

November 1, 2018

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

Dear Ms. Walli:

**Re: EPCOR Natural Gas Limited Partnership
Franchise Agreement with County of Oxford
Ontario Energy Board File No. EB-2017-0232**

Pursuant to Procedural Order No. 3 to the above noted proceeding, Union Gas Limited hereby files its final submissions with respect to the application and evidence of EPCOR Natural Gas Limited Partnership.

Should you have any questions on these submissions, please do not hesitate to contact me.

Yours truly,

[Original signed by]

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Encl.

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Brian Lippold, EPCOR
Brit Tan, EPCOR

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B, as amended;

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

AND IN THE MATTER OF an application made by EPCOR Natural Gas Limited Partnership (“EPCOR”) for an order pursuant to the *Municipal Franchises Act* approving EPCOR’s proposed franchise agreement with the County of Oxford.

SUBMISSIONS OF UNION GAS LIMITED

1. Union Gas Limited primarily objected to two aspects of the proposed Franchise Agreement between EPCOR Natural Gas Limited Partnership and the County of Oxford.
2. First, the originally proposed Franchise Agreement inappropriately used the form of gas supply provision in section 2 meant for lower-tier municipalities, which allowed EPCOR to supply gas to “the inhabitants of the Municipality” rather than the inhabitants of only those lower-tier municipalities with which EPCOR has a valid franchise agreement. This choice was not appropriate because EPCOR has no right to supply gas to seven out of the eight lower-tier municipalities within the County of Oxford and only has the right to provide service to a limited section of the lower-tier Township of South-West Oxford.
3. Second, the proposed Franchise Agreement removed section 5(g) from the 2000 Model Franchise Agreement. Consistent with the OEB’s jurisprudence, this deviation should not be allowed absent evidence of exceptional and unusual circumstances specific to the County of Oxford that would warrant such a deviation. EPCOR has not presented any evidence that such a deviation is warranted here.
4. The originally proposed franchise agreement between EPCOR and the County of Oxford also contained alterations to the format of the 2000 Model Franchise Agreement that has been used as the accepted standard within Ontario since 2000 including changes to: (i) the titles to each section of the

Model Franchise Agreement (“articles” instead of “parts”); (ii) the numbering of the clauses in the Model Franchise Agreement (which in turn results in changes to the references in the definition of ‘Plan’ and within the Alternative Easement clause #11 in the Model Franchise Agreement); (iii) the Duration of Agreement and Renewal Procedures clause #4 of the Model Franchise Agreement; and (iv) the Municipal By-Laws of General Application clause #13 of the Model Franchise Agreement.

5. In its most recent submission dated October 18, 2018, EPCOR attached a revised form of the proposed franchise agreement (Schedule “B”) for the OEB’s consideration. While this version of the franchise agreement is closer to the Model Franchise Agreement, EPCOR is still requesting that section 5(g) be removed.¹
6. Union respectfully requests that the OEB approve the most recently filed version of the proposed Franchise Agreement only if it is amended to correct the title to reflect that it is a Model Franchise Agreement and includes all provisions of the 2000 Model Franchise Agreement.

Section 5(g) of the 2000 Model Franchise Agreement should be retained

7. EPCOR has proposed a deviation from the 2000 Model Franchise Agreement by deleting section 5(g), which requires that “[w]here the gas system may affect a municipal drain, the Gas Company shall also file a copy of the Plan with the Corporation’s Drainage Superintendent for purposes of the *Drainage Act*, or such other person designated by the Corporation as responsible for the drain.”
8. The OEB has rarely approved deviations from the Model Franchise Agreement. It has done so only where “exceptional and unique circumstances” particular to the municipality are present that would warrant a deviation.
9. In E.B.A. 767/768/769/783, the OEB refused to approve proposed deviations from the Model Franchise Agreement proposed by the municipalities. It stated:

4.0.3 The Board continues to accept that there are great advantages to the uniform application of a Model Agreement to all municipal franchises

¹ EPCOR Submission, October 18, 2018, paragraph 18

relating to the provision of natural gas. Uniform conditions for all municipalities prevent unfairness. [...]

