



By EMAIL and RESS

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May 10, 2024
Our File: 2024-0111

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

Attn: Nancy Marconi, Registrar

Dear Ms. Marconi:

Re: EB-2024-0111 – Enbridge Rebasing Phase 2 – Issues List

We are counsel for the Heating, Refrigeration and Air Conditioning Institute of Canada (HRAI), which through an internal reorganization is the successor to the HVAC Coalition, a long-time OEB intervenor. Pursuant to Procedural Order #1, this letter constitutes HRAI's submissions relating to the Draft Issues List.

Enbridge Sustain

In 2022 Enbridge Gas Inc., the regulated utility, launched a major new business within the utility company, called Enbridge Sustain. It did not initially make any announcement, nor did it provide any information to its regulator, the OEB, or to its customers.

When Enbridge filed its EB-2022-0200 Application in November, 2022, Enbridge Sustain was already well advanced. A number of utility employees had been assigned to pursue the initiative, while still on the payroll of the regulated entity. A \$200 million loan facility was being negotiated between the utility and Canada Infrastructure Bank (subsequently announced by CIB in October, 2023), the latter believing it was dealing with a regulated entity with investment grade credit.

However, it was not until December 2022 that a public announcement of the Enbridge Sustain initiative was made, and even then it was not brought to the attention of the OEB or the parties to the rebasing proceeding. It was not until HRAI advised the OEB of its concerns in June of 2023 that the OEB, and most parties, learned that this activity was underway.

The OEB still has no evidence from Enbridge with respect to Enbridge Sustain. By opposing inclusion of Enbridge Sustain in the Issues List, Enbridge seeks to keep it that way.

HRAI is, however, aware of some aspects of Enbridge Sustain. What we know is the following:

- Enbridge Sustain is in the business of supplying, installing, servicing, and – notably – financing heating and air conditioning systems and power generation and storage systems, including hybrids, ground source and air source heat pumps, solar, and storage. It is structured in an energy-as-a-service (EAAS) business model, meaning that the utility will own all of the assets being supplied to end users for heating, cooling, and electricity.
- It is a competitive business, but it is being carried out as an unregulated ancillary business within the regulated utility. As such, Enbridge believes the Affiliate Relationships Code does not apply.
- It uses information of the regulated utility to identify customers and potential customers, and their needs and attributes. Enbridge has not yet disclosed whether Enbridge Sustain will be a beneficiary of research carried out under the proposed Energy Transition Technology Fund.
- All employees of Enbridge Sustain are employees of Enbridge Gas Inc., and report through the management of the regulated utility. It is not known how many FTEs are currently assigned to Enbridge Sustain.
- It appears that the costs of Enbridge Sustain are being subsidized by ratepayers through their rates. Of course, no evidence has yet been filed by Enbridge in this regard, but in bidding on new projects, Enbridge Sustain has provided bids of half of the next highest bid from competitive companies. Given Enbridge's history of being unable to operate this type of business profitably without a ratepayer subsidy (see below), that appears to be the only logical conclusion.
- While the initial target market appears to be commercial and institutional general service customers and new residential construction, the website and other materials appear to anticipate entering the residential retrofit market as well.
- Enbridge has not disclosed whether it plans to offer Enbridge Sustain exclusive rights to bill its customers on the utility bill, but it has ended the Open Bill program, which made the utility bill available to all providers of energy-related goods and services from 2006 to 2023.
- Enbridge's IRP direction appears to include electrification proposals in which Enbridge will own the electrical assets. At a meeting of the IRP Working Group on April 10, 2024, an Enbridge executive advised that including electrification assets, such as those to be owned by Enbridge due to Enbridge Sustain, in rate base is one of the options that Enbridge plans to propose. This comment specifically referenced the use of IRP for system pruning, as mentioned in the Phase 1 Decision, but presumably applies to other IRP proposals.
- Recently, Enbridge has launched a dealer network, similar to both its pre-1998 Authorized Dealer Network, and its 2006 proposed but disallowed EnergyLink contractor management plan. At this early stage, it looks like this is intended to support Enbridge Sustain in the retrofit market. Contractors are being invited to sign up for exclusive franchise areas to promote gas/electric hybrid heating systems. Enbridge will provide leads. Any solely gas leads will also go to that contractor exclusively.
- Enbridge has not yet disclosed whether it plans to expand these activities into retail and merchandising functions, as it has done (or planned) in the past.

