

ONTARIO ENERGY BOARD

IN THE MATTER OF the *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.;

WRITTEN SUBMISSIONS OF THE COUNTY OF ESSEX

I. INTRODUCTION

Overview

1. Enbridge Gas Inc. ("**Enbridge**") applied to the Ontario Energy Board (the "**Board**") pursuant to Section 101 of the *Ontario Energy Board Act, 1998*, S.O. 1998, Chapter 15, Schedule B, seeking an Order as follows:

- (1) to construct a high pressure steel natural gas pipeline within the right-of-way of County Road 46 with a minimum depth of cover of only 1.0 metre, which is not in compliance with the requirements of the County of Essex; and
- (2) to abandon the existing NPS 10 pipeline in place.

2. The Corporation of the County of Essex (the "**County**") is the road authority responsible for County Road 46. As the road authority, it is incumbent upon the County to manage not only its right-of-way, but the safety and integrity of County Road 46. As

part of its mandate as the responsible road authority, the County must set standards and construction requirements for all utilities and others seeking to utilize the right-of-way for their infrastructure. In this application, Enbridge is concerned only with its pipeline, while the County's concerns are much broader, as the County is concerned with regulation of the use of its right-of-way for all users, including utilities, in the public interest.

Important Considerations

3. The **only** sworn evidence before the Board is that of the County. Jane Mustac, the Director of Infrastructure Services and the County Engineer for the County swore an Affidavit setting out various facts and the basis of the position of the County. Dr. William Tape, the expert retained on behalf of the County, swore an Affidavit confirming the contents of his three reports and, further, signed an Acknowledgement of Expert's Duty on July 24, 2020 confirming it is his duty to do the following:

- (1) to provide opinion evidence that is fair, objective and non-partisan;
- (2) to provide opinion evidence that is related only to matters that are within his area of expertise; and
- (3) to provide such additional assistance as the Board may reasonably require, to determine a matter in issue.

4. Enbridge has not provided any sworn Affidavit evidence to the Board, but simply relies upon statements and submissions made by counsel. None of the experts upon whose opinions Enbridge is relying, swore an Affidavit confirming the contents of their respective reports and none of the experts of Enbridge signed an Acknowledgement of Expert's Duty.

5. With all due respect, it is the submission of the County that where there is any conflict in the evidence, the Board should prefer and accept the sworn evidence presented by the County.

6. In reviewing this matter, the Board should keep in the forefront of all its deliberations that the County is seeking to act in the public interest by ensuring that the construction of the new pipeline protects the safety of the public in a reasonable manner and allows the County to manage its right-of-way.

II. SUBMISSIONS

Jurisdiction of the Board

7. Pursuant to the provisions of the *Ontario Energy Board Act, 1998, supra*, in Section 2 and, in particular with respect to this application, paragraph 3, the objective of the Board, in carrying out its responsibility in relation to gas, is, "to facilitate rational expansion of transmission and distribution systems". Section 101 of the *Ontario Energy Board Act, 1998, supra*, provides that any person who has leave to construct the work may apply to the Board, "for authority to construct a work upon, under or over a highway, utility line or ditch."

8. Section 101(3) of the *Ontario Energy Board Act* provides the Board with the authority to, "make an order authorizing the construction upon such conditions as it considers appropriate". It is the position of the County that the Board does not have the jurisdiction nor the expertise to dictate to the responsible road authority, the County, the

appropriate standards and conditions that a utility, Enbridge, must meet in utilizing the road authority's right-of-way.

9. With due respect to the Board, the function of the Board is not to address or determine proper engineering practice nor to comment on whether the standards adopted by the County, the responsible road authority, are proper or reasonable. The County agrees that the construction of this pipeline, in general, is in the public interest. However, it is the position of the County that a depth of cover of less than 1.5 metres is not in the public interest. The County will provide the basis of this position in more detail below.

10. Aside from the submissions made by counsel on behalf of Enbridge, Enbridge has presented no evidence to establish that a depth of cover of less than 1.5 metres is in the public interest. At all times, the County has agreed to the construction of the proposed gas pipeline subject to compliance with the County's construction standards. Enbridge is requesting that the Board make a determination as to the appropriate standard and guideline to be used in the construction of the gas pipeline, in particular, the appropriate depth of cover, a matter not within the jurisdiction or expertise of the Board.

11. Enbridge alleges that placement of the pipeline proposed by Enbridge would be safer, create less impact on the environment, the Town of Lakeshore, motorists and adjacent landowners without any evidence to support said statement. Enbridge, who brought this application and had sufficient opportunity to present evidence to the Board, has provided no evidence of the difference in impact on the environment, the Town of

Lakeshore, motorists and adjacent landowners between the depth of cover proposed by Enbridge and the requirements of the County.

12. The County submits that **if** the County had refused Enbridge access to the right-of-way, the Board would have jurisdiction to order the County to do so. However, that is not the case in the matter currently before the Board. The County has permitted Enbridge to utilize the right-of-way, but has made it clear that in the alignment currently preferred by Enbridge that a greater minimum depth of cover was required to accommodate the future needs of the County related to the roadway itself and the management of the right-of-way for other infrastructure. Enbridge has always been capable of utilizing a different alignment within the right-of-way or utilizing its existing private easements if it wanted to install the pipeline with a lesser minimum depth of cover. However, for reasons known only to Enbridge, it has decided to insist on the current alignment, despite the County's minimum depth requirements.

