



April 5, 2024

Mr. Stephen Motluk
 Senior Advisor
 Ministry of Energy, Northern Development and Mines
Stephen.Motluk@ontario.ca

Dear Mr. Motluk:

Re: ERO# 019-8307 - Bill 165, *Keeping Energy Costs Down Act, 2024*

The Ministry of Energy's proposed Bill 165 allows for significantly increased direct involvement by the Ministry in Ontario Energy Board's ("OEB") decision-making. The Ministry has previously had the authority to issue directives to guide energy policy, however, new provisions proposed by Bill 165 would allow the Minister to involve him or herself directly in ongoing proceedings at the OEB and seeks to suspend the rules of procedural fairness. We are opposed to the Bill because of its impact on the OEB's ability to conduct fair proceedings, which can incorporate evidence about the impacts of climate change, the energy transition, and the affordability of energy for lower-income communities in Ontario. We are also concerned with the impact of this bill on the public's perception of the OEB as a credible and independent decision maker.

A. Background on Advocacy Centre for Tenants Ontario, Canadian Environmental Law Association, Low-Income Energy Network and Seniors for Climate Action Now!

Advocacy Centre for Tenants Ontario (ACTO) is a specialty community legal clinic with a provincial mandate to advance and protect the interests of low-income tenants. ACTO specializes in housing issues related to tenants in Ontario.

Canadian Environmental Law Association (CELA) is a specialty community legal clinic dedicated to environmental equity, justice, and health.

Low Income Energy Network (LIEN) is a joint program of ACTO and CELA. LIEN's vision is for an Ontario where everyone has equitable access to conservation and financial assistance programs and services to meet their basic energy needs affordably and sustainably.

Seniors for Climate Action Now! (SCAN) is an Ontario based climate action group. Its members are older adults determined to address the climate emergency and protect the planet for future generations.

B. Analysis of Bill 165, *An Act to Amend the Ontario Energy Board Act, 1998 Respecting Certain Board Proceedings and Related Matters*

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(1) Disproportionate Impacts of Climate Change

Climate change is the biggest global threat to human health and its impacts are unfair.¹ Health Canada identified populations that are at the highest risk of being harmed by climate change: seniors, youth and children, Indigenous peoples, racialized populations, people with disabilities, people who are pregnant, frontline emergency responders, residents of northern and remote communities, individuals who are socially and economically disadvantaged, and people who are immunocompromised and those living with pre-existing illness.² Ontario’s 2023 Climate Change Impact Assessment Report determined that ‘equity’ within Ontario’s population received a ‘low’ adaptive capacity rating—meaning, vulnerable communities and individuals are disproportionately impacted by climate-related risks, and will only become more vulnerable in the future.³

It is critical that all decisions about Ontario’s energy system reflect the urgency of the climate crisis. Natural gas is a harmful fossil fuel. The Minister of Energy recognized in its Letter of Direction to the OEB on November 23, 2023 that “electrification and the transition to cleaner energy sources requires strong, proactive thought leadership from the OEB in consultation with the sector.”⁴

(2) Analysis of Bill 165 Amendments to the Ontario Energy Board Act

Recommendation 1: Bill 165’s proposed section 4.4 and section 4.4.1 should more explicitly contemplate representation of the interests of under-served and under-represented communities in OEB proceedings.

The OEB’s *Rules of Practice and Procedure* provide for interventions in the Board’s proceedings if an intervenor has a “substantial interest” and intends to participate reasonably in the proceeding.⁵ The new proposed section 4.4 would require the OEB to establish a process to allow for groups “who have an interest” in the proceeding, and prescribed entities, to participate.⁶ The standard proposed by Bill 165 is less stringent than Rule 22 of the OEB’s *Rules of Practice and Procedure* and may allow for broader participation in OEB proceedings. Any amendments that encourage participation, particularly by under-served and under-represented communities such as tenants and lower-income seniors, are welcome. Complex decision-making

¹ Canadian Environmental Law Association, “Environmental Justice and Climate Change” (July 2023), online: <https://cela.ca/wp-content/uploads/2023/08/EJ-Fact-Sheet-Climate-Change-FINAL-.pdf>.

