



EB-2011-0354

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, 2013.

**DECISION ON PROCEDURE FOR ORAL HEARING
OF CONCURRENT EXPERT EVIDENCE**

November 15, 2012

Enbridge Gas Distribution Inc. (“Enbridge”) filed an application on January 31, 2012 with the Ontario Energy Board (the “Board”) under section 36 of the *Ontario Energy Board Act, 1998*, S.O. c.15, Schedule B 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, 2013. The Board assigned file number EB-2011-0354 to the application and issued a Notice of Application dated March 2, 2012.

Following a Board ordered Settlement Conference Enbridge filed a settlement agreement with the Board on October 3, 2012. The Board issued its Decision on Settlement Agreement and Procedural Order No. 5 on October 15, 2012. In that decision, the Board accepted the settlement agreement with the exception of one settled item, that being the matter of the Pension True-up Variance Account (the “PTUVA”). The Board indicated it would accept the settlement agreement if certain wording related to pension costs beyond 2013 was removed. The Board directed Enbridge to file a revised settlement agreement by October 26, 2012 incorporating new wording for the PTUVA, and allowed parties the option to consider other changes to the

settlement agreement. In its Decision and Procedural Order No. 6 dated November 2, 2012 the Board accepted a revised Settlement Agreement dated October 26, 2012.

The revised Settlement Agreement resulted in a settlement of 53 of 56 issues in the case. One of the unsettled issues, relating to the Open Bill Access Program (Issue D11), was the subject of a separate settlement process and a Supplementary Settlement Agreement with respect to this issue was filed with the Board on November 9, 2012.

The other two unsettled issues relate to cost of debt and equity thickness (Issues E1 and E2). These issues are framed as follows:

- Issue E1 [Partial Settlement]

Is the forecast of the cost of debt for the Test Year, including the mix of short and long term debt and preference shares, and the rates and calculation methodologies for each, appropriate?

- Issue E2 [No Settlement]

Is the proposed change in capital structure increasing Enbridge's deemed common equity component from 36% to 42% appropriate?

The Settlement Agreement states that Issue E2 is expected to proceed to hearing and that parties may take a position on Issue E1 when Issue E2 is considered by the Board.

In its Decision on Settlement Agreement and Procedural Order No. 5 dated October 5, 2012, the Board ordered that an experts' conference be held between Concentric Energy Advisors ("Concentric") who prepared evidence for Enbridge with respect to Issue E2, and Dr. Laurence Booth, who prepared evidence for the Canadian Manufacturers and Exporters (CME), the Consumers Council of Canada (CCC), the School Energy Coalition (SEC) and the Vulnerable Energy Consumers Coalition (VECC) (collectively, the "Consortium") with respect to this issue.

The Board indicated that the experts were to file a Joint Written Statement ("JWS") outlining the key issues, the points of agreement and disagreement on those issues,

and the reasons for any disagreement. The Board indicated that it would require a presentation of the JWS at the oral hearing and that at the hearing, the experts for both Enbridge and the Consortium would appear together as a concurrent expert witness panel for the purposes of answering questions from the Board and other parties, as may be permitted by the Board, and providing comments on the views of the other experts on the same panel.

The Board also invited all parties to file submissions with respect to the most appropriate procedure for the oral hearing of the concurrent expert witness panel in light of the objectives of the Board as expressed in Procedural Order No. 5 and in Rule 13A of the Board's Rules of Practice and Procedure.

The Board received submissions from Enbridge, CME, CCC, SEC, VECC, the Building Owners and Managers Association and Board staff.

SEC, as well as others, has proposed that the scope of the issue be addressed as a preliminary matter at the beginning of the hearing. The Board will not adopt this proposal and will not define the scope of the issue any more precisely than it is already worded. The Board reaches this conclusion for two reasons. First, a preliminary scoping process would likely involve reference to and consideration of the substance of the issue. However, the Board will not have heard the oral testimony of the witnesses. Second, to the extent the parties wish to make legal arguments as to the approach the Board should adopt to resolve the issue, they will have the opportunity to do so in due course.

Enbridge has submitted that the oral hearing of concurrent expert evidence should not affect Enbridge's right to present the evidence of company witnesses with respect to the equity ratio issue. The Board agrees. Enbridge's company witnesses that were responsible for the evidence that was pre-filed on the equity ratio issue will be required to provide testimony at the oral hearing and be subject to cross-examination on that evidence prior to the expert witness panel.

