

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Enbridge Gas Inc. for an Order or Orders granting leave to construct natural gas pipelines in the Municipality of Chatham-Kent and Essex County;

AND IN THE MATTER OF an Application by Enbridge Gas Inc. for an Order or Orders approving the proposed forms of pipeline easement and temporary land use agreements.

EB-2022-0157

SUBMISSIONS

OF

THREE FIRES GROUP INC.

December 14, 2023

I. INTRODUCTION

1. We are counsel to Three Fires Group Inc. (“**Three Fires**” or “**TFG**”) in the matter of the application of Enbridge Gas Inc. (the “**Applicant**” or “**EGI**”) to the Ontario Energy Board (the “**OEB**” or the “**Board**”) for approval for an order granting leave to construct natural gas pipelines in the Municipality of Chatham-Kent and Essex County and for other related relief (the “**Application**”).
2. Three Fires is an Indigenous business corporation that jointly represents the interest of Chippewas of Kettle and Stony Point First Nation (“**CKSPFN**”) and Caldwell First Nation (“**Caldwell**” and, together, the “**Three Fires First Nations**”) and has full intervenor status in this proceeding. The Three Fires First Nations each have traditional territory, and associated Aboriginal rights and interests protected by the *Constitution Act, 1982*, that may be impacted by the outcomes of this proceeding.

II. OVERVIEW

3. Three Fires’ submissions will proceed in three main parts as follows:
 - (a) The submissions will note the shortcomings of the Application in the area of Indigenous consultations. These shortcomings are most visible in EGI’s Environmental Report (the “**Report**”) ¹ and represent a broader pattern of conduct on the part of EGI. The submissions will note how consultations could be made more effective moving forward in relation to this project and for future projects.
 - (b) The submissions will then address specific deficiencies in EGI’s proposed approach to mitigating environmental impacts. These concerns cover a range of issues, including:
 - i. issues arising in part from EGI’s uncertain position on the Three Fires First Nations’ jurisdiction over the project area and consequent reluctance to provide for more integrated Indigenous participation in effective monitoring and related reporting mechanisms;

¹ Application, Exhibit F.

- ii. issues where Three Fires seeks more diligent monitoring and reporting generally; and
 - iii. issues associated with the desire on the part of Three Fires (and potentially other First Nations in the future and/or on other projects) to play a more significant role in ongoing inspection activity as well as efforts towards site restoration.
 - (c) The final section of the submissions will highlight that meaningful analysis of the potential effects of the energy transition is becoming increasingly important to the questions that come before the Board. Rather than embrace this challenge in this proceeding, EGI has used the uncertainty associated with energy transition as an excuse for *less* rather than more analysis. As a result, it has generally avoided deeper discussions of the threats and impacts that the energy transition may pose to EGI's business and customers in general and this project in particular.
4. The consequence for this proceeding is an incomplete picture for the purposes of determining whether the project is in the public interest, as well as an almost certain understatement of the medium and long-term risks that the project may face. Three Fires' submissions highlight the contradictions in EGI's evidence, as well as note the areas where EGI's failure to provide further analysis is inconsistent with EBO 134's guidance.
5. Three Fires' central position is that deficiencies in the Application relating to the risks arising from energy transition must be adequately resolved before the OEB should consider approval of the proposed project in this proceeding or a future re-application.
6. Three Fires will include its requests for relief throughout its submissions, then consolidate those requests in the concluding paragraphs herein. Specifically, Three Fires will request that the Board:
- (a) find that the project is not in the public interest and therefore does not pass the EBO 134 test; and
 - (b) direct EGI going forward to improve its Indigenous consultation practices by being more proactive (or at a minimum EGI must be less passive) in incorporating the

histories and positions of First Nations into its initial application materials, including environmental reports.

7. Should the Board choose to deny EGI's application, Three Fires would not oppose an order that anticipates that EGI may re-apply with the benefit of a more satisfactory record that addresses the risks that the energy transition presents for the proposed project in a more meaningful way. More specifically, if the Board permits EGI to reapply, it should do so:
 - (a) on the basis that its EBO 134 analysis must include consideration of the risks of energy transition, acknowledging uncertainty but nevertheless making best efforts towards a thorough examination of both upside and downside risk, including use of probabilities and scenarios that are capable of specifically addressing the potential consequences of the range of plausible energy transition scenarios for the project and assets at issue; and
 - (b) with a requirement that EGI adjust its revenue horizon to 20 years for the purposes of its re-application, which would be consistent with EBO 188's standard for large volume customers.

8. If the Board approves EGI's Application, Three Fires requests that the Board include the following in its decision:
 - (a) capital contributions ("**CIAC**") sufficient to eliminate any subsidy;
 - (b) a requirement for EGI to supplement many of its proposed mitigation and environmental protection activities relating to the construction and longer-term impact of the proposed project, as detailed throughout this Application below and consolidated in the final paragraphs of this submission; and
 - (c) require EGI going forward to improve its Indigenous consultation practices by being more proactive (or at a minimum EGI must be less passive) in incorporating the histories and positions of potentially impacted First Nations into its initial application materials, including environmental reports.

III. SUBMISSIONS

A. EGI's Consultation Efforts Must Improve

9. In the context of EGI's recent leave to construct application in EB-2023-0175 (the "**Watford Application**"), Three Fires delivered written submissions that included requests that EGI improve its Indigenous consultation practices.²
10. Many of the same deficiencies in EGI's consultation practices that Three Fires identified in the Watford Application exist in the context of the current Application, demonstrating that the matters Three Fires have raised are standard EGI practices and not exceptional cases.
11. Accordingly, many concerns that Three Fires raises in this section overlap with or duplicate many of the concerns it recently raised in the Watford Application. These concerns centre on the general omission of First Nations' history in the project area from the relevant reports,³ which potentially contribute to the related problem of EGI's failure to recognize, reflect in their reports, or otherwise meaningfully respond to Three Fires' assertions of rights as relevant to certain matters examined in environmental reports commissioned by EGI.⁴

General Absence of Context and History of First Nations in Relevant Reports

12. The Ministry of Energy identified CKSPFN and Caldwell as Indigenous communities that should be consulted in relation to the Application in a letter dated August 6, 2021.⁵
13. The OEB has recognized that the requirement for Indigenous consultations entails several important procedural elements,⁶ including:

² EB-2023-0175, Three Fires Final Submissions, online:
<<https://www.rds.oeb.ca/CMWebDrawer/Record/824796/File/document>>, ("**Watford Submissions**").

