

Elson Advocacy

March 12, 2025

Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4
registrar@oeb.ca

Dear Ms. Marconi,

**Re: County of Lennox and Addington Franchise Agreement
EB-2024-0134**

We write on behalf of the Concerned Residents to provide a response to the cost claim objection submitted by Enbridge Gas on March 7, 2025. Contrary to Enbridge's assertions, the Concerned Residents contributed responsibly to this proceeding, raised new issues for the OEB's consideration, and provided a unique perspective in a way that is consistent with the OEB's adjudicative processes. As outlined below, the decision to withdraw their opposition served to significantly reduce the cost of the proceeding and was communicated in an appropriately timely manner in the circumstances. The very modest costs sought by the Concerned Residents should be granted.

The OEB's *Practice Direction on Cost Awards* (the "*Practice Direction*") provides a list of items that the OEB may consider, among other factors, in determining the amount of a cost award to a party.¹ Those factors are addressed below.

Responsible participation

The *Practice Direction* asks whether the party participated responsibly in the process. Contrary to Enbridge's assertions, the Concerned Residents acted responsibly throughout, including their decision to withdraw their initial requests regarding the proposed franchise agreement.

The decision to withdraw their original requests served to significantly reduce the cost of the proceeding. The Concerned Residents could have taken a different approach and attempted to pursue the issues it initially raised or a narrower subset of them and, if unsuccessful, seek a review motion. The Concerned Residents made the difficult decision not to do so on the basis that "it would not be an effective use of time and regulatory resources to address these issues at

¹ OEB, *Practice Direction on Cost Awards*, April 1, 2023.

the hearing.”² This decision should be condoned by the OEB, not punished through a disallowance of costs.

Enbridge argues that costs should be disallowed because the decision was communicated at the “eleventh hour.” This characterization is inaccurate. The letter from the Concerned Residents was filed one week prior to the oral hearing, not the night before, or even a few days before the hearing. Furthermore, it would have been difficult to file a letter materially sooner for the following reasons:

- **Co-ordination with the municipality:** The Concerned Residents hoped to speak to staff at the municipality before making final decisions in this proceeding. This was important as the municipality did not have notice of the issues raised by the Concerned Residents before agreeing to the proposed Franchise Agreement, including the province-wide efforts to be allowed to charge fees for the use of rights-of-ways for pipelines. The Concerned Residents had brief, positive communication with County political leadership but was never able to speak with County staff. We reached out to staff for the County four times in writing beginning in October of 2024 and never received a response. It was reasonable to make attempts to speak with County staff before making a decision to withdraw the original requests relating to the franchise agreement. Also, the Concerned Residents made diligent efforts to have those discussions and cannot be faulted for the lack of response from staff.
- **Need for deliberations and instructions:** The decision of the Concerned Residents to fully withdraw *all* the issues it initially sought to raise was not easy to make and it is reasonable that it would take some time for deliberations and instructions. As noted above, there were other options available, including pursuing a subset of the issues it initially sought to raise and/or filing a motion to review the scoping decision of the panel in this case. Time was needed to provide advice on those next steps and for the Concerned Residents to consider that advice and provide instructions to counsel. Furthermore, this coincided with the holiday period and Enbridge’s rebasing case. Even if deliberations and instructions could have been expedited, the challenges in communicating with municipal staff would have existed regardless.

Enbridge argues that costs of the Concerned Residents should be disallowed because they raised issues outside of scope. However, the Concerned Residents were transparent throughout about the issues they sought to raise. They also proactively sought clarification regarding scope in their letter of September 20, 2024, which stated as follows:

We understand that this proceeding cannot result in a different Model Franchise Agreement and that the model agreement can only be updated as a result of a generic hearing. However, we are uncertain of the meaning of the first paragraph and we note that the agreement wording that the Concerned Residents seek is not the result of circumstances that are unique to the County. Indeed, similar issues

² Letter of the Concerned Residents, January 6, 2024.

are being raised by municipal electors with respect to the Guelph Eramosa franchise agreement in a separate proceeding. If all issues have been removed from scope except those that are unique to County, please let us know as that would remove from scope all the issues that the Concerned Residents wish to raise.

Procedural Order #4 provided further clarity regarding scope and disallowed the evidence and better interrogatory responses of the Concerned Residents. Although the Concerned Residents were not ultimately successful, that is not justification to disallow costs. Enbridge made similar objections in a previous review motion, which the OEB declined to accept. The Review Panel held as follows:

Lastly, the OEB is not persuaded by Enbridge Gas's position that ED be denied certain costs on the basis that other parties incurred costs related to ED's withdrawal of the Mohawks of the Bay of Quinte part of the motion. The OEB agrees with ED's response to Enbridge Gas's position. The OEB benefits from hearing a variety of perspectives, which may not be possible "if parties are penalized for pursuing perspectives that do not ultimately win the day".³

The OEB should arrive at the same result in this case today.

