E.B.A. 767
E.B.A. 768
E.B.A. 769
E.B.A. 783

IN THE MATTER OF the Municipal Franchises Act, R.S.O. 1990, c. M.55;

AND IN THE MATTER OF Applications by Centra Gas Ontario Inc. for Orders renewing the terms and conditions upon which the Corporations of the City of Orillia, the Town of Gravenhurst, the Township of Severn and the Town of Bracebridge are, by by-law, to grant to Centra Gas Ontario Inc. rights to construct and to operate works for the distribution of gas; to extend or add works to supply gas to inhabitants of the City of Orillia, the Town of Gravenhurst, the Township of Severn and the Town of Bracebridge; and the period for which such rights are granted;

AND IN THE MATTER OF Applications by Centra Gas Ontario Inc. for Orders dispensing with the assent of the municipal electors of the Corporations of the City of Orillia, the Town of Gravenhurst, the Township of Severn and the Town of Bracebridge regarding the by-laws.

BEFORE: H.G. Morrison
Presiding Member

P. Vlahos
Member

J.B. Simon
Member

DECISION WITH REASONS

March 31, 1998

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1 THE APPLICATIONS

1.0.1 Centra Gas Ontario Inc. ("Centra" or "the Company" or "the Utility") filed Applications ("the Applications") dated October 22, 1996 and December 4, 1996 with the Ontario Energy Board ("the Board") under section 10(2) of the *Municipal Franchises Act* ("the Act") for orders approving the terms and conditions upon which and the period for which Centra is to be granted the right to construct and operate works for the distribution of gas; to extend or add to the works; and to supply gas to the inhabitants of the City of Orillia, the Town of Gravenhurst, the Township of Severn and the Town of Bracebridge ("the Municipalities"). Centra also requested, pursuant to section 9(4) of the Act, that the Board direct and declare that the assent of the electors of the Municipalities to the terms and conditions of the franchise agreements is not necessary. The Board has assigned these Applications Board File Nos. E.B.A. 767, E.B.A. 768, E.B.A. 769 and E.B.A. 783 respectively.

1.0.2 In the Applications Centra requested, pursuant to section 10(4) of the Act, that the Board grant interim orders so as to preserve Centra's franchise rights in the Municipalities beyond the franchise expiration dates, until such time as the Applications are dealt with by the Board. On June 25, 1997, the Board issued interim orders under Board File No. E.B.A. 767-01, E.B.A. 768-01, E.B.A. 769-01 and E.B.A. 783-01, extending the franchise rights to December 31, 1997. Further interim orders were issued on December 12, 1997 extending the franchise rights to June 30, 1998.

1.0.3 By letter dated August 26, 1997, the Board directed Centra to serve and publish a Notice of Application for each of the Municipalities. An affidavit of service and publication dated October 21, 1997 was filed with the Board by Centra.

1.0.4 Centra and the Municipalities indicated in letters to the Board, dated September 29, 1997 and October 21, 1997, respectively, their consent to a written hearing process.

1.0.5 On October 30, 1997, the Board issued Procedural Order 1 which specified dates for the filing of evidence, interrogatories and written submissions. In addition, all evidence and submissions made were deemed to apply to all four proceedings. Procedural Order 2, issued on December 1, 1997, extended the dates for filing submissions and interrogatories.

1.0.6 The Municipalities made a joint submission on January 12, 1998. The Municipalities, Board Staff, Centra[1] and The Consumers' Gas Company Ltd. ("Consumers Gas") submitted argument on February 12, 1998. Union submitted a reply argument on February 19, 1998.

[1] Centra amalgamated with Union Gas Limited on January 1, 1998, under the name Union Gas Limited. All references to Centra in this document pertaining to dates after January 1, 1998 are to the amalgamated company.

