



Ontario | Commission
Energy | de l'énergie
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DECISION ON THRESHOLD QUESTION AND PROCEDURAL ORDER NO. 2

EB-2024-0078

ENBRIDGE GAS INC.

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

BEFORE: Anthony Ziahtic
Presiding Commissioner

Robert Dodds
Commissioner

Michael Janigan
Commissioner

October 8, 2024

1 OVERVIEW

In this motion, Enbridge Gas Inc. (Enbridge Gas) asks the Ontario Energy Board (OEB) to review and vary two aspects of the December 21, 2023 Decision and Order¹ in Enbridge Gas's 2024 Phase 1 cost of service application²:

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

The OEB invited written submissions on the threshold question of whether to hear the motion on the merits.

Having now considered those submissions, the OEB has determined that the motion meets the threshold on the Integration Capital Issue but not on the Asset Lives Issue. The OEB will hear the motion on the merits in respect of the Integration Capital Issue.

¹ Phase 1 Decision.

² EB-2022-0200

2 CONTEXT AND PROCESS

Under Rule 43.01 of the OEB's *Rules of Practice and Procedure*, the OEB may, prior to hearing a motion to review on the merits, consider the "threshold question of whether the motion raises relevant issues material enough to warrant a review of the decision or order on the merits." This may be done with or without a hearing. The Rule specifies that:

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.

In the Notice of Hearing and Procedural Order No. 1, the OEB invited written submissions on the threshold question. All intervenors in EB-2022-0200 were deemed to be intervenors in the motion to review.

3 THE THRESHOLD QUESTION

The Asset Lives Issue

In the Phase 1 Decision, the OEB approved the continuation of the Average Life Group procedure already in use by the legacy Enbridge Gas Distribution in place of the Equal Life Group methodology proposed by Enbridge Gas's consultant, Concentric Energy Advisors. In its submission, Enbridge Gas submitted that the OEB's decision to lengthen the average useful lives of seven harmonized asset classes over those proposed by Concentric Energy Advisors was "wholly inconsistent and irreconcilable" with the OEB's findings on energy transition issues.³ It suggested that the OEB's decision on asset lives, together with its rejection of the proposed Equal Life Group depreciation methodology, has greatly increased the risk of stranded assets.⁴ Enbridge Gas further argued that the OEB failed to provide adequate reasons for its decision on asset lives, noting that "the entirety of the reasons... consists of only two sentences."⁵ Enbridge Gas added that the impact of the decision on asset lives was "a reduction in the revenue requirement of approximately \$61 million in 2024, with a similar impact (subject to adjustment by the price cap mechanism) over the balance of the IRM term".⁶

Several intervenors argued that Enbridge Gas's motion in respect of the Asset Lives Issue should be dismissed at the threshold stage. None of them agreed with Enbridge Gas that the threshold was met.

Intervenors submitted that the motion does not raise novel facts, information, or analysis of law that could ground a review on the Asset Lives Issue.⁷ Many intervenors submitted that even if errors were identified, their rectification would not materially impact the OEB's decision.⁸ Some intervenors specifically noted that the OEB's findings were both internally consistent and consistent with the evidentiary record.⁹ Canadian Manufacturers and Exporters (CME) submitted that the OEB's reasons in its Decision demonstrates that the OEB was guided by a coherent, rational and justified chain of analysis.

³ Enbridge Gas Submissions on Threshold Question, July 10, 2024, para. 4 [Enbridge Gas Submissions].

⁴ *Ibid.*, para. 8.

⁵ *Ibid.*, para. 5.

⁶ *Ibid.*, para. 7.

⁷ Pollution Probe; Vulnerable Energy Consumers Coalition (VECC) 2; Industrial Gas Users Association (IGUA) 5.

⁸ VECC 4, 6; School Energy Coalition (SEC) 4; Consumers Council of Canada (CCC); Ontario Greenhouse Vegetable Growers (OGVG) 21.

⁹ CME 13; IGUA 15.

