Shepherd Rubenstein

By EMAIL and RESS

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Our File: HV-2022-0200

Ontario Energy Board
2300 Yonge Street
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Attn: Nancy Marconi, Registrar

Dear Ms. Marconi:

Re: EB-2022-0200 – Enbridge Rebasing Phase 2 and 3 – HRAI Intervention

We are counsel for the Heating, Refrigeration and Air Conditioning Institute of Canada (HRAI). We have reviewed the intervention objection letter of January 17, 2024 from counsel for the Applicant. This letter is HRAI's response.

We have organized this letter around the five main areas in which EGI takes issue with the HRAI intervention.

Conflict of Interest

The Applicant objects that HRAI and SEC are represented by the same law firm.

At the basic level, it is hard to understand how this would concern the Applicant. There is no conflict, but even if there were it would solely be an issue for the clients in either case. If SEC and HRAI are happy being represented by the same law firm, what interest would EGI have in those client decisions? Does Enbridge believe that either they or the OEB has a responsibility to supervise the retention by substantial and sophisticated organizations of counsel to represent their interests, some kind of *parens patriae* role in selection and retainer of counsel?

HRAI and SEC have both made an express determination that they wish to retain our firm, each knowing the role of the other client and the positions they are likely to take on all relevant issues. They have determined that there is no conflict. That should be the end of that discussion.

In addition, we note that this is not the first time our firm has represented multiple interests in the same proceeding. It has been most often the case with HRAI (when it was HVAC Coalition) and SEC, but it also arose when we represented the Ontario Geothermal Association (an HRAI affiliate) and SEC, and when we represented Northumberland Hills Hospital and SEC, just to give two examples. This has never been a problem.

Multiple representation is in part a function of being a highly specialized law firm, of which there are only a handful in a similar position. The OEB will be aware of other firms which have also represented multiple clients in the same proceeding, to no ill effect on either the clients or the regulatory process.

We note that this also creates efficiencies. While Mark Rubenstein (assisted by Jane Scott) will take the lead in Phases 2 and 3 for SEC, Jay Shepherd can assist when required, and will already have knowledge of the proceeding and its issues through his representation of HRAI. Similarly, Mark Rubenstein can assist Mr. Shepherd on HRAI issues if required, without first having to get up to speed on a complex proceeding.

None of this has been an issue in the past. It is not clear to us why counsel for the Applicant would raise it in this case.

Substantial Interest

With respect, counsel for the Applicant appears to have misinterpreted the test for whether someone should be granted intervenor status.

The test is not whether the prospective intervenor falls within one of the enumerated categories in Rule 22.02 of the *OEB Rules of Practice and Procedure*. The test is two-fold. First, does the person have a "substantial interest"? Second, do they intend to participate responsibly?

On the second point, the Applicant does not appear to have alleged that HRAI will not participate responsibly. This makes sense, since HRAI/HVAC have a long history of participating responsibly in proceedings, and counsel is known to the OEB.

On the first point, a substantial interest is "a material interest that is within the scope of the proceeding".

Clearly, HRAI has a substantial (i.e. material) interest, given that the Applicant's goal through Enbridge Sustain appears to be to use utility advantages (cross-subsidies, information, customer confusion, branding, etc.) to dominate and undermine an existing and vibrant industry employing thousands of skilled workers.

The only question, therefore, would be whether that interest relates to the issues in Phases 2 and 3 of this Rebasing Application.

At its root, the Applicant's argument appears to be "We successfully avoided talking about Enbridge Sustain in Phase 1 of this proceeding, and now it is too late for a new party to raise it".

HRAI has explained in its Intervention Letter the specific connections between Enbridge Sustain and the Phase 2 and Phase 3 issues, and we will not repeat that information here. Each of those connections is a real concern that needs to be addressed in these phases.

However, it is important to look at this at a higher level as well. Phase 1 set rates for 2024. That was its primary purpose, and that is in the final stages of being completed. Phases 2 and 3 are intended to set rates for 2025-2028. That process has not yet started. If the Applicant is – as HRAI alleges – using utility advantages including cross-subsidies in a rapidly growing competitive business, that will undoubtedly affect what rates will be just and reasonable for utility customers in 2025-2028. Subsidies, external revenues, risks, and other matters are all drivers of fair rates.

This is not a minor thing. Although in its infancy, Enbridge Sustain has already announced (see link to CIB website) a $200 million facility from Canada Infrastructure Bank to finance competitive product offerings. This is undoubtedly the first of many such steps.

The essence of the Enbridge argument appears to be that the OEB, its regulator, cannot look at Enbridge Sustain, a major competitive business within the utility, because the opportunity to do so has already passed. The fact that it is a key (undisclosed) part of the Enbridge Energy Transition strategy is assumed not to be relevant.

