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 Distribution Inc. (now Enbridge Gas 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 charged to customers for the sale, distribution, transmission, and storage of gas commencing as of January 1, 2019.

FINAL ARGUMENT
OF THE
HVAC COALITION

February 21, 2020

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1 GENERAL

1.1 *Introduction*

1.1.1 On December 14, 2018 the Applicant Enbridge Gas Inc. ("Enbridge" or the "Applicant") filed an Application to extend the financial terms of its Open Bill Program ("OBA Program") in its former Enbridge Gas Distribution territory to the end of 2020.

1.1.2 The process has had three phases. First, the parties to this proceeding entered into a Settlement Agreement on March 22, 2019 essentially setting out a proposed procedure for the parties to negotiate continuation (or termination) of the OBA Program. That settlement was approved by the Board on April 4, 2019. Second, the parties entered into a Settlement Agreement dated October 23, 2019 resolving all but two issues associated with the OBA Program, and extended the current financial terms of the OBA Program until December 31, 2023. That Settlement (the "Supplementary Settlement") was approved by the Board on November 11, 2019. The third phase dealt with the unresolved issues relating to protection of Enbridge customers, and included further evidence and discovery, a technical conference, an oral hearing, and final arguments.

1.1.3 The two outstanding issues are as follows:

(a) ***Customer Control.*** 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?

(b) ***Post-Contract Charges.*** 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?.

1.1.4 HVAC notes that the remaining issues, although narrow and apparently of little importance, in fact go to the heart of the OBA Program and its viability. Almost 80% of the Applicant's customers in its former Enbridge Gas Distribution territory have third party charges on their gas bill, to the tune of more than $500 million per year. These are Enbridge customers, and Enbridge bills[1], but the charges in question are from third parties unrelated to Enbridge. This situation is unique in Ontario, and likely in North America, and is an artifact of a regulatory history that did not exist in other jurisdictions[2].

1.1.5 The matters in dispute relate to fundamental principles of the monopoly power of

[1] Tr.1:97.
[2] See Evidence of Roger Grochmal on this history. This has been confirmed by Enbridge: Tr.1:89.

utilities, and the protection of customers by the regulator where that monopoly power is deployed for collateral purposes. They also relate to the Board's role in balancing the interests of customers and regulated entities. HVAC – which is concerned among other things about the impacts of these issues on customer choice and fair competition, as well as protecting the interests of the customers of its members – has in this Final Argument attempted to be as thorough as possible, recognizing the broader implications of what are otherwise relatively narrow issues.

1.1.6 HVAC notes that, under the Supplementary Settlement approved by the Board, there are still three matters outstanding that remain to be addressed, although they are to be handled by the parties and are not before the Board in this proceeding:

(a) Development, in consultation with all parties, and distribution of an Enbridge disclosure document to help customers understand their rights under the OBA Program (the "Fact Sheet").

(b) Consultation between Enbridge, small billers, Vista, and HVAC (as the representative of many small billers) to develop OBA Program changes that make the program more accessible to small billers.

(c) Renegotiation of the OBA Agreement that all billers must sign, which was unilaterally amended in 2018 without the participation and consent of all legally required parties.

1.1.7 The Applicant's Argument-in-Chief was filed on February 7, 2020. This is the Final Argument of the HVAC Coalition on the two unsettled issues.

1.1.8 The Board will be aware that some of the parties who intervened in this proceeding have worked together throughout the proceeding to avoid duplication, including sharing ideas, positions, and drafts. We have been assisted in preparing this Final Argument by that co-operation amongst parties.

1.1.9 HVAC has organized this Final Argument into the two unsettled issues, plus two preliminary/procedural areas that may be important to the Board's consideration of the unsettled issues.

1.2 ***Summary of Submissions***

1.2.1 The detailed submissions of the HVAC Coalition in this Final Argument can be summarized a follows.

1.2.2 ***Enbridge Position.*** The Applicant seeks to portray its position as one of neutral party, just trying to be fair to all stakeholders. The evidence demonstrates that is not the case. Enbridge has consistently preferred and pushed forward the position of the large

billers, to the extent of breaching an agreement with customer groups and HVAC Coalition to do so.

1.2.3 ***Evidentiary Basis.*** The evidence before the Board is limited to the evidence of Enbridge, the HVAC Coalition, and Vista. The large billers, such as Enercare, Reliance, and Summit, did not provide any evidence, presumably to avoid having their evidence and positions tested through discovery and cross-examination. Since Enbridge claims not to know what is happening in the marketplace, the only evidence of market impacts, and impacts on customers, is that of HVAC Coalition and Vista, which has not been successfully challenged.

1.2.4 ***Customer Control Over their Enbridge Bill.*** The OBA Program is unique in Ontario, and probably in North America. On behalf of unrelated third parties, Enbridge invoices Enbridge customers, collects and remits payment, and supervises disputes, all in the name of customer convenience. Despite the apparent customer focus, Enbridge actually does all of this solely on the instructions of those third party billers, while refusing to accept the direct instructions of its own customers.

1.2.5 As a result, Enbridge logs more than 100 new disputes between billers and customers every single business day, and has done so for at least the last five years. This is only the disputes that Enbridge sees. Many others never get logged into the Enbridge tracking system.

1.2.6 This is not a reasonable situation. The bills from Enbridge to its customers should be between Enbridge and its customers, and should be focused on Enbridge's gas distribution regulated monopoly franchise. Any third parties that access this billing and collecting function should accept the primacy of the Enbridge-customer relationship. It follows that customers that do not want to pay their obligations to third parties through the Enbridge bill should be entitled to make that decision, and Enbridge should respect it. It should not be more complicated than that.

1.2.7 To achieve a balance of customer control and administrative efficiency, HVAC has proposed a modification of the Enbridge proposal, in which once a customer decides that they don't want a charge, or a biller, or any billers, on their Enbridge bill, there is a period for them to work with the biller, but at all times the customer remains in control of the process[3]. This proposal is based on the "stop payment" function in place at financial institutions that offer analogous payment services.

