



EB-2009-0172

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 Enbridge Gas
Distribution Inc. for an Order or Orders approving or fixing
just and reasonable rates and other charges for the sale,
distribution, transmission and storage of gas commencing
January 1, 2010.

BEFORE: Gordon Kaiser
Vice Chair and Presiding Member

Paul Sommerville
Member

Cathy Spoel
Member

DECISION ON A PRELIMINARY MOTION

This is a preliminary motion to determine if the Board has jurisdiction to consider certain costs that Enbridge Gas Distribution Inc. ("Enbridge") wishes to recover in rates as part of its Application filed on September 1, 2009 under Section 36 of *Ontario Energy Board Act, 1998* (the "Act") for an order approving and fixing rates for the distribution of natural gas effective January 1, 2010.

Background

The regulation of the two major gas utilities in this Province over the past three decades has been governed in part by certain undertakings provided by the gas utilities to the

Lieutenant Governor in Council¹. These undertakings which are set out in Appendix A can be best described as limiting utility activities to pure utility activities. The undertakings dealt with excessive dividends, minimum equity requirements and limits on the activities utilities could engage in.

On September 8, 2009 the Minister of Energy issued a Directive to the Board under Section 27.1 of the *Ontario Energy Board Act, 1998* which effectively amended the undertakings and authorized Enbridge to engage in certain activities related to conservation, demand management, and renewable energy. The Directive is attached as Appendix B to this Decision. An earlier Directive issued in 2006 is attached as Appendix C to this Decision.

On September 14, 2009 Enbridge amended its Application of September 1, 2009. The Application is for rates for 2010 to be set under the Incentive Regulation plan methodology as approved by the Board. 2010 will be the third year of the five-year plan. The rates under the plan are to be adjusted each year by the application of a distribution revenue requirement per customer formula. The September 14, 2009 amendment included Enbridge's request under Section 13(f) of the Application for "approval of a Y-factor and regulatory framework for the offering and provision of district energy and alternative or renewable energy activities and services by the regulated utility in future years."

Enbridge states in evidence filed on October 1, 2009 that it intends to pursue initiatives to own and operate assets capable of generating and distributing alternative forms of energy². Enbridge estimates that the total cost of these initiatives is approximately \$10 million, of which approximately \$4 million would be closed to rate base in 2010. The anticipated associated revenue requirement is approximately \$300,000³ in the 2010 rate year. Enbridge proposes that the costs associated with these Green Energy Initiatives be a component of rate base for ratemaking purposes.

¹ Order in Council 2865/98

² Ex. B, T2, Sch. 4, p.1.

³ Ex. B, T2, Sch. 4, p.4.

Enbridge's description of the Green Energy Initiatives in its pre-filed evidence was supplemented by a more detailed description of individual programs set out in a letter to the Board dated November 13, 2009 which is attached to this decision as Appendix D.

In light of this development the Board took certain procedural steps. On October 23, 2009, the Board issued Procedural Order No. 1 advising that, as a preliminary matter, the Board would determine the issue of whether electricity generation facility projects, and their associated costs, assets and revenues, were properly part of the regulated operations of Enbridge and thus within the Board's ratemaking authority (the "jurisdictional question"). To address this jurisdictional question, the Board invited parties to answer two questions:

1. Are the electricity generation facility projects, and their associated costs, assets and revenues properly part of the regulated operations of Enbridge and thus under the Board's ratemaking authority?
2. If not, does the Board have jurisdiction to deal with the electricity generation facility projects and their associated costs, assets and revenues outside of the ratemaking process?

On November 9, 2009 the Board issued Procedural Order No. 2, amending the questions to be answered as follows:

1. Are the Green Energy Initiatives described in Enbridge's Application (Ex. B, Tab 2, Sch. 4), their associated costs, assets and revenues properly part of the regulated operations of Enbridge and thus under the Board's ratemaking authority?
2. If not, does the Board have jurisdiction to deal with the Green Energy Initiatives, their associated costs, assets and revenues outside of the ratemaking process?

The intervenors in this proceeding include: Association of Power Producers of Ontario ("APPrO"), BOMA Greater Toronto ("BOMA"), BP Canada Energy Company ("BP"), Canadian Manufacturers and Importers ("CME"), Consumer Council of Canada ("CCC"), Direct Energy Marketing Limited ("Direct Energy"), ECNG Energy LP ("ECNG"), Energy Probe, Industrial Gas Users Association ("IGUA"), Just Energy Ontario LP ("Just Energy"), Natural Gas Specialist, Ontario Association of Physical Plant Administrators

("OAPPA"), Ontario Power Generation ("OPG"), Pollution Probe Foundation ("Pollution Probe"), Powerstream Inc. ("Powerstream"), School Energy Coalition ("SEC"), Shell Energy North America (Canada) Inc. ("Shell"), TransCanada Energy Ltd. ("TransCanada Energy"), TransCanada Pipelines Ltd ("TransCanada Pipelines"), Union Gas Limited ("Union"), and Vulnerable Energy Consumers Coalition ("VECC"). TransAlta Cogeneration LP and TransAlta Generation Partnership ("TransAlta") have observer status in this proceeding.

Only Pollution Probe supported the Enbridge position although a number of intervenors took no position.

Jurisdiction

Those intervenors opposing Enbridge's position on the issues in this Motion rely on Section 36 of the *Ontario Energy Board Act, 1998*. They argue that the Board must find its jurisdiction in the Statute and that Section 36 is unambiguous in providing that the Board's jurisdiction is limited to making orders approving just and reasonable rates for the sale, transmission, distribution, or storage of gas. Section 36 of the Act states the following;

36.(1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract.

(2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.

(3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.

(4) An order under this section may include conditions, classifications or practices applicable to the sale, transmission, distribution or storage of gas, including rules respecting the calculation of rates.

Enbridge, and the intervenors supporting Enbridge, argued that there are other sections of the Act that are relevant to the determination of jurisdiction. Specifically, they rely on

Section 36(3) and note that the Divisional Court in the *LIEN* case⁴ relied on that section to give the Board jurisdiction to set rates specifically for low-income consumers. They also argue that the objectives found in Section 2 of the Act operate to expand the Board's jurisdiction.

