

Elson Advocacy

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Nancy Marconi
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Dear Ms. Marconi

**Re: Township of Guelph/Eramosa Franchise Agreement
EB-2024-0188 Procedural Order No. 1**

I am writing on behalf of Dr. Anne-Marie Zajdlik and eMERGE Guelph Sustainability (proposed intervenors) pursuant to *Procedural Order #1* to answer the questions posed by the OEB in that procedural order.

We have answered the questions below out of order as the nature of the proposed evidence (question 1) can be explained more efficiently after discussing the outcomes that the proposed intervenors are seeking. We have also addressed the issues raised by Enbridge in their letter dated September 6, 2024.

Please note that local residents in EB 2024-0134 are raising similar issues as the proposed intervenors in this proceeding. Much of the evidence of the local residents in that proceeding is relevant to the issues raised here by the proposed intervenors. In order to avoid duplication and support coordination, the proposed intervenors are open to meeting with the Applicant and OEB staff to identify opportunities for efficiency between the proceedings, including possible sharing of evidence, hearing the applications together or holding this application in abeyance until a determination has been made in 2024-0134.

Question iii: What specific outcome(s) are the proposed intervenors seeking in this proceeding, including possible impact(s) on the MFA?

At the highest level, the proposed intervenors are seeking a franchise agreement that is fairer for residents and taxpayers in the Township of Guelph/Eramosa (the “Township”). There are two primary concerns with the agreement proposed by the Applicant.

1. **Locking in free use of highway lands:** The proposed agreement appears to lock the Township into an arrangement where it cannot charge any fees for use of its highways for pipelines for 20 years. This is concerning because there is an ongoing campaign by some municipalities to be able to charge fees for use of these lands, including requests that the

Province of Ontario amend s. 9 of Ontario Regulation 584/06 to allow for such fees. If the campaign is successful and fees are allowed, the Township could still be prevented from charging said fees by being locked into this franchise agreement.

This could be addressed in a number of ways in the franchise agreement. For example, a new term could be added to the agreement that would give the Township the right to trigger a negotiation for said fees in the event that O. Reg. 584/06 is amended to allow those fees, including remedies that the Township can exercise if fees cannot be agreed on within a reasonable timeframe.

2. **Payment for relocation:** The proposed agreement requires taxpayers to bear too large of a burden for relocating gas pipelines where they conflict with public works. It appears that taxpayers must bear 100% of these costs for public works that do not fit the definition of municipal works and 35% of the cost for conflicts with municipal works. This is unreasonable seeing as the gas distributor pays \$0 for use of these public lands. Requiring that municipalities use taxpayer dollars to support methane gas pipelines is no longer in the public interest at a time where (a) methane gas is no longer the cheapest heating option and (b) methane gas combustion causes one-third of Ontario's greenhouse gas emissions and needs to be eliminated over the span of approximately 25 years (i.e. by 2050).

This could be addressed in a number of ways in the franchise agreement. First, the cost sharing provisions in section 12 should apply to all public works, not only those public works that can be defined as municipal works. Second, the share of relocation costs borne by taxpayers should be reduced to 0%.

The proposed intervenors would prefer to achieve changes to the Township's next franchise agreement to address those issues as soon as possible. However, there may be other alternative outcomes which would not provide as much progress but would represent a step forward. We can imagine two examples of alternative outcomes:

1. **Decline s. 9(4) order:** The OEB could decline to order that the assent of municipal electors can be dispensed with under s. 9(4) of the *Municipal Franchises Act*. This would allow the issues regarding fairness to those municipal electors to be voted on by those municipal electors.
2. **Call a generic hearing:** The OEB could initiate a generic hearing into the model franchise agreement seeing as the previous generic hearing resulting in the current model was approximately 25 years ago.

Although we have identified some potential amendments to the franchise agreement, the proposed intervenors enter this proceeding with an open mind and wish to reserve the right to hone and adjust their requests based on the evidence that comes forward and the discussions that may occur through this proceeding.