The OEB and stakeholders have no evidence on any of this, as Enbridge refuses to provide this information, and in opposing the inclusion of this issue on the Issues List, is attempting to continue to keep the regulator and the customers in the dark.

HRAI notes that this is not the first time that Enbridge has used this particular strategy, i.e. slipping something by the OEB in one proceeding by providing no evidence, then in the next proceeding arguing that the prior Decision already deals with it, so it can't be "reopened" (see below). The OEB has not in the past been receptive to this approach.

(We note in passing that, the last time Enbridge used this approach, they also objected that there was an OEB Compliance investigation already ongoing, so for that reason as well the OEB should not consider the issue in a rates proceeding. They failed on that point as well.)

This debate over the Issues List appears to boil down to this. Enbridge believes that it can dedicate hundreds of millions of dollars of resources within the regulated entity to a new non-monopoly business activity, without ever having the regulator scrutinize whether it is appropriate and, if it is, whether it is being done fairly and with due regard for the interests of the customers. In fact, Enbridge apparently believes that it doesn't even have to tell the regulator any of the details of this activity.

Background

This is not the first time Enbridge has trod this path, leveraging its regulated monopoly to enter into a competitive business. In the past, the OEB has been unwilling to let Enbridge do so unless rules were put in place to ensure a level playing field. In each case, the OEB's conclusion has been that regulated rates are not just and reasonable, and the regulated ratepayers are not being treated fairly, unless unregulated activities are able to stand on their own.

By their own admission, Enbridge can't operate those businesses profitably within those parameters.

The Ancillary Businesses. The first historical example is the "ancillary businesses" being carried on by Enbridge until the 1990s. Those included equipment rentals and servicing, retail stores, and a number of other competitive activities. Although the financing was through rentals rather than EAAS, and the equipment was limited to items that used gas, the business model was largely the same as Enbridge Sustain. It was supported by an Authorized Dealer Network, through which Enbridge controlled (and policed) the independent HVAC contractors.

Larger HVAC dealers started to exit the punitive and arbitrary Authorized Dealer system in the 1990s, and in a series of cases (EBRO 492, 495, and 497, and EBO-179-14/15) the OEB required Enbridge to allocate to the ancillary businesses a full share of the costs of those businesses. Prior to that time, the businesses were essentially subsidized by ratepayers.

This culminated in EBO-179-14/15, dealing with the proposed continuation of the equipment rental business, where the Commissioners insisted on removing any ratepayer subsidy. This led to the Decision noting:

"The Company has stated that it does not wish to continue the rental program as a going concern, partly because it is unprofitable to do so under fully allocated costs." [Decision with Reasons, p. 26]

This led to the sale of the equipment rental business by Enbridge to Centrica/Direct Energy (now Enercare) in 2000 for \$1 billion. That included a five year non-compete clause, and included granting the private purchaser a five year exclusive right to bill equipment rental customers on the Enbridge utility bill.

Project Sunken Treasure. As the five year non-compete was coming to an end, Enbridge launched a secret internal project called Project Atocha (named after a famous Spanish galleon that sunk with a legendary amount of gold bullion and other treasures). The purpose of the project was to get back into the equipment supply and financing business through an affiliate, Enbridge Solutions Inc. From internal Enbridge documents, it appears clear that the intent was eventually to dominate the HVAC market, and then move into retail stores and other merchandising.¹

To ensure the success of this new venture, Enbridge proposed a new utility activity called EnergyLink, which would have been a portal for customers to contact the utility to get a referral to an HVAC contractor. HVAC contractors would sign up to be part of this, and would be subject to a comprehensive set of rules written, modified from time to time, and enforced by Enbridge. Enbridge would become the one to call for your heating and air conditioning needs. From the internal documents, we know that this would have become the marketing arm for Enbridge Solutions Inc., leveraging the utility name and reputation.

