

# **OEB Staff Compendium for Oral Argument**

**EB-2022-0207**

**February 8, 2023**

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# Tab 1

*Sudbury (City) v Union Gas Ltd. (2001), 54 OR (3d) 439 (Ont CA)*

The Corporation of the City of Sudbury v. Union Gas  
Limited\*

Union Gas Limited v. The Corporation of the City of  
Sudbury

[Indexed as: Sudbury (City) v. Union Gas Ltd.]

54 O.R. (3d) 439  
[2001] O.J. No. 2099  
Docket No. C34115

Court of Appeal for Ontario  
Morden, Moldaver and Goudge JJ.A.  
June 6, 2001

\* Application for leave to appeal to the Supreme Court of Canada was dismissed with costs January 31, 2002 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28770. S.C.C. Bulletin, 2002, p. 157.

Public utilities--Franchises--Extension of franchise--Company owned and operated natural gas distribution system in city pursuant to franchise agreement with city--Franchise agreement provided that city could buy system at any time following termination of franchise--Section 10 of Municipal Franchises Act provides that where franchise agreement is about to expire gas distribution company or municipality may apply to Ontario Energy Board to extend right to operate gas distribution system --Company applied for extension prior to expiration of franchise--City's right to purchase gas distribution system did not arise until end of any extension ordered by Ontario Energy Board--Municipal Franchises Act, R.S.O. 1990, c. M.55, s. 10.

The appellant owned and operated the natural gas distribution system in the municipality pursuant to a franchise agreement

with the municipality. Paragraph 22 of the franchise agreement provided that the municipality had the right to buy the distribution system "at any time following the termination of the franchise". Section 10 of the Municipal Franchises Act, R.S.O. 1990, c. M.55 provides that where a franchise agreement is about to expire, either the gas distribution company or the municipality may apply to the Ontario Energy Board ("OEB") to extend the right to operate the gas distribution system. Just prior to the expiry of the franchise agreement, the appellant applied to the OEB to extend its right to operate the system pursuant to s. 10 of the Act. The municipality then sought a declaration that its right to purchase the gas distribution system provided for in para. 22 of the franchise agreement arose on the expiry of the term of that agreement. The appellant brought a cross-application for a declaration that that right did not arise until the end of any extension ordered by the OEB. The municipality's application was allowed. The appellant appealed.

Held, the appeal should be allowed.

The franchise conferred by the agreement was the bundle of rights and privileges granted to the appellant to construct and operate the gas distribution system in the municipality. The appellant's obligation to sell its gas distribution system was explicitly subject to s. 10 of the Act. The clear meaning of para. 22 of the agreement was that if the OEB made an order pursuant to s. 10 of the Act, the franchise was not terminated and the precondition for the municipality's right to compel a sale was not met.

#### Cases referred to

Union Gas Ltd. v. Dawn (Township) (1977), 15 O.R. (2d) 722, 76 D.L.R. (3d) 613, 2 M.P.L.R. 23 (Div. Ct.)

#### Statutes referred to

Municipal Franchises Act, R.S.O. 1990, c. M.55, ss. 9 [as am.],

Public Utilities Act, R.S.O. 1990, c. P.52, s. 62 [repealed  
S.O. 1999, c. 14, Sch. F, s. 9]

APPEAL from a judgment of Molloy J. (2000), 47 O.R. (3d) 654 granting a declaration that the respondent's right to purchase a gas distribution system from the appellant under a franchise agreement arose on expiry of the term of that agreement.

Glenn Leslie and Sharon S. Wong, for appellant.

John F. Rook, Q.C. and Mahmud Jamal, for respondent.

The judgment of the court was delivered by

[1] GOUDGE J.A.:--The appellant Union Gas ("Union") Limited is the successor company to Northern and Central Natural Gas Corporation Limited. It provides natural gas distribution service to more than 400 municipalities throughout Ontario.

[2] For some 40 years, Union and its predecessor company have owned and operated the natural gas distribution system in the City of Sudbury ("Sudbury") pursuant to two successive franchise agreements with Sudbury and under the regulatory authority of the Ontario Energy Board ("OEB"), the statutory body assigned by provincial law to regulate the natural gas industry in Ontario.

[3] The most recent franchise agreement was made on December 11, 1979. Its 20-year term expired on December 11, 1999. Just prior to that date, in October 1999, Union applied to the OEB to extend its right to operate the natural gas system in Sudbury pursuant to s. 10 of the Municipal Franchises Act, R.S.O. 1990, c. M.55. Sudbury then sought a declaration that its right to purchase the gas distribution system from Union, provided for in para. 22 of the franchise agreement, arose on the expiry of the term of that agreement. Union brought a cross-application for a declaration that this right does not arise until the end of any extension ordered by the OEB.

[4] On April 10, 2000, Molloy J. issued reasons for judgment in favour of Sudbury, which are reported at 47 O.R. (3d) 654. With respect, for the reasons that follow, I have come to the opposite conclusion. I would therefore allow the appeal, dismiss Sudbury's application and allow Union's cross-application.

#### Statutory and Factual Background

[5] Before turning to an analysis of the central issue in this appeal, namely the proper meaning of para. 22 of the franchise agreement, it is helpful to highlight both the agreement's legislative context and the history leading up to it.

[6] As Molloy J. said, it is clear that the natural gas industry is a closely regulated one. The Municipal Franchises Act and the Ontario Energy Board Act, 1998, S.O. 1998, c. 15 make 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. See Union Gas Ltd. v. Dawn (Township) (1977), 15 O.R. (2d) 722, 76 D.L.R. (3d) 613 (Div. Ct.) at p. 734 O.R., p. 625 D.L.R.

[7] More particularly, s. 9 of the Municipal Franchises Act requires that any franchise agreement between a natural gas distribution company and a municipality must be approved by the OEB. Subsections 10(1) and (2) of this Act provide that where such a franchise agreement is about to expire, either the gas distribution company or the municipality may apply to the OEB to extend the right to operate the gas distribution system and the OEB may do so on such terms and conditions as public convenience and necessity appear to require.

[8] Subsections 10(1) and (2) read as follows:

10(1) Where the term of a right referred to in clause 6(1) (a), (b) or (c) that is related to gas or of a right to operate works for the distribution of gas or to supply gas to a municipal corporation or to the inhabitants of a municipality has expired or will expire within one year,

either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right.

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

[9] The final legislative provision of relevance to this matter is s. 62 of the Public Utilities Act, R.S.O. 1990, c. P.52. It empowered a municipality to acquire at any time a privately owned gas distribution system serving its residents at a price calculated according to a legislated formula. This provision was in effect in 1979 when the franchise agreement was made but was repealed effective January 1, 1999.

[10] The 1979 franchise agreement sets out the following grant to Union in para. 2:

2. Subject to the terms and conditions hereinafter set forth, the Corporation hereby grants to the Gas Company the franchise, right and privilege to construct and operate a gas distribution system within the Municipality and to supply gas to the Corporation and to the inhabitants of the Municipality, and to enter upon any public property for the purpose of the construction, operation, maintenance and repair of the gas distribution system and for the transmission of gas in and through the Municipality and to perform any other services that may be necessary in connection with the transmission and supply of gas in the Municipality.

[11] Paragraph 3 of the franchise agreement provides that the franchise granted shall be for a term of 20 years.

[12] Paragraph 20 gives Union the right, prior to the end of the 20-year term, to give notice requesting the grant of a new franchise on terms to be agreed. It then requires Sudbury to advise whether it is willing to do so. It reads as follows:

20. At any time within the twelve-month period commencing twenty-four months and ending twelve months prior to the termination of the term of the franchise hereby granted, the Gas Company may by notice given to the Corporation request the Corporation to grant to the Gas Company a new franchise upon such terms as may be agreed upon and subject to the approval of the Board. The Corporation shall, by notice in writing given to the Gas Company within three months of the date of the request for a new franchise, advise the Gas Company as to whether or not it is willing to grant a new franchise to permit the Gas Company to carry on its business in the Municipality.

[13] Paragraphs 21 and 22 then address possible outcomes where there is no agreement on a new franchise. These paragraphs are in the following terms:

21. If the Corporation fails to grant a new franchise on terms agreeable to both parties hereto and the Ontario Energy Board has not made an order for a renewal of or an extension of the term of the right, then the Gas Company may, subject to the provisions of paragraph 22 and to section 10 of The Municipal Franchises Act, at its option, either:

- (a) sell or dispose of the gas distribution system forthwith to any person, firm or corporation and at such price and on such conditions as the Gas Company may deem advisable; or
- (b) within twelve months following such termination of the term of this franchise remove the gas distribution system or any portion or portions thereof from the public property, provided that failure to effect such removal shall not deprive the Gas Company of title to the gas distribution system or any portion or portions thereof.

Should the Municipality, at any time after a lapse of one year from termination, require the removal of all or any of the Gas Company's said facilities for the purpose of altering or improving public property or in order to facilitate the construction of utility or other works in the highway, the Municipality may remove or dispose of so much of the Gas Company's said facilities as the Municipality may require for such purposes, and neither party shall have recourse against the other for any loss or expense occasioned thereby.

22. At any time following the termination of the franchise, the Corporation may, by notice given to the Gas Company, require the Gas Company to sell the Gas Distribution System, or such portion or portions thereof as shall not have been removed as provided in paragraph 21, to the Corporation or to any person, firm or corporation designated in such notice by the Corporation; and with all reasonable dispatch after the giving of such notice, but subject to section 10 of The Municipal Franchises Act, the Gas Company shall sell such system or such portion thereof accordingly, at such price as may be agreed between the parties hereto or, if the parties hereto shall be unable to agree upon such price and one of them shall refer the determination thereof to arbitration under the provisions of paragraph 19 hereof, at such price as the arbitrator or arbitrators appointed under the said paragraph 19 shall fix as fairly representing the value of such gas distribution system or such portion thereof, as a going concern and as though the Gas Company were still entitled to use the public property for the operation of such system or portion.

[14] The language in these two paragraphs was first approved by the OEB in 1978 in a test case involving a franchise agreement for the City of Timmins brought by a group of northern Ontario municipalities including Sudbury. The phrase in para. 22 ". . . but subject to s. 10 of the Municipal Franchises Act . . ." was not in the draft agreement submitted by the parties, but was added without explanation by the OEB when it rendered its decision approving the agreement.

[15] As I have indicated, the 20-year term of Sudbury's franchise agreement was due to expire on December 11, 1999. Prior to that date, Sudbury gave Union notice that it intended to exercise its contractual right to acquire the gas distribution system pursuant to para. 22. However, Union had launched an application before the OEB to extend the term of its franchise. Union asserted that Sudbury's right of acquisition under para. 22 did not arise until the end of any extension ordered by the OEB or until such an extension had been refused. On October 28, 1999, the OEB issued an interim order extending Union's franchise to June 30, 2000 to permit these court proceedings. That interim order was further extended on consent pending this appeal.

[16] In deciding in favour of Sudbury, Molloy J. found the surrounding factual circumstances and statutory provisions of little or no assistance. She focused on the language of the franchise agreement itself and determined that the most reasonable construction of para. 22 is that it provides to Sudbury the right to purchase the gas distribution system upon the expiry of the term of the agreement irrespective of any order that may be made by the OEB under s. 10 of the Municipal Franchises Act. The essence of her conclusion is as follows [at p. 672 O.R.]:

Paragraph 22, as currently drafted, does not clearly reflect the position of either of the parties. However, if para. 22 had been drafted to provide a right to purchase the system upon the "termination of the franchise hereby granted", I would have little hesitation in interpreting the provision as providing to Sudbury a right to purchase the gas distribution system at the expiry of the rights granted under the agreement, whether by the expiry of the 20-year term or otherwise. The addition of the words "hereby granted" is, in my view, a minor amendment. On the other hand, in order to amend para. 22 so as to clearly reflect the meaning advocated by Union Gas, one would have to say that Sudbury's right to purchase arises upon the "termination of the franchise hereby granted if the OEB has not made an order for a renewal or extension under s. 10 of the Municipal Franchises Act, or, if such an order has been made by the OEB, upon the expiry of

the term of such order". In my view, this would constitute a much more significant amendment than merely adding the words "hereby granted". Further, the rights granted under para. 21 are expressly stipulated to arise only if "the OEB has not made an order for a renewal of or an extension of the term of the right". If the drafters had intended that the very next paragraph be subject to the same restriction, one would expect them to have said so expressly.

In my opinion, adding the gloss suggested by Union Gas strains the ordinary meaning of the words used beyond what is reasonable in the overall context of the agreement. On the other hand, the interpretation advanced by Sudbury is more consistent with the dealings between the parties, the terms of their earlier contract and the language of the 1979 agreement itself. While in hindsight one can suggest language that would have conveyed this meaning more clearly, I find that the most reasonable construction of para. 22 of the agreement is that it provides to Sudbury the right to purchase the gas distribution system upon the expiry of the rights granted under the agreement, irrespective of any order that may be made by the OEB under s. 10 of the Act.

(Emphasis in the original)

[17] In this court the basic positions of the parties were as they have been throughout these proceedings. Union argued that Sudbury's right to purchase its gas distribution system under para. 22 only arises following the termination of its franchise and that the franchise will not terminate if the OEB orders an extension pursuant to s. 10 of the Municipal Franchises Act. On the other hand, Sudbury argued that the franchise is for a 20-year term expiring on December 11, 1999 at which point it terminates and Sudbury's right to purchase arises, subject to s. 10 of the Act. Thus, if the OEB orders that Union's right to operate the system is extended, Sudbury argued that it will nonetheless have the contractual right to acquire ownership of the system, subject only to Union's right to remain in possession of the system as operator.

Analysis

[18] In my view, an examination of the language of the franchise agreement, in particular para. 22 in the context of the role played by s. 10 of the Municipal Franchises Act, demonstrates that the appellant's position is correct. It is useful to set out para. 22 again, adding emphasis to those parts of it that assist in compelling this conclusion:

22. At any time following the termination of the franchise, the Corporation may, by notice given to the Gas Company, require the Gas Company to sell the Gas Distribution System, or such portion or portions thereof as shall not have been removed as provided in paragraph 21, to the Corporation or to any person, firm or corporation designated in such notice by the Corporation; and with all reasonable dispatch after the giving of such notice, but subject to section 10 of The Municipal Franchises Act, the Gas Company shall sell such system or such portion thereof accordingly, at such price as may be agreed between the parties hereto or, if the parties hereto shall be unable to agree upon such price and one of them shall refer the determination thereof to arbitration under the provisions of paragraph 19 hereof, at such price as the arbitrator or arbitrators appointed under the said paragraph 19 shall fix as fairly representing the value of such gas distribution system or such portion thereof, as a going concern and as though the Gas Company were still entitled to use the public property for the operation of such system or portion.

(Emphasis added)

[19] It is clear that the driving force behind this legal dispute is Sudbury's desire to exercise its right to require Union to sell its system for the distribution of gas to the residents of Sudbury. That right, found in para. 22, arises "[a]t any time following the termination of the franchise . . .". The precondition for Sudbury's right is the termination of the franchise. It is the meaning of that phrase that is at the heart of this case.

[20] I agree with Molloy J. that the interpretative task

derives no assistance from the factual context giving rise to the franchise agreement. The only fact of possible relevance is that Union appears to have represented to Sudbury in 1978 that Sudbury would have the right under s. 62 of the Public Utilities Act to purchase the gas distribution system at any time. However, that section was repealed effective January 1, 1999. While the representation was true when it was made, it is of no assistance in giving meaning to the phrase "the termination of the franchise" in para. 22. For that task it is necessary to examine the franchise agreement itself.

[21] Paragraph 2 makes clear that the franchise conferred by the agreement is the bundle of rights and privileges granted to Union to construct and operate the gas distribution system in the City of Sudbury. Paragraph 3 fixes the term of that franchise at 20 years.

[22] Union's obligation to sell its gas distribution system, which is provided for in para. 22, is explicitly subject to s. 10 of the Municipal Franchises Act. Under that section, the OEB has the power to order the renewal or extension of the bundle of rights granted to Union by the franchise agreement. In my view, the meaning of para. 22 is clear: if the OEB makes an order pursuant to s. 10, the franchise is not terminated and the precondition for Sudbury's right to compel a sale has not been met.

[23] Section 10 of the Municipal Franchises Act clearly gives the OEB the power, if public convenience and necessity require it, to renew or extend the right of Union to operate the gas distribution system in Sudbury. The section operates where a franchise agreement reaches the end of its term and the parties have been unable to agree on the conditions for extending it. It protects the interests of those who depend on the gas distribution system by allowing either the municipality or the gas utility company to seek a renewal or extension of the bundle of rights that is the franchise. The OEB may make the order on the terms it determines necessary to protect the public interest. 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 the terms for carrying on the service. If the OEB makes such an order in this case, Union's franchise will not have terminated.

[24] In her reasons for judgment, Molloy J. finds that at the end of the 20-year term, Sudbury has the right to require Union to sell the gas distribution system but that under s. 10, the OEB could grant Union the right to operate Sudbury's system thereafter. With respect, I do not agree. The right of Union to operate a gas distribution system owned by Sudbury is not a right which Union had under the franchise agreement and therefore not one which can be renewed or extended pursuant to s. 10. However, it is not necessary to come to a conclusion on this issue. What is clear is that s. 10 does give the OEB the power to renew or extend Union's franchise and if it were to do so, the franchise would not be terminated, and Sudbury's right to require Union to sell would not arise.

[25] In my view, there are three other aspects of the franchise agreement that support this interpretation.

[26] First, under para. 22, if Union and Sudbury cannot agree on a sale price for the gas distribution system, the price is to be fixed by an arbitration valuing the system "as a going concern and as though the gas company were still entitled to use the public property for the operation of such system . . .". The clear implication is that Sudbury would be acquiring both the gas distribution system and the right to operate it. It would not make commercial sense for Sudbury to agree to buy the system without the right to operate it, but to have to pay for it as a going concern. Thus I think the payment formula provided in para. 22 confirms the parties' agreement that Sudbury's right to require Union to sell the gas distribution system arises only when Union's right to operate the system terminates and not simply at the end of the 20-year term.

[27] Second, para. 22 has para. 21 as its companion piece. Both set out what happens when Union's franchise terminates. Paragraph 21 gives Union certain rights at that point to sell

or remove the gas distribution system failing which Sudbury may remove it. Paragraph 22 gives Sudbury the right to require Union to sell the system. Paragraph 21 is express in stating that the rights it grants do not arise if the OEB has made an order of renewal or extension under s. 10 of the Municipal Franchises Act. While para. 22 is more succinct, making Union's obligation to sell "subject to s. 10 of the Municipal Franchises Act", I think the meaning is the same. If an order is made under s. 10, the franchise does not terminate, and neither the rights accorded to Union by para. 21 nor the right accorded to Sudbury by para. 22 arises.

[28] Third, the language of para. 20 of the franchise agreement provides a revealing contrast to the language of para. 22. Paragraph 20 demonstrates that when the parties wished to precondition a right simply on the expiry of the 20-year term of the agreement, they did not speak of "the termination of the franchise" but, rather, of "the termination of the term of the franchise hereby granted". Indeed, I agree with Molloy J. that Sudbury's position effectively requires that this wording from para. 20 be read into para. 22. On the other hand, for the reasons I have given, I find that para. 22 as written does not give Sudbury the right it seeks if Union's franchise is renewed or extended pursuant to s. 10 of the Municipal Franchises Act. Unlike Molloy J., I think the language of para. 22 is clear and requires no words to be read in in order to convey this meaning as contended for by the appellant. This meaning must prevail over one that requires words to be read into the text.

[29] In summary, I conclude that Sudbury's right to require Union to sell its gas distribution system arises only on the termination of Union's franchise and if the OEB issues an order of renewal or extension at the end of the 20-year term of the franchise agreement that precondition is simply not met.

[30] I would therefore allow the appeal, set aside the order below and order that Sudbury's application be dismissed and Union's cross-application be allowed. Union is entitled to its costs here and below.

Appeal allowed.

# Tab 2

*Kingston (City) v Ontario (Energy Board)*, 2001 Carswell Ont 3051

2001 CarswellOnt 3051  
Ontario Superior Court of Justice (Divisional Court)

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**Kingston (City) v. Ontario (Energy Board)**

2001 CarswellOnt 3051, 108 A.C.W.S. (3d) 181, 150 O.A.C. 347, 21 M.P.L.R. (3d) 20

**The Corporation of the City of Kingston, Appellant and The Ontario Energy Board and Union Gas Limited, Respondents**

Lane, Wright, Aston JJ.

Heard: June 25, 2001

Judgment: September 4, 2001

Docket: Toronto 415/00

Counsel: *Guy J. Pratte, Kevin LaRoche*, for Appellant  
*Patrick Moran*, for Ontario Energy Board  
*Glenn Leslie, Sharon S. Wong*, for Union Gas Limited

Subject: Public

**Related Abridgment Classifications**

**Public law**

- IV Public utilities
  - IV.5 Regulatory boards
    - IV.5.a Licensing [public convenience and necessity]

**Public law**

- IV Public utilities
  - IV.5 Regulatory boards
    - IV.5.c Practice and procedure
      - IV.5.c.iii Statutory appeals
        - IV.5.c.iii.A Right of appeal

**Public law**

- IV Public utilities
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      - IV.5.c.iii Statutory appeals
        - IV.5.c.iii.B Grounds for appeal
          - IV.5.c.iii.B.1 Lack of jurisdiction

**Public law**

- IV Public utilities
  - IV.5 Regulatory boards
    - IV.5.c Practice and procedure
      - IV.5.c.iv Costs

**Headnote**

**Public utilities --- Regulatory boards — Practice and procedure — Statutory appeals — Right of appeal**

Gas company had entered franchise agreements with former township in 1955 to provide service — Agreements expired in 1997 — Newly expanded city refused to renew agreement between gas company and former township — City proposed to allow gas company to retain ownership of gas distribution assets, but city would take control and possession of assets to provide gas service itself — Energy board renewed and extended right of gas company to operate works for distribution of natural gas in city — Board held city needed certificate of public convenience and necessity to provide natural gas to part of city that was formerly municipal township — City appealed decision of board — Gas company brought motion to

vary order dispensing with leave to appeal by city — Motion dismissed — Leave to appeal was not required under [s. 11 of Municipal Franchises Act](#) — Section 128(1) of Ontario Energy Board Act provides that it prevails in event of conflict with another act — [Section 33 of Ontario Energy Board Act](#) allows appeal to divisional court on question of law or jurisdiction — [Municipal Franchises Act, R.S.O. 1990, c. M.55, s. 11](#) — [Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B, ss. 33, 128\(1\)](#).

**Public utilities --- Regulatory boards — Licensing (public convenience and necessity)**

Gas company had entered franchise agreements with former township in 1955 to provide service — Agreements expired in 1997 — Newly expanded city refused to renew agreement between gas company and former township — City proposed to allow gas company to retain ownership of gas distribution assets, but city would take control and possession of assets to provide gas service itself — Energy board renewed and extended right of gas company to operate works for distribution of natural gas in city — Board held city needed certificate of public convenience and necessity to provide natural gas to part of city that was formerly municipal township — Board held it did not have jurisdiction under [s. 10\(2\) of Municipal Franchises Act](#) to allow city to provide gas service using gas company's assets on city's proposed terms — City appealed decision of board requiring certificate of public convenience and necessity — Appeal dismissed — City's right to provide gas service, which pre-dated municipal restructuring, applied to city in same geographic area — As city had no right to construct works within boundaries of former township, city could not transfer such right to new city — City only required certificate respecting land not included in city's former boundaries — Board did not grant gas company right to expand into territory not currently being serviced — [Municipal Franchises Act, R.S.O. 1990, c. M.55, s. 10\(2\)](#).

**Public utilities --- Regulatory boards — Practice and procedure — Statutory appeals — Grounds for appeal — Lack of jurisdiction**

Gas company had entered franchise agreements with former township in 1955 to provide service — Agreements expired in 1997 — Newly expanded city refused to renew agreement between gas company and former township — City proposed to allow gas company to retain ownership of gas distribution assets, but city would take control and possession of assets to provide gas service itself — Energy board renewed and extended right of gas company to operate works for distribution of natural gas in city — Board held city needed certificate of public convenience and necessity to provide natural gas to part of city that was formerly municipal township — Board held it did not have jurisdiction under [s. 10\(2\) of Municipal Franchises Act](#) to allow city to provide gas service using gas company's assets on city's proposed terms — City appealed decision of board — Appeal dismissed — City's proposal would take away gas company's property rights in its equipment and board did not err in finding it lacked jurisdiction to make order — Powers of board under [s. 10\(2\) of Act](#) are not restricted to renewing right to operate gas distribution system and include right to extend or add to works — Where franchise agreement includes right to extend, board has power to make order under Act — Board did not grant gas company right to expand into territory not currently being serviced — [Municipal Franchises Act, R.S.O. 1990, c. M.55, s. 10\(2\)](#).

**Table of Authorities**

**Cases considered:**

*Sudbury (City) v. Union Gas Ltd.*, 2001 CarswellOnt 1968, 18 M.P.L.R. (3d) 191 (Ont. C.A.) — considered

**Statutes considered:**

*Municipal Franchises Act*, R.S.O. 1990, c. M.55  
 Generally — referred to  
 s. 8 — considered  
 s. 8(1)(a) — considered

s. 8(1)(b) – considered

s. 9 – considered

s. 9(1)(a) – considered

s. 9(1)(c) – considered

s. 10(1) [am. 1998, c. 15, Sched. E, s. 21(8)] – referred to

s. 10(2) – considered

s. 11 – pursuant to

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*Ontario Energy Board Act, 1998, S.O. 1998, c. 15, Sched. B*

Generally – referred to

s. 20 – considered

s. 23 – considered

s. 33(1) – considered

s. 33(2) – considered

s. 128 – considered

s. 128(1) – considered

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*Public Utilities Act, R.S.O. 1990, c. P.52*

Generally – referred to

s. 62 – considered

APPEAL by city of decision of Ontario Energy Board to renew and extend gas company's right to operate gas works and requiring city to obtain certificate of public convenience and necessity; MOTION by gas company for order requiring city to obtain leave to appeal.

**Endorsement. *Per curiam*:**

**Nature of the Appeals**

1 The City of Kingston appeals the June 23, 2000 decision of the Ontario Energy Board whereby the Board:

(1) renewed and extended for a period of fifteen years the right of Union Gas to operate works for the distribution of natural gas in the former Township of Pittsburgh (now part of the City of Kingston),

(2) granted Union Gas the right to add to and extend its gas distribution system within that territory, and

(3) found that in future Kingston needs a Certificate of Public Convenience and Necessity to provide natural gas in parts of Kingston that were formerly the municipal Township of Pittsburgh and, further, that the City *may* need such a Certificate even within the City of Kingston as it existed prior to municipal amalgamation in 1998.

2 The respondent, Union Gas, moves for an order varying an order dated December 20, 2000, in which O'Driscoll J. found that Kingston did not need leave to appeal the decision of the OEB, and that he would have granted leave if leave were required. The respondent therefore seeks an order requiring Kingston to obtain leave to appeal.

**Did the Board Err in Deciding it did not have Jurisdiction Under S. 10(2) of the *Municipal Franchises Act (MFA)* to Allow the City of Kingston to Provide the Gas Service Using the Assets of Union Gas, on the Terms Proposed by Kingston, on the Ground it Amounted to an "Expropriation" Which was Beyond its Powers?**

3 Kingston's proposal to the OEB would allow Union to retain ownership of all the gas distribution assets, and be paid the same rate of return it receives on all its other utility assets for the remaining useful life of those assets. However, Kingston would take possession and control of the assets, maintaining them at its expense, in order to assume responsibility for providing gas service to the former Township of Pittsburgh

4 The *Public Utilities Act* vests in municipalities, in the first instance, the right to establish and operate municipal gas utilities. Private companies may only provide this service under authority of a municipal by-law and according to a franchise agreement under the *Municipal Franchises Act*, approved by the OEB and by the electors of the municipality. Union entered into two such franchise agreements with the former Township of Pittsburgh, dating back to 1955. Unsuccessful in its request to the newly expanded City of Kingston for renewal of the latest agreement, it applied to the OEB under [section 10 of the MFA](#) which provides as follows:

10.(1) Where the term of a right referred to in [clause 6\(1\)\(a\), \(b\) or \(c\)](#) that is related to gas or of a right to operate works for the distribution of gas has expired or will expire within one year, either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right.

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

5 Provision of natural gas is a public utility and ownership of assets by Union does not give it the right to operate or use those assets without a franchise. In this case the franchise expired in 1997, though it had been temporarily extended, on consent, up to the time of the OEB decision of June 23, 2000. [Section 10\(2\) of the MFA](#) and [s. 23 of the Ontario Energy Board Act](#) confer broad power on the OEB in meeting its responsibility of protecting the public interest in the supply of natural gas. For example, the Board could probably require Union to continue to operate its gas distribution services even if Union did not want to do so.

6 However, in our opinion, the Board's power to order Union to continue to provide services does not extend to ordering Union to make its assets available, against its will, to some other party for that purpose. Union itself is ready, willing and able to provide those services on terms and conditions determined by the OEB. The proposal of Kingston may fall short of a formal "expropriation". Nevertheless, it takes away from Union a property right it otherwise enjoys, namely, the ability to deny to others the possession, use and enjoyment of its property. There is no express language in any legislation giving the municipality the ability to take away or extinguish property rights in this manner so that it can take over the provision of the service, nor does that power arise by necessary implication in the language of the legislation.

