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**VIA EMAIL and RESS**

October 14, 2020

Christine Long  
Board Secretary  
Ontario Energy Board  
2300 Yonge Street, 27th Floor  
Toronto, ON M4P 1E4

**Re: EB-2020-0160 Enbridge Gas Inc. ("Enbridge Gas")  
Windsor Line Replacement Project – Section 101 Application  
Reply Submission of Enbridge Gas**

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Dear Ms. Long:

In accordance with correspondence from the Ontario Energy Board dated October 5, 2020, enclosed is Enbridge Gas' Reply Submission in the above noted proceeding.

Please contact the undersigned if you have any questions.

Yours truly,

Rakesh Torul  
Technical Manager,  
Regulatory Applications

cc: Scott Stoll, Aird and Berlis LLP  
EB-2020-0160 Intervenors

## **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 dated April 1, 2020, 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.;

## **REPLY SUBMISSIONS OF ENBRIDGE GAS INC. ("ENBRIDGE GAS")**

### **Introduction**

1. Enbridge Gas will provide reply submissions to the responding submissions of Essex County<sup>1</sup>, Environmental Defence, Pollution Probe, Energy Probe, FRPO and Board Staff. These Reply Submissions are organized to address the substantive elements regarding the dispute over the depth of cover and the abandonment of the existing pipeline, the Board's jurisdiction and the evidentiary record in this proceeding.

### **Depth of Cover and Method of Abandonment**

2. Enbridge Gas did not file this Application without considerable reflection. Throughout the negotiations Enbridge Gas was of the view that any disputes with Essex County could be resolved through discussions. Enbridge Gas notes that it was able to secure approvals from each of the other three municipalities (Chatham-Kent, Lakeshore, Tecumseh) through discussion and that for approximately 6 kms west of Manning Road, Enbridge Gas and Essex County were able to find a suitable location for the proposed pipeline.
3. Enbridge Gas considered and rejected other potential pipeline alignments because construction was simply not feasible. Exhibit B, Tab 1, Schedule 1, Attachment 2 shows the additional infrastructure, water lines, Bell cables, hydro poles and drainage ditches which limited the viable options. Even Essex County has stated the right-of-way is crowded so to suggest there are other viable options at this late stage is wrong in fact and inconsistent with their position on the state of the right-of-way.

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<sup>1</sup> Essex County made two submissions, the second to reply to the submissions of Board Staff. These Reply Submissions include responding to both Essex County submissions.

4. Enbridge Gas has secured a number of permits from Essex County in recent years<sup>2</sup> without incident. Enbridge Gas was not aware that Essex County would ignore the findings of the Wood Report nor that it would insist upon following an incorrect interpretation of the TAC Guideline<sup>3</sup> until April 8, 2020 a week later<sup>4</sup> than the Board's Decision and Order in the leave to construct application EB-2019-0172. Further, Enbridge Gas did not expect that the engineering report of Wood PLC would not be accepted. As such, it had no reason to suspect it would not be able to resolve any location issues with Essex County through negotiations. Enbridge Gas continued to negotiate with Essex County until it was clear Essex County would never agree to change the depth of cover.
5. Even if reference had been made to the TAC Guideline earlier, the application of the TAC Guideline does not demonstrate that the evidence supports the additional depth of 1.5 metres throughout the 22km of pipeline running parallel to the roadway. Enbridge Gas has taken the position it is properly applicable to crossing installations only, a position that has some support within the TAC Subcommittee responsible for the TAC Guideline. Finally, this is the first time any municipality has formally requested Enbridge Gas adhere to the TAC Guidelines – a rare occurrence – and even Wood PLC noted that it was not aware of municipalities applying the guideline.<sup>5</sup> Enbridge Gas cannot be expected to anticipate a municipality would so depart from its past practice and the practice of other neighbouring municipalities.
6. The Ontario Energy Board Act requires the Board to grant leave to construct in order for certain hydrocarbon pipelines to be constructed. This *Ontario Energy Board Act* does not differentiate between distribution and transmission pipelines. The distinction is provided in the CSA Z662 and the Code Adoption Document under the authority of the Technical Standards and Safety Authority (the “TSSA”). The TSSA is the provincially mandated body that ensures pipelines are designed in accordance with the applicable technical requirements regardless of location. The municipality's limited authority regarding location does not oust the TSSA's authority regarding design requirements.
7. The evidence in EB-2019-0172 was the Windsor Pipeline Replacement Project would be completed in accordance with the CAN/CSA Z-662-15 (“Z662-15”) and its construction procedures. The evidence expressly identified excavation depth would be approximately 1 metre (EB-2019-0172, Environmental Report, Exhibit C, Tab 6, Schedule 1, page 4.4) which would accommodate a depth of installation of 0.75 metres to the top of pipe which is the minimum required by Enbridge Gas' specifications. Additional depth was contemplated for watercourse and road crossings. Evidence regarding the proposed abandonment included specific requirements of Z662-15 and the TSSA Abandonment Checklist.
8. Essex County and its witness, incorrectly interpreted the nature of the pipeline as a transmission line. It is clearly a distribution line. Essex County compounded this error by

