

August 28, 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”, or the “Company”)
EB-2024-0111 – 2024 Rebasing and IRM – Phase 2
Enbridge Gas response re confidentiality of Enbridge Sustain documents**

We represent Enbridge Gas. In accordance with Procedural Order No. 4, these are the Company’s responding submissions on confidentiality of Enbridge Sustain documents.

Background

In its Decision on HRAI Motion and Procedural Order No. 4, the OEB directed Enbridge Gas to file responses to certain interrogatories. In response, Enbridge Gas filed updated responses to Exhibit I.1.18-HRAI-5 and 10, including copies of Enbridge Sustain business plan documents and copies of an Enbridge Sustain customer contract and Dealer Agreement. In total, Enbridge Gas produced an additional 265 pages of records.

Enbridge Gas requested that the OEB approve confidential treatment of minor portions of the documents filed – the redactions are found on 38 of the 265 pages and in most cases only relate to a small portion of the information on the page. This complies with the OEB’s direction in section 5 of the Practice Direction on Confidential Filings (the “Practice Direction”) to prepare “meaningful redacted documents or summaries so as to maximize the information that is available on the public record”. Enbridge Gas’s August 23, 2024 letter to the OEB set out the high-level reasons for the confidentiality requests, as required by the Practice Direction.

Enbridge Gas also requested, pursuant to section 7.1.7 of the Practice Direction, that the unredacted versions of the Enbridge Sustain documents not be provided to representatives of competitors and potential competitors, even where they have signed the OEB’s Declaration and Undertaking.

HRAI has filed several responses.

First, HRAI has filed 9 Declarations and Undertakings from individuals wishing to have access to the unredacted Enbridge Sustain documents. These requests come from HRAI’s counsel and, HRAI’s internal director, and from 7 individuals who work for competitors or potential competitors to Enbridge Sustain.

Second, HRAI filed a letter on August 26, 2024, asserting why the individuals who signed the Declarations and Undertakings should have access to the unredacted Enbridge Sustain

documents. Essentially, HRAI argues that this is necessary for these parties to prepare responding evidence. No details are provided about who will be the actual witnesses or authors of the evidence. Indeed, 4 of the 9 Declarations and Undertakings from HRAI representatives were provided after the August 26th letter was filed.

Finally, HRAI filed a second letter on August 27, 2024 arguing that most or all of the information that Enbridge Gas seeks to treat as confidential should not be classified as such. The general thrust of the argument is that the public won't be interested in the information, so there would be no harm to Enbridge Sustain.

Overview of Enbridge Gas's response

Enbridge Gas strongly and specifically disputes HRAI's positions and submissions.

The confidential information at issue is commercially sensitive and could cause harm if publicly disclosed. It is the type of information typically protected by the OEB. It is appropriate for the OEB to confirm confidential treatment of the confidential information in the Enbridge Sustain documents.

One of the main ways that disclosure of this confidential information can cause harm is where it is known and used by Enbridge Sustain's competitors and potential competitors. These are the very people to whom HRAI proposes to provide unfettered access. That is particularly concerning in the context of a start-up business that is just getting established, and that will soon be within a separate company outside of the Enbridge Gas utility.

While Enbridge Gas disputes the relevance or usefulness of the evidence that HRAI is proposing to present, in terms of the "narrow ratemaking issue" before the OEB on Issue 27, the Company does acknowledge that witnesses will be required to prepare and speak to the evidence. However, there is no reasonable need to involve 8 different individuals, all of whom are competitors. In order to accommodate HRAI, Enbridge Gas would be prepared to permit 2 of the proposed witnesses, who represent independent HVAC dealers, to have access to the unredacted Enbridge Sustain documents. Details are below.

The redacted information is confidential

The general intent of the OEB's confidentiality rules is to balance the interests of having open and transparent hearings with the interests in keeping commercially sensitive and otherwise confidential information protected from public disclosure.¹

Appendix A to the Practice Direction sets out considerations to take into account when considering confidentiality. Three of these are directly relevant (emphasis added):

(a) the potential harm that could result from the disclosure of the information, including:

i. prejudice to any person's competitive position;

ii. whether the information could impede or diminish the capacity of a party to fulfill existing contractual obligations;

¹ Practice Direction, page 1, paragraph 3.

iii. whether the information could interfere significantly with negotiations being carried out by a party; and

iv. whether the disclosure would be likely to produce a significant loss or gain to any person;

(b) whether the information consists of a trade secret or financial, commercial, scientific, or technical material that is consistently treated in a confidential manner by the person providing it to the OEB.

(e) whether the type of information in question was previously held confidential by the OEB;

Appendix B to the Practice Direction sets out categories of information that will presumptively be considered confidential. Two of these are directly relevant:

1. Unit pricing of a third party

2. Billing rates of a third party

At a high level, the redacted confidential information fits within the categories noted above.

By their very nature, business plans for private companies and business units are confidential. They would not voluntarily be shared or made available to the public, and certainly not to competitors and potential competitors. Enbridge Gas and the Enbridge Sustain business units consistently treat business plans as confidential. And of course, business plans are just that – plans – they are not statements of what is most likely to happen or what has happened.

The OEB has previously found that information in business plans for an unregulated activity should be treated as confidential, assuming that it is relevant at all.²

The OEB has also previously found, in Phase 1 of this rebasing proceeding, that information in the Enbridge GDS (Gas Distribution and Storage) Strategic Plan about the growth plans for non rate regulated business units, including what is now Enbridge Sustain, was relevant, but should be treated as confidential because it is “commercially sensitive”.³

With all that being said, Enbridge Gas was judicious and limited in what was redacted in the confidential business plans. Rather than claiming confidentiality over the entire class of documents, the Company limited its claims to the items most likely to cause harm if disclosed.

It's important to note that Enbridge Gas did not redact the information about product pricing for its current main product (hybrid heating) even though that is confidential.⁴ HRAI indicated that this is important information and Enbridge Gas has provided it in order to be responsive. HRAI has confirmed in its August 27th letter that this pricing is consistent with the market.

² [EB-2021-0110, June 14, 2022 Decision on Confidentiality](#) - see page 12 (Hydro One business plan) and [EB-2018-0165 February 27, 2019 Decision on Confidentiality](#) - see pages 3-6 (Toronto Hydro business plan for non-rate regulated business activities).

³ [EB-2022-0200, July 12, 2023 Decision on Confidentiality](#) – see pages 8 and 10.

⁴ See, for example, Exhibit I.1.18-HRAI-5, attachment 3, page 45.

Similarly, Enbridge Gas provided budget information for Enbridge Sustain for 2024 in an unredacted form. This fits with the issue that the OEB must determine in relation to 2024 rates.

In sum, there is already ample public information about Enbridge Sustain on the record to allow for an informed and meaningful determination of Issue 27. Nevertheless, Enbridge Gas has gone above and beyond to provide three different business plans, as well as contracts with customers and dealers, with only modest redactions.

There are three main categories of information in the Enbridge Sustain documents that Enbridge Gas has identified as confidential and has redacted on that basis. Appendix A to this letter sets out the location of each redacted confidential item, organized according to the three categories set out below.

1. *Figures related to pricing and rate of return assumptions/requirements.*

The items redacted in this category set out Enbridge Sustain's market-sensitive information about its goals for rate of return and how this will be achieved. Included in this redacted information are projections and forecasts about participation in particular market segments, including forecasts of costs and profits. This is not information that a private company would typically share with the market, let alone its competitors – indeed, it is information that would be zealously guarded.

Included in the redactions on this topic are the royalty or similar amounts that Enbridge Gas will receive from dealers, as well as other sensitive arrangements that fall into the category of unit pricing and billing rates. These redactions are seen primarily (but not exclusively) in the Dealer Agreement found at Exhibit I.1.18-HRAI-10, attachment 2.

Requiring public disclosure of additional information on rate of return assumptions/requirements harms Enbridge Sustain in other markets where it is and will be competing to acquire assets and customers. It gives one-sided insight into Enbridge Sustain's business planning that will provide unfair advantages to competitors. These competitors in a variety of market sectors would leverage this information with negative effect on Enbridge Sustain overall due to insights that otherwise would not be available.

2. *Figures relating to specifically to current and projected marketing budget*

Enbridge Sustain has provided most of the information about its forecast operating costs over five years in an unredacted form (see, for example, Exhibit I.1.18-HRAI-5, Attachment 3, page 18). Enbridge Gas is not prepared, however, to publicly file information about its marketing budget and plans.

Information about Enbridge Sustain's marketing plans and budgets is particularly commercially sensitive. Competitors would have a direct view into Enbridge Sustain's plans, allowing the competitors to react in a way that could undercut those plans, thereby causing harm to Enbridge Sustain. Allowing access to the Enbridge Sustain marketing budget allows competitors to prepare for, and adapt to, Enbridge Sustain's entry into the market. That is particularly concerning in the context of a start-up business that is just getting established.

3. *Figures related to sales, capital expenditures, market share*

The items redacted in this category relate to details about Enbridge Sustain's granular plans for capital investments, as well as forecasts about market share and sales in future years.

Again, this is not information that a private company would typically share with the market, or its competitors. It gives insight into Enbridge Sustain's business planning that will provide unfair advantages to competitors and it has no relevance to determination of the Issue 27 rate-making questions for 2024.

Enbridge Sustain will suffer harm from disclosure of the confidential information

Enbridge Gas repeats that the information it seeks to have treated as confidential is limited. It fits within the types and categories of information that the OEB has found to be confidential in the past.

For the reasons described above, there is a real prospect that Enbridge Sustain will suffer harm if its actual or potential competitors learn the redacted details about Enbridge Sustain's plans and forecasts. That harm could be very substantial, and it can be mitigated by limiting the disclosure of the confidential information in the Enbridge Sustain documents. Of particular note is that the cumulative impact of disclosure of all of the confidential information could be very harmful – while it might be that an item-by-item review of the confidential information makes it each item on its own appear somewhat un concerning, Enbridge's additional concern is that showing all of the confidential information together creates a complete view of Enbridge Sustain's plans that will give deep and competitively unfair insights and advantages to competitors.

HRAI's position⁵ that there would be no incremental harm from disclosing the confidential information to the parties, because Enbridge Sustain's main competitors (being the HRAI representatives) will have already seen it after signing Declarations and Undertakings, is very troubling but also revealing. In particular, embedded within this submission is the implied admission that disclosure of the confidential information could in fact harm Enbridge Sustain if seen by competitors. Also, the suggestion that the only people who could use the confidential information to harm Enbridge Sustain are the 9 people who have signed the Declaration and Undertaking is simply wrong. There are many potential competitors to Enbridge Sustain. HRAI itself has exponentially more members than those who signed the Declaration and Undertaking.

⁵ HRAI August 2, 2024 letter, page 2, paragraphs 2 to 4:

"Here, it is important to distinguish between disclosure that is seen by the Applicant's key competitors, and disclosure that is seen by the public.

In the former case, the competitors costing specialists have to see the figures in order to file evidence. Without that disclosure, it would not be possible for the OEB to make a determination, based on full evidence, on whether (or how) the ratepayers are funding this major unregulated business.

In the latter case, disclosure of this information to the public at large has no additional impact on the Applicant's competitive position. Members of the public don't care what Enbridge forecasts as its market share, cost profile, or profitability for this new business, and Enbridge's competitive position will not be affected by public knowledge of these items."

Publishing unredacted business plans on the OEB website will make the commercially sensitive information available to all of them.

Access to the unredacted Enbridge Sustain documents should be restricted

Enbridge Gas acknowledges that HRAI plans to file evidence. Apparently that evidence will compare what costs and pricing of a typical HVAC industry participant with Enbridge Gas, in order to somehow establish that there must be cross-subsidization from ratepayers. Enbridge Gas disputes the relevance or usefulness of the evidence that HRAI is proposing to present, in terms of the “narrow ratemaking issue” before the OEB on Issue 27. However, no final judgment can be made on that topic until the evidence is provided. Enbridge Gas accepts that there would be a need for some HRAI witnesses to prepare and speak to their evidence, and that they might want to see all of the business case information, including the redacted confidential information. Enbridge Gas does not accept that there is any reasonable need for this task to involve 8 different individuals, all of whom are competitors to Enbridge Sustain.

In order to accommodate HRAI, Enbridge Gas would be prepared to permit 2 of the proposed witnesses, who represent independent HVAC dealers, to have access to the unredacted Enbridge Sustain documents. This is in addition to HRAI’s counsel (Jay Shepherd) and HRAI’s Vice-President, Government and Stakeholder Relations (Martin Luymes). Specifically, Enbridge Gas would be prepared to allow access for Dave Murtland (D&B Climate Care) and Victor Hyman (ClimateCare). Enbridge Gas would request that the OEB reiterate in its decision that the terms of the OEB’s Declaration and Undertaking are very clear that recipients of confidential information cannot share it with anyone else (even within their own organization) and cannot use the confidential information for any purpose outside the subject proceeding, and must destroy the confidential information at the end of the proceeding.

On this point, it’s important to emphasize that the evidence about Enbridge Sustain has made clear that the primary line of business that should be of interest to HRAI and their members is the hybrid heating program offering the sale and rental of air source heat pumps with/without a natural gas furnace. The Dealer Agreement provided in evidence⁶ makes clear that Enbridge Sustain’s only sales channel is Dealer partnerships with HRAI members. The HVAC contractors should be positioned to be able to interpret the confidential information and provide responding evidence as deemed necessary.

Enbridge Gas is not agreeable to sharing this information with the representatives of companies primarily in the business of rental or financing of HVAC equipment (e.g. Vista Credit⁷, Create Rental Solutions⁸ and EMCO⁹). These are perhaps the most direct competitors to Enbridge Sustain. While HRAI has taken the position that the only way for Enbridge Gas to re-enter the HVAC business is through cross-subsidization since Enbridge Gas Distribution was unable to compete using fully allocated costs 25 years ago, that misses the point that the Enbridge Sustain business model is different. The proposed involvement from Vista Credit, Create Rental and EMCO seems to indicate that HRAI acknowledges there is a different business model that exists vs the one that Enbridge Gas Distribution exited through the divestment of Enbridge

⁶ Exhibit I.1.18-HRAI-10, Attachment 2.

⁷ The Vista Credit signatory for the Declaration and Undertaking is Darren Keates.

⁸ The Create Rental Solutions signatory for the Declaration and Undertaking is Ron Levy.

⁹ The EMCO signatory for the Declaration and Undertaking is Joanna Woo.

Home Services. In any event, the additional evidence provided by Enbridge Gas makes clear that product pricing is, as HRAI has characterized, “consistent with market pricing”. Since a new business model has emerged and HRAI concedes that pricing is consistent with the market, what relevant evidence can reasonably be expected from direct competitors? Enbridge Gas is very concerned that this is simply a competitor seeking to gain preferential access to this information with the aim of mounting a competitive response to Enbridge Sustain’s business activities. Of additional interest is that rental finance companies are referred to as Associate Members and not referenced in HRAI’s mission nor do they represent the constituent group that HRAI has traditionally represented and continually refer to when referencing Enbridge Gas Distribution’s exit from the business.

Enbridge Gas is not agreeable to providing any of the confidential information to Reliance Home Comfort, which is one of the large incumbent HVAC service providers in the market. Moreover, it’s not clear how Reliance’s general counsel (the person who has signed the Declaration and Undertaking, and who would not be permitted to discuss the confidential information with others at Reliance) is positioned to provide the market operation evidence that HRAI promises. Again here, Enbridge Gas is very concerned that this is simply a competitor seeking to gain preferential access to this information to mount a competitive response to Enbridge Sustain’s business activities. Access to the marketing budget in particular allows Reliance competitive information to which it would otherwise not have access. It is difficult to envision what evidence it could provide the OEB around potential cross subsidization.

Enbridge Gas is not agreeable to sharing this confidential information with Stanley Reitsma, who represents a geothermal construction contractor. Geothermal energy delivery appears to be outside of both HRAI’s stated mission and their member list. HRAI’s intervention in Phase 2 is aimed at protecting its members from Enbridge Gas cross subsidizing business activities, particularly where their members are active. HRAI needs to demonstrate how evidence on geothermal project development and drilling activity is relevant to both their stated intent and the narrow issue in scope. The relevance of any evidence that a geothermal contractor can provide on a completely different market from what is of primary concern to HRAI members remains unclear.

Please let us know if you have any questions.

Yours truly,

AIRD & BERLIS LLP



David Stevens

c: all parties in EB-2024-0111

APPENDIX A – LOCATION OF CONFIDENTIAL INFORMATION, BY CATEGORY

1. <i>Figures related to pricing and rate of return assumptions/requirements.</i>	
Exhibit I.1.18-HRAI-5, Attachment #2	Page 3
Exhibit I.1.18-HRAI-5, Attachment #3	Pages 2, 9, 12, 14-17, 22-26, 28, 41-45
Exhibit I.1.18-HRAI-5, Attachment #4	Pages 10-12, 15
2. <i>Figures relating to specifically to current and projected marketing budget</i>	
Exhibit I.1.18-HRAI-5, Attachment #3	Page 18
3. <i>Figures related to sales, capital expenditures, market share</i>	
Exhibit I.1.18-HRAI-5, Attachment #2	Pages 3, 8, 11
Exhibit I.1.18-HRAI-5, Attachment #3	Pages 7, 38, 49
Exhibit I.1.18-HRAI-5, Attachment #4	Pages 3, 4, 6, 9
Exhibit I.1.18-HRAI-10, Attachment #2	Pages 36-38, 40-43