2 BACKGROUND

2.0.1 Centra's Applications for all four of the Municipalities are for franchise renewals. The Company has franchise rights under agreements signed in 1976 and is distributing gas in the Municipalities. Centra, in seeking to renew its franchise rights proposed to rely on the Model Gas Franchise Agreement ("the Model Agreement"), which was negotiated by the Municipal Franchise Agreement Committee, pursuant to recommendations in the Board's E.B.O. 125 Report, to provide a standard form of franchise agreement acceptable to the municipalities and to the gas distribution companies. No changes to the Model Agreement were proposed by Centra, and the Company applied for a term of 20 years in each application.

2.0.2 The Municipalities seek a franchise agreement in the model form, subject to the following amendments:

(a) the term of the Agreement be ten (10) years;

(b) the right of the Municipalities to charge a permit fee, on a cost recovery basis, for plan review and site inspection when Centra wishes to do construction work on the travelled or untravelled portion of any municipal highway; and

(c) should the Board determine that such permit fees are not appropriate at this time then the term of the Agreement be five (5) years.

Section IV-1 of the model agreement states:

> The Agreement and the respective rights and obligations hereunto of the parties hereto are hereby declared to be subject to provisions of all regulating statutes and all municipal by-laws of general application and to 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. [italics added]

2.0.3 The Municipalities seek to remove the above italicized words. They intend to charge the Company for plan review and site inspections services on a cost recovery basis. The proposal, based on an analysis done by the City of Orillia as presented in its letter of September 10, 1996, is to charge the Company a $50 per permit fee. Other utilities would also be subject to similar charges. The Municipalities also argued that, in a changing environment, terms of the franchise agreements should be shorter to permit updating and to create consistencies.

2.0.4 The Model Franchise Agreement was developed following a generic hearing by the Board, E.B.O.125, called to consider general and specific concerns relating to municipal franchise agreements for the distribution of gas in Ontario. Board Staff, the gas utilities, Ontario Natural Gas Association and representatives from the municipalities participated in developing the Model Agreement, and it has formed the basis of franchise agreements since it was created in 1987.

2.0.5 There is little discussion in the Board's E.B.O. 125 Report of the question of the applicability of municipal by-laws in general or of by-laws imposing fees in particular. The gas distributors in that proceeding took the position that compliance with local by-laws was voluntary, and that any by-laws which sought "to impose permit fees or other additional financial burdens upon the gas distributors, or...[those by-laws which would fix] the location of utility plant" would "interfere with the exclusive jurisdiction of the Board over all matters relating to natural gas distribution or conflict with the terms and conditions of the franchise agreement." It was the Board's conclusion in the above Report that "all gas distributors should comply with

municipal by-laws of general application", but "where compliance with a bylaw would, in effect, amend a franchise agreement between the municipality and the gas distributor,...the franchise agreement as approved by the Board would supersede such a by-law"....[and] there is no requirement on the gas distributor to comply. The Board also expressed the view that "the interpretation of a by-law or a contract, or the enforceability of either should rest with the courts. As a matter of policy, the Board does not support the introduction of permit fees by municipalities."

2.0.6 Under the *Savings and Restructuring Act* which came into effect on January 30, 1996, the Municipalities have the right to enact by-laws imposing "user fees" with certain restrictions. These changes were incorporated into the *Ontario Municipal Act* ("OMA") as Section 220.1, which reads, in part:

s. 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.

.....

(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.

(5) Nothing in this section authorizes a municipality or local board to impose a fee or charge for supplying electrical power, including electrical energy, which exceeds the amount for the supply permitted by Ontario Hydro.

(6) A by-law under this section may provide for,

(a) fees and charges that are in the nature of a direct tax for the purpose of raising revenue;

.....

(d) fees and charges that vary on any basis the municipality or local board considers appropriate and specifies in the by-law, including the level or frequency of the service or activity provided or done, the time of day or of year the service or activity is provided and whether the class of persons paying the fee is a resident or non-resident of the municipality;

(13) The Minister may make regulations,

(a) providing that a municipality or local board does not have the power to impose fees or charges under this section for services or activities, for costs payable for services or activities, for use of municipal property or on the person prescribed in the regulation;

(b) imposing conditions and limitations on the powers of a municipality or local board under this section; and

(c) providing that a body is a local board for the purpose of this section.