Question ii: What is the proposed intervenors' position with respect to the OEB's authority, in a franchise renewal proceeding, to prescribe terms and conditions of a municipal franchise agreement that vary from those that the two contracting parties, one of which is the elected council of the citizens of the municipality, have agreed on for the continuation of the franchise and that are consistent with the MFA?

As a preliminary matter, there are a number of options to address the issues noted above without prescribing terms and conditions that vary from those proposed by the Applicant. For instance, the OEB could deny approval of the terms and conditions of the agreement under s. 9(1) of the *Municipal Franchises Act* with reasons addressing the issues above and with leave for the Applicant to re-apply. Alternatively, the OEB could decline to order that the assent of municipal electors can be dispensed with under s. 9(4) of the *Municipal Franchises Act*. In both cases, the issues would be put back to the parties before they are brought back to the OEB again for reconsideration.

Alternatively, the OEB can impose terms of a franchise agreement. That has been done before in the past over the objections of one party and there is no jurisdictional impediment to it occurring over the objections of two parties. However, as a practical matter, the agreement terms sought by the proposed intervenors are for the benefit of the Township, and so it is highly unlikely that the Township would object to them. As such, any order imposing terms would likely only be over the objections of the gas distributor.

The power to impose terms is most clearly set out in s. 10(2) of the *Municipal Franchises Act*, which reads as follows:

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.

In this case, Enbridge has applied under s. 9, which also states that “[t]he Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and may give or refuse its approval.” It is not entirely clear based on this wording if specific conditions could be directly imposed in a s. 9 application. We believe they could. However, if we are incorrect, there is no doubt that approval under s. 9 could be denied such that the Applicant is required to apply under s. 10, which clearly gives the OEB jurisdiction to impose terms.

In sum, the OEB has the jurisdiction to deny approval and send the matter back to the parties for renegotiation with reasons or, as an alternative, to directly impose terms. Either option could address the issues raised by the proposed intervenors.

Question i: What is the nature of the evidence that the proposed intervenors plan to submit for consideration by the OEB in this proceeding and what is the proposed timing for the filing of such evidence?

The proposed intervenors wish to submit evidence (a) justifying the adjustments to the franchise agreement that they seek as outlined on pages 1 and 2 above and (b) setting out the changes that have occurred since 2000 that would justify deviating from the model franchise agreement. This would include:

1. Evidence in support of the need to allow for a negotiation regarding fees in the event that O. Reg. 584/06 is amended, including evidence that such amendments are a real possibility over the agreement term, such as details of efforts by municipalities to seek those changes;
2. Evidence to justify fees for use of the highways, such as evidence on fees charged in other jurisdictions for use of highways and fees charged to district energy pipelines for use of the highways; and

The proposed evidence is primarily relevant to the issue of fees for use of municipal highways by the utility. Although those fees are not currently permitted by the relevant regulation (O. Reg. 548/06) there is an ongoing campaign by municipalities to have that changed. There is significant concern that the proposed franchise agreement would lock the Township into providing use of the municipal highways for free for the duration of the 20-year franchise agreement even if the regulation is changed to allow for such fees to be charged. To address that issue, the proposed intervenors are seeking a term that would trigger a negotiation or other process to determine the appropriate fees during the term of the agreement should the regulation change.

The proposed evidence would support the need for and importance of such a provision in the franchise agreement. The evidence would support the contention that a change in the regulation is a reasonable possibility (if not a likelihood) within the 20-year franchise agreement term. In specific, the consultant would be asked to do the following:

- Provide a jurisdictional review regarding fees charged by municipalities to gas distributors for use of highways (i.e. road allowances) for gas infrastructure;
 - Describe efforts by municipalities in Ontario to secure fees for use of highways by gas distributors; and
 - Describe whether and how municipalities can charge fees for third party infrastructure in municipal rights of way.
3. Evidence on why it is no longer in the public interest to require taxpayers to provide free access to highway lands and to pay for pipeline relocations, such as the role of that infrastructure in causing climate change.

