

EB-2016-0137
EB-2016-0138
EB-2016-0139

SOUTHERN BRUCE MUNICIPALITIES
WRITTEN SUBMISSIONS

April 27, 2017

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**SOUTHERN BRUCE MUNICIPALITIES
WRITTEN SUBMISSIONS ON THE DRAFT ISSUES LIST AND DRAFT FILING
REQUIREMENTS FOR COMPETITIVE FRANCHISE/CERTIFICATE OF PUBLIC
CONVENIENCE AND NECESSITY APPLICATIONS**

1. We make these written submissions on behalf of the Municipality of Kincardine, the Municipality of Arran-Elderslie and the Township of Huron-Kinloss (the “**Southern Bruce Municipalities**”) in respect of applications brought by EPCOR Southern Bruce Gas Inc. (“**EPCOR**”) for Orders of the Ontario Energy Board (the “**OEB**” or the “**Board**”) approving its franchise agreements with and Certificate of Public Convenience and Necessity for the Southern Bruce Municipalities (the “**Applications**”). In Procedural Order No. 5, the Board invited Parties to file submissions regarding the draft Issues List and the draft Filing Requirements, and the Southern Bruce Municipalities are pleased to take this opportunity to do so.

Preliminary Issues for Feedback

Preliminary Issue 1: Keeping in mind the principles set out in the Decision with Reasons for the generic community expansion proceeding (EB-2016-0004), what should the process for selecting a proponent look like when there are competing proposals for serving a community?

2. The Southern Bruce Municipalities have two submissions on this preliminary issue.
3. First, the Board’s process must give weight to the importance of municipal preference when selecting among utilities to grant a natural gas franchise or a certificate of public convenience and necessity (“**CPCN**”).
4. The Ontario legislature signaled the importance of municipal preference in the underlying statutory framework. The *Municipal Franchises Act*, R.S.O. 1990, c. M.55 is the source of the Board’s legal authority to issue CPCNs and to approve municipal franchise agreements. Unlike other sources of OEB authority (found in the *Ontario Energy Board Act, 1998*) the

legislature chose to entrust the authority to approve municipal franchises and issue CPCNs in an act that, by its nature and very name, highlights the importance of municipal preference.

5. Municipalities are, in turn, given an important role in the selection of utilities that are seeking to provide natural gas service in Section 9 of the *Municipal Franchises Act*, which gives municipalities the jurisdiction to issue and enter into franchise agreements. A utility cannot provide gas service in Ontario without a municipal franchise agreement.
6. Municipalities stand apart from all other stakeholder groups (industrial customers, environmental advocacy groups, or others). Rather than ignoring municipal preferences, or treating it as one in a cacophony of views, the OEB should treat municipalities as their natural partner in selecting the best utility to provide an important regional service.
7. Municipalities are the democratically elected representatives that are most directly connected to local needs and concerns.
8. Natural gas service is not just about rates, safety, or reliable supply. It has a broader social and economic impact on communities. The Board does not have a statutory mandate that considers these broader social policy objectives, nor is the Board very well equipped to weigh these competing objectives.
9. Municipalities are ideally situated to consider, weigh and balance these broader societal and economic concerns. This is their very role as local elected governments. By adding a municipal preference to its consideration, the Board will only enhance its decision making process.
10. Factoring in municipal preference would serve a practical purpose as well. If the Board excludes municipal preference from its consideration, the Board runs the risk of issuing a CPCN to a utility that the local municipality would not support. A possible outcome in this situation would be a utility that holds a CPCN, but cannot obtain a municipal franchise agreement. The Board should take steps to avoid this outcome. Including municipal preference in its decision criteria would be a practical first step.

11. Second, the Board's process must take into account the very unique circumstances associated with the international competitive solicitation process that the Southern Bruce Municipalities have already undertaken to select a proponent and award franchise agreements.
12. Considerable time has already been spent by the Southern Bruce Municipalities evaluating multiple different proposals from proponents from across North America. It is inefficient for the Board to re-start this process again at step 1 and ignore that a process has already occurred.
13. The outcome of the Southern Bruce process resulted in awarding EPCOR franchise agreements. EPCOR is the first new entrant in Ontario that is willing to provide natural gas service in recent history. This fact alone merits attention. In addition, EPCOR has already made an application to the Board and is entitled to have that application heard and adjudicated.
14. A second competitive process will be – because of these unique facts - unfair and will not result in outcomes that are in the public interest. EPCOR was awarded franchise agreements with the Southern Bruce Municipalities **before** the generic hearing decision, and EPCOR has (quite reasonably) been consulting with the community about its proposed solution. This is how it was always done prior to the generic hearing. Because of this, the EPCOR proposal is largely already in the public domain.
15. The practical consequence of this is that it will likely put Union Gas at a competitive advantage during this second competitive bid process. Union Gas could simply tweak their proposal to beat the known EPCOR proposal by a few dollars here or there. An incumbent utility will have a strong incentive to do this, to prevent a new competitor from getting an even stronger foothold in Ontario.
16. EPCOR, on the other hand, submitted their original proposal in a competitive procurement process (which Union had a chance to compete in). The EPCOR proposal likely already

