

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

## NOTICE OF MOTION

Enbridge Gas Inc. ("**Enbridge Gas**") will make a Motion to the Ontario Energy Board ("**OEB**") on a date and at a time to be determined by the OEB.

**PROPOSED METHOD OF HEARING:** Enbridge Gas proposes that the Motion be heard by way of an oral hearing.

### THE MOTION IS FOR:

1. A review and variance of those portions of the Decision and Order in EB-2022-0200 dated December 21, 2023 (referred to herein as the "**Decision**") in which the OEB determined the following issues (collectively referred to in this Motion as the "**Review Issues**")
  - i. The reduction of the Residential and Small Volume Customer Revenue Horizon from 40 years to 0 years ("**Customer Revenue Horizon Issue**");
  - ii. The excessive reduction in the Capital Budget ("**Capital Budget Issue**");
  - iii. The denial of the inclusion of undepreciated capital costs for integration capital in 2024 rate base ("**Integration Capital Issue**");

- iv. The rejection of the Equal Life Group (“**ELG**”) Depreciation Methodology and the lengthening of the Average Useful Life of 7 Asset Classes for Depreciation purposes (“**Depreciation Issues**”); and
  - v. The Deemed Equity component of Enbridge Gas’s Cost of Capital (“**Equity Thickness Issue**”).
2. An Order that the Motion raises issues material enough to warrant a review of the Decision on the merits thus satisfying the “threshold test” in Rule 43.01 of the OEB’s *Rules of Practice and Procedure* in relation to each of the Review Issues.
  3. Variation of the Decision in relation to the Review Issues and approval of the relief requested by Enbridge Gas in the Application and its Reply Argument in relation to the Review Issues.
  4. In the alternative to (3), an Order directing a rehearing of the Review Issues by a differently constituted panel of the OEB;
  5. A stay of the Decision in relation to the Customer Revenue Horizon Issue while this Motion is being determined, including any related issues to be dealt with in Phases 2 and 3 of the EB-2022-0200 proceeding.
  6. A stay of the Decision in relation to some or all of the Review Issues while the OEB conducts any rehearing of those issues, including any related issues to be dealt with in Phases 2 and 3 of the EB-2022-0200 proceeding.
  7. Such further and other Orders as Enbridge Gas may request and the OEB approves.

**THE GROUNDS FOR THE MOTION ARE:**

**The proceeding**

1. Enbridge Gas filed an application with the OEB on October 31, 2022 for an order or orders seeking approval for changes to the rates that Enbridge Gas charges for the sale, distribution, transportation and storage of natural gas effective January 1, 2024 (the “**Application**”). The Application also sought approval for an incentive rate-making mechanism (“**IRM**”) for the years 2025 to 2028 and a number of additional approvals. The Application was prepared in accordance with all relevant OEB guidance.

2. With the goal of receiving a decision from the OEB in respect of matters required for the purposes of setting rates for 2024, Enbridge Gas requested and the OEB issued Procedural Orders requiring the Application to be heard in phases. By Procedural Order No. 2, the OEB set the Issues List for the proceeding dividing the issues to be heard in either Phase 1 or Phase 2. The parties entered into a partial settlement agreement that provided resolution on a number of matters and provided that several of the remaining unsettled issues should be dealt with in a subsequent Phase 3 of the proceeding.
3. While the Decision and this Motion relate to Phase 1 issues, certain determinations made by the OEB in its Decision will have material impacts on Enbridge Gas and stakeholders in respect of the issues remaining to be resolved in subsequent phases of the proceeding. These impacts are therefore relevant for the purposes of this Motion and require the issuance of a stay in respect of aspects of the Decision, including the Customer Revenue Horizon Issue.

#### **The Decision**

4. The OEB issued the Decision on December 21, 2023. The Decision addressed each of the unsettled items in Phase 1 of the proceeding, addressing a total of 18 issues. Enbridge Gas requests that the OEB review and vary the Decision in relation to the five Review Issues.

