

ONTARIO ENERGY BOARD

IN THE MATTER OF an application by Enbridge Gas Distribution Inc. for: an order or orders granting leave to construct a natural gas pipeline and ancillary facilities in the Town of Milton, City of Markham, Town of Richmond Hill, City of Brampton, City of Toronto, City of Vaughan and the Region of Halton, the Region of Peel and the Region of York; and an order or orders approving the methodology to establish a rate for transportation services for TransCanada Pipelines Limited;

AND IN THE MATTER OF an application by Union Gas Limited for: an Order or Orders for pre-approval of recovery of the cost consequences of all facilities associated with the development of the proposed Parkway West site; an Order or Orders granting leave to construct natural gas pipelines and ancillary facilities in the Town of Milton; an Order or Orders for pre-approval of recovery of the cost consequences of all facilities associated with the development of the proposed Brantford-Kirkwall/Parkway D Compressor Station project; an Order or Orders for pre-approval of the cost consequences of two long term short haul transportation contracts; and an Order or Orders granting leave to construct natural gas pipelines and ancillary facilities in the City of Cambridge and City of Hamilton.

**SUBMISSIONS OF UNION GAS LIMITED AND GAZ MÉTRO
(Motion for relief in relation to the GTA Project)**

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PART I – OVERVIEW

1. Union Gas Limited and Gaz Métro bring this motion seeking relief in connection with Enbridge Gas Distribution Inc.’s proposed pipeline between the planned Bram West Interconnect (in the vicinity of Union’s planned Parkway West Station) and Enbridge’s Albion Road Station (“Segment A”). Segment A is a component of a route that will link the Parkway West Station to TransCanada PipeLines Limited’s Mainline north of the Greater Toronto Area.
2. In its Procedural Order No. 5, the Board requested that the parties make submissions with respect to the “threshold” issue of whether the Board’s *Storage and Transportation Access Rule* (“STAR”) applies to Segment A. The Board further requested that the parties make submissions with respect to the process that the Board should follow after the hearing of the threshold issue.
3. There is no dispute among the parties that Segment A is a transmission pipeline. In Union’s and Gaz Métro’s submission, it necessarily follows that STAR applies to Segment A. In particular, the requirement that Enbridge hold an open season with respect to new capacity applies to Segment A.
4. If the Board finds that STAR applies to Segment A, it should refuse to further consider Enbridge’s application for leave to construct Segment A until Enbridge has held an open season in respect of Segment A and the appropriate pipe size has been determined. In other words, it should stay the GTA Project pending an open season.
5. But even if STAR does not apply to Segment A, the Board should still refuse to further consider Enbridge’s application for leave to construct the GTA Project. Consistent with the objectives set out in the *Ontario Energy Board Act*, gas transportation services in Ontario should be offered on a non-discriminatory basis through open seasons, and pipe size should only be fixed after an open season has been held to determine the demand for transportation services on a new pipeline.
6. In these submissions, we first outline the factual background that gave rise to this motion. This includes the necessity for Union and Gaz Métro to access Segment A to achieve security of supply and deliver gas cost savings to their customers, Enbridge’s and TransCanada’s agreement to constrain access to Segment A by Union and by Gaz Métro, and Union’s commitment to

complete the link between the Albion Road Station and TransCanada's Maple Compressor Station. We then set out our legal argument in support of the request for a declaration that STAR applies to Segment A and the request that the Board refuse to further consider Enbridge's leave to construct application until Enbridge holds an open season.

PART II – FACTS

Segment A of the GTA Project is a Transmission Pipeline

7. Segment A of Enbridge's GTA Project is a proposed NPS 36 pipeline linking Union's proposed Bram West Interconnect and Enbridge's Albion Road Station.¹ It will be owned and operated by Enbridge.²

8. The segment will provide a link into the Greater Toronto Area from Union's proposed Parkway West Station.³ If connected to TransCanada's Mainline via a further pipeline between the Albion Station and TransCanada's Maple Compressor Station, Segment A will provide an important link between the Parkway West Station and gas consumers located in Eastern Ontario and Quebec.⁴

9. Segment A is a transmission pipeline. In addition to meeting Enbridge's capacity needs, it will be used by TransCanada to transport gas between Bram West and Albion.⁵

10. There is no dispute among the parties that Segment A is a transmission pipeline. Enbridge acknowledged this at the Technical Conference in this proceeding:

MR. SMITH: Now you mentioned the pipeline being used by Enbridge to meet distribution need, but you describe the pipeline in evidence as a distribution and a transmission line; correct?

¹ Enbridge's pre-filed evidence in EB-2012-0451, A.3.6, Motion Record, Tab 13.

² Transcript from the Technical Conference (Day 1), p. 11, lines 26-28, Motion Record, Tab 18, p. 293

³ Enbridge's pre-filed evidence in EB-2012-0451, A.3.6, Motion Record, Tab 13.

⁴ Union's Answer to Board Staff Interrogatory No. 7, Motion Record, Tab 12, pp. 180-82.

⁵ Memorandum of Understanding between Enbridge and TransCanada, Schedule D, Tab 25, p. 456; Transcript from the Technical Conference (Day 1), p. 12, lines 4-10, Motion Record, Tab 18, p. 265.