The extent of evidence required will depend on the interrogatory process. We hope to obtain as much of the evidence as possible through interrogatories.

We anticipate that four weeks will be required to prepare the evidence. However, we will work within whatever timelines the OEB may provide. If timing is an issue, the proposed intervenors would not object to an interim extension of the existing franchise agreement to allow the issues in this proceeding to be adequately addressed.

It is not clear to us whether the OEB is currently seeking a fully detailed description, timeline, and budget for the proposed evidence. It appears to us that the OEB is only looking to determine the nature of the evidence at a high level before setting out the next steps in this proceeding and for the purposes of determining whether to grant our request to intervene. We have therefore provided a high-level response, but we can provide additional details if they are needed at this time.

Question iv: What is the proposed intervenor's response to the issues raised in Enbridge Gas's intervention request objection letter, filed on September 6, 2024, including in respect of the matter of standing?

We understand the issues raised by the Applicant in their letter dated September 6, 2024, to include the following:

1. Substantial interest of proposed intervenors in the matter
2. Role of intervenors in applications under the *Municipal Franchises Act* where a local Council has endorsed the proposed Franchise Agreement
3. The scope of proceedings under the *Municipal Franchises Act* and the role of the Model Franchise Agreement
4. Notice requirements
5. Municipal fees vs. taxes paid

1. Substantial interest of proposed intervenors in the matter

The Applicant asserts that the proposed intervenors have no substantial interest in the proceeding because they are not Enbridge customers and because there is no “connection between the work being done by eMERGE Guelph in the City of Guelph and the provision of gas distribution services within the Township.”¹

This argument is untrue and should be rejected. The Board's Practice Direction does not restrict eligibility to ratepayer groups covered by s. 3.03(a). A party will be eligible if they represent a relevant interest or policy perspective as detailed in s. 3.03(b). This clearly applies to Dr. Zajdlik, who is a local resident and represents the financial interests and wellbeing of municipal electors. Enbridge is seeking an order under s. 9(4) of the *Municipal Franchises Act*, which reads as follows:

¹ Applicant Letter to the OEB dated September 6, 2024 at p. 2.

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.

In determining whether the assent of municipal electors can be dispensed with, the OEB must have regard to the interests of municipal electors and fairness to those municipal electors. Focusing solely on gas ratepayers would not result in the balancing of competing interests required under the *Municipal Franchises Act*.

It also applies to eMERGE, which represents the public interest in environmental protection. The Applicant's objection to the participation of eMERGE is substantially based on their incorporation in the City of Guelph. While Guelph Eramosa is a distinct Township, it abuts and "surrounds the City of Guelph to the north, west and east sides."² The municipal office is located roughly ten minutes drive from the centre of the City of Guelph. The *Municipal Franchises Act* itself recognizes the interconnected nature of many municipalities by requiring the input of certain neighbouring cities before a franchise agreement can be granted by local council under the Act. As an environmental organization working to affect public policy and reduce carbon emissions in Guelph, they have a sincere interest in the methane gas distribution network surrounding the City. Moreover, it is unrealistic for many lower-tier municipalities to have distinct public policy organizations advocating for environmental protection in provincial regulatory proceedings.

In seeking a franchise agreement that will not provide payments or land-use benefits from municipal electors to the gas distribution company (representing a possible fossil fuel subsidy), the proposed intervenors represent the types of private and policy interests contemplated in section 3.03(b). As such, they should be granted intervenor status and deemed eligible for costs under the Board's Practice Directions.

2. Role of intervenors in applications under the *Municipal Franchises Act* where a local Council has endorsed the proposed Franchise Agreement

In its letter of September 6, 2024, the Applicant raises a number of objections, which are all related to the Township's previous endorsement of the proposed Franchise Agreement. Among other things, Enbridge states that the proposed intervenors are "attempting to override legal authority of the Township" and "have no authority to speak for the Township about municipal taxes or the use of public highways for utility services."

