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October 9, 2007

## SENT VIA COURIER AND E-MAIL

Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street, Suite 2700  
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

**Re: Enbridge Gas Distribution Inc. ("Enbridge") – Application for Expropriation  
Toronto Portlands Energy Centre ("PEC") Reinforcement Project  
Ontario Energy Board File No. EB-2007-0692  
Reply Argument**

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Please find attached a copy of the Reply Argument of Enbridge Gas Distribution Inc. in the above-referenced matter. Ten hard copies and one electronic copy is being provided to the Ontario Energy Board.

If there are any questions, please contact the undersigned at your earliest convenience.

Yours very truly,

**AIRD & BERLIS LLP**



Scott A. Stoll  
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P. Hoey  
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Intervenors  
T. Brett  
C. Mathias  
Union Gas

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## **ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B);

**AND IN THE MATTER OF** an application by Enbridge Gas Distribution Inc. for authority to expropriate land for the purposes of a natural gas pipeline in respect of which the Ontario Energy Board granted leave to construct in EB-2006-0305.

## **REPLY ARGUMENT OF ENBRIDGE GAS DISTRIBUTION INC.**

### **Introduction**

1. Enbridge Gas Distribution Inc. ("Enbridge") is replying to the submissions of the Portlands Energy Centre ("PEC") and The City of Toronto Economic Development Corporation ("TEDCO").

### **PEC**

2. PEC filed submissions on October 5, 2007 confirming need and urgency of the requested expropriation order. Enbridge is in complete agreement with PEC's comments.

### **TEDCO**

3. TEDCO made several comments in respect of the expropriation order but did not oppose the issuance of the expropriation order. Instead, TEDCO sought to restrict the rights and

attributes of the expropriation order, to assert its private interests at the expense of the public interest. Enbridge requests this Board reject the request of TEDCO in its entirety.

4. Enbridge has several concerns and issues with TEDCO's position and method of trying to achieve its results.
5. First, TEDCO is trying to bring certain elements of settlement discussions between it and Enbridge to the Board's attention. Settlement discussions are private and are not proper to bring before the Board.<sup>1</sup> Further, TEDCO misconstrues the reference to the 40 year term upon which it seeks to rely and seeks to cherry pick terms and conditions out of a private negotiation. Raising the details of settlement discussions is completely unacceptable and offends the confidential nature of such discussions. Furthermore, Enbridge has been very clear; absent any agreement, it would seek permanent easements.
6. Second, Enbridge submits that TEDCO, as it did during EB-2006-0305, is merely trying to extract a superior compensation package by negotiating through this Board. Compensation is not an issue for this Board and the Board should resist any inclination to enter negotiations between parties. In EB-2006-0305, the Board specifically noted:

"The Board does not become involved in the detailed negotiation of clauses in the agreements between one landowner and the Applicant. It is also accepted that a review by this Board under section 97 does not extend to the amount of compensation or the structure of compensation arrangements."<sup>2</sup>

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<sup>1</sup> See the Ontario Energy Board's "Settlement Conference Guidelines" provisions regarding confidentiality on pages 4 and 5.

<sup>2</sup> Ex. A, Tab 3, Sched. 2, pg. 10.

7. Requesting terms and conditions is an attempt to structure the compensation arrangements. Also, as noted above, settlement discussions are intended to be private.
8. Third, TEDCO sought to advance its position without testing of the evidence of Enbridge or submitting an iota of evidence to support its position or request. Submissions without evidentiary support should be ignored.
9. Fourth, TEDCO relies upon the decision in *Dell Holdings Ltd. v. Toronto Area Transit Operating Authority*<sup>3</sup> to support its position that this Board should make the order more restrictive. Again, the logic is flawed. Dell involved the compensation of a developer who had a portion of his land expropriated for the purpose of constructing GO stations in Mississauga. This case was not about the public interest in the expropriation but the compensation that was owed to Dell as a result of the expropriation. When there is a taking of property by government, there is a presumption that compensation is owed. A taking without compensation should only occur upon the clearest of language. The court's comments should not be taken as a statement supporting a temporal restriction on the transfer of interests.
10. TEDCO relies upon Dell for support that to minimize the intrusion of its rights; this Board should place a cap on the duration of the easement. This issue was not before the court in Dell. If one applies TEDCO's logic, one would expect see a reversion of the land to Dell when the land is no longer required for the Go Station. Such a reversionary interest was not contemplated in Dell. Taking TEDCO's logic to its logical conclusion would

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<sup>3</sup> (1997), 60 L.C.R. 81 (S.C.C.)

render all transfers of land temporary, which is not in keeping with the *Expropriations Act*.