1.2.8 ***Penalties, Exit and Termination Fees, and other Post-Contract Charges.*** This category of charges should not be allowed on the Enbridge bill. In the last five years, they have increased from an average of $490 per transaction to an average of $1,593 per transaction. They produce a disproportionate number of disputes, and exacerbate

[3] See para. 3.4.2.

the coercive nature of billing charges on the Enbridge bill. There is unchallenged evidence before the Board that billers have used the OBA Program in attempts to force payment of these charges.

1.2.9 There is no evidence before the Board that customers want to be able to pay these charges on their Enbridge bill, nor that billers need this capability for their own business purposes. In fact, the only evidence on this point before the Board is that HVAC companies do not need this capability, and the customers do not prefer to pay these charges in this manner. On the evidence, it is therefore clear that charges in this category generate no benefits, but enable some material level of abuse, and so they should be prohibited in the OBA Program.

1.2.10 ***Timing***. Enbridge claims that, as a result of a "freeze" on their IT systems arising out of their merger, they cannot implement any changes in their systems until 2021. Customer protections should not be put on hold for the convenience of a regulated utility. If the Board determines that a problem should be addressed, the Applicant should address it as soon as reasonably possible, and certainly not a year later.

2 PRELIMINARY ISSUES

2.1 *Introduction*

2.1.1 This proceeding is unusual for any number of reasons, including the amount of time and effort spent by so many parties on a utility program that is minor in the context of Enbridge's core business activities. This is especially notable given that only two issues remain, and yet that required two ADRs, multiple rounds of discovery, an oral hearing, and hundreds of pages of written submissions.

2.1.2 One reason for this is that a majority of Enbridge customers in the former EGD service territory have third party charges on their bills, and this program is an ongoing source of customer complaints and disputes. Another reason is that the OBA Program is unique in Ontario, and maybe North America, a made-in-Ontario departure from normal utility practices.

2.1.3 This proceeding is also unusual in two other ways:

(a) Enbridge, although the Applicant, seeks to characterize this as a dispute between competitive companies within the marketplace, in which Enbridge is a neutral party, not taking sides. Enbridge, they want the Board to believe, is just trying to be fair to everyone, and do what is best for the customers.

(b) One "side" in this dispute, the smaller companies represented by HVAC and Vista, supported by the customer groups BOMA, CME, Energy Probe and VECC, has provided factual evidence to the Board to support their positions. The other "side", the large billers, has provided no evidence to support their positions.

2.1.4 These two preliminary matters are the subject of brief procedural comments, below.

2.2 *Position of Enbridge*

2.2.1 Enbridge's positioning of themselves, as Applicant, but having a neutral stance, is inconsistent with the evidence before the Board. In particular, Enbridge's protestations that it is only looking to act in the interests of its customers appear to be simply incorrect. Whatever its motivations, defending the interests of its customers does not appear to be high on the list.

2.2.2 ***What Is the Evidence?*** In order to assess the evidence of Enbridge, it is useful for the Board to step back and look at how we got to the current position. Several past actions (or inactions) by Enbridge stand out:

(a) Twenty years ago, Enbridge sold exclusive access to the utility bill to Enercare[4]. At that time, Enbridge made no effort to consult customers (or the regulator, for that matter), and took no steps to protect customers in the transaction. Later, when HVAC Coalition and customer groups raised concerns about the transaction, Enbridge fought hard to maintain the transactions unchanged. Enbridge consistently sided with Enercare during that period[5].

(b) Most of the structure of what is now the OBA Program was designed to benefit Enbridge and Enercare. To the extent that there are benefits to customers, or aspects of the program that try to make it more accessible to other users, those were negotiated results proposed by customers and HVAC Coalition. No application by Enbridge – and there have been several - has ever proposed any improvement in either customer benefits or access.

(c) Although Enbridge signed an agreement in 2014 that it would not amend the OBA Agreement without participation in the negotiations by HVAC Coalition and customer representatives[6], in 2018 it actively and deliberately breached that agreement (and the related Board order) to renegotiate the OBA Agreement with a small subset of interested stakeholders[7]. Customer groups and HVAC Coalition were not even aware of the renegotiations until the new contract was a *fait accompli*.

(d) Despite customer complaints averaging more than 100 per day, year after year[8], Enbridge has characterized the more than 25,000 disputes each year as "*The overall level of disputes between Billers and customers is low*"[9][10]. In this Application, Enbridge made no proposals to add additional protections for customers, or to reduce the number or types of disputes. This is true even though thousands of customers reinstated disputes, some of them multiple times, evidence that the dispute process was not working the way they thought it should.

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[4] Throughout this Final Argument, we have referred to Enercare and its predecessors by one term, Enercare, and we have referred to Enbridge and its predecessors by one term, Enbridge, to make the submissions easier to follow. In fact, the transactions in 2001 were between Consumers Gas and Centrica. The latter became the Consumers Water Heater Income Fund, and then Direct Energy, and now Enercare. Consumers Gas became Enbridge Gas Distribution Inc., and then Enbridge Gas Inc. Nothing turns on any of these structural changes.
[5] The history is set out in the Evidence of Roger Grochmal. Enbridge agrees that the history is generally correct: Tr.1:89.
[6] EB-2013-0099, Exhibit N1, p. 8, as approved by the Board on September 23, 2013.
[7] HVAC #6.
[8] Staff #9(a); Tr.1:105.
[9] Argument in Chief, para. 4.
[10] Enbridge's position appears to be similar to that of Enercare, which describes this number of disputes as "extremely rare": Enercare Statement of Positions, page 2.

(e) Although the OPB Program and agreement require billers to have a legal agreement with all customers billed on the Enbridge bill[11], Enbridge in fact never sees these agreements[12], and admits that some customers do not have an agreement with the biller[13]. In fact, the evidence of HVAC and Vista is that many customers do not have agreements that comply with the OBA agreement, but Enbridge does not enforce that requirement.

