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Delivered by Email

Ms. Christine Long  
Registrar  
Ontario Energy Board  
2300 Yonge Street  
Toronto, ON M4P 1E4  
Registrar@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  
Submissions regarding Procedural Order No. 1

Yours truly,



Gordon Kaiser

Copy

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**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** The Ontario Energy Board Act, 1998, S.O. 1998, c.15, Schedule 8, 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.

**SUBMISSIONS ON PROCEDURAL ORDER NO.1**

**TORONTO WATERFRONT REVITALIZATION CORPORATION**

**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 in the City of Toronto at a cost of \$70 million.
2. Waterfront Toronto was granted intervener status in this Application on December 10, 2020.
3. Enbridge Gas states that the Proposed Pipeline is required because of the need to relocate a section of existing pipeline that is located on the Keating Railway Bridge, which is in conflict with the construction of Waterfront Toronto's Port Lands Flood Protection and Enabling Infrastructure Project (PLFPEI). The application also states that Enbridge Gas has advised Waterfront Toronto that Waterfront Toronto is responsible for 100% of the costs of the Proposed Pipeline because Waterfront Toronto has requested relocation of the existing pipeline.
4. For the reasons set out below Waterfront Toronto disputes (a) that gas pipeline as proposed is required by Waterfront Toronto, and (b) that the Ontario Energy Board has jurisdiction to order that any of the costs of the proposed gas pipeline be paid by Waterfront Toronto.
5. This is an unusual application. It is unusual for a gas utility to attempt to allocate the cost of constructing a gas pipeline to a party that is not a gas customer.
6. On December 10, 2020 the Board issued PO No.1 in this proceeding stating at page 2:

Enbridge Gas filed a letter addressed to Toronto dated November 10, 2020, in which it stated that the issue of cost responsibility for the completion of the Proposed Pipeline is an issue for review and determination by the OEB as part of the LTC approval process. In its intervention request, Waterfront Toronto stated, among other things, that Enbridge Gas assumes that the OEB has the jurisdiction to allocate the cost of the pipeline to Waterfront Toronto.

However, Waterfront Toronto believes that the OEB does not have the necessary jurisdiction.

The OEB has determined that it will receive submissions on the following question(s):

- (a) Does the OEB have the jurisdiction to determine cost responsibility for the Proposed Pipeline, including any allocation of costs to Waterfront Toronto? If the answer to this question is “yes”, what steps, if any, should the OEB take to address this situation?
- (b) If the answer is “no”, what steps can the OEB take to ensure that the costs of the Proposed Pipeline are not unfairly shifted to ratepayers and that the OEB is able to meet its statutory objectives which include protecting the interests of consumers with respect to prices and the adequacy, reliability and quality of gas service (OEB Act, s.2)?

This submission addresses these questions.

## **Background**

### **Waterfront Toronto**

- 7. 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**

- 8. 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 a \$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 and will include a new channel in the Don River that also has capacity to handle larger volumes of floodwater. The plan which reconnects the Don River to Lake Ontario by creating a naturalized river mouth is one of the largest infrastructure projects in Toronto's history.

### **The Railway Bridge Dispute**

- 9. This application concerns a dispute between Enbridge and Waterfront Toronto regarding the Keating Railway Bridge. This is a long standing 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.

10. As part of the flood protection project the Bridge needs to be lengthened, given the intended widening of the River. This would require the addition of a new extended pipe parallel to the existing gas line to provide continuous gas services. Waterfront Toronto suggested a number solutions that could be implemented on a cost-effective basis, including the "Toronto Hydro solution" set out below.
11. Enbridge rejected all the Waterfront Toronto 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. At no time did Waterfront Toronto ask for or accept the solution decreed by Enbridge. Nor is Waterfront Toronto in a position to pay for the pipeline proposed by Enbridge.
12. 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 have been sent to the Board. 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. Waterfront Toronto submits that any dispute regarding the Bridge Access Permission is a matter for the Ontario courts, not the Ontario Energy Board.

### **The Toronto Hydro Solution**

13. Toronto Hydro also has utility assets located on the Keating Bridge. Like Enbridge, Toronto Hydro was recently asked by the City to remove its utility assets from the bridge. However, in the case of Toronto Hydro, an agreement was reached whereby the Toronto Hydro infrastructure would be modified and relocated near the bridge at Toronto Hydro's cost. A similar proposal was made to Enbridge. The proposal was rejected by Enbridge. The details of this proposal are set out in Appendix 1.

