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Dear Sirs and Ms. Fernandes,

RE: MATTER: COUNTY OF ESSEX ats ENBRIDGE GAS INC.

OEB FILE: EB-2020-0160

OUR FILE: 77571

Further to the letter of Ms. Christine E. Long, Registrar for the OEB, dated October 5, 2020, please find enclosed Response of the County of Essex to the OEB Staff Submissions, which is being served on you pursuant to said letter and the Rules of Practice and Procedure of the Board.

As always, should any of you need to discuss this matter further for any reason, please do not hesitate to contact my office.

Yours truly,

McTAGUE LAW FIRM LLP



DAVID M. SUNDIN

DMS/dm

Encl.

c.c. OEB via email:

Christine E. Long – Registrar and Board Secretary – boardsec@oeb.ca

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.;

RESPONSE OF THE COUNTY OF ESSEX TO THE OEB STAFF SUBMISSIONS

I. INTRODUCTION

1. The Corporation of the County of Essex (the "**County**") has reviewed the OEB Staff Submission regarding the Section 101 Application brought by Enbridge Gas Inc. ("**Enbridge**"). In the interests of fairness and to ensure a full and complete argument is presented to the OEB, the OEB, by letter dated October 5, 2020 advised that it would allow the County to make a short written reply to the OEB Staff Submissions.

2. The County, intends to make submissions primarily on the following points from the OEB Staff Submissions:

- 1) Which of the parties bears the onus in the Section 101 Application;
- 2) The appropriate evidentiary onus with respect to the various experts' reports, including the opinion of the TSSA.

II. SUBMISSIONS OF THE COUNTY

3. The County submits that the OEB Staff misapprehended the leave to construct application and the resulting leave to construct Decision and Order ("**LTC Order**"). The issue of the depth of cover was not addressed by Enbridge in the leave to construct application other than in one comment made in the Environmental Study completed by Stantec Engineering. The LTC Order is completely silent on the issue of depth of cover and, in fact, requires that Enbridge obtain all necessary approvals, permits, licences and certificates. Part of that process requires the approval of the applicable road authority, in this case, the County.

4. Enbridge, rather than complying with the LTC Order and obtaining all necessary approvals, permits, licences and certificates from the County, chose to proceed with this section 101 application to the OEB, essentially seeking a variance to the LTC Order. The OEB Staff Submissions do not address this issue and simply accept that the Section 101 application is the proper and appropriate vehicle in which to address the issue of the required depth of cover according to the standards of the County, the responsible road authority.

5. The OEB Staff Submissions suggest that the onus to establish the appropriate depth of cover and to vary the LTC Order rests with the County and that it is the County that is seeking to vary the LTC Order. The County submits that these suggestions by OEB Staff are incorrect.

6. The County is satisfied with the current LTC Order, which permits the project to proceed, but with Enbridge being required to obtain municipal consent. The only party seeking to vary the LTC Order is Enbridge, which apparently does not want to be burdened with obtaining the appropriate consents, as required by the LTC Order.

7. Enbridge has brought this application and the onus rests on Enbridge to establish, firstly, that the OEB has the jurisdiction to make the requested order and, secondly, that the LTC Order ought to be varied. The County submits that Enbridge has not satisfied either onus.

8. The County further submits that it appears that Enbridge is requesting, and the OEB Staff is supporting, that the OEB act in the role of the road authority for this project. However, Enbridge and the OEB Staff have failed to provide the jurisdiction that allows the OEB to assume the role of the road authority. The County has previously provided approval for this project, with the unanimous support of County Council, as evidenced by the passing of a By-law approving the form of a Road User Agreement that was in line with the County's minimum standards. The County cannot issue approvals for projects that do not meet its minimum requirements and Enbridge and the OEB Staff have failed to outline how approvals would be issued on this project if a depth that is not compliant with the County's standards is approved by the OEB, or what the role of County Council, if any, would be in the granting of said approvals.

9. The County further submits that if the Board determines that compliance with the minimum requirements of the County, as the road authority, is not in the public

interest, and the OEB takes on the role of the road authority, there is no mechanism for the OEB to administer the project. Neither Enbridge nor the OEB Staff have explained how the OEB can provide approvals, actively manage the project, oversee traffic control, and monitor the safety of roadway during construction activities. That is a role that is properly the function of the County, and for good reason, and which the OEB has no clear jurisdiction to interfere with.