(f) Enbridge logs numerous complaints by customers as breaches of the Consumer Protection Act[14], yet never reports any of those complaints to the relevant government ministry, or to the OEB[15], and, based on the evidence before the Board, there is no practice of advising customers who make the complaints to call either the government or the OEB[16]. In fact, customers are told to call the party they have alleged breached the CPA.

(g) The OBA Agreement requires billers to notify Enbridge if a customer has contacted them to initiate a dispute[17]. Notwithstanding that no biller has ever notified Enbridge of a dispute[18], Enbridge has never investigated that unusual situation to see if any billers have been in breach of the agreement, and thinks it is perfectly fine[19].

(h) Enbridge claims that it has a "three strikes" system[20] to punish misbehaving billers, but in fact it has never issued a strike to any biller. This is despite the fact that eight billers are on the provincial government's Consumer Beware list[21], and at least one biller (Enercare) has been investigated multiple times by the Competition Bureau for its practices related to the goods and services it is billing on the Enbridge bill, and another biller (Reliance) is currently subject to a consent order by that regulator. The fact that a biller is on the Consumer Beware list has no impact on their ability to participate in the OBA Program[22].

(i) Enbridge has audit and investigation rights under the OBA Agreement[23], but in 2019 used the investigation rights only six times[24], and used the audit rights

[11] EP #5; Tr.1:19, 46, 94.
[12] Tr.1:54-5; 62.
[13] Tr.1:98-9.
[14] More than 400 per month in 2019, for example: VECC #5.
[15] Tr.1:31.
[16] HVAC #26, Attachment (Open Bill Manual) and Vista #4, Attachment.
[17] Tr.1:35; 96.
[18] Tr.1:102.
[19] Tr.1:36-7; 96.
[20] Tr.1:33.
[21] HVAC#23. The fact that a biller is on the Consumer Beware list is not a concern for Enbridge: Tr.1:114.
[22] Tr.1:114.
[23] HVAC #43.
[24] Tr.1:32.

only once[25].

(j) Faced with a desire by customer groups and those supporting them (like HVAC Coalition and Vista) to give customers greater ability to protect themselves, Enbridge in this proceeding has been more concerned with keeping any changes administratively simple[26] than it has been to add customer protections. In fact, Enbridge says that it already has "a mechanism for unsatisfied customers to have disputed third party charges removed from the Enbridge Gas bill", and thinks that mechanism, requiring customers to make three complaints over several weeks, is sufficient. Even their new proposal requires customers to make two complaints over a multi-week period.

2.2.3 ***Why Does This Matter?*** There are two reasons why Enbridge's decision to side with the large billers in opposition to the customers matters.

2.2.4 First, as we note below the large billers have not filed any evidence, so they have to rely on the Enbridge evidence in support of the status quo. Although Enbridge denies that their evidence is on behalf of Enercare[27], for example, that is the effect. Claiming to be neutral, and then picking a side, are not consistent actions. The Board should view the evidence of Enbridge, not as that of a neutral "honest broker", but as adversarial to the positions of most of the parties, including the smaller billers and the customer groups.

2.2.5 Second, and much more important, the Board has to date in large part left Enbridge to administer the OBA Program in a manner than protects the customers. While some customer protections have been built into past settlements, the bulk of the program (including the OBA Agreement and the OBA Manual) have been neither reviewed nor approved by the Board.

2.2.6 Enbridge would like the Board to continue to trust them to administer the OBA Program to protect the customers, but the evidence in this proceeding is that Enbridge has failed to do so over the last two decades. In HVAC's submission, Enbridge has had their chance to be the defenders of the customers. Now it is time for the Board to step in and protect the customers directly.

2.3 ***Lack of Evidence from Large Billers***

2.3.1 Leaving aside the evidence from Enbridge, it is striking that the large billers, who are fighting to preserve the status quo, have filed no evidence in support of their positions. They are forced, instead, to rely on the evidence of Enbridge, or to challenge the

[25] Tr.1:102.
[26] Tr.1:107.
[27] Tr.1:92.

evidence produced by HVAC Coalition and Vista.

2.3.2 It is the right of the large billers to decline to file evidence, and it is quite understandable that they would do so. The risks of discovery and cross-examination must be weighed against the value of the evidence they could produce.

2.3.3 ***What Does This Mean to the Board?*** HVAC does not believe that, in this situation, it is appropriate for the Board to make any adverse inferences as a result of the lack of evidence from Enercare and others. If they choose to rely on the Enbridge evidence alone, they should be allowed to do so. It doesn't imply that they are hiding anything, or that their case is weak.

2.3.4 On the other hand, it is submitted that the Board should be vigilant in considering statements of position, and conclusions, from Enercare, Reliance, and Summit (and any other large billers supporting the status quo), to ensure that those statements and conclusions are not disguised attempts to lead untested "evidence".

2.3.5 HVAC cannot challenge the statements of positions and conclusions in the Final Arguments of those parties, because we won't see them before we file these submissions. However, we can provide some examples from the pre-hearing position statements of the parties to illustrate our concern.

2.3.6 Summitt, in their position statement, say the following:

> *"It is Summitt's opinion that the majority of Biller disputes relate to contractual interpretation and obligations between the customer and the Biller. Such disputes are legal in nature and better served by the customer providing written authorization directly or from their legal representative."*

2.3.7 Summitt provided no evidence to the Board that most disputes are "legal in nature", and nothing to support their unusual suggestion that customers should have to retain a lawyer if they want to dispute a Summitt charge. Nothing in the oral hearing supports their assertion.

2.3.8 Another example is the Enercare position statement, which says[28]:

> *"Enercare does not accept that the exclusion of non-recurring charges from the Enbridge bill can be justified as a means of consumer protection. A customer's liability for a non-recurring charge is determined as a matter of contract between the biller and the customer, and in most cases, the contract is subject to regulation under the provincial Consumer Protection Act. The customer's obligation to a pay a non-recurring charge is the same regardless*

[28] Page 3.

of whether that charge is billed through the Enbridge bill or directly to the customer."

