

ONTARIO ENERGY BOARD

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| FILE NO.: | EB-2022-0207 | Enbridge Gas Inc. |
| VOLUME:  DATE  BEFORE:: | 1  February 8, 2023  Bob Dodds  Michael Janigan  David Sword | Presiding Commissioner  Commissioner  Commissioner |

EB-2022-0207

THE ONTARIO ENERGY BOARD

**Enbridge Gas Inc.**

**Application for approval of a Municipal Franchise**

**Agreement with the County of Essex**

Oral Hearing held by videoconference

from 2300 Yonge Street,

25th Floor, Toronto, Ontario,

on Wednesday, February 8, 2023

commencing at 9:33 a.m.

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VOLUME 1

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BEFORE:

BOB DODDS Presiding Commissioner

MICHAEL JANIGAN Commissioner

DAVID SWORD Commissioner

RICHARD LANNI Board Counsel

JULIA NOWICKI

LAWRIE GLUCK Board Staff

NATALYA PLUMMER

GURI PANNU Enbridge Gas Inc. (EGI)

DAVID SUNDIN County of Essex

ALSO PRESENT:

TANYA PERSAD Enbridge Gas Inc.

BRIAN LENNIE

PATRICK McMAHON

BONNIE ADAMS

BRYAN CHAUVIN

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None Filed.

Wednesday, February 8, 2023

### --- On commencing at 9:33 a.m.

MR. DODDS: Good morning, everyone. The Ontario Energy Board is sitting today on a matter of an application by Enbridge Gas Inc.

Enbridge Gas applied to the Ontario Energy Board seeking orders pursuant to the sections 9 and 10 of the Municipal Franchises Act for the following: One, an order approving the terms and conditions upon which and a period for which, the County of Essex is by law to grant Enbridge Gas the right to construct and operate works for the distribution, transmission, and storage of natural gas and the right to extend and add to the works.

And two, an order directing and declaring that the assent of the municipal actors of the County of Essex is not necessary for the proposed franchise agreement by-law under the circumstances.

The application was filed on July the 13th, 2022. The case is number EB-2022-0207. The Ontario Energy Board issued a notice on August the 11th, 2022 advising it would hold a written hearing and asking for interventions by August the 22nd, 2022.

The County of Essex submitted an intervention request on August the 19th, 2022 seeking to submit evidence, interrogatories, and arguments pursuant to Rule 22 of the OEB Rules of Practice and Procedure.

The County of Essex submitted that it is in compliance with its obligations under the Municipal Franchises Act and contests the application on this ground.

The County of Essex was approved as an intervenor in Procedural Order No. 1 on September the 7th, 2022.

In Procedural Order No. 4, the parties were advised that the Ontario Energy Board wished to add an oral argument component to the proceeding.

The Ontario Energy Board has scheduled oral arguments to better understand the positions of the applicant and intervenors.

Oral argument is beneficial, as it would allow this Panel of Commissioners to ask questions with respect to any arguments made.

This oral argument day is being held virtually over one day. It will replace written submissions in this proceeding. It is intended that this oral argument day will be complete -- will complete the record for the proceeding.

This video conference is being transcribed. It is also being audio streamed via the OEB's website, and a live stream is also being conducted through OEB's YouTube channel.

My name is Bob Dodds, and I am the Presiding Commissioner for this proceeding today, and with me are my fellow commissioners, Commissioner Michael Janigan -- I'm not sure where he is on your screen, but he is the fellow with the shock of white hair -- and Commissioner David Sword.

Now, it is suspected that almost all of you after almost three years of virtual hearings are fairly familiar with the protocols that need to be followed when involved in these virtual hearings, but notwithstanding, I'd like to remind you that -- to please place your mics on mute and turn your video cameras off when you're not speaking, and also, turn off your virtual backgrounds if you can.

I'm not sure if you can or not. I'm not sure how much that helps, but if you can, please do that.

If you are speaking, please state your name and the party represented for the court reporter before presenting.

During your presentations, please refrain from asking questions of each other.

The parties are to rely on the existing record. Enbridge Gas will have 30 minutes for its argument-in-chief beginning around, in about five minutes.

OEB Staff and the County of Essex will follow in that order and will each have 30 minutes for their oral submissions.

The Panel will have 10 minutes for questions between each presentation.

Following a 15-minute break, towards, getting close to around 11:30, I believe, Enbridge will have 20 minutes to present its reply argument, followed by ten minutes before Panel questions.

The oral argument proceeding is scheduled to end around 12:30 p.m. today. However, should there be a need for more time, primarily for questions by the Panel and responses by the parties, the time will be extended to 1:00 p.m. If more time is still needed, the proceeding will be adjourned for one hour and will reconvene at 2:00 p.m. We will see as the proceeding progresses on how we are abiding by those time limits.

I will now call upon Mr. Lanni from the Ontario Energy Board to outline some more logistics, if any.

MR. LANNI: Thank you, Mr. Dodds. Richard Lanni. I'm counsel with the OEB. Thank you, everybody, for attending.

I wonder if now is a good opportunity to have appearances of the parties.

Alternatively, we can have appearances given in stages as each party makes its argument.

I will leave that with you, Mr. Dodds.

MR. DODDS: I will suggest they make their appearances as they start their presentation for the court reporter.

MR. LANNI: And typically, if we are in a meeting room all together, I would have met with counsel and Staff to see if there were any preliminary matters and advise them that I would bring those matters to the Panel. I think OEB Staff doesn't have any. Maybe the Panel can ask the other parties if they have any preliminary matters at this time.

MR. DODDS: Yes. Mr. McMahon, do you have any preliminary matters?

MR. McMAHON: Enbridge doesn't have anything preliminary, no. Thanks.

MR. DODDS: Okay. Mr. Sundin, from Essex?

MR. SUNDIN: No preliminary matters.

MR. DODDS: Thank you. And you have none for Staff, I gather?

MR. LANNI: That's correct. Just a reminder that another staff member is going to do the land acknowledgment before the proceedings begin.

MR. DODDS: Okay, if we can have that now.

# Land Acknowledgment:

MS. SANASIE: The Ontario Energy Board acknowledges that our headquarters in Toronto is located on the traditional territory of many nations, including the Mississaugas of the Credit, the Anishnabeg, the Chippewa, the Haudenosaunee, and the Wendat peoples. This area is now home to many diverse First Nations, Inuit, and Métis peoples. We also acknowledge that Toronto is covered by Treaty 13 with the Mississaugas of the Credit.

We are grateful for the opportunity to gather and work on this land, and recognize our shared responsibility to support and be good stewards of it. Thanks.

MR. DODDS: Thank you, Ashley.

The proceedings will now begin.

Mr. McMahon, will you please present your argument in-chief on behalf of Enbridge.

MR. McMAHON: Yes. I'll let Guri lead us on that.

MR. DODDS: Just for the court reporter, McMahon is spelled M-c-M-a-h-o-n.

And who is presenting for you, for Enbridge? We cannot hear you. We still cannot hear.

Is it Mr. Guri Pannu?

MR. McMAHON: He is just going to fix his mic. One second.

MR. DODDS: Okay. And -- but just to clarify, he is appearing on -- or he is presenting on your behalf, Mr. McMahon?

MR. McMAHON: Yes.

MR. DODDS: Okay. And it is Mr. Guri Pannu, right?

MR. McMAHON: Right. G-u-r-i P-a-n-n-u. Thank you.

MR. LANNI: Panel, it is Richard here. I wonder if in this period we can use the time to make appearances and I can begin with Staff, and then I guess Mr. Sundin can give appearances for the county and when Enbridge gets back online they can do that for their staff.

MR. DOBBS: That will be fine with the Panel. Please proceed.

# Appearances:

MR. LANNI: Thank you. My name is Richard Lanni. I am in-house counsel with the Ontario Energy Board. With me is Julia Nowicki and she is our articling student. Lawrie Gluck, who is the manager of natural gas, and Natalya Plummer who is an analyst in natural gas.

Over to you, Mr. Sundin.

MR. SUNDIN: Good morning, David Sundin. I am the county solicitor. I will be making representations on behalf of the County of Essex today.

MR. DOBBS: Thank you.

MR. PANNU: Good morning, Board Chairs. I hope you can hear me now. My name is Guri Pannu. I am counsel for Enbridge Gas. I have in the room with me today Tanya Persad, Brian Lennie, and Patrick McMahon, and there are a couple of people that are on as well from Zoom. So Bonnie Adams and Bryan Chauvin. Thank you.

MR. DODDS: Is Enbridge prepared?

MR. PANNU: Enbridge is ready to go.

