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June 15, 2018

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Ms. Kirsten Walli  
Board Secretary  
Ontario Energy Board  
27-2300 Yonge Street  
Toronto, ON M4P 1E4

Ottawa

Vancouver

New York

Dear Ms. Walli:

**EB-2017-0232: Application for municipal franchise agreement with the County of Oxford**

**Re: Motion by Union Gas Limited and EPCOR Motion Response Submission**

Further to Procedural Order No. 2 dated May 30, 2018, please find the enclosed the written submissions of EPCOR Natural Gas Limited Partnership (EPCOR) in connection with the above matter.

Please do not hesitate to contact me if you have any questions.

Yours very truly,



Patrick G. Welsh

PW:vs

c (email only): Patrick McMahon, *Union Gas Limited*  
Azalyn Manzano, *Ontario Energy Board*  
Brian Lippold, *EPCOR Natural Gas Limited Partnership*  
Britt Tan, *EPCOR*  
Richard King, *Osler, Hoskin & Harcourt LLP*

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Municipal Franchises Act*, R.S.O. 1990, c. M.55, as amended (the “Act”);

**AND IN THE MATTER OF** an Application by EPCOR Natural Gas Limited Partnership for an Order under section 10(2) of the Act renewing the terms and conditions upon which, and the period for which Oxford County is to grant to Natural Resource Gas Limited the right to construct and operate works for the distribution, transmission and storage of natural gas and the right to extend and add to the works in Oxford County;

**AND IN THE MATTER OF** an Application by EPCOR Natural Gas Limited Partnership for an Order under section 10(5) of the Act renewing the term of the right in such a manner that is deemed to be a valid by-law of Oxford County assented to by the municipal electors;

**AND IN THE MATTER OF** an Motion by Union Gas Limited for an Order under section 8 of the *Ontario Energy Board Rules of Practice and Procedure*;

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**MOTION SUBMISSIONS OF  
EPCOR NATURAL GAS LIMITED PARTNERSHIP**

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June 15, 2018

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Partnership

## **Background**

1. On May 25, 2018, Union Gas Limited (“**Union**”) filed a notice of motion requesting a direction from the Ontario Energy Board (the “**OEB**”) requiring EPCOR Natural Gas Limited Partnership (“**EPCOR**”) to (1) provide a customer density map showing the location of EPCOR’s customers and facilities within the Township of South-West Oxford; and (2) providing an explanation of the harm to either the County of Oxford (“**Oxford**”) or EPCOR’s customers of leaving the clause related to the *Drainage Act* within the proposed franchise agreement between EPCOR and Oxford (the “**Proposed Franchise Agreement**”). Further, Union requested an extension to the May 31, 2018 deadline to submit written submissions to a date that is five days after EPCOR provides its response.
2. On May 28, 2018, EPCOR filed a letter indicating that a motion was not necessary to resolve the above matters. Union did not respond to this letter.
3. On May 30, 2018, the OEB issued Procedural Order No. 2, which provided an opportunity for EPCOR and OEB Staff to file submissions with the OEB relating to Union’s motion.

## **Argument**

4. For the reasons set out in these submissions, the OEB should dismiss Union’s motion.

### ***A Customer Density Map is not relevant to these proceedings and has not been requested by OEB Staff***

5. In Union’s Notice of Motion dated May 25, 2018 (the “**Notice of Motion**”), Union argued that EPCOR should be required to provide a customer density map showing the location of EPCOR’s customers and facilities within the Township of South-West Oxford. Union’s reasoning is essentially a “what about EPCOR?” argument. That is, because other gas distributors - in other proceedings and in other contexts - have been required by the OEB or by OEB Staff to provide customer density maps, then “what about EPCOR?”. EPCOR submits that Union’s “whataboutism” is not an adequate reason to require EPCOR to provide a customer density map in the absence of a request from the OEB or from OEB Staff.
6. In the OEB’s Decision in EB-2017-0159<sup>1</sup> (cited by Union in the Notice of Motion), the OEB required Enbridge Gas Distribution Inc. (“**Enbridge**”) to provide a customer density map because OEB Staff had previously requested such a map (specifically, a map of the Town of Collingwood showing the density and location of customers served, together with clearer road boundaries, all to enable the OEB to more properly define Enbridge’s service area boundaries within the Town of Collingwood). In fact, the OEB specified that Enbridge was only required to provide a map showing Enbridge’s service boundaries as well as “the general location and density of customers served.”

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<sup>1</sup> Ontario Energy Board, *Decision on Confidentiality Request and Procedural Order No. 2* (July 4, 2017).