7 [Section 62 of the Public Utilities Act](#) once empowered a municipality to acquire a privately-owned gas distribution system at a price calculated according to a legislated formula. That provision was repealed, effective January 1, 1999. Kingston should not be permitted to now do indirectly what the Legislature has expressly renounced with the retroactive repeal of [s. 62 of the Public Utilities Act](#).

8 Even if the franchise agreement of 1977 contained a specific provision allowing Kingston to acquire the assets of Union on the expiry or termination of the franchise, the result would be the same. See, *Sudbury (City) v. Union Gas Ltd.* [(2001), 18 M.P.L.R. (3d) 191 (Ont. C.A.)], Ontario Court of Appeal docket CA C34115, heard January 26, 2001, decision released June 6, 2001 (unreported). In that case Sudbury asserted a contractual right to acquire Union's gas distribution assets on the pending expiry of the franchise agreement. Union successfully argued Sudbury's right of acquisition did not arise until the end of any extension ordered by the OEB or until such an extension had been refused. In this case, Kingston does not have the contractual right to acquire Union's gas distribution assets or even to use those assets.

9 Under *s. 10(2) of the Municipal Franchises Act*, the OEB may, as a matter of "public convenience and necessity",

(1) make an order renewing or extending the right to operate works for the distribution of gas upon such terms and conditions as it prescribes, or

(2) make an order refusing a renewal or extension of that right.

It has wide ranging power to impose terms and conditions if it renews or extends the right. However, if it refuses to renew or extend the right, there is no apparent authority to impose terms and conditions on a party such as Union that formerly had obligations to provide that public utility.

10 We are therefore of the opinion that the Board did not err in deciding it lacked jurisdiction under *s. 10(2) of the MFA* to allow Kingston to become the gas supplier using the assets of Union. Whether Kingston's proposed compensation was fair, or even generous, and whether Kingston's proposal is accurately described as an "expropriation" is beside the point.

**Did the Board Err in Deciding it had Jurisdiction Under S. 10(2) of the MFA to Authorize Union Gas to Add to or Extend the Gas Utility Works in the Former Township of Pittsburgh?**

11 Counsel for Kingston does not dispute that use of the word "construct" in the 1977 franchise agreement necessarily included the ability of Union to extend the gas distribution system. Indeed, it did so between 1977 and 1997. Although s. 9 of the MFA distinguishes between "the right to construct" and "the right to extend or add to the works" in subclauses (1)(a) and (c), it is illogical, in our opinion, to limit the powers of the OEB under s. 10(2) of the MFA to the maintenance of an existing system. If the franchise agreement itself provides for geographic extensions and additions, surely the OEB has the authority to include that right when it makes an order "renewing or extending the term" of rights contained in such a franchise agreement. This is consistent with the recently released Court of Appeal decision in the *Sudbury (City)* case referred to above. At paragraph 22 the Court addressed the power of the OEB under s. 10 of the MFA and recognized "under that section, the OEB has the power to order the renewal or extension of the bundle of rights granted to Union by the franchise agreement" (emphasis added).

12 In deciding that Union had the ability to add to or extend the gas utility works, the Board did not decree Union had the exclusive right to expand into territory not now being serviced. Now that the former Township of Pittsburgh is part of Kingston, the City can present its own plan to extend its own gas distribution system when and if the situation arises.

13 This leads to a consideration of the last issue raised by Kingston.

**Did the Board Err in Deciding that Kingston Needed to Apply for and Obtain a Certificate of Public Convenience and Necessity If it were to Construct any New Facilities?**

14 Pursuant to the 1997 municipal Restructuring Order, Kingston's municipal jurisdiction now encompasses the area within its original city boundaries together with the former Townships of Pittsburgh and Kingston. That order also provides "all assets...and responsibilities" of the former City of Kingston are transferred to the newly constituted City of Kingston. Kingston submits one consequence of this municipal restructuring is that it is exempt from the requirement of a Certificate of Public Convenience and Necessity to construct gas works anywhere within its reconstituted boundaries because it has been supplying natural gas to Kingston since long before April 1, 1933.

15 Union contends that because the "new" Kingston did not exist on April 1, 1933, it could not have been supplying gas on that date and it is therefore not entitled to rely on the exemptions in *subsections 8(1)(a) and (b) of the MFA*.

16 We are of the opinion that Kingston's ability to provide gas service within its original 1933 boundaries is a right, or "asset", seamlessly transferred to the "new" Kingston, obviating the necessity of a Certificate within that geographic area. However, prior to restructuring, the former Kingston had no right to construct works within the geographic boundaries of the two townships and, therefore, the former City could not

transfer such a right to the new City. Nor could the former Township of Pittsburgh transfer such a right to the newly-constituted municipality, because the township did not provide natural gas service before April 1, 1933.

17 We therefore agree with the Board's conclusion that Kingston needs to apply for a Certificate under [s. 8 of the MFA](#) if it wishes to supply natural gas in the former townships. However it does not require such a certificate with respect to land included in the City's boundaries as of April 1, 1933.

18 Union already holds a subsisting Certificate of Public Convenience and Necessity under [s. 8 of the MFA](#) respecting the lands which were formerly the Township of Pittsburgh. The municipal restructuring does not alter or restrict its ability to supply gas in that entire territory.

#### **Did the City of Kingston Need to Obtain Leave for this Appeal?**

18 Union moves in this appeal for an order varying O'Driscoll J.'s decision of December 20, 2000. In his decision, O'Driscoll J. decided that Kingston did not require leave to appeal the decision of the OEB.

19 However, O'Driscoll J. stated that, if he was in error and leave to appeal is required, he would grant leave to appeal. In his view, the question of whether leave to appeal is required merited the attention of the Divisional Court.

20 Although the issue of leave to appeal in this case is moot by reason of the fact that we have heard the appeal, we will consider the issue because it is still a live issue for future appeals.

21 It is Union's position that leave to appeal is required pursuant to [s.11 of the MFA](#). Kingston submits that the provisions of the *OEB Act* override [s.11 of the MFA](#) and, therefore, leave to appeal is not required.

22 The sections of the two Acts relied on by the parties are:

#### **MFA — s.11**

11. With leave of a judge thereof, an appeal lies upon any question of law or fact to the Divisional Court from any certificate granted under section 8 or any order made under [section 9](#) or [10](#) if application for leave to appeal is made within fifteen days from the date of the certificate or order, as the case may be, and the rules of court apply to any such appeal. R.S.O. 1990, c.M.55, [s.11](#).

#### **OEB Act — ss. 20, 33 and 128**

20. Subject to any provisions to the contrary in this or any other Act, the powers and procedures of the Board set out in this Part apply to all matters before the Board under this or any other Act.

33.(1) An appeal lies to the Divisional Court from any rule made under Part III or any order of the Board.

(2) An appeal may be made only upon a question of law or jurisdiction and must be commenced not later than 30 days after the making of the rule or order.

128.(1) In the event of conflict between this Act and any other general or special Act, this Act prevails.

23 With respect to [s.20 of the OEB Act](#), Union argues that [s.11 of the MFA](#) is a contrary provision which takes precedence. Kingston submits that [s.20](#) deals only in respect to matters being heard by the OEB and has nothing to do with appeals from decisions of the OEB. We agree with Kingston's submission. In our view [s.20](#) has nothing to do with the issue of leave to appeal.

24 Union further submits that the right to appeal differs between the *OEB Act* and the *MFA*. Under the *OEB Act* an appeal is upon a question of law or jurisdiction, whereas, under the *MFA*, an appeal is upon any question of law or fact. Therefore, Union submits that leave to appeal a decision of the OEB under the *MFA* is required pursuant to [s.11 of the MFA](#).

25 Kingston submits that [s.128 of the OEB Act](#) governs. Although the *MFA* is a special Act which conflicts with [the OEB Act, s.128](#) provides that the provisions of the

*OEB Act* prevail. We agree [s.11 of the MFA](#) is overridden by [s.128\(1\) of the OEB Act](#). The motion to vary O'Driscoll J's decision is therefore dismissed.

*Appeal dismissed; motion dismissed.*

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# Tab 3

***Natural Gas Facilities Handbook (excerpt)***  
EB-2022-0081

*(<https://www.oeb.ca/consultations-and-projects/policy-initiatives-and-consultations/natural-gas-facilities-handbook>)*

The Ontario Energy Board (OEB) has released its Natural Gas Facilities Handbook (Handbook). The Handbook brings together the legislative and policy frameworks applicable to different types of applications that regularly come before the OEB for natural gas facilities approvals, including filing requirements based on OEB practice. Release of the Handbook is an important milestone on the OEB's path to modernization and will enhance the timeliness and efficiency of the OEB's processes. The Handbook will be a living document, with updates made over time as needed.

The Natural Gas Facilities Handbook was issued on March 31, 2022.

## 2 MUNICIPAL FRANCHISE AGREEMENT

### 2.1 Introduction

A person is not permitted to provide gas distribution service within a municipality in Ontario unless the requirements of the *Municipal Franchises Act* have been met. These include obtaining a franchise from the municipality in which the works are to be located and having the terms and conditions of the franchise approved by the OEB. These terms and conditions are typically set out in the form of a franchise agreement.

A municipal franchise agreement deals primarily with the relationship between the municipality and the gas distributor with respect to issues such as the use of the municipal road allowances for the construction of the facilities. Virtually all municipal franchise agreements in Ontario are in the form of the OEB's standard [Model Franchise Agreement](#).

A municipal franchise does not grant exclusive rights to the gas distributor, although in most cases only one utility will hold a franchise agreement for any particular area. As a result of municipal reorganizations and consolidations over the years, in some cases a municipality will have franchise agreements with more than one gas distributor for different parts of its territory. The fact that a person holds a franchise agreement with a municipality is not a bar to another person also obtaining a franchise agreement with the same municipality, although the OEB will generally not issue certificates to different persons that cover the same geographic area within a municipality. The rights granted through a franchise agreement are not necessarily exclusive.

It is important to note that a franchise agreement, in and of itself, does not authorize the construction of facilities. Construction of facilities is only permitted after a utility has obtained from the OEB a valid certificate under the *Municipal Franchises Act* and, where applicable, leave to construct, as well as obtaining any permits, approvals and agreements from other agencies or bodies that may be required for construction to proceed. An application for the approval of a municipal franchise agreement may be made at the same time as an application for a certificate.

### 2.2 Legislation

Section 3 of the *Municipal Franchises Act* states that a municipal corporation may not grant any person the right to use or occupy any municipal highway or construct or operate any natural and other gas works<sup>5</sup> in a municipality unless a by-law setting out the terms and conditions applicable to such right has been assented to by the municipal

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<sup>5</sup> The *Municipal Franchises Act* defines "gas" as follows: "natural gas, manufactured gas or any liquified petroleum gas, and includes any mixture of natural gas, manufactured gas or liquified petroleum gas, but does not include a liquified petroleum gas that is distributed by means other than a pipe line".

electors. As noted above, these terms and conditions are typically set out in the form of a franchise agreement.

Section 9 of the *Municipal Franchises Act* states that no by-law granting the right to construct or operate gas facilities shall be submitted to the municipal electors for their assent unless the terms and conditions related to the by-law have first been approved by the OEB. However, section 9 (4) of the Act provides that the OEB may by order declare and direct that the assent of the electors is not necessary if the OEB is satisfied that such assent may be properly dispensed with.

In the vast majority of cases, the OEB declares and directs that the assent of the municipal electors is not necessary. The OEB will typically do so upon having reviewed a resolution issued by municipal council (and filed with the application approving the form of draft by-law and draft franchise agreement and authorizing the applicant to submit them to the OEB for approval. Accordingly, where an applicant is seeking to dispense with the assent of the municipal electors, it should include, as part of its franchise application, the municipality's resolution, draft by-law and draft franchise agreement.

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 their current franchise agreement. Where the OEB approves the renewal or extension of a franchise by issuing an order under section 10, the order is deemed to be a valid by-law of the municipality.

### 2.3 Model Franchise Agreement

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 and as a tool to efficiently administer the many franchise agreements across the Province.<sup>6</sup> 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*<sup>7</sup>, including a term of 20 years. Accordingly, the OEB expects that franchises will be based on the Model Franchise Agreement, unless there is a compelling reason for deviation.<sup>8</sup>

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<sup>6</sup> RP-1999-0048

<sup>7</sup> Part II of the Model Franchise Agreement requires the applicant to select one of two wording options depending on whether the agreement is with an upper or lower tier municipality.

<sup>8</sup> An example of a case in which the OEB allowed a deviation is [EB-2008-0413](#). An example of a case in which the OEB did not allow a deviation is [EB-2017-0232](#).

The [Gas Franchise Handbook](#) is a supplement to the Model Franchise Agreement and serves as a consolidated guide for dealing with operating issues that sometimes require a greater level of detail than appears in the franchise agreement itself.

## **2.4 Filing Requirements**

When applying for approval or renewal of a franchise agreement under section 9 or 10 of the *Municipal Franchises Act*, the application must include the following.

1. Confirmation as to whether the application is for a new franchise area, or a renewal or extension of an existing franchise area.
2. A brief written description of the proposed franchise area<sup>9</sup>, including the physical boundaries (e.g., municipal boundaries, metes and bounds, on-from-to) and the number and general location of any customers to be served or currently served in the proposed franchise area.
3. A map of the boundaries of the requested franchise area, the municipal boundaries, major roads and other geographic features marked clearly, and, at the discretion of the applicant, illustrating either:
  - a. The applicant's natural gas facilities in the proposed franchise area and the number and general location of customers to be served or currently served by the applicant in the proposed franchise area
  - b. The customer density of the proposed franchise area (often provided in the form of a colour coded map that illustrates customer density or "heat map")
4. Documentation on any existing franchise agreements and certificates:
  - a. Where applicable, a copy of any existing certificate(s) pertaining to the proposed franchise area.
  - b. Where applicable, a copy of the current by-law and franchise agreement.
5. Where applicable, a description of any embedded and adjacent franchise areas and the name of any person who serves them.
6. In the case of an application under section 10, a detailed description of any material amendments to the municipality's boundaries (e.g., municipal amalgamations or annexations) within the period of the existing franchise agreement and how such amendments relate to the franchise application.

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<sup>9</sup> A franchise area is the geographical territory within a municipality that the franchise agreement is intended to cover

7. A copy of the draft by-law and the proposed franchise agreement (which should be in the form of the Model Franchise Agreement unless a compelling reason exists for departing from it).
  - a. A copy of the resolution of the Council of the Municipality approving the form of the draft by-law.
  - b. Where applicable, a description of any proposed variance from the Model Franchise Agreement and the supporting rationale outlining the circumstances that would warrant such consideration.

## 2.5 Post-hearing Filings

An applicant is required to file the certified electronic copy of the signed franchise agreement by-law and an affidavit confirming delivery to the municipality within four months of the issuance of the OEB's decision granting the franchise. If the applicant is not able to do so, it must provide the OEB with a letter outlining the reasons for the delay and an expected date by which it will file the signed documents.

# Tab 4

*Dawn-Euphemia (Township) v. Union Gas Ltd.*, 2004 CarswellOnt 3909

2004 CarswellOnt 3909  
Ontario Superior Court of Justice (Divisional Court)

Dawn-Euphemia (Township) v. Union Gas Ltd.

2004 CarswellOnt 3909

**The Corporation of the Township of Dawn-Euphemia, Applicant and Union Gas Limited and Ontario Energy Board, Respondents**

McCombs, O'Driscoll, Wilson JJ.

Heard: January 6, 2004  
Judgment: January 12, 2004  
Docket: London 1412

Proceedings: refused leave to appeal *Dawn-Euphemia (Township) v. Union Gas Ltd. (2004)*, 2004 CarswellOnt 3861 (Ont. C.A.)

Counsel: Barry R. Card, for Appellant  
Glenn Leslie, Sharon S. Wong, for Respondent, Union Gas Limited  
Patrick Moran, for Respondent, Ontario Energy Board

Subject: Public; Estates and Trusts

**Related Abridgment Classifications**

Civil practice and procedure

XXIII Practice on appeal

XXIII.10 Leave to appeal

XXIII.10.b Application

XXIII.10.b.vi Miscellaneous

Estates and trusts

IX Perpetuities and accumulations

IX.1 Rule against perpetuities

IX.1.c Application of rule

IX.1.c.xi Miscellaneous

Public law

IV Public utilities

IV.5 Regulatory boards

IV.5.c Practice and procedure

IV.5.c.iii Statutory appeals

IV.5.c.iii.B Grounds for appeal

IV.5.c.iii.B.1 Lack of jurisdiction

**Headnote**

Public utilities --- Regulatory boards — Practice and procedure — Statutory appeals — Grounds for appeal — Lack of jurisdiction  
Township and U Ltd. had entered into franchise agreements concerning U Ltd.'s right to deal with gas in and throughout

municipality — 1981 franchise agreement between parties governing transmission of gas in municipality was to expire in 2001 — Parties disagreed on effectiveness and binding nature of 1954 franchise agreement dealing with transmission of gas through municipality — Parties were unable to agree on terms of renewed agreement and brought applications before the Ontario Energy Board (“OEB”) for right to renew or extend terms respecting natural gas distribution — U Ltd. requested OEB to impose terms of 2000 agreement respecting gas transmission in and throughout municipality — U Ltd. sought consolidation in one agreement reflecting scope of 1954 and 1981 agreements — OEB accepted submissions of U Ltd. — Township appealed on basis that OEB lacked jurisdiction to impose terms of 1954 agreement as contained in 2000 agreement — Appeal dismissed — [Section 10\(1\) and \(2\) of Municipal Franchises Act](#) was to be read conjunctively — Upon establishment of jurisdiction under s. 10(1) of Act, OEB had wide discretion — 1981 agreement did not supersede 1954 agreement, as 1954 agreement dealt with gas transmission through township and 1981 agreement dealt with gas transmission within township — Renewability of 1954 agreement was before OEB — Municipal franchise was subject to rule against perpetuities — Nature of rights conferred by 1954 agreement was future contingent interest in land and rule against perpetuities applied — Impugned clause in 1954 agreement purporting to create future contingent interest in land extended beyond 21-year period prescribed by law of perpetuities and was thus void — 1954 agreement had expired by its terms in 1974 — OEB had requisite jurisdiction under s. 10(1) of Act to impose terms of 2000 agreement as both 1954 and 1981 agreements had expired.

Estates and trusts --- Perpetuities and accumulations — Rule against perpetuities — Application of rule — Miscellaneous issues

Township and U Ltd. had entered into franchise agreements concerning U Ltd.’s right to deal with gas in and throughout municipality — 1981 franchise agreement between parties governing transmission of gas in municipality was to expire in 2001 — Parties disagreed on effectiveness and binding nature of 1954 franchise agreement dealing with transmission of gas through municipality — Parties were unable to agree on terms of renewed agreement and brought applications before the Ontario Energy Board (“OEB”) for right to renew or extend terms respecting natural gas distribution — U Ltd. requested OEB to impose terms of 2000 agreement respecting gas transmission in and throughout municipality — U Ltd. sought consolidation in one agreement reflecting scope of 1954 and 1981 agreements — OEB accepted submissions of U Ltd. — Township appealed on basis that OEB lacked jurisdiction to impose terms of 1954 agreement as contained in 2000 agreement — Appeal dismissed — [Section 10\(1\) and \(2\) of Municipal Franchises Act](#) was to be read conjunctively — Upon establishment of jurisdiction under s. 10(1) of Act, OEB had wide discretion — 1981 agreement did not supersede 1954 agreement, as 1954 agreement dealt with gas transmission through township and 1981 agreement dealt with gas transmission within township — Renewability of 1954 agreement was before OEB — Municipal franchise was subject to rule against perpetuities — Nature of rights conferred by 1954 agreement was future contingent interest in land and rule against perpetuities applied — Impugned clause in 1954 agreement purporting to create future contingent interest in land extended beyond 21-year period prescribed by law of perpetuities and was thus void — 1954 agreement had expired by its terms in 1974 — OEB had requisite jurisdiction under s. 10(1) of Act to impose terms of 2000 agreement as both 1954 and 1981 agreements had expired.

## Table of Authorities

### Cases considered:

*Aldercrest Development Ltd. v. Hunter* (1970), [1970] 2 O.R. 562, 11 D.L.R. (3d) 439, 1970 CarswellOnt 597 (Ont. C.A.) — distinguished

*Fownes, Re* (1974), 10 N.B.R. (2d) 226, 1974 CarswellNB 202 (N.B. Q.B.) — referred to

*Garland v. Consumers’ Gas Co.* (2000), 2000 CarswellOnt 1408, 185 D.L.R. (4th) 536 (Ont. S.C.J.) — referred to

*Garland v. Consumers’ Gas Co.* (2001), 2001 CarswellOnt 4244, 19 B.L.R. (3d) 10, 152 O.A.C. 244, 57 O.R. (3d) 127, 208 D.L.R. (4th) 494 (Ont. C.A.) — referred to

*Sharpe v. Durrant* (1911), 55 Sol. Jo. 423 — referred to

*South Eastern Railway v. Associated Portland Cement Manufacturers (1900) Ltd.* (1909), [1910] 1 Ch. 12, [1908-10] All E.R. Rep. 353 (Eng. C.A.) — distinguished

*Sudbury (City) v. Union Gas Ltd.* (2001), 2001 CarswellOnt 1968, 18 M.P.L.R. (3d) 191, 54 O.R. (3d) 439 (Ont. C.A.) — referred to

*Thomas v. Thomas* (1902), 87 L.T. 58 (Eng. C.A.) — referred to

*Toronto Street Railway Arbitration, Re* (1892), 22 O.R. 374 (Ont. H.C.) — referred to

*Toronto Street Railway Arbitration, Re* (1893), 20 O.A.R. 125 — referred to

#### **Statutes considered:**

*Municipal Franchises Act*, R.S.O. 1990, c. M.55

Generally — referred to

s. 1 “franchise” — considered

s. 10 — referred to

s. 10(1) — considered

s. 10(2) — considered

APPEAL by township from decision of Ontario Energy Board to impose aspects of franchise agreement.

#### **Per Curiam:**

#### **The Issue**

1 This appeal is brought by the Township of Dawn-Euphemia (“Township”) with respect to a decision of the Ontario Energy Board (“OEB”) dated July 22, 2003. The issue raised is whether the OEB had jurisdiction to impose aspects of the 2000 Model Franchise Agreement allowing Union Gas Limited (“Union”) the right to construct and operate gasworks within the Township for the purposes of transmitting natural gas through the Township.

#### **The Background Facts and the Application before the OEB**

2 The Township is an important hub in the Province of Ontario with respect to storing, distributing and transmitting gas throughout southwestern Ontario. The Township and Union have, over the years, entered into several franchise agreements with respect to the rights of Union to distribute, store and transmit gas both in the Municipality for local use, and through the Municipality for wider distribution to other municipalities.

3 The 1981 Franchise Agreement (The 1981 Agreement) between the Township and Union dealing with the transmission of gas in the Municipality was to expire in 2001.

4 The parties are in disagreement about whether their 1954 Franchise Agreement (The 1954 Agreement) dealing with the transmission of gas through the Municipality was still in effect and binding upon the parties.

5 The parties were unable to agree on terms for a renewed franchise agreement. Therefore, both Union and the Township brought applications before the OEB seeking the right to renew or extend the terms with respect to the distribution of gas. Both Union and the Township later amended their original applications.

6 After the amendments, Union asked the OEB to impose the terms of the 2000 Model Franchise Agreement with respect

to the transmission of gas both in and through the Municipality. Union sought a consolidation of rights and obligations in one agreement reflecting the scope of both the 1954 and the 1981 Agreements.

7 The Township sought to amend the 2000 Model Franchise Agreement so that the order of the OEB would deal only with transmission of gas in, but not through, the Township. The Township wished to deal only with rights that were to expire contained in the 1981 Agreement.

### **The OEB Decision**

8 The OEB accepted the submissions of Union and imposed the terms of the 2000 Model Franchise Agreement. The 2000 Model Franchise Agreement consolidated the rights and obligations of the parties contained in both the 1954 and the 1981 Agreements with respect to transmission of gas in and through the Township.

### **The Position of the Parties in this Appeal**

9 It is the position of the appellant Township that the OEB lacked jurisdiction to impose the terms of the 1954 Agreement as contained in the 2000 model Franchise Agreement. First, the Township asserts that the 1954 Agreement was “superceded” by the 1981 Agreement. Second, it asserts that the application by Union did not squarely place the issue of the 1954 Agreement before the OEB, and therefore, the OEB lacked jurisdiction. Finally, with respect to the 1954 Agreement, counsel for the Township submits that it was a licence agreement only, and that it did not create an interest in land, precluding reliance upon the rule against perpetuities.

10 Counsel for the OEB concedes that in order for the OEB to have jurisdiction to enforce the terms of the 2000 Model Franchise Agreement dealing with transmission in and through the Township, both the 1954 and the 1981 Agreements had to have expired, or be soon to expire before the prerequisites of s. 10 (1) of the *Municipal Franchise Act* R.S.O. 1990, c. M. 55 (“MFA”) were met. It is not disputed that the 1981 Agreement had expired. Counsel for the OEB submits that the 1954 Agreement had expired in 1974, as its terms offended the rule against perpetuities. Therefore, the OEB had jurisdiction to make the renewal order.

11 In the alternative, it is the position of counsel for the OEB that if the 1954 Agreement is still in effect, and its terms do not offend the rule against perpetuities, then the OEB exceeded its jurisdiction and the 1954 Agreement would still be binding upon the parties. In that event, the OEB decision with respect to transmission of gas in the Township, reflected in the 2000 Model Franchise Agreement, would be valid and enforceable.

12 It is the position of Union that the OEB did not exceed its jurisdiction, because s.10 (2) of the MFA provides broad jurisdiction to impose terms and conditions in the interests of the public. Union suggests that sections 10 (1) and 10 (2) of the MFA may be read disjunctively. The Union submits that the OEB had the jurisdiction under s. 10(2) to consolidate rights under the existing 1954 Agreement, and the soon to expire 1981 Agreement in accordance with the terms of the 2000 Model Franchise Agreement. Union disagrees with the submission of counsel for the OEB that the rule against perpetuities applies to the 1954 Agreement.

### **Conclusions with Respect to the Issues Raised**

#### ***1) The Interpretation of s. 10 of the MFA***

13 Sections 10 (1) and (2) of the MFA provide:

#### **Application to Energy OEB for renewal, etc., of gas franchise**

10. (1) Where the term of a right referred to in clause 6 (1) (a), (b) or (c) that is related to gas or of a right to operate works for the distribution of gas has expired or will expire within one year, either the municipality or the party having the right may apply to the OEB for an order for a renewal of or an extension of the term of the right.

## **Powers of Energy Board**

(2) The OEB has and may exercise jurisdiction and power necessary for the purposes of this s.and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the OEB, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

14 We agree with the position of counsel for the OEB that sections 10 (1) and (2) of the MFA must be read conjunctively. Jurisdiction arises for the OEB to intervene when one of the conditions in ss. 10 (1) is met. Ss. 10 (2) describes the power of the OEB to impose terms and conditions in the interest of the public once the prerequisite threshold of jurisdiction is met under ss. 10 (1). We do not agree with Union’s assertion that the expiry of the 1981 Agreement provides the OEB with jurisdiction to impose terms and conditions outside of the 1981 Agreement.

15 Once jurisdiction is present under ss. 10 (1), of the MFA the discretion and powers of the OEB are broad, as confirmed in ss. 10 (2) of the MFA and the case law. See: *Garland v. Consumers’ Gas Co.* (2000), 185 D.L.R. (4th) 536 (Ont. S.C.J.) confirmed at (2001), 57 O.R. (3d) 127 (Ont. C.A.) at para 17, and *Sudbury (City) v. Union Gas Ltd.* (2001), 54 O.R. (3d) 439 (Ont. C.A.) at para 23.

### **2) Does the 1981 Agreement supercede the 1954 Agreement?**

16 The 1954 Agreement and the 1981 Agreement deal with distinct and discrete issues. The 1954 Agreement deals with gas transmission rights for gas lines that pass through the Township. The 1981 Agreement deals with local supply and transmission of gas in the Township. We conclude that the 1981 Agreement did not supercede, or affect the enforceability of the 1954 Agreement.

### **3) Was the renewability of the 1954 Agreement before the OEB?**

17 We accept the position of counsel for the OEB and Union that once Union requested enforcement of the terms of the 2000 Model Franchise Agreement, the issue of renewability of the terms of the 1954 Agreement was properly before the OEB. The Municipality made submissions to the OEB with respect to the enforceability and effect of the 1954 Agreement. Union was very clear in its submissions that the enforceability of the terms of the 1954 Agreement was squarely before the OEB.

18 The OEB’s decision carefully outlines the respective positions of the parties with respect to the 1954 Agreement, but does not rule on questions of jurisdiction, because that issue was not specifically raised by the parties. We conclude that the OEB had jurisdiction to consider the renewability of the 1954 Agreement.

### **4) Had the 1954 Agreement expired as it offended the Rule Against Perpetuities?**

19 The remaining issue in this appeal is whether the 1954 Agreement had expired as the term offended the rule against perpetuities. If it had expired, the OEB then had jurisdiction to deal with matters contained in the 1954 Agreement pursuant to ss. 10 (1) of the MFA.