MS. GHIRIDAR (Enbridge): Correct.

MR. SMITH: There is no doubt that it is a transmission line?

MS. GHIRIDAR (Enbridge): The use of a portion of the line for transmission purposes for third-party shippers puts it into that category.⁶

11. Enbridge currently intends to reserve Segment A to the exclusive use of itself and of TransCanada.⁷

12. In its 2010 application for STAR compliance, Enbridge undertook to conduct open seasons in accordance with the Board's prescribed rules.⁸

13. Enbridge has not conducted an open season in respect of Segment A, and has confirmed that it does not intend to do so. In fact, it has contractually obliged itself to TransCanada not to hold an open season in respect of Segment A.⁹

14. Enbridge apparently believes that it is exempt from the requirement under STAR to hold an open season in respect of Segment A. However, it is unable to identify any provision of STAR that would exempt it from this requirement, except the Board's general power to grant exemptions from STAR compliance.¹⁰

⁶ Transcript from the Technical Conference (Day 1), p. 23, lines 20-28, p. 24, line 1, Motion Record, Tab 18, pp. 276-77.

⁷ Memorandum of Understanding between Enbridge and TransCanada, Schedule D, Tab 25, p. 456; Transcript from the Technical Conference (Day 1), p. 12, lines 4-10, Motion Record, Tab 18, p. 265.

⁸ Decision of the Board in EB-2010-0177 regarding Enbridge's compliance with STAR, Motion Record, Tab 35.

⁹ Transcript from the Technical Conference (Day 1), p. 15, lines 20-22, p. 16, lines 4-15, p. 18, lines 17-22, Motion Record, Tab 18, pp. 268-69, 271.

¹⁰ Enbridge's answers to undertakings JT1.2, Motion Record, Tab 21, p. 387.

Diversity, Security of Supply and Gas Cost Savings are Dependent on Access to Parkway-Maple Path

15. Union and Gaz Métro require expansion of the pipeline capacity between Parkway and Maple to carry incremental short-haul volumes of 110,000 GJ/day and 258,000 GJ/day, respectively, which are already contracted to be transported between the Dawn Hub and Parkway.¹¹

16. This expansion will allow Union and Gaz Métro's customers in Northern and Eastern Ontario and in Quebec to realize approximately \$103 to \$138 million annually in gas cost savings resulting from increased access to the liquid Dawn Hub. The gas cost savings will be achieved by shifting the source of gas delivered to those customers from long-haul supply sourced from the Western Canadian Sedimentary Basin ("WCSB") and transported on TransCanada's Mainline to short-haul supply sourced from the Dawn Hub, which is located closer to Eastern markets.¹²

17. Shifting from long-haul supply sourced from the WCSB to short-haul supply sourced from the Dawn Hub provides further gas supply benefits in the form of diversity and security of supply. The amount of gas supply available from the WCSB to move east from Empress (in Alberta) is currently in decline and is expected to continue to decline into the future. This reduction in supply is a risk for Union and Gaz Métro's customers in Northern and Eastern Ontario and in Quebec, respectively. Union and Gaz Métro are responding to this supply risk by proactively contracting transportation to access new supply options in their supply portfolios with natural gas sourced from other production basins.¹³

¹¹ Transcript from the Technical Conference (Day 1), p. 134, lines 27-28, p. 138, lines 16-20, Motion Record, Tab 18, pp. 329, 333.

¹² Union's Answer to Board Staff Interrogatory No. 7, Motion Record, Tab 12, pp. 180-82.

¹³ Union's Pre-Filed Evidence in EB-2013-0074, Section 4 – Changing North American Natural Gas Supply Dynamics, Motion Record, Tab 5.

The Régie Decision

18. Quebec's Régie de l'énergie has already approved Gaz Métro's shift from WCSB-sourced gas to Dawn Hub-sourced gas.
19. Like Union, Gaz Métro prepares a gas supply plan. This plan is prepared having regard, among other things, to the risks inherent in the sources of gas supply.¹⁴
20. Pursuant to the Quebec *Act respecting the Régie de l'énergie* (the "Régie Act"), Gaz Métro must submit its gas supply plan to the Régie for approval. In determining whether to approve the plan, the Régie considers whether the plan ensures, among other things, sufficiency of supply for Québec natural gas consumers.¹⁵
21. On July 6, 2012, Gaz Métro applied to the Régie for the approval of its most recent gas supply plan.¹⁶ Gaz Métro sought approval to move its source of supply to the Dawn Hub from Empress. The Régie characterized the request as a "fundamental strategy orientation",¹⁷ intended to reflect the recent significant changes in the natural gas market in Canada.¹⁸
22. In addition to the economic benefits and the reduction of the distance between supply and market, the change in the source of supply is intended to enable Gaz Métro to reduce its vulnerability and dependence on the TransCanada Mainline.¹⁹

¹⁴ Régie Act, section 72, Supplementary Motion Record, Tab 1; *Regulation respecting the tenor of a supply plan and the intervals at which it is to be submitted*, chapter R-6.01, r. 8, sections 1(2)b, c) and 1(3)b), Supplementary Motion Record, Tab 2.

