Ontario Energy Board | Commission de l'énergie de l'Ontario

BY EMAIL

July 29, 2024

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

Dear Ms. Marconi:

Re: Ontario Energy Board (OEB) Staff Submission on Threshold Question
Enbridge Gas Inc. Motion to Review and Vary the December 21, 2023 Decision and Order in EB-2022-0200
OEB File Number: EB-2024-0078

Please find attached OEB staff's submission on the threshold question in the above referenced proceeding, pursuant to the Notice of Hearing and Procedural Order No. 1.

Yours truly,

K Viraney

Khalil Viraney
Case Manager

Encl.

cc: All parties in EB-2024-0078

ONTARIO ENERGY BOARD

OEB Staff Submission on Threshold Question

Enbridge Gas Inc.

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

EB-2024-0078

July 29, 2024

Introduction

On December 21, 2023, the Ontario Energy Board (OEB) issued its Phase 1 Decision and Order on all unsettled issues in Enbridge Gas Inc.'s (Enbridge Gas) 2024 Rates application (EB-2022-0200). Enbridge Gas filed a Notice of Motion on January 29, 2024 requesting the OEB to review the Phase 1 Decision and Order in relation to five review issues. On May 29, 2024, Enbridge Gas filed a Fresh as Amended Notice of Motion, narrowing its request to two aspects of the December 21, 2023 Decision and Order:

1. The lengthening of the Average Useful Life of seven asset classes for depreciation purposes (Asset Lives Issue); and
2. The denial of the inclusion of undepreciated capital costs for integration capital in 2024 rate base (Integration Capital Issue).

In the Notice of Hearing and Procedural Order No. 1, the OEB asked for submissions on the threshold question of whether the motion raises relevant issues material enough to warrant a review of the Decision and Order on the merits.

OEB staff submits that Enbridge Gas's motion does not meet the threshold. Both the Asset Lives Issue and the Integration Capital Issue are in essence discretionary rate-making questions that do not have a single "correct" answer. The OEB's *Rules of Practice and Procedure* do not permit Enbridge Gas to ask a second panel of Commissioners to exercise its discretion in a different way.

The Threshold Question

Parties that are disappointed with an OEB decision do not have an automatic right to have the matter reconsidered by the OEB. Under section 21.2(1) of the *Statutory Powers and Procedure Act*, "A tribunal may, if it considers it advisable and if its rules made under section 25.1 deal with the matter, review all or part of its own decision or order, and may confirm, vary, suspend or cancel the decision or order." The OEB's Rules do indeed provide for such a review – except where the request for a review fails to meet a threshold test.

Specifically, Rule 43.01 states that "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." It goes on to explain that the considerations in the analysis of the threshold question may include:

> (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);
>
> (b) whether any new facts, if proven, could reasonably have been placed on the record in the proceeding to which the motion relates;
>
> (c) whether any new facts relating to a change in circumstances were within the control of the moving party;

> (d) whether any alleged errors, or new facts, if proven, could reasonably be expected to result in a material change to the decision or order;
>
> (e) whether the moving party's interests are materially harmed by the decision and order sufficient to warrant a full review on the merits; and
>
> (f) where the grounds of the motion relate to a question of law or jurisdiction that is subject to appeal to the Divisional Court under section 33 of the OEB Act, whether the question of law or jurisdiction that is raised as a ground for the motion was raised in the proceeding to which the motion relates and was considered in that proceeding.

Rule 42.01 says that a notice of motion to review must "provide a clear explanation of why the motion should pass the threshold described in Rule 43.01."

The Rules in respect of motions to review were amended in 2021, following consultation with stakeholders. When those amendments were proposed, the OEB explained that "the purpose of a review is not simply to reargue a case that was already presented to the original panel of Commissioners. Motions to review should be limited to instances where a party can clearly identify a material error of fact, law or jurisdiction in the decision or order, or if there is a change in circumstances or new facts that would have a material effect on the decision or order."[1]

The Asset Lives Issue

Enbridge Gas's principal objection to the Phase 1 panel's finding on the Asset Lives Issue is that "the lengthening of the useful lives of seven significant asset classes is inconsistent with the Decision's clear concerns about the stranding of assets."[2] Even if there were an inconsistency – which OEB staff disputes – that would not amount to an error of fact or law. Enbridge Gas itself describes the alleged error as "a reviewable inconsistency",[3] but under the OEB's Rules, inconsistencies are not reviewable.