20 Clause 8 of the 1954 Agreement provides:

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

[emphasis added]

21 Two issues are raised with respect to the perpetuity question. First, did the 1954 Agreement create an interest in land, as suggested by counsel for the OEB and counsel for Union, or was it a licence, as suggested by counsel for the Township? A licence agreement is not subject to the rule against perpetuities, but an interest in land is. Second, were the rights conveyed in the 1954 Agreement future contingent rights exceeding the twenty-one year perpetuity period, or were they vested rights?

22 The 1954 Agreement, by its terms, grants a franchise right. No one made submissions with respect to the nature of a franchise agreement in the context of this case, but it is relevant. The preamble to the 1954 Agreement states that Union Gas Ltd. requests the Corporation of the Township of Dawn to:

grant it a **franchise** or right of passing through the Municipality for the purpose of constructing, using and operating a line or lines and works for the transmission through the Municipality of gas not intended to be distributed from the said line or lines in the Municipality

(emphasis added).

23 Furthermore, the governing legislation is the *Municipal Franchises Act*. In s.1 of the MFA, “franchise” is defined as including “any right or privilege to which this Act applies”.

24 As the 1954 Agreement is characterized as a franchise agreement, it is helpful to look at the meaning of “franchise”, “licence” and “interest in land”.

25 “Franchise” has different meanings in different contexts. In the context of a government granting franchise rights to a utility company, Black’s Law Dictionary 7th ed., s.v. defines “special franchise” as:

A right conferred by the government, esp. to a public utility, to use property for a public use but for private profit.

26 In David M. Epstein ed. *Eckstrom’s Licensing in Foreign and Domestic Operations* 4th ed. (1998) as cited in Black’s Law Dictionary, 7th ed., the authors confirm that the franchise rights granted to a utility are more substantial than a mere licence:

When referring to government grants (other than patents, trademarks, and copyrights), the term franchise is often used to connote more substantial rights, whereas the term “license” connotes lesser rights. Thus, the rights necessary for public utility companies to carry on their operations are generally designated as franchise rights.

27 A licence is defined in Black’s Law Dictionary 7th ed., s.v. “licence” as:

A revocable permission to commit some act that would otherwise be unlawful; esp. an agreement (not amounting to a lease or profit à prendre) that it will be lawful for the licensee to enter the licensor’s land to do some act that would otherwise be illegal such as hunting game.

28 The essential qualities of a licence are that the rights are a personal arrangement between two parties, are revocable, and create no property interest in the land. A licence is not binding on a subsequent purchaser of land over which the licence is granted. See Bruce Ziff, *Principles of Property Law*, 2nd ed. (Scarborough: Carswell, 1996) at 252.

29 It appears clear that a franchise, in the context of a grant to a public utility, is greater than a licence. Is a franchise an interest in land?

30 An “interest” is defined in Black’s Law Dictionary, 7th ed., as:

2. A legal share in something; all or part of a legal or equitable claim to or right in property.

31 A contingent interest is defined in Black’s Law Dictionary, 7th ed., s.v. “contingent interest” as:

An interest that the holder may enjoy only upon the occurrence of a condition precedent.

32 First, the agreement is with Union Gas, but includes rights to “successors and assigns”. By its terms, the 1954 Agreement may be assigned, which precludes a finding that the 1954 Agreement was a personal licence between the contracting parties.

33 Second, the language of the 1954 Agreement is empowering and broad. It provides a grant of significant rights related to the land:

The Municipality does hereby grant, confer and assure unto the Company, its successors and assigns, full right, power, permission and consent to enter upon, use and occupy the highways of or under the jurisdiction of the Municipality to survey, construct, lay, maintain, inspect, alter, repair, renew, remove, replace, reconstruct, use and operate in, through, upon, under, along and across the same or any of them, a pipe line or pipe lines with any and all connections, apparatus, appliances, and attachments ...

34 Third, the 1954 Agreement anticipates a long term, permanent arrangement. It is not anticipated that the Agreement could be revoked requiring the transmission lines to be removed.

35 The courts have held that both easements and profits à prendre are interests in land and are therefore subject to the rule against perpetuities. See *Sharpe v. Durrant* (1911), 55 Sol. Jo. 423 and *Thomas v. Thomas* (1902), 87 L.T. 58 (Eng. C.A.). A municipal franchise has been held to be more than a “mere easement” as it is a right a company is granted by the legislature with the consent of the municipality and not just a private arrangement. See *Toronto Street Railway Arbitration, Re* (1892), 22 O.R. 374 (Ont. H.C.), affirmed at (1893), 20 O.A.R. 125.

36 We conclude that a municipal franchise creates an interest in land similar to an easement and a profit à prendre. A municipal franchise is therefore subject to the rule against perpetuities.

37 Counsel on behalf of the OEB asserts that the phrase “and for so long thereafter as the said line or lines are in actual use for the transportation of gas” in the 1954 Agreement confers a future contingent interest in land to Union that offends the rule against perpetuities. Union takes the position that the 1954 Agreement continues to be in effect, because its clause 8 confers an immediate vested interest in land that does not offend the rule against perpetuities.

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

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 a need arose, a process of 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 OEB and the local authorities, as the case may be.

40 The decisions relied upon by Union are not applicable to the facts of this case. *South Eastern Railway v. Associated Portland Cement Manufacturers (1900) Ltd.* (1909), [1908-10] All E.R. Rep. 353 (Eng. C.A.) involved a grant conferring an immediate vested right, not a contingent future right. So too, the decision of *Aldercrest Development Ltd. v. Hunter*, [1970] 2 O.R. 562 (Ont. C.A.) involved an immediate vested grant of an interest in land.

## Conclusion

41 For these reasons, we conclude that because clause 8 of the 1954 Agreement purports to grant a future contingent interest in land that extends beyond the twenty-one year period prescribed by the law of perpetuities, the clause is void. (See *Fownes, Re* (1974), 10 N.B.R. (2d) 226 (N.B. Q.B.)). The 1954 Agreement had, therefore, expired by its terms in 1974.

42 We concur with counsel for the OEB that it had jurisdiction to impose the terms and conditions of the 2000 Model Franchise Agreement as both the 1954 and 1981 Agreements had expired. The OEB had the requisite jurisdiction conferred by s.10(1) of the MFA. The appeal is, therefore, dismissed.

**Costs**

43 In their submissions counsel agreed that a reasonable figure for costs to the successful party would be \$5,000.00, inclusive of GST and disbursements. The Township shall pay Union costs in that amount. The OEB is not entitled to costs by the terms of their governing legislation.

*Appeal dismissed.*

# Tab 5

*EB-2021-0269 Decision and Order, EPCOR Natural Gas Limited Partnership, February 17, 2022*

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## **DECISION AND ORDER**

**EB-2021-0269**

### **EPCOR NATURAL GAS LIMITED PARTNERSHIP**

**Application for Approval of Municipal Franchise Agreements with each of the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth and Amendments to the Certificates of Public Convenience and Necessity for each of the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth**

**BY DELEGATION, BEFORE: Pascale Duguay**  
Manager  
Natural Gas

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**February 17, 2022**

# 1 OVERVIEW

Through this Decision and Order, the Ontario Energy Board (OEB) approves an application filed by EPCOR Natural Gas Limited Partnership (ENGLP) for: 1) amendments to the certificate of public convenience and necessity (certificate) for each of the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth (the municipalities), and 2) orders approving municipal franchise agreements with the municipalities and directing and declaring that the assent of the municipal electors of the municipalities is not necessary.

New certificates are being issued conditional upon ENGLP receiving a decision and order granting leave to construct for the “Brockton Project” in a future proceeding before the OEB. In June of 2021, the Ontario government announced certain projects that are eligible to receive funding under Phase 2 of its Natural Gas Expansion Program to expand access to natural gas across the province. The Brockton Project was one of the projects selected for funding by the Ontario government.<sup>1</sup>

With respect to the franchise agreements, the OEB’s approval is conditional on ENGLP refiling an amended copy of each franchise agreement with the OEB, in accordance with the findings set out below.

The effective dates of each certificate and franchise agreement shall be the respective date upon which ENGLP has satisfied the conditions set out in this Decision and Order.

<sup>1</sup> O. Reg. 451/21: Expansion of Natural Gas Distribution Systems, made under the *Ontario Energy Board Act, 1998*.

## 2 CONTEXT AND PROCESS

ENGLP filed the application on October 20, 2021, under sections 8 and 9 of the *Municipal Franchises Act*. The application was for the following relief:

1. An order of the OEB approving ENGLP's natural gas franchise agreements with the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth.
2. An order of the OEB directing and declaring that the assent of the municipal electors of the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth is not necessary in relation to granting the natural gas franchise agreements.
3. An order of the OEB amending ENGLP's existing certificates for the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth.

The OEB issued a Notice of Hearing on November 4, 2021. Enbridge Gas Inc. (Enbridge Gas), JAKO Developments Inc., and the Municipality of Brockton were each granted intervenor status. The OEB proceeded by way of a written hearing.

Enbridge Gas and JAKO Developments Inc. filed interrogatories on December 6, 2021, and ENGLP responded to them on December 13, 2021.

Enbridge Gas and OEB staff filed submissions on January 12, 2022. ENGLP filed a reply submission on January 19, 2022.

### 3 APPLICATION

ENGLP is a gas distributor, and is a corporation incorporated under the laws of the Province of Ontario, with offices in the Town of Aylmer and the Municipality of Kincardine.

ENGLP currently holds limited certificates for the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth.<sup>2</sup> The certificates are limited in the sense that they authorize ENGLP only to construct pipeline facilities within the municipalities in order to supply gas to the Municipality of Arran-Elderslie, the Municipality of Kincardine and the Township of Huron-Kinloss.

Enbridge Gas is also a gas distributor that currently holds certificates for the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth.<sup>3</sup>

JAKO Developments Inc. is developing a subdivision located 1,800 metres east of ENGLP's proposed certificate area for the Municipality of West Grey. Through its interrogatories, JAKO Developments Inc. requested that ENGLP expand its current application to include the subdivision.

#### 3.1 Request for Municipal Franchise Agreements

ENGLP applied to the OEB for approval of its franchise agreements with each of the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth.

In their submissions, OEB staff and Enbridge Gas noted that, as filed, the franchise agreements and related by-laws were executed by ENGLP and the municipalities prior to receiving the OEB's approval of their terms and conditions. Section 9 of the *Municipal Franchises Act* provides, in part, that no by-law granting the right to construct or operate works for the distribution of gas shall be submitted to the municipal electors for their assent unless the terms and conditions upon which and the period for which such right is to be granted have first been approved by the OEB.

OEB staff and Enbridge Gas submitted that, notwithstanding their execution, the franchise agreements should not take effect until their terms and conditions have first

<sup>2</sup> Each of ENGLP's existing certificates were issued under EB-2018-0263

<sup>3</sup> EB-2009-0090, EB-2007-0819 and EB-2008-0081 respectively

been approved by the OEB. In its reply submission, ENGLP accepted the position taken by OEB staff and Enbridge Gas on this point.

Enbridge Gas also noted that the terms and conditions of the executed franchise agreements contain a departure from the terms and conditions of the [Model Franchise Agreement](#) (Model Agreement). Specifically, each of the franchise agreements omits paragraph 4(b) of the Model Agreement.

Paragraph 4 of the Model Agreement discusses the duration of the agreement and renewal procedures. Paragraphs 4(a) and 4(b) of the Model Agreement are set out as follows:

a. If the Corporation has not previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law.

or

b. If the Corporation has previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law provided that, if during the 20-year term this Agreement, the Model Franchise Agreement is changed, then on the 7th anniversary and on the 14th anniversary of the date of the passing of the By-law, this Agreement shall be deemed to be amended to incorporate any changes in the Model Franchise Agreement in effect on such anniversary dates. Such deemed amendments shall not apply to alter the 20-year term.

Enbridge Gas submitted that, given that each of the municipalities has already been receiving gas distribution services (from Enbridge Gas and its predecessors), paragraph 4(b) is the condition that is applicable to ENGLP's franchise agreements with the municipalities.

In its reply submission, ENGLP stated that it had interpreted paragraph 4(a) to be the applicable condition, as none of the three municipalities had previously received gas distribution services from ENGLP (or its predecessors). ENGLP submitted that the OEB should approve the franchise agreements as filed but stated that, if the OEB finds paragraph 4(b) necessary, the OEB should proceed to approve the franchise agreements on the condition that the signatories amend each of their agreements to replace paragraph 4(a) with 4(b), and thereafter file the amended agreements with the OEB.

### 3.2 Request for Certificates of Public Convenience and Necessity

ENGLP currently holds what is commonly referred to as “limited” certificates for each of the municipalities. The certificates are limited because they authorize ENGLP to only construct pipeline facilities within the municipalities in order to supply gas to the Municipality of Arran-Elderslie, the Municipality of Kincardine and the Township of Huron-Kinloss.<sup>4</sup>

ENGLP applied to amend the authorization that it holds (under its existing certificates) to construct works to supply natural gas to the areas comprising the Brockton Project. In its application, ENGLP stated, specifically:

In terms of the request for amended [certificates] for the Municipality of Brockton, the Municipality of West Grey and the Township of Chatsworth, ENGLP proposes that the OEB follow the same process as in proceeding EB-2020-0232 when issuing new CPCNs for the Project service areas. In that proceeding the OEB issued ENGLP a new certificate for the expanded service area which cancelled and superseded ENGLP’s prior certificate. Furthermore, the OEB issued a new certificate to Enbridge Gas which excluded the new service areas granted to ENGLP and cancelled and superseded the prior certificate.

Accordingly, the new certificates, if approved, would supersede the existing certificates for each of the Municipality of Brockton, the Municipality of West Grey and the Township of Chatsworth.

In its submission, OEB staff identified an inaccuracy with respect to the proposed certificates for the Municipality of West Grey and the Township of Chatsworth. OEB staff submitted that ENGLP should file amended versions of the certificates for the OEB’s consideration. In its reply submission, ENGLP confirmed the accuracy of OEB staff’s observation, and provided revised draft certificates and service territory maps for the Municipality of West Grey and the Township of Chatsworth. ENGLP submitted that the revised draft certificates filed with its reply submission, which reflected the amendments proposed by OEB staff, should be approved by the OEB as part of the current proceeding.

Through interrogatories, JAKO Developments Inc. requested that ENGLP expand the east border of its proposed service area for the Municipality of West Grey by four

<sup>4</sup> ENGLP certificates EB-2018-0263

kilometres to Mulock Road to include its subdivision development.<sup>5</sup> In an interrogatory response, ENGLP stated that its ability to connect customers outside of the Brockton Project area would be subject to the EBO 188 Guidelines under which a standard test for economic feasibility would be required for these connections. ENGLP further indicated that it does not have sufficient detail to complete a financial feasibility analysis and would also need to confirm that it would be best suited to service these additional areas.

OEB staff and Enbridge Gas each submitted that the OEB should not expand the service area as requested by JAKO Developments Inc. as part of this proceeding. OEB staff further stated that the OEB should first confirm whether any additional service area requests would require an application for an amended certificate upon completion of a financial feasibility analysis and confirmation that ENGLP would be in the best position to serve that additional area. Enbridge Gas further submitted that any service to JAKO Developments Inc.'s subdivision development, or any other area, should be based on a review of the costs by each utility interested and able to provide service to that area.

In its reply submission, ENGLP agreed that a financial feasibility analysis should be completed for additional service areas that are not part of the current application. ENGLP accepted that the additional expansion requested by JAKO Developments Inc. should be excluded from the certificate at this time.

Enbridge Gas noted that the facilities proposed by ENGLP to supply gas within the municipalities will be located on territory that is already part of certificates held by Enbridge Gas and that, as long as ENGLP's expanded certificate rights within the municipalities are limited to providing service to specific customers within specific lots and concessions for which ENGLP has OEB approval to serve, there should be limited impact on Enbridge Gas's existing ratepayers given the nature of Enbridge Gas's facilities in these areas. Enbridge Gas stated, however, that only proposed certificates for the Municipality of West Grey and the Township of Chatsworth appear to identify specific areas in which ENGLP proposes to construct facilities. Enbridge Gas noted that the proposed certificate for the Municipality of Brockton covers all of the municipality except for a small part in which Enbridge Gas currently has facilities in place, even though ENGLP's proposed facilities (to Enbridge Gas's knowledge) do not cover the whole municipality (excluding the area where Enbridge Gas has facilities in place). Enbridge Gas stated that given the OEB's recent practice of restricting service areas covered by certificates to specific lots and concessions in which proposed facilities will be located, Enbridge Gas believes that leave to construct (LTC) type information is

<sup>5</sup> ENGLP's responses to JAKO Developments Inc.

required in order to best describe the certificate coverage areas. Enbridge Gas submitted that the OEB should deny ENGLP's certificate request for the Municipality of Brockton and reconsider it as part of a future LTC application by ENGLP so that the specific service areas (described using metes and bounds or some other suitable method) can be properly identified.

In its submission, OEB staff took the view that the OEB has the necessary information to grant ENGLP's certificate (and franchise agreement) requests in this proceeding. OEB staff also submitted, however, that the OEB's approval of the certificates should be conditional upon ENGLP obtaining the authorization to construct the Brockton Project in a future LTC proceeding before the OEB, in order to ensure that any awarded certificates are not unused.

ENGLP first addressed Enbridge Gas's concern in an interrogatory response.<sup>6</sup> ENGLP confirmed that its proposed certificate for the Municipality of Brockton includes the areas required to bring service to customers for the Brockton Project, and that (through the authorizations granted in the South Bruce Expansion Applications proceeding) ENGLP holds the certificates for and provides service in the Municipality of Kincardine and Township of Arran-Elderslie. ENGLP submitted that, with the infrastructure to be developed as part of the Brockton Project, there will be a small rural area within the Municipality of Brockton (for which Enbridge Gas currently has certificate authorization) that will be "directly sandwiched" between ENGLP's natural gas infrastructure. ENGLP submitted that, given the circumstances, it will be in the best position to provide service to the customers in this area through future expansions.

In its reply submission, ENGLP reiterated its position that the information provided regarding the details and location of its proposed facilities is sufficient, and that further details would be provided in its LTC application for the Brockton Project. ENGLP stated that Enbridge Gas's proposal that the OEB deny ENGLP's certificate request for the Municipality of Brockton in this proceeding, and that the OEB reconsider it as part of the LTC, is unreasonable and unnecessary. ENGLP also submitted that it would be agreeable if the OEB were to approve the certificates conditional upon ENGLP receiving leave to construct for the Brockton Project.

<sup>6</sup> ENGLP's response to Enbridge Gas-4(b)

## 4 FINDINGS

I find that it is in the public interest to approve the application, for the reasons, and subject to the conditions, set out in my findings below.

### 4.1 Municipal Franchise Agreements

The franchise agreements filed with ENGLP's application depart from the Model Agreement at paragraph 4. Considering that each municipality has already been receiving gas distribution services, I agree with Enbridge Gas that paragraph 4(b) of the Model Agreement is the applicable clause to the new franchise agreements between ENGLP and each of the municipalities. I am approving the franchise agreements at this time, on the condition that the parties to each franchise agreement amend their respective agreement by reinserting paragraph 4(b). I expect ENGLP to thereafter file the amended franchise agreements with the OEB. The franchise agreements shall take effect on the dates that they are amended by the parties to include paragraph 4(b).

Natural gas distributors are expected to follow the form of the Model Agreement when filing applications for the approval of franchise agreements, unless there is a compelling reason for any deviation. In accordance with the Model Agreement, franchise agreements should, in all cases, contain both paragraphs 4 (a) and 4 (b), and the factual circumstances underpinning the agreement will, on a case by case basis, be determinative of which paragraph will apply. In other words, distributors do not need to delete the inoperative paragraph.

I also note that ENGLP filed its application after the franchise agreements had already been executed with the municipalities, and after the municipalities had already signed the municipal by-laws approving the franchise agreements. In the future, applications for approvals under section 9 of the *Municipal Franchises Act* should be filed with the OEB prior to the applicant and municipality having executed the proposed franchise agreement.

### 4.2 Certificates of Public Convenience and Necessity

I find that it is in the public interest to grant new certificates to ENGLP for each of the municipalities, conditional on the certificates taking effect when ENGLP obtains a decision and order granting leave from the OEB to construct the Brockton Project.

The certificates shall be granted in accordance with the amended drafts that were filed in ENGLP's reply submission (which include the necessary revisions to the certificates for the Municipality of West Grey and the Township of Chatsworth).

Enbridge Gas noted that, to its knowledge, ENGLP's proposed certificate for the Municipality of Brockton covers areas where ENGLP's proposed facilities are not currently expected to be located and that, therefore, the OEB should defer consideration of the certificate request for the Municipality of Brockton until ENGLP's files its LTC application. Having considered Enbridge Gas's concern, I however find that the information submitted as part of ENGLP's application in this proceeding to be consistent with its proposal to the Ontario government to obtain funding for the Brockton Project.<sup>7</sup> As such, I agree with ENGLP and OEB staff that the OEB has the necessary information to approve ENGLP's certificate requests in this proceeding. I also note that ENGLP's existing and proposed natural gas infrastructure surrounds the areas covered in its requested certificate for the Municipality of Brockton. As a result, I also agree with ENGLP that it would be in the best position to serve the small area in the Municipality of Brockton as the small area would be located between ENGLP's existing and proposed natural gas infrastructure.

With respect to the request from JAKO Developments Inc. to include its subdivision development in ENGLP's service area for the Municipality of West Grey, I agree with OEB staff and Enbridge Gas that any additional expansion of service area in the municipalities should be subject to the completion of a financial feasibility analysis and confirmation of the utility best positioned to serve the additional area. I note that this was not disputed by ENGLP and would be in the best interest of JAKO Developments Inc. I also note that unlike the small area in the Municipality of Brockton that would be located between ENGLP's existing and proposed natural gas infrastructure, a feasibility analysis is needed here because the subdivision development would be located 1800 metres east of ENGLP's proposed certificate area for the Municipality of West Grey and within the area currently covered by Enbridge Gas's certificate. To that point, I note that

Enbridge Gas stated that subject to gathering further information and conducting the appropriate feasibility analysis, it would be competitive to provide the service needed for this or any other development in this area. Any requests by ENGLP, Enbridge Gas, or any other natural gas distributor to serve customers in service areas within the municipalities that are outside of the service areas included in the certificates granted in

<sup>7</sup> EB-2019-0255, ENGLP's proposal for the Brockton Project, filed November 24, 2020

this proceeding should be made in a new application to the OEB. Such an application could be dealt with on an expedited basis were the applicant to include a financial feasibility analysis and provide evidence indicating that another gas distributor would not be contesting the application (i.e., confirmation that the parties agree which distributor is best positioned to serve the additional area).

ENGLP's new certificates are being issued with this Decision and Order, but they will not become effective until the date that ENGLP receives a decision and order granting leave to construct for the Brockton Project. The certificates are attached as Schedule A, C and E for the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth respectively. The certificates will enable ENGLP to bring natural gas service to unserved areas within each of the municipalities, in accordance with the Brockton Project, subject to ENGLP receiving a decision and order granting leave to construct for the Brockton Project.

Upon their effective dates, ENGLP's new certificates will supersede ENGLP's current certificates for the municipalities.

New certificates, attached as Schedule G, H and I to this Decision and Order, are also granted to Enbridge Gas for the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth. Under these new certificates, Enbridge Gas's authorization to serve the municipalities will exclude the service areas granted to ENGLP in this proceeding. These new certificates will not become effective until the date that ENGLP receives a decision and order granting leave to construct for the Brockton Project and, upon their effective dates, the new certificates will supersede Enbridge Gas's current certificates for the municipalities.

## 5 ORDER

### IT IS ORDERED THAT:

1. The terms and conditions upon which, and the period for which, the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth are each, by by-law, to grant to EPCOR Natural Gas Limited Partnership 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, in each respective municipality, as set out in the Model Franchise Agreement, are approved. The franchise agreements shall take effect on the dates that they are amended to include paragraph 4(b), as set out above in this Decision and Order.
2. The assent of the municipal electors of each of the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth to the by-laws is not necessary.
3. Certificates of public convenience and necessity are granted to EPCOR Natural Gas Limited Partnership to construct works or supply natural gas within the Municipality of Brockton (attached at Schedule A), the Municipality of West Grey (attached at Schedule C), and the Township of Chatsworth (attached at Schedule E). EPCOR Natural Gas Limited Partnership's service territory in each of the municipalities is limited to the areas set out in the maps attached at Schedules B, D and F, respectively. The certificates of public convenience and necessity shall take effect on the date that EPCOR Natural Gas Limited Partnership has a decision and order granting leave to construct for the Brockton Project. On their effective dates, EPCOR Natural Gas Limited Partnership's new certificates will supersede its existing certificates for the Municipality of Brockton, the Municipality of West Grey, and the Township of Chatsworth (EB-2018-0263).
4. Certificates of public convenience and necessity are granted to Enbridge Gas Inc. to construct works or supply natural gas within the Municipality of Brockton (attached at Schedule G), the Municipality of West Grey (attached at Schedule H), and the Township of Chatsworth (attached at Schedule I). The certificates of public convenience and necessity shall take effect on the date that EPCOR Natural Gas Limited Partnership has a decision and order granting leave to construct the Brockton Project. On their effective dates, Enbridge Gas Inc.'s new certificates will

supersede its existing certificates for the municipalities (EB-2009-0090, EB-2007-0819 and EB-2008-0081).

5. EPCOR Natural Gas Limited Partnership shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

**DATED** at Toronto February 17, 2022

**ONTARIO ENERGY BOARD**

Pascale Duguay  
Manager, Natural Gas

# Tab 6

1957 Franchise Agreement, Enbridge Gas Inc. Application, Schedule B

AGREEMENT made in duplicate this <sup>13</sup>~~14~~ day of December,

A.D. 1957.

B E T W E E N:

THE CORPORATION OF THE COUNTY OF ESSEX,  
hereinafter called "the Corporation"

- OF THE FIRST PART - 2

A N D

UNION GAS COMPANY OF CANADA, LIMITED,  
hereinafter called "the Company"

- OF THE SECOND PART -

WHEREAS the Company has requested The Corporation of the County of Essex (hereinafter called "the Municipality") to grant it a franchise or right to lay down, maintain and use pipes and other necessary works for the transmission of gas on, in, under, along or across any highway under the jurisdiction of the said Council for the purpose of passing through the Municipality in the continuation of a line, work or system which is intended to be operated in or for the benefit of another municipality and is not used or operated in the Municipality for any other purpose except that of supplying gas in a township to persons whose land abuts on a highway along or across which gas is carried or conveyed or to persons whose land lies within such limits as the said Council by by-law passed from time to time at the request of the Company determines should be supplied with such service.

AND WHEREAS the Council of the Corporation has by By-law passed on the <sup>13</sup>~~14~~ day of December, A.D. 1957, granted the said franchise from and after the date of the execution of this Agreement and has authorized and empowered the Warden and Clerk of the Corporation to execute this Agreement and to affix the corporate seal thereto.

NOW THEREFORE THIS AGREEMENT made in consideration of the premises and of the performance of the covenants and obligations hereinafter contained on the part of the Company, WITNESSETH as follows:-

1. Full right, power, permission and consent are hereby granted, conferred and assured unto Union Gas Company of Canada, Limi-

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ted, its successors and assigns, to keep, use, operate, repair, maintain, remove, abandon, replace, reconstruct, alter and extend its existing lines, pipes and works in the highways under the jurisdiction of the Council of the Municipality and to lay down, maintain and use pipes and other necessary works for the transmission of gas on, in, under, along or across any highway under the jurisdiction of the said Council for the purpose of passing through the Municipality in the continuation of a line, work or system which is intended to be operated in or for the benefit of another municipality and is not used or operated in the Municipality for any other purpose except that of supplying gas in a township to persons whose land abuts on a highway along or across which gas is carried or conveyed or to persons whose land lies within such limits as the said Council by by-law passed from time to time at the request of the Company determines should be supplied with such service.

2. 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.

3. The said pipelines shall be laid across the said highways in locations approved by the Road Superintendent of the County of Essex for the time being or such other officer as may be appointed by the Council for that purpose, and the charges of such Road Superintendent or other officer attending to give such approval shall be paid by the Company.

4. All pipelines shall be placed underground, if required by the officer of the Corporation and shall be so constructed as not to obstruct or interfere with the use of the highway or with any sewers, water-pipes, drains or ditches thereon or therein, or with works of improvement or repair thereof or with the roads or bridges to property fronting thereon.

5. Upon the laying down of the said pipelines or other works hereby authorized or taking any of the same up, or moving the same from place to place in any highway, the highway shall be left unbroken on its surface and in as safe and good a state of repair as it was before

it was entered upon or opened.

6. In the event that the Corporation in pursuance of its statutory powers shall deem it expedient to alter the construction of any highway or of any municipal drain, ditch, bridge, culvert or other municipal works or improvements thereon or therein and in the course thereof it shall become reasonably necessary that the location of a main, line, pipe or works of the Company laid or operated under this By-law should be altered at a specified point to facilitate the work of the Corporation, then upon receipt of reasonable notice in writing from the Clerk of the Corporation specifying the alteration desired, the Company shall, at its own expense, alter or re-locate its main, pipe, line or works at the point specified.

7. The Company shall and does hereby at all times indemnify and save harmless the Municipality from and against all loss, damage, injury or expense which the Municipality may bear, suffer or be put to by reason of any damage to property or injury to persons caused by the construction, repair, maintenance, removal or operation by the Company of any of its mains, pipes, lines or works in the Municipality unless such loss, damage, injury or expense is occasioned by Act of God or by the act, neglect, or default of some person, firm or corporation other than the Company, its servants, contractors, sub-contractors, agents or employees.

