EB-2024-0078

ONTARIO ENERGY BOARD

Ontario Power Generation Inc.

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

SUBMISSIONS OF CANADIAN MANUFACTURERS & EXPORTERS ("CME")

November 1, 2024

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1.0 INTRODUCTION

1. These submissions are made on behalf of Canadian Manufacturers & Exporters ("**CME**") regarding the motion made by Enbridge Gas Inc ("**EGI**") to review and vary the Ontario Energy Board's (the "**OEB** or the **Board**") Decision and Order in EB-2022-0200, which related to EGI's application for 2024 Rates – Phase 1 (the "**Decision**").

2. EGI filed an application with the OEB for approval to change rates charged to customers beginning January 1, 2024. It was EGI's first rebasing application since Enbridge Gas Distribution ("**EGD**") amalgamated with Union Gas Limited ("**Union**").

3. The Board made, *inter alia*, the following determinations in the Decision:

   (a) That EGI's proposal with respect to the asset life parameters of seven classes of assets was inappropriate, and the asset life parameters proposed by InterGroup Consultants Ltd. ("**Intergroup**") and agreed to by Emrydia Consulting Corporation ("**Emrydia**") better reflected what was known about the service lives of the assets. (the "**Asset Lives Issue**").[1]

   (b) That EGI would not be allowed to include the undepreciated capital costs for integration capital in its 2024 rate base (the "**Integration Capital Issue**").[2]

4. On May 29, 2024, EGI filed an amended motion to review and vary the Decision with respect to the Asset Lives Issue, and the Integration Capital Issue.

5. The Board requested that parties make submissions on whether the Asset Lives Issue or the Integration Capital Issue met the Board's threshold test for motions to review and vary. On October 8, 2024, the Board published its decision with respect to the threshold issue. The Board determined that the Asset Lives Issue did not meet the threshold. The Board

[1] EB-2022-0200, Decision and Order, December 21, 2023, p. 86.
[2] EB-2022-0200, Decision and Order, December 21, 2023, p. 74.

found that EGI's motion with respect to the Integration Capital Issue met the threshold and cited the fact that EGI's motion alleged that the panel in EB-2022-0200 made factual errors that went beyond merely how the Board exercised its discretion or the weight that they gave conflicting evidence.[3]

6. Critically, the Board did not determine *whether* the previous panel had made factual errors or whether those errors warranted changing the Decision. The Board only found that EGI's allegations went beyond the Board's exercise of discretion or the weighing of conflicting evidence. Accordingly, the Board requested that parties make submissions on the merits of EGI's motion regarding the Integration Capital Issue.

7. CME submits that the Board may have made an error with respect to the types of projects that made up the integration capital amounts EGI sought to recover from ratepayers. However, this error was not material and therefore the Board should not vary the Decision. Ultimately, the Decision was founded on a rational chain of analysis that led to just and reasonable rates.

2.0 MOTIONS TO VARY AND THE STANDARD OF REVIEW

8. Pursuant to *Rule* 43, the Board has the power to review whether a motion to review and vary "raises relevant issues material enough to warrant a review of the decision or order on the merits".[4]

9. The *Rules* provide that the moving party must set out the grounds for the motion in its notice of motion, and must refer to one of three grounds of review:

(a) The Board made a material and clearly identifiable error of fact, law or jurisdiction;

[3] EB-2024-0078, Decision on Threshold Question and Procedural Order No. 2, October 8, 2024, p. 7.
[4] Ontario Energy Board, *Rules of Practice and Procedure*, Revised February 1, 2024, p. 32.

(b) New facts have arisen since the decision was published which would reasonably have resulted in a material change to the decision; or

(c) Facts that existed at the time of the decision but were unknown and could not have been known with the exercise of reasonable diligence and could reasonably have resulted in a material change to the decision.

10. *Rule* 43.03 provides that the OEB will only vary a decision when it is clear that a material change is warranted to the decision based on one of the grounds set out at paragraph 9 of these submissions.

