

## **DECISION AND ORDER**

**EB-2020-0160**

### **ENBRIDGE GAS INC.**

Application under Section 101 of the *Ontario Energy Board Act*,  
1998

**BEFORE: Michael Janigan**  
Presiding Commissioner

**Robert Dodds**  
Commissioner

---

**November 12, 2020**

## TABLE OF CONTENTS

1	INTRODUCTION AND SUMMARY.....	1
2	THE PROCESS .....	3
3	BACKGROUND .....	5
4	THE PUBLIC INTEREST TEST .....	7
5	DECISION ON THE ISSUES .....	8
5.1	THE OEB'S JURISDICTION UNDER SECTION 101 .....	8
5.2	DEPTH OF COVER OF THE PROPOSED PIPELINE.....	10
5.3	ABANDONMENT OF THE EXISTING PIPELINE.....	16
5.4	CONFIDENTIALITY OF INFORMATION.....	19
6	CONCLUSION .....	20
7	ORDER .....	21

# 1 INTRODUCTION AND SUMMARY

This is the Decision and Order of the Ontario Energy Board (OEB) regarding an application filed by Enbridge Gas Inc. (Enbridge Gas) on June 12, 2020.

Enbridge Gas applied to the OEB under section 101 of the *Ontario Energy Board Act, 1998*, (OEB Act) for an order authorizing the construction of 29 km of natural gas pipeline and related facilities along County Road 46, located in the Towns of Tecumseh and Lakeshore in the County of Essex. The proposed pipeline and facilities are part of the Windsor Pipeline Replacement Project (Project) that was approved by the OEB in its decision and order<sup>1</sup>, dated April 1, 2020 (LTC Decision).

According to Enbridge Gas, the current application was filed to resolve a dispute between Enbridge Gas and The Corporation of the County of Essex (Essex County), the road authority for County Road 46 with respect to the construction of the Project. Enbridge Gas states that Essex County has refused to issue the necessary permits for the construction of the pipeline along County Road 46 unless Enbridge Gas agrees to: (a) install the pipeline with a depth of cover of 1.5m rather than the 1m depth of cover proposed by Enbridge Gas; and (b) remove the existing pipeline in the right-of-way in lieu of abandonment in place.

Enbridge Gas requests the following specific relief from the OEB:

- a) an order, pursuant to section 101 of the OEB Act, 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 1m and otherwise in accordance with Enbridge Gas' standards and procedure including abandoning the existing pipeline in place
- b) In the alternative to a), an order, pursuant to section 101 of the OEB Act and Condition 4 of the Decision and Order in the Leave to Construct Application, direction and authorization, in whole or in part, to:
  - i. construct a work upon, under or over a highway, utility line or ditch at a depth of cover of approximately 1.5m and otherwise in accordance with CSA Z662 and Enbridge Gas' construction policies and standards; and/or
  - ii. Removal and remediation of approximately 21.8 kms of NPS 10 steel existing steel main.

---

<sup>1</sup> EB-2019-0172 Decision and Order

Based on review of the evidence filed in this proceeding, the OEB is satisfied that the construction of the pipeline as proposed by Enbridge Gas is in the public interest.

Accordingly, the OEB approves the Enbridge Gas application for an order, pursuant to section 101 of the OEB Act, granting Enbridge Gas authorization to, within the County Road 46 right of way, construct the Project previously approved in the LTC Decision at a depth of cover of approximately 1m and to abandon the existing pipeline in place.

## 2 THE PROCESS

The OEB issued a Notice of Hearing and Procedural Order No. 1 on June 30, 2020, approving the intervention request of Essex County and made provision for the filing of evidence by Essex County and for the filing of interrogatories and interrogatory responses. In response to the OEB's notice, Energy Probe Research Foundation (Energy Probe), Pollution Probe, Environmental Defence and the Federation of Rental-housing Providers of Ontario (FRPO) applied for intervenor status and cost eligibility.

In Procedural Order No. 2, issued on July 24, 2020, Energy Probe, Pollution Probe, Environmental Defence and FRPO were approved as intervenors.

Interrogatories on the Enbridge Gas' evidence were filed by OEB staff and intervenors on July 31, 2020. Enbridge Gas filed its responses to interrogatories on August 14, 2020. Essex County filed its evidence on July 24, 2020. Interrogatories on Essex County's evidence were filed by OEB staff and intervenors on August 7, 2020 and responded to by Essex County on August 21, 2020.

On August 17, 2020, Environmental Defence filed a motion requesting that the OEB order Enbridge Gas to provide full and adequate responses to Interrogatories I.ED.1 (a) to (d) and I.ED.4 (a) to (e); and in the alternative, that a technical conference be held.