13. The County further notes that the authority of the County in determining the appropriate placement of the pipeline within the right-of-way is addressed in the Franchise Agreement between the County and Enbridge, dated December 11, 1957 (the "**Franchise Agreement**"). The Franchise Agreement provides, *inter alia*, as follows:

"3. The said pipeline shall be laid across the said highways in locations approved by the Road Superintendent of the County of Essex for the time being or such other officer as may be appointed by the Council for that purpose...

4. All pipelines shall be placed underground, if required by the officer of the Corporation and shall be so

constructed as not to interfere with the use of the highway...

6. In the event that the Corporation in pursuance of its statutory powers shall deem it expedient to alter the construction of any highway...and in the course thereof it shall become reasonably necessary that the location of a main, line, pipe or works of the Company laid or operated under this By-law should be altered at a specified point to facilitate the work of the Corporation, then upon receipt of reasonable notice in writing from the Clerk of the Corporation specifying the alteration desired, the Company shall, at its own expense, alter or relocate its main, pipe, line or works at the point specified."

14. The County further submits that Enbridge has failed to state what jurisdiction the Board has to override the provisions of the Franchise Agreement, other than its overarching powers provided for pursuant to Section 101(3) of the *Ontario Energy Board Act, supra*. However, the County submits that in order for Section 101(3) of the *Ontario Energy Board Act, supra* to be exercised by the Board it first has to determine that the method of construction proposed by Enbridge, as opposed to what is being required by the County, is in the public interest, and Enbridge has not provided any such evidence to date. Failing that determination being made by the Board, it lacks the jurisdiction to override the provisions of the Franchise Agreement and the requirements imposed by the County on Enbridge to complete the Project.

15. The Franchise Agreement provides the discretion as to the placement of the pipelines to the County Engineer. The County submits that this is logical as the County Engineer is in the best position to determine how to balance the competing needs for use of the right-of-way by a variety of users. The County further submits (as further

outlined below) that it is not in the public interest to override the requirements of the County and to permit Enbridge to construct the pipeline at a depth that does not consider the County's current and future needs. As such, the Board does not have the jurisdiction to override the provisions of the Franchise Agreement.

Leave to Construct Application

16. Enbridge originally applied to the Board on August 9, 2019 for an Order granting Enbridge leave to construct approximately 64 kilometres of nominal pipe size ("**NPS**") 6 pipeline to replace a section of the existing NPS 10 pipeline (the "**Project**") pursuant to Section 90(1) of the *Ontario Energy Board Act, supra.* (the "**LTC Application**").

17. Although served and aware of the application, the County did not participate in the application for leave to construct for numerous reasons, most importantly that the application itself did not address or refer to the depth of cover other than a single paragraph in the Environment Assessment Report. The County had no objection to the replacement of the pipeline and was in discussions with Enbridge regarding the location of the pipeline. At the time of the LTC Application, Enbridge had not made any objections or raised any concerns related to the depth of cover of 1.5 metres upon which the County insisted if the pipeline was placed within the 6.0 metres of the existing paved edge of the roadway of County Road 46.

18. The Board rendered a Decision and Order dated April 1, 2020 (the "**LTC Order**") granting Enbridge leave to construct the NPS 6 pipeline subject to certain terms

and conditions. The LTC Order did not specify the depth of cover of the new pipeline but it did require that Enbridge, "certify that it has obtained all approvals, permits, licences, and certificates required to construct, operate and maintain the proposed Project". Rather than obtaining the necessary approvals, permits, licences and certificates from the County, Enbridge chose to proceed with this Section 101 application to the Board, attempting to circumvent the requirements of the County as the responsible road authority.

19. Enbridge states in its Submissions that Enbridge is required to advise the Board of "any proposed changes in the project", and that is the purported basis for Enbridge commencing the Application in this matter. However, the County submits that there have been no "proposed changes" that require the Board's approval or oversight. The LTC Order did **not** provide for the minimum depth of cover for the pipeline but **did** require that Enbridge obtain municipal "approvals, permits, licences, and certificates required" to complete the Project. The County submits that as the LTC Order was silent on the minimum depth of cover, and as the LTC Order provided that municipal approvals were required, the existing LTC Order is sufficient for the Project to proceed subject to Enbridge obtaining the necessary approval from the County. Enbridge is attempting to circumvent the required approval process provided for in the LTC Order by seeking an order from the Board regarding the appropriate depth of cover.

County Road 46

20. The County is the road authority and responsible to ensure that all construction within the right-of-way conforms with the requirements and standards of the

County to ensure the safety and wellbeing of the public. The responsibility of the County extends well beyond the mandate of Enbridge and includes numerous other utilities and entities competing for use of the right-of-way.

21. As the road authority responsible for not only County Road 46 but all roads and rights-of-way within its jurisdiction, the County adheres to a set of standards which it applies to all entities seeking to utilize the right-of-way. The County, after careful review and consideration, determined the appropriate standards to which activities within the right-of-way would be subject. Such decision is within the sole jurisdiction of the County given that the County is responsible for all activities undertaken within the right-of-way within its jurisdiction. The County applies those standards to all activities undertaken within the right-of-way including the construction of the proposed Project by Enbridge.

22. County Road 46 is a heavily travelled east-west road in Essex County. It is used to transport heavy and oversized loads, often using the shoulder to accommodate those loads, in addition to being used to transport farm equipment as well as the usual vehicular traffic.

