

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 Procedure* of the Ontario Energy Board.

FRESH AS AMENDED NOTICE OF MOTION

Enbridge Gas Inc. ("**Enbridge Gas**" or the "**Company**") will make a Motion to the Ontario Energy Board ("**OEB**") on a date and at a time to be determined by the OEB.

PROPOSED METHOD OF HEARING: Enbridge Gas proposes that the Motion be heard by way of an oral hearing.

THE MOTION IS FOR:

1. A review and variance of those portions of the Decision and Order in EB-2022-0200 dated December 21, 2023 (referred to herein as the "**Decision**") in which the OEB determined the following issues (collectively referred to in this Motion as the "**Review Issues**"):
 - i. The lengthening of the Average Useful Life of seven asset classes for depreciation purposes ("**Asset Lives Issue**"); and
 - ii. The denial of the inclusion of undepreciated capital costs for integration capital in 2024 rate base ("**Integration Capital Issue**").

2. An Order that the Motion raises issues material enough to warrant a review of the Decision on the merits thus satisfying the “threshold test” in Rule 43.01 of the OEB’s *Rules of Practice and Procedure* in relation to each of the Review Issues.
3. Variation of the Decision in relation to the Review Issues and approval of the relief requested by Enbridge Gas in the Application and its Reply Argument in relation to the Review Issues.
4. In the alternative to (3), an Order directing a rehearing of the Review Issues by a differently constituted panel of the OEB.
5. Such further and other Orders as Enbridge Gas may request and the OEB approves.

THE REVIEW MOTION STANDARD:

1. Rule 40.01 of the OEB’s *Rules of Practice and Procedure* allows any person to bring a motion requesting the OEB to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.
2. Rule 42.01(a) of the OEB’s *Rules of Practice and Procedure* requires that a notice of motion set out the grounds for the motion, which may include:
 - i. the OEB made a material and clearly identifiable error of fact, law or jurisdiction;
 - ii. new facts that have arisen since the decision was issued that, had they been available at the time of the proceeding, could reasonably be expected to have resulted in a material change to the decision; or
 - iii. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.
3. The OEB has confirmed that this list of grounds is “not an exhaustive list”. What is required is that the motion to review must raise a question as to the correctness of the order or decision.¹ The moving party must demonstrate that the findings are contrary to the evidence before the panel, that the panel failed to address a material issue, that the panel made

¹ EB-2016-0005 Decision on Motion to Review and Vary by the City of Hamilton, March 3, 2016, page 4.

inconsistent findings or something of a similar nature.² The moving party must also demonstrate that the alleged error is material and would vary the outcome of the decision.³

THE GROUNDS FOR THE MOTION ARE:

Background

1. Enbridge Gas filed an application with the OEB on October 31, 2022 for an order or orders seeking approval for changes to the rates that Enbridge Gas charges for the sale, distribution, transportation and storage of natural gas effective January 1, 2024 (the “**Application**”). The Application also sought approval for an incentive rate-making mechanism (“**IRM**”) for the years 2025 to 2028 and a number of additional approvals.
2. With the goal of receiving a decision from the OEB in respect of matters required for the purposes of setting rates for 2024, Enbridge Gas requested and the OEB issued Procedural Orders requiring the Application to be heard in phases.
3. The OEB issued the Decision on December 21, 2023. The Decision addressed each of the unsettled items in Phase 1 of the proceeding, addressing a total of 18 issues.
4. Enbridge Gas filed a Notice of Motion on January 29, 2024, seeking review and variance of five issues in the Decision. In this Fresh as Amended Notice of Motion, Enbridge Gas is limiting the request for review and variance to the two noted Review Issues. Explanation of this change is set out below.

The Errors in the Decision

5. There is a strong basis to determine that the Decision is incorrect with respect to the two Review Issues.

(a) Overall Errors

6. Pursuant to section 36 of the *Ontario Energy Board Act, 1998* (“**OEB Act**”), the OEB has an obligation to set rates that are just and reasonable.

² NGEIR (EB-2006-0322, EB-2006-0338, EB-2006-0340) Motions to Review, the Natural Gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007, pages 17-18.

³ Rules 42.01(a) and 43.01(d); see also EB-2006-0322/0338/0340 Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007, pages 17-18.