³ Watford Submissions, paras 9-15.

⁴ *Ibid.*, paras 16-48.

⁵ Application, Exhibit H, Tab 1, Schedule 1, Attachment 2.

⁶ OEB's Environmental Guidelines, page 16:
<https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2023-03/OEB-Enviromental-Guidelines-for-Hydrocarbon-Projects-8th-Edition-20230328.pdf>.

- (a) meeting with Indigenous communities to share the information necessary for communities to understand and assess the potential impact on Aboriginal or treaty rights;
 - (b) responding to questions and concerns raised by Indigenous communities; and
 - (c) discussing options to accommodate communities in respect of adverse effects on Aboriginal or treaty rights.
14. EGI's public-facing [Indigenous Reconciliation Action Plan](#) ("IRAP") and its [Indigenous Peoples Policy](#) ("IPP") endorse the basic position that First Nations are entitled to appropriate consultation and accommodation. Both documents include many significant commitments concerning consultation with Indigenous peoples as well as respecting and upholding the rights of Indigenous peoples. Commitments and significant statements of principle from the IRAP and the IPP include:
- (a) EGI's recognition of the importance of the United Nations Declaration on the Rights of Indigenous Peoples in the context of existing Canadian law;⁷
 - (b) EGI's recognition of the legal and constitutional rights possessed by Indigenous Peoples in Canada and the importance of the relationship between Indigenous Peoples and their traditional lands and resources;⁸
 - (c) EGI's stated principle to "engage early and sincerely through processes that aim to achieve the support and agreement of Indigenous nations and governments for our projects and operations that may occur on their traditional lands";⁹
 - (d) EGI's stated principle that it seeks "the input and knowledge of Indigenous groups to identify and develop appropriate measures to avoid and/or mitigate the impacts of our projects and operations that may occur on their traditional lands."¹⁰

⁷ Exhibit H, Tab 1, Schedule 1, Attachment 5, page 2.

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

15. As set out in the following section, EGI's consultation efforts fall short of the OEB's general guidelines as well as its own corporate commitments.

EGI's Application Contains Shortcomings in Area of Indigenous Consultations

16. The most notable example of EGI's shortcomings relating to Indigenous consultations is found in the Report, which was also the case in the Watford Application.¹¹ The Report contains virtually no significant mention of the history of First Nations in the project area, nor does it reference the area's history of colonization, including policies such as the *Drainage Act*, which favoured agricultural expansion, and the displacement of First Nations from their lands and traditional territories.
17. EGI's long corporate history in the area provides an essential context towards assessing these omissions, which are fundamental to Three Fires' position on many of the business, public interest, and environmental questions central to the Application. EGI promotes its long history in southwest Ontario and elsewhere in Canada,¹² which presumably has provided EGI with the exposure necessary to understand the importance of Indigenous history, rights assertion, and understanding and stewardship of the relevant territories to an environmental review such as the one in this proceeding.
18. EGI's approach is problematic both on a principled basis and in terms of the implications it presents for this proceeding. On a principled basis, EGI's approach is deficient in at least three ways:
- (a) First, the general omission of the history of First Nations in the region from the Report reflects the fact that little effort was directed towards assembling the information readily available in the public domain on matters relating to colonization and displacement and the impacts on First Nations and Indigenous Peoples.

¹¹ See Watford Submissions, paras 9-15.

¹² See, for example, EGI's description of its corporate history on its website: <<https://www.enbridge.com/about-us/our-history#:~:text=The%20roots%20of%20what%20is.and%20endures%20to%20this%20day>>.

- (b) Second, it fails to draw upon EGI's own extensive corporate history in the area, which almost certainly has offered EGI the opportunity to become aware of the existence of these issues.
- (c) Third, it places the unjust and inequitable onus on First Nations to raise even the most basic and accepted positions relating to their position and history, failing which such matters risk omission from application materials and other consideration. It potentially absolves EGI from a more proactive responsibility to consider (let alone investigate and improve their understanding concerning) the place and history of First Nations in relation to the projects that EGI proposes which is contrary to the principles and spirit of Reconciliation.
19. EGI's passive approach to the consideration of the history of First Nations in the area also creates omissions in their proposed approach for the construction of the proposed project. One notable example is the failure of EGI's report to reference CKSPFN's Band Council Resolution #2851 (available to EGI since May 2017) (the "**Band Council Resolution**"),¹³ which notes that certain waterways were never surrendered and requires a company that uses or plans to use any part of the applicable territory to seek and obtain *express* permission from the government of CKSPFN for the proposed usage.¹⁴
20. As Three Fires noted in the Watford Application, EGI's deficiencies in this proceeding form part of a larger pattern of conduct, which only grows more apparent as the importance and prominence of Reconciliation increases among Ontario's priorities.¹⁵
21. A better approach more consistent with the OEB's stated objectives for Indigenous consultation would be an approach that genuinely shares the onus of ensuring that the history and perspectives of First Nations are reflected in the documents that are the centrepiece of a leave to construct application and provide an essential part to the associated Indigenous consultations. This would include an earlier and more collaborative engagement, rather than one where First Nations bear the entire onus and

¹³ See Exhibit I.TFG.23, Question B and Appendix A.

¹⁴ Exhibit I, Three Fires-6, Question H-J. The Band Council Resolution #2851 can be found at pp. 48-49 of the TFG interrogatories. See also Exhibit I, Three Fires-31 and Three Fires-36, Question C.