In addition, Enbridge argues that the Minister's Directive of September 8, 2009 operates to expand the Board's jurisdiction to include in its rate base the activities newly authorized therein.

The intervenors respond that the Minister's directive cannot, as a matter of law, bestow new jurisdiction on the Board or override what they say is the clear meaning of Section 36. They acknowledge that the Directive has the effect of authorizing Enbridge to carry on the stipulated activities within the utility, but argue that this does not mean that the costs associated with them can be placed in rate base.

The respective positions were very ably argued before us, but, because of the position the Board takes with respect to the specific Green Energy initiatives advanced by Enbridge in this case, we find it unnecessary to make any finding on the jurisdictional issue. It was common ground among the parties that in every instance where a utility proposed to include project costs in rate base a case-by-case assessment would be needed. Before such costs could be reasonably included in rate base, the Board would have to decide on a case-by-case basis both that it had the jurisdiction to do so, and that it should do so given the content and characteristics of the project.

The Board has determined that even if it does have the jurisdiction to include the costs associated with these programs in rate base, a finding that we explicitly do not make, we will not allow these costs to be included in rate base for the reasons set out below.

There are a number of reasons why these investments should not be allowed in rate base. When assets are allowed in rate base it is generally because those assets are related to the monopoly franchise. Enbridge does not have a monopoly franchise for the production of renewable energy. Its franchise is related to the distribution of natural gas. To the extent that the Green Energy Initiatives involve activities for the production of renewable energy, they occur within a competitive market. Other participants would be

⁴ *Advocacy Centre for Tenant-Ontario v. Ontario Energy Board*, [2008] O.J. 1970 (Div. Ct.)

materially disadvantaged were that to occur. The same line of reasoning applies to the Green Energy Initiatives that do not directly involve the generation of electricity, but which take place within a broad competitive market involving the provision of a variety of new and refined products designed to facilitate the creation of an innovative conservation culture in Ontario. Permitting a well financed public utility to include its costs of participation in this market into its rate base, thereby transferring risk to the ratepayer, is unfair to other market participants.

Another reason for excluding such costs in rate base is that it significantly increases the risk to the ratepayer. The ring fencing of utility assets from non-utility assets, which began in 1985 for Enbridge and in 1986 for Union, was based on a concern that the diversification activities by the gas utilities would expose utilities' customers to undue risk.

That rationale was set out in the Board's December 1989 Report in EBRLG 33⁵ which considered an Application by ICG Utilities to include an LNG plant within the utility. The Board rejected that application and required the utility to locate that investment within an affiliate. The Minister's Directive of September 8, 2009 clearly removes that requirement for the specific activities listed in the Directive. But as indicated, the Board is not mandated by that Directive to include the associated costs in rate base. In fact, given the effect the inclusion of those costs into rate base would have, the Board would expect the Directive to be very explicit if it was intended to have that effect.

The third argument against allowing these costs in rate base is that an alternative funding mechanism has been established by the government. Section 25.35 of the *Electricity Act, 1998* introduced in May along with the *Green Energy Act*, provided that the Minister may direct the Ontario Power Authority ("OPA") to "develop a feed-in tariff program that is designed to procure energy from renewable energy sources under such circumstances and conditions and in consideration of such factors and within such periods as the Energy Minister may require."

The Minister subsequently issued such a Directive on September 24, 2009 and on November 30, 2009, the first applications were received. Successful applicants for feed-in tariff program ("FIT") contracts will receive 20 year contracts from the OPA for the

⁵ EBRLG 33: Report of the Board, Ontario Energy Board, 1989.

purchase of that power and some of those costs will be allocated in such a way as to be incorporated in the global adjustment. In other words, the government has established a funding scheme for renewable energy sources. That funding mechanism is open to Enbridge. Moreover, this form of funding recognizes the fact that renewable energy will benefit all the citizens of the province and not just those within Enbridge's territory. If renewable energy costs are in rates, then the costs of projects will be paid by Enbridge's gas ratepayers. But those projects will benefit the people of Ontario regardless of where they are located.

There is a fourth reason for not allowing utilities to include renewable generation assets in rate base. The Board believes that it is desirable to treat the electricity and gas sectors in a similar fashion. The same issue has arisen in relation to electricity utilities. To date, generation assets have not been allowed in rate base because under the statutory scheme that applies to electricity a regulation is required and the government has not passed any such regulation.

Section 78(3) of the *Ontario Energy Board Act, 1998* states that the Board may make orders fixing just and reasonable rates for "the transmitting or distributing of electricity or such other activity as may be prescribed for the retailing of electricity in order to meet a distributor's obligations under section 28 of the *Electricity Act, 1998* (emphasis added). The reference to "or such other activity as may be prescribed" was added under the *Green Energy and Green Economy Act, 2009*, as was the right of electricity distributors to own and operate certain generation and energy storage facilities. The Board's authority to fix just and reasonable rates in relation to any other activity is contingent on the activity being prescribed by regulation. To date, no such regulation has been made. As a result, renewable generation assets cannot be included in the rate base of electricity distributors. The approach the Board has set out above with respect to the Green Energy Initiatives is consistent with the policy adopted for the electricity utilities.

For these reasons, the Board concludes that costs associated with renewable energy projects should not be included in rate base. To do so would be a significant departure from the accepted regulatory model. Assets in rate base are typically monopoly assets. These are not monopoly assets. These activities can and will be carried out by a number of entities and are essentially competitive in nature. More importantly, placing the assets in rate base not only impacts directly the gas rates but dramatically shifts the risk from shareholder to ratepayer. If the assets are in rate base, the shareholder earns

a regulated rate of return on these assets. There is no indication in the Directive that that was the Government's objective.

Moreover, a well-developed program to fund renewable energy exists under the recently enacted feed-in tariff program. There is, in the Board's view, no reason to introduce an additional funding mechanism that would give preference to regulated utilities. Implicit in Section 25.35 of the *Electricity Act* and the Directive issued under that section is the concept that the funding of renewable energy projects would come from all electricity ratepayers, not only the ratepayers of the utility that decides to embark on those initiatives. Under this scheme, none of these costs would be borne by Enbridge's ratepayers through their natural gas rates.