7. The term “just and reasonable” is a legal standard established and repeatedly confirmed by the Supreme Court of Canada for nearly one century. In *Ontario (Energy Board) v. Ontario Power Generation*⁴, Justice Rothstein explained that this standard requires that the service provider recover its reasonable costs of service and earn a reasonable rate of return.
8. As a result of the errors of fact, law or jurisdiction made by the OEB in relation to the Review Issues, the OEB failed to set rates that are just and reasonable.
9. Moreover, the OEB has an obligation to provide reasons supporting the determinations set out in its decisions. The reasons must take account of the positions taken by parties and provide explanation for the OEB’s decisions. In the case of each of the Review Issues, the OEB failed to provide reasons that meet the expected standard. In particular, the OEB failed to provide reasons for preferring certain evidence, failed to address material evidence adduced by Enbridge Gas and made findings without adequately explaining the evidentiary foundation and chain of reasoning in support of those findings. Each of these insufficiencies is a reviewable error.

(b) Asset Lives Issue

10. Depreciation expense is a component of just and reasonable rates. In the Application, Enbridge Gas sought approval for the Equal Life Group (“ELG”) depreciation methodology and for a modest shortening of the average useful life of several asset classes. Both requests were made to reduce the risk of future stranded assets.
11. A key focus of the Decision is on the stranded asset risk that the OEB finds is created by the energy transition. Most of the Decision is premised on the OEB’s determination that the energy transition is underway and the usual way of doing business is not sustainable. The OEB stated in the Decision:

Two important themes emerged during this proceeding:

- *climate change policy is driving an energy transition that gives rise to a stranded asset risk, and*
- *the usual way of doing business is not sustainable*⁵.

⁴ 2015 SCC 44.

⁵ Decision, page 20.

12. Despite this, the OEB rejected the ELG methodology and imposed the “business as usual” Average Life Group (“**ALG**”) methodology which does not accelerate depreciation. The Decision further approved average useful lives for use with seven asset classes that were longer than those proposed by the depreciation expert retained by Enbridge Gas, Concentric and, in the case of five asset classes, approved average useful lives at the extreme higher end of the existing approved ranges of average useful lives for Enbridge Gas Distribution and Union Gas or even longer lives. In rejecting the ELG Depreciation methodology and approving longer average useful lives for certain asset classes, the Decision appreciably increases the risk of stranded assets as compared to the Enbridge Gas proposals which took into consideration the risk of future stranded assets. While the Company will not pursue a review and variance of the OEB’s rejection of the ELG depreciation methodology, the lengthening of the useful lives of seven significant asset classes is inconsistent with the Decision’s clear concerns about the stranding of assets.

13. The seven asset classes which are the subject of this review motion and the resulting impacts on the depreciation expense approved in the Decision are set out in Table 1 below. As noted in Table 1, the total impact on the depreciation expense from the Decision’s lengthening of the average useful lives of the seven asset classes is a decrease of approximately \$46.2 million each year. This amount is clearly material, as is the increased risk of stranding of these assets classes.

Table 1

Summary of Depreciation Parameters								
Line no.	Asset Account	Account Description	Previously Approved Parameters (1)	Concentric Proposed Parameters (1)	Intergroup/OEB Approved Parameters (2)	Intergroup/OEB Approved Annual Provision (4)	Annual Provision - Concentric Lives	Variance - Approved vs
			(a)	(b)	(c)	(d)	(e)	(f) = (e) - (d)
1	456	STORAGE - COMPRESSOR EQUIPMENT	EGD - 40-R2 UG - 35-R2.5	40-R4	44-R4	17,827,110	21,256,340	3,429,230
2	457	STORAGE - REGULATING AND MEASURING EQUIPMENT	EGD - 30-R1.5 UG - 30-R3	35-R3	40-R2.5	1,693,672	2,244,645	550,973
3	464	TRANSMISSION - EQUIPMENT	EGD - N/A UG - 50-R5	30-L0.5	50-S4	75,791	123,009	47,217
4	465	TRANSMISSION - MAINS	EGD - N/A UG - 55-R4	60-R4	70-R4	41,418,895	50,650,785	9,231,890
5	473.01	DISTRIBUTION PLANT - SERVICES - METAL	EGD - 45-L1.5 UG - 50-R1.5	40-S0.5	45-S1	25,017,533	29,719,429	4,701,897
6	475.21	DISTRIBUTION PLANT - MAINS - COATED & WRAPPED	EGD - 61-R3 UG - 55-R4	55-R3	61-R3	90,877,053	108,711,757	17,834,704
7	475.3	DISTRIBUTION PLANT - MAINS - PLASTIC	EGD - 65-R3 UG - 60-L2	60-R4	65-R3	75,909,415	86,353,221	10,443,806
8	Total					252,819,469	299,059,187	46,239,717

- (1) Enbridge Gas Reply Argument, pages 221 & 222 and Table 3, page 224.
- (2) Decision, Table 3, pages 84 & 85.
- (3) EB-2010-0211, Exhibit D2, Foster and Associates Depreciation Study, Account 462, page 27.
- (4) Enbridge Gas Draft Rate Order Response, Table 8, filed March 15, 2024.

