

**EB-2018-0319**

**ONTARIO ENERGY BOARD**

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

**AND IN THE MATTER OF** an Application by Enbridge Gas Distribution Inc. for an order or orders approving its proposal for open billing services.

**AND IN THE MATTER OF** an Application by Enbridge Gas Distribution Inc. for an order or orders amending or varying the rates charges to customers for the sale, distribution, transmission and storage of gas commencing as of January 1, 2019

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**Argument Submission of**  
**Energy Probe Research Foundation**

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**February 21, 2020**

## **Executive Summary**

Energy Probe submits that Open Bill Access (OBA) customers should have complete control over the addition, removal and reinstatement of third-party charges on their Enbridge Gas bill through the OBA services and that there should be absolute prohibition on billing OBA customers for penalties, exit or termination fees, or similar charges through the Enbridge Gas bill.

## **Background**

Enbridge Gas Inc. filed the EB-2018-0319 application with the OEB on December 4, 2018 for approval to continue the existing financial terms associated with offering OBA services for 2019 and 2020. After a lengthy discovery and settlement process the parties in the EB-2018-0319 proceeding agreed to a partial settlement.

In its Decision and PO No. 8, the OEB approved the partial settlement proposal, which settled on all but two items, and scheduled an oral hearing on the two unsettled items for January 30 and 31, 2020. The following are the two unsettled items.

1. What control should OBA customers have over the addition, removal and reinstatement of third-party charges on their Enbridge Gas bill through the OBA services?
2. What restrictions, if any, should be placed on billing OBA customers for penalties, exit or termination fees, or similar charges through the Enbridge Gas bill?

## **The Arguments Submission of Energy Probe on the First Unsettled Item**

In Procedural Order No. 10, dated January 16, 2020, the OEB asked parties in the EB-2018-0319 Enbridge Open Bill proceeding, to file initial positions on the two unsettled items.

In its letter to the OEB of January 27, 2020, Energy Probe Energy set out its initial positions on the two items.

The initial position of Energy Probe on the first unsettled item was that OBA customers should have complete control over the addition, removal and reinstatement of third-party charges on their Enbridge Gas bill through the OBA services. No charge of any kind from third parties should be on the Enbridge Gas bill without specific prior written authorization by means of a signed contract between the customer and the third party. Energy Probe still maintains the same position.

Enbridge claimed that giving customers control over the addition, removal and reinstatement of third party charges on their Enbridge Gas bill through the OBA services would be “administratively burdensome and expensive, considering there are 1.4 million OBA customers”.<sup>1</sup> Enbridge witnesses who made that determination did not rely on any analysis, nor did they consult with their service provider of outsourced customer care services<sup>2</sup>. They did not even consult with their senior management. They did not calculate the cost impact of giving customers control of what third party charges should be on the bill.<sup>3</sup> Energy Probe submits that the OEB should not assign much weight to Enbridge’s claim.

Enbridge proposed a new process that “is essentially the same process” that Enbridge has “now with an aligned timing for resolving the disputes to 15 days.”<sup>4</sup> It appears from the evidence that the three Enbridge witnesses came up with this proposed new process without any discussion with their service provider that actually does the OBA work.<sup>5</sup> It is possible that the new process will save money or it may not. Enbridge does not know<sup>6</sup>. Energy Probe submits that the OEB should not have much confidence in Enbridge’s new process because little thought or analysis was involved in its development.

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<sup>1</sup> Tr. Vol. 1, page 13

<sup>2</sup> Ibid, page 49

<sup>3</sup> Ibid, page 50

<sup>4</sup> Ibid, page 51

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

Enbridge bill is a bill for gas distribution, an essential utility service. For historical reasons Enbridge allows third parties to use its bill for non-utility services<sup>7</sup>. No other Ontario distributor allows third parties to use its bill. Therefore, Enbridge bill is unique and an anomaly. Other utility bills that utility customers typically pay are for electricity, water and wastewater, and garbage removal. These services, including the natural gas distribution service, are seen by utility customers as essential services. They place the highest priority on paying these bills<sup>8</sup>. Third party billers that use the Enbridge bill to bill their customers for non-utility services have enjoyed a large competitive advantage against competitors that bill their customers directly by having customers place higher priority on payments to them. This places a responsibility on Enbridge to ensure that its bill is used by billers to accurately and appropriately bill their customers. Enbridge's duty in this regard is the same as it is for utility portion of the Enbridge bill where Enbridge has a responsibility that its OEB approved charges to customers for its delivery and commodity services are accurate and appropriate. There is no evidence that Enbridge reviews or approves charges from billers on its bill. Indeed, there is evidence that Enbridge deliberately does nothing<sup>9</sup>. Enbridge expects that customers will review such charges. It is likely that many if not most customers assume that Enbridge has reviewed and approved charges from billers.