Intervenors also generally argued that Enbridge Gas's review motion is not about errors of fact or law, but about the weight that the OEB gave to certain pieces of evidence.¹⁰ More specifically, intervenors emphasized that the original panel's preference for the asset lives analysis of two of the depreciation experts (OEB staff's and IGUA's) over Enbridge Gas's expert was a discretionary choice that was adequately explained in the Decision.¹¹

OEB staff similarly submitted that there were no errors of law or fact to ground a motion for review. OEB staff disputed Enbridge Gas's contention that there were "inconsistent" findings in the Decision and submitted that, in any event, inconsistencies do not form a proper basis upon which a review motion can be brought under the Rules of Practice and Procedure. OEB staff emphasized that the selection of appropriate asset lives is a discretionary exercise, for which there is no single correct answer.

In its reply submission, Enbridge Gas reiterated that clauses (d) and (e) of Rule 43.01 are satisfied and that determinations on the presence of errors of law cannot be based upon the simple characterization of a decision having been within the OEB's discretion.¹² Enbridge Gas contended that its focus remains on the disconnect between the evidence and the record, internal inconsistencies, and inadequate reasons.¹³ Enbridge Gas emphasized, that "the OEB further does not have the discretion to issue decisions and make factual findings which are inconsistent with each other, and it does not have the discretion to issue decisions with inadequate reasons – in fact, internally inconsistent or inadequate reasons can amount to errors of law."¹⁴

The Integration Capital Issue

Enbridge Gas submitted that the OEB's decision to deny inclusion of the undepreciated integration capital costs in the 2024 rate base was incorrect and constituted an improper application of the OEB's policies and principles.¹⁵ The denied costs related largely to technology investments for IT system updates that would benefit ratepayers and would have been required regardless of integration. As such, Enbridge Gas submitted that it was appropriate for ratepayers to pay the remaining costs under the OEB's 'beneficiary pays' and 'benefits follow costs' principles.

¹⁰ SEC 35; CME 6; CCC; Three Fires Group Inc. 29

¹¹ SEC 26-27; IGUA 15

¹² Enbridge Gas Reply Submission, August 15, 2024, paras. 11-12 [Enbridge Gas Reply].

¹³ *Ibid.*, 19.

¹⁴ Enbridge Gas Reply Submission, p. 4.

¹⁵ Enbridge Gas Submissions, para. 9.

Enbridge Gas submitted that the OEB misinterpreted the evidence. Enbridge Gas alleged that there were two main factual errors. First, the OEB cited certain amalgamation-related property consolidation projects to justify the absorption of remaining costs by the company, when actually those projects did not proceed, and most capital integration expenditures were actually directed toward IT projects that were required regardless of integration. Second, the OEB found that integration savings exceeded costs, whereas in fact the company's total integration costs exceeded savings by more than \$100 million.¹⁶ Enbridge Gas submitted that these alleged errors are material and impact the outcome of the OEB's decision.

CME, CCC, SEC and VECC submitted that Enbridge Gas's motion does not pass the threshold on the Integration Capital Issue.

SEC submitted that Enbridge Gas was essentially repeating the same arguments about the MAADs Decisions and the MAADs Handbook which were previously considered and rejected by the OEB in the Phase 1 Decision. SEC said that none of the alleged factual errors undermines the OEB's core findings that, a) it approved a five-year deferred rebasing period for Enbridge Gas, on the basis that it would provide a reasonable opportunity to recover their integration costs, and b) as it had recovered those costs already, it would be a 'windfall' to the company if it was then allowed to recover those costs from ratepayers again."¹⁷

CCC and VECC supported the submissions of SEC on the Integration Capital Issue.

CME argued that neither the MAADs Handbook nor the OEB's Decision on Amalgamation of Enbridge Gas Distribution and Union Gas guarantee that Enbridge Gas will offset the transaction costs with achieved savings. CME noted that the OEB merely provided Enbridge Gas the opportunity to offset its costs through a deferred rebasing period. It is not relevant whether Enbridge Gas succeeded in recovering its transition costs during the deferred rebasing period.