23. The Affidavit of Jane Mustac sets out the Average Daily Traffic on County Road 46 as follows:

- (1) a high of 11,972 vehicles per day;
- (2) a low of 2,012 vehicles per day;
- (3) heavy truck traffic varies from a high of 12.39% to a low of 4.85% of the vehicular traffic.

24. In addition, the County issued 188 permits for oversized and overweight trucks in 2019 with the following breakdown of the types of permits:

Annual Permits (an unlimited number of trips)	79
Project Permits (the number of trips varies by permit)	18
Single Trip Permits (one trip per permit)	69
Superload Permits (generally one trip per permit)	22

25. Given the high volume of traffic, especially the high volume of oversized and overweight trucks, the County advised Enbridge that it required any pipeline placed within 6.0 metres of the current paved edge of the roadway (being the current and future planned travelled portion of the road) including both the paved road and the unpaved shoulder, have a minimum depth of cover of 1.5 metres.

26. The LTC Order required that Enbridge "obtain" all approvals, permits, licences and certificates required to construct the proposed project. The onus rested upon Enbridge to obtain those approvals. The County set out the requirements to obtain the necessary approvals, permits, licences and certificates required to construct the proposed project, but Enbridge refused to adhere to the standards and conditions the County applies to this and all other projects within the right-of-way.

TAC Guidelines

27. The onus rests upon the County as the responsible road authority to determine the standards and conditions for utilities and other entities using the right-of-way. It is not the responsibility of Enbridge to criticize or refuse compliance with County standards that meet or exceed those that Enbridge is regulated to comply with. The

County must ensure that all roads within its jurisdiction are maintained properly for the safety and wellbeing of all members of the public, clearly being in the public interest.

28. Enbridge takes the position that complying with the minimum standards contained in CSA Z662-2015 is sufficient in the circumstances, and that Enbridge is not required to meet the County's requirements, despite the fact that Enbridge is seeking to construct a high-pressure steel gas pipeline in the right-of-way for which the County is responsible. The County in no way objects to the construction of the pipeline nor does it wish to delay its construction. However, Enbridge is required to adhere to the same standards and conditions of the County as any other entity installing or constructing facilities within the right-of-way.

29. The primary concern of the County is to ensure the safety and wellbeing of the public using County Road 46 and to manage the right-of-way for all users and for the County's future needs. It is in the public interest that heavily travelled roads are safe for use by the public and that all needed utilities have access to use of the right-of-way.

30. Enbridge takes the position that the County should not utilize the TAC Guidelines in its role as the road authority and, instead, should rely on the CSA Z662-15. The CSA Z662-15, entitled "Oil and Gas Pipeline Systems", is aimed and directed at the oil and gas industry and not road authorities such as the County. On the other hand, the TAC Guidelines were written to assist road authorities in maintaining the rights-of-way under their jurisdiction. Specifically, in the introduction, the TAC Guidelines state:

"It is the intent of these general guidelines to assist the various road authorities in establishing and

administering reasonably uniform utility accommodation guidelines and standards. However, even if policies, guidelines, standards, specifications and regulations may vary from one province to another, **utilities should be installed in accordance with each road authority's accommodation guidelines** minimizing possible interference and impairment to the highway and its structures, minimizing adverse visual impacts and minimizing maintenance are covered in these guidelines. Whenever appropriate, existing utility accommodation guidelines and standards should be updated in light of these guidelines." (*emphasis added*)

31. The TAC Guidelines are intended to provide a general guideline for road authorities,

"in regulating the use and occupancy of highway (and freeway) rights-of-way by utilities. They are related to matters, which are the responsibility of road authorities for preserving the safe operation, maintenance, construction and integrity of the highway." [TAC Guidelines – 2. Applicability]

32. The TAC Guidelines recognize that the responsibilities and considerations of the road authority differ from those of the utility, in this case, Enbridge, wishing to use and occupy the right-of-way. The primary responsibility of the County, while accommodating Enbridge, is to ensure that such accommodation does not adversely affect the constructability, operation, and maintenance of County Road 46. Allowing Enbridge to utilize a depth of cover of less than 1.5 metres fails to address the responsibility of the County in the circumstances.

33. Although Enbridge may be of the view that a depth of cover as set out in CSA Z662-15 of 0.6 metres is sufficient in the circumstances, Enbridge is the utility and not the responsible road authority. The CSA Z662-15 sets out **minimum** standards only.

This does not translate into a requirement that the depth of cover cannot be more than 0.6 metre only that it cannot be less than 0.6 metres. Further, as provided in more detail below, once County Road 46 is widened, if Enbridge buries the pipeline with only a minimum depth of 1.0 metre, the pipeline will be exposed during widening work and will not meet even the 0.6 metre minimum depth requirement of CSA Z662-15 once the widening work is completed.

34. The County submits that it is in the public interest for Enbridge to comply with the County's requirements in completing the Project, which includes compliance with the TAC Guidelines, for, among other reasons, the following:

- (1) The greater minimum depth required by the TAC Guidelines in the travelled, or future travelled, portion of the road makes it less likely that the installation of a high pressure gas pipeline under a heavily travelled roadway will not adversely affect the use, operation and maintenance of County Road 46;
- (2) If Enbridge does not meet the greater minimum depth of cover required by the TAC Guidelines during installation of the Project now, it will be required to relocate or provide for a greater depth of cover when County Road 46 is widened in the near future. The County submits that it is not in the public interest to relocate the pipeline in the near future at great expense to either Enbridge, the ratepayers, and/or the taxpayers of the County; and
- (3) The greater minimum depth of cover required by the County makes its less likely that the users of County Road 46 are placed in a

position of serious potential harm should, for example, a highly pressurized gas pipeline rupture.

