DECISION

IN THE MATTER OF an application by Liberty Utilities (Canada) LP pursuant to Section 27(2) of the *Gas Distribution Act, 1999*, S.N.B. 1999, c. G-2.11, for an order granting leave for Liberty Utilities LP to acquire the beneficial ownership of Enbridge Gas New Brunswick Limited Partnership.

(Matter No. 433)

May 24, 2019

NEW BRUNSWICK ENERGY AND UTILITIES BOARD

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NEW BRUNSWICK ENERGY AND UTILITIES BOARD:

Chairperson:	Raymond Gorman, Q.C.
Members:	Michael Costello
	John Patrick Herron
Counsel:	Ellen Desmond, Q.C.
Chief Clerk:	Kathleen Mitchell

APPLICANT:

Liberty Utilities (Canada) LP:	Len Hoyt, Q.C.

INTERVENERS:

J.D. Irving, Limited:	Christopher J. Stewart
PUBLIC INTERVENER:	Heather Black

A. Introduction

[1] Liberty Utilities (Canada) LP, as represented by its general partner, Liberty Utilities (Canada) GP Inc. (Liberty Utilities or Applicant), applied to the New Brunswick Energy and Utilities Board (Board) on January 21, 2019 for an order granting leave for Liberty Utilities to acquire the beneficial ownership of Enbridge Gas New Brunswick Limited Partnership.

[2] Liberty Utilities is a wholly-owned subsidiary of Algonquin Power & Utilities Corp. (Algonquin), which is a Canadian-based corporation. Liberty Utilities owns and operates 27 utilities in the United States, including regulated natural gas utilities.

[3] Enbridge Gas New Brunswick Limited Partnership, as represented by its general partner, Enbridge Gas New Brunswick Inc. (EGNB) is a privately-owned utility that distributes and sells natural gas in New Brunswick. EGNB was awarded the general distribution franchise for the province in 1999. In 2016, the Government of New Brunswick passed legislation to renew EGNB's franchise agreement for a 25-year renewable term. EGNB currently provides natural gas to approximately 12,000 customers.

[4] Liberty Utilities is required, pursuant to subsection 27(2) under the *Gas Distribution Act, 1999*, S.N.B. 1999 c. G-2.11 (GDA), to apply to the Board for leave in the event it intends to acquire directly, or indirectly, 20 per cent or more of the ownership of EGNB. This subsection provides as follows:

> **Prohibition against disposal of a gas distribution system, or sale or merger of a gas utility, without leave of the Board**
>
> **27**(2) Without first obtaining an order granting leave from the Board, no person shall acquire directly or indirectly 20 per cent or more of the beneficial ownership of a gas distributor.

[5] EGNB and Liberty Utilities entered into a Securities Purchase Agreement (SPA) on December 3, 2018. Pursuant to this agreement, Liberty Utilities will acquire all of the issued and outstanding limited partnership interests of Enbridge Gas New Brunswick Limited Partnership and all of the issued and outstanding shares in its general partner, EGNB.

[6] Pursuant to the SPA, Liberty Utilities will be making this purchase for $331 million, subject to certain adjustments that will be made at the time of closing the transaction. The SPA expressly

acknowledges that approval of the Board is a pre-condition to closing the transaction and that closing will not occur until after Board approval.

[7] Liberty Utilities must also obtain the consent of the Province of New Brunswick, as represented by the Minister of Energy and Resource Development, to the change of control of EGNB and the release of any Enbridge affiliate from any and all obligations in relation to EGNB's Amended and Restated General Franchise Agreement (GFA) dated December 23, 2016. This consent has not yet been granted.

[8] In addition, *Competition Act* approval, as defined in the SPA, is also required. A No-Action letter was provided by the Competition Bureau of Canada on December 20, 2018.

[9] Liberty Utilities also requested the following relief:

(i) Board approval of the amendments to the GFA, pursuant to section 10 of the GDA; and

(ii) a determination that the transaction and consequential name changes shall not be cause for termination of EGNB's GFA pursuant to section 4.4(a)(vii) of that agreement.

[10] The Board held a pre-hearing conference on February 20, 2019 at which time a hearing schedule was confirmed.

[11] The hearing was held on May 6th in Saint John. In addition to the pre-filed evidence, Liberty Utilities presented its witness panel for cross-examination by other parties.

[12] There were two interveners registered in this Matter, namely J.D. Irving, Limited and the Public Intervener. Neither intervener filed evidence and only the Public Intervener participated at the oral hearing.

