



DECISION AND ORDER ON APPLICATION WITHDRAWAL REQUEST

EB-2020-0198

ENBRIDGE GAS INC.

**Application for leave to construct a natural gas pipeline and
associated facilities in the in the City of Toronto**

BEFORE: Emad Elsayed
Presiding Commissioner

Robert Dodds
Commissioner

February 19, 2021

TABLE OF CONTENTS

1	INTRODUCTION.....	1
2	THE PROCESS	2
3	SUBMISSIONS ON WITHDRAWAL.....	5
4	FINDINGS	11
5	FINAL COST AWARDS PROCESS	14
6	ORDER	15

1 INTRODUCTION

Enbridge Gas Inc. (Enbridge Gas) applied to the Ontario Energy Board (OEB) under sections 90 and 97 of the *Ontario Energy Board Act, 1998* (OEB Act), for an order granting leave to construct (LTC) approximately 1.9 kilometres of 20-inch diameter and approximately eight metres of 24-inch diameter natural gas pipeline and ancillary facilities (Proposed Pipeline) in the City of Toronto (Application). Enbridge Gas stated that the Proposed Pipeline is required because of the need to relocate a section of existing pipeline (Existing Pipeline) that is located on and adjacent to the Keating Railway Bridge (Bridge) that is in conflict with the construction of Toronto Waterfront Revitalization Corporation's (Waterfront Toronto) Port Lands Flood Protection and Enabling Infrastructure Project (Flood Protection Project). The abandonment of the Existing Pipeline and construction of the Proposed Pipeline are collectively referred to as the Project.

The estimated capital cost of the Project is approximately \$70.5 million. Enbridge Gas stated that it had advised Waterfront Toronto that Waterfront Toronto is responsible for 100% of the costs of the Project because Waterfront Toronto had requested the relocation of the Existing Pipeline.

In its intervention request, Waterfront Toronto stated that it believes that the OEB does not have the jurisdiction to allocate the cost of the pipeline to Waterfront Toronto. Waterfront Toronto stated that it had proposed that Enbridge Gas move its pipeline to a new utility corridor where Toronto Hydro and other utilities would be located (Utility Corridor) but that the proposal was rejected by Enbridge Gas¹.

¹ Waterfront Toronto Submission on Jurisdiction, filed January 8, 2021, at paragraph 14

2 THE PROCESS

Procedural Order No. 1 was issued on December 10, 2020 and granted intervenor status to the City of Toronto, Energy Probe Research Foundation (EP), Environmental Defence Canada Inc. (ED), Federation of Rental-housing Providers of Ontario (FRPO), Pollution Probe, Toronto and Region Conservation Authority (TRCA), Toronto Waterfront Revitalization Corporation (Waterfront Toronto), and School Energy Coalition (SEC).

Procedural Order No. 1 also provided for written submissions from Enbridge Gas, OEB staff and the intervenors on two questions regarding the OEB's jurisdiction to determine cost responsibility for the Proposed Pipeline.

Procedural Orders No. 2 and No. 3 revised the schedule for the filing of submissions, interrogatories, and responses to interrogatories.

Procedural Order No. 4 deferred the interrogatory stage of the proceeding until a settlement conference could be held.

On January 22, 2021 the OEB issued its Decision on Jurisdiction. The OEB found that it has full jurisdiction to determine cost responsibility for the Project to the extent that it is pertinent to the OEB's rate-setting mandate and its consideration of the public interest in a LTC proceeding as articulated in the OEB Act. However, the OEB stated that it does not have jurisdiction to order Waterfront Toronto to pay all or part of the Project cost. The Decision on Jurisdiction also noted that, although Enbridge Gas had provided an assessment of several project alternatives, that list may not have included some potentially more cost-effective solutions such as the Utility Corridor.

Discontinuance of Settlement Conference and Notice of Withdrawal

The settlement conference commenced on January 25, 2021. After the first day of the settlement conference, Enbridge Gas filed a letter advising that it is withdrawing its application. Enbridge Gas stated that, given the Decision on Jurisdiction, other options discussed in the Application, which were not pursued due to timing and other restrictions, should be investigated further.