The Directive of September 8, 2009 to this Board must be read in conjunction with the Directive of September 24, 2009 to the OPA with respect to the FIT program. When the scheme of the legislation is considered in its entirety having regard to the recent amendments to the *Ontario Energy Board Act, 1998* and the principles set out in the *Green Energy Act* there is no compelling reason to conclude that the costs of renewable energy projects should be allowed in the rate base of a gas utility.

DATED at Toronto, December 22, 2009
ONTARIO ENERGY BOARD

Gordon Kaiser
Vice Chair and Presiding Member

Original signed by

Paul Sommerville
Member

Original signed by

Cathy Spoel
Member

Original signed by

Appendix "A"

DECISION ON A PRELIMINARY MOTION

Enbridge Gas Distribution Inc.

EB-2009-0172

DATED: December 22, 2009



Ontario
Executive Council
Conseil des ministres

Order in Council
Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

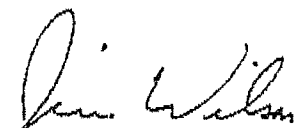
Sur la recommandation du soussigné, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil des ministres, décrète ce qui suit :

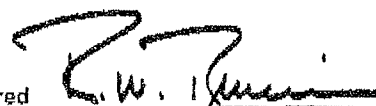
WHEREAS Westcoast Energy Inc., 1001142 Ontario Inc., Union Energy Inc., Union Gas Limited, and Union Shield Resources Ltd. provided Undertakings dated the 27th day of November, 1992 to the Lieutenant Governor in Council and these Undertakings were referred to in Order in Council No. 3639/92;

AND WHEREAS Enbridge Inc. (previously IPL Energy Inc.) and The Consumers' Gas Company Ltd. provided Undertakings dated the 21st day of June, 1994 to the Lieutenant Governor in Council and these Undertakings were referred to in Order in Council No. 1606/94;

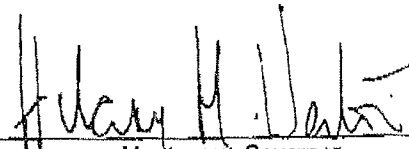
AND WHEREAS, with the receipt of Royal Assent for the *Energy Competition Act, 1998* on the 30th day of October, 1998, it is considered expedient to approve new Undertakings provided by Union Gas Limited, Centra Gas Utilities Inc., Centra Gas Holdings Inc., Westcoast Gas Inc., Westcoast Gas Holdings Inc. and Westcoast Energy Inc. and by The Consumers' Gas Company Ltd., Enbridge Consumers Energy Inc., 311594 Alberta Ltd., Enbridge Pipelines (NW) Inc. and Enbridge Inc. (the "New Undertakings");

NOW THEREFORE the New Undertakings, attached hereto, are accepted and approved.

Recommended 
Minister of Energy, Science & Technology

Concurred 
Chair of Cabinet

Approved & Ordered DEC 9 - 1998
Date


Lieutenant Governor

UNDERTAKINGS OF UNION GAS LIMITED,
CENTRA GAS UTILITIES INC., CENTRA GAS HOLDINGS INC.,
WESTCOAST GAS INC., WESTCOAST GAS HOLDINGS INC.,
WESTCOAST ENERGY INC.

TO: Her Honour The Lieutenant Governor in Council for the Province of Ontario

WHEREAS Centra Gas Utilities Inc. holds all the issued and outstanding common shares of Union Gas Limited ("Union");

AND WHEREAS Centra Gas Holdings Inc. holds all the issued and outstanding common shares of Centra Gas Utilities Inc.;

AND WHEREAS Westcoast Gas Inc. holds all the issued and outstanding common shares of Centra Gas Holdings Inc.;

AND WHEREAS Westcoast Gas Holdings Inc. holds all the issued and outstanding common shares of Westcoast Gas Inc.;

AND WHEREAS Westcoast Energy Inc. holds all the issued and outstanding common shares of Westcoast Gas Holdings Inc. ("Westcoast");

the above named corporations do hereby agree to the following undertakings:

1.0 Definitions

In these undertakings,

- 1.1 "Act" means the *Ontario Energy Board Act, 1998*;
- 1.2 "affiliate" has the same meaning as it does in the *Business Corporations Act*;
- 1.3 "Board" means the Ontario Energy Board;
- 1.4 "business activity" has the same meaning as it does under the Act or a regulation made under the Act; and
- 1.5 "electronic hearing", "oral hearing" and "written hearing" have the same meaning as they do under the *Statutory Powers Procedure Act*.

2.0 Restriction on Business Activities

- 2.1 Union shall not, except through an affiliate or affiliates, carry on any business activity other than the transmission, distribution or storage of gas, without the prior approval of the Board.

3.0 Maintenance of common equity

- 3.1 Where the level of equity in Union falls below the level which the Board has determined to be appropriate in a proceeding under the Act or a predecessor Act, Union shall raise or Westcoast and its affiliates shall provide within 90 days, or such longer period as the Board may specify, sufficient additional equity capital to restore the level of equity in Union to the appropriate level.

- 3.2 Any additional equity capital provided to Union by Westcoast or its affiliates shall be provided on terms no less favourable to Union than Union could obtain directly in the capital markets.
- 4.0 **Head Office**
- 4.1 The head office of Union shall remain in the Municipality of Chatham-Kent.
- 5.0 **Prior Undertakings**
- 5.1 These undertakings supersede, replace and are in substitution for all prior undertakings of Union, Westcoast and their affiliates.
- 6.0 **Dispensation**
- 6.1 The Board may dispense, in whole or in part, with future compliance by any of the signatories hereto with any obligation contained in an undertaking.
- 7.0 **Hearing**
- 7.1 In determining whether to grant an approval under these undertakings or a dispensation under Article 6.1, the Board may proceed without a hearing or by way of an oral, written or electronic hearing.
- 8.0 **Monitoring**
- 8.1 At the request of the Board, Union, Westcoast and their affiliates will provide to the Board any information the Board may require related to compliance with these undertakings.

9.0 Enforcement

9.1 The parties hereto acknowledge that there has been consideration exchanged for the receipt and giving of the undertakings and agree to be bound by these undertakings.

9.2 Any proceeding or proceedings to enforce these undertakings may be brought and enforced in the courts of the Province of Ontario and Westcoast, Union and their affiliates hereby submit to the jurisdiction of the courts of the Province of Ontario in respect of any such proceeding.