¹⁵ Régie Act, section 72, Supplementary Motion Record, Tab 1; Régie de l'énergie Decision D-2010-144, p. 29, para. 104, Supplementary Motion Record, Tab 3.

¹⁶ Demande d'approbation du plan d'approvisionnement et de modification des conditions de service et tarif de Société en commandite Gaz Métro à compter du 1er octobre 2012, File number R-3809-2012, Phase 1, Supplementary Motion Record, Tab 4.

¹⁷ Régie de l'énergie Decision D-2012-175, para. 52, Motion Record, Tab 22.

¹⁸ Régie de l'énergie Decision D-2012-175, paras. 15-20, Motion Record, Tab 22.

¹⁹ Régie de l'énergie Decision D-2012-175, paras. 26 and 28, Motion Record, Tab 22.

23. TransCanada intervened before the Régie and contested Gaz Métro's application. TransCanada did so despite the fact that it had contracted with Gaz Métro for new short-haul capacity between the Dawn Hub and GMi-EDA pursuant to its May 2012 open season (as discussed below).²⁰

24. In the result, the Régie approved Gaz Métro's request, rejected TransCanada's position and concluded that:

[43] The Régie shares the distributor's opinion and deems that remaining with Empress and not acquiring additional carrying capacities for the Dawn-GMi-EDA route would leave the distributor's customers captive of [TransCanada]'s FTLH tolls.

[44] The Régie agrees with the IGUA in saying that transferring to Dawn would give Gaz Métro and its customers greater selection and flexibility. As a matter of fact, transferring to Dawn would give access to new supply sources from Northeastern America while continuing to have the possibility of purchasing natural gas from Empress while going through Dawn, if it turned out to be the most economical solution. [...]

[54] For all these reasons, the Régie approves Gaz Métro's proposal to transfer the supply structure from Empress to Dawn, a proposal that is materializing through the tenders submitted by Gaz Métro for the calls for tenders launched in 2012 by Union and [TransCanada], who retained them.²¹

25. TransCanada should not be allowed to frustrate the Régie's decision by limiting Gaz Métro's access to Segment A.

26. Gaz Métro has a direct interest in the new capacity on Segment A, which is necessary in order to carry out its approved supply plan.

27. Ultimately, in order to support an efficient marketplace for energy, it is critical that natural gas be able to flow unimpeded to meet market demands. Restricting flow into, within and

²⁰ Régie de l'énergie Decision D-2012-175, paras. 32 and following and paras. 51-53, Motion Record, Tab 22.

²¹ Régie de l'énergie Decision D-2012-175, paras. 43-44 and 54, Motion Record, Tab 22.

out of Ontario undermines the development of an efficient marketplace to the detriment of all energy consumers. The expansion of the Parkway to Maple corridor is necessary to provide Ontario and Quebec industry, power generators, businesses and residents with increased access to the diverse and affordable natural gas supply of the Dawn Hub. The depth and liquidity of the Dawn Hub depends on the ability to move natural gas supplies to and from that trading point.²²

Parkway-Maple Expansion Intended to Accommodate Incremental Volumes

28. In 2012 Union studied the possibility of building a pipeline that would link Parkway and Maple. It held an open season in April/May 2012 in respect of new capacity on that pipeline.²³

29. Soon after Union initiated the open season, TransCanada proposed to build for incremental short-haul volumes from Parkway to Maple, and held a parallel open season in May 2012. Union and Gaz Métro agreed with TransCanada's proposal to build the pipeline expansion, and bid into TransCanada's open season for their incremental short-haul volumes of 110,000 GJ/day and 258,000 GJ/day, respectively. They did so in reliance on TransCanada's agreement to have the line in service by November 1, 2014.²⁴

30. The proposed expansion along the Parkway to Maple corridor, as agreed during the May 2012 TransCanada open season, would have accommodated Union and Gaz Métro's incremental short-haul volumes and allowed them to ensure diversity and security of supply and deliver substantial gas cost savings to their customers. Segment A was to be the first component of the expansion.²⁵

²² Union's Answer to Board Staff Interrogatory No. 7, Motion Record, Tab 12, pp. 180-82.

²³ Transcript from the Technical Conference (Day 1), p. 120, lines 12-17, Motion Record, Tab 18, p. 315.

²⁴ Transcript from the Technical Conference (Day 1), p. 122, lines 23-28, p. 123, lines 1-10 Motion Record, Tab 18, pp. 317-18; Transcript from the Technical Conference (Day 2), p. 23, lines 22-28, Motion Record, Tab 19, p. 364; Correspondence between Union and TransCanada, Motion Record, Tab 23.

²⁵ Union's Answer to Board Staff Interrogatory No. 7, Motion Record, Tab 12, pp. 180-82.

Incremental Volumes Denied Access to Parkway-Maple Expansion

31. Union and Gaz Métro's ability to deliver gas cost savings to their customers has now been thwarted as a result of the actions of Enbridge and TransCanada. First, unknown to Union and Gaz Métro until recently, Enbridge and TransCanada have agreed to restrict to themselves access to Segment A. Second, Enbridge and TransCanada have agreed to restrict the size of the Segment A pipeline such that it will not accommodate Union and Gaz Métro's incremental short-haul volumes. Third, TransCanada has suspended indefinitely any build for Union and Gaz Métro's incremental short-haul volumes on the second portion of the path, linking Albion to Maple.

