TORYS LLP

79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2 Canada
P. 416.865.0040 | F. 416.865.7380
www.torys.com

Myriam Seers
mseers@torys.com
P. 416.865.7535

May 25, 2018

BY RESS, EMAIL AND COURIER

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street
27th Floor
Toronto, Ontario M4P 1E4

Dear Ms. Walli:

Re: EB-2017-0232 – EPCOR application for approval of a franchise agreement with the County of Oxford

We are counsel to Union Gas Limited in the above-noted matter. Please find enclosed Union's motion to compel EPCOR to answer certain interrogatories posed by Union.

The motion record will be filed on RESS and a copy served on all parties.

Yours truly,

Original Signed by Myriam Seers

Myriam Seers

MS/lt
Enclosure

cc (email only): Patrick McMahon, Union Gas Limited
Azalyn Manzano, OEB Staff
Richard King, Osler, Hoskin & Harcourt LLP
Patrick Welsh, Osler, Hoskin & Harcourt LLP
Brian Lippold, EPCOR
Brian Tan, EPCOR

25631178.1

EB-2017-0232

ONTARIO ENERGY BOARD

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

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

AND IN THE MATTER OF an application made by EPCOR Natural Gas Limited Partnership ("EPCOR") for an order pursuant to the *Municipal Franchises Act* approving EPCOR's proposed franchise agreement with the County of Oxford;

AND IN THE MATTER OF Rule 8 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

MOTION RECORD OF UNION GAS LIMITED
(Motion to compel answers to interrogatories)

May 25, 2018

Torys LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, ON M5K 1N2
Fax: 416.865.7380

Myriam Seers
Tel: 416.865.7535
Lawyers for Union Gas Limited

TO: **ONTARIO ENERGY BOARD**
2300 Yonge Street, 27th Floor
P.O. Box 2319
Toronto, Ontario M4P 1E4

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
Box 50, 1 First Canadian Place
Toronto, Ontario M5X 1B8
Fax: (416) 367-6749

Patrick G. Welsh
Tel: (416) 862-5957

Lawyers for the Applicant,
EPCOR Natural Gas Limited Partnership

TABLE OF CONTENTS

TAB 1

EB-2017-0232

ONTARIO ENERGY BOARD

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

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

AND IN THE MATTER OF an application made by EPCOR Natural Gas Limited Partnership ("EPCOR") for an order pursuant to the *Municipal Franchises Act* approving EPCOR's proposed franchise agreement with the County of Oxford;

AND IN THE MATTER OF Rule 8 of the *Rules of Practice and Procedure* of the Ontario Energy Board.

NOTICE OF MOTION

Union Gas Limited will make a motion to the Ontario Energy Board at its offices at 2300 Yonge Street, Toronto, on a date and time to be fixed by the OEB.

PROPOSED METHOD OF HEARING: Union proposes that this motion be heard in writing or through any other method as directed by the OEB.

THE MOTION IS FOR:

1. An order:

   (a) requiring that EPCOR provide full and adequate responses to Union interrogatories 1(c) and 2(d); and

   (b) Granting an extension of the May 31, 2018 deadline to submit written submissions to a date that is five days after EPCOR provides full and adequate responses to those interrogatories.

The grounds for the motion are:

Like all gas distributors, EPCOR should be required to provide a customer density map

2. In its interrogatory 1(c), Union requested that EPCOR provide a customer density map showing the location of EPCOR's customers and facilities within the Township of South-West Oxford. EPCOR has, without explanation, failed to provide the requested map. This information is necessary to determine the areas in which EPCOR is providing service, and to what extent.

3. While EPCOR states in its application that it has a Certificate of Public Convenience and Necessity granting it the right to construct works to supply gas and to supply gas in the County of Oxford, certificates E.B.C. 111 and 119 only grant EPCOR rights to construct works to supply gas and to supply gas within a limited number of specific lots which are within the lower-tier Township of South-West Oxford.

