



# **ONTARIO ENERGY BOARD**

**OEB STAFF SUBMISSION  
March 19, 2018**

**OM Limited Partnership**

**Application for certificate of  
public convenience and necessity**

**EB-2017-0289**

## Introduction

OM Limited Partnership (OMLP) filed an application with the Ontario Energy Board (OEB) on August 24, 2017 under section 8 of the *Municipal Franchises Act*, for an order granting OMLP a certificate of public convenience and necessity (certificate). OMLP intends to construct facilities in order to supply natural gas to the new Maricann Group Inc.'s (Maricann) Langton facility located in Langton, Ontario (New Langton Facility).

Maricann is a publicly traded and vertically integrated producer and distributor of marijuana for medical purposes. Maricann is replacing its current 44,000 square foot Langton facility with a 217,500 square foot facility on an adjacent property. Maricann will require significant volumes of natural gas to fuel its greenhouse operations and production facility.

OMLP is a limited partnership between ON-Energy Corp. (ON-Energy), an Ontario oil and natural gas production company, and Maricann.<sup>1</sup> OMLP proposes to supply natural gas that has been locally produced by ON-Energy to the New Langton Facility.

The New Langton Facility is located immediately adjacent to the existing Maricann facility that receives gas service from Union Gas Limited (Union Gas). Both facilities are located on the north half of Lot 2, Concession 7, Norfolk County.

OMLP's proposed facilities consist of a tie-in system that connects ON-Energy's existing local production wells and gathering pipeline system (Facilities) to the service line feeding the New Langton Facility. The proposed tie-in system is required to provide dehydration, odourization, pressure regulation and volumetric measurement capabilities.<sup>2</sup> A new 3.7 kilometer nominal pipe size (NPS) 4, high-density polyethylene (HDPE) pipeline (Pipeline) is also required to loop the existing gathering pipeline system and provide a connection point for the tie-in system. The Pipeline will be constructed on North Walsingham County Road #8 from West Quarter Town Line to Norfolk County Road #23.<sup>3</sup>

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<sup>1</sup> Efforts to create the partnership began prior to August, 2017 but were not completed until December, 2017.

<sup>2</sup> EB-2017-0289, OMLP's application for certificate of public convenience and necessity, page 9.

<sup>3</sup> Ibid. Page 9.

Construction of the New Langton Facility is underway. Construction of the tie-in system and Pipeline (collectively, the Project) have yet to begin. Maricann has requested first gas delivery from OMLP by May 1, 2018.

OEB staff submits that this is not a standard certificate application. OMLP's application raises a number of questions that should be addressed in order to determine if a certificate should be granted to OMLP.

The key question in this application is whether or not OMLP is seeking a system bypass. The OEB's consideration of bypass applications is different from its consideration of ordinary certificate applications.

In addition, OEB staff considered whether a leave to construct approval of the OEB is required to construct the Pipeline and whether OMLP needs to be rate regulated.

OEB staff submits that OMLP's application may be considered a system by-pass application and that it is unclear whether OMLP also requires a certificate for the Pipeline. OEB Staff also submits that leave is not required for the Pipeline, and that OMLP may require rate regulation.

## **Process**

The OEB issued a Notice of Hearing on January 10, 2018, which was served and published as directed. Union Gas applied for and was granted intervenor status. The OEB proceeded by way of a written hearing.

The OEB issued Procedural Order No. 1 on February 13, 2018, setting the schedule for written interrogatories and written submissions. Union Gas and OEB staff submitted interrogatories on February 23, 2018. OMLP submitted interrogatory responses on March 9, 2018.

## **System By-Pass**

A system by-pass occurs when a party other than the incumbent gas utility is permitted to construct a pipeline to serve one or more customers, despite the fact that an incumbent has a certificate (and usually nearby pipeline facilities) for that territory – in other words when a party seeks to build pipeline to serve customers in another utility's service territory. It is unclear whether the current application is a case of system by-pass.

Although Union has certificates for the areas surrounding the Maricann properties, the OEB's records are clear that no party holds a certificate for the actual properties upon which the existing Maricann facility and the New Langton Facility are located. OMLP is therefore free to file an application for a certificate for those properties without triggering a bypass.

However, OMLP is also proposing to build pipeline on lands for which Union currently does hold a certificate; in particular the 3.7 km Pipeline that is being constructed to connect the existing gathering lines to the Maricann properties. OMLP has not applied for a certificate for this portion of their proposed pipeline system, presumably because they are not actually serving a customer in Union's service territory, and therefore do not believe that a certificate is required.

