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February 21, 2020

Reply To: Thomas Brett
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Our File No. 190444

VIA RESS, EMAIL AND COURIER

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attention: Kirsten Walli,
Board Secretary

Dear Ms. Walli:

Re: EB-2018-0319: Enbridge Gas Inc., Open Bill Access

Please find enclosed herewith BOMA's Submission, in connection with the above captioned proceeding.

Yours truly,

FOGLER, RUBINOFF LLP

A handwritten signature in blue ink, appearing to read 'Tom Brett', with a large, stylized loop at the end.

Thomas Brett

TB/dd

Encls.

cc: All Parties (*via email*)

ONTARIO ENERGY BOARD

**Enbridge Gas Inc. Application for approval to continue the existing
financial terms associated with offering Open Bill
Access services for the years 2019 and 2020**

**SUBMISSION OF BUILDING OWNERS AND MANAGERS ASSOCIATION,
GREATER TORONTO ("BOMA")**

February 21, 2020

Tom Brett
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SUBMISSION OF BOMA

In its Decision and Procedural Order No. 8, the Board approved a partial settlement proposal which settled all but two issues in this proceeding. In Procedural Order No. 11, the Board scheduled an oral hearing on those two unsettled issues for January 30 and 31, 2020. Those unsettled issues were:

"What level of control should OBA customers have over the addition, removal, and reinstatement of third party charges on their Enbridge bill through the OBA program" ("Level of Customer Control"); and

"What restrictions, if any, should be placed on billing OBA customers for penalty, exit, or termination fees or similar charges through the Enbridge bill" ("Termination Fees").

While BOMA was not able to attend the oral hearing on January 30 and 31, 2020, for personal reasons, BOMA has reviewed the transcripts of the two days' proceedings carefully, as well as, of course, the evidence, including IRs and replies to IRs filed during the month of January by the various parties.

Level of Customer Control

- BOMA's understanding is that under the current regime, the billers advise Enbridge when to add or remove charges on the Enbridge bill and the amount of those charges. Customers cannot direct Enbridge to add or remove a third party charge.
- Customers can call Enbridge to dispute whether a charge is valid or create a dispute through the Enbridge Gas website if they have an online account. In either case, Enbridge logs the customer's dispute claim in its dispute tracker system, and reports it to the biller in Enbridge's daily dispute report on the same day or the next day. Enbridge

logs the dispute as a CPA or non-CPA dispute, which categorization is decided by Enbridge staff. Enbridge does not remove the disputed charge from the bill at this stage.

- The biller is required to communicate the status of each customer billing dispute to Enbridge's biller hotline by email on or before the due date. The due date is forty-five days for a CPA-related dispute and fifteen days for a non CPA-related dispute.
- If the dispute is not settled by the due date, Enbridge will close the dispute, remove the disputed charge from the bill, and block that product from being billed to that customer by that biller going forward.
- If the biller deems the dispute to be settled before the due date, they advise Enbridge. Enbridge then reinstates the charge on the customers' bill.
- If the customer then calls to say the dispute is not resolved in his view, the dispute is again noted on Enbridge's tracking system. However, in this case, the biller only has the original due date (fifteen days or forty-five days from the date of the customer's first complaint), plus five business days to resolve the dispute.
- If the biller has not reported the dispute as settled before the new due date, Enbridge will close the dispute, credit the disputed charge to the customer, remove the charge from the customer's bill, and block that product from being billed to that customer by that biller going forward.
- If the customer contacts Enbridge again to say that the dispute is still not resolved, the process does not start again. Rather, Enbridge will close the dispute and remove the amount from the bill, and block that product from being billed to that customer by that biller going forward.

The above description of Enbridge's existing process was taken from Enbridge's Evidence-in-Chief, filed January 30, 2020, pp4-5, and the summary of the existing regime in the Settlement Proposal at pp10-11.