These objections are inconsistent with the procedures under section 9 of the *Municipal Franchises Act* and should be rejected. As discussed above, the procedures under section 9 of the *Municipal Franchises Act* provide two options for approval of a proposed Franchise Agreement: i. assent by municipal electors after OEB approval for the terms and conditions or ii. final approval by the OEB after a public hearing.

² Guelph Eramosa Township Website: <https://www.get.on.ca/contact/directions-maps>.

The purpose of the public hearing is to ensure that all relevant voices are heard, such that a municipal plebiscite can be dispensed with. This includes the voices of municipal electors impacted by the issue of fees for use of municipal highways and voices of advocates on an important public interest, such as environmental protection.

The proposed intervenors do not claim to speak for the Township and do not wish to circumvent legitimate government processes. They are interested parties whose input is relevant and necessary to the Board's proper consideration of the application.

Were the Board to adopt the Applicant's interpretation, as set out in its letter of September 6, 2024, there would be no role for interested parties to intervene in any proceeding where the two parties have previously agreed to the terms of the Franchise Agreement. This runs contrary to any plain language reading of the *Municipal Franchises Act* and should be rejected.

3. Substantive Issues: The scope of proceedings under the *Municipal Franchises Act* and the role of the Model Franchise Agreement

The Applicant raises a separate set of objections that go to the heart of the issues that the proposed intervenors request to be addressed as part of a public hearing. These objections relate to the role of the Model Franchise Agreement and the scope of proceedings under the *Municipal Franchises Act*.

It is inappropriate for Enbridge to seek a ruling on these issues at this early stage of the proceeding. Instead, they should be addressed in the future when the issues list is determined. It is inefficient and unfair to attempt to pre-determine scope in an intervention objection letter.

If the Board disagrees with the proposed intervenor's position on the timing of these objections, the following initial response is provided.

The Applicant states that a Franchise Agreement should be based on the Model Franchise Agreement unless there are "compelling reasons to deviate from it." The proposed intervenors agree. However, parties must also have the opportunity to justify a proposed divergence. 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 proposed intervenors merely seek that opportunity, including via access to interrogatory responses on topics that are within scope. 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*. 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.

4. Notice requirements

The Applicant's letter of September 6, 2024, argues that the proposed intervenors should be refused due to a lack of notice to the Township and other municipalities. This argument is not supported in law and misapprehends the proposed intervenors' interest in the proceeding.

The *Municipal Franchises Act* does not require prior notice of issues in order to participate in a public hearing under section 9. As has been discussed previously, the public hearing requirement under section 9 is provided as an alternative to a municipal plebiscite. The assumption is that many electors will not have followed or participated in the municipal debates over a Franchise Agreement but should still have a chance to voice their opinion on the matter. Arguably, this is in part due to the length and importance of these Franchise Agreements.

The Applicant further argues that the proposed intervenors' participation should be rejected at this stage because the scope of issues would have required notice to other municipalities currently using the Model Franchise Agreement. However, as has been stated, the proposed intervenors do not seek revisions to the Model Franchise Agreement. That would require a generic hearing.

5. Municipal fees vs. taxes paid

Enbridge notes that it pays taxes to the municipality as if this is an argument against the need even for any hearing into whether the municipal franchise agreement is appropriate in this case. However, taxes are entirely different from the payment of fees to use public land. For instance, district energy providers are often required to pay fees for pipes under public land even though they also pay taxes. In any event, Enbridge's argument is a substantive one that should be dealt with as part of the hearing not as a preliminary question of whether a hearing is required in the first place.

For the reasons outlined above, the proposed intervenors ask the Board to reject the Applicant's objections and approve their participation in EB-2024-0188.

Yours truly,



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