Initially, it was intended that, once the five year deal with Direct Energy ended, Enbridge Solutions would be given the exclusive right to bill on the utility bill, but before it got going the OEB ordered the utility bill to be opened to all, and the Open Bill settlement was struck.

The budget for EnergyLink was included (not by name) in the OM&A budget approved in RP-2005-0001, in which multi-year rates were established. Then, in EB-2006-0034, the OEB considered whether the EnergyLink proposal was appropriate. Enbridge argued in that case that it was too late to deal with EnergyLink, because the previous case was the cost of service proceeding in which the budget was considered. The OEB rejected this, on the basis that EnergyLink had not been disclosed to the Board, so it could not be taken to have approved it, directly or indirectly.

In addition, Enbridge argued that Mr. Hewson's Compliance group was investigating a complaint about EnergyLink, so it should not be considered in the rate case. The Commissioners rejected this as well.

Ultimately, Enbridge was directed not to proceed with EnergyLink. Not surprisingly, without the advantage of EnergyLink's market control in the utility, Enbridge Solutions Inc. was then wound down.

Patterns

Now, perhaps fighting for their life, Enbridge now seeks to use the Energy Transition as the new excuse to enter that same competitive business using utility monopoly information and other advantages, and a ratepayer subsidy.

There is no evidence, so we must assume that it is at least possible third time is the charm, i.e. this incursion into a similar non-monopoly business is a good one that should be allowed by the OEB.

What Enbridge says is that we must treat that possibility as fact, because they won't let the OEB look at the evidence and judge for themselves whether this is a good idea. The OEB, says Enbridge, should just accept on faith that everything Enbridge is doing here is A-OK, unlike the last two times the OEB looked at this.

This is wrong.

¹ Project Atocha is described in K10.1 in EB-2006-0034. However, since that was a confidential document, it is no longer in our possession, and we are unable to get a copy from the OEB document archives due to that continuing confidentiality.

If Enbridge wants to pursue this activity, it should, as it has in the past, face the regulator, provide full information, and accept the regulator's judgment rather than trying to impose their own. If Enbridge is right, and this is a good idea that should be pursued as they are doing, within the utility, then the Commissioners will reach that conclusion based on the evidence.

However, if the decision is to be made by the regulator, rather than unilaterally by the utility, the issue of Enbridge Sustain must be on the Issues List.

Existing Issues List

As noted in our Intervention Letter and Reply, HRAI believes that most of the issues relating to Enbridge Sustain can be tied to existing issues on the Phase 2 Issues List. We will not repeat our submissions in that regard. Those letters are attached. They also include our submissions on intervenor status, and costs.

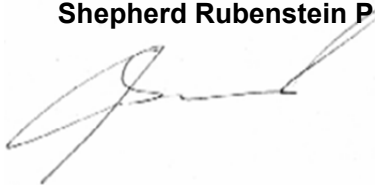
We note, however, that the most transparent and straightforward way to deal with this is to add an issue on the Phase 2 Issues List dealing expressly with Enbridge Sustain, consistent with the underlying assumption in Procedural Order #1. The wording of that issue could be as follows:

"Are the existing and planned activities of Enbridge related to Enbridge Sustain, and the proposal to carry on that business as an unregulated ancillary business within the regulated entity, appropriate, and do the terms and procedures under which it is and will be operated fully protect the ratepayers?"

HRAI therefore submits that this issue should be added to the Phase 2 Issues List.

All of which is respectfully submitted.

