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VIA RESS, EMAIL and COURIER

April 25, 2012

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

**Re: Enbridge Gas Distribution Inc. ("Enbridge") – Argument-in-chief
Application for Authority to Expropriate Certain
Board File Number: EB-2011-0391**

Procedural Order No. 2, dated April 16, 2012, cancels the originally scheduled oral hearing for this proceeding and directs the parties to proceed by way of a written hearing.

Attached please find the argument-in-chief of Enbridge. A redacted version of the argument has been provided and filed on the RESS as well as on Enbridge's website at www.enbridgegas.com/ratecase under the "Other Regulatory Proceedings" tab.

Please contact the undersigned if you have any questions.

Sincerely,

A handwritten signature in blue ink, appearing to read 'S. Spratt'.

Shari Lynn Spratt
Supervisor Regulatory Proceedings

Attachment

cc: Mr. Scott Stoll, Aird & Berlis LLP
EB-2011-0391 Intervenor and Affected Landowners

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 the *Public Utilities Act*, R.S.O. 1990, c.P-52.

AND IN THE MATTER OF the *Expropriations Act*, R.S.O. 1990, c. E-26;

AND IN THE MATTER OF an application by Enbridge Gas Distribution Inc. for a declaration and order for the authority to expropriate land for the purposes of a natural gas distribution main in the City of Welland in the Region of Niagara;

ENBRIDGE GAS DISTRIBUTION INC. ARGUMENT IN CHIEF

1. Enbridge Gas Distribution Inc. ("**Enbridge**") has requested the Board grant the right to expropriate an approximately 3 metre wide easement as shown on R-Plan 59R-14643 (Exhibit C., Tab 1, Schedule 3, page 3) and an approximately 4.57 metre wide easement as shown on Plan 59R-14636 (Exhibit C., Tab1, Schedule 3, page 4), centred on an NPS 12 steel pipeline (the "**NPS 12 Pipeline**") in Welland, Ontario.
2. Currently, there are two property owners, Party A and Party C that are directly impacted by this proceeding. Both property owners have acknowledged the jurisdiction of the Board to make such an order and have not questioned Enbridge's evidence nor have

they opposed the issuance of the order. As such, Enbridge understands the primary outstanding issue for the property owners is the compensation to be paid in respect of the easement. As the Board is aware, compensation in respect of an expropriation is not an issue for the Board, but rather, is to be dealt with by the Ontario Municipal Board ("**OMB**").

3. Enbridge recognizes the unique factual circumstances that have resulted in this proceeding and therefore will provide a summary of the context.

Background and the Lands

4. This proceeding at the Board was initiated by Enbridge in response to a court application brought by one of the impacted parties, Party A, in which it was alleged the presence of the NPS 12 Pipeline across their property constituted a trespass. A claim for \$1,000,000 was made by Party A against Enbridge in respect of the alleged trespass. Enbridge denied the trespass and brought a motion in the court rejecting the court's jurisdiction and asserting the jurisdiction of the Board. The court action was eventually withdrawn by Party A who have now conceded to the Board's jurisdiction.
5. The Application, when filed on November 29, 2011, concerned three property owners and two pipelines. The first pipeline is an NPS 12 Pipeline that crosses under the Welland Canal and the second is an NPS 8 Pipeline that connects to the NPS 12 pipeline and generally runs parallel to the Welland Canal.
6. Enbridge reached a settlement with Party B, one of the property owners. Both the NPS 12 and the NPS 8 pipeline are located on the Party B property that was the subject of the settlement agreement.

7. The two remaining property owners, Party C and Party A are only impacted by the NPS 12 pipeline
8. Enbridge has continued to dialogue with Party C and Party A.

Party	Description of Impacted Lands
Party A	<p>PIN#64129-0121(LT)</p> <p>Part of Lot 16, Concession 5, (formerly geographic Township of Humberstone) now in the City of Welland, Regional Municipality of Niagara, designated as Part 3 on Reference Plan 59R-12761.</p> <p>(Also see Exhibit B, Tab 1, Schedule 2, Area #5)</p>
Party C	<p>PIN: 64127-0529(LT)</p> <p>Part Lots 17, 18 and 19, Concession 5, and part of the Road Allowance between Lots 18 and 19 (closed by By-law 4350 Inst. R0185603), Concession 5 formerly Geographic Township of Humberstone now in the City of Welland, Regional Municipality of Niagara designated as Part 1 on Reference Plan 59R-12761.</p> <p>(Also see Exhibit B, Tab 1, Schedule 2, Area #3)</p> <p>PIN: 64129-0119(LT)</p> <p>Part of Lots 16 and 17, Concession 5, and part of the Road Allowance between Lots 16 and 17 (closed by By-law 4350 Inst. R0185603), Concession 5 formerly Geographic Township of Humberstone now in the City of Welland, Regional Municipality of Niagara designated as Part 2 on Reference Plan 59R-12761.</p> <p>(Also see Exhibit B, Tab 1, Schedule 2, Area #4)</p>

History of the Enbridge Land Rights

9. The Pipelines have been the subject of a series of License Agreements over the last five decades. Copies of the license agreements for the Pipelines may be found at Exhibit C, Tab 4, Schedules 1 to 6. The use of a license agreement, rather than an easement, is common when dealing with the St. Lawrence Seaway Authority and other federal government organizations.
10. On or about November 23, 2005 Enbridge received a letter dated November 21, 2005 from Peter McLean, the Real Property Management Officer of The St. Lawrence Seaway Management Corp., as The St. Lawrence Seaway Authority is now known, which letter explained that it was necessary to separate the license agreement covering the majority of the NPS 12 Pipeline into two license agreements. The NPS 12 Pipeline is also subject to a third license agreement. Copies of the license agreements for the NPS 12 Pipeline may be found at Exhibit C, Tab 4, Schedules 1 to 4.
11. It is not certain whether The St. Lawrence Seaway Management Corp. made potential purchasers aware of the existing license agreements.
12. A registered plan, 59R-12761, which shows the pipeline and pipeline markers was received and deposited by the Land Registrar on May 17, 2005. As such potential purchasers should have been aware of the NPS 12 Pipeline.
13. Subsequent to the original sale of lands by The St. Lawrence Seaway Management Corp. the lands were purchased by the current landowners. A detailed list of the sales of the lands is provided at Exhibit B, Tab 2, Schedule 1.

Right to be on the Property

14. Prior to the disposal of the property by The St. Lawrence Seaway Management Corp. there was absolutely no controversy surrounding the legality of the Pipelines to be present on the property as Enbridge had entered into multiple license agreements.
15. Enbridge submits the NPS 12 Pipeline is permitted to be on Party C and Party A's property by virtue of the rights provided by the license agreements and section 58 of the Public Utilities Act ("**PUA**") which is reproduced below.

58. (1) The company shall not exercise any of its powers within a municipality unless a by-law of the council of the municipality has been passed with the assent of the municipal electors where such assent is required by the *Municipal Franchises Act* authorizing the company to exercise the power and the company when so authorized may exercise any of the powers of expropriation conferred on a municipal corporation with respect to the public utility the company is supplying, if the power to expropriate is conferred on it by its instrument of incorporation or by any amendments to the instrument of incorporation.

(2) Subject to subsection (1), a company may conduct any of its pipes or carry any of its works through the land of any person lying within ten miles of the municipality for supplying which the company was incorporated.

(3) The *Expropriations Act* applies to an expropriation under this section.

(4) Subsection (1) applies to a gas distributor as defined in the *Ontario Energy Board Act, 1998* but does not apply to other companies supplying natural gas.

16. While this section has not been judicially considered, Enbridge submits it meets the requirements to gain the benefit of 58(2).
 - (i) This section applies to Enbridge who is a "gas distributor" as defined in the *Ontario Energy Board Act, 1998*.
 - (ii) Enbridge has franchise agreements with the relevant municipalities. The various franchise agreements were filed at Exhibit C, Tab 2, Schedules 1, 2 and 3.

17. As such, pursuant to s.58(2) of the PUA, Enbridge may conduct any of its pipes and works through the land of any person. This does not restrict the type of person against whom the utility may exercise this right. It is Enbridge's position that this right recognizes the public interest being served by the utility.
18. Enbridge constructed and operated the Pipeline under the authority of the license agreements.
19. Trespass is an unlawful invasion of a person's property. Enbridge had a right pursuant to the license agreements and section 58 of the PUA to be on the property. Further, the existence of the NPS 12 Pipeline should have been known to the property owners as there were pipeline markers on the property and the registered plan filed with the Registry office clearly showed the presence of the pipeline.
20. As such there was no trespass.

Public Interest.

21. The Board is to be guided by the public interest in determining whether or not it should issue an order of expropriation.
22. Neither of the directly impacted landowners posed any questions during the interrogatory phase of the proceeding, filed evidence or indicated that it would cross-examine any Enbridge witness. As such, there is no concern regarding the evidence or opposition to the request.
23. Enbridge submits the granting of the order is in the public interest for the following reasons:

- (i) The pipeline is required to serve more than 5,600 customers and a further 1,400 customers rely on the NPS 12 Pipeline for security of supply;¹
- (ii) The pipeline was installed and operated for several decades prior to the current owners acquiring the lands;
- (iii) The directly impacted landowners are not opposing the issuance of the order;
- (iv) The issuance of the expropriation order will provide a mechanism to establish compensation for the directly impacted landowners that is consistent with the *OEB Act* and the *Expropriation Act*; and
- (v) The expropriation order is the least costly method of providing evidence of Enbridge's rights and maintaining the supply of natural gas to its customers without the need to construct new facilities.

Conclusion:

24. Enbridge requests the Board issue an Order(s):

- (a) For a declaration that Enbridge has certain rights and interests in the lands upon which the Pipelines are located;
- (b) For a declaration that Enbridge is not trespassing on the properties;
- (c) Expropriating an easement, the rights of which are described in paragraph 26 below, the following:
 - (i) Part Lots 16, 17, 18 and 19, Concession 5, and part of the Road Allowance between Lots 16 and 17, Concession 5 and Part of the Road Allowance between lots 18 and 19 (closed by By-law 4350 Inst. R0185603), Concession 5, formerly Geographic Township of

¹ Exhibit B, Tab 2, Schedule 1, page 3, para. 9.

Humberstone now in the City of Welland, Regional Municipality of Niagara designated as Parts 1 and 2 on Plan 59R-14643; and

- (ii) Part of Lot 16, Concession 5, (formerly the geographic Township of Humberstone) now in the City of Welland in the Regional Municipality of Niagara being Part 1 of Plan 59R-14636.

25. The rights to be expropriated in respect of each of the properties identified are the following:

- (i) An easement in favour of Enbridge Gas Distribution Inc. and any successors, assigns, servants or agents thereof, in perpetuity to enter upon the lands to survey, remove trees, clear, lay, construct, install, operate, use, inspect, remove, renew, replace, alter, enlarge, reconstruct, repair, expand, maintain pipelines and all works, appurtenances, attachments, apparatus, appliances, markers, fixtures and equipment.

26. The requested relief is in the public interest.

DATED April 25, 2012 at Toronto, Ontario.

ENBRIDGE GAS DISTRIBUTION INC.

By its counsel

AIRD & BERLIS LLP



Scott Stoll