

Elson Advocacy

January 19, 2024

BY RESS

Nancy Marconi

Registrar

Ontario Energy Board

2300 Yonge Street, Suite 2700, P.O. Box 2319

Toronto, Ontario M4P 1E4

Dear Ms. Marconi:

**Re: Motion to review decisions in EB-2022-0156/0249
Ontario Energy Board File No. EB-2023-0313**

I am writing to respond to Enbridge's letter of yesterday's date arguing that Environmental Defence's costs for this proceeding should be disallowed. Enbridge specific objections are unfounded and are based on a distortion of the facts and the review panel's decision. However, Enbridge has not objected to the quantum of costs, which is an indication that they are reasonable in the circumstances.

Environmental Defence Interests

Enbridge argues that Environmental Defence's costs should be disallowed because it lacked sufficient interest in this proceeding. Enbridge's argument misrepresents Environmental Defence's stated interests and the review panel's comments on those interests. Enbridge has cherry picked words out of context to misconstrue Environmental Defence's interests. As noted in Environmental Defence's reply submissions, it opposes subsidies for fossil fuel infrastructure.¹ Environmental Defence's primary position in these cases is that the revenue forecasts are overly optimistic, which will likely result in additional and unwarranted subsidies for the proposed new fossil fuel infrastructure from existing customers. We note that Environmental Defence's interest also aligns perfectly with the interests of existing customers, whose energy bills will increase unnecessarily if they are ultimately made to subsidize these pipelines to cover future revenue shortfalls.

Enbridge also takes wording about heat pumps in Environmental Defence's reply submissions entirely out of context to imply that Environmental Defence somehow has motives that do not align with customer interests. As noted in Environmental Defence's reply submissions, it sought a condition that Enbridge provide accurate information on the annual operating costs of heat

¹ Environmental Defence Reply Submissions, November 9, 2023, p. 3.

pumps versus gas in any marketing materials that discuss operating cost savings from gas.² This desire for accurate information is “important to Environmental Defence’s efforts to help consumers adopt heat pumps as the home heating option that minimizes energy bills and carbon emissions.”³ Again, we note that this interest aligns with the interest of customers, who benefit from having accurate information when making choices about their heating equipment, and are harmed by Enbridge’s alleged deceptive marketing about their heating choices.

Although the review panel noted that Environmental Defence’s interests “included” broad issues and “extend beyond the immediate scope of these proceedings,” that is far different from saying that it has no interest or insufficient interest in this proceeding to obtain costs. Environmental Defence’s interests do extend beyond the immediate scope of this proceeding, especially its interest in stopping catastrophic climate change. But that does not mean it does not also have definite and important interests directly related to this proceeding, including the interests discussed above in stopping further subsidies from existing customers toward this new fossil fuel infrastructure and ensuring that potential new customers are provided with fair and accurate information, both of which perfectly align with the customer interests that the OEB is mandated to protect.

Value of Environmental Defence’s Proposed Evidence

Enbridge argues that Environmental Defence’s costs should be disallowed because the evidence it sought to admit was so devoid of value that Environmental Defence never should have brought the motion in the first place. Again, Enbridge misconstrues the review panel’s decision. In contrast to Enbridge’s characterization, the review panel decided that the motion raised “relevant issues material enough to warrant a review of the decision.”⁴ That would not have been the case if the proposed evidence was so completely devoid of value as suggested by Enbridge.

Furthermore, the review panel denied the motion not because the evidence was completely devoid of any value, but on the more nuanced ground that the decision not to admit the evidence was not a “material and clearly identifiable error.” For instance, it specifically noted as follows: “The original panel could have allowed the proposed evidence. But it was not a material and clearly identifiable error to disallow it.”⁵ Similarly, the review panel never stated that it would have come to the same determination as the original panel did, indicating as follows instead:

The question in this motion is not whether this review panel would have made a different determination than the original panel, but whether the original panel made a material and clearly identifiable error. We conclude that it did not.⁶

Although the review panel ultimately denied the motion, it never suggested that it was somehow improper to bring the motion in the first place or make any other finding about the proposed evidence that would support a disallowance of costs.