9.3 For the purpose of service of any document commencing a proceeding in accordance with Article 9.2, it is agreed that Union is the agent of Westcoast and its affiliates and that personal service of documents on Union will be sufficient to constitute personal service on Westcoast and its affiliates.

10.0 Release from undertakings

10.1 Westcoast, Union and their affiliates are released from these undertakings on the day that Westcoast no longer holds, either directly or through its affiliates, more than 50 per cent of the voting securities of Union or on the day that Union sells its gas transmission and gas distribution systems.

11.0 Effective Date

11.1 These undertakings become effective on March 31, 1999.

DATED this 7th day of December, 1998.

UNION GAS LIMITED

by *[Signature]*

CENTRA GAS UTILITIES INC.

by *[Signature]*

CENTRA GAS HOLDINGS INC.

by *[Signature]*

WESTCOAST GAS INC.

by *[Signature]*

WESTCOAST GAS HOLDINGS INC.

by *[Signature]*

WESTCOAST ENERGY INC.

by *[Signature]*

**UNDERTAKINGS OF THE CONSUMERS' GAS COMPANY LTD.,
ENBRIDGE CONSUMERS ENERGY INC., 311594 ALBERTA LTD.,
ENBRIDGE PIPELINES (NW) INC. AND ENBRIDGE INC.**

TO: Her Honour The Lieutenant Governor in Council for the Province of Ontario

WHEREAS Enbridge Consumers Energy Inc. holds all of the issued and outstanding common shares of The Consumers' Gas Company Ltd. ("Consumers");

AND WHEREAS 311594 Alberta Ltd. holds all of the issued and outstanding common shares of Enbridge Consumers Energy Inc.;

AND WHEREAS Enbridge Pipelines (NW) Inc. holds all of the issued and outstanding common shares of 311594 Alberta Ltd.;

AND WHEREAS Enbridge Inc. ("Enbridge") holds all of the issued and outstanding common shares of Enbridge Pipelines (NW) Inc.;

the above named corporations do hereby agree to the following undertakings:

1.0 Definitions

In these undertakings,

1.1 "Act" means the *Ontario Energy Board Act, 1998*;

- 1.2 “affiliate” has the same meaning as it does in the *Business Corporations Act*;
 - 1.3 “Board” means the Ontario Energy Board;
 - 1.4 “business activity” has the same meaning as it does under the Act or a regulation made under the Act; and
 - 1.5 “electronic hearing”, “oral hearing” and “written hearing” have the same meaning as they do under the *Statutory Powers Procedure Act*.
- 2.0 Restriction on Business Activities**
- 2.1 Consumers shall not, except through an affiliate or affiliates, carry on any business activity other than the transmission, distribution or storage of gas, without the prior approval of the Board.
- 3.0 Maintenance of common equity**
- 3.1 Where the level of equity in Consumers falls below the level which the Board has determined to be appropriate in a proceeding under the Act or a predecessor Act, Consumers shall raise or Enbridge and its affiliates shall provide within 90 days, or such longer period as the Board may specify, sufficient additional equity capital to restore the level of equity in Consumers to the appropriate level.
 - 3.2 Any additional equity capital provided to Consumers by Enbridge or its affiliates shall be provided on terms no less favourable to Consumers than Consumers could obtain directly in the capital markets.

4.0 Head Office

4.1 The head office of Consumers shall remain within the franchise area of Consumers.

5.0 Prior Undertakings

5.1 Subject to Article 5.2, these undertakings supersede, replace and are in substitution for all prior undertakings of Consumers, Enbridge and their affiliates.

5.2 The undertakings of British Gas PLC and Consumers dated June 16th, 1994 and approved by the Lieutenant Governor in Council on June 23rd, 1994, remain in full force and effect.

6.0 Dispensation

6.1 The Board may dispense, in whole or in part, with future compliance by any of the signatories hereto with any obligation contained in an undertaking.

7.0 Hearing

7.1 In determining whether to grant an approval under these undertakings or a dispensation under Article 6.1, the Board may proceed without a hearing or by way of an oral, written or electronic hearing.

8.0 Monitoring

8.1 At the request of the Board, Consumers, Enbridge and their affiliates will provide to the Board any information the Board may require related to compliance with these undertakings.

9.0 Enforcement

9.1 The parties hereto acknowledge that there has been consideration exchanged for the receipt and giving of the undertakings and agree to be bound by these undertakings.

9.2 Any proceeding or proceedings to enforce these undertakings may be brought and enforced in the courts of the Province of Ontario and Enbridge, Consumers and their affiliates hereby submit to the jurisdiction of the courts of the Province of Ontario in respect of any such proceeding.

9.3 For the purpose of service of any document commencing a proceeding in accordance with Article 9.2, it is agreed that Consumers is the agent of Enbridge and its affiliates and that personal service of documents on Consumers will be sufficient to constitute personal service on Enbridge and its affiliates.

10.0 Release from undertakings

10.1 Enbridge, Consumers and their affiliates are released from these undertakings on the day that Enbridge no longer holds, either directly or through its affiliates, more than 50 per cent of the voting securities of Consumers or on the day that Consumers sells its gas transmission and gas distribution systems.

11.0 Effective Date

11.1 These undertakings become effective on March 31, 1999.

DATED this 7th day of December, 1998.

THE CONSUMERS' GAS COMPANY LIMITED

by T. P. [Signature]
[Signature]

ENBRIDGE CONSUMERS ENERGY INC.

by T. P. [Signature]
[Signature]

311594 ALBERTA LTD.

by [Signature]
[Signature]

ENBRIDGE PIPELINES (NW) INC.

by [Signature]
[Signature]

ENBRIDGE INC.

by [Signature]
[Signature]

Appendix "B"

DECISION ON A PRELIMINARY MOTION

Enbridge Gas Distribution Inc.

