ONTARIO ENERGY BOARD

PROPOSED AMENDMENTS TO THE AFFILIATE RELATIONSHIPS CODE FOR GAS UTILITIES

AND

PROPOSED AMENDMENTS TO THE NATURAL GAS REPORTING & RECORD KEEPING REQUIREMENTS: RULE FOR GAS UTILITIES

COMMENTS OF ENBRIDGE GAS DISTRIBUTION INC.

I. Introduction

On July 29, 2010, the Board issued a Notice under section 45 of the *Ontario Energy Board Act, 1998* (the "Act") regarding proposed amendments to the Affiliate Relationships Code for Gas Utilities (the "ARC") and the Natural Gas Reporting & Record Keeping Requirements: Rule for Gas Utilities (the "RRR"). The Board invited comments on the proposed amendments to the ARC and the RRR and its Notice stated that such comments must be filed by September 17, 2010. These are the comments of Enbridge Gas Distribution Inc. ("Enbridge") filed in response to the Board's Notice.

II. Comments on Proposed ARC Amendments

Enbridge supports the direction taken in the proposed ARC amendments and offers two specific suggestions for changes. Enbridge agrees with the Board that it is appropriate to frame the rules governing affiliate relationships to avoid inappropriate incentives favouring either utility-owned business arrangements or affiliate-owned arrangements.

Enbridge's two specific comments arise from the proposed changes to sections 1.6 and 2.4.1 of the ARC.

The first relates to an apparent, and perhaps inadvertent, reduction in the requirements for notice and consultation in connection with any proposed amendments to the ARC. Sections 45 and 46 of the Act contain important provisions regarding notice and the opportunity for comment when the Board proposes to amend the ARC. There can be no doubt that these provisions of the Act prevail over any wording used in the ARC. This is

currently recognized in section 1.6 of the ARC, which deals with amendments to the ARC and which states that amendments may be made only in accordance with sections 45 and 46 of the Act.

The Board's Notice states that the Board is taking this opportunity to "update" section 1.6 with respect to the coming into force of amendments and with respect to determinations made by the Board under the ARC. Enbridge has no comment on the proposed changes to section 1.6 in the two areas that are referred to in the Board's Notice. As well, though, the proposed amendments remove from section 1.6 the statement that amendments may only be made in accordance with sections 45 and 46 of the Act.

Enbridge assumes that the proposal to remove the reference to sections 45 and 46 from section 1.6 of the ARC is not intended to affect in any way the procedure that the Board follows when an amendment to the ARC is proposed. Rather, Enbridge assumes that this change has been included in the "update" to section 1.6 only because the Board now considers it to be redundant to refer to sections 45 and 46 of the Act in section 1.6. Unfortunately, though, there is nothing in the Board's Notice to confirm this assumption or to address this particular aspect of the proposed changes to section 1.6. Enbridge respectfully requests that the Board clarify the reason for the proposal to remove the reference to sections 45 and 46 of the Act from section 1.6 of the ARC. Enbridge holds very strongly to the view that the requirements for notice and consultation are critical and should be clearly stated and understood to avoid future issues.

Section 2.4.1 of the ARC currently states, in part, that a utility shall not invest in the securities of an affiliate, nor provide guarantees or any other form of financial support, if the amount of support or investment, on an aggregated basis over all transactions with all affiliates, would equal an amount greater than 25 percent of the utility's total equity (the "Basic Investment Cap"). The proposed amendments to the ARC increase the Basic Investment Cap above the 25 percent level in certain circumstances. In the case of an affiliate that owns and operates one, or more than one, "qualifying facility", but also conducts other business activities, the proposed section 2.4.1A increases the Basic Investment Cap to 35 percent of the utility's total equity.

The proposed section 2.4.1B contains further provisions that apply in the case of an affiliate whose sole business activity is the ownership and operation of qualifying facilities. In these circumstances, the proposed section 2.4.1B says that the utility's investment or financial support may be in any amount, provided that the total investments and financial support over all transactions with all affiliates does not exceed 100% of the utility's total equity (the "Enhanced Investment Cap"). Enbridge supports the Board's proposal to introduce this Enhanced Investment Cap.