¹⁵ Watford Submissions, paras 15 and 22.

must do so reactively and under significant capacity constraints relating to both time and resources.

Requested Relief Relating to Indigenous Consultations

22. Based on these omissions from and deficiencies in the Application materials, Three Fires requests that the OEB in its decision require EGI going forward to improve its Indigenous consultation practices by being more proactive (or at a minimum EGI must be less passive) in incorporating the histories and positions of First Nations into an application for leave to construct in order to satisfy the OEB's consultation requirements and expectations.
23. The omissions and deficiencies relating to the Band Council Resolution also provide the basis for and/or are consistent with Three Fires' relationship with the project area that inform its requests for a more significant role in monitoring and protecting against the potential environmental impacts that result from EGI's proposed construction plan and environmental safeguards, which is described in greater detail in the next section.

B. Specific Points of Environmental Concern

24. The Three Fires First Nations place significant importance on the risk of environmental impacts that the Application presents. This concern arises in part from the responsibility that these First Nations have to care for the lands, waters, and all of creation as it relates to the territories that form the subject of the Report.
25. This section details the aspects of EGI's proposed approach for mitigating environmental impacts that are deficient and require additional measures and/or monitoring in order to ensure proper care and protection of the project area. This section also includes particulars concerning TFG's requested relief in response to the highlighted shortcomings in EGI's proposals.

Aquatic Habitats

26. The Three Fires First Nations place a high priority on the protection of aquatic habitats and related aquatic life. The Band Council Resolution asserting authority to the

waterways and lakebeds within its Traditional Territory reflects this concern, as well as the history and relationship with the lands that shape Three Fires' efforts.

27. EGI has confirmed that the Panhandle Loop will cross 42 watercourses, including 11 named drains, 15 unnamed drains, Jeannettes Creek, Baptiste Creek, and the Thames River.¹⁶
28. EGI has proposed generic sediment and control plans for watercourse crossings as a mitigation measure, which will consist of horizontal direction drills, dam and pump and temporary vehicle crossings.¹⁷ EGI proposes to cross all major water crossings using trenchless installation methods.¹⁸
29. EGI proposes similar mitigation measures with respect to Jack's Creek Drain and the species at risk fish and mussel species that live there. Specifically, EGI proposes trenchless crossing methods and the use of an Environmental Inspector in an effort to avoid impacts to any SAR species within the Jack's Creek Drain.¹⁹
30. EGI accepts that the Western Chorus Frog, which also lives in the area, is protected in Ontario by the Provincial Policy Statement under the Planning Act, and it confirms that the Western Chorus Frog is listed provincially and federally as a species at risk for the Great Lakes/St. Lawrence population.²⁰
31. EGI's proposed mitigation measures are intended to avoid impacts to candidate amphibian breeding habitat, and include sediment and erosion controls, with the possibility for further measures in the future.²¹
32. EGI currently proposes no reporting or feedback mechanisms specific to water crossings or aquatic habitat.²²

¹⁶ See Exhibit I.TFG.12, Question A; Environmental Report, Section 4.3.1.1, p. 25.

¹⁷ Exhibit I.TFG 12, Response B.

¹⁸ Exhibit I.TFG.21.

¹⁹ Exhibit I.TFG 13, Response B.

²⁰ Exhibit I.TFG.10, Response A.

²¹ *Ibid.*, Response D.

²² The Report, Table 5-5.

33. The importance of aquatic habitats, aquatic life, and water in the project area more generally each call for a higher level of protection than what EGI has proposed. Three Fires in general has serious concerns that EGI's current proposals do not adequately guard against the risk of accident or other unplanned events, which can carry immediate and significant consequences for aquatic environments.
34. Three Fires also has the particular concern that EGI's proposals include nothing to monitor, report, or guard against the specific risk of "frac-outs", whereby drilling fluid is released into the surrounding area. Frac-outs present an acute risk to aquatic life and are therefore an outcome EGI should be required to make heightened efforts towards preventing.
35. Three Fires therefore requests that the OEB include the following in any order granting EGI leave to construct requiring EGI to:
 - (a) Propose a plan for ongoing testing of aquatic habitats that they encounter during the construction phase. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
 - (b) Report any time construction approaches a watercourse crossing, confirming whether any new risks have emerged and providing the basis (including what efforts were made) for the conclusion. The report should also include confirmation the EGI's proposed construction method remains trenchless construction.
 - (c) Report particulars of all incidents of frac-outs, including the date of the incident, details of the resulting damage, and what mitigation efforts EGI proposes to limit the damage and prevent recurrence.
 - (d) Consult with the Three Fires First Nations (and other affected First Nations) on the selection of its Environmental Inspector as well as concerning the instructions provided to the individual selected.

- (e) Provide the Three Fires First Nations (and other impacted First Nations) with copies of its unfinalized Environmental Protection Plan to provide opportunity for comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.

Ongoing Monitoring of Fugitive Emissions

- 36. The ongoing operation and proposed reinforcement of the EGI pipeline will produce ongoing and permanent effects for the area, underscoring the importance of effective mitigation and monitoring.
- 37. EGI's current proposal fails to effectively mitigate the risks that the project will present in terms of the risk of fugitive emissions.
- 38. An essential measure towards reasonable mitigation of these risks is a commitment to effective monitoring. A meaningful commitment to monitor fugitive emissions would entail some form of real-time and/or daily monitoring, which would likely include an ongoing analysis of the quantity of gas entering the pipeline as compared with the quantity of gas exiting the pipeline.
- 39. At present, EGI's proposal falls far short of this standard. EGI proposes to survey for leaks on an annual basis and does not specify how it will report any findings.²³
- 40. Three Fires therefore requests that the OEB include the following in any order granting EGI leave to construct:
 - (a) EGI should be required to propose a plan for its ongoing monitoring of fugitive emissions. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.