2.3.9 Once again, Enercare provided no evidence that they have contracts with customers for amounts they bill on the Enbridge bill, let alone that the contracts are CPA protected, and in fact the only evidence on this point is that Enercare does not have contracts in many cases[29].

2.3.10 A third example is found in the Transcript for the second day of the hearing. Enercare counsel sought to put on the record the following[30]:

"MR. DUFFY: And you'll agree with me no court or regulator has ruled that EnerCare's buyout violates consumer protection laws; correct?
MR. LEIS: Has it ever been challenged? I don't know that.
MR. DUFFY: You don't know if a court's ever ruled that; correct?
MR. LEIS: Well, I don't know if it has or hasn't. I really can't answer that question. Have your contracts been challenged in court? Is there a result I should know about?"

2.3.11 Enercare may argue that their buyout is compliant with all consumer protection laws. There is no evidence on the record that is the case. Enercare tried to get Mr. Leis to admit that, and he expressly did not.

2.3.12 ***The Enercare Transcripts.*** In Exhibit K2.1[31], Enercare purports to introduce into evidence transcripts of telephone calls between one of its staff members, Gabrielle, and a customer Enercare counsel claimed was the customer in Case E of the Vista evidence[32]. No witness attested to the correctness of these transcripts (which contain at least some errors that are obvious on their face, such as the first line in Tab 4), and so they can only be treated by the Board as evidence if Mr. Leis, to whom they were put, admitted that they were what they purported to be.

2.3.13 But Mr. Leis was not able to admit that the transcript related to the same customer, because he was never provided with an unredacted version of the transcript. Enercare counsel argued that the Board could look at the unredacted version[33]. However, that doesn't really solve his problem, because no witness has attested to the bona fides of that transcript. It is thus not evidence, and Enercare cannot ask the Board to reach any conclusions based on that transcript[34].

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[29] See, e.g., Tr.1:70.
[30] Tr.2:25.
[31] Enercare Cross-Examination Materials for Vista, Tabs 3 and 4.
[32] Tr.2:31.
[33] Tr.2:32.
[34] HVAC notes that, had it been evidence, there would have been discovery and cross-examination, so for example HVAC would have been able to ask for a copy of the customer contract, which is not currently in the record.

2.3.14 As we note later in this Final Argument[35], whether it is evidence or not doesn't really matter, because in any case it doesn't say what Enercare believes it says. That having been said, HVAC submits that the entirety of Tabs 3 and 4 of Exhibit K2.1 must be ignored by the Board, because they are not properly led as evidence in this proceeding.

2.4 ***Conclusion***

2.4.1 HVAC submits that:

(a) Enbridge's attempt to portray itself as a neutral "honest broker" in this proceeding should be rejected by the Board. Enbridge has consistently allied itself with the large billers, to the detriment of both the majority of potential or actual billers, and the customers whose "convenience" is being pursued with this service.

(b) The Board does not have to respond to the lack of evidence by the large billers with any inferences against their positions. However, it is important for the Board to consider carefully which positions of the parties are supported by actual evidence, properly led by parties in this proceeding, and which have no evidentiary support.

[35] Para. 3.2.9 et seq.

3 CUSTOMER CONTROL OVER THEIR BILL

3.1 ***Background***

3.1.1 The starting point for the analysis of this issue is the basic question HVAC put to Enbridge in cross-examination, "Who is allowed to decide what is included in a customer's bill?" Their answer was[36]:

- ***(a)*** Enbridge can decide what goes on the customer bill, but they are limited to charges approved by the Board, and thus charges allowed under the OEB Act.

- ***(b)*** Billers under the OBA Program can instruct Enbridge to put charges on the bill. No regulatory approval is required, and Enbridge does not check if a biller has authority to charge those amounts[37].

- ***(c)*** The customer has no right to decide what is billed to them on their Enbridge bill.

3.1.2 On the face of it, this is simply wrong. The Enbridge bill is an invoice from Enbridge to a customer for charges regulated by this Board. Under the OBA Program as it is currently structured, and as proposed by Enbridge for the future, third parties who would otherwise have no say in what goes on that bill are given an absolute right to add amounts to the bill. With respect to those unregulated charges, neither the Board nor the customers themselves have any say in whether those charges go on the bill or not, and even if customers object, the initial answer from Enbridge has been, and will continue to be, refusal to follow the customer's instructions.

3.1.3 In support of their position, Enbridge argues repeatedly that it is not reasonably to require customer instructions for the 800,000 new charges added to Enbridge bills under the OBA Program each year[38].

3.1.4 With respect, this is a straw man, and Enbridge knows it. The issue in this proceeding is not whether every new charge on the bill needs a communication from the customer to Enbridge. The parties have for the most part accepted that ease of administration is achieved only if billers are allowed to provide lists of new charges to Enbridge electronically, and that is what is done today. HVAC is not proposing to change that.

3.1.5 What is being proposed, by HVAC and others, is that, when a customer tells Enbridge that they don't want a particular charge on their bill, Enbridge should comply with that

[36] See Tr.1:92-94. These three bullets are a summary of their response.
[37] Tr.1:95.
[38] See, e.g., Tr.1:19, 49, and many other times in the transcripts.

instruction. Enbridge should not, instead, follow the instructions of the relevant biller, contrary to the customer's wishes. In this respect, it should be like a "stop payment" at the bank. The bank does not insert itself into the process. It just accepts its own customer's instructions.

3.1.6 Enbridge proposes to continue to give the billers more rights to make decisions about the customer's bill than the customers themselves. Some parties, including HVAC, believe that the rights of the customer should be paramount.

3.2 ***The Current Situation***

3.2.1 The current dispute protocol works as follows[39]:

(a) If a biller adds a charge to a customer's bill, Enbridge accepts that addition without question.

(b) If the customer objects to the charge, and has a legitimate reason for objecting[40] (in the opinion of Enbridge), then the charge (and any future charges) remains on the bill, but the biller is contacted and told there is a dispute. The biller then has 45 days to resolve the dispute with the customer, or 15 days if what is alleged appears to be a breach of the Consumer Protection Act.

