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BY EMAIL and RESS

November 1, 2024
Our File: EB20240078

Ontario Energy Board
2300 Yonge Street
27th Floor
Toronto, Ontario
M4P 1E4

Attn: Nancy Marconi, Registrar

Dear Ms. Marconi:

Re: EB-2024-0078 – Enbridge Gas Inc. Motion to Review – SEC Submissions

We are counsel to the School Energy Coalition ("SEC"). Enclosed, please find SEC's submissions on the Motion to Review.

Yours very truly,
Shepherd Rubenstein P.C.

Mark Rubenstein

cc: Brian McKay, SEC (by email)
Applicant and intervenors (by email)

EB-2024-0078

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 Rule 8 and 40, 42 and 43 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

SUBMISSIONS OF THE SCHOOL ENERGY COALITION

A. Overview

1. Enbridge Gas Inc. ("Enbridge") filed an application with the Ontario Energy Board ("OEB") pursuant to section 36 of the *Ontario Energy Board Act*, seeking approval for rates for the sale, distribution, transmission, and storage of gas for the period of 2024 to 2028 (EB-2022-0200). After a lengthy oral hearing and detailed final arguments from all parties on the unsettled issues as part of Phase 1 of the proceeding, the OEB issued its Decision and Order on December 21, 2023 ("Phase 1 Decision").[1]

2. Enbridge filed a motion, which was subsequently amended, to review and vary aspects of the OEB's Phase 1 Decision. In its Decision on the Threshold Question and Procedural Order No. 2 ("Decision on the Threshold Question"), the OEB determined that Enbridge had met the threshold question under Rule 43.01 and that it would hear the merits of the challenge to the Phase 1 Decision with respect to the inclusion of integration capital in the 2024 opening rate base.[2]

[1] *Decision and Order* (EB-2022-0200), December 21, 2023 ["Phase 1 Decision"]
[2] Decision on Threshold Question and Procedural Order No.2 (EB-2024-0078), October 8, 2024, p.7

3. Enbridge's motion to review and vary should be dismissed. As SEC noted in its submissions on the threshold question, the alleged errors are nothing more than, a) disagreements with the hearing panel's exercise of discretion, b) arguments that the hearing panel had already rejected, and c) alleged errors which, even if corrected, would not have impacted the hearing panel's decision, or resulted in a different outcome.

B. Background

4. Enbridge's application was its first rebasing application for the amalgamated utility, Enbridge Gas Inc. Its two predecessors, Enbridge Gas Distribution ("EGD") and Union Gas ("UG"), had not rebased since 2013.[3] As part of its proposed 2024 opening rate base, Enbridge sought to include $119 million of undepreciated capital costs related to $189 million of integration-related in-service additions incurred during the deferred rebasing period.[4]

5. In the Phase 1 Decision, the Hearing Panel disallowed the inclusion of the undepreciated integration capital in the rate base. It found that doing so would be inconsistent with the intent of the OEB's decision in the MAADs proceeding ("MAADs Decision") [5], where it granted the deferred rebasing period. The OEB noted in the MAADs Decision that "five years provides a reasonable opportunity for the applicants to recover their transition costs."[6] The Hearing Panel recognized that the MAADs Panel had been "presented with evidence describing the nature of the capital investments and" their costs, and had "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."[7]

6. The Hearing Panel agreed with Enbridge that benefits should follow costs, but stated that "[i]n this case, the benefits did follow the costs – Enbridge Gas made capital investments that yielded savings exceeding the cost of those investments during the deferred rebasing period, savings that it got to keep."[8] Rejecting Enbridge's argument, the Hearing Panel found that allowing

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[3] Phase 1 Decision, p.69
[4] Phase 1 Decision, p.71
[5] *Decision and Order* (EB-2017-0306/307), August 30, 2018
[6] Phase 1 Decision, p.74, citing *Decision and Order* (EB-2017-0306/307), August 30, 2018 p.22
[7] Phase 1 Decision, p.74
[8] Phase 1 Decision, p.75

the undepreciated capital costs to be included in the 2024 rate base, despite the deferred rebasing period, "would amount to a windfall to the utility."[9]

