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VIA COURIER, RESS and EMAIL

September 11, 2018

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

Dear Ms. Walli:

**Re: Ontario Energy Board File No. EB-2017-0319
Enbridge Gas Distribution Inc. (“Enbridge”)
Application for Renewable Natural Gas Enabling Program and
Geothermal Energy Service Program - Reply Argument**

In accordance with the Ontario Energy Board’s Procedural Order No. 4 in the above noted proceeding, enclosed please find Enbridge’s reply submission.

Please contact the undersigned if you have any questions.

Yours truly,

(Original Signed)

Bonnie Jean Adams
Regulatory Coordinator

cc: All Parties to EB-2017-0319 (via email)

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
Distribution Inc. for an order or orders related to its
Renewable Natural Gas Enabling Program and Geothermal
Energy Service Program;

AND IN THE MATTER OF an application by Enbridge Gas
Distribution Inc. for an order or orders amending or varying
the rates charged to customers for the sale, distribution,
transmission, and storage of gas commencing as of January
1, 2018.

**ENBRIDGE GAS DISTRIBUTION
REPLY ARGUMENT
RENEWABLE NATURAL GAS ENABLING PROGRAM**

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A. OVERVIEW

1. On August 7, 2018, Enbridge Gas Distribution Inc. (Enbridge, or the Company) filed its Argument in Chief, summarizing its Renewable Natural Gas (RNG) Enabling Program, which is designed to enable the production of RNG in Ontario and facilitate the delivery of RNG to market. Enbridge's Argument in Chief explained why it is appropriate for the Ontario Energy Board (OEB) to approve the RNG Upgrading and RNG Injection Services proposed in this Application.
2. Eleven parties¹ filed Arguments in response to Enbridge. This Reply Argument sets out Enbridge's response.
3. No party objects in principle to Enbridge's proposed RNG Injection Service. While some parties raise questions about the ratemaking methodology and contracting for this service (see below), all parties appear to accept that this is an appropriate rate-regulated utility service for Enbridge to offer to interested customers.
4. All parties also accept that the combined effect of the Undertakings and 2006 and 2009 Minister's Directives mean that Enbridge itself (without use of an affiliate) is permitted to undertake the RNG Upgrading Services. There is, however, a split in opinion about whether the OEB should permit Enbridge to offer RNG Upgrading Services as a rate-regulated utility service. While some parties accept that this is appropriate, others object and argue that the OEB does not have jurisdiction to set rates for this activity.
5. Enbridge says that RNG upgrading is properly characterized as a "distribution" activity, and that the OEB has the authority to set rates for this activity under section 36 of the *OEB Act*. More broadly, when looking at the scope of its jurisdiction, it is appropriate for the OEB to take account of its statutory objectives, and to consider

¹ OEB Staff (Staff), Anwaatin Inc. (Anwaatin), Association of Power Producers of Ontario (APPRO), Building Owners and Managers Association (BOMA), Canadian Biogas Association (CBA), Consumers Council of Canada (CCC), Energy Probe Research Foundation (EP), Federation of Rental-housing Providers of Ontario (FRPO), Industrial Gas Users Association (IGUA), Ontario Sustainable Energy Association (OSEA) and School Energy Coalition (SEC).

how to implement those. The RNG Enabling Program is an innovative new offering that aims to support and encourage the development of a cleaner gas source for Ontario natural gas consumers. That fits with the OEB's statutory objective to promote energy conservation, and it fits within the Ontario Government's stated intention to introduce a climate change plan.

6. Beyond the jurisdiction issues, parties raise a number of questions about the way that Enbridge has designed the rates and sample contracts for the RNG Enabling Program services, and around the variance account treatment that is proposed. Generally speaking, these questions relate equally to both RNG Injection (Rate 401) and RNG Upgrading (Rate 400). Enbridge acknowledges that some of the questions raise fair concerns about the proposed approach, and has proposed some updates to its proposal in this Reply Argument.
7. In the body of this Reply Argument, Enbridge addresses the main questions raised by other parties, using the Issues List provided by the OEB. As will be seen, the RNG Enabling Program is a proper utility activity that will support RNG market development in Ontario. Enbridge's innovative proposal strikes an appropriate balance between market encouragement and ratepayer protection. Enbridge should be permitted to proceed with the RNG Upgrading Service (Rate 400) and RNG Injection Service (Rate 401).

B. JURISDICTION

8. Issue 1 in this proceeding asks "Should the new business activity – RNG Enabling Program – be considered as part of the utility's regulated business?". This issue applies equally to the RNG Injection Service and the RNG Upgrading Service.
9. It appears that there is little, if any disagreement on two aspects of this issue.

