



July 30, 2024

**VIA RESS**

Ontario Energy Board  
P.O. Box 2319,  
2300 Yonge Street, 27<sup>th</sup> Floor  
Toronto, ON M4P 1E4  
Attention: Registrar

Dear Ms. Marconi,

**Re: Enbridge Gas Inc.  
Motion to Reivew and Vary the December 21, 2023 Decision and Order in EB-2022-0200  
Board File No.: EB-2024-0078**

We are counsel to Three Fires Group Inc. ("**TFG**") in the above-noted proceeding. Please find attached the submissions of TFG on the threshold question in accordance with Procedural Order No. 1.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel Vollmer".

DT Vollmer

c. All Parties  
Reggie George, TFG  
Kate Kempton, Woodward & Company LLP, Counsel for Ginoogaming First Nation

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended (the “**Act**”);

**AND IN THE MATTER OF** Enbridge Gas Inc. Motion to Review and Vary the December 21, 2023 Decision and Order in EB-2022-0200.

**EB-2024-0078**

**SUBMISSIONS**  
**OF**  
**THREE FIRES GROUP INC.**

**July 29, 2023**

## I. INTRODUCTION

1. We are counsel to Three Fires Group Inc. (“**TFG**”) in the matter of the motion of Enbridge Gas Inc. (“**EGI**”) to the Ontario Energy Board (the “**OEB**” or the “**Board**”) to review and vary certain aspects of the December 21, 2023 Decision and Order on Phase 1 of its application for 2024 natural gas rates (EB-2022-0200) (the “**Decision**”).
2. TFG is an Indigenous business corporation that represents the interest of Chippewas of Kettle and Stony Point First Nation (“**CKSPFN**”). TFG was a Board-approved intervenor in Phase 1 of EGI’s rebasing application and has full intervenor status in this proceeding.

## II. OVERVIEW

3. The Board’s Procedural Order 1 (“**PO1**”) invited parties to Phase 1 of EGI’s rebasing proceeding to make submissions on the threshold question of whether EGI’s current motion “raises relevant issues material enough to warrant a review of the decision or order on the merits.”<sup>1</sup>
4. TFG submits that EGI has failed to satisfy the applicable threshold test on the aspect of its current motion relating to the lengthening of the Average Useful Life of seven asset classes for depreciation purposes (“**Average Useful Life Issue**”).
5. The Board’s dismissal of EGI’s position on the Average Useful Life Issue took place in the context of the Board’s clear and consistent findings that EGI had failed to carry out a meaningful assessment of the risks to its system arising from energy transition, leaving EGI’s attempts to invoke the energy transition without a persuasive evidentiary foundation.
6. In this way, EGI’s current motion to review and vary the Board’s findings relating to the Average Useful Life Issue amount to an attempt to seek a different interpretation of the evidence available to the Board and should accordingly be dismissed.
7. TFG takes no position on the aspect of EGI’s motion relating to the inclusion of undepreciated capital costs for integration capital.

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<sup>1</sup> EB-2024-0075, Procedural Order 1, (June 21, 2024).

8. Ginoogaming First Nation, a Board-approved intervenor in EGI's Phase 1 application for 2024 natural gas rates (EB-2022-0200), generally supports and adopts the submissions of TFG.

### III. SUBMISSIONS

#### A. Background

9. As the Board noted in the Decision, the energy transition and how it impacts the future of the gas system were major points of focus in the proceeding underlying the current motion.<sup>2</sup>
10. TFG was among the parties that were highly engaged on energy transition issues in the proceeding.
11. TFG's final submissions expressed the concern that EGI's efforts to assess the risks arising from energy transition were insufficient, increasing the risk that remote and/or vulnerable communities, including First Nations, will not have their unique needs examined and addressed.<sup>3</sup> TFG's final submissions also expressed the concern that EGI's insufficient efforts to analyze and address risks relating to the energy transition increases the risk that Ontario will face higher costs as it transitions under more condensed timeframes or will otherwise fail to identify and mitigate the costs of transition in a timely manner.<sup>4</sup>
12. TFG made similar arguments in the context of questions relating to depreciation methodology. In particular, TFG expressed the concern that EGI's incomplete analysis relating to the possible effects of the energy transition made it impossible to reliably assess key questions concerning depreciation, such as whether an economic planning horizon is appropriate for all or some of the company's assets.<sup>5</sup>

#### Decision

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<sup>2</sup> EB-2022-0200, Decision and Order, page 9. ("**Decision**").