7. Ultimately, as part of the rate order process, the $119 million was reduced to $91 million based on Enbridge's submission, as the original amount had only been an estimate. In doing so, the Hearing Panel expressed surprise with the company and commented that "[t]his does not instill confidence in the accuracy of Enbridge Gas's evidence and oral testimony."[10]

C. <u>Enbridge's Burden and the Role of a Review Panel</u>

8. While the Review Panel noted in its Decision on the Threshold Question that it would hear the motion on the merits, it made clear that it was not making a finding on whether there were, in fact, errors, or whether, in the absence of such errors, the outcome should have been different.

9. As part of its motion to review, Enbridge has the burden of demonstrating not only that the Hearing Panel made factual or legal errors, but also that, in the absence of such errors, the outcome would have been different. Rule 42.01(a)(i) is clear that "a disagreement as to the weight that the OEB placed on any particular facts does not amount to an error of fact," and "a disagreement as to how the OEB exercised its discretion does not amount to an error of law or jurisdiction unless the exercise of discretion involves an extricable error of law."[11]

10. Furthermore, a motion to review is "not an opportunity for a party to reargue the case",[12] and a finding should not be overturned "unless there is no evidence to support the decision and [it] is clearly wrong."[13] In the rate-setting context, there is almost never a clear 'right' or 'wrong' answer. The OEB is required to exercise judgment and balance various considerations and, therefore, deference should be given to the original decision-maker, the Hearing Panel.

11. Even if, the OEB finds that there were errors, the Review Panel may still deny the request to vary the original decision. Similar to an appeal, a motion to review can be dismissed for reasons different from those given by the original panel.[14]

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[9] Phase 1 Decision, p.75
[10] *Interim Rate Order* (EB-2022-0200), April 11, 2024, p.5
[11] *Rules of Practice and Procedure,* Rule 42.01(a)i)
[12] *Decision with Reasons* (EB-2006-0322/338/340), May 22, 2007, p.18; See also *Grey Highlands (Municipality) v. Plateau Wind Inc*., 2012 ONSC 1001, para. 7
[13] *Decision and Order* (EB-2009-0063), August 10, 2010, para. 35
[14] See for example, *Sri Lankan Canadian Action Coalition v. Ontario (Attorney General),* 2024 ONCA 657, para. 35; *Clark v. Ontario (Attorney General),* 2019 ONCA 311, para. 66

D. Alleged Factual Errors Would Not Change The Result

12. Enbridge argues that the Hearing Panel made two factual errors in its findings, claiming that "[o]ne can reasonably assume that the OEB would come to a different conclusion when the facts are corrected."[15] SEC disagrees. Enbridge is simply attempting to confuse the issue, and overstate the Hearing Panel's reliance in the Phase 1 Decision on certain references or calculations that it claims are in error. More importantly, even if corrected, these minor errors would not change the outcome.

Integration Projects

13. Enbridge says that the Hearing Panel made a factual error in its assessment of the integration projects. It points to a reference in the Phase 1 Decision where the Hearing Panel cited SEC and CCC regarding certain real estate consolidation projects that would not have occurred in the absence of amalgamation.[16]

14. Enbridge is correct that those references in the SEC's Final Argument were to projects that were not part of the $119 million in undepreciated capital costs, due to the Capital Update, which delayed those projects until after 2023.[17] Enbridge argues that most of the integration capital costs at issue were for IT projects from which ratepayers will continue to benefit, and therefore it would be unfair for its shareholders to bear the costs. It claims that those IT projects would have needed to be undertaken at some point regardless of amalgamation.

15. However, Enbridge's own evidence, confirmed at the oral hearing, stated that all the expenditures were capital "expenditures required to integrate EGD and Union onto common systems, processes, and facilities."[18] In fact, the argument that some of the integration capital IT projects would have been required absent the merger was raised for the first time during the oral hearing as part of the relevant witness panel's Examination-in-Chief.[19] None of this was mentioned in the thousands of pages of pre-filed evidence, interrogatory responses, technical conference transcripts, or undertakings.