On August 20, 2020, the OEB issued Procedural Order No. 3, making provision for written submissions by parties on the merits of Environmental Defence's motion and reply submissions by Environmental Defence.

Submissions on Environmental Defence's motion were filed by parties on August 24, 2020 and a reply submission was filed by Environmental Defence on August 27, 2020.

On August 24, 2020, FRPO filed a motion for full and adequate responses to certain interrogatories, which was later withdrawn.

On September 9, 2020, the OEB issued a decision denying the motion filed by Environmental Defence and determined that it would proceed to determine the application by way of a written hearing setting, for which it set out the schedule for the filing of an Argument-in-Chief (AIC), submissions by parties and a reply submission. The OEB also requested the provision of the certain information to assist its review of the issue of abandonment or removal of the existing pipeline.

Enbridge Gas filed its AIC on September 22, 2020. Submissions were filed by intervenors and OEB staff on October 2, 2020. In its submissions, Essex County requested permission to make responding submissions to the submission of OEB Staff. On October 5, 2020 the OEB issued a letter permitting Essex to file a short written reply

to the arguments of OEB staff by October 8, 2020 and revised the date for the filing of Enbridge Gas' reply submissions to October 14, 2020.

### 3 BACKGROUND

The relief sought in this application relates to the portion of the route of the 64 kilometer Project that lies along County Road 46 in the Essex County. The purpose of the Project is to replace the existing Windsor pipeline (which covers essentially the same route) in order to address multiple pipeline integrity concerns identified by Enbridge Gas and to ensure the safety and reliability of the pipeline. As required by section 90 of the OEB Act, Enbridge Gas applied to the OEB for an order granting leave to construct the Project. After holding a public hearing, the OEB determined that the Project was in the public interest and granted the application in the LTC Decision.<sup>2</sup> The OEB's approval was subject to a number of conditions of approval, including condition 4 which requires Enbridge Gas to advise the OEB of any proposed changes to the Project, and to obtain OEB approval for these changes.

A 29 kilometer portion of the Project passes along County Road 46. The leave to construct application approved in the LTC Decision included Enbridge Gas' proposal for a depth of cover of approximately 1m for the replacement pipeline and its proposal to abandon the existing pipeline in place.

Pursuant to the terms of a 1957 municipal franchise agreement (Franchise Agreement), Enbridge Gas requires a number of approvals from Essex County to construct the Project. Enbridge Gas also requires various permits. Although Enbridge Gas and Essex County have agreed on a number of matters, Essex County has refused to issue permits or approvals for the construction of the pipeline along County Road 46 unless Enbridge Gas agrees to: (a) install the pipeline with a depth of cover of 1.5m rather than the 1m depth of cover proposed by Enbridge Gas; and (b) remove the existing pipeline in the right-of-way in lieu of abandonment in place.<sup>3</sup>

Enbridge Gas has asserted that the demands of Essex County will result in increased construction costs that, if implemented, would constitute a "change" within the meaning of Condition 4 and that requires OEB approval before it can be implemented.

Condition 4 sets out the following:

4. Enbridge Gas shall advise the OEB of any proposed change in the project, including, but not limited to, changes in: OEB-approved construction or restoration procedures, the proposed route, construction schedule and cost, the necessary environmental assessments and approvals, and all other approvals, permits, licenses, certificates and rights required to construct the proposed

---

<sup>2</sup> EB-2019-0172 Decision and Order

<sup>3</sup> EB-2019-0172 Application

facilities. Except in an emergency, Enbridge Gas shall not make any such change without prior notice to and written approval of the OEB. In the event of an emergency, the OEB shall be informed immediately after the fact.

Enbridge Gas has stated that as it could not agree with the Essex County requirements, there was no alternative but to seek the OEB's assistance to resolve the disagreement.



---

## 4 THE PUBLIC INTEREST TEST

Section 101 of the OEB Act states:

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

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

(2) The procedure set out in subsections 99 (1) to (4) applies with necessary modifications to an application under this section.

(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.

The onus for demonstrating that the proposed order is in the public interest rests with the applicant, Enbridge Gas.