4. In EB-2017-0159, in which the OEB approved a franchise agreement between Enbridge Gas Distribution and the Township of Collingwood, the OEB made clear that gas distributors are expected to submit customer density maps when applying for approval of franchise agreements and certificates of public convenience and necessity. It stated:

> The OEB requires a clear understanding of where customers are being served by rate-regulated natural gas distributors within the Province…. I agree that the map suggested by OEB staff and supported by Enbridge Gas (i.e. the Density Map) adequately serves the purpose of the information being sought by the OEB that is to accurately delineate a distributor's service boundaries, as well as the general location and density of customers served. … I expect Enbridge Gas, ***as well as other rate-regulated distributors in the Province***, to be guided by this decision regarding current and future applications for the approval of franchise agreements and for certificates of public convenience and necessity. [Emphasis added.]

5. Since the EB-2017-0159 proceeding, the OEB has expected natural gas distributors to submit customer density maps in all applications for approval of a franchise agreement or certificate of public convenience and necessity. Board Staff have requested such maps in a number of proceedings, including (for example) EB-2017-0126, EB-2017-0367, EB-

2017-0368, EB-2017-0369, EB-2018-0116 and EB-2018-0152. Such maps allow the OEB to identify what service is being provided, and to what extent.

6. As a natural gas distributor in Ontario, EPCOR should be expected to provide the same degree of detail to support its application as that required from other distributors.

EPCOR should explain the proposed deviation from the 2000 Model Franchise Agreement

7. EPCOR also did not answer Union's interrogatory 2(d), through which Union asked EPCOR to "explain the harm to either the County of Oxford or EPCOR's customers of leaving the clause related to the *Drainage Act* within the franchise agreement."

8. EPCOR has proposed a deviation from the 2000 Model Franchise Agreement, by deleting section 5(g), which requires that "[w]here 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."

9. EPCOR has not provided any explanation for this deviation other than to state that the clause was removed at the County of Oxford's request.

10. The OEB has rarely approved deviations from the Model Franchise Agreement, and has done so only where "exceptional and unique circumstances" particular to the municipality are present that would warrant a deviation.

11. The 2000 Model Franchise Agreement was developed through consultation processes involving gas utilities and municipalities, and was adopted by the OEB in its December 29, 2000 report in RP-1999-0048 (as supplemented in the Board's April 11, 2001 report). This Model Franchise Agreement introduced certain revisions to the 1987 Model Franchise Agreement, which was developed following the OEB's May 21, 1986 report in E.B.O. 125. Both processes involved extensive consultations, written submissions and testimony from a broad cross-section of key stakeholders, including the County of Oxford and EPCOR's predecessor, Natural Resource Gas Limited.

12. In E.B.A. 767/68/69/83, the OEB refused to approve proposed deviations from the Model Franchise Agreement. It stated:

> 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. […]
>
> 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.

13. The OEB confirmed this reasoning in EB-2008-0413. It stated (at p. 13) that "[t]he Model Franchise Agreement is an important tool to efficiently administer the many franchise agreements across this Province. The Model Franchise Agreement should be departed from only in exceptional and unusual circumstances."

14. EPCOR has failed, both in its application and by refusing to explain the harm that would result from retaining section 5(g) of the Model Franchise Agreement, to explain whether any "exceptional and unusual circumstances" exist that would warrant a deviation from the Model Franchise Agreement.

15. Union is concerned that the removal of such an important clause from a Franchise Agreement may set a precedent for other Franchise Agreements, and should not be approved by the OEB without a compelling explanation and assurance that this deviation only applies to this particular Franchise Agreement and that it is based on considerations that apply only to the County of Oxford.

16. Thus, EPCOR should be required to explain any harm that would result to either the County of Oxford or EPCOR's customers if the clause were not removed. This explanation will permit the OEB to determine whether exceptional and unusual circumstances specific to the County of Oxford are present that would justify a deviation from the Model Franchise Agreement in the particular circumstances of this case.

Documentary Evidence:

17. The following documentary evidence will be used at the motion:

(a) Union's interrogatories

(b) EPCOR's answers to interrogatories;

(c) The OEB's Decision on Confidentiality Request and Procedural Order No. 2 in EB-2017-0159, its Decision and Order in EB-2017-0159, its reports in RP-1999-0048, and its decisions and orders in E.B.A. 767/68/69/83 and EB-2008-0413; and

(d) such further evidence as counsel may advise and the OEB may permit.

