

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 THE CONSUMERS COUNCIL OF CANADA
ON THE PROCEDURE FOR THE ORAL HEARING OF THE
CONCURRENT EXPERT WITNESS PANEL**

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The Consumers Council of Canada

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1. In Procedural Order No. 5, the Board invited parties to file submissions with respect to “the most appropriate procedure for the oral hearing” of the concurrent expert witness panel. These are the submissions of the Consumers Council of Canada (“CCC”) in response to that invitation.
2. The following matters need to be considered when determining the appropriate procedure:
 - a. What is the status of the experts’ Joint Written Statement? (the “JWS”)
 - Is it evidence?
 - How does it relate to the pre-filed evidence of the experts?
 - b. Is there to be examination-in-chief on the JWS?
 - If so, by whom and in what order?
 - c. Does the Board hearing panel question the experts first?
 - If so, does each expert respond to each question posed by the panel?

- Does each expert have the right to respond to the other expert's answer?
- d. What is the role of OEB staff?
- In particular, when do they cross-examine the experts?
- e. Does each expert respond to the questions asked by Board Staff?
- f. Does each expert have the right to comment on the answers of the other expert to questions posed by Board Staff?
- g. What is the role of counsel to the parties who are sponsoring the experts?
- Do they have the right to conduct examination-in-chief of their respective expert?
 - Do they have the right to cross-examine the opposing parties' expert?
 - Do counsel for each of the parties sponsoring an expert have the right to cross examine?
- h. Should the experts be permitted to cross-examine each other?
- i. Is there a right to re-examination of the experts?
- If so, by which counsel?

3. The answers to these questions are informed by a number of considerations, as follows:

- a. What are the objectives of the Experts' Conference, the JWS, and the joint witness panel?

In Procedural Order No. 5, the Board states that the purpose of the Experts' Conference is to "identify, scope and narrow relevant issues and sub-issues, to identify the points on which the views of the experts' differ and are in agreement".

CCC submits that it is not the function of the experts to identify, scope, and narrow the relevant issues. That is the function of the Board, following submissions by counsel for the parties. It is helpful for the experts to identify, in their respective pre-filed evidence, the points on which they agree, and the points on which they disagree. Doing so makes consideration of the experts' evidence more efficient at the oral hearing. However, efficiency is undermined if the experts are allowed to frame the issues themselves.

- b. An important consideration is that of fairness to the interests of the parties. While it is common ground that an expert's function is to assist the trier of fact in understanding technical evidence, it must also be remembered that an expert is called by a party to the adversarial process to advance its case in a way which the party believes protects the interests of its client. It is important that the rights of the parties to the adversarial process not be restricted.

4. The Board itself, and Board Staff, can retain their own experts, and can frame the issues that they want those experts to address in ways which might well be inconsistent with the ways the parties have asked their own experts to frame the issues.

5. An analysis of all of these matters is affected by the way the process for the handling of the experts' evidence has been handled to this point.

6. The parties were never consulted about the appropriate procedure for the Experts' Conference or the content of the JWS. They were never asked, for example, whether the preparation of the JWS was either necessary or appropriate in this case.

7. Most importantly, the parties were never consulted about the list of "discussion points" prepared by Board Staff that the experts were asked to address. Those "discussion points" included matters which, in the CCC's view, were inappropriate for the experts to consider at their Conference and to include in the JWS. For example, an understanding of the Board's Capital Structure Policy, and of the application of the fair return standard, are matters of argument which, the CCC submits, should not have been left to the experts to consider at their Conference or include in the JWS.

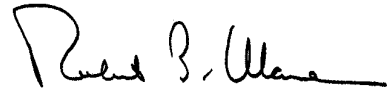
8. The CCC and the CME have included, in their Joint Compendium, materials which discuss the procedures which might be adopted for the joint testimony of experts. The materials may provide guidance for future cases, where the rules have been clearly defined in advance of the entire process. For this case, however, the procedure adopted should reflect the reality that the rules were not set in advance, based on consultation with the parties.

9. Based on the foregoing considerations, the CCC submits that the following procedure should be followed for the oral hearing of the concurrent expert witness panel:

- Counsel for the parties should conduct an examination-in-chief of their respective witnesses, based not just on the JWS, but on the experts' evidence as a whole;
- That examination-in-chief should be followed by questions from the Board panel. Each expert should be entitled to respond to the question asked by the Board panel;
- Board Staff should then conduct a cross-examination;
- There should be no cross-examination by the experts of each other. The cross-examination should be conducted by counsel for the parties only;
- Counsel for all of the sponsoring parties should be entitled to cross-examination;
- Following cross-examination, counsel for the parties should be entitled to conduct a re-examination.

10. The testimony of the experts called by EGD should be limited to their appearance on the Joint Panel. Those experts should not be permitted to testify as part of a panel of EGD witnesses. To allow them to do so undermines any claim they might otherwise have to objectivity.

All of which is respectfully submitted.

A handwritten signature in black ink, appearing to read "Robert B. Warren". The signature is written in a cursive style with a long horizontal stroke at the end.

Robert B. Warren, Counsel to the Consumers Council of Canada.

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