10. The OEB Staff Submissions are based on the premise that as long as Enbridge complies with the requirements of CSA Z662-15 and satisfies the requirements of the Technical Standards and Safety Authority, (the "**TSSA**") this supersedes or overrides the standards of the County as the responsible road authority. The County submits that this position is contrary to the LTC Order that required Enbridge, as a condition of the LTC Order, to obtain the necessary approvals, permits, licences and certificates from the affected municipalities. The OEB Staff Submissions failed to address why it is appropriate for Enbridge to ignore the terms of the LTC Order by ignoring the requirement of the County, which meet or exceed the requirements of CSA-Z662-15.

11. The focus of the TSSA review of the project was limited to a determination of whether the project complied with the applicable construction standards to which Enbridge must adhere by regulation. The TSSA review did not comment nor address in any way the responsibilities and obligations of the County to manage its right-of-way nor did it offer any comment or opinion on the safe operation of the pipeline. Further, the

TSSA did not comment on why it would be inappropriate for Enbridge to comply with the requirements of the County that meet or exceed Enbridge's regulatory requirements.

12. With respect to the TSSA, the TSSA made it clear that the standards in CSA Z662 are the minimum requirements for road crossings. This means that Enbridge must comply with these minimum standards, but that does not equate to a determination that Enbridge may not exceed those standards. Although the TSSA has the authority to implement the applicable standards and regulatory requirements with which Enbridge must comply, the TSSA has no authority to determine or oversee the standards to which the responsible road authority, the County, must adhere in this matter. The only time the TSSA should be involved is if the County was requiring a depth of cover that did not meet the minimum standards required by the TSSA. That is not the case in the current application.

13. Enbridge's installation is purportedly governed by the provisions of CSA Z662-15, the standard applicable to oil and gas pipelines. The County's mandate is much wider and requires the County to address issues far beyond the design and construction of oil and gas pipelines.

14. The OEB Staff are commenting on the guidelines the County ought to adopt in allowing utilities to utilize the right-of-way within the authority and responsibility of the County. Enbridge is concerned only with the installation and construction of its pipeline. The concerns of the County are much more far reaching and require a balancing of not

only the ability of Enbridge to utilize the right-of-way but numerous other utilities as well as the motoring public.

15. Regardless of the standard to which Enbridge must adhere in the construction of the pipeline, such standards do not apply to the County as the responsible road authority, as long as the County's requirements at least adhere to the minimum requirements imposed on Enbridge. It is the responsibility of the County to determine the appropriate criteria within which to allow utilities to utilize its rights-of-way. With all due respect to the OEB Staff and the OEB itself, a determination of the reasonableness or not of the County standards is beyond the scope of the jurisdiction of this Honourable Board.

III. **EXPERTS**

16. The OEB Staff Submission, on its face, accepts the statements of Enbridge without addressing or commenting on the sworn Affidavit evidence submitted by the County.

17. The OEB Rules of Practice and Procedure, specifically Rule 13A, address the issue of expert evidence. Rule 13A.03 states the following:

"13A.03 An expert's evidence shall, at a minimum, include the following:

- (a) the expert's name, business name and address, and general area of expertise;
- (b) the expert's qualifications, including the expert's relevant educational and professional experience in respect of each issue in the

proceeding to which the expert's evidence relates;

- (c) the instructions provided to the expert in relation to the proceeding and, where applicable, to each issue in the proceeding to which the expert's evidence relates;
- (d) the specific information upon which the expert's evidence is based, including a description of any factual assumptions made and research concluded, and a list of the documents relied on by the expert in preparing the evidence; and
- (e) in the case of evidence that is provided in response to another expert's evidence, a summary of the points of agreement and disagreement with the other expert's evidence.
- (f) **an acknowledgement of the expert's duty to the Board in Form A to these Rules, signed by the expert.** [Emphasis added.]

18. The County is the only party to this proceeding who filed an Affidavit from its expert, Dr. William Tape, along with the **required** Acknowledgement of Expert's Duty to the Board in Form A. The reports prepared on behalf of Enbridge did not include an executed Acknowledgement of Expert's Duty to the Board from any of the Enbridge experts.