B. Issues

[13] The following issues must be considered:

1. What test should be adopted by the Board, in applying subsection 27(2) of the GDA;

2. Whether Liberty Utilities has met the requirements of this test;

3. What, if any, Board approvals are required as a result of changes to the GFA; and

4. What, if any, conditions should apply if the Board grants leave.

C. Analysis

1. What test should be adopted by the Board in applying subsection 27(2) of the GDA

[14] EGNB was granted the first provincial natural gas distribution system in New Brunswick in 1999. EGNB has been the distributor since that time, a period of almost 20 years. This is the first time the Board has considered a request under subsection 27(2) of the GDA and the Board must consider under what circumstances leave should be granted.

[15] While the *Energy and Utilities Board Act*, S.N.B. 2006, c. E-9.18 (EUB Act) provides the Board with general supervisory power with respect to the distribution of natural gas, and the Board has full jurisdiction to make orders in the public interest, both the GDA and the EUB Act are silent on the factors to be considered when determining whether to grant leave pursuant to subsection 27(2).

[16] The Applicant submits that the proper test to be applied is the "no-harm" test, which examines whether a proposed transaction will have a positive or neutral effect. If there is no harm arising from the sale of the utility, then leave should be granted. The Applicant submits that this test has been applied in other Canadian jurisdictions.

[17] This test has, in fact, been widely used both in Alberta and Ontario. The Alberta Utilities Commission (AUC) in its decision dated April 18, 2019, being decision 24105-D01-2019, articulated this test as follows:

> 39. In deciding an application for Commission approval of a transaction outside of the ordinary course of business under sections 101 and 102 of the *Public Utilities Act*, the Commission has traditionally applied a no-harm test. The Commission's predecessor, the Alberta Energy and Utilities Board (the board), in Decision 2000-41 articulated this test as follows:
>
> > ….that it should weigh the potential positive and negative impacts of the transactions to determine whether the balance favours customers or at least leaves them no worse off, having regard to all of the circumstances of the

> case. If so, then the Board considers that the transactions should be approved[35]

40. The board also determined that where harm is identified, some form of mitigation may be necessary in order for the transaction to proceed.

41. The no-harm test and the factors considered by the Commission have continued to evolve. In Decision 2014-326[36], dealing with the sale of AltaLink, L.P's transmission assets and business to MidAmerican (Alberta) Canada Holdings Corporation, the Commission provided its summary of the factors that may be considered when applying the no-harm test, and referenced previous Commission decisions discussing each of those factors.

[18] In Decision 2014-326, dated November 28, 2014, the AUC stated as follows:

> 107. In fulfilling its public interest mandate when considering applications pursuant to sections 101 and 102 of the *Public Utilities Act*, the Commission has traditionally applied a no harm test, a test which parties have identified in their submissions in this proceedings.
>
> 108. The no harm test and the factors considered by the Commission has evolved from past decisions of the Commission and its predecessors. In its September 22, 2014 ruling, the Commission referenced the overview presented by the submissions of MC Alberta. These factors have been reproduced as follows:
>
> > The first is whether there will be any impact to the rates and charges passed on to customers, and that you'll find in Decision 2005-118,[81] Decision 2004-35[82] and Decision 2011-374.
> >
> > … second, whether any operational benefit or risk arises related to the acquiring party's utility experience. That's in Decision 2005-118, 2004-35, Decision 2006-38. …
> >
> > Third, whether the financial profile of the utility will be impacted for the purposes of attracting capital. That's in Decision 2006-56, Decision 2006-38 and Decision 2011-374. Fourth, in the case of AltaLink, whether the utility will remain sufficiently legally, financially and operationally separate from the acquiring party, which is, of course, the ring-fencing provisions, code of conduct, et cetera, and that's in Decision 2006-56 and 2011-374.
> >
> > Fifth, whether the Commission will maintain sufficient regulatory oversight of the utility; Decision 2004-35, Decision 2011-374
> >
> > Sixth, whether the management and operational expertise will remain in place post transaction; Decision 2006-38, Decision 2011-374.

> Seventh, whether the transmission [*sic*] [transaction] will result in any cost impacts for customers relating to such things as tax and pension funds. And that's Decision 2000-41.
>
> And eight, that the acquiring party wishes to be in the utility business in Alberta whereas the divesting party does not. That's in Decision 2005-118, Decision 2004-5 and Decision 2006-38.[83]

109. In addition to the factors summarized by MC Alberta from past Commission and Board decisions, the no harm test must also reflects that:

- customers are, to the maximum extent possible, to be protected against any negative ramifications arising from the transactions (Decision 2006-056)[84]
- customers are not entitled to a level of post-transaction regulatory certainty they would not have realized if the transaction had not been approved. (Decision 2006-056)[85]
- customers are at least no worse off after the transaction is completed after consideration of the potential positive and negative impacts of the proposed share transactions (Decision 2011-374)[86]