BOMA proposes an adjustment to this regime. BOMA believes that the customer should be able, at any time, directly or through its authorized agent, to direct Enbridge to remove any non-regulated utility charge from the bill. Once that charge is removed from the bill, it can be put back on the bill only by the customer's direction, or that of the customer's authorized agent, or by the biller, provided that the biller includes, as part of its direction to reinstate the charge, a current written authorization of the customer or its agent. BOMA makes this proposal for the following reasons:

1. Under the current regime, the customer does not have adequate control of his relationship with the company that supplies the service or equipment (approximately 95% of the equipment supplied are gas-fired water heaters), if that supplier is billing the customer through Enbridge's gas bill, as can be seen from the description of the current regime, above. The customer cannot direct Enbridge to remove the offending charge from its bill. It can only advise Enbridge that it disputes the bill. It is then up to Enbridge to advise the biller, to set the deadline for the biller's response, and to determine the nature of the dispute, as CPA-related or not. Moreover, Enbridge takes advice from the biller, not the customer, as to whether the dispute has been resolved. The evidence suggests that in many instances, the biller and the customer disagree on whether the dispute has been resolved. All of these characteristics of the existing process diminish the customer's control of its own bill, can result in the charge remaining on the bill, while the dispute is laboriously sorted out. To have an appropriate degree of control, the customer must be

able to direct Enbridge to remove a charge which the customer disputes very quickly, certainly, within ten days of the customer's request. Mr. Grochmal provided evidence on behalf of HVAC, which stated:

"I don't accept however that if a customer tells Enbridge directly that they don't want a third party charge on their bill, it is okay for Enbridge to ignore their direct instruction. This gives third party billers more rights to control what is on my bill than I have."

The customer should also be able to direct Enbridge to remove the customer's liability for all identical future charges for that equipment or service. It is not appropriate for Enbridge to have any further active role in the settlement of the dispute after the customer's first direction. Enbridge should remove the charge from the bill and advise the biller that it has done so.

2. Under the present rules, the biller can direct Enbridge to reinstate the charge on the bill, without providing evidence that the customer has agreed to the reinstatement. Vista has provided evidence that billers have, in many instances, advised Enbridge that it and the customer have settled the dispute when, in fact, they have not, and have documented several cases of this abuse. In these cases, customers have had to continue to pay the charge, notwithstanding the fact that they dispute the charge. As noted above, the customer must then advise Enbridge a second time that the charge remains on its bill and the process to remove it must start all over again. Enbridge states that they do not require the biller to provide evidence that the customer agrees with the biller that the dispute has been resolved because they have assumed, without checking even on a selected basis with the customer, that the customer agrees that the dispute has been resolved. BOMA proposes that the charge, and all future charges for the same piece of equipment, can be

reinstated only if the biller is able to present evidence to Enbridge of the customer's agreement, in writing, or an electronic equivalent, a copy of which confirmation must be included with the biller's request to reinstate the charge. Enbridge must not reinstate the charge if it has not received the customer's confirmation in the agreed form. The customer's confirmation must be provided no earlier than two business days prior to the date on which the biller seeks reinstatement. In other words, it must be contemporaneous. The form of the confirmation should be developed and implemented under the revised OBA program rules. The onus should not be on the customer to have to contact Enbridge a second time to advise that the dispute, which it previously alerted Enbridge to, has not been settled.

3. BOMA does not believe that this change in rules can be deferred to future discussions on rule changes. The problem needs to be addressed now in this proceeding. Moreover, the major biller, Enercare, has made it clear during this proceeding that it will not agree to any significant amendments to the current practice with respect to the degree of customer control, and the Board should not anticipate that Enercare will be any more flexible in any future negotiation. Failing to act now is just "kicking the can down the road".
4. As noted above, Enbridge has confirmed in this proceeding that it does not verify that when a third party biller advises Enbridge that a customer dispute has been resolved, and the biller's charge should continue to be on or should be put back on the bill, that the customer has agreed. Enbridge does not ask the customer for evidence or check with the customer (Exhibit 1, Staff 9 and Exhibit 1, HVAC 39).