OEB staff is not certain that this is a correct interpretation. Section 8 of the *Municipal Franchises Act, 1990*, provides that "no person shall construct any works to supply natural gas in any municipality ... without the approval of the OEB..."<sup>4</sup> It is not clear from this language if a certificate is required where a party is constructing pipeline in another utility's service territory (i.e., the municipality covered by the certificate), but not actually serving any customers in that service territory. The language in the Act could support either interpretation.

OMLP states that it considers the entire Pipeline to be a natural gas production gathering system pipeline as it is used to move untreated raw natural gas<sup>5</sup> and as such the Pipeline does not require OEB approval.<sup>6</sup> However, if the need for the new Pipeline arises from the need to bring natural gas to the tie-in system at the New Langton Facility, then the Pipeline may be akin to a distribution pipeline.

If the OEB finds that the Pipeline requires a certificate, then this becomes a system by-pass case.

If the OEB views OMLP's request not to be a regular certificate application and not a system by-pass application, then the question the OEB must answer is whether a

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<sup>4</sup> Municipal Franchises Act, R.S.O. 1990. Section 8.

<sup>5</sup> EB-2017-0289, OMLP response to OEB staff interrogatory 6. a).

<sup>6</sup> EB-2017-0289, OMLP response to OEB staff interrogatory 6. b).

certificate should be awarded. In such cases, the OEB typically considers whether the applicant has the technical wherewithal to construct and operate pipeline facilities. In this case, ON-Energy currently owns and operates over 300 km of pipelines in Ontario, and so OEB staff does not have concerns regarding OMLP's ability to be granted a certificate.<sup>7</sup>

If the OEB determines that OMLP's request is a system by-pass application, then the OEB should address this request according to established principles. The OEB does not have a general policy for, or against, system by-pass; rather, the OEB evaluates each case on its merits.<sup>8</sup> The following principles have been established by the OEB through previous bypass cases:

- a) Economic benefit to the applicant alone is not sufficient grounds to permit bypass.<sup>9</sup>
- b) Even though a bypass is in the interest of the applicant, that does not negate the possibility that it could also be in the public interest.<sup>10</sup>
- c) If the incumbent gas distributor cannot meet the needs of the applicant and there is no material harm to existing rate-payers, then a by-pass may be granted.<sup>11</sup>
- d) While there may be a lost opportunity in terms of foregone revenues for the incumbent gas distributor and its ratepayers, there are no lost revenues for the incumbent gas distributor if the load is incremental.<sup>12</sup>

OEB staff submits that the primary questions before the OEB are whether Union Gas can meet the needs of the applicant, and whether granting OMLP's certificate request creates material harm to Union's existing system or rate-payers. In the recent Greenfield South Power Corporation bypass application, the OEB allowed the application after it determined that Union's existing system and rate-payers would not be harmed by the bypass, while also noting that the applicant would apparently save significant amounts of money through the bypass.<sup>13</sup>

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<sup>7</sup> EB-2017-0289, OMLP's application for certificate of public convenience and necessity, page 8.

<sup>8</sup> EB-2014-0299 (Greenfield South Power Corporation), Decision and Order, page 9.

<sup>9</sup> EBRO-477 (Cardinal Power, 1993) as referenced in EB-2014-0299 (Greenfield South Power Corporation), Decision and Order, page 7.

<sup>10</sup> EB-2014-0299 (Greenfield South Power Corporation), Decision and Order, page 9.

<sup>11</sup> EB-2014-0299 (Greenfield South Power Corporation), Decision and Order, page 4.

<sup>12</sup> Ibid. Page 10.

<sup>13</sup> EB-2014-0299 (Greenfield South Power Corporation), Decision and Order.

There are some differences between the Greenfield case and the current case however, chiefly the fact that Union already has pipe in the ground and is serving the existing facility on the property (though apparently without a certificate). In the view of OEB staff, there is insufficient information on the record to determine whether or not Union Gas can meet the needs of the New Maricann Facility or what impacts there could be to Union Gas' existing rate-payers as a result of granting OMLP's certificate request.

OMLP asserts that granting its certificate request will have no impact on current or future natural gas users<sup>14</sup> because no customers of Union Gas or any other gas utilities are being asked to bear the cost of OMLP's facilities.<sup>15</sup>

OEB staff notes that OMLP's explanation does not take into consideration potential matters that could affect existing Union Gas customers, such as the creation of stranded assets, increased gas procurement costs, foregone revenues, and changes in distribution system efficiency. This is likely because OMLP does not have access to the information needed to assess these factors; that information can only come from Union Gas.

## Other Matters

OEB Staff has also considered several other matters related to OMLP's proposal. OEB staff considered whether leave of the OEB is required to construct the Pipeline and whether OMLP needs to be rate regulated.