Enbridge and TransCanada Have Restricted Access to Segment A

32. On January 28, 2013, Enbridge and TransCanada entered into a confidential Memorandum of Understanding in respect of Segment A. The MOU was amended on April 26, 2013 and again on May 21, 2013.²⁶

33. Pursuant to the MOU, all capacity on Segment A beyond the capacity needed to serve Enbridge's distribution franchise shall be for the sole and exclusive use of TransCanada. Schedule D to the MOU sets out the terms of the Transportation by Others ("TBO") agreement between the parties. It provides that:

Enbridge's allocated capacity on the Enbridge Pipeline would be equal to 800,000GJ/d, and TransCanada shall be entitled to the balance of the capacity on the Enbridge Pipeline, including any increase in such capacity.²⁷

34. At the Technical Conference, Enbridge admitted that capacity on Segment A over and above Enbridge's allocated capacity will be allocated to TransCanada exclusively.²⁸

²⁶ Memorandum of Understanding between Enbridge and TransCanada and amendments, Motion Record, Tabs 25-27.

²⁷ Memorandum of Understanding between Enbridge and TransCanada, Schedule D, Motion Record, Tab 25, p. 456.

²⁸ Transcript from the Technical Conference (Day 1), p. 12, lines 4-10, Motion Record, Tab 18, p. 265.

35. The MOU expressly contemplates the reduction or cancellation of commitments TransCanada made to Union and Gaz Métro in the May 2012 open season.²⁹

36. Further, pursuant to section 2.7 of the MOU, TransCanada retains exclusive right over Segment A's excess capacity for a period of ten years following any termination of the MOU.³⁰

37. In exchange for granting TransCanada exclusivity over transportation capacity on Segment A, Enbridge secured, among other things, TransCanada's agreement to cooperate with and not to oppose or seek to delay Enbridge and Union's efforts to obtain leave from the Board to construct the GTA Project and the Parkway West project.³¹

38. Although it knows that Union and Gaz Métro need access to Segment A to deliver substantial gas cost savings to their customers and require diversity and security of supply, Enbridge has confirmed that it does not intend to hold an open season in respect of excess capacity on Segment A. In fact, as set out above, it is Enbridge's position that it is prohibited from doing so under the terms of its MOU with TransCanada.³²

39. Enbridge asserts in its answers to undertakings that it "has consulted with and negotiated arrangements with both TransCanada and Union in a non-discriminatory and transparent manner."³³ It has not. Enbridge made public the MOU for the first time on June 7, 2013, in response to an interrogatory from Canadian Manufacturers & Exporters in this proceeding. Until they reviewed the MOU, Union and Gaz Métro were not aware that they would be denied access to Segment A.³⁴ Since Segment A is a transmission pipeline, they expected and relied on the fact

²⁹ Memorandum of Understanding between Enbridge and TransCanada, Schedule B, section 6, Motion Record, Tab 25, p. 462.

³⁰ Memorandum of Understanding between Enbridge and TransCanada, section 2.7, Tab 25, pp. 449-50; Transcript from the Technical Conference (Day 1), p. 13, lines 3-21, Motion Record, Tab 18, p. 266.

³¹ Memorandum of Understanding between Enbridge and TransCanada, section 4.2(a), Tab 25, pp. 454.

³² Transcript from the Technical Conference (Day 1), p. 15, lines 20-22, p. 16, lines 4-15, p. 18, lines 17-22, Motion Record, Tab 18, pp. 268-69, 271.

³³ Enbridge's answers to undertakings JT1.2, Motion Record, Tab 21, p. 1, Motion Record, Tab 21, p. 387.

³⁴ Transcript from the Technical Conference (Day 1), p. 23, lines 16-19, p. 132, lines 6-11, Motion Record, Tab 18, pp. 276, 327.

that open access would be provided to them by way of a binding open season, as required by STAR.³⁵

Enbridge and TransCanada Have Agreed to Limit the Size of the Segment A Pipeline

40. In addition to entering into an MOU restricting access to Segment A to themselves, Enbridge and TransCanada agreed to limit the size of the Segment A pipeline. In February 2012, Enbridge amended its application for leave to construct to increase the size of Segment A to NPS 42 from NPS 36.³⁶ As set out in Recital E to the First Amendment to their MOU, dated April 26, 2013, Enbridge and TransCanada then agreed to reduce the size of Segment A back to NPS 36.³⁷

41. Enbridge has admitted that there is nothing preventing it from constructing an NPS 42 pipeline on Segment A.³⁸ Despite this, TransCanada and Enbridge agreed to reduce the size to NPS 36 without consulting Union or Gaz Métro, the other potential users of the Parkway to Maple corridor, as to the appropriate size of the pipeline to meet future incremental demands.³⁹

42. While an NPS 36 pipeline will provide sufficient capacity to meet existing demands on TransCanada's system, it is insufficient to accommodate Union and Gas Métro incremental short-haul demands of 110,000 GJ/day and 258,000 GJ/day, respectively. It also ignores the potential use of that path by other shippers, which STAR's requirement for an open season would otherwise reveal.⁴⁰

³⁵ Transcript from the Technical Conference (Day 1), p. 132, lines 23-28, p. 133, lines 1-4, Motion Record, Tab 18, pp. 327-28; Transcript from the Technical Conference (Day 2), p. 5, lines 2-8, Motion Record, Tab 19, p. 346.

