SUBMISSION OF ENBRIDGE GAS DISTRIBUTION INC. ON THE ONTARIO ENERGY BOARD'S PROPOSED:

(A) NEW CONFIDENTIAL FILINGS PRACTICE DIRECTION; (B) APPENDICES TO THE PRACTICE DIRECTION; and, (C) PROPOSED AMENDMENTS TO RULE 10

Enbridge Gas Distribution Inc. ("Enbridge" or "Company") has received and reviewed the Ontario Energy Board's ("Board") proposed Practice Direction on Confidential Filings ("Practice Direction) and proposed amendments to the Board's *Rules of Practice and Procedure* ("Rules") dated April 24, 2006. Issues associated with managing the regulatory process deserve a significant amount of attention. Overall, Enbridge views the proposed Practice Direction to be positive and timely.

Specific comments of Enbridge on the Practice Direction and Rules are characterized below.

(A) PRACTICE DIRECTION

Section 1: Introduction and Purpose. The Company makes two general comments:

i) The introductory section states that the "Practice Direction seeks to strike a balance between the objectives of transparency and openness and the need to **protect confidential information in appropriate cases"** *(emphasis added)*. The Company submits that the latter part of this statement is inappropriate. The focus of the Board should not be to decide what is, or is not, an "appropriate case" to protect confidential information. Rather, information that is found to be appropriately confidential by the Board must be afforded proper protection in all cases. It is a fundamental principle of good commerce that a guarantee of confidentiality permits and encourages entities to negotiate in an open and effective fashion. If parties cannot rely on the confidential treatment of that which transpires during their negotiations, for example, then they of necessity will feel constrained to conduct themselves in a cautious, tight-lipped, non-committal and cost-ineffective manner.

ii) Not unlike other commercial entities, Enbridge regularly contracts with third parties for the provision of goods and services. However, given the regulatory environment in which Enbridge operates, Enbridge must consistently deal with added contractual pressures when negotiating contracts with third parties. These pressures are two-fold: firstly, third party contractors are concerned about the potential release of commercially sensitive information directly to the intervenors or their counsel / consultants in proceedings before the Board, especially when such intervenors may also be competing service providers;

and, secondly, third party contractors are increasingly demanding added incentives or compensation in exchange for the increased risk of their confidential information being made public. Utilities may become obligated to provide this Practice Direction to potential third party contractors. Enbridge is concerned that the Practice Direction will result in the shrinking of the Company's pool of potential third party contractors and other business partners. There will certainly be an increase in the number of potential third party contractors who will either: (a) not want to risk the public disclosure of their sensitive commercial information and, therefore, decline work with Enbridge; or (b) charge a premium given the increased possibility of public disclosure.

Section 3: Definitions and Interpretation. The Company makes three specific comments:

i) Confusion may arise from the fact that certain of the terms in section 3.1 of the Practice Direction are explicitly defined differently than those same terms are otherwise defined in the Rules. These include "applicant", "application", "Board", "document", "party" and "proceeding". The Board should clarify why it feels the existing definitions in the Rules that are applicable to Rule 10 (Confidential Documents) are deficient.

ii) The Board's guidelines dealing with "Settlement Conferences" are consistent in using a certain terminology (e.g., Settlement Conference, instead of ADR Conference). The Board should clarify why the terminology needs to be changed in this Practice Direction.

iii) It may be helpful if the Practice Direction explicitly defined the term "confidential information". For example, it could simply be stated that "Confidential Information is information not in the public domain that is private to a party (such as identity or personally identifiable health information, *etc.*) or that is proprietary to party (such as commercially sensitive information, intellectual property, trade secrets, *etc*.)."