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<sup>2</sup> Essex County's response to Enbridge Gas's interrogatories (Q.29, 30 Tab #2 and Tab #3 filed in County of Essex\_IRR\_EGI\_20200821.pdf)

<sup>3</sup> Enbridge Gas submissions, September 22, 2020, pp 15-16

<sup>4</sup> County of Essex\_IRR\_EGI20200821.pdf, Enbridge – Q#36, refers to Exhibit N of Mustac Affidavit, Essex County Tab 2. .

<sup>5</sup> Enbridge response to Interrogatories, Exhibit I.Staff.4(c), page 3 of 3.

applying the wrong section of the wrong version of the applicable Code. Had it recognized the NPS 6 pipeline was a distribution pipeline, the version of the Code would have become irrelevant as the requirements for cover on distribution pipelines is the same in both Z662-15 and Z662-19. However, the error in choice of applicable Code documents was compounded by the misclassification of the pipeline and its refusal to reconsider the overwhelming evidence of its error.

9. There is no doubt the Board's approval in its Decision and Order contemplated construction in accordance with the evidence presented in EB-2019-0172 that included a reference to the typical depth of the pipeline. Had Enbridge Gas just proceeded to bury the pipeline at 1.5 metres without informing the Board and obtaining its consent, there is no doubt intervenors would have suggested Enbridge Gas had been offside EB-2019-0172, Condition 4.
10. A plain and ordinary reading of section 101(3), see below, provides the Board with the ability to impose conditions it considers appropriate in the public interest. Note, the Board's authority is "*despite any other Act*" and therefore supersedes any agency or body seeking to rely upon another Act to contradict the Board's order. Such conditions could include both the running line and the depth of the pipeline. There is nothing in the provision to suggest the Board cannot impose conditions regarding either the location or depth of the pipeline.

(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.
11. Enbridge Gas, the TSSA and Board Staff, have expressly acknowledged that Enbridge Gas has properly set out the appropriate Z662-15 code and its requirements. Enbridge Gas' proposal meets all technical legal requirements. Further, Wood has confirmed the pipeline is sufficient to meet situations of overweight loads.
12. However, despite the evidence, including the opinion of the TSSA, Essex County has continued to deny the distinction between distribution and transmission pipelines that is included in the CSA Z662-15. Despite not performing any engineering analysis, something that was within its power to do, Essex County has continued to discount that engineering analysis of the performance of the pipeline under load. Enbridge Gas notes that there has been no evidence that the performance of the pipeline is unacceptable from a safety perspective. Once this failure is recognized, Essex County's position lacks foundation. As FRPO stated, "*there is little for the Board to rule in favour of the County thus imposing costs upon the ratepayers.*" This acknowledges the factors of cost to ratepayers, safety, and compliance with applicable laws are all relevant to the Board's consideration. Enbridge Gas would respectfully reiterate its position regarding the CSA Z662-15 (the "**Code**"), the appropriate provisions of the Code and will not repeat the argument.
13. Enbridge Gas notes that the potential widening of County 46 east of Manning Road is not substantiated in any official Essex County document or publication. Essex County is the road authority, not Ms. Mustac or other staff. While Essex County Staff may be of the

view that such a widening will be necessary in the future, it has not provided any evidence of Essex County taking any substantive steps in this regard – no planning evidence, no funding allocation, no land acquisition, no engineering, no capital plan, and no environmental assessment. As such, the potential for such conflict is too remote to warrant the additional expenditures necessary to achieve the 1.5 metre depth of cover.