The customers that review these charges are in an uneven situation that favours the billers. The largest biller, Enercare, does not have signed contracts with a large proportion of its customers. To challenge a charge, a customer without a contract has nothing to refer to and is forced to rely on whatever information Enercare is willing to provide. Even if there is a signed contract, the customer may have lost it. In that case Enercare will provide the customer with the copy of the contract for a \$50 charge<sup>10</sup>. The charge seems large and punitive. It appears to be designed to discourage customers from getting a copy of their own contract. If a customer does manage to get a copy of the contract, the customer would not find the contract helpful because it does not clearly specify charges as can be seen from copies of contracts attached to an interrogatory response.<sup>11</sup>

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<sup>7</sup> HVAC, Written Evidence of Roger Grochmal, Pages 1 to 4

<sup>8</sup> Tr. Vol. 2, page 79

<sup>9</sup> Tr. Vol. 1, pages 55 to 57

<sup>10</sup> Staff-1, Tr. Vol. 2, pages 69 and 70

<sup>11</sup> Vista Credit Corporation response to EP-4

Enbridge claims that this not a large problem since its statistics show that only a small percentage of customers filed complaints<sup>12</sup>. Energy Probe believes that it is likely that a far larger number of customers would have complained about their bills but were afraid to do it due to poor command of English or fear of dealing with officials.

Currently third-party charges on the Enbridge bill are a form of negative option billing. These charges are placed on the bill and it is up to the customer to have them removed. The default option is for the charges to stay on the bill. Energy Probe submits that this is in contravention of Negative Option Billing Regulations<sup>13</sup> and should not be allowed by the OEB. Other parties may claim that the Negative Option Billing Regulations do not apply to Enbridge since Enbridge is not a financial institution, or an insurance or a loan company. Energy Probe submits that the billing and collection service Enbridge is providing to third party billers is identical to services that financial institutions provide and should therefore be in compliance with the Negative Option Billing regulations. To comply with the regulations, the default option must be changed from the current negative option billing to positive option billing. No charge of any kind from third parties should be on the Enbridge Gas bill without specific prior written authorization by means of a signed contract between the customer and the third party. Enbridge should review all such contracts and only place charges on the customer's bill after it has approved the contract between the customer and the OBA biller.

### **The Argument Submission of Energy Probe on the Second Unsettled Item**

The initial position of Energy Probe on the second unsettled item was that there should be absolute prohibition on billing OBA customers for penalties, exit or termination fees, or similar charges through the Enbridge Gas bill.

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<sup>12</sup> AIC, page 5

<sup>13</sup> Negative Option Billing Regulations (SOR/2012-23) <https://laws-lois.justice.gc.ca/eng/regulations/sor-2012-23/index.html>

In its Argument in Chief, Enbridge states that it “believes that it is important to balance the interests of all parties (OBA customers, Enbridge Gas ratepayers, different Biller groups and the Company) in determining updated business practices”<sup>14</sup>. Enbridge witnesses were unable to explain how Enbridge intends to do this balancing of interests.<sup>15</sup> Enbridge does not have copies of contracts between customers and billers, and does not do much of anything beyond providing “the tracking systems, the disputes between the biller and the customer”.<sup>16</sup> Its “comprehensive dispute process”<sup>17</sup> is just a “simple transfer of information”.<sup>18</sup>

It seems that Enbridge is acknowledging that its current process is not balanced and that it greatly favours the billers. However, its proposed changes do not address the main problem which is that Enbridge is not reviewing and approving penalties, exit or termination fees, or similar charges that billers have placed on the Enbridge bill. It is still left to the customers to do it and the customers do not have adequate information to challenge such penalties, termination fees and charges. Moreover, none of this would matter if the billers were billing directly and not using the OEB regulated utility bill for non-utility services.

As the OEB explained in its Procedural Order No. 10, effective March 1, 2020 amendments to the Gas Distribution Access Rule (GDAR) resulting from the OEB’s review of customer service practices for gas distributors will take effect. GDAR Section 9.3.6 prescribes the allocation of payments and section 9.3.7 prohibits disconnects for any charges other than gas charges, security deposits and billing adjustments. Energy Probe believes that many OBA customers are not aware of this change and will likely remain unaware of it for some time, particularly newcomers to Canada with limited command of the English language. It is likely that they will continue to believe that Enbridge will disconnect their gas service if they do not pay penalties, exit or termination fees or similar charges from third parties on the Enbridge bill, and will feel compelled to pay them even if they believe that such charges are exorbitant or unfair.

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<sup>14</sup> AIC page 1

<sup>15</sup> Tr. Vol. 1, pages 52 and 53

<sup>16</sup> Ibid., page 56

<sup>17</sup> Ibid.