## 5 DECISION ON THE ISSUES

### 5.1 The OEB's Jurisdiction under Section 101

#### 5.1.1 Submissions of Parties

Enbridge Gas has argued that section 101(3) provides the OEB with the authority to make orders to authorize construction upon, under or over a highway without the consent of the municipality and despite what may be provided in any other Act. Enbridge Gas also argued that Section 101(3) expressly authorizes the OEB to impose such conditions as it deems appropriate.<sup>4</sup>

Essex County's view is that the County and the OEB each have exclusive jurisdiction in separate areas relative to pipelines. Essex County submitted that the OEB has exclusive jurisdiction, among other things, in determining where expansions of transmission and distribution systems take place and the associated cost recovery while the County has exclusive jurisdiction, as the road authority, to determine the appropriate standards and conditions for utilities such as Enbridge Gas, to utilize the right-of-way.<sup>5</sup>

Essex County argued that its authority in determining the appropriate placement of the pipeline within the right-of-way is addressed in the Franchise Agreement between Enbridge Gas and Essex County and that the OEB does not have the jurisdiction to override the provisions of the Franchise Agreement.<sup>6</sup>

Enbridge Gas submitted that the Franchise Agreement must be interpreted within its provisions as a whole and within the comprehensive regulatory scheme set out by the OEB Act.<sup>7</sup> Enbridge Gas referenced the preeminence of the OEB's authority as provided in Section 128 of the OEB Act, stating that an agreement entered into under by-law must be considered in light of the OEB's exercise of its statutory mandate, including decisions made pursuant to section 101(3). Enbridge Gas also noted that the OEB Act, sub-section 19(6), provides the OEB with the exclusive jurisdiction over the issues in this application.<sup>8</sup>

Other parties such as Environmental Defence submitted that the OEB should defer to Essex County as the rightful authority in this case stating that Essex County has put

---

<sup>4</sup> AIC, pages 3-5

<sup>5</sup> Essex County Submissions, paragraphs 8, 87

<sup>6</sup> Essex County Submissions, paragraph 15

<sup>7</sup> Reply Argument, paragraph 20

<sup>8</sup> Reply Argument, paragraph 21

forward reasonable justifications for withholding permission in this case pending modifications in Enbridge Gas' proposal.<sup>9</sup>

Pollution Probe supported Essex County's authority to enforce its permitting rights under the Franchise Agreement stating that the public interest is best served by minimizing long term costs and impacts related to the proposed pipeline and abandonment of the existing pipeline.<sup>10</sup>

FRPO and OEB staff generally supported the relief requested by Enbridge Gas.

## Findings

In this application, pursuant to its responsibilities under sec. 101 of the OEB Act, the OEB is required to assess the public interest with respect to two issues regarding the Project along County Road 46: 1) What is the appropriate depth of cover? and 2) Should the existing pipeline be removed, or should it be abandoned in place?

While the OEB recognizes the rights and responsibilities of Essex County as the road authority and pursuant to its Franchise Agreement with Enbridge Gas (as the successor to the signatory Union Gas Ltd.), the OEB's statutory responsibilities under the OEB Act requires the OEB to determine this application in accordance with the public interest. As noted by Enbridge Gas, section 19(6) of the OEB Act gives the OEB exclusive jurisdiction over matters covered by section 101 (and all other provisions of the OEB Act and any other act that confers jurisdiction on the OEB).

It is important to note that the OEB has already determined in the LTC Decision that the overall Project itself is in the public interest. The Project, as presented in the evidence of the leave to construct proceeding, included a depth of cover of 1m along County Road 46, and stated that the existing pipeline would be abandoned in place. The cost estimates for the Project (which in the ordinary course will be passed on to ratepayers) were reviewed in the LTC Decision and were premised on both the 1m depth of cover and abandoning the existing pipeline in place. No party to the leave to construct proceeding took issue with the proposed depth of cover or proposal to abandon the existing pipeline in place. Essex County received notice of the leave to construct proceeding but chose not to intervene.

In making its determination on the public interest, the OEB is guided by its statutory objectives with respect to natural gas. Of particular relevance in this case is the objective of protecting the interests of consumers with respect to prices and the

---

<sup>9</sup> Environmental Defence submission, page 3

<sup>10</sup> Pollution Probe submission, page 8

reliability and quality of gas service. The principal criteria relied upon by the OEB in assessing this application are cost (including the need for and relative cost of the options presented before the OEB) and reliability (including safety and pipeline integrity issues).

## **5.2 Depth of Cover of the Proposed Pipeline**

### **5.2.1 Submissions of Enbridge Gas and Essex County**

Enbridge Gas has proposed a depth of cover of 1m for the pipeline to be installed along County Road 46.<sup>11</sup> Essex County requested that when the proposed pipeline is within 6m of the edge of the road, the pipeline needs to be installed with a 1.5m depth of cover.<sup>12</sup>

Enbridge Gas stated that its proposal to use a depth of cover of 1m is consistent with the Canadian Standards Authority(CSA) CSA Z662-15 Oil and Gas Pipeline Systems standard which sets out a minimum depth of cover of 0.6m for both the road right-of-way and below the travelled surface of a road for a distribution pipeline.<sup>13</sup>

Essex County stated that it relies on the Transportation Association of Canada's Guidelines (TAC Guidelines) for Underground Utility Installations Crossing Highway Rights-of-Way as a basis to support its request for a depth of cover of 1.5m. Essex County stated that the TAC Guidelines set out a minimum depth of cover of 1.5m for an uncased pipeline as proposed by Enbridge Gas.<sup>14</sup>

Enbridge Gas submitted that the TAC Guidelines are just guidelines and have no binding authority.

