

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act 1998*, S.O. 1998, c.15 (Schedule B);

AND IN THE MATTER OF an application by Enbridge Gas Distribution Inc. for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas commencing January 1, 2013.

SUBMISSIONS OF ENBRIDGE GAS DISTRIBUTION INC. REGARDING PROCESS FOR ORAL HEARING OF EXPERT EVIDENCE

A. Introduction

1. The Board issued a Decision on Settlement Agreement and Procedural Order No. 5 ("Procedural Order 5") in this proceeding on October 15, 2012. Procedural Order 5 made provision for the presentation of experts' evidence under Rule 13A of the Board's *Rules of Practice and Procedure* (the "Rules").
2. The Board's expert evidence requirements, as set out in Procedural Order 5, apply in respect of the evidence of Concentric Energy Advisors, ("Concentric") prepared on behalf of Enbridge Gas Distribution Inc. ("Enbridge", or the "Company"), and the evidence of Dr. Laurence Booth, prepared on behalf of a group of intervenors referred to by the Board as "the Consortium". These experts provided evidence in this proceeding with regard to the appropriate ratio of common equity in Enbridge's overall capital structure (the "equity ratio issue").
3. Procedural Order 5 required that the experts participate in a pre-hearing expert conference (the "Experts' Conference") held on October 22 and 23, 2012. It also required that the

experts file a Joint Written Statement and that there be a presentation of this Joint Written Statement at the oral hearing.

4. With respect to the oral hearing itself, Procedural Order 5 states that the experts will appear together as a concurrent expert witness panel “for the purposes of answering questions from the Board and other parties, as may be permitted by the Board, and providing comments on the views of the other experts on the same panel”. Procedural Order 5 goes on to say that, because this is “a new process at the Board”, all parties are invited to file submissions with respect to the most appropriate procedure for the oral hearing of the evidence of the concurrent expert witness panel. These submissions are to be made “in light of the objectives of the Board as expressed herein and in Rule 13A of the Board’s Rules”.
5. These are the submissions of Enbridge, filed in accordance with Procedural Order 5, regarding the procedure for the oral hearing of the evidence of the concurrent expert witness panel. Prior to filing these submissions, Enbridge received a copy of a letter dated November 9, 2012 from counsel for the School Energy Coalition (“SEC”) to the Board that contains comments regarding “the Board’s process for dealing with Cost of Capital Issue E2 – Equity Thickness”. The comments in SEC’s letter go far beyond the issue upon which the Board invited submissions, namely, the most appropriate procedure for the oral hearing of the concurrent expert witness panel. Given the directions of the Board set out in Procedural Order 5, Enbridge will restrict its submissions to the issue upon which the Board invited submissions and it will not address the comments made by SEC.

B. Objectives of the Board

6. The requirement of Procedural Order 5 that the experts appear as a concurrent expert witness panel for the purpose of answering questions and providing comments on the views of other experts repeats, with only small changes, the words of paragraph 13A.04(b) of the

Rules. Aside from this requirement, Procedural Order 5 does not explicitly set out the Board's objectives for the concurrent expert witness panel at the oral hearing.

7. Procedural Order 5 does, however, explicitly set out the purposes of the Experts' Conference and the Joint Written Statement. According to Procedural Order 5, the purposes of the Experts' Conference were as follows:

...to identify, scope, and narrow the relevant issues and sub-issues, identify the points on which the views of the experts differ and are in agreement, and prepare a Joint Written Statement

According to Procedural Order 5, the Joint Written Statement was intended to:

...outline the key issues, the points of agreement and disagreement on those issues, and the reasons for any disagreement.

8. Rule 13A.02 sets out very plainly an objective, and indeed a requirement, of the Board with respect to expert evidence. It states as follows:

An expert shall assist the Board impartially by giving evidence that is fair and objective.

Rule 13A.03 lists a number of more specific, minimum requirements for the evidence of an expert, including requirements that the evidence contain the specific information upon which the evidence is based - with a description of factual assumptions and research - and a summary of points of agreement and disagreement with the other experts' evidence.

9. Based on the provisions of Rule 13A, Enbridge concludes that the Board's general objective when it receives the evidence of a concurrent expert witness panel at an oral hearing is to

establish a procedure for the presentation of evidence in a manner that is impartial, fair and objective and aimed at providing assistance to the Board. Based on the provisions of both Procedural Order 5 and Rule 13A, Enbridge concludes that the Board's more specific objectives for the evidence of a concurrent expert witness panel include the following:

- (1) identify the issues arising from the opinions of the experts that should be considered by the Board as it comes to a decision on the broader matter at issue (in this case, the equity ratio issue);
- (2) narrow these issues by identifying points of agreement and disagreement; and
- (3) provide comments that will assist the Board in understanding the reasons for any areas of disagreement.