Enbridge Gas cites the OEB's 2007 decision on the motions to review the NGEIR decision for the notion that "inconsistent findings" can properly form the basis for a motion to review.[4] But that decision was made before the 2021 Rule amendments. The new Rules set out an exhaustive list of the permissible grounds for a motion to review. There are only three such grounds and "inconsistency" is not one of them. They are: (a) a material and clearly identifiable error of fact, law or jurisdiction; (b) new facts that have arisen since the decision was issued; and (c) facts which existed prior to the decision but were unknown.[5]

One of the 2021 Rule amendments was a change to Rule 42.01 clarifying that "a disagreement as to how the OEB exercised its discretion does not amount to an error of

[1] OEB Letter re Proposed Amendments to Rules 40-43, May 13, 2021.
[2] Fresh as Amended Notice of Motion, para. 12.
[3] Fresh as Amended Notice of Motion, para. 14.
[4] Enbridge Gas Submissions on Threshold Question, para. 23.
[5] Rule 42.01(a).

law or jurisdiction unless the exercise of discretion involves an extricable error of law." The approval of depreciation rates, including the asset lives used as an input in the depreciation methodology, is a quintessentially discretionary exercise. There is no single right answer to the question of what asset life to use for any given asset class. Indeed, three depreciation experts testified in this case: one on behalf of Enbridge Gas, one on behalf of OEB staff, and one on behalf of the Industrial Gas Users Association (IGUA). They did not all agree on which asset lives to use. Ultimately the OEB adopted the recommendations of two of them (those engaged by OEB staff and IGUA) in respect of seven asset classes. That was no legal error. It was a discretionary choice, made after hearing extensive evidence on the depreciation issue.

If any authority were needed for the proposition that a discretionary rate-making question is not a question of law, it can be found in *Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board),* where the Alberta Court of Appeal held that "[a]n arguably unreasonable exercise of a discretion is not an error of law or jurisdiction."[6] That statement has been cited in other judicial decisions including at least two by the Ontario Divisional Court in appeals of OEB decisions. [7]

Enbridge Gas itself acknowledged in its argument-in-chief in Phase 1 that the selection of asset lives is a question of judgment to which there may be a range of reasonable answers:

> What is clear from the evidence filed by the depreciation experts is that the data and analysis of peer groups will in many instances demonstrate a range of average service lives for various assets. It is then the job of the depreciation expert to apply professional judgment to recommend the appropriate average service life and Iowa curve. It is clear from the written and oral evidence that the professional judgment of one depreciation expert may not be identical to that of another and thus there may be several recommendations made in respect of the same asset group which both experts consider to be reasonable. Indeed, many of the EGD and Union asset accounts had different average service lives and used different Iowa curves even though the assets were in many instances very similar.[8]

Enbridge Gas went on to argue that energy transition considerations should tilt the balance towards the shorter end of the reasonable range. The original panel did not accept that argument. Its findings on the Asset Lives Issue need to be read in the context of its broader findings on depreciation. The panel explained:

> While Enbridge Gas's proposal to change to the ELG [Equal Life Group] methodology results in some acceleration in 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 the InterGroup and Emrydia witnesses that neither the ELG nor ALG [Average Life Group] procedures were designed to address the energy transition

[6] *Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board),* 2007 ABCA 192, para. 8.
[7] *Natural Resource Gas Limited v. Ontario Energy Board*, 2012 ONSC 3520, para. 8; *Conserve Our Rural Environment v. Dufferin Wind Power Inc.*, 2013 ONSC 7307, para. 13.
[8] Enbridge Gas argument-in-chief, para. 516.

risk.[9]

The panel's core finding on depreciation was that "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."[10] In other words, stick with the status quo approach to depreciation (other than harmonizing the legacy rate zones and moving the Union Gas rate zone, which had used the Generation Arrangement procedure, to the ALG procedure used for the Enbridge Gas Distribution rate zone), and in the next rebasing application, put forward a comprehensive plan that accounts for the stranded asset risk in the company's depreciation policy. Having provided that direction, there was clearly no inconsistency in continuing to apply the "usual" approach to determining asset lives in the interim, until such time as a depreciation policy that is properly reflective of the energy transition is put in place. [11]

In any case, Enbridge Gas made the same argument that there was an inconsistency between lengthening asset lives and mitigating risks arising from the energy transition in Phase 1.[12] The Phase 1 panel was alive to the argument, noting that "Enbridge Gas stated that some submissions [by other parties] were contradictory"[13] but did not accept it. There is no reason to allow Enbridge Gas to make the argument again to another panel of Commissioners.

The Integration Capital Issue

Enbridge Gas also challenges the Phase 1 panel's disallowance of undepreciated integration capital costs in opening rate base for 2024. (The amount was estimated at $119 million in the Decision but later revised to $91 million in the Rate Order.)