19. Again, as previously stated in the County's earlier submissions, 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. The County submits that the OEB Staff have

failed to outline why they prefer the expert evidence of Enbridge that does not comply with the OEB's own Rules of Practice and Procedure, over that provided by Dr. Tape, or why his evidence should be discounted.

20. The onus rests with Enbridge to satisfy the Board that its proposed depth of cover of 1.0 metre meets all safety requirements in light of the fact that Enbridge is installing a high pressure pipeline within the travelled portion of a heavily travelled roadway used by many overweight and heavy loads. The County requesting that the pipeline be installed with a minimum depth of cover of 1.5 metres to meet the 0.6 metres Enbridge alleges is all it is required to meet pursuant to CSA Z662-15 from the new road subgrade is a reasonable and rational requirement of the County. In any event, the onus does not rest on the County to prove a negative. Rather, the onus rests on Enbridge to establish a positive that the proposed depth of cover is safe in the circumstances of this particular roadway.

21. The County also submits that, further to the paragraph above, the OEB Staff are incorrect when they state on page 7 of the OEB Staff Submissions that the TAC Guidelines are only "relevant to crossings, and not parallel lines" and that the depth of cover proposed by Enbridge will be "adequate...even if the pipeline were to be located under the travelled portion of the road."

IV. **WIDENING OF COUNTY ROAD 46**

22. There is no evidence before the Board that the County does not intend to widen County Road 46 within the foreseeable future. The County submits that future

development is planned, which will require a widening of County Road 46, and was brought forward as a concern of the pipe size by County Council. Once development is initiated, the plans to widen County Road 46 will be scheduled accordingly.

23. Other than the statement of Enbridge that such widening is not contained in its Official Plan, was not included in the Transportation Master Plan of the County and was not identified in its Capacity Expansion Program, the only sworn evidence before the Board is that of Jane Mustac, the County Engineer. Ms. Mustac is in a far better position and has far greater knowledge of the intention of the County regarding the widening of County Road 46 than does Enbridge or the OEB Staff. It is the submission of the County that the Board should accept the evidence of Ms. Mustac that County Road 46 will be widened within the foreseeable future thus placing the proposed pipeline beneath the travelled portion of the road.

24. The County further submits that once the County Road 46 construction is set to begin, the County will demand, pursuant to the provisions of the Franchise Agreement, that Enbridge relocate the pipeline to another location, only increasing costs unnecessarily. Enbridge has failed to show why it is in the public interest to install the pipeline now in a manner that does not account for the County's needs and requirements, only to expend monies in the near future to relocate it. The County submits that it is in the public interest to locate the pipeline in a location now (either by changing the alignment or complying with the County's depth requirements in the current alignment)

that does not affect the County's future plans for County Road 46 and unnecessarily incur relocation costs in the near future.

V. **PUBLIC INTEREST**

25. The OEB Staff makes the statement that "Enbridge Gas's proposal regarding the depth of cover is in the public interest". Such statement is made without any analysis or evidence setting out what the public interest is in the circumstances. Enbridge has presented no evidence, and the onus rests with Enbridge, as to whether the proposed depth of cover is in the public interest.

VI. **REMOVAL OF EXISTING PIPELINE**

26. The OEB Staff Submissions rely on the statements of Enbridge that abandonment of the pipeline is in accordance with the requirements of CSA Z662-15. Whether or not this is the case, is not a relevant consideration as the County is not governed by the CSA Z662-15 standards. The OEB Staff do not give sufficient credence to the sworn Affidavit evidence of Jane Mustac, the County Engineer, which details the reasons for the removal.

27. The onus rests with Enbridge to establish that the abandonment of the pipeline is in the public interest. Other than making this statement, the OEB Staff Submissions provide no basis upon which to make this statement. There is no analysis or consideration of what constitutes the public interest or how abandonment versus removal impacts or affects the public interest.

28. The County emphasizes again the sworn evidence of Jane Mustac explaining in detail the reasons for the removal of the pipeline. Enbridge has presented no evidence, including no evidence of the actual cost other than an "estimate", as to why abandonment is preferable to removal. Further Enbridge has not provided any evidence as to why removal of the pipeline in private easements is not cost prohibitive, but it is only cost prohibitive if removed from the right-of-way.

29. The County respectfully requests that the OEB give little, if any, weight to the OEB Staff Submissions given the numerous deficiencies and misapprehensions in those Submissions.

October 8, 2020

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