MR. DOBBS: If you would please proceed.

# Closing Argument by Mr. Pannu:

MR. PANNU: Thank you. We are here today for an application that Enbridge brought, and the practical effect of the application that we have brought before the Board is to replace the County of Essex agreement, which was made in 1957, with the model franchise agreement.

Enbridge is applying under section 10 and earlier. The Board Chairs have noted that we've also applied under section 9. I will make some comments on that later on in the submission.

As a way of background the model franchise agreement is a form of agreement that EGI uses, or Enbridge Gas, to store, distribute, and transmit gas in over 312 of our lower tier municipalities and in 26 of our upper tier municipalities.

And of particular note, both of the Ontario rate-regulated utilities, in this case EPCOR and Enbridge Gas, utilize the model franchise agreement.

And so in our proceeding and in our application, and I will highlight this later in Exhibit B-Staff-4, in one of our responses to OEB Staff, we highlighted the number of agreements that Enbridge has now replaced with the model franchise agreement, which include virtually all of our -- in fact all of our perpetual franchise agreements.

One of the points that I'd like to make with respect to the model franchise agreements is the general principle of the Board as it relates to these matters.

Generally, the OEB expect natural gas distributors to use the model franchise agreement unless there is a compelling reason to deviate from the argument. That is really going to the substance and the heart of what we're arguing today. It is our submissions that the County of Essex, on this record, has produced no compelling evidence to deviate from using the model franchise agreement.

If I can take you to the first, Bonnie if you don't mind, can you please pull up tab 2, page 27 of OEB Staff's compendium. I wanted to -- thank you, Bonnie, for pulling that up.

What I wanted to note through the Natural Gas Facilities Handbook which the Board had prepared last year to provide commentary -- or not commentary but guidelines and explanations for the process of franchise agreements as well as expectations, I'll take you to that second paragraph that's highlighted.

The Board here notes that virtually all municipal franchise agreements in Ontario are in the form of the OEB standard model franchise agreement.

Bonnie, if you can go to the next page, at page 28, please. There is some further guidance there that is highlighted in the fourth paragraph which states:

"Most franchise agreements are for a term of 20 years. Section 10 of the Municipal Franchises Act allows either the municipality or the gas distributor to apply for a renewal of the franchise agreement up to a year before the expiration of the current franchise agreement."

Then there is some further guidance on the franchise agreements in the following paragraph, and as well as the process and the amount of input and the history behind the franchise agreement, as well as laying down the general principles that I discussed earlier.

"The OEB adopted the model franchise agreement 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 as a tool to efficiently administer many franchise agreements across the province. The model franchise agreement provides a template to guide applicants and municipalities regarding the terms that the OEB finds reasonable under the Municipal Franchises Act."

That's a key phrase, so I want to go back to that, because as we talk about the guiding principle and the need for compelling evidence, I do want to note this important sentence, that the model franchise agreement provides a template to guide applicants and municipalities regarding the terms that the OEB finds reasonable, including a term of 20 years.

So accordingly, the OEB expect that franchises will be based on the model franchise agreement unless there is a compelling reason for deviation.

So Bonnie, if it you don't mind, I would like to take everyone to tab 1 at page 6 of EGD's compendium and I will go over a case between the County of Oxford and EPCOR.

Thanks, Bonnie.

Over here, what I wanted to highlight with respect to this case, EB-2017-0232, which is part of our compendium, EPCOR made an application to renew a municipal franchise agreement that had expired with the County of Oxford.

There was some discussion and debate over -- or particularly with the County where they wanted to remove the clause related to the drainage act with respect to the model franchise agreement, and the Board made a finding in that case which reiterates and highlights that principle.

Go to page 6, Bonnie. You are at page 6. Go to the second paragraph at the top where it says "as noted previously", there is a sentence that I'd like to highlight starting with "I find."

"I find there is no compelling reason on the record of this proceeding for the OEB to deviate from the standard provisions of the 2000 model franchise agreement by removing the drainage act clause."

And similarly, as I stated at the top of this -- at the top of our submissions, and we'll go through in detail, the County of Essex has provided no compelling evidence in line with the case that we're just discussing to deviate from the model franchise agreement.

So if I can take you very quickly to the jurisdiction under subsection 10.2. Bonnie, if you could turn to tab 13, page 100 of the OEB's compendium.

As noted at the beginning of our submissions and as outlined by the Board Chairs, that Enbridge had made two requests during their application. One under 9(4), and the other under 10(2). So I quickly want to deal with that.

The relief -- or not the relief, but the application that we made under 9(4) we're no longer requesting. During the course of the proceeding we've learned that subsection 10, subsection 5 -- or section 10(5) -- dispenses the need with the municipal assent that's necessary under an application made under 9(4), so I'd like to take you very quickly to read section 10(5).

So it says:

"An order of the Board heretofore or hereafter made subsection 2, renewing or extending the term of right or an order of the Board under subsection 4 shall be deemed to be valid law of the municipality concerned assented by the municipal electors for the purposes of this Act and section 8 of the Public Utilities Act."

So again, for clarity, Enbridge is making the application under subsection 10(2), as we no longer need the exercise of discretion under 9(4).

So if we can go to subsection 2, the reason I -- Enbridge has raised this and brought this up is because this is the section that gives the Board broad power and discretion to make an order for Enbridge to continue or renew its rights to provide natural gas in the County of Essex.

If we can go back, Bonnie, to tab 1 of the previous case on page 5, I want to discuss that discretion. Or not the discretion, but just the broad power.

So that is tab 1 of EGI's compendium, page 5. Thank you, Bonnie.

So at the second paragraph from the bottom the Board discusses in its findings in that case with EPCOR the powers that it has under section 10(2):

"As the OEB previously determined in its decisions with the reasons regarding the franchise agreement between Natural Resources Gas and the Town of Aylmer, 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 model franchise agreement 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."

If you can continue, Bonnie, to the next page:

"The MFA sets out the obligations of the franchise holder in regard to the technical, construction, safety, and operational aspects of the distribution system within the municipality. The Board finds that adherence to the conditions of the 2000 MFA will ensure that these functions are properly carried o out."

The reason I highlighted that section again was to demonstrate that even when there is opposition from either party with respect to the model franchise agreement, in this case be it the municipality or the natural gas distributor, section 10(2) of the Municipal Franchises Act gives the Board very broad jurisdiction and power to impose a model franchise agreement with a qualifier, provided that public convenience and necessity is met.

In this decision -- or, sorry, in the decision with respect to EPCOR and the County of Oxford, it was noted that using the model franchise agreement -- sorry, the model franchise agreement can meet that test of public convenience and necessity.

Bonnie, if you can go to -- we'll go to that in a second, sorry.

So before we continue, I also wanted to talk a little bit about the relevant history for the purposes of going through some of the evidence.

So EGI applied for the -- or made its application on November 3rd, 2021. In the process of notifying the County that we're putting an application together to put a new franchise agreement in place in the form of a model franchise agreement, we provided the typical material that we provided, the draft by-law, a draft resolution, the proposed -- the model franchise agreement to be used, as well as the gas franchise handbook.

That is the same process that we've -- in terms of both the documents and the process that we undertake, where we've engaged other municipalities to put in place a franchise agreement.

In our application in a letter dated April 6th, 2022, the County of Essex indicated that they would not like to use the model franchise agreement. The County indicated that it was satisfied with the 1957 agreement related to Enbridge's rights within the County of Essex.

And the County made a specific reference in Schedule F of Enbridge's application, indicating:

"From a review of the County's files related to their franchise agreement, I've discovered that since in or about 1984 Union Gas and now Enbridge have been pressuring the County to terminate the franchise agreement and enter into a fresh agreement with terms more favourable to them.

"The County has always refused, noting that it is satisfied with the terms in the current franchise agreement. This position by the County only became more entrenched following the actions taken by Enbridge in 2019 and 2020."

Again, that reference is in Schedule F of Enbridge's application, the April 6th, '22 letter of the County of Essex.

So for clarity and for purposes of this record, Enbridge used the same process for renewing its -- for renewing or putting forth a franchise application as it does with other municipalities.

We put the same package of material together. There was no pressure and there is no evidence of this pressure that the County has demonstrated or put on this record.

So I'd like now to get to get to why we are asking the Board to exercise its jurisdiction under section 10(2) of the Municipal Franchises Act.

And the rationale for that -- and you will hear about this from the other parties -- is that it's Enbridge's position and its submission that the 1957 agreement or the County of Essex agreement has expired by application of the rule against perpetuities.

