



## The Corporation of the Town of Tecumseh

Financial Services

**To:** Mayor and Members of Council

**From:** Luc Gagnon, Director Financial Services & Treasurer

**Date to Council:** September 11, 2018

**Report Number:** FS-2018-14

**Subject:** Water Bulk Supply Rate Memorandum of Agreement

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### Recommendations

It is recommended:

**That** by-law No. 2018-52 be adopted **to authorize** the Mayor and Clerk to execute the Memorandum of Agreement dated August 14<sup>th</sup>, 2018 between the Town of Tecumseh, Windsor Utilities Commission and the City of Windsor.

### Background

The Town of Tecumseh (the Town), the Windsor Utilities Commission (WUC) and the City of Windsor (Windsor) entered into a Water Servicing Agreement on November 10, 2004, and a subsequent Amending Agreement on January 16, 2006. The Agreement provides the Town with a secure source of drinking water up to a maximum daily demand of 87 MLD, for a period of fifty years.

The Agreement Schedule A (attached) sets out the 2004 Bulk Water Rate to be charged for all water supplied to the Town, and provides for annual adjustments in the Bulk Water Rate based on the Consumer Price Index (CPI). The initial rate to be charged per the agreement was \$0.266 per cubic meter. The CPI increased rate for January 1, 2016 is \$0.3301.

In addition, the agreement contemplates the Bulk Water Rate may be adjusted immediately following each 10 year anniversary of the "Effective Date" of the Agreement, to reflect a Regulatory Price Change (RPC) and/or a Non-Regulatory Improvements Price Change (NRIPC). Schedule A of the Agreement outlines the methodology for implementing any such changes and requires strict compliance with Schedule A of the Agreement. No other types of price changes are permitted.

An RPC "...means that portion of any increase in the price for water charged by the Commission to its customers, which increase is attributable to Regulatory Change". Regulatory Change "...means change, mandated by statutes or regulations enacted or promulgated by the Province of Ontario, enacted after the "Effective Date" of the Agreement, impacting the manner in which water is to be treated or supplied by the Commission."

According to the Agreement, "Non-Regulatory Improvements Price Change" means a price change caused by non-regulatory improvements made by the Commission to its water treatment facilities, which result in significant and measurable improvements in water quality.

On December 14, 2016, WUC issued a letter indicating its intention to revise the prices charged to the Town under the Agreement. This letter was followed by an email of January 23, 2017, attaching spreadsheets detailing a calculation proposing a rate change from \$0.3301 to \$0.7400. This calculation was based on estimated 2016 costs. The minutes of the Permanent Joint Staff Liaison Committee (PJSLC) meeting of January 18, 2017 were also attached. It is noted that the PJSLC is a committee called for under the terms of the Agreement that deals with rate increases among other items.

By letter of January 24, 2017, the Town, through its Director of Public Works and Environmental Services, Dan Piescic, outlined concerns of Tecumseh including: a) the fact that WUC is proposing a rate that is over double the then current rate, b) that the timelines for review of information are unrealistic, and c) highlighting the needs to follow Schedule A of the Water Agreement.

It is further noted that Schedule A, Part 2, (7) of the Agreement states that "a proposed price adjustment ... shall in the first instance be determined by unanimous consent of the PJSLC, and in the absence of unanimous consent, by the arbitral provisions contained in the agreement ..." At no time has the PJSLC made a determination by unanimous consent on the proposed price adjustment.

On February 2, 2017, WUC issued an email containing certain spreadsheets detailing their request for a revised rate of \$0.67. We understand that the change reflects finalized actual costs for up to 2016.

Negotiations and/or discussions continued into 2017 resulting in WUC providing, on a without prejudice basis, a further set of spreadsheets proposing a revised rate of \$0.4133 (the "WP Offer"). Changes included removing certain capital costs from consideration and a revised calculation of component costs.

On or about December 13, 2017, the Town provided a summary (letter attached) of their concerns regarding WUC's outstanding request for a rate change. In response, WUC instructed their solicitors to issue a letter dated December 20, 2017, requesting a mediation of the dispute.

## Comments

The CAO and Director, Financial Services met with the CEO and CFO of WUC on July 26, 2018 in an effort to determine if there was an opportunity to reach an agreement prior to the

scheduled mediation session. While the discussions were cordial and informative, we were unable to reach an agreement based on the complexities of the issues.

WUC and the Town engaged in a mediation process on August 13-14, 2018. The Town was represented by the Town's Solicitor, the Directors of Financial Services & Treasurer and Public Works & Environmental Services and the Town's engineering consultant who has been involved with the Water & Wastewater Master Plan and was involved in the creation of the Agreement in 2004. WUC was represented by VP Finance & CFO Byron Thompson and VP Water Operations Gary Rossi and Thomas McRae of Shibley Righton. The mediator was The Honorable Warren K. Winkler, Q.C. (Mediator).