<sup>3</sup> EB-2022-0200, Final submissions of TFG, para 7. ("**Final Submissions**").

<sup>4</sup> Final Submissions, para 6.

<sup>5</sup> Final Submissions, para 87.

13. In the result, the Board expressed similar concerns as to the adequacy of EGI's record, consistently finding that EGI had generally failed to demonstrate a meaningful assessment concerning the risks of energy transition.
14. The Board's conclusions on this point provide the essential context for the Board's decision relating to the Average Useful Life Issue, as set out in further detail in the balance of this section.
15. The Board noted throughout the Decision that EGI's Application was deficient in terms of any meaningful assessment of risks arising from the energy transition. These findings had negative consequences in terms of EGI's ability to advance its position on issues more exposed to the energy transition's potential effects, such as asset management and depreciation. For example, the Board made the following findings contrary to EGI's position in the context of its proposed asset management plan:
- EGI did not provide an adequate assessment of the risk that its assets would become stranded as a result of the energy transition sufficient to justify its proposed capital spend as prudent.<sup>6</sup>
  - "In the face of energy transition, Enbridge Gas bears the onus to demonstrate that its proposed capital spending plan, reflected in its Asset Management Plan, is prudent, and that it has accounted appropriately for the risk from energy transition.... The record is clear that Enbridge Gas has failed to do so."<sup>7</sup>
  - EGI provided "no meaningful consideration of ... the risk of assets becoming stranded or underutilized."<sup>8</sup>
16. The Board reached similar negative conclusions regarding EGI's failure to meaningfully address energy transition in the context of approaches to procedures for depreciation. Its consideration of issues relating to depreciation in general was thorough, having identified depreciation policy as one of three "important areas" where the risk of stranded assets needs to be mitigated.<sup>9</sup>

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<sup>6</sup> Decision, page 2

<sup>7</sup> Decision, pages 19-20.

<sup>8</sup> Decision, page 21. See also page 24.

<sup>9</sup> Decision, page 23.

17. The Board's analysis of depreciation policy noted the contention of Concentric (on behalf of EGI) that its proposed approach to asset depreciation was "particularly appropriate given energy transition issues".<sup>10</sup>

18. However, the Board once again found EGI's invocation of the energy transition unpersuasive in the absence of a more substantial evidentiary record on the issue. The Board once again highlighted EGI's failure to carry out a meaningful assessment of the risk of stranded assets as a reason for rejecting EGI's proposed approach. The Board stated:

While Enbridge Gas's proposal to change to the ELG 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 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.<sup>11</sup> (Emphasis added.)

19. The Board's approach to the Average Useful Life Issue is entirely consistent with the approaches and findings described above. Its rejection of EGI's position on Asset Life Parameters constitutes a third significant example in which the Board premised its decision on the weakness of EGI's evidentiary record. More specifically, the Board's findings on Asset Life Parameters represent another example of the Board's finding that EGI failed to adequately address energy transition in a way that could justify the company's proposed approach.

20. The Board once again acknowledged EGI's position, specifically noting the company's arguments concerning energy transition:

Enbridge Gas stated that some submissions were contradictory, arguing to lengthen average service lives despite the energy transition risk, showing that the

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<sup>10</sup> Decision, page 80.

<sup>11</sup> Decision, page 83.

positions taken by intervenors are driven solely by a desire to reduce depreciation expense and rates.<sup>12</sup>

21. Once again, however, the Board rejected EGI's invocation of the energy transition in the absence of an adequate evidentiary record. The key passage providing the rationale for dismissing EGI's proposal notes both EGI's failure to conduct a meaningful analysis of the risks arising from energy transition, as well as a related deficiency concerning EGI's failure to demonstrate how any such analysis influenced its expert's recommendations:

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 in its next rebasing application.<sup>13</sup>

22. In short, the Decision in its entirety shows that the Board clearly and consistently found that EGI failed to establish an evidentiary record sufficient to prevail on key issues relating to energy transition. EGI's failure to demonstrate meaningful efforts to assess the risks arising from energy transition were significant factors in the Board's rejection of EGI's positions both on issues relating to Asset Life Parameters and more broadly.