represents their best proposal. It had to win the competitive procurement held by the municipalities to be selected as the preferred proponent.

17. Southern Bruce is also concerned that the Board's solicitation of interest of potential competitors to EPCOR favored incumbent utilities, like Union Gas, at the expense of new entrants. While Southern Bruce distributed their RFQ to a broad distribution list including potential proponents in both Canada and the United States as well as incumbent utilities in Ontario, the Board's notice was limited to sending a letter to parties in a previous OEB proceeding which, by its very nature, favored incumbents that participated and excluded any other potential new entrants. Without a broad solicitation of interest for gas expansion, such as the RFQ approach undertaken by Southern Bruce, on what basis can the Board say that its process is truly competitive? Could the limited nature of the Board's solicitation of incumbent gas utilities only expose the Board to a legal challenge in the future? What impact or threat could such a challenge do the integrity and timing with respect to the current OEB process? As the Board is aware Southern Bruce is very concerned about ongoing delay in the adjudication of EPCOR's application.
18. Because of these unique facts, the Southern Bruce Municipalities recommend that a transitional approach is necessary in this case. On a going forward basis, the Board can proceed with its competition. But in this case, a different approach is merited.
19. The Southern Bruce Municipalities submit that the Board should consider the Applications in a manner consistent with the Board's legal test for franchises and CPCNs. The Board should not attempt to determine whether another transaction, whether real or potential, can have a more positive effect than the one that has already been placed before it unless EPCOR fails to pass the Board's tests for approval of the franchise or issuance of the CPCN.
20. If and only if EPCOR fails to pass the Board's test for approval should a second phase of this proceeding be commenced. This second phase could be conducted under the new competitive framework.

21. This approach is consistent with the way the OEB's approach in considering merger, acquisitions, amalgamations, and divestiture applications (RP-2005-0018/EB-2005-0234/EB-2005-0254/EB-2005-0257):

*“The Board is of the view that **its mandate in these matters is to consider whether the transaction that has been placed before it** will have an adverse effect relative to the status quo in terms of the Board's statutory objectives. **It is not to determine whether another transaction, whether real or potential, can have a more positive effect than the one that has been negotiated to completion by the parties.**”*

Preliminary Issue 2: Should the funding of this process be treated as a business development cost or a regulatory expense, recoverable from future ratepayers? What other approaches should the OEB consider?

22. Any costs incurred for this first competitive process should not be borne exclusively by Southern Bruce ratepayers. The residents of Southern Bruce should not have to shoulder the burden of pilot testing the Board's experiment in competitive processes. This is neither just nor reasonable. There are a myriad of interest groups participating in this proceeding. Most do not have any direct interest in Southern Bruce, but rather have an interest in shaping OEB policy. The costs of establishing OEB policies should be spread across all natural gas ratepayers in the province of Ontario.
23. The Southern Bruce Municipalities submit that the preparation of proposals by utilities should be treated as a business development expense, consistent with other competitive procurements. This is how the Southern Bruce Municipalities ran their competitive procurement process, and it did not serve as a disincentive to proponents. If the OEB decides to award any costs for the preparation of proposals, in the interest of fairness, the OEB could award pre-defined honorariums to each proponent to help cover some of the related costs.
24. Finally, the costs incurred by the Southern Bruce Municipalities to conduct a competitive procurement process prior to the generic proceeding should be recoverable from ratepayers.

The Southern Bruce Municipalities' competitive procurement advanced the OEB's public interest mandate in a number of ways:

- a. first, the Southern Bruce Municipalities' procurement resulted in the selection of EPCOR – the first new entrant utility in Ontario in recent memory;
- b. second, the Southern Bruce Municipalities' procurement pioneered the idea of charging stand-alone rates to facilitate the expansion of natural gas into parts of the province that are not already served – a model that was later adopted by the OEB in its generic decision; and
- c. third, the Southern Bruce procurement pioneered the waiver of municipal taxes as a mechanism to further facilitate the expansion of natural gas services – a model that was favored by the OEB as part of its generic decision.