Both parties were given an opportunity to provide comments on their respective positions. Generally speaking there was little agreement on any of the issues. WUC felt the agreement was opaque and subject to interpretation whereas the Town felt the Agreement was pretty direct in its wording.

After reviewing briefs and hearing presentations from the parties, the Mediator opined that, in his estimation, this mediation process was not likely to reach a successful conclusion if the intention was to solve all issues on the table. The likely next step as contemplated in the agreement would be going through an arbitration process.

The Mediator had both sides consider the option of coming to agreement on a price increase over and above inflation, for the next ten years, in some reasonable manner not directly related to interpreting the Agreement and then developing "a negotiating process to resolve interpretation of the agreement as a basis for determining subsequent ten year adjustments" (Negotiating Process).

Town and WUC negotiators felt this was a reasonable compromise as long as clarity was reached on how adjustments were to be determined in the future. The Town evaluated the risk inherent in the arbitration process, i.e. an arbitrator's decision is binding and there is always a risk of unfair results based on an individual's interpretation of the words in the Agreement. The cost of arbitration is also significant in that large quantities of documentation are typically required. Finally, consideration was given to the wording in the document that we felt was appropriate based on the historical formulation of the agreement but that may not be as abundantly clear based on considering the words alone.

Negotiations were undertaken for a price change that was ultimately agreed to be \$0.03 higher than the CPI increased January 1, 2017 rate i.e.  $\$0.3301 + \$0.0300 = \$0.3601$ . Rates for the ensuing nine years would be increased by CPI only.

The Negotiating Process was then considered with the group agreeing to the following:

- Enter into a negotiating process with a view to clarifying, by amendment or otherwise, the provisions in the Agreement relating to Water Consumption Bulk Supply Rates and Summer Levy Bulk Supply Rates.
- The negotiating process shall begin no later than October 1, 2018 and shall conclude on or before October 1, 2019.
- The parties shall thereafter engage in good faith negotiation with a view to narrowing the issues. This should occur, unless otherwise extended, on or before November 30, 2018.

- Thereafter the parties shall engage in a mediation/arbitration process before the Honourable Warren K. Winkler, Q.C. in a form provided by the Honourable Warren K. Winkler, Q.C. in consultation with the parties.

A Memorandum of Agreement (attached) was formulated and it was agreed that the negotiating parties would recommend the Agreement be ratified by Town Council and WUC Commission.

## **Consultations**

Public Works & Environmental Services  
Town Solicitor

## **Financial Implications**

The one time January 1, 2017 adjustment of \$.0300 is a 9.1% increase in the rate charged. Without the adjustment, the inflationary increase would have been \$.0059 or 1.8%. The net increase over and above CPI is \$0.0241 or an increase of 7.3%. The Summer Levy rate adds approximately 10% to the cost of purchased water resulting in a 8.0% ( $7.3\% \times 1.10$ ) overall increase in the water costs paid to WUC. Based on an annual cost of \$1.3 million, the expected increase in annual cost is \$104,000 ( $\$1,300,000 \times 8.0\%$ ) higher than anticipated in the rate study.

Overall impact to the average residential consumer water bill is \$11.52 per year or a 4.1% increase. The impact to our large consumer would also be 4.1% which amounts to approximately \$13,000 per year.

## Link to Strategic Priorities

Applicable	2017-18 Strategic Priorities
<input type="checkbox"/>	Make the Town of Tecumseh an even better place to live, work and invest through a shared vision for our residents and newcomers.
<input checked="" type="checkbox"/>	Ensure that the Town of Tecumseh's current and future growth is built upon the principles of sustainability and strategic decision-making.
<input type="checkbox"/>	Integrate the principles of health and wellness into all of the Town of Tecumseh's plans and priorities.
<input type="checkbox"/>	Steward the Town's "continuous improvement" approach to municipal service delivery to residents and businesses.
<input checked="" type="checkbox"/>	Demonstrate the Town's leadership role in the community by promoting good governance and community engagement, by bringing together organizations serving the Town and the region to pursue common goals.

## Communications

Not applicable ☒

Website ☐

Social Media ☐

News Release ☐

Local Newspaper ☐

This report has been reviewed by Senior Administration as indicated below and recommended for submission by the Chief Administrative Officer.

Prepared by:

Luc Gagnon, CPA, CA, BMath  
Director Financial Services & Treasurer

Reviewed by:

Phil Bartnik, P.Eng.  
Director Public Works & Environmental Services

Recommended by:

Tony Haddad, MSA, CMO, CPFA  
Chief Administrative Officer

<b>Attachment Number</b>	<b>Attachment Name</b>
1	Schedule "A" Rates for Water Supply to Tecumseh
2	December 13, 2017 Letter to WUC re concerns
3	Memorandum of Agreement