

ONTARIO ENERGY BOARD

EB-2024-0134

IN THE MATTER OF the *Ontario Energy Board Act*, 1998, S. O. 1998, c. 15, Schedule B;

AND IN THE MATTER OF an application by Enbridge Gas for approval of franchise agreement with the County of Lennox and Addington and for an order declaring that the assent of electors is not necessary

Notice of Motion

October 3, 2024

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NOTICE OF MOTION

Environmental Defence will make a motion to the OEB on a date and through a method of hearing to be determined by the OEB.

The motion is for:

1. An order under Rule 27 that Enbridge provide full and adequate responses to the Concerned Residents' Interrogatories 1 to 4 and 6 to 10; and
2. An order that Enbridge answer the supplementary interrogatory set out below.

The grounds for the motion are:

Request 1: Full and adequate responses to interrogatories 1 to 10

3. Enbridge declined to answer 9 of the 11 interrogatories filed by the Concerned Residents. Those refusals were based on an overly narrow view of the scope of this proceeding as relating only to factors that are *unique* to the County and/or pre-emptively ruling out divergence from the Model Franchise Agreement. That understanding of the scope is inconsistent with the factors that the OEB is required to consider under the *Municipal Franchises Act* and the OEB's directions in *Procedural Order #2*.

Statutory mandate

4. Section 9 of the *Municipal Franchises Act* requires OEB approval for municipal franchise agreements and grants jurisdiction to the OEB to declare that the assent of municipal electors is not required for a franchise agreement. In hearing applications under s. 9 of the *Act*, the OEB is required to consider and weigh relevant factors. The OEB cannot as a

matter of law reduce the scope of hearings under s. 9 in a way that would preclude the required consideration and weighing of relevant factors.

5. This was recognised by the OEB in 2000 in its report setting the terms of the current Model Franchise Agreement.¹ In that report, the OEB stated as follows:

The Panel notes that the Board does not have the jurisdiction to impose a uniform agreement on the parties. That would be tantamount to a predetermination of the decisions which the Board is required to make under the MFA. The purpose of the 2000 MFA is to provide a template to guide the Gas Companies and municipalities as to terms and conditions the Board generally finds reasonable in applications under the MFA.

6. The OEB was clear that the Model Franchise Agreement is a “template” and a “guide” and cannot be used in a way that would predetermine future applications under the *Municipal Franchises Act*. Enbridge’s interpretation of the scope of this proceeding would amount to the very kind of predetermination that the OEB acknowledged is impermissible. Enbridge’s interpretation would treat all or the vast majority of the Model Franchise Agreement not as a guide, but as mandatory provisions that must apply in each case.
7. Although the model agreement is a “guide” as to the terms and conditions the Board generally finds reasonable, parties must still be able to attempt to make a case that different terms and conditions may be warranted. The Concerned Residents raise new factors that were not considered in the proceeding that created the Model Franchise Agreement (RP-1999-0048), including a term to prevent the County from being locked into providing free access to its public highways even if the ongoing municipal campaign to have O. Reg. 584/06 amended to allow fees for said access is successful (see the letter

¹ RP-1999-0048, OEB Report, December 29, 2000

of the Concerned Residents of October 1, 2024 for more details). This issue is not unique to this County, but is an entirely valid issue to raise in this proceeding.

8. A party seeking a term that is not in the Model Franchise Agreement or a term that differs from the Model Franchise Agreement must justify the divergence in their submissions, as the Concerned Residents will do. However, that party must also have the *opportunity* to justify the divergence. Enbridge's excessively narrow view of the scope of this proceeding would preclude the opportunity to justify the divergence and preclude the consideration of those issues that is necessary to fulfill the OEB's mandate under the *Municipal Franchises Act*.

Procedural Order #2

9. Enbridge's interpretation of the scope of this proceeding is also inconsistent with *Procedural Order #2*. The relevant wording of that procedural order reads as follows:

The issues within the scope of this proceeding include any proposed amendment(s) to the terms and conditions of the franchise that may be warranted as a result of circumstances specific to the County.