11. When reviewing a previous panel's decision, the standard of review is reasonableness. As set out by the Board in EB-2018-0085:

> "The OEB has previously applied the reasonableness standard in considering a motion to review, and has said that the original hearing panel is entitled to deference."[5]

12. The Supreme Court of Canada has found that in order for a decision to be "reasonable", it must meet two criteria:

(a) It must be based on reasoning that is both rational and logical. It is not a line-by-line treasure hunt for errors. The reviewing body must be able to trace the decision maker's reasoning without finding a flaw in the logic employed. The line of reasoning must reasonably lead the tribunal from the evidence to its conclusion.[6]

(b) It must be justified in relation to the facts and law that are relevant to the decision. This can include, among other things, the evidence, the submission of parties, previous decisions, and the governing legislation at issue.[7]

[5] EB-2018-0085, Decision, August 30, 2018, at para. 18.
[6] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at para. 102.
[7] *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 105-106.

13. Accordingly, CME submits that the reviewing panel's task will be to review the Decision to determine whether the Board followed a rational chain of analysis that connected the relevant evidence and law to a reasonable decision. To the extent that the previous panel made any errors, then the panel is required to determine whether those errors could, if corrected, have reasonably changed the Decision.

14. CME submits that the Decision is based on the evidence presented to it, and uses a rational chain of analysis to reach its conclusion. Even if there was an error in the specific details cited by the Board in the Decision, those errors would not be reasonably expected to change the outcome.

3.0 THERE WERE NO MATERIAL ERRORS REGARDING THE INTEGRATION CAPITAL ISSUE

15. EGI alleges that the Board made numerous errors with respect to the Integration Capital Issue. EGI alleges that the Decision is not consistent with the Board's handbook for amalgamations (the "**MAADs Handbook**"), the Board's decision in EB-2017-0306/7 (the "**MAADs Decision**"), or the "benefits follow costs" principle, and that the Board made several incorrect findings of fact.

16. CME submits that the Decision is fully consistent with the MAADs Handbook, the MAADs Decision and the "benefits follow costs" principle. Moreover, the findings of fact cited by EGI are not material errors. Any errors that the Board may have made in this respect do not have an impact on the Decision. Accordingly, the panel should not vary it.

3.1 The Decision is Consistent with Regulatory Principles and Previous Decisions

17. The Decision is consistent with the "benefits follow costs" principle, the MAADs Handbook and the MAADs Decision. In this regard:

(a) Both ratepayers and the utility pay a cost for the utility to be able to amalgamate. The utility pays the costs of achieve synergies and integration. Ratepayers forego the opportunity to enjoy lower rates because of the savings achieved in the previous ratemaking term, which would otherwise accrue to them absent the amalgamation.[8]

(b) Since both the utility and ratepayers pay the cost, the "benefits follow costs principle" in the context of an amalgamation requires that the Board apportion the benefits of amalgamation between the utility and the ratepayers.

(c) The MAADs Handbook guides the Board's apportionment. The MAADs Handbook in force when the Board published the Decision stated that "incremental transaction and integration costs are not generally recoverable through rates".[9] The subsequent paragraph provides that utilities are allowed to defer rebasing for up to ten years to grant them the opportunity to realize on anticipated gains and retain achieved savings for a period of time to "offset the costs of the transaction".[10] In other words, the reason that utilities are allowed to defer rebasing is to recover the transaction and integration costs which they are not allow to recover directly through rates.

(d) The apportionment of benefits between the utility and ratepayers is therefore determined through the length of the deferred rebasing period. The longer the deferred rebasing period, the greater savings are granted to the utility, and less to ratepayers. The shorter the rebasing period, the more benefits are granted to ratepayers. The MAADs Handbook only provides that the Board should give the

[8] EB-2017-0307, Decision and Order, August 30, 2018, p. 23.
[9] Ontario Energy Board, Handbook to Electricity and Distributor and Transmitter Consolidations, January 19, 2016, p. 8.
[10] Ontario Energy Board, Handbook to Electricity and Distributor and Transmitter Consolidations, January 19, 2016, pp. 8-9.

utility the "opportunity" to keep savings to offset the costs of the transaction.[11] It is not required to guarantee that the utility will recover them.