Essex County's evidence indicated potential future widening of County Road 46 and stated that this will result in the new pipeline being constructed under the travelled portion of the road. Essex County expressed concern that a depth of cover of 1.0m under a heavily travelled roadway with significant volumes of overweight vehicles will not meet the minimum necessary safety requirements for its residents and other users of the road and those adjacent to it.<sup>15</sup>

---

<sup>11</sup> Application, Exh A/Tab 2/Sch 1/page 4, paragraph 13

<sup>12</sup> Essex County Evidence, Tab 1, Page 2, paragraph 7

<sup>13</sup> Enbridge Gas OEB Staff IRR 1(h)

<sup>14</sup> Essex County Evidence, Tab 1, page 5

<sup>15</sup> Essex County evidence, Tab 1, paragraph 23, page 8

As part of its evidence, Enbridge Gas provided engineering analysis reports prepared by its own engineers and by an independent engineering firm, Wood PLC, to demonstrate the sufficiency of a 1.0m depth of cover.<sup>16</sup> Essex County retained an independent engineering firm, Haddad Morgan & Associates Ltd. (Haddad Evidence), to review and comment on the engineering analysis reports prepared by Enbridge Gas and Wood PLC. Haddad prepared two reports which noted that conservative loadings were used and soil considerations including the fact that the soil in and around a roadway has generally been disturbed will impact the load analysis.<sup>17</sup>

Enbridge Gas submitted that it undertook a detailed engineering analysis of the stresses that would be transferred to the pipe under the most severe loading conditions permissible by law in Ontario and found that the pipe could withstand these stresses with a large margin of safety at the proposed 1m depth of cover.<sup>18</sup> Enbridge Gas argued that Essex County has provided no technical information that demonstrates that Enbridge Gas' proposed installation is unsafe or otherwise deficient.

Enbridge Gas also argued that Essex County has not demonstrated a future conflict with a road project supporting the increase in the depth of cover, stating that while Essex County has advised of a potential widening for County Road 46, Essex County has not provided any official document that shows the expansion of County Road 46 east of Manning Road (County Road 19).<sup>19</sup>

Enbridge Gas stated that its proposal meets all relevant technical requirements and any other option would impose significant costs. Enbridge Gas estimated that \$7.2 million of additional costs (i.e. \$7.2 million higher than the budget reviewed by the OEB in the LTC Decision) would be incurred to accommodate coverage depth of 1.5m.

Essex County argued that Enbridge Gas is seeking to utilize a depth of cover that does not accord with the most recent CSA Z662 standard, CSA Z662-19, as Enbridge Gas has insisted that the CSA Z662-15 standard applies. Essex County further asserted that in applying the CSA Z662 standard, Enbridge is relying on clauses that do not apply to steel pipelines for which the minimum cover for buried pipelines below the travelled surface of a road is 1.2m and not 1m as proposed by Enbridge Gas.<sup>20</sup>

---

<sup>16</sup> Application, Exh B/Tab1/Sch5/App A

<sup>17</sup> Essex County Evidence, Tab 3, Exhibit C

<sup>18</sup> AIC, paragraphs 47-49, page 10

<sup>19</sup> AIC, paragraphs 63,64

<sup>20</sup> Essex County October 2<sup>nd</sup> submissions on application, paragraphs 37-45

Enbridge Gas responded to Essex County's assertions, stating that Clause 4.11.1 of the CSA Z662 standard, upon which Essex County relies, is a provision that is applicable to transmission lines.

Enbridge Gas argued that the proposed pipeline meets the definition of a distribution line as per Clause 2.2 of the CSA Z662 standard as it has a number of distribution stations attached to it and, has several hundred customers (residential and commercial) connected directly to the pipeline.<sup>21</sup> Enbridge Gas submitted that the hoop stress calculation of 16.8% specified minimum yield strength (SMYS) is below the threshold set out in Clause 3 of the Technical Standards and Safety Authority (TSSA) Code Adoption Document which states that transmission pipelines are those that operate at or above 30% of the pipe's SMYS at maximum operating pressure.<sup>22</sup>