(c) Only the biller has the right to tell Enbridge that a dispute has been resolved or not[41], and no evidence of that resolution is required[42]. Enbridge simply takes the biller's word for it[43].

(d) If the customer calls a second time and disputes the charge, again with a reason for the dispute, the charge (and any future charges) still remains on the bill. The biller is once more contacted and advised that the dispute has been re-instated.

(e) Once more only the biller has the right to tell Enbridge that the dispute has been resolved, or not, and once more no evidence is required.

(f) If the customer calls a third time and still disputes the charge, or if the biller does not advise that there has been a resolution within the time limit, then the

[39] Tr.1:10-12.
[40] Tr.1:106. Note that the current system does not allow a customer to decide that they just don't want a third party charge on their bill, and they would prefer to pay it another way: Tr.1:96. This happens enough that Enbridge even has a call centre script for it: Enercare #4; Tr.1:95.
[41] Tr.1:94.
[42] Staff #9(d); Tr.1:95.
[43] HVAC #39.

charges are removed from the customer's bill.

3.2.2 HVAC asked Enbridge in cross-examination about the real timing of this process. While Enbridge witnesses appeared confused with the questions[44], HVAC believes that the following timeline is roughly correct:

(a) Day 1: Charge appears on Enbridge bill. Assumption is that customer complains immediately. Enbridge advises the biller of the dispute.

(b) Day 31: Disputed charge appears on the customer's next bill, along with any current charges for the same bill.

(c) Day 31-45: Biller advises Enbridge (electronically) that the dispute has been resolved, without providing any particulars[45].

(d) Day 61: Customer sees the charge on their third bill, and calls Enbridge once again to dispute the charge. Enbridge again advises the biller of the dispute.

(e) Day 62-66: Biller advises Enbridge (electronically) that the dispute has been resolved, without providing any particulars.

(f) Day 91: Customer sees the charge on their fourth bill (perhaps with three more months of the same charge), and calls Enbridge once again to dispute the charge. Enbridge removes it from the bill and blocks that billing code.

(g) Day 121: Customer checks their fifth bill, and finds that the charge has been removed.

3.2.3 Even if the customer complains each of the three times on the day they receive their bill, they must see it on four bills before it is removed. It is only on the fifth bill that they see Enbridge responding to their complaint by removing it. When Enbridge says "It would be unlikely that it's even four bills"[46], that is just mathematically incorrect. In fact, if the customer delays advising Enbridge of the dispute after any of the four times the customer sees it on the bill[47], it could easily be one more billing cycle before the customer finally succeeds in getting it removed from the bill.

3.2.4 Thus, under the current procedures, there are multiple barriers placed in front of the customer:

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[44] Tr.1:108-110.
[45] Tr.1:56.
[46] Tr.1:110.
[47] For example, because they ask a lawyer or other advisor or family friend for advice, or they are undecided whether they want to continue to fight the utility, etc.

(a) The initial decision to object to something that is on the government (OEB)-approved utility bill[48].

(b) The hassle for the customer to call the utility and object (including any time on hold, etc.).

(c) The initial refusal of the utility to accept the customer's request to remove the charge from the bill (no matter what the customer says).

(d) The delay for most disputes in even the first notification that the charge is still being claimed (i.e. the second bill).

(e) The further hassle of objecting a second time, again with any time on hold.

(f) A second refusal of the utility to accept the customer's instructions.

(g) Another bill showing that the utility is continuing to pursue the disputed charges.

(h) The requirement to object a third time.

(i) Additional uncertainty until the customer sees the fifth bill, with the charge removed.

3.2.5 It is, in fact, surprising that, in light of all these roadblocks, there are still more than 25,000 customer-initiated disputes every year[49]. Further, despite the fact that billers (with blind acceptance and support by Enbridge) claim that the vast majority are resolved, more than 2,000 customers call back a second time to reinstate their disputes[50] (i.e. claiming they were not in fact resolved). And, even when the utility persists in their refusal to believe their own customer for a second time, hundreds of customers call back a third time[51] to say that the claimed resolution is not true.

3.2.6 How many customers don't even complain at all, reasoning that if the utility is charging them for something, they have to pay it, whether they like it or not[52]? How many customers don't want to initiate a "fight" with their utility, whether out of fear or resignation[53]?

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[48] Tr.1:80.
[49] Staff #9(a). It is notable that about 20% of disputes are multiple disputes on the same account: VECC #3.
[50] Staff #9(c) ; Enercare #3.
[51] Staff #9(c) ; Enercare #3.
[52] Tr.1:80.
[53] Enbridge admits that they have no information on how many customers either don't dispute charges they feel they shouldn't pay, or don't persist after their first or second call to the utility: Tr.1:112.

3.2.7 And, perhaps most important, how many customers, faced with their utility supporting the billers and refusing to believe what the customer has to say, give up before the process plays out to its lengthy conclusion? If thousands of customers keep fighting on despite the roadblocks, this Board should ask itself what that implies about customers who just could not bring themselves to start, or continue, such a fight.

3.2.8 The undisputed evidence before this Board is that including charges on the Enbridge bill has a coercive effect on customers[54]. Enbridge then compounds that with a dispute process that heavily favours the billers, and makes it difficult for customers to be heard.

3.2.9 ***Customer Confusion.*** That brings us to the strange case of Mr. X., Case E in the Vista evidence, and allegedly Tab 4 in Exhibit K2.1. As HVAC has noted earlier[55], Tab 4 of the Exhibit K2.1 is not proper evidence, and should be ignored by the Board for the purposes proposed by Enercare.

3.2.10 However, the transcript in Tab 4 can be instructive, not as evidence rebutting the evidence of Mr. Leis, but as an example of how billers can determine that disputes are "resolved". If you assume that the customer in Case E and the customer in Tab 4 are the same (which is not a matter of evidence), Enercare and the customer did not actually agree on a resolution.

