

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an application by Enbridge Gas Inc. for an order
or orders to continue the existing financial terms associated with offering
Open Bill Access services for the years 2019 and 2020.

**RESPONDING ARGUMENT OF ENERCARE INC.
REGARDING OUTSTANDING ITEMS**

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I. INTRODUCTION

1. These are the written submissions of the Enercare Inc. ("**Enercare**") on the two outstanding issues regarding Enbridge Gas Inc.'s ("**Enbridge**") Open Bill Access ("**OBA**") program:

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

2. Enercare supports the position of Enbridge on these unsettled items, subject to specific considerations described below. In short, Enercare's belief is that the operational details of the OBA program should be left within the discretion of Enbridge, with input from billers as appropriate.

3. With respect to the first unsettled issue, Enercare agrees that customers should have ultimate control over what happens on their Enbridge bill, but this needs to be balanced with the effective operation of the OBA program. The task is to devise an approach that: (i) affords billers and customers with a reasonable window to address disputes; (ii) provides customers with the power to remove third-party charges in the event of an unresolved dispute; and (iii) is not administratively burdensome to customers, Enbridge or billers. Enbridge's proposal to revise the OBA program's existing dispute resolution process strikes an appropriate balance between these three objectives.

4. Regarding the second unsettled issue, Enbridge submits that all charges agreed to in the contract between the biller and the customer should be permitted on the Enbridge bill with no restrictions on specific non-recurring charges. There is no evidence that any such charges require special treatment under the OBA program. The available evidence demonstrates that customers overwhelmingly prefer all their energy-related services consolidated onto a single bill for convenience.¹

¹ Vista Credit Corp. Pre-filed Evidence, Attachment A, Exhibit K1.5

II. BACKGROUND AND CONTEXT

5. Enercare adopts the Background and Context section of Enbridge's written argument-in-chief and adds the following for additional context.

6. A number of the intervenors in this proceeding are competitors in markets for energy services and products. As the oral hearing demonstrated, these intervenors have business interests in various markets served by the OBA program and have naturally taken positions to advance their competitive position. The Board must be particularly conscious of this dynamic when evaluating the evidence tendered by Vista Credit Corp. ("**Vista**") and the HVAC Coalition in this proceeding. Vista has wrapped itself in the flag of consumer protection in attempt to obscure its real purpose – to gain a competitive advantage in the "game" it plays in the water heater rental market.² As detailed below, Vista's claims of advancing consumer protection are undercut by its own practices.

7. The purpose of this proceeding is to resolve the two unsettled issues with the OBA program, not to engage in a broader exploration of the history or functioning of the markets underlying the third-party charges billed through the OBA program. These markets are subject to extensive regulation under the federal *Competition Act* and the provincial *Consumer Protection Act* (the "**CPA**"). The Board should not be distracted by evidence or submissions that go beyond the two unsettled issues in this proceeding.³

III. ARGUMENT

A. Issue 1 – Addition, Removal and Reinstatement of Disputed Charges

8. As of the date of writing, the Board is faced with essentially two proposals regarding how charges can be removed from and reinstated onto an Enbridge bill:

- (a) Enbridge and Board Staff propose a resolution window of 15 calendar days or 10 business days, respectively, following which the charge would be removed if the dispute is not resolved. Under Enbridge and Staff proposals, charges resolved after the resolution window could only be reinstated to the Enbridge bill with customer authorization.

² Cross examination of Glen Leis, Ontario Energy Board Hearing Transcript ("**Transcript**"), Vol. 2, p. 30, ll. 2 to 14.

³ Enercare strongly objects to the allegation in paragraph 3 of BOMA's Argument-in-Chief that it has been inflexible in negotiations on the OBA Program. The allegation is a violation of the without prejudice nature of the discussions that occurred in the settlement conferences in this proceeding and should be struck. In any event, Enercare has been open to changes in the OBA program as demonstrated by its agreement to the Supplementary Partial Settlement Proposal and acceptance of the changes to the dispute resolution process proposed by Enbridge in this proceeding.