10. First, parties accept that both of the RNG Enabling Program activities can be operated by Enbridge itself, and do not need to be offered by an affiliate.² There is no dispute that both RNG Injection and RNG Upgrading can be considered as either “distribution” activities (permitted by the Undertakings³) or as the provision of services by Enbridge that would assist the Government of Ontario in achieving its goals in energy conservation (permitted by the 2006 Minister’s Directive that expanded the scope of Enbridge’s permitted business activities⁴).
11. Second, parties also appear to accept that Enbridge can and should operate the RNG Injection Service as a regulated utility activity, and that the OEB has jurisdiction under section 36 of the *OEB Act*⁵ to set and approve rates for the RNG Injection Service.⁶ There is no dispute that the RNG Injection Service is considered “distribution” of gas and that this is something that can and should be offered by Enbridge and rate-regulated by the OEB.
12. The key area of disagreement is around whether the OEB has jurisdiction under section 36 of the *OEB Act* to set and approve rates for the RNG Upgrading Service, and whether Enbridge can treat that service as a regulated utility activity. Most of the arguments submitted by other parties focus on the specific wording of section 36, with some parties indicating their opinion that RNG upgrading should not be considered to be “distribution”, and therefore the OEB cannot set rates for that activity.⁷
13. Those parties asserting that RNG upgrading is not “distribution” do not provide specific facts as to why RNG upgrading cannot be included as part of Enbridge’s

² See, for example, Staff Submission at pp. 5 and 8, BOMA Final Argument at p. 2, IGUA Written Submissions at pp. 1 and 8-9, and SEC Submissions at pp. 2 and 3.

³ See section 2.0 of Enbridge’s Undertakings, dated December 9, 1998, filed at Appendix 1 to Exhibit B, Tab 1, Schedule 1.

⁴ This specific item is found on the first page of the 2006 Minister’s Directive, filed at Exhibit B, Tab 1, Schedule 1, Appendix 1, p. 12 of 13.

⁵ Section 36, *Ontario Energy Board Act, 1998 (OEB Act)*.

⁶ See, for example, Staff Submission at p. 5, BOMA Final Argument at p. 2, IGUA Written Submissions at p. 1 and SEC Submissions at p. 2.

⁷ See, for example, Staff Submission at p. 5, SEC Submissions at p. 2, APPRO Submissions at p. 1 and CCC Final Argument at p. 3.

distribution activities. Enbridge submits that a functional review of the nature of Enbridge's proposed RNG Upgrading services supports the conclusion that these are "distribution" services that are subject to section 36 of the *OEB Act*.

14. The activity of distributing gas to a consumer includes accepting gas into the distribution system and ensuring that the gas entering the distribution system meets applicable codes and standards. In the case of RNG, this includes both the Upgrading and Injection Services. As explained at the Technical Conference, raw untreated biogas fits within the definition of gas in the *OEB Act*⁸ and when Enbridge takes steps to upgrade that gas to a quality such that it can be comingled with other gas in the broader distribution system that is a gas distribution activity.⁹ Stated differently, the RNG upgrading is the first step of Enbridge's distribution activities offered to RNG producers. RNG upgrading is a required activity to enable an RNG producer to transport RNG to end-use customers.

15. Contrary to the submissions made by several parties, the fact that RNG upgrading service can be provided by other parties does not render this a non-utility activity.¹⁰ There are current examples of distribution activities that can be carried out by Enbridge (as a regulated utility service), or by third parties (in which case the activities are not regulated). As explained at the Technical Conference, piping on customer properties can be provided by Enbridge, or by third parties. Another example of an activity that can be provided by Enbridge (under a distribution rate) or by third parties (on an unregulated basis) is natural gas compression for vehicles.¹¹ A further example is where customers install their own regulation equipment to change pressures downstream of Enbridge's meter. For all of these examples, where Enbridge provides this service, it is considered "distribution"; where the

⁸ Section 3 of the *OEB Act* defines "gas" as including "natural gas, substitute natural gas, synthetic gas, manufactured gas, propane-air gas or any mixture of any of them", and it defines "manufactured gas" as "any artificially produced fuel gas, except acetylene and any other gas used principally in welding or cutting metals".

⁹ TC Tr. 166-167.

¹⁰ See, for example, CCC Final Argument at p. 3, IGUA Written Submissions at p. 3 and APPRO Submissions at p. 2.

¹¹ TC Tr. 168.

customer procures the service for itself, then the customer owns and operates the infrastructure.¹² In all of these examples, the customer's activities are not considered to be "distribution" under the *OEB Act*, and no rate order is required.

16. In any event, when assessing whether RNG upgrading is a distribution activity it is appropriate to take a broad and purposive view of the governing legislation. As explained in Enbridge's response to Energy Probe Interrogatory #2, there are several regulatory and legal precedents recognizing that the Board's rate setting power under section 36 of the *OEB Act* is broad, and that it must be determined and applied with reference to the Board's objectives as well as Government and public policy.¹³

17. In the Ontario Divisional Court's majority decision about rate affordability programs (the ACTO Decision)¹⁴, the Court reversed the OEB's majority decision from Enbridge's 2007 rate case, which had decided that the OEB does not have jurisdiction to approve different rates for low-income consumers.¹⁵ The Divisional Court emphasized that the OEB may consider a range of factors when considering the scope of its jurisdiction, including its own statutory objectives and public policy. In coming to this conclusion, the majority decision cited the following passage from an earlier Enbridge case heard by the Divisional Court:

*... [T]he [OEB Act] involves economic regulation of energy resources, including setting prices for energy which are fair and reasonable to the distributors and the suppliers, while at the same time are a reasonable cost for the consumer to pay. This will frequently engage the balancing of competing interests, as well as consideration of broad public policy.*¹⁶

¹² TC Tr. 167-170.

¹³ Energy Probe Interrogatory #2, filed at Exhibit I.2.EGDI.EP.2.

¹⁴ *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 CanLII 23487 (ON S.C.D.C.) (the ACTO Decision).

¹⁵ EB-2006-0034, Decision- Rate Affordability Programs, April 26, 2007 (the OEB Rate Affordability Programs Decision).

¹⁶ ACTO Decision, at para. 35, citing *Enbridge Gas Distribution Inc. v. Ontario Energy Board* (2005), 75 O.R. (3d) 72, at para. 24.

18. The Court's observation that determining the scope of the OEB's jurisdiction requires balancing of a number of factors is similar to the following observation made in the OEB's (overturned) majority decision about rate affordability programs in Enbridge's 2007 rate case:

The Board was created and made operational through legislation. The Board has a responsibility to operate to the full depth and breadth of the authority granted to it in its governing statute. The limits or boundaries of its authority need not, nor should, be a bright line. This would require near unachievable foresight by the legislators to consider all of the possible eventualities. The objectives provided in the [OEB] Act are intended to be broad enough to allow the Board to operate with discretion in an ever changing environment and focused enough to ensure that the Board operates within the government's policy framework.¹⁷

19. Enbridge submits that when the OEB is considering its own jurisdiction and setting rates, it is appropriate for the Board to take its statutory objectives as well as public policy into account.

20. The OEB highlighted the importance of "Public Policy Responsiveness" in the Renewed Regulatory Framework (which applies to gas distributors as well as electricity utilities), noting this as one of the four outcomes to be achieved by distributors.¹⁸

21. Both the OEB's statutory objectives and relevant public policy support the view that the OEB's ratemaking jurisdiction over the distribution of gas should include the RNG Upgrading service.

22. There are seven objectives set out in section 2 of the OEB Act that apply when the OEB carries out its responsibilities in relation to gas. The third of these objectives is as follows:

To facilitate rational expansion of the transmission and distribution systems.

¹⁷ OEB Rate Affordability Programs Decision, at p. 5. Note that while the Divisional Court overturned this decision, the Divisional Court did not expressly or implicitly disagree with the passage quoted herein.

¹⁸ Report of the Board: Renewed Regulatory Framework for Electricity Distributors: A Performance-Based Approach, October 18, 2012, at p. 6.

23. The OEB has provided guidance on many occasions on how to assess the rational expansion of distribution systems, such that new customers do not create an undue burden on existing customers. Because of the desire to limit absolute carbon emissions, market transformation initiatives such as the RNG Enabling services will reduce the burden of escalating carbon prices on existing customers from the expansion of distribution systems to serve future customers. These programs do so by managing total emissions associated with current and future customers that would otherwise have chosen natural gas for home heating. In addition, these services also adhere to (or exceed) EBO 188 guidelines by requiring a profitability index of 1.02 or greater to ensure no undue cross subsidy from existing gas rate payers to the users of these services.

24. The fifth of the OEB's objectives as it relates to gas is as follows:

To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.

25. As described in Argument in Chief, carbon reduction remains an important goal in Ontario even after the end of Cap and Trade.

26. New legislation that was introduced in late July to wind down the Cap and Trade Program confirms that Ontario will continue to have targets for the reduction of GHG emissions and will have a (new) "climate change plan".¹⁹

27. Additionally, the Federal Government may implement a Clean Fuel Standard (CFS), which could require that a minimum portion of fuel distributed in the buildings and industrial sectors would be renewable. Assuming that the CFS proceeds as anticipated, natural gas distributors like Enbridge will not be able to satisfy all of their

¹⁹ *Cap and Trade Cancellation Act, 2018* (Bill 4), at sections 3 ("Targets") and 4 ("Climate Change Plan"). The proposed legislation can be found at <https://www.ola.org/en/legislative-business/bills/parliament-42/session-1/bill-4#BK7>.

obligations through offsets or market instruments – there will be a requirement for procurement and supply of RNG commodity.²⁰

28. Taking these items into account, a broad and purposive view of the scope of “distribution” of natural gas should include activities that will facilitate the transportation of RNG through Enbridge’s broader distribution system. Increasing the availability of RNG, which is a cleaner (less carbon intensive) fuel source than conventional natural gas will contribute towards achieving the OEB’s statutory objectives along with public policy objectives.

29. Approval of these new services fits with the OEB’s commitment to support innovation by utilities as they develop new services that enhance customer choice and serve customer needs. This new focus and commitment to innovation can be seen in, among other things, the OEB’s Strategic Blueprint for 2017-2022²¹ and the OEB’s LTEP Implementation Plan²².

30. Offering the new RNG Enabling Services will respond to customer demand that is currently not being met. Contrary to the submissions made by Energy Probe²³, the evidence in this case makes clear that there is a current interest and demand from RNG producers looking to proceed with projects, even after the cancellation of Cap and Trade in Ontario.²⁴

31. Several parties made lengthy submissions about the significance of decisions from the Quebec Régie²⁵ and the British Columbia Utilities Commission (BCUC)²⁶ that

²⁰ TCTR4-6. Details about the current proposals for a Federal Government CFS are set out in “Clean Fuel Standard Regulatory Framework” filed in response to Undertaking JT1.3 (Attachment 1).

²¹ Strategic Blueprint 2017-2022: Keeping Pace with an Evolving Energy Sector – see, for example, the discussion of innovation and customer choice at pp. 11 and 13.

²² The OEB’s Implementation Plan in Response to the Minister of Energy’s Directive in respect of the implementation of Ontario’s Long-Term Energy Plan 2018 – see, for example, the discussion of encouraging a culture of innovation at pp. 36-39.

²³ Energy Probe Argument, at p. 5.

²⁴ TC Tr. 25, 46-47, 124 and 130.

²⁵ Decision of Régie de l’énergie in D-2013-041 / R-3824-2012 re. Gaz Métro Limited Partnership. An English translation of this decision was filed by Staff on August 29, 2018.

have addressed whether RNG upgrading services and facilities should be included within the regulated utility in those jurisdictions.²⁷

32. As Enbridge described in response to Undertaking JT1.1, the BCUC and the Régie came to different conclusions about whether RNG upgrading facilities should be included within the regulated utility. The BCUC allowed the activity, and the Régie did not. Each decision takes into account the local governing legislation, as well as relevant factual circumstances.

33. The BCUC and Régie decisions are not determinative of the matters before the OEB in this case, because the circumstances of each case are unique and because OEB is not in any way bound by decisions of other regulators. However, to the extent that the OEB wishes to take account of these other decisions, Enbridge notes that:

- a. The proposal before the Régie was different from Enbridge's RNG Upgrading service in that Gaz Métro proposed that all the costs of its upgrading services would be charged to all distribution ratepayers.²⁸ Enbridge proposes that RNG producers will pay all costs of the RNG Upgrading service, plus a safety factor. This mitigates against the concerns noted by the Régie about gas ratepayers subsidizing or funding a program that goes beyond traditional utility activities.
- b. One reason supporting the BCUC's approval of the Fortis BC biomethane program was that it was consistent with government policy and statutory objectives, including the use of clean or renewable resources and the reduction of greenhouse gas emissions. Ontario has similar policy and statutory objectives.²⁹

²⁶ The two BCUC decisions about Fortis BC RNG facilities are described and linked in Enbridge's response to Undertaking JT1.1.

²⁷ See, for example, BOMA Final Argument at pp. 4-5, IGUA Written Submissions at pp. 4-8 and APPrO Submissions at pp. 5-6.

²⁸ Decision of Régie de l'énergie in D-2013-041 / R-3824-2012, at para. 26.

²⁹ BCUC Commission Order G-2010-13, In The Matter Of FortisBC Energy Inc. Biomethane Service Offering: Post Implementation Report And Application For Approval Of The Continuation And Modification Of The Biomethane Program On A Permanent Basis, Decision dated December 11, 2013, at pp. 5-8. It should be noted that the BCUC's findings on this topic were not determinative of the entire application – the BCUC noted that the finding that the Application is consistent with government policy does not resolve the question of who should pay for the biomethane service (see p. 8). Ultimately, the BCUC confirmed that customers receiving biomethane service should pay for the associated costs (see p. 42).

34. As a final point, several parties assert that even if the OEB has jurisdiction to set rates (service charges) for RNG Upgrading, it should decline to do so. The main argument is that allowing Enbridge to offer this service through the utility could impede future competition.³⁰
35. Enbridge submits that these concerns are misplaced. The RNG Enabling Program is intended to enable RNG production, and is being proposed because there is little or no current activity in this space. Service recipients will pay the full cost of service, plus a “safety factor”. There is no evidence of any current market players who will be adversely impacted by Enbridge offering a regulated RNG Upgrading service. Enbridge’s evidence (which is not contradicted by any other parties) is that there are no other parties in the marketplace offering services equivalent to the RNG Enabling Program.³¹ The CBA, on behalf of RNG producers, welcomes the service noting that “...it would be unreasonable and counterproductive to the intended purpose of the proposed RNG Enabling Programs to prevent Enbridge from engaging in upgrading services as part of its regulated business on the basis of a theoretical market to provide those services which simply does not exist at this point in time...”.³²
36. It could be the case that in the future there is an active and competitive market for RNG upgrading services. At that point, it would be open to any party to bring an application under section 29 of the *OEB Act*, asking that the OEB forebear from regulating the price of RNG Upgrading Service offered by Enbridge. It is clear, though, that no such application is being made at this time.

³⁰ See, for example, Staff Submissions at pp. 9-11, FRPO Submissions at pp. 2-3, APPRO Submissions at pp. 2-5

³¹ TC Tr. 60-61.

³² CBA Submissions at p. 5.

C. RATEMAKING METHODOLOGY

37. Issues 2.1 and 2.2 are titled “Service Fees”, and ask “Are the methodologies to set services fees for the RNG Enabling Program – Upgrading Service and Injection Service reasonable and appropriate?”
38. As described in evidence and Argument in Chief, Enbridge is using long-standing regulatory constructs that have been approved by the OEB as the basis to determine the revenue requirement for each project. The revenue requirement will be converted into levelized rates that will be charged each year of the contract in order to achieve the expected PI of 1.02 or greater. Under this approach, all costs (plus an additional safety margin) will be recovered over the term of the contract for each service.
39. Enbridge plans to use the same ratesetting methodology for both RNG Upgrading (Rate 400) and RNG Injection (Rate 401). Enbridge is seeking approval of this ratesetting methodology in this proceeding. Once approved, Enbridge will apply this methodology to all RNG Enabling Program projects. As is the case with other contract rates (such as Rate 125), Enbridge will not be seeking individual approvals of customer-specific levelized rates for RNG Enabling Program projects.
40. Most parties support or do not object to Enbridge’s proposed ratemaking methodology (though, as noted above, some parties do object to the use of any regulated rate for the RNG Upgrading Service). Board Staff and BOMA each indicate that the methodology to set service fees is appropriate.³³ Many parties chose not to make any submissions on this issue.³⁴
41. The main objection raised is that the OEB, and not Enbridge, should set the rates for each RNG Enabling Service contract. Both CCC and SEC argue that the proposed

³³ Staff Submission at pp. 12 and 14, and BOMA Final Argument at pp. 6-7. The CBA also appears to support the ratemaking methodology.

