activity for a government to encourage the development of a market through procurement policies. This has happened in solar and wind, with the result that prices

²⁴ JT1.2; forecast to be 57% of estimated annual production in the next five year period.

²⁵ I.SEC.4.

²⁶ I.SEC.11.

²⁷ AIC p. 11.

²⁸ I.Staff.3; I.LPMA.15.

²⁹ EB-2011-0242/0283, p. 23.

³⁰ I.Staff.3 (a).

³¹ I.Staff.3 (b).

have come down and volumes have gone up. In fact, if the government eventually implements the “requirement” for utilities to offer a VRNG program, that is the likely justification for it.

On the other hand, it is not clear that it is the role of the regulator to allow a regulated utility to enter a non-monopoly area in order to create a competitive market. That would not appear to be among the statutory objectives of the Board.

Competition with Gas Marketers. It is important for the Board to look at this in the context of the regulatory regime that applies to the Applicant. Enbridge is seeking approval from the Board to compete directly with gas marketers. In the VRNG program, Enbridge would not be the default supplier of the commodity, as it normally is. It would be directly marketing its RNG option to customers, using its utility status as a market advantage. Enbridge is generally not allowed to market the gas commodity to customers in competition to marketers. It is seeking an exception in this case.

The question, therefore, is whether there is something sufficiently special about this proposal that justifies making an exception to the fundamental structure of the Ontario gas market.

Absence of Gas Marketer Participation. On the other hand, if the Enbridge VRNG program is a threat to existing or future offerings by gas marketers, you would expect them to have participated in this proceeding to say so. Except for Summit, gas marketers appear to have taken a pass on this proceeding. Summit did not lead any evidence.

Competition – Conclusion. It is not clear that the Applicant’s entry into a non-monopoly market will stifle competition, in the short or long term, although undoubtedly that is a risk. It is also not clear that the proposed program will seed the market, and help develop a “robust” RNG market in Ontario. Even if there is a suggestion of that, it is unusual to ask a regulator – rather than a government policy-maker – to approve a procurement program aimed at created a new market.

SEC believes that, on the evidence before the Board, there is insufficient justification to make an exception to the basic structure of the Ontario gas commodity market. There does not appear to be a compelling case that Enbridge should once more be allowed to take on the role of gas marketer.

In the alternative, if the Board accepts the position of Enbridge that it will not stifle a competitive market, then in our submission the Board should require an independent review of the RNG market in Ontario no later than the time of rebasing in 2024.

Collateral Costs to Customers; Benefits to the Applicant

Inclusion of Costs in the ESM. SEC is aware that other parties will raise the question of subsidy of the RNG program by non-participants, and so will not provide an extensive analysis. In our view, consistent with some other parties, the fact that 50% of the net operating and capital costs of the program will be borne by customers through the ESM mechanism is an unacceptable subsidy. If the Board approves the VRNG program, SEC submits that all components of revenue requirement related to that program should be excluded in the calculation of the ESM.

We note, in this respect, that the forecast costs are not material³². If that turns out to be the case, then Enbridge will not be concerned that these costs are excluded from the ESM

³² Tr2:131-2.

calculation. On the other hand, if the actual costs turn out to be more significant, the customers should not be at risk for those amounts. It is not appropriate for non-participating customers to subsidize what is essentially a charitable donation by other customers.

Benefits to the Applicant. Enbridge, through its affiliates, is a participant in the RNG sector³³. In responses to interrogatories, Enbridge has refused to provide details of that participation³⁴, but admits that its affiliates may gain indirect benefits from the VRNG program³⁵.

Given these facts, SEC submits that, if the program is approved, the Applicant be required to provide, at the time of rebasing, full disclosure of all unregulated RNG activities, whether or not they believe those activities are related to the VRNG program. Enbridge believes those indirect benefits will be small³⁶. If that is true, disclosure is the best way for the Board to ensure that the economics of the program are appropriate.

Marketing Risks

SEC is concerned that the Applicant plans to market this program in ways that will lead customers to conclusions that are incorrect.

There are four aspects of the marketing that concern us:

1. Enbridge is unlikely to tell customers the cost per tonne that they are paying for carbon reductions, and put that into the context of other carbon reduction alternatives³⁷.
2. Enbridge does not plan to tell customers that their voluntary payment will not result in them having any more RNG in their gas supply than their non-participating neighbours³⁸.
3. The marketing materials will not tell potential participants the very small percentage of gas that is being displaced by RNG through the program.
4. The program will use “social recognition” and rewards to encourage customers to participate³⁹.