8. This agreement shall enure to the benefit of and be binding upon the parties hereto, their successors and assigns.

IN WITNESS WHEREOF the said parties have caused to be affixed hereto their respective corporate seals duly attested by the hands of their proper officers in that behalf.

SIGNED, SEALED AND DELIVERED



APPROVED AS IN FORM  
*[Signature]*

THE CORPORATION OF THE COUNTY OF ESSEX  
[Original Signed By Lawrence Brunet]

\_\_\_\_\_  
[Original Signed By] Warden.

\_\_\_\_\_  
Clerk.

UNION GAS COMPANY OF CANADA, LIMITED  
[Original Signed By]  
Vice-President and General Manager.

\_\_\_\_\_  
[Original Signed By] Assistant Secretary.

# Tab 7

Certificate of Public Convenience and Necessity, Enbridge Gas Inc. Application, Schedule C

ONTARIO FUEL BOARD

IN THE MATTER OF The Municipal Franchises Act, Chapter 249, R.S.O. 1950 Section 8 as amended, and

IN THE MATTER OF an Application by Ontario Natural Gas Storage and Pipelines Limited to the Ontario Fuel Board for approval of the Board to construct works to supply and/or to supply gas in the under-mentioned municipalities

- The Corporation of the County of Essex ✓
- The Corporation of the County of Kent
- The Corporation of the County of Lambton
- The Corporation of the County of Middlesex
- The Corporation of the County of Perth
- The Corporation of the County of Waterloo
- The Corporation of the County of Wellington
- The Corporation of the County of Wentworth
- The Corporation of the County of Halton
- The Corporation of the Town of Ojibway
- The Corporation of the Township of Sandwich West
- The Corporation of the Township of Sandwich East
- The Corporation of the Township of Maidstone
- The Corporation of the Township of Rochester
- The Corporation of the Township of Tilbury North
- The Corporation of the Township of Dover
- The Corporation of the Township of Chatham
- The Corporation of the Township of Sombra
- The Corporation of the Township of Dawn
- The Corporation of the Township of Caradoc
- The Corporation of the Township of London
- The Corporation of the Township of Westminster
- The Corporation of the Township of Blanshard
- The Corporation of the Township of Downie
- The Corporation of the Township of North Dumfries
- The Corporation of the Township of Waterloo
- The Corporation of the Township of Guelph
- The Corporation of the Township of West Flamborough
- The Corporation of the Township of Trafalgar

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B E F O R E:

A. R. Crozier, Chairman, and ) Monday, the 6th day  
 W. R. Howard, Commissioner ) of January, 1958.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

UPON the Application of Ontario Natural Gas Storage and Pipelines Limited for approval of the Ontario Fuel Board to construct works to supply and to supply gas to any person engaged in the transmission and/or distribution of gas in each or any of the municipalities referred to in the style of cause in this Application pursuant to Section 8 of The Municipal Franchises Act, R.S.O. 1950, Chapter 249, as amended; upon the hearing of such Application by the Board at its Offices, 4 Richmond Street, East, in the City of Toronto and Province of Ontario on the 6th day of January, 1958, after due Notice of such Hearing had been given as directed by the Board; in the presence of

- 2 -

Counsel for the Applicant and in the presence of F. R. Palin, Esquire, C.A., Assistant General Manager of and for the Applicant, Sheppard McCallum, Esquire, Reeve of the Township of Sombra, Norman Wilson and Byron Young, President and Secretary respectively of Lambton Gas Storage Association; upon hearing the evidence adduced, the exhibits filed and Counsel aforesaid;

THIS BOARD DOTH CERTIFY, pursuant to Section 8 of The Municipal Franchises Act, R.S.O. 1950, Chapter 249, as amended, that Public Convenience and Necessity appear to require that approval of the Ontario Fuel Board shall be and the same is hereby given to Ontario Natural Gas Storage and Pipelines Limited to construct works to supply and to supply gas to any person engaged in the transmission and/or distribution of gas in all or any of the following municipalities, namely:-

County of Essex	Township of Tilbury North
County of Kent	Township of Dover
County of Lambton	Township of Chatham
County of Middlesex	Township of Sombra
County of Perth	Township of Dawn
County of Waterloo	Township of Caradoc
County of Wellington	Township of London
County of Wentworth	Township of Westminster
County of Halton	Township of Blanshard
Town of Ojibway	Township of Downie
Township of Sandwich West	Township of North Dumfries
Township of Sandwich East	Township of Waterloo
Township of Maidstone	Township of Guelph
Township of Rochester	Township of West Flamborough
	Township of Trafalgar.

AND THIS BOARD DOTH further Order and Direct that the costs of this Application fixed at the sum of \$145.00 shall be paid forthwith by the Applicant to the Board.

DATED at Toronto, Ontario, this 8th day of January, 1958.

ONTARIO FUEL BOARD

"A. R. Crozier"  
Chairman

"W. R. Howard"  
Commissioner

ONTARIO FUEL BOARD

IN THE MATTER OF The Municipal Franchises Act, Chapter 249, R.S.O. 1950, Section 8 as amended, and

IN THE MATTER OF an Application by Ontario Natural Gas Storage and Pipelines Limited to the Ontario Fuel Board for approval of the Board to construct works to supply and/or to supply gas in the under-mentioned municipalities

The Corporation of the County of Essex,  
et al

BEFORE:

A. R. Crozier, Chairman, and

W. R. Howard, Commissioner

Monday, the 6th day of January, 1958.

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CERTIFICATE OF PUBLIC CONVENIENCE  
AND NECESSITY

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McNevin, Gee & O'Connor,  
Barristers, etc.,  
Bank of Montreal Bldg.,  
CHATHAM, Ontario.

# Tab 8

Enbridge Gas Inc. IR Response to Staff.1(a), Staff.1(d), Staff.1(e), Staff.3

ENBRIDGE GAS INC.

Response to Interrogatory from  
Ontario Energy Board Staff

Reference: Application, page 2, paragraph 4  
 Application, page 3, paragraph 15  
 Application, page 4, paragraph 17  
 Schedule B: By-Law Number 1270, pages 1-2  
 Schedule B: 1957 Agreement, pages 1-3  
 Schedule D: OEB Decision and Order EB-2019-0172  
 Dawn-Euphemia (Township) v. Union Gas Ltd., 2004 Carswell Ont 3909,  
 paras 36 and 38.

Preamble:

Enbridge Gas stated that it currently has a “perpetual” franchise agreement with the County of Essex dated December 11, 1957 (1957 franchise agreement). The 1957 franchise agreement is not based on the OEB’s 2000 Model Franchise Agreement (model franchise agreement). Details in respect of processes relating to as-built drawings, terms for completing emergency work, insurance, and alternative easements notifications that are standard components of the model franchise agreement are not also found in the 1957 franchise agreement.

Enbridge Gas stated that a new agreement, based on the model franchise agreement, is required to satisfy the requirements under the *Municipal Franchises Act* for the use of the rights of way of the highways in the County of Essex and would provide updated language regarding insurance and relocations.

Questions:

- a) Please discuss how the model franchise agreement is needed to satisfy the requirements under the *Municipal Franchises Act* for the use of the rights of way of the highways in the County of Essex.
- b) Please describe operational and other challenges, if any, when dealing with matters relating to as-built drawings, terms for completing emergency work, insurance, and alternative easements, for example, that are not detailed in the 1957 franchise agreement (as they are in the model franchise agreement).
- c) Please advise if Enbridge Gas’s use of the right of way of the highways in the County of Essex has been negated or hindered in the absence of there being a model franchise agreement between the parties and, if it has been, explain how.
- d) Please explain why the application was filed pursuant to section 10 of the *Municipal Franchises Act*, given that Enbridge Gas views the 1957 franchise agreement to be “perpetual” (i.e., having no expiry date).
- e) Please explain why Enbridge Gas did not file this application at an earlier time, such as in 2004 following the Ontario Divisional Court’s decision in *Dawn-Euphemia (Township) v. Union Gas*

Ltd., or even more recently in 2019, for example, with Enbridge Gas's EB-2019-0172 leave to construct application?

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Response:

- a) The *Municipal Franchises Act* requires that there be a franchise agreement between the municipal corporation and the gas company serving that municipality. Section 3 of the *Municipal Franchises Act* states:

*3 (1) A municipal corporation shall not grant to any person nor shall any person acquire the right to use or occupy any of the highways of the municipality for a public utility or to construct or operate any part of a public utility in the municipality unless a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted or acquired has been assented to by the municipal electors.*

Section 9 of the *Municipal Franchises Act* states that no by-law granting "the right to construct or operate works for the distribution of gas", amongst other things, "shall be submitted to the municipal electors for their assent unless the terms and conditions upon which and the period for which such right is to be granted, renewed or extended have first been approved by the Ontario Energy Board" (OEB). The 1957 franchise agreement with the County of Essex only applies to the transmission of gas (with specific exceptions). Given the current extent of distribution pipelines within areas under the jurisdiction of the County of Essex (see map filed at Exhibit B.Essex.1), a Model Franchise Agreement needs to be put in place to ensure that the requirements identified in the *Municipal Franchises Act* regarding the distribution of gas are properly and consistently addressed.

The OEB has directed that the current 2000 Model Franchise Agreement be used as the model for such agreements and has reinforced this direction in its decisions and orders associated with franchise agreement renewals.<sup>1</sup> The OEB has also denied proposals to amend the Model Franchise Agreement.<sup>2</sup>

The Model Franchise Agreement outlines the terms that the OEB finds reasonable under the *Municipal Franchises Act*. The OEB has previously advised natural gas distributors that they are expected to follow the form of the Model Franchise Agreement when filing applications for the approval of franchise agreements unless there is a compelling reason for deviation.

The OEB adopted the Model Franchise Agreement following significant input from interested stakeholders, including the Association of Municipalities of Ontario and natural gas distributors,

<sup>1</sup> For example, EB-2022-0127 - Decision and Order - Fort Erie Franchise Agreement, Decision and Order, June 30, 2022

<sup>2</sup> For example, EB-2017-0232 - EPCOR Natural Gas - Decision and Order, December 13, 2018; EB-2010-0188 – Enbridge Gas Distribution – Decision and Order, July 8, 2010

to provide guidance to applicants and municipalities regarding the standard terms of a franchise agreement and as a tool to efficiently administer the many franchise agreements across the Province.<sup>3</sup> As the OEB indicates in its Natural Gas Facilities Handbook, 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*. The OEB notes in the Natural Gas Facilities Handbook and in past decisions and orders regarding franchise agreements that it expects that franchise agreements will be based on the Model Franchise Agreement, unless there is a compelling reason for deviation.

As noted, the vast majority of the many Enbridge Gas' pipelines located within the County of Essex have been constructed and are operated as distribution pipelines. As has been identified in the review of the Panhandle Expansion project<sup>4</sup>, significant growth is forecast to occur across the entire Panhandle System with concentration in the Leamington-Kingsville and Windsor areas. This growth will require ongoing expansion of the distribution system that currently exists throughout the County of Essex.

Further, the 1957 franchise agreement with the County of Essex is no longer effective according to the reasoning applied by the Divisional Court in its decision on January 12, 2004 in *Dawn-Euphemia vs. Union Gas*. It concluded that a municipal franchise creates an interest in land similar to an easement and a profit à prendre so a municipal franchise is therefore subject to the rule against perpetuities.<sup>5</sup> The franchise agreement in that case is very similar to the 1957 franchise agreement with the County of Essex in that both confer a future contingent interest in land. For instance, the rights of Enbridge Gas to construct pipelines under the 1957 franchise agreement with the County of Essex are subject to such locations being approved by the Road Superintendent of the County (or such other appointed officer).

- b) Enbridge Gas will always design and build with direct consultation with all municipal groups and stakeholders. If the County of Essex's position is that a relocation project will not allow for or diminish the use of an existing asset in the future, Enbridge Gas agrees to take on cost associated with movement of main. Typically, however, through partnered planning and consultation, concessions are made to take into account known future development. For instance, in the case of the Windsor Line Replacement Project, all concessions were made to include future sidewalks, water main plant, etc.

For the Windsor Line Replacement Project, the significant challenge came in the form of the inability to comply with requested depth of cover as many of the locations the County requested main be moved were at bottoms of municipal drains. To install at deeper depths in these locations, there are operational safety risks as well as the compromise of numerous regulated

<sup>3</sup> RP-1999-0048

<sup>4</sup> EB-2022-0157 - Exhibit A, Tab 3 and Exhibit I.ED.7

<sup>5</sup> Superior Court of Justice (Divisional Court) Endorsement – Court File No. 1412 – Township of Dawn-Euphemia vs. Union Gas, January 12, 2004

waterways. Ultimately, the OEB was not convinced that the expenditure of an additional \$7.2 million to afford an extra 0.5m of depth of cover was required as a prudent cost to ratepayers.<sup>6</sup>

- c) The operating policies of Enbridge Gas within the County of Essex, including within the lower-tier municipalities that make up the County of Essex, have been influenced by the Model Franchise Agreement that has been put in place with each of the lower-tier municipalities. While the 1957 franchise agreement with the County of Essex does not contain the same terms and conditions as the franchise agreements with the lower-tier municipalities, Enbridge Gas has ensured a consistent application of operational policies throughout the County of Essex.

Issues faced on the Windsor Line Replacement Project did not result from enforcing the Model Franchise Agreement, but rather due to gaps in the 1957 franchise agreement that were amended by using a Road User Agreement and other over and above requirements.

On the matter of implementing a Road User Agreement, specific issues were encountered with regards to pipeline depth to account for future road work. For the Windsor Line Replacement Project, the significant challenge came in the form of the inability to comply with requested depth of cover as many of the locations the County of Essex requested main be moved were at bottoms of municipal drains. To install at deeper depths in these locations, there are operational safety risks as well as the compromise of numerous regulated waterways. In response, Enbridge Gas proposed to construct the pipeline with a minimum depth of cover in the untraveled portion of the ROW of 0.75m. This depth of cover adhered to Enbridge Gas' Construction and Maintenance manual specification and exceeded the requirements of the TSSA regulated CSA Z662 pipeline design and operating code for a pipeline installed under the travelled portion of a roadway (0.6m). The request for a minimum pipeline depth of cover of 1.5m would have created significant impacts to construction including road closures during initial installation of the pipeline and services as well as future installations of services off this line. Furthermore, at this depth, a significant number of existing water services and mains would have been in conflict as well as proposed future water mains. Other issues with this minimum depth of cover would have been increased requirements for trench shoring which would widen the construction and future maintenance footprint and encroachment into County Road 46, which would result in increased traffic interruptions. Significant costs would have been incurred and passed on to ratepayers in having to comply to the additional depth requested by the County of Essex.

- d) In Enbridge Gas' view and past practice, there are two types of applications that can be submitted related to franchise agreements. The first type of application can be filed pursuant to section 9(3) of the *Municipal Franchises Act* where there is an agreement with the municipality to pursue the approval of a franchise agreement. The second type of application can be filed pursuant to section 10 of the *Municipal Franchises Act* when the municipality disagrees with the proposal to put a franchise agreement in place and Enbridge Gas must rely on the jurisdiction of the OEB to approve a franchise agreement despite the position of the municipality.

<sup>6</sup> EB-2020-0160 – Decision and Order, November 12, 2020, page 15

See also the response to part (a) above related to the Divisional Court determining that a municipal franchise is subject to the rule against perpetuities. As the 1957 franchise agreement with the County of Essex will have expired according to the reasoning applied by the Divisional Court, it is reasonable for Enbridge Gas to have applied to the OEB pursuant to section 10 of the *Municipal Franchises Act* in this case.

Over the years, Enbridge Gas (and its predecessors) have made several attempts to move the County of Essex on to a Model Franchise Agreement as the distribution pipeline network within the County of Essex has continued to expand. Those attempts were consistently met with the County of Essex taking the same position as it has taken in the most recent attempt (i.e., the County of Essex had no desire to discuss the Model Franchise Agreement as an option).<sup>7</sup>

- e) As noted above, over the years, Enbridge Gas (and its predecessors) have made several attempts to move the County of Essex on to a Model Franchise Agreement as the distribution pipeline network within the County of Essex has continued to expand. Those attempts were consistently met with the County of Essex indicating that it had no desire to discuss the Model Franchise Agreement as an option.

At the time of the Divisional Court decision in Dawn-Euphemia vs. Union Gas (January 12, 2004), Union Gas was awaiting the OEB's decision on its 2004 cost of service application (RP-2003-0063) and, while ongoing applications for approvals of franchise agreement renewals continued, most issues around franchise agreements were deferred. Addressing perpetual franchise agreements did not get raised until work was initiated in the Windsor Line Replacement Project.

During the review of the Windsor Line Replacement Project<sup>8</sup>, it was decided that franchise agreement discussions with the County of Essex would be deferred until after the OEB approved leave to construct. This current application was filed after discussions initiated with the County of Essex in 2019 were concluded with the written response from the County of Essex on April 6, 2022.<sup>9</sup>

<sup>7</sup> Application, Schedule F

<sup>8</sup> EB-2019-0172 - Decision and Order - Windsor Line Replacement Leave to Construct (April 1, 2020)

<sup>9</sup> Application, Schedule F

ENBRIDGE GAS INC.Response to Interrogatory from  
Ontario Energy Board Staff

Reference: Application, page 2, paragraph 5  
Application, page 3, paragraph 11

Preamble:

Enbridge Gas states that the 1957 franchise agreement only references Enbridge Gas's transmission assets and does not reference the distribution of gas, except for a clause that allows Enbridge Gas to service a customer that abuts the road. Enbridge Gas submits that a model franchise agreement needs to be put in place to cover distribution and transmission assets and associated operations within the County of Essex.

Questions:

- a) Please discuss how the model franchise agreement would better cover Enbridge Gas's distribution and transmission assets in the County of Essex.
- b) Please discuss how the model franchise agreement would better confirm Enbridge Gas's operational obligations in the County of Essex.
- c) Please advise if the absence of a model franchise agreement has been (and/or will be) a challenge to connecting new customers in the County of Essex and, if so, how.

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Response:

- a) The vast majority of the many Enbridge Gas' pipelines located within the County of Essex have been constructed and are operated as distribution pipelines. The 1957 franchise agreement with the County of Essex does not address the distribution of gas in the manner that the Model Franchise Agreement does to protect the interests of Enbridge Gas, the County of Essex and all end-use customers.

Some attributes of the Model Franchise Agreement (as expanded upon in the supplementary Gas Franchise Handbook) that are not addressed in the 1957 franchise agreement with the County of Essex are as follows:

- the Model Franchise Agreement applies to the distribution, storage and transmission of gas in the municipality while the 1957 franchise agreement only pertains to necessary works "for the purpose of passing through the Municipality in the continuation of a line, work or system which is intended to be operated in or for the benefit of another municipality and is not used or operated in the Municipality for any other purpose except that of supplying gas in a township to persons whose land abuts on a highway along or across which gas is carried or conveyed or to persons whose land lies within such limits";

- while the 1957 franchise agreement with the County of Essex gives Enbridge Gas the right “to keep, use, operate, repair, maintain, remove, abandon, replace, reconstruct, alter and extend its existing lines, pipes and works in the highways under the jurisdiction of the Council of the Municipality”, it does not address the process required to be followed pursuant to the Model Franchise Agreement in the areas addressing Approval of Construction (Section 5), the requirement to provide As Built Drawings (Section 6), the details of what needs to be done in the case of an Emergency (Section 7), what needs to be completed upon the Restoration of a work area (Section 8), the requirement for the municipality to provide reasonable notice if an Alternate Easement is required (Section 11), the process to be followed and the allocation of costs associated with Pipeline Relocation (Sections 12 and 18), the process and costs responsibilities associated with the Disposition of Gas System components (Section 15), and the right for Enbridge to alternative Use of Decommissioned Gas System components (Section 16);
- the 1957 franchise agreement with the County of Essex stipulates that the costs of any pipeline relocation deemed by the County of Essex to be necessary are to be allocated 100% to Enbridge Gas and ultimately recovered from all customers; the Model Franchise Agreement stipulates that the cost of relocating the gas system related to road and other municipal works will be shared 65% / 35% between Enbridge and the municipality (unless the part of the gas system altered or relocated was constructed or installed in the Union South operations area prior to January 1, 1981);
- the 1957 franchise agreement with the County of Essex does not define any terms used where the Model Franchise Agreement specifically defines various terms (Section 1) including “highway” which includes any bridge, viaduct or structure forming part of a highway, and any public square, road allowance or walkway and includes not only the travelled portion of such highway, but also ditches, driveways, sidewalks, and sodded areas forming part of the road allowance; the lack of definitions may ultimately lead to interpretation issues;
- the 1957 franchise agreement with the County of Essex does not specifically consent to Enbridge Gas entering upon all highways under the jurisdiction of the County of Essex to construct, maintain, replace, remove, operate and repair any part of the gas system for the distribution, storage and transmission of gas in and through the County of Essex as is specifically stipulated in the Model Franchise Agreement (Section 3);
- the 1957 franchise agreement with the County of Essex has an initial term of 10 years that renews as long as the lines are being used for the transportation of gas as opposed to the specific Duration of Agreement and Renewal Procedures (Section 4) identified in the Model Franchise Agreement; a franchise agreement like this without a termination or expiry date is subject to the rule against perpetuities, according to the Ontario Divisional Court in Dawn-Euphemia (Township) v. Union Gas Ltd.; and

- while the 1957 franchise agreement with the County of Essex contains an indemnification clause similar to the Model Franchise Agreement (Section 9), the 1957 franchise agreement makes no reference to the insurance coverage that Enbridge Gas is required to have in place pursuant to the Model Franchise Agreement (Section 10) nor the assurance that the insurance will be maintained in full force and effect to protect both the County of Essex and Enbridge Gas.
- b) In addition to the specific points made in response to a) above, given that the vast majority of the pipelines located within the County of Essex have been constructed and are operated as distribution pipelines, Enbridge Gas must ensure that they are specifically addressed in any agreement or permit issued for operating within the County of Essex. The Model Franchise Agreement addresses all aspects of Enbridge Gas' operations within the County of Essex and has been put in place for all operations within the jurisdiction of lower-tier municipalities within the County of Essex.
- c) Typically, there are no major issues or challenges to address with respect to connecting new customers in the County of Essex. Enbridge Gas works well with County administration proactively on projects to ensure concessions are made for future development and relocate pipeline mains when requested to do so.  
Issues were encountered, however, with respect to the Windsor Line Replacement Project (refer to responses provided at Exhibit B.Staff.1 and Exhibit B.Staff.2) due to the requirement for a Road User Agreement and other provisions which covered off gaps within the 1957 franchise agreement.

# Tab 9

Enbridge Gas Inc., Application, filed July 13, 2022 (excerpt)

## ONTARIO ENERGY BOARD

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

**AND IN THE MATTER OF** an Application by Enbridge Gas Inc. for an Order approving the terms and conditions upon which, and the period for which, Enbridge Gas Inc. will be given 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 in the County of Essex;

**AND IN THE MATTER OF** an Application by Enbridge Gas Inc. for an Order directing and declaring that the assent of the municipal electors of the County of Essex to the franchise agreement is not necessary.

### APPLICATION

1. Enbridge Gas Inc. (Enbridge Gas), a regulated public utility, is a corporation incorporated under the laws of the Province of Ontario, with its offices in the City of Toronto and the Municipality of Chatham-Kent.
2. The Corporation of the County of Essex (Municipality) is a municipal corporation incorporated under the laws of the Province of Ontario. Attached hereto and marked as Schedule “A” is a map showing the geographical location of the Municipality and a customer density representation of Enbridge Gas’ service area. Enbridge Gas currently serves approximately 70,640 customers within the Municipality.
3. The County of Essex is an upper-tier regional municipality comprised of seven lower-tier municipalities in southwestern Ontario - the Town of Amherstburg, the Town of Essex, the Town of Kingsville, the Municipality of Lakeshore, the Town of LaSalle, the Municipality of Leamington and the Town of Tecumseh. Enbridge Gas has Franchise Agreements with and Certificates of Public Convenience and Necessity for each of the lower-tier municipalities within the County of Essex. Enbridge Gas and its predecessors have been providing access to gas distribution services within the County of Essex since approximately 1889.
4. Enbridge Gas currently has a “perpetual” franchise agreement with the County of Essex dated December 11, 1957 (attached hereto as Schedule “B”). The franchise agreement and associated bylaw of the Municipality only refer to allowing the transmission of gas along county roads:

*“A By-law to authorize Union Gas Company of Canada, Limited (hereinafter called “the Company”) to lay down, maintain and use pipes and other necessary works for the transmission of gas on, in, under, along or across any highway under the jurisdiction of the Council of the Council of County of Essex.” [Bylaw 1270, page 1, emphasis added]*

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*“Full right, power, permission and consent are hereby granted, conferred and assured unto Union Gas Company of Canada, Limited its successors and assigns, to keep, use, operate, repair, maintain, remove, abandon, replace, reconstruct, alter and extend its existing lines, pipes and works in the highways under the jurisdiction of the Council of the Municipality and to lay down, maintain and use pipes and other necessary works for the transmission of gas on, in, under, along or across any highway under the jurisdiction of the said Council for the purpose of passing through the Municipality in the continuation of a line, work or system which is intended to be operated in or for the benefit of another municipality and is not used or operated in the Municipality for any other purpose except that of supplying gas in a township to persons whose land abuts on a highway along or across which gas is carried or conveyed or to persons whose land lies within such limits as the said Council by by-law passed from time to time at the request of the Company determines should be supplied with such service.”* [Franchise Agreement, paragraph 1, emphasis added]

*“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.”* [Franchise Agreement, paragraph 2, emphasis added]

5. The existing franchise agreement does not reference the distribution of gas although there is an exception within the franchise agreement (as noted above) which states that Enbridge Gas may provide gas service to a customer from any pipeline if the customer abuts the road:

*“...and is not used or operated in the Municipality for any other purpose except that of supplying gas in a township to persons whose land abuts on a highway along or across which gas is carried or conveyed or to persons whose land lies within such limits as the said Council by by-law passed from time to time at the request of the Company determines should be supplied with such service.”* [Franchise Agreement, paragraph 1, emphasis added]

6. Enbridge’s Windsor Line starts at the Port Alma Station, located in the Municipality of Chatham-Kent, and ends in the City of Windsor. It serves portions of the Municipality of Chatham-Kent and the County of Essex including the Municipality of Lakeshore, the Town of Essex, the Town of Tecumseh, and the City of Windsor.
7. In 2019, Enbridge Gas proposed a pipeline replacement project designed to address pipeline integrity issues with the Windsor Line by constructing approximately 64 km of NPS 6 replacement pipeline operating at a pressure of 3450 kPa between the intersection of Concession 8 and County Road 46 (located in the Town of Tecumseh) and the existing Enbridge Gas Port Alma Transmission Station (located in the Municipality of Chatham-Kent). The proposed pipeline was designed as a distribution pipeline operating at less than 30% SMYS.

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8. The Ontario Energy Board approved the construction of the new Windsor Line as a distribution pipeline as part of its review of the Windsor Line Replacement Project (EB-2019-0172<sup>1</sup> and EB-2020-0160<sup>2</sup>) based on the description of the distribution pipeline in the EB-2019-0172 evidence.<sup>3</sup>
9. Copies of the Ontario Energy Board's decisions in the EB-2019-0172 and EB-2020-0160 proceedings are provided for reference and attached hereto as Schedules "C" and "D".
10. Enbridge Gas also has other distribution pipelines along roads under the jurisdiction of the County of Essex. Enbridge Gas has a Certificate of Public Convenience and Necessity for the County of Essex (FBC 192) dated January 8, 1958 (attached hereto as Schedule "E") which allows for the construction of works associated with the transmission and distribution of gas within the County of Essex.
11. On November 3, 2021, Enbridge Gas notified the County of Essex that a Model Franchise Agreement needs to be put in place to cover distribution and transmission assets and associated operations within the County of Essex. At that time, Enbridge Gas provided the Municipality with a draft bylaw, a draft resolution and the proposed Model Franchise Agreement to be used for this process. The Municipality was also provided with a copy of the Gas Franchise Handbook as an explanatory supplement to the 2000 Model Franchise Agreement.
12. On January 25, 2022, the same package of material related to the Model Franchise Agreement proposed for the Municipality was provided to the County Solicitor for review.
13. On February 22, 2022, Enbridge Gas spoke with the County Solicitor to discuss concerns that the Municipality had with the Model Franchise Agreement and to review the regulatory process associated with having a franchise agreement approved by the Ontario Energy Board.
14. In a letter dated April 6, 2022 (attached hereto as Schedule "F"), the County of Essex confirmed that it had no desire to discuss the Model Franchise Agreement as an option. The County of Essex remained satisfied with its existing franchise agreement dated December 11, 1957 related to the transportation of natural gas and saw no compelling reason to abandon it for the Model Franchise Agreement.
15. Enbridge Gas does not support the Municipality's position that the current transmission franchise agreement satisfies the *Municipal Franchises Act* which requires that municipalities must have a Franchise Agreement in place for the use of the rights of way of the highways of the municipality.