- (b) Vista and HVAC prefer an approach where third-party charges would immediately be removed from the Enbridge bill when Enbridge is given notice of a dispute by the customer (or by their agents, such as Vista).

9. Enercare generally supports Enbridge's proposal on Issue 1, as set out at paragraphs 21-25 of its written argument-in-chief, subject to the considerations discussed at paragraph 12 below. Enbridge's proposal to revise the OBA program's existing dispute resolution process strikes an appropriate balance between the three objectives identified at paragraph 3 above.

Enbridge's Proposal provides a Reasonable Resolution Window

10. Enercare supports an approach that provides a reasonable window for a biller and the customer to resolve any concerns or disputes.

11. The objective evidence tendered in this proceeding shows that disputes in the OBA program are extremely rare⁴ and predominantly involve routine matters that in the vast majority of cases are resolved without removal of the charge from the bill.⁵ Billers and customers should continue to be provided with a reasonable window of opportunity to resolve disputes prior to the removal of the charge from the Enbridge bill. Eliminating this resolution opportunity will result in the unnecessary removal of charges from the Enbridge bill to the detriment of both customers and billers.

12. Enercare has two modifications to Enbridge's proposal which are put forward with a view to making the OBA program as efficient as possible.

- (a) A 15 calendar day resolution window may not be appropriate in all cases. For instance, a customer may not respond to biller inquiries promptly for various reasons (vacation, seasonal change in residence, etc.). The responsiveness of a customer in resolving a dispute should be considered in determining appropriate dispute resolution period. As such, Enbridge should be granted the discretion to extend the resolution window if appropriate.
- (b) Enbridge has proposed that to reinstate a charge outside of the 15 calendar day resolution window, a biller would have to provide "appropriate proof" that a customer has agreed to the resolution. Enbridge's evidence is that requiring

⁴ Enbridge Gas Inc. Third Round Interrogatory Responses, Exhibit I.Summit.1.

⁵ Enbridge Gas Inc. Third Round Interrogatory Responses, Exhibit I.STAFF.9 and Exhibit I.VECC.5.

specific written authorizations from customers to reinstate charges, as proposed by Board staff, "would be administratively very difficult."⁶ Enercare submits that Enbridge should be granted the discretion to determine what constitutes "appropriate proof". However, Enercare proposes that a voice recording or written authorization (including email) from the customer constitutes "appropriate proof" absent exceptional circumstances. Enbridge indicated it would be willing to accept such authorizations and could investigate the right way to operationalize that authorization.⁷

13. Enercare opposes the proposals from Vista and the HVAC Coalition under which a disputed charge would be immediately removed from the Enbridge bill. The evidence filed in this proceeding does not bear out the allegations of systematic abuse of the dispute resolution process. The immediate removal of a disputed charge would see customers lose the efficiency of a single bill system in circumstances that typically involve misunderstandings. Enercare agrees with Enbridge that immediate cancellation would take away "the opportunity for customers and billers to resolve issues that may be a simple matter of clarification between the parties."⁸

14. The evidence of Vista's witness – Mr. Glen Leis – was largely a piece of advocacy and should be entirely disregarded by the Board. It became apparent during his oral testimony that Vista views this proceeding as another playing field on which to continue the "game"⁹ it plays in the competitive rental water heater market. The evidence shows that Vista practice is to provide unsubstantiated advice to customers¹⁰ about the alleged illegality of its competitors' buyout charges or termination fees¹¹ (even though Vista also imposes buyout charges and "arguably similar" termination fees¹²), to get Vista appointed as the customer's authorized agent for the purpose of dealing with Enbridge,¹³ and then initiate a dispute with Enbridge on the customer's

⁶ Enbridge Evidence in Chief, Transcript, Vol. 1, p. 19, l. 8.

