



Ontario | Commission  
Energy | de l'énergie  
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**BY EMAIL**

February 7, 2023

Ms. Nancy Marconi  
Registrar  
Ontario Energy Board  
2300 Yonge Street, 27<sup>th</sup> Floor  
Toronto, ON M4P 1E4  
[Registrar@oeb.ca](mailto:Registrar@oeb.ca)

Dear Ms. Marconi:

**Re: Enbridge Gas Inc.  
Application for a Municipal Franchise Agreement with the County of Essex  
Oral Argument Day – Summary of OEB Staff Oral Argument  
OEB File Number: EB-2022-0207**

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Procedural Order No. 4 set the date for a transcribed oral argument day in the proceeding referenced above. By letter dated February 3, 2023, the OEB requested that all parties in the proceeding submit a written two-page summary of their argument with the OEB by February 7, 2023. Please find attached a summary of OEB staff's oral argument in the above referenced proceeding. This document has been sent to all parties registered in the proceeding.

Yours truly,

Richard Lanni  
Legal Counsel

Encl.

cc: All parties in EB-2022-0207



# **ONTARIO ENERGY BOARD**

## **Summary of OEB Staff Oral Argument**

**Enbridge Gas Inc.**

**Application for a Municipal Franchise Agreement with the County of  
Essex**

**EB-2022-0207**

**February 7, 2023**

1. The OEB is being asked by Enbridge Gas Inc. (Enbridge) to issue an order under s. 10 of the *Municipal Franchises Act (MFA)* that would impose a franchise agreement on Enbridge and the County of Essex (County) in the form of the 2000 Model Franchise Agreement (Model Agreement).<sup>1</sup> The County contests the application.<sup>2</sup>
2. In OEB staff's view, the key questions for the OEB's determination are:
  - i. Does the OEB have the jurisdiction to hear the application? If so,
  - ii. Do public convenience and necessity require the renewal or extension of the term of the franchise? And, if so,
  - iii. Should the OEB order that the terms and conditions of the renewal or extension be in the form of the Model Agreement?
3. OEB staff submits that the answers to each of these questions is "yes". Based on the record of this proceeding:
  - i. The OEB has jurisdiction under s. 10 of the *MFA* to hear the application.
  - ii. Public convenience and necessity require that the term of the franchise between Enbridge and the County be renewed.
  - iii. It is in the public interest that the terms and conditions of the renewal be in the form of the Model Agreement unless there is a compelling reason for deviation.If the OEB finds that the answer to question (i) or (ii) is no, OEB staff submits that the application should be denied, in which case gas transmission and distribution in the County will, indefinitely, continue to primarily be governed by the terms of the 1957 Agreement.
4. OEB staff's submission rests on the following three lines of argument.
5. **First, the OEB's jurisdiction under s. 10 of the MFA is clear.** On an application under s. 10 (1) of the *MFA*, the OEB has jurisdiction if the term of a franchise has expired (or will expire within one year). Once jurisdiction is present under s. 10 (1), the discretion and powers available to the OEB under s. 10 (2) of the *MFA* are broad. Under s. 10 (2), if public convenience and necessity appear to require it, the OEB may grant a renewal or extension of the expired (or expiring) franchise "for such period of time and upon such terms and conditions as may be prescribed" by the OEB. The OEB may do so even when there is no agreement between the municipality and the gas company. The nature and scope of the OEB's powers under s. 10 of the *MFA*, as described above, have been confirmed by decisions of the courts and the OEB.<sup>3</sup>
6. **Second, the condition set out in s. 10 (1) of the MFA is met because the 1957 franchise agreement between Enbridge and the County is expired.** The clause in

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<sup>1</sup> Enbridge also requested relief under s. 9 (4) [Compendium, Tab 9]. Relief under this section is not required where the OEB issues an order under s. 10 (2), given that such order is deemed to be a by-law assented to by the municipal electors.

<sup>2</sup> Affidavit of Allan Botham, [Compendium, Tab 10], Responses of County of Essex to Information Request of Enbridge Gas [Compendium, Tab 11].