May 25, 2018

TORYS LLP
79 Wellington St. W., 30th Floor
Box 270, TD South Tower
Toronto, Ontario M5K 1N2
Fax: 416.865.7380

Myriam Seers
Tel: 416.865.7535
Lawyers for Union Gas Limited

TO: **ONTARIO ENERGY BOARD**
2300 Yonge Street, 27th Floor
P.O. Box 2319
Toronto, Ontario M4P 1E4

AND TO: **OSLER, HOSKIN & HARCOURT LLP**
Box 50, 1 First Canadian Place
Toronto, Ontario M5X 1B8
Fax: (416) 367-6749

Patrick G. Welsh
Tel: (416) 862-5957

Lawyers for the Applicant,
EPCOR Natural Gas Limited Partnership

TAB 2

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2017-0159

Enbridge Gas Distribution Inc.

Application for franchise agreement with the Town of Collingwood

DECISION ON CONFIDENTIALITY REQUEST AND PROCEDURAL ORDER NO. 2

July 4, 2017

Enbridge Gas Distribution Inc. (Enbridge Gas) filed an application with the Ontario Energy Board (OEB) on April 4, 2017 under section 9 of the *Municipal Franchises Act* for an order approving Enbridge Gas' proposed franchise agreement with the Town of Collingwood.

The OEB issued a Notice of Application on April 26, 2017. On June 7, 2017, the OEB issued Procedural Order No. 1 and an Interim Order extending Enbridge Gas' franchise rights in the Town of Collingwood given the possibility that the term of the current franchise agreement could expire before the OEB's review of the application was complete.

Following receipt of the application, OEB staff requested additional material form Enbridge Gas; namely, a map of the Town of Collingwood showing the density and location of customers served, together with clearer road boundaries. The purpose of the additional information was to enable the OEB to more properly define the utility's service area boundaries within the Town of Collingwood.

On May 23, 2017, Enbridge Gas filed a Schedule "A-1 Confidential" which consisted of a map identifying all of Enbridge Gas' existing gas mains in the municipality (Gas Mains Map). Enbridge Gas requested confidential treatment for

the map, pursuant to the OEB's *Practice Direction on Confidential Filings*. The grounds for its confidential treatment included that the information contained therein is proprietary and subject to periodic change; and that it contains highly sensitive information from public safety, system security and customer personal information perspectives.

Union Gas Limited (Union Gas), Natural Resource Gas Limited (NRG) and EPCOR Southern Bruce Gas Inc. (EPCOR) were deemed as intervenors. The OEB provided an opportunity for intervenors and OEB staff to make written submissions with respect to Enbridge Gas' request for confidentiality of certain information that it filed in the proceeding. The OEB received submissions from OEB staff and Union Gas. Enbridge Gas filed a reply submission on June 22, 2017.

Confidentiality Request

While OEB staff expressed appreciation over Enbridge Gas' concerns, OEB staff was concerned that granting confidential treatment to the Gas Mains Map in this proceeding may impact other types of applications, such as future leave to construct filings. OEB staff submitted that rather than making a decision on Enbridge Gas' request for confidential treatment to the Gas Mains Map, Enbridge Gas should be afforded an opportunity to retract the map from the proceeding and, in its place, file a revised map that meets the OEB's informational needs for this current proceeding, alleviates the applicant's confidentiality concerns, and that can ultimately be placed on the public record. OEB staff suggested that one alternative might be to shade service areas, varying the colour of the shading to indicate customer density, and to provide the number of customers in each of the areas.

Union Gas agreed with Enbridge Gas' statement that documents identifying specific locations of gas distribution and transmission facilities should be treated as confidential.

Enbridge Gas filed a reply submission on June 22, 2017 reiterating that, in the event that the OEB wishes to use the Gas Main Map for any purpose, the Gas Mains Map ought to be afforded confidential treatment by the OEB for the reasons expressed by Enbridge Gas in its request for confidential treatment, and supported by Union Gas. However, Enbridge Gas also stated that, in the event that the OEB requires it, Enbridge Gas would be agreeable to filing a version of the Collingwood franchise map that shows areas with gas service and colored indicators of relative population density (Density

Map). If the OEB requires this Density Map, then Enbridge Gas would retract the Gas Mains Map from its filing.

