



**BY EMAIL and RESS**

**Mark Rubenstein**  
mark@shepherdrubenstein.com  
Dir. 647-483-0113

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

April 10, 2023  
Our File: EB20220200

**Attn: Nancy Marconi, Registrar**

Dear Ms. Marconi:

**Re: EB-2022-0200 – Enbridge 2024-2028 – SEC Motion**

We are counsel to the School Energy Coalition (“SEC”). Pursuant to Procedural Order No. 4, below is the information for which SEC seeks production at the Motion Hearing, and the rationale, including why the requested information is relevant and should be produced<sup>1</sup> by Enbridge Gas Inc. (“Enbridge”).

***1. Interrogatory 1.2-SEC-77 (CGA/AGA Benchmarking Information)***

SEC requested, in interrogatory 1.2-SEC-77<sup>2</sup>, copies of benchmarking information not already included in the Application, that directly or indirectly related to material aspects of Enbridge’s business. In the interrogatory response, Enbridge provided information about benchmarking work it has participated in, including annual and special studies through its membership in the Canadian Gas Association (“CGA”) and American Gas Association (“AGA”), but refused to produce the studies. Enbridge does so, not based on relevance or that it does not have possession of the material, but that the studies are subject to a confidentiality agreement that requires permission to distribute the work. Enbridge says that the necessary permissions have not been granted.<sup>3</sup>

In response to Undertaking JT1.7, for similar reasons, Enbridge refused to even provide details on what is included in the annual benchmarking studies.

SEC submits that the OEB should order production of the CGA/AGA benchmarking studies.

The OEB has repeatedly and consistently found that confidentiality and non-disclosure agreements

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<sup>1</sup> [Rules of Practice and Procedure](#), Rule 27.03

<sup>2</sup> Exhibit 1.2-SEC-77

<sup>3</sup> Interrogatory Response 1.2-SEC-77 references a number of other benchmarking studies, including other material that also has not been provided. Based on the description of the specific benchmarking studies, SEC is not seeking an order requiring disclosure of those non-CGA/AGA studies.

with third-parties are not a valid basis for non-production of relevant documents.<sup>4</sup> Most recently, in EB-2020-0007, in ordering production of benchmarking studies that were covered by a confidentiality agreement, the OEB found that it "does not accept that [disputed reports] can be withheld from intervenors or the OEB based on private agreements with third parties."<sup>5</sup> In making its order, the OEB cited a previous decision on this issue:

Distributors cannot limit or exclude the Board's jurisdiction by private agreements amongst themselves or with third parties. The Board has often stated that distributors must be cognizant of this when entering into confidentiality agreements with third parties that extend to the provision of information and documents that the utility knows or ought to know may be reasonably required to be produced as part of the regulatory process.<sup>6</sup>

The same rationale applies to Enbridge and the CGA/AGA benchmarking studies in this proceeding. The benchmarking information should be provided. The existence of a confidentiality agreement between Enbridge and the CGA/AGA may be relevant to the issue of benchmarking studies being treated as confidential pursuant to the *Practice Direction on Confidential Filings*, but it is not relevant to the requirement to disclose relevant information to Enbridge's regulator and intervenors.

## **2. Interrogatory 2.6-SEC-119(a)/Undertaking JT 3.16**

In interrogatory 2.6-SEC-119(a)<sup>7</sup>, SEC sought specific information regarding each community expansion project that Enbridge has undertaken. In its response, Enbridge provided some information as it relates to forecast or approved information (name of project, budgeted capital costs, 10-year customer forecast, original forecast Profitability Index, SES term), but refused to provide information regarding actual or updated information (forecast costs, actual capital costs-to-date, actual customers forecast by year, revised forecast PI based on most recent forecast costs and attachment forecast case, forecast revenue shortfall).<sup>8</sup>

Enbridge's refusal to provide the requested information was made on two grounds.<sup>9</sup>

First, the information in some instances may not be available, and in other cases requires what Enbridge says is an onerous effort extract the data, which Enbridge could not undertake within the timeframe to respond to interrogatories.

Second, actual information for community expansion projects will be reviewed after the rate-stability period has ended, which was not this application, and that the OEB had previously accepted Enbridge's proposal not to update the project PI and potentially the SES term for these projects.

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<sup>4</sup> For example: [Decision and Order on Confidentiality and Motion \(EB-2013-0416\), August 25, 2014](#), p.5:

"The Board has confirmed many times that a confidentiality agreement between a regulated utility and a service provider does not prevent the Board from requiring disclosure of information on the public record".

