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August 15, 2024

BY EMAIL AND FILED VIA RESS

Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street
Suite 2700
Toronto, ON M4P 1E4

Dear Ms. Marconi:

Re: Enbridge Gas Inc. ("Enbridge Gas")
EB-2024-0078 – Motion to Review and Vary (the "Motion")
Reply Submission of Enbridge Gas on the Threshold Question under Rule 43

We represent Enbridge Gas. As directed in Procedural Order No. 1, attached is the Reply Submission of Enbridge Gas on the threshold question under Rule 43 for the Motion.

Please let us know if you have any questions.

Yours truly,

AIRD & BERLIS LLP

David Stevens

c: Ian Richler, counsel to OEB
all parties in EB-2022-0200 / EB-2024-0078

EB-2024-0078

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 Inc., pursuant to section 36(1) of the *Ontario Energy Board Act, 1998*, for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas as of January 1, 2024.

AND IN THE MATTER OF the OEB's Decision and Order dated December 21, 2023.

AND IN THE MATTER OF Rules 8 and 40, 42 and 43 of the *Rules of Practice and Procedur*e of the Ontario Energy Board.

ENBRIDGE GAS INC.

Motion to Review and Vary OEB's December 21, 2023 Decision in Phase 1 of Enbridge Gas Inc.'s Rebasing Application

Reply Submission of Enbridge Gas Inc. on the Threshold Question Under Rule 43

August 15, 2024

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Overview

1. In Procedural Order No. 1 dated June 21, 2024, the OEB referenced Rule 43 of the OEB's Rules of Practice and Procedure which provides that "prior to proceeding to hear a motion to review on its merits, the OEB may determine, with or without a hearing, a threshold question of whether the motion raises relevant issues material enough to warrant a review of the Decision or order on the merits". The OEB then went on to state that: "As a preliminary matter, before considering the merits of Enbridge Gas's Motion, the OEB will hear arguments, in writing, on the threshold question".[1]

2. Enbridge Gas Inc. ("**Enbridge Gas**" or the "**Company**") filed its written submissions on the threshold question on July 10, 2024. The following parties filed written submissions on or about July 29, 2024: CCC, CME, IGUA, Ontario Greenhouse Vegetable Growers ("**OGVG**"), Pollution Probe ("**PP**"), SEC, Three Fires Group ("**TFG**"), VECC and OEB staff. As contemplated under PO #1, this is the Reply Submission of Enbridge Gas to the various submissions made by intervenors and OEB staff. For the purposes of this Reply, Enbridge Gas repeats and adopts its original submissions filed July 10, 2024 and applies the same defined terms.

The Threshold Question

3. While Enbridge Gas will not repeat the submissions made in its July 10, 2024 filing, it believes that it is appropriate to highlight what OEB staff and intervenors were invited to provide submissions on, namely, the "threshold question". Rule 43.01 states that the OEB may consider a threshold question of whether the Review Motion filed by Enbridge Gas raises relevant issues material enough to warrant a review of the Decision or order on the merits. The Rule then goes on to list six examples of relevant considerations. The Rule makes it clear that the list of considerations is not exhaustive.

4. To be responsive to the threshold question, intervenors should have made submissions on whether the Enbridge Gas Review Motion raises relevant issues material enough to warrant a review of the Decision and/or submissions on the various considerations identified in the Rule or in the Enbridge Gas Threshold Submission.

[1] EB-2024-0078 Notice of Hearing and Procedural Order No. 1, June 21, 2024, page 2 ("**PO #1**").

5. It is noteworthy that both Rule 43 and PO #1 specifically provide that the submissions on the threshold question should be heard prior to hearing the motion on the merits. Enbridge Gas submits that most of the submissions clearly went far beyond what was contemplated by PO #1 and Rule 43 and delved into the merits of the Review Motion. Indeed many of the submissions are of the nature and substance that one would expect to hear at a rehearing by the OEB of the matter following a successful outcome on the Review Motion. While Enbridge Gas prefiled (in draft form) the submissions that it would make on a hearing of the Motion, providing a draft of the submissions was intended to ensure that the OEB fully understands the scope and nature of the Company's position about the errors in the Decision. It was not intended as an invitation to parties to go beyond matters relevant to the threshold question.

6. OEB staff go even further, conflating the provisions of Rule 42.01 with the considerations relevant on a preliminary threshold question phase of a motion under Rule 43. Rule 43 contains a non exhaustive list of considerations that are relevant for the purposes of the threshold question, several of which read:

   (a) whether any alleged errors are in fact errors (as opposed to a disagreement regarding the weight the OEB applied to particular facts or how it exercised its discretion);

   (d) whether any alleged errors, or new facts, if proven, could reasonably be expected to result in a material change to the decision or order; and

   (e) whether the moving party's interests are materially harmed by the decision and order sufficient to warrant a full review on the merits.

