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November 30, 2020

Delivered by Email

Ms. Christine Long
Registrar & Board Secretary
Ontario Energy Board
2300 Yonge Street
Toronto, ON M4P 1E4
BoardSec@oeb.ca

Dear Ms. Long:

**Re: Application by Enbridge Gas Inc. for an Order Granting Leave to Construct a
Natural Gas Pipeline in the City of Toronto. EB-2020-0198**

We are counsel to Waterfront Toronto in this matter. Please find attached Waterfront Toronto's Notice of Intervention in this proceeding.

Yours truly,



Gordon Kaiser

Copy:
Mark Kitchen
Director, Regulatory Affairs

Guri Pannu
Legal Counsel

ONTARIO ENERGY BOARD

IN THE MATTER OF The Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule B, and in particular, S.90.(1) and S.97 thereof;

AND IN THE MATTER OF an Application by Enbridge Gas Inc. for an Order granting leave to construct natural gas pipelines in the City of Toronto.

NOTICE OF INTERVENTION OF

TORONTO WATERFRONT REVITALIZATION CORPORATION

(Operating as WATERFRONT TORONTO)

November 30, 2020

Introduction

1. On October 13, 2020, Enbridge Gas Inc filed an Application with the Board under section 90 of the *Ontario Energy Board Act* for orders granting leave to construct approximately 2 km of pipeline at a cost of \$70 million. Pursuant to section 97 the Act Enbridge also sought orders approving a form of easement agreement.

2. Waterfront Toronto hereby requests intervener status in this Application and intends to participate in the proceeding as necessary, and may submit evidence, argument or interrogatories, and/or cross-examine witnesses. The interests of Waterfront Toronto in this proceeding are set out in the following sections of this Notice. A major concern that Waterfront Toronto has is that the Application assumes that the Ontario Energy Board has the jurisdiction to allocate the cost of the pipeline to Waterfront Toronto. For the reasons set out below, Waterfront Toronto believes that the Ontario Energy Board does not have the necessary jurisdiction.

3. Waterfront Toronto does not intend to seek an award of costs. Waterfront Toronto requests that all materials filed in this proceeding be served on counsel and the following senior officers of Waterfront Toronto:

David Kusturin
Chief Project Officer
Waterfront Toronto
20 Bay Street
Suite 1310
Toronto, On M5J 2N8
Dkusturin@waterfronttoronto.ca

Ian Ness
General Counsel
Waterfront Toronto
20 Bay Street
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Waterfront Toronto

4. In November 2001 three levels of government - Canada, Ontario, and the City of Toronto, established Waterfront Toronto to oversee the planning and development of the Toronto waterfront. Each of the three governments appoint four representatives to the Board of Directors. The Chair is jointly appointed by all three governments.

The Port Lands Flood Protection Project

5. In 2018 Waterfront Toronto began the Port Lands Flood Protection Project. The project is designed to protect the Port Lands from flooding and develop the infrastructure to promote development of the waterfront. This is \$1.25 billion project to protect 800 acres of land prone to flooding. Currently the Port Lands face extreme weather events causing potential flooding from the Don River. This project will widen the mouth of the Don River to accommodate larger volumes of floodwater. It will include a new channel in the Don River that has capacity to handle larger volumes of floodwater. The plan which reconnects Don River to Lake Ontario by creating a naturalized river mouth is one of the largest infrastructure projects in Toronto's history.

The Bridge Dispute

6. To understand Waterfront Toronto's interest in this proceeding it is necessary to explain

the dispute between Enbridge and Waterfront Toronto regarding the Harbour Line Railway Bridge, also known as the Keating Railway Bridge (the "Bridge"). This is a 75-year-old bridge that crosses the Don River just north of the Lakeshore Road vehicular bridge. It is owned by the City of Toronto. In 1955 the Toronto Harbor Commission granted Consumers Gas, now Enbridge, permission to use the Bridge to carry the pipe across the Don River (the "Bridge Access Permission"). The pipe is attached to the side of the Bridge.

7. As the flood protection project planning moved forward it became apparent that adjustments would have to be made to lengthen the Bridge, given the intended widening of the River, and this would require the addition of a new extended pipe parallel to the existing gas line to provide continuous gas services. Waterfront Toronto suggested this approach, as well as a number of other solutions that could be implemented on a cost-effective basis.

8. Enbridge rejected all the proposals. Instead, Enbridge insisted on the new \$70 million pipeline proposed in this Application. Enbridge also informed Waterfront Toronto that Waterfront Toronto would be responsible for all of the costs. While Waterfront Toronto recognizes the need to modify the pipeline, at no time did Waterfront Toronto ask for or accept the solution decreed by Enbridge. Waterfront Toronto is not in a position to pay for the relocation of the pipeline as proposed by Enbridge. If the pipeline is not relocated, the Bridge work cannot be undertaken and flood protection of lands east of the Don River will not be achieved. This will have a significant impact on projects proposed for that area.

