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BY EMAIL

November 19, 2021

Ms. Christine E. Long
Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4
Registrar@oeb.ca

Dear Ms. Long:

**Re: Ontario Energy Board (OEB) Staff Submission
Six Nations Natural Gas Limited
Application for Certificates of Public Convenience and Necessity for and
Municipal Franchise Agreements with the County of Brant and Norfolk
County
OEB File Number: EB-2021-0238**

Please find attached OEB staff's submission in the above referenced proceeding, pursuant to Procedural Order No. 1.

Yours truly,

Catherine Nguyen
Applications, Natural Gas

Encl.

cc: All parties in EB-2021-0238



ONTARIO ENERGY BOARD

OEB Staff Submission

Six Nations Natural Gas Limited

**Application for Certificates of Public Convenience and Necessity for and
Municipal Franchise Agreements with the County of Brant and Norfolk County**

EB-2021-0238

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1 OVERVIEW

These are OEB staff's submissions on the application filed by Six Nations Natural Gas Limited (SNNG) for an order approving certificates of public convenience and necessity (certificates) for and municipal franchise agreements (franchise agreements) with the County of Brant and Norfolk County (Application) to enable SNNG to serve approximately 16 off-reserve customers (Off-Reserve customers) in an area that is adjacent to customers that it currently serves on Six Nations Indian Reserve No. 40 (Reserve)¹. SNNG further requested that it be permitted to seek to amend the areas covered by the certificates in the future by way of a motion to review and vary (motion to review) under Part VII of the OEB's *Rules of Practice and Procedure*.

Subject to certain minor changes discussed below, OEB staff generally supports SNNG's application for certificates for and franchise agreements with the County of Brant and Norfolk County. However, OEB staff does not support SNNG's request that it be permitted to seek to amend the areas covered by the certificates in the future by way of a motion to review. Any future requests for changes to the areas covered by the certificates should proceed through a new application under the *Municipal Franchises Act* (MFA).

1.1 Six Nations Natural Gas Limited

SNNG was established in 1989 and has been providing on-reserve natural gas services to approximately 2,500 members and businesses of Six Nations Grand River Territory and Mississauga's of the Credit First Nation² (On-Reserve Customers) on the Reserve³. The Reserve is bordered, in part, by Bateman Line, in the County of Brant and Indian Line, in Norfolk County.

1.2 The Application

SNNG filed the Application on August 30, 2021, under sections 8 and 9 of the MFA for:

1. An order approving certificates to construct works and supply gas to the off-reserve customers on Bateman Line, County of Brant and Indian Line, Norfolk County
2. An order permitting SNNG, by motion to review, to seek to amend the areas covered by the certificates in the future to connect additional off-reserve customers on Bateman Line, County of Brant and Indian Line, Norfolk County

¹ Application, p. 1.

² Response to OEB Staff-1 (a) (ii)

³ Application, p.1

3. An order approving natural gas franchise agreements with the County of Brant and Norfolk County
4. An order directing and declaring that the assent of the municipal electors of the County of Brant and Norfolk County is not necessary in relation to granting the natural gas franchise agreements

The draft franchise agreements proposed by SNNG depart from the [2000 Model Franchise Agreement](#) in certain respects.

The draft certificates proposed by SNNG in the Application are limited to seven specific civic addresses on Bateman Line and nine specific civic addresses Indian Line. SNNG proposes to use the motion to review process as a means to amend the certificates to add additional customers in the future, if necessary.

SNNG acknowledges that it is currently providing natural gas service to one of the seven Off-Reserve Customers on Bateman Line and six of the nine Off-Reserve Customers on Indian Line. Enbridge Gas Inc. (Enbridge Gas) currently holds certificates for this area, although it is not serving any customers in the immediate vicinity⁴. Enbridge Gas is a party to this proceeding and, according to the application, has conveyed its support to SNNG (though OEB staff have not seen Enbridge's final submission in this proceeding).

SNNG states in its application⁵ that the construction of the pipeline to connect the new customers does not trigger the requirement for leave to construct pursuant under section 90 (1) of the *Ontario Energy Board Act*.

1.3 The Issues

The application before the OEB is for the issuance of certificates and the approval of franchise agreements under the MFA. In that context, OEB staff submits that the only issues that need to be decided by the OEB are the following, and OEB staff's submissions are therefore limited to these issues:

1. Franchise Agreements
 - a. Are the proposed amendments to the 2000 Model Franchise Agreement necessary?
 - b. Should the draft franchise agreements be approved?
2. Certificates
 - a. Is this a case of system bypass?
 - b. Does SNNG have the technical and financial capacity to construct,

⁴ Enbridge Gas certificates EB-2003-0047 and EB-2017-0108-A1

⁵ Application, p. 9,

operate and maintain natural gas facilities in the proposed certificate area?

- c. Should the certificate requests be granted, and if so what is the most appropriate method for describing the certificate rights?
- d. Is the proposal to use the motion to review process an appropriate way to amend the certificates in future, if required?