Enbridge Gas referenced clause 12.4.7.1 of CSA Z662 standard, which states that the requirements for cover under Clause 4.11.1 do not apply and which confirms that the appropriate cover requirements are those set out in Table 12.2 of the standard.<sup>23</sup> In response to interrogatories, Enbridge Gas confirmed that the requirements for depth of cover for distribution pipelines is identical between CSA Z662-15 and CSA Z662-19.<sup>24</sup>

Essex County has argued that the Franchise Agreement provides the discretion as to the placement of the pipelines to the County Engineer.<sup>25</sup> Conditions 3 and 4 of the Franchise Agreement provide that any pipeline constructed shall be laid at locations approved by the Road Superintendent of the County and shall be constructed so as to not interfere with the use of the highway or any sewers, water-pipes, drains, or ditches therein or thereon. Enbridge Gas argued that the Franchise Agreement limits the purview of the Road Superintendent to reviewing proposed pipeline installations for such interference and does not grant the Road Superintendent authority to impose design or other restrictions beyond those necessary to limit such interference.<sup>26</sup>

## 5.2.2 Submissions of Other Parties

Energy Probe submitted that the depth of cover of the pipeline as proposed by Enbridge Gas is appropriate because it meets the standards of the TSSA for distribution

---

<sup>21</sup> AIC, paragraphs 33 and 35

<sup>22</sup> AIC, paragraphs 34,36

<sup>23</sup> Application, Exhibit B/Tab 1/Schedule 2/Page 3 and AIC, paragraph 28

<sup>24</sup> Enbridge IRR OEB staff 2(d)

<sup>25</sup> Essex County October 2 submissions, paragraph 15

<sup>26</sup> Application, Exhibit B/Tab 1/Schedule 3, page 2

pipelines. Energy Probe stated that the pipeline meets the definition of a distribution pipeline and is therefore not a transmission pipeline as Essex County claims.

Energy Probe asserted that the TSSA is responsible for technical standards under which gas distributors operate in Ontario and stated that the technical standard currently in effect in Ontario is CSA Z662-15 that TSSA has adopted. Energy Probe submitted that the fact that there is a later version and that it may be adopted by TSSA in the future is irrelevant.

FRPO submitted that Essex County's plans for this section of road are not advanced sufficiently to provide detail and therefore without the nature, timing and scope of the expansion, the impact on the pipe cannot be known and it would be hard to justify the costs of additional depth.

Pollution Probe submitted that CSA Z662 provides a minimum standard and clearly indicates that its minimum standards are not intended to be used prescriptively. Pollution Probe noted that Essex County outlines specific concerns related to its safe operation and maintenance of County Road 46 which is a major (Class 2) arterial road. Pollution Probe also noted that Essex County has also confirmed that it intends to widen County Road 46 in the next 5 to 10 years. Pollution Probe argued that in consideration of the current and future impacts of the proposed pipeline on the road allowance it appears clear that prescriptive application of the minimum CSA Z662 standards is not sufficient or appropriate.

OEB staff submitted that based on a review of all of evidence provided, Enbridge Gas' proposal regarding the depth of cover is in the public interest. OEB staff noted that the TSSA reviewed the pipeline design specification and did not raise any issues regarding the safe operation of the pipeline. OEB staff submitted that the TSSA, as the agency overseeing the operation of the pipelines in Ontario, has the authority over the applicable standards.

The OEB also received a letter regarding the Project from the TSSA (TSSA Letter). The TSSA is an entity governed by the *Technical Standards and Safety Act*, whose purpose is to enhance public safety by providing for the efficient and flexible administration of technical standards for a number of matters, including natural gas pipelines. Ontario regulation 210/01 assigns various responsibilities to the TSSA with respect to natural gas pipelines, and imposes a number of requirements on pipeline operators (such as Enbridge Gas). The TSSA reviews and audits all new pipeline projects that are submitted to the OEB for leave to construct to ensure that they meet all applicable standards.

The TSSA Letter confirmed that the applicable standards for the Project is CSA Z662-15. It further indicated that the TSSA has reviewed the technical aspects of the Project, including design, material specifications, wall thickness calculations and required depth of cover. The TSSA did not identify any concerns and indicated that in general it supported the Project.

## Findings

The OEB notes that the TSSA has confirmed that CSA Z662-15 is the applicable standard, which requires a minimum depth of cover of 0.6m for distribution pipelines. The TSSA has not identified any concerns with the Project, including the proposed depth of cover of 1m.