35. There is no justification for the statements made by Enbridge in its submissions that the "adoption" of the TAC Guidelines was made after the fact to support and justify the position taken by the County. The County has the responsibility and the obligation to manage the right-of-way and operate the roads within its jurisdiction in a manner ensuring the safety, traffic carrying ability and physical integrity of the roads. The use of the TAC Guidelines is one tool in the arsenal of the County to reasonably regulate the presence of utilities within the right-of-way. The obligation rests upon the County to determine the conditions upon which a utility may place its infrastructure within the right-of-way. The County consistently applies standards, policies and best practices, including the TAC Guidelines, to all utilities wishing to place structures within the right-of-way.

36. The County further submits that if Enbridge is not satisfied with the County's requirements for minimum depth of cover along the alignment proposed by Enbridge, that it remains open for Enbridge to utilize the existing pipeline's alignment to construct the Project. If Enbridge were to construct the Project along the existing pipeline's alignment, the County would not require a greater depth of cover. It is only the proximity to the travelled, or future travelled, portion of the road that results in the County requiring a greater minimum depth of cover.

CSA Z662

37. Enbridge relies on CSA Z662-15 as setting the minimum depth of cover required for the NPS 6 pipeline. Although there is a more recent version of the CSA Z662, CSA Z662-19, Enbridge insists that the older version governs. The 2019 edition, in the Preface, specifically states, "This is the eighth edition of CSA Z662 Oil and gas pipeline systems. It supersedes the previous editions published in 2015, 2011, 2007, 2003, 1999, 1996 and 1994." The position taken by Enbridge is contrary to the intent of CSA Z662 and contrary to best engineering practices.

38. The expert opinion of Dr. Tape confirms that good engineering practice requires adherence to the most recent and up-to-date standards and guidelines.

39. Enbridge relies on Table 12.5 of the CSA Z662-15 to justify a depth of cover of 1.0 metre. Table 12.5 falls within Clause 12 of the CSA Z662-15. According to Clause 12.1.2,

"Clause 12 does **not** apply to **steel** distribution or service lines intended to be operated at hoop stress of 30% or more of the specified minimum yield strength of the pipe." (*emphasis added*)

40. Clause 12, and Table 12.5 within clause 12, of CSA-Z662 deals with polyethylene piping, and not with steel piping. Steel piping is to be designed and installed in accordance with clause 4.

41. Enbridge has confirmed that the NPS 6 pipeline to be installed in the project is a **steel** pipeline with a maximum operating pressure of 3,450 kPa, a high pressure pipeline. Enbridge attempts to distinguish between a distribution line and a transmission line, arguing there are different depth of cover requirements for each type line. It is the

position of the County that the characterization of the pipeline is irrelevant. From the prospective of the County, the relevant issue is the fact that it is dealing with a high pressure line which Enbridge intends to place within the travelled portion of County Road 46.

42. It is the position of the County that even in applying the CSA Z662 standards, Enbridge is relying on clauses that do not apply to steel pipelines. Clause 4 specifically applies to steel pipelines as set out in Clause 4.1.1 which states:

"Clause 4 includes the requirements for the design of pipeline systems constructed primarily from steel, including compression stations over 750 kW and pipe stations over 375 kW."

43. Clause 4.11.1 of the CSA Z662-19 addresses the issue of the depth of cover as follows:

"The cover requirements for buried pipelines **shall** not be less than the values given in Table 4.9, except as allowed by Clause 4.11.2" (*emphasis added*)

44. Clause 1.9 of CSA Z662-19 defines "shall" as, "to express a requirement, i.e., a provision that the user is obliged to satisfy in order to comply with the standards".

45. Table 4.9 of the CSA Z662-19 sets out the **minimum** cover for buried pipelines below the travelled surface of a road to be 1.2 metres. Thus, for Enbridge to meet the standards to which it alleges it adheres, the depth of cover **must be a minimum** of 1.2 metres and not the 1.0 metres proposed by Enbridge.

46. The County submits that the applicable standards to the installation of the pipeline are the standards that are in place when the pipeline is installed, not when the pipeline installation was being designed. As such, the County submits that if the CSA-Z662 standards are applicable, that it is the 2019 version that is applicable, and not the 2015 version.

47. The County further submits that if Enbridge is not satisfied with the minimum depth required by either the County or the 2019 version of the CSA-Z662, it remains open to Enbridge to revise its planned installation to reduce the minimum depth of cover required. Enbridge could leave the pipeline in the current alignment preferred by Enbridge, but encase the pipeline, which would reduce the minimum depth of cover to 1.0 metres. Alternatively, Enbridge could utilize the existing alignment, which would reduce the minimum depth of cover in areas outside the current or future travelled portion of the roadway. However, Enbridge has insisted on remaining within its current preferred alignment and has refused to encase the pipeline.