³⁶ Enbridge's Pre-Filed Evidence, Exhibit A.2.4, p. 1, Motion Record, Tab 14, p. 197; First Amendment to the Memorandum of Understanding between Enbridge and TransCanada, recital C, Motion Record, Tab 26, p. 468.

³⁷ First Amendment to the Memorandum of Understanding between Enbridge and TransCanada, recital E, Motion Record, Tab 26, p. 468.

³⁸ Transcript from the Technical Conference (Day 1), p. 22, lines 7-15, Motion Record, Tab 18, p. 275.

³⁹ Transcript from the Technical Conference (Day 1), p. 23, lines 4-15, Motion Record, Tab 18, p. 276.

⁴⁰ Transcript from the Technical Conference (Day 1), p. 133, lines 24-28, Motion Record, Tab 18, p. 328; Transcript from the Technical Conference (Day 2), p. 4, lines 11-19, Motion Record, Tab 19, p. 345; Union's Answer to Board Staff Interrogatory No. 7, Motion Record, Tab 12, p. 181.

TransCanada Has Suspended Indefinitely any Build for Incremental Capacities on the Albion-Maple Pipeline

43. In addition to the above, TransCanada has now suspended indefinitely any build for Union and Gaz Métro's incremental short-haul volumes on the Albion to Maple path, contrary to the commitments it made during the 2012 open season.

44. In April 2013, TransCanada announced its unilateral decision to suspend construction of the Albion-Maple expansion.⁴¹ It had earlier decided to delay the project's in-service date by a year, from November 1, 2014 to November 1, 2015.⁴²

45. It is now highly unlikely that TransCanada will ever build from Albion to Maple.⁴³ In a recent letter to the Eastern local distribution companies, TransCanada explained that, due to a recent decision of the National Energy Board, it had "no other choice" but to "cancel the Parkway-Maple expansion."⁴⁴

46. To the extent that TransCanada does build from Albion to Maple, it is planning to do so only in respect of existing volumes. It does not intend to build to accommodate the incremental short-haul volumes required by Union and Gaz Métro, at least not on reasonable terms.⁴⁵ In this respect, on June 27, 2013 TransCanada issued its new capacity open season for 2015/2016, which (1) fails to fully accommodate Union and Gaz Métro's incremental volumes, (2) conditions TransCanada's offer of new capacity upon a 15-year contract commitment, and (3) proposes short-haul tolls which are equal to or greater than the long-haul tolls established by the

⁴¹ Letter from TransCanada to Union dated April 29, 2013, Motion Record, Tab 31.

⁴² Letter from Union to TransCanada, Motion Record, Tab 24; Letter from TransCanada to Union, Gaz Metro and Enbridge, Motion Record, Tab 34; Transcript from the Technical Conference (Day 2), p. 24, lines 9-12, Motion Record, Tab 19, p. 365; Letter from TransCanada to Union, Motion Record, Tab 29; Minutes of meeting between Union, Enbridge and TransCanada, Motion Record, Tab 30.

⁴³ Transcript from the Technical Conference (Day 1), p. 117, lines 10-17, Motion Record, Tab 18, p. 312.

⁴⁴ Letter from TransCanada to Union, Gaz Metro and Enbridge, Motion Record, Tab 34.

⁴⁵ Transcript from the Technical Conference (Day 1), p. 18, lines 3-9, p. 115, lines 18-28, Motion Record, Tab 18, pp. 271, 310; Second Amendment to Memorandum of Understanding between Enbridge and TransCanada, Recital C, Motion Record, Tab 27, p. 473; Transcript from the Technical Conference (Day 1), p. 19, lines 2-18, Motion Record, Tab 18, p. 272.

National Energy Board (or three times the tolls associated with the commitments made to Union and Gaz Métro last year).⁴⁶

47. In addition, TransCanada's planned crude oil pipeline conversion will negatively impact natural gas pipeline capacity to eastern markets beginning as early as 2015. TransCanada will remove sections of its Mainline from natural gas service starting with the Northern Ontario Line in 2015 and followed by the Eastern Triangle in 2016 (between North Bay and eastern Ontario). This new capacity constraint will be on top of the existing constraint between Parkway and Maple.⁴⁷

Union Is Committed to Building from Albion to Maple

48. Given the circumstances described above, Union and Gaz Métro have determined that they must act proactively to ensure security of supply. Union therefore proposes to build the Albion-Maple pipeline either on its own or in a joint venture with Gaz Métro.⁴⁸

49. Shortly after receiving notice that TransCanada no longer intended to build the Albion-Maple expansion, Union and Gaz Métro jointly initiated an environmental assessment for a pipeline linking Albion to Maple, which is expected to be completed within six months.⁴⁹ If required, this environmental assessment will support an application to the Board for leave to construct the line.⁵⁰

⁴⁶ TransCanada's Firm Transportation New Capacity Open Season for 2015/2016, Supplementary Motion Record, Tab 11.