²³ Exhibit I, TFG-9, Question C.

Tree Clearing and Site Restoration Activities Generally

41. Three Fires is also concerned about the preservation and (if necessary) full restoration of trees located in the woodlot on County Road 8.
42. EGI has committed to avoiding clearing trees to the extent feasible, restoring lands to a state similar to pre-existing conditions (with the exception of areas within the permanent easement), and undertaking a tree replacement program.²⁴
43. The prospect of clearing trees and EGI's associated commitments to restoration underscore the importance of site restoration more generally, as well as the significant role that First Nations can and should play in site restoration.
44. The knowledge and perspectives of the Three Fires First Nations, as well as other affected First Nations, should be considered an essential part of any effort towards establishing the pre-construction conditions of the area, as well as what constitutes an acceptable restoration plan.
45. Three Fires therefore requests that the OEB include the following in any order granting EGI leave to construct:
 - (a) EGI should be required, as a general principle, to engage in a meaningful way with Three Fires and the other affected First Nations on issues relating to site restoration. This engagement should take place at a minimum six weeks before any proposed site restoration, so that First Nations have the opportunity to meaningfully engage and comment. Affected First Nations should, among other things, be afforded the opportunity to propose culturally important species as part of restoration efforts.
 - (b) EGI should be required to produce a site-specific restoration plan that restores the project area to its original condition or better. The plan should reflect the outcome of meaningful engagement with the affected First Nations, and it may recognize that full restoration in all cases will not be possible, so offsetting

²⁴ Exhibit I, Three Fires-15.

improvements in nearby areas may be appropriate, such as may be the case with the specific example of the easement area.

- (c) EGI should be required to attempt to achieve consensus with the affected First Nations on the pre-construction conditions of the project area and, in the event of disagreement after meaningful engagement, EGI should be required to include details of any such disagreement as well as the engagement efforts behind the disagreement in any Monitoring Report or Final Monitoring Report.

C. EGI Has Not Established that the Project Serves the Public Interest

- 46. The energy transition and its implications are increasingly central to the Board's mandate to determine what supports the public interest in an application for leave to construct. The spending and planning decisions that Ontario and its energy sector take today will have significant consequences for the medium and longer-term affordability, reliability, and accessibility of Ontario's energy sector.
- 47. What makes these decisions difficult is there is no authority that provides perfect clarity as to how the energy transition will unfold or the technologies that will enable certain paths or preclude others on the path to a decarbonized economy.
- 48. EGI emphasizes this uncertainty, but then uses uncertainty as an excuse to avoid a meaningful examination of threats to its projected demand for natural gas in the project area. In particular, EGI has denied awareness of any threat to the demand for natural gas that underpins the project, either in the short or in the long-term. The Application's economic analysis, which forms the heart of EGI's public interest argument, also contains no meaningful risk analysis relating to, and indeed no express reference to, the energy transition.
- 49. No credible private enterprise with its own capital at stake would adopt the approach EGI has taken to its economic analysis in the current proceeding. Almost any business would assess the risk to long-term demand under a range of plausible scenarios before making any decision to invest the significant sums that EGI proposes to spend in this proceeding.

50. Similarly, it is difficult to imagine any other significant public infrastructure project moving ahead on the basis of an analysis like that of EGI. It is nearly impossible to imagine that a public body would agree to spend hundreds of millions of dollars of public funds on, for example, a subway, a recreation facility, or a stadium without an extensive analysis of plausible long-term demand scenarios, especially in circumstances where a consensus exists that there is a high degree of uncertainty concerning the future on matters of extreme importance for the project, and where the proponent itself has acknowledged in other forums that its entire operation faces the risk of a “death spiral” due, in part, to the risk of sharp and imminent declines in demand for its services.²⁵
51. In other words, the need for a more complete demand analysis, which would accept the current uncertainty by including an assessment of the range of plausible energy scenarios and their implications for the Application, is especially apparent given EGI’s own evidence in the recent rebasing application, where EGI relied on evidence that asserted that it faces the risk of a “death spiral” caused in part by sharply declining demand producing increased costs for those remaining on the system.²⁶
52. The project’s anticipated \$150 million shortfall presents yet another compelling reason for a more robust economic analysis that fully accounts for the risks of energy transition. If EGI is asking Ontario ratepayers to subsidize its continued expansion, EGI should be required to examine and disclose what the full extent of the subsidy may be under less optimistic scenarios than the one it has currently chosen.
53. EGI’s failure to examine and/or disclose its downside risk under scenarios that are unfavourable to the company compounds a related omission in the Application related to opportunity cost. While the Application contains extensive details related to matter such as anticipated jobs and investments that will result from its proposed expansion, it fails to address the opportunity cost that the project represents on questions like:
- (a) whether obtaining a subsidy of \$150 million (or presumably more under the range of energy transition scenarios that EGI has not examined as part of this Application) from Ontario ratepayers limits the OEB’s future ability to seek rate

²⁵ See for example, EB-2022-0200, Exhibit 5, Tab 3, Schedule 1, Attachment 1, pp 38-39 and 57-58.

²⁶ *Ibid.*

increases in relation to other projects or initiatives, or the (provincial or federal) government's ability to seek future forms of revenue from these same ratepaying (and taxpaying) sources;

- (b) to the extent that those abilities are limited, how the proposed project's purported benefits compare with the benefits of other opportunities that will no longer be available;
- (c) whether, in the context of a limited pool of funds, the Ontario government might choose to provide a \$150 million subsidy to sectors (or communities) other than the ones associated with EGI's operations in this Application, as well as to EGI by association;
- (d) to the extent subsidizing these sectors is advisable, whether the avoidance of CIACs is preferable, as opposed to the relevant sectors seeking subsidies to offset those costs from the provincial (or federal) government; and
- (e) the extent and effect of the cost impact on individual ratepayers at a time when affordability concerns are extremely high for many Ontarians.