Yours very truly,
Shepherd Rubenstein Professional Corporation



Jay Shepherd

cc: Martin Luymes, Sandy MacLeod, and UAC members, HRAI (by email)
Interested Parties (by email)



By EMAIL and RESS

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January 10, 2024
Our File: 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), which through an internal reorganization is the successor to the HVAC Coalition, a long-time OEB intervenor. This letter is sent to seek intervenor status in the Enbridge ("EGI") Rebasing proceeding, EB-2022-0200, Phases 2 and 3, to consider issues of concern to HRAI members and their customers, the ratepayers of Enbridge. We have filed today an appropriate Intervention Form on HRAI's behalf.

HRAI and HVAC Coalition

HRAI is the national industry association for companies and individuals in the business of heating and cooling buildings and related activities. Formed in 1968 as a federal non-profit corporation, it has branches throughout Canada, with a head office in Mississauga. It has three Divisions: Manufacturers, Wholesalers, and Contractors. The Contractors Division subsumes the HVAC Coalition, which had previously been a separate non-profit corporation dealing with energy policy and regulatory issues for HVAC contractors across Canada.

HRAI has four main areas of activity. A large part of the organization is focussed on educational activities. This includes many technical and safety-related training programs, as well as research and technical information such as manuals and white papers. Its government relations team provides expert information to governments at all levels on HVAC related issues, and on the impacts of policies on HRAI members, their employees, and the public. This includes significant policy analysis and development. HRAI also operates the contractor locator application, which allows consumers to find a local contractor that has the right expertise for their job.

Until recently, energy-related regulatory activities were carried out by the HVAC Coalition. In 2022 the work of that organization was folded into the Contractors Division. HVAC Coalition has been intervening in select OEB proceedings since 1997, always with targeted interventions that tie together the interests of HVAC contractors and the customers of utilities.

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The Contractors Division has a separate governing board, but has established a Utility Action Committee (UAC) of large and small contractors, and other interested members, to oversee this intervention. Counsel reports to the UAC, and under their oversight to HRAI President Sandy MacLeod and Vice-President Martin Luymes.

Background and Reason for Late Intervention

HRAI is intervening to deal with the effects of a new EGI unregulated activity, being carried out within the regulated utility, called Enbridge Sustain. While this activity is expected to have some impacts in 2024, the primary impacts will be in 2025 and beyond as it ramps up.

Enbridge Sustain is a business involving the sale, installation, servicing and financing of solar, EV, heat pumps (gas and electric), geothermal, and other energy-related equipment for residential and commercial buildings in Ontario. The business model is “energy-as-a-service” (EAAS), which means that the provider, Enbridge Sustain (a division of EGI), owns the capital assets producing energy-related services, such as heating, cooling, and electricity generation and storage. The building owner pays a monthly fee for those services. The time period is indefinite.

The EAAS model is a recent approach, discussed in a Deloitte White Paper in the UK in 2019, and is potentially a replacement for utility rate base through the creation of a new monopoly created by market dominance. It is based in part on the old ESCO (“energy service company”) model, and in part on the SAAS (“software as a service”) model used by many technology companies.

We are advised that Enbridge Sustain is being carried out as an unregulated ancillary business by the utility, EGI, and all of the people providing the service are EGI employees. Most of them have responsibilities within the regulated business as well as this unregulated business.

We understand that the initial marketing approach of EGI is new construction, allowing builders to remove the cost of sustainable options from the price of houses. It is expected that the monthly payments on those financings for a residential new build will be several hundred dollars, in addition to the homeowners’ mortgage payments. The first forays into new subdivisions and commercial buildings have taken place in 2023.

Sample copies of materials from Enbridge relating to parts of this initiative (the “Solar PV Sell Sheet” and “Geothermal Heating and Cooling”) are attached. The latter is a page from the utility website that links to Enbridge Sustain in the “Contact Us” box.