So it is our position that that agreement has expired and we are requesting that the Board -- or applying through section 10(2) for the Board to use its jurisdiction to put in a franchise agreement in the form of the model franchise agreement.

The current case is very, very similar to the case of Dawn-Euphemia that is part of the OEB Staff's compendium.

And in that case Union Gas attempted to replace the Town of Dawn-Euphemia's -- the franchise agreement that was in place in 1954. In that case the Board had determined that the franchise agreement in 1954 had expired, and part of the reason had to do with the term of that agreement or, in fact, it was the term of that agreement that offended the rule against perpetuities, so Bonnie, if I can take you to tab 6, please, page 56.

It is paragraph 2 of the 1957 franchise agreement of the County of Essex.

This clause in the County of Essex agreement at paragraph 2 states:

"The rights and privileges hereby granted shall continue and remain in force for a period of ten years from the date hereof and so long thereafter as the said lines are in actual use for the transportation of gas."

And the key sentence that we'd like to highlight here is:

"So long thereafter as the said lines are in actual use for the transportation of gas."

Bonnie, if we can compare that to tab 4, I believe the Dawn-Euphemia agreement, or their discussion of that agreement is in there.

Please go down. Following page, please. There it is, at paragraph 20. Thank you, Bonnie.

In this case the Divisional Court is reviewing clause 8 of the 1954 agreement of Dawn-Euphemia. If you can see in bold, I will read that in a second, but the clause states:

"The rights and privileges hereby granted shall continue and remain in force for a period of 20 years from the date hereof and so long thereafter as the said line or lines are in the actual use for the transportation of gas."

So in both the 1957 agreement and the 1954 agreement they have identical clauses as it relates to creating a future contingent interest in land.

And the key here is that future contingent interest that is created offends the rule of perpetuities because it exceeds the duration that the law allows for such interest.

Bonnie if you could go to, I think it is page 38. In that case with respect to future contingent interest, the Divisional Court had held:

"We conclude that the nature of the rights conferred by the 1954 agreement was a future contingent interest in land and therefore the rule against perpetuities applies."

At paragraph 39:

"The rights conferred upon Union to enter the land and build further transmission lines were contingent on future needs and were not known or predictable at the time the 1954 agreement was entered into. As the need arose a process application and approval began. The right to enter upon the land and build transmission lines was not automatic but was contingent upon meeting the conditions imposed by the Board and the local authorities, as the case may be."

And the argument here is the same. We have a contingent interest where the right to build a line by Enbridge Gas is not automatic; it is contingent on both approval by the Board and approval by the county.

Bonnie, if you could please go to page 41. Go above. I think it is a page above. One more. It is paragraph 41:

"So for the reasons we conclude that because clause 8 of the 1954 agreement purports to grant a future contingent interest in land that extends beyond the 21 period prescribed the law of perpetuities the clause is void. The 1954 agreement therefore had expired by its terms in 1974."

And so Enbridge is taking a similar position, given that the identical language in 1954 and 1957 agreement by application of this Divisional Court case in which leave to appeal by the Court of Appeal was refused, this is good law. This is current law. The law in this case favours a reading that the 1954 agreement has expired.

Again we are requesting that the Board use its jurisdiction under section 10(2) to use its powers to put in a municipal franchise agreement in the form of the model franchise agreement, for Enbridge Gas to serve and distribute natural gas in the County of Essex.

I want to take you briefly to tab 19, page 94 which we'll very quickly look at section 19 of the OEB Act.

Sorry, Bonnie, if you could go to 19 (1) and just make it more clear. Section 19(1) it is on page 93.

I anticipate that you will hear from my friends from the County of Essex that they will argue that the Board does not have the jurisdiction to deal with questions of law and they've put forward some material in their argument that it's only the Superior Court that has the competent jurisdiction to deal with questions of law. And, in fact, under section 19(1) of the OEB Act, it is quite clear that the Board has, in all matters within its jurisdiction, authority to hear and determine all questions of law and fact.

So it is Enbridge's position that that is incorrect and the Board does have the jurisdiction, as noted in the Divisional Court case to deal with questions of law, particularly in this case, the rule against perpetuities.

I'd like to take you now to some submissions related to some of the evidence put forward by the county as to why they would not like to utilize the model franchise agreement, and some of that evidence had come forward in the affidavit put forward by the county.

Specifically, in the county's affidavit they had indicated that part of the rationale for not wanting to switch over to the model franchise agreement was the increase in potential relocation costs, and so if in the future at some time Enbridge would have to remove its assets as a result of some road work or other municipal works, that may push up the -- or increase the relocation cost.

And so in the -- part of this issue was discussed in the Windsor line case that Enbridge was part of in EB-2020-0160 with the County of Essex.

In that case the County of Essex wanted Enbridge to remove its abandoned pipeline that was in the roadway and the Board ruled in favor of Enbridge that they were not required to do that.

Part of the rationale for that was that it was an unnecessary burden to the ratepayers to impose those further costs, but more particularly the county didn't put forward any compelling evidence in that proceeding with respect to any future works that would necessitate that type of undertaking.

Again, in this proceeding, the county really hasn't put any better evidence with respect to what they did in the Windsor case. Again, they're simply saying in a generic fashion the relocation costs would increase.

If we go to -- I want to highlight some comments on that relocation cost, so if we go to tab 3 of EGI's compendium, page 25.

In this matter with RP-1999-0048, I bring it up in general to highlight that relocation costs as part of this proceeding were also discussed and a point of contention, and after hearing from both the municipalities and the -- and in case the natural gas companies, the natural gas distributors, the Board determined as a result of this proceeding that the cost sharing set out in the model franchise agreement is a fair compromise between the municipalities and the distributors.

The key point here, the key point with respect to this case is that, just like any other municipality that Enbridge operates in, relocation costs are part of doing business, and it is part of the relationship between the distributor and the municipality. There is nothing unique. There is nothing compelling that the county has raised with respect to that. Relocation costs occurred in all of the many municipalities we operate in.

And so again, there is nothing compelling about that, and the Board has been pretty clear with respect to the model franchise agreement that the cost-sharing mechanism in there is a fair compromise between these two parties.

Lastly, I'd like to highlight some of the deficiencies, or perhaps some of the better protections that the model franchise agreement provides the county, and provides better clarity in terms of the operating relationship between Enbridge Gas and the County of Essex.

The 1957 agreement is quite an old agreement and has language that is not as modernized as the model franchise agreement.

The other important or more important thing to note there with the agreement is that, throughout this time and currently, Enbridge Gas has been operating through many other provisions within the model franchise agreement as though it has already been in place. So as part of Exhibit B-Staff-3a we highlighted a number of differences where the model franchise agreement provides not only better protections but describes much better the relationship between the County of Essex and Enbridge.

And so for example, in terms of the model franchise agreement in the 1957 agreement, we put forward in our evidence that the approval process, which is in section 5 of the model franchise agreement, is not part of the 1957 agreement. The requirement to put as-built drawings in section 6 of the model franchise agreement is not part of the 1957 agreement. The details of what needs to be done in case of an emergency in section 7 of the model franchise agreement is not part of the 1957 agreement.

The restoration works that needs to be completed in the restoration work area in section 8 is not part of the 1957 agreement, nor is the obligation of the municipality in terms of what to do if an alternative easement is required as part of section 11, not part of the 1957 agreement.

The 1957 agreement contains an indemnification clause similar to the model franchise agreement, but it makes no reference to the insurance coverage that Enbridge is required to have in place, nor the insurance that's required to be maintained in full force and effect during the duration of the agreement.

And so, to summarize our argument for today, what we're asking the Board to find and the order that we're seeking is, one, that the 1957 agreement has expired. And it is clearly expired through application of the Dawn-Euphemia case, which is good law, in a decision that was made by the Divisional Court, and leave to appeal was not given by the Court of Appeal.

Secondly, we would like the Board to use its jurisdiction and broad powers under section 10(2) to provide an order for Enbridge to continue operating its natural gas franchise within the County of Essex and, therefore, replacing the 1957 agreement with the model franchise agreement in the upper-tier form.

And for now, those are my submissions.

If you don't mind, Board Chairs, may I please have a moment just to very quickly confer with my colleagues and look over my notes to make sure that I haven't missed anything?

MR. DODDS: That's fine. Thank you. What do you need, two minutes?

MR. PANNU: I think I need about two minutes. Thank you.

MR. DODDS: After you've convened, the Commissioners will be asking some questions of you.

MR. PANNU: Thank you.

MR. LANNI: Panel, may I ask a question?

MR. DODDS: Who is --

MR. LANNI: It is Richard. It is Richard.

MR. DODDS: Oh, yes. Hi, Richard.