Bona fides of the Concerned Residents

Enbridge argues that costs should be disallowed in part because it is unclear who constitutes the Concerned Residents. Although this is not a specific consideration set out in the *Practice Direction*, it warrants a response. The Concerned Residents have been clear about who they are. The following details were provided in response to a request from the Registrar's office:

The group consists of local residents who are concerned about the financial and environmental impacts of methane gas distribution and combustion as well as the local chapter of Seniors for Climate Action Now (SCAN! Kingston). The residents and SCAN! members include municipal electors who would be directly impacted by the orders sought by the applicant, including the order pursuant to s.9(4) of the *Municipal Franchises Act* to dispense with the requirement to secure assent of the municipal electors of the County of Lennox and Addington. The group is not incorporated.

Eric DePoe has been designated as the lead for the group. His address is ... His phone number is ... His email address is ... This is his personal contact information and my understanding is that the OEB would not be putting his postal address or phone number on the public record.

³ EB-2023-0313, Decision and Order on Cost Awards, March 5, 2024, p. 3 (Motion to Review and Vary OEB Decisions in EB-2022-0156/EB-2022-0248/EB-2022-0249).

Mr. DePoe is a paralegal and is very active in the community in the Lennox and Addington County area. He ran in the 2022 provincial election for the riding of Hastings-Lennox and Addington and received the second-most votes.

Mr. DePoe and the Seniors for Climate Action Now are well-regarded. Additional information on both is readily available online.

In early May 2024, local residents saw the Notice of Hearing for this proceeding in a local newspaper. They were concerned about the proposed agreement and wanted to participate in the hearing. A copy of the notice from the newspaper is attached at Appendix A. They were referred to my firm and I agreed to represent them. Contrary to Enbridge's implication, this is a *bona fide* intervenor and this intervention is exactly how the OEB's processes and the *Municipal Franchises Act* are meant to work.

Contribution to the Proceeding

The *Practice Direction* asks whether the party contributed to a better understanding by the Board of one or more issues. In this case, the Concerned Residents raised new issues for the OEB's consideration, including substantive issues around the appropriateness of the proposed agreement and process issues around scope. The Concerned Residents brought forward important perspectives of municipal electors who are concerned about the financial and environmental impacts of a proposed franchise agreement.

Although the Concerned Residents were not successful, they raised important perspectives and issues. Granting costs would be consistent with the above-noted costs ruling of the Review Panel in EB-2023-0313:

The OEB benefits from hearing a variety of perspectives, which may not be possible "if parties are penalized for pursuing perspectives that do not ultimately win the day".⁴

Other *Practice Direction* factors

Other factors cited in the *Practice Direction* also support awarding costs:

- The *Practice Direction* asks whether the party complied with Board orders and rules. The Concerned Residents did so and Enbridge does not allege any breaches of Board orders or rules.
- The *Practice Direction* asks whether party made efforts to co-operate. The Concerned Residents sought to co-operate with the municipality multiple times, as noted above.

⁴ EB-2023-0313, Decision and Order on Cost Awards, March 5, 2024, p. 3 (Motion to Review and Vary OEB Decisions in EB-2022-0156/EB-2022-0248/EB-2022-0249).

- The *Practice Direction* asks whether participation was unduly repetitive. Participation in this case was not repetitive at all whatsoever.
- The *Practice Direction* asks whether participation was focused on material issues. The original requests of the Concerned Residents focused on important aspects of the proposed franchise agreement. The Concerned Residents withdrew its original requests once additional clarity was provided regarding the scope of the proceeding.
- The *Practice Direction* asks whether a party has unnecessarily lengthened the process or acted inappropriately or irresponsibly. Enbridge's allegations in this regard around the withdrawal of the initial requests of the Concerned Residents are unfounded for the reasons noted above. The conduct of the Concerned Residents was entirely appropriate and served to avoid a hearing and unnecessary cost.

Enbridge has not objected to the specific quantum of costs sought. Nor has it argued that the amount is out of line with amount of work at issue. We agree. The quantum of costs is low in light of the work involved in advising a client that is not familiar with OEB proceedings, researching new issues that have not been raised at the OEB previously, proposing evidence, preparing motion materials regard interrogatory responses, and responding to various detailed objections by Enbridge.

Broader concerns

Enbridge opens its letter by citing the Minister's support of the OEB's 10-point intervenor action plan. Contrary to Enbridge's assertions, these considerations support awarding costs. The OEB's report to the Minister highlighted how external participation in OEB adjudicative proceedings "is an important part of how the OEB hears applications and makes its decisions."⁵ It also notes that covering intervenor costs "ensures that the OEB hears a variety of perspectives."⁶ These considerations apply equally here.

The OEB's report and the Minister's letter both discuss the need to manage overall intervenor costs. The costs sought by the Concerned Residents are not material to the \$4.4 million in intervenor costs incurred annually or the \$13 billion in utility revenues that the OEB regulates.⁷ The costs sought by the Concerned Residents constitute approximately 0.1% of the former and 0.00005% of the latter. Enbridge's detailed four-page objection is far overblown for the amounts at issue and is not an efficient use of the OEB's time to adjudicate.