(14) A regulation under this section may be general or specific in its application and may be restricted to those municipalities and local boards specified in the regulation.

...

3 POSITIONS OF THE PARTIES

The Municipalities

3.0.1 The Municipalities submitted that modifications to the Model Agreement were needed to reflect recent provincial financial and legislative changes which result in reductions in municipal funding from the Province and the introduction of new mechanisms, such as user fees, as a means for the municipalities to "compensate for grant reductions" by raising revenue on a cost recovery basis. In their view, the deficit produced by the reduction in transfer payments must be made up either by increasing taxes or from other sources, and "[t]he Provincial Government has discouraged property tax increases and therefore permit fees provide a source of making up the difference." They noted that a large portion of the taxes paid by the utilities "are used to provide other services such as education", and, in any case, "the assessment of pipeline in municipal highways is a recognition of rights acquired by Centra for which no other form of compensation is paid."

3.0.2 The Board's lack of support for permit fees in E.B.O. 125 should not, in the Municipalities' view, "fetter [the Board's] discretion to consider the imposition of permit fees ...[many] years subsequent in a different economic environment where specific legislation has been enacted to permit the charging of such fees." The Municipalities noted that the Board envisioned in its E.B.O. 125 Report the necessity of viewing franchise agreements on a case-by-case basis to "address specific local concerns...[or arguments that]... the Model Agreement should not apply in that particular case".

3.0.3 In the Municipalities' submission, inspections and plan review are needed to safeguard municipal assets, and would not be required if installations were not required. User fees for inspections and plan review, they argued, would benefit the utility by "ensuring proper installation of gas service and a reduced potential for liability".

3.0.4 As to any possible cross-subsidies, the Municipalities argued that costs associated with permit fees could be charged to those receiving the connection, and that in any case a one time permit fee of, for example, fifty dollars is, assuming a 30 year attachment forecast, "insignificant whether charged to the particular consumer or passed on to all ratepayers." They claimed further that all of their residents help pay for services which benefit the gas company, whether gas is available to them or not in their particular area, and noted that the utility uses municipal services such as roads for access to its facilities.

3.0.5 It was the Municipalities' position that the exemption in Section 220.1 of the *Municipal Act* "prohibits charges relating to the movement of gas through the municipality and would preclude a user fee for the right to the use of municipal property for pipeline", but does not prohibit fees for plan review and site inspections. Section 220.1(13) of the *OMA* provides a specific exemption mechanism, should the utilities wish to seek exemption, and in the Municipalities' view only the provincial government should determine the circumstances under which the powers given to the Municipalities should be abrogated.

Board Staff

3.0.6 Board Staff submitted that section 220.1 of the OMA is clear legislative authority for the municipalities to levy user fees for municipal services and that this legislative authority is part of a government policy to make municipal governments more self-reliant and able to manage with fewer provincial subsidies. In Board Staff's view, it would be inappropriate for the Board not to recognize this legislative intent.

3.0.7 Board Staff's view was that section 220.1 may override the permit fee clause in all existing municipal franchise agreements, but that this broader question is best left to the courts, as suggested in the E.B.O. 125 Decision.

3.0.8 Board Staff recommended that the Board should, on the basis of public convenience and necessity, renew the rights set out in the municipal franchise agreements contained in the Applications but should impose the condition that the words "which impose permit fees" be deleted from Section IV-1 of the franchise agreements as requested by the municipality. As an alternative, Board Staff suggested the Board consider adding the phrase "except those fees allowed under section 220.1 of the Ontario Municipal Act" to Section IV-1 of the agreements after the words "which impose permit fees".

3.0.9 Board Staff noted that any user fee imposed by a municipality must be by way of a by-law enacted under section 220.1 of the OMA. As subordinate legislation, any by-law must fit squarely within the terms of that section.