On January 26, 2021, Waterfront Toronto filed a letter objecting to the withdrawal of the Application and submitted that a delay in the removal of the Existing Pipeline from the Bridge could have costly impacts on the Flood Protection Project and increase the potential damage from floods on the Don River.

On January 27, 2021, Enbridge Gas filed a letter responding to Waterfront Toronto's objection. Enbridge Gas stated that it had prepared the Application based upon a need for the Existing Pipeline to be relocated by May 2, 2022, but had recently come to understand that the May 2, 2022 deadline was not as firm as it had been previously told. Enbridge Gas stated that, absent contribution from either Waterfront Toronto or the City of Toronto, the costs of any relocation would be borne by the ratepayers and that it would be prudent to consider less expensive alternatives. Enbridge Gas stated that it is planning to review at least two other options, that were discussed in the Application: (i) micro-tunneling under the Don River, and (ii) the Villiers Island alternative. These alternatives, based upon preliminary Class 5 cost estimates, were more than \$20 million less than the alternative recommended in the current Application. Both of these options were considered early on in the evaluation process but were not pursued given Waterfront Toronto's schedule.

On January 28, 2021 Waterfront Toronto filed a second letter stating that it does not object to Enbridge Gas withdrawing the Application in order to consider alternatives but noted that Enbridge Gas has not indicated when it will refile a new LTC application.

On January 29, 2021, TRCA filed a letter supporting Waterfront Toronto's position on the request to withdraw the Application.

Procedural Order No. 5 was issued on January 29, 2021. The OEB found that, in order to determine whether withdrawal of the Application may adversely affect the interests of any party or be contrary to the public interest, the OEB would be assisted by submissions from parties on whether the OEB should allow the Application to be withdrawn or what conditions should be applied if the withdrawal is allowed. Parties were directed to focus any submissions on the following topics:

1. Adverse Impacts on Waterfront Toronto: What impact could the withdrawal of the application have on the Flood Protection Project schedule, if any? Can Waterfront Toronto adjust its schedule such that Enbridge Gas has more time to assess alternatives to the Project proposed in this Application?
2. Public Interest and Reliability of Natural Gas supply: If the Application is withdrawn, how can Enbridge Gas ensure the security of gas supply to its customers in the City of Toronto while addressing the removal of the Existing Pipeline from the Bridge?
3. Withdrawal with Conditions: If the OEB allows the Application to be withdrawn what, if any, conditions should it include in its decision? For example, should

Enbridge Gas be required to provide a schedule for filing a new Leave to Construct application?

Pollution Probe filed its submissions on February 3, 2021. Each of the City of Toronto, EP, ED, FRPO, OEB staff, TRCA, Waterfront Toronto and SEC filed their submissions on February 5, 2021. Enbridge Gas filed its reply submission on February 12, 2021.

3 SUBMISSIONS ON WITHDRAWAL

Waterfront Toronto

Waterfront Toronto stated that the Flood Protection Project is a series of 23 interdependent projects and that scheduling currently requires the completion of the Flood Protection Project by March of 2024. Waterfront Toronto submitted that the issue of the relocation of the Existing Pipeline must be resolved in order to permit the Flood Protection Project to proceed as planned.

Waterfront Toronto stated that it is assessing the possibility of creating a new river crossing, upriver from the Bridge, that could accommodate an Enbridge Gas pipeline on a temporary basis and that this assessment would likely be completed by the end of February 2021.

Waterfront Toronto also stated that it is studying whether components of the Flood Protection Project can be rescheduled or re-sequenced to accommodate a delay, but that this exercise depends on whether the Enbridge Gas's infrastructure can be relocated on a temporary basis.