With its decision to commence a second competitive procurement, the OEB has rendered the Southern Bruce Municipalities' competitive procurement process moot. Given this result, Southern Bruce taxpayers will be harmed and ratepayers should make those taxpayers and Southern Bruce whole.

Preliminary Issue 3: In its Decision with Reasons for the generic community expansion proceeding (EB-2016-0004), the OEB introduced the idea of a rate stability feature for its framework for natural gas expansion:

A minimum rate stability period of 10 years (for example) would ensure that rates applied for are representative of the actual underpinning long-term costs. The utility would bear the risk for that 10-year period if the customers they forecast did not attach to the system.

a) How should a rate stability period be implemented for the Southern Bruce areas?

25. The Southern Bruce Municipalities are supportive of a 10-year rate stability period. This longer-term period will provide residents with certainty that any investments they make to convert to natural gas will be able to be recovered over time.

26. If a utility cannot commit to a 10-year rate stability period, the Board should reject that utility's proposal.

b) Is a 10-year rate stability period too long or too short?

27. A 10-year period is a short time frame. Customers need price certainty and it may not be until after 10 years have passed that it becomes apparent to utilities that their conversion forecasts were too aggressive. However, utilities may not be able to manage risk over longer periods of time without having to charge customers increased risk premiums. Southern Bruce submits that a 10-year minimum period strikes an appropriate balance in the circumstances.

c) Should proponents have the opportunity to update costs during the rate stability period? If so, what types of costs?

28. Yes, but only for extraordinary costs that are outside of the reasonable control of proponents and that were not foreseeable at the time of the competitive procurement process. This would be akin to a Z-factor application applicable to the electricity sector.

Preliminary Issue 4: In expanding natural gas service to new areas, the OEB expects to approve franchise agreements following the results of a certificate competition. The selection process is primarily about finding the best value for consumers over the long term, after analyzing the supply plans and associated costs.

a) Is there a need for a common format for applications to be able to appropriately assess and compare the value propositions of different proponents – for example through establishing filing requirements?

29. Yes. The Southern Bruce Municipalities submit that the draft Filing Requirements are a good start to establishing a common format. However, those filing requirements must be revised to reflect that municipal preference is a fundamental and important factor in making a value judgment between different proposals.
30. The weighing of factors included in the filing requirements as well as factors beyond the filing requirements are important to the local municipality and ought to be given due consideration by the Board. This includes considerations such as whether agricultural customers and local farmers outside of the densely populated areas will be served by a proposal. In a municipality such as Southern Bruce where the agricultural industry is a significant employer, this is a key consideration that may be overlooked by a utility, or the OEB, absent this depth of local knowledge and input.

b) If so, please provide comments on the draft filing requirements attached at Schedule C.

31. In the opening language of the draft Filing Requirements, the Board states that “*When there are multiple parties’ interested in being granted the same franchise agreement and Certificate of Public Convenience and Necessity to serve an area, the OEB will apply the following decision criteria: Organization; Financial capacity; Proposed community supply; Schedule; Costs - construction and administration/support costs; Other factors”.*
32. Under the *Municipal Franchises Act*,¹ a municipality has sole jurisdiction grant a franchise agreement.² The OEB does not have the legal authority to grant a franchise agreement. The OEB only has authority to approve a franchise agreement after one is first granted by the municipality in question.³ The draft Filing Requirements suggest that the OEB is assuming authority to grant a franchise agreement. This would be a violation of the OEB’s statutory jurisdiction, and would be subject to judicial review. The Southern Bruce Municipalities hope that this was an oversight in the Board’s draft Filing Requirements, and not an attempt to expand the Board’s jurisdiction into municipal matters.

¹ *Municipal Franchises Act*, R.S.O. 1990, c. M.55.

² *Ibid* at s. 4(1).

³ *Supra* Note 1 at s. 9(1).

33. This issue highlights the importance of including municipal preference as a leading criteria in the Board's draft Filing Requirements when selecting a proponent where there are competing proposals for serving a community. Franchises and CPCNs are both granted under the *Municipal Franchises Act*. This is not the same as other OEB licenses for electricity utilities, which is the OEB's exclusive jurisdiction. Rather, the legislature indicated its intent that municipalities have an important role to play in the selection of gas utilities and the granting of gas franchises.

34. For these reasons, the Southern Bruce Municipalities submit that a new Section (C) be added to the draft Filing Requirements entitled "MUNICIPAL PREFERENCE", with the sub-headings listed below.