4.0.4 The Board finds that the four Municipalities have not demonstrated unusual circumstances specific to these Municipalities which would justify different terms and conditions in their agreements from those in the Model Agreement. The Board therefore finds that the franchise agreement for each of the Municipalities should be in the model form, without the requested amendments.²

10. The OEB confirmed this reasoning in EB-2008-0413. It stated that “[t]he Model Franchise Agreement is an important tool to efficiently administer the many franchise agreements across this Province. The Model Franchise Agreement should be departed from only in exceptional and unusual circumstances.”³
11. Union’s Franchise Agreement with the County of Oxford, approved by the OEB on October 6, 2009 in EB-2009-0293, includes section 5(g).
12. EPCOR has failed, both in its application and by being unable to explain the harm that would result from retaining section 5(g) of the Model Franchise Agreement, to explain whether any “exceptional and unusual circumstances” exist that would warrant a deviation from the Model Franchise Agreement. EPCOR has not provided any explanation for this deviation other than to state that the clause was removed at the County of Oxford’s request.⁴
13. The fact that a municipality requested an amendment is not sufficient to warrant deviation from the 2000 Model Franchise Agreement. If it were, the benefits of uniform application of franchise agreements would be lost because each franchise agreement would be subject to revisions made on a case by case basis by municipalities, even absent exceptional or unique circumstances.
14. The only explanation on the record explaining the proposed removal of section 5(g) falls short of establishing “exceptional and unique circumstances” specific to the County of Oxford, or even that the County of Oxford refused to sign the proposed Franchise Agreement if it contained section 5(g).

2 EBA 767/768/769/783 Decision with Reasons dated March 31, 1998, Section 4 – Board Findings

3 EB-2008-0413 Decision and Order dated May 5, 2009, NRG Franchise Agreement with Aylmer, page 13

4 Application, para. 11; October 18, 2018 submission.

In his email of December 12, 2016, the Chief Administrative Officer for the County of Oxford stated with respect to drainage that:

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 confirmation, 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.⁵

15. In response, Brian Lippold of Natural Resource Gas responded:

Unfortunately, it is the one issue that we are powerless to move. If you refer to the attached documents, the Franchise Agreement that Oxford most recently signed with Union, was void of the alterations that your team has requested of NRG Ltd. As Osler had previously argued, the agreement is an OEB form document. They do not change and have not changed the standard Franchise Agreement.

We have recently renewed our agreements with Southwest Oxford, Aylmer/Malahide, Thames Centre, Middlesex, Central Elgin and Norfolk. In each case, the OEB put the order in place for renewal without adjustment to language. We understand your concerns. However, this is not a matter of NRG choosing to be uncooperative. It's a matter of the Governing Body's process and law; one that prevents us from making concessions on items pertaining to drainage.⁶

16. The County of Oxford's first concern was that it does not bear responsibility for any drainage works, and therefore that "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." There is nothing exceptional or unique about the County of Oxford's circumstances that warrant

⁵ Application, Schedule H.

⁶ Application, Schedule H.

removal of this standard provision. The provision is included in Union's Franchise Agreement with the County of Oxford. To Union's knowledge, this provision has not been removed from any franchise agreement with an upper-tier municipality, even though other upper-tier municipalities may similarly not be responsible for drainage projects. Thus, the Board should not approve this proposed deviation from the 2000 Master Franchise Agreement.

17. Oxford's second concern was cost apportionment of municipal drain-related requests. In *Union Gas Limited v. Norwich (Township)*, the Ontario Court of Appeal held that costs associated with gas line relocation at the municipality's request to accommodate drainage works are subject to apportionment as set out in section 12 of the Franchise Agreement, rather than to the cost allocation provisions set out in the *Drainage Act*.⁷ The Court of Appeal cited section 5(g) as evidence that, contrary to the Township of Norwich's position, drainage works are municipal works for the purpose of section 12. Therefore, the second concern raised by Oxford is no longer applicable. Appropriately, no changes were made to the cost-apportionment provision in section 12.
18. Union therefore objects to the approval of the proposed franchise agreement if it does not include section 5(g) of the 2000 Model Franchise Agreement.

Customer Density Map

19. In its interrogatory 1(c), Union requested that EPCOR provide a customer density map showing the location of EPCOR's customers and facilities within the Township of South-West Oxford. In its Decision dated October 4, 2018, the Board determined that EPCOR ought to provide information that would be gleaned from a customer density map and directed EPCOR to provide information that accurately delineates its service boundaries, as well as the general location and density of the customers it serves in the County of Oxford.
20. Union does not feel that the map provided by EPCOR in its October 18, 2018 submission meets the standard expected and required of other gas distributors. The map that EPCOR provided simply shows EPCOR's service boundaries in the County of Oxford and numbers of customers served in

⁷ *Union Gas Limited v. Norwich (Township)*, 2018 ONCA 11 at para. 33.

general areas within the county. It is not clear to Union exactly where the customers are located (given that the entire map is covered in the hash marks identified as “location of customers”) nor what the red and blue lines and other objects on the map represent.

All of which is respectfully submitted this 1st day of November, 2018.