Location of the Pipeline

48. The requirement of the County that the NPS 6 pipeline have a minimum depth of cover of 1.5 metres only applies to the area within six metres of the current paved edge of County Road 46 (being the current and future travelled portion of the road). If Enbridge placed the pipeline in an area more than six metres from the travelled edge of County Road 46, the County would have no difficulty with a lower depth of cover. The County has communicated this to Enbridge repeatedly, but Enbridge has failed to justify why another alignment is not feasible, other than stating it is not feasible.

49. Although requested on numerous occasions to provide a reason for the refusal to place the pipeline more than six metres from the edge of the travelled portion of County Road 46, the only response received from Enbridge is "that it is not feasible". The County asked this question on a number of occasions during negotiations with Enbridge and the same question was asked in the Interrogatories of the County to Enbridge. To date, Enbridge Gas has refused to provide any reasoning or response to that question other than that "it is not feasible" and a broad statement of the possible conflict with other utilities and municipal drains. Although requested by OEB Staff Interrogatories and County Interrogatories, the only response provided by Enbridge as to why placement of the pipeline more than 6.0 metres from the edge of the road is not feasible is that, "[t]here are a number of conflicts with other utilities and municipal drains." [Exhibit I. STAFF.14, Page 2 of 2]

50. In the initial discussions with Enbridge, the County was of the view that the new pipeline should be placed along the same route and in the same area as the existing NPS 10 pipeline. Such placement would solve many difficulties and be less costly and, certainly, less intrusive. However, again, Enbridge has refused to proceed on that basis simply maintaining that, "it is not feasible".

Depth of Cover and Public Interest

51. In its submissions, Enbridge relies on Section 101(3) of the *Ontario Energy Board Act, supra*, to obtain an order from the Board to impose a minimum depth of cover of 1.0 metre upon the County. The County has never taken the position that Enbridge

may not construct the pipeline, but the County has insisted that Enbridge comply with the County's standards and conditions in issuing the necessary approvals in accordance with the LTC Order.

52. Enbridge makes broad and sweeping statements that the construction of the pipeline in general, as found by the Board in the LTC Application, is in the public interest. In the current application, the questions before the Board are:

- (1) whether a depth of cover of less than 1.5 metres in all the circumstances of this matter is in the public interest; and
- (2) whether it is in the public interest for the Board to effectively vary the LTC Order issued in the LTC Application because Enbridge is not satisfied that the County's standards are reasonable.

The issues before the Board do not relate to the construction of the pipeline, but rather the manner in which it will be constructed in the area within the jurisdiction of the County.

53. To make such a determination, the Board requires a great deal more evidence than the bald statements made by Enbridge that a minimum depth of cover of only 1.0 metre, in contravention of the County's requirements, is in the public interest. Enbridge Gas has presented absolutely no evidence of any environmental impacts should the depth of cover be 1.5 metre nor the impact on third parties such as the Town of Lakeshore and adjacent property owners.

54. The determination of whether a matter is in the public interest is really one of opinion based on the circumstances and facts presented. Whether a matter is in the

public interest is neither a question of law nor a question of fact. The construction of a gas pipeline in a manner that fails to meet the minimum safety standards of the road authority is not in the public interest. [See *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4 at paras. 106 and 107].

55. The County submits that in fact, the construction of this particular pipeline in the same or adjacent area to the existing pipeline would result in lower costs, less disruption to County Road 46 and would be most in the public interest. For reasons that Enbridge has refused to disclose, Enbridge has chosen to place this pipeline within the travelled (or future planned travelled) portion of the right-of-way. Such a decision requires that Enbridge comply with the standards of the County in constructing the gas pipeline including meeting a minimum depth of cover of 1.5 metres within the travelled (or future planned travelled) portion of the roadway.

56. The Board has before it the undisputed sworn evidence from the County Engineer, Ms. Mustac, and the expert of the County, Dr. Tape, in support of the requirements for a minimum depth of cover of 1.5 metres and the basis for those requirements.

57. The County submits that the Board should only interfere with its prior LTC Order (which gave the County approval authority for the Project) and/or the Franchise Agreement if it is in the public interest to do so. The County further submits that Enbridge has failed to provide any evidence as to why it would be in the public interest to do so. In contrast, the County has provided evidence as to why it is in the public interest for the

Board **not** to interfere with its prior LTC Order and/or the Franchise Agreement. This evidence includes, among other things:

- (1) protecting the County's needs for the roadway, which includes other users of the roadways, other utilities, and for the placement of other infrastructure;
- (2) the cost savings in having the pipeline installed in accordance with the County's standards now, such that there will be no relocation costs when County Road 46 is widened; and
- (3) helping to ensure the safety of users of the roadway.

Engineering Analysis

58. The only sworn Affidavit expert evidence before the Board is that of Dr. William Tape, the expert retained on behalf of the County. Further, Dr. Tape is the only expert that signed an Acknowledgment of Expert's Duty.

59. Enbridge has questioned the qualifications and expertise of Dr. Tape in giving his opinions in the matter. The Curriculum Vitae of Dr. Tape was attached as Exhibit "A" to his Affidavit and sets out his qualifications and experience. Not only does Dr. Tape have a Bachelor of Science in Civil Engineering, he also holds a Masters in Open Channel Hydraulics (Civil) and a doctorate in Structural (Civil) Engineering. He is a Professional Engineer and a professor at the University of Windsor. Despite the allegations of Enbridge, the County submits that Dr. Tape is amply qualified to provide the opinions he has given in this matter as they relate to the placement of underground infrastructure within a municipal roadway.