9. On October 30, 2020, the City of Toronto terminated the Bridge Access Permission with Enbridge. A copy of the termination letter of October 30, 2020, including the 1955 documents, was sent to the Board and is reproduced in Attachment 1. As a result, Enbridge no longer has a right to locate their pipeline on the Bridge. Under the termination letter the pipe must be removed by May 2, 2022. The Bridge is an old bridge. It was initially built for railways, but it has little rail traffic today. The City has been considering for some time whether to continue operating this bridge.

Toronto Hydro

10. There is another important development that is not before the Board. Toronto Hydro also has utility assets located on the Bridge. It is also being required by the City to remove its infrastructure from the Bridge. However, in the case of Toronto Hydro, an agreement has been reached whereby the Toronto Hydro infrastructure would be modified and relocated on or near the Bridge at Toronto Hydro's cost. This is consistent with the proposal initially made to Enbridge.

Jurisdiction

11. This Application states that Enbridge intends to allocate 100 percent of the \$70 million cost of the pipeline to Waterfront Toronto. The Ontario Energy Board does not have jurisdiction to order Waterfront Toronto to pay these costs.

12. It is true that a capital contribution for pipeline construction was found by the Board to be

a rate, within the meaning of the Act, in the *Natural Resource Gas* in 2013.¹ The rational was that the capital contribution contributed to the rate that this customer would be paying for gas.

13. There is a major difference between *Natural Resource Gas* and this case. Natural Resource Gas had entered into a pipeline gas recovery agreement with the IGPC Ethanol to supply gas to a new ethanol facility in the town of Alymer. Under the agreement the Natural Resource Gas pipeline would be extended to the new facility IGPC was building. That is not the case here.

14. Waterfront Toronto is not building a facility that needs gas. Waterfront Toronto is not contracting for gas in any shape or form. Work must be undertaken on the Bridge so that Waterfront Toronto can complete construction of the flood protection project. The decision of Enbridge to seek leave to construct a new route, if it appropriately serves current and future customers, does not entitle it to recover the attendant costs from Waterfront Toronto. In *Natural Resource Gas* the capital charge was directly related to the supply of gas to a particular customer and the rate for that gas. That was a critical element of that decision. It bears no resemblance to this case.

15. There is another consideration. Natural Resource Gas was decided long before the recent *Vavilov* decision² of the Supreme Court of Canada. Before *Vavilov*, energy regulators were given much greater latitude by the courts in deciding questions of jurisdiction.³ That has changed. After *Vavilov*, there is much less deference. In 2020, courts in Ontario and Manitoba have significantly reduced the discretion of energy regulators when it comes to interpreting their home statute on questions of jurisdiction.⁴

Conclusion

16. The position of Enbridge in this Application is set out clearly in paragraph 44 of the application.

44. Enbridge Gas's position is that the relocation of the NPS 20 is 100% at the cost of Waterfront Toronto. Enbridge Gas does not have a contract with Waterfront Toronto. Nor is Waterfront Toronto the agent of the City. In these circumstances, when a third party project conflicts

¹ *Natural Resource Gas Limited*, EB 2012 – 0396 (February 7, 2013) p.4.

² *Canada (Ministry of Citizenship and Immigration v. Vavilov*, 2019 S.C.C.65 (Can).

³ *Union Gas Ltd. v. Township of Dawn* (1977), 15 O.R. (2nd) 722, O.J. No.2223 at paras 28 and 29; *Natural Resource Gas Limited v. Ontario Energy Board*, [2005], O.J. No.1520 (Div.Ct) at para 13; *Enbridge Gas Distribution Inc. v. Ontario Energy Board*, [2005], 75 O.R. (3rd)72, [2005]O.J. No.1520 (Div.Ct.).

⁴ *Manitoba Hydro v. Manitoba Public Utilities Board*, 20 MBCA 60; *Enbridge Gas Distribution Inc. v. Ontario Energy Board*, 2020 ONSC, 3616; *Nation Rise Wind Farm Limited v. Minister of the Environment*, 2020, ONCA 2984.

and requires the relocation of Enbridge Gas infrastructure, the third party is required to pay 100% of the costs of relocation.⁵

Waterfront Toronto believes that the Board should not grant the order requested to have Waterfront Toronto pay for the new pipeline for two principal reasons.