3.0.10 As to the effect of subsection 220.1(4)of the OMA which makes provision for exemptions from the imposition of user fees for certain activities such as transportation of natural resources, Board Staff submitted that the supply of gas to end use customers is traditionally defined as "distribution", and that a municipal franchise by its very nature concerns the supply of gas to the inhabitants of a municipality. In Board Staff's view, the exemption in subsection 220.1(4)(e) of OMA does not apply to a natural gas distribution utility with sufficient clarity to justify the conclusion that gas utilities will be exempt from any by-law enacted by the municipality. Had the Legislature intended to include natural gas distributors in the exemption, Board Staff submitted, it could have used the word "distribution" which is used with a defined meaning throughout the *Ontario Energy Board Act.*

3.0.11 Board Staff also noted that any by-law enacted under section 220.1 OMA must be in the nature of a fee for a service provided by a municipality and cannot be in the nature of a tax for general municipal purposes. Board Staff submitted that the issue of possible double taxation on the part of municipalities or the exact fees to be charged is not one that the Board need address. If there is an inherent unfairness to the gas utilities then Board Staff suggested they seek a specific exemption.

3.0.12 With respect to the term of the agreement, the Company is seeking a 20 year term and the Municipalities a 10 or 5 year term (depending on the Board's disposition of the issue of user fees). Board Staff submitted that the issue of user fees should not dictate or influence the term of the agreement, there being no unique circumstances which would apply to the Municipalities to require a deviation from the findings in

E.B.A. 795 which specified a 15 year term as being appropriate for franchise renewal. Board Staff supported approval of the franchise agreement between Centra and the Municipalities for a term of 15 years, consistent with recent franchise renewal cases before the Board and with the principles in E.B.O. 125. Further, Board Staff recommended that the assent of the electors is not necessary.

Centra

3.0.13 Centra argued that the Model Franchise Agreement in its current standard form "assures that consistent terms and equitable conditions are applied to all municipalities". The utility pointed to the Board's views in the E.B.A. 795 Decision that generic changes to the Model Agreement might be needed periodically, but changes in individual franchises as they were renewed were not necessarily desirable, and that a review of the Model Agreement should await finalization of the current legislative proposals. Centra argued that there is no evidence that current legislative changes are in final form, and that no individual changes should be made to individual franchise agreements at this time. Amending the agreements on an individual basis would, the utility argued, " ...give [these four Municipalities] an advantage over all other municipalities who have renewed, have had previous amendment requests denied, or are entering into new Model Franchise Agreements". Board Staff's view that the terms should be consistent, but user fees should be allowed is, in the utility's view, inconsistent.

3.0.14 The utility submitted that individual changes to franchise agreements to allow municipalities to charge fees will result in cross-subsidies from one franchise area to the next, especially given the postage stamp rate allocation system under which the utility operates. In Centra's view it would not be reasonable to determine different rates depending on whether permit fees are charged by the municipality in which the customer resides and what those fees are. All taxpayers, the utility argued, benefit from the presence of natural gas in a community, and from the taxes the utility pays on pipe in the ground, so it would be inappropriate to charge permit fees to gas ratepayers only. Further, given the Board's expressed interest in the economic feasibility of expansion projects, and its concern to protect ratepayers from the impact of uneconomic projects, as stated in recent decisions, Centra argued that additional capital costs occasioned by anticipated municipal fees could jeopardize the

economic feasibility of an expansion project, and would in any case impact other ratepayers.

3.0.15 The utility noted that expansion of distribution facilities increases a municipality's tax base and argued that this benefits all residents. In the utility's view, the increased economic advantages to the community are not balanced by additional services to the utility, nor does the pipeline upon which tax is exacted utilize many of the services for which property taxes are utilized. The Company also argued that it is taxed on a lineal or "per foot" basis, while other utilities are not, nor are telephone and cable companies assessed on buried facilities. In Centra's view, comparison with fees charged to other utilities is not justified. It is the utility's position that any costs to provide services to it are more than covered by the taxes paid.

