

ONTARIO ENERGY BOARD

Enbridge Gas Inc. (EGI)

**Motion to Review and Vary the December 21, 2023
Decision and Order in EB-2022-0200**

SUBMISSION ON THE THRESHOLD QUESTION

Industrial Gas Users Association (IGUA)

SCOPE OF SUBMISSIONS

1. These submissions address EGI's July 10th Submissions herein on the threshold question (EGI Threshold Submissions) in respect of the Asset Lives Issue.
2. As was the case in the proceeding from which this motion arises, IGUA defers to SEC's submissions on determination of the threshold question on the Integration Capital Issue, a draft of which we have had the benefit of considering. Our silence in these IGUA submissions on the Integration Capital Issue does not indicate agreement with EGI's position on either the threshold question or the substantive merits regarding that issue.

THRESHOLD TEST

3. Rule 43.01 of the OEB's *Rules of Practice and Procedure (Revised March 6, 2024)* (*OEB Rules*) articulates the threshold question as "*whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits*". The Rule goes on to provide a (non-exhaustive) list of potential considerations regarding relevance and materiality, the two most applicable of which in respect of EGI's Motion for Review are;

(a) *whether any alleged errors are in fact errors (as opposed to a disagreement regarding the weight the OEB applied to particular facts or how it exercised its discretion);*

...

(e) *whether the moving party's interests are materially harmed by the decision and order sufficient to warrant a full review on the merits.*

4. As noted by EGI in the EGI Threshold Submissions¹, the OEB's NGEIR review motions decision provides additional guidance on application of the threshold test, stating that;

...there must be an identifiable error in the decision and that a review is not an opportunity for a party to reargue the case.

In demonstrating that there is an error, the applicant must be able to show that the findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings, or something of a similar nature. It is not enough to argue that conflicting evidence should have been interpreted differently.

5. The OEB's findings in its Decision and Order herein dated December 21, 2023 (Decision) on the Asset Lives Issue are;

(a) supported by the evidence cited in the Decision;

(b) address all issues in respect of the Hearing Panel's asset lives findings including in respect of the implication on those findings of the energy transition; and

(c) are fully consistent with the balance of the Hearing Panel's findings in the Decision in respect of depreciation (of which asset lives is a component), and more broadly in respect of how depreciation considerations relate to the work not yet done by EGI, but which the Hearing Panel directed should be done in order to properly consider the impacts of the energy transition on depreciation policy.

6. EGI has therefore not met the threshold test in respect of the Asset Lives Issue and its motion in that respect should be dismissed.

EGI's ASSERTIONS

7. In relation to the Asset Lives Issue, in attempting to satisfy the Threshold Question EGI asserts that:

¹ Paragraph 22.

- (a) “there is an obvious inconsistency between the findings of the OEB in respect of the energy transition and the approval to lengthen average useful lives.”²
- (b) The Decision “fails to include adequate reasons for its approval of the asset lives in question”.³
- (c) “the OEB made a reviewable error by failing to acknowledge the significant negative impact of the Decision on the business risk of Enbridge Gas”.

EGI’s ASSERTIONS FAIL ON THE FACE OF THE DECISION

- 8. Contrary to EGI’s assertions, there is no inconsistency between the findings of the OEB in respect of the energy transition and the approval to lengthen average useful lives.
- 9. Those findings were as follows⁴ (our emphasis):

The OEB also approves Intergroup’s proposed net salvage parameters in Table 5. The OEB notes that four of the six life parameters are the same as the legacy Union Gas, while the other two are higher (less negative). In contrast all six life parameters proposed by Concentric are lower (more negative). The OEB prefers the stability of Intergroup’s recommendations relative to the legacy rates, until the future studies and reporting discussed in the next section are filed by Enbridge Gas.

- 10. A few pages earlier in the Decision⁵ the Hearing Panel expressly addresses the impact that energy transition considerations had on its consideration of the evidence on asset life determinations. In the Decision the Hearing Panel expressly describes its consideration of the issue and explains its finding thereon, as follows (our emphasis):

The OEB reviewed the 12 asset classes in question, considering the range of proposals for each asset class and the overall range of proposals for all 12 asset classes. While Enbridge Gas submitted that the recommendations made by Concentric included consideration of the energy transition, it is not clear what impact that had on Concentric’s recommendations. Elsewhere in this Decision and Order, the OEB has identified the need for Enbridge Gas to carry out a proper assessment of risk and determine the extent to which that risk should be addressed in its depreciation policy. Enbridge Gas has been directed to address this and other stranded risk mitigation options at its next rebasing application.

² Paragraph 4.

³ Paragraph 5.

⁴ Decision, page 91, last paragraph.

⁵ Decision, page 86.

The OEB prefers the analysis provided by InterGroup and Emrydia. The OEB approves the changes to asset life parameters proposed by InterGroup in Table 3 and supported by Emrydia during the oral proceeding.

