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November 1, 2018

Kirsten Walli  
Board Secretary  
Ontario Energy Board  
P.O. Box 2319  
27th Floor, 2300 Yonge Street  
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: EPCOR Natural Gas Limited Partnership  
Application for franchise agreement with the County of Oxford  
Board File Number EB-2017-0232**

Please find attached OEB staff's submission in the above-noted proceeding.

Yours truly,

*Original signed by*

Azalyn Manzano  
Case Manager

/ attach.



# **ONTARIO ENERGY BOARD**

**OEB STAFF SUBMISSION  
November 1, 2018**

**EPCOR Natural Gas Limited Partnership  
Application for franchise agreement with the  
County of Oxford**

**EB-2017-0232**

## Introduction

These are the submissions of Ontario Energy Board (OEB) staff on the application filed by EPCOR Natural Gas Limited Partnership (EPCOR) on August 24, 2017, under section 9 of the *Municipal Franchises Act*. The application is for an order approving EPCOR's proposed franchise agreement with the County of Oxford.<sup>1</sup>

EPCOR's predecessor, Natural Resource Gas Limited (NRG) had a franchise agreement with the County of Oxford dated June 14, 1989. The franchise agreement expired on June 14, 2009.

According to the evidence, during NRG's attempts in 1998-1999 and 2015-2017 to come to an agreement with the County of Oxford, the County of Oxford appears to have requested that certain clauses in the MFA be revised or removed, despite repeated explanations by NRG that the OEB typically does not approve deviations from the 2000 Model Franchise Agreement (MFA).

On November 1, 2017, NRG sold its natural gas distribution system to EPCOR. NRG, and now EPCOR, have been operating in the County of Oxford without a valid franchise agreement since 2009.

OEB staff notes that the County of Oxford was given notice of this proceeding. The County of Oxford has not participated and it has not filed any correspondence with the OEB regarding its reluctance to agree to the MFA.

## Process

The OEB issued a Notice of Hearing on February 2, 2018, which was served and published as directed. Union Gas Limited (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 April 19, 2018, setting the schedule for the written hearing. Union Gas and OEB staff submitted interrogatories on May 3, 2018. EPCOR filed its responses to interrogatories from OEB staff and Union Gas on May 17, 2018.

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<sup>1</sup> The application was originally filed by Natural Resource Gas Limited, which was acquired by EPCOR in November 2017.

On May 25, 2018, Union Gas filed a motion for the OEB to compel EPCOR to provide full and adequate responses to Union interrogatories 1(c) and 2(d), and to extend the May 31, 2018 deadline to submit written submissions to a date that is five days after EPCOR provides full and adequate responses to the interrogatories (the Motion).

On May 28, 2018, EPCOR filed a letter in response to the Motion, providing further information and ultimately stating that the Motion is unnecessary to resolve these matters.

On May 30, 2018, the OEB issued Procedural Order No. 2 giving notice of the Motion and setting the timeline for filing additional evidence and written submissions on the merits of the Motion. EPCOR and OEB staff filed submissions on June 15, 2018. Union Gas filed its reply submission on June 22, 2018.

On October 4, 2018, the OEB issued a Decision on Motion and Procedural Order No. 3 (Decision on Motion and P.O. 3), which ordered EPCOR to provide a response to Union interrogatories 1(c) and 2(d), and provided for submissions on the application. Specifically, EPCOR was ordered to provide information accurately delineating its service boundaries, as well as the general location and density of the customers it serves, in the County of Oxford. EPCOR was also ordered to provide an explanation as to why it would be problematic to leave the *Drainage Act* clause in its franchise agreement with the County of Oxford. The OEB also asked EPCOR to explain how EPCOR currently fulfills the intent of the *Drainage Act* clause where it has a franchise agreement with an upper-tier municipality that has assigned its responsibility for drainage to the lower-tier municipality.

In accordance with the Decision on Motion and P.O. 3, EPCOR filed its responses on October 18, 2018.