Waterfront Toronto submitted that the OEB can and should retain jurisdiction over this issue and that the withdrawal of the Application should only take place after:

- a) The OEB has first heard and ruled on a submission by Waterfront Toronto regarding the new river crossing facility that Waterfront Toronto would make available to Enbridge Gas on a temporary basis
- b) Enbridge Gas has agreed to use the new river crossing facility on a temporary basis during the construction of the Flood Protection Project and until no later than March 31, 2024, if the OEB finds that to be in the public interest

City of Toronto

The City of Toronto expressed support for Waterfront Toronto's submissions, and submitted that Enbridge Gas should be permitted to withdraw its Application only after the OEB has first decided the issues raised by Waterfront Toronto's proposed submissions relating to a new river crossing facility.

The City of Toronto submitted that there was a likelihood of severe and negative impacts of delay to the Flood Protection Project and that setting a deadline for any new application by Enbridge Gas is necessary to ensure that the Existing Pipeline is

replaced expeditiously. The City of Toronto submitted that, if Enbridge Gas is permitted to withdraw its application, it should be required to file a new LTC Application on an urgent basis.

Energy Probe (EP)

EP submitted that, in dealing with the withdrawal of Enbridge Gas's application, the OEB should be guided by the objectives under the OEB Act and that there is nothing in the OEB Act that requires the OEB to do anything in response to Waterfront Toronto's objection.

EP stated that there is no schedule for the Flood Protection Project on the record of this proceeding, and that it is not possible to determine with any certainty what would be the impacts of the withdrawal of the application, or if any such impacts would be adverse on Waterfront Toronto. EP further submitted that there is no evidence on the record of this proceeding to suggest that the withdrawal of the Application affects the security of supply to Enbridge Gas's customers in the City of Toronto.

EP submitted that Enbridge Gas's request to withdraw the Application should be accepted by the OEB without conditions.

Environmental Defence (ED)

ED submitted that, if the OEB grants the withdrawal then Enbridge Gas should be ordered to file a new application on an expedited basis. ED submitted that a short timeline would avoid the risk of increased costs, which are not in the best interests of either ratepayers or taxpayers and would ensure the reliability of gas supply to Toronto.

Pollution Probe

Pollution Probe submitted that it is in the public interest to proceed in a manner that will enable the critical flood protection along the Don River, while ensuring natural gas capacity to meet peak winter conditions for downtown Toronto.

Pollution Probe opined that all potential alternatives to the Project are within the study area in the Environmental Report filed in this proceeding. If a different alternative becomes the best option, then Enbridge Gas would simply need to inform the Ontario Pipeline Coordinating Committee that the different alternative is the new preferred project and seek any incremental feedback.

Pollution Probe submitted that, if the OEB decides to approve the withdrawal request, it is not practical to expect that any conditions imposed by the OEB would enable the relocation to be completed within the timeline required. In Pollution Probe's view, it would be more efficient to continue the current proceeding and require the information related to the other options to be filed in an expeditious manner.

School Energy Coalition (SEC)

SEC noted that questions related to the Flood Protection Project schedule can only be answered by Waterfront Toronto but also questioned whether it is any part of the OEB's role to ensure that the Flood Protection Project can proceed as planned. In SEC's view, it is not the OEB's role to protect Waterfront Toronto from financial loss, nor is it a responsibility that the ratepayers should be asked to bear.

With respect to the reliability of gas supply, SEC opined that the Existing Pipeline will be removed from the Bridge by the time Waterfront Toronto needs it to be off in order to proceed with their plans and that the OEB does not need to do anything to ensure that result.

SEC submitted that putting any conditions on the withdrawal would not be useful although the OEB should be clear about what it expects in a new LTC application. SEC submitted that, at a minimum, the OEB's expectations should include:

- 1) Any new LTC application to deal with the relocation of the Existing Pipeline must include a proper analysis of alternatives to whatever preferred option is proposed and be filed with sufficient time so that the OEB can engage in a proper review of the application
- 2) Issues with respect to Enbridge Gas's legal right to be on the Bridge, or not, and with respect to contribution by Waterfront Toronto to the cost of relocation, must be resolved before the new application is filed
- 3) Ratepayers must not be asked to pay any amount for this capital project that exceeds the benefits being delivered for the customers (as opposed to benefits to Waterfront Toronto, EGI shareholders, or anyone else)

Federation of Rental-housing Providers of Ontario (FRPO)

FRPO stated that it supports and adopts the submissions of SEC.