Essex County argues that as the road authority it should be permitted to apply a different standard, in this case the TAC guidelines. Although Essex County raises general concerns about safety related to the depth of cover, it has not provided any compelling evidence that the standard adopted by the TSSA and the depth of cover proposed by Enbridge Gas leads to an unsafe or otherwise technically deficient result. The Haddad Evidence filed by Essex County speaks to a road authority's ability to set appropriate criteria; however, it does not point to any actual safety concerns with respect to the proposed 1m depth of cover. The Wood Report, prepared under seal by a licensed engineer, filed by Enbridge Gas includes a comprehensive review of the depth of cover issue, and concluded that there were no safety concerns regarding a 1m depth of cover. This is also consistent with the conclusion of Enbridge Gas's in-house engineers.

Essex County has drawn attention to the fact that the evidence offered by Enbridge Gas in this proceeding was "unsworn". This follows the standard practice of the OEB in written proceedings, where, generally speaking, written evidence filed with the OEB is not sworn or affirmed. The OEB's Rules of Practice and Procedure (Rules) do not require that written evidence be sworn or affirmed.<sup>27</sup> Essex County also noted that the Wood PLC evidence was not accompanied by an acknowledgement of the expert's duty pursuant to Rule 13A.03 of the Rules. This issue was raised in final argument and not explored through the interrogatory process. While the lack of the formal acknowledgment is unfortunate, the OEB will not disregard the Wood PLC evidence on account of this oversight. Enbridge Gas is reminded to ensure that the appropriate form accompanies experts' reports in the future, even where there is expected to be a written hearing.

---

<sup>27</sup> Rule 13, OEB Rules of Practice and Procedure.



The OEB has reviewed the TAC guidelines referenced by Essex County with respect to required depth of coverage. It is clear that these guidelines are not binding on Essex County (or the OEB), and that the applicable standard is CSA Z662-15. It is also unclear to the OEB that the TAC guidelines actually recommend a depth of cover of 1.5 m for pipelines running parallel to a road. As Enbridge Gas points out in its AIC, the TAC guidelines state: “The purpose of these general guidelines is to assist the various road authorities in establishing and administering reasonably uniform criteria for the accommodation of utilities crossing (emphasis added) highway (and freeway) rights-of-way”.<sup>28</sup> This wording suggests that the TAC guidelines in this respect are not meant to provide guidance with respect to depth of cover for pipelines running parallel (as opposed to across) a roadway.

The appropriate standard for depth of cover for the Project is set out in CSA Z662-15 – a minimum of 0.6m. This applies whether the pipeline is beside the road, on the road allowance, or underneath the road. The proposed depth of cover of 1m exceeds this standard. The TSSA has reviewed the Project and has not identified any concerns with the proposed depth of cover (or in any other area). The engineering evidence filed by Enbridge Gas looked specifically at this issue and indicated that a depth of cover of 1m was safe. The engineering evidence filed by Essex County does not point to any specific safety concerns regarding a depth of cover of 1m along County Road 46. The OEB accepts that there could be circumstances under which a depth of cover should exceed (or, in this case, more greatly exceed) the standards established in CSA Z662-15. However, in the current case there appears to be no justification for requiring or approving a 1.5 m depth of cover. The OEB will not require an expense that would ultimately be borne by ratepayers where there is no proper justification for this cost.

The OEB further notes the applicability of the non-mandatory TAC guidelines to this project is not clear. As well, the OEB is unwilling to supplant the standards and views expressed by the TSSA and the engineering reports under seal that were filed by Enbridge Gas with a standard derived from the TAC guidelines.

The OEB is accordingly not convinced that the expenditure of an additional \$7.2 million to afford an extra 0.5m of depth of cover is required as a prudent cost to ratepayers.

---

<sup>28</sup> Enbridge Gas AIC, para. 77. Emphasis added. A member of the TAC Committee responsible for the TAC guidelines also expressed doubt as to whether the guidelines are meant to cover pipelines travelling parallel to the roadway – see Enbridge Gas AIC para. 78.

## 5.3 Abandonment of the Existing Pipeline

### 5.3.1 Submissions of Enbridge Gas and Essex County

Enbridge Gas is seeking the OEB's authority to abandon the NPS 10 pipeline in place consistent with its proposal in the leave to construct application. Essex County argues that Enbridge Gas should be required to remove the existing NPS 10 steel main from the right-of-way rather than permitting it to be abandoned in-place.

In its application, Enbridge Gas stated that the existing pipeline was installed primarily within 1m of the property line offering homeowners, municipalities and the Essex County the ability to establish landscaping and tree coverage. Enbridge Gas argued that removal of the pipeline would require significant excavation and would result in significant long-term remediation for restorations. Enbridge Gas estimated \$5.9 million in additional costs for removal of the pipeline.

Enbridge Gas confirmed that its proposal is in compliance with the requirements of section 12.10.3.4 of the CSA Z662-15 standard for the abandonment of distribution lines.

