

## ENERGY PROBE INTERROGATORY #2

### INTERROGATORY

Issue 1 – New Business Activities

Ref: Exhibit B / Tab 1 / Schedule 1 / p. 4 #11 and 12

Preamble: Energy Probe wishes to understand the legislative/regulatory framework for this application.

- a) Please provide in tabular format, the sections of the Act, Rules, Guidelines, legislative and other regulatory requirements that pertain to the specific relief requested in this application. Provide evidentiary references that relate to each.
- b) Specifically, please provide a detailed explanation why and how the Board's objects for rational expansion of the natural gas distribution, storage and transmission system apply to each of
  - i) The RNG Enabling Program and
  - ii) The Geothermal Energy Services Program
- c) Please explain, for each of these proposed activities how it fits within the Board's mandate to regulate monopoly natural gas supply and distribution services.

### RESPONSE

- a) to c) This response explains key reasons why the Board has the necessary jurisdiction and authority to approve Enbridge's proposal to include the assets, revenues and costs associated with the RNG Enabling Program and the Geothermal Energy Services Program as part of the regulated utility, and to approve fees, charges or rates for these activities. As explained on the following pages, the key provisions of the OEB Act that Enbridge relies upon are sections 2 (objectives) and 36 (ratemaking). The Company also relies upon the Board's Cap and Trade Framework for Natural Gas Utilities and RRFE, and the Government's 2017 LTEP and climate change initiatives.

In this answer, Enbridge has endeavoured to be responsive to the numerous interrogatories asked on this topic. However, given the relatively short time available, and the fact that interrogatory responses are not ideally suited to legal and policy submissions, Enbridge requests the opportunity to make further submissions

about this topic before the Board makes any preliminary or final determination on any associated issue(s).

In 2006 and 2009, the Undertakings between the Province and Enbridge were amended to enable, inter alia, Enbridge to provide services that would assist the Government of Ontario in achieving its goals in energy conservation. This included the promotion of cleaner energy sources, alternative energy sources and renewable energy sources.

Based on *the Climate Change Mitigation and Low-carbon Economy Act, 2016* (“Climate Change Act”), the Natural Gas Utilities are under a legal obligation to account for and cover their emissions (including the emissions of most of their customers) through the procurement of financial instruments as a requirement of the Cap and Trade program. The Board in its Cap and Trade Framework, outlines several ways in which the utilities may propose to meet their Cap and Trade obligations which includes in addition to financial instruments (e.g., allowances, offsets): customer abatement (e.g., renewable natural gas (“RNG”), energy efficiency, fuel switching such as geothermal, new technologies), and facilities abatement (e.g., distribution system upgrades).

It is clear to the Company that decarbonizing gas utility service is now an inherent component of utility business, resulting from the Board’s statement that that responsibility for GHG emissions related to gas delivery is an *“ongoing business obligation of a natural gas distributor under the Climate Change Act”*<sup>1</sup> and *“part of the Utilities’ cost of providing distribution service similar to other delivery costs.”*<sup>2</sup>

There are several regulatory and legal precedents recognizing that the Board’s rate setting power under section 36 of the OEB Act is broad, and that it must be determined and applied with reference to the Board’s objectives as well as Government and public policy. This is seen from the majority decision in Enbridge’s 2007 rate case (in relation to the issue of rate affordability programs)<sup>3</sup>, and in the majority decision regarding the subsequent appeal to the Divisional Court (the ACTO case).<sup>4</sup>

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<sup>1</sup> Cap and Trade Framework for Natural Gas Utilities – Early Determination regarding Billing of Cap and Trade Related Costs and Customer Outreach - File No.: EB-2015-0363, page 5.

<sup>2</sup> Cap and Trade Framework for Natural Gas Utilities – Early Determination regarding Billing of Cap and Trade Related Costs and Customer Outreach - File No.: EB-2015-0363, page 6

<sup>3</sup> EB-2006-0034, Decision- Rate Affordability Programs, April 26, 2007 (the OEB Rate Affordability Programs Decision).

<sup>4</sup> *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 CanLII 23487 (ON S.C.D.C.) (the ACTO case).