<sup>1</sup> EB-2019-0172 - Decision and Order - Windsor Pipeline Leave to Construct (April 1, 2020)

<sup>2</sup> EB-2020-0160 - Decision and Order - Section 101 Application - Windsor Pipeline Replacement Project (November 12, 2020)

<sup>3</sup> EB-2019-0172 - Exhibit B, Tab 1, Schedules 3 and 5

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16. The Model Franchise Agreement outlines the terms that the Ontario Energy Board finds reasonable under the *Municipal Franchises Act*.<sup>4</sup> The Ontario Energy Board has previously advised natural gas distributors that they are expected to follow the form of the Model Franchise Agreement when filing applications for the approval of franchise agreements unless there is a compelling reason for deviation.<sup>5</sup>
17. The franchise agreement currently in place between Enbridge Gas and the County of Essex is outdated in its language relative to the Model Franchise Agreement, and the language in the Model Franchise Agreement better confirms Enbridge Gas' distribution rights within the Municipality and provides the Municipality with updated language regarding insurance and relocations.
18. In particular, the franchise agreement currently in place between Enbridge Gas and the County of Essex stipulates that Enbridge Gas (and its ratepayers) pay all costs of relocation work requested by the Municipality:
- “In the event that the Corporation in pursuance of its statutory power shall deem it expedient to alter the construction of any highway or of any municipal drain, ditch, bridge, culvert or other municipal works or improvements thereon or therein and in the course thereof it shall become reasonably necessary that the location of a main, line, pipe or works of the Company laid or operated under this By-law should be altered at a specified joint to facilitate the work of the Corporation, then Union on receipt of reasonable notice in writing from the Clerk of the Corporation specifying the alteration desired, the Company shall, at its own expense, alter or re-locate its main, pipe, line or works at the joint specified.”* [Franchise Agreement, paragraph 6, emphasis added]
19. This is contrary to the cost sharing mechanism identified in the Model Franchise Agreement which is in use in all other municipalities in which Enbridge Gas operates.
20. Enbridge Gas proposes that the right to operate works for the distribution, transmission and storage of natural gas and to extend or add to the works within the County of Essex should be formalized for a period of twenty (20) years pursuant to the provisions of the Model Franchise Agreement without amendment attached hereto as Schedule “G”.
21. Enbridge Gas currently has franchise agreements in place with 312 lower and single-tier municipalities as well as with 26 other upper-tier municipalities and all are the current Model Franchise Agreement without amendments (except for one franchise agreement with a lower-tier municipality that contains a service area limitation).

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

<sup>5</sup> EB-2021-0269, Decision and Order, February 17, 2021

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22. The address of the Municipality is as follows:

County of Essex  
360 Fairview Avenue West  
Essex, ON N8M 1Y6  
Attention: Mary Birch, Director of Council Services & Community Services / Clerk  
Telephone: (519)776-6441 ext. 1335  
Email: [mbirch@countyofessex.ca](mailto:mbirch@countyofessex.ca)

The address for Enbridge Gas' regional operations office is:

Enbridge Gas Inc.  
109 Commissioners Road  
London, ON N6A 4P1  
Attention: Steven Jelich, Director, Southwest Region Operations  
Telephone: (519) 667-4109  
Email: [steven.jelich@enbridge.com](mailto:steven.jelich@enbridge.com)

23. The newspaper having the highest circulation in the County of Essex is the *Windsor Star*. This is the newspaper used by the County of Essex for its notices.

24. Enbridge Gas now applies to the Ontario Energy Board for:

- (a) an Order under s.10 approving the terms and conditions upon which, and the period for which, the County of Essex is, by 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
- (b) an Order pursuant to s.9(4) 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.

**DATED** at the Municipality of Chatham-Kent, in the Province of Ontario this 13<sup>th</sup> day of July, 2022.

**ENBRIDGE GAS INC.**

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Patrick McMahon  
Technical Manager  
Regulatory Research and Records

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Comments respecting this Application should be directed to:

Mr. Patrick McMahon  
Technical Manager, Regulatory Research and Records  
Enbridge Gas Inc.  
50 Keil Drive North  
Chatham, ON N7M 5M1  
[patrick.mcmahon@enbridge.com](mailto:patrick.mcmahon@enbridge.com)  
Telephone: (519) 436-5325

# Tab 10

Affidavit of Allan Botham, County of Essex, filed November 14, 2022  
(excerpt)

## ONTARIO ENERGY BOARD

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

**AND IN THE MATTER OF** an Application by Enbridge Gas Inc. for an Order approving the terms and conditions upon which, and the period for which, Enbridge Gas Inc. will be given 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 in the County of Essex;

**AND IN THE MATTER OF** an Application by Enbridge Gas Inc. for an Order directing and declaring that the assent of the municipal electors of the County of Essex to the franchise agreement is not necessary.

### AFFIDAVIT OF ALLAN BOTHAM

I, Allan Botham, of the Town of Leamington, in the County of Essex, and Province of Ontario, make oath and say as follows:

#### **Professional Background**

1. I am the Director of Infrastructure Services and the County Engineer for the Corporation of the County of Essex (the "**County**"), and, as such, I have knowledge of the matters hereinafter deposed. Where I do not have personal knowledge of the matters to which I hereinafter depose, I state the source of any information set forth and verily believe it to be true.
2. I obtained a degree in engineering from the University of Windsor in 1994, and am a Registered Professional Engineer in the Province of Ontario. Since my graduation in 1994 the following has been my professional experience to the present:
  - (1) Earth Tech Canada (formerly Proctor & Redfern) – Design Engineer/Project Manager – 1994 to 2007;

- (2) Dillon Consulting – Senior Project Manager/Associate – 2005 to 2007;
- (3) Municipality of Leamington – Capital Project Engineer – 2007 to 2009;
- (4) Municipality of Leamington – Manager of Engineering Services – 2009 to 2021;  
and
- (5) County of Essex – Director of Infrastructure Services/County Engineer – 2022 to present.

Attached hereto and marked as **Exhibit "A"** to this my Affidavit is a true copy of my resume.

- 3. I make this Affidavit in response to the Application commenced by Enbridge Gas Inc. ("**Enbridge**") in OEB File No. EB-2022-0207 seeking to unilaterally impose the Model Franchise Agreement on the County (the "**Application**"), despite there being a perpetual Franchise Agreement in place between the County and Enbridge, as further described below.

#### **Overview of Existing Franchise Agreement**

- 4. Since in or about 1957 the transmission and distribution of natural gas in the County has been governed by a franchise agreement, dated December 11, 1957 (the "**Franchise Agreement**") with the Union Gas Company of Canada, Limited ("**Union Gas**"). Attached hereto and marked as **Exhibit "B"** to this my Affidavit is a true copy of the Franchise Agreement.
- 5. The Franchise Agreement provides, among other things, as follows:
  - (a) At paragraph 1, that the County granted Union Gas "its successors and assigns, to keep, use, operate, repair, maintain, remove, abandon, replace, reconstruct, alter, and extend its existing lines, pipes and works in the highway under the jurisdiction of the County of the [County] and to lay down, maintain and use pipes and other necessary works for the transmission of gas on, in, under, along or across any highway under the jurisdiction of the said Council for the purpose of passing through the [County] in the continuation of a line, work, or system which is intended to be operated in or for the benefit of another municipality and is not

used or operated in the [County] for any other purpose except that of supplying gas in a township to persons whose lands abuts on a highway along or across which gas is carried or conveyed..."

(b) At paragraph 2, that "[t]he rights and privileges hereby granted shall continue and remain in force for a period of ten years from the date [of the Agreement] and so long thereafter as the said lines **are in actual use for the transportation of gas** [emphasis added]."

(c) At paragraph 6, that should the County require the lines to be altered or relocated that Union Gas would "at its own expense, alter or relocated its main, pipe, line, or works at the point specified."

6. It is my understanding that on or about January 1, 2019, Union Gas merged with Enbridge, following which Enbridge took control of the lines owned by Union Gas in the County and assumed the rights and responsibilities of Union Gas under the terms of the Franchise Agreement.

### **Relationship Between County and Lower Tiers**

7. The County is an upper tier municipality, which is comprised of seven (7) lower tier municipalities, namely, the Town of Amherstburg, the Town of Essex, the Municipality of Lakeshore, the Town of LaSalle, the Municipality of Leamington, the Town of Kingsville, and the Town of Tecumseh (collectively, the "**Lower Tier Municipalities**").
8. The County oversees, through the County Engineer's Office, the County Road network that Enbridge utilizes to provide gas in accordance with the terms of the Franchise Agreement. However, only the rural portions of the County Road network are under the County's supervision and control. All urban sections in settlement areas are under the control of the Lower Tier Municipalities.

9. It is my understanding that each of the Lower Tier Municipalities have their own respective franchise agreements with Enbridge that governs the supply of gas in the Lower Tier Municipalities.
10. Given the above, I can confirm, that to the best of my knowledge, the only customers of Enbridge receiving gas directly pursuant to the terms of the Franchise Agreement between the County and Enbridge are those "persons whose land abuts on a [County Road] along or across which gas is carried or conveyed".
11. Since the signing of the Franchise Agreement in 1957 to the present, it is my understanding that only those whose property abuts rural sections of the County Road network receive gas in accordance with the terms of the Franchise Agreement at issue. Meanwhile anyone whose property does not abut a County Road or whose property abuts a County Road with an urban area having their provision of gas governed pursuant to the terms of franchise agreements between Enbridge and the Lower Tier Municipalities.
12. Respectfully, I disagree with the assertion of Enbridge in their Application that they serve 70,640 customers in the County. They may very well serve 70,640 customers pursuant to the terms of the franchise agreement between them and the Lower Tier Municipalities and the Franchise Agreement with the County. However, the number of customers Enbridge has in the "County" that are governed by the "Franchise Agreement" in question, are a small fraction of the 70,640 customers they claim are affected.
13. From my review of the Application, I note that Enbridge has failed to provide evidence of what has changed between 1957 to the present that would result in the Franchise Agreement expiring. The lines governed by the Franchise Agreement are, to my knowledge, used for "distribution" to those whose property abuts County Roads in rural areas, and is otherwise used for transmission to customers located in the Lower Tier Municipalities. In other words the method of delivering gas to the

residents of the County and its Lower Tier Municipalities has not changed since the Franchise Agreement was entered into in 1957.

14. Finally, it is my understanding that the lines since 1957 to the present have been "in actual use for the transportation of gas" as required by the Franchise Agreement.
15. From a review of the County's files related to the Franchise Agreement, I have 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 actions taken by Enbridge in 2019 and 2020, as more fully outlined below.

#### **The County Road 46 Issue**

16. From a review of my predecessor's files, it is my understanding that in or about 2019 Enbridge advised the County that it wanted to replace a section of natural gas pipeline between Port Alma and Windsor (the "**Project**"). Enbridge approached County Council as the Project would involve replacing about 30 kilometres of pipeline along County Road 46 (the "**County Road 46 Section**").
17. Prior to the Project being undertaken, the County Road 46 Section of pipeline was located in the right of way of the County and in a number of private easements with individual property owners. However, the proposal of Enbridge was that the new line for the County Road 46 Section would be solely in the County right of way with the private easements being abandoned, and with the pipe being at a very shallow depth.
18. Upon learning of Enbridge's intention to solely use the County's right of way for the County Road 46 Section and abandon its private easements, the County team dealing with the Project advised Enbridge that the County's preference was that Enbridge continue to use its private easements where possible, obtain new

easements where possible, and/or use the existing alignment, as the right of way has limited room for all of the infrastructure currently contained in the County Road 46 right of way, and planned infrastructure later.

19. Enbridge was told that the above was required for the following reasons:

- (a) County Road 46 is used as a route for oversized and overweight loads, with both the paved roadway and unpaved shoulder being utilized. As such, any pipeline in either the paved roadway or unpaved shoulder must meet the County's requirements of having at least 1.5 metres of depth of cover; and
- (b) It is the County's intention to reconstruct and improve County Road 46, by, among other things, widening the highway, and increasing the number of lanes from the current two (2) lanes. This will result in portions of the pipeline in the County Road 46 Section of the Project being under either the paved roadway or the unpaved shoulder. The unpaved shoulder also forms part of the travelled portion of the roadway, given that, among other things, County Road 46 is used by agricultural users and oversized and/or overweight loads.

20. Despite the objections of the County, in contravention of the clear language in the Franchise Agreement about the authority of the County Engineer, Enbridge ignored the concerns of the County, and through an Application to the OEB in OEB File No. 2020-0160, forced the installation of the County Road 46 Section into an area from which Enbridge knew it would have to be moved at some point in the not too distant future to allow for road improvements along County Road 46.

21. Given the above behaviour of Enbridge in refusing to accommodate the County's concerns with the County Road 46 Section of the Project, the County is not willing to consider entering into the Model Franchise Agreement. The Model Franchise Agreement will push the relocation costs of the County Road 46 Section of the Project on to the County, despite its prior clear warnings to Enbridge and the OEB. Further, the Model Franchise Agreement will provide even less authority to the



# Tab 11

Responses of County of Essex to Information Request of Enbridge Gas, 2 and 3(b), filed December 13, 2023.

**Enbridge  
Request 2:**

*Please confirm the County of Essex's understanding that there are significant differences in the terms and conditions of the franchise agreements under which customers along county roads are provided access to natural gas.*

**County  
Response 2:**

The County is not aware of significant differences in the terms and conditions of the franchise agreements under which customers along county roads are provided access to natural gas. The County is aware of the terms and conditions contained in its valid Franchise Agreement from 1957 that Enbridge is, as a successor, a party to. The County remains satisfied that those terms and conditions are sufficient.

**Enbridge**

**Request 3(a):**

*Please confirm that the County of Essex is aware of the reasoning applied by the Divisional Court in its decision on January 12, 2004 in Dawn-Euphemia vs. Union Gas that concluded that a municipal franchise creates an interest in land similar to an easement and a profit à prendre so a municipal franchise is therefore subject to the rule against perpetuities.*

**County**

**Response 3(a):**

The County is not aware of the reasoning of the Divisional Court in the *Dawn-Euphemia v. Union Gas* matter from 2004.

**Enbridge**

**Request 3(b):**

*Please explain why the County of Essex does not believe that the rule against perpetuities applies to the 1957 franchise agreement.*

**County**

**Response 3(b):**

Again, the County is not aware of the basis on which Enbridge is taking the position that rule against perpetuities applies. Further, the County is not aware of the grounds, if any, that Enbridge alleges grants the OEB the authority to act as a court of competent jurisdiction to make a ruling on the common law principles of the rule against perpetuities.

That being said, the County's position is that if the rule against perpetuities applies to the franchise agreement in question, that the franchise agreement does not offend the rule. The right for the predecessors of Enbridge to use the land vested in or about 1957 or 1958 when the lands were used by them for the purposes granted, and remain used for that purpose. Further, the modern rule against perpetuities has been referred to as being utilized to prevent lands from being tied up and being incapable of being disposed. Enbridge uses public road allowances under the franchise agreement in question, which road allowances are not going to be conveyed to third parties in any event.

**Enbridge**

**Request 3(c):** *Please describe what the County of Essex considers to be included under the "distribution" of gas to end-use customers.*

**County**

**Response 3(c):** The County considers "distribution" to be the actual supply of gas to an end user, whereas the County considers "transmission" to be transmitting gas across the County to another municipality for distribution to end users within that other municipality.

**Enbridge**

**Request 3(d):** *Please confirm the County of Essex's understanding that the vast majority of pipelines located along roads under the County's jurisdiction have been constructed and are operated as distribution pipelines.*

**County**

**Response 3(d):** This is not the County's understanding. The County's understanding is that the pipelines located along roads under the County's jurisdiction have the primary purpose of transmitting gas to other jurisdictions (i.e. urban areas, lower tier municipalities, the City of Windsor, etc.), with distribution to those properties that front on to County Roads being ancillary to that.

**Enbridge**

**Request 3(e):** *Please confirm that the County of Essex understands that the terms and conditions associated with franchise agreements executed within the County of Essex have changed significantly since 1957 to be more reflective of the processes leading to the installation, maintenance, care and subsequent abandonment activities.*

**County**

**Response 3(e):** Again, the County is unaware of the contents of the franchise agreements that may be in place between Enbridge and other local municipalities. The County is not a party to those agreements. The County relies on Response 1 above in responding to Request 3(e) of Enbridge.

# Tab 12

*Ontario Energy Board Act, 1998, SO 1998, c 15, Sched. B., ss. 2, 19(6), and 23.*

<a href="#">125.2</a>	Duties of directors and officers of a corporation
<a href="#">126.</a>	Offences
<a href="#">126.0.1</a>	Order for compensation, restitution
<a href="#">126.0.2</a>	Default in payment of fines
<a href="#">126.0.3</a>	Liens and charges
<a href="#">126.1</a>	Admissibility in evidence of certified statements
<a href="#">127.</a>	Regulations, general
<a href="#">128.</a>	Conflict with other legislation
<a href="#">128.1</a>	Reports on Board effectiveness
<a href="#">130.</a>	Transition, uniform system of accounts
<a href="#">131.</a>	Transition, undertakings
<a href="#">132.</a>	Transition, director of licensing
<a href="#">133.</a>	No cause of action, Fixing the Hydro Mess Act, 2019

## PART I GENERAL

### Board objectives, electricity

**1** (1) The Board, in carrying out its responsibilities under this or any other Act in relation to electricity, shall be guided by the following objectives:

1. To inform consumers and protect their interests with respect to prices and the adequacy, reliability and quality of electricity service.
- 1.1 REPEALED: 2019, c. 6, Sched. 2, s. 1.
2. To promote economic efficiency and cost effectiveness in the generation, transmission, distribution, sale and demand management of electricity and to facilitate the maintenance of a financially viable electricity industry.
3. To promote electricity conservation and demand management in a manner consistent with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
4. To facilitate innovation in the electricity sector.
5. REPEALED: 2020, c. 36, Sched. 34, s. 1.

2004, c. 23, Sched. B, s. 1; 2009, c. 12, Sched. D, s. 1; 2015, c. 29, s. 7; 2019, c. 6, Sched. 2, s. 1; 2020, c. 36, Sched. 34, s. 1.

(2) REPEALED: 2016, c. 10, Sched. 2, s. 11.

### Section Amendments with date in force (d/m/y)

2002, c. 23, s. 4 (1) - 09/12/2002

2003, c. 3, s. 2 - 01/08/2003

2004, c. 23, Sched. B, s. 1 - 01/01/2005

2009, c. 12, Sched. D, s. 1 - 09/09/2009

2015, c. 29, s. 7 - 04/03/2016

2016, c. 10, Sched. 2, s. 11 - 01/07/2016

2019, c. 6, Sched. 2, s. 1 - 01/10/2020

2020, c. 36, Sched. 34, s. 1 - 08/12/2020

### Board objectives, gas

**2** The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

1. To facilitate competition in the sale of gas to users.
2. To inform consumers and protect their interests with respect to prices and the reliability and quality of gas service.
3. To facilitate rational expansion of transmission and distribution systems.

4. To facilitate rational development and safe operation of gas storage.
5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances.
- 5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
6. To promote communication within the gas industry. 1998, c. 15, Sched. B, s. 2; 2002, c. 23, s. 4 (2); 2003, c. 3, s. 3; 2004, c. 23, Sched. B, s. 2; 2009, c. 12, Sched. D, s. 2; 2019, c. 6, Sched. 2, s. 2.

**Section Amendments with date in force (d/m/y)**

2002, c. 23, s. 4 (2) - 09/12/2002

2003, c. 3, s. 3 - 01/08/2003

2004, c. 23, Sched. B, s. 2 - 01/01/2005

2009, c. 12, Sched. D, s. 2 - 09/09/2009

2019, c. 6, Sched. 2, s. 2 (1, 2) - 01/10/2020

**Board objectives, implementation plans**

**2.1** The Board, in exercising its powers and performing its duties under this or any other Act, shall be guided by the objective of facilitating the implementation of any directives issued under subsection 25.30 (2) of the *Electricity Act, 1998* in accordance with the implementation plans submitted by the Board and approved under clause 25.31 (5) (a) of that Act, including any amendments submitted by the Board and approved under that clause. 2016, c. 10, Sched. 2, s. 12.

**Section Amendments with date in force (d/m/y)**

2016, c. 10, Sched. 2, s. 12 - 01/07/2016

**Definitions**

**3** In this Act,

“affiliate”, with respect to a corporation, has the same meaning as in the *Business Corporations Act*; (“membre du même groupe”)

“associate”, where used to indicate a relationship with any person, means,

- (a) any body corporate of which the person owns, directly or indirectly, voting securities carrying more than 50 per cent of the voting rights attached to all voting securities of the body corporate for the time being outstanding,
- (b) any partner of that person,
- (c) any trust or estate in which the person has a substantial beneficial interest or as to which the person serves as trustee or in a similar capacity,
- (d) any relative of the person, including the person's spouse as defined in the *Business Corporations Act*, where the relative has the same home as the person, or
- (e) any relative of the spouse, as defined in the *Business Corporations Act*, of the person, where the relative has the same home as the person; (“personne qui a un lien”)

“Board” means the Ontario Energy Board; (“Commission”)

“board of directors” means the board of directors of the Board set out under section 4.1; (“conseil d'administration”)

“chief commissioner” means the commissioner who is chief commissioner under section 4.3; (“commissaire en chef”)

“chief executive officer” means the chief executive officer under section 4.2; (“chef de la direction”)

“commissioner” means a commissioner under section 4.3; (“commissaire”)

“construct” means construct, reconstruct, relocate, enlarge or extend; (“construire”)

“distribute”, with respect to electricity, means to convey electricity at voltages of 50 kilovolts or less; (“distribuer”)

“distribution system” means a system for distributing electricity, and includes any structures, equipment or other things used for that purpose; (“réseau de distribution”)

“distributor” means a person who owns or operates a distribution system; (“distributeur”)

**Orders and licences**

**15** (1) All orders made and licences issued by the Board shall be signed by a commissioner or the registrar of the Board. 2003, c. 3, s. 19; 2019, c. 6, Sched. 2, s. 16 (1).

**Same**

(2) Despite subsection (1), an order made or licence issued by the Board pursuant to section 6 may be signed by the employee who made the order or issued the licence. 2003, c. 3, s. 19.

**Judicial notice**

(3) An order or licence that purports to be signed by a person referred to in subsection (1) or (2) shall be judicially noticed without further proof. 2003, c. 3, s. 19.

**Legislation Act, 2006, Part III**

(4) Part III (Regulations) of the *Legislation Act, 2006* does not apply to the orders made or licences issued by the Board. 2003, c. 3, s. 19; 2006, c. 21, Sched. F, s. 136 (1).

**Note: On a day to be named by proclamation of the Lieutenant Governor, subsection 15 (4) of the Act is repealed. (See: 2019, c. 6, Sched. 2, s. 16 (2))**

**Section Amendments with date in force (d/m/y)**

2003, c. 3, s. 19 - 01/08/2003

2006, c. 21, Sched. F, s. 136 (1) - 25/07/2007

2019, c. 6, Sched. 2, s. 16 (1) - 01/10/2020; 2019, c. 6, Sched. 2, s. 16 (2) - not in force

**16** REPEALED: 2003, c. 3, s. 19.

**Section Amendments with date in force (d/m/y)**

2003, c. 3, s. 19 - 01/08/2003

**17** REPEALED: 2003, c. 3, s. 19.

**Section Amendments with date in force (d/m/y)**

2000, c. 26, Sched. D, s. 2 (1) - 06/12/2000

2002, c. 1, Sched. B, s. 2 (1, 2) - 01/07/2002

2003, c. 3, s. 19 - 01/08/2003

**Transfer of authority or licence**

**18** (1) No authority given by the Board under this or any other Act shall be transferred or assigned without leave of the Board. 1998, c. 15, Sched. B, s. 18 (1).

**Same**

(2) A licence issued under this Act is not transferable or assignable without leave of the Board. 1998, c. 15, Sched. B, s. 18 (2).

**Board's powers, general****Power to determine law and fact**

**19** (1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact. 1998, c. 15, Sched. B, s. 19 (1).

**Order**

(2) The Board shall make any determination in a proceeding by order. 1998, c. 15, Sched. B, s. 19 (2); 2001, c. 9, Sched. F, s. 2 (1).

**Reference**

(3) If a proceeding before the Board is commenced by a reference to the Board by the Minister of Natural Resources, the Board shall proceed in accordance with the reference. 1998, c. 15, Sched. B, s. 19 (3).

**Additional powers and duties**

(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application. 1998, c. 15, Sched. B, s. 19 (4).

**Exception**

(5) Unless specifically provided otherwise, subsection (4) does not apply to any application under the *Electricity Act, 1998* or any other Act. 1998, c. 15, Sched. B, s. 19 (5).

**Jurisdiction exclusive**

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act. 1998, c. 15, Sched. B, s. 19 (6).

**Section Amendments with date in force (d/m/y)**

2001, c. 9, Sched. F, s. 2 (1) - 08/08/2001

**Powers, procedures applicable to all matters**

**20** Subject to any provision to the contrary in this or any other Act, the powers and procedures of the Board set out in this Part apply to all matters before the Board under this or any other Act. 1998, c. 15, Sched. B, s. 20.

**Board's powers, miscellaneous**

**21** (1) The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act. 1998, c. 15, Sched. B, s. 21 (1).

**Hearing upon notice**

(2) Subject to any provision to the contrary under this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such manner and to such persons as the Board may direct. 1998, c. 15, Sched. B, s. 21 (2); 2021, c. 2, Sched. 2, s. 1.

(3) REPEALED: 2000, c. 26, Sched. D, s. 2 (2).

**No hearing**

(4) Despite section 4.1 of the *Statutory Powers Procedure Act*, the Board may, in addition to its power under that section, dispose of a proceeding without a hearing if,

- (a) no person requests a hearing within a reasonable time set by the Board after the Board gives notice of the right to request a hearing; or
- (b) the Board determines that no person, other than the applicant, appellant or licence holder will be adversely affected in a material way by the outcome of the proceeding and the applicant, appellant or licence holder has consented to disposing of a proceeding without a hearing.
- (c) REPEALED: 2003, c. 3, s. 20 (1).

1998, c. 15, Sched. B, s. 21 (4); 2002, c. 1, Sched. B, s. 3; 2003, c. 3, s. 20 (1).

**Consolidation of proceedings**

(5) Despite subsection 9.1 (1) of the *Statutory Powers Procedure Act*, the Board may combine two or more proceedings or any part of them, or hear two or more proceedings at the same time, without the consent of the parties. 2003, c. 3, s. 20 (2).

**Non-application**

(6) Subsection 9.1 (3) of the *Statutory Powers Procedure Act* does not apply to proceedings before the Board. 1998, c. 15, Sched. B, s. 21 (6).

**Use of same evidence**

(6.1) Despite subsection 9.1 (5) of the *Statutory Powers Procedure Act*, the Board may treat evidence that is admitted in a proceeding as if it were also admitted in another proceeding that is heard at the same time, without the consent of the parties to the second-named proceeding. 2003, c. 3, s. 20 (3).

**Interim orders**

(7) The Board may make interim orders pending the final disposition of a matter before it. 1998, c. 15, Sched. B, s. 21 (7).

2019, c. 6, Sched. 2, s. 17 (1, 2) - 01/10/2020

2021, c. 4, Sched. 6, s. 73 (1) - 01/06/2021

### **Final decision**

**22.1** (1) The Board shall issue an order that embodies its final decision in a proceeding within 60 days after making the final decision. 2003, c. 3, s. 21.

### **Validity of decision not affected**

(2) Failure to comply with subsection (1) does not affect the validity of the Board's decision. 2003, c. 3, s. 21.

### **Section Amendments with date in force (d/m/y)**

2003, c. 3, s. 21 - 01/08/2003

### **Conditions of orders**

**23** (1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application. 1998, c. 15, Sched. B, s. 23.

(2) REPEALED: 2003, c. 3, s. 22.

### **Section Amendments with date in force (d/m/y)**

2002, c. 1, Sched. B, s. 4 - 27/06/2002

2003, c. 3, s. 22 - 01/08/2003

### **Written reasons to be made available**

**24** All written reasons of the Board shall be kept by the registrar and be made available to any person upon payment of the required fee. 1998, c. 15, Sched. B, s. 24; 2003, c. 3, s. 23; 2019, c. 6, Sched. 2, s. 29.

### **Section Amendments with date in force (d/m/y)**

2003, c. 3, s. 23 - 01/08/2003

2019, c. 6, Sched. 2, s. 29 - 01/10/2020

### **Obedience to orders of Board a good defence**

**25** An order of the Board is a good and sufficient defence to any proceeding brought or taken against any person in so far as the act or omission that is the subject of the proceeding is in accordance with the order. 1998, c. 15, Sched. B, s. 25.

### **Assessment**

**26** (1) Subject to the regulations, the board of directors may assess those persons or classes of persons prescribed by regulation with respect to all expenses incurred and expenditures made by the Board in the exercise of any powers or duties under this or any other Act. 1998, c. 15, Sched. B, s. 26 (1); 2003, c. 3, s. 24; 2019, c. 6, Sched. 2, s. 28 (1).

### **Obligation to pay assessment**

(2) Every person assessed under subsection (1) shall pay the amount assessed. 1998, c. 15, Sched. B, s. 26 (2).

### **Order to pay assessment**

(3) If a person fails to pay an assessment made under subsection (1), the Board may, without a hearing, order that person to pay the assessment. 1998, c. 15, Sched. B, s. 26 (3).

### **Failure to pay**

(4) If a licensee fails to pay an assessment in accordance with the order, the Board, without a hearing, may suspend or cancel that person's licence. 1998, c. 15, Sched. B, s. 26 (4).

