



Ontario
Energy
Board | Commission
de l'énergie
de l'Ontario

BY EMAIL

February 21, 2023

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

Dear Ms. Marconi:

**Re: Ontario Energy Board (OEB) Staff Submission
Enbridge Gas Inc.
Application for Approval of a Municipal Franchise Agreement with, and
Certificate Amendment for, the Municipality of Leamington
OEB File Number: EB-2022-0201**

Please find attached OEB staff's submission in the above referenced proceeding, pursuant to Procedural Order No. 2.

Yours truly,

Natalya Plummer
Natural Gas

Encl.

cc: All parties in EB-2022-0201



ONTARIO ENERGY BOARD

OEB Staff Submission

Enbridge Gas Inc.

**Application for Approval of a Municipal Franchise Agreement with,
and Certificate Amendment for, the Municipality of Leamington**

EB-2022-0201

February 21, 2023

Background

On June 30, 2022, Enbridge Gas Inc. (Enbridge Gas) filed an application for a franchise renewal with the Municipality of Leamington (Municipality) and an amendment to its certificate of public convenience and necessity (Certificate) in respect of the Municipality. The application was filed under sections 8, 9(4) and 10 of the *Municipal Franchises Act* (MFA).

Franchise Renewal under s. 10 (1) of the MFA

Enbridge Gas and the Municipality are party to a franchise agreement that took effect on January 20, 2003 (the 2003 Agreement). The 2003 Agreement is based on the terms and conditions of the OEB's 2000 Model Franchise Agreement (Model Agreement), for a term of 20 years ending in January 2023.

In its application, as originally filed, Enbridge Gas requested the following in respect of its franchise with the Municipality:

- (a) an Order pursuant to s.10 [of the MFA] approving the terms and conditions upon which, and the period for which, the Municipality of Leamington 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) [of the MFA] directing and declaring that the assent of the municipal electors of the Municipality of Leamington is not necessary for the proposed franchise agreement.

During the course of the proceeding, Enbridge Gas withdrew its request for relief under section 9(4).¹

Enbridge Gas submitted that the Municipality will not consent to a renewal of the franchise based on the Model Agreement unless the terms and conditions are amended to contain a reference to costs assessed under the *Drainage Act*. The application states as follows:

On June 28, 2022, the Council of the Municipality voted not to approve the form of draft bylaw and Model Franchise Agreement proposed by Enbridge Gas and instead requests that any order of the Ontario Energy Board renewing or extending the term of the rights within the Model Franchise Agreement include an order directing an amendment to section 12(d) of the Model Franchise Agreement as follows:

¹ Where the OEB makes an order under section 10(2) of the MFA, the order is deemed by section 10(5) to be a valid by-law of the Municipality assented to by municipal electors.

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, or the relocation is required pursuant to the report of an engineer appointed under the Drainage Act, R.S.O. 1990, c. D.17 or the costs have been assessed pursuant to section 26 of the Drainage Act, R.S.O. 1990, c. D.17 in which case the Gas Company shall pay 100% of the relocation costs.

The Municipality is an intervenor in the proceeding. In its intervention request, the Municipality submitted that its “interest in the proceeding arises as a direct result of the fact that the [...] Franchise Agreement seeks to impose costs upon the taxpayers of Leamington in circumstances described in the Franchise Agreement”.²

Certificate Request under s. 8 of the MFA

The Municipality was formed in 1999 upon the amalgamation of the former Town of Leamington and the former Township of Mersea.

Enbridge Gas holds a Certificate (FBC 259, dated March 17, 1959) that predates the date of the formation of the Municipality. As such, the Certificate applies to several historic municipalities, including the former Town of Leamington and the former Township of Mersea.

In respect of the Certificate, Enbridge Gas requested the following:

(c) an Order pursuant to s.8 [of the MFA] cancelling and superseding those parts of the existing Certificate of Public Convenience and Necessity held by Enbridge Gas Inc. for the former municipalities within the Municipality of Leamington and replacing them with a Certificate of Public Convenience and Necessity to construct works to supply natural gas in the Municipality of Leamington.