### **Boundary/Density Map**

OEB staff notes that the boundary map filed by EPCOR outlines certain areas in different colours, but does not include a legend. OEB staff submits that EPCOR could provide additional clarity regarding the boundary map by explaining the significance of the different coloured lines. Otherwise, OEB staff submits that the map appears to have provided the information requested by the OEB.

## Deviations from the Model Franchise Agreement

EPCOR's originally proposed franchise agreement varied from the MFA in both form and substance. Both Union Gas and OEB staff commented on the formatting changes made by EPCOR in the proposed franchise agreement. Substantively, the proposed deviation from the MFA concerns the removal of Paragraph 5(g), which states:

Where 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 the purposes of the *Drainage Act*, or such other person designated by the Corporation as responsible for the drain (*Drainage Act* clause).

EPCOR maintains that the proposed deviation was made to accommodate the County of Oxford, as the County of Oxford had made it a condition to entering into a franchise agreement with EPCOR. Union Gas filed a motion to compel EPCOR to explain the "exceptional and unique circumstances" particular to the municipality that would warrant a deviation, and argued that these circumstances did not appear to exist in this situation. OEB staff agreed that an understanding of the rationale for changes to the MFA would be helpful to the OEB in considering whether or not the changes should be approved.

In its Decision on Motion and P.O. 3, the OEB found that it was clear that the intent of the *Drainage Act* clause in the MFA, which was to provide information to the proper authorities, had to remain in the franchise agreement. The OEB also noted that drainage appeared to be an upper-tier responsibility which could be transferred to a lower-tier municipality, and that the *Drainage Act* clause allowed for EPCOR to file a copy of its plan with any other person designated by the County of Oxford as responsible for drainage. The OEB then ordered EPCOR to provide an explanation as to why it would be problematic to leave the *Drainage Act* clause in its franchise agreement with the County of Oxford.

In its October 18, 2018 submission, EPCOR filed an updated franchise agreement, which reverted the formatting back to that of the MFA, and re-inserted the *Drainage Act* clause in Paragraph 5(g). EPCOR stated that it agreed with the OEB's observation in its Decision on Motion and P.O. 3 in that the *Drainage Act* clause allows the County of Oxford to assign the responsibility for drainage to the Township of South-West Oxford. EPCOR stated that its position with the municipality has always been, and continues to be, that it is not necessary to remove the *Drainage Act* clause from the proposed franchise agreement. However, EPCOR submitted that the *Drainage Act* clause

creates an obligation on the utility solely for the benefit of the municipality, and that if the municipality, as the sole beneficiary of this clause, disagreed with the clause and refused to sign the agreement if the clause were not removed, then it was reasonable to remove the clause. EPCOR added that the removal of the *Drainage Act* clause has not, and would not change EPCOR's practice, as EPCOR would submit a copy of the plan to the applicable person responsible for drainage if there was a risk that the gas system would affect a municipal drain.

EPCOR also proposed two paths forward. The OEB could approve the updated franchise agreement with the *Drainage Act* clause struck out. Alternatively, the OEB could approve the updated franchise agreement with the *Drainage Act* clause intact, and give EPCOR 60 days from the date of the order to obtain the County of Oxford's consent and approval to the updated franchise agreement. If the County of Oxford did not consent to the updated franchise agreement, the OEB could consider issuing an order pursuant to section 10 of the *Municipal Franchises Act*. Section 10 of the *Municipal Franchises Act* allows either the municipality or the utility to apply to the OEB to renew or extend the term of the right to operate works or distribute gas in a municipality, if the right has expired or will expire in a year.

OEB staff notes that the MFA was developed by the OEB, with input from municipal leaders and utility representatives, to provide consistency in the terms and conditions of the franchise agreements that municipalities and utilities sign to coordinate the construction, operation and maintenance of the gas system. This consistency is important because hundreds of municipalities have agreements with gas utilities. With the model MFA, both utilities and municipalities have the comfort of knowing that the franchise agreements they sign are fairly and consistently applied throughout the Province.