⁴⁷ Union's Answer to Board Staff Interrogatory No. 1, Motion Record, Tab 11, pp. 146-47; Transcript from the Technical Conference (Day 1), p. 121, lines 15-17, Motion Record, Tab 18, p. 316.

⁴⁸ Transcript from the Technical Conference (Day 1), p. 117, lines 18-28, p. 118, lines 1-4, Motion Record, Tab 18, pp. 312-13.

⁴⁹ Transcript from the Technical Conference (Day 1), p. 119, lines 11-13, p. 132, lines 12-22, Motion Record, Tab 18, pp. 314, 327.

⁵⁰ Union's Answer to Board Staff Interrogatory No. 7, Motion Record, Tab 12, p. 182.

50. If approvals are granted according to the expected schedule, the Albion-Maple pipeline is expected to be in service by November 1, 2015,⁵¹ and in any event by no later than November 1, 2016.⁵²

51. A map showing an aerial view of the proposed routing for the Albion to Maple pipeline is included at Tab 20 of the Motion Record.

Union and Gaz Métro Require Access to Segment A

52. However, even if Union builds from Albion to Maple, Union and Gaz Métro require access to Segment A in order to complete the link between Parkway and Maple.⁵³

53. There is no legitimate impediment to Enbridge providing access to Segment A to Union and Gaz Métro.

54. If Union were to build a pipeline from Parkway to Maple, the portion from Bram West to Albion would run parallel to Segment A, on the same right of way along the 407 highway corridor. In Union's respectful view, it would make little sense, and would be an inefficient use of infrastructure, for the Province of Ontario to have two large-diameter, high-pressure pipelines built within the same corridor in close proximity to one another.⁵⁴

55. Indeed, the most efficient use of infrastructure would be to have one pipeline linking Bram West to Albion that meets the needs of all customers. That objective would best be achieved by permitting Union, Gaz Métro and any other interested shipper open access to Segment A.

⁵¹ Transcript from the Technical Conference (Day 1), p. 120, lines 6-10, Motion Record, Tab 18, p. 315.

⁵² Transcript from the Technical Conference (Day 1), p. 124, lines 25-28, p. 136, lines 5-10, Motion Record, Tab 18, pp. 319, 331.

⁵³ Transcript from the Technical Conference (Day 1), p. 116, lines 5-17, p. 120, lines 18-22, p. 125, lines 22-28, Motion Record, Tab 18, p. 311, 315, 320.

⁵⁴ Transcript from the Technical Conference (Day 1), p. 123, lines 11-28, p. 124, lines 1-2, Motion Record, Tab 18, pp. 318-19; Transcript from the Technical Conference (Day 2), p. 38, lines 16-28, p. 39, lines 1-15, Motion Record, Tab 19, pp. 379-80.

PART III - ARGUMENT

56. The first issue in this motion is whether STAR applies to Segment A. Union and Gaz Métro submit that it does.

57. The second issue is how the Board should proceed after it determines whether STAR applies to Segment A. Union and Gaz Métro submit that, regardless of whether STAR applies to Segment A, the Board should refuse to further consider Enbridge's motion for leave to construct the GTA Project until it holds an open season in respect of Segment A.

First Issue: STAR Applies to Segment A

Background to Adoption of STAR

58. STAR came into force on June 16, 2010. The Board adopted STAR following an extensive consultation process, pursuant to its power to make rules establishing conditions of access to natural gas transmission services provided by gas transmitters.⁵⁵

59. A key purpose of STAR is to establish operating requirements to ensure open and non-discriminatory access to gas transportation services.⁵⁶ As Board Staff set out in its discussion paper issued during the consultation process that led to the adoption of STAR, one of the objectives of STAR is to ensure that access to gas transportation services is provided to all potential customers on a non-discriminatory basis.⁵⁷ One of the reasons why non-discriminatory access to transportation services is so important, as Board Staff recognized, is to continue to encourage the liquidity of the Dawn Hub to the benefit of Ontario.⁵⁸

⁵⁵ *Ontario Energy Board Act*, S.O. 1998, c. 15, Sched. B, s. 44(1)(d).

⁵⁶ STAR, section 1.1.1, Motion Record, Tab 2, p. 14.

⁵⁷ Board Staff Discussion Paper, pp. 5, 7, Supplementary Motion Record, Tab 6.

⁵⁸ Board Staff Discussion Paper, p. 15, Supplementary Motion Record, Tab 6.

60. The objectives of STAR are consistent with the objectives of the Board in relation to gas, which include:

- (a) to facilitate competition in the sale of gas to users;
- (b) to protect the interests of consumers with respect to prices and the reliability and quality of gas service;
- (c) to facilitate the rational expansion of the transmission and distribution system;
and
- (d) to facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.⁵⁹

61. STAR furthers the objectives of the Board in relation to gas by ensuring the appropriate and “rational expansion” of gas transmission systems taking into consideration the needs of all interested parties and enabling the right-sizing of proposed pipelines by way of open seasons.