Findings

The OEB requires a clear understanding of where customers are being served by rate-regulated natural gas distributors within the Province. I find that the Gas Mains Map provides information beyond the intent of the information requested from Enbridge Gas. I agree that the map suggested by OEB staff and supported by Enbridge Gas (i.e. the Density Map) adequately serves the purpose of the information being sought by the OEB that is to accurately delineate a distributor's service boundaries, as well as the general location and density of customers served. I also agree with the reservations expressed by Enbridge Gas and expect the utility to submit the Density Map with the noted caveats. Upon the filing of this map, Schedule "A-1 Confidential" will be removed from the record of this proceeding.

I expect Enbridge Gas, as well as other rate-regulated gas distributors in the Province, to be guided by this decision regarding current and future applications for the approval of franchise agreements and for certificates of public convenience and necessity.

It is necessary to make provision for the following matters related to this proceeding. The OEB may issue further procedural orders from time to time.

IT IS THEREFORE ORDERED THAT:

1. Upon Enbridge Gas Distribution Inc.'s filing of a map that accurately delineates the distributor's service area boundaries in the Town of Collingwood, as well as the general location and density of customers served, Schedule A-1 Confidential shall be withdrawn from the record of this proceeding. The filing shall be made to the OEB on or before **July 11, 2017**.

All filings to the Board must quote the file number, **EB-2017-0159** and be made electronically in searchable/unrestricted PDF format through the OEB's web portal at https://www.pes.ontarioenergyboard.ca/eservice/. Two paper copies must also be filed. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at

https://www.oeb.ca/industry. If the web portal is not available, parties may email their documents to the address below.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Azalyn Manzano at Azalyn.Manzano@oeb.ca and Board Counsel, Richard Lanni at Richard.Lanni@oeb.ca.

ADDRESS

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary

E-mail: boardsec@oeb.ca
Tel: 1-888-632-6273 (Toll free)
Fax: 416-440-7656

DATED at Toronto, July 4, 2017

ONTARIO ENERGY BOARD

By delegation, before: Pascale Duguay

Original signed by

Pascale Duguay
Manager, Application Policy and Climate Change

TAB 3

Ontario Energy Board
Commission de l'énergie de l'Ontario

DECISION AND ORDER

EB-2017-0159

ENBRIDGE GAS DISTRIBUTION INC.

Application for a Municipal Franchise Agreement with the Town of Collingwood

By Delegation, before: Pascale Duguay

July 20, 2017

INTRODUCTION AND SUMMARY

Enbridge Gas Distribution Inc. (Enbridge Gas) filed an application with the Ontario Energy Board (OEB) on April 4, 2017 under section 9 of the *Municipal Franchises Act.*

The application seeks an order of the OEB approving Enbridge Gas' proposed municipal franchise agreement with the Town of Collingwood. In this Decision and Order, a reference to the Town of Collingwood is a reference to the municipal corporation or its geographical area, as the context requires.

The application is approved as described in this Decision and Order.

THE PROCESS

The OEB held a written hearing. A Notice of Hearing was published in a local newspaper on May 5, 2017. Union Gas Limited (Union Gas), Natural Resource Gas Limited (NRG) and EPCOR Southern Bruce Gas Inc. (EPCOR) were deemed intervenors by the OEB. There were no other intervenors.

During the course of the proceeding, Enbridge Gas filed a Schedule "A-1 Confidential" which consisted of a map identifying all of Enbridge Gas' existing gas mains in the municipality (Gas Mains Map). Enbridge Gas requested confidential treatment for the map, pursuant to the OEB's *Practice Direction on Confidential Filings*. The grounds for its confidential treatment included that the information contained therein is proprietary and subject to periodic change; and that it contains highly sensitive information from public safety, system security and customer personal information perspectives.

On June 7, 2017, the OEB issued Procedural Order No. 1 and Interim Order extending Enbridge Gas' franchise rights in the Town of Collingwood until the final disposition of this proceeding. Procedural Order No. 1 made provision for the parties and OEB staff to file written submissions on Enbridge Gas' request for confidential treatment of Schedule "A-1 Confidential". The OEB received submissions from Enbridge Gas, Union Gas and OEB staff.