7. Rather than making submissions on such matters, OEB staff reference the amendments to Rule 42.01 made on July 30, 2021. It should be recalled that Rule 42.01 sets out the requirements of a notice of motion for review. Clause 42.01 (a) specifically states (as amended):

   42.01 Every notice of a motion made under Rule 40.01, in addition to the requirements under Rule 8.02, shall:

   (a) set out the grounds for the motion, which grounds must be one or more of the following:

> *(i) the OEB made a material and clearly identifiable error of fact, law or jurisdiction. For this purpose, (1) disagreement as to the weight that the OEB placed on any particular facts does not amount to an error of fact; and (2) disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction unless the exercise of discretion involves an extricable error of law.*

8. OEB staff take the position that, even at the threshold question stage, the OEB should apply an extremely restrictive interpretation of clause 42.01(a)(i)(2) to the effect that if the motion entails a decision on a matter where OEB staff believe that the OEB exercised discretion, then the motion automatically fails the threshold question and should be dismissed before hearing the merits of the motion.

9. The OEB noted in its July 30, 2021 Letter regarding the adoption of amendments to Rules 40 – 43 that certain parties had expressed the concerns that: (a) the question of the weight attached to evidence might arise in a case where the OEB completely ignored relevant evidence, which itself would be an error of law and that (b) virtually all OEB decisions and orders involve some exercise of discretion, and that if interpreted too narrowly, 42.01(a)(i)(2) could eliminate virtually all motions to review[2]. Stated differently, certain parties expressed concern that the proposed amendments to Rule 42.01 should not eliminate review motions where the OEB ignored relevant evidence (which would be an error of law) and that the amendments should not be interpreted in a fashion which would virtually eliminate all motions to review.

10. Specifically in response to these concerns, the OEB amended Rule 42.01(a)(i)(2) to read: "disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction, *unless the exercise of discretion involves an extricable error of law*" (italicized wording was added). Enbridge Gas submits that what this makes clear is that the OEB understood the concerns expressed about taking such a narrow interpretation of the amended rule and chose language which it believed would alleviate this concern. This includes the implicit acceptance by the OEB that where the OEB has ignored relevant evidence, that this may amount to an error of law. Consistent with this, the courts have

[2] EB-2021-0154, OEB Letter dated July 30 2021 re. Adoption of Amendments to Rules 40-43 of the Rules of Practice and Procedure regarding Motions to Review and Minor Administrative Changes, page 2.

held that where a decision has unreconcilable inconsistencies or fails to provide adequate reasons, these also may be errors of law[3].

11. Enbridge Gas acknowledges that parties may take the position when the OEB hears the motion on its merits that the evidence that the OEB ignored, the inconsistencies identified in the Decision and/or the lack of adequate reasons do not amount to an error of law in this particular case. However, to sustain such a position necessarily requires the OEB to hear all of the submissions, including those of the moving party and to review relevant sections of the record. A determination as to whether the errors alleged by a moving party amount to errors of law or jurisdiction cannot and should not be made based upon the simple characterization of a decision having been made by the OEB exercising discretion. The simple legal reality is that the OEB does not have the discretion to make decisions that do not result in just and reasonable rates[4]. The OEB further does not have the discretion to issue decisions and make factual findings which are inconsistent with each other and it does not have the discretion to issue decisions with inadequate reasons – in fact, internally inconsistent or inadequate reasons can amount to errors of law[5].

12. In terms of those matters which are relevant for the purposes of the threshold question, Enbridge Gas submits that clauses 43.01(d) and (e) have clearly been satisfied. If the alleged errors are proven, that will necessarily result in a material change to the Decision. The Decision in respect of the Asset Lives Issue reduced Enbridge Gas's depreciation expense by approximately $46.2 million in 2024 and will have a similar impact in subsequent years of the 2025- 2028 IRM term. The revenue requirement impact is a reduction of approximately $61 million in 2024, with a similar impact (subject to adjustment by the price cap mechanism) over the 2025-2028 IRM term. The disallowance of $91 million in integration capital resulted in a large write-off, which reduced the revenue requirement in 2024 by approximately $34 million and has a similar impact (subject to