C. Issues Addressed in These Submissions

10. These submissions by Enbridge will address the following three points:

- (1) Enbridge submits that the procedure followed by the Board for the oral hearing of the evidence of the concurrent expert witness panel should not in any way affect Enbridge's rights to present the evidence of Company witnesses with respect to the equity ratio issue;
- (2) Enbridge submits that, in addition to their evidence given as part of the concurrent expert witness panel, the experts from Concentric should be allowed to give evidence at the oral hearing on a witness panel together with the Company witnesses; and
- (3) Enbridge respectfully submits that clear and specific directions from the Board are required to establish the process for the concurrent expert witness panel to give evidence at the hearing.

D. Submissions of Enbridge

(1) Company Witness Panel

11. The evidence of Concentric with respect to the equity ratio issue (Exhibit E2, Tab 2, Schedule 1) is not the only evidence on the issue that was included in Enbridge's filing in support of this application. Enbridge also filed the evidence of Company witnesses on the equity ratio issue (Exhibit E2, Tab 1, Schedule 2) and Company witnesses answered many interrogatories that bear on the issue.
12. Enbridge will call its panel of Company witnesses at the oral hearing to adopt under oath their written evidence and answers to interrogatories and to be examined on their evidence. Enbridge submits, and indeed assumes, that nothing in Procedural Order 5 is intended to deprive Enbridge of any of its rights relating to the presentation of the evidence of Company witnesses at the oral hearing. In this regard, Enbridge submits that Rule 13A neither contemplates nor authorizes a Procedural Order that would in any way prejudice the rights of an applicant to present such evidence at an oral hearing.

(2) Experts on Company Witness Panel

13. Enbridge has structured and assembled its evidence on the equity ratio issue in the expectation that it will present a witness panel at the oral hearing that combines Concentric and Company witnesses. As a result, the evidence of Concentric and of the Company witnesses on the equity ratio issue together comprises a unified and integrated "package" of evidence.
14. This can be seen, for example, from the fact that certain interrogatories with respect to the equity ratio issue were answered jointly by Concentric and Company witnesses. (See, for example, the responses to interrogatories at Exhibit I, Issue E2, Schedules 20.1, 20.2 and 21.6.) As well, the Concentric and Company witnesses testified together on a witness panel

at the Technical Conference and jointly answered undertakings given during the Technical Conference. (See Exhibits JT2.13, JT2.14, JT2.16 and JT2.18-JT2.20.)

15. The interdependent and integrated nature of the evidence on the equity ratio issue can also be seen from the fact that the pre-filed evidence of Concentric and of the Company witnesses both address particular aspects of business risk. (This subject is dealt with at pages 2 to 8 of the evidence of the Company witnesses referred to above and at pages 18 to 22 of the evidence of Concentric referred to above.) The Company witnesses provided evidence based on their knowledge of business risks faced by Enbridge and Concentric provided evidence based on its expertise regarding the risk environment for the natural gas distribution business. This joint approach to evidence on business risk was, and has been throughout the course of the proceeding, a core element of the presentation of Enbridge's case on the equity ratio issue. A process that does not allow for a witness panel combining Concentric witnesses and Company witnesses, if known to Enbridge from the outset, would in all likelihood have caused Enbridge to present its case in a materially different way.
16. It is all the more important that Enbridge call a witness panel that combines Concentric and Company witnesses given the position that Dr. Booth has advanced regarding the nature of the evidence on business risk. Dr. Booth contends that "there is normally expert evidence on business risk". (See Exhibit L-21, page 2.) When asked why the Company witnesses are not qualified to address business risk, he replied: "Dr. Booth is advised by counsel that EGD I employees would not qualify as experts". (See Exhibit I, Issue E2, Schedule 22.5.) While Enbridge does not accept Dr. Booth's contention that business risk cannot or should not be addressed by Company witnesses, a witness panel combining Concentric and Company witnesses is needed to respond to questions about the basis for providing both Company and Concentric evidence on business risk and to address the inter-relationship and areas of concurrence as between the two sets of evidence.
17. Enbridge recognizes and respects the Board's objective that a concurrent expert witness panel will present evidence in a manner that is impartial, fair and objective and aimed at

providing assistance to the Board. Enbridge submits, though, that this objective must not, and need not, be applied in a manner that prejudices the rights of an applicant to make its case to the Board. Enbridge submits that, in addition to giving evidence on the concurrent expert witness panel in accordance with the objectives of the Board, the Concentric witnesses can and should also testify on Enbridge's witness panel. Should there be any question about the order of testimony of these two witness panels, Enbridge is certainly open to an order of testimony that would have the Company witness panel (with Concentric witnesses) precede the concurrent expert witness panel.