54. On this basis and for reasons more fully elaborated below, Three Fires asserts that EGI has failed to demonstrate that its proposal is in the public interest, meaning that the OEB should reject the Application.

55. The remainder of this section will address the following issues in support of Three Fires' position:

- (a) EBO 134 provides guidance that the concept is a dynamic and comprehensive concept, meaning that issues arising from energy transition appropriately fall within its scope of analysis;
- (b) the \$150 million subsidy that EGI accepts the project would entail is reason enough to doubt that the project is in the public interest, absent appropriate contributions in aid of construction;

- (c) EGI has likely understated the short and medium-term risk to its demand projections, which are overly reliant on its Expression of Interest (“**EOI**”) process; and
- (d) EGI has similarly failed to adequately account for (or address and refute) the potential impact of the energy transition on its demand forecasts.

56. Three Fires will conclude the section by explaining why, in the event the Board approves the Application, it believes that CIACs should be required as part of any approval.

The Public Interest Test Is Dynamic and Should Accommodate Energy Transition Considerations

57. Section 96 of the *Ontario Energy Board Act, 1998*²⁷ (the “**OEB Act**”) establishes the central test for the purposes of this proceeding, which is whether “the Board is of the opinion that the construction, expansion or reinforcement of the proposed work is in the public interest”.

58. A second important source of guidance is EBO 134, which provides extensive description as to what the “public interest” entails for the purposes of the Board’s application of the OEB Act’s section 96. Among its most relevant guidance is its recognition that the concept of “public interest” must remain dynamic and must reflect the full context and circumstances of an application. EBO 134 states:

5.14. The Board reiterates that the concept of public interest is dynamic and must change with the circumstances. The Board considers that the relevant criteria from those listed above, and others depending on the circumstances, should be addressed as fully as possible so that the Board has complete information on which to base its determination as to whether or not a project is in the public interest.²⁸

5.15. There can be no firm criteria for determining the public interest and the Board will not attempt to define these criteria closely. The weighting the Board attaches to each criterion considered can also change with the circumstances of a specific application.

²⁷ *Ontario Energy Board Act, 1998*, [S.O. 1998, c. 15, Sched. B.](#)

²⁸ EBO 134, Report of the Board, June 1, 1987 (“**EBO 134**”), s. 5.14.

59. EBO 134 therefore empowers the Board to consider how the public interest can take into account the context and complexities of modern-day Ontario and the challenges Ontario faces today, including with respect to issues arising from the energy transition and climate change.
60. EBO 134 also emphasized the importance to the Board of a comprehensive record, with data appropriately quantified and assumptions clearly stated:

5.19. Any application to the Board should include evidence on all public interest criteria considered relevant by the participants. Any data that can be quantified in a meaningful fashion should be presented that way with assumptions clearly stated.

EGI Accepts that the Project Would Require \$150 Million Subsidy

61. EGI accepts that the proposed project is not financially viable without subsidization.²⁹ Its Stage 1 analysis suggests that there is a \$150 million shortfall, yielding a profitability index of approximately 0.48.³⁰ This shortfall increases to \$174 million on a net-present-value basis in the event a 20-year revenue horizon.³¹ EGI has accepted the characterization that, if approved, the proposed financial structure for the project would constitute a subsidy from existing ratepayers to newly connecting ratepayers.³²
62. EGI also accepts that the size and impact of such a subsidy is relevant to the consideration of the public interest to the extent that the subsidy provides value to the broader economy.

MR. MORAN: All right. So would you agree, then, that, for the purposes of what we decide here, the size and impact of that subsidy is something that we should take into account before we finalize our decision on this?

MR. MacPHERSON: We would agree. This is a public interest matter to the extent that the subsidy provides value to the broader economy.³³

63. EGI's concession of a \$150 million shortfall should be understood as one possibility among others, as its evidence in the current proceeding and the rebasing proceeding

²⁹ Day 3 Transcript, p. 97.

³⁰ *Ibid.*, p. 97.

³¹ *Ibid.*, p. 103.

³² *Ibid.*, p. 97.

³³ Day 3 Transcript, p. 101.

demonstrate. The \$150 million estimated shortfall fails to account for at least two forms of downside risk, both of which are detailed in the following sections:

- (a) risk of overstated demand in the EOI process; and
- (b) risks relating to declining demand from the energy transition more broadly.

Short- and Medium-Term Risk: Overstated Demand in the EOI Process

- 64. EGI asserts that the need for their proposed project is driven primarily from increased demand in the greenhouse sector, the automotive sector, and the power generation sector.³⁴
- 65. A central mechanism that EGI used to assess anticipated customer demand for natural gas services was an expression of interest reverse open season process.³⁵ The 2023 expression of interest process was looking to capture market potential between 2024 and 2033, which was then used to inform EGI's five-year demand forecast that appears in this proceeding.³⁶
- 66. EGI acknowledges that their demand projections are subject to several forms of downside risk, including:
 - (a) the EOIs that were used to inform the demand forecast are almost all non-binding, with no guarantee that the anticipated demand will materialize,³⁷ and no or minimal penalties in the event a customer who has not yet signed a distribution contract chooses not to follow through with its expression of interest,³⁸ and
 - (b) many applicable municipal plans do not yet have their details finalized, with related uncertainty concerning any impact on emission targets and any resulting impact natural gas demand;³⁹

³⁴ *Ibid.*, p. 20.

³⁵ *Ibid.*

³⁶ *Ibid.*, p. 21.

³⁷ Day 3 Transcript, pp. 25-26

³⁸ *Ibid.*, pp. 28-29. There is no penalty for backing out of an expression of interest, and companies are generally only responsible for costs in the event they back out of a letter of indemnity: see page 28.

³⁹ *Ibid.*, pp. 26-27.