[3] For example, see *Hanson-Tasker v Dr. D. Brian Ewart*, 2020 BCSC 1653 at paras. 24 and 25, which quotes the Ontario Court of Appeal decision in *Enbridge Gas Distribution Inc. v. Ontario Energy Board* 2006 CanLII 10734 (ON CA) at para. 22.
[4] *Ontario (Energy Board) v. Ontario Power Generation*, 2015 SCC 44, Motion Record, Tab 9 (a).
[5] *Hanson-Tasker v Dr. D. Brian Ewart*, 2020 BCSC 1653 at paras. 24 and 25, and *Enbridge Gas Distribution Inc. v. Ontario Energy Board*, 2006 CanLII 10734 (ON CA) at para. 22 regarding inconsistent reasons. See *National Gallery of Canada v. Lafleur de la Capitale Inc.*, 2017 ONCA 688 at paras. 10 – 12 regarding inadequate reasons.

adjustment by the price cap mechanism) over the 2025-2028 IRM term. There is no question that these are material.

13. Indeed, reversing findings for even one of the two Review Issues would result in a material change to the Decision. The Decision in respect of the Asset Lives Issue will have an even longer-term negative consequence given the elevated risk to the Company of the stranding of the assets in question.

14. Even if the OEB determines that it will consider the position taken by OEB staff that at the threshold question stage the OEB should dismiss the Review Motion because the OEB allegedly exercised discretion which means that there can be no error of law, a position that Enbridge Gas refutes, the Company submits that the cases cited by OEB staff in support of its position are easily distinguishable and should not be relied upon by the OEB panel.

15. OEB staff primarily relied upon the Alberta Court of Appeal decision in *Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board)*[6]. Here the issue before the Court was the denial by the Alberta Energy and Utilities Board ("**AEUB**") of the Appellant's costs (an intervenor) for their participation in hearings to approve certain oil sands surface mines. The Court of Appeal referenced in its decision the provisions of the *Energy Resources Conservation Act* ("**ERCA**") which is the statute under which the AEUB had the discretion to award costs[7].

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[6] Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board), 2007 ABCA 192,

[7] Para. 2 of the Court's decision repeated the statutory provisions:

> Local intervener costs awards are provided for in the *Energy Resources Conservation Act*, R.S.A. 2000, c. E-10:
> 28(1) In this section, "local intervener" means a person or a group or association of persons who, in the opinion of the Board, (a) has an interest in, or (b) is in actual occupation of or is entitled to occupy
> land that is or may be directly and adversely affected by a decision of the Board in or as a result of a proceeding before it, but, unless otherwise authorized by the Board, does not include a person or group or association of persons whose business includes the trading in or transportation or recovery of any energy resource.
>
> (2) On the claim of a local intervener or on the Board's own motion, the Board may, subject to terms and conditions it considers appropriate, make an award of costs to a local intervener.
> (3) Where the Board makes an award of costs under subsection (2), it may determine

16. As can be seen, the language of the *ERCA* conferred on the AEUB a wide statutory discretion in respect of who is entitled to costs and the costs awards themselves. It did not provide, as the *OEB Act* mandates, that the OEB **shall be** guided by the statutory objectives of section 2. The discretion granted in the *ERCA* is also very different from the obligation on the OEB to approve rates that are just and reasonable[8]. The discretion to award or not award costs cannot be compared to the obligations incumbent on the OEB under the *OEB Act*. To argue that the OEB should dismiss the motion to review at the threshold question stage, even where the materiality of the issues is not in question, solely because the OEB allegedly exercised any amount of discretion, would be inappropriate and contrary to Rule 43. This position risks undermining the bedrock principle of procedural fairness as it amounts to a summary disposition of material issues without any consideration of the record and without hearing full submissions. More fundamentally, Enbridge Gas submits that OEB staff's interpretation would lead to an absurd result whereby parties' rights would be largely vitiated and render the review motion process largely meaningless. The fact is that there is a rule that provides for a review of OEB decisions. That rule must be meaningful and must not be construed in a manner which would lead to an absurdity[9].

17. If the novel position taken by OEB staff is sustained, it is appropriate to ask: does this not act as an incentive for every decision to be framed as, in some way, involving an exercise of the OEB's discretion which would then make it automatically immune from review? The objective of the amendments to the Rules was to weed out immaterial review motions at the outset, not to summarily dismiss those that should be considered on their merits. OEB staff's position could result in a chilling effect that could improperly prevent meritorious matters from being fully heard and decided.

(a) the amount of costs that shall be paid to a local intervener, and
(b) the persons liable to pay the award of costs.

[8] *Ontario (Energy Board) v. Ontario Power Generation*, 2015 SCC 44, Motion Record, Tab 9 (a). Please also see OEB staff submission on Threshold Question, July 29, 2024, page 7.

[9] *Greenshields et al. v. The Queen*, 1958 CanLII 36 (SCC): See para. 47: "It is a cardinal rule for the interpretation of all statutes that they should be so construed, if possible, that they do not lead to an absurdity."

18. A further consideration which the Company submits it has already addressed fully for the purposes of the threshold question test is clause 43.01 (a) which reads:

> (a) *whether any alleged errors are in fact errors (as opposed to a disagreement regarding the weight the OEB applied to particular facts or how it exercised its discretion);*

19. While more will be stated below under the sections of this Reply which separately address the two Review Issues, the fact is that neither the Company's threshold question submission nor its draft submission on the merits raise as an issue any disagreement regarding the weight that the OEB applied to particular facts or how it exercised its discretion. A decision which is not based on the evidentiary record, is internally inconsistent and/or that lacks adequate reasons, are not matters that can be described as going to weight or how the OEB has exercised its discretion. Rather, they go to the heart of the OEB's statutory and legal obligations. Each of these, if proven, constitute errors of law and have resulted in a material negative impact on Enbridge Gas.

Asset Lives Issue

20. The response of parties to the submissions made by Enbridge Gas on this issue needs to be viewed with some context. First, an extraordinary amount of time was spent during the hearing on energy transition issues. Directionally, intervenors were virtually unanimous in their view that the energy transition will result in a significant decline in the demand for natural gas and therefore the need for natural gas infrastructure. There was talk of a "death spiral" and the stranding of assets. As noted in the earlier Enbridge Gas submissions, the Decision was replete with such references and acknowledged the risk of stranded assets being those assets which have not yet been fully depreciated being no longer used or useful. The position of intervenors and the wording of the Decision all pointed in the direction of a shortening of average useful lives of key assets, not a lengthening based upon the recommendations of a depreciation expert that admitted that no adjustments were made to reflect the risks of energy transition[10]. This is an obvious inconsistency accented by the determinations made by the OEB in respect of the residential customer revenue horizon and the capital budget.

[10] EB-2022-0200, Exhibit N.M1.EGI.2, Motion Record, Tab 4(d); 17Tr. 193 and 197, Motion Record, Tab 4(c).

21. Enbridge Gas further submits that the Decision approved the lengthening of the average useful lives of 7 asset accounts without adequate reasons, particularly in light of the issues raised in respect of the energy transition. As well, the Decision in respect of the Asset Lives Issue has increased the risk of stranding and thus the risk that the Company will not be able to recover its invested capital on such assets. This only highlights the inadequacy of the reasons given.

22. Several parties in their submissions on the threshold question have rewritten the OEB's Decision in respect of the Asset Lives Issue. They have pointed to portions of the Decision that relate to other matters such as the depreciation methodology and net salvage and postulate that certain conclusions can be reached about the reasons why the OEB extended the average useful life of several material asset classes. Intervenors undoubtedly felt compelled to come to the support of the OEB given that the full extent of the reasons given in the Decision for this lengthening of lives is:

> *The OEB prefers the analysis provided by InterGroup and Emrydia. The OEB approves the changes to the asset life parameters proposed by InterGroup in Table 3 and supported by Emrydia during the oral proceeding*[11]*.*

23. There is no language in the Decision which explains and supports a 27% increase in the average useful life of asset account 465 Transmission Mains, which had a previously approved average useful life of 55 years for Union Gas which has now been extended to 70 years[12]. There is simply no way to reconcile this change with the balance of the Decision and the concerns expressed by all Parties and the OEB in respect of the risks of future stranding.

24. There is similarly no reasoning given by the OEB for why it rejected the 40 year average useful life of asset account 473.01 Distribution Plant Services – Metal recommended by Concentric and instead approved an average useful life of 45 years other than the statement that: “The OEB prefers the analysis provide by InterGroup…” Approving a longer average useful life of this asset class, which is substantially residential, relative to what was recommended by Concentric which specifically included energy transition issues

[11] Decision page 86, Motion Record, Tab 2.
[12] There was no previously approved average useful life and curve for Enbridge Gas Distribution for Transmission - Mains. Concentric proposed that the harmonized account have an average useful life of 60 years. This was not accepted by the OEB.

in its evaluation of asset lives flies in the face of what the OEB stated in the very last paragraph of the section of the Decision dealing with asset lives which states:

> *Depreciation assumptions for new customer connections for small volume customers will not be relevant under the zero revenue horizon that the OEB is requiring as of January 1, 2025, as the cost of these new connections will not go into rate base*[13]*.*

25. The majority of the panel considered the risk of energy transition and the possible future stranding of assets so great that it ordered a reduction in the revenue horizon to zero. To then approve an increase in the average useful lives of one of the most significant residential customer asset accounts relative to what was recommended due at least in part to the energy transition, can only be fairly characterized as a glaring and irreconcilable inconsistency.