## **B. Issue**

23. The central question on this motion is the threshold question of whether EGI's current motion "raises relevant issues material enough to warrant a review of the decision or order on the merits."<sup>14</sup>

## **C. Law and Application**

24. EGI's materials correctly identify Rule 43.01 of the OEB's *Rules of Practice and Procedure* as applicable to the threshold question under consideration in this motion.

25. Rule 43.01 sets out the considerations that a threshold determination may include:

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<sup>12</sup> Decision, page 86.

<sup>13</sup> Decision, page 86.

<sup>14</sup> PO1

In addition to its powers under Rule 18.01, 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. Considerations 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.

(Emphasis added.)

26. OEB decisions considering the threshold test have confirmed that a motion will fail if it is simply an attempt to re-argue the case, including by way of a challenge to the weight the Board place on the evidence properly before it.<sup>15</sup>

27. The NGEIR review motions, for example, confirm that an applicant, in order to succeed on the threshold question, must do more than argue that conflicting evidence should have been interpreted differently:

Therefore, the grounds must "raise a question as to the correctness of the order or decision". In the panel's view, the purpose of the threshold test is to determine whether the grounds raise such a question. This panel must also decide whether there is enough substance to the issues raised such that a review based on those

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<sup>15</sup> See Donald D. Rennick (EB-2021-0251) Motion to Review, Decision with Reasons, October 21, 2021, page 6; EB-2019-0180, Motion to Review and Vary, Decision And Order, page 9.



issues could result in the Board deciding that the decision should be varied, cancelled or suspended.

With respect to the question of the correctness of the decision, the Board agrees with the parties who argued 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.

The applicant must also be able to demonstrate that the alleged error is material and relevant to the outcome of the decision, and that if the error is corrected, the reviewing panel would change the outcome of the decision.

In the Board's view, a motion to review cannot succeed in varying the outcome of the decision if the moving party cannot satisfy these tests, and in that case, there would be no useful purpose in proceeding with the motion to review.<sup>16</sup>

(Emphasis added.)

28. The review motion arising from North Bay Hydro Distribution Limited's cost of service application further establishes that a threshold motion will fail if it amounts to a challenge to the Board's weighting of the evidence before it and a disagreement with the exercise of the Board's discretion. The reviewing commissioner stated:

... the motion does not raise new facts or questions of law or jurisdiction that would reasonably be expected to result in a material change to the Decision. The grounds of the motion amount to a request for a rehearing of the evidence in the rate application with a view to urging a different result based on the motion applicant's view of the weight of the evidence and his disagreement with the exercise of discretion by the hearing panel.<sup>17</sup>

29. EGI's motion relating to the Average Useful Life Issue amounts to a disagreement regarding the weight the Board applied to EGI's efforts (or shortcomings) concerning assessments of the risks arising from energy transition, as well as a challenge to how the Board exercised its discretion on those issues. The Board's findings, especially when viewed in the larger context of the decision, were consistent that EGI had failed to establish

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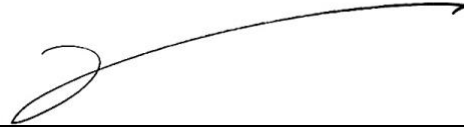
<sup>16</sup> NGEIR (EB-2006-0322, EB-2006-0338, EB-2006-0340) Motions to Review, the Natural Gas Electricity Interface Review Decision, Decision with Reasons, May 22, 2007, pages. 17-18

<sup>17</sup> Donald D. Rennick (EB-2021-0251) Motion to Review, Decision with Reasons, October 21, 2021, page 6.

the evidentiary foundation necessary to justify its proposal on the Average Useful Life Issue.

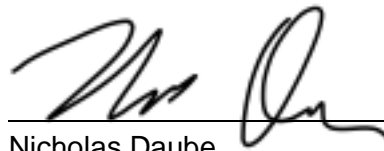
30. In the circumstances, TFG requests that the aspect of EGI's motion relating to the Average Useful Life Issue be dismissed. TFG submits that to do otherwise would be to reward EGI for failing to address the energy transition with the urgency and transparency that these issues require.

ALL OF WHICH IS RESPECTFULLY  
SUBMITTED THIS  
29<sup>th</sup> day of July, 2024



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Lisa (Elisabeth) DeMarco  
Resilient LLP  
Counsel for TFG



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Nicholas Daube  
Resilient LLP  
Counsel for TFG