MR. LANNI: Hi. It's just a procedural matter. I wonder if the court reporter could mark the compendiums of the parties as Exhibit 1 for Enbridge's, Board Staff's as Exhibit 2, and the County's as Exhibit 3, and to the extent that the County has other -- has a requirement that other documents be marked as exhibits, Mr. Sundin can raise it later. Thank you.

MR. DODDS: Thank you.

EXHIBIT NO. 1: ENBRIDGE GAS'S COMPENDIUM.

EXHIBIT NO. 2: BOARD STAFF'S COMPENDIUM.

EXHIBIT NO. 3: THE COUNTY OF ESSEX'S COMPENDIUM.

MR. PANNU: Thank you for allowing that indulgence. Enbridge doesn't have anything further, so we're ready for questions if needed.

MR. DODDS: Okay. Thank you very much, Mr. Pannu, on behalf of Enbridge.

Commissioner Janigan, I believe you have some questions. Your sound is not on.

# Questions by the Board:

MR. JANIGAN: There. Sorry about that.

Mr. Pannu, what franchising agreement is in place today?

MR. PANNU: The franchise agreement that is in place today is currently the 1957 perpetual franchise agreement.

MR. JANIGAN: But that has expired, as I understand it, and probably would have expired in accordance with the case law associated with the rule against perpetuity some time ago.

MR. PANNU: That's our position. That's correct.

MR. JANIGAN: Okay. And the model franchise agreement went into place in, I believe, 2000. Twenty-three years has gone by, and I take it the 1957 agreement has been in place. But as I understand your testimony, Enbridge has been inserting other provisions into the arrangement based on that model franchise agreement.

MR. PANNU: I think, to be clear on that, Commissioner, what Enbridge is saying with respect to that is since -- two points, maybe. So since the 1957 agreement, the County of Essex, despite it being expired, has never opposed Enbridge to be there. This isn't a situation where the County of Essex is arguing trespass, for example. We have been operating, providing our service in that franchise.

The key here -- or the difference is we've been operating as though the 2000 agreement has been in place. For example, the need to put in either the as-builts or going for authority before the road superintendent, those types of matters are really -- they take the higher forms of protection that are within the 2000 model franchise agreement.

So it is not in place, but I think -- what I'm trying to argue, it's as if it is in place.

And the other point there again is, we've been there operating but not in a trespass situation with the permission of the county.

MR. JANIGAN: Yes, I guess the question is, 23 years has gone by without anything being done to put in place that agreement with Essex. I take it, are the two decisions that you refer to associated with pipeline coverage? Is that the only time a dispute has gone to the OEB?

MR. PANNU: Sorry, I don't think I understand that question. Can you clarify --

MR. JANIGAN: Well, you've cited that the recent pipeline coverage decisions of the OEB associated with, I guess, the position that a need -- there's a need to replace the existing '57 agreement with the model franchise agreement.

Have there been any other disputes of that kind which were resolved by the OEB that arose out of the model franchise agreement -- arose out of the, I'm sorry, the 1957 agreement?

MR. PANNU: I'll have to confer. If you'd give me a moment, I can quickly confer and ask my colleagues.

MR. DODDS: If it is more expedient, you can answer those questions towards the end of this proceeding, if you wish. Mr. Pannu, you can look into answering those questions at the end of the proceedings, when there are general questions after all the submissions.

MR. PANNU: Yes, I would prefer that I think, just for the sake of clarity to make sure we've got the right set of facts.

MR. DODDS: We'll do that. Any further questions, Commissioner Janigan?

MR. JANIGAN: Just one other question arising from that.

In these circumstances, and particularly the last two decisions it was noted that the OEB Act governed all of the aspects of the dispute between the county and Enbridge.

Going forward, what is the necessity in this circumstance of -- apart from the fact that we've set out that the 1957 agreement is void, what is the necessity at this point in time for the imposition of the model franchise agreement by the OEB?

MR. PANNU: Thank you, Commissioner. So as you highlighted, obviously part of the basis of that is the fact that the agreement is void, but the other is this is the only franchise agreement in the over 300 that we've named and the only perpetual agreement now within Enbridge's franchise. So I believe -- I don't know the exact number right now, but I know there is over 325 agreements, and there is one now that is not consistent.

And so I think even in terms of public convenience and necessity to meet that test, the Board has does have this preference and there is a reason that we moved towards the model franchise agreement and going back to the compelling reason to deviate. If we go by that proposition there is no reason for compelling evidence to have the 1957 agreement.

And moreover, the model franchise agreement gives better certainty so we can avoid disputes like this. That is part of the rationale, is to have efficiency. And that's part of it.

Thirdly, I think if the agreement has expired, we need an agreement, in this case the model franchise agreement, that recognizes Enbridge's rights to provide these services within the county.

MR. JANIGAN: Okay, so firstly, it is public interest. Second of all, would be administrative convenience, and third, it expedites Enbridge's ability to provide operation and services; would that be correct?

MR. PANNU: I think that and in connection with that, to also avoid these very potential disputes.

MR. JANIGAN: Thank you very much. Those are all my questions.

MR. DODDS: Thank you Commissioner Janigan. Commissioner Sword.

MR. SWORD: Thank you. Mr. Pannu, one question. The model franchise agreement came out in the year 2000 or so and what we're learning is several of your perpetual agreements that you may have had in place were changed over. Why wasn't this one considered around that period of time in the early 2000s for a changeover?

MR. PANNU: I think we've attempted at various times to try to get to the model franchise agreement. I know we've tried most recently, that I'm aware of, as part of the Windsor line proceeding but we were unsuccessful.

At that time the focus was to get the Windsor line replacement in place, but it's not as though -- it's not as though Enbridge hasn't attempted in previous cases.

I think in this case, after getting to all the examples we have provided, I think, on the record, where we have converted all of our perpetual franchise agreement, this was the lone outstanding one. And we felt the need for this agreement to be replaced by the model franchise agreement.

For a number of those reasons as I named earlier, both consistency, the fact that this one's been expired and we need a franchise agreement to provide service that properly recognizes our rights to provide that service in the county of Essex.

MR. SWORD: Have you been impinged in any way from providing service as a result of the 1957 agreement?

MR. PANNU: No, we haven't had any difficulties and we have a good relationship with the county. We've provided the services with the county, as I mentioned.

MR. SWORD: You've indicated that some of the work that takes place, indemnification, restoration, and sharing of as-built drawings and working as if you have a model franchise agreement on that right now, and that seems to be to your satisfaction and, perhaps, to the satisfaction of Essex on that. So, you've indicated your need for change for consistency basis.

But from an operational perspective, apart from the relocation costs, are there any other operational concerns that you have?

MR. PANNU: I think on that question I'd like to take that away, I guess, and confer with my colleagues and just confirm. I'll answer that in the general questions as well.

MR. SWORD: Sure. Thank you. Just a question on your assets that you have. There is a provision, I understand, of municipal property taxes that you pay on your buildings. I understand, also, that municipal property taxes are paid on your system of underground assets and pipes; is that correct?

MR. PANNU: Yes, that's correct.

MR. SWORD: What type of municipal services would a pipe require or receive? What kind of -- or rather in this case from the county? Would the county need to do anything to your pipe when it's in the ground? Does it attract any county costs?

MR. PANNU: I think it would just be -- well the costs that I'm aware of is are the potential relocation costs that can occur, for example, when there road work.

Typically the way that -- whether it is this county or other municipalities, there is a process in place respect to having a discussion in terms of how those assets will be relocated. But one of those potential costs, as you alluded to, could be the relocation cost.

MR. SWORD: And just -- sorry?

MR. PANNU: And the one thing I wanted to highlight with respect to those relocation costs, in this case, with the 1957 agreement you would have the relocation costs where Enbridge bears 100 percent of the responsibility, but in every other municipality across the franchises where Enbridge operates and in accordance with the model franchise agreement, we would be using the cost-sharing formula that was stipulated by the Board and negotiated by the Association of Municipalities and the distributors, that 65-35, 35 percent being the cost, for example, that the county would bear, if that that were the case, and 65 percent the distributor.

MR. SWORD: Because costs are being considered and it is related to the pipe, do you have an idea within Essex -- and you may not now and perhaps later, perhaps on a best case basis be able to determine your -- what level of municipal property taxes that you pay in Essex that would be related to your pipe?

MR. PANNU: Yes, for sure. I think that is a question that I will take away and confirm in the general questions.

MR. DODDS: Thank you very much. Thank you very much, Mr. Pannu. As we said there will be questions at the end of this proceeding. Thank you.