#### **The Review Motion standard**

5. Rule 40.01 of the OEB's *Rules of Practice and Procedure* allows any person to bring a motion requesting the OEB to review all or part of a final order or decision, and to vary, suspend or cancel the order or decision.
6. Rule 42.01(a) of the OEB's *Rules of Practice and Procedure* requires that a notice of motion set out the grounds for the motion, which may include:
  - i. the OEB made a material and clearly identifiable error of fact, law or jurisdiction;
  - ii. new facts that have arisen since the decision or order was issued that, had they been available at the time of the proceeding to which the motion relates, could if proven reasonably be expected to have resulted in a material change to the decision or order;or

- iii. facts that were not previously placed in evidence in the proceeding and could not have been discovered by reasonable diligence at the time.
7. The OEB has confirmed that this list of grounds is “not an exhaustive list”. What is required is that the motion to review must raise a question as to the correctness of the order or decision.<sup>1</sup> The moving party must demonstrate that the findings are contrary to the evidence before the panel, that the panel failed to address a material issue, that the panel made inconsistent findings or something of a similar nature.<sup>2</sup>
  8. The moving party must also demonstrate that the alleged error is material and would vary the outcome of the decision.<sup>3</sup>

### **The Errors in the Decision**

9. There is a strong basis to determine that the Decision is incorrect with respect to the Review Issues. There is also new evidence of Government of Ontario policy not available during the hearing of Phase 1, and not considered in the Decision, which could reasonably be expected to have resulted in a material change to the Decision.

#### **(a) Overall Errors**

10. Pursuant to section 36 of the *Ontario Energy Board Act, 1998* (“**OEB Act**”), the OEB has an obligation to set rates that are just and reasonable.
11. The term “just and reasonable” is a legal standard established and repeatedly confirmed by the Supreme Court of Canada for nearly one century. In *Ontario (Energy Board) v. Ontario Power Generation*<sup>4</sup>, Justice Rothstein explained that this standard requires that the service provider recover its reasonable costs of service and earn a reasonable rate of return.
12. As a result of the errors of fact, law or jurisdiction made by the OEB in relation to the Review Issues, the OEB failed to set rates that are just and reasonable.

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<sup>1</sup> EB-2016-0005 Decision on Motion to Review and Vary by the City of Hamilton, March 3, 2016, page 4.

<sup>2</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>3</sup> Rules 42.01(a) and 43.01(d); see also EB-2006-0322/0338/0340 Decision with Reasons on Motions to Review the Natural Gas Electricity Interface Review Decision, May 22, 2007, pages 17-18.

<sup>4</sup> 2015 SCC 44.

13. Most of the Decision is premised on the OEB's determination that the energy transition is underway and the usual way of doing business is not sustainable. A key focus of the Decision is on the stranded asset risk that the OEB finds is created by the energy transition.
14. The Decision effectively makes new policy that is directly at odds with Government of Ontario policy. In this way, key aspects of the Decision are fundamentally flawed. It is appropriately the role of the provincial government to make the overarching policy, and for the OEB to implement it. As an economic regulator, it is the OEB's role to serve and promote provincial energy policy.<sup>5</sup> Where the OEB creates new policy that conflicts with Government of Ontario policy, that is an error, contrary to the OEB's statutory objectives in respect of natural gas and an overstepping of jurisdiction that must be corrected.
15. On this point, there are key statements of Government of Ontario policy that were not reflected in the Decision and which, when considered, should result in a variance to the Decision. These include the following:
- i. The Powering Ontario's Growth report from July 2023 which states, in part:  
*Natural gas will continue to play a critical role in providing Ontarians with a reliable and cost-effective fuel supply for space heating, industrial growth, and economic prosperity.*<sup>6</sup>
  - ii. The Renewed Letter of Direction issued by the Minister of Energy to the Acting Chair of the OEB dated November 29, 2023 which states, in part:  
***Our government has ambitious goals to build at least 1.5 million new homes, new highways, subways and improved rail transportation, and has also been successful in attracting new jobs to the province, particularly in critical minerals, electric vehicles and battery manufacturing. With this in mind, it is critical that the OEB ensures that Ontario's electricity and gas transmission and distribution systems are built to support these goals in a timely manner, while protecting ratepayers. Achieving this goal requires timely decision-making, well scrutinized costs and a regulatory environment with certainty for proponents. ... Lastly, while the Ministry awaits the Electrification and Energy Transition Panel's report on energy sector governance and supporting a cost-effective energy transition, we must be mindful of affordability impacts to customers while maintaining resilient energy systems. The OEB should continue to ensure that the***

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<sup>5</sup> The [Memorandum of Understanding](#) between the Minister of Energy and the Chair of the OEB, dated July 4, 2023, clearly sets out the delineation between the roles and responsibilities of the Minister and the OEB with respect to policy making. For instance, section 7.1(a) indicates that the Minister is responsible for "developing the Government's overall energy policy priorities and broad policy directions".