Marketing Materials. The first three concerns are simply about being honest with the customers in the marketing materials and messaging. SEC fully understands that being honest and clear about those three things is likely to result in reduced participation, and therefore a lower environmental impact. On the other hand, the alternative is to mislead the customers, which is not really an acceptable outcome.

SEC does not believe that the Board should micromanage utility initiatives. In our view, the Board should set expectations, and then allow the utility the freedom to manage to meet those expectations.

³³ I.SEC.3; JT1.12.

³⁴ Tr.1:149.

³⁵ JT1.15.

³⁶ JT1.15.

³⁷ I.ED.8(b).

³⁸ I.ED.4.

³⁹ Ex. B/2/3; I.Summitt.11.

In this case, if the Board determines that it will allow Enbridge to proceed with this program, it is submitted that the Board should set a clear and firm expectation that all marketing and messaging will be complete, unambiguous, and fair. It should describe the impacts of the program, the role of the participant, and every other salient fact in a clear manner that is not likely to be misleading.

While the marketers running the program may well bristle at a requirement of clarity and honesty, that is the way the Board can protect the customers. Knowing that, at rebasing, the Board and parties will want to see what Enbridge has done in that respect, we would anticipate that Enbridge will ensure its marketing meets the Board's expectation and protects the customers.

Social Recognition and Rewards. SEC's biggest concern with the VRNG program is the possibility that customers will see their \$2 per month as an easy and inexpensive way of being environmentally proactive, and will choose it to the exclusion of other, much better options available to them. Every customer that gets a sign on their lawn saying they are greener than their neighbours⁴⁰, but at the same time decides that they now don't need to insulate their attic, is a failure of the VRNG program. Every customer that shows their kids their monthly contribution to the environment, but doesn't use the setback thermostat any more, is a similar failure.

VRNG should not become the new compact fluorescents. Just as many people bought their one compact fluorescent years ago (and later their one or two LED lights), and thought they were doing their bit, so too it is possible VRNG will become the simple, low cost way to support environmental improvement, while actually doing almost nothing of real benefit.

It is this component of the program that is the most problematic, and is the reason SEC believes that that Board should not approve the program. The public interest benefit, if any, in procuring a small amount of unreasonably high cost emission reductions, is likely much less than the cost of diverting customers away from truly meaningful actions to help the environment.

Conclusion

SEC therefore submits that the Board should not approve this program. If the government does want something like this to proceed, they can "require" the gas utilities to implement it, or can direct the OEB to approve a VRNG program on terms acceptable to the government⁴¹. Unless and until the government does so, in our submission the Board should apply normal regulatory principles to the application before it.

That would lead, in our submission, to the following conclusions:

1. The public interest benefits of the program are *de minimis*.
2. The proposed cost of the carbon reductions being sought is unreasonably high.
3. Approval would allow the Applicant to once more become a gas marketer, competing

⁴⁰ I.VECC.1.

⁴¹ An actual requirement or directive will allow the government to stipulate what aspects of the program are necessary to meet its policy objectives. As the Board has seen, the presentations by the Applicant to the government were not consistent with the program that is current being proposed to the Board, and many other presentations have simply been kept secret: see JT2.6.



with unregulated companies but with unfair advantages due to its regulated utility status, contrary to directly applicable past Board guidance.

4. Non-participating customers will be subsidizing the program through the ESM.
5. Participating customers will be influenced to direct their environmental support to a program with minimal benefits, and thus may reduce their support of activities that have real environmental benefits.

In these circumstances, the program should not be approved.

In the alternative, if the Board determines that the Applicant should be allowed to proceed, in our submission Enbridge should be required to provide a full report at the time of rebasing, including details of how the program has been fairly and clearly marketed, and including a full review of the impact on the competitive RNG market.

All of which is respectfully submitted.

Yours very truly,

Shepherd Rubenstein Professional Corporation

A handwritten signature in black ink, appearing to read "Jay Shepherd", written over a light blue horizontal line.

Jay Shepherd

cc: Wayne McNally, SEC (by email)
Interested Parties (by email)