Could we now have the submissions from the Ontario Energy Board?

MR. LANNI: Yes. I could use a five-minute break, if that is okay.

MR. DODDS: Okay, that's fine. A five-minute break for the entire proceeding?

MR. LANNI: Yes, just a bio break.

MR. DODDS: Okay, so granted. We'll see you in five-minute and actually we'll see you at 1040.

MR. LANNI: Excellent. Thank you.

MR. DODDS: Thank you.

### --- Recess taken at 10:34 a.m.

### --- On resuming at 10:39 a.m.

MR. DODDS: Thank you very much. The proceeding is back in process, and Richard, if you could give the submission from the Staff. Thank you.

# Closing Argument by Mr. Lanni:

MR. LANNI: Thank you, Panel.

In this proceeding the OEB is being asked by Enbridge to issue an order under section 10 of the Municipal Franchises Act that would impose a franchise agreement on Enbridge and the county in the form of the 2000 model agreement.

the County contests the application and, as alluded to by my friend Mr. Pannu relief is no longer being requested under section 9(4) of the act. It is just not necessary if an order is issued under section 10.

In OEB's Staff's view, the key questions for the Board's determination are, first, does the OEB have the jurisdiction to hear the application; do public convenience and necessity require the renewal or extension of the term of the franchise; and, if so, should the OEB order that the terms and conditions of the renewal or the extension be in the form of the model agreement?

OEB Staff submits that the answers to each of those questions is yes. Based on the record of this proceeding, the OEB has jurisdiction under section 10 of the Municipal Franchises Act to hear the application.

Public convenience and necessity require that the term of the franchise between Enbridge and the County be renewed.

And three, it in the public interest that the terms and conditions of the renewal be in the form of the model agreement unless the Panel finds there is a compelling reason for deviation.

If the OEB finds that the answers to question 1 and 2 is no, then OEB Staff submits that the application should be denied at this time, in which case gas transmission and distribution in the county will indefinitely continue to be primarily governed by the terms of the 1957 agreement and various other road-user agreements and agreements that the County and utility currently have in place.

Our submission is based on three lines of argument: one, jurisdiction; two, that the 1957 agreement has expired; and three, an assessment of public convenience and necessity and the public interest in this case.

So with respect to the first issue, it is OEB Staff's submission that section 10 of the Municipal Franchises is clear and the Board's jurisdiction under it is clear. On an application under section 10(1), the OEB has jurisdiction if the term of a franchise has expired or is about to expire within one year. Once jurisdiction is present under 10(1), the Board has discretion and powers available to it under section 10(2), and those -- section 10(2) powers are broad. Under section 10(2), if public convenience and necessity appear to require it, the OEB may grant a renewal or extension of the expiring or expired franchise for such period of time and upon such terms and conditions as may be prescribed by the OEB.

And that's the language used right in that section. The OEB may do so even when there is no agreement between a municipality and a gas company.

The nature and scope of the OEB's powers under section 10 of the Municipal Franchises Act, as I've just described, has been confirmed by decisions of the courts and by the OEB. I won't have time to take the Panel to all of the references in my compendium, but I will just highlight them and maybe get to one or two.

At tab 1 is the decision of the Court of Appeal in Sudbury and Union Gas, and that's a decision that I will come back to, so maybe, Bonnie, if you could bring that up.

At tab 2, paragraph 5, there's a reference in the Kingston v. Ontario Energy Board decision of the Divisional Court that is relevant.

At compendium tab 4, paragraphs 15 to 18, page 36 of the compendium, there are some salient findings of the Divisional Court in the Dawn-Euphemia v. Union Gas Limited case.

The Re: Centra Gas case of the Ontario Energy Board, which is at tab 14, also contains some important provisions -- cites some important precedent at paragraphs 2.3.4 and on.

I will also get to very briefly tab 12, which is the legislation in the OEB Act, but first let's go to the Sudbury case. If you could get to paragraph 6, please. Do you not have paragraph numbers on -- oh, there we go. Okay.

Just to reiterate the Divisional Court, citing a lower case decision, at paragraph 6:

"It is clear that the natural gas industry is a closely regulated one. The Municipal Franchises Act and the Ontario Energy Board make clear that the legislature has accorded the OEB the widest powers to regulate the supply and distribution of natural gas in the public interest."

A couple sentences lower:

"The court finds that Subsections 10(1) and (2) of the Act provide that, where such a franchise agreement is about to expire, either the gas company or the municipality may apply to the OEB to extend the right to operate the gas operation system, and the OEB may do so on such terms and conditions as public convenience and necessity appear to require."

If you could then turn to paragraph 23, Bonnie.

Here there is a discussion again about the Board's powers under section 10 of the Municipal Franchises Act and how it operates in the event where a municipality and the gas company cannot come to agreement on terms. The court states:

"In my view, a purposive reading of the section gives to the OEB a broad power to impose the terms of renewal or extension of the franchise so that service to the public will not be interrupted simply because the municipality and the utility have been unable to agree on terms for carrying on the service."

I may return to that decision briefly later, but if we could go to tab 12, page 94. My friend has already pointed to it. Section 19(6) provides that the Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by the OEB Act or any other act.

And section 23 of the OEB Act states that -- grants the Board broad powers in making orders, including the power of the Board to impose such conditions as it considers proper.

I will move on to the second line of argument, which is focused on the 1957 agreement. In Staff's submission, the condition set out in section 10(1) of the Municipal Franchises Act is met because the 1957 franchise agreement is expired.

The clause in the 1957 agreement that relates to the duration of term violates the rule against perpetuities, and as a result the 1957 agreement is expired -- and in this regard I won't take you through the decision, and just submit that Staff supports the submissions of Enbridge on this point.

Staff might add that the court in Dawn-Euphemia, in getting to its conclusions, cited what one could refer to as a three-part test. I'll paraphrase from that decision. The Board said, first, the 1954 agreement granted rights not only to the immediate parties to the agreement but, likewise, to their successors and assigns.

Second, the 1954 agreement granted a broad and significant rights with respect to land.

And third, the 1957 agreement anticipated a long-term, permanent arrangement noting that it was not anticipated that the agreement could be revoked requiring the transmission lines to be removed.

This at page 36 of the compendium.

In similar fashion to the 1954 agreement in the Dawn-Euphemia case, the 1957 agreement that is before the Board today granted rights not only to the immediate parties to the agreement but, likewise, to the successors and assignors.

The 1957 agreement granted broad and significant rights with respect to land and the 1957 agreement anticipated a long-term, permanent arrangement as there is no express expiry date.

Though neither party raised this in their filings, OEB Staff would be remiss in failing to note that section 10(6) of the Municipal Franchises Act would appear to preclude an application under section 10 in respect of a right that has expired before December 2nd, 1969.

Bonnie, if you could go to compendium tab 13, page 100.

You will note that essentially the language of 10(6).

OEB Staff's view is that this section must be interpreted purposefully -- purposively. As found by the Court of Appeal in the Sudbury decision, the OEB Act and the Municipal Franchises Act make it clear that the legislature has accorded to the OEB the widest powers to regulate the supply and distribution of natural gas in the public interest. And then the Court of Appeal went on to state that a purposive reading must be afforded to the interpretation of section 10 of the MFA.

Section 10(6) by its words applies to agreements that, by their terms, had been understood by the parties and the OEB to have expired as of December 2nd, 1969, which is the date on which section 10 of the MFA -- of the act came into effect.

In other words, taking a purposive view of section 10 and of the Municipal Franchises Act, it's Staff's view that section 10(6) doesn't apply to an agreement that is later held to have expired by operation of law.

Anecdotally, section 10 was enacted in 1969 to deal with franchise renewals, and at that time it referred to rights that expired before the coming into force of this section.

Prior to that time, both the utility and the municipality had a common-law right to terminate a franchise agreement upon the expiry of the franchise agreement.

With the introduction of section 10 to the Municipal Franchises Act, that is no longer true, as was held by the OEB in Re: Centra Gas, and we'll take -- I can take you to that later, but the court said something to the effect that even today the Board likely has the power to require a utility to continue operating, even if it no longer wished to because of the public interest afforded to the Board through section 10.

Finally on this line of argument, it is important to also note that the parties have operated as if the 1957 agreement is in full force and effect, and to this day they primarily carry out their rights and obligations in the County of Essex pursuant to it.

Our third line of argument is that the record of the proceeding establishes that public convenience and necessity required that the term of the franchise between the parties be renewed at this time, and there is no compelling reasonable on the record that the franchise not be in the form of the model agreement.

As we have already submitted and as Enbridge, the OEB has broad jurisdiction over the gas industry for the protection of the public interest.