<sup>6</sup> [Powering Ontario's Growth](#), page 30.

***needs of all customers are considered in its work, and that access to electricity and natural gas in an affordable manner remains central to decision-making.***<sup>7</sup> (emphasis added)

- iii. The December 22, 2023 press release from the Minister of Energy (described below) objecting to the OEB's ruling on the Customer Revenue Horizon issue.<sup>8</sup>
- iv. The Report of the Electrification and Energy Transition Panel ("**EETP**") and the Government of Ontario's January 19, 2024 response. The EETP makes clear that natural gas will continue to play critical roles in the short and medium terms and recognizes that the pace of transition is unknown. The Minister of Energy's response to the EETP indicates in part that:

*I am particularly pleased to see that the panel shares **our government's view that natural gas will continue to be an important part of Ontario's energy mix** as we implement our pragmatic plan to invest in and bring online more clean nuclear energy. .... I look forward to announcing our next steps towards an integrated energy planning process later this year.*<sup>9</sup> (emphasis added)

16. The OEB's determinations on revenue horizon, capital budget and system renewal, depreciation and equity thickness are inconsistent with provincial policy as it currently stands. This is important and must be remedied because the effect of the Decision is to drive Enbridge Gas's decisions and operations in a way that is contrary to Government of Ontario policy.

**(b) Customer Revenue Horizon Issue**

17. The customer revenue horizon is the period of time over which new customers are assumed to pay the costs associated with connecting those customers. The customer revenue horizon has a direct impact on the rate paid by customers.

18. In the Application, Enbridge Gas did not seek any change from its historic OEB-directed approach of using a 40-year customer revenue horizon.

19. In the Decision, a majority of the OEB ordered (Commissioner Duff dissenting) that the customer revenue horizon for residential and small volume gas customers be reduced from 40 years to 0 effective January 1, 2025. The impact of this change – effectively eliminating

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<sup>7</sup> [November 29, 2023 Letter of Direction from the Minister of Energy](#), page 2.

<sup>8</sup> [Ontario Government Standing Up for Families and Businesses](#).

<sup>9</sup> [Ontario Welcomes Report on Electrification and Energy Future](#).

the customer revenue horizon – is that new customers must pay all capital costs of connection up front, as compared to spread evenly over 40 years.

20. In dissent, Commissioner Duff held:

*I do not support a zero-year revenue horizon for assessing the economics of small volume gas expansion customers. I do not find the evidentiary record supports this conclusion. The CIAC comparison table filed by Enbridge Gas did not even consider zero within the range of revenue horizon options. Zero is not a horizon. It is fundamentally inconsistent with the intent of E.B.O. 188 by requiring 100% of connection costs upfront as a payment, rather than a contribution in aid of construction. There was no mention of zero in E.B.O. 188 – yet a 20 to 30 year revenue horizon was considered. To me, the risk of unintended consequences to Enbridge Gas, its customers and other stakeholders increases given the magnitude of this conclusive change.<sup>10</sup>*

21. On the morning of December 22, 2023, mere hours following the release of the Decision, the Minister of Energy issued an extraordinary press release which objected to this ruling, stating:

*I am extremely disappointed in yesterday's split decision by the Ontario Energy Board to reduce the amortization period for the cost of installing new natural gas connections for homes. This decision, which would mean costs that are normally paid over 40 years would be owed in full up front, could lead to tens of thousands of dollars added to the cost of building new homes. At a time when Ontario, like the rest of Canada, is already dealing with the difficult headwinds of high interest rates and inflationary pressures, the Ontario Energy Board's decisions would slow or halt the construction of new homes, including affordable housing. We will not stand for this.*

*In response, I will use all of my authorities as Minister to pause the Ontario Energy Board's decision. At the earliest opportunity, our government will introduce legislation that, if passed, would reverse it, so that we protect future homebuyers and keep shovels in the ground.<sup>11</sup>*

22. In eliminating the customer revenue horizon, the OEB made reviewable errors by:

- i. Acting contrary to the statutory objectives for gas as set out in the *OEB Act* and the policies of the Government of Ontario;
- ii. Acting contrary to the principles of natural justice, and denying Enbridge Gas procedural fairness by:

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<sup>10</sup> Decision, page 143.

<sup>11</sup> [Ontario Government Standing Up for Families and Businesses](#).