Enbridge also supports the increase in the Basic Investment Cap from 25 percent to 35 percent as set out in the proposed section 2.4.1A, but it recommends that the Board raise the limit in section 2.4.1A beyond 35 percent to 50 percent of total equity. For

Enbridge's specific circumstances, the proposed Basic Investment Cap of 35 percent would allow it to finance approximately 8 to 10 qualifying facility projects, while a Basic Investment Cap of 50 percent would allow 20 to 25 projects to be financed. Enbridge believes that this higher number of projects is much more in line with the expectations of the Ontario government and that, at the same time, a 50 percent Basic Investment Cap would continue to ensure that the financial stability and integrity of the utility is maintained, with no potential negative impact on ratepayers.

Enbridge therefore respectfully asks the Board to consider whether the increase from 25 percent to 35 percent of total equity allowed by section 2.4.1A is a sufficiently meaningful step towards the overall objectives of the proposed ARC amendments. Given that, under the proposed amendments, the Enhanced Investment Cap is 100% of total equity when the utility invests in an affiliate whose sole business is the ownership and operation of qualifying facilities, it is not at all clear to Enbridge why the Basic Investment Cap should be limited to 35 percent in circumstances where the only difference is that the particular affiliate happens to have some other business activity. Everything else being equal, Enbridge suggests that, if aggregate financial support can reach 100% of total equity when an investment is made in an affiliate whose sole business is ownership and operation of qualifying facilities, then aggregate financial support of 50% of total equity is a reasonable level for the Basic Investment Cap when the particular affiliate owns and operates qualifying facilities and also has some other business activity.

Enbridge understands that the Basic Investment Cap for electricity distribution utilities with affiliates that own one or more qualifying facilities is 35 per cent of the distributor's total equity. Enbridge notes, however, that there are approximately 80 electricity distribution utilities regulated by the Board and that the size and scale of these utilities varies widely. In contrast, the two gas distribution utilities that have been permitted by the Ontario government to own and operate qualifying facilities, Enbridge and Union Gas Limited ("Union"), are both of a relatively large size and scale, with very widespread franchise areas. It is to be expected that, in comparison to many of the electricity distributors, the opportunities for qualifying facilities potentially available to Enbridge and Union will be relatively larger in number, size and scale.

III. Comments and Concerns Regarding Proposed RRR Amendments

Enbridge has serious concerns about the proposed amendments to the RRR relating to advance notice requirements and it respectfully requests that the Board modify the proposed changes to sections 2.1.16 and 2.1.17 of the RRR in the manner set out below.

Section 2.1.16 of the amendments to the RRR states that a utility that proposes to acquire the ownership of, or to construct, a qualifying facility, shall provide notice of its intention to do so no less than 60 days before the scheduled closing of an acquisition or the scheduled commencement of construction. Section 2.1.17 states that a utility that

proposes to invest in, or provide guarantees or any other form of financial support to, an affiliate in an amount that, on an aggregated basis across all affiliates would equal an amount that exceeds 35% of the utility's total equity, shall provide no less than 60 days notice of its intention to do so.

Enbridge submits that the provision of notice at least 60 days in advance of closing of a transaction is problematic, and potentially a barrier to a successful transaction, primarily because such business dealings are highly confidential and their outcome is uncertain. It is Enbridge's experience that parties to a pending transaction are often uncertain about the terms of an agreement, or more importantly, whether they will even reach an agreement, until the final version of the agreement is executed. To put this into a "regulatory framework", the proposed advance notice requirements are roughly equivalent to asking a utility in a rate application to notify the Board 60 days in advance of a proposal to enter into a Settlement Agreement with its stakeholders and to give some indication of the nature of the agreement.

Not only is it very difficult to predict a successful business relationship in advance of reaching an agreement, an advance notice requirement could potentially have a detrimental effect on commercial negotiations. Enbridge expects that counterparties would be deterred by a requirement that notice be given of transactions that are still under negotiation, particularly when the parties to any potential transaction would have no idea of what the Board intends to do with the information and how the Board would make any use of the information in a way that maintains confidentiality.

This point highlights a fundamental concern, which is that Enbridge does not know why the Board needs this information and what the Board could possibly do with highly confidential advance notice of a potential transaction once the information is received. The gas utilities are not subject to any prior approval requirement such as the provisions of section 80 of the Act that apply to electricity transmitters and distributors and their affiliates. Enbridge therefore respectfully urges the Board to give careful consideration to whether it has any need for the filing of commercially sensitive information about potential, but uncertain, transactions involving the gas utilities. In this regard, the Board might consider questions such as the following:

~ Would the Board analyze the information in any way and, if so, what could the Board possibly do with the results of such analysis?