OEB staff submitted that Enbridge Gas did not identify any legal error in the Decision pertaining to the Integration Capital Issue. Staff submitted that even if, as Enbridge Gas alleges, the original panel improperly applied the OEB's benefits follow costs principle, it would not amount to an error of law, noting that the application of such principles are not legally mandated and are matters of discretion. OEB staff also noted that factual errors only meet the threshold if they could result in a material change. OEB staff

¹⁶ *Ibid*

¹⁷ *Ibid.*, para. 45.

submitted that the alleged errors do not go to the heart of the panel's discussion on the Integration Capital Issue.

In its reply submission, Enbridge Gas pointed out that all of the other parties who made submissions “agree, or do not dispute, that the OEB made two factual errors in its Decision on the Integration Capital Issue – the OEB mistakenly cited and relied on property consolidation projects which did not occur as being the main examples of integration capital spending, and the OEB relied upon an incorrect finding that Enbridge Gas's integration spending exceeded its integration savings.”¹⁸ Enbridge Gas argued that those parties “effectively re-writ[e]” the Decision in order to suggest that the findings on the Integration Capital Issue would have been the same even in the absence of those factual errors.¹⁹

Enbridge Gas reiterated that the OEB's errors in its Phase 1 Decision related to the Integration Capital Issue are real and material, and could lead to a different outcome if corrected and/or addressed. Enbridge Gas submitted that the Review Motion raised relevant issues material enough to warrant a review of the Phase 1 Decision.

Findings

The review panel finds that the motion does not meet the threshold on the Asset Lives Issue. Rule 43.01(a) of Rules of Practice and Procedure specifies that one of the factors that may be considered at the threshold stage is “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).” The errors alleged by Enbridge Gas are not in fact errors but a disagreement regarding the weight the OEB placed on conflicting evidence. After hearing the evidence, the OEB preferred the asset life recommendations of the two other experts (OEB staff's and IGUA's) over Enbridge Gas's expert. It provided reasons for doing so, which when read in the context of the Decision as a whole, are comprehensible and coherent. The review panel agrees with OEB staff and intervenors who argued that Enbridge Gas is essentially seeking to relitigate a discretionary rate-making question in this motion, which is not something the Rules allow.

The review panel does not accept Enbridge Gas's contention that the original panel's decision to extend certain asset lives was inconsistent with other findings on energy transition issues and in particular the concern about stranded assets. The Decision explained that it was “not clear” what impact the energy transition issues have on the

¹⁸ Enbridge Reply, para. 39.

¹⁹ Enbridge Reply, para. 42.

depreciation analysis by Enbridge Gas's expert.²⁰ The Decision called 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", and to address that in its next rebasing application.²¹ As OEB staff put it in its submission on the threshold question, "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."²²

The review panel finds that the motion with respect to the Integration Capital Issue meets the threshold. The concerns raised by Enbridge Gas about the original panel's findings on the Integration Capital Issue should be heard on the merits. These concerns are not merely about how the original panel weighed the evidence or exercised its discretion. They include alleged factual errors that Enbridge Gas claims were material. To be clear, at this threshold stage, the review panel makes no findings on whether in fact the Decision included factual errors, or whether, in the absence of such alleged errors, the outcome on the Integration Capital Issue should have been different. Those are matters that can and should be addressed in a hearing on the merits.

The review panel will therefore proceed to hear submissions on the merits of Enbridge Gas's motion as it pertains to the Integration Capital Issue only. The review panel notes that Enbridge Gas requested that the hearing of the motion include an oral component. The OEB will make a determination on whether to have an oral component after written submissions on the merits of the integration capital issue have been received.

²⁰ Decision, p. 86.

²¹ Decision, p. 86.

²² OEB staff Submission, p. 6.

4 ORDER

THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Enbridge Gas shall serve and file written submissions on the merits of its motion in respect of the Integration Capital Issue by **October 18, 2024**.
2. Intervenors and OEB staff shall serve and file responding submissions by **November 1, 2024**.
3. If the OEB determines that an oral component is required, an oral hearing will be held on **November 12, 2024** at 9:30 am in the OEB's offices at 2300 Yonge Street, Toronto. If the OEB determines that an oral component is not required, further directions will be provided regarding a written reply submission by Enbridge Gas.

DATED at Toronto **October 8, 2024**

ONTARIO ENERGY BOARD

Nancy Marconi
Registrar