In the Ontario Energy Board Rate Affordability Programs Decision in Enbridge's 2007 rate case, the majority noted that:

The Board was created and made operational through legislation. The Board has a responsibility to operate to the full depth and breadth of the authority granted to it in its governing statute. The limits or boundaries of its authority need not, nor should, be a bright line. This would require near unachievable foresight by the legislators to consider all of the possible eventualities. The objectives provided in the [OEB] Act are intended to be broad enough to allow the Board to operate with discretion in an ever changing environment and focused enough to ensure that the Board operates within the government's policy framework. Determinations on jurisdiction should be guided solely by the question of what can reasonably be considered to have been intended by the legislators in the scoping and crafting of the Board's mandate. There should be no predestining bias based on a desire by the regulator to include or exclude any particular issue.<sup>5</sup>

The OEB's majority decision was appealed to the Divisional Court. Although the Divisional Court did not agree with the OEB's majority decision in Enbridge's 2007 rate case, the Court did not disagree with the OEB's view of the importance of considering its statutory objectives when considering the scope of the Board's jurisdiction. In the Divisional Court's reasons allowing the appeal of the Board decision (the ACTO case), the majority indicated that:

...[T]he legislation involves economic regulation of energy resources, including setting prices for energy which are fair and reasonable to the distributors and the suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy.<sup>6</sup>

From these passages, it is clear that when considering its own jurisdiction and setting rates, it is appropriate for the Board to take its statutory objectives as well as public policy into account. As a result of public policy, it is also now clear that the economic regulation of energy resources includes the cost of carbon associated with current and future energy consumption.

The Board highlighted the importance of "*Public Policy Responsiveness*" in the Renewed Regulatory Framework (which applies to gas distributors as well as electricity utilities), noting this as one of the four outcomes to be achieved by distributors.<sup>7</sup>

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<sup>5</sup> OEB Rate Affordability Programs Decision, at page 5.

<sup>6</sup> ACTO case, at para. 35, quoting from *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2005), 75 O.R. (3d) 72, [2005] O.J. No. 756 at para. 24.

<sup>7</sup> Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach, October 18, 2012, at page 6.

More recently, the Board has recognized its responsibility to take public policy into account in its draft Framework for the Assessment of Gas Distributor Gas Supply Plans, issued April 12, 2018. In this document the Board has identified three principles to guide it in its consideration of utility gas supply plans that are “consistent with its legislative mandate”, one of which is to ensure that gas supply plans are “*aligned with public policy in relation to climate change and expansion of natural gas service where appropriate*”.<sup>8</sup>

The 2017 LTEP sets out the Government’s energy policies and plans for the coming years, and “builds on the province’s leading role in the global fight against climate change”. The 2017 LTEP includes a number of plans and initiatives to encourage innovation and new technologies, and assist in meeting climate change goals. Several of these are directly relevant to this Application, including:

- A direction to build a “*culture of innovation*” in the energy sector and look for ways to allow utilities to make non-traditional and “non-wires” investments and work with customers in scenarios where each party owns part of an energy system.<sup>9</sup>
- A plan to have RNG become part of the Ontario supply mix: “*Ontario is looking at using renewable natural gas to lower the carbon intensity of the natural gas that people burn. .... As an added benefit, it can use the existing natural gas distribution system and replace the use of conventional natural gas in today’s stoves and furnaces.*”<sup>10</sup>
- A goal to increase the number of geothermal energy systems used for low carbon space and water heating in homes and buildings across Ontario. The 2017 LTEP indicates that “*Natural gas will continue to play a critical role in space and water heating, but we must use it as efficiently as possible and supplement it with the next generation of clean energy technologies, such as ground-source and air-source heat pumps. Proceeds from cap and trade auctions will help fund the further application of these technologies.*”<sup>11</sup>

It is clear from the LTEP, that government policy encourages supplementing natural gas use with the adoption of efficient technologies with a lower carbon footprint.

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<sup>8</sup> Draft Report of the Ontario Energy Board - Framework for the Assessment of Distributor Gas Supply Plans, page 6.

<sup>9</sup> Ontario’s Long-Term Energy Plan 2017: Delivering Fairness and Choice (“2017 LTEP”), at pages 69-70.

<sup>10</sup> 2017 LTEP, at page 114.

<sup>11</sup> 2017 LTEP, at pages 109 and 115.

The Company's proposal creates a pathway for the Board to approve geothermal and RNG services that further the Government's climate change and clean energy policy and priorities.

There are seven objectives set out in section 2 of the OEB Act that apply when the Board carries out its responsibilities in relation to gas. The third of these objectives is as follows:

To facilitate rational expansion of the transmission and distribution systems.