~ Would the Board undertake any internal investigation and, if so, to what end?

~ Who might learn about this confidential information during the course of any such analysis or investigation by the Board?

~ If, as is very likely to be the case, the Board were to do nothing with the information, is this to be taken as a tacit acknowledgment in respect of the ultimate transaction?

~ If, on the other hand, the Board were to contemplate that it might take some action as a result of receiving information about a potential transaction, what would be its authority to do so?

~ If the Board decided to take some action, would this not entail risk of public disclosure of confidential information and what role would interested parties play?

~ How could the Board possibly take action on the basis of the information in a way that would maintain the complete confidentiality of the particular transaction and that would not put a damper on future transactions by raising concerns about the risk of disclosure of highly confidential information?

~ And, if the Board were to decide to take some action, how effective or meaningful is that action likely to be, given that the Board would have been given 60 days advance notice of an uncertain negotiation that may have changed direction or may have been terminated unsuccessfully?

Enbridge submits that considerations such as these reveal that the Board does not have a real need for the advance notice that is provided for in the proposed sections 2.1.16 and 2.1.17 of the RRR. Given that there is no real need for the information, Enbridge's concerns about providing advance notice of a confidential negotiation take on a heightened importance.

Confidential treatment of information relating to a contemplated business transaction is essential to enable a thorough exchange of sensitive commercial information needed for parties to conduct due diligence. Enbridge is vitally concerned about any unintended or otherwise inappropriate disclosure of such confidential information for competitive reasons, in that competitive third parties may use the information for their own advantage. While the Board's Notice does not indicate whether filings under the proposed sections 2.1.16 and 2.1.17 of the RRR would be available for review by the public, it seems that, at a minimum, a freedom of information request could be made in respect of notices that have been filed with the Board.

The appropriate manner of disclosure of information about material transactions by a reporting issuer is, of course, governed by securities law. To the extent that a transaction to be reported pursuant to the proposed RRR amendments is "material" either for Enbridge or for another party to the transaction, Enbridge is concerned that the proposed RRR amendments are inconsistent with securities law requirements. Securities law requires public disclosure of a "material change", but such notice is not provided unless there is a high level of certainty about the change, or the transaction has already occurred. Although public notice might be given before a transaction has closed, it would likely not be given at least 60 days in advance of the transaction closing.

Enbridge also invites the Board to consider a situation where, because of the 60 day requirement, notice of a particular transaction is given, but, for whatever reason, negotiations thereafter gradually move in a different direction. In these circumstances, the original notice could lead those with access to it to the wrong conclusion. Because the notice would contain information that could lead others to the wrong conclusion, it may well prove to be the case that it would have been better had the notice never been provided.

For these reasons, Enbridge respectfully submits that section 2.1.16 of the proposed RRR amendments should provide for notice to be given as soon as practicable after the execution of agreements for an acquisition transaction or construction of a qualifying facility. Similarly, section 2.1.17 should provide for notice to be given after the making of an investment or the provision of a guarantee or other form of financial support. In each case, Enbridge submits that it would be appropriate that the notice be required as soon as practicable after the triggering event, but in no event more than 60 days thereafter.

Enbridge has an additional comment about section 2.1.17 of the proposed RRR amendments. As already discussed, this section states that a utility must give notice to the Board if its financial support to affiliates on an aggregated basis will exceed 35% of its total equity. However, in certain circumstances (as set out in section 2.4.1 of the ARC and section 2.4.1A of the proposed ARC amendments), the utility's financial support to affiliates is not allowed to exceed 35% of total equity, unless the utility has obtained an exemption under section 1.6 of the ARC. This creates uncertainty about why section 2.1.17 of the proposed RRR amendments requires notice to the Board of something that the utility cannot do under sections 2.4.1 and 2.4.1A except in the case where the utility has obtained an exemption from the Board.

Enbridge assumes that section 2.1.17 is intended only to apply in circumstances where section 2.4.1B of the ARC amendments would allow a utility's financial support to affiliates on an aggregated basis to reach 100% of total equity. Presumably the intention of section 2.1.17 is to require that notice be given when, under section 2.4.1B of the proposed ARC amendments, financial support across all affiliates will exceed

35% of total equity. Enbridge respectfully requests that the Board clarify whether this assumption about the intention of paragraph 2.1.17 is correct.

All of which is respectfully submitted.

September 17, 2010.