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[15] Enbridge Submissions on Motion to Review and Vary, paras. 32, 45
[16] Enbridge Submissions on Motion to Review and Vary, para. 33
[17] EB-2022-0200 Tr.14, p.145
[18] EB-2022-0200 Exhibit 2, Tab 5, Schedule 3, p.18; EB-2022-0200 Tr.14, p.150-151, 180
[19] EB-2022-0200, Tr.14, p.147, see also Tr.14, p.187-188

16. As SEC commented in its Final Argument, by that stage it was impossible to determine which projects would still have had to be undertaken, as well as their scope and timing. However, it was clear from a cursory review of the list of projects[20] that many would not have had to be completed in the absence of the amalgamation or within the timeframe required by the merger.[21]

17. There is little substantive difference between integration capital IT projects and real estate projects, in that, absent the amalgamation, costs would eventually have been incurred to upgrade real estate assets or construct new facilities, as was being proposed. The point the OEB was making is that these costs would not have been incurred, at least at that time, if not for the amalgamation.

18. Regardless, none of the alleged factual errors undermines the OEB's core findings that; a) it approved a five-year deferred rebasing period for Enbridge on the basis that it would provide a reasonable opportunity to recover its integration costs, and b) as those costs had already been recovered, it would be a "windfall" to the company if it were allowed to recover those costs from ratepayers again.[22] The evidence and the Phase 1 Decision found that the company not only had a reasonable opportunity to recover those costs, but did so, and then some.

Calculation of Net Savings

19. Enbridge takes issue with the OEB's calculation of the net savings after integration.[23] The Phase 1 Decision compared Enbridge's forecast of direct OM&A savings to what appears to be the original forecast of capital costs (which was, in fact, higher than the updated costs that make up the $119 million of undepreciated costs at issue). Enbridge seems to suggest that the total integration costs are higher than the savings. Even if the OEB's calculation is incorrect, Enbridge's calculation is also wrong and inconsistent with the MAADs framework and the MAADs Decision. The correct measure is not the difference between total integration costs and savings.

20. The benefit that Enbridge received through the deferred rebasing period was not just the direct O&M savings from the merger, but the ability to keep all the annual savings it had achieved since its last rebasing for an additional five years. If it had rebased in 2019 as originally scheduled, it would have had to pass those savings on to customers. As the MAADs Decision stated when approving the five-year deferred rebasing period, "[d]uring the last rate-setting frameworks, both

[20] EB-2022-0200, Exhibit 1, Tab 9, Schedule, 1, Attachment 1
[21] EB-2022-0200, SEC Final Argument, para. 3.3.18
[22] Phase 1 Decision, p.74-75
[23] Enbridge Submissions on Motion to Review and Vary, para.41

Union Gas and Enbridge Gas earned more than the OEB-approved return, as evidenced by the earnings sharing mechanisms for both utilities."[24] By deferring rebasing, "[c]ustomers will not benefit from any efficiency gains from this previous period until the end of the rebasing period."[25]

21. The undisputed evidence, confirmed by Enbridge's own witness, Ms. Ferguson, was that by the end of 2022 (the last year of actuals available during the hearing in the summer of 2023), the company had earned $231 million above its ROE (net of integration costs, including OM&A integration costs), which was more than the $119 million in undepreciated integration capital costs it was seeking to add to the 2024 rate base.[26] Ms. Ferguson agreed that Enbridge would still earn above its OEB-approved ROE, even if the OEB decided that it could not add the $119 million of integration costs to the rate base.[27]

22. In fact, the amount of overearnings could have been even higher, considering that the $119 million discussed during the oral hearing was later reduced to $91 million as part of the Rate Order process, based on the precise information Enbridge provided at that late stage in the hearing.[28]

23. Ultimately, it does not matter which set of calculations is used. The OEB was correct in finding that after Enbridge was granted the deferred rebasing period, based on a set of 'rules' that allowed it to benefit while bearing all the integration costs, it would be unfair to allow the company to pass those significant integration costs on to customers after it had already reaped the benefits.

