



Enbridge Gas Inc.
50 Keil Drive North
Chatham, Ontario, Canada
N7M 5M1

February 6, 2023

Ms. Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Marconi:

**Re: Enbridge Gas Inc.
Application for Renewal of Franchise Agreement – County of Essex
Ontario Energy Board File No. EB-2022-0207**

In accordance with OEB Staff instructions, enclosed please find a summary of Enbridge Gas' argument-in-chief for the upcoming oral argument day scheduled for February 8, 2023.

Should you have any questions on this submission, please do not hesitate to contact me.

Yours truly,

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Regulatory Research and Records
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cc (by email): David Sundin, County of Essex (dsundin@countyofessex.ca)

Encl.

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

AND IN THE MATTER OF an Application by Enbridge Gas Inc. for an
Order renewing or extending the terms and conditions upon which Enbridge
Gas Inc. will continue to construct and operate works for the distribution,
transmission and storage of natural gas in the County of Essex;

ARGUMENT-IN-CHIEF SUMMARY OF ENBRIDGE GAS INC.

1. Enbridge Gas' has applied to the Ontario Energy Board (OEB) to replace the perpetual franchise agreement it had with the County of Essex (County) with the Model Franchise Agreement (MFA).
2. Enbridge Gas has MFAs in place with 312 lower and single tier municipalities as well as 26 other upper tier municipalities without amendments.¹ Both of the major OEB rate regulated utilities (Enbridge and EPCOR) use the MFA to supply, distribute and transmit natural gas in municipalities across Ontario. Enbridge Gas has replaced all perpetual franchise agreements with the MFA with the exception of the County of Essex.²
3. The OEB adopted the MFA following significant input from interested stakeholders, including the Association of Municipalities of Ontario and natural gas distributors, to provide guidance to applicants and municipalities regarding the standard terms of a franchise agreement and as a tool to efficiently administer the many franchise agreements across the province.³ The MFA outlines the terms that the OEB finds reasonable under the *Municipal Franchises Act*.⁴ The OEB has previously advised natural gas distributors that they are expected to follow the form of the MFA when filing applications for the approval of franchise agreements unless there is a compelling reason for deviation.⁵
4. Section 10(2) of the *Municipal Franchises Act* provides the OEB with broad jurisdiction and power to make and order renewing or extending the term of a franchise agreement if public convenience and necessity require it. The OEB can approve a franchise agreement over the objections of the parties, if that agreement, in the OEB's view, meets the test of public convenience and necessity. The 2000 MFA incorporates the standard terms and conditions that the OEB has found in previous cases to meet this test and has served as the basis for many new and renewed franchise agreements since.⁶
5. Enbridge Gas is requesting the OEB to use its powers under section 10(2) to replace the 1957 franchise agreement since it has expired. The 1954 franchise agreement debated in the Dawn-Euphemia case is very similar to the 1957 franchise agreement with the County because both agreements confer a future contingent interest in land that offends the rule

¹ Application, Paragraph 21.

² The perpetual franchise agreement with the Regional Municipality of Halton that was referenced at Exhibit B.Staff.4 has been replaced with a MFA per the EB-2022-0238 Decision and Order issued December 13, 2022.

³ RP-1999-0048 Report to the Board, December 29, 2000

⁴ Report of the Ontario Energy Board - Natural Gas Facilities Handbook - EB-2022-0081, March 31, 2022

⁵ EB-2021-0269, Decision and Order, February 17, 2021

⁶ EB-2017-0232, page 5

against perpetuities. In the Dawn-Euphemia case, the Divisional Court found that the 1954 franchise agreement was no longer effective because a municipal franchise creates an interest in land similar to an easement so a municipal franchise is therefore subject to the rule against perpetuities. Similar to the Dawn-Euphemia case, the 1957 franchise agreement offends the rule against perpetuities as the language is nearly identical in both agreements. This case has not been subsequently overturned or varied. The County incorrectly states that the OEB lacks “the authority to act as a court of competent jurisdiction to make a ruling on the common law principles of the rule against perpetuities”.⁷ Section 19 of the *Ontario Energy Board Act* allows the OEB to determine questions of law and fact.

6. To date, the County has not provided any compelling evidence on the record to deviate from using the MFA. The County provided two reasons in the affidavit of Mr. Botham for its unwillingness to consider entering into the MFA. The first reason is that the relocation costs would increase for the County as it intends to reconstruct and improve County Road 46 by widening the highway. The second reason, the MFA will provide even less authority to the County Engineer to control precisely where in the right of way Enbridge Gas is permitted to place its infrastructure.
7. In its Windsor Line decision (EB-2020-0160), the OEB found that the County did not provide compelling reasons for its demands that the existing Enbridge Gas pipe be removed and did not point to any specific current or potential future conflicts with other infrastructure projects or uses.⁸ The County has not provided any better evidence in this proceeding. Further, the fact that the County may conduct road work in the future does not render it unique as compared to other Ontario municipalities with whom Enbridge Gas has MFAs and within which Enbridge Gas operates, including all of the lower-tier municipalities in the County itself. Relocation costs were similarly a point of contention in the RP-1999-0048 proceeding and the OEB decided, after hearing from municipalities and gas companies, that the cost sharing set out in the MFA is the appropriate compromise to these concerns.⁹
8. The MFA is fairly prescriptive, it provides the municipality with broad authority to issue permits and approval for the work on terms satisfactory to the Road Superintendent. and Enbridge Gas has been operating in the County for many years in accordance with this practice, despite the wording of the 1957 agreement. The MFA better confirms Enbridge Gas’ distribution rights within the County and provides the County with updated language regarding insurance and relocations. Exhibit B Staff 3A highlights these differences.
9. In conclusion, Enbridge Gas requests that the OEB order pursuant to subsection 10(2) of the *Municipal Franchises Act* that as a matter of public convenience and necessity, it will renew the franchise rights of Enbridge Gas in the County of Essex in the form of the MFA for upper tier municipalities.¹⁰

⁷ Responses of the County of Essex, page 3

⁸ EB-2020-0160 Decision and Order, page 18

⁹ RP-1999-0048 Report to the Board, December 29, 2000, pages 25 and 26

¹⁰ Application, Schedule “G”