Section 5: General Process for Confidentiality in Matters Before the Board. The Company makes the following specific comments:

i) With regard to section 5.1, the process for obtaining a ruling on confidentiality is overly structured and potentially time-consuming. It is not appropriate for all matters before the Board. The Company submits that the Board should ultimately build some flexibility into the process. In some circumstances (technical conferences being one), complying with the detailed provisions regarding filing a covering letter that meets certain requirements, filing a confidential unredacted version of the sensitive document that meets certain

requirements and filing either a redacted version or a summary would be cost- and time-ineffective.

ii) The intent of Clause 5.1.13 is to allow a party to withdraw information that the Board refuses to treat as confidential. The existing language only talks about a party making a "request that the information be withdrawn." The Company's view is that this language should be strengthened so that in those situations where the filing of the documentation is optional (for example, an applicant does not believe the filing is necessary in support of an application), the right to have the information returned should not be challengeable. The Company suggests adding the following sentence to the end of section 5.1.13:

> Where the filing of such information is at the discretion of the applicant, the Board shall agree to the request for withdrawal and return the original and any copies of the information to the person that requested confidential treatment of it.

iii) The inflexibility of the process becomes even more pronounced when, as often seems to be the case, confidentiality issues arise during an oral hearing. Section 5.2.1 of the Practice Direction contemplates that the usual procedure will apply to requests for confidentiality made in the context of an oral hearing, but quite rightly recognizes the likelihood that the panel will have to take action to achieve a more expedited determination. It is far from uncommon for a request for confidential information to be made during the cross-examination of a witness – in most, if not all cases, it is simply not practical to have all cross-examination on the particular issue stand down until a procedure like that in the Practice Direction is followed. There seems to be good reason for the principle of the Practice Direction that the same procedure should be followed for confidentiality requests whether made pre-hearing or during a hearing – but why not have a more flexible and streamlined procedure that is practical even in the context of a hearing?

iv) In Appendix "C", the Board illustrates types of records previously assessed as confidential. At Item 3 therein, it references "solicitor-client" and "litigation privilege". Solicitor and client privilege is an absolute privilege. Before the Courts, it is challengeable and lost if certain requisite elements are not satisfied. Challenges to solicitor and client privilege are almost always made to a motions Judge, who is different than the Judge who presides over the main proceeding. If a document to which solicitor and client privilege is claimed contains strategic or tactical advice, it may negatively impact the client's interests if revealed to the Judge having authority to dispose of the matter. In proceedings before the Board, the Company submits that a person claiming solicitor and client privilege and litigation privilege should have the option of requesting that any challenge to the request be heard by a Board member other than a member of the panel assigned to the main proceeding.

Accordingly, it would be appropriate to include a new clause under Section 5, to the following effect:

5.4 Solicitor-client or Litigation Privilege

5.4.1 Where a party requests confidential treatment on the basis of solicitor-client or litigation privilege, such party has the right to request that any determination of the appropriateness of the privilege claim be heard and adjudicated upon by a Board member other than a member assigned to the proceeding in which the claim to privilege is made.

Section 6: Arrangements as to Confidentiality. The meaning of the opening sentences of section 6 of the Practice Direction is not clear. The Company makes the following three specific comments:

i) The first sentence says: "The fact that the Board has agreed to a request for confidentiality will not, in most cases, result in the non-disclosure of the confidential information." This is a double negative (will not result in non-disclosure) and the meaning of non-disclosure in this context needs clarification (it seems certain that, once confidentiality has been determined, there will be non-disclosure in the sense of non-placement on the public record).

ii) The second sentence begins with the word "Accordingly", but it is not clear why the first sentence feeds into the second. It seems more logical that the sentences would work the other way around (i.e., the Board will consider as an alternative to non-disclosure, whether information can be disclosed under suitable arrangements … accordingly, the fact that the Board has agreed to a request for confidentiality does not determine the issue of disclosure).

iii) Section 6.1 also provides that in certain circumstances, confidential information will be disclosed to parties upon execution of a Declaration and Undertaking. The Practice Direction does not, unfortunately, speak to the consequences of a party's breach of such Declaration and Undertaking. In this regard, the Practice Direction should state that if a party breaches his or her obligations under such agreement, he or she is subject to remedies available to the disclosing party, and that such remedies may include equitable relief and monetary damages.