See also, [Procedural Order No.3, \(EB-2020-0007\), February 19, 2021](#), p.2; [Procedural Order No.4 \(EB-2013-0115\), March 19, 2014](#), p.3; [Decision on Phase 1 Partial Decision and Order: Production of Documents \(EB-2011-0140\), June 14, 2012](#), p.3; [Motion Hearing Transcript \(EB-2012-0031\), October 23, 2012](#), p.28 [Decision on Confidentiality \(EB-2011-0123\), August 19, 2011](#), p. 3;

<sup>5</sup> [Procedural Order No.3, \(EB-2020-0007\), February 19, 2021](#), p.2

<sup>6</sup> [Procedural Order No.4 \(EB-2013-0115\), March 19, 2014](#), p.3

<sup>7</sup> Exhibit I.2.6-SEC-119a

<sup>8</sup> With respect to the refused information, the interrogatory points readers to the response to 1.12-FRPO-21, where a similar type, although not the same information was requested but was refused.

<sup>9</sup> Interrogatory Response 1.12-FRPO-21

At the Technical Conference, SEC followed up and explained that the information was not being requested for the purpose of updating the SES term in this application.<sup>10</sup> The benefit of the information is that it provides a window into several specific discrete projects, where Enbridge has previously provided to the OEB detailed costing and customer attachment information. SEC also notes that the previous decision reference by Enbridge says little about providing information only.<sup>11</sup> References to not needing to update the Profitability Index were in the context of proposals to potentially adjust the SES term.

Based on the clarification, Enbridge gave an undertaking (JT 3.16) that: “[s]ubject to data availability, Enbridge will provide responses to the portions of SEC-119, part (a) that were previously declined.”<sup>12</sup>

To SEC’s surprise, Enbridge did not provide *any* of the initially refused portions of interrogatory 2.6 SEC-119(a) in response to the Undertaking JT 3.16. It simply repeats the same basis for the initial refusal, both with respect to inability to complete within the timeframe responding to undertakings, as well as relevance of the information.

The OEB should order production of all the requested information in interrogatory 2.6-SEC-119(a).

If the issue is that the company requires further time to undertake the necessary data extraction to respond to the request, SEC does not oppose Enbridge being granted the time to do so. The information can be provided before the Settlement Conference. The information is important and can be accommodated within the time frame of the proceeding. Enbridge on its own has proposed certain updates to information before the settlement conference begins.<sup>13</sup>

SEC is both concerned and disagrees with the second objection made in the Undertaking Response, that of relevance. Enbridge had previously made such an objection, and then after discussion at the Technical Conference, undertook “subject to data availability” to provide the previously refused information. It is now not open to the company, after giving a legal undertaking, to refuse to provide the information on this ground. Enbridge was quite careful to provide “under advisement” undertakings<sup>14</sup> (which are not actually undertakings but marked as such for identification) that to allow it to consider its position further. It did not do so with respect to Undertaking JT 3.16.

With respect to the question of relevance, SEC disagrees with Enbridge’s position. As previously explained, these specific projects provide the OEB with an ideal look at the progress of specific growth projects, where the full range of forecasts (both costs and revenue) were disclosed to the OEB during a leave to construct application. The requested actual and revised forecast information used in these community expansion projects are an example of Enbridge’s forecasting accuracy, and expansion projects more broadly. These are matters that are clearly relevant to the application, including but not limited to, forecast additions, capital costs, and energy transition risk.

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<sup>10</sup> Technical Conference Transcript. March 24, p.77

<sup>11</sup> [Decision and Order \(EB-2020-0094\), November 5, 2020](#), p.8

<sup>12</sup> Technical Conference Transcript. March 24, p.78

<sup>13</sup> See for example, Enbridge plans to propose a levelized recovery scenario due to the delay in-service date of the Panhandle Regional Expansion Project “by no later than the start of settlement conference in this proceeding”. (See Undertaking JT 5.4). It also plans to provide an updated response to Interrogatory Response 7.0-Staff-237 in advance of the settlement conference, with updated bill impacts (See JT 8.13).

<sup>14</sup> See for example Undertakings JT 1.15, JT 1.17, JT 1.20, JT 1.28



We note that in response to Undertaking JT 3.17, Enbridge refused to provide the underlying information related to its Rolling Project Portfolio on the basis that, while the company does maintain the information, there are more than 1000 projects captured in individual models, and that responding would be too onerous. While SEC is not bringing a motion with respect to Undertaking JT 3.17, it only reinforces the appropriateness and relevance of providing information on this subset of projects where Enbridge has previously provided the forecast information to the OEB.

Yours very truly,  
**Shepherd Rubenstein P.C.**

Mark Rubenstein

cc: Brian McKay, SEC (by email)  
Applicant and Intervenors (by email)