14. In rendering the Decision in relation to the Asset Lives Issue, the OEB made reviewable errors by ignoring or disregarding its own entirely incompatible findings in relation to the risks of energy transition and in relation to a number of other issues including the customer revenue horizon, the capital budget and the appropriate depreciation methodology. Expressing concerns about the risk of stranded assets throughout the Decision and yet increasing the risk of stranded assets by increasing the average useful lives of certain material assets classes is a reviewable inconsistency.
15. The OEB made a reviewable error by failing to take into consideration the material negative impact on Enbridge Gas's business risk that will result from the approval of longer average useful lives than were proposed by Concentric and which are, in most cases, even longer than the average useful lives previously approved for Enbridge Gas Distribution and Union Gas. In the event that the energy transition results in a material number of customers leaving the system before the assets are fully depreciated, there is a risk that the remaining undepreciated assets will become a stranded cost on Enbridge Gas's regulatory accounting books. This risk arises because five of those asset classes for which depreciation was prolonged have significant remaining undepreciated costs. This does not result in just and reasonable rates.
16. The OEB made a reviewable error by failing to provide any reasons for rejecting the recommendations of Concentric and approving longer average useful lives which, in respect of five of the seven asset classes, are at either the extreme upper end of the existing approved ranges of average useful lives for Enbridge Gas Distribution and Union Gas or longer. In support of its approval for the lengthening of the useful lives of seven asset classes, the only reason given in the Decision is that the OEB "prefers" the analysis provided by the depreciation expert retained by OEB Staff, InterGroup, and supported by the depreciation expert retained by IGUA, Emrydia, during the oral hearing.
17. The OEB made further reviewable errors by relying upon the recommendations made by InterGroup in respect of the average useful lives of a number of asset classes, while taking no account of InterGroup's admission that it did not consider energy transition issues for the purposes of its recommendations. Emrydia similarly confirmed that it did not consider energy transition issues for the purposes of its recommendations. In contrast, Concentric specifically referenced energy transition considerations in its expert report and confirmed on numerous occasions in oral evidence that its recommendations were influenced by and reflective of

energy transition issues. In the circumstances, where the OEB expressly premised its Decision on energy transition risk, the inconsistent application of that factor amounts to an error.

18. The OEB made a further reviewable error by approving average useful lives at either the extreme upper end of the existing approved ranges of average useful lives or by lengthening the previously approved average useful life, which is wholly inconsistent with the following statement found at pages 82-83 of the Decision:

If the principle is that depreciation expense is recovered over the used and useful life of an asset, and the used and useful life of an asset is shortened as a result of ratepayers leaving the gas system so that assets are no longer used or become underutilized before they reach the end of their physical life, this needs to be addressed in the utility's depreciation policy⁶

(c) Integration Capital Issue

19. The OEB disallowed the full remaining value of Enbridge Gas's undepreciated integration capital costs from being included in rate base. In its decision on the Phase 1 Rate Order, following submissions from the parties, the OEB determined that the proper amount to be disallowed from rate base is \$91 million.⁷ In effect, the OEB has ordered that Enbridge Gas must forever bear the cost consequences of investments made during the deferred rebasing term, even where those investments benefit customers on an ongoing basis.
20. The OEB's reasons determining that the integration capital costs shall not be included in rate base fail to meet the expected standard in terms of explanation, connection to the evidence and addressing positions advanced by Enbridge Gas.
21. The OEB's decision on the Integration Capital Issue contains reviewable errors because the OEB improperly applied the OEB's foundational "benefits follow costs" and "beneficiary pays" policies.
- i. The OEB agreed that customers are benefiting from \$86 million per year of integration savings on an ongoing basis after rebasing. However, the integration capital costs are

⁶ Decision, pages 82-83.

⁷ EB-2022-0200 Interim Rate Order, April 11, 2024, page 5.