<sup>18</sup> Ibid. page 57

The energy services provided by OBA billers are part of the competitive market for such services. In the competitive market, penalties, exit or termination fees, or similar charges are some of the tools, companies use to keep their customers captive and prevent them from obtaining services from competitors. These are used by dominant market players as barriers to entry of competitors. They may be a matter of concern to the Competition Bureau and should not be of concern to the OEB unless the OEB approved utility bill is used as tool to keep customers of OBA billers captive. It is likely that the Enbridge OBA bill has been used by billers for that very purpose from the beginning of the OBA program and would continue to be used for that purpose if penalties, exit or termination fees, or similar charges are allowed to remain on the bill. The OEB should not allow itself to be used as a barrier to entry that prevents the customers of OBA billers from switching to competitors. If companies that are OBA billers want to charge their customers penalties, exit or termination fees they are free to bill their customers for such charges directly and should not use the Enbridge OBA bill and its OEB sanction as a actual or perceived clout to enforce payment.

Large, buyout, exit and termination fees for rental water heaters are a greatest source of customer complaints. Energy Probe believes that such fees are preventing customers from switching to more efficient tankless water heaters. As pointed out in Energy Probe's submission earlier in this document on the first unsettled issue, the largest OBA biller, Enercare, does not have signed contracts with a large number of its customers. As can be seen from copies of signed contracts that it has with some customers, it would be difficult for a customer to determine what the buyout or termination fee from the fine print information on the contract document<sup>19</sup>. The customer in that situation would have to rely on whatever information Enercare is willing to provide.<sup>20</sup>

It is a historical fact that in 2007 Toronto Hydro sold its water heater rental business to the The Consumers' Waterheater Income Fund, (now Enercare). Toronto Hydro's rental business consisted of electric and gas water heaters. Customers that had rented gas water heaters from

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<sup>19</sup> Vista Credit Corporation response to EP-4

<sup>20</sup> Tr. Vol. 1, pages 136 and 137

Toronto Hydro must have already been Enbridge gas heating customers and would have been transferred to the OBA bill. It is likely the Enbridge OBA bill was also used to bill customers who had electric water heaters as there is no evidence that Enercare used other billers. This case is therefore not limited to gas water heater rentals, it also includes rentals of electric water heaters if they are billed using Enbridge's OBA bill. It is possible that there were a large number of customers that had a gas furnace and an electric water heater, because many electric water heaters were unmetered and were seen as a good deal by customers with high hot water usage. Prior to the transaction, these customers would have had an Enbridge gas bill and a bill from Toronto Hydro for a rental water heater. After the sale of the business to The Consumers' Waterheater Income Fund (now Enercare) the rental charges for a rented water heater, whether gas or electric would have been on the Enbridge OBA bill. A former Toronto Hydro water heater rental customer, whether gas or electric that now wishes to replace the old rented water heater with a new purchased, more efficient water heater, will be forced to pay a termination fee to Enercare. It is not clear if that termination fee would be based on the date of the installation of the water tank, which would have been some time prior to 2007 or the date of the sale of the water heater business by Toronto Hydro to The Consumers' Waterheater Income Fund (now Enercare). There could be a significant difference in the termination fee but the customer would not have the information and would need to rely on whatever information Enercare is willing to provide.<sup>21</sup> The reason that Energy Probe has brought this situation to the OEB's attention is as an illustration of information asymmetry between customers and billers.

Energy Probe believes that there is large information asymmetry as Enercare has most of the information and the customer very little. The customer is entirely at the mercy of Enercare. The OEB should not allow itself to be used by Enbridge so that Enercare and other OBA billers indirectly maintain their market position by keeping their customers captive through information asymmetry and arbitrary, buyout, exit and termination fees.

In its AIC, Enbridge argues that such charges should be on the bill for customer convenience and that its proposed new process will give customers a choice to have these charges on the bill<sup>22</sup>. As

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<sup>21</sup> Tr. Vol. 2, pages 74 to 76

<sup>22</sup> AIC page 8



pointed out by VISTA, it would probably be more convenient for a customer to use a credit card for that purpose.<sup>23</sup> As in its proposal on the first unsettled issue, what Enbridge proposes is again negative option billing. The default option under Enbridge's proposal is that charges are placed on the bill and it is up to the customer to have them removed. Energy Probe submits that what Enbridge proposes is contrary to Negative Option billing regulations<sup>24</sup> and the OEB should not allow such charges on the OBA bill. If the OEB decides to allow that these charges be on the OBA bill they should be a positive selection by the customer to have them on the bill. Having said that, Energy Probe submits that buyout, exit and termination fees and similar penalties should not be on the Enbridge bill because they are a method of keeping customers captive and are a misuse of the OEB approved utility bill for competitive purposes.

Respectfully submitted on behalf of Energy Probe by its consultant,  
Tom Ladanyi  
TL Energy Regulatory Consultants Inc.

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<sup>23</sup> Tr. Vol. 1, page 132 and 133

<sup>24</sup> Negative Option Billing Regulations (SOR/2012-23) <https://laws-lois.justice.gc.ca/eng/regulations/sor-2012-23/index.html>