² Health Canada, “Who is Most Impacted by Climate Change?” (7 November 2022), online: <https://www.canada.ca/en/health-canada/services/climate-change-health/populations-risk.html#a2>.

³ Climate Risk Institute, “Ontario Provincial Climate Change Impact Assessment Technical Report, prepared for the Ontario Ministry of Environment, Conservation, and Parks” (2023) at 329, 460, online: <https://www.ontario.ca/files/2023-11/mecp-ontario-provincial-climate-change-impact-assessment-en-2023-11-21.pdf>.

⁴ Minister of Energy, “Letter of Direction” (29 November 2023), online: <https://www.oeb.ca/sites/default/files/letter-of-direction-from-the-Minister-of-Energy-20231129.pdf>.

⁵ Ontario Energy Board, “Rules of Practice and Procedure” r 22, online: https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2024-03/OEB_Rules-Practice-and-Procedure_20240306.pdf.

⁶ Bill 165, s.4.4 and 4.4.1.

is always stronger and more justifiable when more diverse voices can participate in decision-making.

Recommendation 2: The proposed section 28.8 should be deleted.

The remainder of Bill 165's proposed amendments should be deleted.

The proposed s.28.8 would allow for the Ministry to order a generic hearing by directive, including if the Ministry identifies an issue in an ongoing OEB proceeding. We are concerned about any proposed power to disrupt ongoing proceedings, where parties have been participating in good faith in an independent process by identifying issues and providing evidence to the Tribunal.

It is of particular concern that the Ministry may specify that the OEB must consider "documents written or issued by the Government or by a Minister or Ministry of the Crown" in the new generic hearing.⁷ The parties in OEB proceedings are well placed to identify appropriate evidence and put forward their positions.

Section 28.8(3)(d) also provides a disproportionate amount of discretion to the Minister to scope the generic hearing.

The OEB must be charged with taking account of the generic hearing directive, but also taking account of the factors set out in its governing legislation and raised by potential intervenors, responsive to the issues before it.

S.28.8(7) seeks to prevent the rules of procedural fairness from applying to the new proposed type of generic hearing and should be deleted. This is an unnecessary provision, and contrary to the democratic and administrative fairness tradition of Canada's quasi-judicial tribunal system.

If a party disagrees with the decision of the OEB, there is an available mechanism to request reconsideration by the OEB or to pursue an appeal to the Ontario Divisional Court on a question of law or jurisdiction.⁸ With respect to the particular decision of the OEB in file number EB-2022-0200 and EB-2024-0078, which was the stated impetus for Bill 165⁹, Enbridge Gas Inc. has utilized the available procedural avenues to challenge the decision. It filed a reconsideration request on January 29, 2024.¹⁰ It also filed a Notice of Appeal with the Ontario Divisional Court.¹¹ There was therefore already two appropriate legal avenues for Enbridge to seek redress

⁷ Bill 165, s.28.8.

⁸ *Ontario Energy Board Act, 1998*, c 15, Sch B, s. 33.

⁹ Bill 165, "First Reading", online: <https://www.ola.org/en/legislative-business/house-documents/parliament-43/session-1/2024-02-22/hansard-para834>.

¹⁰ Enbridge Gas Inc., "Notice of Motion" (29 January 2024), online: https://www.enbridgegas.com/-/media/Extranet-Pages/Natural-gas-matters/EGI_Motion_Review_2024-Rebasing_20240129.pdf?rev=a10194ae3edb421aad531ecf987c6861&hash=3B7FFA1F89BFE45DF2938FC44FDE1640.