Section 7: ADR Conferences. The Company submits that the insertion in the Practice Direction of section 7, dealing with "ADR conferences", is unnecessary. The exchange of information and views at a Settlement Conference falls into an entirely different category than sensitive commercial or personal information. In this regard, the Company makes eight specific comments:

i) The Practice Direction under consideration deals with confidential filings – seldom, if ever, should negotiating information from a Settlement Conference become the subject of a filing with the Board. There should be no issue at all about Settlement Conference information finding its way into a Board proceeding except in very limited circumstances entirely unrelated to the circumstances otherwise addressed in the Practice Direction.

ii) Section 7.1.1 addresses the circumstances when sensitive commercial or personal information is entitled to confidential treatment. The Company submits that, except in very rare instances, Settlement Conference information is always confidential and there is no issue about whether it is entitled to confidential treatment.

iii) Section 7.1.2 addresses a procedure for how sensitive information that is relevant to an issue before the Board can be taken into account in the Board's consideration of that issue. The Company submits that rarely, if ever, should Settlement Conference information be taken into account in the Board's consideration of an issue.

iv) Section 7.1.2 also states that information from a Settlement Conference may be disclosed where necessary to support a Settlement Proposal. The wording here must be carefully crafted so as not to encourage individual parties to routinely argue that disclosure of confidential negotiating information is justified on the basis of supporting the Settlement Proposal. Such disclosure really would be appropriate only in circumstances where all parties agree that it can be justified for the purpose of supporting the Settlement Proposal, but the Practice Direction already contemplates that disclosure of Settlement Conference information may occur with the consent of all parties. It seems far preferable to leave this to be dealt with under the general exception for disclosure of Settlement Conference information with the "express consent" of all parties.

v) Section 7.1.3 is irrelevant to the issue of "Confidential Filings" and should be omitted.

vi) Section 7.1.4 is fundamentally incorrect and should also be omitted. All documents exchanged in an ADR conference process should be presumed to be confidential unless clearly indicating otherwise.

vii) Given the fundamental differences between Settlement Conference information and the sensitive information addressed elsewhere in the practice direction, it is not clear why the section on "ADR conferences" has been included with the rest of the Practice Direction. It would seem to be more appropriate to address the confidentiality of Settlement Conferences in the

Settlement Conference guidelines (or practice direction, if there is to be one) and to plainly indicate that the Practice Direction on Confidential Filings has no application to confidential Settlement Conference information. If it is thought to be useful to deal with confidential Settlement Conference information in the practice direction, then wording should be added to explicitly recognize that this is a fundamentally different category of information.

viii) If the Board decides to retain clauses relating to ADR conferences, the Company believes it would be helpful to clarify that "no party, even in the absence of a request for the return of confidential documents, may rely upon such documents for any purpose, including in support of an objection to a future request for confidentiality made in respect of the same or different documents." The Board must not permit parties to use confidential information received during an ADR process as the basis for a motion compelling additional information. Similar language should be included in the "undertaking" portion of the Declaration and Undertaking (Appendix D).

Section 11: Access to Confidential Information Outside of Proceeding. This section provides that interested persons may request access to confidential information at times other than during the proceeding. Enbridge makes the following three comments:

i) Enbridge submits that such a request should be made not to the person that filed the confidential information, but to the person that "owns" or has "control of" the confidential information. Oftentimes, the Company is required to produce confidential information of third party contractors or business partners. The Company does this on the basis that it will destroy such confidential information at the end of the proceeding in which it was filed.

ii) The Company opposes having to maintain control of a third party's confidential information for indefinite periods of time so as to be able to comply with section 11 access requests.

iii) As an alternative, the Board itself might consider maintaining a library of all confidential information filed with it and put in place a system where access requests by interested persons would be made to the Board through the Board Secretary, with notice provided to the party who originally filed the confidential document.