3.2.11 Vista contacted Enercare and advised that the customer disputed a buyout charge. Enercare allegedly called the customer to discuss it. The salient part of the transcript is the following[56]:

> *"Gabrielle: So, did you want me to provide you with the buyout quote for that? Or just process it to remove it?*
>
> *[Customer] Ok Gabrielle, so what happened was umm… I got my furnace and my A/C redone by a company and I was thinking about going tankless. They said they do the tankless too so they do it through Vista now they told me that when they're to replace it to call EnerCare and that to ask them where to drop the tank off and I said well isn't there a termination fee with that? They said ya don't worry we will take care of that.*
>
> *[there follows a lengthy exchange in which it is clear that the customer does not understand what the Enercare CSR is telling him, and can't relate it to why he is calling them. The CSR then advises him on what Vista will do.]*
>
> *Gabrielle: Send them an email saying this is the buyout for the rental and they'll reimburse you the $608 before tax.*

[54] Tr.1:28; Evidence of Roger Grochmal; Vista Evidence; Tr.1:122.
[55] Para. 2.3.12, et. seq.
[56] K2.1, Tab 4, p. 1-3.

[Customer]: Uhh… Vista will?

Gabrielle: Ya, Vista will. That's what they had requested right? Get a buyout?

[Customer]: Ya.

Gabrielle: Get them the buyout? Ya, so you can actually give them your bill. The bill that you received. It's already published on there.

[Customer]: Oh ok, cause they said once they take the tank don't worry about it. Laughing

[Customer]: Then it appears on the bill and all of a sudden I'm worried about it.

Gabrielle: They are expecting that you'll provide them with the billing so they can reimburse you. What they'll do is, are you billing with Vista, through it's a rental?

[Customer]: Uh, it is.

Gabrielle: Is it. And you're billing on your Enbridge bill?

[Customer]: Uh, yes.

Gabrielle: Ya, so what they do is they provide a credit of that to your Enbridge bill and it takes care of it.

[Customer]: Mhmm.

Gabrielle: Ya, it's ok.

[Customer]: Ok."

3.2.12 Enercare interpreted this conversation to mean the following[57]:

"Biller Name: Enercare Rome Services
Resolution Comments: CUSTOMER DISPUTES RENTAL BUYOUT FOR $ 608.00 HST.

CHARGE IS VALID,

CUSTOMER HAS BEEN INFORMED OF THE RESOLUTION ON 8/22/2018,

Customer understand and agrees to the resolution. Please close the dispute."

3.2.13 The customer, on the other hand, interpreted this conversation to mean something completely different[58]:

[57] K1.5, Attachment B, p. 46.
[58] K1.5, Attachment B, p. 48.

"I told Enbridge that Vista was dealing with Enercare to resolve this.

I agreed to nothing with Enbridge."

3.2.14 A fair read of the transcript would allow for both interpretations, although it is at least arguable that the CSR, experienced in dealing with customer disputes, simply manipulated the conversation so that it would appear that the customer was accepting what she was saying. It is notable that, while the conversation was said to occur on August 22nd, the customer contacted Vista on October 18th, after seeing an unexpected buyout charge still on his bill. During that period, Enercare advised neither the customer nor Vista that it had reinstated the charge, although clearly it must have advised Enbridge, because it was still on the bill in October. The customer, on the other hand, was surprised that the charge was still on his bill.

3.2.15 Assuming for the sake of the hypothetical that the conversation and the emails are the same customer, this example illustrates well the problem with allowing the biller to decide when a dispute has been resolved, and giving the biller the sole power to instruct Enbridge on reinstating charges on the bill. Had the system been set up so that the customer had to advise Enbridge of the reinstatement, any confusion over what was going to happen would have been resolved. The customer would certainly not have called up Enbridge and told them to keep the buyout charge on the bill.

3.3 ***Modified Enbridge Proposal***

3.3.1 Enbridge has responded to the concerns of some parties to this proceeding by proposing a modified dispute process, which has the following attributes[59]:

(a) The time limit for resolution of a dispute by a biller is reduced from 45/15 days to 15 days for all.

(b) Customers will no longer have to give a reason why they want a third party charge removed from their bill[60].

(c) Billers can only re-instate a charge once. If a customer calls back a second time, then the charge is removed from the bill and cannot be reinstated without a customer authorization[61].

3.3.2 In effect, Enbridge makes clear that this is identical to the previous dispute resolution

[59] HVAC #30; Tr.1:12-13.
[60] Tr.1:106.
[61] Tr.1:74, 78. As noted below, the method of authorization is not yet determined.

process[62], except that the time frames are shortened and the second reinstatement by the biller requires a customer authorization. If the Board does the math on the time frames as set out in para. 3.2.5 above, this would mean that the customer first sees that Enbridge has followed their instructions on the third bill following the disputed charge, rather than the fifth.

3.3.3 This is certainly an improvement, but it has four problems:

(a) Customers still have to overcome their reluctance to dispute a charge from their gas utility. This problem is largely endemic to the OBA Program, although the Fact Sheet described in the Supplementary Settlement may provide some limited help with that.

(b) Billers will still have a preferred position vis-à-vis the customer bill, in that they can overrule a request by the customer to have charges removed from the bill, and Enbridge will implement what the biller wants, not what the customer tells them they want[63].

(c) If a customer persists in calling back the second time to complain, and the charge is removed from the bill and blocked, the biller can still have it reinstated by showing Enbridge "proof" that the customer has agreed with the second reinstatement[64]. As the Board saw in Exhibit K2.1[65], it is relatively easy for a biller to turn an ambiguous telephone conversation into a re-authorization.

(d) Although Enbridge plans to "clean up" the billing codes, blocking a charge will only block a particular billing code, and the billers can have many to choose from[66]. There is no proposal to allow a customer to block any particular biller, or even all third party billers, from charging them on the Enbridge bill.

3.3.4 Worse, perhaps, the Enbridge modified proposal is still a biller-biased dispute system, in which the biller retains too many rights, and Enbridge continues to refuse to recognize the right of their customer to have a say in what is on their Enbridge bill.