⁷ Cross examination of Enbridge, Transcript, Vol. 1, p. 21, l. 12-19.

⁸ Enbridge Evidence in Chief, Transcript, Vol. 1, p. 14, l. 28 to p. 15, l. 1.

⁹ Cross examination of Glen Leis, Transcript, Vol. 2, p. 30, ll. 2 to 14.

¹⁰ Compendium for Enercare's Cross Examination of Glen Leis, Tab 5, Exhibit K2.1; Cross examination of Glen Leis, Hearing Transcript Vol. 2, p. 25, l. 21 to p. 27, l. 5.

¹¹ Vista's allegation that certain buyout charges used by Enercare are invalid has never been accepted by a court or tribunal of competent jurisdiction: Cross examination of Glen Leis, Transcript, Vol. 2, p. 24, l. 18 to p. 25, l. 20.

¹² Cross examination of Glen Leis, Transcript, Vol. 2, p. 39, l. 9 to p. 40, l. 1.

¹³ Vista Credit Corp. Pre-filed Evidence at paras. 21-22, Exhibit K1.5; Cross examination of Glen Leis, Hearing Transcript Vol. 2, p. 43, l. 28 to p. 44, l. 19.

behalf. Vista's practices were exposed during cross-examination after Vista had denied in response to an interrogatory that it was providing advice to the customers of other billers.¹⁴

15. Mr. Leis also pointed to the Canadian Payment Association Rules (the "**CPA Rules**") for pre-authorized debit ("**PAD**") agreements as the "best practice" regarding customer control over third-party charges.¹⁵ But contrary to Mr. Leis' assertion, the CPA Rules do not provide for the immediate cancellation of a PAD agreement – which authorizes a direct withdrawal of money from a customer's bank account – by a customer.¹⁶ In fact, the CPA Rules state that following a direction to cancel a PAD agreement, a biller must only make "best efforts" to cancel a PAD agreement within 30 days and new PADs (i.e. withdrawals) may be issued during that period.¹⁷ The CPA Rules do not provide a process under which the customer can direct cancellation notices to his or her financial institution (referred to as the CPA "member")¹⁸ and actually impose a strict 90-day window during which a customer can seek reimbursement from their financial institution in the event of a disputed withdrawal.¹⁹

16. Contrary to what Vista claims, the CPA Rules do not provide a precedent for the immediate removal of third-party charges from the Enbridge bill when Enbridge (the equivalent of a CPA member) is provided with a notice of dispute. If anything, the CPA Rules provide an analogous example where a biller is provided with a reasonable window to resolve a dispute with its customer without the involvement of the member.

17. Moreover, the evidence in this proceeding demonstrates that Vista does not practice what it preaches. Mr. Leis admitted under cross-examination that Vista does not follow an "immediate cancellation" practice itself when billing customers (including for buyout charges and termination fees) by way of a PAD – which unlike the Enbridge bill actually allows Vista to withdraw money directly from the customer's bank account.²⁰ As demonstrated by its rental

¹⁴ Vista Credit Corp. Corrected Responses to Interrogatories, Response to VECC #4.

¹⁵ Vista Credit Corp. Pre-filed Evidence, Attachment B at p. 18, Exhibit K1.5; Cross examination of Glen Leis, Hearing Transcript Vol. 2, p. 6, ll. 16-25.

¹⁶ While a customer can issue a stop payment on a PAD (as it can on any payment), this is a distinct process from cancelling the PAD agreement and may subject to fees by the financial institution: Compendium for Enercare's Cross Examination of Glen Leis, Tab 6, Exhibit K2.1; Cross examination of Glen Leis, Hearing Transcript Vol. 2, p. 23, ll. 8 to 26.

¹⁷ Vista Credit Corp. Pre-filed Evidence, Attachment C, Exhibit K1.5 (Rule 27).