Intervenors play an important role by providing perspectives that are different from those of applicants such as Enbridge. If intervenor costs are unduly disallowed, that important role will be hindered. This will add to the existing imbalance in resources between applicants and intervenors. Enbridge's staff and counsel have 100% confidence that they will be paid and can charge market rates. The same is not true for intervenor counsel. Caution is needed when

⁵ OEB, *Report Back to the Minister Intervenors and Regulatory Efficiency*, September 27, 2024, p. 2.

⁶ *Ibid.* p. 3.

⁷ *Ibid.* p. 3.

considering intervenor costs as it is not in the public interest to increase the imbalance in resources between applicants and those representing other perspectives.

Challenge to counsel

Finally, we ask that the OEB take particular care in its decision on costs in this proceeding as Enbridge is using this proceeding to argue that we, as counsel, are irresponsible. Enbridge has used allegations regarding the Concerned Residents in support of requests that the OEB reject the intervention requests of two entirely different clients. This occurred in EB-2024-0342 and in EB-2025-0058.⁸ In both cases, Enbridge has argued that entirely different proposed intervenors (Environmental Defence and eMERGE Guelph) should be denied intervenor status on the basis that the Concerned Residents allegedly acted inappropriately by withdrawing its original objections.⁹ The connection that Enbridge draws between the entirely different intervenors is that we are counsel for all of them.

Although my firm often represents parties that have perspectives that often differ from those of Enbridge, that does not make us irresponsible. The OEB benefits from hearing from a range of perspectives. We ask that the OEB take care not to support Enbridge's attempt to use this case to hinder the ability of those with different perspectives to participate in Enbridge proceedings.

Conclusion

The fact that Enbridge was required to post a Notice of Hearing (attached as Appendix A) shows that the opportunity for public participation is important. The intervention of the Concerned Residents fulfilled that purpose, consistent with the *Municipal Franchises Act*.

Furthermore, the difficult decision by the Concerned Residents to withdraw its original requests was responsible and efficient, and should not be penalized via a disallowance of costs. The requested costs, worth 0.00005% of the revenue regulated by the OEB, is a very small price to pay in support of the kind of participation from unique perspectives that drives good and transparent decision-making at the Ontario Energy Board.

Yours truly,




Kent Elson

cc: Parties in the Above Proceeding

⁸ EB-2024-0342, Enbridge Letter, February 14, 2025, p. 4; EB-2025-0058, Enbridge Letter, February 28, 2025, p. 5.

⁹ *Ibid.*

Appendix A – Notice in Local Newspaper



NOTICE OF A HEARING

Enbridge Gas Inc. has applied to renew its natural gas franchise agreement with the County of Lennox and Addington

Enbridge Gas Inc. (Enbridge Gas) is asking the OEB for:

- **An order approving the renewal of a natural gas franchise agreement with the County of Lennox and Addington.** This would continue Enbridge Gas's right to construct, operate and add to the natural gas distribution system and to distribute, store and transmit natural gas in and through the County of Lennox and Addington for the next 20 years and to the inhabitants of those local or lower tier municipalities within the County of Lennox and Addington with which Enbridge Gas has a valid franchise agreement for that purpose.
- **An order directing that the acceptance of the municipal electors of the County of Lennox and Addington is not required in relation to the by-law approving the natural gas franchise agreement.**

YOU SHOULD KNOW

THE ONTARIO ENERGY BOARD WILL HOLD A PUBLIC HEARING

There are three types of OEB hearings: oral, electronic, and written. The OEB plans to proceed with a written hearing. If you think a different hearing type is needed, you can write to us to explain why.

During this hearing, we will question the applicant about its case. We will also hear questions and arguments from participants that have registered as Intervenor. After reviewing all the evidence, we will decide whether to approve this application.

HAVE YOUR SAY

You have the right to information about this application and to participate in the process. Visit www.oeb.ca/participate and use file number **EB-2024-0134** to:

- Review the application
- Apply to become an intervenor
- File a letter with your comments

IMPORTANT DATES

You must engage with the OEB on or before **May 13, 2024** to:

- Provide input on the hearing type (oral, electronic or written)
- Apply to be an intervenor

If you do not, the hearing will move forward without you, and you will not receive any further notice of the proceeding.


PRIVACY

If you write a letter of comment, your name and the content of your letter will be put on the public record and the OEB website. If you are a business or if you apply to become an intervenor, all the information you file will be on the OEB website.

LEARN MORE

<p>Ontario Energy Board TTY: 1 877-632-2727 Monday - Friday: 8:30 AM - 5:00 PM oeb.ca/notice</p>	<p>Enbridge Gas Inc. 1 866-763-5427 Monday - Friday: 8:30 AM - 5:00 PM enbridgegas.com</p>
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This hearing will be held under section 9(3) and 9(4) of the **Municipal Franchises Act**, R.S.O. 1990, c. M.55.
 Ce document est aussi disponible en français.



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