### **The Board's Jurisdiction**

14. The Application states that Enbridge intends to allocate 100 percent of the \$70 million cost of the pipeline to Waterfront Toronto. Waterfront Toronto submits that the Ontario Energy Board does not have jurisdiction to order Waterfront Toronto to pay these costs.
15. The question of whether the Ontario Energy Board has jurisdiction to order a capital contribution for pipeline construction was first determined by the Board in *Natural Resource*



*Gas* in 2013.<sup>1</sup> There, the Board found that the Board had jurisdiction under its rate making authority. The rationale was that the capital contribution contributed to the rate that the customer would be paying for gas.

16. There is a major difference between *Natural Resource Gas* and this case. In *Natural Resource Gas* the utility had agreed to extend its pipeline to a new ethanol plant being built by the customer. There was a dispute regarding the amount of the capital contribution that the customer should be paying to the utility. The Board was asked to resolve the dispute but the utility argued that the Board did not have jurisdiction to establish the amount and order the capital contribution. The Board disagreed stating:

The primary issue in this motion to review is the Board's jurisdiction to determine the contribution amounts to be paid by IGPC to NRG for the construction of the Pipeline. The foundation for such jurisdiction is found in the Board's powers to set rates for the sale, distribution and transmission of natural gas as derived from section 36 of the Act. **That IGPC is a customer of NRG is not in dispute.** The key question for the Board to resolve is whether a capital contribution is a "rate" as defined by the Act, and therefore subject to the Board's jurisdiction and regulation pursuant to section 36. For the reasons set out below the Board finds that the capital contribution paid (or owed) by IGPC does constitute a rate charged to a customer of NRG as defined in Act.

The Act defines a rate as: "a rate, charge or other consideration and includes a penalty for late payment." The Board agrees with IGPC and Board staff that this definition is very broad, and that it appears to cover virtually any payment from a customer to a utility for the provision of distribution service. There does not appear to be any dispute that the capital contribution is a payment for distribution service, **nor that IGPC is a customer of NRG.** Although capital contributions are not included in a utility's Board approved tariff of rates, the definition of rate is much broader than this and clearly includes "other compensation".

The finding that a capital contribution is a rate is further supported by general regulatory principles. The Board's first objective under section 1(1) of the Act is to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of electricity service." One of the key purposes of the Board's regulation, therefore, is to ensure that utilities are not able to abuse their monopoly power by charging unreasonable amounts to their customers. IGPC is located in NRG's service territory and is a customer of NRG. There is no means for IGPC to receive distribution service from any other utility. IGPC, like any customer, is entitled to a just and reasonable rate for the distribution services it receives from its utility. The Board was created (in part) to make just such a determination. The Board also agrees with IGPC that the amount of financial assurance provided to NRG by IGPC is a rate. As a condition of receiving service, IGPC was required to post a letter of credit in favour of NRG. The Board finds that any such funds held by the utility in order to protect itself

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<sup>1</sup> *Natural Resource Gas Limited*, EB 2012 - 0396 (February 7, 2013) p.4.

and its customers from any financial liability of serving IGPC must be just and reasonable to reflect the financial risks associated with the NRG's assets and liabilities

In summary, the Board finds that a capital contribution is a rate. As such it lies within the exclusive jurisdiction of the Board under section 36. The Board will commence a second phase to the proceeding to determine the appropriate amount of the capital contribution through a Procedural Order to follow.

[Emphasis Added]

17. A year later the Board in the same case confirmed its jurisdiction in an aid to construct application based on its rate making authority.<sup>2</sup>

The Board has already determined in EB-2012-0396, for the reasons set out in that decision, that a capital contribution is a “rate” within the meaning of the Act. The Board is directed by section 36(2) of the Act to ensure that all rates charged by a utility to a customer are just and reasonable, and section 36(1) of the Act specifically provides that the Board “is not bound by the terms of any contract”. In setting just and reasonable rates, the Board can adopt whatever method or technique that it considers appropriate. Accordingly, contrary to NRG's argument, determining the appropriate amount of IGPC's capital contribution falls within the Board's jurisdiction under the Act to set rates.

18. Waterfront Toronto is not building a facility that needs gas. Waterfront Toronto is not contracting for gas in any shape or form. 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 and the basis for the Board's jurisdiction.
19. There is another consideration. *Natural Resource Gas* was decided long before the recent *Vavilov* decision of the Supreme Court of Canada.<sup>3</sup> Before *Vavilov*, energy regulators were given much greater latitude by the courts in deciding questions of jurisdiction.<sup>4</sup> 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.<sup>5</sup> Waterfront Toronto is raising a question of

<sup>2</sup> *Natural Resource Gas Limited*, EB-2013-0081, February 27, 2014 at page 11.

<sup>3</sup> *Canada (Ministry of Citizenship and Immigration v. Vavilov*, 2019 S.C.C.65 (Can).

<sup>4</sup> *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.).