2 OEB Staff Submission

OEB staff submits that SNNG appears to have the technical ability and financial means to operate natural gas facilities in the areas covered by the proposed certificates and franchise agreements. Subject to certain modifications, OEB staff submits that the OEB should grant the applications. First, OEB staff submits that SNNG should be required to revise and refile its proposed franchise agreements to match the OEB's Model Franchise Agreement. Second, OEB staff submits that the OEB should grant certificates that are defined by metes and bounds as opposed to specific civic addresses. OEB staff also does not support SNNG's request that it should be permitted to seek to amend the areas covered by the certificates through a motion to review.

2.1 Franchise Agreements

Are the proposed amendments to the 2000 Model Franchise Agreement necessary?

The Model Franchise Agreement was initially developed by the OEB with stakeholder input in 2000. It provides a template to guide applicants and municipalities regarding the terms that the OEB finds reasonable under the MFA. The OEB therefore expects that franchise agreements will be based on the 2000 Model Franchise Agreement unless there is a compelling reason for deviation.

SNNG's proposed franchise agreements are largely in the form of the Model Franchise Agreement; however, there are some inconsistencies. OEB staff submits that the OEB should require SNNG to re-file the franchise agreements in the form of the Model Franchise Agreement.

In its draft franchise agreement with Norfolk County, SNNG inadvertently included in paragraph 2 the explanatory introduction used to differentiate between the two choices presented in paragraph 2⁶. SNNG submitted that the explanatory introduction does not alter the substantive terms of the paragraph, but that it may be struck by the OEB.

In its draft franchise agreements with the County Brant and Norfolk County, SNNG deleted the explanatory introduction used to differentiate between the two choices presented in paragraph 4⁷. SNNG submitted that the explanatory introduction does not alter the substantive terms of the paragraph, but that they may be re-inserted by the OEB.

In its draft franchise agreements with the counties, SNNG inserted a special condition at paragraph 18 which is only associated with franchise agreements between legacy Union Gas Limited (Union Gas) and municipalities in southern Ontario. SNNG submitted

⁶ SNNG's response to OEB staff 5 (a)

⁷ SNNG's response to OEB staff 5 (b) (i) and (ii)

that if, substantively, the provision does not apply, there would be no basis to take action pursuant to that clause⁸.

OEB staff submits that the Model Franchise Agreement should not be deviated from unless there are compelling reasons to do so. OEB staff sees no compelling reasons to deviate from the Model Franchise Agreement in this case. OEB staff submits that the OEB should require SNNG to correct the draft franchise agreements with the counties of Norfolk and Brant and arrange with those counties to put the corrected draft franchise agreements through third reading.

Should the draft franchise agreements be approved?

OEB staff submits that the OEB should grant SNNG's franchise agreement requests, provided that SNNG refiles draft franchise agreements that revert to the wording of the 2000 Model Franchise Agreement.

2.2 Certificates

Is this a case of system bypass?

OEB staff submits that this is a case of system bypass, but that it is not a matter of concern because the incumbent utility (Enbridge Gas) does not appear to oppose SNNG's certificate application. It is effectively a bypass with the consent of the incumbent utility.

A system bypass 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 the incumbent has a valid certificate for the area (and usually nearby pipeline facilities).

SNNG states that it contacted Enbridge Gas to confirm whether it opposed SNNG providing service to the Off-Reserve Customers and that Enbridge Gas advised that it had no concerns and conveyed its support⁹. Enbridge Gas has indicated that it is most likely more economic and practical for SNNG to serve the Off-Reserve Customers¹⁰ that are covered by the certificates in the application. Enbridge Gas is an intervenor in this proceeding.

Does SNNG have the technical and financial capacity to construct, operate and maintain the natural gas facilities in the areas covered by the certificates?

OEB staff submits that SNNG has the technical and financial capabilities to construct,

⁸ SNNG's response to EGI-3 (b)

⁹ Application, p. 4

¹⁰ Enbridge Gas, Intervention Request Letter, p. 2, para. 7

operate and maintain the natural gas facilities in the areas covered by the certificates.

This application is SNNG's first application for a certificate. For applicants that are not already regulated by the OEB, the certificate process should be used as an opportunity to confirm that the applicant has the necessary technical and financial capabilities to develop, construct, operate and maintain a natural gas facilities¹¹.

In response to an interrogatory¹², SNNG stated that it "has been operating safely and reliably for over 30 years without major incident" and confirmed that:

- It maintains construction, operation, maintenance, and emergency procedures and pipeline integrity management and public awareness plans which are Technical Standards and Safety Authority compliant and consistent with those of other utilities operating in Ontario
- No additional debt or equity is required with respect to the proposed natural gas facilities for the newly certificated areas

Should the certificate requests be granted, and if so, what is the most appropriate method for describing the certificate rights?

OEB staff submits that the OEB should not approve the draft certificates proposed by SNNG in the Application, which are described using specific civic addresses. OEB staff submits that the OEB should instead approve the draft certificates filed by SNNG in response to an interrogatory¹³, subject to the correction of one possible typographical error, which are defined by metes and bounds.