E. <u>No Error in the Application of OEB Policy</u>

24. Enbridge makes several further arguments regarding its view that the Phase 1 Decision misapplied OEB policy. While SEC disagrees with Enbridge's position that the OEB misapplied or misinterpreted any OEB policy or regulatory principle, it does not matter for the purpose of this motion to review, as these are not valid grounds for such a motion. The application of a policy or

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[24] *Decision and Order* (EB-2017-0306/307), August 30, 2018, p.23

[25] *Decision and Order* (EB-2017-0306/307), August 30, 2018, p.23

[26] EB-2022-0200 Tr.14, p.170:

> MR. RUBENSTEIN: And that $231 million of overearnings above the OEB-approved amount is still more than the $119 million in the undepreciated integration capital costs you are seeking to add to rate base in 2024. Correct?
> MS. FERGUSON: Correct

[27] EB-2022-0200 Tr.14, p.170:

> MR. RUBENSTEIN: So the company would still earn above the OEB approved amount if the OEB said that those costs could not be put into rate base. Correct?
> MS. FERGUSON: Correct.

[28] *Interim Rate Order* (EB-2022-0200), April 11, 2024, p.5

regulatory principle is not an error of fact or law, but a disagreement on how the Hearing Panel exercised its broad rate-setting discretion.[29] The Rules explicitly preclude "disagreement as to how the OEB exercised its discretion…unless the exercise of discretion involves an extricable error of law."[30] Enbridge does not argue that there was any error of law, and they could not so argue in this case.

MAAD Policy

25. Enbridge argues that the Hearing Panel erred in finding that allowing integration capital to be added to the rate base was inconsistent with the intent of the MAADs Decision. It claims that the MAADs Decision's use of the term "transition costs" is actually a subset of "integration costs," based on the argument that the OEB premised its decision on a SEC estimate that the costs of the consolidation were $150 million, which is far less than the $400 million that was actually spent (capital and OM&A).[31]

26. The OEB should reject this argument. Transition and integration costs are the same thing, and if anything, the company appears to be indirectly challenging the findings of the MAADs Decision.

27. The updated MAADs Handbook, which Enbridge references in its argument when it suits its purposes[32], has replaced the term "integration costs"[33] with "transition costs," which it defines as "costs that are attributable to the consolidation."[34] This would surely encompass "capital expenditures required to integrate EGD and Union onto common systems, processes, and facilities."[35]

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[29] In footnote 47, Enbridge takes issue with OEB Staff's position in its Threshold Question submissions, that failure to apply an OEB policy is not an error of law and that commissioners are free to ignore or misapply policies. SEC submits this is not what happened in this case. The Hearing Panel did no such thing. However, SEC notes that when the OEB made changes to narrow the grounds available for a motion to review in 2021, it sought comments from interested stakeholders. SEC specifically raised the issue that the proposed wording would exclude motion to review when the OEB departs from core regulatory principles that are not legal requirements (See EB-2021-0154, SEC Comments on Rules of Practice and Procedure Amendments, June 3, 2021, p.3) Ultimately, the OEB was not persuaded by SEC's comments as it did not make changes to address this specific concern (See EB-2021-0154, OEB Letter, Re: Adopting Adoption of Amendments to Rules 40-43 of the Rules of Practice and Procedure regarding Motions to Review and Minor Administrative Changes, July 30, 2021)

[30] *Rules of Practice and Procedure*, Rule 42.01(a)(i)

[31] Enbridge Submissions on Motion to Review and Vary, paras. 47-48

[32] Enbridge Submissions on Motion to Review and Vary, para. 54

[33] Handbook to Electricity Distributor and Transmitter Consolidations (January 19, 2016), p.8

[34] Handbook to Electricity Distributor and Transmitter Consolidations (Revised July 11, 2024), p. 13

[35] EB-2022-0200 Exhibit 2, Tab 5, Schedule 3, p.18; EB-2022-0200 Tr.14, p.150-151, 180

28. It is clear that the MAADs Decision was referring to the same thing. All of the evidence on costs related to integration costs, and transition costs were not used as a sub-category of costs by either Enbridge or any other party. Tellingly, during the oral hearing, Enbridge's witnesses never made such a distinction. It was only when faced with final arguments and ultimately a decision they did not like, that they attempted to make such a claim.