(B) APPENDICES

Appendix A: Powers and Duties that have been Delegated to an Employee of the Board. In the interest of brevity, the final three boxes can be condensed, and thus simplified, as follows:

Application for relief under sections 8 through 10 of the *Municipal Franchises Act*	Managing Director of Market Operations

Appendix B: Considerations in Determining Requests for Confidentiality. In the first sentence, replace the word "RECORD" with "DOCUMENT".

Appendix C: Types of Records that have Previously been held Confidential. The Company makes the following comments:

i) In both the title and the first sentence of the first paragraph, replace the word "RECORD" with "INFORMATION".

ii) With regard to paragraph #3, the word "COVERED" should be replaced with "PROTECTED".

Appendix D: Form of Declaration and Undertaking. With regard to the portion of this Appendix that is the "Declaration, Enbridge submits as follows:

i) re: paragraph #2 – the second last word should be changed from "THE" to "THIS".

ii) re: paragraph #2 – the Board should require that signatories also declare as follows:

> "I declare that if I have any real or apparent conflicts of interest in receiving any confidential information in this proceeding, I will list such potential conflicts below or otherwise advise the Board."

iii) re: paragraph #3 – in the third line of the paragraph, delete the words "AND MATERIALS".

iv) re: paragraph #4 – this paragraph will likely be confusing to some readers and can be simplified as follows:

> "I understand that execution of this Declaration and Undertaking is a condition of an Order of the Board and that the Board may apply to the Ontario Superior Court of Justice to enforce it."

With regard to the portion of this Appendix that is the "Undertaking", Enbridge submits as follows:

i) re: Subtitle - To be consistent with the "Declaration", the subtitle should read "I UNDERTAKE THAT" and, accordingly, the word "THAT" should be removed from the start of each of Item's #1 through #5.

ii) re: paragraph #5 – the words "UNDER THE DIRECTION OF THE BOARD SECRETARY" in the first line of subparagraph (a) should apply equally to subparagraph (b). The words should therefore be moved up to the end of the opening sentence to Item #5.

iii) In order to preclude any ambiguity as to what rights, if any, the recipient has in the confidential information, the Declaration and Undertaking should require signatories to:

> "acknowledge that the confidential information is the property of the disclosing party and that the disclosure of the information does not convey any right, title or license in the information to the recipient."

iv) The Declaration and Undertaking should require signatories to:

> "abide by any order as to damages that the Board or a Court may make if it ultimately appears that the disclosure of confidential information has caused damage to the disclosing party for which the party represented by the undersigned ought to compensate the disclosing party."

This language is similar to that found at Rule 40.03 of the Rules of Civil Procedure which make the giving of such an undertaking a prerequisite to the granting of an interlocutory injunction or mandatory order. Including such language would operate to act as a caution against frivolous requests.

(C) RULE 10: CONFIDENTIAL DOCUMENTS

With regard to the proposed amendments to Rule 10, Enbridge makes the following comments:

i) Subsection 10.04(d) should be revised (*i.e.* broken up) as follows:

> (d) order that the confidential version of the document be disclosed under suitable arrangements as to confidentiality;
>
> (e) order that a non-confidential redacted version of the document or a non-confidential summary of the document be prepared and filed for the public record; or,
>
> (f) make any other order the Board finds to be in the public interest.

ii) Section 10.03 states that an objection may be filed "in accordance with the *Practice Directions* and within the time specified by the Board". Section 10.05 subsequently states that a withdrawal may be made "within the time specified in the *Practice Directions*". The wording of these sections should be made consistent.

iii) Section 10.05 provides that a party may make a "request to withdraw" but does not explain how such request should be made. Given that there is no mention of how such requests should be made in the Practice Direction, this section should provide clarification, for example, "such a request is to be made directly to the Board during an oral hearing or, at any other time, to the Board Secretary in writing."

iv) With regard to section 10.08, the words "OR WHO HAS CONTROL OR OWNERSHIP OF" should be inserted in the first line after the word "FILED".