5. BOMA believes that the practice of the Canadian Payments Association ("CPA"), in respect of authorization to CPA members for pre-authorized payments, provides a good model for dispute resolution. CPA rules provide that if a payor (customer) directs the CPA member to cease making pre-authorized payment arrangements, the member (the financial institution) must do so, based on that direction, unless and until the customer provides further direction otherwise. The CPA approach is an example of a more customer-friendly and alternative practice for the removal and reinstatement of third party biller charges.
6. Enbridge's statement of its position is at best ambiguous. Enbridge states that it does not believe that OBA customers should direct the addition of a third party charge to the Enbridge bill on the grounds that "it would be administratively burdensome and expensive". However the issue before the Board is not whether the customer can add a third party charge to the bill, but whether it can direct the removal of a third party charge, which it disputes from the Enbridge bill (our emphasis). These are different issues. Enbridge needs to address the removal issue. It has not done so. Moreover, Enbridge has not provided any concrete or quantitative evidence on the additional expense of allowing the OBA customer to direct the removal of third party charges from the bill, or, for that matter, to add a third party charge to the bill.
7. Enbridge proposes an updated approach, which includes the following changes:
 - (a) All disputes, whether CPA-related or not, must be resolved in fifteen days, failing which, the disputed charge would be credited back to the customer and the charge and bill type code would be removed from future billing. BOMA agrees that

removing the requirement for Enbridge to identify disputes as CPA versus non-CPA would assist Enbridge. BOMA has never understood the need to make such a distinction in the first place or the origins of that proposal.

- (b) If a customer contacts Enbridge, after the biller has reported to Enbridge that the dispute with that customer has been resolved, and the customer indicates that the dispute has not been resolved, Enbridge would credit the charge back to the customer and the charge and bill type code would be blocked from future billing. Enbridge's proposals may enable disputes to be settled more quickly. However, they fall short of what is required, as it continues to permit the biller to advise Enbridge to reinstate a charge that the customer has disputed without written contemporaneous confirmation from the customer that the dispute has been settled. That feature of the existing process is most harmful of the customer's control of its own bill, and tilts the field in favour of the biller.
- (c) Enbridge also argues that its proposals minimize changes to the OBA program back office processes and system changes and their associated costs (Ibid, p6). However, Enbridge does not specify what this cost would be. Moreover, that argument is not persuasive because Enbridge shareholders already benefit from the program, as they receive a share of biller fee revenues. BOMA would accept reduction of the ratepayers' allocation if Enbridge provided credible evidence that the additional costs to accommodate BOMA's proposal exceeded the current shareholders' benefit from the program.

- (d) BOMA does not agree with Enbridge that its proposals would "take away the opportunity for customers and billers to resolve issues that may simply require a clarification between the parties". If the biller can provide a statement that the dispute is settled, which includes evidence as described above that the customer agrees that the dispute is settled, within a fifteen day period from the customer's complaint to Enbridge, that dispute can be settled just as quickly as it can under the Enbridge proposal.

Termination Fees

BOMA is of the view that Enbridge should not allow any penalty, exit, or termination fees, or any similar post-contract charges, from third party billers on the Enbridge bill. BOMA is of this view for several reasons:

1. The amounts of these fees are large, often between \$300.00 and \$600.00, which is at least ten to fifteen times larger than the typical monthly rental payments for water heaters. In many cases, contracts between the biller and the customer do not exist to support these payments, in other cases contracts were entered into during the period when such contracts were illegal under the Consumer Protection Act. These large payments need to be addressed separately from the issue of the customer's control over its bill because they raise additional issues to those raised by the ongoing rental payments.
2. The evidence of Mr. Roger Grochmal, on behalf of the HVAC Coalition, an engineer with long experience in the industry, and currently the owner of an energy services company, which was not seriously challenged during the hearing, is that the Open Bill

Program effectively makes Enbridge a collection agency for the third party biller (Mr. Grochmal, January 10, 2020 evidence, p4).

3. Mr. Grochmal also stated that even if the customers had more control over their bills generally, it is still necessary to prohibit termination fees. He stated:

"Unfortunately, the customers who would not be protected by having control over their bill are the ones that are the most vulnerable. For many customers, if they are told by a biller they have to pay a \$200 exit fee on their utility bill to change water heaters, they might call Enbridge to ask if they have to pay that utility bill. When Enbridge tells them it will come off the bill, problem solved. A more vulnerable customer, though, like a senior living alone, or a new immigrant still grappling with Canadian practices, may be less likely to object or ask questions. If the biller says they have to pay, and the charge turns up on their Enbridge bill, they will assume they have to pay. Otherwise, why would their utility include it in their bill?"