(C) MUNICIPAL PREFERENCE

The applicant must provide the following:

7.1 Evidence that any proposed contribution in aid of construction is affordable and is supported (in writing) by the municipality.

35. **Rationale:** Under the new rules a proponent could say that they have a very low rate impact proposal by charging a large contribution in aid of construction ("CIAC") to the municipality. The draft Filing Requirements do not appear to consider a CIAC of something other than \$0 as a potential outcome – but there is no rule mandating this. If this occurs and the OEB selects this proponent – then Southern Bruce is returned to the former unsustainable situation that started the generic hearing to begin with. If the municipalities simply cannot afford the CIAC no project will happen. Consequently, affordability of any CIAC to the municipality is a key consideration that should be addressed by the OEB.

7.2 Evidence of a legally binding agreement of any municipal tax rebate(s).

36. **Rationale:** In the generic hearing decision, the OEB made it clear that the municipality has sole and exclusive discretion of whether or not to award a municipal tax rebate to a particular

utility to support a project. Because of this, the OEB must assume that a local municipality will not rebate taxes unless proven otherwise in the form of a legally binding agreement with that municipality evidencing the tax rebate. The OEB must not assume that all utilities will benefit from the same tax rebate, as this would infringe upon a municipality's independence. A municipality may only be willing to grant a tax rebate if a proposal is designed to best serve local needs.

7.3 Evidence of a Municipal Franchise Agreement and other evidence of municipal support such as an approved council Resolution and By-Law.

37. **Rationale:** It is entirely foreseeable that a municipality may (for whatever reason) be unwilling to award a franchise agreement to a utility that the OEB selects as a preferred proponent and awards a CPCN. This would result in an impasse that would prevent the project from proceeding. One would expect the OEB would want to avoid this outcome by soliciting evidence of municipal support or a municipal franchise agreement in advance.

7.4 Evidence of municipal support of the proponent's proposed supply plans (scope of service area).

38. **Rationale:** The drivers, needs and complexities of local municipalities are most well-understood by the municipalities themselves. The OEB lacks the in-depth knowledge municipal councils possess about their region, local customers and local industry.

c) Should the OEB use a Reference Plan based on a set of working assumptions such as long term system demand? What other parameters should be set in a Reference Plan?

39. Yes. This allows for a fair comparison of two competing proposals.
40. However, prior to adopting a Reference Plan, the Board should seek municipal input on the terms of the Reference Plan to ensure that the scope of the plan and other assumptions meet

local needs and are consistent with municipal preference. The Southern Bruce Municipalities would be pleased to assist in this regard.

d) Should applicants have the opportunity to create their own proposals by applying their own demand forecasts, construction phasing, etc. as opposed to a Reference Plan?

41. Yes, variations to a Reference Plan should be permitted to encourage innovation and creativity. However, any such variation should include considerations of whether or not the municipality was consulted on the variation and whether the municipality is supportive of the variation, to ensure that it meets community needs.

Preliminary Issue 5: How should the costs of proposals be compared? (e.g. \$/month, \$/system capacity, use of demand day, delivery capacity of the system for comparison)

42. The Southern Bruce Municipalities submit that, in addition to cost and the above-noted factors, municipal preference is a key factor that the Board must include in comparing proposals.

43. This is consistent with the Board's approach in contested Service Area Amendment applications, which considers customer preference in addition to efficient rationalization of the distribution system and other impacts arising from the proposal, including rate impacts. Specifically, the Board determined in RP-2003-0044 that:

“Customer choice may become a determining factor where competing offers to the customer(s) are comparable in terms of economic efficiency, system planning and safety and reliability, demonstrably neutral in terms of price impacts on customers of the incumbent and applicant distributor, and where stranding issues are addressed.”

44. The Southern Bruce Municipalities submit that municipal preference should become the determining factor where competing proposals are comparable in terms of the Board's other chosen evaluation criteria.

45. By incorporating municipal preference, the Board will factor in additional considerations that are important to regional interests that fall outside of the factors the Board identifies in response to Preliminary Issue 5. This includes a careful and locally informed consideration of things like minimum system coverage, the ability to service different customers, and the proposed schedule for completing the project. All of these are relevant considerations, in addition to costing metrics.

Preliminary Issue 6: Should measures be put in place to ensure completion of the proposed projects, and if so, what should these measures be?

46. Yes. Two measures are proposed:

- (1) Defined performance milestones with penalties for failure to complete; and
- (2) A cliff date after which the CPCN expires (and where a consequence of expiry is ineligibility to bid for a CPCN in the same municipality).

All of which is respectfully submitted.