26. Contrary to the submission by SEC[14], it would not have taken the OEB hundreds of additional pages and double the time to explain in the Decision why the OEB approved the lengthening of the average useful lives of the 7 account classes in question. As the Decision approved increases in average useful lives for many assets beyond the average useful lives previously approved for one or both of the legacy utilities, some justification for this should have been included in the Decision particularly given all of the time spent during the proceeding and in the Decision about the risks of energy transition. Yet the Decision is silent on this point.

27. Given the above reality, intervenors and OEB staff have made every effort to try and shore up the Decision by referencing language in the Decision that relates to other issues. Enbridge Gas submits this attempt to rewrite the Decision for the OEB is not sustainable, is reflective of the embedded deficiencies in the Decision, and is demonstrably wrong for several reasons.

28. First, in light of the OEB's acceptance of the ALG depreciation methodology procedure over the ELG methodology proposed by Enbridge Gas's expert, Concentric, the OEB specifically directed Enbridge Gas to study all reasonable alternative methodological

[13] Decision page 87, Motion Record, Tab 2.
[14] SEC Submission July 29, 2024, page 6.

approaches, including the units of production approach[15]. In respect of net salvage parameters, the OEB directed Enbridge Gas to track and study ten specific accounts for the purposes of more accurately estimating actual net salvage[16]. The OEB specifically stated that it preferred InterGroup's net salvage recommendations relative to the legacy rates until the future studies it ordered in respect of the ten identified accounts was completed[17].

29. The Decision in respect of asset lives makes no such linkage. Had the OEB intended that some or all of the legacy average useful lives remain in place until the Company undertook further study, the OEB could have said just that. It did not. Instead it approved the average useful lives of the 7 asset accounts which are the subject of this motion without explanation.

30. The OEB specifically states in the Decision that it directed the Company, "elsewhere in this decision" to address the depreciation methodology policy and "other stranded risk mitigation options"[18] The risk which is referenced refers to, of course, the future stranding of assets by them no longer being required yet not fully depreciated. This language can in no way be used to justify an increase in average useful lives as a lengthening of useful lives increases the risk of stranding, the very risk which the Company has been directed to study.

31. Clearly, the risk of stranding was considered of such importance to the OEB that it directed Enbridge Gas to undertake the aforementioned study for the purposes of delineating and addressing the risk of stranding. The expectation from this study is that the risk of stranding will require some acceleration of depreciation, perhaps as noted by the OEB, by means of a units of production methodology[19]. It is completely counterintuitive that Enbridge Gas would be directed to study methodologies which would accelerate depreciation and, in the same decision and without any rationale or explanation, be ordered to lengthen the average useful lives of several significant asset classes.

[15] Decision page 92, Motion Record, Tab 2.
[16] Decision page 92, Motion Record, Tab 2.
[17] Decision page 91, Motion Record, Tab 2.
[18] Decision page 86, Motion Record, Tab 2.
[19] Decision page 92, Motion Record, Tab 2.

32. It should come as no surprise that no party has argued that the directives in the Decision requiring the Company to undertake a review of all reasonable depreciation methodologies constitute support and a basis to increase the average useful lives of the asset accounts in question. While parties reference the OEB's determination that Enbridge Gas should undertake further analysis of depreciation methodologies as the basis for refusing a wholesale change in depreciation methodology[20] none were so bold as to suggest that the directives specifically support the lengthening of average useful lives at this time. The obvious reason for this is they all know that directionally, the future study and analysis that the Company has been ordered to undertake will likely support some form of accelerated depreciation[21], not a deceleration which is what the Decision has ordered in respect of the 7 asset accounts in question.

33. OEB staff characterize the Decision as the OEB deciding to "maintain the status quo on depreciation until the implications of energy transition could be properly accounted for, in the next rebasing application."[22] Such a characterization cannot be sustained given what the OEB actually held in the Decision. It did not maintain the *status quo*. Notably, the majority of the asset lives recommended by Concentric in its depreciation study were approved by the OEB. This included those asset accounts which, as noted by Concentric witnesses Mr. Kennedy and Ms. Nori, included those for which energy transition issues were considered[23].