STAR Applies to Segment A

62. STAR applies to Enbridge in relation to Segment A, because Segment A is a transmission pipeline.

63. STAR applies to all natural gas transmitters that are legally permitted to do business in Ontario.⁶⁰ “Gas transmitter” is defined as a “person who provides transportation services pursuant to the Act, other than gas distribution services as defined in the *Gas Distribution Access Rule*” (“GDAR”).⁶¹ GDAR defines “gas distribution services” as “services relating to the

⁵⁹ *Ontario Energy Board Act*, S.O. 1998, c. 15, Sched. B, s. 2.

⁶⁰ STAR, section 1.5.1, Motion Record, Tab 2, p. 6.

⁶¹ STAR, section 1.2.1, Motion Record, Tab 2, p. 4.

distribution of gas to a consumer”.⁶² It follows that anyone who transports gas other than for distribution to consumers is subject to STAR.

64. As stated above, there is no dispute among the parties that Segment A is a transmission pipeline, as Enbridge will use it to transport gas for TransCanada other than for distribution to Enbridge’s consumers.⁶³

65. Enbridge is therefore subject to the requirements of STAR in respect of Segment A.

STAR Requires that Enbridge Hold an Open Season for Segment A

66. STAR clearly requires that new capacity that becomes available as a result of the construction of a new pipeline or the expansion of an existing pipeline be offered to all potential shippers on a non-discriminatory basis by way of an open season.

67. At section 2.1.2 STAR provides that:

Firm transportation service that becomes available as a result of a facility expansion (i.e., new capacity) shall be offered through an open season. Existing capacity that is available or will become available for long-term firm transportation service shall be offered through an open season.⁶⁴

68. “Firm transportation service” is defined as “service that is not subject to curtailment or interruption.”⁶⁵

69. Segment A is a new facility that offers firm gas transportation service to TransCanada from Bram West to Albion.⁶⁶ Enbridge is therefore required to offer capacity available on

⁶² GDAR, section 1.2.1, Supplementary Motion Record, Tab 5.

⁶³ Transcript from the Technical Conference (Day 1), p. 23, lines 20-28, p. 24, line 1, Motion Record, Tab 18, pp. 276-77.

⁶⁴ STAR, section 2.1.2, Motion Record, Tab 2, p. 18.

⁶⁵ STAR, section 1.2.1, Motion Record, Tab 2, p. 15.

⁶⁶ Memorandum of Understanding between Enbridge and TransCanada, Schedule D, Tab 25, p. 456; Transcript from the Technical Conference (Day 1), p. 12, lines 4-10, Motion Record, Tab 18, p. 265.

Segment A to other potential shippers by way of an open season. It cannot contract out of this obligation.

Second Issue: The Board Should Stay the GTA Project Pending an Open Season

70. In Union and Gaz Métro's submission the Board should refuse to further consider Enbridge's application for leave to construct the GTA Project pending the holding of an open season. The Board should therefore stay the GTA Project even if it finds that STAR does not apply in respect of Segment A.

71. Union and Gaz Métro request this relief in accordance with the Board's general power to determine its own process and its broad discretion in relation to the granting of leave to construct, and not as a compliance matter under Part VII.1 of the Act.⁶⁷

Open Season Intended to Ensure Non-Discriminatory Access to Transportation Services

72. As discussed above, STAR codifies the principle that new gas transportation capacity should be offered by way of open season to ensure the non-discriminatory access to capacity by all potential shippers and the right-sizing of pipelines.

73. Indeed, the holding of an open season in relation to new capacity furthers the Board's objectives in relation to gas by ensuring the appropriate and rational expansion of transmission systems, taking into consideration the needs of all potential shippers.

74. But the principle that access to gas transportation services should be offered on a non-discriminatory basis is not dependent upon the application of STAR. As Enbridge stated during the STAR consultation process, "EGD agrees with the starting premise of the Discussion Paper that all customers must have non-discriminatory access to transportation services regardless of whether they purchase storage services."⁶⁸ Union's submissions during the STAR consultation process reflected the long-standing application of the principle of non-discriminatory access to

⁶⁷ *Ontario Energy Board Act*, S.O. 1998, c. 15, Sched. B, Part VII.1.

⁶⁸ Enbridge's Comments on Board Staff's Discussion Paper in EB-2008-0052 STAR, p. 3, Supplementary Motion Record, Tab 8.

transportation services. In its submissions, Union made clear that it has been offering long-term firm transportation services on a non-discriminatory basis via open seasons since 1989 because it has always been in Union's interest to provide capacity when capacity is available.⁶⁹

75. Enbridge's refusal to hold an open season in respect of Segment A, and its reservation of the excess capacity on Segment A for TransCanada's exclusive use, is in direct violation of both the letter and the spirit of STAR, and of the pre-existing market rules in place when STAR was adopted. Enbridge and TransCanada are engaging in the very behaviour that STAR was designed to prevent.