The OEB agrees with Enbridge Gas that any detailed discussion of generic changes to the Model Franchise Agreement is not in scope given this application is for one specific franchise agreement renewal.
10. The Concerned Residents understand this wording to mean that "generic changes" to the model franchise agreement require a generic hearing. The OEB did not preclude the Concerned Residence from justifying new terms that are not contained in the Model Franchise Agreement in this specific agreement nor state that any such terms must relate to factors unique to the County.
11. The Concerned Residents wrote to the OEB regarding the scope on September 20, 2024, noting as follows: "If all issues have been removed from scope except those that are

unique to the County, please let us know as that would remove from scope all the issues that the Concerned Residents wish to raise.” The OEB responded on September 26, 2024 and did not indicate that the issues that the Concerned Residents wish to raise are out of scope. If those issues were indeed out of scope as Enbridge now asserts, the OEB would have indicated so. Enbridge should be required to answer the interrogatories so that this matter can be properly adjudicated by the OEB in accordance with its statutory mandate and *Procedural Order #2*.

Request 2: Full and adequate responses to interrogatories 1-4 and 6-10

12. Environmental Defence also seeks an order that Enbridge answer an additional interrogatory relating to its response to interrogatory #11. That interrogatory asked for correspondence between the County and Enbridge. The response included an email from the County listing significant concerns with Enbridge and requesting additional wording in the Franchise Agreement to address those concerns. Oddly, the interrogatory response did not attach any correspondence responding to those concerns or to the requested additional wording. The Concerned Residents seek further details.

13. The relevant correspondence from the County reads as follows:

I would like to confirm or expand on the wording of the agreement to cover examples that have been encountered with the Gas Company’s plant over the past several years.

Examples:

1. Gas main was to be installed 1.0m behind the curb on an urban road. When reconstructing this road, including watermain (0.3m in front of the curb), the gas main was encountered directly over the watermain for the entire length of the reconstruction and only 6” below curb. This resulted in an additional cost to the municipality to support the gas main for the duration of the watermain replacement as only Enbridge/Union Gas would pay for 50% of the works.
2. Gas main was installed by directional boring along and across an urban road. During reconstruction of the road, the gas main was encountered above the approved installation depths and had been bored directly through our storm system at various locations. This resulted in an additional cost to the municipality to support the gas main and relocate our infrastructure to remove the conflict with no compensation from Enbridge/Union Gas.

3. Gas main was installed in 2018 on a County Road by means of directional boring. The gas main was not installed at the design/approved depths resulting in a hump across the entire pavement section similar to a small speed bump. We have asked that this section be regraded and repaved. Nothing has been completed to date.

4. Gas main was installed in 2023 on a County Road by means of a directional bore. This road had newer pavement and our permit stated that no road cuts were permitted. The gas main was not installed at the design/approved depths and they completed an excavation/cut to install in our new road. County staff asked that this main be lowered to design/approved depths. Enbridge now wants to abandon this service line and connect at a different location thus not requiring the excavation. We have been left with a road cut that has not been properly repaired. It was repaired with cold patch instead of asphalt and at a time when asphalt was ready available.

Can Enbridge revise or add wording to reflect the scenario in example 1? We believe that all of this expense should have been the responsibility of the Gas Company. Section 5 (h) can be enhanced by adding “should the gas plant deviate from the approved location, the Gas Company shall be responsible for 100% of all associated costs including the relocation of the gas plant (if needed) and rehabilitation to existing infrastructure. Additionally, can you please confirm that Section 8 Restoration would apply to examples 2, 3, and 4. Thus allowing the County to have a contractor repair these sections to the satisfaction of the County? If so, why are we at this stage with little to no co-operation from the Gas Company.

In an effort to increase communication and co-operation between the parties, staff would like to see wording in the agreement that the Gas Company shall meet with the Corporation at least once per calendar year to review/discuss short and long term capital plans. This will help with reducing costs for both parties and mitigate delays and inconveniences during the construction phase.

14. The Concerned Residents ask that the following interrogatory be answered by Enbridge:

“Please explain how the concerns expressed in Attachment 2 of interrogatory #11 have been addressed, including a list of how each example has been resolved (if it has been resolved) and what assurances Enbridge gave the County, and provide any Enbridge notes or documentation regarding these matters and the agreement changes proposed by the County.

Conclusion

15. The Model Franchise Agreement is meant to “guide” the process of securing franchise agreements and improve consistency. It is not meant to “predetermine” the issues in individual franchise agreement proceedings such that parties are denied the opportunity to attempt to justify terms that diverge from the model. The Concerned Residents merely

seek that opportunity, including via access to interrogatory responses on topics that are within scope.