### ***Leave to Construct***

Pursuant to section 90 of the *Ontario Energy Board Act, 1998*, and Ontario Regulation 328/03, no person shall construct a hydrocarbon line without first obtaining from the OEB an order granting leave to construct the hydrocarbon line if:

- a) the proposed hydrocarbon line is more than 20 kilometres in length

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<sup>14</sup> EB-2017-0289, OMLP's application for certificate of public convenience and necessity, page 12.

<sup>15</sup> EB-2017-0289, OMLP response to Union Gas interrogatory 3. a) and b).

- b) the proposed hydrocarbon line is projected to cost more than the amount prescribed by the regulation (currently \$2,000,000)
- c) any part of the proposed hydrocarbon line
  - i. uses pipe that has a nominal pipe size of 12 inches or more, and
  - ii. has an operating pressure of 2,000 kPa (approx. 290 psig) or more.

Given that OMLP's Pipeline is 3.7 kilometres in length, has an estimated capital cost of \$335,000, is NPS 4 and operates at a maximum of 100 psig<sup>16</sup> (approx. 690 kPa), OEB staff submits that leave to construct approval from the OEB is not required.

### **Rate Regulation**

Pursuant to section 36 of the *Ontario Energy Board Act, 1998*, "no gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in accordance with an order of the Board, which is not bound by the terms of any contract." A "gas distributor" is defined in the Act as "a person who delivers gas to a consumer". It seems clear that OMLP proposes to deliver gas to a consumer. The fact that the consumer is an affiliate does not negate the requirement for rate regulation. Pursuant to section 3 of Ontario Regulation 161/99, "[s]ection 36 of the Act does not apply to the sale, transmission, distribution or storage of gas by a distributor who distributes less than 3,000,000 cubic metres of gas annually."

OMLP states:

OMLP does not see itself as a transmitter, distributor or storage company. OMLP is an owner of its gas production taken from its gas gathering line and a part owner of the [New] Maricann Facility. As such, the requirements and thresholds listed in O.reg 161/99 Section 3 and section 36 of the OEB Act, do not appear to be applicable.<sup>17</sup>

OEB staff disagrees with OMLP's position for the following reasons.

- a) OMLP states that, "[t]he gas costs charged by Union to Maricann for natural gas supplied are higher than will be charged through the OMLP."<sup>18</sup> This quote

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<sup>16</sup> EB-2017-0289, OMLP's application for certificate of public convenience and necessity, page 8.

<sup>17</sup> EB-2017-0289, OMLP response to OEB staff interrogatory 4. e).

<sup>18</sup> Ibid. Page 4.

demonstrates that OMLP intends to supply (or distribute) gas to Maricann and charge for that service.

- b) Using gas consumption and conversion factors provided by OMLP<sup>19</sup>, OEB staff estimates the peak capacity of the New Langton Facility will be in excess of 7.5 million cubic meters of natural gas per year (i.e., in excess of the 3,000,000 cubic meters per year threshold).
- c) OEB staff notes that neither the OEB Act nor Ontario Regulation 161/99 provide relief for a company supplying gas to itself or an affiliate in terms of the requirement to obtain an order of the OEB.

OEB staff submits that since OMLP intends to distribute more than 3,000,000 cubic meters of natural gas annually, it appears likely that the company must therefore be rate regulated by the OEB. For this reason, OEB staff submits that OMLP should bring forward a rate application at the appropriate time.

OEB staff notes that the OEB has different means of rate regulation at its disposal. For example, it may be possible to establish a less onerous form of regulation given the nature of the distribution relationship in this case. Options for rate regulation can be discussed in advance of a rate application.

## Conclusion

OEB staff submits that this is not a standard certificate application. OMLP's application raises a number of questions that should be addressed before determining whether a certificate should be granted, particularly whether this constitutes a system by-pass application and whether a certificate is required to construct the Pipeline.

If the OEB finds that this is a case of system by-pass and that there is insufficient evidence to make a determination on either of the two questions above, the OEB could issue a procedural order requiring the production of further information on the record. If the OEB finds that the Pipeline also requires a certificate, then OMLP should be instructed to bring forward the necessary application.

If the OEB finds that this is not a system by-pass case, OEB staff recommend that a

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<sup>19</sup> EB-2017-0289, OMLP response to OEB staff interrogatory 4. a) and c).



certificate be issued forthwith.

In addition, OEB staff observes that while leave to construct does not appear to be required for the Pipeline, it does appear that OMLP must be rate regulated by the OEB, which would be the subject of a separate proceeding.

All of which is respectfully submitted.