¹⁸ As one would expect, the practice of financial institutions (like that of Enbridge) is to refer customers to the biller in the event the biller disputes a PAD or wants to cancel a PAD agreement: Compendium for Enercare's Cross Examination of Glen Leis, Tab 6, Exhibit K2.1.

¹⁹ Vista Credit Corp. Pre-filed Evidence, Attachment C, Exhibit K1.5 (Rule 20); Compendium for Enercare's Cross Examination of Glen Leis, Tab 6, Exhibit K2.1; Cross examination of Glen Leis, Hearing Transcript Vol. 2, p. 17, l. 10 to p. 24, l. 15.

²⁰ Cross examination of Glen Leis, Hearing Transcript Vol. 2, p. 38, l. 14 to p. 41, l. 15.

agreement, Vista actually utilizes a 30-day cancellation window for PADs as is permitted under the CPA Rules.²¹

18. While the anecdotal evidence of Mr. Roger Grochmal tendered by the HVAC Coalition provided some context, it is of minimal value to the Board in answering the issues in this proceeding. During his testimony, Mr. Grochmal admitted that he did not have any direct or recent experience with the OBA program's dispute resolution process²² and that his company uses Vista's platform.²³

Enbridge's Proposal Leaves Ultimate Control with the Customer

19. Under Enbridge's proposal, the customer has the ultimate decision on whether a third-party charge remains on their Enbridge bill. While no party disputes this proposition, Vista has suggested that customers do not have control over their bill because Enbridge billers are engaging in widespread abuse of the OBA program by falsely reporting disputes as resolved. This is untrue. Enbridge, who administers the OBA program, has given evidence that "there is not a systemic abuse of the open bill program as it pertains to biller disputes and the removal of charges".²⁴

20. On behalf of Vista, Mr. Leis put forward unsubstantiated allegations as "evidence" to suggest that customers (or their agents, such as Vista) should at any time be able to direct the removal of third-party charges from the Enbridge bill. To substantiate this proposition, Mr. Leis relied upon five hearsay examples in which he alleges that Enercare misinformed Enbridge regarding the resolution of a dispute. Referred to by Vista as Cases A through E, these examples do not withstand scrutiny:

- (a) Regarding Case A, Mr. Leis admitted on cross-examination that Vista, as the customer's agent, had been made aware that Enercare was taking the position it provided to Enbridge;²⁵
- (b) Regarding Cases B through D, Mr. Leis admitted on cross-examination that he did not even know what Enbridge had been told by Enercare, and that his

²¹ Compendium for Enercare's Cross Examination of Glen Leis, Tab 7, Exhibit K2.1.

²² Cross examination of Roger Grochmal, Transcript, Vol. 2, p. 81, l. 1 to p. 82, l. 11.

²³ Evidence in Chief of Roger Grochmal, Transcript, Vol. 2, p. 57, l. 14 -19.

²⁴ Cross examination of Enbridge Panel, Transcript, Vol 1., p. 23., ll. 16-21.

²⁵ Cross examination of Glen Leis, Transcript Vol. 2, p. 37, ll. 13-19, p. 38, ll. 7-9.

position that Enbridge had been misinformed was not supported by Vista's documents;²⁶ and

- (c) Regarding Case E, Enercare has produced a transcript demonstrating the unequivocal agreement of the customer to the charge at issue.²⁷

21. Further, Vista has suggested in its written and oral evidence that immediate cancellation is necessary to protect customers from disconnection. That is simply not true. The undisputed evidence in this case is that Enbridge (i) does not (and has never) disconnected a customer due non-payment of a third-party charge, and (ii) does not require that a customer pay any portion of a disputed third-party charge during the dispute resolution period.²⁸