3.4 ***The Appropriate Solution***

3.4.1 After hearing the oral evidence, HVAC Coalition still believes that customers should

[62] Tr.1:51.
[63] Tr.1:73-4.
[64] Enbridge has not told the Board what it thinks sufficient "proof" would be: Tr.1:21.
[65] Tab 4. See our discussion under Section 3.2 above.
[66] Staff #12; HVAC #42; Summit #2; Tr. 1:69.

have primacy in their billing arrangements, and so should control whether they pay non-regulated charges on the gas bill, or not.

3.4.2 However, HVAC also has listened to the concerns of Enbridge, and believes that a modification of the Enbridge proposal could be a workable resolution of this issue. The HVAC proposal is essentially the same as a stop payment at a bank, except with a time delay of fifteen days.

3.4.3 Under this modified approach, the following would be the case:

(a) A customer may at any time instruct Enbridge that:

(i) A particular charge should be removed from their Enbridge bill;

(ii) A particular biller should not be allowed to bill any items on that customer's Enbridge bill; or

(iii) The customer does not want to have any third-party charges billed through their Enbridge bill.

(b) If a customer calls Enbridge and for any reason wants one or more third party charges removed from their Enbridge bill, or any third party billing prohibited in the future, the following should happen:

(i) Enbridge should advise the customer that they should contact the biller (or billers, if more than one is being removed).

(ii) Enbridge should tell the customer that the charge will automatically be removed within 15 calendar days, unless the customer advises Enbridge directly that the charge, or some modified charge, is re-authorized.

(iii) Enbridge should email, fax, or mail to the customer the one-page Fact Sheet on customer rights that is referred to in the Supplementary Settlement.

(iv) The biller should be advised of the customer instruction, and the deadline, and advised that the customer must communicate with Enbridge online, by phone, or in writing if the charge, or any modified charge, is to be billed on the Enbridge bill.

(v) At the end of 15 days Enbridge should block all future charges of any billing code from that biller unless the customer authorizes other charges in a direct communication with Enbridge.

(vi) Enbridge should not accept any further instructions from the biller relating to that customer without direct contact between Enbridge and the customer.

3.4.4 This simplified approach aligns with the approach proposed by Enbridge, but with one major difference. Once a customer asserts their right to control their Enbridge bill, Enbridge from that point on only takes instructions from its own customer[67]. The biller no longer has any power to override the customer's wishes.

3.4.5 HVAC notes that this proposal still allows a period during which the customer and the biller can interact. If there is a resolution to be had, the customer and the biller are given a reasonable time to work it out. The difference is in the default. In the Enbridge proposal, the default is that the biller decides the resolution of the dispute. In the HVAC proposal, the default is that the customer's wishes prevail. The element of coercion, while not completely removed, is significantly reduced.

3.5 ***Testing "Customer Convenience"***

3.5.1 Enbridge has taken the position before this Board that customers want the OBA Program because it is an added convenience for them. Although it is clearly not an essential program (given that it is not available in the Union territory), the parties have agreed to continue it in the Enbridge territory, and the Board has approved that agreement.

3.5.2 If customers want the program because it is convenient, and that is Enbridge's primary justification for the program, then it follows that a decision by a customer not to use the program in any instance or for any third party relationship (i.e. that it is no longer convenient for them) should be respected.

3.5.3 Enbridge appears to be afraid that, if the OBA Program is made more customer friendly, billers will no longer want to use it. Clearly if the largest biller, Enercare, decides that they don't want to use it any more, the program is no longer financially viable, and would have to be terminated.

3.5.4 HVAC believes that, if building in proper customer protections makes the OBA Program no longer viable, that is a good result. If the program only works as long as customers have insufficient protections, and are coerced into paying for things they don't believe they should pay, then it is contrary to the public interest, and should not be continued.

3.5.5 HVAC does not, however, think that protecting the customers will kill the program. We believe that billers will adapt to the shift to a more customer-focused program, but will still prefer the convenience the OBA Program offers to the billers, and the

[67] Enbridge says that this would add cost, but provides no details: Vista #6; Tr.1:48. This process, which is simpler than the current process, should be cheaper than present. However, if it is more expensive, there is no reason why Enbridge should not levy a charge on the biller whose billing has been disputed.

customers will still prefer the convenience the OBA Program provides to them. The result should in fact be fewer disputes[68] (because the unfair advantage to the billers will have been removed), happier customers, and a more efficient program.

3.6 ***Timing***

3.6.1 Enbridge has provided evidence that their IT systems are in a "freeze" due to their merger, so they cannot implement any changes to the dispute system (or anything else ordered by this Board in this proceeding) until 2021 at the earliest[69].

3.6.2 With respect, the Board is Enbridge's regulator. If the Board determines that customer protection requires changes to how Enbridge operates, those changes should not be implemented at the convenience of Enbridge. They should be implemented as quickly as reasonably possible, so that customers get the necessary protections as quickly as possible.

3.6.3 HVAC therefore submits that Enbridge should be required to implement the Board's decision relative to customer control over the Enbridge bill (and also the second issue) promptly and without any unreasonable delay.

3.7 ***HVAC Recommendation***

3.7.1 HVAC therefore submits that the Board should require Enbridge to give customers the overriding power to determine what third party charges the customer allows on their Enbridge bill. The detailed proposal in para. 3.4.2 above is a modification of the Enbridge proposal, with the intent of shifting the balance between billers and customers from a biller-focused system to a customer-focused system.

[68] Enbridge says there will be higher call volume, but provides no supporting evidence or rationale: Vista #6.
[69] Vista #6; Tr. 1:22.

4 PENALTIES, TERMINATION AND EXIT FEES, ETC.

4.1 *Introduction*

4.1.1 The second unresolved issue is whether the Enbridge bill should be used to bill customers for post-contract charges, penalties, termination and exit fees, buyouts, etc. HVAC believes that they should be prohibited from the Enbridge bill.

4.1.2 This question is much more binary than the first unresolved issue. There is no evidence that customers want to be able to pay these charges on the Enbridge bill. There is no evidence from any billers providing any rationale why these charges should be allowed on the Enbridge bill. There is only evidence from Enbridge, HVAC, and Vista that:

(a) These charges represent a large proportion of the disputes between customers and billers.