<sup>5</sup> *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; *Planet Energy Corp. v. Ontario Energy Board*, 2020, ONSC 598



jurisdiction, statutory interpretation, and law. On the basis of *Vavilov* correctness is now the standard to be applied in these circumstances.

### Conclusion

20. For the reasons stated above the Board does not have jurisdiction to order Waterfront Toronto to pay the costs of the proposed pipeline as Enbridge demands. The Board's jurisdiction in this regard is based on its ratemaking authority. That at a minimum requires the party paying part or all of the capital costs to be a customer of the utility. This point is made very clearly by the Board in the NRG decision. There is no dispute on the facts here. Waterfront Toronto is not a customer and has never been a customer. The Board does not have jurisdiction to order a non-customer to pay for a pipeline and has not previously done so. It should not start now.
21. Waterfront Toronto has no objection to Enbridge building the proposed pipeline provided Waterfront Toronto does not bear any of the cost. Even if the Board finds that it has jurisdiction to allocate costs to Waterfront Toronto, Waterfront Toronto under the Board's established principles would not be responsible for any cost. Waterfront Toronto is not a gas customer. Waterfront Toronto will not use any of the gas being transported on the proposed pipeline. As the Board stated in *Owen Sound Reinforcement* earlier this year: "the principle of beneficiary pays underlies the need for capital contributions".<sup>6</sup> Any unfairness to rate payers should be addressed when the Board applies its well established cost allocation rules.
22. It is important to note paragraph 6 of the Enbridge Application:
 

To help facilitate the PFLPEI, Enbridge Gas has identified the need to relocate and abandon approximately 155 m of nominal pipe size (NPS) 20 high pressure (HP) steel (ST) natural gas main. The pipeline must be relocated due to a conflict with PLFPEI. The pipeline is located on the Keating Railway Bridge (the Bridge) which spans the Don River and is located to the east and west of the Bridge. The pipeline is in conflict the PLFPEI because it is located at the mouth of the Don River, directly in the area where the PLFPEI will widen the Don River.
23. To be clear Waterfront Toronto never requested the \$70 million proposed pipeline. Nor did Waterfront Toronto ever suggest it would pay for any part of it. Nor did Waterfront Toronto agree that the pipe on the bridge had to be relocated due to a conflict with the PLFPEI. As it turns out the City of Toronto has terminated the Enbridge access rights on the Keating Railway Bridge. All of the necessary adjustments to the Bridge and the pipeline can be made within the timelines required. There is no conflict.
24. Last, but not least, Waterfront Toronto is ready, willing, and able to provide Enbridge with access to the new utility corridor that will cross the river.

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<sup>6</sup> *Enbridge Gas Inc. Re Owen Sound Reinforcement Project*, EB-2019-0183, at page 20.

25. In the Procedural Order the Board raises a concern regarding reliability with respect to gas supply. There is little risk. The existence of the new utility corridor described in Appendix 1 should address that concern.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th of DECEMBER, 2020



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## Appendix 1

### The Toronto Hydro Solution

The Toronto Hydro Solution is based on a new utility corridor being built by Waterfront Toronto.

The project will begin with the closure of the Gardiner Expressway on and off ramps to Logan Avenue and Lakeshore Boulevard as well as the closure of the Eastbound Lake Shore Boulevard bridge over the Don River. This will facilitate demolition of the overhead Gardiner ramps to be followed by lengthening, widening and reconstruction of the existing Lake Shore vehicular and Keating Rail bridges over the Don River.

Utility assets that will cross the Don River on the Keating Rail Bridge include the new Toronto Hydro duct bank, the City of Toronto watermain, and RESCU communication line. Provision has also been made for the Enbridge 20" NPS gas main. These utility assets will be located on the north side of the newly reconstructed Keating Rail bridge. To support this utility corridor, new cantilever beams will be constructed on the north side of the existing Keating Rail Bridge. New foundations for the lengthened rail bridge will be installed on the west side of the Don River. The Toronto Hydro duct bank, City watermain, RESCU line, and (potentially) Enbridge gas main will be installed on these new structures.

The Toronto Hydro duct bank will tie into new electrical chambers to be constructed on the east and west sides of the bridge. On the west side of the bridge, this will connect with the existing feeder main located beneath the west bound lane of Lake Shore Boulevard. On the east side, the chamber will connect with the new feeder main service being constructed along Saulter - Lake Shore - Don Roadway. Upon completion of each utility in the new utility corridor, the original crossing infrastructure will be abandoned and removed to allow for the completion of the Keating Rail Bridge extension.

The new utility corridor also offers Toronto Hydro (and potentially Enbridge) another advantage - the ability to replace aging assets on the bridge with new assets and technology.