FRPO submitted that Enbridge Gas should provide information to assist the OEB in understanding the impact of the alternatives on system capacity as it relates to the reliability of gas supply. FRPO opined that Enbridge Gas could provide this information with its evolved proposal as a result of negotiations with Waterfront Toronto and the City of Toronto. In this way, any incremental benefits arising from the proposed project can be recognized in the OEB's consideration of the public interest.

FRPO also submitted that Enbridge Gas should provide the OEB with more information on the efficacy of taking the feed for the proposed Station A from the west side of the Don River in the area of their recent NPS 30 relocation. FRPO submitted that the OEB should place conditions on the withdrawal that require Enbridge Gas to report on whether this connection and shorter path to Station A is a viable alternative; in the alternative, the OEB could state its expectation that more information on this alternative be presented in any subsequent application for relocation.

OEB Staff

OEB staff submitted that, if the Application is withdrawn, Enbridge Gas would need to file a new LTC application, either for an alternative to the Project or to revive the Project proposed in the current Application. OEB staff stated that in the interest of time and regulatory efficiency, the unresolved issues ought to be managed and resolved by Enbridge Gas and Waterfront Toronto, even after the Application is withdrawn and well before Enbridge Gas files a new LTC application.

OEB staff stated that, if there is sufficient flexibility in the schedule of the Flood Protection Project, then it would be prudent for Enbridge Gas to further investigate other potentially lower cost options. However, if there is no flexibility in the schedule of the Flood Protection Project, then OEB staff's near-term concern is how Enbridge Gas will deal with the imminent need to move the Existing Pipeline from the Bridge in a cost effective way while ensuring the reliability and security of natural gas supply to customers in the City of Toronto. OEB staff submitted that there is merit in the OEB making its expectations known and maintaining oversight of Enbridge Gas's plans.

OEB staff also submitted that, if the OEB approves the withdrawal of the Application, the OEB should include a number of conditions that require Enbridge Gas to report on the following matters until such time as Enbridge Gas files a new LTC application:

- a) Its review of viable and cost-effective alternatives to the Project as well as the status of discussions with Waterfront Toronto with respect to finding mutually acceptable solutions having regard to the Flood Protection Project schedule and the relocation work that Enbridge Gas needs to carry out
- b) Any updates on the City of Toronto's requirement to remove the Existing Pipeline from the Bridge, including updates on any extensions to the May 2, 2022 deadline
- c) Measures that Enbridge Gas is considering to ensure the cost effective removal of the Existing Pipeline from the Bridge and the schedule of removal activities (if the removal of the Existing Pipeline from the Bridge is required by May 2, 2022) and any measures that may be needed to be implemented as a temporary relocation and how any such measure will ensure reliability and security of gas supply
- d) Updates on when Enbridge Gas plans to file a new LTC application for a temporary relocation of the Existing Pipeline, if required, as well as a long-term (permanent) relocation

Toronto and Region Conservation Authority (TRCA)

TRCA stated that it supports removal of the Existing Pipeline from the Bridge as soon as possible.

TRCA stated that it adopts Waterfront Toronto's withdrawal conditions and proposed a third condition – that Enbridge Gas and Waterfront Toronto co-ordinate with TRCA while planning the pipeline relocation to ensure that the project takes into account TRCA's requirements under the *Conservation Authorities Act*. Such engagement would include:

- a) Prior to finalizing the detailed design plans for permit issuance, TRCA will be provided an opportunity to review the proposed alternative(s), identify specific permit submissions and review requirements
- b) Enbridge Gas will include in the permit application its response to comments from TRCA during the planning stage

Enbridge Gas

In its reply submission, Enbridge Gas reiterated its safety concerns regarding any option, temporary or otherwise, that would involve construction activity occurring around

an exposed NPS 20 vital main. Enbridge Gas pointed out that the City of Toronto has yet to determine whether or not it will abandon the Bridge and that the City of Toronto has filed a court application seeking certain declaratory relief in respect of the Existing Pipeline being located on the Bridge (Court Application).