Essex County submitted that there are numerous infrastructure demands within the right-of-way in which Enbridge Gas intends to construct the new pipeline. Essex County stated that it had requested that the new pipeline be constructed in the same corridor as the existing pipeline, utilizing all available private easements. Essex County submitted that when it became apparent that Enbridge Gas would not agree to this request, it reluctantly agreed to the construction of the new pipeline within the right-of-way on condition that the existing pipeline be removed and not simply abandoned.<sup>29</sup>

Essex County submitted that the Franchise Agreement provides Essex County with the authority to demand that Enbridge Gas remove the abandoned pipeline at Enbridge Gas' expense. In its AIC, Enbridge Gas submitted that Essex County's rights under the Franchise Agreement are not unfettered but must be exercised within the intent and the express provisions of the Franchise Agreement and in a manner that is consistent with the broad public interest.

---

<sup>29</sup> Essex County evidence, Tab 1, paragraph 33, page 11

### 5.3.2 Submissions of Other Parties

Energy Probe submitted that the OEB does not have the authority to direct a utility as to how it must dispose of shareholder owned assets no longer in use and not in rate base and can only approve or disapprove the costs of removal or the revenues from disposal of such assets in a rate proceeding.

Energy Probe submitted that if Essex County wants the old NPS10 pipeline removed, it can either negotiate with Enbridge Gas or take it to court.

FRPO argued that Essex County has not provided any specific need which drives the need to remove the pipe at this time stating that Essex County has only expressed concern that it takes up a corridor in a crowded right of way. FRPO stated that Enbridge Gas has acknowledged that with the existing Franchise Agreement, Essex County maintains the right to request removal if there is a specific need. FRPO submitted that these factors weigh in favour of not incurring the cost and environmental impact unless there is a specific need and that if that time comes, Essex County can exercise that right.

Pollution Probe submitted that there is no basis under Section 101 of the OEB Act for consideration of the requested approval for the abandonment of the 30 km stretch of NPS 10 pipeline. Pollution Probe stated that removal of abandoned pipelines is particularly important in congested rights-of-way to provide valuable room for future infrastructure.

OEB staff submitted that Enbridge Gas' proposal for the abandonment in place of the existing NPS 10 pipeline as set out in the leave to construct application is in the public interest.

OEB staff submitted that Essex County has not provided evidence of any concrete plans to expand the road that would necessitate the removal of the pipeline. OEB staff also noted Essex County's response to Enbridge Gas' interrogatory which states that the existing NPS 10 pipeline is "unlikely" to be directly impacted by the purported widening even if it were to occur.<sup>30</sup>

### Findings

Much of the argument with respect to the abandonment in place issue relates to the Franchise Agreement. Unlike the great majority of franchise agreements in Ontario, the Franchise Agreement in this case is not in the form of the OEB's model franchise

---

<sup>30</sup> Essex County IRR – Enbridge 21

agreement. It was executed in 1957 and appears to have no expiry date, and therefore has not come before the OEB since the creation of the model franchise agreement in 2000. The OEB notes that franchise agreements under the *Municipal Franchises Act* are not “enforceable provisions” under the OEB Act, and are therefore not subject to the compliance provisions under Part VII.1 of the OEB Act. The OEB further notes that disputes relating to the terms of a franchise agreement have in some cases been brought to the courts for resolution.<sup>31</sup>

Essex County appears to rely on section 6 of the Franchise Agreement, which states: “In the event that [ Essex County] 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 main, line, pipe or works of [Enbridge Gas] ... should be altered at a specific point to facilitate the work of the [ Essex County], then upon receipt of a reasonable notice in writing from the Clerk of the [ Essex County] specifying the alteration desired, [Enbridge Gas] shall, at its own expense, alter or re-locate its main, pipe, line or works at the point specified.” This is not a general provision related to abandonment, and indeed the section does not mention abandonment at all. The Franchise Agreement requires Enbridge Gas to alter or re-locate its pipeline only as may be reasonably necessary to accommodate some alteration or construction of a highway. As noted above, there do not appear to be any immediate plans to expand County Road 46, nor is the OEB aware of any reason that an alteration or relocation of the (soon to be abandoned) existing pipeline is reasonably necessary.

This relates to a more general observation of the OEB that irrespective of the Franchise Agreement, the Essex County has not provided any compelling reasons why the existing pipeline should be removed. It has not pointed to any specific current or potential future conflicts with other infrastructure projects or uses. It does not dispute the fact that Enbridge Gas's proposal to abandon the pipeline in place is consistent with CSA Z662-15.

The OEB finds that there is insufficient evidence, at least at this time, to justify removal of the NPS 10 pipeline as requested by Essex County. The public interest does not support the expenditure of an additional \$5.9 million in costs for such removal. The OEB notes that the proposed removal would also unnecessarily impact the surrounding environment to meet as yet undefined future needs for that land.

