

Ontario Energy
Board

P.O. Box 2319
2300 Yonge Street
26th. Floor
Toronto ON M4P 1E4
Telephone: (416) 481-1967
Facsimile: (416) 440-7656

Commission de l'Énergie
de l'Ontario

C.P. 2319
2300, rue Yonge
26e étage
Toronto ON M4P 1E4
Téléphone: (416) 481-1967
Télécopieur: (416) 440-7656



Chair

Président

January 11, 2001

TO: All Participants in 1999-0048

RE: 2000 Model Franchise Agreement

Enclosed is the Report to the Board of the Panel with respect to the 2000 Model Franchise Agreement. The Board has adopted the 2000 Model Franchise Agreement attached as Appendix A to the Report.

A handwritten signature in black ink, appearing to read "Floyd Laughren".

Floyd Laughren
Chair

Encl.

Ontario Energy
Board

Commission de l'Energie
de l'Ontario



RP-1999-0048

IN THE MATTER *OF THE MUNICIPAL FRANCHISES ACT;*

AND IN THE MATTER OF THE 2000 MODEL FRANCHISE AGREEMENT.

REPORT TO THE BOARD

December 29, 2000

RP-1999-0048

IN THE MATTER OF the *Municipal Franchises Act*;

AND IN THE MATTER OF the 2000 Model Franchise Agreement.

BEFORE: Sheila K. Halladay
Presiding Member

Floyd Laughren
Member and Chair

Judy Simon
Member

A. Catherina Spoel
Member

REPORT TO THE BOARD

December 29, 2000

TABLE OF CONTENTS

1. <u>BACKGROUND AND THE PROCEEDING</u>	1
1.1 BACKGROUND	1
1.2 THE PROCEEDING	4
2. <u>PROPOSED AMENDMENTS SUPPORTED BY ALL OF THE PARTIES</u>	7
2.1 UPDATING AND CLARIFICATION OF TERMINOLOGY	7
2.2 CONSTRUCTION ISSUES	11
2.3 INSURANCE AND LIABILITY	18
2.4 LEGISLATIVE CHANGE	19
2.5 ABANDONED PIPE	20
3. <u>ISSUES NOT AGREED TO BY ALL OF THE PARTIES</u>	25
3.1 RELOCATION COSTS	25
3.2 DURATION OF THE AGREEMENT	27
3.3 DEFAULT PROVISIONS	30
4. <u>FEES</u>	33
4.1 BACKGROUND	33
4.2 JURISDICTION OF THE BOARD	35
4.3 OTHER GENERAL ISSUES RELATING TO FEES	41
4.4 SPECIFIC FEES	44
5. <u>ADDITIONAL MATTERS</u>	53
5.1 CITY OF TORONTO	53
5.2 FRANCHISE HANDBOOK	56

APPENDICES

Appendix A - 2000 Model Franchise Agreement

1. BACKGROUND AND THE PROCEEDING

1.1 BACKGROUND

1.1.1 The *Municipal Franchises Act* (the “MFAct”) was first enacted in 1912. Section 3 of the MFAct 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.

1.1.2 The MFAct was further amended in 1954 with the addition of section 9, which deals with the original grant of the franchise. Section 9 of the MFAct 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

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*.

- 1.1.5 In November 1985, the Board held a generic hearing (E.B.O. 125) to provide a forum for the discussion of a number of general and specific concerns which had arisen regarding municipal franchise agreements for the distribution of gas in Ontario. The Board wanted to determine whether the existing forms of franchise agreements between municipalities and gas distributing companies were adequate, and whether the ways in which these agreements were entered into were appropriate.
- 1.1.6 On May 21, 1986, the Board issued its Report, which described the Board's findings and provided policy guidelines. The findings of the Board were not legally binding on its future deliberations but were expressions of the Board's policies or guidelines on the various issues discussed. E.B.O. 125 recommended the establishment of a special Municipal Franchise Committee ("MFC") to be made up of representatives from the municipalities, the gas distributing companies and the Board to resolve a number of questions about municipal franchise agreements which were raised originally at the hearing, but that the Board felt would be most constructively answered through discussion and negotiation rather than by decisions or orders of the Board.