29. Even on its face, Enbridge's argument is both misleading and wrong. Enbridge's reference to the $150 million as the basis of the OEB's decision is a selective citation from the OEB's summary of a single party's arguments, not the OEB Panel's findings.[36] The MAADs Decision found that the company had a reasonable opportunity to recover its costs based on the fact that both EGD and UG had consistently over-earned since they had last rebased, and that customers would not benefit from that until they rebase.[37]

30. Additionally, Enbridge's reliance on the new language included in the updated MAADs Handbook, issued almost six months after the Phase 1 Decision, is also misplaced.[38]

31. As a preliminary matter, that language is legally irrelevant. Not only does it not bind the OEB Panel as a legal matter, but how could the Commissioners have considered policy guidance that did not yet exist? This policy was the product of stakeholder input that explicitly included their views on the integration capital issue in Phase 1.[39] Moreover, as suggested by the name of the document, it applies to electricity distributors and transmitters and "does not automatically apply to consolidation applications in the natural gas sector."[40]

32. In any case, the language is entirely consistent with the Phase 1 Decision. The updated MAADs Handbook comments that, with respect to integration capital, the OEB "will determine

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[36] See for example, EB-2017-0306/307, Undertaking J2.4

[37] *Decision and Order* (EB-2017-0306/307), August 30, 2018, p.23. The $150M number referenced in the MAAD Decision from SEC's argument is straight out of EGD/UG's pre-filed evidence which provided a table showing integration capital investments vs. savings. If Enbridge's view is that the $150M number did not include OM&A costs, then that is the company's own fault in how it presented the evidence. Notwithstanding, the MAADs Panel was well aware of the company's forecast total integration cost, including capital and OM&A, as well as its forecast savings (see for example, EB-2017-0306/307, Undertaking J2.4)

[38] Enbridge Submissions on Motion to Review and Vary, para. 50-54

[39] See OEB Staff Discussion Paper, Evaluation of Policy on Utility Consolidations, (EB-2023-0188), February 8, 2024, p.35

[40] Handbook to Electricity Distributor and Transmitter Consolidations (Revised July 11, 2024), p.5; The MAADs Decision in effect came to the same conclusion regarding the previous version of the Handbook that was in effect at the time when it noted that the OEB policy, up to a 10 year deferred rebasing period which Enbridge has sought, was adopted to incent consolidation in the electricity sector (see *Decision and Order* (EB-2017-0306/307), August 30, 2018, p.23).

whether it is appropriate to include the remaining book value of these capitalized costs in the opening test year rate base or whether there was an expectation that these costs be recovered through the consolidation savings." [emphasis added] [41]

33. This is exactly what the Phase 1 Decision did. It correctly found that the MAADs Decision explicitly recognized that there was an expectation these costs would be recovered through consolidation savings when "presented with evidence describing the nature of capital investments and the cost of those investments... 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."[42]

Benefits Follow Costs

34. Enbridge's claim that the Hearing Panel failed to apply the "benefits follow the costs" principle has no basis, and is nothing more than an attempt to re-argue its case.[43] Its position is that since customers will benefit from the integration savings after rebasing, they should pay the post-rebasing portion of the costs that supported that outcome.