110. The application of the no harm test is conducted in two stages. First, the Commission must assess whether the transaction results in harm to customers. If the Commission concludes that customers may be harmed, the Commission proceeds to the second stage of its determination and considers whether any identified harms can be mitigated through approval conditions.[87]

[19] Similarly, In Ontario, the "no-harm" test was articulated in a combined proceeding before the Ontario Energy Board. In proceeding RP-2005-0018/EB-2005-0234/EB-2005-0254/ EB-2005-0257 the Ontario Energy Board offered the following comments at pages 6 and 7 of its decision dated August 31, 2005:

> The Board believes that the "no harm" test is the appropriate test. It provides greater certainty and, most importantly, in the context of share acquisition and amalgamation applications it is the test that best lends itself to the objectives of the Board as set out in section 1 of the Act. The Board is of the view that its mandate in these matters is to consider whether the transaction that has been placed before it will have an adverse effect relative to the status quo in terms of the Board's statutory objectives. It is not to determine whether another transaction, whether real or potential, can have a more positive effect than the one that has been negotiated to completion by the parties. In that sense, in section 86 applications of this nature the Board equates "protecting the interests of consumers" with ensuring that there is "no harm to consumers".

[20] The Public Intervener also supported the use of the no-harm test. In her view, this test does serve the public interest by ensuring that the transaction will not be approved unless the evidence demonstrates there will be no harm to ratepayers.

[21] Having considered the submissions of the parties and the jurisprudence from other jurisdictions, the Board finds that the "no-harm" test is the appropriate test to be used when considering subsection 27(2) of the GDA and in a transaction of this nature.

2. Whether Liberty Utilities has met the requirements of the "no-harm" test

[22] There are a number of factors that can be considered when applying the "no-harm" test. It may be that, in any given case, some or all of these factors may apply. The Board finds the following factors to be relevant to this Application:

a. Whether there will be any impact to the rates and charges passed on to customers;

b. Operational benefits or risk that may arise as a result of the Applicant's experience;

c. Whether the financial profile of the utility will be impacted, for the purposes of attracting capital;

d. Whether the Board will continue to maintain sufficient regulatory oversight of the utility;

e. Whether the management and operational expertise that currently exists at EGNB, will remain in place, post transaction; and

f. Whether there will be any cost impacts related to such things as tax or pension obligations that will occur post transaction and that may negatively affect customers.

a. Impact on rates and charges passed on to customers

[23] Liberty Utilities does not seek to pass along to customers of EGNB either the premium above book value (i.e. good will), or the costs associated with the transaction. It states that, given its operational plans, it will be able to maintain the current cost structure.

[24] When asked specifically during cross examination about whether this transaction would have any impact on customer rates or charges, Mr. McEachran, Senior Director of

Regulatory Strategy at Liberty Utilities Canada Corp., testified that he did not think there would be any rate impacts, although rates may possibly move "slightly downward" because of reduced affiliate charges.

b. Operational benefits or risk

[25] In its evidence, Liberty Utilities states that it places a high value on system reliability, integrity and safety and that it has demonstrated this commitment in the utilities that it operates. While EGNB is a relatively new system, Liberty Utilities' stated commitment to safety and reliability will be foundational to the business as the system ages.

[26] When asked specifically about the operation of the pipelines, Liberty Utilities states that a Transition Services Agreement will be executed with EGNB, which will include an obligation for EGNB to continue providing all engineering-related support for a period of up to eighteen months. During this transition period, Liberty Utilities will have an opportunity to fully develop and implement a transfer of these responsibilities. Similarly, the technical manuals which EGNB has developed, will transition to Liberty Utilities, allowing for knowledge transfer.

[27] In addition, Liberty Utilities owns and operates 27 utilities in various states. This specific utility will become part of the East region, where it has extensive experience and has safely provided service to many thousands of customers.

c. Financial profile of the utility

[28] Liberty Utilities states that it will finance the acquisition of EGNB by using a combination of intercompany debt and equity provided by Algonquin, its parent company. It states that Algonquin is financially sound with a sound investment grade rating.

[29] Financial information related to Algonquin was provided and was the subject of both interrogatories and cross-examination. Liberty Utilities indicates, through its evidence, that it is a stable company with a history of utility operations. It has the financial means to operate the distribution company.

d. Energy and Utilities Board - Regulatory oversight of the utility

[30] It is anticipated that Liberty Utilities will have a positive and constructive regulatory relationship with the Board.

[31] The Applicant acknowledges the role of the Board and the need for oversight, and willingly agreed to continue providing reports that may assist the Board in its role.

e. Management and operational expertise

[32] Liberty Utilities states that minimal operating changes are expected. It will take advantage of its shared services model, which provides the benefit of relying on a service group with broad experience while delivering economies of scale.