On July 4, 2017, the OEB issued a Decision on Confidentiality Request and Procedural Order No. 2. The OEB stated, in part, as follows:

> The OEB requires a clear understanding of where customers are being served by rate-regulated natural gas distributors within the Province. I find that the Gas Mains Map provides information beyond the intent of the information requested from Enbridge Gas. I agree that the map suggested by OEB staff and supported by Enbridge Gas (i.e. the Density Map) adequately serves the purpose of the information being sought by the OEB that is to accurately delineate a distributor's service boundaries, as well as the general location and density of customers served. I also agree with the reservations expressed by Enbridge Gas and expect the utility to submit the Density Map with the noted caveats. Upon the filing of this map, Schedule "A-1 Confidential" will be removed from the record of this proceeding. I expect Enbridge Gas, as well as other rate-regulated gas distributors in the Province, to be guided by this decision regarding current and future applications for the approval of franchise agreements and for certificates of public convenience and necessity.

On July 11, 2017, Enbridge Gas filed a request that Schedule A-1 Confidential (i.e. the Gas Mains Map) be withdrawn from the record of the proceeding. In its place, and pursuant to the OEB's instructions in Procedural Order No. 2, Enbridge Gas filed a revised map that it submits accurately delineates Enbridge Gas' service area boundaries in the Town of Collingwood, as well as the general location and density of customers served.

THE APPLICATION

The Town of Collingwood is a municipal corporation incorporated under the laws of the Province of Ontario.

Enbridge Gas is a corporation incorporated under the laws of the Province of Ontario, with its head office in the City of Toronto.

Enbridge Gas holds a municipal franchise agreement with the Town of Collingwood (By-Law No. 97-30, dated June 23, 1997) that was set to expire on June 23, 2017. Enbridge applied to the Town of Collingwood for a renewal of its franchise and on March 13, 2017, the Town of Collingwood gave its approval. The proposed municipal franchise

agreement is in the form of the 2000 Model Franchise Agreement, with no amendments, and is for a term of twenty years. With the application, Enbridge Gas filed the Town of Collingwood's draft by-law granting the franchise renewal, and a copy of the proposed municipal franchise agreement. Enbridge Gas also filed a copy of the Town of Collingwood's resolution approving the form of the proposed franchise agreement and requesting the OEB to direct and declare that the assent of the municipal electors is not necessary (Resolution passed March 13, 2017).

OEB FINDINGS

I find that it is in the public interest to grant the application. Enbridge Gas filed a complete application and provided notice of the hearing in the manner instructed by the OEB. I note that the proposed municipal franchise agreement is in the form of the 2000 Model Franchise Agreement, with no amendments, and is for a term of twenty years.

I find that the map submitted by Enbridge Gas on July 11, 2017 adequately serves the purpose of the information being sought by the OEB in this proceeding; namely, to accurately inform the OEB of the distributor's service boundaries in the Town of Collingwood, as well as the general location and density of customers served. Enbridge Gas' request that Schedule A-1 Confidential be withdrawn from the record of this proceeding is granted.

IT IS ORDERED THAT:

1. The terms and conditions upon which, and the period for which, the Town of Collingwood is, by by-law, to grant to Enbridge Gas Distribution Inc. the right to construct and operate works for the distribution, transmission and storage of gas, and the right to extend or add to the works, in the municipality, as set out in the municipal franchise agreement attached as Schedule A, are approved. A current map of the Town of Collingwood is attached as Schedule B.

2. The assent of the municipal electors to the by-law is not necessary.

3. Enbridge Gas Distribution Inc. shall pay the OEB's costs incidental to this proceeding upon receipt of the OEB's invoice.

DATED at Toronto, July 20, 2017

ONTARIO ENERGY BOARD

Original Signed By

Pascale Duguay
Manager, Application Policy and Climate Change

SCHEDULE A

EB-2017-0159

DATED: July 20, 2017

Franchise Agreement

Model Franchise Agreement

THIS AGREEMENT effective this day of , 20 .

BETWEEN: The Corporation of The Town of Collingwood hereinafter called the

"Corporation"

- and -

Enbridge Gas Distribution Inc. 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.

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 it 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

The Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, except by-laws which have the effect of amending this Agreement.

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. 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 THE TOWN OF COLLINGWOOD

By: _____

By: _____

Duly Authorized Officer

ENBRIDGE GAS DISTRIBUTION INC.

By: _____

By: _____

DATED this day of , 20 .

