



**BY EMAIL and RESS**

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August 6, 2020  
Our File: EB20190255

**Attn: Christine Long, Registrar & Board Secretary**

Dear Ms. Long:

**Re: EB-2019-0255 – Natural Gas Expansion – SEC’s Response to Enbridge’s Letter**

We are counsel to the School Energy Coalition (“SEC”). Pursuant to the Ontario Energy Board’s (the “Board”) letter dated July 29<sup>th</sup>, these are SEC’s comments on the request by Enbridge Gas Inc. (“Enbridge”) that the Board not publicly post the proposals it receives regarding the potential expansion projects.

***Overview***

SEC submits that, subject to a limited qualification, the Board should reject Enbridge’s request. The Board’s original decision to make each proponent’s filed project information public, with limited exceptions, after the deadline, was entirely appropriate and consistent with past practice and good policy.

There is no reason that principles set out in the *Practice Direction on Confidential Filings* (“*Practice Direction*”) should not apply to all requests for confidentiality before the Board, be that in a hearing or a public consultation process that will lead to the Board issuing a section 35 report. Both involve the exercise of the Board’s authority.<sup>1</sup>

To be treated as confidential pursuant to the *Practice Direction* on Confidential Filings, “the onus is on the person requesting confidentiality to demonstrate to the satisfaction of the Board that confidential treatment is warranted in any given case.”<sup>2</sup> Those harms should not be speculative, and must outweigh the public interest in providing the documents on the public record. Enbridge has not demonstrated that publishing the project proposals will cause any harm that warrants overturning the Board’s decision to place them on the public record. While Enbridge has provided some basis under which it may be appropriate in limited circumstances that certain specific information should be treated confidentially, the Board’s *Practice Direction* allows for Enbridge to make a particularized request for confidential treatment. There is no reason for the Board to change its existing policy on confidential

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<sup>1</sup> *Practice Direction on Confidential Filings*, p.1

<sup>2</sup> *Ibid.*

filings. Within that policy, there is ample scope to deal with the circumstances discussed by Enbridge, if they arise.

### **Background**

In December 2019, the Board was directed by the Minister of Energy, Northern Development and Mines, with the support of the Associate Minister of Energy, under section 35 of the *Ontario Energy Board Act, 1998*, to examine potential natural gas expansion projects, as an input into the government's decision-making on which projects will be eligible for ratepayer funding under the new provisions introduced by way of the *Access to Natural Gas Act, 2018*.<sup>3</sup>

The Minister was not required to ask for the Board's assistance in soliciting proposals, but in doing so, it signaled to all those who are interested in undertaking the first stage of its selection process by way of open process. The Board recognized that when it established the consultation and sought stakeholder comments on the draft filing guidelines.

Board consultations are public processes, where the default rule is that information that parties provide is put on the public record. Contrary to Enbridge's suggestion, the process put in place in this matter is not an "information gathering exercise only".<sup>4</sup> The Minister has asked the Board to "analyze the proposed projects with a focus on assessing whether they can be implemented substantially as proposed."<sup>5</sup> The public, including customers, deserve to see the information the Board is using to make its evaluation, and to provide a list of projects to the Minister that it believes should be considered. This promotes transparency and accountability in the Board's decision-making process.

Enbridge seems to argue that since the Minister "did not authorize or direct the OEB to amend the parameters of the program to make submissions public"<sup>6</sup>, it cannot or should not do so. It has not provided any legal authority for such a proposition, and there is in fact no legal basis for the Board to be prohibited from making submissions public. If it were inappropriate to do so, one would have expected the Minister to be concerned about the Board's determination on confidentiality. None of the actions of the Minister indicate that the Government has any issue with the Board's approach. At no time after the Board began the consultation process with a letter specifically indicating that it planned to post the proposals on its website after the deadline, nor when it confirmed its decision in the Final Filing Guidelines, did the Minister indicate to the Board that it did not agree with this approach. In fact, everything to date would seem to indicate the Minister is in favor of the transparent process the Board has undertaken as a result of its section 35 directive. This makes sense. One of the hallmarks of Board involvement is transparency, which is likely one of the reasons the Minister elected to invoke Section 35.

Enbridge also claims, without any support, that "publication of project information may diminish the Ontario government's discretion to determine the ranking and geographic distribution of projects." SEC does not understand why this would be the case. The Minister has a legal discretion under the *Access to Natural Gas Act, 2018* to select projects. Public disclosure of which projects have been submitted

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<sup>3</sup> The *Access to Natural Gas Act, 2018* amended the *Ontario Energy Board Act* by adding section 36.2 which provides for a mechanism to recover from existing natural gas ratepayers amounts to fund natural gas expansion projects.

<sup>4</sup> Enbridge Letter, July 17, 2020, p.2

<sup>5</sup> Letter to OEB Vice-Chair Dodds from Minister of Energy, Northern Development and Mines Rickford, and Assoc. Minister of Energy Walker, December 12, 2019, p.1

<sup>6</sup> Enbridge Letter, July 17, 2020, p.2

to the Board in no way inhibits that legal discretion. The only circumstance in which that might be the case is if the Minister were planning to exercise its discretion based on factors kept secret from the public. There is no suggestion that this is the Government's intention, and it would be surprising if it were.

It is telling that Enbridge raised no issues on the Board's proposed approach more than six months ago, even though the Board specifically asked for submissions on these issues when it sought comment on the draft filing guidelines.

### ***Specific Issues***

SEC submits that Enbridge has provided little information regarding what the specific harms it believes will occur if the information is made public. For the most part, it has simply made sweeping assertions regarding potential harms. This is not sufficient for the Board to reverse its decision to place the filing proposals on the public record.

Enbridge argues that public disclosure will prejudice proponents from participating in future expansion efforts, since they will have gone to the trouble and expense of preparing the proposals, and "other parties can use that public information to pursue those projects not selected or for other unintended purposes, without incurring comparable efforts or providing due compensation to the original proponent."<sup>7</sup> It is telling that the only proponent who is making this claim is the dominant provider of natural gas in Ontario. Existing customers are presumably funding, through rates, the costs of work to prepare these proposals. Enbridge's request is anti-competitive. If somehow another proponent uses some information that is contained in the proposals to prepare their own proposal for a future solicitation, then so be it. Ontario is a better place if a future proponent is somehow able to provide a better proposal to the Government of Ontario, at a lower cost, for expanding natural gas to new communities.

Enbridge argues that certain information included in its project proposals may raise privacy concerns. It notes that some of its proposed projects will serve a discrete number of customers in a limited area, and in certain circumstances, this may reveal customer specific information that would normally be protected by the Board. It is hard for SEC to judge this claim in the abstract. It surely cannot be that simply providing the location of existing or proposed gas facilities by themselves would reveal indirectly customer specific information that warrants confidentiality. With that said, it should be open for Enbridge to request confidentiality pursuant to the *Practice Direction* and to provide the Board specific information that would allow it to make an assessment based on the specific facts of a given proposal. Parties would then be allowed to comment on that specific confidentiality claim, in the normal course.

Enbridge is also concerned that, while it has project proposals that do not reveal customers names and addresses, some support material provided by municipalities may include names and addresses of customers who have expressed interest in receiving natural gas. SEC does not oppose confidential treatment of this information, which is consistent with what the Board has done in the past, at least with respect to address and contact information of third-parties. This can easily be done with limited redactions where necessary, and is consistent with the *Practice Direction*. It in no way justifies a sweeping abrogation of the Board's principles of transparency.

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<sup>7</sup> Enbridge Letter, July 17, 2020, p.2



Similarly, where Enbridge believes that public disclosure of maps which provide specific locations of existing or planned facilities would pose a safety and public security risk, then it can seek confidentiality in the normal course over such specific information pursuant to the *Practice Direction*. It is not a reason for the entirety of the proposal to be deemed confidential.

***Summary***

SEC submits the Board should reject Enbridge's request to overturn the Board's decision to place all proposals it receives on the public record. If Enbridge believes that specific limited information contained within its proposals meet the criteria for confidentiality under the *Practice Direction*, it can make such a request at that time.

Yours very truly,

**Shepherd Rubenstein P.C.**

Mark Rubenstein

cc: Wayne McNally, SEC (by email)  
Enbridge Gas Inc and other interested parties (by email)