- underpinning some of the benefit. Customers who receive the ongoing benefits of integration should pay for the costs after rebasing; and
- ii. The OEB was correct in stating that when considering the “benefits follow costs principle”, the OEB must consider the impetus for the specific cost incurred in considering whether the benefits are related to the costs. However, in conducting this analysis, the OEB failed to consider the actual integration capital costs that Enbridge Gas incurred and now seeks to include in rate base. The OEB failed to consider Enbridge Gas’s evidence that 75% of the integration capital was focused on replacement of end-of-life IT systems that will benefit customers. Instead, the OEB made reference to real estate consolidation projects and other projects totaling \$153.9 million, citing argument from SEC.⁸ A review of the SEC submission makes clear that these amounts relate to projects that Enbridge Gas has planned but not undertaken.⁹ The amounts and projects considered by the OEB are not part of the undepreciated integration capital costs.
22. The OEB committed a reviewable error in finding that the undepreciated capital costs are not recoverable because Enbridge Gas had integration savings that exceed its integration costs. This finding is unconnected to the OEB’s Mergers, Amalgamations, Acquisitions and Divestitures (“**MAADs**”) policies. It punishes Enbridge Gas for successful operation of its business. In any case, this finding is factually wrong when the impacts of the Company’s operations and maintenance expenses related to integration are taken into account.
23. Finally, the OEB made a reviewable error in finding that Enbridge Gas could and should have chosen to depreciate the integration capital assets more quickly, to minimize the undepreciated costs at rebasing. Enbridge Gas is subject to the OEB’s Uniform System of Accounts. The Company’s depreciation rates are approved by the OEB and there was no opportunity for Enbridge Gas to seek approval of an alternate depreciation rate until the Application.

⁸ Decision, page 74.

⁹ SEC Final Argument, pages 57-58.

(d) Rules and Additional Grounds

24. Enbridge Gas relies upon Rules 7, 8, 12, 40, 41, 42 and 43 of the OEB's *Rules of Practice and Procedure*.
25. In addition to the specific grounds set out above, the grounds for this Motion also include such further grounds as counsel may advise and the OEB may permit. At this time, Enbridge Gas does not intend to rely on additional evidence beyond what is on the record from the Application, other than (as necessary) evidence from official Government sources about current amendments to the *OEB Act*.

The errors are material

26. Each of the errors described above has a material financial impact on Enbridge Gas.
27. At a high level, the disallowance of \$91 million in integration capital requires a large write-off, which has an impact of approximately \$34 million per year on revenue requirement in 2024, and a similar impact (subject to adjustment by the price cap mechanism) over the 2025-2028 IRM term. The use of the OEB-ordered asset lives reduces Enbridge Gas's depreciation expense by approximately \$46.2 million in 2024 and a similar amount 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.
28. Additionally, the errors in the Decision will constrain Enbridge Gas's ability to attract capital to invest in Ontario. Each of these items make such investments relatively less attractive than other opportunities for Enbridge.
29. Furthermore, contrary to the OEB's repeatedly expressed concerns about stranded asset risks, the aspect of the Decision that approves longer average useful lives for certain asset classes appreciably increases the risk of stranded assets in comparison to the Enbridge Gas proposals which reduced the risk of future stranded assets.

Enbridge Gas satisfies the threshold test

30. Rule 43.01 of the OEB's *Rules of Practice and Procedures* states that "prior to proceeding to hear a motion under Rule 40.01 on its merits, the OEB may, with or without a hearing, consider

a threshold question of whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits.”

31. Each of the errors highlighted in this Notice of Motion raises material questions about the correctness of the Decision. Correcting the errors will materially impact the Decision. As such, Enbridge Gas satisfies the OEB’s threshold test and the OEB should proceed to hear the Motion on its merits.
32. Should the OEB find it necessary to consider the threshold question, Enbridge Gas requests the opportunity to make written submissions.

The Fresh as Amended Review Motion

33. This Fresh as Amended Notice of Motion for Review and Variance sets out the two Review Issues that Enbridge Gas is pursuing – Asset Lives and Integration Capital. These are a small subset of the 18 issues determined in the Decision, and a significant narrowing from the Company’s original request that the OEB review and vary the Decision in relation to five issues.
34. The reasons why Enbridge Gas is not pursuing several of the originally stated Review Issues are outlined below.
 - i. Enbridge Gas requested that the OEB review and vary its decision to reduce the Residential and Small Volume Customer Revenue Horizon from 40 years to 0 years (“**Customer Revenue Horizon Issue**”). On February 22, 2024, the Government of Ontario introduced legislation (Bill 165) to amend the *OEB Act* to prescribe the revenue horizon that will apply, in relation to natural gas, for the determination of economic feasibility of new consumer connections, system expansions and calculations of contributions in aid of construction.¹⁰ The legislation received Royal Assent on May 16, 2024. The provisions related to the revenue horizon will come into force upon later proclamation, presumably at the same time as a Regulation is issued prescribing the revenue horizon that will apply. The Minister of Energy has indicated that the prescribed revenue horizon for Enbridge Gas will be 40 years until it is revisited by the

¹⁰ Bill 165, *Keeping Energy Costs Down Act, 2024*.