The Regional Municipality of Ottawa-Carleton ("Ottawa-Carleton")
The Industrial Gas Users Association ("IGUA")
The Township of Hay ("Hay")
The Township of Sarawak
The City of Thunder Bay
The Ontario Good Roads Association
The Town of Oakville

- 1.2.4 The Board invited parties to make oral presentations to a Panel of the Board. On January 25, 2000, the representatives of the following parties made oral presentations to the Panel:

The Gas Companies

Glenn F. Leslie	Counsel for Union
Paddy Davies	Director, Marketing Expansion, Enbridge Consumers Gas
Bob Adie	General Manager, Franchise Relations, Union
William Blake	President and General Manager, NRG

AMO

Andrew Wright	Counsel for AMO
Robert Foulds	Consultant
Casey Brendon	Engineer
Patricia Vanini	Director of Policy and Government Relations

Ottawa-Carleton

Ernest McArthur	Counsel
Lorne Ross	Manager Surface Projects

2. PROPOSED AMENDMENTS SUPPORTED BY ALL OF THE PARTIES

2.1 UPDATING AND CLARIFICATION OF TERMINOLOGY

2.1.1 The parties recommended that a number of provisions of the 1987 MFA should be clarified and updated.

2.1.2 The parties suggested that the term “Clerk” is not universally used throughout the province and that the term “Clerk” should be changed to “duly authorized officers” in the 2000 MFA.

2.1.3 The parties noted that MFA¹ and the *Ontario Energy Board Act, 1998* (“OEB Act”) have each been amended to reflect that Gas Companies are primarily engaged in the storage, transmission and distribution of gas. In addition, recent changes to the MFA¹ have removed the need for the municipality to grant the right to supply gas and similarly the right to sell gas. Therefore, the parties recommended that reference to “supply” and “sell” should be removed in the 2000 MFA.

- 2.1.8 The parties suggested that the purpose of the Franchise Handbook should be clarified by making reference to it in the 1987 MFA (now Paragraph 17 of the 2000 MFA), which would now read:

The Parties acknowledge that operating decisions sometimes require a greater level of detail than that which is appropriately included in the Model Agreement. Guidance on such matters may, by agreement between the Gas Companies and AMO, be provided in a Franchise Handbook. Such a Handbook can, by agreement of the parties, be amended from time to time as experience requires, to reflect changing technology.

Panel Recommendations

- 2.1.9 The Panel generally agrees with these positions of the parties and accordingly recommends that the 1987 MFA should be amended as follows:

- Replace references to “Clerk” with “duly authorized officer” throughout the 2000 MFA.
- Delete references to “supply” and “sell” gas throughout the 2000 MFA.
- Replace references to “road allowances” with “highways” throughout the 2000 MFA.
- Clarify the 1987 MFA by adding the words “Subject to the terms and conditions of this Agreement, the consent of the Corporation...” at the beginning of Paragraph 3 of the 2000 MFA.
- Reword the 1987 MFA, dealing with emergencies, so that Paragraph 7 of the 2000 MFA reads:

Ontario and the gas utility companies,
as may be amended from time to time.

2.2 CONSTRUCTION ISSUES

- 2.2.1 A number of issues relating to construction of the gas system were raised by the parties.

Construction Standards

- 2.2.2 The parties proposed that the 1987 MFA should be updated to ensure that it refers to the current construction standard so that Clause 5(b) of the 2000 MFA would read:

The Engineer/Road Superintendent may require sections of the gas system to be laid at a greater depth than required by the latest CSA standard for gas pipeline systems to facilitate known projects or to correct known highway deficiencies..

Geodetic Information

- 2.2.3 AMO proposed that given the increased complexity of works within the highway, geodetic information is desirable. AMO acknowledged the Gas Companies' concern that additional expense would be incurred if Gas Companies were required to produce geodetic information for a significant portion of the existing gas system. However, AMO felt that the wording in the 1987 MFA was too restrictive, particularly, when advances in GIS systems and digital surveying technology will continue to make this information more easily available in the future.

2.2.7 The Gas Companies' initial position was that there was no need to alter the wording of the 1987 MFA as it already provides municipal officials sufficient information on actual plant location.