76. Only by holding an open season will access to Segment A be available to all potential shippers on Segment A, including TransCanada, Union and Gaz Métro, on a non-discriminatory basis. As described above, access to Segment A would allow Union and Gaz Métro to achieve security of supply and gas cost savings for their customers as described above. It would also continue to encourage the liquidity of the Dawn Hub by providing an additional access route for other shippers between the Dawn Hub and TransCanada's Mainline, via Union's planned Parkway West station. Until it holds an open season, Enbridge cannot know what the projected demand for capacity along Segment A will be, although it is clear that capacity is required at least by Union and Gaz Métro.

Open Season Is Essential To Determining Appropriate Pipe Size

77. It is also critical for Enbridge to hold an open season in respect of Segment A so that an appropriate pipe size can be determined. Without an open season, the Board cannot possibly determine whether the NPS 36 pipe size that Enbridge and TransCanada agreed to use is in fact the appropriate size to meet the demand for capacity between Bram West and Albion.

78. At the Technical Conference, Enbridge agreed that one of the benefits of holding an open season is that an open season provides an indication of the market demand for transportation on a particular route.⁷⁰ Board Staff is also of the view that open seasons are the preferred method for

⁶⁹ Union's Comments on Board Staff's Discussion Paper in EB-2008-0052 STAR, pp. 3, 6-8, Supplementary Motion Record, Tab 7.

⁷⁰ Transcript from the Technical Conference (Day 1), p. 22, lines 16-20, Motion Record, Tab 18, p. 275.

determining appropriate pipe size. In a presentation to stakeholders during the STAR consultation process, Board Staff noted that, under the United States Federal Energy Regulatory Commission's ("FERC") rules, the holding of open seasons is the preferred way to show need for new facilities.⁷¹ Staff also noted that it saw merit in adopting an approach to open seasons consistent with the FERC rules.⁷²

79. The holding of an open season is critical to determining the size of the pipe that will be sufficient to meet the existing and incremental capacity requirements of all the potential users of Segment A, including Union and Gaz Métro.

The GTA Project Should be Stayed Pending an Open Season

80. In light of the above, the Board should refuse to further consider Enbridge's application for leave to construct the GTA Project until Enbridge has held an open season in respect of Segment A. It should do so regardless of whether STAR applies in respect of Segment A.

81. The Board has broad discretion in deciding whether to approve the construction of a new pipeline.⁷³ The Board also has broad powers to control the process it adopts in leave to construct proceedings. Rule 4.01 of the Board's *Rules of Practice and Procedure* provides that the Board may *at any time in a proceeding* make orders with respect to the procedure and practices that apply in the proceeding, and that all parties must comply with all applicable procedural orders. In accordance with rule 5.01, where a party fails to comply with a procedural order, the Board may grant the relief it considers appropriate or adjourn the proceeding until it is satisfied that there is compliance.⁷⁴ By subsection 23(1) of the *Ontario Energy Board Act*, the Board also has broad discretion to impose conditions that it considers appropriate on any order.⁷⁵

⁷¹ Board Staff presentation, p. 8, Supplementary Motion Record, Tab 7.

⁷² Board Staff Discussion Paper, p. 9, Supplementary Motion Record, Tab 6.

⁷³ *Ontario Energy Board Act*, S.O. 1998, c. 15, Sched. B, s. 90.

⁷⁴ *Rules of Practice and Procedure*, rules 4.01 and 5.01.

⁷⁵ *Ontario Energy Board Act*, S.O. 1998, c. 15, Sched. B, s. 23(1).

82. Given Enbridge's refusal to hold an open season in respect of Segment A, the Board should exercise these broad powers in the context of Enbridge's application for leave to construct. The Board should refuse to further consider Enbridge's leave to construct application until Enbridge has held an open season. The Board may do so without making an order compelling Enbridge to comply with STAR pursuant to Part VII.1 of the Act.

83. The Board should not accede to Enbridge's request, in its answers to undertakings, that the path forward involve not the holding of an open season in respect of Segment A but negotiations among Enbridge, TransCanada, Union and Gaz Métro.⁷⁶ In establishing STAR, the Board expressly rejected informal negotiations as a mode of allocating capacity in favour of the open season process.⁷⁷ It did so because the open season process is transparent and open to all potential shippers. Only by holding an open season will the true demand for capacity on Segment A become known and non-discriminatory access be provided to all interested parties.

84. Accordingly, the Board should indicate in its decision that it will refuse to exercise its discretion to grant leave to construct Segment A until Enbridge has abided by STAR and its undertaking to the Board by holding an open season. The Board may do so by staying the GTA Project until an open season is held.

⁷⁶ Enbridge's answer to undertaking JT1.2 in EB-2012-0451, p. 3, Motion Record, Tab 21, p. 389.


⁷⁷ Board's Notice of Issuance of a New Rule (STAR), pp. 3-4, Supplementary Motion Record, Tab 10.

PART IV – ORDER REQUESTED


85. On this first phase of the motion, Union and Gaz Métro request an order declaring that STAR applies to Segment A.

86. With respect to the second phase of the motion, Union and Gaz Métro submit that the Board should refuse to further consider Enbridge’s leave to construct application until Enbridge has held an open season in respect of Segment A. It should stay the GTA Project pending the holding of an open season. The Board should do so regardless of whether it finds that STAR applies.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



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