17. First, Enbridge claims the pipeline is necessary because of a *conflict* between their presence on the Bridge and the needs of the Port Lands Flood protection project that requires replacement of the existing Enbridge pipe on the Bridge with a new \$70 million pipeline. Enbridge's suggestion that there is a conflict between the Pipeline and the Project presumes that Enbridge has a legal right to maintain in its Pipeline in its present location that is being interfered with. Prior to the delivery of its application, however, Enbridge was on notice that it had no permanent right to utilize the Bridge and this was formalized by the City's letter of October 30, 2020. As such, any supposed conflict disappeared on October 30, 2020, when the City of Toronto terminated the Enbridge access rights to the Bridge. The conflict no longer exists and, accordingly, it is incorrect to say that Waterfront Toronto is the reason why the pipeline needs to be relocated.

18. Under the termination letter the Enbridge utility assets must be removed from the Bridge by May 2, 2022. After that, Waterfront Toronto will be able to undertake the work necessary to complete the flood protection project. If there is any disagreement regarding the interpretation of the Bridge Access Permission that is a matter for the courts, not the Ontario Energy Board.

19. Second, in section 44 of the Application, Enbridge claims that the \$70 million cost is the responsibility of Waterfront Toronto. Waterfront Toronto has made it clear to Enbridge that it is not responsible for the cost, does not have the resources to pay the cost and is not in a position to pay the cost. The Ontario Energy Board does not have jurisdiction to order Waterfront Toronto to pay the \$70 million that Enbridge states is required for their new pipeline.

20. Waterfront Toronto is not a gas customer. Nor does Waterfront Toronto intend to become a gas customer. The \$70 million charge for the new pipeline is not a rate. When allocating the cost of pipeline construction, the only basis for Ontario Energy Board jurisdiction is its rate-making authority.⁶ This Application does not ask the Ontario Energy Board to set any rates. The proposed \$70 million charge to Waterfront Toronto is not a rate. Before setting this matter down for hearing, the Board should call for submissions on jurisdiction.

21. The concerns set out in this Notice are more detailed than is often the case in an Intervention Notice. This results from two factors. First, the facts have materially changed since the Application was filed. In particular, on October 30, 2020 the City terminated in writing the Bridge Access Permission. The fact that the termination letter has been served on Enbridge is not in dispute. Second, Waterfront Toronto believes that the Board does not have jurisdiction to grant the relief Enbridge seeks with respect to payment of the costs by

⁵Section 44, Exhibit B, Schedule 1, page 42 of 47

⁶ *Natural Resource Gas Limited*, EB 2012 – 0396 (February 7, 2013) p.4.

Waterfront Toronto. It is generally agreed that it is better to deal with questions of jurisdiction early rather than to wait for final argument.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 30TH DAY OF NOVEMBER, 2020



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Chris Murray, City Manager

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Services
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Tel: 416-338-7200
tracey.cook@toronto.ca

October 30, 2020

Enbridge Gas Inc.
500 Consumers Road
North York, Ontario
M2J 1P8

Sent via email: cynthia.hansen@enbridge.com

Attention: Cynthia Hansen
Executive Vice President and President, Gas Distribution and Storage

Dear Ms. Hansen:

Re: Notice of Termination of Enbridge Licence to Utilize Keating Rail Bridge (the "Bridge") to Support a 20" Natural Gas Pipeline ("Pipeline")

Enbridge Gas's NPS 20 Relocation Project application, EB-2020-0198

Further to my letter dated July 31, 2020 and our discussions with Enbridge on August 19, 2020 and subsequently, I am writing to confirm that the licence granted to Enbridge's predecessor, Consumer's Gas Company of Toronto ("Consumer's Gas"), in 1955 to utilize the Keating Rail Bridge to support its natural gas pipeline is terminated.

1955 Cost Indemnity Provided by Consumers' Gas

Given the necessity for Enbridge to remove the Pipeline from the Bridge because its 1955 permission has been terminated, the portion of Enbridge's leave to construct application suggesting that the sole reason for relocation is due to the Port Lands Flood Protection Project and that Waterfront Toronto is responsible for the cost to relocate the Pipeline along the route that Enbridge selected requires correction.

Enbridge's leave to construct application does not address the fact that the February 22, 1955 letter from the Toronto Harbour Commissioner's to Consumers' Gas granting permission to use the Bridge and setting out the terms on which that permission was granted was explicit that all installation and future costs of this work were to be borne by Consumer's Gas (which obligations are now Enbridge's). For your ease of reference, we re-attach a copy of the February 22, 1955 letter previously shared.

As we have advised, in view of the 1955 terms, the cost to remove and relocate the Pipeline must be borne by Enbridge and the *Public Service Works on Highways Act* has no application.

Requirement for Removal of the Pipeline by May, 2022

The complete removal of the Pipeline from all Bridge infrastructure is required as soon as possible, and, in any event, not later than May 02, 2022. For your information, work on the Lakeshore Bridge will commence as of July, 2021, with the anticipated progression of work in this area necessitating the complete removal of Enbridge's infrastructure by the May 02, 2022 deadline indicated.