Enbridge Gas submitted that, if the Existing Pipeline must be removed from the Bridge by May 2022, then there are no alternative options other than the current Application that can meet that time frame. Enbridge Gas estimated that it could assemble a new LTC application for the Project in a few months. In this scenario, withdrawal of the current Application, coupled with the resubmission of a new application with updated evidence and the benefit of the resolution of the Court Application would assist the OEB in discharging its statutory duties in considering the public interest.

Enbridge Gas submitted that, if there is additional time beyond May 2022, then the availability of other options must be considered more closely and that it would take 10 to 12 months to assemble the necessary evidence to support a LTC application for either the micro-tunneling or Villiers Island alternatives.

Enbridge Gas stated that the Existing Pipeline cannot be removed from service without replacement capacity being made available and that loss of the Existing Pipeline in winter conditions could leave tens of thousands of residences and businesses without natural gas.

Enbridge Gas opposed any condition that would require it to submit a LTC application by a certain date and it opposed any ongoing reporting obligation. Enbridge Gas stated that it would commit to filing with the OEB any resolution of the Court Application within 10 days of such resolution. Enbridge Gas stated it would also commit to working diligently towards an acceptable resolution and the filing of a new LTC application.

4 FINDINGS

The OEB approves Enbridge Gas's request to withdraw its application. The OEB will not impose any conditions on this approval but will set some expectations regarding any new application. These expectations are listed at the end of the Findings section.

The OEB's decision is based on the following two reasons:

a) Insufficient evidence regarding the best project alternative from the ratepayers' perspective

In all matters related to natural gas, including leave to construct applications, the OEB's objectives include informing customers and protecting their interests. This has been, and will continue to be, a guiding principle of the OEB's review, both in the current Application or a new application.

Enbridge Gas stated that the recommended alternative, at a cost of about \$70.5 million, is not the least cost alternative but was recommended because of the tight timeline to remove the Existing Pipeline from the Bridge by May 2, 2022. In its January 27, 2021 letter to the OEB, Enbridge Gas stated that, by withdrawing its application and taking more time, it will be able to better examine at least two more alternatives, which could be more than \$20 million less expensive than the Project. The OEB finds that other alternatives should be pursued to ensure that the relocation project is prudent and that the ratepayers are not burdened by unnecessary additional cost.

Waterfront Toronto stated that it is currently exploring a temporary alternative involving a new river crossing. Waterfront Toronto suggested that it could complete the assessment of this alternative approximately by the end of February 2021. The OEB notes that the use of a temporary crossing was already assessed by Enbridge Gas and rejected because of cost, schedule, safety and environmental concerns. Enbridge Gas's cost estimate for a temporary crossing was \$45.4 million plus the cost of a temporary bridge².

Waterfront Toronto suggested that Enbridge Gas should not be allowed to withdraw its application until this alternative is presented to, and ruled upon by, the OEB and until Enbridge Gas agrees to use the new river crossing facility during the construction of the Flood Protection Project. The OEB does not accept Waterfront Toronto's proposal. If a temporary crossing is to be re-examined for some reason, this can be done as part of

² Exhibit B, Tab 1, Sch 1, page 30-35

Enbridge Gas's new application. There is no reason to delay the process any further to examine an alternative that has already been assessed by Enbridge Gas, nor is there a reason to examine a single alternative to the exclusion of other potentially more permanent, less costly alternatives.

b) Lack of clarity regarding cost responsibility

In its Decision on Jurisdiction, the OEB found that it has full jurisdiction to determine cost responsibility for the Project to the extent that it is pertinent to the OEB's rate-setting mandate and its consideration of the public interest in a LTC proceeding, as articulated in the OEB Act. The Decision on Jurisdiction also stated that the OEB does not have jurisdiction to order Waterfront Toronto to pay all or part of the Project cost. It should also be clarified, as pointed out by some intervenors in this proceeding, that the OEB does not have the authority to deal with flood protection issues.