22. Enbridge's current practice of not disconnecting customers for unpaid third-party charges will be formalized in March 2020. With amendments to the Gas Distribution Access Rule, Enbridge will be formally prohibited from disconnecting gas supply or applying late payment charges in connection with third-party charges. To ensure that customers are made aware of their rights, Enbridge has committed to preparing a customer information notice that will describe the OBA program and include information about the customer's rights in the dispute process. This document will be provided as a bill insert to all existing Enbridge customers and new OBA customers, and will also be posted on the Enbridge website.²⁹ Interested parties, including Vista and the HVAC Coalition, will have an opportunity to provide input on the content of the notice and the frequency of its distribution.³⁰

Enbridge's Proposal is not Administratively Burdensome

23. Enbridge's current dispute resolution process is largely automated,³¹ which is appropriate given the sheer size of the OBA program (approximately 1.4 million bills per month). The Enbridge proposal allows Enbridge to use the system's current functionality and the modifications can be introduced during the current system freeze. As the proposal builds on the existing functionality, billers should be able to adapt to the changes being proposed by Enbridge.

²⁶ Cross examination of Glen Leis, Transcript Vol. 2, p. 35, l. 5 to p. 36, l. 3.

²⁷ Compendium for Enercare's Cross Examination of Glen Leis, Tab 4, Exhibit K2.1; Cross examination of Glen Leis, Transcript Vol. 2, p. 30, l. 15 to p. 33, l. 25.

²⁸ Enbridge Gas Inc. Third Round Interrogatory Responses, Exhibit I.STAFF.9; Cross examination of Glen Leis, Transcript Vol. 2., p. 3, ll. 3-24.

²⁹ Supplementary Partial Settlement Proposal, Exhibit N1-2-1, pp. 7-8.

³⁰ Supplementary Partial Settlement Proposal, Exhibit N1-2-1, p. 8; Cross examination of Glen Leis, Transcript Vol. 2, p. 3, l. 25 to p. 6, l. 3; Cross examination of Roger Grochmal, Transcript, Vol. 2, p. 78, ll. 3-23, p. 82, l. 13 to p. 83, l. 1.

³¹ Enbridge Evidence in Chief, Transcript, Vol. 1, p. 15, ll. 16-17.

24. By contrast, Board Staff's proposal of 10 business days (which is effectively equivalent to 15 calendar days)³² creates three administrative issues:

- (a) A system that allows customers to directly notify Enbridge of a resolved dispute will create many manual transactions.³³ Currently, Enbridge handles more than 20,000 disputes per year – 90% of which are resolved between the biller and customer before the end of the dispute period.³⁴ As such, the Board Staff proposal could result in thousands of additional manual transactions.
- (b) The Board Staff proposal views the dispute resolution process as binary -- either the dispute is resolved, or the charge is removed from the Enbridge bill. However, in practice the biller and customer may agree on a different negotiated resolution.³⁵ Enbridge's existing system can accommodate such updated information from billers and implement the resolution in a subsequent bill. Enbridge's existing system cannot accept a negotiated resolution communicated by a customer.³⁶
- (c) A 10 business day dispute window for all disputes would create the administrative burden of updating the Enbridge computerized OBA administration system, which is currently under a system freeze until late 2021.³⁷ The 15-day calendar day dispute window does not require such updates. Enbridge's universal 15-day proposal would integrate a workaround whereby all disputes will be categorized as CPA disputes.

25. The proposal advanced by Vista and Board Staff would also create an administrative burden for Enbridge. According to Enbridge, if the Vista proposal was adopted, the back office would have to manually update the system to immediately stop billing, take off charges and credit the customer.³⁸

³² For example, using February 1, 2020 as a starting point, there is effectively one day of difference between 10 business days and 15 calendar days – being February 14 and February 15 respectively).

³³ Enbridge Evidence in Chief, Transcript, Vol. 1, p. 17, ll. 10-13.

³⁴ Enbridge Evidence in Chief, Transcript, Vol. 1, p. 17, ll. 14-17.

³⁵ Enbridge Evidence in Chief, Transcript, Vol. 1, p. 17, ll. 25-28.