60. Enbridge is relying on reports prepared by Wood PLC and an Enbridge staff professional engineer. The Wood report appears to focus on the analytic assessment of the structural mechanics of the pipe itself, specifically its loading limits. The Wood report does not dispute the validity or importance of the TAC Guidelines but simply indicates that their engineers have not dealt with a municipality that applies the TAC Guidelines.

61. The County further notes that the Wood reports, in Appendix "E", makes the following relevant statement:

"In our experience, municipalities we have dealt with have not, to date, referenced the [TAC Guidelines]. For new or replacement plant installations, municipalities have deferred to the utility company's standard depth of bury. The **exception** to this practice has been at a location of an actual or anticipated future conflict, where addition[al] depth of bury has been required.

62. The County submits that the County has repeatedly advised Enbridge of both an "actual" and an "anticipated future conflict" which requires a greater depth of cover. The "actual" conflict is the current use of County Road 46 by, among other vehicles, agricultural equipment and for transporting oversized/overweight loads, which utilize both the paved roadway and the unpaved shoulder. The "anticipated future conflict" is the planned expansion and improvement of County Road 46. As outlined in the paragraph below, this will result in special challenges, which is why the County is insisting on adherence to the minimum depth of cover provided for in the TAC Guidelines.

63. The County submits that, as a point of clarification, there is a distinction between the minimum depth of cover for "below pavement structure (subgrade)" and

"below pavement surface" in the TAC Guidelines. The minimum depth of cover of 1.5 metres referred to in the TAC Guidelines is below pavement surface and is required in order to obtain a minimum depth of cover of 0.6 metres below the subgrade. Even at this depth, the future road construction activities will be challenging while working near any gas pipeline, especially a high pressure gas pipeline, and can be extremely dangerous. Extra caution and care will need to be exercised by the County even with a minimum depth of 1.5 metres in any future road work, which result in more costs being incurred by the County, which will have to be recouped through its taxpayers.

64. The County further submits that when the roadway is widened, if Enbridge is allowed to install the pipeline with a minimum depth of 1.0 metre, the pipeline would be without cover and/or exposed during the installation of the pavement and associated structure and subject to direct loading of construction vehicles and heavy equipment, including excavators, compaction equipment, etc. If the pipeline is installed at 1.0 metre as Enbridge is requesting, Enbridge would be required to relocate the pipe to accommodate the road improvements. It is presumed that the future costs of relocating the pipeline in the future will far exceed the costs of simply installing the pipeline in accordance with the County's requirements now. The County submits that it is not in the public interest to install a pipeline at the depth requested by Enbridge as it would result in major safety concerns, potential service interruption, and extreme costs to meet the County's requirements and needs later.

65. In the submissions of Enbridge, Enbridge makes the comment without any engineering opinion or evidence that a vehicle travelling parallel to the pipeline would only

have one wheel on the pipeline resulting in a 50% of the axel load over the top of the pipeline. There is absolutely no basis for this statement and no reliable evidence before the Board that this is actually the case nor what the affect of would be on the pipeline in the specific circumstances in question.

66. Dr. Tape is clear in his reports and in his sworn evidence that the CSA Z662 Guidelines established minimum standards. He notes that, "In the presence of other guidelines, the most stringent should be considered in the interest of best engineering practices and public safety". [Essex County, Tab 3, Page 4, Paragraph 12G]

67. Dr. Tape was clear that the appropriate depth of cover is 1.5 metres. Further, as the County is the responsible road authority, it is the obligation of the County to dictate the terms of use of the right-of-way and not the obligation of the utility, in this case, Enbridge, to dictate the terms of use.

68. Aside from the statement of Enbridge that the pipe is safe with a 1.0 metres depth of cover, neither the Wood report nor the report of the staff engineer specifically makes that comment or gives that assurance.

69. Enbridge relies on the letter from the TSSA that it is satisfied with Enbridge's reliance on the standards set out in CSA-Z662-16. However, the County submits that the TSSA is not a road authority, and has no jurisdiction to usurp the role of the County Engineer in determining what standards to apply within a roadway. If the County was demanding that Enbridge breach its regulatory obligations, the opinion of the TSSA would be highly relevant. However, the County is simply demanding that Enbridge meet the

County's requirements, which meet or exceed Enbridge's regulatory requirements. As such, the County submits that the opinion of the TSSA is irrelevant and unnecessary in this matter.

Widening of County Road 46

70. The County has made it abundantly clear to Enbridge that it intends to widen County Road 46 by increasing the number of lanes. The sworn and uncontradicted evidence of Jane Mustac, the Director of Infrastructure Services and the County Engineer, for the County, confirms that such widening will result in some portions of the new pipeline being either under the paved roadway or the unpaved shoulder. County Road 46 is a heavily travelled east/west corridor used by agricultural vehicles and oversized and/or overweight loads. As such, the unpaved shoulder also forms part of the travelled portion of the roadway.

71. The fact that there is no current official document setting out the proposed widening of County Road 46 is irrelevant. The only evidence before the Board regarding the widening of the road is that of Ms. Mustac, the County Engineer. The submission of Enbridge that the proposed widening is too speculative and too remote to warrant additional expenditures to provide additional depth of cover has no basis in fact.

72. Enbridge stated that it is in the public interest to construct the pipeline in its current location without any evidence to support that statement. In fact, upon widening of the road, the pipeline will lie under the travelled portion of the road requiring its removal and movement. This will result in additional costs, clearly not in the public interest.