Duplicate Proceedings

The third objection the Applicant raises is that there is already an investigation going on within the Compliance Division (and the Competition Bureau, for that matter), so raising Enbridge Sustain in this proceeding would be duplicative.

This is not correct.

Compliance Division can only investigate and take action with respect to whether Enbridge is offside of existing rules or codes or licence conditions. Compliance Division has no jurisdiction to consider "just and reasonable rates", or to assess how the Applicant's actions related to Enbridge Sustain affect rates. The ratemaking jurisdiction – fair treatment of the ratepayers – is being exercised by this panel of Commissioners.

In its Intervention Letter, HRAI specifically noted the ratemaking scope of the current proceedings, and its responsibility to ensure that its participation is directed at ratemaking. It will not be raising the Affiliate Relationships Code (which Enbridge claims doesn't apply to Enbridge Sustain anyway), but it will be raising benefits being granted by ratepayers to a competitive business without compensation, and increasing numbers of utility employees working in a competitive business but paid by the ratepayers.

Ability to Add Value

The final objection to the intervention appears to be that other parties (ratepayer interests) can raise issues relating to Enbridge Sustain if they believe they are important, so the HRAI intervention is not necessary.

There are two problems with this.

First, the fact that two parties are supporting the same positions is not a reason to deny intervention eligibility. Ratepayer groups and environmental groups often have some positions in common, although they often come at those positions via different routes. The Commissioners often benefit from the fact that a diverse group of parties have reached similar conclusions on material issues. It adds perspective.

Second, HRAI is unique in that it has actual knowledge of the industry within which Enbridge Sustain is operating, and what is happening on the ground right now. This is evidenced by the fact that Enbridge Sustain was in the market late in 2022 (having already obtained CIB financing in October 2022), yet none of the other parties were aware of it until Phase 1 was well advanced. Most in fact learned about the issue – and the potential problems it could create – for the first time when they saw the HRAI letter of June 2023.

We also note that HRAI has an additional expertise of value to the Commissioners relating to new home construction. Just as the Commissioners will want to hear from home builders on connection policy implementation, so too the HRAI members will be available to provide information to the Commissioners on the practical realities of that implementation. Since virtually all gas and non-gas heating equipment in new construction is supplied by HRAI members, they have valuable knowledge. No-one else can provide that knowledge.

Costs

On the issue of costs, HRAI notes that OGA and HVAC Coalition both have regularly been found eligible for cost recovery in the past. In almost every case, the OEB has said that it will assess whether full, partial, or zero costs will be awarded based on the extent to which the intervenor participates responsibly in the proceeding and adds value to the regulatory process. Costs are paid by ratepayers because it benefits ratepayers to have a particular intervenor involved. The OEB determines whether the ratepayers are getting value for money based on the actual participation of that intervenor.

So, for example, when HVAC Coalition intervened in an Enbridge case to raise the issue of EnergyLink, a costly EGI initiative to regulate the HVAC industry, the OEB determined that the HVAC Coalition intervention added value for the customers. When HVAC Coalition intervened to deal with the Open Bill program, the OEB made a similar determination. When the Ontario Geothermal Association (an HRAI affiliate) intervened in the Community Expansion case, and provided evidence that could not have come from any other source, the OEB awarded costs because they added value to the process.

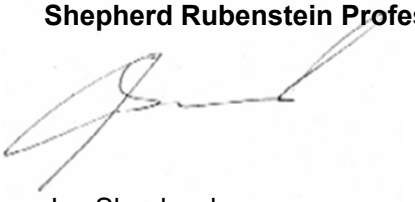
In each case, a key issue was whether the intervenor pursued their narrow commercial interests, or focused on the issues of relevance to the ratepayers. HRAI and its affiliates/predecessors have demonstrated that they do the latter.

What EGI has not addressed in its objection is that eligibility for costs is not the same as an award of costs. HRAI understands that being found eligible is just a preliminary step. Then HRAI must, with its intervention, add value that benefits the ratepayers. If HRAI and its members talk about how Enbridge Sustain will hurt their commercial interests, they will not get an award of costs. On the other hand, if HRAI and its members ensure that their intervention is about just and reasonable rates, and only that, then the ratepayers will benefit and the OEB is more likely to order reimbursement of reasonably incurred costs.

HRAI therefore submits that the OEB should make a determination that HRAI is eligible for cost recovery, with the standard caveat that an award of costs is dependent on responsible intervention that benefits the customers.

All of which is respectfully submitted.

Yours very truly,
Shepherd Rubenstein Professional Corporation



Jay Shepherd

cc: Martin Luymes and Sandy MacLeod, HRAI (by email)
Brian McKay and Ted Doherty, SEC (by email)
Interested Parties (by email)