Enbridge Gas submitted that this is necessary so that Enbridge Gas’s certificate rights in the Municipality will be geographically aligned with the current municipal boundaries of the Municipality. In its Argument-in-Chief, Enbridge Gas stated:

There have been no submissions made by any party regarding the request by Enbridge Gas for an Order cancelling and superseding those parts of the existing Certificate of Public Convenience and Necessity (CPCN) held by Enbridge Gas for the former municipalities within Leamington (FBC 259) and replacing them with a single CPCN to construct works to supply natural gas in Leamington. Enbridge Gas submits that the requested CPCN will not change the area within Leamington to which Enbridge Gas’ CPCN rights pertain but will be geographically aligned with the current municipal boundaries of Leamington and avoid any confusion of

² Municipality of Leamington, Intervention Letter, August 5, 2023.

references to former municipalities.³

Process

A Notice of Hearing was issued on July 27, 2022. The intervention period closed on August 8, 2022.

An intervention request was filed by the Municipality on August 5, 2022. In its intervention request, the Municipality stated that it intended to file evidence, interrogatories, and argument in the proceeding. In setting out the procedural timeline for the hearing, the OEB issued letters to the Municipality on August 12, 2022, and August 23, 2022, requesting additional detail in respect of the anticipated nature of its intervention. By letters dated August 19 and August 29, 2022, the Municipality advised that it would focus its intervention on paragraph 12 of the Model Agreement.

Procedural Order No.1 set the dates for the filing of interrogatories, interrogatory responses, evidence from the Municipality, and a letter from Enbridge Gas indicating whether it intends to file responding evidence.

Procedural Order No. 2 set the dates for the filing of reply evidence from Enbridge Gas, interrogatories, Enbridge Gas's argument-in-chief, written submissions from the Municipality and OEB staff, and a reply submission from Enbridge Gas.

The parties filed the relevant documents in accordance with the dates established in the procedural orders.

OEB Staff Submission

In summary, OEB staff submits that: (i) public convenience and necessity require a renewal of the franchise given that the existing 2003 Agreement is expired; (ii) the OEB should issue an Order under s. 10(2) of the MFA approving a new franchise agreement based on the terms and conditions of the Model Agreement; and (iii) Enbridge Gas's request in respect of its Certificate should be granted.

Renewal of Enbridge Gas's Franchise with the Municipality of Leamington

Section 10 of the MFA gives the OEB the power, if public convenience and necessity require it, to renew or extend the right of a gas company to operate the gas distribution system in a municipality, on "terms and conditions as may be prescribed by the OEB".

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

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

³ Enbridge Gas, Argument-in-Chief, February 3, 2023, para 11.

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 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 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.

The nature and scope of the OEB's powers under s. 10 of the MFA have been confirmed by a number of decisions of the courts. For example, the Court of Appeal has stated:

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.⁴

That the OEB may issue an order renewing a franchise under section 10 of the MFA even when there is no agreement between the municipality and the gas company is a view that has also been held consistently by the OEB. For example, in its decision regarding a franchise agreement between Centra Gas and the Township of Pittsburgh, the OEB stated that in determining public convenience and necessity the OEB is:

...guided by the objectives of the OEB Act [and] that in the OEB'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

⁴ *Sudbury (City of) v Union Gas Ltd.*, 2001 CanLII 2886. See also: *Dawn-Euphemia (Township) v. Union Gas Ltd.*, 2004 CarswellOnt 3909, wherein the Divisional Court stated that "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 also: *Re City of Peterborough and Consumers Gas* (1980), 111 D.L.R.. (3d) 234, wherein the Divisional Court stated: "If however there is no [Franchise] agreement, it is obviously a matter for adjudication by the Board and they must decide the terms and conditions that the [Municipal Franchises] Act contemplates. This is a matter that is entirely within the Board's discretion, to be exercised after a proper hearing."