² *Ibid.*

³ *Ibid.*

⁴ Decision and Order, December 13, 2023, p. 8.

⁵ Decision and Order, December 13, 2023, p. 16.

⁶ Decision and Order, December 13, 2023, p. 16.

Inclusion of the Mohawks of the Bay of Quinte First Nation

Enbridge argues that there was no change in circumstance to justify withdrawing its motion with respect to the Mohawks of the Bay of Quinte First Nation. That is false. On December 4, 2023, counsel for the First Nation wrote a letter to me, as counsel for Environmental Defence, which contained the following request: “We hereby request that you immediately and unconditionally write to the Board and withdraw your motion with respect to the MBQ Project.” Environmental Defence withdrew that portion of the motion later that same day, directly in response to that specific request.⁷

Since the beginning, Environmental Defence said that it was deferring to the relief sought by the First Nation. However, our understanding was that there were at least some aspects of the relief sought by Environmental Defence that were consistent with the First Nation’s position, including the request that Enbridge provide accurate information on the annual operating costs of heat pumps versus gas in any marketing materials that discuss operating cost savings from gas. The situation changed when Enbridge stopped construction due to the Review Motion, prompting the First Nation to ask Environmental Defence to withdraw the motion. Environmental Defence’s position never changed. Instead, circumstances changed, necessitating a withdrawal of that portion of the motion in order to remain consistent with its stated position vis-à-vis the First Nation.

Enbridge argued that Environmental Defence should be denied costs on account of other parties incurring costs, such as Enbridge Gas legal costs. This argument is inconsistent with the entire cost regime at the OEB, which is meant to encourage a variety of viewpoints to be put forward in proceedings, even though not all viewpoints can win the day. Enbridge’s argument would apply every time a party’s position is not accepted as costs would be denied based on the wasted time of all other parties in addressing that position. The OEB benefits from hearing a variety of perspectives, which will not be possible if parties are penalized for pursuing perspectives that do not ultimately win the day.

If there is any party that is causing unnecessary cost and delay, it is Enbridge, for stridently opposing any party other than itself from being able to file evidence in these three gas expansion proceedings and in other ongoing gas expansion proceedings, including evidence proposed by Environmental Defence and evidence proposed by a local resident that conducted their own survey in Sandford.⁸ Environmental Defence’s evidence would likely have cost a mere \$4,000 per proceeding and could have been provided within the time extension that Enbridge received to file interrogatory responses in this proceeding.⁹ As the review panel noted, “[t]he original panel could have allowed the proposed evidence.”¹⁰ The original panel likely would have allowed the evidence, as recommended by Board Staff,¹¹ were it not for the strong objections of Enbridge.

⁷ Environmental Defence Letter, December 4, 2024.

⁸ EB-2022-0156/0248/0249, Enbridge Letter dated March 28, 2023; EB-2022-0111, Enbridge Letters dated August 8, 2023, December 21, 2023, and January 18, 2024.

⁹ Environmental Defence Evidence Proposal, March 9, 2023.

¹⁰ Decision and Order, December 13, 2023, p. 16.

¹¹ EB-2022-0156/0248/0249, Board Staff Letter dated March 28, 2023.

These proceedings would have concluded more quickly and at less cost were it not for Enbridge's focus on process over substance.

Quantum

Enbridge has not objected to the specific quantum of costs sought by Environmental Defence as being excessive or otherwise inappropriate. This is telling, particularly in light of the considerable efforts that Enbridge has made to develop objections to the costs sought by Environmental Defence. If there was even a remote basis on which to object to the reasonableness of the quantum of costs for the review motion, Enbridge likely would have done so. This is an indication that the costs were reasonable in the circumstances.

Yours truly,

A handwritten signature in blue ink, appearing to read 'K. Elson', with a stylized, cursive script.

Kent Elson

cc: Applicant and intervenors in the above applications