2.2.8 The parties eventually proposed the following compromise:

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. 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 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" plan shall be of equal quality to the pre-construction plan and if the approved pre-construction plan included elevations that were geodetically referenced, the "as built" plan shall similarly include elevations that were geodetically referenced. If requested, one copy of the drawings shall be in an electronic format and one shall be a hard copy drawing.

Warranty

2.2.9 AMO noted that while the 1987 MFA gives the municipality control over the location of the gas system in the highway, AMO wanted the 2000 MFA to explicitly state that the municipality's approved location in the road allowance is to be taken by the Gas Companies on an "as is" basis. AMO also wanted the 2000 MFA to clarify that the municipality's approval is related to standard cross-sections and

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 the commencement of work on the gas system.

- 2.2.13 The Panel recommends that the Board adopt the parties' proposal with respect to providing geodetic information with slight modifications and that the following provision be inserted in Clause 5 (c) of the 2000 MFA:

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.

- 2.2.14 The Panel recommends that the Board adopt the parties' proposal with respect to "as built" drawings with minor wording changes.

- 2.2.15 The Panel recommends acceptance of the parties' proposal with respect to no warranty being provided as to the condition of the highway. The Panel recommends that for clarity this provision should be in a separate clause in Paragraph 5 of the 2000 MFA.

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.

written notice to the Corporation by the Gas Company.

The issuance of an insurance policy as provided in this section 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.

Upon request by the Corporation, the Gas Company will confirm that premiums for such insurance have been paid and that such insurance is in full force and effect.

Panel Recommendation

- 2.3.4 The Panel recommends that the Board adopt the parties' proposal with respect to insurance and liability with a slight modification to reflect changes in the numbering of the paragraphs..

2.4 LEGISLATIVE CHANGE

- 2.4.1 AMO stated that it was prepared to abide by the guidelines in E.B.O. 125 where the Board stated "that in the case of renewals, a ten to fifteen year term therefore seems to be adequate" provided that a clause dealing with legislative change during the term of the franchise agreement be inserted in the 2000 MFA. AMO proposed that the 2000 MFA require the parties to renegotiate terms if there is a substantial change to the legal regime during the term of the franchise agreement. If the parties could not agree within six months, the matter would be referred to the Board. Alternatively, AMO wanted a renewal term not exceeding ten years.

- 2.5.2 The Gas Companies' position was that the wording in the 1987 MFA strikes an appropriate balance between the interests of the utilities and the municipalities and that AMO's proposal could give rise to unnecessary and excessive costs. The Gas Companies also expressed concern that it may be unsafe to remove all abandoned gas pipelines and that removal is best done as part of roadway construction. The Gas Companies submitted that differentiating between abandoned and decommissioned pipe is unhelpful and that neither term should be interpreted as relinquishing ownership. The Gas Companies argued that future revenues relating to the use of the pipe should benefit gas ratepayers since municipalities have the ability to levy fees on non-gas users through municipal access agreements.
- 2.5.3 Ottawa-Carleton submitted that abandoned pipe should remain in the road until the road is reconstructed, at which time it should be removed by the Gas Company at its cost. If not removed at that time, it would become the municipality's property. Ottawa-Carleton also proposed that use of pipe for purposes other than gas should require a separate municipal access agreement. Ottawa-Carleton supported the submission made by Toronto that if a Gas Company uses its plant for purposes other than the transmission of gas a new access agreement is required.
- 2.5.4 After discussion, AMO and the Gas Companies proposed that a section be added to the 2000 MFA to deal with the use of deactivated gas pipelines as a telecommunications conduit or for any other purposes.

(c) Decommissioned parts of the gas system used for purposes other than the transmission and 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.

3. ISSUES NOT AGREED TO BY ALL OF THE PARTIES

3.1 RELOCATION COSTS

3.1.1 Ottawa-Carleton submitted that it was reasonable for the Gas Companies to pay all costs associated with the relocation of gas pipelines since the Gas Companies know when they request the use of rights-of-way for pipelines that relocation is a distinct possibility. Ottawa-Carleton also submitted that relocation costs are no different from other utility related rights-of-way costs, which should be paid by the user, not the taxpayer. Ottawa-Carleton indicated that the Federation of Canadian Municipalities (“FCM”) supports the position that telecommunication and private utility companies should pay 100% of relocation costs, where required for bona fide municipal purposes. If the Board decides that municipal taxpayers should share Gas Companies’ relocation costs, Ottawa-Carleton requested that consideration be given to the sliding scale presented in its submissions.