34. Even more telling is what the Decision does in respect of the 7 asset accounts which are the subject to the Asset Lives Issue. It should be recalled that the two legacy utilities, Enbridge Gas Distribution and Union Gas, had previously OEB approved average useful lives for their asset accounts and many of these were of different lengths. Concentric proposed the harmonization of the average useful lives of these accounts and, as stated

[20] SEC Submission July 29, 2024, page 8; IGUA argues that while the directive is applicable to Depreciation methodology the findings are according to IGUA "equally applicable" to asset lives. IGUA Submission July 30, 2024 page 4.
[21] The evidence of IGUA expert witness Dr, Hopkins noted that leading jurisdictions in the US are addressing the energy transition issue by, inter alia, considering the acceleration of depreciation. Please see Exhibit M8, Attachment 3: Survey of Analysis of Gas Utility Futures, May 1, 2023, pages 3, 4, 5, 14 and 15.
[22] OEB staff Submission, July 29, 2024; page 8.
[23] EB-2022-0200 16Tr. 135-136 Motion Record, Tab 4(b) and 17Tr.46, 47, 48, 115-116 Motion Record, Tab 4(c).

numerous times during the oral hearing, it considered as one relevant factor for the purposes of its recommendation, where appropriate, the risks of energy transition[24]. By the OEB in several instances lengthening the average useful life of the assets of one of the legacy utilities to the longer average useful life previously approved for the other legacy utility, or by the lengthening of the average useful life even more, as is the case in respect of Transmission Mains from 55 years to 70 years, it is not accurate to suggest that the OEB has maintained the *status quo* as submitted by OEB staff.

35. One can understand why OEB staff made this submission, they are trying to justify not only what the Decision approved but to also compensate for the lack of reasons. In the end, such a submission cannot be supported as the Decision clearly does not maintain the *status quo* until the next rebasing.

36. It is therefore reasonable to conclude that:

(i) the OEB could easily have made its intentions clear and provided justification for the asset lives in question by adding a sentence or two to the Decision, but it did not;

(ii) the attempt to prop up the Decision in respect of the Asset Lives Issue by referencing other parts of the Decision fails given the specificity of the OEB's directives in respect of the depreciation methodology and net salvage issues; and

(iii) it is simply wrong to postulate that the OEB intended to maintain the *status quo* in respect of the 7 asset accounts in question given that the Decision approved many changes to average asset lives which are different from what was the *status quo*.

37. In summary, for the purposes of the threshold question, Enbridge Gas submits that none of the intervenor submissions undermine the fact that the alleged errors, if proven, would have a material impact on the Decision and will continue to have a material harmful impact on Enbridge Gas. The submissions also do not find language elsewhere in the Decision which can be used to support and supplement the inadequate reasons given in respect of the approval of longer average useful lives of the 7 asset accounts in question. This means that the minimum standard incumbent on the OEB to provide reasons in its

[24] *Ibid.*

Decision has not been met which, it is submitted, is an error of law. Further, the submissions fail to resolve the inconsistencies which exist in the Decision and which, it is submitted, also constitute errors of law. These errors surpass the threshold question and should be heard on their merits.

Integration Capital Issue

38. Only five parties filed substantive submissions about the Integration Capital Issue – OEB staff, CME, Staff, SEC and VECC.

39. These parties all agree, or do not dispute, that the OEB made two factual errors in its Decision on the Integration Capital Issue – the OEB mistakenly cited and relied on property consolidation projects which did not occur as being the main examples of integration capital spending, and the OEB relied upon an incorrect finding that Enbridge Gas's integration spending exceeded its integration savings.[25]

40. These parties differ from Enbridge Gas in that they say that these errors are minor, explainable, not material, and would not lead to a different outcome if corrected. To reach that position, these parties speculate as to how the OEB could reach the same outcome after correcting the factual errors.

41. Enbridge Gas repeats its position that the OEB's errors in its Decision related to the Integration Capital Issue are real and material and could lead to a different outcome if corrected and/or addressed. The Company's submissions (here and previously) establish that the threshold question has been satisfied for this issue, because the Review Motion raises relevant issues material enough to warrant a review of the Decision on the merits.

42. The position taken by other parties effectively re-writes the OEB's Decision in order to justify not proceeding past the threshold question to a full hearing of the review motion on the Integration Capital Issue. That is not appropriate. It is like saying "here is the Decision

[25] Note that there is also a third factual error, which is that the OEB said that Enbridge Gas could choose to depreciate the integration capital assets more quickly. The Company addressed this is in its draft Submissions for the motion, and the Submissions in response from other parties do not address the main point, which is that the Company cannot create its own depreciation rates without OEB approval.

that the OEB meant to write, and assuming that the OEB would have written that Decision then there is no basis to hear the Review Motion."