Enbridge has also submitted that, in addition to their evidence given as part of the concurrent expert witness panel, the experts from Concentric should be allowed to give evidence on the witness panel together with Enbridge's company witnesses. The Board has determined that it will allow the Concentric witnesses to testify only as part of the

concurrent expert witness panel. The Board reaches this conclusion for several reasons. First, the Concentric witnesses have been offered by Enbridge as independent experts on the issues to be determined by this Board, and second, the experts were not listed in the relevant Enbridge evidence as individuals that would be speaking to that evidence. Given this and given that the Board clearly indicated in its Decision on Settlement Agreement and Procedural Order No. 5 dated October 15, 2012 that it would require the experts for both Enbridge and the Consortium to appear together as a concurrent expert witness panel, the Board is of the view that it is a fairer and more appropriate approach to have the Concentric witnesses appear only once as part of the concurrent expert witness panel. Further, the Board has convened the expert concurrent witness panel for the express purpose of hearing the evidence in an independent fashion. To call the company witnesses and the Concentric witnesses together could undermine that purpose and unnecessarily result in lack of clarity concerning matters to which the company can speak on and be tested, and matters to which the experts can speak on and be tested.

The Board notes however that it may be appropriate for company witnesses to defer to the Concentric witnesses if in the view of those company witnesses, the answer falls within the purview of the expertise of the Concentric witnesses. The Board also notes that it may be appropriate for the experts to address particular questions asked of the company witnesses as part of their opening statements. It may also be appropriate for particular questions to be asked of both the company witnesses and the experts, or for certain aspects of the cross-examination of the company witness panel, to be addressed by Enbridge as part of its re-examination of the experts. None of these alternatives will be precluded by the Board at this point.

Concerning the submissions on the procedural aspects of the oral hearing of the concurrent experts' panel, the Board has determined that the procedure to be followed should be based on the process which would be followed if they were to appear separately, but be augmented so as to garner the benefits of a concurrent panel. The process will be as follows:

1. The Board will swear the expert witnesses.
2. The witnesses will be examined for the purposes of qualifying them as experts in the relevant area. The witnesses for Concentric will go first.

3. Each of the experts will adopt their evidence filed individually and concurrently and will advise of any errors or other similar issues.
4. Each expert (or team of experts in the case of Mr. Coyne and Ms. Lieberman) will be given 30 minutes to make an opening statement, in lieu of an examination in chief lead by counsel. In the opening statement they will be expected to summarize their own evidence, summarize their understanding of the evidence of other expert(s) and highlight the main areas of disagreement, including disagreements of fact, methodology, and opinion that are relevant to the resolution by this Board of the issue. The Concentric witnesses will go first.
5. Each of the expert/team will be given an opportunity (at their option) to question the opposing expert(s). The purpose of this questioning is to enable further clarification of the major differences in fact, methodology, and opinion that are relevant to the resolution by the Board of this issue. It is not intended to be a cross-examination process. The Concentric witnesses will be the first to ask questions. Each side will have 30 minutes to question the opposing expert(s).
6. Each party, including each of the individual parties in the Consortium and Board staff, will have an opportunity to cross-examine the experts. Parties that have sponsored one or more experts will be expected to address their questions only to the opposing expert(s). The Board panel will interject to provide an opportunity for the expert that is not currently being questioned to respond to the particular line of questioning or the particular answers provided as and when the Board determines that there is a logical break in the questioning or when the Board is interested in hearing the other expert's view.

Mr. Coyne and Ms. Lieberman will be subject to cross-examination first, with Enbridge's counsel having an opportunity for re-examination. Dr. Booth will be subject to cross-examination next and the Board will permit only one of the counsel for the sponsoring parties to re-examine Dr. Booth, if re-examination is necessary.

On re-examination, the Board panel may ask the expert(s) that was not being re-examined to respond to one or more aspects of the re-examination.

Although the Board is allowing all parties, including each of the individual parties in the Consortium, to cross-examine the Enbridge expert witnesses, the Board expects parties to coordinate their efforts so that there is no duplication. The parties are requested to provide Board staff with an agreed order of cross-examination in advance of the hearing.

7. The Board panel, as is customary in Board proceedings, may ask questions at any time during the proceeding and may intervene with respect to procedural or other issues in order to most appropriately oversee and manage the proceeding so that it is fair, and to elicit the information it needs in respect of the issues to be decided.

DATED at Toronto November 15, 2012

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary