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October 2, 2020

Christine E. Long
Registrar and Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
Toronto ON
M4P 1E4

Dear Ms. Long

**RE: EB-2020-0160 Enbridge Gas Windsor Pipeline Section 101 Application
Energy Probe Argument Submission**

Attached is the argument submission of Energy Probe Research Foundation (Energy Probe) in the EB-2020-0160 proceeding, the application by Enbridge Gas Inc. to the Ontario Energy Board for an order under Section 101 of the OEB Act for authorization to construct the Windsor Pipeline Replacement Project approved by the OEB in its EB-2019-0172 Leave to Construct decision.

Respectfully submitted on behalf of Energy Probe by its consultant.

Tom Ladanyi
TL Energy Regulatory Consultants Inc.

cc. Patricia Adams (Energy Probe)
Rakesh Torul (Enbridge Gas Inc.)
Scott Stoll (Aird & Berlis LLP)
Intervenors of Record

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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
Inc. pursuant to Condition 4 from the Ontario Energy Board's
Decision and Order, and Section 101 of the *Ontario Energy
Board Act, 1998* for authority to construct a work upon, under
or over a highway, utility line or ditch in the County of Essex
for the purposes of a natural gas pipeline in respect of which
the Ontario Energy Board granted leave to construct in EB-
2019-0172 to Enbridge Gas Inc.;

Enbridge Gas Application for Authority to Construct the Windsor Line Replacement Project

Argument Submission of Energy Probe Research Foundation

October 2, 2020

Executive Summary

Energy Probe submits that the OEB should grant Enbridge Gas the authorization under section 101 of the OEB Act to construct the replacement pipeline at the location and with the depth of cover approved in the EB-2019-0172 Leave to Construct Decision. Essex County has not presented persuasive evidence why such authorization should not be granted. Energy Probe submits that the OEB should refrain from issuing any order regarding the removal of the old NPS10 pipe.

However, Energy Probe is concerned that the authorization might have the unintended consequence of signaling to utilities that they do not have to negotiate for construction permits with municipalities since the OEB will issue authorizations to proceed with construction if municipalities refuse to issue permits. It may even make municipal permits redundant. In its decision the OEB should make clear to Enbridge that it expects Enbridge to obtain permits through negotiations with municipalities.

Section 101 Application

This may be the first application under Section 101 of the OEB Act filed since the creation of the OEB in 1960. There may not be any experience with the wording of applications under Section 101. Energy Probe submits that the OEB should first decide if the wording of the application by Enbridge is appropriate. For that purpose, the OEB should look at Section 101 which is reproduced below in full.

Crossings with leave

101 (1) The following persons may apply to the Board for authority to construct a work upon, under or over a highway, utility line or ditch:

1. Any person who has leave to construct the work under this Part.
2. Any person who intends to construct the work and who is exempted under section 95 from the requirement to obtain leave.
3. Where the proposed work is the expansion or reinforcement of a transmission or distribution system, any person who is required by the Board, pursuant to a condition of the person's licence, to expand or reinforce the transmission or distribution system.
4. The officers, employees and agents of a person described in paragraph 1, 2 or 3. 2006, c. 33, Sched. X, s. 3.

Procedure

(2) The procedure set out in subsections 99 (1) to (4) applies with necessary modifications to an application under this section. 1998, c. 15, Sched. B, s. 101 (2).

Order

(3) Without any other leave and despite any other Act, if after the hearing the Board is of the opinion that the construction of the work upon, under or over a highway, utility line or ditch is in the public interest, it may make an order authorizing the construction upon such conditions as it considers appropriate. 1998, c. 15, Sched. B, s. 101 (3).

Section 101 allows gas distributors and transmitters to apply to the Board for authority to construct a work upon, under or over a highway, utility line or ditch if the distributor or transmitter has a leave to construct (LTC) decision under Section 90 under this of the OEB Act. Enbridge Gas meets this condition since it obtained LTC order in the EB-2019-0172 Windsor Pipeline replacement proceeding.

An order under Section 101 gives a distributor or a transmitter authorization to proceed with construction even if it has not obtained construction permits from affected municipalities or agencies such as conservation authorities. Section 101 order is therefore a very powerful order that could be open to abuse if it is not used as intended.

Energy Probe believes that the Legislature intended that orders under Section 101 be used in situations where a municipality or an agency refuses to issue permits without good reasons. The question for the Board is to decide if Essex County has persuasive reasons for not issuing permits to Enbridge. Energy Probe believes that the evidence supporting Essex County's reasons for not issuing permits to Enbridge Gas for construction of the pipeline on are not persuasive as is explained later in this document.

In its application dated June 12, the following relief was requested by Enbridge Gas:

"Enbridge Gas requests the Board issue a decision with:

- a. an order, pursuant to section 101 of the Ontario Energy Board Act, 1998, S.O. 1998, c-15, Schedule B, granting Enbridge Gas authorization to, within the County Road 46 right of way, construct a work upon, under or over a highway, utility line or ditch at a depth of cover of approximately 1 metre and otherwise in accordance with Enbridge Gas's standards and procedure as typically shown in Exhibit B, Tab 1, Schedule 1, Attachment 2; including abandoning the existing pipeline in-place; or*
- b. In the alternative to a), an order, pursuant to section 101 of the Ontario Energy Board Act, 1998, S.O. 1998, c-15, Schedule B and Condition 4 of the Decision and Order in the Leave to Construct Application, direction and authorization, in whole or in part, to:*
 - i. construct a work upon, under or over a highway, utility line or ditch at a depth of cover of approximately 1.5 metres and otherwise in accordance with CSA Z662 and Enbridge Gas's construction policies and standards; and/or*
 - ii. Removal and remediation of approximately 21.8 kms of NPS 10 steel existing steel main.*

c. *Such other orders as are necessary for the proper completion of this proceeding.*”

The application by Enbridge Gas gives the OEB two Alternatives, (a) and (b). However, Enbridge only has a Leave to Construct order for the pipeline described in Alternative (a). It does not have a Leave to Construct a different pipeline as contemplated in Alternative (b). Energy Probe submits that the OEB can not under Section 101 authorize construction of a pipeline for which there is no Leave to Construct decision.

By wording the application as an *either or* decision Enbridge Gas is attempting to transfer responsibility for the outcome of the decision from its management to the OEB. In effect, the application says that Enbridge management can not decide what to do and is asking the OEB to tell it what it must do. Energy Probe submits that a properly worded Section 101 application would request authorization for a decision that management of a utility has already made and would fully accept accountability for the outcome.

There is evidence that Enbridge may have already partially succeeded in transferring the accountability from its management to the OEB since Essex County indicated that it will hold the OEB accountable¹. Energy Probe believes that an application that attempts to transfer accountability to the Board is improper and that the OEB could have declined to proceed with it. Since the OEB has decided to proceed with the application, it should make clear in its decision that it will not allow Enbridge to transfer accountability for its management decisions to the Board.

The application is also improper since Alternative (b) contemplates that the OEB panel would re-engineer the pipeline by moving its location and changing the depth of cover. OEB panels do not provide pipeline engineering services to utilities. They either approve or withhold approvals of pipelines engineered by utilities.

Energy Probe submits that for the above reasons, the OEB should only consider Alternative (a) and either issue the requested authorization or not.

¹ Essex response to Energy Probe – Q#1 (b)

There was no motion for review, so the EB-2019-0172 LTC Decision still stands.

Enbridge did not file a Motion to Review the Board's EB-2019-0172 Leave to Construct Decision as permitted under Rule 42 of OEB's Rules of Practice and Procedure. Neither did Essex County nor any other party. The EB-2019-0172 Decision therefore still stands. In that decision, based on the evidence before it, the Board Panel decided to approve the Windsor Pipeline Replacement Project.

Energy Probe was an intervenor in the EB-2019-0172 LTC proceeding and argued that there was inadequate evidence on the record for the Board to approve the project. The Board Panel was not persuaded by Energy Probe's argument. Energy Probe accepts the Board's decision and is not re-arguing it or seeking that it be varied in any way. Energy Probe submits that no part of the decision can be varied without a motion to review.

Location of the replacement pipeline can not be changed in this proceeding.

In the EB-2019-0172 LTC proceeding the OEB approved the Windsor Pipeline Replacement project including the location of the replacement pipeline. The environmental report by Stantec that resulted in the selection of the preferred route may have been deficient since Stantec failed to consult Essex County in its preparation². The report was reviewed by Board Staff and by the Ontario Pipeline Coordinating Committee who approved it. There is no evidence that either entity was aware of that fact, or if they had been aware of it would have withheld their approval.

It appears from the evidence that during the EB-2020-0172 LTC proceeding Enbridge did not disclose to the OEB that Essex County had not agreed with the location of the replacement pipeline. Energy Probe believes that this non-disclosure should be of concern to the Board. Essex County is a major stakeholder of this project and its position should have been reported to the OEB by Enbridge in the EB-2019-0172 LTC proceeding. It is particularly troubling if this non-disclosure was a deliberate part of the regulatory strategy by Enbridge.

As part of its evidence in the proceeding, Enbridge filed exhibits that showed the precise location of the replacement pipeline along County Road 46. Board Staff and intervenors reviewed the evidence. No

² Essex Response to Energy Probe – Q#2

party in the proceeding questioned the location of the pipeline. Essex County was aware of the proceeding and chose not to intervene.

The OEB approved the replacement project including the precise location of the pipeline. That location can not be changed without a motion to vary the decision. No party has filed such a motion. The replacement pipe must therefore be constructed at the precise location approved by the Board.

If there had been a Settlement Process as suggested by Energy Probe, Enbridge Gas and Essex County could have negotiated a change in the location of the replacement pipe and then requested OEB approval for the change by filing a motion. Both parties declined the opportunity to negotiate.

Therefore, alternative (b) presented in the EB-2020-0160 application can only be considered if there is a motion to review the EB-2019-0172 LTC Decision. As no such motion has been filed, the location of the replacement pipeline approved in the EB-2019-0172 LTC Decision can not be changed by an order resulting from the EB-2020-0160 proceeding.

The depth of cover proposed by Enbridge is appropriate

The depth of cover over the NPS6 replacement pipeline proposed by Enbridge is appropriate because it meets the standards of the Technical Standards and Safety Authority (TSSA) for distribution pipelines. The NPS6 replacement pipeline meets the definition of a distribution pipeline and is therefore not a transmission pipeline as Essex claims.³

The TSSA is responsible for technical standards under which gas distributors operate in Ontario⁴. The technical standard currently in effect in Ontario is the version of CSA Z662-15 that TSSA has adopted. The fact that there is a later version and that it may be adopted by TSSA in the future is irrelevant. Opinions by consulting engineers are also irrelevant as the OEB does not have the authority to impose different standards than TSSA.

³ AIC, paragraphs 33 to 35, pages 7 and 8

⁴ TSSA Letter, July 21, 2020

TAC Guidelines for Underground Utility Installations Crossing Highway Rights-of-Way referred to by Essex County are not relevant because they are guidelines only and not standards⁵ that gas distributors are required to follow. Enbridge could have agreed to follow the TAC guidelines but the OEB can not order Enbridge to follow them.

The OEB can not order the removal of the old NPS10 pipeline.

Essex County wants Enbridge to remove the old NPS10 pipeline. Enbridge wants to abandon it in place as that is its normal practice. No party has applied to the Board to have the pipeline removed. Even if such an application was filed, Energy Probe believes that the Board does not have the authority to direct a utility as to how it must dispose of shareholder owned assets no longer in use and not in rate base. It can only approve or disapprove the costs of removal or the revenues from disposal of such assets in a rate proceeding. Energy Probe believes that if Essex County wants the old NPS10 pipe removed it can either negotiate with Enbridge Gas or take it to court.

Conclusion

Despite its concerns with the EB-2020-0160 application, Energy Probe submits that the OEB should issue the authorization requested by Enbridge Gas in its application as Alternative (a) for the following reasons.

- Essex County decided not to intervene in the EB-2019-0172 proceeding to protect its interests despite being fully aware of the proceeding.
- Essex County failed to present persuasive evidence in the EB-2020-0160 proceeding as to why authorization to construct under Section 101 should not be issued to Enbridge Gas.
- Enbridge has a Leave to Construct the pipeline approved in the EB-2019-0172 LTC Decision. It does not have a Leave to Construct a pipeline serving the same purpose but in a different location.

⁵ Essex response to Energy Probe – Q#5 (a)

- The location of the replacement pipe can not be changed by this proceeding because there was no motion to vary the EB-2019-0172 LTC Decision that determined that location to be appropriate.
- The depth of cover can not be changed by this proceeding because the OEB does not have the authority to change TSSA standards.
- The OEB can not order Enbridge to remove the pipe since it does not have the authority over the disposal of shareholder owned assets that are not in use and not in rate base.

The OEB should make clear in its decision that it holds Enbridge management fully accountable for any outcomes resulting from the decision.

Energy Probe is concerned that the authorization might have the unintended consequence of signaling to utilities that they do not have to negotiate for construction permits with municipalities since the OEB will issue authorizations to proceed with construction if municipalities refuse to issue permits. It may even make municipal permits redundant. In its decision the OEB should indicate to Enbridge that it expects Enbridge to obtain permits through negotiations with municipalities and that it should not assume that all applications under Section 101 will be successful.

Gas distributors have in the past been able to negotiate agreements with municipalities they serve. This application by Enbridge Gas is a troubling development. Energy Probe believes that Enbridge should avoid applications under Section 101 as they may lead to reduced cooperation between municipalities and Enbridge Gas. Public interest is best served if Enbridge Gas and municipalities cooperate and resolve any differences through negotiations without involving the OEB.

Respectfully submitted on behalf of Energy Probe by its consultant.

Tom Ladanyi

TL Energy Regulatory Consultants Inc.