---

<sup>31</sup> *Union Gas Ltd. v. Norwich (Township)*, 2018 ONCA 11.

## 5.4 Confidentiality of Information

### 5.4.1 Submissions of Enbridge Gas

In response to Pollution Probe Interrogatory 10, Enbridge Gas filed a redacted version of the Services Agreement with Wood PLC.

The OEB's Decision on Environmental Defence's Motion directed Enbridge Gas to provide an explanation, including specific reasons, why the information provided in Attachment 1 of the response to Pollution Probe Interrogatory 10 should be treated as confidential and why public disclosure of that information would be detrimental.

In its AIC, Enbridge Gas explained that the public response included redactions of two segments of the Services Agreement, namely insurance and pricing.

Enbridge Gas referenced the OEB's *Practice Direction on Confidential Filings* which states that the OEB may consider any prejudice to a person's competitive position in determining whether or not such information should be disclosed.

Enbridge Gas submitted that Wood PLC operates in the highly competitive environment of engineering consulting services and that it would be harmful to Wood PLC if its competitors were able to review the contents of the Services Agreement as the competitors would be able to alter their service offerings based upon this information.

Enbridge Gas noted the lack of probative value that this element of the evidence has in respect of the matters at issue in this proceeding and requested that this information be retained in confidence.

### 5.4.2 Submissions of other parties

OEB staff submitted that Wood PLC's competitive position could be harmed by the release of the redacted information and supported Enbridge Gas' confidentiality request. OEB staff also noted that the redacted information has little relevance to the merits of the proceeding. No other parties filed submissions on this issue.

## Findings

The OEB agrees with Enbridge Gas' submissions on the issue of confidentiality in that the provision of the unredacted agreement could harm the competitive position of Wood PLC and is not material to the resolution of the issues herein.

---

## 6 CONCLUSION

As stated earlier, in this application the OEB is required to determine whether the construction of the proposed pipeline within the right-of-way with a 1m depth of cover as well as abandonment in place of the existing NPS 10 pipeline is in the public interest.

The OEB reiterates that while it recognizes the rights and responsibilities of the Essex County road authority, and its Franchise Agreement with Enbridge Gas, the OEB's statutory responsibilities under the OEB Act requires the OEB to determine this application in accordance with the public interest.

The OEB's decision does not rescind or amend the Franchise Agreement but is a determination of the public interest in the execution of the project based on the evidentiary record.

Accordingly, the OEB approves the Enbridge application for an order, pursuant to section 101 of the OEB Act, granting Enbridge Gas authorization to, within the County Road 46 right of way, construct the Project approved by the OEB in the LTC Decision at a depth of cover of approximately 1m and to abandon the existing pipeline in place.

## 7 ORDER

### THE ONTARIO ENERGY BOARD ORDERS THAT:

1. Enbridge Gas Inc. is granted authorization, pursuant to section 101 of the OEB Act, to, within the County Road 46 right of way, construct the Project approved by the OEB in proceeding EB-2019-0172 at a depth of cover of approximately 1m and to abandon the existing pipeline in place.
2. Eligible intervenors shall file with the OEB and forward to Enbridge Gas Inc. their respective cost claims in accordance with the OEB's *Practice Direction on Cost Awards* on or before **November 19, 2020**.
3. Enbridge Gas Inc. shall file with the OEB and forward to intervenors any objections to the claimed costs of the intervenors on or before **November 26, 2020**.
4. If Enbridge Gas Inc. objects to any intervenor costs, those intervenors shall file with the OEB and forward to Enbridge Gas Inc. their responses, if any, to the objections to cost claims on or before **December 3, 2020**.
5. Enbridge Gas Inc. shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

All materials filed with the OEB must quote the file number, **EB-2020-0160**, and be submitted in a searchable/unrestricted PDF format with a digital signature through the OEB's web portal at <https://pes.ontarioenergyboard.ca/eservice>. Filings must clearly state the sender's name, postal address, telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at [www.oeb.ca/industry](http://www.oeb.ca/industry). We encourage the use of RESS; however, parties who have not yet [set up an account](#), may email their documents to [registrar@oeb.ca](mailto:registrar@oeb.ca).

All communications should be directed to the attention of the Registrar and be received no later than 4:45 p.m. on the required date.

Email: [registrar@oeb.ca](mailto:registrar@oeb.ca)

Tel: 1-888-632-6273 (Toll free)

Fax: 416-440-7656

**DATED** at Toronto November 12, 2020

**ONTARIO ENERGY BOARD**

*Original Signed By*

Christine E. Long

Registrar