³⁶ Enbridge Evidence in Chief, Transcript, Vol. 1, p. 18, ll. 1-6.

³⁷ Enbridge Evidence in Chief, Transcript, Vol. 1, p. 15, ll. 21-23; Cross examination of Enbridge Panel, Transcript, Vol. 1, p. 21, ll. 20-26.

³⁸ Enbridge Evidence in Chief, Transcript, Vol. 1, p. 14, ll. 19-23 and p. 15, ll. 16-20.

B. Issue 2 – Restrictions on So-Called “End of Contract” Charges

26. Enercare believes that the term “end of contract” charges is misleading, because it suggests that such charges are in some way extra-contractual. This is not the case. Such charges, and specifically rental water heater buyout charges, are expressly agreed to by the customer in their contract. However, given that all other parties are using the term, Enercare will do so as well for consistency in these submissions.

27. Enercare supports Enbridge’s position that no specific restrictions should be placed on the ability of billers to bill end of contract charges through the Enbridge bill (which is the current practice).³⁹ The evidence shows that only a small percentage of end of contract charges are disputed,⁴⁰ and that only a portion of disputed charges are removed from the bill.⁴¹

28. No compelling rationale has been presented to demonstrate why the option of billing end of contract charges through the Enbridge bill should be eliminated. Vista has argued that customer protection justifies prohibiting end of contract charges from being included on the Enbridge bill. But consumer protection is not furthered by removing end of contract charges from the Enbridge bill; a customer’s liability for end of contract charges is determined as a matter of contract between the biller and the customer, and the customer is already protected by applicable laws, including the *Consumer Protection Act*. Vista is not suggesting that end of contract charges are *prima facie* inappropriate; nor could it do so as Vista itself charges buyout charges and termination fees upon early termination of its contracts.⁴² While Vista has made the business decision to bill such charges using other means (such as a PAD) – as it is entitled to do – this does not mean that other billers should be prohibited from billing end of contract charges through the OBA program.

29. Enbridge’s proposal will provide at least equivalent (and arguably greater) protection to consumers than the CPA Rules which Vista says reflect a “best practice” that should guide the Board.⁴³ The CPA Rules allow the use of PADs for all payments under a contract (including end of contract charges) and, as noted above, a biller has 30 days to make “best efforts” to terminate a PAD agreement upon notice from a customer.⁴⁴ Under the updated OBA regime

³⁹ Enbridge Gas Inc. Third Round Interrogatory Responses, Exhibit I.HVAC 30.

⁴⁰ Enbridge Gas Inc. Third Round Interrogatory Responses, Exhibit I.Enercare.5.

⁴¹ Enbridge Gas Inc. Third Round Interrogatory Responses, Exhibit I.Enercare.3.

⁴² Compendium for Enercare’s Cross examination of Glen Leis, Tab 7, Exhibit K2.1; Cross examination of Glen Leis, Transcript Vol. 2, p. 39, l. 9 to p. 40, l. 1.

⁴³ Vista Credit Corp. Pre-filed Evidence at para. 25, Exhibit K1.5.

⁴⁴ Vista Credit Corp. Pre-filed Evidence, Attachment C, Exhibit K1.5.

proposed by Enbridge, disputed end of contract charges will be automatically removed from the bill if the dispute remains unresolved after 15 days.

30. The existing process for billing end of contract charges, coupled with the changes to the dispute resolution process proposed by Enbridge and Enercare, protects customers and reflects consumer preference.

IV. ORDER REQUESTED

31. For the foregoing reasons, Enercare respectfully requests that the Board find:

- (a) Enbridge's proposal to revise the OBA program's existing dispute resolution process (with the modifications suggested at paragraph 12 above) provides OBA customers with an appropriate level of control over the addition, removal and reinstatement of third-party charges on their Enbridge bill.
- (b) No specific restrictions should be placed on billing OBA customers for penalties, exit or termination fees, or similar charges through the Enbridge bill.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of February 2020.


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