The Board has provided guidance on many occasions on how to assess the rational expansion of distribution systems, such that new customers do not create an undue burden on existing customers. Because of the desire to limit absolute carbon emissions, market transformation initiatives such as geothermal and the RNG enabling services reduce the burden of escalating carbon prices on existing customers from the expansion of distribution systems to serve future customers. These programs do so by managing total emissions associated with current and future customers that would otherwise have chosen natural gas for home heating. In addition, these services also adhere to EBO 188 guidelines by requiring a profitability index of 1.0 or greater to ensure no undue cross subsidy from existing gas rate payers to the users of these services.

The fifth of the Board's objectives as it relates to gas is as follows:

To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

It is important to note the use of the word "energy" in this statutory objective. The wording of the objective does not refer to "gas" conservation or "gas" efficiency; it refers to "energy" in both contexts, namely, conservation and efficiency. In order for the Board to give due consideration to the most efficient utilization of energy resources, as well as to conservation of energy, it must be the case that the Board has jurisdiction to approve, in a gas utility proceeding, abatement initiatives such as those proposed by Enbridge.

The fact that the Board should take a broad view of its ratemaking powers can also be seen in the Board decision in an NRG case considering contributions in aid of construction (CIAC).<sup>12</sup> In that decision, the Board confirmed that it can approve charges under section 36 of the OEB Act even where those charges do not lend themselves to fixed charges within a rate tariff. This is consistent with the wide

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<sup>12</sup> EB-2012-0396 Decision with Reasons, February 7, 2013.

definition of “rate” found in the OEB Act.<sup>13</sup> The following excerpt from the Board’s decision in the NRG proceeding makes clear that utilities charge many rates (in the form of CIAC) that are not individually approved by the Board:

The Board recognizes that, as a practical matter, the setting of a rate for a capital contribution cannot be conducted in the same manner as the rates set out in a utility’s rate tariff. The amount owing for any capital contribution is fact specific, and will be different depending on the capital costs of the assets and the revenues that the utility is expected to receive through ordinary rates. The need for a capital contribution may arise at any time, and seldom will be the case where the timing allows the Board to review the proposed contribution through a routine rate case. Indeed many projects requiring capital contributions (especially in the electricity sector) will not even be attached to a leave to construct. Under these circumstances the Board has established the formula for calculating the capital contribution. In cases where the parties cannot agree on the appropriate amount (which are rare), the Board will intervene to settle the dispute and ensure that a just and reasonable rate is established.<sup>14</sup>

All of the items described above point in favour of the Board taking a broad view of its ratemaking powers, to include charges associated with abatement programs where such activities are aimed at reducing the Company’s overall compliance obligations. Taken together, these items lead to the conclusion that the Board has jurisdiction under the provisions of the OEB Act to allow Enbridge to conduct abatement activities such as geothermal energy services and RNG enabling programs within the regulated utility.

Finally, Enbridge asserts that even if the Board should find that it does not have express jurisdiction to permit including the abatement activities described in this application within the regulated utility, this should be permitted under the doctrine of necessary implication. The seminal decision of the Supreme Court of Canada in *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*<sup>15</sup> addressed the approach to statutory interpretation that is to be taken in determining the jurisdiction of a regulatory tribunal. The Court made clear that a tribunal’s jurisdiction is not limited to the powers explicitly conferred by the governing legislation. Rather, as stated by the Supreme Court, “the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime”. This is the doctrine of jurisdiction by necessary implication.

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<sup>13</sup> The definition of “rate” in section 3 of the OEB Act is “a rate, charge or other consideration and includes a penalty for late payment.”

<sup>14</sup> EB-2012-0396 Decision with Reasons, February 7, 2013, at page 15.

<sup>15</sup> *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006] 1 S.C.R. 140 (S.C.C.).

Under the doctrine of necessary implication, the Board has, in addition to its express mandate, all powers that are practically necessary for the accomplishment of the object intended to be secured by the statutory regime. The object intended to be secured by the statutory regime is the regulation of energy matters. The statute guides the Board to regulate in accordance with the public interest and public policy. Specific mention is made of energy efficiency and conservation. The clear intent of Ontario Government public policy is to encourage carbon abating activities, with specific mention and support being given to RNG adoption and geothermal systems for homeowners. Taking all of this together, Enbridge asserts that the doctrine of necessary implication provides the Board with jurisdiction to permit a gas utility to undertake abatement programs like the RNG Enabling Program and the Geothermal Energy Services Program as abatement programs within the regulated utility.