(b) There have been abuses of the OBA Program that centre around using the program to coerce customers into paying this category of charges[70].

(c) While giving customers more control over what is on their bill would help, the most vulnerable customers would still face the potential of abuse of the OBA Program to collect these charges[71].

(d) There are many other ways for billers to collect these charges, which are typically larger, one-time charges.

4.2 *Who is Disadvantaged?*

4.2.1 The total number of rental buyout and other post-contract transactions went up 40% from 2014 to 2019[72], but this represents under 5% of the current rental contracts and about 0.35% of the total charges processed annually through the Enbridge bill[73].

4.2.2 Notwithstanding the relatively small number, this category of charges represents more than 7% of disputes[74], and the average dollar value of each charge has increased 250% from 2014 to 2019[75]. Each year, 3% or more of this category of charges are

[70] See Vista Evidence, K1.5.
[71] Evidence of Roger Grochmal, p. 7.
[72] HVAC #46, p. 2. In 2014 it was 5,016 transactions per month, and in 2019 it was 7,064 per month, an increase of 40.8%.
[73] About 60,000 per year out of more than 17 million total charges annually: Ex. B/2/2, p. 3.
[74] 9,644 disputes out of 137,757 for 2014-2018: see Enercare #5.
[75] Staff #12. The actual dollar value increase in rental buyout charges actually appears to be 225%, from an average

disputed[76]. This compares to 0.16% of other charges disputed[77] in a typical year, i.e. almost twenty times the rate of disputes.

4.2.3 This stands to reason. These charges are usually much larger than normal recurring monthly payments[78], so they have more than an impact on the customer, and they often come at a time when the relationship between biller and customer is ending. Further, customers usually feel that paying a monthly charge for equipment is a fair thing to do, but often believe that paying an exorbitant exit fee, for which they get nothing, is not fair.

4.2.4 This is also the exact situation in which the coercive power of the Enbridge bill is at its highest level. If a customer doesn't want to pay a monthly charge for a water heater on their Enbridge bill, for example, they have to make other arrangements or the biller will just come and remove the equipment. The loss to the biller is a couple of months of small payments, which even without the Enbridge bill the customer would likely pay just because they are small[79].

4.2.5 Conversely, if a charge of $600, $800, $1,000 or more is being levied, and the customer is returning the equipment, the utility bill is the biller's primary leverage. If the customer does not feel they should have to pay it (and even if they are legally not required to pay it under the CPA), they still face the decision of "not paying the gas bill", which for many customers is something they fear[80].

4.2.6 Note that this is particularly important where a biller does not have an actual agreement with the customer, as is so often the case.

4.2.7 Although Enbridge assumes that billers have an enforceable agreement with every customer they bill through the Enbridge bill[81], the evidence before the Board is that is not the case at all. Many customers do not have agreements related to items being billed on the Enbridge bill. This is only a minor problem for billers when they are charging recurring charges, because Enbridge almost never checks to see if they have agreements[82].

4.2.8 On the other hand, if the biller is seeking to charge a termination or exit fee, then

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of $490 per charge in 2014 to $1,593 per charge in 2019: Summit #3 and Summit #4.
[76] Enercare #5.
[77] Ex. B/2/2, p. 3.
[78] See materials attached to Vista Evidence. The total rental buyout charges in 2018 was more than $11 million: Summit #4.
[79] The unchallenged evidence of Mr. Grochmal is that customers will generally pay up to about $500 without dispute, just to avoid a problem.
[80] Evidence of Roger Grochmal, p. 5.
[81] EP #5; Tr. 1:19, 46, 94.
[82] Tr.1:54-5; 62.

unless the biller can use the coercive power of the utility bill, they may have a hard time collecting that charge if the customer doesn't think it is fair. Small Claims Court, for example, would require proof there is an agreement before issuing a judgment.

4.2.9 Neither Enbridge nor any other party has led evidence that customers want to pay termination, exit, buyout and other post-contract charges on their utility bill, and the customer groups in this proceeding oppose inclusion of these amounts on the bill. The only evidence before the Board is that Atlascare, Mr. Grochmal's company, collects pre-agreed buyout amounts directly from customers, not through the utility bill[83], and Vista does not collect post-contract charges through the utility bill either[84].

4.2.10 The only parties who want to allow collection of these charges on the utility bill are Enbridge, which has offered no reason other than these charges are in the agreements between customers and billers[85], and the large billers, who have not filed any evidence supporting the need to include these amounts on the utility bill.

4.2.11 HVAC believes that the Board should ask the question "Why should customers be billed for these amounts on their gas bill?"[86] Unless there is a clear rationale – and none has been given in this proceeding – then the fact that there have been abuses, and the fact that there are a disproportionate number of disputes in this category, weigh in favour of excluding these charges from the bill.

4.3 ***HVAC Recommendation***

4.3.1 HVAC therefore submits that there is no reason for billers to include these charges on the Enbridge bill, and the balance of fairness favours prohibiting these charges in order to reduce the number of disputes, and increase customer satisfaction with the program.

[83] Evidence of Roger Grochmal, p. 8.
[84] Tr.1:123.
[85] Tr.1:16. This is a "fact" Enbridge assumes but knows is often not true.
[86] The large billers, and Enbridge, want to reverse the onus, asking the question "Why should the Board upend the status quo that allows these charges on the utility bill?" HVAC believes this is the wrong question. The entire OBA Program is an exception to the normal practice that utility bills are for regulated charges. Each aspect of the program should be justified as being in the customer interest for the Board to allow the exception.

5 OTHER MATTERS

5.1 ***Costs***

5.1.1 The HVAC Coalition hereby requests that the Board order payment of our reasonably incurred costs in connection with our participation in this proceeding. It is submitted that the HVAC Coalition has participated responsibly in all aspects of the process, in a manner designed to assist the Board as efficiently as possible.

All of which is respectfully submitted.

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