43. Moreover, the arguments from other parties that the OEB's factual mistakes are either not material or do not go to the heart of the Integration Capital Issue are wrong. The OEB's findings within the Decision on the Integration Capital Issue total approximately 4 pages. More than half of that space is devoted to the two items where factual errors were made. The OEB itself relied heavily on these two factual errors in deciding not to allow recovery of integration capital costs. If the factual errors are corrected, then the OEB may come to a different Decision. That is why the Review Motion should proceed to be heard on its merits.

44. The OEB's first factual error, which is acknowledged by OEB staff and SEC, is the OEB's finding that Enbridge Gas had spent most of the integration capital amounts on property consolidation projects required because of amalgamation. As seen in the Decision, this was a key finding because the OEB relied on that finding to conclude that the benefits followed the costs, such that the Decision on Integration Capital is consistent with OEB policy. The OEB relied on that factual finding to mistakenly conclude that "the cost would not have been incurred in the first place in the absence of amalgamation":

> *The OEB agrees that benefits should follow costs, yet the OEB must also consider the impetus for the specific costs incurred. For example, CCC and SEC referenced the GTA East and West facilities at a total cost of $67.3 million submitting that real estate consolidation projects would not have been undertaken in the absence of the amalgamation. CCC and SEC also identified similar integration projects totaling $153.9 million. The ongoing use of those buildings may provide benefits to ratepayers, yet the cost would not have been incurred in the first place in the absence of amalgamation.*[26]
> [emphasis added]

45. The reality is that Enbridge Gas did not spend money on property consolidation projects during the deferred rebasing period. The main amounts included as integration capital were IT projects that would have been required separately by the legacy utilities had there been no amalgamation. However, because of the amalgamation these projects were conducted on a combined basis and termed as integration-related.

[26] Decision pages 74-75, Motion Record, Tab 2.

46. CME and SEC seek to re-write the OEB's Decision. They do this by pointing to their own view of the IT projects being no different from other integration projects. These parties argue that the OEB would have reached the same conclusion if the Decision had cited those IT projects rather than the real estate consolidation projects as the prime examples of integration capital spending.[27]

47. Enbridge Gas disagrees. The IT projects are fundamentally different from property consolidation projects. As summarized in the Company's draft submissions for the Review Motion,

> *The largest of Enbridge Gas's integration capital investments were driven by technology investments to align and update key IT systems. The projects to implement these updated systems had been planned before amalgamation. These investments would have been required in the absence of amalgamation, except that they would not have been done on a combined basis. Key areas where the work was done was in CIS systems (used for billing) and work and asset management systems (used for distribution operations). These are fundamentally important systems to support ordinary utility operations. The cost of upgrading the CIS systems on a combined basis was lower than would have been the case had the legacy utilities undertaken the needed upgrades on a stand-alone basis. All of this was explained in Enbridge Gas's testimony at the hearing, and highlighted in Argument in Chief*.[28]

48. There is no dispute that the expectation under the OEB's MAADs policy is that transaction and integration costs are "generally" for the account of the shareholder. However, the phrase "generally" must mean something different from "always". The OEB's Decision seems to recognize this by stating that it is appropriate to look at the "impetus" for the integration spending at issue. That the word "generally" does not mean "always" is now even more clear from the fact that the OEB has recently seen fit to expand on its MAADs Handbook guidance about treatment of amalgamation expenses to emphasize that it's important to look at the nature of the expense, to consider "*the nature of the expenditure and whether it would have occurred regardless of the consolidation*".[29]

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[27] CME Submission July 29, 2024, pages 16-17; SEC Submission July 29, 2024, pages 9-10.
[28] Enbridge Gas draft Submissions for Review Motion, paras. 74-75 (including footnotes), Motion Record, Tab 1.
[29] The OEB's MAADs Handbook, and the implications of the recent changes, are described in detail in the Enbridge Gas draft Submissions for the Review Motion – see Enbridge Gas draft Submissions for Review Motion, paras. 71-73 (including footnotes), Motion Record, Tab 1.

49. On this point, Enbridge Gas specifically rejects the OEB staff contention that no matter the nature of the integration costs, they are not recoverable because the MAADs Decision said that all such costs would be absorbed by the shareholder over the five-year deferred rebasing term.[30] Effectively, OEB staff are re-writing the OEB's Decision. The OEB's Decision does not take such an extreme position. If the OEB took that view, then there would have been no need to look at the nature of the actual integration costs or the quantum of integration spending and savings.