- a. Failing to give notice to the parties and others that it was considering a fundamental change that effectively cancels established OEB policy relating to the customer revenue horizon. The OEB recognizes in the Decision that it is appropriate for developers and others to participate in Phase 2 for an opportunity to make submissions on the implementation of the zero customer revenue horizon,<sup>12</sup> but did not find it appropriate to invite such parties to participate in Phase 1 when the Customer Revenue Horizon Issue was added late in the process and when the OEB must have known it was considering an outcome that would have immense impacts on developers; and
- b. Rendering a decision in the absence of any evidence considering the effect of a zero-year revenue horizon and with no evidence that any other jurisdiction has adopted this approach.

23. The OEB made reviewable errors by basing key parts of its Decision on items for which no evidence was presented and/or tested, and instead introduced and relied upon conjecture and speculation and/or untested or outdated information on important topics such as (without limitation): how developers and customers would respond to a zero-year revenue horizon; whether Enbridge Gas will be willing to perform an economic activity with no regulatory certainty about how it will be compensated for engaging in the activity; the relative costs of gas and electric heating; what federal government funding is available for customers installing cold climate electric heat pumps for space heating; the impacts of electric heat pumps on incremental capacity; the impact on emissions from gas fired generation; the resilience of energy systems; the adequacy of electric heat pumps for space heating under design day conditions; and the sufficiency of electricity generating capacity to offset the loss of natural gas for space heating requirements.

24. The OEB made further reviewable errors by failing to consider the impact on Enbridge Gas and its customers of requiring a zero-year revenue horizon for all new connections as of January 1, 2025 in circumstances where such connections (and associated customer

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<sup>12</sup> The OEB's findings at pages 45 and 47 of the Decision appear to indicate that Phase 2 consideration of implementation of the zero-year revenue horizon is limited to the mechanics of implementation rather than a further consideration of the zero-year revenue horizon itself.

contributions) have already been committed and where the supporting infrastructure to connect such future customers will have already been installed.

25. Additionally, many of the foundational determinations in the Decision on the Customer Revenue Horizon Issue are not supported by, or are contradicted by, the evidence. Examples include (without limitation) the findings that:

- i. “Changing the revenue horizon does not conflict with EBO 188”;<sup>13</sup>
- ii. “This is the best proceeding to change the revenue horizon issue”<sup>14</sup> and “The record ... is sufficient to determine this issue and there is no benefit to deferring the issue to a subsequent proceeding”<sup>15</sup>; and
- iii. NRCan Greener Homes Program grant funding will help new and existing customers adopt and convert to electric heating.<sup>16</sup> This funding has in fact been discontinued as communicated in November 2023.<sup>17</sup>

26. The OEB made reviewable errors by breaching the legally mandated Fair Return Standard (“**FRS**”). As a result of the Decision, Enbridge Gas has no ability to invest in and earn a return on capital for new customer connections. At the same time, Enbridge Gas is legally obligated to connect new customers along existing lines and to serve those customers safely and reliably.

27. Finally, the OEB made reviewable errors by determining a zero-year revenue horizon, which is an amendment to the Gas Distribution Access Rule (“**GDAR**”), rather than proceeding in the more appropriate manner of holding a generic rulemaking proceeding, which powers are properly exercised by the OEB’s Chief Executive Officer pursuant to section 44 of the *OEB Act*. The OEB’s approach of granting an exemption from GDAR compliance for a fundamental change that Enbridge Gas did not request and that effectively negates the key component of the longstanding E.B.O. 188 policy that Enbridge Gas is required to comply with pursuant to section 2.2.2 of the GDAR is not appropriate.

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<sup>13</sup> Decision, page 32.

<sup>14</sup> Decision, page 33.

<sup>15</sup> Decision, page 39.

<sup>16</sup> Decision, page 38.

<sup>17</sup> EB-2022-0035, Enbridge Gas letter dated November 10, 2023, page 3.