The record in EB-2022-0200 does not include disclosure by EGI of the rapidly expanding Enbridge Sustain initiative. Although it was publicly announced in December, 2022 (shortly after the application filing was completed), and in the planning stages (and budgets) long before that, EGI did not include information on this in its pre-filed evidence or any of the updates. A CCC interrogatory appears to be seeking information on it (I.1.2-CCC-20), but it is not mentioned in the response. A lengthy consumer research report for EGI dated November 15, 2022 by Research Strategy Group mentions it in passing as part of survey questions (I.1.2-SEC-83, Attach. 1, p. 39, 88,89). None of the budgets for either OM&A or capital specify spending on this, the Enbridge Sustainability Report does not mention it, and the evidence on ancillary businesses doesn’t refer to it, even though it is more significant than the NGV business, which attracted considerable attention.

It is particularly notable that the utility’s materials on the Energy Transition include no reference to the Enbridge Sustain initiative, despite it being a key part of the utility’s strategy to deal with declining market demand for natural gas space and water heating.

We also note that the evidence on the termination of the Open Bill program does not refer to this. The removal of competitors from the utility bill would allow Enbridge Sustain to have a preferred position as the sole supplier billing through the utility.

Because this activity was not raised by the utility in EB-2022-0200, and was not general public knowledge until the proceeding was well advanced, HRAI was therefore not in a position to intervene in Phase 1 of the Rebasing application, and is in the position of seeking to intervene only in Phases 2 and 3.

In this regard, we note that HRAI does not seek to re-open or challenge any aspect of 2024 rates or revenue requirement, and fully accepts the record in Phase 1, including the Decision with Reasons of December 21, 2023. HRAI's interests are related only to 2025 and beyond, and the issues the Commissioners determine are live in Phases 2 and 3.

Issues of Concern to the Intervenor

On June 15, 2023, we wrote the OEB on behalf of HRAI with respect to concerns related to Enbridge Sustain. That letter is attached, as it describes in some detail the history related to this business activity (i.e. this is not the first time for EGI), and the broader issues that it raises. The result of that letter is that an investigation is currently ongoing by the Compliance Division of the OEB. The implications of that are described later in this letter.

Without repeating the previous letter, the concerns related to Enbridge Sustain can be summarized as follows:

1. Customer confusion is expected to arise (as it has in the past) as customers interact with utility personnel thinking they are protected by OEB regulation.
2. Allocations of operating and capital costs between regulated and unregulated activities, while likely not material in 2024, will become material, and increasingly so, in subsequent years.
3. The unregulated business will have access to utility information, unconstrained by the Affiliate Relationships Code (since it is not an affiliate), for the purpose of making an incremental and unregulated return.
4. As was the case when the utility was last in this business, the unregulated business may have exclusive access to the utility bill, something the OEB has prohibited in past decisions.
5. EGI will seek to recover Green Button costs from customers, while the primary beneficiary may be an unregulated business within the utility.
6. As EGI asserts market dominance in the supply of heating and cooling equipment, it will, consistent with its admitted strategy, be in a position to slow down the transition away from fossil fuels.

We note that EGI has already seen public concerns over the information they provide to potential customers in community expansion situations, as evidenced by the attached "Price Comparison Chart" being used by EGI. It is reasonable to assume, given EGI's opposition to the shift away from fossil fuels, that a similar approach may be taken by Enbridge Sustain. By way of example, in Phase 1 of EB-2022-0200 EGI argued, without any supporting evidence, that gas connections should be retained by those electrifying their homes as a type of "insurance policy".

Substantial Interest and Relationship to Phases 2 and 3

The issues of concern to HRAI cause it to have a substantial interest in this proceeding, and particularly in the following Phase 2 and Phase 3 issues:

Incentive Rate Mechanism. While the budget and plans of EGI for Enbridge Sustain have not been made public, it is possible to estimate (roughly) the potential impact on revenue requirement going forward.