14. In addition, Ms. Mustac is incorrect in her assertion that there is only a single reference in EB-2019-0172 to the depth of excavation in the environmental report in EB-2019-0172. Enbridge Gas expressly stated:

8. The minimum installation depth of cover is 0.6 metres and will be in accordance with Section 12.4.7 Cover in Table 12.2 of the applicable current edition of CSA Z662. Additional depth of cover greater than the minimum will be provided to accommodate existing or planned facilities and where ground conditions allow greater depth.<sup>6</sup>

15. The evidence was directly in front of the Board in the leave to construct and formed part of the evidentiary basis upon which the Decision and Order was made. Essex County had to the opportunity and should have participated in EB-2019-0172 if it had a concern regarding the depth of cover. Its failure to avail itself of the Board's process should reduce the weight of its evidence in this proceeding.
16. Enbridge Gas submits there is no evidence of any corresponding benefit in terms of safety or the avoidance of future relocation that warrants spending \$7.2 million.
17. Enbridge Gas has reviewed the submissions regarding the abandonment of the more than 20 km of NPS 10 pipeline. Essex County continues to misstate that Enbridge Gas is proceeding with removal of the NPS 10 pipeline. Enbridge Gas has not committed to such removal. It is clear, however, that should the Board require removal of the 22 km of NPS 10 pipeline within the municipal road allowance that remaining pipeline within the private easement will need to be removed.
18. There is no evidence that supports any third party wanting access to the area where the NPS 10 pipeline is located. Further, its excavation and removal would require the removal of hundreds of trees, increased remediation efforts and increased disruption.
19. Enbridge Gas continues to be of the view that abandonment in place as permitted by applicable regulation, costs approximately \$5.9 million less, and is less disruptive to landowners, motorists and the environment. There is no pressing public interest that requires the excavation and removal of the NPS 10 pipeline. There are several factors for abandoning the pipeline in place.

### **The Franchise Agreement**

20. The Franchise Agreement must be interpreted within its provisions as a whole and within the comprehensive regulatory scheme set out by the Ontario Energy Board Act. To accept Essex County's position is to render the Board's authority meaningless as the municipality

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<sup>6</sup> EB-2019-0172, Exhibit B, Tab 1, Schedule 5, paragraph 8

could determine what projects would or would not be permitted within its highways without regard to the public interest and the Board's statutory mandate.

21. The preeminence of the Board's authority is expressly provided in Section 128 of the Ontario Energy Board Act, which is reproduced below. An agreement entered into under by-law must be considered in light of the Board's exercise of its statutory mandate, including decisions made pursuant to section 101(3).

**128** (1) In the event of conflict between this Act and any other general or special Act, this Act prevails. 1998, c. 15, Sched. B, s. 128 (1).

(2) This Act and the regulations prevail over any by-law passed by a municipality. 1998, c. 15, Sched. B, s. 128 (2).

22. Enbridge Gas submits a proper, contextual interpretation of the Franchise Agreement provides for limited discretion of the County Engineer to be exercised as was set out in the Enbridge Gas Submissions.

### **Jurisdiction, the Test and Precedence**

23. Enbridge Gas acknowledges this Application was the first application it has filed under section 101(3) of the *Ontario Energy Board Act*. The Board's experience with this section has been primarily in the electricity industry where it has not been the subject of due consideration from multiple parties. However, there is no debate the Board has relied upon section 101(3) to grant authority to construct facilities on, under or over a highway. The Ontario Energy Board Act clearly articulates that the Board is to act in the public interest in leave to construct applications and the application of sub-section 101(3). Further, the Board has granted changes to Enbridge Gas where it made a request pursuant to Condition 4 for a change compared to what was approved in the leave to construct.
24. Enbridge Gas would remind the Board and parties that this Board has been in existence for more than 60 years and this is the first such application which would indicate that Enbridge Gas, and its predecessors, have a long established successful record of resolving issues regarding the location of plant with municipalities across the province without the need to resort to the Board.
25. Further, Enbridge Gas has contended, and the Board has recognized, the issues in this Application are very narrow. The Board is required to consider the public interest regarding these issues and not extraneous issues.
26. The Ontario Energy Board Act provides for a determination of the public interest and deference to any single entity tips the balance of interests that the Board should be considering. As such, Enbridge Gas rejects the notion advanced by Environmental Defence that any deference to the municipality are warranted. Specifically, Enbridge Gas is not trying to shift costs to the taxpayer but rather avoid the incursion of such costs by either the taxpayer or the ratepayer as there is no reason for such costs to be imposed upon anyone.