67. EGI accepts that their customers in the auto and greenhouse sectors are both jurisdictionally mobile and sensitive to the total cost of doing business in a jurisdiction, of which energy costs can form a part.⁴⁰
68. Another form of downside risk that EGI acknowledges but failed to incorporate in its demand calculations in any direct way relates to the decarbonization commitments of its customers. EGI acknowledges that some businesses in Ontario, such as Stellantis in the area of the proposed project, are beginning to pursue emission reduction paths that stand apart from jurisdictional reduction goals. It also accepts that such net zero commitments, carbon neutrality commitments, and emission reduction commitments in general, are increasingly prevalent in the Canadian corporate sector, and they have the potential to impact demand.⁴¹
69. Nevertheless, EGI concedes that its economic analysis does not include any form of risk discounting to account for the possibility of companies leaving the jurisdiction or otherwise reducing demand,⁴² which EGI acknowledged at the hearing, relying on the security of executed distribution contracts as a protection against these short and medium-term risks:

MR. DAUBE: We have talked about various types of risks. Can you confirm, please, that your economic analysis doesn't include any sort of risk discounting, any sort of discounting that reflects risks, like companies leaving the jurisdiction, companies not following through on their initial expression of interest, and so on. Is that right? There's no risk discounting in there?

MR. MacPHERSON: That's correct. But, just for clarity, once we have executed a distribution contract, it's in service, the company holds sufficient security to guarantee the, guarantee the payment of that contract and will continue to do so through the term of the contract.⁴³

70. Even if the entirety of the demand reflected in EGI's EOI process enter into executed distribution contracts, EGI's economic analysis will continue to suffer from significant failure to account for its complete risk picture.

⁴⁰ *Ibid.*, pp. 22-23.

⁴¹ *Ibid.*, pp. 55-56.

⁴² Exhibit E, Tab 1, Schedule 1.

⁴³ Day 3 Transcript, page 34.

71. EGI's expectation is that the customers reflected in their EOI process will enter into contracts of 10-20 years. This expectation applies equally to customers from the gas plant, auto, and greenhouse sectors.⁴⁴
72. Even if EGI's most optimistic predictions on each of these factors turn out to be accurate – i.e., translation of EOIs into executed contracts of 10-20 years in duration – EGI's economic analysis will continue to suffer from its failure to examine, in any meaningful way, the effects of the energy transition.
73. As set out in the next section, contracts expected to expire beginning in the 2030s will provide EGI with no protection against the risk of transition scenarios more threatening to its business or associated risks should EGI's assumptions concerning technologies that it intends to rely on for its decarbonization pathways prove to be overstated.

Medium- and Long-Term Risk: Demand Uncertainty Relating to Energy Transition

74. EGI has consistently taken the position in this proceeding and previously that the course and consequences of the energy transition are uncertain. Its Argument-in-Chief, for example, states that “No one can reasonably predict the course of change in energy transition or the policy changes that may be made either hastening or slowing its progress.”⁴⁵
75. While it may be true that no one can predict the future with certainty, it is also true that it has proven possible to identify certain energy pathways that Ontario may follow, as well as to debate the likelihood of any given scenario's occurrence.
76. EGI itself has engaged in at least some consideration of what the future may bring – as any business interested in its continuing relevance would. In its rebasing application earlier this year, for example, EGI repeatedly acknowledged the significant risks that the energy transition poses for the company and for specific assets, recognizing the “uncertainty around the impacts that energy transition could potentially have on Enbridge Gas's system” and acknowledging the possibility that that “future depreciation studies

⁴⁴ *Ibid.*, pp. 29-30.

⁴⁵ EGI Argument-in-Chief, paragraph 86. See other EGI statements regarding the uncertainty of energy transition at Exhibit I.PP.45, Response C; Day 3 Transcript, page 40.

may warrant the introduction of a regional or system wide [Economic Planning Horizon], as the energy transition unfolds and more information on the future utilization of Enbridge Gas's assets becomes available."⁴⁶

77. EGI also advanced expert evidence at the rebasing application that was clear in its identification of the significant risks facing EGI associated with plausible future transition scenarios. For example, EGI relied without qualification or reservation on expert evidence that articulated the risks that the company faces as follows:

(a) "The future growth and retirement programs of the EGI system may be significantly different than the retirement patterns witnessed in the past." ... "It could be assumed that large-scale retirement of assets may be required in the periods between now and 2050."⁴⁷

(b) "The opposition to natural gas threatens the Company's sales volumes through franchise renewal challenges, potential net-zero mandates, and increasingly stringent building codes or bans on new gas hook-ups. The company has deferral and variance accounts that provide a degree of short-term insulation from the risk ... However, in the long-term, investors are concerned that increasing costs recovered over declining volumes may create a "death spiral" scenario."⁴⁸

78. EGI accepts that considering the effects of the energy transition is relevant to the question of what is in the public interest, including the consequences of the energy transition on rates and access:

MR. DAUBE: ... I take it from your answer that you agree that considering the effects of energy transition is relevant to consideration of what's in the public interest?

MS. WADE: Yes, I would agree with that.

⁴⁶ TFG Compendium, Tab 26, page 93 (Original Citation EB-2022-0200, Exhibit 4, Tab 5, Schedule 1), paragraph 35; see also Day 3 Transcript, page 48-49.

⁴⁷ TFG Compendium, Tab 27, page 97 (Original Citation EB-2022-0200, Exhibit 4, Tab 5, Schedule 1, Attachment 1, page 34); see also Day 3 Transcript, page 51-52.

⁴⁸ TFG Compendium, Tab 33, page 125 (Original Citation EB-2022-0200, Exhibit 5, Tab 3, Schedule 1, Attachment 1), section 3.2.3; see also Day 3 Transcript, page 49

MR. DAUBE: And breaking that down, you agree that the impact of the energy transition, its consequences on rates and access to energy sources, reliable energy sources are both relevant to the public interest?