3.1.2 The Gas Companies contended that the provisions of the 1987 MFA are reasonable. If Gas Companies were required to pay all of the costs of relocation, the municipality would not be at financial risk for any part of the decision to relocate the pipeline.

- 3.1.7 The Panel recommends that Clause 12 (d) of the 2000 MFA be as follows:

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

- 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

- 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 7th anniversary and the 14th anniversary the franchise

would have the option of performing the obligation at the defaulting party's expense, or taking action for an order of specific performance directing the defaulting party to fulfill its obligations under the franchise agreement, and, if successful, all legal costs related to such court action would be paid by the defaulting party to the non-defaulting party on a solicitor/client basis. In addition, the municipality could terminate the franchise agreement if the Gas Company repeatedly and persistently defaulted on its obligations in a material way or in a manner that put the safety of any person at risk, or if the Gas Company was in financial distress.

- 3.3.2 The Gas Companies did not believe that it is in the interests of the Gas Companies or gas customers to potentially subject the franchise agreement to termination each time a municipality claimed that the Gas Company is in default of any provision of the franchise agreement. The Gas Companies claimed that they have a long history of successful cooperation with municipalities on operating issues and that these good relations, along with the obligations contained in the 1987 MFA, provide sufficient incentive for Gas Companies to operate in a manner that meets the municipalities' needs. The Gas Companies were concerned that it is unnecessary and risky to suggest that a municipality could terminate a franchise as a result of a relatively minor operating issue. The Gas Companies noted that a franchise agreement is the same as any other contract and accordingly suggested that common law principles governing default should prevail.

- 3.3.3 AMO subsequently amended its proposal to suggest that the following provision should be included in the 2000 MFA:

In the event that an order is made by the Ontario Energy Board under section 42 of the *Ontario Energy Board Act, 1998*, as the same may be amended from time to time, that an entity other than the Gas

4. FEES

4.1 BACKGROUND

4.1.1 In E.B.O. 125 the Board decided that the gas utilities should not be required to pay fees to municipalities for permits. The 1987 MFA provided that the Gas Company was subject to “all municipal by-laws of general application and all orders and regulations made thereunder from time to time remaining in effect save and except by-laws which impose permit fees and by-laws which have the effect of amending this Agreement.”

4.1.2 While the Gas Companies do not pay fees, their pipeline assets are assessed under the *Assessment Act* and they pay municipal taxes on those assets. The total amount of these taxes paid to municipalities throughout Ontario was estimated by the Gas Companies to be \$71 million in 1998. The 1987 MFA also requires the Gas Companies to pay restoration costs when they undertake work in a municipality.

4.2 JURISDICTION OF THE BOARD

4.2.1 In 1996 and 1998, the *Municipal Act* was amended to create the present section 220.1 which provides, in part, as follows:

220.1(2) Despite any Act, a municipality and a local board may pass by-laws imposing fees or charges on any class of persons,

(a) for services or activities provided or done by or on behalf of it;

(b) for costs payable by it for services or activities provided or done by or on behalf of any other municipality or local board; and

(c) for the use of its property, including property under its control.

...

220.1(4) No by-law under this section shall impose a fee or charge that is based on, is in respect of or is computed by reference to...

(e) the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources.

220.1(5) Nothing in this section authorizes a municipality or local board to impose a fee or charge for distributing or retailing electrical power, including electrical energy, which exceeds the amount permitted by the Ontario Energy Board.

4.2.5 The Gas Companies argued that the words “despite any Act” in subsection 220.1(2) of the *Municipal Act* do not override the power granted to the Board under subsection 19(6) of the OEB Act, but simply remove any question that a municipality is otherwise competent to pass by-laws imposing fees or charges. They argued that the authority of the municipalities is still subject to the Board’s exclusive jurisdiction over the terms and conditions of gas transmission and distribution franchises.