**(c) Capital Budget Issue**

28. In support of its 2024 requested Capital Budget, Enbridge Gas filed extensive evidence. In the Decision, the OEB reduced the Capital Budget by \$250 million. Although stated to be a 17% reduction, the actual reduction is much greater taking into account the directions to move to a zero-year revenue horizon in 2025, and to treat indirect overheads as O&M costs rather than capital (on a phased-in basis from 2024 to 2028).
29. In reducing the Capital Budget, the OEB made reviewable errors by failing to provide reasons for its decision and by failing to consider properly, or at all, the evidence filed by Enbridge Gas. Examples include (without limitation) the OEB's findings set out below, none of which reference, let alone substantively grapple with, the lengthy evidence and submissions from Enbridge Gas:
- i. "Enbridge Gas regarded the repair of assets to extend the useful life of the asset as the equivalent to a "run to failure" approach";<sup>18</sup>
  - ii. "Enbridge Gas has not established that its current approach to system renewal maximizes system monitoring for the purpose of repair and asset life extension over asset replacement"<sup>19</sup>; and
  - iii. "Enbridge Gas needs to implement an approach that assesses asset condition and has as its objective the maximization of asset life... reducing the risk of stranded asset cost... safe and reliable life extension delivers more value to ratepayers than premature asset replacement".<sup>20</sup>
30. The OEB made further reviewable errors by directing Enbridge Gas to take steps to implement the Decision that are inconsistent with the legal and regulatory obligations imposed on Enbridge Gas by statute and OEB guidance, such as:
- i. "system pruning", to disconnect portions of the distribution system (and the customers on those portions of the system) despite Enbridge Gas's statutory obligation to continue to serve such customers; and

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<sup>18</sup> Decision, page 51.

<sup>19</sup> Decision, page 57.

<sup>20</sup> Decision, page 57.

- ii. Reducing capital expenditures through integrated resource planning (“**IRP**”) to convert gas customers to electricity despite the OEB having expressly held in the EB-2020-0091 IRP Framework decision that Enbridge Gas is not permitted to engage in electricity related IRP activities.

31. The OEB made additional reviewable errors by making a Decision that is contrary to the FRS, the regulatory compact, the OEB’s statutory objectives for natural gas and Government of Ontario policy by reducing Enbridge Gas’s Capital Budget by an amount that far exceeds \$250 million per year by 2028, when considered in combination with the other reductions to capital spending arising from changes to customer revenue horizon and the capitalization of indirect overhead costs. While some of those changes will only become implemented over the 2025 to 2028 term, they are necessary outcomes from the Decision. The impact resulting from the Decision is that the amount of capital that Enbridge Gas can invest in the gas system is very significantly reduced, with a corresponding reduction in the amounts on which Enbridge Gas can earn a return. At the same time, Enbridge Gas is expected to continue to provide the same safe, reliable service to more than 4 million customers.

***(d) Integration Capital Issue***

32. The OEB disallowed the full net book value of \$119 million for Enbridge Gas’s undepreciated integration capital costs from being included in rate base. In effect, the OEB held that Enbridge Gas must forever bear the cost consequences of investments made during the deferred rebasing term, even where those investments benefit ratepayers on an ongoing basis.

33. The OEB’s Decision on the Integration Capital Issue contains reviewable errors because the OEB improperly applied the OEB’s foundational “benefits follow costs” policy.

- i. The OEB agreed that ratepayers are benefiting from \$86 million per year of integration savings on an ongoing basis after rebasing. However, the integration capital costs are underpinning some of the benefit. Ratepayers who receive the ongoing benefits of integration should pay for the costs after rebasing; and
- ii. The OEB was correct in stating that when considering the “benefits follow costs principle”, the OEB must consider the impetus for the specific cost incurred in considering whether the benefits are related to the costs. However, in conducting this

analysis, the OEB failed to consider the actual integration capital costs that Enbridge Gas incurred and now seeks to include in rate base. The OEB failed to consider Enbridge Gas's evidence that 75% of the integration capital was focused on replacement of end of life IT systems that will benefit customers. Instead, the OEB made reference to real estate consolidation projects and other projects totaling \$153.9 million, citing argument from SEC.<sup>21</sup> A review of the SEC submission makes clear that these amounts relate to post-deferred rebasing projects that Enbridge Gas has planned but not undertaken.<sup>22</sup> The amounts and projects considered by the OEB are not part of the \$119 million of undepreciated costs.

34. The OEB's finding that the undepreciated capital costs are not recoverable because Enbridge Gas had earnings above allowed return on equity ("**ROE**") that exceed the undepreciated capital costs is a reviewable error. This finding is unconnected to the OEB's Mergers, Amalgamations, Acquisitions and Divestitures ("**MAADs**") policies. It punishes Enbridge Gas for successful operation of its business. It is also factually wrong when the impact of the disallowance of the Union pension receivable included in the Decision is taken into account.
35. Finally, the OEB made a reviewable error in its finding that Enbridge Gas could and should have chosen to depreciate the integration capital assets more quickly, to minimize the undepreciated costs at rebasing. Enbridge Gas is subject to the OEB's Uniform System of Accounts. The Company's depreciation rates are approved by the OEB and there was no opportunity for Enbridge Gas to seek approval of an alternate depreciation rate until the Application.