Further, Enbridge is attempting to define public interest in a fine and narrow fashion to further its own interests at the expense of the public and safety.

73. According to Enbridge, there is no difference in cost whether the depth of cover is 1.2 metres or 1.5 metres. As such, it appears, based on the submissions of Enbridge, that it does not matter to Enbridge whether the 1.2 metres required by CSA Z662-19 or the 1.5 metres required by the TAC Guidelines are applied. If there is no difference in cost to Enbridge between 1.2 metres and 1.5 metres, then the requirements of the County that the minimum depth of cover should be 1.5 metres in accordance with the TAC Guidelines should be complied with. As such, the County submits that if the Board determines that it has jurisdiction to determine the minimum depth of cover of the pipeline, the Board should make an order that the pipeline have a minimum depth of cover of 1.5 metres within 6.0 metres of the current paved edge of County Road 46.

74. Again, the County submits that if Enbridge is not satisfied that it cannot comply with a minimum depth of cover of 1.5 metres within 6.0 metres of the current paved edge of County Road 46 due to cost concerns, Enbridge can utilize an alternate alignment further from the current or future travelled portion of the roadway.

75. Finally, the County submits that when County Road 46 is widened, a minimum depth now of 1.5 metres will result in the pipeline being 0.6 metres below the future subgrade of the roadway. The County requiring the minimum recommended by the TAC Guidelines now, will result in Enbridge being in compliance with the minimum standards they are purportedly regulated to comply with pursuant to CSA Z662-15.

76. The County submits that it is being reasonable in requiring a minimum depth of 1.5 metres now, as it will result in Enbridge being in compliance with the CSA Z662-15 standards during the life of the pipelines. The County further submits that it would required a minimum depth now of 2.2 metres to meet the minimum 1.2 metres required by the 2019 CSA Z662 standards and 2.5 metres now to comply with the 1.5 metres of minimum cover under the TAC Guidelines, once County Road 46 is reconstructed and improved.

77. Finally, based on the above, the County submits that Enbridge **cannot** meet the minimum requirements of CSA Z662-15 if it only has a minimum depth of cover of 1.0 metre now, as the pipeline will end up in the roadbed with no cover when the County completes the improvements to County Road 46. In essence the County cannot complete the improvements to County Road 46 with the pipeline at a depth of cover of 1.0 metre now and the pipeline will need to be relocated in short order. The County submits that the expense and delay to development in permitting the pipeline to be installed with a minimum depth of cover of only 1.0 metre is not in the public interest.

Removal of Existing Pipeline

78. The County has requested that Enbridge Gas remove the existing pipeline from the municipal right-of-way within the jurisdiction of the County. The evidence before the Board from the County is that the municipal right-of-way along County Road 46 corridor is crowded with many utilities seeking to utilize that corridor for their infrastructure.

79. Approximately 20% of the existing NPS 10 pipeline is located within private easements. Enbridge intends to remove the NPS 10 pipeline from the private easements as part of this project, but refuses to remove the NPS 10 pipeline from the right-of-way. Enbridge cites various reasons for this position including the remedial costs associated with the removal. Enbridge will be faced with similar issues in removing the NPS 10 pipeline from private easements.

80. It is incumbent upon the County to manage its right-of-way. The removal of the existing pipeline will allow other users to utilize that space given the increasing demands for use of the right-of-way.

81. The County submits that the Franchise Agreement in place between the County and Enbridge provides the County with the authority to demand Enbridge remove the abandoned pipeline at the expense of Enbridge.

82. Enbridge Gas, as part of this project intends to remove the old pipeline from the private easements and yet is reluctant to do so in the municipal right-of-way. Enbridge Gas has provided little if any evidence as to the reason this is not feasible other than perhaps additional cost. However, the County submits that the costs of removing the pipeline from the right-of-way at the same time as it is removed from the private easements is more cost efficient than Enbridge remobilizing equipment and labour to return to remove the old pipeline when the County needs to utilize the right-of-way around the time of construction related to the widening of County Road 46.

83. The County submits, that it is in the public interest for Enbridge to remove the existing pipeline, not only because it will be more cost effective to do so when dealing with the decommissioning and removal in the private easements, but also because it is in the public interest to remove a pipeline that could cause environmental problems going forward from potential leaks and other contamination. The County further submits that Enbridge has failed to demonstrate how it is in the public interest to keep an abandoned pipeline in place in a crowded right-of-way, especially when the abandoned pipeline serves no purpose and causes environmental concerns.

Concluding Submissions

84. Enbridge has rightly pointed out that Section 101(3) has not been expressly considered in a disputed case. Enbridge then relies on the decision contained in *Union Gas Ltd. v. Township of Dawn et al*, [1977] O.J. No. 2223 ("*Dawn*"), in support of its position. However, the *Dawn* decision was related to the passage of a By-law by a municipality that would serve to impede the distribution of natural gas across the Province. That is not the case in the matter currently before the Board. The County has a Franchise Agreement in place and rightly recognizes that Enbridge has the right to utilize the right-of-way. However, Enbridge has decided to utilize a portion of the right-of-way in which the County has future widening plans, and therefore requires a greater depth. Enbridge can either comply with the County's depth requirements in its current preferred alignment, or select an alignment that does not interfere with the County's other needs.