EB-2009-0172

DATED: December 22, 2009



Executive Council
Conseil des ministres

Order in Council Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

Sur la recommandation du soussigné, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil des ministres, décrète ce qui suit:

WHEREAS Enbridge Gas Distribution Inc. and related parties ("Enbridge") gave undertakings to the Lieutenant Governor in Council that were approved by Order in Council on December 9, 1998 and that took effect on March 31, 1999 ("the Enbridge Undertakings"), and Union Gas Limited and related parties ("Union") gave undertakings to the Lieutenant Governor in Council that were approved by Order in Council on December 9, 1998 and that took effect on March 31, 1999 ("the Union Undertakings");

AND WHEREAS the Minister of Energy and Infrastructure has the authority under section 27.1 of the *Ontario Energy Board Act, 1998* to issue directives, approved by the Lieutenant Governor in Council, that require the Ontario Energy Board to take steps specified in the directives to promote energy conservation, energy efficiency, load management and the use of cleaner energy sources including alternative and renewable energy sources;

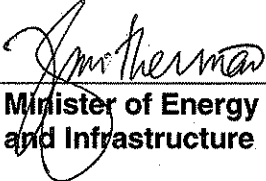
AND WHEREAS The Government of Ontario has, with the passage of the *Green Energy and Green Economy Act, 2009*, embarked upon a historic series of initiatives related to promoting the use of renewable energy sources and enhancing conservation throughout Ontario;

AND WHEREAS certain amendments to the *Ontario Energy Board Act, 1998* provided for by the above-noted statute authorize electricity distribution companies to directly own and operate renewable energy electricity generation facilities with a capacity of ten (10) megawatts or less, facilities that generate heat and electricity from a single source, or facilities that store energy, subject to criteria to be prescribed by regulation;

AND WHEREAS it is desirable that both Enbridge and Union are accorded authority similar to those of electricity distributors to own and operate the kinds of generation and storage facilities referenced above, while clarifying that the latter two activities, namely the ownership and operation of facilities that generate heat and electricity from a single source, or facilities that store energy, are to be interpreted to include stationary fuel-cell facilities each of which does not exceed 10 Megawatts in capacity, as well as to allow Enbridge and Union the authority to own and operate assets required in respect of the provision of services by Enbridge and Union that would assist the Government of Ontario in achieving its goals in energy conservation including where such assets relate to solar-thermal water and ground-source heat pumps;

AND WHEREAS the Minister of Energy has previously issued a directive pursuant to section 27.1 in respect of the Enbridge Undertakings and the Union Undertakings, under Order-in-Council No. 1537/2006, dated August 10, 2006.

NOW THEREFORE the directive attached hereto is approved and is effective as of the date hereof.

Recommended: 
Minister of Energy
and Infrastructure

Concurred: 
Chair of Cabinet

Approved and Ordered: SEP 08 2009
Date


Lieutenant Governor

MINISTER'S DIRECTIVE

Re: Gas Utility Undertakings Relating to the Ownership and Operation of Renewable Energy Electricity Generation Facilities, Facilities Which Generate Both Heat and Electricity From a Single Source and Energy Storage Facilities and the Ownership and Operation of Assets Required to Provide Conservation Services.

Enbridge Gas Distribution Inc. and related parties gave undertakings to the Lieutenant Governor in Council that were approved by Order in Council on December 9, 1998 and that took effect on March 31, 1999 ("the Enbridge Undertakings"); and Union Gas Limited and related parties gave undertakings to the Lieutenant Governor in Council that were approved by Order in Council on December 9, 1998 and that took effect on March 31, 1999 ("the Union Undertakings").

The Government of Ontario has, with the passage of the *Green Energy and Green Economy Act, 2009*, embarked upon a historic series of initiatives related to promoting the use of renewable energy sources and enhancing conservation throughout Ontario.

One of those initiatives is to allow electric distribution companies to directly own and operate renewable energy electricity generation facilities of a capacity of not more than 10 megawatts or such other capacity as is prescribed by regulation, facilities which generate both heat and electricity from a single source and facilities for the storage of energy, subject to such further criteria as may be prescribed by regulation.

The Government also wants to encourage initiatives that will reduce the use of natural gas and electricity.

Pursuant to section 27.1 of the *Ontario Energy Board Act, 1998*, and in addition to a previous directive issued thereunder on August 10, 2006 by Order in Council No. 1537/2006, in respect of the Enbridge Undertakings and the Union Undertakings, I hereby direct the Ontario Energy Board to dispense,

- under section 6.1 of the Enbridge Undertakings, with future compliance by Enbridge Gas Distribution Inc. with section 2.1 ("Restriction on Business Activities") of the Enbridge Undertakings, and
- under section 6.1 of the Union Undertakings, with future compliance by Union Gas Limited with section 2.1 ("Restriction on Business Activities") of the Union Undertakings,

in respect of the ownership and operation by Enbridge Gas Distribution, Inc. and Union Gas Limited, of:

- (a) renewable energy electricity generation facilities each of which does not exceed 10 megawatts or such other capacity as may be prescribed, from time to time, by

regulation made under clause 71(3)(a) of the *Ontario Energy Board Act, 1998* and which meet the criteria prescribed by such regulation;

- (b) generation facilities that use technology that produces power and thermal energy from a single source which meet the criteria prescribed, from time to time, by regulation made under clause 71(3)(b) of the *Ontario Energy Board Act, 1998*;
- (c) energy storage facilities which meet the criteria prescribed, from time to time, by regulation made under clause 71(3)(c) of the *Ontario Energy Board Act, 1998*; or
- (d) assets required in respect of the provision of services by Enbridge Gas Distribution Inc. and Union Gas Limited that would assist the Government of Ontario in achieving its goals in energy conservation and includes assets related to solar-thermal water and ground-source heat pumps;
- (e) for greater certainty, the use of the word "facilities" in paragraphs (b) and (c) above shall be interpreted to include stationary fuel-cell facilities each of which does not exceed 10 Megawatts in capacity.

This directive is not in any way intended to direct the manner in which the Ontario Energy Board determines, under the *Ontario Energy Board Act, 1998*, rates for the sale, transmission, distribution and storage of natural gas by Enbridge Gas Distribution Inc. and Union Gas Limited.



George Smitherman
Deputy Premier, Minister of Energy and Infrastructure

Appendix "C"

DECISION ON A PRELIMINARY MOTION

Enbridge Gas Distribution Inc.

