Elson
Advocacy

December 4, 2024

Ms. Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Marconi:

Re: Enbridge Gas Inc. 2024 to 2028 Rates Application
EB-2024-0111

I am writing to respond to the letter of yesterday's date from Enbridge, which asked the Board to require that Environmental Defence's witnesses on the IRM topic appear before Enbridge's witnesses and to prohibit Mr. Neme from testifying at the oral hearing in relation to his Phase 1 evidence. There is no merit for either of these extraordinary requests.

Burden of proof and order of examinations

Enbridge argues that Environmental Defence should be made to lead its case first on the basis that Environmental Defence has the burden of proof as it is putting forward an alternative to Enbridge's proposals. This argument is contrary to the clear wording in the *Ontario Energy Board Act, 1998* stating that "the burden of proof is on the applicant."[1] It is also contrary to OEB regulatory documents stating the same.[2]

Enbridge has proposed an incentive rate-making mechanism that would allow Enbridge to earn 100% of the incremental revenue from incremental customers, which is estimated to total $280 million over the rate term.[3] Enbridge has the burden of justifying this, not Environmental Defence.

Although Environmental Defence is seeking an order that deviates from Enbridge's proposal, that is always the case when intervenors oppose aspects of an application. A corollary of Enbridge's argument is that intervenors always have the burden of proof whenever they seek something different from what the applicant has sought, whether that be a different capital budget, directions regarding capital planning approaches, changes to IRM parameters, or otherwise.

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[1] *Ontario Energy Board Act, 1998*, SO 1998, c 15, Sch B, s. 36(6) (link).
[2] OEB Handbook for Utility Rate Applications, p. 5 ("For all regulated utilities, the onus is on the utility to demonstrate that its rate (or payment amount) proposals are just and reasonable.") (link); OEB Filing Requirements, pp. 2 & 7 ("Utilities are reminded that the onus is on the applicant to make its case and ensure that the OEB has the information it needs to adequately assess and deliberate on the application." (link).
[3] Response to ED Question #4 (link, PDF p. 16).

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Enbridge's request is unprecedented. Enbridge cites an OEB decision, but that decision did *not* involve an order that intervenor evidence be heard first.[4] Indeed, no intervenor evidence was filed in that case. If there was a precedent wherein the OEB had ordered an intervenor to lead their case first, presumably Enbridge would have cited that decision instead.

The OEB decision cited by Enbridge is not applicable. It concerns a case where intervenors filed no evidence and Enbridge's evidence did not support the relief sought by the intervenors. The OEB merely noted that the relief sought by intervenors must be based on evidence in the record.[5] That is entirely different from a finding that would reverse the burden of proof and require intervenors to be effectively treated as applicants when they seek relief that is different from that sought by the applicant.

Mr. Neme's Phase 1 evidence

Enbridge asks the Mr. Neme be prohibited from testifying regarding the evidence that he prepared for Phase 1. There is no basis for such a prohibition. The Phase 1 evidence is relevant to why it is important to decouple revenue from customer numbers. The brief examination-in-chief proposed by Environmental Defence would assist the panel members who were not present for Phase 1 and will also assist all panel members by highlighting the elements of the Phase 1 evidence that are relevant to the Phase 2 issues.

Enbridge notes that Mr. Neme's Phase 1 evidence was not filed in the Phase 2 proceeding (EB-2024-0111). That is no basis for prohibiting Mr. Neme from testifying regarding the Phase 1 evidence. Procedural Order #1 stated that "[i]n Phase 2, parties may refer to any evidence filed in Phase 1." There was no need for Environmental Defence to file Mr. Neme's evidence in Phase 2.

Enbridge seems to suggest that it did not have an opportunity to conduct discoveries regarding Mr. Neme's evidence. That is not true. Enbridge had ample opportunity to test the evidence in Phase 1. Also, Enbridge will have a further opportunity to cross-examine Mr. Neme at the Phase 2 hearing.

Enbridge argues that it would be waste of hearing time to have Mr. Neme testify regarding his Phase 1 report. We disagree. Mr. Neme's Phase 1 evidence provides important factual details that Environmental Defence will rely on to support the need to decouple revenue from customer numbers. In particular, pages 8 to 41 of Mr. Neme's evidence establishes that major declines in peak and annual gas demand are very likely due to decarbonization.[6] The facts outlined in those pages support the need for customer number revenue decoupling. This can be seen in Environmental Defence's recent motion presentation, which provided an overview of Environmental Defence's arguments on this point and relied on Mr. Neme's evidence to do so.[7]

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[4] EB-2016-0186, Decision and Order, February 23, 2017, p. 3 (link).
[5] *Ibid*.
[6] EFG Evidence, Updated, Exhibit M9-GEC-ED, May 11, 2023 (link).
[7] Environmental Defence Presentation, November 18, 2024, pp. 4 & 9 (link).

Enbridge relies on a court case that is not at all applicable. First, the court decision is based on two rules in the *Rules of Civil Procedure*, which do not apply to OEB hearings and have no equivalent in the OEB's Rules of Practice and Procedure.[8] Second, the court decision is in the context of rules of evidence that apply in Superior Court, which are considerably more rigid that those applicable to tribunals such as the OEB. Third, Mr. Neme's testimony would meet even the more rigid rules applicable in courts as he would be testifying regarding his Phase 1 evidence, not on a new or different topic.

Enbridge's request regarding Mr. Neme is unprecedented. We are not aware of any instances in which the OEB has prohibited an expert from testifying regarding relevant evidence they submitted in the proceeding.

Responses to motion question

After conferring with the Current Energy Group, we believe a revised response to the Environmental Defence motion question #3 is warranted and could avoid unnecessary use of hearing time. That question asked for the average incremental cost per customer for the general service customer classes. However, after reviewing the response with the Current Energy Group, it appears that the Enbridge response does not indicate the cost of an additional customer *incremental to the costs already covered by base rates*. For instance, the response accounts for incremental costs relating to capital (e.g. depreciation expense, interest expense, ROE, etc.) which are already covered by base rates due to the fact that the capital budget approved in Phase 1 included capital costs to connect new customers (approximately $250 million annually). Although we can explore this at the hearing, it would be more efficient for Enbridge to provide a written response indicating the cost of an additional customer incremental to the costs already covered by base rates. This would help confirm whether the incremental revenue from incremental customers is truly required to cover incremental costs, or is instead a windfall that creates incentives for Enbridge that conflict with the best interests of customers.

Yours truly,

Kent Elson

cc: Parties to the above proceeding

[8] *Marchand v. The Public General Hospital Society of Chatham*, 2000 CanLII 16946 (ON CA), at para 31.