11. Enbridge has taken the appropriate measures to limit the intrusion upon TEDCO's rights created through the expropriation by:

- (i) requesting an order to expropriate an easement and not a transfer of the lands;
- (ii) limiting the extent of land requested – 0.24 acres out of approximately 400 acres that TEDCO owns in the Portlands area;<sup>4</sup>
- (iii) where possible, choosing land that is already encumbered by other utilities such as Ontario Power Generation Inc. and Hydro One who have 999 year leases and Enbridge who has a permanent easement.

12. A further flaw in the TEDCO's logic is the apparent presumption the pipeline will only ever serve PEC and therefore the duration of the easement should be limited to the duration of that agreement. The area is supposed to be developed and is targeted for development. In fact, the purpose of TEDCO is to redevelop the Portlands area. When TEDCO intervened in EB-2006-0305 it stated:

“.....[TEDCO's] purpose is the advancement of the City's Economic Development Strategy, including employment, redevelopment of brown field sites, sustainable development, excellent design and job creation. To this end TEDCO holds approximately 400 acres in the Portlands Area”.

13. Enbridge noted during the oral hearing that the pipeline has capacity to serve other customers [Tr. 9-14-07, p. 5, ll. 8-11]. Once the pipeline is constructed, Enbridge will

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<sup>4</sup> EB-2006-0305, Letter dated January 23, 2007 requesting intervenor status.

have a statutory obligation to supply any customer along the pipeline that requests service.<sup>5</sup> The obligation to serve these other customers is not time limited.

14. Also, TEDCO's proposed conditions expressly contemplating re-locating the pipeline in the event that it redevelops adjacent lands. The broad public interest of potential natural gas customers is served with a permanent easement and an ability to supply such customers through the proposed pipeline. If the lands in question were owned by a third party, it is logical that TEDCO would desire a permanent pipeline easement to provide comfort to potential businesses that a secure supply of natural gas is available for the Portlands.
15. The public interest is served by granting the easements, both permanent and temporary, requested by Enbridge.
16. However, while Enbridge does not recommend any such limitation, if the Board seeks to place any temporal limitation on the duration of the easement, such limitation should be based upon the time at which the pipeline does not serve any customers.

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<sup>5</sup> OEB Act, section 42(2) which states: "Subject to the *Public Utilities Act*, the *Technical Standards and Safety Act, 2000* and the regulations made under the latter Act, sections 80, 81, 82 and 83 of the *Municipal Act, 2001* and sections 64, 65, 66 and 67 of the *City of Toronto Act, 2006*, a gas distributor shall provide gas distribution services to any building along the line of any of the gas distributor's distribution pipe lines upon the request in writing of the owner, occupant or other person in charge of the building."

**Relief Requested**

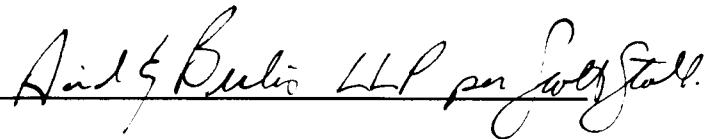
17. Except as expressly noted herein, Enbridge encourages this Board to reject TEDCO's requested relief. TEDCO's request is without evidentiary support and based upon flawed logic.
18. Enbridge repeats its requests for an order to permit it to expropriate from TEDCO the lands necessary for the temporary and permanent easements required by the Applicant for the pipeline as described in the application and as requested in the Argument in Chief.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

DATED October 9, 2007 at Toronto, Ontario.

**ENBRIDGE GAS DISTRIBUTION INC.**  
By its counsel

**AIRD & BERLIS LLP**

A handwritten signature in cursive script that reads "Aird & Berlis LLP per [signature]". The signature is written over a horizontal line.