4. Placing the termination fee on the Enbridge bill lends additional credibility to the fee.

Mr. Grochmal stated that:

"A third party bill doesn't carry the same weight as a bill from the gas utility" (HVAC Response to Board Staff IR #2).

He also stated:

"People pay their utility bills much more readily than other bills just because they are utility bills" (Ibid, p17).

Finally, in response to Board Staff IR #1 to HVAC, Mr. Grochmal stated:

"If the charge is less than about \$500.00, our experience is that most customers will pay it to get the monkey off their back, even though they may not believe it is fair and even though they have never seen the contract they are supposed to have signed. I note that when they ask Enercare for a copy of their contract, they are advised that they have to pay a \$50.00 archiving fee to see it" (HVAC Response to Board Staff IR #1, p1).

5. Recent research conducted by Enbridge in 2011, on Third Party Billing Perceptions, states that:

"There is confusion around the relationship Enbridge has with third party billers; only half (48%) are aware that Enbridge is not affiliated with energy service providers included on the Enbridge bill. Even fewer (43%) are aware that Enbridge does not support or endorse these services" (our emphasis) (Vista evidence, January 10, 2020, Attachment A; Research was submitted as evidence by Enbridge in EB-2011-0354, Exhibit 1, Tab D, Schedule 20.2, Attachment).

BOMA is not aware of any more recent research that contradicts these findings and was filed in this proceeding.

6. In responding to one of Mr. Millar's questions at the hearing, Mr. Grochmal pointed out that, although additional information on customer's rights will be circulated as a result of the partial settlement agreement, "you don't necessarily post it on the fridge" and over time, customers may easily forget the information, so that while the extra information helps, it does not alleviate his concerns (Tr.2, p78). Similarly, the Board's proposed change to GDAR defining the priority of payment of items on the Enbridge bill (gas first) was not sufficient to change his view. He stated:

"So you can create a priority but whether my right to dispute a charge or to, you know, ensure that I am not facing a disconnection? and maybe there should be a disclaimer on the bill that not paying third party charges won't get your bill – your gas disconnected, because that's the fear that's in people's heads that we see, anyway" (Tr.2, p79).

7. Vista's evidence on the issue of customer control of its bill and termination fees is similar to Mr. Grochmal's evidence. In Vista's evidence filed on January 10, 2020, Vista states:

"10. In VISTA's view, informed by longstanding participation in the OBA program, this customer perception renders particularly problematic the ability of third party billers to include penalties, exit or termination fees, or similar charges, on the Enbridge bill. In VISTA's experience customers feel compelled to pay these charges despite disputing their validity, because they are on the Enbridge bill and in order to maintain gas service.

11. In the context of customer perceptions that third party billers are somehow related to or endorsed by Enbridge and that payment of their charges is required

in order to maintain gas service, allowing penalty, exit or termination fees on the Enbridge bill can falsely legitimize those charges or unduly coerce customers into paying those charges despite legitimate and continuing dispute regarding the validity of those charges.

12. *For this reason, Enbridge should not be engaged in any way in contract enforcement or collection activities for third party billers."*

8. Vista also suggests that there is no business requirement that third party billers use the Enbridge bill for collection of legitimate post-contract charges. Vista states that:

"If a customer agrees on the legitimacy of the charge, he or she is generally willing to pay such charge by credit card or electronic funds transfer (Ibid, p8).

9. Vista also points out that buyers have abused the right to have postdated charges on the customer bill, as evidenced by a series of orders by the Commissioner of Competition (in 2014-2015) concerning the anti-competitive nature of such charges.
10. Finally, the Board should take note of the history of the OBA program in making its decision, in particular, the fact that in 2002, Enbridge sold its water heater rental business that was then carried on by a separate, non-regulated Enbridge entity, to Centrica PLC (operating as Direct Energy, and later Enercare) for \$1 billion. One of the terms of that sale was that the purchaser, Centrica, would have the exclusive right to bill their customers (at the time, the Enbridge affiliate had 1,300,000 water heaters with customers). While at that time the anti-competitive consequences of the arrangement may not have been clear, over the years and after the Enbridge bill had been opened to other energy service providers, the anti-competitive aspects of termination fees on the Enbridge bill have become clearer.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON BEHALF OF BOMA