Since removal of the Pipeline by this deadline requires prompt steps be taken, the City and Waterfront Toronto anticipate that Enbridge will work with the Ontario Energy Board to expedite the proceedings for permission to relocate the Pipeline. This will assist the City and Waterfront Toronto in coordinating with Enbridge to facilitate the cost effective removal of the Pipeline and mitigate the risk of impacts on work planned for the Port Lands.

Next Steps

We would like to confirm with Enbridge that there is no dispute with respect to the legal effect of the City's termination of the 1955 licence permitting Enbridge to utilize the Bridge, and discuss how this issue can best be addressed so that the Ontario Energy Board proceeding is appropriately focused. In this regard, we request a response by November 6, 2020.

Thank you in advance for your anticipated cooperation.

Yours Truly,



Tracey Cook
Deputy City Manager
Infrastructure and Development Services
City of Toronto

Attached:

Letters dated January 28, 1955 and February 22, 1955 between the Toronto Harbour Commissioners and Consumers' Gas Company of Toronto

Copies:

M. Kitchen, Director, Regulatory Affairs, Enbridge, by email
G. Pannu, Senior Legal Counsel, Enbridge, by email
M. Aldred, General Counsel and Chief Operating Officer, Ontario Energy Board, by email to MaryAnne.Aldred@oeb.ca
R. Murray, Case Manager, Ontario Energy Board, by email to Ritchie.Murray@oeb.ca
City of Toronto, City Solicitor's Office and Waterfront Secretariat
Chief Executive Officer, Waterfront Toronto



THE **Consumers' Gas**

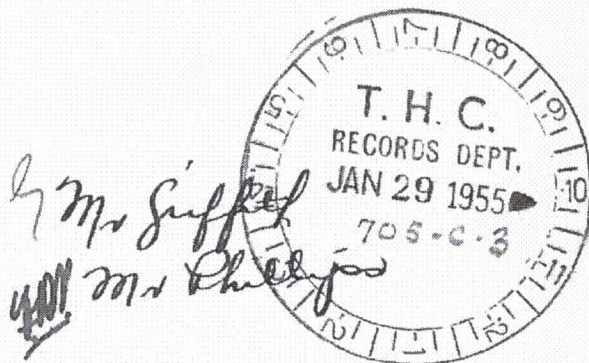
COMPANY OF TORONTO

A.L. BISHOP, PRESIDENT
OAKAH L. JONES, VICE-PRESIDENT
AND GENERAL MANAGER
TELEPHONE EM 3-6941

OFFICE OF THE
GENERAL SUPERINTENDENT OF DISTRIBUTION

January 28th. 1955.

Mr. F. R. Phillips,
Acting Chief Engineer
Toronto Harbour Commissioners
60 Harbour St. TORONTO



Re: Railway Bridge over Don River - Keating St.

Dear Sir:

The Consumers' Gas Company of Toronto, hereby request permission to use the centre concrete pier of the above mentioned bridge, to support 20 inch steel natural gas main crossing the Don River at this point, as shown on our plan No. 1E2-27.

Thanking you for your co-operation in this matter.

Yours truly,

THE CONSUMERS' GAS CO. OF TORONTO

Wm. Walburn

Wm. Walburn,

Assistant General Supt. of Distribution.

WW/lf

February 22, 1955.

The Consumers' Gas Company of Toronto,
19 Toronto Street,
Toronto 1.

Attention Mr. Wm. Walburn,
Asst. General Supt. of Distribution.

Dear Sir:-

Replying to your letter of 28th ultimo requesting permission to support your 20" gas main on the centre pier of the Commissioners' Railway Bridge crossing the Don River at Keating Street and as shown on your plan No. 1E2-27, I am now able to advise you as follows.

Your request was placed before the Commissioners at their meeting held on February 15th, 1955, and was approved by them subject to the following conditions:-

- (1) That all costs shall be borne by the Consumers' Gas Company.
- (2) That all local or other by-laws or regulations pertaining to the installation of gas lines shall be observed.
- (3) The Consumers' Gas Company to agree to indemnify and save harmless the Commissioners for any loss, injury or damage whatsoever arising out of the construction, operation, maintenance or existence of the gas pipe line in its location on the bridge. All works undertaken on the bridge in connection with the gas pipe line to be to the satisfaction of the Chief Engineer of the Commissioners and all costs of construction and repair to be the sole expense and responsibility of the Consumers' Gas Company.

Will you please acknowledge receipt and acceptance of the foregoing conditions.

Yours very truly,

FRP/P


Acting Chief Engineer.