11. The foregoing passage reflects consideration by the Hearing Panel of the evidence regarding the extent to which Concentric Energy Advisors (Concentric), EGI's depreciation experts, considered the energy transition in respect of their asset life recommendations. That evidence includes the testimony of Ms. Nori of Concentric to the effect that while in making some of her judgements regarding the expected asset life curves she "considered" the energy transition, such considerations were not in fact articulated anywhere in Concentric's report or interrogatory responses, and she was unable to provide any further explanation of how or when such considerations were taken.⁶
12. The "need for Enbridge Gas to carry out a proper assessment of risk and determine the extent to which that risk should be addressed in its depreciation policy" was expressly addressed in the Decision in the context of overall depreciation procedure findings⁷, as follows (our emphasis):

Enbridge Gas has identified a risk of stranded asset costs due to the energy transition but has not assessed that risk, including whether to address it in its depreciation proposal.

The OEB will not approve Enbridge Gas' proposal to change its depreciation procedure at this time. While Enbridge Gas's proposal to change to the ELG methodology results in some acceleration of the recovery of the depreciation expense, the OEB does not accept the assertion that this proposal was responsive to the risk of stranded asset costs, since Enbridge Gas has not provided any meaningful assessment of that risk in its application. Further, the OEB is persuaded by the testimony of InterGroup and Emrydia witnesses that neither the ELG nor the ALG procedures were designed to address the energy transition risk.

Enbridge Gas needs to carry out a proper assessment of risk and determine the extent to which that risk should be addressed in its depreciation policy. Given that, this is not the time to change to a new methodology.

13. While applied in the foregoing excerpt to the issue of ELG versus ALG depreciation methodology, the findings are equally applicable, and are expressly referred to as such in the asset life curve specific findings excerpted at paragraph 10, above.

⁶ Transcript 17, pages 47-48.

⁷ Decision, page 83.

14. The Hearing Panel further addressed the topic of *Future Studies and Reporting* in respect of depreciation policy, and expressly directed such studies, as follows⁸ (our emphasis):

For its next rebasing application, Enbridge Gas is directed to study options to ensure its depreciation policy addresses the risk of stranded asset costs appropriately. These options must encompass all reasonable alternative approaches, including the Units of Production approach. Enbridge Gas shall determine whether to propose changes to its approach to account for the impact of the energy transition, recognizing that a failure to act prudently in relation to the risk of stranded assets will have an impact on the ability to keep those assets in rate base.

15. It is thus plain and clear on the face of the Decision that the Hearing Panel:
- (a) Expressly stated the basis upon which it preferred the asset lives evidence of InterGroup, supported by the evidence of Emrydia at the Hearing.
 - (b) Expressly reconciled its concerns regarding the energy transition on the one hand, and its findings on the asset service lives, and depreciation policy more generally, for the purposes of the next 5 years on the other hand.
16. There is absolutely no basis in considering these reasons for decision, which expressly acknowledge and reflect the evidentiary record, to argue as EGI does that the decision is “*obviously inconsistent*” or “*fails to provide adequate reasons*”.
17. The *Draft Submissions on Motion to Review and Vary* that EGI attaches to its actual submissions on the threshold question, ostensibly to “*highlight[] and explain[] specific errors within the Decision*”, go deeper into the record and effectively set out arguments regarding the preponderance of the evidence. These additional materials highlight EGI’s “*disagreement regarding the weight the OEB applied to particular facts or how it exercised its discretion*”, a consideration expressly excluded from considerations regarding the threshold question under Rule 43.1, and add nothing to analysis EGI’s allegations of “*obvious inconsistency*” and “*fail[ure] to provide adequate reasons*” in respect of the OEB’s findings on the Asset Lives Issue.
18. EGI may disagree with the balance struck by the Hearing Panel in setting depreciation provisions for the next 5 years, pending the further work regarding energy transition and appropriate depreciation policy response that EGI has been directed to undertake, but that is not a basis to conclude that the review which EGI seeks is warranted.

⁸ Decision page 92, last full paragraph.

19. EGI's third asserted basis for review, as noted above, is that *"the OEB made a reviewable error by failing to acknowledge the significant negative impact of the Decision on the business risk of Enbridge Gas"*.
20. In fact, and contrary to this assertion, the Decision;
- (a) Directs review of, *inter alia*, depreciation policy in light of the energy transition for consideration at the time of EGI's next rebasing within 5 years.
 - (b) Recognizes EGI's own position *"that the impact of the energy transition is very small over the same five-year period"*.⁹
 - (c) Grants an increase in equity thickness, in express recognition of *"the evidence and the resulting business risk associated with the energy transition"*¹⁰, expressly including *"the risk of stranded assets arising from the energy transition"*.
21. The Hearing Panel's considerations and conclusions in this respect were expressly summarized in the context of its decision to grant EGI an increase in its equity thickness, which is where the OEB generally addresses a regulated utility's business risk. The Decision states as follows¹¹ (our emphasis):

Considering both a decrease in business risk due to amalgamation, and an increase in business risk due to the energy transition, which is partially mitigated by this Decision and Order, the OEB concludes that there is a net increase in business risk that justifies a modest increase in the deemed equity thickness.