MS. WADE: Yes, I would agree with that.⁴⁹

79. EGI also acknowledges that it is in the public interest to seek to identify any risks arising from the energy transition and seek to mitigate them.⁵⁰
80. Nevertheless, EGI's economic analysis contains no reference to any risks arising from the energy transition, which EGI acknowledged at the hearing.⁵¹
81. EGI's general position in this proceeding has been there is no need for analysis of risks specific to this project arising from the energy transition because there is no such risk to analyze. The starkest example of this came in response to an interrogatory from Pollution Probe:

Q: Has Enbridge conducted a risk assessment on the probability that the proposed Project will become a stranded asset before being fully depreciated? If yes, please provide a copy of the assessment and all related materials. If no, what evidence exists to support that the pipeline will remain used and useful for the full amortization period.

A: Enbridge Gas has no reasonable basis to believe that the proposed facilities will become stranded assets and thus has had no reason to complete the assessment in question.⁵²

82. EGI elaborated on this position at the hearing. EGI's position that the project faces no stranded asset risk arising from the energy transition appears to be based on three primary factors: 1) the rate of growth in demand over the past several years; 2) EGI's forecast that that rate of growth is unlikely to change over the next several years; and 3) the capacity constraints within the electricity system.⁵³ As EGI conveyed at the hearing:

MR. MORAN: Thank you. Now, you've talked about -- Ms. Wade, you have talked about the fact that you don't, at this point, foresee any issue associated with the energy transition leading to stranded costs. Right?

⁴⁹ Day 3 Transcript, page 39-40.

⁵⁰ Day 3 Transcript, page 41.

⁵¹ Exhibit E, Tab 1, Schedule 1; Day 3 Transcript, page 37-38

⁵² Exhibit I.PP.43; Day 3 Transcript, page 42.

⁵³ Day 3 Transcript, page 52 and 103-104.

MS. WADE: That's correct.

MR. MORAN: And I think you said that's based on the information we have available to us right now. And the information you have available to you right now is, in the context of this project, over the last several years, demand has been growing at a certain rate, and you are forecasting over the next several years that that's not going to change.

MS. WADE: I would agree with that. And then also the capacity constraints within the electricity system, as well.⁵⁴

83. EGI's elaborated position is heavily problematic in at least four ways, described more fully below:

- (a) it fails to comply with EBO 134's guidance to provide clear evidence on matters of public interest;
- (b) it deprives the Board of a full opportunity to understand how EGI reconciles its evidence from the rebasing hearing, where systemic risk was emphasized, with its current position, which denies the existence of any risk specific to the project;
- (c) it similarly deprives the Board of a full opportunity to understand how EGI reconciles its position from the rebasing hearing, where it maintained it did not have access to the studies necessary to assess stranded asset risk, with its current position that maintains there is no risk for the current Application; and
- (d) it is inconsistent with its assertions elsewhere in the record to the effect that it is impossible to predict the future of energy transition, and its resulting refusal to engage meaningfully on questions relating to plausible the energy transition scenarios, since it assumes a scenario favourable to EGI by forecasting the continued limitations of electrification capacity.

84. First, at the very least, EGI's failure to set out its thinking concerning energy transition risks as part of its economic analysis is inconsistent with EBO 134's guidance, set out at section 5.19 and calling for:

⁵⁴ Day 3 Transcript, page 103-104.

- (a) “evidence on all public interest criteria considered relevant by the participants”;
and
 - (b) “[a]ny data that can be quantified in a meaningful fashion [to] be presented that way with assumptions clearly stated.”
85. By declining to include its position as to why there are no energy transition risks relevant to the Application, even if only to present its rationale for ruling out such considerations as risks, EGI also deprives the Board and other parties the full opportunity to understand and potentially challenge the position.
86. Second, EGI’s omission of a risk analysis also deprives the Board of a full opportunity to examine how EGI reconciles its position in this Application with the risks it emphasized in the rebasing application, which are described above.
87. Third, EGI conceded at the rebasing hearing that the company has failed to provide the analysis necessary to determine the existence or extent that the energy transition poses for the company in relation to specific regions, sectors, assets, or projects. In particular:
- (a) EGI’s energy transition plan does not include any analysis of what assets are more likely to be underutilized at a regional level,⁵⁵ meaning potential utilization is assessed only at the level of EGI’s entire system;
 - (b) EGI does not yet have a view on which assets, if any, will need to be retired earlier than current plans anticipate,⁵⁶ and
 - (c) EGI’s view is that, in order to assess the risk of underutilization, the company would need to conduct modelling on a regional basis in tandem with the electricity sector.⁵⁷
88. EGI concedes that this lack of analysis contributes to uncertainty as to how the energy transition will unfold and its consequences:

⁵⁵ Day 3 Transcript, p. 42; TFG Compendium, Tab 29, p. 102-103.

⁵⁶ Day 3 Transcript, p. 43; TFG Compendium, Tab 29, pp. 102-103.

⁵⁷ Day 3 Transcript, p. 43; TFG Compendium, Tab 29, pp. 102-103.

MR. DAUBE: But you accept that there is a risk of stranded assets. You just don't know what it is yet. Isn't that right?

MS. WADE: Well, I think we had, yes, extensive discussion about this, that Enbridge can't say with 100 percent certainty exactly how the energy transition is going to unfold. We would say the assets that we are putting into service, or proposing to put into service as part of this application, we feel very strongly, would still be required in the future and that there is opportunity to decarbonize them.

MR. DAUBE: But part of the reason for that lack of certainty, whether or not you should have done them, part of the reason is you don't have access to the studies yet that would provide additional insight as to the likelihood of stranded assets in this region and elsewhere.