Section 10 authorises the OEB to impose the terms of the of renewal of a franchise so that service to the public will not be at risk of interruption where a municipality and a gas company are unable to agree to the terms for carrying on that service.

If -- Bonnie, if you could go to tab 14, paragraphs 4.03 to 06, page 114.

This is a decision of the OEB that was held -- upheld by the Divisional Court on appeal. Essentially what these paragraphs state that while the views of the municipality should be taken into account by the OEB, they are not determinative of the issue of assessing the public convenience and necessity, and 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.

That determination rests the entirely with the Board.

In Staff's view, the 1957 agreement is inadequate in several respects. It predates the enactment of section 10 of the Municipal Franchises Act in 1969. It predates the detailed negotiations that underpin the findings and recommendations of the OEB in two lengthy generic hearings that the Board held in 1986 and 2000 that resulted in the adoption of the model franchise agreement. I won't take you through them. Enbridge has done already.

But Enbridge's response to Staff's IRs 1a and Staff 3 at tab 8 of our compendium lists a number of the key provisions found in the model agreement that are absent from the 1957 agreement, including terms relating to cost sharing, as-built drawings, emergency work, insurance, et cetera.

I'd also like to submit that Board guidance recently issued, you know, summarizes precedents set by the OEB and the courts. I think some of the language used in the Natural Gas Franchises Handbook, you know, says that:

"In approving the model agreement the OEB intended that these key provisions apply uniformly and fairly 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 out for a term of 20 years."

Also as stated in the Natural Gas Franchises Handbook and in -- I believe this is a decision referred to therein:

"The OEB expect that franchises will be based on the model agreement unless there is a compelling reason for deviation."

In summary, 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 interest 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. I am happy to answer any questions from the Panel.

MR. DODDS: Thank you very much, Richard. I believe, Commissioner Sword, you have a question.

# Questions by the Board:

MR. SWORD: Thank you, thank you, Mr. Lanni. Mr. Lanni, are there any agreements that you are aware of or that OEB Staff are aware of that have a deviation from the model franchise?

MR. LANNI: There are some. I don't think there is a listing of -- there is a list of such agreements with deviations on the record of this proceeding.

I know that the Natural Gas Facilities Handbook refers to one case, and maybe somebody on my team can alert me to that case, but where a deviation exists. It might be the City of Toronto.

And from my detailed reviews of EBO-125 decision and the RP-1998 decision in preparing for today, the flavour that I got from the parties to those proceedings, the various stakeholders, the municipalities, the AMO, Board Staff, the Board, you know, it was acknowledged that it would be appropriate for there to be deviations from time to time.

I think the words used in one of those proceedings was "unusual or exceptional cases", and the language that's more recently been used in jurisprudence and in the courts -- or, sorry, at the Board, is compelling deviation, but I think they mean the same thing.

MR. SWORD: For a deviation to occur, can that take the form of a special amendment to it, to the agreement that both parties agree to?

MR. LANNI: Yes. Any amendment to the form of the agreement would be a deviation, and I guess you could consider a -- you could break that out into two groups. I mean, there could be a substantive deviation that would very likely require, you know, a detailed review or assessment, and there could also be potentially, you know, a non-substantive deviation if there were -- I would imagine.

MR. SWORD: Okay, thank you. Commissioner Dodds, I don't have any further questions.

MR. DODDS: Thank you. Commissioner Janigan? Commissioner Janigan?

MR. JANIGAN: I'm coming. I have some difficulty finding the mute/unmute button. I'm sorry for that.

No, Commissioner Dodds, I have no questions.

MR. DODDS: Thank you, Mr. Lanni, and now if we could have a presentation from Essex, and I think that is with Mr. Sundin, if you could proceed.

# Closing Argument by Mr. Sundin:

MR. SUNDIN: Good morning, it is David Sundin, county solicitor, giving submissions on behalf of the County of Essex today.

So it is my hope to simplify the argument as such as possible, so to that end I can advise the Panel that the county is largely in agreement with the submissions made by the OEB today, but subject to one important question being asked first.

So if we look at the -- at paragraph 2 that's already been provided by the OEB, and I could have that pulled up. Am I allowed to share my screen, or -- there we go. Thank you, Bonnie.

Could you go to the argument summaries provided by the OEB? There we go. Paragraph 2.

So the OEB posed three questions there. I'm in agreement that those three questions need to be answered by this Panel today, but only if a primary and first question is asked first, and that is whether or not there is a declaration that the 1957 franchise agreement actually is void.

I believe it is the position of Enbridge and the OEB that, despite Enbridge not seeking that specific relief in its application, that the OEB Panel today can make that determination.

It is the submission of the county that that is a matter that is properly brought before the Superior Court of Justice as to whether or not the current 1957 agreement is void by operation of the rule against perpetuities.

So before I get into that I do want to provide a bit of the factual background. So again, as you've heard already today, since in or about 1957 supply of gas in the County of Essex has been governed by a perpetual franchise agreement. Since that time the utilization of the gas lines in the County has not changed.

It is important to note that the County is comprised of both the upper-tier level, the County of Essex, which operates under the 1957 franchise agreement, and has also seven lower tiers that report up to the County that have their own franchise agreements with the -- with Enbridge.

And so the lines that are governed by the County's franchise agreement are on rural roads, that then transmit the gas to the urban centres that operate under separate franchise agreements.

So since 1957 and to date, the gas lines that service the county road network run along it to transmit gas to the municipal centres and simply distribute to those whose property fronts on to county roads.

And I don't believe Enbridge has provided any evidence that the operations in the County have changed substantially over that period of time.

There was a misquote that this franchise agreement governs 70,000 households. The County is in the position that that is incorrect, that other franchise agreements within the County might govern supply of gas to 70,000 households, but those are certainly not governed by this 1957 agreement, which only deals with rural residents that front on to county roads.

So back to the key issue, then: Does the OEB have jurisdiction to act as a common-law court?

Respectfully, I submit that the answer to that question is no. So the County submits that, absent a finding by a court of competent jurisdiction that the current franchise agreement from 1957 is void, there can be no application pursuant to section 10 by the Municipal Franchises Act.

As the OEB Staff rightly pointed out in their submissions, section 10 is only triggered if a franchise agreement is expired and requires renewal or replacement.

I'd like to take you to the OEB Staff compendium in which they enclosed at tab number 16 a report of the Board from 1986, and I will refer to page 125. At that time this Board report noted:

"The Board has no jurisdiction to declare that perpetual agreements should be terminated. That is a matter either for the courts, the legislature, or the parties involved.

"The Board's view, however, is that in the future new franchise agreements or renewals thereof ought not to be in perpetuity."

So, again, I fail to see how anything has changed since this Board report came out which noted that the Board had no jurisdiction to terminate, make declarations that perpetual agreements ought to be terminated, and no authority has been presented by either OEB Staff or Enbridge to state that this jurisdiction is now in the hands of the OEB, despite the reading of section 19.

So the county submits that the Board continues to lack the jurisdiction to make declarations related to perpetual franchise agreements through application of the common-law rule against perpetuities.

I will start my submissions on that by referring you to the Perpetuities Act, which is included in the county's compendium at tab number 1.

And in that act, the legislature defined "court" as meaning Superior Court of Justice. It did not include the Ontario Energy Board as a court for that purpose.

Then going down to the next page, section 5, the legislature described how one would go about seeking a determination on the validity or invalidity of an interest in land, and it notes there that:

"A party may apply to the court for a declaration as to validity or invalidity with respect to the rule against perpetuities of an interest in that property, and the court may on such application make an order as to validity or invalidity of an interest based on the facts existing and events that have occurred at the time of the application."

And so to date, that has not happened. Enbridge has not gone to seek a declaration that the 1957 franchise agreement is void, and if so, the date on which it was deemed to be void. That is important. As the OEB pointed out, that section 10 is not triggered if a franchise agreement was found to be void prior to 1969.

And so, if an application was properly brought before the Superior Court of Justice and there is a determination that the 1957 franchise agreement is not void, that would be the end of the matter and section 10 would not be triggered; and likewise, if an application was properly brought before the Superior Court of Justice and there was a determination that it was void but was void prior to 1969, then section 10 again would not have application, although other sections certainly would and we'd be dealing with it in any event.

Again, that was an important first step which has not occurred yet. But even if the Board did have jurisdiction to make a ruling on the rule against perpetuities, which I again respectfully submit the Board does not have, it is the county's position that the franchise agreement does not offend the common-law rule against perpetuities.

I have included a recent case of Superior Court of Justice. It is Justice Vella which summarized the common-law rule for your convenience today.