In accordance with the OEB Act, the OEB will approve a new LTC application only if it is satisfied that the proposed work is in the public interest, which includes ensuring that the reliability and quality of gas service is not going to be put at risk and that the proposed project provides a direct benefit to the ratepayers. The OEB's mandate regarding cost responsibility is limited to the extent to which any cost is proposed to be assigned to ratepayers.

The OEB arranged for a settlement conference among the parties on January 25, 2021 (and January 26, 2021 if necessary), to specifically deal with the two issues listed above (project alternatives and cost responsibility). The parties met only on January 25 and Enbridge Gas filed a letter with the OEB on the same day requesting the withdrawal of its application.

With the withdrawal of the Application, the Project described therein is effectively no longer before the OEB. To the extent that the Project (or something similar) is revived through a new application, evidence of the evaluation of the alternatives (including their estimated costs) will be an important component of that application. The OEB will review that evidence if and when such an application is filed.

OEB's Expectations in a New Application

If Enbridge Gas were to file a new application, the OEB would have the following expectations:

- Enbridge Gas would assess all feasible alternatives with a focus on protecting the interests of ratepayers with respect to prices and the reliability and quality of gas service
- Ratepayers would not be asked to pay any amount that exceeds the benefits being delivered to them
- Issues between Enbridge Gas and Waterfront Toronto and/or the City of Toronto regarding schedule, legal rights and cost responsibility would be resolved before the new application is filed
- Enbridge Gas would allow sufficient time for the OEB to conduct a proper review of the new application

5 FINAL COST AWARDS PROCESS

In Procedural Order No. 1, the OEB determined that Energy Probe, ED, FRPO, Pollution Probe and SEC are eligible to apply for an award of costs.

Prior to its approval of Enbridge Gas's request to withdraw the Application, the OEB conducted several steps of a hearing that included submissions on the OEB's jurisdiction, a settlement conference and submissions on the withdrawal of the Application.

The OEB is making provision for the filing of cost claims by eligible intervenors.

In its submission on Enbridge Gas's request to withdraw the Application, TRCA stated that, "[i]n the event of a withdrawal TRCA reserves its right to make submissions as to costs of this proceeding."

The OEB notes that TRCA did not request cost eligibility at the time that it applied for intervenor status in this proceeding and was not awarded cost eligibility in Procedural Order No. 1. Pursuant to the OEB's *Practice Direction on Cost Awards*, the TRCA would not be eligible for a cost award³. Accordingly, the OEB will not consider a cost award request by TRCA.

³ Ontario Energy Board *Practice Direction on Cost Awards*, last revised April 24, 2014. Section 3.05 (j) states that "a conservation authority established by or under the *Conservation Authorities Act* (Ontario) or a predecessor of that *Act*, individually or in a group" is not eligible for cost awards.

6 ORDER

IT IS THEREFORE ORDERED THAT:

1. The OEB accepts the withdrawal of application EB-2020-0198 without conditions.
2. Energy Probe, ED, FRPO, Pollution Probe and SEC shall file with the OEB and forward to Enbridge Gas Inc. their cost claims in accordance with the OEB's *Practice Direction on Cost Awards* on or before **March 05, 2021**.
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 **March 19, 2021**.
4. If Enbridge Gas Inc. objects to the costs of a specific intervenor, that intervenor shall file with the OEB and forward to Enbridge Gas Inc. its response, if any, to the objections to cost claims on or before **April 5, 2021**.
5. Enbridge Gas Inc. shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, do not include personal information (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's [Rules of Practice and Procedure](#).

All materials filed with the OEB must quote the file number, **EB-2020-0198** and be submitted in a searchable/unrestricted PDF format with a digital signature through the OEB's web portal at <https://p-pes.ontarioenergyboard.ca/PivotalUX/>. 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. We encourage the use of RESS; however, parties who have not yet [set up an account](#), may email their documents to 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.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Ritchie Murray at ritchie.murray@oeb.ca and OEB Counsel, Ljuba Djurdjevic at ljuba.djurdjevic@oeb.ca.

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DATED at Toronto, **February 19, 2021**

ONTARIO ENERGY BOARD

Original Signed By

Christine E. Long
Registrar