MS. WADE: I think that's fair. And, again, I think that's going to have to be done at a regional level to understand the likelihood of that happening, given the other part of the energy system and whether or not that would be able to accommodate the energy sources, and to look at the results that we are going to get from our hydrogen study.⁵⁸

89. Fourth, EGI's reliance on future capacity constraints in the electricity sector contradicts its general assertions that the future is impossible to predict and represents an example of the company's willingness to embrace future hypotheticals favourable to the company.⁵⁹
90. It is important to recognize that the constraints in the electricity system upon which EGI relies for its demand forecast in this Application recognize only current constraints and current plans to alleviate those constraints. In other words, EGI's economic analysis makes no effort to account for the possibility of the emergence of a significant electricity alternative to natural gas or the risk that could pose to long-term demand in the project area:

Contributions in Aid of Construction Should Form Part of Any Order Granting Leave

91. Three Fires believes that capital contributions sufficient to eliminate any subsidy are appropriate in this case, but wishes to ensure that any order to that effect does not create a precedent that limits the future ability of non-commercial actors (and specifically First

⁵⁸ Day 3 Transcript, pp. 47-48

⁵⁹ Other notable examples are the availability and general viability of hydrogen and renewable natural gas.

Nation communities) to seek expanded access to natural gas when a project's profitability is in question.

92. Three Fires believes a CIAC is appropriate in this case where the question of subsidy arises in the following key circumstances:
- (a) where the entities receiving the subsidy would be businesses pursuing profit (as opposed to residential customers or vulnerable communities);
 - (b) where many of the businesses have already raised the prospect of leaving the jurisdiction, highlighting that these businesses do not offer the permanence of residential customers (which EGI acknowledges);⁶⁰ and
 - (c) where the uncertainty as to the reliability of demand for natural on the part of these profit-focused customers is exacerbated by the uncertainty arising from energy transition.
93. It is noteworthy that EGI's position on why it opposes CIACs contains no mention of any risks arising from the project, including matters such as the non-binding nature of current expressions of interest, business mobility or future municipal energy plans in the area. It similarly contains no mention of risks arising from energy transition.⁶¹
94. A proper assessment of both the expected advantages and disadvantages of EGI's proposals, including an assessment of risk of demand fluctuations and cost exposure, is necessary in order to provide a comprehensive understanding of what will serve the public interest.
95. EGI may be able to remedy some or all of these evidentiary shortcomings in the context of an updated application, but Three Fires submits that at present EGI's general failure to provide a meaningful analysis of the risks that this project may face mean that the companies requesting the project should bear the burden of risks EGI has left uncertain and undefined.

⁶⁰ Day 3 Transcript, page 102.

⁶¹ Day 3 Transcript, page 35.

IV. RELIEF REQUESTED

96. Therefore, Three Fires respectfully requests that the Board:
- (a) find that the project is not in the public interest and therefore does not pass the EBO 134 test; and
 - (b) require EGI going forward to improve its Indigenous consultation practices by being more proactive (or at a minimum EGI must be less passive) in incorporating the histories and positions of First Nations into its initial application materials, including environmental reports.
97. Should the Board choose to deny EGI's Application but allow EGI to re-apply on the basis of a more comprehensive record that more meaningfully addresses issues arising from the energy transition, Three Fires requests that the Board's order should include:
- (a) a requirement that EGI's EBO 134 analysis include consideration of the risks of the energy transition, acknowledging uncertainty but nevertheless making best efforts towards a thorough examination of both upside and downside risk, including use of probabilities and scenarios that are capable of specifically addressing the project and assets at issue; and
 - (b) a requirement that EGI adjust its revenue horizon to 20 years for the purposes of its re-application, which would be consistent with EBO 188's standard for large volume customers.
98. If the Board approves EGI's Application, Three Fires requests that the Board include the following in its decision:
- (a) capital contributions sufficient to eliminate any subsidy; and
 - (b) require EGI going forward to improve its Indigenous consultation practices by being more proactive (or at a minimum EGI must be less passive) in incorporating the histories and positions of First Nations into its initial application materials, including environmental reports.

99. Three Fires also requests that any order approving the project also include the following terms in relation to the environmental impacts of the project:
- (a) EGI should be required to propose a plan for ongoing testing of aquatic habitats that they encounter during the construction phase. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
 - (b) EGI should be required to report any time construction approaches a watercourse crossing, confirming whether any new risks have emerged and providing the basis (including what efforts were made) for the conclusion. The report should also include confirmation the EGI's proposed construction method remains trenchless construction.
 - (c) EGI should be required to report particulars of all incidents of frac-outs, including the date of the incident, details of the resulting damage, and what mitigation efforts EGI proposes to limit the damage and prevent recurrence.
 - (d) EGI should be required to consult with the Three Fires First Nations (and other affected First Nations) on the selection of its Environmental Inspector as well as concerning the instructions provided to the individual selected.
 - (e) EGI should be required to provide the Three Fires First Nations (and other impacted First Nations) with copies of its unfinalized Environmental Protection Plan to provide opportunity for comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
 - (f) EGI should be required to propose a plan for ongoing monitoring of fugitive emissions. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.

- (g) EGI should be required, as a general principle, to engage in a meaningful way with Three Fires and the other affected First Nations on issues relating to site restoration. This engagement should take place at a minimum six weeks before any proposed site restoration, so that First Nations have the opportunity to meaningfully engage and comment. Affected First Nations should, among other things, be afforded the opportunity to propose culturally important species as part of restoration efforts.
- (h) EGI should be required to produce a site-specific restoration plan that restores the project area to its original condition or better. The plan should reflect the outcome of meaningful engagement with the affected First Nations, and it may recognize that full restoration in all cases will not be possible, so offsetting improvements in nearby areas may be appropriate, such as may be the case with the specific example of the easement area.
- (i) EGI should be required to attempt to achieve consensus with the affected First Nations on the pre-construction conditions of the project area and, in the event of disagreement after meaningful engagement, EGI should be required to include details of any such disagreement as well as the engagement efforts behind the disagreement in any Monitoring Report or Final Monitoring Report.

V. COSTS

100. Three Fires respectfully submits that it has participated responsibly in this proceeding with a view to maximizing its assistance to the Board, and therefore requests that the Board order reimbursement of its reasonably incurred costs.

ALL OF WHICH IS RESPECTFULLY
SUBMITTED THIS
14th day of December, 2023

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