³⁴ These parties include Anwaatin, APPrO, FRPO, IGUA and OSEA.

approach gives too much discretion to Enbridge, and takes away the OEB's oversight rights.³⁵

42. Enbridge submits that its proposed ratemaking approach is appropriate and consistent with other OEB-approved rates. In the case of Rate 125, Enbridge and extra-large volume customers work together to enter into a contract that sets out a billing contract demand that will recover all of the costs of serving the customer.³⁶ In the case of contributions in aid of construction (which the OEB has said are a "rate"), Enbridge works with customers to determine the appropriate amount to be paid to bring the project PI to the necessary level.³⁷ These processes are each undertaken between Enbridge and the customer, and the outcomes are not specifically reviewed or approved by the OEB. Importantly, however, the OEB retains overall oversight and complaint jurisdiction over these regulated activities, and impacted parties can seek assistance where appropriate.

43. A requirement that each RNG Enabling Program rate must be approved by the OEB would be unduly onerous. This would necessitate separate issues in each rate proceeding, and could delay the provision of service to interested customers. Enbridge submits that there is appropriate protection to all parties where Enbridge follows a defined process to set the rate for each new project, and where the project will not proceed unless both the customer and Enbridge agree to a contract. Consistent with this position, Enbridge is open to Staff's suggestion³⁸ that the Rate Schedules for Rates 400 and 401 each describe the ratesetting methodology, and that each rate application would include a list of new RNG Enabling facilities, and a statement that the rates associated with those facilities are in accordance with the OEB-approved methodology.

³⁵ CCC Final Argument at pp. 4-5 and SEC Submissions at pp. 4-5.

³⁶ Discussed at the June 27, 2018 Technical Conference – TC Tr. 35-36.

³⁷ This is discussed in response to Energy Probe Interrogatory #2, at pp. 5-6 (Exhibit I.1.EGDI.EP.2).

³⁸ Staff Submission at pp. 13 and 14.

44. Only one party (SEC) objects to Enbridge's proposed levelized rate, which would see RNG Enabling Program customers charged the same amount for each month/year of their contract. SEC argues that the service fee should be adjusted over time to take account of changes in costs.³⁹
45. Enbridge believes that it is appropriate to set the service fees (rates) for each contract at the outset. This will provide the RNG producer with the certainty required to proceed with their project. That is what is needed for this "enabling program", which is aimed at increasing the breadth and depth of RNG supply in Ontario, which will ultimately benefit Ontario consumers. The CBA, representing RNG producers in Ontario, supports the use of levelized rates.⁴⁰ Enbridge's ratepayers will be protected by the fact that RNG Enabling Program customers will pay more than the forecast costs of each project over the term of each contract, because the service fees will be set to return a PI of at least 1.02.
46. SEC also questions whether Enbridge's proposed ratesetting methodology includes all necessary and relevant costs in the derivation of revenue requirement and service fees. SEC asserts that Enbridge does not appear to include any amounts for future capital costs over the term of an RNG Enabling Program contract, and that there is no allowance included for indirect costs (overhead) that should be allocated to each contract.⁴¹
47. Enbridge confirms that the derivation of revenue requirement and service fees for Rates 400 and 401 does include overhead costs and fully allocated costs. This is specified in the prefiled evidence⁴², and was confirmed at the Technical Conference⁴³. Enbridge does not expect that there will be any substantial unforecast future capital costs associated with the RNG Enabling projects, because Enbridge will establish suitable warranties and protections from manufacturers and

³⁹ SEC Submissions at pp. 6-7.

⁴⁰ CBA Submissions at p. 6.

⁴¹ SEC Submissions at pp. 7-8.

⁴² Exhibit B, Tab 1, Schedule 1, p. 19, para. 56.

⁴³ TC Tr. 135-137.

installation contractors to cover future unanticipated future capital costs for RNG processing and injection facilities. Any changes required by the customer will result in adjustments to the customer's fees to cover the associated additional costs.⁴⁴

48. In summary, Enbridge submits that its ratesetting methodology sets a fair and appropriate balance between enabling the development of Ontario RNG production, protecting existing ratepayers and regulatory efficiency.

D. TERMS AND CONDITIONS

49. Issue 2.4 asks "What are the appropriate terms and conditions of the RNG Enabling Program – Upgrading Service, and RNG Enabling Program – Injection Service?"

50. Under this general topic, several parties made suggestions about additional terms and conditions to be included in Enbridge's contracts with RNG customers, and also proposed conditions of approval for this Application. No party asserted that the proposed terms and conditions of the RNG Enabling Program rate schedules and pro forma contract are fundamentally flawed.

51. Staff indicates that they have not identified any issues with Enbridge's proposed standardized contracts, and do not object to Enbridge's plan to seek financial assurances only where the customer is identified as being risky.⁴⁵

52. SEC asserts that all RNG Enabling Program customers should be required to provide sufficient financial assurances to ensure that ratepayers will not be at risk for the costs of any default.⁴⁶ BOMA argues that contracts must be structured so that ratepayers are not exposed to any loss, including from the financial failure of an RNG producer, and asserts that Enbridge must have strong financial assurances in place to protect against losses.⁴⁷

⁴⁴ See response to APPrO Interrogatory #5(d), filed at Exhibit I.2.EGDI.APPrO.5.

⁴⁵ Staff Submission at p.14.

⁴⁶ SEC Submissions at p. 8.

⁴⁷ BOMA Final Argument at pp. 6-7.

53. Enbridge disputes that financial assurances are required for every RNG Enabling Program contract. As explained at the Technical Conference, many of the expected counterparties will be municipalities, who pose very little default risk.⁴⁸ Enbridge has lengthy experience dealing with a wide variety of customers, and is well-positioned to make informed and appropriate decisions about which customers should provide financial assurances to support infrastructure investments and long-term contracts.⁴⁹ Enbridge has taken this approach for many years with large volume customers, and sees no reason for a more prescriptive financial assurances requirement for RNG Enabling Program customers. There is no need for a blanket requirement that every counterparty provide financial assurances – that provide little benefit to ratepayers and will increase costs for RNG Enabling Program customers and make the RNG Enabling Program less successful in its goal of enabling the market.

54. The CBA, as representative of RNG producers, makes a number of suggestions about items that should be added to or included in Enbridge's RNG Enabling Program contracts. The following subparagraphs set out CBA's proposals, and Enbridge's response.

- a. *Where final service fees are materially higher than the forecast amount there should be an opportunity for an RNG producer to seek review of the prudence of the higher amount.*⁵⁰

Enbridge agrees that where the final estimate of costs for an RNG Enabling Program project are substantially higher than the initial estimate, then the customer may opt not to proceed. Where the customer does proceed, and the costs are different than expected, the customer who is receiving a regulated service has the option to raise concerns through the OEB.

- b. *RNG producers should have the option of making a capital contribution towards the RNG Enabling facilities, which would reduce their service fees.*⁵¹

Enbridge believes that this approach is inappropriate and not aligned with good regulatory practice. Enbridge does not allow large volume customers

⁴⁸ TC Tr. 194-197.

⁴⁹ See Enbridge's Undertaking Response JT1.15.

⁵⁰ CBA Submissions at p. 7.

⁵¹ CBA Submissions at p. 7.

to “buy down” their rates through substantial up-front payments beyond what is required to bring the PI to a reasonable level – the same should hold true for the RNG Enabling Program.

- c. *Where an RNG producer ceases production, or where Enbridge is unable to provide continued service, the service fee should be recalculated to exclude O&M costs and other costs that will no longer be incurred by Enbridge.*⁵²

Enbridge confirms that the termination fee to be paid by an RNG Enabling Program customer (at such time as the customer permanently discontinues service before its contract has completed) will only include payment for the remaining undepreciated capital costs and decommissioning costs of the facilities provided for the customer.⁵³

- d. *Where Enbridge is unable to perform the contracted services (either upgrading or injection), the customer should not have to pay service fees.*⁵⁴

Enbridge aims to avoid the situation of being unable to accept RNG injections by conducting due diligence before embarking on the construction of RNG Enabling facilities. Where appropriate, Enbridge may be able to provide the RNG producer with different options for injection locations. If Enbridge forecasts that it will not be able to inject enough RNG at the chosen connection location to make the project viable at a cost acceptable to the customer, the parties will not proceed. However, where from time to time the connected pipeline is temporarily not able to accept the full amount of the RNG producer’s injections, the customer will still be responsible to pay service fees. These service fees are intended to recover the costs of the facility, regardless of the actual injections and upgrading provided. Having said this, the periods of constraint are most likely to be limited and occur in the summer months where demand on the system is low and the pipes are full (near maximum operating pressure).

55. Finally, BOMA includes several items that it says the OEB should require as conditions of approval. The following subparagraphs set out BOMA’s proposals, and Enbridge’s response.⁵⁵

⁵² CBA Submissions at p. 7.

⁵³ See the description of “Termination Charge” in the pro-forma Biogas Services Agreement filed in response to Staff Interrogatory #6, at Exhibit I.2.EGDI.STAFF.6, p. 57 of 92.

⁵⁴ CBA Submissions at p. 8.

⁵⁵ Enbridge’s response to BOMA’s assertion that financial assurances should be required for each contract is set out above.

- a. *The Biogas Services Agreement should include a provision that any stranded costs be for the account of utility shareholders.*⁵⁶

Enbridge does not agree. Ratepayers will benefit from the RNG Enabling Program over time (because the PI for each contract will be set at >1.02). It is not appropriate to require that ratepayers receive all such benefits and never have to bear any costs. Moreover, and in any event, this is not an issue to be included in the contract between Enbridge and the RNG producer – the arrangements between those parties are not impacted by how Enbridge accounts for any losses arising from the contract.

- b. *The Biogas Services Agreement should include a dispute resolution provision.*⁵⁷

It is not clear to Enbridge why this is required – parties to a contract always have the right to commence an action in Court to address and resolve any differences. Further, it may be that disputes over some of the items included in the contract could be referred to the OEB. However, that determination would be made by the OEB, which would not be bound by the parties' views about the extent of the OEB's jurisdiction.

- c. *The contract as a whole should be acceptable to the OEB.*⁵⁸

Enbridge does not believe that it is necessary for the OEB to specifically review and approve the form of contract. That is not a requirement for large volume customer contracts, such as those between Enbridge and Rate 125 customers.

- d. *Enbridge should file “two or three” RNG Enabling Program contracts with the OEB, and the contract already signed with the City of Toronto should be submitted to the OEB for review in a public proceeding in the next 90 days.*⁵⁹

It is not clear to Enbridge why it would be necessary to file signed contracts. Enbridge is not seeking OEB approval of the standardized form, or of the specific contracts entered into with customers.

56. In summary, subject to the comments above, Enbridge submits that there is no requirement for additional conditions of approval in this case.

⁵⁶ BOMA Final Argument at p. 10. FRPO makes a similar assertion (at page 3 of its Submissions), as does CCC (at page 5 of its Final Argument).

⁵⁷ BOMA Final Argument at p. 10.

⁵⁸ BOMA Final Argument at p. 10.

⁵⁹ BOMA Final Argument at pp. 8 and 10.

E. DEFERRAL AND VARIANCE ACCOUNTS

57. Issues 3.1 and 3.2 ask: “Is the proposal to include the annual sufficiency / deficiency of the RNG Enabling Programs within the Cap and Trade Compliance Obligation Variance Accounts reasonable and appropriate? [and] Is the disposition methodology appropriate?”

58. Only two parties object to any aspects of Enbridge’s deferral and variance account proposal. Other parties either support the proposal⁶⁰, or made no submissions.

59. Staff argue that there should not be any variance account approved for the RNG Enabling Programs, because the new facilities should be treated like any other expansion project.⁶¹

60. In response, Enbridge submits that there is a meaningful difference, and that is why a variance account is appropriate. The use of a levelized rate for the RNG Enabling Programs (which is different for the rate design used for other projects) will result in deficiencies some years and sufficiencies in other years. On an overall basis, there is an expected sufficiency for each project (and for the RNG Enabling Program as a whole). It is appropriate that the annual sufficiency/deficiency associated with the projects under the RNG Enabling Programs be recorded in a variance account for annual disposition to ratepayers. The application of a PI for each project that is set to greater than 1.02 is intended to protect ratepayers against the risk of having to pay for a net deficiency over the contract term for any particular project. Under this approach, ratepayers will receive the expected net benefit from each RNG Enabling Program project. If there was no variance account treatment for the net revenues for each project, then all variances (cumulating to an expected net sufficiency) would accrue to Enbridge rather than to ratepayers.

61. Staff also assert that if the variance accounts are approved, the recorded balances should be cleared to RNG Enabling Program customers, not other gas ratepayers.⁶²

⁶⁰ CBA Submission at p. 9.

⁶¹ Staff Submission at p.16.

62. Enbridge disagrees. As Staff acknowledge, this would result in RNG producers paying a variable rate. This will make potential customers less interested in proceeding. It will also mean that ratepayers will not enjoy the overall benefits of the RNG Enabling Program. Enbridge submits that it is more appropriate for variance account balances to be cleared to distribution ratepayers, thereby ensuring that ratepayers receive the net benefits from the RNG Enabling Program.

63. BOMA supports the creation of a variance account, but asserts that any amounts recorded should only be cleared to gas ratepayers in years where there is a credit balance.⁶³

64. Enbridge does not agree. It is anticipated that ratepayers will enjoy an overall sufficiency over time from the RNG Enabling Program. It is not appropriate that Enbridge would be required to only clear the variance account in years where it shows a sufficiency.

65. Finally, BOMA questions Enbridge's proposal to use the existing GHG-Customer Variance Account until that account is discontinued, and submits there should be a new variance account established immediately to track the annual sufficiency/deficiency amounts associated with the RNG Enabling Program.

66. Enbridge agrees that this new account should be established immediately, in order to avoid future confusion.

F. ABORIGINAL OR TREATY RIGHTS

67. Issue 4.1 asks "Are any Aboriginal or treaty rights impacted by this application? If so, what Aboriginal or treaty rights?" and Issue 4.2 asks "To the extent any Aboriginal or treaty rights are potentially impacted, has the duty to consult been adequately discharged with respect to these rights?"

68. Two parties made submissions on this issue.

⁶² Staff Submission at p.17.

⁶³ BOMA Final Argument at p. 9.

69. Staff acknowledged that Enbridge has committed to address any potential impacts to Aboriginal or treaty rights that arise in relation to specific RNG Enabling Program projects as those projects are proposed and proceed. Staff indicated therefore that it may be premature to address this issue at this time. In that regard, Staff highlighted that the OEB has specific processes that will be engaged in an OEB proceeding where Aboriginal or treaty rights may be impacted by decisions to be made in the proceeding. Staff pointed to Chapter 3 of the OEB's 2016 Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario (the Guidelines) where the OEB provides further direction to parties on what is expected with respect to consultations including the duty to consult with potentially affected Indigenous communities.⁶⁴
70. Anwaatin's position is that the relief sought in this case impacts on treaty and Aboriginal rights, and that therefore the duty to consult has been triggered. Anwaatin relies on several cases for the proposition that the duty to consult exists not only for projects or decisions that have an immediate impact on land or resources but also to strategic higher level decisions affecting Aboriginal lands, rights or treaties.
71. Enbridge is of the view that the relief sought in this Application is not of the nature that would trigger the duty to consult. Enbridge is simply seeking approval to be able to offer RNG Injection and Upgrading Services. These services will only be taken by parties who contract for them. No approvals are sought for any specific projects in this proceeding.⁶⁵

⁶⁴ Staff Submission at p. 19, citing the OEB's 2016 Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario, which can be found at https://www.oeb.ca/oeb/Documents/Regulatory/Enviro_Guidelines_HydrocarbonPipelines_2016.pdf.