### **Payment of full amount**

(5) The Board may reinstate the licence of a person whose licence was suspended or cancelled under subsection (4) if the person pays all amounts owing under this section. 1998, c. 15, Sched. B, s. 26 (5).

### **Regulations**

(6) The Lieutenant Governor in Council may make regulations,

- (a) prescribing persons or classes of persons liable to pay an assessment under subsection (1);

# Tab 13

*Municipal Franchises Act, RSO 1999, c M.55.*

Français

## Municipal Franchises Act

### R.S.O. 1990, CHAPTER M.55

**Consolidation Period:** From August 1, 2003 to the e-Laws currency date.

Last amendment: 2003, c. 3, s. 1.

Legislative History: 1996, c. 1, Sched. M, s. 25; 1998, c. 15, Sched. E, s. 21; 1999, c. 14, Sched. F, s. 7; 2001, c. 25, s. 480; 2002, c. 17, Sched. F, Table; 2003, c. 3, s. 1.

#### Definitions

**1** In this Act,

“franchise” includes any right or privilege to which this Act applies; (“concession”)

“gas” means natural gas, manufactured gas or any liquefied petroleum gas, and includes any mixture of natural gas, manufactured gas or liquefied petroleum gas, but does not include a liquefied petroleum gas that is distributed by a means other than a pipe line; (“gaz”)

“highway” includes a street and a lane; (“voie publique”)

“public utility” means natural and other gas works. (“service public”) R.S.O. 1990, c. M.55, s. 1; 1998, c. 15, Sched. E, s. 21 (1); 2001, c. 25, s. 480 (1).

#### Section Amendments with date in force (d/m/y)

1998, c. 15, Sched. E, s. 21 (1) - 01/04/1999

2001, c. 25, s. 480 (1) - 01/01/2003

**1.1** REPEALED: 2001, c. 25, s. 480 (2).

#### Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. M, s. 25 - 30/01/1996

2001, c. 25, s. 480 (2) - 01/01/2003

**2** REPEALED: 1999, c. 14, Sched. F, s. 7.

#### Section Amendments with date in force (d/m/y)

1999, c. 14, Sched. F, s. 7 - 22/12/1999

#### Restriction

**3** (1) A municipal corporation shall not grant to any person nor shall any person acquire the right to use or occupy any of the highways of the municipality for a public utility or to construct or operate any part of a public utility in the municipality unless a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted or acquired has been assented to by the municipal electors. 2001, c. 25, s. 480 (3).

(2) REPEALED: 1998, c. 15, Sched. E, s. 21 (3).

(3), (4) REPEALED: 2001, c. 25, s. 480 (4).

#### Section Amendments with date in force (d/m/y)

1998, c. 15, Sched. E, s. 21 (2, 3) - 01/04/1999

2001, c. 25, s. 480 (3, 4) - 01/01/2003

**Consent of council of city, when required**

**4** (1) The council of a local municipality shall not grant a franchise upon any highway of the municipality within a radius of eight kilometres of the boundary of any city without notice in writing to the council of the city, and if the council of the city, within four weeks after the receipt of the notice, gives a notice in writing to the council of the local municipality that it objects to the granting of the franchise the approval of the Ontario Energy Board shall be obtained, and if the council of the city does not give such notice within such time, it shall be deemed to have no objection and the council of the local municipality may grant the franchise with the assent of the municipal electors of the local municipality as provided by section 3. R.S.O. 1990, c. M.55, s. 4 (1); 2001, c. 25, s. 480 (5).

**Definition**

(1.1) In subsection (1),

“city” means a local municipality that was a city on December 31, 2002. 2002, c. 17, Sched. F, Table.

(2) REPEALED: 2001, c. 25, s. 480 (6).

**Section Amendments with date in force (d/m/y)**

2001, c. 25, s. 480 (5, 6) - 01/01/2003

2002, c. 17, Sched. F, Table - 01/01/2003

**Extension of certain existing works not to be made without by-law**

**5** (1) Where a by-law granting a franchise or right in respect of a public utility under subsection 3 (1), that has not been assented to by the municipal electors as provided by that subsection, was passed before the 16th day of April, 1912, no extension of or addition to the works or services constructed, established or operated under the authority of such by-law as they existed and were in operation at that date shall be made except under the authority of a by-law hereafter passed with the assent of the municipal electors, as provided by subsection 3 (1), and such consent is necessary, although such last-mentioned by-law is expressly limited in its operation to a period not exceeding one year. R.S.O. 1990, c. M.55, s. 5 (1); 2001, c. 25, s. 480 (7).

**Exceptions as to franchises granted before 16th March, 1909**

(2) Subsection (1) does not apply to a franchise or right granted by or under the authority of any general or special Act of the Legislature before the 16th day of March, 1909, but no such franchise or right shall be renewed, nor shall the term thereof be extended by a municipal corporation except by by-law passed with the assent of the municipal electors as provided in section 3. R.S.O. 1990, c. M.55, s. 5 (2).

**Section Amendments with date in force (d/m/y)**

2001, c. 25, s. 480 (7) - 01/01/2003

**Exceptions:**

**6** (1) Except where otherwise expressly provided, this Act does not apply to a by-law,

**works originating in another municipality**

- (a) granting the right of passing through the municipality for the purpose of continuing a line, work or system that is intended to be operated in or for the benefit of another municipality and is not used or operated in the municipality for any other purpose except that of supplying gas in a municipality to persons whose land abuts on a highway along or across which the same is carried or conveyed, or to persons whose land lies within such limits as the council by by-law passed from time to time determines should be supplied with any of such services;

**gas transmission lines**

- (b) granting the right of passing through the municipality with a line to transmit gas not intended to be distributed from such line in the municipality or only intended to be distributed from such line in the municipality to a person engaged in the transmission or distribution of gas;

**works required for transmission of gas**

- (c) conferring the right to construct, use and operate works required for the transmission of gas not intended for sale or use in the municipality; or

**limited to three years**

- (d) that is expressly limited in its operation to a period not exceeding three years and is approved by the Ontario Energy Board. R.S.O. 1990, c. M.55, s. 6 (1); 2001, c. 25, s. 480 (8-11).

(2) REPEALED: 2001, c. 25, s. 480 (12).

**Section Amendments with date in force (d/m/y)**

2001, c. 25, s. 480 (8-12) - 01/01/2003

**Extension of franchise**

7 (1) Where a by-law to which clause 6 (1) (d) applies is passed, that clause does not apply to any subsequent by-law in respect of the same works or any part of them or to an extension of or addition to them, although the subsequent by-law is expressly limited in its operation to a period not exceeding three years, and no such subsequent by-law has any force or effect unless it is assented to by the municipal electors as provided by subsection 3 (1). R.S.O. 1990, c. M.55, s. 7 (1).

**Idem**

(2) Despite subsection (1), clause 6 (1) (d) applies to a subsequent by-law or by-laws in respect of the same works or any part of them or to an extension of or addition to them if the period of operation of such subsequent by-law or by-laws is expressly limited so that the total period of operation of the original by-law and the subsequent by-law or by-laws does not exceed three years. R.S.O. 1990, c. M.55, s. 7 (2).

**Approval for construction of gas works or supply of gas in municipality**

8 (1) Despite any other provision in this Act or any other general or special Act, no person shall construct any works to supply,

- (a) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas; or
- (b) gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas and in which gas was then being supplied,

without the approval of the Ontario Energy Board, and such approval shall not be given unless public convenience and necessity appear to require that such approval be given. R.S.O. 1990, c. M.55, s. 8 (1); 1998, c. 15, Sched. E, s. 21 (4).

**Form of approval**

(2) The approval of the Ontario Energy Board shall be in the form of a certificate. R.S.O. 1990, c. M.55, s. 8 (2).

**Jurisdiction of Energy Board**

(3) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and to grant or refuse to grant any certificate of public convenience and necessity, but no such certificate shall be granted or refused until after the Board has held a public hearing to deal with the matter upon application made to it therefor, and of which hearing such notice shall be given to such persons and municipalities as the Board may consider to be interested or affected and otherwise as the Board may direct. R.S.O. 1990, c. M.55, s. 8 (3).

**Section Amendments with date in force (d/m/y)**

1998, c. 15, Sched. E, s. 21 (4) - 07/11/1998

**Gas franchise by-law to be approved by Energy Board**

9 (1) No by-law granting,

- (a) the right to construct or operate works for the distribution of gas;
- (b) REPEALED: 1998, c. 15, Sched. E, s. 21 (5).
- (c) the right to extend or add to the works mentioned in clause (a); or
- (d) a renewal of or an extension of the term of any right mentioned in clause (a),

shall be submitted to the municipal electors for their assent unless the terms and conditions upon which and the period for which such right is to be granted, renewed or extended have first been approved by the Ontario Energy Board. R.S.O. 1990, c. M.55, s. 9 (1); 1998, c. 15, Sched. E, s. 21 (5-7).

**Jurisdiction of Energy Board**

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and may give or refuse its approval. R.S.O. 1990, c. M.55, s. 9 (2).

**Hearing to be held**

(3) The Ontario Energy Board shall not make an order granting its approval under this section until after the Board has held a public hearing to deal with the matter upon application therefor and of which hearing such notice shall be given in such manner and to such persons and municipalities as the Board may direct. R.S.O. 1990, c. M.55, s. 9 (3).

**Electors' assent may be dispensed with**

(4) The Board, after holding a public hearing upon such notice as the Board may direct and if satisfied that the assent of the municipal electors can properly under all the circumstances be dispensed with, may in any order made under this section declare and direct that the assent of the electors is not necessary. R.S.O. 1990, c. M.55, s. 9 (4).

**Section Amendments with date in force (d/m/y)**

1998, c. 15, Sched. E, s. 21 (5-7) - 07/11/1998

**Application to Energy Board for renewal, etc., of gas franchise**

**10** (1) Where the term of a right referred to in clause 6 (1) (a), (b) or (c) that is related to gas or of a right to operate works for the distribution of gas has expired or will expire within one year, either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right. R.S.O. 1990, c. M.55, s. 10 (1); 1998, c. 15, Sched. E, s. 21 (8).

**Powers of Energy Board**

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right. R.S.O. 1990, c. M.55, s. 10 (2).

**Hearing**

(3) The Board shall not make an order under subsection (2) until after the Board has held a public hearing upon application therefor and of which hearing such notice shall be given in such manner and to such persons and municipalities as the Board may direct. R.S.O. 1990, c. M.55, s. 10 (3).

**Interim order**

(4) Despite subsection (3), where an application has been made under subsection (1) and the term of the right has expired or is likely to expire before the Board disposes of the application, the Board, on the written request of the applicant, and without holding a public hearing, may make such order as may be necessary to continue the right until an order is made under subsection (2). R.S.O. 1990, c. M.55, s. 10 (4).

**Order deemed by-law assented to by electors**

(5) An order of the Board heretofore or hereafter made under subsection (2) renewing or extending the term of the right or an order of the Board under subsection (4) shall be deemed to be a valid by-law of the municipality concerned assented to by the municipal electors for the purposes of this Act and of section 58 of the *Public Utilities Act*. R.S.O. 1990, c. M.55, s. 10 (5).

**Right expired before commencement of section**

(6) An application may not be made under this section in respect of a right that has expired before the 2nd day of December, 1969. R.S.O. 1990, c. M.55, s. 10 (6).

**Section Amendments with date in force (d/m/y)**

1998, c. 15, Sched. E, s. 21 (8) - 07/11/1998

**11** REPEALED: 2003, c. 3, s. 1.

**Section Amendments with date in force (d/m/y)**

2003, c. 3, s. 1 - 01/08/2003

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# Tab 14

*E.B.A. 825/872, Decision with Reasons, Centra Gas (Ontario) Inc., Re, June 22, 2000*

2000 CarswellOnt 10612  
Ontario Energy Board

 Original Go to

**Centra Gas (Ontario) Inc., Re**

2000 CarswellOnt 10612

**Centra Gas (Ontario) Inc., Re**

Sheila K. Halladay Presiding Member, Roger M.R. Higgin Member, A. Catherina Spoel Member

Judgment: June 1, 2000

Docket: None given.

Counsel: Counsel — not provided

Subject: Natural Resources; Public

<b>Headnote</b>
<b>Natural resources</b>
<b>Public law</b>

**Decision of the Board:**

**1. BACKGROUND TO THE APPLICATION AND HEARING**

**1.1 THE APPLICATION**

1.1.1 On July 31, 1997, Centra Gas (Ontario) Inc. ("Centra") a predecessor of Union Gas Limited ("Union" or the "Company") filed an application (the "Application") with the Ontario Energy Board (the "Board") for an order or orders under sections 9 and 10 of the *Municipal Franchises Act, R.S.O. 1990, c. M.55*, as amended, (the "MFA") for approval of the terms and conditions and for renewal, or extension of, the franchise for the Township of Pittsburgh. The Board assigned the Application file No. E.B.A. 825. On September 9, 1997, the Board issued its first Interim Order extending the franchise until October 24, 1998.

1.1.2 On October 15, 1998, shortly before the expiry of first Interim Order, Union submitted a second application to the Board under [section 10 of the MFA](#) for an order renewing the term of the right to operate the works for the distribution of gas in that portion of the City of Kingston ("City", "new City", "Kingston" or "new Kingston") which was formerly the Township of Pittsburgh. The Board assigned this application file No. 872. For this purposes of the current proceeding the Board relied on the E.B.A. 825 application.

**1.2 BACKGROUND**

1.2.1 Effective December 5, 1955, the Corporation of the Township of Pittsburgh ("Pittsburgh") entered into a franchise agreement (the "1955 Franchise Agreement") with Lakeland Natural Gas Limited ("Lakeland"), a predecessor of Centra and Union, to provide natural gas within the boundaries of the Township of Pittsburgh. The terms and conditions of the agreement were approved by the Ontario Fuel Board, the predecessor of the Board, and a Certificate of Public Convenience and Necessity was issued on March 28, 1956.

1.2.2 Effective October 14, 1977, Pittsburgh entered into a new franchise agreement (the "1977 Franchise Agreement") with Lakeland's successor, Northern and Central Gas Corporation Limited, to provide natural gas in Pittsburgh until October 24, 1997. The 1977 Franchise Agreement was approved by the Board.

1.2.3 On January 7, 1997, the Minister of Municipal Affairs and Housing signed an order (the "Restructuring Order") under subsection 25.2 of the *Municipal Act R.S.O. 1990, c. M.45* as amended by S.O. 1996 C-1 Sch M, s.1 and S.O.1997, c.26, Sch to

implement a proposal for restructuring for the City of Kingston ("old Kingston" or "old City"), the Township of Kingston ("Kingston Township" or the "former Township of Kingston"), and Pittsburgh (or the "former Township of Pittsburgh"). Section 3.1 of the Restructuring Order provided that effective January 1, 1998, old Kingston and the former Townships of Kingston and Pittsburgh and their local boards would be dissolved and a new city named The Corporation of the City of Kingston would be incorporated.

1.2.4 In June 1997, Centra approached Pittsburgh with a request to renew the 1977 Franchise Agreement. In light of the pending municipal restructuring, the matter was dealt with by the Transition Board, which consisted of the Mayor of old Kingston and the Reeves of the former Townships of Pittsburgh and Kingston. The Transition Board agreed that it would be appropriate, in the circumstances of the anticipated amalgamation, to renew the 1977 Franchise Agreement on an interim basis.

1.2.5 On July 30, 1997, Centra filed an application with the Board for an order or orders under sections 9 and 10 of the MFA for approval of the terms and conditions and for renewal or extension of the franchise for Pittsburgh. Centra also applied, with the consent of the Transition Board, for an interim one year extension of the franchise. On September 9, 1997, the Board issued its first Interim Order extending the franchise until October 24, 1998. Centra amalgamated with Union effective January 1, 1998.

1.2.6 The Restructuring Order took effect on January 1, 1998 and incorporated the new City of Kingston to govern as a single municipality encompassing the area of the three former municipalities.

1.2.7 On August 10, 1998, Union wrote to the Kingston City Clerk requesting approval of its request to renew the franchise for the area of Kingston formerly encompassed by the former Township of Pittsburgh. On October 14, 1998 the City, through Utilities Kingston, advised Union the City had decided that Utilities Kingston would provide natural gas distribution services in Pittsburgh, as well as in the old City.

1.2.8 On October 15, 1998, shortly before the expiry of the first Interim Order, Union submitted a second application to the Board under section 10 of the MFA for an order renewing the term of the right to operate the works for the distribution of gas in that portion of the City of Kingston which was formerly the Township of Pittsburgh. By letter dated October 21, 1998, Union informed the Board that it was unable to reach an agreement with Kingston with respect to a franchise renewal for Pittsburgh and requested an extension of the first Interim Order. On October 26, 1998, the Board issued a second Interim Order, on a without prejudice basis and with the consent of Kingston and Union, extending Union's franchise rights in the former Township of Pittsburgh until the franchise renewal could be considered, or at the latest April 24, 1999.

1.2.9 On December 2, 1998, Kingston filed a motion (the "Motion") challenging the Board's jurisdiction to deal with the Application.

1.2.10 On December 15, 1998, Kingston City Council passed a resolution approving "all necessary steps to ensure that consumers within the former Pittsburgh Township received the lowest cost, safe and reliable supply of natural gas by any means permissible by law, including the acquisition of the existing assets required for the distribution of natural gas in the former Township of Pittsburgh".

1.2.11 On February 25, 1999, the Board heard the Motion and issued its oral decision confirming the Board's jurisdiction to hear the franchise renewal application.

1.2.12 On March 9, 1999, the Board issued a procedural order calling for evidence, interrogatories and responses to be filed by April 12, 1999.

1.2.13 On March 11, 1999, Kingston advised Union that its Council was considering a by-law under section 62 of the *Public Utilities Act, R.S.O. 1990, c. P.52*, as amended, ("PUA") to acquire the works and property of Union in the former Township of Pittsburgh.

1.2.14 The Board issued its Notice of Hearing on April 14, 1999, setting a hearing date of May 19, 1999. By letter dated May 12, 1999, signed jointly by Union and Kingston, the parties requested an adjournment of the hearing, pending an attempt to negotiate a settlement of the issues. The Board granted the requested adjournment and issued a third Interim Order, extending the franchise until August 24, 1999.

1.2.15 In June 1999, Council passed a by-law in order to effect the acquisition of Union's gas distribution assets in the former Township of Pittsburgh.

1.2.16 The Board issued further Interim Orders on August 23, 1999 extending the interim franchise until December 24, 1999 and on November 23, 1999 extending the franchise expiry date to June 24, 2000.

1.2.17 On August 6, 1999, the Ministers of Municipal Affairs and of Energy Science and Technology wrote to the Mayor of Kingston and indicated that, subject to approval by the Legislature, the Government intended to repeal [section 62 of the PUA](#). On December 22, 1999, [section 62 of the PUA](#) was repealed retroactive to January 1, 1999.

### **1.3 THE HEARING**

1.3.1 A hearing of the Application was held on December 11 and 12, 1999. Written arguments were submitted by the parties on January 21, 2000. Oral arguments were heard on January 31, 2000 and February 2, 2000.

1.3.2 The following representatives appeared at the hearing:

Glenn Leslie	Union Gas Limited
Sharon Wong	
Guy Pratte	City of Kingston
Kevin LaRoche	
Fred Cass	The Consumers' Gas Company Ltd.
Jennifer Lea	Board Counsel
Michael Lyle	Board Solicitor

1.3.3 Union called the following Company witnesses:

John Wellard	Senior Vice President, Asset Management
Jane Peverett	Senior Vice President, Finance and Business Services
Michael Deschesne	Eastern District Manager
Paul Dhaen	Senior Analyst, Financial Analysis
Michael Packer	Manager, Rates and Pricing
Harold Pankrac	Team Leader, Rates and Pricing

1.3.4 The City of Kingston called the following witnesses:

Gary Bennett	Mayor, City of Kingston
Bert Meunier	Chief Administrative Officer, City of Kingston
James Keech	General Manager, Utilities Kingston
Nancy Taylor	Assistant General Manager, Utilities Kingston

1.3.5 A complete record of the proceedings, together with exhibits, is available for public inspection at the Board's offices.

1.3.6 The Board has considered the evidence, submissions and arguments in the Application, but has only referenced them to the extent necessary to provide background to its decision.

## **2. STATUTORY FRAMEWORK**

2.0.1 Three principal statutes deal with the provision of natural gas to residents of Ontario: the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sch. B (the "OEB Act"); the *Public Utilities Act*; and the *Municipal Franchises Act*.

### **2.1 ONTARIO ENERGY BOARD ACT (THE "OEB ACT")**

2.1.1 The OEB Act deals with the general jurisdiction of the Board to regulate the production, transmission, distribution and storage of natural gas in Ontario. The OEB Act does not deal explicitly with the Board's jurisdiction regarding the renewal of franchises. However, subsection 19(6) of the OEB Act provides that:

The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this [the OEB Act] or any other Act.

2.1.2 Section 23 of the OEB Act grants the Board broad powers in making orders, including the power of the Board to "impose such conditions as it considers proper". In addition an order of the Board may be "general or particular in its application".

## ***2.2 THE PUBLIC UTILITIES ACT (THE "PUA")***

2.2.1 The PUA deals with a broad range of public utilities, including natural gas.

2.2.2 Subsection 18(1) of the PUA provides that a municipality "may manufacture, procure, produce and supply for its own use and the use of the inhabitants of the municipality any public utility ... and for such purposes may purchase, construct, improve, extend, maintain and operate any works that may be considered requisite".

2.2.3 Section 28 of the PUA provides that a municipal council may pass by-laws for the maintenance and management of the public utility works and the conduct of the officers and employees in connection with them. A council may also fix rates or charges for supplying the public utility.

2.2.4 Section 58 of the PUA provides that a company (as distinct from a municipal utility) shall not exercise any of its powers within a municipality unless a by-law of the council of the municipality has been passed authorizing such action, with the assent of the electors as may be required by the MFA.

2.2.5 The effect of the PUA is to vest in the municipalities, in the first instance, the right to establish and operate municipal gas utilities and to allow private companies to operate in a municipality under the authority of a municipal by-law.

## ***2.3 THE MUNICIPAL FRANCHISES ACT (THE "MFA")***

2.3.1 The MFA was first enacted in 1912. Section 3 of the MFA provides that a municipal by-law granting, extending or renewing a right to construct or operate a public utility must set forth the terms and conditions upon which and the period for which such right is to be granted and that the by-law must receive the assent of the electors.

2.3.2 In 1933, the MFA was amended with the addition of section 8, which prohibited any person from constructing any work to supply gas unless a certificate of public convenience and necessity had been obtained from the Ontario Municipal Board. Section 8 was later amended to confer certification authority on the Ontario Fuel Board and later on the Board. Section 8 of the MFA did not replace the requirement that a utility must obtain a franchise from the municipality.

2.3.3 The MFA was further amended in 1954 with the addition of section 9, which deals with the original grant of the franchise. Section 9 of the MFA now provides:

9(1) No by-law granting,

(a) the right to construct and operate works for the distribution of gas;

(c) the right to extend or add to the works mentioned in clause (a); or

(d) a renewal of or an extension of the term of any right mentioned in clause (a)

shall be submitted to the municipal electors for their assent unless the terms and conditions upon which and the period for such right is to be granted, renewed or extended have first been approved by the Ontario Energy Board.

2.3.4 Section 10 was added to the MFA in 1969. 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. Section 10 is specifically intended to allow the Board to implement a renewal of a franchise where there is no agreement between the municipality and the utility and to allow the Board to determine the terms of the franchise being renewed. Section 10 of the MFA, as amended, now provides, in part:

10(1) Where the term of a right ... to operate works for the distribution of gas has expired or will expire within one year, either the municipality or the party having

the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right.

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right. ...

(5) An order of the Board heretofore or hereafter made under subsection (2) renewing or extending the term of the right ... shall be deemed to be a valid by-law of the municipality concerned assented to by the municipal electors for the purposes of this Act and [section 58 of the Public Utilities Act](#).

2.3.5 Therefore in order for the Board to exercise its jurisdiction under [section 10 of the MFA](#) the Board must consider the following criteria:

- the term of the right to operate works for the distribution of gas has expired or will expire within one year and either the municipality or the party having the right has applied to the Board for an order for a renewal of or an extension of the term of the right;
- "public convenience and necessity" require the Board to make an order renewing or extending the term of the right, or "public convenience and necessity" do not require the Board to renew or extend the right; and
- the Board can impose appropriate terms and conditions.

### **3. POSITIONS OF THE PARTIES**

#### **3.1 UNION'S PROPOSAL**

3.1.1 Union has requested the Board to issue an order under [section 10 of the MFA](#) renewing the term of its right to operate the works for the distribution of gas in that portion of the City of Kingston which was formerly the Township of Pittsburgh. Union has suggested that the terms and conditions imposed by the Board should be those of the existing model franchise agreement. However, Union recognized that the Board is considering amendments to the model franchise agreement and Union indicated it would be amenable to the Board imposing the terms and conditions of any new model franchise agreement.

#### **3.2 KINGSTON'S PROPOSAL**

3.2.1 Kingston has been providing gas and electrical service within its boundaries since it acquired the Kingston Light, Heat and Power Company in 1904. Responsibility for gas and electricity, as well as water works, was given over to a Public Utility Commission in 1913. "Town Gas" produced by coal gasification was replaced with natural gas service when the utility was connected to the TransCanada PipeLines ("TCPL") system in 1958.

3.2.2 Kingston was providing gas utility service prior to 1933 and therefore has been exempt from the necessity of obtaining a certificate of public convenience and necessity under [section 8 of the MFA](#) in respect of construction of gas distribution facilities in the old City of Kingston. Kingston is also exempt from rate regulation by the Board by virtue of subsection 36(8) of the OEB Act.

3.2.3 During the 1950's through to the 1990's the City received several offers to purchase Kingston's gas utility, including offers from Lakeland, ICG Utilities (Ontario) Ltd., The Consumers' Gas Company Ltd., and Centra. These offers were rejected by the City. Kingston operates one of two municipal gas utilities in Ontario (the other is Kitchener). Utilities Kingston now serves approximately 10,800 natural gas customers, comprised of 8,800 residential, 1,904 commercial, and 13 small and large industrial customers.

3.2.4 Kingston pointed out that at no time prior to the municipal restructuring with the Townships of Pittsburgh and Kingston had Kingston ever evinced any intention of providing gas services in either of Union's franchise areas in the former Townships of

Pittsburgh and Kingston. It was as a result of the restructuring, a product of the policy of the provincial government to enhance efficiency of municipal government, that the City decided to operate a single gas distribution system in both the former Townships of Pittsburgh and Kingston. Union has a franchise agreement for the former Township of Kingston that expires in 2004.

3.2.5 Kingston proposed that the Board order that operational responsibility for the distribution of gas in the former Township of Pittsburgh be transferred to Kingston as soon as a transition could be operationally accomplished (the "transition date"). By the transition date, Union would transfer operation of the distribution works in the former Township of Pittsburgh to Kingston, including the responsibility for maintaining and replacing Union's existing distribution plant in the former Township of Pittsburgh. New plant required for the distribution system, either for replacement or growth, would be paid for and owned by Kingston.

3.2.6 Kingston would pay Union for Kingston's exclusive use of Union's distribution plant located in the former Township of Pittsburgh, including the Joyceville Lateral and the Barriemfield Lateral. This amount would recover the undepreciated capital costs of Union's distribution plant (including the costs of the laterals) at the composite depreciation rate determined by the Board, from time to time, in Union's rates cases. The consideration payable by Kingston to Union would be derived annually from the declining undepreciated capital costs of Union's distribution plant in the former Township of Pittsburgh. The consideration would be paid by Kingston to Union over the remaining economic life of the distribution plant, until the plant had been fully depreciated or replaced by Kingston.

3.2.7 Kingston would also pay Union an amount to compensate Union for the actual costs of transmission service on the Barriemfield Lateral, as agreed by the parties or, in the absence of any agreement, as determined by the Board following a hearing.

3.2.8 If, after determining the amounts payable to Union for the first year, Kingston decided that it did not wish to proceed with its proposal, then Kingston would be deemed to have consented to the renewal of Union's franchise pursuant to [section 9 of the MFA](#) on the terms and conditions requested by Union.

3.2.9 The City proposed that any matter that the parties could not resolve themselves pertaining to the interpretation and/or implementation of the Board order would be resolved by the Board in the manner prescribed by the Board.

### **3.3 PUBLIC CONVENIENCE AND NECESSITY**

3.3.1 In considering the proposals of parties, the key issue for the Board to determine is "public convenience and necessity". The [MFA](#) does not define "public convenience and necessity" nor does it set specific criteria that the Board should apply in determining whether the franchise should be renewed. The parties have suggested a number of factors that the Board should take into account in making its determination.

#### *Legislative Context*

3.3.2 Union submitted that the exercise of the Board's discretion under [section 10 of the MFA](#) should be made within the context of its governing statutes and should be consistent and governed by the purposes and interests which the statutes seek to protect.

3.3.3 It was Union's position that important factors which are to govern the manner in which the Board exercises its discretion include: the purpose of [section 10 of the MFA](#); the objectives of the Board as set out in section 2 of the OEB Act; previous OEB decisions regarding its jurisdiction under section 10; and previous judicial decisions establishing that the municipality has no power to encroach on the Board's exclusive jurisdiction.