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. And, 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.⁵

In respect of determining public convenience and necessity under the MFA, the OEB has also held that the Model Agreement incorporates the standard terms and conditions that the OEB has found in previous cases to meet the public convenience and necessity test, and has served as the basis for new and renewed franchise agreements since 2000.⁶

The OEB's recently issued *Natural Gas Facilities Handbook* provides the following description of the Model Agreement and of the OEB's expectation that it be followed absent a compelling reason not to do so:

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. 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*, 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.⁷

The Municipality filed a summary of its position on August 29, 2022 (Summary) and evidence in the form of an Affidavit by its Drainage Superintendent on November 8,

⁵ *Centra Gas (Ontario) Inc., Re, 2000 Carswell 10612 (E.B.A. 825/872)*. The OEB's decision was upheld on appeal to the Divisional Court, *Kingston (City) v. Ontario (Energy Board)*, 2001 CarswellOnt 3051 and the Court of Appeal, *Kingston (City) v. Ontario (Energy Board)*, 2002 CarswellOnt 4902. Application for leave to appeal to the Supreme Court of Canada was dismissed. See also: EB-2012-0072, Decision and Order, issued December 13, 2012.

⁶ EB-2017-0232, Decision and Order, issued December 13, 2018. See also EB-2012-0072, Decision and Order, December 13, 2012, wherein in its decision regarding the franchise between Natural Resources Gas and the Town of Aylmer, the OEB stated:

Under the [Municipal Franchises] Act the Board can approve a franchise agreement over the objections of the parties if that agreement, in the view of the Board meets the test of public convenience and necessity. The Board has established standard terms and conditions under a model franchise agreement which it has found in many previous cases to meet this test.

⁷ EB-2022-0081, *Natural Gas Facilities Handbook*, issued March 31, 2022.

2022 (Affidavit). The Municipality's general view is that, if the OEB orders a renewal of the franchise, paragraph 12(d) of the Model Agreement should be amended in respect of cost-sharing in certain circumstances.

In its Summary, the Municipality stated, in part, that due to its unique geography, it is more likely that it would be faced with the requirement to pay 35% of the costs of pipeline relocation than would other municipalities and that this will place an unnecessary burden upon its taxpayers. The Municipality's view is that "an exemption from the cost sharing provisions related to relocations caused as a result of drainage works is reasonable in these circumstances and public policy would dictate such costs should be spread amongst the Enbridge ratepayers, rather than the Municipality's taxpayers".⁸

The Affidavit reiterated the Municipality's position that its drainage systems are unique and a cause of significant operational costs to the Municipality:

8. Given the flat lands that exist in the Municipality, there is limited flexibility with available depths and grades to satisfactorily drain lands contributing to a particular drain, whether it is an open or covered drain. As such, these depths and grades are typically fixed and cannot be adjusted without significant and costly improvements to the drainage such as by adding pumps or diversion.

9. Further complicating the Municipality's drainage system is the fact that a portion of the Municipality (located in the South East) is approximately 1.79 meters below sea level. As such, the Municipality has to employ the use of 10 pump stations. These 10 pump stations contain a total of 7 electric powered pumps and 7 diesel powered pumps, which range in size from 24" to 48". These pump stations are necessary to drain approximately 22.8 square km's of the Municipality.⁹

In its Argument-in-Chief, Enbridge Gas submitted that "Leamington asserts that its drainage systems are unique but has failed to provide evidence to support such a claim [and that this] unsupported assertion of uniqueness does not warrant a deviation from the Model Franchise Agreement."¹⁰

Enbridge Gas was asked, through interrogatories, to provide details in respect of its use of the Model Agreement throughout Ontario, and in respect of the company's experience working with municipalities with drainage issues or topography similar to that which the Municipality experiences. In its responses, Enbridge Gas confirmed that virtually all of its franchise agreements are in the form of the current Model Agreement

⁸ Municipality of Leamington, Letter, August 29, 2022.

⁹ Municipality of Leamington, Affidavit, November 8, 2023.

¹⁰ Enbridge Gas, Argument-in-Chief, February 3, 2023, para 5.

and outlined several instances where it has worked with municipalities with similar drainage issues and topography as the Municipality to alter drainage designs and avoid the relocation of gas infrastructure¹¹. Enbridge Gas cited the Municipality of Chatham-Kent as an example of an area with significant drainage infrastructure. Within the Dover Township area Enbridge Gas noted that “there have been several drainage-related issues impacting Enbridge Gas infrastructure over the years including the Dover Transmission Station which is located in the middle of a large pump drainage and high value crop area, and our Panhandle pipelines.”¹²

OEB staff submits that the Municipality has not established that its topography presents drainage-related operational challenges that are unique as compared to other municipalities within the Province.¹³ To the contrary, it would appear from the record of this proceeding that, over the years, many Ontario municipalities (each of whom operates under the Model Agreement, without amendment) have had to deal with drainage-related operational challenges in the context of gas pipeline relocations, and that Enbridge Gas has tried to be responsive to them.