THE CORPORATION OF THE

TOWN OF COLLINGWOOD

- and -

ENBRIDGE GAS DISTRIBUTION INC.

FRANCHISE AGREEMENT

ENBRIDGE GAS DISTRIBUTION INC.
500 Consumers Road
North York, Ontario
M2J 1P8

Attention: Regulatory Affairs Department

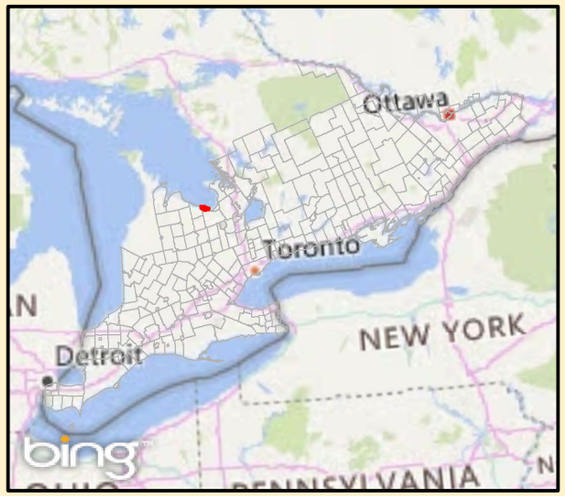
SCHEDULE B

EB-2017-0159

DATED: July 20, 2017

Map of the Town of Collingwood

Key Map

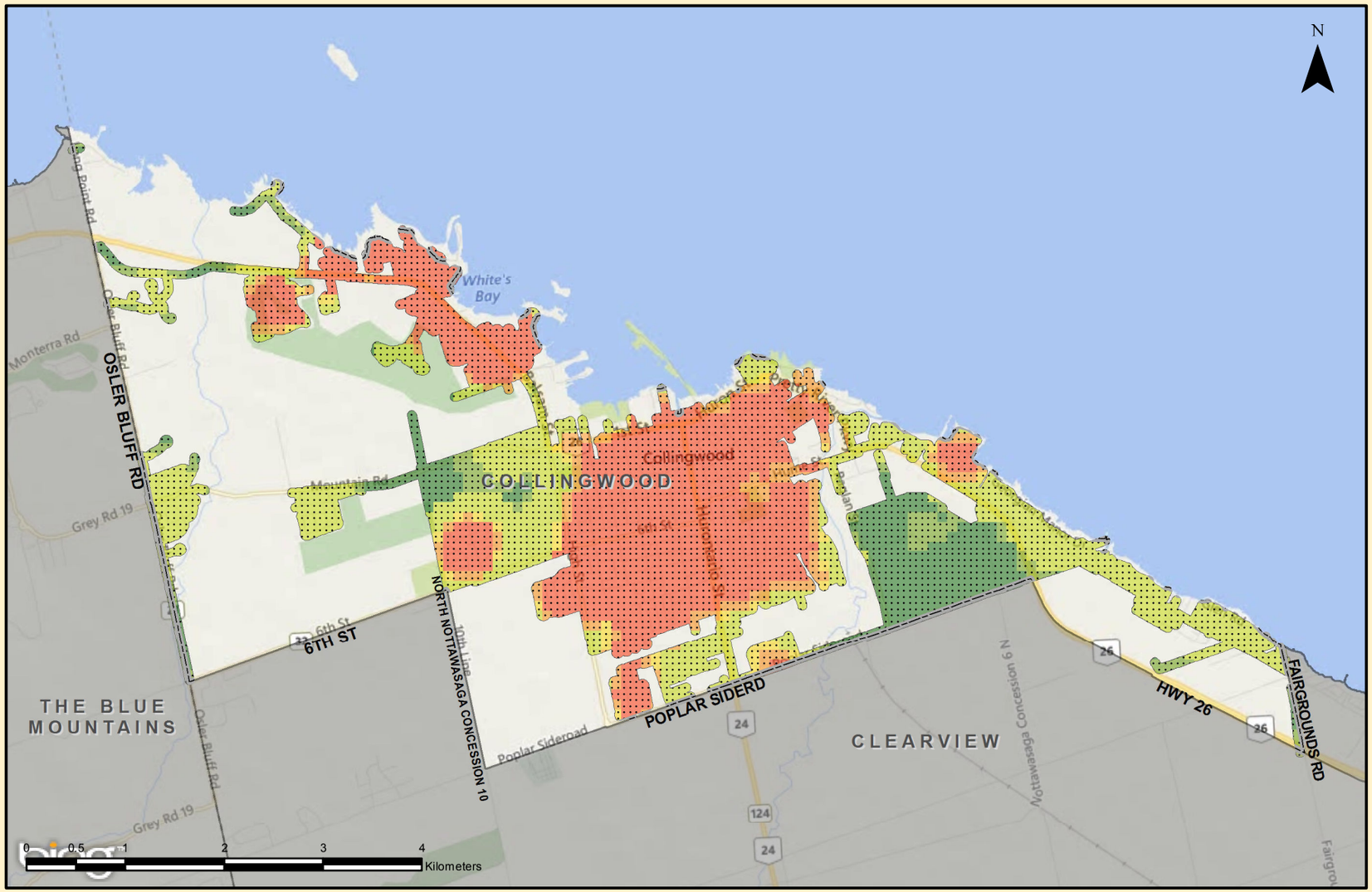


Legend

- Collingwood Boundary
- Enbridge Pipeline Coverage Area

Customer Density

- Low Density
- High Density



Disclaimer:
The map is provided with no warranty express or implied and is subject to change at any time. Any person using the Density Map shall do so at its own risk and the Density Map is not intended in any way as a tool to locate underground infrastructure for the purposes of excavation.

Collingwood

ENBRIDGE
Life Takes Energy®

TAB 4

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

1. BACKGROUND AND THE PROCEEDING

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

> and the period for such right is to be granted, renewed or extended have first been approved by the Ontario Energy Board.

1.1.3 Municipal franchise agreements for the distribution of gas were first introduced in Ontario around the turn of the century, although the majority of them were established after 1957 when natural gas from western Canada was first transmitted to Ontario and large-scale gas distribution became possible. Each franchise agreement was negotiated on an individual basis.

1.1.4 Section 10 was added to the MFAct in 1969. Prior to that time both a utility and a municipality had a common law right to terminate a franchise upon the expiry of the franchise agreement. Section 10 is specifically intended to allow the Board to implement a renewal of a franchise where there is no agreement between the municipality and the utility and to allow the Board to determine the terms of the franchise being renewed. Section 10 of the MFAct, as amended, now provides, in part:

> 10(1) Where the term of a right ... to operate works for the distribution of gas has expired or will expire within one year, either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right.
>