4.2.6 The Gas Companies noted that in E.B.O. 125 the Board found that:

- the OEB Act prevails over any other general or specific statute, including any by-law passed by a municipality;
- municipalities may pass by-laws relating to the laying, maintenance and use of gas pipelines on highways under the *Municipal Act*, subject to the MFA Act;
- the terms and conditions of such a by-law must be approved by the Board before it can be assented to by the municipal electors;
- the interpretation of a by-law or an existing agreement as a contract or the enforceability of either is the role of the courts; and
- the Board can impose a settlement on the two parties if they cannot agree on the terms by ordering a renewal or extension of an existing franchise agreement on such terms and conditions as the Board deems to be in the public interest.

4.2.7 The Gas Companies noted that section 128 of the OEB Act provides as follows:

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

(2) This Act and the regulations prevail over any by-law passed by a municipality.

Companies claimed that their position is supported by the Board's decision in the Orillia Four Case, where they argued, the Board expressed its concern that interpreting subsection 220.1(4) of the *Municipal Act* in a contrary manner might be inconsistent with the exemption in clause 257.1(1)(c) of the *Municipal Act*, which uses the same words and has been interpreted to exempt Gas Companies from the definition of "business" for the purposes of general municipal licensing powers.

- 4.2.12 Toronto argued that subsection 220.1(4) of the *Municipal Act* is not an exemption clause, as it does not exempt any class of person or businesses. Toronto argued that this clause limits the use of municipal powers to duplicate certain federal and provincial taxes, namely income taxes, GST and PST, by precluding fees and charges in the nature of income, consumption, transaction or sales taxes. This would preclude, under clause (4)(e) of section 220.1, charges by municipalities that would be in the nature of timber stumpage fees or tolls on the transportation of gas through the municipality for example, by TranCanada Pipelines Limited.
- 4.2.13 Ottawa-Carleton submitted that the reference to "transport" in section 220.1(4)(e) of the *Municipal Act* has nothing to do with the transportation of gas but relates to property and land use.
- 4.2.14 The Gas Companies argued that the Board is fully competent to regulate the use of public rights-of-way and to determine the appropriate compensation to be paid by the Gas Companies for such use. They argued that numerous entities, such as telephone and telecommunication companies, as well as gas and electric utilities, have statutory rights to place their facilities on, over, or under the highway, and that each of these entities is regulated as to the manner and conditions of the use of the highways.

- 4.2.18 The mere fact that the municipality has the ability to pass a by-law imposing fees does not restrict the Board's jurisdiction under the MFAAct to determine the reasonable terms and conditions that govern the relationship between the municipality and the Gas Company.
- 4.2.19 The Board's jurisdiction under the MFAAct is to approve or impose terms and conditions of a franchise agreement. The Panel finds that the Board continues to have the jurisdiction to include terms and conditions dealing with all aspects of the relationship between the parties, including the extent to which municipalities can require Gas Companies to pay fees for activities related directly to the presence of the gas works in the municipality.
- 4.2.20 The Panel therefore finds that the Board has the jurisdiction to determine the extent to which Gas Companies should be required to pay permit fees, fees for the use of municipal property, and compensation for damage caused to municipal property.
- 4.2.21 The Panel recommends that the Board adopt these findings.

4.3 OTHER GENERAL ISSUES RELATING TO FEES

- 4.3.1 The Gas Companies submitted that legislative changes do not justify the introduction of new municipal fees and charges to natural gas ratepayers. They argued that the government's stated intent of the *Energy Competition Act* is to create jobs and protect consumers by promoting low-cost energy through competition and not to provide new sources of revenue for municipalities.

- 4.3.6 The Gas Companies claimed that municipal taxes are meant to help to recover the costs of services provided by the municipality, such as snow removal, garbage pick-up, parks, sewage treatment, arenas etc. The Gas Companies argued that they do not employ any of these services and, therefore, imposing additional municipal fees on gas pipelines is not justifiable and would unfairly shift municipal costs to natural gas ratepayers. The Gas Companies pointed out that they pay property taxes to the municipalities regardless of whether their pipelines are located on municipal road allowances, provincial highways or private property.
- 4.3.7 Toronto argued that municipalities should eliminate undesirable cross-subsidization between property taxpayers who are gas customers, and property taxpayers who are not gas customers. To achieve this, Toronto wants to charge the Gas Companies full cost recovery for the costs that their activities impose on the municipality. Toronto argued that the resulting increase in cost to the Gas Companies would be equal to the amount of the subsidy that they and/or their customers have been enjoying.
- 4.3.8 It was the position of the Gas Companies that fees that merely shift costs from the municipal taxpayer to the gas ratepayer without adding any economic benefit are clearly not in the public interest.
- 4.3.9 The Gas Companies argued that under the “no cross-subsidization” approach, the urban gas customer would end up paying more overall, as the gas rate increases required to recover the new municipal fees would be only partially offset by lower taxes, which at best would be fully allocated across all municipal taxpayers. They claimed that the concept of postage stamp rates would come under pressure depending on the resulting disparity between large and small municipalities. If fees were introduced over time as franchise agreements were renewed, gas ratepayers in