22. Instructively, the Decision goes on to state as follows (our emphasis):

Enbridge Gas has not met the onus to establish that its ultimate requested increase to 42% is reasonable. In the absence of the risk assessment evidence that Enbridge Gas is directed to develop for its next rebasing application, the OEB denies Enbridge Gas's request. The OEB approves an increase to the deemed equity thickness to 38% at this time.

23. EGI has also asserted that¹²:

The errors on the Review Issues have further material impacts that go beyond direct financial impacts to Enbridge Gas. For instance, they have the effect of

⁹ Decision, page 67, 2nd full paragraph.

¹⁰ Decision, page 67, last paragraph.

¹¹ Decision, page 68.

¹² EGI Threshold Submissions, paragraph 35.

constraining Enbridge Gas's ability to attract capital to invest in Ontario and making such investments less attractive than other opportunities.

24. EGI has neither cited nor provided one shred of evidence in support of this bald assertion (and it would be completely inappropriate for it to now seek to do so in reply).
25. The assets in question are depreciated, and thus the recovery by EGI of its shareholder's investment therein is provided for, over decades, on any of the asset life periods proposed during the proceeding, whether by Intergroup and Emrydia, or by Concentric/EGI. In contrast, the OEB's Decision expressly contemplates that within the next 5 years it will be reviewing and reconsidering these asset lives, and EGI's broader depreciation policy, in light of the energy transition risk when EGI returns with its homework in that respect properly done. That is what the Decision directs.
26. In the interim, over the next 5 years, EGI's shareholder will continue to recover the capital that it has invested in the subject assets, and to earn a return on the undepreciated capital cost of those assets. There is absolutely no material impairment to EGI's ability to earn a return of and on its shareholders capital arising from the OEB's findings on the Asset Lives Issue, in particular given EGI's own position regarding the time horizon over which energy transition risk is expected to materialize. For EGI to now take the opposite position in asserting some sort of impairment of the "*fair return standard*" – i.e. EGI's ability to attract capital - as basis for review of the OEB's Decision on the Asset Lives Issue is both surprising and disingenuous.
27. Again, while EGI may disagree with the Hearing Panel's findings on an appropriate near term energy transition risk adjusted capital structure (from 36% to 38% effective January 1, 2024), such disagreement in no way supports the contention that EGI's "*interests are materially harmed by the decision and order sufficient to warrant a full review on the merits*". Beyond a bald allegation EGI has provided absolutely nothing to support such an assertion.

CONCLUSION

28. In this instance, determination of the threshold question articulated by Rule 43.1 is a straightforward matter. Through the passages excerpted in this submission, among

others, the Decision clearly demonstrates, contrary to the assertions in the EGI Threshold Submissions, that the OEB purposefully and expressly:

- (a) reconciled its fundings in respect of the energy transition and its approval to lengthen certain of EGI's average useful lives for the purposes of setting EGI's depreciation provision pending EGI's further work on assessing the impact of the energy transition and how to properly respond thereto;
- (b) provided the reasons that it preferred InterGroup's and Emrydia's average useful life evidence to that of Concentric; and
- (c) considered, acknowledged, and in fact addressed the impact of its Decision, including in respect of depreciation, on the business risk of EGI.

29. EGI has failed to demonstrate any reasonable basis to conclude that in, respect of the Asset Lives Issue, the Hearing Panel's *"findings are contrary to the evidence that was before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings"*¹³, or that EGI's *"interests are materially harmed by the decision and order sufficient to warrant a full review on the merits"*¹⁴.

30. EGI may *"disagree[] regarding the weight the OEB applied to particular facts or how it exercised its discretion"*¹⁵. Reference to the *Draft Submissions on Motion to Review and Vary* attached to EGI's Threshold Submissions delve extensively, albeit in many cases incompletely, into the record of this proceeding, indicating that it does disagree and so seeks to reargue its positions. As stated in the NGEIR review motions decision;

...a review is not an opportunity for a party to reargue the case.

... It is not enough to argue that conflicting evidence should have been interpreted differently.

31. EGI has failed to establish a reasonable basis for concluding that the Hearing Panel in fact committed errors in its determinations in respect of the Asset Lives Issue, or that EGI's interests are *"materially harmed by the decision and order sufficient to warrant a full review on the merits"*.¹⁶

¹³ NGEIR Review Decision With Reasons, EB-2006-0322/338/340, May 22, 2007, p.18.

¹⁴ Rule 43.1(e).

¹⁵ Rule 43.1(a).

¹⁶ Rule 43.1.

32. EGI's motion for review of the Useful Lives Issue should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:



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