[33] At the same time, the day-to-day operations of EGNB will be managed full time and exclusively by the current General Manager. It indicated that it empowers employees at the local level and uses a decentralized approach to business operations. The transition from EGNB into Liberty Utilities is designed to be seamless and there will be few changes with respect to how employees conduct their work.

f. Post-transactional cost impacts related to such things as tax or pension obligations, that may negatively affect customers

[34] During the course of this hearing, the Applicant confirmed that it did not expect any post-transactional costs that would negatively impact customers.

[35] Having considered all of these factors, the Board is satisfied that Liberty Utilities has met the requirements of the no-harm test. The Board is satisfied that, as much as may be possible, customers will be protected from any negative ramifications arising from this transaction. The Board is also satisfied that customers will be at least no worse off, after the transaction is completed.

3. What, if any, Board approvals are required as a result of changes to the GFA

[36] Liberty Utilities made two specific requests, arising from expected changes to the GFA.

[37] The first request was pursuant to subsection 10(1) of the GDA which states as follows:

Amendment of franchise agreements

10(1) After January 31, 2000, no amendment to a franchise agreement is effective unless it is in writing, has been executed by the parties and has been approved by the Board.

[38] Mr. Hoyt, counsel to Liberty Utilities, submitted that there would be amendments to the existing GFA, in the form of what will be called a Substitution Agreement and Amendment to General Franchise Agreement. The intent of this document is to confirm, in writing, the consent of the Province to the transfer and to substitute Algonquin as a guarantor in place of Enbridge Inc. Subsection 10(1) requires the Board to approve this executed amendment.

[39] Mr. Hoyt notes that while the Board does not yet have an executed agreement to consider, it was anticipated that the document would be available in the immediate future.

[40] As a result, the Board will reserve making a decision or granting an approval on this issue, until such time as the executed agreement has been filed and considered by the parties. Further direction on this issue will follow in due course.

[41] The second request relates to section 4.4(a)(vii) of the GFA, which states as follows:

4.4 Rights of Termination

(a) Upon the Board determining that any of such have occurred, the following circumstances shall be sufficient cause for the Province to give notice of termination of this Agreement to the General Franchise Holder:

(vii) if at any time during the Term there occurs any addition, deletion or change in the General Franchise Holder or any Guarantor or change in the effective control thereof or a material adverse change, financial or otherwise to any such party, and in any such event the Board determines that this Agreement should be terminated.

[42] In light of this provision, Liberty Utilities is seeking a determination from the Board that the anticipated transaction and consequential name changes shall not be cause for termination.

[43] The Board finds that such a determination is appropriate in this instance. While this transaction will result in a change in the effective control of the General Franchise Holder, Liberty Utilities has specifically requested approval from both the Province of New Brunswick and the Board. If the Province does consent to this transfer, clearly there would not be cause for termination.

[44] In these circumstances, the Board finds that the GFA is not terminated.

4. What, if any, conditions should apply if the Board grants leave

[45] While the Public Intervener did not oppose the transfer, she did suggest that the Applicant should be required to file additional information that will assist the Board in its ongoing oversight. She specifically suggested that Liberty Utilities should account for its transaction costs, file details of its corporate allocations and regularly report on safety and customer service metrics.

[46] The Board considers each of these issues to be important and it will continue to oversee them. While additional reporting will not be ordered at this time, the Board will consider including some of these items as minimum filing requirements. They will also be carefully considered in the next general rate application.

[47] There are however, other conditions that are necessary and will apply in this instance.

D. Conclusion

[48] Having considered all of the evidence in this matter, the Board does grant leave pursuant to subsection 27(2) of the GDA, on the following conditions:

a. The transaction is approved, subject to Liberty Utilities obtaining the consent of the Province of New Brunswick.

b. The leave shall expire three months from the date of this Decision. If the transaction has not been completed by that date, or the Board has not extended this leave in writing, a new application will be required in order for the non-completed transaction to proceed.

c. All regulatory approvals and orders, previously issued to EGNB, will continue to apply to Liberty Utilities.

d. Notice of completion of the transfer shall be promptly given to the Board.

e. Immediately thereafter, all permits and licenses should transfer to Liberty Utilities and in the event new permits or licenses are required, the Chief Clerk is directed to prepare the same.

f. Proof of insurance is to be provided immediately to the Board.

g. Reporting requirements, as they currently apply to EGNB, will continue to apply to Liberty Utilities once the transfer is complete.

Dated in Saint John, New Brunswick, this 24th day of May, 2019.

Raymond Gorman, Q.C.
Chairperson

Michael Costello
Member

John Patrick Herron
Member