In OEB staff’s view, even if the Municipality’s position in respect of its unique topography is accepted, the cost-sharing provisions of the Model Agreement should still apply to the Municipality. These provisions were intended to apply uniformly throughout the Province and it would not, in OEB staff’s submission, be in the public interest for all of Enbridge Gas’s customers to pay for additional costs where those costs are attributable to the unique topography of the Municipality (assuming this is the case). Put another way, if the cost-sharing formula in paragraph 12 (d) of the Model Agreement does not apply in the Municipality, then it will result in an increase in the share of costs to be borne by Enbridge Gas, with the likely result that these costs will be passed on to Enbridge Gas’s ratepayers. In this regard, it is OEB staff’s general view that, even assuming that each municipality within Ontario has its own unique features or challenges (as compared to other Ontario municipalities), it should be the taxpayers of the given municipality who should bear the additional costs (attributable to such unique aspect).

Moreover, the Court of Appeal has confirmed that the cost sharing provisions of paragraph 12 of the Model Agreement, when included in a franchise agreement between the parties, operate as an exception to the cost allocation provisions set out in the *Drainage Act*.¹⁴ In rendering its decision, the Court stated that the Model Agreement

¹¹ Enbridge Gas Inc., Response to Interrogatory from Ontario Energy Board Staff, Staff.1(a) and (b).

¹² *Ibid.*

¹³ It should be noted that OEB staff makes this submission without having reviewed the written submission of the Municipality, also filed February 21, 2023.

¹⁴ *Union Gas Limited v. Norwich (Township)*, 2018 ONCA 11.

“describes the cost-sharing mechanism in clear language and it unambiguously applies when a municipality requests relocation of a gas system to accommodate *any* municipal works”. The Court also acknowledged that the cost-sharing mechanism in paragraph 12(d) was developed by the OEB as a disincentive to municipalities to require unnecessary pipeline relocation.

OEB staff submits that public convenience and necessity require a renewal of the franchise given that the existing 2003 Agreement is expired. OEB staff further submits that the OEB should exercise its jurisdiction under s. 10(2) of the MFA to renew the franchise between Enbridge Gas and the Municipality based on the terms and conditions of the Model Agreement, without amendment. In OEB staff’s view, renewal of the franchise between Enbridge Gas and the Municipality based on the terms and conditions of the Model Agreement would preserve the balancing of interests that the OEB sought to achieve when approving the Model Agreement. Further, based on the evidence in this proceeding there is no compelling reason to deviate from the cost allocation provisions of the Model Agreement in respect of drainage-related works as requested by the Municipality.

Enbridge Gas’s Certificate of Public Convenience and Necessity

OEB staff notes that the Municipality did not raise any objection to Enbridge Gas’s request for an amendment to the Certificate.

OEB staff submits that granting Enbridge Gas’s request would be consistent with the established practice of the OEB to grant applications from gas distributors seeking to cancel and supersede old certificates where a new certificate may better align with current municipal boundaries.¹⁵

In OEB staff’s view, the request is reasonable and should be granted. The Certificate was issued in 1959, and the requested amendment aligns with current municipal boundaries and avoids any confusion that may arise from references to the historic municipalities that were amalgamated to create the Municipality in 1999.

¹⁵ See, for example: EB-2022-0172, Decision and Order, issued September 8, 2022, in which the OEB approved Enbridge Gas’s request for a new certificate that was “geographically aligned with the current municipal boundaries of the Township of North Dumfries [and that the] approach is reasonable given the evidence provided by Enbridge Gas regarding the coverage associated with the historical certificates and the location of its current infrastructure, specifically in the former Township of Beverly”.

See also: EB-2022-0253, Decision and Order, issued January 24, 2023, in which the OEB approved the issuance of a new certificate that “is geographically aligned with the current municipal boundaries of the Town of Bracebridge” and found the “approach is reasonable given that the company has also demonstrated its plans for system expansion within the municipality.”

~All of which is respectfully submitted~