3.3.4 Section 2 of the OEB Act sets out the objectives that are to guide the Board in carrying out its responsibilities in relation to gas. Union pointed out that, in particular, paragraphs 2 and 3 of section 2 of the OEB Act require the Board to seek to maintain just and reasonable rates for the transmission, distribution and storage of gas and to facilitate rational expansion of transmission and distribution systems.

3.3.5 Union's position was that when determining the public interest and what is required for public convenience and necessity, the only factors which the Board is

entitled to take into account are public interest factors related to the regulation and control of the transmission, distribution, sale and storage of gas, and that the Board is not endowed with power to make decisions which only promote the aims of individual municipalities, including raising revenue for municipalities.

*Deference to Wishes of City Council*

3.3.6 Kingston's evidence was that the City had decided, through its duly elected Council, that the interests of the City, including the former Township of Pittsburgh, required that the franchise with Union not be renewed. Kingston submitted that the Board should show substantial deference to the City's decision and should not interfere unless the decision was patently unreasonable. The City contended that this approach is consistent with the primacy of municipal consent to the grant of franchises which is embedded in the relevant statutory framework.

3.3.7 Union countered Kingston's position with the proposition that [section 10 of the MFA](#) would serve no purpose if the municipality's wishes were paramount or determinative of when a franchise should be renewed and that just because a municipality wants a particular outcome does not mean that it is necessarily in the public interest. In support of this position Union pointed out that [section 10 of the MFA](#) allows the Board to impose terms contrary to the municipality's wishes.

3.3.8 Union pointed out that in the preliminary motion brought by the City, the Board has already ruled that it has jurisdiction to entertain this Application, even though the City does not want the franchise renewed.

3.3.9 Union agreed that while the Board can consider the municipality's wishes, the Board should also consider other relevant factors. Union argued that if the Board were governed solely by the municipality's wishes that would be de facto delegation of the Board's discretion and such delegation would be improper.

3.3.10 Union pointed out that section 10 was added to the [MFA](#) in 1969. Prior to that time both the municipality and the utility had common law rights to terminate a franchise upon the expiry of the franchise agreement. Section 10 was specifically intended to allow the Board to implement a renewal of a franchise where there was no agreement between the municipality and the utility.

*Reasonable Expectation of Renewal*

3.3.11 Union contended that its shareholder and management had a "reasonable expectation" that its franchise would always be renewed provided Union fulfilled its franchise obligations. Although Union acknowledged that it did not have a "right" to perpetual renewal, it also took the position that it was entitled to renewal if it continued to provide superior service and to meet its obligations.

3.3.12 Kingston interpreted Union's argument to mean that the Board should limit its view of public convenience and necessity to determining whether Union had met its franchise obligations. Kingston countered that there is no factual evidence to support this "expectation". Union did not deny that neither the Township nor the City contributed to such an expectation; that Union had never communicated such an expectation to the Township or the City; and that neither the 1955 nor the 1977 Franchise Agreement contained an automatic right of renewal.

3.3.13 The City argued that the Board's consideration of public convenience and necessity is not limited to refusing to renew a franchise only in those situations where the franchisee has breached its franchise obligations. That would, in Kingston's view, be redundant, since in such a situation, the municipality would have the contractual right to terminate the franchise. In addition, there is no indication that the Board can only terminate a franchise in circumstances of force majeure, which again would not require the Board's intervention, since frustration would by normal operation of contract law principles lead to termination of the franchise.

3.3.14 Union argued that a reasonable expectation of renewal is realistic and that enduring franchises are an implicit assumption and foundation of the postage stamp rate regime. Union contended that this conclusion was supported by past practice of franchise renewals.

3.3.15 Kingston contended that whatever "expectations" Union's investors have, they are not based on any analysis of the franchise agreements or the law applicable to their

renewal, and that the consequences of their expectations ought not to be visited upon Kingston, or to serve to motivate a tortured interpretation of the statutory regime.

3.3.16 Kingston's position was that the pattern of renewals in other municipalities cannot create a contractual right between Union and Kingston. Kingston argued that if this matter is as fundamental and threatening to its business as Union now claims, then Union could have guarded against the risk of non-renewal by negotiating an appropriate renewal term with the municipalities.

3.3.17 Kingston indicated that the 1977 Franchise Agreement protected Union in that it afforded Union the right to sell its assets to any person in the event that the municipality did not wish to renew and the Board did not order a renewal. Thus, the City contended that Union clearly recognized and adverted to the risk that the Board could refuse to extend or renew its right to operate.

#### *Rates*

3.3.18 Kingston's evidence was that its residential gas utility rates are lower than Union's. Assuming that Kingston applied its current rates to Pittsburgh residents, the City contended that 99.9% of Pittsburgh residents would benefit from a rate decrease. Only two industrial customers would experience an increase.

3.3.19 Union stated that if Kingston operated a gas distribution system in Pittsburgh it would have to pay a transmission rate to Union to transport gas through Union's transmission line to Pittsburgh, under Rate 77, thus narrowing or eliminating Kingston's purported rate advantages. Alternatively, Kingston would have to build its own transmission line at an estimated cost of approximately \$525,000. Union contended that if Kingston operated the system in Pittsburgh an annual revenue deficiency would occur and that it would be necessary for Kingston to raise rates.

#### *Operation of the Gas Distribution System*

3.3.20 Kingston has adopted a restructuring plan to address financial challenges confronting the provision of public utility services by Utilities Kingston. The City's view is that it will be most convenient for residential, commercial and industrial customers to be able to access one supplier of natural gas, electricity, sewer and water services. Kingston's position was that Utilities Kingston can offer equally reliable service, at better rates than Union, to all residents of Kingston, with the result that all residents are treated equally and benefit to an optimal extent from convergence of services.

3.3.21 As part of its evidence Kingston filed survey results which indicated that the residents of Pittsburgh are in favour of Kingston's convergence plan.

3.3.22 Union countered that it had been providing reliable gas service for 40 years and that Union would provide superior service to that of Kingston.

3.3.23 Kingston submitted that there was no evidence to indicate that Union had more reliable service, safer operations or a greater range of services than Kingston.

#### *Ownership of the Assets*

3.3.24 Union pointed out that it is the only party who currently owns facilities to distribute gas in the former Township of Pittsburgh. The only alternative proposed, namely Kingston's proposal that the Board impose a lease or service agreement on Union such that Kingston operate Union's pipeline in the former Township of Pittsburgh, is unfeasible since, among other reasons, the Board has no authority to impose such an order.

3.3.25 Union also noted that the fact that the municipality is the legal owner of public lands on which the distribution system is built does not entitle the City to any special right to object to or prohibit a utility from using the land. Public lands do not belong to a municipality in the same way as lands belong to a private owner. A municipality holds lands in trust for the public, and a municipality is required by law to allow those lands to be used for the furtherance of the public interest.

#### *Business Case*

3.3.26 Kingston presented a business case, for purposes of illustration, to the Board that was based on assumptions and payments designed to keep Union whole in respect of the rate-making value of its gas assets in Pittsburgh. This case suggested Kingston

could generate profits on a 5-year, 10-year and *a fortiori*, longer term horizon. Kingston pointed out that Union considers that 40 years is an appropriate horizon to assess the feasibility of system expansion.

3.3.27 Kingston stated that it has no intention of providing service to Pittsburgh if the terms imposed by the Board are prohibitive and not in the interests of all Kingston residents. i.e. that there is no business case for doing so. Any order that terminated the franchise would be evaluated by Kingston carefully. If the costs were not acceptable, then Kingston has stated that it would renew the franchise with Union to ensure that Pittsburgh will continue to be served.

#### *Other Considerations*

3.3.28 Union argued that a refusal by the Board to renew the franchise would have several negative repercussions including: the end of postage stamp rates; increased debt costs and investor uncertainty, since the risk of franchise termination had not been factored into the determination of its allowed rate of return; the elimination of private sector profit; and loss of tax revenue to other levels of government.

#### *Public Policy*

3.3.29 The Consumers' Gas Company Ltd. ("Enbridge") limited its submissions to the broad public interest. Enbridge stated that the advantages of a system with a small number of natural gas distributors are stability, economies of scale, risk spreading, uniformity and consistency of customer treatment and regulatory facilitation. Moreover, Enbridge alleged that any Board decision that supports the concept of breaking up the status quo regarding gas distribution rights would be deleterious to the Province. Enbridge also submitted that Kingston's proposal implies that municipalities can break up distribution rights by refusing to renew franchises, even where there is no issue of an incumbent distributor's performance and execution of its obligations. Enbridge argued that Kingston's proposal was focused on Kingston's interests alone, not on public convenience and necessity or the broader public interest. While Kingston and other municipalities could negotiate a purchase or joint partnership with current or prospective gas utilities, Kingston's proposal to acquire a private utility's assets and move it into the public sector is contrary to the intent of the *Energy Competition Act 1998, S.O. 1998, c.15*.

#### *Precedent*

3.3.30 Kingston submitted that much of Union's case depends on the premise that if the Board were to terminate the Pittsburgh franchise this would inevitably create a precedent which would have disastrous consequences. These would include increased costs of capital, the end of natural gas system expansion, and the abandonment of postage stamp rates. Kingston cautioned that the Board "must be very wary of these apocalyptic predictions".

3.3.31 In this regard, Kingston submitted that its circumstances are unique: it is one of only two municipalities in Ontario which provides natural gas service to its residents; Kingston's refusal to renew the Pittsburgh franchise is the result of the expansion of its territory mandated by the Ontario government; it desires to treat all of its residents equally; Kingston has almost 100 years of expertise in the provision of gas service in the municipality; it has demonstrated its expertise to the great satisfaction of its ratepayers; Kingston has demonstrated that it is as efficient as Union and can offer cheaper rates; and Kingston's initiatives toward convergence were undertaken prior to the amendments to the OEB Act.

3.3.32 Union argued that the uniqueness claimed by Kingston, such as its historical experience in operations, could be effectively replicated elsewhere by hiring a gas distribution system operator to run the system on the municipality's behalf. A decision in favour of Kingston would lead to other municipalities following Kingston's example, leading to a possible disintegration of the integrated gas distribution network in the province.

3.3.33 Kingston submitted that there is nothing more than anecdotal evidence that any municipalities are contemplating not renewing franchises, except for the City of Sudbury, whose situation is fundamentally different from the situation in Kingston. Kingston pointed out that, apart from Enbridge, no other individual, company or

interest group made representations to the Board on behalf of the broader public interest.

### **3.4 TERMS AND CONDITIONS**

3.4.1 In addition to the issues of public convenience and necessity set out above, in considering an application under [section 10 of the MFA](#) the Board must also consider the specific proposals regarding the terms and conditions of franchise renewal suggested by the parties and the extent of the Board's jurisdiction to impose terms and conditions.

#### *Terms and Conditions Requested by Kingston*

3.4.2 The City argued that [section 10 of the MFA](#) must, explicitly or by necessary implication, vest in the Board the power to transfer the operation of the works to another person. Were this not the case, every refusal to impose a renewal under section 10 would leave municipal ratepayers without service. Hence, whatever the precise circumstances that justify the termination of a franchise, the Board must have the power to bring about this termination in a fashion that is in the public interest. The City contended that termination of a franchise is sanctioned by the opening words of [subsection 10\(2\) of the MFA](#) which provides that the Board "has and may exercise jurisdiction and power necessary for the purposes of this section".

3.4.3 The City argued that if the Board can order that a franchise is terminated it must necessarily follow that it can order the transfer of the operation of the franchisee's assets to a third party. Whether such transfer is called an extension of an existing franchise with a Board order that the franchisee permit another party to operate the works on its behalf, or whether the Board actually orders that the franchise is not renewed, subject to terms and conditions that ensure an orderly wind-down, is immaterial.

3.4.4 The City submitted that under its proposal Union would receive payments which would compensate it fully for the rate-making value of its assets and any remaining operating and maintenance costs, including those that might be associated with the continued operation of the Barriefield Lateral transmission line. However, Union would not be compensated for any growth that might have occurred had the franchise been renewed. The City's position was that this approach was reasonable since that growth was entirely contingent on the renewal of the franchise, in respect of which the City claimed Union had neither a contractual nor a statutory right.

3.4.5 Union stated that it had no intention of selling its gas distribution assets in the former Township of Pittsburgh. In this respect Union noted the Province's policy, as expressed by the Minister of Energy, Science and Technology, that sales of utilities must be between willing buyers and sellers. Union has stated clearly to the City that it is not a willing seller and its assets are not for sale.

3.4.6 Union submitted that the Board does not have jurisdiction to impose the terms and conditions sought by Kingston. In Union's view there are only two ways in which a potential new gas distributor could develop distribution capacity in Pittsburgh: either build an entirely new distribution system or negotiate the purchase of Union's system on terms agreeable to Union.

3.4.7 Union argued that from an economic perspective, construction of a second set of facilities would increase distribution rates for Union's other customers, would be manifestly unfair to Union's investors, and would create a substantial disincentive for future expansion of gas service in the Province.

3.4.8 Union estimated the net book value of its rate base assets in the former Township of Pittsburgh at \$4.7 million. It also estimated the market value as \$7.2 million based on a discounted cash flow analysis. Using the formula set out in the repealed subsection 62(2) of the PUA the value was estimated by Union as \$6.85 million.

3.4.9 Union claimed that Kingston's proposal is a thinly disguised attempt to circumvent the repeal of section 62 of the PUA and is in fact an expropriation which would deny Union the use of its property. Under Kingston's proposal, the City would be allowed to remove and replace Union's distribution system and payments to Union would end as soon as the City had replaced all of Union's assets with its own. In Union's

view, the fact that the expropriation occurs gradually over a period of time does not change its character.

*Terms and Conditions Requested by Union*

3.4.10 At the hearing the issue was raised as to whether the Board has jurisdiction to impose the full terms of the model franchise agreement on the parties or whether the Board is limited to granting Union the right only to continue to "operate" the works.

3.4.11 Union's position is that the Board has the power to renew Union's rights specifically to extend or add to its works in the former Township of Pittsburgh. In Union's view, renewing the right to operate the works effectively renews the right to extend or add to the works as well. Adding or extending to already existing works is inherent in the right to operate. A more restrictive interpretation of "operate" would be inconsistent with the purposes of the legislation, resulting in absurd consequences and depriving new customers of gas service during a renewal period where a restrictive interpretation precluded extensions.

3.4.12 Union argued that one of the objectives of [section 10 of the MFA](#) is to protect gas customers who might be deprived of gas service in the event that a municipality and utility company could not agree on the terms of a franchise renewal. In order for the Board to be able to protect the interests of all the residents of a municipality, the Board must necessarily have jurisdiction to authorize the expansion of the utility's gas distribution system to serve new customers in the municipality. Union also argued that a narrow interpretation of [section 10 of the MFA](#) would not be consistent with the objectives of the OEB Act and would lead to arbitrary and inequitable consequences.

3.4.13 Union stated that it is a principle of statutory interpretation that the Legislature does not intend to produce absurd consequences, and interpretations which lead to unreasonable results are to be avoided. In order to operate gas works to properly serve the residents of a community, a utility must be able to maintain and replace those works as needed. Therefore the right to "operate works" must inherently include permission to maintain and replace those works. Public convenience and necessity also requires that the right to operate inherently includes permission to add to and extend the already existing works to serve new customers.

#### 4. BOARD FINDINGS

4.0.1 The Board's jurisdiction under [section 10 of the MFA](#) is limited to two options: if public convenience and necessity appear to require it, the Board can renew or extend the term of the franchisee's right; or if public convenience and necessity do not appear to require it, the Board can refuse the extension of the right to operate the distribution works. On its face, [section 10](#) indicates no preference for renewal or termination; the sole consideration is public convenience and necessity.

4.0.2 The Board finds that it has the sole jurisdiction to determine "public convenience and necessity" under [section 10 of the MFA](#). This is supported by the decision in *Union Gas Limited v. Township of Dawn* (1977), 76 D.L.R. 613 that provided at page 622:

In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenance, expropriation of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the *Planning Act*.

4.0.3 In determining "public convenience and necessity" the Board is guided by the objectives of the OEB Act relating to the rational development of the supply, distribution and transmission of natural gas, including the maintenance of just and reasonable rates for the transmission, distribution and storage of gas and the facilitation of rational expansion of natural gas transmission and distribution systems.

4.0.4 In the Board's view, "public interest" and "public convenience and necessity" are broader than local, parochial interests and the Board is required to consider matters affecting provincial gas distribution as a whole and not just local interests. In considering each individual application to renew or extend a franchise, the Board must

balance the specific interests of all direct stakeholders, including ratepayers, the municipality and the utility shareholder, against the broader public interest.

4.0.5 While the views of the municipality should be taken into account by the Board they are not determinative of the issue of determining where public convenience and necessity lies.

4.0.6 The fact that Union had a "reasonable expectation" that the franchise would be renewed is also not a relevant factor in the determination of public convenience and necessity. The mere fact that most franchises are renewed without dispute is not sufficient to justify an assumption of automatic renewal of the franchise.

4.0.7 The Board is also not convinced that, if it were to refuse to renew Union's franchise agreement for the Township of Pittsburgh, the dire consequences predicted by Union, such as the end of postage stamp rates, loss of economies of scale, loss of expertise, reduction of expansion of gas distribution, increased cost and complexity of regulation and an increase in the utility's risk and cost of capital, would in fact occur.

4.0.8 The Board agrees with Kingston that because of the City's unique situation, the Board's determination in this case should not be considered a precedent for other municipalities to follow.

4.0.9 Both Union and Kingston have a long history of operating gas distribution systems in a safe, reliable and efficient manner. The Board is confident that either party has the ability to operate a gas distribution system in the former Township of Pittsburgh.

4.0.10 However, the issue before the Board is whether public convenience and necessity require the Board to grant or deny Union's Application. In order to make a determination in this case, the Board must also consider the Board's jurisdiction to order the requested terms and conditions.

4.0.11 The Board is not convinced by the City's arguments that if the Board can terminate a franchise it must necessarily follow that it can transfer the operation of the assets to a third party. Any power to expropriate must be clear and unambiguous in the Board's governing legislation. This is not the case in this instance.

4.0.12 As noted by the Ontario Superior Court of Justice in *Re Corporation of the City of Sudbury and Union Gas Ltd.* (2000), 47 O.R. (3d) 654 ("*Sudbury v. Union*") at page 664, "The OEB has no jurisdiction to decide who is entitled to ownership of the gas distribution system".

4.0.13 Kingston's proposal is creative and attempts to characterize its proposed arrangement with Union as a lease or services agreement. However, the practical effect of the proposal is that the City would gradually take over ownership of Union's gas distribution assets in the former Township of Pittsburgh. The Board has no authority to do indirectly what it cannot do directly. The Board agrees with Union that it has no jurisdiction to expropriate Union's assets and the fact that the expropriation occurs gradually over a period of time does not change its character. The Board has no authority to make the order requested by Kingston.

4.0.14 In a number of previous cases, the Board has determined that it has jurisdiction to impose the terms of a franchise agreement in situations where the municipality and the gas distribution company cannot agree. The Divisional Court in *Re City of Peterborough and Consumers Gas* (1980), 111 D.L.R. (3d) 234 upheld the Board's jurisdiction to impose the terms of the franchise in situations where the municipality and the gas distribution company cannot agree on the terms.

4.0.15 The opening words of [subsection 10\(1\) of the MFA](#) provide that "where the term of a right ..... *to operate* works for the distribution of gas has or will expire within one year" (emphasis added). In other words, the expiration of the right to operate the gas distribution works is a triggering event and is a condition precedent to an application by the municipality or the utility under [section 10\(1\) of the MFA](#).

4.0.16 In *Sudbury v. Union* the Ontario Superior Court of Justice recognized at page 664 that:

The OEB has exclusive jurisdiction to determine who is entitled to operate the Sudbury gas system.

4.0.17 The Court, however, noted at page 660 of the decision that this jurisdiction to determine who has the right to operate the gas distribution system is not unlimited:

The power of the Board to extend the term of a franchise under [section 10 of the \*Municipal Franchises Act\*](#) is limited. There is no power in the OEB to grant a franchise to another party over the objection of a municipality. There is only the power to renew or extend an existing franchise, and then only if 'public convenience and necessity appear to require it'.

4.0.18 In the Board's view the right to operate and the ancillary rights necessary to accomplish this include the ability to add to and extend the gas system, as provided for in the model franchise agreement.

4.0.19 The Court in *Sudbury v. Union* pointed out at page 660 of the decision that the Board has powers to impose terms and conditions and stated:

However, where the appropriate circumstances exist for the exercise of the OEB's jurisdiction to renew or extend the term of operating rights, the Board also has an ancillary jurisdiction under s.10(2) to impose "terms and conditions" on the renewal or extension. The OEB's jurisdiction under this provision is not restricted by who has ownership of the gasworks.

and at page 667:

Under s.10 of that Act [the [MFA](#)] the OEB can only order an extension or renewal of the right to operate the gas distribution system (**along with any ancillary rights necessary to accomplish that end**).

(emphasis added)

4.0.20 Prior to 1988 franchise agreements between municipalities and utilities were negotiated on an individual basis. In November 1985, the Board held a generic hearing, E.B.O.125, to consider and provide the Board's guidance on issues frequently arising from franchise agreements. As a result of the Board's determination in E.B.O.125, a model franchise agreement was developed. This model agreement has formed a template for most new and renewed franchises.

4.0.21 The Board has recently received submissions and heard presentations from municipalities and utilities on proposed amendments to the model franchise agreement. As a result, the Board is in the process of approving and issuing a new form of model franchise agreement (the "2000 Model Franchise Agreement").

4.0.22 The Board notes that the City of Kingston is not disputing the particular terms of the franchise agreement proposed by Union; rather it is stating that the Board should not impose a franchise agreement at all. The City has stated that it would be willing to agree to the terms of the model franchise agreement proposed by Union if the City determines that it does not want to proceed with its proposal to take over the operation of Union's gas distribution assets in the Township of Pittsburgh. Union has also indicated that it would be amenable to the Board imposing the terms and conditions of the 2000 Model Franchise Agreement.

4.0.23 The Board finds that it does not have the jurisdiction to impose the order requested by Kingston. Therefore, in order to ensure that residents of Pittsburgh continue to receive natural gas distribution services, the Board finds that public convenience and necessity appear to require that the Board renew or extend the term of the right of Union to operate works for the distribution of gas in the City of Kingston in the area comprised of the former Township of Pittsburgh.

4.0.24 Once the 2000 Model Franchise Agreement has been approved and issued by the Board, the Board will issue an order renewing the right of Union to operate works for the distribution of gas in in the geographic area of the City of Kingston that was formerly the Township of Pittsburgh for the period and on the terms and conditions set out in the 2000 Model Franchise Agreement.

4.0.25 In the interim, the Board orders that the right to operate works for the distribution of gas and to supply gas, conferred by the franchise agreement between Union Gas Limited (the successor of Centra Gas (Ontario) Inc. and Northern and Central Gas Corporation Limited) and the former Corporation of the Township of

Pittsburgh, dated October 24, 1977, be continued until such time as the order referred to in paragraph 4.0.24 is issued by the Board or at the latest December 24, 2000.

## 5. ADDITIONAL MATTERS

5.0.1 A number of additional matters were raised at the hearing that the Board considers are important to comment on at this time.

### 5.1 CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

5.1.1 The effect of the Restructuring Order on the requirement of the City to obtain a Certificate of Public Convenience and Necessity pursuant to [section 8 of the MFA](#) was raised at the hearing.

5.1.2 [Subsection 8\(1\) of the MFA](#) provides:

Despite any other provision in this Act or any other general or special Act, no person shall construct any works to supply

(a) natural gas in any municipality in which such person was not on the 1<sup>st</sup> day of April, 1933, supplying gas; or

(b) gas in any municipality in which such person was not on the 1<sup>st</sup> day of April, 1933, supplying gas and in which gas was then being supplied,

without the approval of the Ontario Energy Board, and such approval shall not be given unless public convenience and necessity appear to require that such approval be given.

5.1.3 The old City was supplying gas prior to April 1, 1933 and therefore the Board has not issued Kingston a Certificate of Public Convenience and Necessity with respect to constructing works to supply natural gas.

5.1.4 Union argued that since the new City did not exist on April 1, 1933, it could not have been supplying gas on that date and therefore is not entitled to rely on the exemptions in paragraphs 8(1)(a) and (b) of the MFA.

5.1.5 While the creation of the new City has loosely been described as a municipal amalgamation, this is not legally accurate. Clause 3.1(a) of the Restructuring Order provides:

On January 1, 1998, The Corporation of the City of Kingston and the Corporations of the Townships of Pittsburgh and Kingston and their local boards are dissolved and a new city to be named The Corporation of the City of Kingston is incorporated.

Therefore the old City is not the same person as the new City.

5.1.6 However, as a result of the Restructuring Order, the new City still retains certain aspects of the status of the old City. Clause 7.3(a) of the Restructuring Order provides that:

All assets, liabilities, obligations and responsibilities of the Corporation of the City of Kingston and The Corporations of the Townships of Pittsburgh and Kingston and their local boards are transferred to the new Corporation of the City of Kingston on January 1, 1998, without compensation.

5.1.7 While the ability to supply gas without a Certificate of Public Convenience and Necessity is more properly characterized as a "right", if the clause is given broad purposive reading, it is arguable that such ability may be characterized as an "asset" which has been transferred from the old City to the new City. This interpretation is supported by the general principle that a statute must be clear and unambiguous in taking away rights that have previously been enjoyed. This interpretation would be consistent with the Privy Council decision in *United Gas & Fuel Co. v. Dominion Natural Gas* [1934] 3 D.L.R. 529 (J.C.P.C.)

5.1.8 It is the Board's view that, because of the uncertainty of the effect of the Restructuring Order, it would be prudent for the City to apply to the Board for a Certificate of Public Convenience and Necessity to construct works to supply natural gas within the boundaries of the old City.

5.1.9 The Board is sympathetic to Kingston's desire to be able to offer gas services to all of its residents, both old and new. The Board is confident that Kingston has the ability to provide safe, reliable, gas distribution services throughout the new City as it has provided in the past in the old City.

5.1.10 The Board notes that the franchise granted to Union is not exclusive. Since the original grant of the right to distribute natural gas is vested in the municipality, subject to obtaining a Certificate of Public Convenience and Necessity, Kingston also has the right to construct works in the former Townships of Pittsburgh and Kingston.

5.1.11 If Kingston wishes to expand its facilities in areas of the City that were formerly in the Townships of Pittsburgh or Kingston, the City should apply to the Board for Certificates of Public Convenience and Necessity at that time.

## **5.2 RATE 77**

5.2.1 During the proceeding, both Union and Kingston assumed that if Kingston were to receive natural gas from the Barriefield lateral, Kingston would pay Union for such transmission service under Rate 77. The Board is of the view that this may not be the applicable rate.

5.2.2 If Kingston decides to expand its works to provide service to customers in the former Township of Pittsburgh, the Board will address issue of the appropriate rate for the use of transmission services, if required, at that time.

## **6. COSTS**

6.0.1 The Board's costs shall be paid by the Company upon receipt of the Board's invoice.

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# Tab 15

*Re City of Peterborough and Consumers Gas (1980), 111 D.L.R. (3d) 234*

1980 CarswellOnt 2234  
Ontario Superior Court of Justice (Divisional Court)

 Original [Go to](#)

**CITY OF PETERBOROUGH AND CONSUMERS' GAS CO., RE**

1980 CarswellOnt 2234, 3 A.C.W.S. (2d) 40

**IN THE MATTER OF The Municipal Franchises Act, R.S.O. 1979, Chapter 289; AND IN THE MATTER OF a franchise agreement between the Consumers' Gas Company and The Corporation of the City of Peterborough BETWEEN: THE CORPORATION OF THE CITY OF PETERBOROUGH, Appellant, and THE CONSUMERS' GAS COMPANY and THE ONTARIO ENERGY BOARD, Respondents**

Henry, Reid and Griffiths, JJ

Judgment: April 28, 1980

Docket: None given.

Counsel: G.H.T. Farquharson, Q.C. for the appellant P. Y. Atkinson for Consumers' Gas Company T. C. Marshall, Q.C. for the Ontario Energy Board

Subject: Public

***HENRY, J. (ORALLY):***

1 This appeal is brought before us by the Corporation of the City of Peterborough, with leave granted by Callaghan, J. on August 22, 1979 to argue the following question.

Did the Ontario Energy Board exceed its jurisdiction and authority under section 10(2) of the *Municipal Franchises Act* in imposing contractual obligations on the appellant which varied existing obligations or which were not contained in the existing franchise agreement dated the 26th day of January, 1959 on an application to the Board under the said section for renewal?

2 The appeal arises out of a franchise agreement made between the City and the Consumers' Gas Company (one of the respondents herein) on January 26, 1959 permitting the Company to provide gas services to the City for a period of twenty years. That franchise agreement was set to expire on January 26, 1979.

3 Negotiations were undertaken between the Company and the City with a view to the renewal of the franchise upon its expiry. It appears that agreement was not reached on the terms to be embodied in a new franchise agreement. As a result the matter came before the Ontario Energy Board as will be described.

4 In the circumstances regard must be had to the provisions of the *Municipal Franchises Act*, R.S.O. 1970, c. 289, ss. 3, 9 and 10.

5 This statute provides for the franchising of the supply *inter alia* of natural gas, manufactured gas and other gases and it is provided in Section 3 that the Municipal Corporation shall not grant permission to supply gas to the Municipality unless a by-law setting forth "the terms and conditions upon which and the period for which such right is to be granted," has been assented to by the Municipal electors.