For example, if just half of the customer additions forecast in 2025 are switched to Enbridge Sustain as the supplier of heating and cooling equipment, the additional capital assets of EGI will exceed by a substantial amount the \$250 million the OEB ordered as a reduction to the capital budget. Some portion of this could be expected to be offset by reductions in customer connections costs for those new customers. This could be expected to have similarly material impacts on OM&A costs, particularly the \$500 million of expected costs in the Distribution Operations and Engineering and STO components of the OM&A budget. The change in the capital budget would also likely have an effect on the \$310 million of capitalized overhead, and the OEB's ordered reduction in capitalization over time.

HRAI believes it will be essential for EGI to file forecasts relating to Enbridge Sustain, and the impact on OM&A and capital budgets in 2025 through 2028, so that the IRM formula can properly address the shift in emphasis by the company from regulated to unregulated activities.

We note that this is part of a more general issue. Traditional IRM approaches are designed to reflect the continuation of the status quo into the future, often building in a predictable level of growth. In the context of the Energy Transition, expected and unexpected changes to the status quo during the IRM period will be important considerations for IRM design.

Utility/Non-utility Cost Allocation. The allocation issues between utility and non-utility businesses are centred around non-utility storage, but cost allocation can only be done properly when all costs are considered. The same principles are likely to apply to all unregulated business activities within the utility. As Enbridge Sustain takes increasing levels of utility resources, proper cost allocation for that business will be important both absolutely, and as a factor in assessing cost allocations related to storage.

In this regard, we note that the last time this utility was in this type of unregulated business, it was OEB decisions requiring proper cost allocation that resulted in the utility spinning the activity out of the utility, and ultimately selling it.

Revenue Horizon on New Connections. The Commissioners have ordered a reduction of the revenue horizon for new connections, and allocated to Phase 2 of this proceeding consideration of any implementation issues that may arise. Although a press release from the Minister of Energy suggests that this part of the Decision will not stand, nothing has happened as yet, and it appears clear that some change to the revenue horizon will still take place. The only question is how much of a change, and when.

HRAI, whose members currently supply almost all of the space and water heating equipment for new homes in Ontario, are in a unique position to provide the OEB with input on those implementation issues. Not only can HRAI members provide direct evidence, but HRAI is actively involved with policy groups, academic studies, and other persons in the sector that are looking at the Energy Transition in the context of equipment for new homes. It may be possible to bring in expert evidence, if the Commissioners determine that would assist them. The Energy Transition is a major transition for the HVAC sector as well as for gas utilities, as HVAC companies transition to the supply, installation and maintenance of electric heat pumps.

Of course, this issue also relates indirectly to Enbridge Sustain, since the services that unregulated business is and will be providing will be affected, perhaps materially, as the existing cost advantage for heat pumps is increased and moved more to the capital cost as opposed to future savings.

Energy Transition Technology Fund. This proposal would have utility ratepayers funding development of technologies that support the Energy Transition. Given the broad nature of the Enbridge Sustain business, Enbridge Sustain is potentially a primary beneficiary of those ratepayer investments.

Aside from the obvious conflict of interest, Phase 2 will presumably have to deal with safeguards to protect ratepayers from funding on which they may have no direct or indirect benefit in the future, and with the availability of R&D funding on a nonpreferential basis.

Earnings Sharing Mechanism. The design of the ESM will necessarily be unique for EGI, given that the utility is going through a period of significant change. Among the issues may be the extent to which unregulated earnings driven by the Energy Transition, and/or driven by use of utility assets and personnel, are factored into the shareable earnings. Also, as with NGV, the OEB may have to be conscious of the risk to ratepayers that arises when a new and less stable business is being grown within the utility. This is primarily a cost allocation issue, but can also affect earnings sharing.

Related to this is the fact that, as we understand it, EGI may be seeking to use a substantial new tax credit, the Clean Technology Investment Tax Credit, that may be only available in this context to utilities. The OEB will want to consider whether the rates in 2025 and thereafter should be adjusted as the actual tax payable by EGI goes down due to a tax credit that may not be available if Enbridge Sustain were an affiliate. The OEB may also be concerned with any risks to the regulated business and its customers if, as HRAI suspects, EGI ends up after reassessment not being eligible for this tax credit.