50. All of this makes the OEB's first factual error very important and material. Had the OEB focused on the actual integration spending projects, rather than on projects that were not undertaken, then the OEB would (or at least could) have come to a different conclusion about whether the integration capital amounts should be included in rate base.

51. For Enbridge Gas to once again point the OEB to the actual nature of the integration capital expenditures is not improper re-argument, as asserted by other parties. Rather, Enbridge Gas is simply identifying the specific factual error in the Decision that should be corrected, as it is obliged to do in a review motion. Had it not done so, Enbridge Gas would have inevitably been met with the argument that its motion is fatally flawed.

52. As Enbridge Gas sets out in its Fresh as Amended Notice of Motion, and explains in its draft Submissions for the Review Motion, a core part of the Company's position is that the OEB failed to properly apply the Benefits follow Costs and Beneficiary Pays principles. The Company submits that this is akin to a legal error, as the OEB should be expected to follow and apply its own policies, especially those as fundamental as the OEB's guiding principles engaged in this motion.[31] Pursuing this line of argument will necessarily require the Company to repeat submissions already made, in order to show how the OEB should have applied its own policies to determine that the integration capital costs are properly included in rate base.

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[30] OEB staff Submission July 29, 2024, page 6.
[31] OEB staff say that there is no legal standard related to OEB policies, and therefore failure to apply such policies is not an error in law – see OEB staff Submission July 29, 2024, page 4. This is a troubling position to take. Effectively it negates the importance and predictive power of having OEB policies in the first place if OEB Commissioners are free to ignore or mis-apply such policies as they choose.

53. The OEB's second factual error, which is acknowledged by CME and SEC, and not disputed by OEB staff, is the OEB's finding that the integration savings achieved by Enbridge Gas during the deferred rebasing term exceed the capital costs spent by the Company on integration. This ignores the $280 million in O&M integration spending from Enbridge Gas over the deferred rebasing term. As explained in Enbridge Gas's submissions, the fact is that the Company spent significantly more than it saved, and all the sustained savings have now been credited to ratepayers.[32]

54. The OEB's finding that Enbridge Gas's integration savings exceeded integration costs was critically important to the OEB's Decision, directly leading to the OEB concluding that "there is no basis to add any amount of the integration capital investment to the 2024 rate base".[33]

55. The Decision is clear in finding that it's fair for Enbridge Gas to absorb the integration capital costs because its savings exceeded its expenses on integration. The factual underpinning for that conclusion was mistaken. One can reasonably assume that the OEB could come to a different conclusion when the facts are corrected. The effect of the OEB's uncorrected Decision is very material, as it requires Enbridge Gas to absorb the undepreciated capital costs, and further denies Enbridge Gas the opportunity to earn any return on those investments that will continue to serve and benefit ratepayers.

56. CME and SEC argue that the OEB's error is not material, because Enbridge Gas earned above its allowed rate of return (ROE) and therefore it could afford to absorb the full cost of the integration capital projects.[34] These parties made the same submission in their Phase 1 arguments, but the OEB did not adopt the position in its Decision. Enbridge Gas disputes this position, as it did in its submissions in Phase 1.[35] However, the main point for present purposes is that CME and SEC are seeking to re-write the OEB's Decision to find different justifications in place of the factual error.

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[32] Enbridge Gas draft Submissions for Review Motion, paras. 83-84 (including footnotes), Motion Record, Tab 1.
[33] Decision pages 75-76, Motion Record, Tab 2.
[34] CME Submission July 29, 2024, page 18; SEC Submission July 29, 2024, page 11.
[35] Enbridge Gas Reply Argument, paras. 197-198 – see Motion Record, Tab 5(e), pages 799-800.

57. At this “threshold question” stage, it cannot be appropriate to have parties tell the OEB what it could have written and relied upon in the Decision, and then have the OEB use that alternate approach as a basis to find that the threshold question is not satisfied such that the Review Motion need not be heard on its merits.

58. Should parties wish to argue how the OEB could have come to its Decision in a different way, that is more appropriately considered in the context of a re-hearing, or at very least at the time when the Review Motion is heard on its merits. To make a determination now on how the Decision could have been written differently, before even hearing the Review Motion, is not appropriate and denies Enbridge Gas procedural fairness of being able to respond as necessary.

Conclusion

59. For the reasons set out in its July 10, 2024 Submission, and in this Reply Submission, Enbridge Gas respectfully requests that the OEB determine that this Review Motion has passed the threshold question and that each of the Review Issues should be considered on their merits.

All of which is respectfully submitted this August 15, 2024.

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