4.4.3 The Gas Companies pointed out that Gas Companies usually pay substantially higher property taxes per metre of gas pipeline in larger cities than in the rest of the province due to typically higher mill rates. They argued that while some municipalities have suggested that higher permit fees are necessary in larger communities to cover the higher cost of dealing with the congestion and complexity in their road allowances and to eliminate taxpayer subsidization of gas use, the gas Companies claimed that, in fact, gas ratepayers in smaller municipalities subsidize natural gas ratepayers in larger more congested municipalities because operating and maintenance costs are higher in urbanized areas.

4.4.4 The Gas Companies argued that allowing one municipality to pass by-laws which override the franchise agreement would diminish the benefits of standardization, and that by-laws such as those introducing new fees, should not be used in a way that could amend the franchise agreement.

Compensation for the Use of Municipal Rights-of-Way

4.4.5 Ottawa-Carleton submitted that times have changed and that the 1987 MFA no longer serves its purpose. Ottawa-Carleton argued that the concept perpetuated by the 1987 MFA that the community as a whole should subsidize a large and profitable business which uses public property without payment is anachronistic. In an environment of deregulation, competition, financial constraint, user-pay and accountability, its relevance is limited. Ottawa-Carleton requested that the Board recognize the municipality's authority over its roads and its responsibility to exercise "Good Road Management" in the best interests of its taxpayers.

- 4.4.9 While the Gas Companies pay the Ministry of Transportation a nominal charge for the use of provincial highways, the Gas Companies argued that it is applied mainly to road crossings, and has a total impact of less than \$150,000 per year for all three gas utilities. They argued that this charge is based on an historic anomaly and is the only amount of this sort paid to the Ministry of Transportation. The Gas Companies urged that this should not be used to justify the payment of licence fees to municipalities.
- 4.4.10 Ottawa-Carleton submitted that the payment of taxes does not entitle any commercial entity to free use of the rights-of-way. Whether or not the Gas Companies should be assessed for property taxes is irrelevant to the issue of fair and reasonable compensation for use of the rights-of-way.

Compensation for Damage to Highways

- 4.4.11 Ottawa-Carleton submitted that the failure of Gas Companies to pay the full cost of their presence in municipal highways means that municipalities must incur those costs, and that this is not an effective management of the public's assets or finances.
- 4.4.12 The Gas Companies claimed that the majority of distribution pipelines facilities are located outside the travelled portion of the road and that the Gas Companies often bore under the road rather than dig up the surface. They pointed out that in all cases the affected road allowance is at a minimum "well and sufficiently restored to the reasonable satisfaction of the Engineer/Road Superintendent" as is guaranteed by the restoration clause in the 1987 MFA.

Panel Recommendations

Permit Fees

- 4.4.17 The Panel finds that permit fees are not fees “based on, in respect of or computed by reference to the transportation of natural resources” and therefore are not prohibited by subsection 220.1(4) of the *Municipal Act*. Rather they are fees or charges on Gas Companies for “services or activities provided or done by or on behalf of” the municipality and are therefore permitted pursuant to clause 220.1(2)(a) of the *Municipal Act*.
- 4.4.18 The Panel recommends that the municipality should be permitted to charge fees which reasonably reflect the costs incurred by the municipality in issuing permits to the Gas Companies. The Panel has determined that it is reasonable for Gas Companies to pay fees that directly relate to the costs incurred by the municipalities in providing these services.
- 4.4.19 The reasonable costs to a municipality arising from approval of construction activities of Gas Companies in the course of their businesses should be borne by the Gas Companies (and ultimately by the gas ratepayers) and not by the municipal tax payers.
- 4.4.20 The Panel does not recommend that a fixed charge should be set by the Board since the actual costs to the municipality will vary greatly depending on the nature, location and complexity of the construction activity.