3.0.16 Centra argued that both the municipality and the utility benefit from the expansion and operation of the gas utility's distribution business, and that the request to charge permit fees "is an attempt to hide municipal costs in utility gas rates." It is, the utility argued, in the municipality's own interest to review plans and inspect sites, as the review and planning of construction sites helps to avoid future relocation costs. Whether or not inspections and plan reviews take place, the utility is obliged by the franchise agreement to pay restoration costs arising from installation of its facilities, and 65% of pipeline relocation costs. The restoration clause, in the utility's view, protects municipalities against liability for improper installation.

3.0.17 As to the Municipalities' argument that additional costs imposed through user fees would be minor, the utility noted that there are a large number of franchises, and applying the Municipalities' own estimate of yearly time expended on special services for the gas companies, estimated that the proposed fees could result in several million dollars in increased costs to be borne by gas ratepayers. In any event, the Company argued, no "specific plan with regard to when, for what purpose and for what amount they will charge permit fees" has been provided by the Municipalities, especially given their suggestion in final argument that fees may pertain specifically to service connections. Given that section 220.1 of the Act does not require justification for particular fees or charges, nor does it require them to be cost-based, in Centra's view, granting the requested amendments to the Model Franchise Agreement would be "granting the Municipalities the power to unilaterally levy undetermined and unlimited charges and fees for any current or future municipal service".

3.0.18 With respect to the proposed term of the agreement, Centra pointed to the Municipalities' responses to Board Staff interrogatories requesting identification of "unusual circumstances" which would justify a term different from the standard set by the Board in the E.B.A. 795 Decision, in which the Municipalities cite the reduction in transfer payments and change in municipal responsibilities; Centra argued that these are not unusual circumstances pertaining specifically to these Municipalities.

3.0.19 Centra's position with respect to the exemption provision for natural resources was that it applies to gas utilities. Distribution, it submitted, is covered under the term "transportation". The Company argued that there was no intention of differentiating between distribution and transmission under the *Savings and Restructuring Act,* and that any by-laws purporting to apply permit fees to gas utilities would be invalid. Centra pointed out that the provision also contains the term "*exploitation* of natural resources", and cited a dictionary definition for this phrase: *"turn to economic account the utilization or working of a natural resource"*, a phrase which, the Company argued, characterizes its natural gas activities in a municipality. The words in the exemption, Centra submitted, should be given their ordinary meanings, not meanings intended to assist in interpreting another statute, such as the *OEB Act,* and any provision exempting a party from the levying of fees and charges, being essentially an exemption from a taxation provision, should be broadly interpreted.

3.0.20 The Company also pointed out that another subsection of the OMA, ss.257(1)(c), which gives power to municipalities to license, regulate and govern any "business" contains an exemption in the same words as the one under consideration here. It submitted that, should the Board decide that the Company does not fit within the exemption for the purposes of user fees, it may be that the Company would be subject to licensing, governance and regulation by the municipalities as well. Such a conclusion, Centra suggested, is in conflict with the exclusive jurisdiction given to the Board under section 13(6) of the *OEB Act.*

Consumers Gas

3.0.21 Consumers Gas supported the arguments of Centra relating to cross-subsidies, property taxes, restoration and relocation costs, and the exemption under Section 220.1. It also noted that these four Municipalities had budget surpluses in 1996, while providing the services for which they seek to impose fees on a "cost recovery basis only", and submitted that no evidence was provided as to actual costs which support the need for additional revenue to cover these services.

3.0.22 Consumers Gas also argued that allowing these four municipalities to charge user fees would be unfair to other municipalities who have renewed their franchise agreements on the basis of the Model Agreement, and that effectively amending the Model Agreement at this time is premature, given the state of legislative change.

3.0.23 Consumers Gas submitted that "the imposition of the Model Agreement without amendment is the only way in which the Board can be certain to balance the interests of the parties fairly until such time as another generic review of the Model Agreement is warranted, which can only occur after the expected changes to the Municipal Act are known".