OEB at a later date.¹¹ This will effectively negate the OEB's Decision in relation to the Customer Revenue Horizon Issue and as a result (assuming that the expected Regulation is issued) Enbridge Gas no longer seeks review and variance of the Customer Revenue Horizon Issue.¹²

- ii. Enbridge Gas requested that the OEB review and vary its decision to reduce the 2024 capital budget envelope by \$250 million. At this time, with the 2024 year well underway and no decision on the review motion likely before late in the year, Enbridge Gas has determined that it will not challenge the capital budget reduction as any different direction would be difficult to implement. Additionally, in response to the OEB's direction in the Decision for Enbridge Gas to focus on asset life extensions, the Company has made a proposal in "Phase 2" of the Application (EB-2024-0111) for eligibility and treatment of qualifying asset life extension investments as being eligible for incremental capital module ("**ICM**") treatment in appropriate circumstances. This proposal helps balance the challenges that Enbridge Gas will face under the reduced capital budget envelope.
- iii. Enbridge Gas requested that the OEB review and vary its decision to set the deemed equity component of the Company's cost of capital at 38%, rather than the requested 42%. After the Notice of Motion was filed, the OEB initiated a new generic cost of capital proceeding (EB-2024-0063), "to consider the methodology for determining the values of the cost of capital parameters and deemed capital structure to be used to set rates for electricity transmitters, electricity distributors, natural gas utilities, and Ontario Power Generation Inc." Enbridge Gas has determined that it would be duplicative and inefficient to pursue its review of the OEB's deemed capital structure decision at the same time as the OEB is also considering that item in a separate and concurrent proceeding. Enbridge Gas will advance its position about the proper

¹¹ [The Keeping Energy Costs Down Act | Ontario Newsroom](#).

¹² On February 12, 2024, the OEB issued a partial stay of the Phase 1 Decision, in relation to the Customer Revenue Horizon Issue. On April 26, 2024, the OEB issued a letter extending the partial stay until June 28, 2024, stating "In granting the Partial Stay, the OEB concluded that it would be inefficient to spend time on the Customer Revenue Horizon Issue pending legislation proposed by the Minister of Energy which could make this portion of the Enbridge Decision moot. This legislation (Bill 165) has now been tabled in the legislature and has been ordered for third reading. If passed, the legislation would enable regulations to be made on the Customer Revenue Horizon issue. The same reason for issuing the stay persists, therefore the OEB is extending the stay until June 28, 2024".

deemed capital structure in the new generic proceeding and may assert that any determinations in that case be applied to Enbridge Gas rates and revenue requirement during the current IRM ratemaking term.

- iv. Enbridge Gas requested that the OEB review and vary its Decision to reject the ELG depreciation methodology proposed by the Company and to instead order the use of the ALG depreciation methodology. The Company notes that the Decision requires Enbridge Gas, for its next rebasing application, to study options to ensure its depreciation policy addresses the risk of stranded asset costs and that these options must encompass all reasonable alternative approaches including the Units of Production approach. The Company is taking steps to respond to this directive. In light of this, the Company believes that it is more efficient to address the question of the preferred depreciation methodology from the perspective of the risk of stranded assets in the next rebasing application. This said, given the clear concern expressed by the OEB in the Decision about the risks of stranded assets, Enbridge Gas continues to seek a review and variance of the lengthening of the Average Useful Life of seven asset classes given that it increases the risk of asset stranding.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

1. The EB-2022-0200 Decision and Order dated December 21, 2023;
2. The record of the EB-2022-0200 proceeding, including prefiled evidence, interrogatories, technical conference transcripts and undertaking responses, hearing transcripts, undertaking responses, arguments, submissions and OEB decision on the Interim Rate Order;
3. Enbridge Gas's submissions on this Motion and its Motion Record to be delivered in accordance with the OEB's directions; and
4. Such further and other materials as Enbridge Gas may provide and the OEB may permit.

Updated May 29, 2024

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AND TO: ALL INTERVENORS IN EB-2022-0200