In OEB staff's view, Enbridge Gas has not identified any legal error in the Decision. Enbridge Gas argues that the Phase 1 panel "improperly applied the OEB's foundational 'benefits follow costs' and 'beneficiary pays' policies",[14] but even if that were the case – which OEB staff does not concede – that would not amount to an error of law. There is no statutory or other legal requirement for benefits to follow costs or for the beneficiary to pay. In any case, those policies were fully argued before the Phase 1 panel. The panel expressly found that, "In this case, the benefits did follow the costs – Enbridge Gas made capital investments that yielded savings that exceeded the cost of those investments during the deferred rebasing period, savings that it got to keep."[15]

[9] Phase 1 Decision and Order, p. 83.
[10] Phase 1 Decision and Order, p. 83.
[11] OEB staff's depreciation expert explained that the typical approach involves an assessment of three factors: an actuarial analysis of plant; interviews with management and operations staff from the utility; and a comparison to peer utilities: Exhibit M – OEB Staff Depreciation, April 21, 2023, p. 28.
[12] Enbridge Gas Reply, para. 593.
[13] Phase 1 Decision and Order, p. 86.
[14] Enbridge Gas Fresh as Amended Notice of Motion, para, 21.
[15] Phase 1 Decision and Order, p. 75.

OEB staff submits that Enbridge Gas should not be given the opportunity to reargue its case before another panel of Commissioners.

Enbridge Gas also alleges that the Phase 1 panel made two factual errors. First, Enbridge Gas says that "the OEB erroneously found that the main integration capital expenditures at issue were directed at property consolidation projects that were only needed because of integration…. The property consolidation projects were planned but did not proceed. The main integration capital expenditures were actually directed at IT projects that were needed regardless of integration."[16] Second, Enbridge Gas says that the Phase 1 panel mistakenly found that integration savings exceeded costs; "In fact, the Company's total integration costs exceeded savings by more than $100 million" when O&M is taken into account.[17]

Let us assume for the sake of argument that both of Enbridge Gas's contentions are correct.[18] That would still not be enough to clear the threshold. Under the Rules, a factual error only meets the threshold test if it "could reasonably be expected to result in a material change to the decision or order".[19]

In OEB staff's view, neither of the alleged factual errors goes to the heart of the Phase 1 panel's decision on the Integration Capital Issue. The central conclusion, articulated in the first paragraph under the Findings heading on p. 74 of the Decision, was that the disallowance of the undepreciated integration capital amounts would be "consistent with the intent of the OEB's decision in the MAADs proceeding." The Phase 1 panel explained that in the MAADs proceeding:

> The OEB granted a deferral rebasing period of five years on the basis that the five years was a reasonable opportunity to recover transition costs. When hearing the MAADs application, the OEB was presented with evidence describing the nature of capital investments and the cost of those investments. After hearing that evidence, the panel clearly turned its mind to the five-year period as a reasonable opportunity to recover those costs during the five years against the savings that would be achieved and retained by the utility.[20]

The MAADs decision was rooted in the OEB's Handbook, which at the time (and still today, after recent amendments) says that "Incremental transaction and integration costs are not generally recoverable through rates."[21] The Handbook explained that, to address utility concerns about those costs, the consolidated utility would be entitled to a deferred rebasing period: "This deferred rebasing period is intended to enable distributors to fully realize anticipated efficiency gains from the transaction and retain

[16] Enbridge Gas Submissions on Threshold Question, para. 10.
[17] Enbridge Gas Submissions on Threshold Question, para. 10; Appendix A to Submissions, para. 84.
[18] Enbridge Gas does appear to be correct that the Decision cited certain projects that were never implemented. OEB staff has not verified whether the total integration costs including O&M exceeded integration savings.
[19] Rule 43.01(d).
[20] Phase 1 Decision and Order, p. 74.
[21] Handbook to Electricity Distributor and Transmitter Consolidations, January 19, 2016, p. 8.

achieved savings for a period of time to help offset the costs of the transaction."[22] In the MAADs decision, the OEB approved a deferred rebasing period of five years rather than the ten years contemplated in the Handbook, finding that five years would provide the new Enbridge Gas with a reasonable opportunity to recoup its integration costs.[23] The MAADs decision did not guarantee recovery of those integration costs within the five years.

In sum, the Phase 1 panel agreed with those intervenors who argued that allowing Enbridge Gas to recover integration costs beyond the five-year deferred rebasing period would run counter to the MAADs decision and defeat the purpose of the MAADs Handbook. There was no factual or legal error in that. It is reason enough to have denied the request for inclusion of the integration capital in opening rate base. Even if everything in the Findings section after that point were excised – including the allegedly erroneous references to the property consolidation projects and the net integration savings, as well as the suggestion that Enbridge Gas could have "chosen to fully depreciate its integration capital assets during the deferral period"[24] – the outcome would still be the same.