(e) In the MAADs Decision, the Board reviewed the MAADs Handbook and the and determined the appropriate rebasing period:

> "The OEB finds that five years provides a reasonable opportunity for the applicants to recover their transition costs."[12]

(f) The Decision recognized that the Board previously decided the proper apportionment of benefits from the deferred rebasing period in EB-2017-0306/7:

> "In the MAADs proceeding, Enbridge Gas requested a deferred rebasing period of ten years. The OEB in its decision granted a deferred rebasing term of five years and noted that "five years provides a reasonable opportunity for the applicants to recover their transition costs." The OEB stated that the policy of permitting a deferred rebasing period of up to ten years was adopted to incent the consolidation of electricity distributors."[13]

Accordingly, the Decision found that altering the allocation of benefits now to further favour the utility would represent a windfall to EGI and was inappropriate.

18. EGI argued that the revisions to the MAADs Handbook made in 2024 show that the Decision is inconsistent with the MAADs Handbook. Setting aside the impropriety of judging the Decision on the basis of revisions to the MAADs Handbook which did not exist when the Decision was published, the Decision is consistent with the 2024 revisions.

19. The MAADs Handbook now provides that the Board will review capitalized costs incurred by the utility to see whether they should be included in rate base after the deferred rebasing period or "whether there was an expectation that these costs be recovered through the consolidation savings."[14]

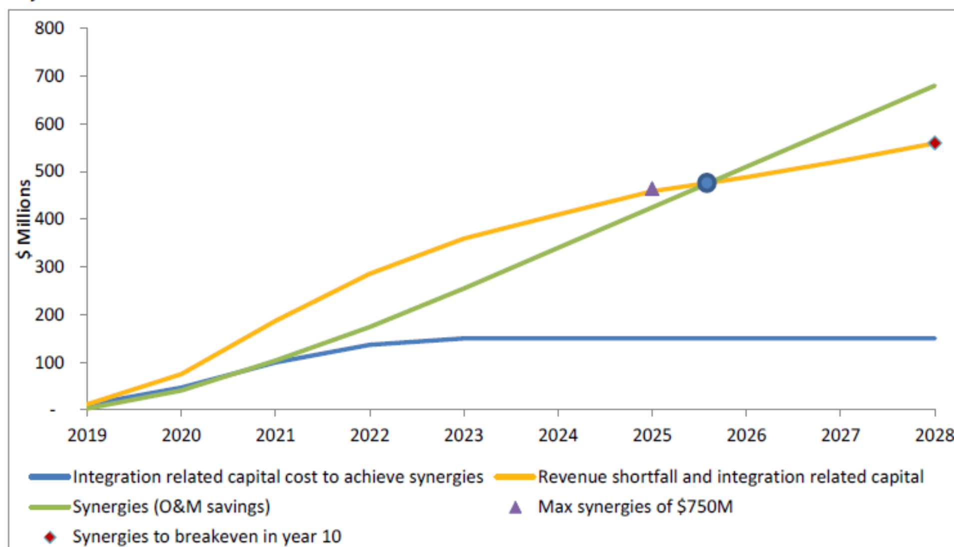
[11] Ontario Energy Board, Handbook to Electricity and Distributor and Transmitter Consolidations, January 19, 2016, pp. 8-9, 11-12.
[12] EB-2017-0307, Decision and Order, August 30, 2018, p. 22.
[13]
[14] Ontario Energy Board, Handbook to Electricity Distributor and Transmitter Consolidations, July 11, 2024, p. 14.