6 Section 9 provides that no by-law granting the right to supply gas shall be submitted to the municipal electors for their assent unless "the terms and conditions upon which and the period for which such right is to be granted, renewed or extended" have first been approved by The Ontario Energy Board. In granting such approval the Ontario Energy Board is by subsection 3 required to hold a public hearing after giving notice to proper parties; and thereafter the Board may dispense with the assent of the electors.

7 Section 10 of the Act provides in part as follows:

10(1) Where the term of a right referred to in clause a, b or c of subsection 1 of section 6 that is related to gas or of a right to operate works for the distribution of

gas or to supply gas to a municipal corporation or to the inhabitants of a municipality has expired or will expire within one year, either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right. 1974, c.59, s.1.

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

(3) The Board shall not make an order under subsection 2 until after the Board has held a public hearing upon application therefor and of which hearing such notice shall be given in such manner and to such persons and municipalities as the Board may direct.

8 It was particularly with respect to Section 10 that Mr. Farquharson addressed his arguments before us.

9 In these circumstances the Company applied to the Board under Section 10 in view of the imminent expiry of the existing franchise agreement asking for an order for an interim extension, which was granted, and the final renewal or extension of the term of the right under the franchise. Notice was given to persons who might wish to appear at a hearing which the Board advertised would be held. The Company and the City among others appeared before the Board at the hearing. Before the Board among other materials, was the expiring agreement, a proposed draft prepared by the Company of a new franchise agreement which differed in some respects from the expiring agreement, and an answer filed by the City in the proceedings stating that the City would accept the Company's proposed draft if certain amendments were made.

10 The Board then held the hearing and considered the contending proposals. There is no issue before us as to the adequacy or fairness or completeness of that hearing. In the result it rejected all of the City's proposals and accepted those of the Company. The order of the Board then imposed terms and conditions, some of which were imposed upon the City that the City does not accept.

11 Mr. Farquharson's submissions on behalf of the City are really two-fold. First he says that the Board under this statutory authority may only extend or renew an agreement that is in existence between the City and the Company, whether that be the expiring agreement itself or a new one on terms negotiated. Second he says that no terms or conditions may be imposed by the Board upon the City that the City does not accept - in effect he urges us to interpret Section 10 as saying that terms and conditions are imposed upon the applicant who is seeking the order of the Board.

12 With respect we do not agree with these submissions.

13 In the sections that I have cited there is no requirement that the "terms and conditions" must be reached by agreement. No doubt this route will frequently be followed in circumstances such as these and there will be agreement between the parties as to the terms and conditions that ought to be imposed and it may be that the Board will adopt them. If however there is no agreement, it is obviously a matter for adjudication by the Board and they must decide the terms and conditions that the Act contemplates. This is a matter that is entirely within the Board's discretion, to be exercised after a proper hearing, and in our opinion that discretion was properly exercised. There is nothing in the statutory provisions to require that the terms and conditions found in the expiring agreement must be continued or that what is prescribed by the Board as a result of its adjudication be agreeable to either or both of the parties. It is for the Board to adjudicate when the matter is set down before them. Assuming that the hearing has been properly held, it is immaterial that the terms and conditions imposed are not those either in the expiring agreement or in a new agreement or are acceptable to the contending parties.

14 At the conclusion of the hearing the Board made the following order:

1. The Board is of the opinion that public convenience and necessity require it to make this Order.

2. The term of Consumers' right to construct and operate works for the transmission and distribution of gas in and through the City of Peterborough and to supply gas to the Corporation of the City of Peterborough and to its inhabitants is hereby renewed for a period of 20 years from the issue date of this Order.

3. The right is extended upon the terms and conditions of the proposed franchise agreement attached hereto as Appendix 'A'.

4. Consumers' shall pay to the Board its costs in the amount of \$2,006.00.

15 In the reasons for its decision it simply dealt with that part of the matter as follows:

Under Section 10(2) of the Act, the Board has jurisdiction, if public convenience and necessity appear to require it, to make an order renewing or extending the term of the right of a franchise for such period of time and upon such terms and conditions as may be prescribed by the Board. The Board is of the opinion that public convenience and necessity require it to make such an Order. The Board has concluded that the term of right shall be renewed for a period of 20 years upon the terms and conditions contained in the proposed franchise agreement as submitted by Consumers' and attached hereto as Appendix B. The costs of the Board shall be paid by the Applicant.

16 In the result we find no fault in the decision of the Board. What it did was properly done within its statutory authority.

17 The appeal will therefore be dismissed. As no costs are asked there will be no order as to costs.

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# Tab 16

*E.B.O. 125 Report of the Board*, In the matter of the OEB's review of franchise agreements and certificates of public convenience and necessity, May 21, 1986 (excerpt)

of the municipality involved. Union argued that separate road user agreements could place the control of pipelines beyond the purview of the OEB if municipalities were to insist that road user disputes should more properly be put before the Ontario Municipal Board. The gas

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distributors are of the opinion that one franchise agreement can encompass both concerns.

- 7.26 With regard to multi-party agreements, Union maintained that any such agreement must involve all local municipalities, the County/Regions, and the utility, to be effective, and all would have to agree to a common termination date of existing franchises. Union was prepared to renegotiate such franchises, but pointed out that, in practice, negotiating one agreement with up to 24 local municipalities, as in Essex County, would be very difficult.

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Position of the Board:

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- 7.27 There appears to be a great deal of confusion as to whether the OEB has jurisdiction in all instances over regional and county franchise agreements, especially in those situations where the municipality is the host to the pipeline but does not itself receive gas. The Board agrees that a recommendation should be made to amend the Municipal Franchises Act, so that it is clear that the OEB does have such jurisdiction and the Board suggests that the MFA Committee recommended later in this chapter develop such an amendment. In making this recommendation, the Board confirms that it does not believe that it is necessary to separate the

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Was Page 7/13. See Image [OEB:11L1H-0:143]  
729

road user rights and the franchise rights into separate agreements for either lower- or upper-tier municipalities.

- 7.28 The Board appreciates that some municipalities are trying to achieve consistency by advocating multi-party agreements within a region or county, but also notes that the municipalities themselves have differing views as to the feasibility and effectiveness of multi-party agreements. The Board is not opposed to the principle of multi-party agreements, but would leave this to the parties to decide as to whether or not such an alternative is workable. The Board is of the opinion, however, that in the case of separate agreements, the road user agreements for the region and the franchise agreements for the local municipality should, where possible, generally contain similar provisions.

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Duration of Franchise Agreements

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- 7.29 Most franchise agreements between gas distributors and municipalities are for 20 to 30 years and some franchises are said to be in perpetuity. What is the most appropriate term for a franchise agreement or renewal? A variety of views were presented at the hearing.

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Position of the Municipalities:

7.30 There was a wide variance of opinion among the municipalities. The City of Sudbury recommended that the term of the franchise agreement be limited to a five-year period whereas the Township of Zorra proposed a term of not less than 20 years.

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7.31 The Regional Municipality of Ottawa-Carleton submitted that a separate road user agreement be created for a proposed term of 10 years. Additionally, this municipality and others proposed that termination dates for road user agreements and gas franchise agreements should be uniform within a regional area.

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7.32 FONOM differentiated between the initial franchise agreement and a renewal. In the first case FONOM advocated a twenty-year term and for the second, a ten-year period.

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#### Position of the Utilities:

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7.33 The gas distributors represented by ONGA were in support of a twenty year term for a franchise agreement and no differentiation was made between the duration of an initial agreement and its renewal.

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Was Page 7/15. See Image [OEB:11LIH-0:145]

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7.34 The principle of uniform termination dates for franchise agreements within a regional area was not opposed by the utilities, but it was pointed out that there could be a practical problem of having to negotiate a great many renewals at the same time.

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#### Position of the Board:

7.35 While some advantage to the municipalities may result from shorter term franchise agreements, these may result in more complicated documents, which in the end, may not decrease the financial exposure of the municipalities. When a utility commences distribution in a new franchise area, it expects a return on its investment over time. If the term of the agreement is too short, the utility's risk may increase, which could lead to increased costs of capital and in turn might increase the cost of gas throughout the franchise area.

741

7.36 The Board is of the opinion that a first time agreement should be of a duration of not less than fifteen years and no longer than twenty years. The minimum duration seems adequate to give security to the utility whereas a maximum term has been established by the Public Utilities Act (sections 24 and 60) which sets the upper limit of a contract to a twenty-year term.

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Was Page 7/16. See Image [OEB:11LIH-0:146]

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7.37 The duration of a renewal agreement may not necessarily need to be the same as the initial agreement; the risk of the utility is substantially lower since the plant has been depreciated to a large extent during the initial term of the agreement. In the case of renewals a ten to fifteen-year term would, therefore, seem to be adequate.

744

7.38 There are 83 agreements said to be perpetual in Ontario, 82 of which are found in the Union franchise area. 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.

7.39 A uniform expiry date within a regional area could help to achieve two goals. It might place the local municipalities in a better negotiating position with the utility and it would contribute to the standardization of franchise agreements at least within each regional municipality or county. The Board is of the opinion that this subject should be addressed by the MFA Committee in order to explore the practicality of this concept.

Was Page 7/17. See Image [OEB:11L1H-0:147]

#### Standardization

7.40 A large portion of this Report has dealt with specific issues that have led to difficulties in negotiating franchise agreements. Underlying these specific concerns was always the question of whether the Board could or should impose a standard form of franchise agreement either on a franchise-wide or province-wide basis.

#### Position of the Municipalities:

7.41 SWOMC stated very clearly that:

The OEB has no jurisdiction to establish a standard form of franchise to be required in every case or in every case involving a particular gas utility as otherwise it declines jurisdiction by prejudging the result before the prescribed public hearing.

7.42 However, SWOMC added that the OEB may establish policy by which to test the appropriateness of specific franchise provisions. SWOMC submitted that it would prefer to work within the existing legislative framework, rather than accede to the gas utilities' solution which was to have a standard form of franchise agreement legislated.

7.43 Nevertheless, SWOMC did propose a draft franchise agreement for the Union franchise area in

Was Page 7/18. See Image [OEB:11L1H-0:148]

its original brief on the premise that present "standard" agreements favoured the gas utility's interests. The suggested clauses included those which could form the usual basis of an agreement and also those which represent SWOMC's proposed solution to outstanding issues. Although SWOMC's proposals were set forth in the form of a standard agreement, SWOMC submitted that the agreement provided for additional negotiated clauses that would pertain to local concerns and as such would be required to be approved by the OEB on a case-by-case basis.

7.44 Other municipalities that addressed the issue agreed that the OEB has no jurisdiction under the

# Tab 17

*RP-1999-0048, Report to the Board, In the Matter of the Municipal Franchises Act, and In the Matter of the 2000 Model Franchise Agreement, December 29, 2000 (excerpt)*

The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, in which case the Gas Company shall pay 100% of the relocation costs.

### 3.2 Duration of the Agreement

{tc \12 "Duration of the Agreement}

#### 3.2.1 In E.B.O. 125 the Board stated it was of the opinion that:

... a first time agreement should be of a duration of not less than fifteen and no longer than twenty years. ... In the case of renewals, a ten to fifteen-year term would therefore seem to be adequate.

3.2.2 As discussed above, AMO was originally prepared to accept the ten to fifteen-year renewal term provided the Board accepted its proposal for allowing the franchise agreement to be amended if there is a legislative change. If this is not the case, AMO requested a maximum ten-year term for renewal of franchise agreements.

3.2.3 The Gas Companies felt that franchise agreements and renewals should not be shorter than they are currently (20 and 15 years respectively). The Gas Companies pointed out that they evaluate the economic feasibility for system expansion to recover the costs of an investment in the distribution system to provide service to residential customers over a period of 40 years or more. For a typical expansion project involving a mix of commercial and residential customers, the costs of the project will

generally be greater than the revenue for at least 15 years. Therefore, the Gas Companies contended that they do not typically realize a return on the original investment until well beyond the 15-year mark.

3.2.4 Gas Companies argued that the increased risk involved in a shorter duration of franchise renewal would ultimately hinder their ability to add new customers through expansion of the gas system and decrease the feasibility of expansion into new communities.

3.2.5 Ottawa-Carleton took the position that it opposed the proposed 20-year term for new or initial gas franchise agreements. Ottawa-Carleton submitted that a 20-year commitment by the municipality without redress during that time would amount to an abrogation of its road management responsibilities. Where gas pipes have been in the ground for a long time and the utility has already recovered its initial investment there are no issues of “security” or “investment” or “return”.

3.2.6 Ottawa-Carleton submitted that even where the installation is new, the municipality’s ownership rights and management obligations ought not to be subrogated to those of the user of property in the form of a 20-year commitment. Ottawa-Carleton argued that the municipality, as the owner of property, must set the term for the use of its property which is commensurate with the municipality’s obligations for, and responsibilities to, that property. In Ottawa-Carleton’s submission it ought not to be the entity seeking permission to use that property that sets the term. This is especially the case when, in Ottawa-Carleton’s submission, the proposed use is for the benefit entirely of the user.

3.2.7 AMO and the Gas Companies subsequently proposed a compromise that the original term of the franchise should be for 20 years. The renewal term should also be for 20

years with subsequent updates in year 7 and year 14 of any renewal term to make allowances for revised conditions arising from Board-approved changes to the Model Franchise Agreement in the interim period. A 20-year term would provide stability for both parties with respect to the duration of the franchise agreement. The ability to modify the franchise agreement in years 7 and 14 of any renewal term, in order to incorporate all model franchise agreement changes other than term, would provide some opportunity to update the terms and conditions of the franchise agreement on a regular basis.

### **Panel Recommendations**

3.2.8 The Panel recommends that the Board accept in principle the compromise reached between AMO and the Gas Companies. The Panel is of the view that the 20-year term will provide stability for municipalities, gas utilities, and their respective stakeholders. The 7 and 14 year modification capability will provide the opportunity during the 20-year period to bring the terms and conditions of the franchise agreement up to new standards. The Panel notes that AMO and the Gas Companies have agreed that there will be no updates during the initial term of the franchise agreement for municipalities who did not previously have gas service and that this will address the needs of Gas Companies with respect to system expansion.

3.2.9

The Panel is concerned that the wording suggested by AMO and the Gas Companies is ambiguous. It is important to clarify that the initial term is 20 years if the municipality has not previously received gas distribution services. In all other circumstances the term is for 20 years, and if the 2000 MFA is changed, except for the 20-year term, then on the 7<sup>th</sup> anniversary and the 14<sup>th</sup> anniversary the franchise agreement between the Gas Company and the municipality will be deemed to have been amended to incorporate the changes in the 2000 MFA.

# Tab 18

Model Franchise Agreement



Ontario Energy Board

Ontario

## Model Franchise Agreement

THIS AGREEMENT effective this day of 20

BETWEEN:

hereinafter called the "Corporation"

- and -

hereinafter called the "Gas Company"

WHEREAS the Gas Company desires to distribute, store and transmit gas in the Municipality upon the terms and conditions of this Agreement;

AND WHEREAS by by-law passed by the Council of the Corporation (the "By-law"), the duly authorized officers have been authorized and directed to execute this Agreement on behalf of the Corporation;

THEREFORE the Corporation and the Gas Company agree as follows:

### Part I - Definitions

1. In this Agreement:
  - a. "decommissioned" and "decommissions" when used in connection with parts of the gas system, mean any parts of the gas system taken out of active use and purged in accordance with the applicable CSA standards and in no way affects the use of the term 'abandoned' pipeline for the purposes of the *Assessment Act*;
  - b. "Engineer/Road Superintendent" means the most senior individual employed by the Corporation with responsibilities for highways within the Municipality or the person designated by such senior employee or such other person as may from time to time be designated by the Council of the Corporation;

- c. "gas" means natural gas, manufactured gas, synthetic natural gas, liquefied petroleum gas or propane-air gas, or a mixture of any of them, but does not include a liquefied petroleum gas that is distributed by means other than a pipeline;
- d. "gas system" means such mains, plants, pipes, conduits, services, valves, regulators, curb boxes, stations, drips or such other equipment as the Gas Company may require or deem desirable for the distribution, storage and transmission of gas in or through the Municipality;
- e. "highway" means all common and public highways and shall include any bridge, viaduct or structure forming part of a highway, and any public square, road allowance or walkway and shall include not only the travelled portion of such highway, but also ditches, driveways, sidewalks, and sodded areas forming part of the road allowance now or at any time during the term hereof under the jurisdiction of the Corporation;
- f. "Model Franchise Agreement" means the form of agreement which the Ontario Energy Board uses as a standard when considering applications under the *Municipal Franchises Act*. The Model Franchise Agreement may be changed from time to time by the Ontario Energy Board;
- g. "Municipality" means the territorial limits of the Corporation on the date when this Agreement takes effect, and any territory which may thereafter be brought within the jurisdiction of the Corporation;
- h. "Plan" means the plan described in Paragraph 5 of this Agreement required to be filed by the Gas Company with the Engineer/Road Superintendent prior to commencement of work on the gas system; and
- i. whenever the singular, masculine or feminine is used in this Agreement, it shall be considered as if the plural, feminine or masculine has been used where the context of the Agreement so requires.

## **Part II - Rights Granted**

### 2. To provide gas service:

The consent of the Corporation is hereby given and granted to the Gas Company to distribute, store and transmit gas in and through the Municipality to the Corporation and to the inhabitants of the Municipality.

or

The consent of the Corporation is hereby given and granted to the Gas Company to distribute, store and transmit gas in and through the Corporation and to the inhabitants of those local or lower tier municipalities within the Municipality from which the Gas Company has a valid franchise agreement for that purpose.

\* Footnote: Choose one only.

### 3. To Use Highways.

Subject to the terms and conditions of this Agreement the consent of the Corporation is hereby given and granted to the Gas Company to enter upon all highways now or at any time hereafter under the jurisdiction of the Corporation and to lay, construct, maintain, replace, remove, operate and repair a gas system for the distribution, storage and transmission of gas in and through the Municipality.

### 4. Duration of Agreement and Renewal Procedures.

- a. If the Corporation has not previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law.

or

- b. If the Corporation has previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law provided that, if during the 20-year term this Agreement, the Model Franchise Agreement is changed, then on the 7<sup>th</sup> anniversary and on the 14<sup>th</sup> anniversary of the date of the passing of the By-law, this Agreement shall be deemed to be amended to incorporate any changes in the Model Franchise Agreement in effect on such anniversary dates. Such deemed amendments shall not apply to alter the 20-year term.
- c. At any time within two years prior to the expiration of this Agreement, either party may give notice to the other that it desires to enter into negotiations for a renewed franchise upon such terms and conditions as may be agreed upon. Until such renewal has been settled, the terms and conditions of this Agreement shall continue, notwithstanding the expiration of this Agreement. This shall not preclude either party from applying to the Ontario Energy Board for a renewal of the Agreement pursuant to section 10 of the *Municipal Franchises Act*.

## **Part III - Conditions**

### 5. Approval of Construction

- a. The Gas Company shall not undertake any excavation, opening or work which will disturb or interfere with the surface of the travelled portion of any highway unless a permit therefor has first been obtained from the Engineer/Road Superintendent and all work done by the Gas Company shall be to his satisfaction.
- b. Prior to the commencement of work on the gas system, or any extensions or changes to it (except service laterals which do not interfere with municipal works in the highway), the Gas Company shall file with the Engineer/Road Superintendent a Plan, satisfactory to the Engineer/Road Superintendent, drawn to scale and of sufficient detail considering the complexity of the specific locations involved, showing the highways in which it proposes to lay its gas system and the particular parts thereof it proposes to occupy.

- c. The Plan filed by the Gas Company shall include geodetic information for a particular location:
    - i. where circumstances are complex, in order to facilitate known projects, including projects which are reasonably anticipated by the Engineer/Road Superintendent, or
    - ii. when requested, where the Corporation has geodetic information for its own services and all others at the same location.
  - d. The Engineer/Road Superintendent may require sections of the gas system to be laid at greater depth than required by the latest CSA standard for gas pipeline systems to facilitate known projects or to correct known highway deficiencies.
  - e. Prior to the commencement of work on the gas system, the Engineer/Road Superintendent must approve the location of the work as shown on the Plan filed by the Gas Company, the timing of the work and any terms and conditions relating to the installation of the work.
  - f. In addition to the requirements of this Agreement, if the Gas Company proposes to affix any part of the gas system to a bridge, viaduct or other structure, if the Engineer/Road Superintendent approves this proposal, he may require the Gas Company to comply with special conditions or to enter into a separate agreement as a condition of the approval of this part of the construction of the gas system.
  - g. Where the gas system may affect a municipal drain, the Gas Company shall also file a copy of the Plan with the Corporation's Drainage Superintendent for purposes of the *Drainage Act*, or such other person designated by the Corporation as responsible for the drain.
  - h. The Gas Company shall not deviate from the approved location for any part of the gas system unless the prior approval of the Engineer/Road Superintendent to do so is received.
  - i. The Engineer/Road Superintendent's approval, where required throughout this Paragraph, shall not be unreasonably withheld.
  - j. The approval of the Engineer/Road Superintendent is not a representation or warranty as to the state of repair of the highway or the suitability of the highway for the gas system.
6. As Built Drawings.

The Gas Company shall, within six months of completing the installation of any part of the gas system, provide two copies of "as built" drawings to the Engineer/Road Superintendent. These drawings must be sufficient to accurately establish the location, depth (measurement between the top of the gas system and the ground surface at the time of installation) and distance of the gas system. The "as built" drawings shall be of the same quality as the Plan and, if the approved pre-construction plan included elevations that were geodetically referenced, the "as built" drawings shall similarly include elevations that are geodetically referenced. Upon the request of the Engineer/Road

Superintendent, the Gas Company shall provide one copy of the drawings in an electronic format and one copy as a hard copy drawing.

#### 7. Emergencies

In the event of an emergency involving the gas system, the Gas Company shall proceed with the work required to deal with the emergency, and in any instance where prior approval of the Engineer/Road Superintendent is normally required for the work, the Gas Company shall use its best efforts to immediately notify the Engineer/Road Superintendent of the location and nature of the emergency and the work being done and, if it deems appropriate, notify the police force, fire or other emergency services having jurisdiction. The Gas Company shall provide the Engineer/Road Superintendent with at least one 24 hour emergency contact for the Gas Company and shall ensure the contacts are current.

#### 8. Restoration

The Gas Company shall well and sufficiently restore, to the reasonable satisfaction of the Engineer/Road Superintendent, all highways, municipal works or improvements which it may excavate or interfere with in the course of laying, constructing, repairing or removing its gas system, and shall make good any settling or subsidence thereafter caused by such excavation or interference. If the Gas Company fails at any time to do any work required by this Paragraph within a reasonable period of time, the Corporation may do or cause such work to be done and the Gas Company shall, on demand, pay the Corporation's reasonably incurred costs, as certified by the Engineer/Road Superintendent.

#### 9. Indemnification

The Gas Company shall, at all times, indemnify and save harmless the Corporation from and against all claims, including costs related thereto, for all damages or injuries including death to any person or persons and for damage to any property, arising out of the Gas Company operating, constructing, and maintaining its gas system in the Municipality, or utilizing its gas system for the carriage of gas owned by others. Provided that the Gas Company shall not be required to indemnify or save harmless the Corporation from and against claims, including costs related thereto, which it may incur by reason of damages or injuries including death to any person or persons and for damage to any property, resulting from the negligence or wrongful act of the Corporation, its servants, agents or employees.

#### 10. Insurance

- a. The Gas Company shall maintain Comprehensive General Liability Insurance in sufficient amount and description as shall protect the Gas Company and the Corporation from claims for which the Gas Company is obliged to indemnify the Corporation under Paragraph 9. The insurance policy shall identify the Corporation as an additional named insured, but only with respect to the operation of the named insured (the Gas Company). The insurance policy shall not lapse or be cancelled without sixty (60) days' prior written notice to the Corporation by the Gas Company.

- b. The issuance of an insurance policy as provided in this Paragraph shall not be construed as relieving the Gas Company of liability not covered by such insurance or in excess of the policy limits of such insurance.
- c. Upon request by the Corporation, the Gas Company shall confirm that premiums for such insurance have been paid and that such insurance is in full force and effect.

## 11. Alternative Easement

The Corporation agrees, in the event of the proposed sale or closing of any highway or any part of a highway where there is a gas line in existence, to give the Gas Company reasonable notice of such proposed sale or closing and, if is feasible, to provide the Gas Company with easements over that part of the highway proposed to be sold or closed sufficient to allow the Gas Company to preserve any part of the gas system in its then existing location. In the event that such easements cannot be provided, the Corporation and the Gas Company shall share the cost of relocating or altering the gas system to facilitate continuity of gas service, as provided for in Paragraph 12 of this Agreement.

## 12. Pipeline Relocation

- a. If in the course of constructing, reconstructing, changing, altering or improving any highway or any municipal works, the Corporation deems that it is necessary to take up, remove or change the location of any part of the gas system, the Gas Company shall, upon notice to do so, remove and/or relocate within a reasonable period of time such part of the gas system to a location approved by the Engineer/Road Superintendent.
- b. Where any part of the gas system relocated in accordance with this Paragraph is located on a bridge, viaduct or structure, the Gas Company shall alter or relocate that part of the gas system at its sole expense.
- c. Where any part of the gas system relocated in accordance with this Paragraph is located other than on a bridge, viaduct or structure, the costs of relocation shall be shared between the Corporation and the Gas Company on the basis of the total relocation costs, excluding the value of any upgrading of the gas system, and deducting any contribution paid to the Gas Company by others in respect to such relocation; and for these purposes, the total relocation costs shall be the aggregate of the following:
  - i. the amount paid to Gas Company employees up to and including field supervisors for the hours worked on the project plus the current cost of fringe benefits for these employees,
  - ii. the amount paid for rental equipment while in use on the project and an amount, charged at the unit rate, for Gas Company equipment while in use on the project,
  - iii. the amount paid by the Gas Company to contractors for work related to the project,

- iv. the cost to the Gas Company for materials used in connection with the project, and
  - v. a reasonable amount for project engineering and project administrative costs which shall be 22.5% of the aggregate of the amounts determined in items (i), (ii), (iii) and (iv) above.
- d. The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, in which case the Gas Company shall pay 100% of the relocation costs.

#### **Part IV - Procedural And Other Matters**

##### 13. Municipal By-laws of General Application

The Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, except by-laws which have the effect of amending this Agreement.

##### 14. Giving Notice

Notices may be delivered to, sent by facsimile or mailed by prepaid registered post to the Gas Company at its head office or to the authorized officers of the Corporation at its municipal offices, as the case may be.

##### 15. Disposition of Gas System

- a. If the Gas Company decommissions part of its gas system affixed to a bridge, viaduct or structure, the Gas Company shall, at its sole expense, remove the part of its gas system affixed to the bridge, viaduct or structure.
- b. If the Gas Company decommissions any other part of its gas system, it shall have the right, but is not required, to remove that part of its gas system. It may exercise its right to remove the decommissioned parts of its gas system by giving notice of its intention to do so by filing a Plan as required by Paragraph 5 of this Agreement for approval by the Engineer/Road Superintendent. If the Gas Company does not remove the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in any highway, the Corporation may remove and dispose of so much of the decommissioned gas system as the Corporation may require for such purposes and neither party shall have recourse against the other for any loss, cost, expense or damage occasioned thereby. If the Gas Company has not removed the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in a highway, the Gas Company may elect to relocate the decommissioned gas system and in that event

Paragraph 12 applies to the cost of relocation.

#### 16. Use of Decommissioned Gas System

- a. The Gas Company shall provide promptly to the Corporation, to the extent such information is known:
  - i. the names and addresses of all third parties who use decommissioned parts of the gas system for purposes other than the transmission or distribution of gas; and
  - ii. the location of all proposed and existing decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas.
- b. The Gas Company may allow a third party to use a decommissioned part of the gas system for purposes other than the transmission or distribution of gas and may charge a fee for that third party use, provided
  - i. the third party has entered into a municipal access agreement with the Corporation; and
  - ii. the Gas Company does not charge a fee for the third party's right of access to the highways.
- c. Decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas are not subject to the provisions of this Agreement. For decommissioned parts of the gas system used for purposes other than the transmission and distribution of gas, issues such as relocation costs will be governed by the relevant municipal access agreement.

#### 17. Franchise Handbook

The Parties acknowledge that operating decisions sometimes require a greater level of detail than that which is appropriately included in this Agreement. The Parties agree to look for guidance on such matters to the Franchise Handbook prepared by the Association of Municipalities of Ontario and the gas utility companies, as may be amended from time to time.

#### 18. Other Conditions

**The following paragraph shall be inserted as a special condition in the old Union Gas franchise area, which is understood to be the franchise area of Union Gas in southwestern Ontario prior to its merger with Centra Gas.**

Notwithstanding the cost sharing arrangements described in Paragraph 12, if any part of the gas system altered or relocated in accordance with Paragraph 12 was constructed or installed prior to January 1, 1981, the Gas Company shall alter or relocate, at its sole expense, such part of the gas system at the point specified, to a location satisfactory to the Engineer/Road Superintendent.

19. Agreement Binding Parties

This Agreement shall extend to, benefit and bind the parties thereto, their successors and assigns, respectively.

IN WITNESS WHEREOF the parties have executed this Agreement effective from the date written above.

THE CORPORATION OF \_\_\_\_\_

By: \_\_\_\_\_

Duly Authorized Officer

[Insert name of Gas Company]

By: \_\_\_\_\_