- 4.4.26 The Panel is of the view that the requirement in the 1987 MFA that the Gas Companies undertake restoration work to the satisfaction of the municipal authorities is sufficient protection for the municipalities and the public.
- 4.4.27 The Panel recommends that paragraph 13 of the 2000 MFA should be amended as follows:

This Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, including by-laws which charge permit fees intended to recover the reasonable costs of the Corporation related to the issuing, monitoring and enforcing of permits, and to all orders and regulations made thereunder from time to time, except by-laws which have the effect of amending this Agreement, or which require payment for the occupancy of highways by the gas system.

5. ADDITIONAL MATTERS

5.1 CITY OF TORONTO

- 5.1.1 Toronto requested that the Board make it clear in its Report that the 2000 MFA does not apply to Toronto because it is a special case.
- 5.1.2 Toronto advised the Board that legislation was enacted in 1848 (the “1848 Act”) which incorporated a company (a predecessor of ECG) and gave the company the power to “open the ground in the streets” in the former City of Toronto in order to lay down the necessary mains and pipes. The 1848 Act was silent on the issue of any compensation or cost recovery.
- 5.1.3 The other former municipalities that were amalgamated into the present City of Toronto were not subject to similar legislation but made different arrangements over the years with the gas companies. To the best of its knowledge neither the old City of Toronto, nor the other municipalities with which it was amalgamated, have had any written franchise agreements with either ECG or any of its predecessor companies. These municipalities and the gas companies have operated under essentially voluntary ad hoc arrangements.

5.1.8 Toronto pointed out that the Board's jurisdiction does not include making rules or regulations that the terms of the model agreement must govern all relationships between municipalities and gas companies. Each case must be decided on its own merits despite the fact that the Board can use certain general policies.

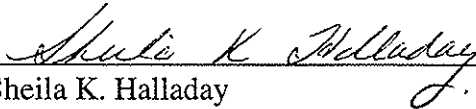
5.1.9 Toronto submitted that there is no expiry in the legislation covering Toronto; it goes on in perpetuity. Therefore, it is a pure question of law whether section 10 of the MFA Act applies to Toronto because the opening words of section 10 are "where the term of a right to operate works for the distribution of gas has expired or will expire within one year".

Panel Recommendation

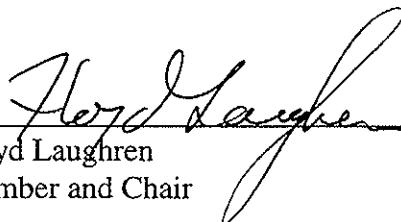
5.1.10 The Panel notes that the Board does not have the jurisdiction to impose a uniform agreement on the parties. That would be tantamount to a predetermination of the decisions which the Board is required to make under the MFA Act. The purpose of the 2000 MFA is to provide a template to guide the Gas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

5.1.11 For the purposes of this proceeding, it is not necessary for the Panel to determine the effect of the 1848 Act, the effect of the amalgamation of the former municipalities, the legal import of the MFA Act nor the current arrangements between the Toronto and ECG. Toronto is free to negotiate the terms of its relationship with ECG.

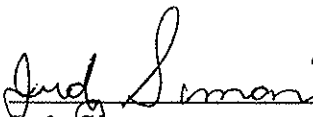
THIS REPORT IS RESPECTFULLY SUBMITTED December 29, 2000.



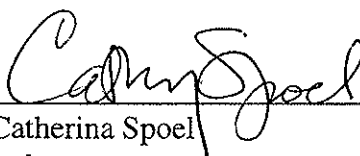
Sheila K. Halladay
Presiding Member



Floyd Laughren
Member and Chair



Judy Simon
Member



A Catherina Spoel
Member

2000 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 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.
- (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

This Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, including by-laws which charge permit fees intended to recover the reasonable costs of the Corporation related to the issuing, monitoring and enforcing of permits, and to all orders and regulations made thereunder from time to time, except by-laws which have the effect of amending this Agreement, or which require payment for the occupancy of highways by the gas system.

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: _____