20. In this case, both EGI and the Board expected the costs at issue, namely capitalized costs, to be recovered through the consolidation savings and not being passed on to ratepayers after the deferred rebasing period.

21. EGI included its forecast of the capital costs necessary for integration in its evidence in EB-2017-0306/7. EGI stated that their “base case” was $150 million in spending. EGI’s own evidence was that the $150 million integration capital spending (the blue line) would be recovered through savings (the green line) by 2021:[15]

[15] EB-2017-0306/7, Undertaking Response J2.4, May 11, 2018.

The diamond mark found at year 2028 of the yellow line identifies that if Amalco spends $150 million in capital investment and achieves savings of $560 million, the payback period would be 10 years.



Graph 1: Case A with $150 million capital investment and $680 million Net O&M savings

A Base Case: $150M/$680M (capex/synergies)

	Payback Net cash flow approach ($ Millions)	2019	2020	2021	2022	2023	2024	2025	2026	2027	2028	Source/Calculation
A.1	Revenue shortfall to meet allowed ROE	1	28	59	62	60	50	49	30	34	38	Exhibit B, Tab 1, Table 3
	Cumulative	1	29	87	149	209	260	309	338	372	410	
A.2	Integration related capital cost to achieve synergies	11	36	53	37	13	-	-	-	-	-	Exhibit B, Tab 1, Attachment 12
	Cumulative	11	47	100	137	150	150	150	150	150	150	
A.3	Revenue shortfall and integration related capital	12	64	112	99	73	50	49	30	34	38	Line A.1 plus Line A.2
	Cumulative Shortfall	12	76	187	286	359	410	459	488	522	560	
A.4	Synergies (O&M savings)	3	38	63	70	81	85	85	85	85	85	Exhibit B, Tab 1, Attachment 12
	Cumulative	3	41	104	174	255	340	425	510	595	680	
A.5	Gap - synergies vs revenue shortfall and integration related capital	(9)	(35)	(83)	(112)	(104)	(70)	(34)	22	73	120	Cumulative A.4 less Cumulative Shortfall (A.3)

Table 1: Data and sources for Case A and Graph 1

22. The table and the chart make it clear that the $150 million cost included “capital costs to achieve synergies”. In other words, EGI’s evidence demonstrated that their expectation was that they would be able to recover what they had forecast to be the capital costs of the amalgamation through savings.

23. EGI argues that the MAADs decision was based on the premise that it would have to absorb $150 million in capitalized costs, not the close to $400 million they claim now are integration costs. CME disagrees. The MAADs decision found that EGI was required to absorb the integration costs in full. EGI estimated those to be $150 million, but that was

not the Board's finding. The Decision provides that five years provided EGI a reasonable opportunity to earn enough to cover the integration costs, full stop.

24. The Decision recognized that EGI and the Board's expectation was that EGI would recover its capital costs through the amalgamation savings:

> "The OEB granted a deferred 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."[16]

25. The Decision is consistent with the MAADs Decision, the MAADs Handbook and the expectations of the parties regarding the recoverability of integration capital costs. The Decision is therefore consistent with the evidence, the Board's regulatory policy, and its previous decisions on EGI's amalgamation.

3.2 There is no Material Error With Respect to Project Type

26. EGI argued that the Board misunderstood the projects that made up the integration capital costs that it proposed to add to rate base. EGI pointed to real estate projects referenced by the Decision which are not included in the integration costs that EGI sought to add to rate base as evidence of this alleged error.

27. The Decision discloses no material error when properly interpreted. The Board found that projects that were caused by the amalgamation should be considered amalgamation related capital spending, and therefore not eligible to be added to rate base and paid for

[16] EB-2022-0200, Decision and Order, December 21, 2023, p. 74.

by ratepayers. CME acknowledges that the real estate projects referenced in the Decision are not included in the capital costs EGI is seeking to add to rate base. However, the Board's underlying reasoning is equally applicable to the projects that are included in EGI's remaining integration costs.