27. Enbridge Gas disputes the public interest requires the Board to consider only whether compliance with the requirements of Essex County is possible. That interpretation would displace the consideration of all other factors within the public interest, including those of ratepayers, and elevate the requests of Essex County above those of other intervenors and the Applicant. Essex County would have *de facto* jurisdiction despite the express language in sub-section 19(6) of the Ontario Energy Board Act. Such an interpretation is not supported in law nor does it logically follow from the wording of the Ontario Energy Board Act.
28. Enbridge Gas is not submitting that Essex County's requests are worthy of consideration and would point to the successful negotiation of the installation west of Manning Road to support that balancing of various interests.
29. Enbridge Gas submits the Board has the appropriate jurisdiction to make the order requested. In the Submissions, Enbridge Gas provided an analytical framework for the analysis found in the interpretation of the "public interest". Enbridge Gas does not view a term such as "public interest" as capable of being defined in an exhaustive manner. Indeed, while this proceeding has raised very narrow issues that may not be the case in the future.
30. Enbridge Gas notes that the *Ontario Energy Board Act*, sub-section 19(6), provides the Board with the exclusive jurisdiction over the issues in this Application.
- (6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.
31. The notion that the Board has either ceded jurisdiction or does not have jurisdiction because it omitted to expressly provide for the specific depth of cover in its order is mistaken. As noted, the Board's jurisdiction is exclusive. To accept Essex County's position, would require the Board to be omniscient in making orders regarding any potential issues that could arise and render the Board's authority meaningless. The obligation to seek approvals from external agencies is not a transfer of authority away from the Board, but rather is intended to ensure that all applicable laws are satisfied. However, where such permitting agency will not provide a permit, there is recourse to the Board.
32. Essex County, while trying to distinguish the Court's decision in *Union Gas v. Dawn*<sup>7</sup>, creates a scenario where a municipality can prevent a project that has been determined to be in the public interest. This is exactly what the legislature was trying to prevent. Enbridge Gas has noted the Windsor Pipeline supports the distribution of natural gas to hundreds of customers – 398 directly connected and more indirectly connected – both within and beyond Essex County's borders. The authority of the Board is premised in Ontario legislative requirements in the *Ontario Energy Board Act* and not those articulated in respect inapplicable legislation that gave rise to the *Atco* decision.

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<sup>7</sup> *Union Gas Ltd. v. The Corporation of the Township of Dawn* [1977] CarswellOnt 328 (Ont. Div. Ct.).

33. Notably, Enbridge Gas' position complies with all applicable laws. Board Staff acknowledged such compliance with applicable codes and requirements in its submissions. Essex County is seeking efforts that go significantly beyond the requirements of law – and importantly – such request has not been substantiated as necessary for either safety reasons or to avoid a future conflict with road construction. It is for that reason that Enbridge Gas sought the Board's intervention to assess and determine the course of conduct that best satisfies the public interest.
34. Enbridge Gas notes that parties raised the spectre that the Board's decision in this Application could open the floodgates to similar future applications. Enbridge Gas feels there is some legitimacy to the concern but takes the opposite view. Rather than Enbridge Gas seeking to avoid legitimate needs of municipalities, the more likely scenario is a repeat of the existing situation where a municipality is overly conservative or makes unreasonable request.
35. Effectively, Essex County states the Board is *functus* in its ability to give direction on the depth of cover as the leave to construct has required Enbridge Gas to acquire permits – including a permit from Essex County. Essex County is of the view it could make any unreasonable (or reasonable) request, say 4 metres depth of cover, and the Board is without jurisdiction. This is the opposite of Essex County's position on the abandonment as there was extensive evidence in the leave to construct that the pipeline would be abandoned in place. Essex County ignores the authority provided to the Board in the *Ontario Energy Board Act*, sections 19, 90, 101 and 128 and the Board's Rules of Procedure regarding review and variance of prior decisions.
36. Enbridge Gas notes, if Essex County's position is accepted, permitting agencies would be incented to ignore the leave to construct proceeding and seize jurisdiction through the Board's order which includes a condition to obtain permits. Such a circumstance would deprive the Board of the proper consideration of the public interest in the leave to construct and transfer authority away from the Board to the various permitting agencies – such as municipalities and conservation authorities. This cannot be what the legislature intended given the express language of sections 19(6), 101(3) and 128 in the Ontario Energy Board Act.