> (2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

> ...
>
> (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.

1.1.7 The Model Franchise Agreement (the "1987 MFA") was published by the MFC with the concurrence of the Board in 1987 and has served as a template for most

initial franchise agreements and also for renewal of franchises during the ensuing years.

The Proceeding

1.1.8 In December 1998, the Association of Municipalities of Ontario ("AMO") sent a letter to Mr. Floyd Laughren, the Chair of the Board, requesting that the Board consider amendments to the 1987 MFA. Representatives of Union Gas Limited ("Union"), The Consumers' Gas Company Ltd., carrying on business as Enbridge Consumers Gas ("Enbridge Consumers Gas" or "ECG") and Natural Resource Gas Limited ("NRG") (collectively, the "Gas Companies") and AMO met to consider mutually agreeable changes to the 1987 MFA.

1.1.9 On September 24, 1999, the parties presented a letter and report entitled "Summary of Discussions Between the Municipal Order of Government (AMO) and the Gas Companies Regarding Amendments to the Model Gas Franchise Agreement" to the Board. The parties agreed on minor changes to the 1987 MFA, but could not agree on any substantive amendments.

1.1.10 On November 1, 1999, the Board issued a "Request for Comment" requesting interested parties to comment on a variety of issues. The Board received written submissions from the following parties on December 6, 1999, and these submissions were posted on the Board's Web site:

AMO
The Gas Companies
The City of Toronto ("Toronto")
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

1.1.11 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

Toronto

Andrew Roman	Counsel
Lorraine Searles-Kelly	Solicitor
Andrew Koropeski	Director of Transportation Services, Department of Works and Emergency Services

Board Staff

Stephen McCann	Board Solicitor
Neil McKay	Manager, Facilities
Wilfred Teper	Regulatory Officer

1.1.12 Written replies to the oral presentations were submitted to the Board by February 11, 2000. The Board allowed further written responses by Ottawa-Carleton and by Toronto on March 22, 2000 and by the Gas Companies on March 28, 2000.