85. Again, as stated above, the determination of whether a matter is in the public interest is really one of opinion based on the circumstances and facts presented. Whether a matter is in the public interest is neither a question of law nor a question of fact. The County again submits that the construction of a gas pipeline in a manner that fails to meet the minimum safety standards of the road authority is not in the public interest. The County again states that it relies on the Supreme Court of Canada's decision in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, [2006] S.C.J. No. 4 at paras. 106 and 107].

86. Just prior to finalizing, serving, and filing the Written Submissions in this matter, the County received the Written Submissions of the OEB Staff, which at first glance appear to be largely supportive of the position advanced by Enbridge. The County submits that it is improper for the OEB Staff to have provided submissions in support of Enbridge prior to considering the County's submissions. The County submits that it should be granted an opportunity to provide submissions in response to the submissions of the OEB Staff.

III. SUMMARY OF ARGUMENT

87. In summary, the position of the County is as follows:

- (1) The County and the Board each have exclusive jurisdiction in separate areas relative to pipelines;
- (2) The Board has exclusive jurisdiction, among other things, relative to determining where expansions of transmission and distribution systems take place and the cost recovery for same;

- (3) Meanwhile, the County has exclusive jurisdiction, as the Road Authority, to determine the appropriate standards and conditions for utilities such as Enbridge, to utilize the right-of-way. The County has not commented on or taken issue with the design of the pipeline, which is an area within the jurisdiction of the Board. However, the County has commented and taken issue with the minimum depth of cover required for the alignment selected by Enbridge. Respectfully, the Board lacks the jurisdiction to usurp the role of the County as the Road Authority;
- (4) Tasking the County as the Road Authority with determining the appropriate location within the right-of-way for the placement of infrastructure is logical, as the County is in the best position to address its own future needs and competing claims for use of the right-of-way. Respectfully, the Board is not well positioned to address either future needs of the roadway or competing claims;
- (5) As such, the determination of the appropriate standards and conditions adopted and followed by County as the Road Authority regarding the actual construction methods utilized by utilities is outside the jurisdiction and beyond the expertise of the Board;
- (6) The County relies upon, among other things, the TAC Guidelines, which were specifically created to assist road authorities in maintaining the rights-of-way under their jurisdiction;

- (7) The CSA Z662 standards apply and are directed to the oil and gas industry and not to road authorities such as the County;
- (8) As the requirements of the TAC Guidelines meet or exceed the minimum standards with which Enbridge is regulated to comply, the Board should not interfere with the County's determination of the minimum depth of cover;
- (9) However, in the alternative, if the Board determines that the CSA Z662 standards should be applied rather than the County's standard, the appropriate version to use is the 2019 version of the Guidelines and not the 2015 version;
- (10) If the Board determines that the CSA Z662 standards apply, Clause 4 is the applicable provision of the CSA Z662-19 Guidelines, which applies to steel pipelines, and thereby applies to the NPS 6 pipeline in the current circumstances;
- (11) If the board determines that clause 4 of the CSA Z662 standards apply, the applicable provision of CSA Z662-19 is Table 4.9 which mandates a **minimum** cover for buried pipelines to be 1.2 metres below the travelled surface of a road;
- (12) As it is the position of Enbridge that there is no cost difference between a minimum depth of cover of 1.2 metres and a minimum depth of cover of 1.5 metres, in the interests of safety and fostering what is in the public interest, the appropriate depth of cover for any

pipeline buried within the current or future travelled portion of County Road 46 should be set at 1.5 metres;

- (13) The Franchise Agreement in place between the County and Enbridge provides the County with the authority to demand Enbridge remove the abandoned pipeline at the expense of Enbridge; and
- (14) If Enbridge is not satisfied with either the minimum depth requirements in its preferred alignment, or removing the existing pipeline, Enbridge can instead utilize the alignment of the existing pipeline. If Enbridge utilizes the alignment of the existing pipeline, the minimum depth of cover will be greatly reduced, and the County will not require that the existing pipeline be removed.

IV. ORDER REQUESTED

88. The County respectfully requests that based on the submissions above, and the unrefuted sworn evidence of the County, this honourable Board make the following orders:

- (1) Dismiss the Section 101 application of Enbridge on the basis that the Board does not have jurisdiction to order the appropriate standards and conditions the County as the responsible road authority should adhere in allowing Enbridge to utilize its right-of-way;
- (2) Confirm that the LTC Order remains in place, and that municipal consent remains a requirement of the Project;

- (3) In the alternative, order that Enbridge must select an alignment that is not within the current and/or future travelled portion of County Road 46 and comply with the standards of the County related to construction in the right-of-way;
- (4) In the further alternative, if another alignment is not feasible, order that Enbridge comply with the standards of the County, which include, but are not limited to, a minimum depth of cover of 1.5 metres in any area within the current and/or future travelled portion of County Road 46; and
- (5) Order the removal of all the existing NPS 10 pipeline within the right-of-way of the County following completion of the Project.

Dated: October 2, 2020

JOSEPHINE STARK
LSO # 24691J
DAVID M. SUNDIN
LSO # 60296N
McTAGUE LAW FIRM LLP
Barristers & Solicitors
455 Pelissier Street
Windsor, Ontario N9A 6Z9
(T) 519-255-4356
(F) 519-255-4384
(E) dsundin@mctaguelaw.com

LAWYERS FOR THE INTERVENOR,
THE CORPORATION OF THE COUNTY
OF ESSEX