Given that the MFA was the product of a wide-ranging comprehensive review and ultimately agreed to by both municipalities and the utilities, any modifications may have effects beyond the proceeding at hand. OEB staff submits that good operating practice for utilities – in carrying out their gas distribution activities in Ontario municipalities – remains essentially the same today as it did almost 20 years ago when the MFA was first issued. The OEB does have the power to approve agreements that do not match the MFA; however it does so only when presented with a compelling reason<sup>2</sup>.

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<sup>2</sup> For example, see Natural Resource Gas Limited's Application for Franchise Renewal with the Town of Aylmer (EB-2008-0413).

In addition, municipal franchise agreement parties' strict adherence to the form and content of the MFA over the years has allowed the OEB to approve franchise agreements and franchise renewals efficiently and in a timely manner that best serves the public interest.

EPCOR states that from its understanding, the County of Oxford might have been concerned that any reference to the *Drainage Act* in the proposed franchise agreement may inadvertently expose the County of Oxford to liability with respect to drainage issues. In its evidence, EPCOR referenced the County of Oxford's December 12, 2016 email to NRG, which noted a legal dispute between a lower-tier municipality and a gas utility in Ontario, and included a statement from the County of Oxford that the agreement must acknowledge "that municipal drain related cost apportionment must follow that prescribed by the Drainage Act, as amended"<sup>3</sup>.

Based on the December 12, 2016 email, it is unclear whether the County of Oxford is proposing to remove the *Drainage Act* clause because of a concern related to the obligation for EPCOR to file a copy of the plan with the Corporation's Drainage Superintendent, or to one of cost apportionment.

OEB staff is not opposed to the deviation of EPCOR's franchise agreement with the County of Oxford from the MFA provided that the rationale for it is well-grounded. However, OEB staff submits that EPCOR has not been able to provide a clear and satisfactory rationale as to why it is necessary to delete the *Drainage Act* clause from the proposed franchise agreement. As the OEB noted, the *Drainage Act* clause, as it is currently worded, requires the utility to inform the person designated by the municipality as responsible for drainage, which in this case would be the Drainage Superintendent for the Township of South-West Oxford. And, as Union Gas notes in its reply submission in its motion to compel responses to interrogatories, the *Drainage Act* clause has not been removed from any franchise agreement with an upper-tier municipality, even though other upper-tier municipalities may also not be responsible for drainage projects. OEB staff cannot discern any reason that the County of Oxford would be opposed to this clause.

OEB staff submits that it would be more harmful to the public interest to allow EPCOR to delete the Drainage Act clause from the updated franchise agreement without

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<sup>3</sup> Email from the County of Oxford to NRG on December 12, 2016 in Evidence/Schedule I

providing a compelling rationale, as it would provide precedent for other municipalities to request deviations from the MFA.

## Conclusion

OEB staff notes that EPCOR (and its predecessor) have not had a valid franchise agreement with the County of Oxford since 2009.

Despite the lengthy period of time since the previous franchise agreement expired in 2009, OEB staff believes that this application should properly be considered a renewal under section 10 of the *Municipal Franchises Act*, and not an application for a brand new franchise under section 9. Section 10 clearly applies where “a right to operate works for the distribution of gas [i.e. the franchise agreement] **has expired** or will expire within a year...”<sup>4</sup> An OEB approved franchise agreement was previously in place and has expired; the relevant section is therefore section 10.

Section 10(2) allows the OEB to “make an order renewing or extending the term of the right for such period of time **and upon such terms and conditions as may be prescribed by the Board...**” OEB staff submits that the OEB should use this power to renew the previous municipal franchise under the terms of the current MFA, without any changes. OEB staff submits that neither EPCOR nor the County of Oxford have presented any good reason that existing provisions of the MFA should not apply. Under such circumstances, OEB staff believes the OEB should use its powers to approve the MFA without any changes and without any further process.

All of which is respectfully submitted.

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<sup>4</sup> Emphasis added.