EB-2009-0172

DATED: December 22, 2009



Ontario

Executive Council
Conseil des ministres

Order in Council Décret

On the recommendation of the undersigned, the Lieutenant Governor, by and with the advice and concurrence of the Executive Council, orders that:

Sur la recommandation du soussigné, le lieutenant-gouverneur, sur l'avis et avec le consentement du Conseil des ministres, décrète ce qui suit:

WHEREAS Enbridge Distribution Inc. and related parties gave undertakings to the Lieutenant Governor in Council that were approved by Order in Council on December 9, 1998 and that took effect on March 31, 1999; and Union Gas Limited and related parties gave undertakings to the Lieutenant Governor in Council that were approved by Order in Council on December 9, 1998, and that took effect on March 31, 1999;

AND WHEREAS opportunities exist for Enbridge Distribution Inc. and Union Gas Limited to carry on business activities that could assist the Government of Ontario in achieving its goals in energy conservation;


AND WHEREAS the Minister of Energy may issue, and the Ontario Energy Board shall implement, directives that have been approved by the Lieutenant Governor in Council that require the Board to take steps specified in the directives to promote energy conservation, energy efficiency, load management or the use of cleaner energy sources, including alternative and renewable energy sources;

NOW THEREFORE the attached Directive is approved.

Recommended:


Minister of Energy

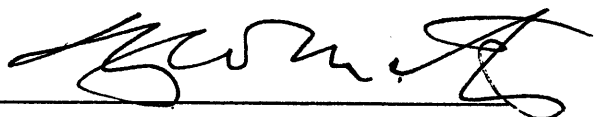
Concurred:


Chair of Cabinet

Approved and Ordered:

AUG 10 2006

Date



Administrator of the Government

O.C./Décret 1537 / 2006

Minister of Energy

Hearst Block, 4TH Floor
900 Bay Street
Toronto ON M7A 2E1
Tel: 416-327-6715
Fax: 416-327-6574

Ministre de l'Énergie

Édifice Hearst, 4e étage
900, rue Bay
Toronto ON M7A 2E1
Tél: 416-327-6715
Télé: 416-327-6574



MINISTER'S DIRECTIVE

Re: Gas Utility Undertakings

Enbridge Gas Distribution Inc. and related parties gave undertakings to the Lieutenant Governor in Council that were approved by Order in Council on December 9, 1998 and that took effect on March 31, 1999 ("the Enbridge Undertakings"); and Union Gas Limited and related parties gave undertakings to the Lieutenant Governor in Council that were approved by Order in Council on December 9, 1998 and that took effect on March 31, 1999 ("the Union Undertakings").

Pursuant to section 27.1 of the *Ontario Energy Board Act, 1998*, I hereby direct the Ontario Energy Board to dispense,

- under section 6.1 of the Enbridge Undertakings, with future compliance by Enbridge Gas Distribution Inc. with section 2.1 ("Restriction on Business Activities") of the Enbridge Undertakings, and
- under section 6.1 of the Union Undertakings, with future compliance by Union Gas Limited with section 2.1 ("Restriction on Business Activities") of the Union Undertakings,

in respect of the provision of services by Enbridge Gas Distribution Inc. and Union Gas Limited that would assist the Government of Ontario in achieving its goals in energy conservation, including services related to:

- (a) the promotion of electricity conservation, natural gas conservation and the efficient use of electricity;
- (b) electricity load management; and
- (c) the promotion of cleaner energy sources, including alternative energy sources and renewable energy sources.

.../cont'd

In addition, pursuant to section 27.1 of the *Ontario Energy Board Act, 1998*, I hereby direct the Board to dispense, under section 6.1 of the Enbridge Undertakings, with future compliance with section 2.1 of the Enbridge Undertakings in respect of research, review, preliminary investigation, project development and the provision of services related to the following business activities:

- (a) the local distribution of steam, hot and cold water in a Markham District Energy initiative; and
- (b) the generation of electricity by means of large stationary fuel cells integrated with energy recovery from natural gas transmission and distribution pipelines.

Further, pursuant to section 27.1 of the *Ontario Energy Board Act, 1998*, I hereby direct the Board to dispense, under section 6.1 of the Union Undertakings, with future compliance with section 2.1 of the Union Undertakings in respect of research, review, preliminary investigation, project development and the provision of services related to the following business activities:

- (a) the generation of electricity by means of large stationary fuel cells integrated with energy recovery from natural gas transmission and distribution pipelines.

To the extent that any activities undertaken by Enbridge Gas Distribution Limited or Union Gas Limited in reliance on this Directive are forecast to impact upon their regulated rates, such activities are subject to the review of the Ontario Energy Board under the *Ontario Energy Board Act, 1998*.

In this directive, "alternative energy source" and "renewable energy source" have the same meanings as in the *Electricity Act, 1998*.



Dwight Duncan
Minister

Appendix “D”

DECISION ON A PRELIMINARY MOTION

Enbridge Gas Distribution Inc.

EB-2009-0172

DATED: December 22, 2009

Fred Cass
Direct: 416-865-7742
E-mail: fcass@airdberlis.com

November 13, 2009

Kirsten Walli, Board Secretary
Ontario Energy Board
P.O. Box 2319, 26th Floor
2300 Yonge Street
Toronto, Ontario
M4P 1E4

Dear Ms. Walli:

**Re: Enbridge Gas Distribution Inc. – 2010 Rate Adjustment
OEB File No. EB-2009-0172**

In accordance with Procedural Order No. 1 in EB-2009-0172, Enbridge Gas Distribution Inc. (Enbridge) submitted a written argument to the Board that addressed the issues set out in the Procedural Order. This argument was filed on November 4, 2009. On November 9, 2009, the Board issued Procedural Order No. 2, which re-states the issues set out in the earlier Procedural Order. The re-stated issues are as follows:

1. Are the Green Energy Initiatives described in Enbridge's Application (Ex. B, Tab 2, Sch. 4), their associated costs, assets and revenues properly part of the regulated operations of Enbridge and thus under the Board's ratemaking authority?
2. If not, does the Board have jurisdiction to deal with the Green Energy Initiatives, their associated costs, assets and revenues outside of the ratemaking process?

Procedural Order No. 2 indicates that, if Enbridge is of the view that additional written submissions are required to establish the Board's ratemaking jurisdiction over those Green Energy Initiatives which are not characterized as electricity generation facility programs, it may do so by November 13, 2009. The Procedural Order also indicates the Board's expectations that any such submissions would be brief.