These are just some of the areas in which HRAI's concerns arise in Phases 2 and 3.

The OEB may conclude that establishing a specific Enbridge Sustain issue, dealing with all aspects of this, a new initiative by a regulated entity that the OEB has not yet had a chance to consider, is the best approach for Phase 2 in terms of regulatory efficiency. However, in the event that the OEB wishes to keep the current Phase 2 and Phase 3 Issues Lists unamended, HRAI would be involved on those issues as described above and as permitted by the Commissioners.

Related Regulatory Investigations

We note that Enbridge Sustain is the subject of two other regulatory investigations, one by the OEB and one by the Competition Bureau. Neither is a proceeding in which parties can participate, and the issues are not the same as those arising in EB-2022-0200.

- **The Compliance Division of the OEB** is investigating whether Enbridge Sustain is complying with all of the OEB's applicable rules and policies. This cannot consider cost allocation and rate impact issues, which are a separate jurisdiction with which this panel of Commissioners is seized. Further, because Enbridge Sustain is operating within the utility, rather than as a separate entity, EGI believes (and they may be correct) that the Affiliate Relationships Code (ARC) does not apply. Thus, while the Compliance investigation is free to identify ARC-like concerns that would arise if this were an affiliate, no compliance action can be taken in that regard. Only an OEB panel such as this one is able to do that.
- **The Competition Bureau of Canada** is investigating whether the actions of EGI in the Enbridge Sustain business breach the *Competition Act*. Such an investigation does not deal with the interests of utility ratepayers (at least not directly), and in any case in the past the Competition Bureau has been clear that the activities of regulated utilities in Ontario are primarily the regulatory responsibility of the OEB.



We therefore do not believe that these parallel proceedings will have any material overlap with the intervention by HRAI in Phases 2 and 3 of EB-2022-0200.

Intervenor Status and Costs

HRAI therefore requests that they be added as an intervenor in EB-2022-0200, for the reasons set forth above. We will act as their counsel, with the undersigned as the primary contact.

HRAI advises that it plans to seek an order, under the Practice Direction on Cost Awards, for recovery of its reasonably incurred costs to intervene in this proceeding. Its predecessor organization, HVAC Coalition, has applied for and been granted orders for cost recovery in numerous OEB proceedings over the last two decades or more.

HRAI will follow the same approach as HVAC Coalition. That is, its intervention will remain focused on assisting the Commissioners in understanding the issues and getting to the facts, so that the Commissioners are able to protect the ratepayers and deliver on their statutory mandate to set “just and reasonable rates”. HRAI is aware that the OEB does not exist to protect the HVAC industry, and in this proceeding is exercising a customer-focused jurisdiction. The OEB will be aware that, in the past, HRAI/HVAC has demonstrated to the OEB that it is clear on that distinction, and has governed its intervention approach to meet that objective. Those same customers are also our customers.

All of which is respectfully submitted.

Yours very truly,
Shepherd Rubenstein Professional Corporation

A handwritten signature in dark ink, appearing to read 'Jay Shepherd', written over a light blue horizontal line.

Jay Shepherd

cc: Martin Luymes and Sandy MacLeod, HRAI (by email)
Interested Parties (by email)



By EMAIL and RESS

Jay Shepherd
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January 24, 2024
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.

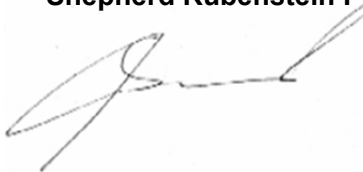
In each case, a key issue was whether the intervenor pursued their narrow commercial interests, or focused on the issues of relevance to the ratepayers. HRAI and its affiliates/predecessors have demonstrated that they do the latter.

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)
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Interested Parties (by email)