28. Specifically, the Board found that in order for the benefits of the amalgamation to follow the costs, the OEB "must consider the impetus for the specific costs incurred" (emphasis added).[17]

29. EGI has stated that the primary capital cost for integration was IT related projects.[18] EGI argued that since IT projects would have been needed even absent the amalgamation, ratepayers should bear the cost of those projects after the deferred rebasing period.

30. While EGI may have been required to incur capital costs to update IT infrastructure at some point in the future, the reason why they were required to spend it during the deferred rebasing period, and the scope of the projects (and therefore the cost) was tied directly to the amalgamation of EGD and Union. Ratepayers were denied the benefit of continuing with the existing IT infrastructure (and therefore not having to pay additional capital costs), or of smaller scale and less expensive projects (with more modest scopes of work) because of the shareholder's corporate desire to amalgamate. To put it in other words, the impetus for the specific costs incurred by EGI in this case (the actual projects with the costs EGI seeks to pass on to ratepayers) was the fact that they needed to integrate their IT systems as a result of the merger.

31. The Decision recognized that requiring ratepayers to pay for projects caused by the amalgamation would be unfair. The fact that the Decision cited real estate projects that

[17] EB-2022-0200, Decision and Order, December 21, 2023 at p. 74.
[18]

ultimately were not included in the integration capital that EGI requested to add to rate base is irrelevant, as the reasoning remains the same even if applied to IT projects the cost of which EGI is looking to add to rate base.

3.3 There is No Error with Respect to the Integration Savings

32. EGI argued that the Board's finding that the savings from amalgamation were greater than EGI's costs for amalgamation is an error. While the difference between the amount of savings and the amount of costs can vary depending on what to include in each category, ultimately, the Decision is correct and grounded in the evidence.

33. The evidence in EB-2022-0200 made it clear that not only was EGI given the opportunity to earn back the costs of amalgamation during the rebasing period, but it also succeeded in doing so:

> "Q: the outcome of that deferred rebasing was the company earned more than its -- the gross earnings above its ROE were sufficient to recover its integration costs, including the amounts you are seeking to put into rate base for 2024. Correct?
>
> A: Correct."[19]

34. EGI in fact earned more than $231 million more than its allowed ROE.[20] Accordingly, regardless of whether the savings were from the amalgamation projects themselves, or the existing efficiencies that were never passed on to ratepayers as a result of the deferred rebasing, or another source, EGI had its opportunity to earn back the costs of amalgamation and capitalized on that opportunity.

[19] EB-2022-0200, Transcript, Volume 14, p. 171.
[20] EB-2022-0200, Transcript, Volume 14, pp. 169-170.

35. Moreover, even if EGI's overearnings were not greater than the costs of amalgamation, that fact is irrelevant, and would not be expected to alter the Decision.

36. As outlined above, the MAADs Handbook describes the purpose of the policy with respect to a utilities' recovery of the costs of integration. It states that utilities are provided with the "opportunity to offset transaction costs with any achieved savings".

37. Neither the MAADs Handbook nor the MAADs Decision guarantee that EGI will offset the transaction costs with achieved savings. They do not provide that ratepayers will pay for transaction costs if EGI fails to offset the costs with achieved savings. All the MAADs Handbook provides is that EGI be given the opportunity to offset its costs. EGI agreed with this proposition in EB-2022-0200.[21] That's exactly what the Board provided to EGI. Whether EGI succeeded or not is irrelevant.

38. Accordingly, CME submits that even if this panel were to find that the Decision is wrong about whether amalgamation costs were offset by EGI's savings, that would not be expected to the change the Decision and therefore do not pass the threshold test.

4.0 COSTS

39. CME requests that it be awarded 100% of its reasonably incurred costs in connection with this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of November, 2024.

Scott Pollock

Counsel for CME

[21] EB-2022-0200, Transcript, Volume 14, p. 164.