The Supreme Court of Canada has warned judges reviewing a tribunal decision not to embark on a "line-by-line treasure hunt for error".[25] A tribunal faced with a request to reconsider its own decision ought to exercise the same restraint. It should – and indeed under the OEB's Rules, the OEB must – concern itself with errors that could have materially changed the decision.

In disallowing the integration capital, the Phase 1 panel was merely following the MAADs decision and the MAADs Handbook, which taken together provided Enbridge Gas with an opportunity to recover its integration costs during the five-year deferral period but not afterwards.

Enbridge Gas argued in its argument-in-chief in Phase 1 that its request for integration capital should be granted as an exception to the Handbook's general rule against recovery through rates. It made the same points it now repeats in its motion, namely that "the capital costs are not necessarily 'incremental' (because they were already forecast by the legacy utilities on a standalone basis) and [that] the undepreciated capital costs support ongoing operational benefits to customers."[26] The Phase 1 panel was unpersuaded by that argument. The Rules do not permit Enbridge Gas to try it out again with another panel.

[22] Handbook, p. 8.
[23] Decision and Order, August 30, 2018 (EB-2017-0306/0307), p. 22.
[24] Phase 1 Decision and Order, p. 75.
[25] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 102.
[26] Enbridge Gas argument-in-chief, para. 233.

The Alleged "Overall Errors"

Enbridge Gas argues that, in respect of both the Asset Lives Issue and the Integration Capital Issue, the OEB (a) failed to meet its statutory obligation to set rates that were just and reasonable and (b) provided insufficient reasons for its findings. In its draft submission on the merits, Enbridge Gas calls these "overall errors" in the Decision.[27]

Enbridge Gas is of course correct that the OEB must ensure that rates are just and reasonable, and must provide reasons. A failure to do either would amount to an error of law. Nevertheless, the mere assertion that there was such a failure in a motion to review does not automatically bring the moving party over the threshold.

As the Supreme Court of Canada said in *Teal Cedar Products Ltd. v. British Columbia*, courts should "exercise caution" in accepting an appellant's characterization of an issue as a legal question: "The motivations for counsel to strategically frame a mixed question as a legal question — for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments — are transparent."[28] The same logic applies to a review panel of the OEB in applying the threshold test. Enbridge Gas has pointed to supposed legal errors in an attempt to fit its motion in under the Rules, but in reality its argument amounts to an attempt to relitigate Phase 1.

Both the Asset Lives Issue and the Integration Capital Issue were highly discretionary. The law does not dictate one particular correct answer to either issue.

As for the sufficiency of reasons, the Supreme Court has said that "the written reasons given by an administrative body must not be assessed against a standard of perfection."[29] They do not need to "include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred."[30]

When the reasons on the Asset Lives Issue and the Integration Capital Issue are read in the context of the Decision as a whole, they provide a reasonable justification for the Phase 1 panel's findings.

On the Asset Lives Issue, Enbridge Gas says the Decision contained only two "perfunctory" sentences.[31] That is incorrect. It overlooks the entire preceding paragraph which explains that "it is not clear what impact [the energy transition] 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."[32]

[27] Enbridge Gas Submissions on Threshold Question, Appendix A, para. 27.
[28] 2017 SCC 32, para. 45.
[29] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 91.
[30] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, para. 91.
[31] Enbridge Gas Submissions on Threshold Test, Appendix A, para. 17.
[32] Phase 1 Decision and Order, p. 86.

As discussed earlier, the Phase 1 panel chose to maintain the status quo on depreciation until the implications of the energy transition could be properly accounted for, in the next rebasing application. And again, the OEB heard from three experts in the highly specialized field of depreciation and adopted the asset lives recommended by two of them.

On the Integration Capital Issue, the OEB explained that denying the costs was consistent with the MAADs decision. That finding was also consistent with the MAADs Handbook. Applying an established policy generally does not require exhaustive reasons; the reasons are found in the policy itself.

Summary

Under the Rules, a motion is not an opportunity to relitigate the case, or to get a second opinion on an essentially discretionary rate-making question. This approach makes sense as a matter of adjudicative efficiency.[33] A party generally should get only one "kick at the can". The original hearing should not be a mere dress rehearsal for the review hearing. The OEB is an expert tribunal, but when it comes to rates, one panel of Commissioners has no more expertise than another. The panel that actually hears the evidence is better placed than a review panel to assess it and make a determination.

Although couched in the language of legal and factual error, Enbridge Gas's motion is in reality an argument that the Phase 1 panel should have exercised its discretion in a different way. Such an argument is not a proper ground for a motion to review under the Rules.

Enbridge Gas's motion should therefore be dismissed at the threshold stage.

~All of which is respectfully submitted~

[33] OEB Letter re Adoption of Amendments to Rules 40-43, July 30, 2021.