That is found at tab 3 of the compendium of the County, starting at paragraph 20 which is on page 24. So as you'll see from paragraphs 20 and 21, Justice Vella noted that this is an old rule dating back to the 17th century. That's the rule against perpetuities, dates back to the 17th century and requires that a contingent interest vest within 21 years.

So going down to the next page. Note that Justice Vella, quoting:

"The role against perpetuities is a rule invalidating interest which vests too remotely. It is often called the rule against remoteness of vesting. Furthermore, the rule against perpetuities is doctrine of the law of property, not contract."

There is a historical reason for that which doesn't really relate to the county and Enbridge's case.

But going down to paragraph 24, it was noted that:

"The underlying rationale was to prevent the indefinite sterilization of property by fostering certainty of vesting. The public policy reflect the benefit of land not being tied up indefinitely, thus prevent commercial or other development of property."

So the importance here is whether or not it vested. And that was pointed out as well in the other case that I provided, which is found at tab 2. That is a 2018 decision of Court of Appeal in Clarke and Kokic.

If we could go down to paragraph -- page 14 of that decision, page 14 of the compendium.

The court held there:

"The Kokics argue that the ancillary rights under the easement are void because of the rule against perpetuities. We disagree."

The court went on to say:

"The rule against perpetuities has no obligation in this case. The rule does not restrict the duration of the property interests, but the length of time that may elapse between the creation of a contingent interest and the vesting of that interest."

Going down again, the next page:

"As stated by the court in Dyer, at paragraph 18, the rule applies only to contingent interests. An express easement includes the ancillary rights reasonably necessary for the use and enjoyment of the easement. These rights vested at the time of grant, and are not contingent interests. Thus, the rule against perpetuities does not apply to them."

So the county submits that even if the issue of the rule against perpetuities was properly before the Board, or brought before a court, as the county submits it should have been, the franchise agreement question does not offend the rule. It is not contingent interest. Union Gas and its successor Enbridge have used the lands of the county since the signing of the 1957 franchises agreement. It vested upon their use of the franchise rights that were granted.

Again, the rule is only in play if there was a contingent interest.

The county submits that the Dawn-Euphemia case relied on by the OEB Staff and by Enbridge is distinguish here.

Further, we note that it was the Divisional Court that made the finding there, that it was a violation against the rule against perpetuities, and it was made on specific facts of that case.

Although the language of the agreements are similar, Dawn-Euphemia was decided on the specific facts that were before the court on that, and likewise the county should have the opportunity to have the relevant facts to show that this interest vested before the court prior to ruling on whether or not the 1957 franchise agreement violates the rule against perpetuities.

Again, Enbridge and OEB Staff have failed to provide any reference to what authority OEB has to make a declaration at common law with respect to rule against perpetuities, especially in light of the language found in the Perpetuities Act.

Without a finding that the existing 1957 franchise agreement is void, then section 10, Municipal Franchises Act cannot be triggered and the application of Enbridge must fail.

My friend on behalf of Enbridge earlier noted that the county was taking the position that the Municipal Franchises Act is not acceptable to the county. That's not entirely true. The model franchise agreement may very well be acceptable to the county, subject to there being a finding that the existing franchise agreement is void.

The county has taken the position it's taken because it's taken the position that the 1957 agreement remains in full force and effect, that parties have governed themselves in accordance with that agreement since its inception, and it has worked well for us.

The Board does have the ability -- should there be a finding that the 1957 agreement is void, the Board has the ability to renew the franchise under existing terms. I found no case of the Board doing so previously, but that option is open to the Board.

But failing that, then the model franchise agreement would be appropriate.

Again, the county's position is section 10 has not been triggered, and therefore the Board lacks the authority to do so at this time.

Subject to questions, those are my submissions.

MR. DODDS: Thank you very much, Mr. Sundin. Commissioner Janigan, I believe you have some questions. Your mute is off.

# Questions by the Board:

MR. JANIGAN: Thank you. I'm operating between two screens and it gets lost on the other screen when I am trying to bring the arrow over to unmute it.

Thank you very much, Mr. Sundin. I'd like to take you again to the Perpetuities Act, if that could be brought up on the screen. If we go to, I believe it's paragraph 6 of that, which I believe that you cited or paragraph 5, sorry, I think.

You noted that this is the way in which a declaration that an agreement is void for offending the rule of perpetuities must take place in order to say that, for example, this agreement, the 1957 agreement, offends the rule against perpetuities. But I note that, unlike what you have suggested, this is written as an applicant may at any time apply to the court for a declaration.

It's not mandatory that such declaration be obtained in order to conclude that the rule against perpetuities has been offended. Is that not correct?

MR. SUNDIN: Yes, the submission of the county is that a party may apply --

MR. JANIGAN: Yes --

MR. SUNDIN: -- and has chosen not to apply, but in order for there to be a finding that there had been a violation of the rule against perpetuities, that is for a court to decide.

MR. JANIGAN: But just because a person may apply to the court for a ruling does not necessarily mean that the agreement is not void for offending against the rule of perpetuities.

MR. SUNDIN: And it may very well be void. Again, the submission of the county is that determination has not been made yet, by either a court or by this Board, and in the application, there is even a failure to seek that relief for a declaration that the agreement is void.

There's just an application requesting that section 10 be utilized to impose the terms of a model franchise agreement on the County of Essex, but before that could happen there has to be that finding, is my submission.

MR. JANIGAN: Okay. Just to return on that point, it is your position that the OEB may not make a finding that the 1957 agreement is void for the reasons of offending against the rule of perpetuities?

MR. SUNDIN: That is the position of the county, yes, that the Board lacks the jurisdiction to make that ruling, and the alternative submission was that if you disagree with me on that, then this is an interest that has vested, and therefore the rule was not triggered in the first place.

MR. JANIGAN: I wonder if you could bring up the 1957 municipal franchise agreement itself.

MR. SUNDIN: That is found in the compendium of the OEB Staff at tab number 6.

MR. JANIGAN: And I want to look at the provisions that enable then Union Gas to obtain the municipal franchise.

If you just scroll down a little further. I think it is in section 2. And it notes that:

"The rights and privileges hereby granted shall continue and remain in force for a period of 10 years from the date hereof and so long thereafter as the said lines are in actual use for the transportation of gas."

The latter part of that clause seemed to indicate a contingent interest, not a vested interest; would you not agree?

MR. SUNDIN: No, I would not agree. Again, it remains in force for as long as it's being used for gas. The transmission of gas stops and then the interest ends. That's very much an interest that's determinable.

MR. JANIGAN: Yes. But that's a contingent interest that terminates in that circumstance. It's not vested with Union in perpetuity. There is a contingency associated with it.

MR. SUNDIN: They have to continue to supply gas, certainly.

MR. JANIGAN: Okay, okay. Just getting back to questions that I think were asked of Enbridge.

The model franchise agreement, the -- I believe in this proceeding the county has not made a suggestion that the model franchise agreement is objectionable, apart from the fact that they believe the 1957 agreement applies. Is that a correct summary of the position of the county?

MR. SUNDIN: That's the correct summary, yes.

MR. JANIGAN: Okay. And I take it as well there is no submission associated with some kind of equitable estoppel or anything else that Enbridge has failed to take appropriate steps to implement the model franchise agreement and, as such, is estopped from doing so?

MR. SUNDIN: No, I think any such argument would fail, given the language of the Municipal Franchise Act, which requires one to be in place.

MR. JANIGAN: Okay.

MR. SUNDIN: So the failure of Enbridge to act expeditiously doesn't change the legislature's intent there.

MR. JANIGAN: Okay. Well, thank you very much for those answers. Those are all my questions.

MR. DODDS: Thank you, Commissioner Janigan. Commissioner Sword?

MR. SWORD: Thank you, thank you, Mr. Sundin. One question. It is more of an operational one.

MR. SUNDIN: Sorry, the lights just turned off here. My apologies. One second. We're saving energy, and without movement they turned off. My apologies.

MR. SWORD: Conservation in motion.

MR. SUNDIN: Yes.

MR. SWORD: Mr. Sundin, a question: Since this has been in operation since 1957, and one of the points of contention is the relocation costs, have there been any occasions that you are aware of where the pipe has been on the county road there for the county, 1957 agreement is in place, whereby Enbridge has assumed a relocation paying 100 percent of the costs?

MR. SUNDIN: I'm only aware of the 2019/'20 issue with the location of the pipeline on County Road 46.

My understanding is that for the minor relocates that are largely required, that Enbridge sent an invoice and the county pays that pursuant to the fee split.