⁶⁵ While not directly related to the question of whether there is a duty to consult, Enbridge notes that in a recent National Energy Board (NEB) proceeding, the NEB denied standing to several Aboriginal groups in a TransCanada PipeLines application for a new regulated service, holding that those parties would not be impacted because the applicant was not seeking to construct any new facilities or carry out any physical disturbance. See RH-003-0217, Ruling No. 1, dated April 24, 2017, found at: <https://apps.neb-one.gc.ca/REGDOCS/File/Download/3248198>.

72. The cases noted by Anwaatin in support of the proposition that the duty to consult may be engaged even where no specific land rights are at issue have a very different context from Enbridge's RNG Enabling Program Application. The *Carrier Sekani* case related to a hydroelectric dam project, and the recent *Tsleil-Waututh Nation v. Canada (Attorney General)* case relates to the TransMountain pipeline expansion project. Each of these cases involved Crown conduct that might adversely affect Aboriginal or treaty rights or interests. That is not the case here.

73. The *Carrier Sekani* case explains that three elements must be met to give rise to a duty to consult on the part of the Crown.⁶⁶ In Enbridge's view, not all of those elements exist in relation to the relief sought in this case. One of the required elements is that there must be a Crown decision or other Government action that engages a potential Aboriginal or treaty right that could have adverse impacts on pending Aboriginal claims or rights. While it may be the case that a policy decision could be viewed as a "Government action", the specific decision to be made by the OEB in this proceeding regarding approval of the RNG Enabling Program does not have the potential to adversely impact Aboriginal claims or rights.

74. The recent *Tsleil-Waututh Nation v. Canada (Attorney General)* decision cited by Anwaatin expands on the duty to consult set out in the *Haida Nation* decision of the Supreme Court of Canada⁶⁷ stating "[t]he duty arises when the Crown has actual or constructive knowledge of the potential existence of Indigenous rights or title and contemplates conduct that might adversely affect those rights or title. The duty reflects the need to avoid the impairment of asserted or recognized rights caused by the implementation of a specific project."⁶⁸ Again, the relief sought in this Application does not fit within the described threshold that would engage the duty to consult. Anwaatin's submissions focus on the potential impacts from unspecified future RNG

⁶⁶ *Alcan v Carrier Sekani Tribal Council*, [2010] 2 S.C.R. 650, at paras. 31 to 50.

⁶⁷ *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, at para. 35.

⁶⁸ *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, at para. 487. The first sentence from the quoted passage is taken from the *Haida Nation* decision (at para. 35). The second sentence is the Federal Court of Appeal's own observation or interpretation.

Enabling facilities that could be located at or around Aboriginal lands⁶⁹ – the submissions do not include any specific description of how the approvals sought in this Application will impact Aboriginal claims or rights. In Enbridge’s view, these are speculative impacts, which the Supreme Court of Canada has indicated (in the *Carrier Sekani* decision)⁷⁰ are not sufficient to trigger the duty to consult.

75. Enbridge acknowledges that some future RNG Enabling Program projects located in and around First Nations and Indigenous communities could potentially impact Aboriginal or treaty rights. However, the OEB is not being asked to provide any review or approval of any specific projects in this proceeding or to render a decision that adversely affects Anwaatin’s rights. If specific RNG Enabling Program projects are proposed in the future, and such projects do give rise to a duty to consult, then Enbridge expects that the Ministry of Energy and/or the OEB will provide direction to Enbridge about how that duty is to be honoured, taking account of the OEB’s existing processes as set out in the Guidelines.⁷¹

G. REQUESTED RELIEF

76. In relation to the RNG Enabling Program, Enbridge respectfully requests OEB approval of the following items:

- a. The ratesetting methodology to be applied to determine rates (service fees) for the RNG Upgrading and RNG Injection Services;
- b. The Rate 400 and Rate 401 Rate Schedules (updated as described herein); and
- c. The creation of a new RNG Enabling Program Variance Account to record and recover annual sufficiency/deficiency amounts associated with the RNG Enabling Program.

⁶⁹ Anwaatin Final Argument at para. 14.

⁷⁰ *Carrier Sekani*, at paras. 45 and 46.

⁷¹ Enbridge would follow any consultation activities appropriate in the circumstances. Enbridge notes that it has created and adheres to its own Indigenous Peoples Policy which directs the methods by which Enbridge develops mutually beneficial relations with Indigenous communities close to, or potentially affected by, its operations. The Enbridge Indigenous Peoples Policy can be found at: https://www.enbridge.com/~/_media/Enb/Documents/About%20Us/indigenous_peoples_policy.pdf?la=en.

All of which is respectfully submitted this 11th day of September 2018.



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