35. Enbridge made the exact same arguments before the Hearing Panel[44], and the OEB explicitly rejected them, stating that "[in] this case, the benefits did follow the costs," as the savings achieved, which Enbridge got to keep, exceeded the costs.[45] To allow it to include the costs of the savings would result in a "windfall to the utility."[46]

36. As SEC noted in its Final Argument, Enbridge did not provide "any evidence that the specific integration capital costs are the primary drivers of most of the integration savings."[47] If anything, the evidence suggested otherwise as most of the achieved savings, all of which are O&M costs[48], did not come from integration-related capital projects.[49] They came from activities such

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[41] Handbook to Electricity Distributor and Transmitter Consolidations (Revised July 11, 2024), p.14
[42] Phase 1 Decision, p.74
[43] The OEB has said that "a motion to review is not an opportunity for the party to re-argue its case" (See *Decision and Order* (EB-2019-0180), December 5, 2019, p.10; *Decision with Reasons* (EB-2006-0322/338/340), May 22, 2007, p.18)
[44] Phase 1 Decision, p.71
[45] Phase 1 Decision, p.75
[46] Phase 1 Decision, p.75
[47] EB-2022-0200, SEC Final Argument, para. 3.3.14
[48] EB-2022-0200, Exhibit 1, Tab 9, Schedule 1, p.25; SEC Final Argument,, para. 3.3.14
[49] EB-2022-0200, Interrogatory Response 1.9-CCC-25d; Undertaking JT 1.9, Attachment 1

organizational restructuring (e.g., reduction in headcount due to position redundancies) and the alignment of processes and procedures.[50]

Adequacy of Reasons

37. Enbridge argues that the Phase 1 Decision did not meet the requirements for providing adequate reasons, primarily on the basis that the "determination to disallow around $100 million in costs was made in a two page 'Findings' section of the Decision."[51]

38. As the Divisional Court has stated, "[a]dequacy of reasons is not based on the length of the reasons or the number of pages used."[52] While the OEB must address the key issues, it is not required to "respond to every argument or line of possible analysis" or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion."[53] The Supreme Court has noted that "[t]o impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice."[54]

39. The Phase 1 Decision was required to address more than two dozen unsettled or partially settled issues[55], with each issue often requiring several determinations. If the OEB were required to provide a detailed explanation of why it accepted or rejected every single argument on every sub-issue, the OEB's 145-page decision would have been several times longer and taken significantly longer to release. Even in the context of the higher threshold required in a judicial proceeding, the Ontario Court of Appeal has cautioned that any review must be "read in the context of the record."[56]

40. The reasons regarding integration capital are more than sufficient to meet any required legal standard, especially when read, as required, in the context of the EB-2022-0200 record.[57] Enbridge is simply upset that the OEB did not agree with its position.

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[50] EB-2022-0200, Interrogatory Response 1.9-CCC-25d, also see Attachment 1; EB-2020-200, Undertaking JT 1.9, Attachment 1
[51] Enbridge Submissions on Motion to Review and Vary, para. 30
[52] *Bryczkowski v. Dennison Associates*, 2017 ONSC 6384, para. 17
[53] *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65, para.128; citing *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, para. 16, 25
[54] *Canada (Minister of Citizenship and Immigration) v. Vavilov,* 2019 SCC 65, para. 128
[55] Phase 1 Decision
[56] *Bruno v. Dacosta,* 2020 ONCA 602, para. 23
[57] *Bruno v. Dacosta,* 2020 ONCA 602, para. 23

Just and Reasonable Rates

41. Enbridge also argues that by not allowing it to recover the undepreciated costs for integration capital, the OEB is acting contrary to the requirement to set just and reasonable rates, as it would not have the ability to recover its costs.[58] SEC submits that Enbridge has the situation backwards.

42. As part of the MAADs Decision, Enbridge was granted the opportunity to defer rebasing for five years in exchange for bearing the costs of integration. In Phase 1, the evidence showed that Enbridge was forecast to earn more than its cost to serve during the deferred rebasing period, even excluding the recovery of any integration capital costs.[59]

F. <u>Relief</u>

43. SEC submits the OEB should dismiss the motion to review.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

November 1, 2024

Mark Rubenstein
Counsel for the School Energy Coalition

[58] Enbridge Submissions on Motion to Review and Vary, paras. 22-25
[59] EB-2022-0200 Tr.14, p.170-171