(3) Evidence of the Concurrent Expert Witness Panel at the Hearing

18. As stated above, Enbridge submits that clear and specific directions are required to establish the process for the concurrent expert witness panel to give evidence at the hearing. More particularly, directions are needed with respect to the presentation of the Joint Written Statement prepared by the expert witnesses and with respect to examination of the concurrent expert witness panel.
19. Procedural Order 5 is clear that the Board will require a presentation of the Joint Written Statement at the oral hearing, but it does not indicate the nature of the presentation expected by the Board nor does it indicate the manner or process of presentation expected by the Board. Enbridge submits that further directions in this regard will guide the participants in the hearing as they seek to fulfill the expectations of the Board regarding presentation of the Joint Written Statement.
20. With respect to examination of the concurrent expert witness panel, there is a risk that the rules of natural justice will not be observed if parties are deprived of their rights of examination and cross-examination, yet cross-examination, or indeed any examination, of the concurrent expert witness panel is likely to yield unjust and unfair results without specific direction from the Board to establish a workable procedure.

21. A typical cross-examination question to an adverse witness is much unlike a proper question to a non-adverse witness. For example, a typical cross-examination question will constitute "sweetheart" cross-examination when put to a non-adverse witness and, more fundamentally, leading questions are a central tool of cross-examination, but are improper for a non-adverse witness, except in areas that are not contentious. Questions posed to the concurrent expert witness panel by the parties will be questions put to a panel composed of both adverse and non-adverse witnesses. As a result, directions are needed to make clear how questions are to be put to the concurrent expert witness panel by the parties and how the witnesses on the panel are to participate in the answering of such questions.
22. This point about the questioning of the concurrent expert witness panel is just one specific issue that arises from a more general area of concern: while, again, Enbridge understands the Board's objectives with regard to the evidence of the experts' panel, the Board's objectives must be reconciled not only with the rights of the parties to the proceeding but also with the need for the experts' evidence to be properly tested in order for the Board to determine the extent to which the evidence can be relied upon and given weight.
23. Procedural Order 5 contemplates that the Board panel will take the lead in putting questions to the concurrent expert witness panel and that parties will be able to ask questions only as permitted by the Board. This provision of Procedural Order 5 seems to align with the Board's objective of seeking evidence that is impartial and aimed at assisting the Board. However, it is critical that the evidence be subject to such testing as may be necessary for the Board to reach appropriate conclusions about reliability and weight and, with the greatest of respect to the Board, Enbridge submits that, for a number of reasons, the opposing party in a case tends to be particularly well-positioned to test an expert's evidence. Further, while it may align with the Board's objectives to structure a concurrent expert witness panel such that all expert witnesses will be given, or may seize, an opportunity to comment on any question put to the panel, this procedure radically alters the dynamics of long-established examination techniques for testing the evidence of witnesses.

24. In order to strike a balance between the objectives of the Board and the role of the parties in testing the evidence of the expert witnesses, Enbridge submits that the directions of the Board could include one or more of the following:

- (1) a direction that cross-examination of the concurrent expert witness panel be limited to questioning on those areas that the expert witnesses have identified as the areas of disagreement between them;
- (2) a direction that there be only one cross-examination of each expert or set of experts, that is, one cross-examination of Dr. Booth and one cross-examination of the Concentric witnesses, on behalf of the party or parties adverse in interest to the respective experts;
- (3) a direction that cross-examinations of the concurrent expert witness panel be time-limited; or
- (4) a direction that cross-examination of the concurrent expert witness panel be limited to the Board Panel and Board Staff with the balance of the hearing (i.e., combined Company and Concentric witness panel and the Consortium's expert witness testimony) proceeding in the traditional manner.

E. Conclusion

25. For all of the reasons given above, Enbridge makes the following submissions in respect of the oral hearing of the equity ratio issue in this proceeding:

- (1) the procedure followed by the Board for the oral hearing of the evidence of the concurrent expert witness panel must not in any way affect Enbridge's rights with respect to the presentation of the evidence of Company witnesses on the equity ratio issue;

- (2) in accordance with the structure and intent of Enbridge's evidence, Enbridge's witness panel should be comprised of both Company witnesses and the experts from Concentric; and
- (3) clear and specific directions from the Board are required to establish the process for the concurrent expert witness panel to give evidence at the hearing.

All of which is respectfully submitted.

November 13, 2012.



Fred D. Cass

Counsel for Enbridge Gas Distribution Inc.

for: