

September 6, 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 to HRAI submissions re. CIB documents**

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We represent Enbridge Gas.

In its Decision on HRAI Motion and Procedural Order No. 4, the OEB directed Enbridge Gas to provide a memorandum of understanding (MOU) and credit agreement associated with Enbridge Sustain and Canada Infrastructure Bank (CIB). These are referred to in this letter as the “CIB documents”. It is important to note at the outset that Enbridge Gas is not party to either of the CIB documents. The MOU is between Enbridge Inc. and CIB. The credit agreement is between Enbridge Sustain Finance Inc. and CIB.

As required by Procedural Order No. 5, Enbridge Gas provided copies of the CIB documents to counsel for HRAI. On September 4, 2024, HRAI’s counsel provided submissions arguing that the CIB documents should be publicly disclosed, and requesting even more disclosure (we will refer to this letter as the HRAI submission).

This letter sets out Enbridge Gas’s response to HRAI’s submission. We have spoken with CIB’s counsel about HRAI’s submission. In several places in this letter we set out CIB’s position or information that is relevant to the response to HRAI’s submission. We have been advised that CIB will not be making any separate reply submission.

The submission from HRAI include references to specific provisions of the CIB documents, and for that reason it has been filed confidentially. In this response, we have refrained from referencing specific confidential information and therefore we have no concern with this letter being included on the public record. We will confidentially file a separate letter with the OEB attaching redacted and unredacted versions of the CIB documents, for consideration by the OEB in the event that a determination is made that some public disclosure of the CIB documents is necessary.

We have some preliminary comments in response to the HRAI submission.

First, we have spoken with CIB’s counsel and are advised that CIB’s position about the confidentiality of their own documents has not changed. Enbridge Gas supports that position. However, if the OEB is inclined to order public disclosure of the CIB documents, then Enbridge Gas supports CIB’s alternate position that redactions for confidentiality and limits on access

should be approved. In the body of this letter, we set out the joint position of Enbridge Gas and CIB that where disclosure is required, then portions of the CIB documents should be redacted and treated as confidential in accordance with the principles and guidance from the OEB's Practice Direction on Confidential Filings.

Second, we again highlight that Enbridge Gas is not a counterparty to either of the CIB documents. The MOU is between Enbridge Inc. and CIB. The credit agreement is between Enbridge Sustain Finance Inc. and CIB. The arrangements set out in the financing documents do not involve Enbridge Gas Inc., and do not engage concerns about the narrow ratemaking question set out in Issue 27 about whether ratepayers are somehow paying for Enbridge Sustain activities. In fact, the documents establish that it is not Enbridge Gas Inc. that is providing financial support for the Enbridge Sustain business. This again brings into question how useful or relevant the CIB documents are for determining Issue 27 in the Phase 2 Rebasing proceeding. Moreover, it raises serious questions about why even more disclosure (as argued for by HRAI) is appropriate or necessary. HRAI says that it would be in the public interest for the public to see the details of the CIB financing. That ignores the central question. What is at issue is whether Enbridge Gas ratepayers are subsidizing Enbridge Sustain. That is the lens through which any disclosure requests should be considered.

Third, it is not clear why HRAI needs disclosure of the CIB documents (or to see the modest redactions to the Enbridge Sustain business plans attached to Exhibit I.1.18-HRAI-10) to all of the members of HRAI who have signed Declarations and Undertakings. HRAI's requests began with the explanation that the "witnesses" needed to see the documents in order to prepare evidence about how their own business costs are different from Enbridge Sustain's. Now we are informed that the HRAI evidence will come from only a small number of witnesses, but other HRAI members will see the confidential documents and will advise those witnesses. Reference is made by HRAI to the likelihood that requests will be forthcoming for even more HRAI members to have access to the confidential documents. Enbridge Gas has legitimate concerns that HRAI is making no effort at all to reasonably limit the disclosure of confidential information.

Fourth, HRAI's evidence proposal was premised on the tenuous and untestable proposition that if Enbridge Sustain's costs are different from other businesses run by HRAI members, then this must imply a subsidy from ratepayers. It is unclear how HRAI might attempt to substantiate such an assertion, especially in the light of the abundant amount of information filed by Enbridge Gas that indicates how costs are properly allocated to Enbridge Sustain. HRAI is attempting to prove a negative. The example given in HRAI's August 29<sup>th</sup> letter underlines this point – HRAI says that if Enbridge Sustain's marketing budget is too low (as judged by HRAI members) then they will flag it as a possible subsidy and ask Enbridge Gas for more justification. It appears that no amount of evidence will satisfy HRAI. Additionally, over time the scope of the planned HRAI evidence seems to be expanding, to justify the participation of a broad range of members of the HVAC industry in the review of Enbridge Sustain's and CIB's confidential business planning documents.

Finally, taking the four points above into consideration, Enbridge Gas submits that the relevant context supports a conclusion that there must be reasonable limits on who can see the confidential information (both the CIB documents and the Enbridge Sustain business plans), and on whether even more disclosure is required. In short, the balance of convenience here favours limited disclosure. The relevance of these documents is limited at best. In the case of the MOU, the relevance is hard to see at all, given that it has been replaced by the credit agreement. In any

case, both documents are commercially sensitive. The sensitivity of the confidential information is most acute in the context of disclosure to competitors, who are the very people to whom HRAI proposes granting access. HRAI's proposal would see a very large number of the representatives of competitors have full access, without any compelling explanation of why this is necessary. It would also see a requirement for even more disclosure. That should not be approved and it would be commercially and competitively unfair to Enbridge Sustain. OEB regulation and disclosure requirements should not operate so as to have an anti-competitive effect of having competitive businesses disclose clearly commercially sensitive business information to competitors or to the public.

With that context, here are our responses to HRAI's specific submissions, using the headings included in the HRAI submissions.

#### Confidentiality Claims by CIB/ Confidentiality Claims on the CIB Documents by Enbridge Gas

In the August 27, 2024 letter from CIB's counsel, the reasons why the CIB documents should be protected from public disclosure are set out. We are advised that CIB maintains its position. Enbridge Gas supports that position. CIB has no further submissions on this topic, other than as set out below.

In its recent submission, HRAI recites a number of provisions of the Credit Agreement and concludes that there is no express protection of confidentiality that would support non-disclosure. HRAI further concludes that any such protections in the MOU have been superseded by the Credit Agreement, noting that the MOU is no longer of any force or effect.

While it is true that the central focus of the MOU (which is the loan arrangements) has been superseded by the credit agreement (making the MOU entirely irrelevant to Issue 27), that does not mean that all aspects of the MOU are inoperative. Contrary to HRAI's submissions, the non disclosure agreement (NDA) between Enbridge Inc. and CIB associated with the MOU continues to be in force and effect. The NDA is very relevant to the question of what should be protected from disclosure. Enbridge Inc. is not party to the credit agreement and is not released from its obligations under the NDA. The "entire agreement" clause in the credit agreement does not invalidate the NDA. The "entire agreement" clause is in a new contract between Enbridge Sustain Finance Inc. and CIB – it does not release or invalidate previous agreements with Enbridge Inc., which is not party to the credit agreement. Both Enbridge Inc. and CIB take the view that they continue to be bound by the NDA, and the documents and contract structure support that position.

On this point, we have been asked by CIB to indicate that, in their experience, it is entirely consistent to have an NDA with the proponent (i.e. parent sponsor) of a project in the early stages, as no project special purpose vehicle corporation (Project SPV) may have yet been formed, and then to have such NDA continue notwithstanding the fact that the Project SPV enters into a finance document that contains its own confidentiality provisions. A broader set of commercially sensitive information – proprietary to the CIB – may be shared with the project proponent in developing the programme at the MOU stage, which CIB would wish to have protected by the confidentiality provisions of the NDA notwithstanding the signing of subsequent definitive finance documents with the Project SPV.

In its August 27, 2024 letter, CIB stated that if the OEB orders disclosure of the CIB documents, then CIB would like the opportunity to make submissions about the appropriate scope of redaction to protect specific confidential information from public disclosure. CIB also indicated that

disclosure of the unredacted information should not be granted to HRAI industry members (as opposed to HRAI counsel or HRAI management).

The high level reasons to restrict disclosure such that confidential information about the CIB documents is not provided to HVAC industry members (as well as the general public) are set out in the CIB letter:

*Disclosure of the terms and conditions in the Records is reasonably likely to cause harm to the CIB and other market participants engaged in energy efficiency retrofit projects. Disclosure of the terms in the Records would be harmful to the CIB as it would undermine the CIB's ongoing and future negotiations with other proponents for building retrofit financings. This would severely prejudice the CIB's competitive position and would interfere significantly with negotiations currently being carried out by the CIB with other proponents.*

*Disclosure of financing terms would also severely prejudice other borrowers who have obtained CIB financing under the Building Retrofits Initiative. The end customers of those other industry participants would also attempt to use the CIB-Enbridge financing as a benchmark in negotiations. The Credit Agreement refers to information such as interest rates, rate discount methodologies, amortization principles, GHG calculations and other deal-specific terms and conditions.*

*Disclosure of the Records could therefore be catastrophic to a nascent energy efficiency retrofits industry that the CIB has worked hard to inculcate in Ontario and across Canada.*

CIB has now reviewed the CIB documents and has provided Enbridge Gas with copies including the provisions proposed to be protected from public disclosure. The redactions proposed by CIB are consistent with the statement of harm that would result from disclosure that is set out above.

Even where disclosure might not harm Enbridge Gas, harm to the counterparties of a commercial agreement is certainly a relevant factor for the OEB to consider.

On the question of what scope of redactions is appropriate, it is fair for the OEB to also consider the questionable relevance of these documents to the narrow ratemaking issue being considered as Issue 27. HRAI's own letter acknowledges that the CIB funding is directed at a relatively small portion of the Enbridge Sustain business and that this will be mostly funded through the federal government through CIB.

Enbridge Gas agrees with the proposed redactions. The proposed redactions fit within the categories of information that the OEB has indicated may be filed confidentially, taking into account the guidance set out in Appendices A and B to the Practice Direction on Confidential Filings. In particular, the following provisions of Appendices A and B are relevant:

From Appendix A – Considerations in Determining Requests for Confidentiality

*Some factors that the OEB may consider in addressing confidentiality of filings made with the OEB are:*

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

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- 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;*
  - 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;*
- (f) whether the information is required by legislation to be kept confidential.*

From Appendix B – Categories of Information that Will Presumptively Be Considered Confidential

*This Appendix contains a list of specific categories of information that will presumptively be considered confidential, subject to any objections from parties as to why confidential treatment should not be accorded to such information in a particular proceeding.*

- 1. Unit pricing of a third party*
- 2. Billing rates of a third party*

Attachment A to this letter sets out details of the request for confidential treatment of portions of the CIB documents, for consideration by the OEB in the event that a determination is made that some public disclosure of the CIB documents is necessary. The broader requests for confidential treatment of the provisions of the MOU are appropriate in light of the fact that it's not a document that is relevant to this proceeding.

Both Enbridge Gas and CIB repeat their request that any disclosure of unredacted documents related to CIB be restricted to not include HVAC industry participants. As stated in earlier submissions, Enbridge Gas would accept disclosure of the business plan documents to HVAC contractors, but not finance companies and other industry participants.

We will confidentially file a separate letter with the OEB attaching redacted and unredacted versions of the CIB documents.

#### HRAI claim for disclosure of additional documents

HRAI argues that the CIB documents are incomplete, because there are related documents that should also be disclosed. Enbridge Gas strongly disagrees. These additional documents are neither relevant nor necessary to the determination of Issue 27.

The "Financial Model" referenced in the Credit Agreement is a spreadsheet of potential projects. Contrary to HRAI's arguments, this is not something that will answer the question of whether

ratepayers are subsidizing Enbridge Sustain. The operative terms of the Credit Agreement are set out in the document itself.

The "Management Services Agreement" that HRAI seeks is something that HRAI believes must exist, but is not something actually referenced in the CIB documents. HRAI asserts that this document would show risks to which ratepayers are being exposed. To the contrary, any such document would simply recognize that proper cost allocation will be applied, as with other intercorporate service agreements. Enbridge Gas disputes that production of any such document is necessary.

The "Energy Services Agreement" is the agreement that would be entered into with a customer to receive the services being funded through the CIB Credit Agreement. HRAI says disclosure of this document would explain the flow of funds between CIB and Enbridge entities. Enbridge Gas notes that there is no Energy Services Agreement in place at this time. The projects contemplated by the CIB documents have not commenced. In any event, any such documents (when they do exist) will not be relevant to the question of whether there is cross-subsidization of Enbridge Sustain by ratepayers. The record is already clear that Enbridge Gas is not an obligor to CIB.

Enbridge Gas therefore submits that no additional disclosure is needed.

Please let us know if you have any questions.

Yours truly,

AIRD & BERLIS LLP



David Stevens

c: all parties in EB-2024-0111

**Attachment A – Confidentiality Requests**

<b>Exhibit</b>	<b>Description of Document</b>	<b>Confidential Information Location</b>	<b>Brief Description</b>	<b>Basis for Confidentiality Claim</b>
	MOU between Enbridge Inc. and CIB	Pages 1, 10, 11, 17, 19, 20,	Names and contact information for signatories.	Information about individuals protected by federal privacy law.  Protected under Appendix A, sections (d) and (f).
		Pages 2-9, 13-18, 22-35	Key standard and negotiated terms of CIB agreements.	Information that reveals the terms and conditions under which CIB would deal with counterparties, which would not typically be shared publicly. Among other things, this includes financial information and points of negotiation that could be used by other counterparties in future negotiations with CIB.  Protected under Appendix A, sections (a)(i), (iii) and (iv), (b) and (f), as well as Appendix B, items 1 and 2.  Alternately, the OEB could find that all or some of the redacted information is irrelevant to Issue 27.
	Credit Agreement between Enbridge Sustain Finance Inc. and CIB	Pages 59-61	Names and contact information for signatories.	Information about individuals protected by federal privacy law.  Protected under Appendix A, sections (d) and (f).

Exhibit	Description of Document	Confidential Information Location	Brief Description	Basis for Confidentiality Claim
		Pages 7, 8, 10, 13-15, 17, 34, 36, 28, 42-45, 53-54, 62-67, 69, 72-75, 78-85, 90, 100-101, 103-104, 113, 115, 122-124, 130, 143	Key standard and negotiated terms of CIB agreements.	<p>Information that reveals the terms and conditions under which CIB would deal with counterparties, which would not typically be shared publicly. Among other things, this includes financial information and points of negotiation that could be used by other counterparties in future negotiations with CIB.</p> <p>Protected under Appendix A, sections (a)(i), (iii) and (iv), (b) and (f), as well as Appendix B, items 1 and 2.</p> <p>Alternately, the OEB could find that all or some of the redacted information is irrelevant to Issue 27.</p>