**(e) Depreciation Issues**

36. Depreciation expense is a component of just and reasonable rates. In the Application, Enbridge Gas sought approval for the ELG depreciation methodology. Enbridge Gas further sought approval for a modest shortening of the average useful life of several asset classes. Both requests were made to reduce the risk of future stranded assets.
37. The OEB stated in the Decision:

*Two important themes emerged during this proceeding:*

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<sup>21</sup> Decision, page 74.

<sup>22</sup> SEC Final Argument, pages 57-58.

- *climate change policy is driving an energy transition that gives rise to a stranded asset risk, and*
- *the usual way of doing business is not sustainable*<sup>23</sup>.

38. Despite this, the OEB rejected the ELG methodology and imposed the “business as usual” Average Life Group (“**ALG**”) methodology which does not accelerate depreciation. The Decision further approved average useful lives for use with 7 asset classes at either the extreme upper end of the existing approved ranges of average useful lives or by lengthening the currently approved average useful life. In rejecting the ELG Depreciation methodology and approving longer average useful lives for certain asset classes, the Decision appreciably increases the risk of stranded assets as compared to the Enbridge Gas proposals which reduced the risk of future stranded assets.
39. In rendering the Decision in relation to the Depreciation Issues, the OEB made reviewable errors by ignoring or disregarding its own entirely incompatible decision in relation to the Customer Revenue Horizon Issue and in relation to the Capital Budget Issue.
40. The OEB made further reviewable errors by relying upon the recommendations made by the depreciation expert retained by OEB Staff, Intergroup, in respect of: (a) using the ALG depreciation methodology and (b) the average useful lives in respect of a number of asset classes while taking no account of Intergroup’s admission that it did not consider energy transition for the purposes of its recommendations. In contrast, the depreciation expert retained by Enbridge Gas, Concentric, specifically referenced energy transition issues in its expert report and confirmed on numerous occasions in oral evidence that its recommendations were influenced by and reflective of energy transition issues. In the circumstance, where the OEB expressly premises its Decision on energy transition risk, the inconsistent application of that factor amounts to an error.
41. The OEB made a further reviewable error by rejecting the ELG methodology, which would accelerate depreciation in comparison to ALG, and in approving average useful lives at either the extreme upper end of the existing approved ranges of average useful lives or by lengthening the currently approved average useful life, which is wholly inconsistent with the following statement found at pages 82-83 of the Decision:

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<sup>23</sup> Decision, page 20.

*If the principle is that depreciation expense is recovered over the used and useful life of an asset, and the used and useful life of an asset is shortened as a result of ratepayers leaving the gas system so that assets are no longer used or become underutilized before they reach the end of their physical life, this needs to be addressed in the utility's depreciation policy ... .<sup>24</sup>*

**(f) Equity Thickness Issue**

42. The OEB made reviewable errors in relation to the Equity Thickness Issue by:

- i. Failing to approve a deemed equity thickness which is comparable to the return available from the application of invested capital to other enterprises of like risk (the comparable investment standard component of the FRS). On the evidence accepted by the OEB, this is 40.5%; and
- ii. Introducing an entirely new test, namely an energy transition stranded asset risk analysis ("**Risk Analysis**"), as a prerequisite threshold question required to be undertaken by Enbridge Gas before the OEB ensures that the FRS is met where: (a) no such prerequisite is required by the FRS; (b) there is no existing methodology or precedent for such Risk Analysis that sets out the requirements, assumptions, weightings, criteria and standards; (c) the energy transition policies of the Government of Ontario have not yet been announced making such Risk Analysis wholly unreliable; and (d) the evidentiary record confirmed that no such Risk Analysis has ever been required by any regulator in North America and none have been undertaken by any natural gas utility.

43. The OEB made further reviewable errors by failing to consider and recognize, as part of its determination that the FRS has been met, the material increase in business risk, both real and perceived, due to various aspects of the Decision such as: (i) the zero-year customer revenue horizon; (ii) increasing the average useful lives of certain assets; (iii) rejecting a depreciation methodology which accelerates depreciation in light of the energy transition; and (iv) excessively reducing the capital budget. Enbridge Gas is significantly riskier than before the Decision. These new and increased risks were not raised and considered by the OEB or the parties during the proceeding. This is procedurally unfair and contrary to natural justice.