Enbridge was authorized to undertake the Green Energy Initiatives by a Directive issued by the Minister of Energy and Infrastructure under section 27.1 of the *Ontario Energy Board Act, 1998*. Prior to the issuance of the Directive, Undertakings given to the Lieutenant Governor in Council prevented Enbridge from engaging in any such activities (without prior approval of the Board).

The Minister's Directive was issued on September 8, 2009 and the scheduled date for filing of pre-filed evidence in this proceeding was October 1, 2009. While Enbridge proposes to move ahead in 2010 with activities authorized by the Directive, the period of

less than a month between issuance of the Directive and the date for filing of evidence was not sufficient for full development of Enbridge's plans.

That should not suggest any lack of urgency for Enbridge to proceed with its Green Energy Initiatives in 2010. The opposite is true. The Green Energy Initiatives are of urgent importance for 2010. The government will require immediate actions from stakeholders and industry participants to implement the aims of the *Green Energy and Green Economy Act* to create 50,000 jobs for Ontarians in the next three years and make Ontario a global leader in clean, renewable energy and conservation. Similarly, immediate action from market participants is necessary to begin to make steps towards the aggressive emissions reduction targets being proposed by the Ontario government. Utilities such as Enbridge are well positioned to deliver on the Government's green energy goals and must begin to do so as soon as possible. Enbridge has identified customers who have immediate interest in some of its Green Energy Initiatives. It is important to note that a defining characteristic of many Green Energy Initiatives, that they are long life assets, creates a real concern in terms of lost opportunities. That is, opportunities not realized now will be lost for a very long period of time, as less efficient and less environmentally sensitive technologies will be used instead. It is these circumstances that make it important for Enbridge to proceed with its Green Energy Initiatives starting in 2010.

Upon the filing of Enbridge's evidence, the Board raised issues about its jurisdiction with respect to electricity generation that are to be addressed as a preliminary matter at the outset of the proceeding. (Procedural Order No. 1 calls this a "preliminary motion.")

The context for the Board's issues about its jurisdiction in respect of electricity generation was the Green Energy Initiatives (as opposed to some other context, such as emergency backup electricity generation to support gas utility operations). Enbridge therefore addressed the Board's issues about electricity generation by way of submissions with regard to the Board's role and jurisdiction in respect of green energy matters. Because Enbridge made submissions about the Board's role and jurisdiction in respect of green energy matters, these submissions are generally applicable to all of the Green Energy Initiatives. Enbridge did not make detailed submissions about individual activities within the overall group of Green Energy Initiatives, nor could it have done so given the context already described (i.e., an evidentiary filing less than one month after Enbridge was given authority to undertake the Green Energy Initiatives and a requirement to address jurisdictional issues as a preliminary matter at the outset of the proceeding).

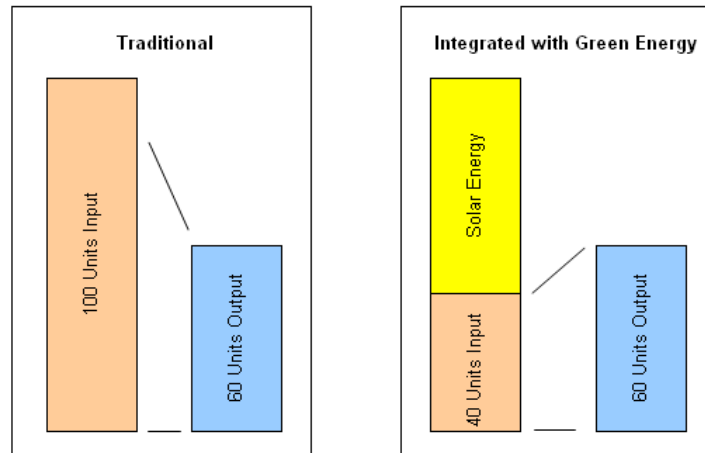
Procedural Order No. 2 broadened the Board's issues to encompass all of the Green Energy Initiatives. Enbridge assumes that, in so broadening the issues, the Board intends to address its role and jurisdiction with regard to green energy matters, rather than attempting to reach conclusions about individual activities within the overall group of Green Energy Initiatives. Nevertheless, given that the Board's issues have now been explicitly expanded beyond electricity generation, Enbridge believes that the Board's consideration of its role in relation to green energy matters would be aided by a greater understanding of some Green Energy Initiatives.

Enbridge's pre-filed evidence sets out some of the Green Energy Initiatives that it may choose to pursue in 2010. As explained in Enbridge's argument, its Green Energy Initiatives are all activities that are newly permitted under the Minister's Directives. The initiatives that Enbridge may pursue in 2010 and subsequent years will largely be driven by market opportunities and demand, which cannot be completely known at this time. For that reason, the list of Green Energy Initiatives set out in Enbridge's pre-filed evidence is intended to be illustrative, and not exhaustive.

That said, with the expanded scope of the "jurisdictional question" beyond electricity generation projects, Enbridge wishes to provide further details of four examples of Green Energy Initiatives that it plans to pursue. All of these will make substantial contributions to energy efficiency and conservation and assist in meeting government goals for emissions and greenhouse gas reductions.

One of Enbridge's proposed Green Energy Initiatives allows for waste energy from pressure let-down stations along the Company's transmission and distribution lines to be captured and converted into electricity. This is effected using technology called a "turboexpander", which is a flow turbine that harvests the energy from gas flows at the point where the pipeline pressures are reduced. The captured energy is then used to produce clean electricity. This technology represents an exciting opportunity for gas distributors to produce "green" electricity from an existing energy source that would otherwise go unused and wasted. Enbridge has identified 40 to 80 megawatts of potential generation from a number of such sources on its distribution system. The August 10, 2006 Minister's Directive permits this type of activity, which is described in the Directive as "project development and the provision of services related to the generation of electricity by means of large stationary fuel cells integrated with energy recovery from natural gas transmission and distribution pipelines". This is an opportunity that is exclusively available to gas transmitters and distributors, since it directly uses their pipes and is located within their facilities. Enbridge does not believe that it would be appropriate, for operational integrity and safety reasons, to make this opportunity available to third parties.