¹¹ Globe and Mail, "Enbridge Appealing Ontario Energy Board Ruling on Natural Gas Costs" (23 January 2024), online: <https://www.theglobeandmail.com/business/article-enbridge-appealing-ontario-energy-board-ruling-on-natural-gas-costs/>.

if it disagreed with the OEB's decision. Bill 165 creates a concerning political avenue for the Minister's intervention, not based on legal principle or doctrine, which is of serious concern.

Recommendation 3: The proposed section 36.0.1 should be deleted. The issue of revenue horizons is best dealt with by consideration of evidence at an OEB hearing. Lower-income people will be disproportionately impacted by longer revenue horizons for the natural gas distribution system because they are less able to transition away from natural gas to cleaner technologies.

Bill 165, section 36.0.1 seeks to establish the revenue horizon for the natural gas distribution system by regulation or by hearing if the regulation so indicates. Despite the Ministry's disagreement with the OEB's decision in the Phase I hearing of Enbridge Gas Inc. – 2024-2028 Natural Gas Distribution Rates - EB-2022-0200, we recommend deleting this provision.

We are very concerned about the impact of a longer revenue horizon on lower-income consumers. It currently requires significant capital to transition from natural gas to other cleaner heating technologies; low-income owners and tenants are less able to transition away from reliance on natural gas. As higher-income consumers shift to clean technologies, such as heat pumps, the customers left paying for the natural gas system will be lower-income. Those remaining consumers will pay an increasing proportion of the costs for the natural gas system if the revenue horizon is long.

The issues that arise in the OEB's decision are best dealt with in an independent tribunal process with the consideration of evidence and the submissions of the parties and intervenors. A regulation-making process will not necessarily incorporate the public's interests, or appropriately evaluate the evidence. We are concerned especially about the interests of low-income consumers.

We note that the Ministry of Energy's Letter of Direction to the Ontario Energy Board dated November 29, 2023 noted that the OEB should review its "revenue horizon direction" to ensure that the balance of growth and ratepayer costs remain appropriate and that the OEB should ensure that Ontario natural gas ratepayer interests are protected.¹² There is no indication that the Ministry would intervene and seek to block a decision of the OEB where it evaluated the issue of the revenue horizon for natural gas, in the context of a hearing with evidence, and came to a conclusion about how best to protect consumer interests going forward.

As stated earlier, the rules of procedural fairness should not be prevented from applying in these proceedings. The determination of an appropriate revenue horizon and stranded assets, and how it will impact all consumer classes, is complex and best dealt with in a hearing after consideration of evidence.

Recommendation 4: The proposed section 96.2 should be deleted. A Board Order should be required to construct transmission and distribution lines subject to the requirements of s.90 of the *Ontario Energy Board Act*.

¹² Minister of Energy, "Letter of Direction" (29 November 2023) at 4, online: <https://www.oeb.ca/sites/default/files/letter-of-direction-from-the-Minister-of-Energy-20231129.pdf>.

Bill 165, section 96.2 allows the Minister to provide for the construction of transmission lines and distribution lines without a Board order. It is unclear why the Board's authority would be circumvented in particular cases. It is important for the Board to consider a range of considerations and factors as has been established in the case law over many years, including public interest, public welfare, safety, and financial sustainability. It is also concerning that s.96.2(4) would allow the Minister to rescind a Board order refusing to grant permission to construct a transmission or distribution line without any reasons or criteria. As stated above, the rules of procedural fairness should apply. We therefore recommend deleting this provision.

Conclusion on Bill 165

Bill 165 raises serious concerns about fairness. The OEB's decision on Enbridge's rate application is only one decision and was made on the basis of the evidence at the tribunal hearing and the submissions of the parties and intervenors. Enbridge is able to challenge a decision if it disagrees with the outcome and it has filed both a reconsideration request and an appeal with the Ontario Divisional Court. There is no need or justification for the new powers for the Minister created by Bill 165.

Regards,



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