<sup>3</sup> *Sudbury (City of) v Union Gas Ltd* [Compendium, Tab 1], *Kingston (City) v. Ontario (Energy Board)* [Compendium, Tab 2], *Dawn-Euphemia (Township) v. Union Gas Ltd.* [Compendium, Tab 4], *Centra Gas (Ontario) Inc., Re., E.B.A. 825/872* [Compendium, Tab 14]

the 1957 Agreement that relates to the duration of term violates the rule against perpetuities. As a result, the 1957 Agreement is expired.<sup>4</sup> OEB staff notes that s. 10 (6) of the *MFA* precludes an application under s. 10 in respect of a right that has expired before Dec. 2, 1969. OEB staff's view is that s. 10 (6) should be interpreted purposively, such that the section applies to agreements that, by their terms, had been understood by the parties (and the OEB) to have expired as of Dec. 2, 1969, the date on which s. 10 of the *MFA* came into effect, and not to an agreement that is later held to have expired by operation of law.<sup>5</sup> In this regard, it is important to note that the parties have operated as if the 1957 Agreement is in full force and effect and, to this day, primarily carry out their rights and obligations in the County of Essex pursuant to it.

**7. Third, based on the record of the proceeding, public convenience and necessity require that the term of the franchise between the parties be renewed; and, there is no compelling reason that the franchise agreement not be in the form of the Model Agreement:**

i. The OEB has broad jurisdiction over the gas industry for the protection of the public interest. Section 10 of the *MFA* authorizes the OEB to impose the terms of renewal of a franchise so that service to the public will not be at risk of interruption where a municipality and gas company are unable to agree on the terms for carrying on the service. While the views of the municipality should be taken into account by the OEB they are not determinative of the issue of assessing public convenience and necessity. Similarly, while the gas company may have a reasonable expectation that a franchise will be renewed, this expectation is also not a relevant factor in determining public convenience and necessity.<sup>6</sup>

ii. The 1957 Agreement is inadequate in several respects. It pre-dates the enactment of s. 10 of the *MFA*. It pre-dates the detailed negotiations that underpinned the findings and recommendations of the OEB following two lengthy generic proceedings held in 1986 and 2000 that resulted in the adoption of the Model Agreement.<sup>7</sup> Also, a number of the key provisions found in the Model Agreement are absent from the 1957 Agreement, including terms relating to cost-sharing, as-built drawings, emergency work, and insurance.<sup>8</sup>

iii. The Model Agreement provides a template to guide the sector regarding the key terms that the OEB finds reasonable under the *MFA*. In approving the Model Agreement, the OEB intended that these key provisions apply fairly and uniformly

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<sup>4</sup> *Dawn-Euphemia (Township) v. Union Gas Ltd.* [Compendium, Tab 4]

<sup>5</sup> Section 10 was enacted in 1969 to deal with franchise renewals, and at that time (6) referred to rights that expired "before the coming into force of this section". Prior to that time, both a utility and a municipality had a common law right to terminate a franchise upon the expiry of the franchise agreement.

<sup>6</sup> *Ontario Energy Board Act, 1998* [Compendium, Tab 12], *Sudbury (City of) v Union Gas Ltd* [Compendium, Tab 1], *Centra Gas (Ontario) Inc., Re., E.B.A. 825/872* [Compendium, Tab 14], *Re City of Peterborough and Consumers Gas* [Compendium, Tab 15].

<sup>7</sup> *E.B.O 125 Report of the Board* [Compendium, Tab 16], *RP-1998-0048, Report to the Board* [Compendium, Tab 17].

<sup>8</sup> Enbridge IR Responses to Staff.1(a) and Staff.3 [Compendium, Tab 8]

throughout the province, and almost all franchise agreements approved by the OEB since 2000 are in the same form as the Model Agreement, and are set for a term of 20 years.<sup>9</sup> The OEB expects that franchises will be based on the Model Agreement “unless there is a compelling reason for deviation”.<sup>10</sup>

8. OEB staff submits that, in this proceeding, it is in the public interest that an order be issued renewing the franchise between Enbridge and the County based on the Model Agreement. Such order would preserve the balancing of interests that the OEB sought to achieve when approving the Model Agreement. Based on the record of this proceeding, OEB staff is not aware of any compelling reason for the OEB to not proceed this way.

~All of which is respectfully submitted~

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<sup>9</sup> *Natural Gas Facilities Handbook* [Compendium, Tab 3].

<sup>10</sup> *EB-2021-0269, Decision and Order*, February 17, 2021 [Compendium, Tab 5].