A second Green Energy Initiative that Enbridge plans to pursue in 2010 is solar thermal water heating technology. This involves attaching a solar thermal unit to a natural gas water heater, to increase its efficiency. The solar unit will provide more than half of the required water heating, so that less natural gas is required in total. The natural gas savings will be substantial, as seen in the following example. Assuming that a current house needs 60 units of hot water, then it would require 100 units of natural gas to achieve this (assuming that current natural gas water heaters are 60% efficient). If a solar thermal unit was attached to the water heater, then 36 of the 60 units of hot water would come from the sun through the solar panels and the other 24 units would require only 40 units of natural gas. Therefore, as seen in the chart below, the energy efficiency would move from 60% in the conventional case to 150% with the adoption of the solar panel.



Enbridge's role with this new technology would be as an enabler, to take steps to encourage its adoption by interested customers. The September 8, 2009 Minister's Directive permits this type of activity, which involves "assets required in respect of the provision of services by Enbridge .. that would assist the Government of Ontario in achieving its goals in energy conservation, including assets related to solar-thermal water". Given the negative impact that the use of this technology would have on Enbridge's system load, the Company is not prepared to pursue this opportunity unless it is able to include any investment as part of its regulated operations.

Another Green Energy Initiative that Enbridge plans to pursue in 2010 is the capture and use of biogas from landfills or anaerobic digesters. The project would include Enbridge's involvement with facilities and associated pipelines required to convert raw biogas from either a landfill operation or from an anaerobic digester to bio-methane. The resulting bio-methane would have the same chemical characteristics as natural gas and the bio-methane would be injected into the natural gas pipeline system. Careful monitoring and processes must be observed to ensure that the bio-methane would not pose any greater health risk to end use customers and distribution staff than natural gas, and that the bio-methane would have the same effectiveness as natural gas in any end-use appliances. Since the bio-methane would come from a waste stream, it would be considered a "green" gas or renewable in nature. This would assist end-use customers who would be users of the bio-methane to effectively reduce their greenhouse gas emissions. The August 10, 2006 Minister's Directive permits this type of activity, which involves "services that would assist the Government of Ontario in achieving its goals in energy conservation, including services related to: .. the promotion of cleaner energy sources, including alternative energy sources and renewable energy sources." Enbridge has had discussions with municipalities in its franchise area about these projects and the municipalities' desire to acquire these "green" energy sources for their operational needs and to aid municipalities in meeting their greenhouse gas emission reduction targets. One encouraging example of

such discussions is those being held with the City of Toronto about bio-methane opportunities within their Source Separated Organic facilities.¹

Enbridge also intends to pursue District Energy projects.² One current District Energy project opportunity is to provide heat to homes in a subdivision by using thermal energy to provide hot water and space heating to all homes on the site. In this particular project, the ground source geo-exchange system would provide baseload heating and cooling and some electricity would be needed to meet peak heating and cooling requirements. There would be no natural gas system to the community and natural gas consumption would be eliminated. By relying on geothermal energy, the community's total energy (natural gas and electricity) consumption would be decreased significantly below what it would be with conventional natural gas and electrical options for thermal energy. There are also other types of District Energy projects that could be pursued in the future. The September 8, 2009 Minister's Directive permits this type of activity, which involves "the ownership and operation of ... assets required in respect of the provision of services by Enbridge ..that would assist the Government of Ontario in achieving its goals in energy conservation, including assets related to ... ground-source heat pumps..³ Enbridge's investigations into District Energy projects have revealed that customers and municipalities are eager to make use of Enbridge's thermal distribution expertise, and that without the participation of a major utility like Enbridge, these projects will not proceed. Because of the fact that these projects will generally decrease natural gas use (as is the case with solar thermal

¹ The City of Toronto very recently issued its Sustainable Energy Strategy, titled "The Power to Live Green". This strategy recognizes the connection between green energy activities and "distribution". Among other things, it says "Smart energy distribution will improve security of supply, eliminate waste, promote efficiency and enable conservation. Deployment of distributed energy systems and further development to the smart grid will help decentralize energy production and move clean, renewable power to where it is needed, when it is needed."

(at p. 10) http://www.toronto.ca/livegreen/downloads/2009-10_report.pdf

² The City of Toronto's Sustainable Energy Strategy describes District Energy as follows: "Distributed or district energy is a recognized approach to meeting the heating, cooling, and domestic hot water needs of buildings, that also can support the process heating requirements of local industry. District energy is the distribution of thermal energy using a pipeline distribution system work. A district energy system may be designed with a single central energy plant or multiple smaller plants. These thermal plants may use various types of fuel including natural gas, renewable energy (geo-energy, bio-energy, solar), or industrial waste heat. By linking buildings and industrial activities together, district energy systems can aggregate the varying energy requirements into a steady heat load that can be effectively and efficiently managed. Modern high performance district energy systems provide an opportunity to meet the demand and minimize energy waste, reduce energy costs, provide increased security of energy supply, and reduce the need for large scale central generation." (at p. 18)

³ Other types of District Energy projects are permitted under different provisions of the Directives, which allow for Enbridge to own and operate "generation facilities that use technology that produces power and thermal energy from a single source" and which encourage Enbridge to provide "services that would assist the Government of Ontario in achieving its goals in energy conservation, including services related to ... the promotion of electricity conservation, natural gas conservation and the efficient use of electricity .. and the promotion of cleaner energy sources, including alternative energy sources and renewable energy sources."

November 13, 2009

Page 6

water heating technology), Enbridge is not prepared to pursue this opportunity unless it is able to include the investment as part of its regulated operations.

As stated, Enbridge's submissions are premised on the assumption that, in broadening the issues, the Board intends to consider its role and jurisdiction in green energy matters. However, the new, broader issues framed in Procedural Order No. 2 also raise the possibility that the Board could attempt to reach conclusions about (or, in essence, pre-judge) individual activities that are within the Green Energy Initiatives. Enbridge submits that, as is apparent from the examples given above, each activity within the Green Energy Initiatives will have its own particular features that must be considered in an activity-by-activity jurisdictional analysis. This is not an analysis that can be done on a preliminary motion at the outset of the 2010 rate proceeding.

Yours truly,

AIRD & BERLIS LLP



Fred Cass

FDC/