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<sup>24</sup> Decision, pages 82-83.

44. The OEB made additional reviewable errors by misinterpreting and, in effect, double counting the perceived reduction in business risk arising from the amalgamation of Enbridge Gas Distribution Inc. (“**EGD**”) and Union Gas Limited (“**Union**”) in 2019. OEB Staff expert LEI noted, and the OEB accepted LEI’s conclusion, that the amalgamation generated certain reductions in business risk. With these business risk reductions in mind, LEI recommended a comparable investment standard comparison to like natural gas utilities in Canada. LEI’s deemed equity thickness recommendation already reflected its consideration of the reduction in business risk arising from the amalgamation. By setting the equity thickness for Enbridge Gas at only 38% (compared to the above-noted current average of 40.5% among LEI’s comparable gas utilities), the OEB has erred in misinterpreting LEI’s determinations and effectively double counted the perceived business risk reduction from amalgamation.

***(g) Rules and Additional Grounds***

45. Enbridge Gas relies upon Rules 7, 8, 12, 40, 41, 42 and 43 of the OEB’s *Rules of Practice and Procedure*.

46. In addition to the specific grounds set out above, the grounds for this Motion also include such further grounds as counsel may advise and the OEB may permit.

**The errors are material**

47. Each of the errors described above have a material impact on Enbridge Gas. This is especially the case when one takes account of the fact that most of the errors relate to Enbridge Gas’s 2024 budget, rate base and revenue requirement, which are all used as the base for each of the following years of the IRM term. This means that the impact of the errors will be experienced up to five times over.

48. From a financial perspective, the impact of each of the errors is significant.

49. The errors in the Decision, if not remedied, will necessarily result in a scenario where the number of new residential and small volume commercial customers connecting to the Enbridge Gas system will be significantly reduced starting in 2024. That will conflict with the plans from the Government of Ontario to add 1.5 million new homes in the coming decade. Added to this is the fact that other system growth projects may be suspended or cancelled, because the remaining capital budget envelope will be focused on safety and reliability and

because of the increased regulatory uncertainty resulting from the Decision. This may impact economic development projects across Ontario which had been counting on gas service.

50. Additionally, the errors in the Decision related to capital budget, equity thickness, the depreciation methodology and asset lives will constrain Enbridge Gas's ability to attract capital to invest in Ontario. Each of these items make such investments relatively less attractive than other opportunities for Enbridge.
51. In the result, the errors in the Decision will have a material impact on not only Enbridge Gas, but also on ratepayers, businesses and the economic development of Ontario.
52. Furthermore, contrary to the OEB's repeatedly expressed concerns about stranded asset risks, the impact of the Decision in rejecting the ELG Depreciation methodology and approving longer average useful lives for certain asset classes, appreciably increases the risk of stranded assets in comparison to the Enbridge Gas proposals which reduced the risk of future stranded assets.

**Enbridge Gas satisfies the threshold test**

53. Rule 43.01 of the OEB's *Rules of Practice and Procedures* states that "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."
54. Each of the errors highlighted in this Notice of Motion raises material questions about the correctness of the Decision. Some of the errors are related to new evidence not considered in the Decision. Correcting the errors will materially impact the Decision. As such, Enbridge Gas satisfies the OEB's threshold test and the OEB should proceed to hear the Motion on its merits.
55. Should the OEB find it necessary to consider the threshold question, Enbridge Gas requests the opportunity to make written submissions.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Motion:

1. The EB-2022-0200 Decision and Order dated December 21, 2023;
2. The record of the EB-2022-0200 proceeding, including prefiled evidence, interrogatories, technical conference transcripts and undertaking responses, hearing transcripts and undertaking responses and argument;
3. Enbridge Gas's additional evidence on this Motion, which will include new evidence related to developments after arguments were filed in EB-2022-0220, to be delivered in accordance with the OEB's directions;
4. Enbridge Gas's submissions and Motion Record on this Motion to be delivered in accordance with the OEB's directions; and
5. Such further and other materials as Enbridge Gas may provide and the OEB may permit.

January 29, 2024

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**AND TO: ALL INTERVENORS IN EB-2022-0200**