7. Similarly, in EB-2017-0126, the OEB required Union to provide customer density maps in a letter dated December 13, 2017, after Union had filed its application (without customer density maps) on March 7, 2017. The OEB requested that Union provide this information because Union was seeking Certificates of Public Convenience and Necessity (a “**Certificate**”) for areas where Union had constructed works outside of the bounds of its existing Certificates. This direction also applied to EB-2017-0126 (also cited by Union in the Notice of Motion). As far as EPCOR can tell, Union voluntarily provided customer density maps in each of the other examples cited in the Notice of Motion (i.e., EB-2017-0367, EB-2017-0368, EB-2017-0369, EB-2018-0116 and EB-2018-0152).
8. In this proceeding, the original applicant, Natural Resource Gas Limited (“**NRG**”), provided a map showing the general location of NRG’s (now EPCOR’s) distribution facilities within Oxford County’s jurisdiction as Schedule B to the application.<sup>2</sup> The application was submitted on June 12, 2017, prior to the OEB’s decision regarding Enbridge’s map in EB-2017-0159 (July 4, 2017). However, and in any event, OEB Staff, in Interrogatory 3 (May 3, 2018), did not request a customer density map from EPCOR.<sup>3</sup> Rather, OEB Staff asked EPCOR to confirm that its Certificate covered the area described in Schedule B (i.e., the map) and to confirm that all of EPCOR’s infrastructure within the Township of Southwest Oxford is currently located within the bounds of its Certificate. EPCOR confirmed both of these questions in its Interrogatory Responses dated May 17, 2018.<sup>4</sup>
9. Consistent with past behavior,<sup>5</sup> Union is trying to make this proceeding about EPCOR’s (or NRG’s) valid Certificates. However, this proceeding is about EPCOR’s application to renew its franchise agreement with Oxford County, and EPCOR has already confirmed that its infrastructure is located within the bounds of its Certificate. In the absence of a specific issue regarding boundaries, Certificates, or customer density, and in the absence of a specific request from OEB Staff, there is no need for EPCOR to provide a customer density map because it is not relevant to these proceedings.
10. Furthermore, as explained in EPCOR’s letter dated May 28, 2018, a customer density map would not provide much assistance to the OEB because all of Oxford County is of relatively low density, and in any event, both Union and OEB Staff already have copies of EPCOR’s system map.<sup>6</sup> In light of this, and in the absence of a request from OEB Staff for a customer density map, Union’s persistence with this matter can only be seen as an effort to drive up EPCOR’s cost for what should be a straightforward franchise renewal application.

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<sup>2</sup> EB-2017-0232, Application of Natural Resource Gas Limited (June 12, 2017) (the “**Application**”) at Schedule “B”.

<sup>3</sup> EB-2017-0232, OEB Staff Interrogatories (May 3, 2018) at p. 2.

<sup>4</sup> EB-2017-0232, EPCOR Interrogatory Responses (May 17, 2018) at p. 6.

<sup>5</sup> See, e.g., EB-2014-0207; EB-2015-0205; EB-2016-0145; EB-2017-0108.

<sup>6</sup> EB-2017-0232, EPCOR Letter re Motion by Union Gas Limited (May 28, 2018) at p. 1.

***EPCOR has repeatedly explained the rationale for removing the provision in the Model Franchise Agreement regarding drainage, and there is no additional information to provide***

11. In the Notice of Motion, Union argued that EPCOR should provide extensive submissions regarding whether exceptional and unusual circumstances justify a deviation from the Model Franchise Agreement (the “MFA”). Union noted that it was concerned about the precedential value of any deviation from the MFA, and expressed the opinion that the OEB should not approve any such deviation without a compelling explanation and assurance that this deviation only applies to this particular franchise agreement.
12. Put simply, EPCOR is perplexed by Union’s request. In the original application, NRG clearly stated that it agreed to remove the *Drainage Act* provision at Oxford’s request. NRG also included background to its discussions with Oxford. In its letter to Oxford County dated September 24, 2015, NRG proposed using the MFA and made it clear to Oxford that “the [OEB] has advised that its preference is not to depart from the terms contained in the Model Franchise Agreement.”<sup>7</sup> NRG further noted that “it is open to a gas company to refer the [franchise] agreement to the [OEB] for approval where, for whatever reason, a franchise agreement cannot be concluded between a gas company and a county.” As explained in the Application, NRG and Oxford engaged in discussions between October and November 2015, but were unable to reach an agreement regarding the terms of a proposed franchise agreement.
13. On December 12, 2016, Oxford County’s Chief Administrative Officer wrote to NRG, advising that there was a “need for NRG Ltd. to address the following issues” in the proposed franchise agreement. One of those issues was the provision in the MFA relating to the *Drainage Act*, where Oxford County argued that drainage was not its responsibility. Specifically, Oxford County stated that:

Drainage

- Drainage is a lower tier responsibility within the context of two tier municipalities such as the County of Oxford. As such all municipal drain related issues must reference the need for necessary approvals from the appropriate lower tier municipal authority in Oxford County not the County of Oxford. For information, there are eight area municipalities within the County of Oxford, each with authorities and responsibilities under the Drainage Act.
  - Further, it must be acknowledged within the agreement that municipal drain related cost apportionment must follow that prescribed by the Drainage Act, as amended. This is a critical issue given current legal dispute with regard to a lower tier municipality and a gas utility within the Province of Ontario.<sup>8</sup>
14. In response, NRG further explained to Oxford that its preference was not to depart from the MFA, and that the OEB had approved all of NRG’s recent franchise renewals without

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<sup>7</sup> EB-2017-0232, Application, Schedule G, Letter from Patrick Welsh to Brenda Tabor (September 24, 2015).

<sup>8</sup> EB-2017-0232, Application, Schedule H, Email from Peter Crockett to Brian Lippold (December 12, 2016).

modification to the MFA, and that Oxford's request regarding the removal of the *Drainage Act* provision presented a "road block".<sup>9</sup> As explained in the Application, NRG and Oxford entered into "without prejudice" discussions regarding the terms of the proposed franchise agreement, and NRG ultimately agreed to remove the *Drainage Act* provision from the MFA.

15. In its Interrogatories, OEB Staff asked about the status of discussions between EPCOR and Oxford County regarding the form of the proposed franchise agreement, and asked generally about the correspondence with Oxford that NRG included in its application.<sup>10</sup> In response, EPCOR explained that the purpose of filing the correspondence in evidence was to provide the OEB with the background regarding NRG's discussions with Oxford County, in order to explain to the OEB that the removal of the reference to the *Drainage Act* was at Oxford's request and was a condition precedent of Oxford's in order to enter into a new franchise agreement with NRG.<sup>11</sup>
16. Regarding Union's stated concerns in its Notice of Motion of the potential precedential impact of allowing the removal of any provision of the MFA, EPCOR submits that the record clearly shows that NRG and EPCOR did not remove the *Drainage Act* provision lightly. Rather, NRG and EPCOR repeatedly explained to Oxford County that the OEB prefers not to deviate from the MFA, and that in all other franchise renewals, NRG used the terms of the MFA.
17. Additionally, in its interrogatories, EPCOR expressed a willingness to bring any new or modified terms as directed by the OEB to Oxford County and noted that a more expeditious solution would simply be for the OEB to issue an order granting a franchise agreement for Oxford County to EPCOR on such new or modified terms as the OEB deems just.<sup>12</sup> EPCOR preferred an amicable negotiation about the terms of its franchise agreement with Oxford over a potentially contentious OEB proceeding imposing a franchise agreement on Oxford County, but if imposed terms are the OEB's preference, then EPCOR is willing to heed the OEB's direction.
18. Consequently, Union's request in the Notice of Motion, that EPCOR provide further justification for departing from the MFA, is unnecessary at this stage. EPCOR's request to depart from the MFA is clearly an exceptional request, and if the OEB is concerned about precedential impact, then it would be appropriate for the OEB to give clear guidance about the infrequency of departures from the MFA and the unique nature of these circumstances in its Decision and Order. Furthermore, EPCOR has stated plainly that it is willing to defer to the OEB's preference regarding the terms of the franchise agreement with Oxford County.

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<sup>9</sup> EB-2017-0232, Application, Schedule H, Email from Brian Lippold to Peter Crockett (March 20, 2017).

<sup>10</sup> EB-2017-0232, OEB Staff Interrogatories (May 3, 2018) at pp. 1-2.

<sup>11</sup> EB-2017-0232, EPCOR Interrogatory Responses (May 17, 2018) at p. 5.

<sup>12</sup> EB-2017-0232, EPCOR Interrogatory Responses (May 17, 2018) at p. 1.

19. Put simply, there is no additional information that EPCOR would or could provide that is different from what has already been stated. Again, the only reasonable explanation for Union's persistence with this matter is that it is an effort to drive up the cost of, and prolong the duration of, what should be a straightforward franchise agreement renewal.

**Conclusion**

20. Union has failed to demonstrate the need for EPCOR to provide a customer density map or further information regarding the removal of the *Drainage Act* provision from the MFA. Union's motion should be dismissed, as it appears to be an attempt to drive up the cost of, and prolong the duration of, what should be a straightforward franchise agreement renewal.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

June 15, 2018



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