The large concern for the County was the very expensive replacement of the County Road 46 line, which was the subject of the only other position I'm aware of before the OEB with respect to gas lines in the county.

That was the concern the county had. It was going in a location that will require movement. I know my friend has made the submission that the county needs to provide evidence of that.

I think, you know, affidavits in two proceedings is evidence that the county fully intends to widen that roadway, which will inevitably require relocation of the County Road 46 pipeline which feeds into the city of Windsor, so it is a vital piece of infrastructure that is going to need relocation in the very near future, and that is what has raised concerns with relocation costs at this point.

MR. SWORD: Thank you. And Mr. Sundin, apart from this specific circumstance and the operational issues related to it, has the county been generally satisfied with the interactions you've had on operational issues with Enbridge?

MR. SUNDIN: My understanding is the county was very pleased with the predecessor Union Gas and has been less enthusiastic about relationships with Enbridge today.

MR. SWORD: All right. Thank you. Commissioner Dodds, no further questions. Thank you, Mr. Sundin.

MR. SUNDIN: Thank you very much, Commissioner Sword, and thank you very much, Mr. Sundin.

The question is now, does the Panel or everyone want to go for the morning break? Maybe perhaps Enbridge would want a little bit more time? We could take a 15-minute break that was scheduled, and not hearing any objection, let's take that break for 15 minutes and reconvene at 11:14.

### --- Recess taken at 11:29 a.m.

### --- Upon resuming at 11:45 a.m.

MR. DODDS: Thank you, all the parties. We are -- the proceeding is open again.

Enbridge Gas, are you prepared to give your reply submission? Mr. Pannu, are you there?

MR. PANNU: Sorry, I'm also learning that I need to turn the mute function off to speak. Yes, we're prepared to go and ready to proceed.

MR. DODDS: Okay, if you will proceed. Thank you.

# Reply Argument by Mr. Pannu:

MR. PANNU: Thank you. I'd like to deal primarily with two issues that my friend had raised, primarily with jurisdiction and the expiration of the 1957 agreement. And very quickly I want to go back to jurisdiction.

Mr. Sundin had made the point that the Board does not have the jurisdiction to apply the rule against perpetuities. In fact, that is a matter and an application you have to make before the Superior Court.

And so before I tell you why we don't agree with that position, I think Commissioner Janigan had pointed out that that is a permissive right, and in fact there is no statement in the reference that he brought up that the applicant has to do that. In other words, an applicant has to go before a court and make the determination that the rule against perpetuities applies.

I pointed earlier to section 19 and I don't need you to go back and pull up the reference, but the section 19 of the OEB Act is clear that the Board has jurisdiction to deal with questions of both law and fact. So the Board does have the jurisdiction to make determinations on the rule against perpetuities.

And in fact, in the Dawn-Euphemia case that is exactly what was done. That is a 2004 decision from the Divisional Court, and that is what the -- those were the submissions that were made by the Board and the finding that was made by the Divisional Court that the rule against perpetuities applied, specifically because there was a future contingent interest that exceeded the time period that was allowed or the duration by the rule against perpetuities. I will get to that in a moment.

My friend Board Staff Mr. Lanni had also provided a number of other sections that provide the Board with its jurisdiction. Section 23 also gives the Board a broad discretion in protecting the interests of the public and for the Board to make orders to that effect.

I also want to bring your attention to a section that was not raised, and that is section 128 of the OEB Act.

That section pertains, to the extent that there is a conflict between this act and the other act, for example, the Perpetuities Act and another act, that this act of the Board prevails. And again, it demonstrates and illustrates the Board's broad jurisdiction.

So it's Enbridge's respectful submission that there is ample, ample evidence and ample references on this record that illustrate the Board's broad jurisdiction to apply, and particularly with reference to section 19, to deal with issues of law.

The second point my friends made, and I want to note what they had said, was they believed the 1957 agreement is not void but they would accept the model franchise agreement if a determination was made that it was deemed expired.

So earlier the first case that my friend had brought had dealt really with the termination. We are not dealing with the termination of an agreement. We are dealing with the expiration of an agreement, so it can be distinguished on the basis of those facts.

And secondly, the Court of Appeal decision that my friend is relying on, that was dealing with a completely different set of facts. The case that we have with Dawn-Euphemia, that's dealing with the municipal franchise agreement. We were trying to do the same thing that was done in that case. It was effectively trying to replace an old agreement, a perpetual agreement, with the model franchise agreement.

And the Court of Appeal decision is dealing with property rights between two individuals in which they have a dwelling next to each other, and there is a conflict over an easement. But there is nothing, there is no evidence and there is nothing in the decision dealing with a future contingent interest.

So very simply, the finding in that case was the rule against perpetuities did not apply because there was no future contingent interest.

That is not the factual situation here. The agreements between the 1954 and the 1957 agreement are nearly identical. But for the reference of the 10 or 20 years, the future contingent interest is using the exact same language. There is no difference. It is identical language, and that language was determined by the Divisional Court to be a future contingent interest that violated the rule against perpetuities. There was no submission made with respect to that specific clause at all, and none of the cases distinguish that specific fact.

Lastly -- well, I to want to point out as well as I made submissions earlier, that there was leave -- there was leave to appeal made to the Court of Appeal, but it was denied with the 1954 Dawn-Euphemia case.

And so again, it is our position that it is good and current law.

There is one final submission that I'd like to make with respect to one point of evidence that the county had raised, and it had to do with relocation costs As far as Enbridge is aware, our understanding is in any situation where we're asked to relocate, Enbridge has paid 100 percent of the relocation costs and that's obviously what's required under the 1957 agreement.

So those are our submissions respect to our reply.

MR. DODDS: Thank you very much. Commissioner Sword, do you have any further questions?

MR. SWORD: No, thank you.

MR. DODDS: Commissioner Janigan? Commissioner Janigan? I think you are still on mute.

MR. SWORD: I think he's --

MR. DODDS: I'll assume you have no further questions at this stage.

I have one more question. It is more of a clarification. Enbridge is seeking an order directing and declaring that the assent of the municipal electors of the County of Essex is not necessary for the proposed franchise agreement by law, under the circumstances.

If that is so granted by the Board, how would that affect your model franchise agreement? If you look at the preamble and at the second whereas, it says:

"By by-law passed by council of the corporation, the duly authorized officers have been authorized and directed to execute this agreement by on behalf of the corporation."

If a council refuses to issue such a by-law, what you are saying is that this agreement would still come into effect. And perhaps the second part that the should be added to that whereas, along the basis that, or, in the absence of such by-law as so ordered by the Ontario Energy Board.

All I want to do is make sure there is clarification, because you may run into this in other places where municipalities may not want to sign. Does that leave a gap in these model franchise agreements?

MR. PANNU: I'm going to take a moment and confer with my colleagues. May I have a moment?

MR. DODDS: Absolutely.

MR. PANNU: Thank you.

MR. DODDS: While we're waiting, Commissioner Janigan, did you have any questions? You are still on mute, I think. You are still on mute.

MR. JANIGAN: No, I don't have any further questions. Sorry about that. I can't get it off my laptop onto my monitor. It is driving me crazy.

MR. DODDS: It is for the record. Thank you very much. Mr. Pannu.

MR. PANNU: Thank you, Commissioner -- Commissioner Dodds. Sorry.

So with respect to your question, Enbridge isn't proposing a change in the order that they've requested from the Board. We note that we're in the Board's hands with respect to that, but I do want to note in subsection -- in 10(5) with respect to the by-law, if an order is made under 10(2), that specific section deems that a by-law is in effect.

So I'm wondering with respect to that submission if that's sufficient?

MR. DODDS: Yeah, that is sufficient for my purposes. But is that clear in the MFA? All I'm trying to do is just preclude someone else questioning it in the future.

If some municipality does not enter -- pass such by-laws, and there is an order, would anybody else reading that agreement 10, 15 years later understand that?

MR. PANNU: I think that's a fair point. I think with respect to that again we are not seeking any deviation, but I think it is something that we'll leave in the Board's hands to decide.

MR. DODDS: Okay, thank you very much for that.

Staff, is there any further proceeding -- or issues or things we have to deal with before we close this proceeding?

MR. LANNI: I don't think so, and Staff has no further issues, thank you.

MR. DODDS: Okay. I'd like to thank everyone else. This proceeding is now adjourned. The close of record is now closed, and I would like to thank everyone for your good presentations and for staying on time in the end, and once again, the proceeding is now closed. Thank you.

MR. LANNI: Thank you.

MR. PANNU: Thank you.

### --- Whereupon the hearing concluded at 11:58 a.m.