With its interrogatory responses, SNNG filed revised draft certificates for the County of Brant and Norfolk County describing the proposed service territory as a geographical area and in a manner that could be placed on the public record^{14,15}. OEB staff notes that the revised draft certificates filed encompass what appear to be an additional nine residential properties (five in the County of Brant and four in Norfolk County) that would were not included in the draft certificates as originally filed.

OEB staff also notes that the description of the requested service territory for Norfolk County reads "for 240 metres south of Indian Line..." and the proposed service territory

¹¹ A similar approach is reflected in the OEB's [Final Guidelines for Potential Projects to Expand Access to Natural Gas Distribution](#), Appendix A, pages 1-2. See also, EB-2005-0473, Greenfield Energy Centre LP, LTC and certificate application

¹² SNNG's response to OEB Staff-1

¹³ SNNG's response to OEB Staff-4 (d)

¹⁴ SNNG's response to OEB Staff-4 (d)

¹⁵ Interrogatory Responses of SNNG, Appendix A

map reads as 210 metres¹⁶. OEB staff submits that SNNG should confirm in its Reply Submission the correct measurement for the service territory in Norfolk County and file a corrected service territory map and/or certificate, as applicable.

OEB staff submits that the OEB should grant to SNNG the draft certificates filed as part of its interrogatory responses. If the OEB grants SNNG's revised draft certificates, OEB staff recommends that the OEB cancel Enbridge Gas's current certificates for the County of Brant¹⁷ and Norfolk County¹⁸ and replace them with new certificates that reflect the areas listed in SNNG's new certificates¹⁹.

Is the proposal to use the motion to review process an appropriate way to amend the certificates in future, if required?

SNNG requested that with the terms of any order by the OEB issuing certificates provide that SNNG may seek to amend such order to permit the connection and service of additional customers on Bateman Line and/or Indian Line, by way of a motion to review. OEB staff does not support this request.

In explaining its request, SNNG stated:

For administrative efficiency, SNNG proposes that the terms of any order issued by the Board issuing Certificates of Public Convenience and Necessity provide that SNNG may seek to amend such order to permit the connection and service of additional customers on Bateman Line and/or Indian Line within the counties of Brant and Norfolk, respectively, by way of a motion to review and vary. Such terms will permit customers without access to natural gas services to be connected in an efficient manner while maintaining regulatory certainty. SNNG believes that such requests will be limited in number, and therefore not extensive—and therefore are seeking a cost-effective mechanism to add these customers (which would be impaired if each new customer required a new application to the Board²⁰).

OEB staff does not accept that allowing SNNG to amend certificates indefinitely through a motion to review is appropriate, nor would it necessarily be more efficient than a fresh application under the MFA.

Motions to review under Part VII of the Rules are only appropriate under certain limited circumstances. Motions to review are a time limited remedy, and parties can only file a

¹⁶ Interrogatory Responses of SNNG, Appendix A and B

¹⁷ EB-2003-0047

¹⁸ EB-2017-0108-A1

¹⁹ For example, EB-2020-0232 Decision and Order, February 11, 2021

²⁰ SNNG application, p. 5

motion to review within 20 days of the date of the order or decision that is the subject of the motion.²¹ Although the OEB has the discretion to extend this time limit under appropriate circumstances, this rule reflects the OEB's interest in promoting regulatory certainty; decisions and orders should generally be considered to be final, and not left open to review for an indefinite period of time.

Rule 42 sets out the permissible grounds for a motion to review. The only ground that could theoretically apply to SNNG's request would be under Rule 42.01(a)(ii): "new facts that have arisen since the decision or order was issued that, had they been available at the time of the proceeding to which the motion relates, could if proven reasonably be expected to have resulted in a material change to the decision or order." OEB staff submits, however, that the purpose of Rule 42.01(a)(ii) is not to allow an open ended opportunity for parties to request changes to decisions or orders where the very basis for the original application may have changed. The purpose of the OEB's power to review is to allow it to correct errors in a decision or order, not to consider what amounts to a new application.

It is also not clear that a motion to review would be more administratively efficient than an application under section 8 of the MFA. A successful motion to review requires a hearing, and SNNG has indicated that Enbridge Gas would receive notice of any motion to review, as well as any affected landowners. In the current hearing Enbridge Gas is the only intervenor, and the process has moved very quickly (the application was filed on August 27, 2021). It is not clear that a motion to review process would feature fewer intervenors, nor that it would be materially faster or less administratively burdensome than a proceeding under the MFA.

Applicants requesting changes to certificate area rights in the past required OEB approval by means of a certificate amendment application^{22,23}. OEB staff sees no compelling reason to grant SNNG's request to amend any approved certificates by way of motion to review in the future; put simply this is not the intended function of a motion to review. OEB staff submits that if certificates are granted to SNNG, the OEB should not accept SNNG's request that the motion to review mechanism be included in the OEB's order, and should instead confirm in its decision that the connection of additional customers outside of the granted certificate area will require an application for an amended certificate under the MFA.

~All of which is respectfully submitted~

²¹ Rule 40.03

²² When amending existing certificate rights, the OEB typically cancels the existing certificate and issues a new one.

²³ For example, EPCOR Natural Gas Limited Partnership, Certificate Amendment, EB-2020-0232