### **Evidence**

37. Enbridge Gas submits it is inappropriate to make an argument during responding submissions that the absence of a sworn statement should disqualify the evidence filed by Enbridge Gas. The submission ignores the long history of this Board accepting written evidence as if given under affidavit – especially where a hearing is written only. Any allegation of failure to comply with the Board's Rules of Procedure should have been both specific and timely and it was neither specific, nor timely.
38. Enbridge Gas submits Essex County, if actually concerned about the presentation of the evidence, should have made such position known at the onset of the proceeding. Certainly, if Essex County viewed there to be no evidence, they should have stated the position prior to asking interrogatories. Enbridge Gas notes that Essex County did not



respond to interrogatories under affidavit so it seems to have taken a position in its Responding Submissions that is inconsistent with its behavior.

39. Finally, Enbridge Gas would note that much of the evidence filed disclosed the identity of likely witnesses and there has been no suggestion that any of the Enbridge Gas potential witnesses lack credibility. We do note that the Wood Report was given under the seal of the professional engineers who authored it attesting to the information provided.
40. As such, Enbridge Gas submits any suggestion that the record is somehow diminished, should be dismissed.
41. Enbridge Gas submits Dr. Tape's evidence has been thoroughly unhelpful and should be ignored. Enbridge Gas did not accede to Essex County seeking to have Mr. Tape declared an expert. First, there was no description of his area of expertise for which he was to be qualified. In response to various Interrogatories, Dr. Tape admitted he lacks any extensive experience with Z662-15 codes; did no technical analysis of either Enbridge Gas' or Wood PLC's calculations; and no technical analysis<sup>8</sup> of the TAC Guideline; and did not review any geotechnical information<sup>9</sup>. When Enbridge Gas expressed concern about his and Essex County's interpretation of the TAC Guideline they did nothing<sup>10</sup> while Enbridge Gas sought assistance from the TAC Committee responsible for the TAC Guideline.<sup>11</sup> Further, in certain instances Dr Tape offered an opinion in respect of legal matters (e.g. the ability of Essex County to impose conditions) – which is well beyond anything to which he should have expressed an opinion.

## **Conclusion**

42. Essex County would have this Board ignore the engineering evidence of Enbridge Gas and Wood PLC, ignore the position of the TSSA, ignore the provisions of the Ontario Energy Board Act and the obligation to act in the public interest. Its position is premised on (i) an erroneous interpretation of the 1957 Franchise Agreement that would provide unfettered discretion to the Road Superintendent even where it is contrary to the findings of this Board; (ii) the inability to interpret and apply the Z662-15; (iii) an overly narrow interpretation of the public interest and the Board's mandate. Finally, Essex County's interpretation would directly contradict the Board's authority endorsed by the Court in *Union Gas v. Dawn*<sup>12</sup>.
43. Essex County should not be permitted to gain from its conscious decision to forego participating in the leave to construct application. Its silence should not allow it to gain jurisdiction over that of the Board. The *Ontario Energy Board Act* clearly provides the Board with exclusive jurisdiction and superior rights to those of any municipality, including Essex County.

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<sup>8</sup> County of Essex\_IRR\_EGI20200821.pdf, Tab 1, ENB-01(b), page 33 of pdf.

<sup>9</sup> County of Essex\_IRR\_EGI20200821.pdf, Tab 1, ENB-12(b), page 36 of pdf and EP-Essex-4, page 38 of pdf.

<sup>10</sup> County of Essex\_IRR\_EGI20200821.pdf, Tab 1, ENB-15(b), page 37 of pdf.

<sup>11</sup> See Enbridge Response to Interrogatories, Exhibit I.Staff.4(b) page 3 including Attachment 4.

<sup>12</sup> *Union Gas Ltd. v. The Corporation of the Township of Dawn* [1977] CarswellOnt 328 (Ont. Div. Ct.).

44. Enbridge Gas submits that it should be permitted to install the NPS 6 pipeline with a depth of cover of 1.0 metre. In addition, Enbridge Gas should be permitted to abandon the NPS 10 pipeline in place consistent with its procedures and the requirements in the CAN/CSA Z662-15. As recognized by Board Staff and others, the public interest is best served by granting Enbridge Gas its preferred relief.
45. 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; including abandoning the existing NPS 10 pipeline in-place.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 14<sup>th</sup> day of October, 2020.

ENBRIDGE GAS INC.



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By its Counsel  
Scott A. Stoll  
Aird & Berlis LLP