4 BOARD FINDINGS

4.0.1 The Municipalities have argued that the new legislation amounts to a change in their powers, and therefore requires a change in the form of the Model Agreement. While there was no reference in the E.B.O. 125 Report of specific statutes under which municipalities could impose permit fees, at the time the Model Franchise Agreement was negotiated there would have been no need for the prohibition on "by-laws which impose permit fees" if no municipality had the power to enact such a by-law. It therefore appears that the coming into effect of the *Savings and Restructuring Act* may not have changed matters to the extent argued for by the Municipalities and Board Staff. Permit fees may have been permitted previously, but the Agreement excluded them; "user" fees are now permitted, and can as well be excluded under the Agreement.

4.0.2 The Board is not persuaded that the new statutory provisions allowing municipalities to charge fees preclude the inclusion of a prohibition on such fees in a new franchise agreement. *A fortiori*, the Board does not agree with Board Staff that the statute overrides *existing* franchise agreements in this respect. The Board could not approve a term of the franchise agreement that was contrary to a statutory provision. The new statutory provision does not, however, *require* the municipalities to charge fees; it allows them to do so. If the Municipalities and the Company had agreed to the prohibition of fees, the Board would have approved the franchise agreement in the model form. When no agreement is reached, the Board, under s. 10 of the Act, must determine the terms and conditions upon which the franchise is granted, and may of course impose terms that are not agreed upon by one or both parties to the agreement.

4.0.3 The Board continues to accept that there are great advantages to the uniform application of a Model Agreement to all municipal franchises relating to the provision of natural gas. Uniform conditions for all municipalities prevent unfairness. Utilities pay taxes to all municipalities on their facilities; to add user fees in some cases and not others would, as argued by the Company, result in cross subsidies under the present rate structure. Nor is it evident that the resulting costs to ratepayers would be insignificant, as argued by the Municipalities.

4.0.4 The Board finds that the four Municipalities have not demonstrated unusual circumstances specific to these Municipalities which would justify different terms and conditions in their agreements from those in the Model Agreement. The Board therefore finds that the franchise agreement for each of the Municipalities should be in the model form, without the requested amendments.

4.0.5 As to the term of the agreement, for the same reasons given by the Board in E.B.A. 795, terms of 15 years are ordered for each of the four agreements.

4.0.6 The political and financial climate in which municipalities operate may well have changed from that prevailing when the Model Agreement was drafted; such changes may make more urgent the need to review the terms of the Model Agreement in a generic fashion. Such a review would need to address the way in which all municipalities, whether they have recently renewed their franchise agreements or not, could take advantage of changes resulting from the negotiation of a new agreement.

4.0.7 The Board expects Board Staff to consult with the utilities, municipalities and other interested parties as to the appropriate timing for a generic proceeding to review the Model Franchise Agreement. The consultation should be designed to provide the Board with an assessment of the status of the changing legislative regime, potential issues to be considered in the generic review, and possible formats for it.

4.0.8 The utilities have argued that, even if the Board finds that the new statutory provisions support the amendment of the franchise agreement as argued for by the Municipalities, fees could not be charged to the utilities because of the exemption contained in s. 220.1(4) of the statute. They point to the parallel exemption in s.257(1)(c) of the OMA, which uses the exact same words. Given its findings above, it is not necessary for the Board to decide as to the effect of the exemption. However, the Board is concerned that the interpretation of the exemption clause

argued for by the Municipalities might require inconsistent interpretation of the two exemption clauses to avoid conflict with the Board's exclusive jurisdiction to regulate gas distributors, transmitters and storage companies under the *OEB Act.*

4.0.9 The Board also finds that the assent of the municipal electors of the respective Municipalities to the proposed by-laws is not necessary.

4.0.10 The appropriate orders will be issued in due course.

4.0.11 The Board's costs of and incidental to these proceedings shall be fixed at $600 and shall be paid by Centra forthwith upon the issuance of the Board's invoice.

DATED AT Toronto March 31, 1998.

H.G. Morrison
Presiding Member

P. Vlahos
Member

J.B. Simon
Member