1.1.13 It became apparent to the Panel during the oral presentations that, with some assistance, the parties might be able to reach agreement on a number of additional issues. The parties met with Board Staff on a number of occasions and were able to propose amendments to the 1987 MFA on many of the outstanding issues. The parties also prepared a draft Model Franchise Agreement reflecting the issues that had been agreed upon by the parties and submitted it to the Board.

1.1.14 Chapter 2 of this Report to the Board deals with proposed amendments supported by all of the parties. Chapter 3 deals with proposed amendments not agreed to by all of the parties. Chapter 4 deals with the issue of fees. Chapter 5 deals with additional matters. Appendix "A" sets out the 2000 Model Franchise Agreement ("2000 MFA").

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 MFAct 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 MFAct 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.

2.1.4 To address inconsistencies in the 1987 MFA, the parties proposed that the 2000 MFA should replace the words "road allowances" with "highway".

2.1.5 The parties suggested that Paragraph II 2 of the 1987 MFA (now paragraph 3 of the 2000 MFA) should be clarified by adding the words:

> Subject to the terms and conditions of this Agreement, the consent of the Corporation....

2.1.6 The parties proposed that the last two lines of Paragraph III 3 of the 1987 MFA (now Paragraph 7 of the 2000 MFA) dealing with contacts in an emergency, should be clarified to read "...notify the police force, fire or other emergency services having jurisdiction" and that this paragraph should be amended by adding an additional sentence stating that:

> The Gas Company shall provide the Engineer/Road Superintendent with one or more 24 hour emergency contacts for the Gas Company and shall ensure the contacts are current.

2.1.7 The parties suggested that the wording of the 1987 MFA should be updated by modernizing the gender in the agreement by adding Clause I 1(f) to the 1987 MFA (now Clause1(i) of the 2000 MFA), to read:

> 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.

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:

> 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 the at least one 24 hour emergency contact for the Gas Company and shall ensure the contacts are current.

- Update the 1987 MFA to reflect differences in number and gender so that Clause 1(i) of the 2000 MFA reads:

> 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.

- Clarify the purpose of the Franchise Handbook by amending the 1987 MFA so that Paragraph 17 of the 2000 MFA reads:

> 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.

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.

2.2.4 At the hearing, the Gas Companies' position was that the limited requirements of the 1987 MFA are valid and strike an appropriate balance between the needs of municipalities and the costs incurred by the Gas Companies and their customers. The Gas Companies submitted that they generally do not possess geodetic information for general use since such geodetic information is not sufficient for the physical locates required for safety reasons when working in close proximity to gas pipes. Their position was that a requirement to provide geodetic information as proposed by AMO could create additional, unnecessary costs, estimated by the Gas Companies at approximately $8 million per year.

2.2.5 The parties subsequently proposed that the following provision be included in Paragraph 5 (a) of the 2000 MFA:

> The plan will include geodetic information when dealing with complex circumstances in order to facilitate known projects, including projects which are reasonably anticipated by the Engineer/Road Superintendent. Geodetic information will also be provided where the Corporation has geodetic information for its own services and all others at the same location.

"As Built" Drawings

2.2.6 AMO's position was that given the complexity of the works within municipal rights-of-way, "as built" drawings, geodetically referenced, may be necessary.

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 anticipated road system works, and is not to be taken as a representation that the location is suitable for the Gas Company's purposes, as the approved location may be found to be impractical for environmental or other reasons.

2.2.10 The Gas Companies' initial position was that the determination of responsibility for environmental impacts should continue to be judged on the basis of the circumstances surrounding any particular occurrence. The Gas Companies were concerned that AMO's proposed clause may pre-determine responsibility for any adverse environmental impact. The Gas Companies felt that it was unreasonable to require utilities to contract out of the common law or to allow municipalities to remain silent on known hazards. The Gas Companies felt that negligence claims against the municipality might not be possible if use of the rights-of-way is at the utility's own risk.

2.2.11 The parties subsequently proposed that the following sentence should be added to Paragraph 5 (b) of the 2000 MFA:

> This approval 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.

Panel Recommendations

2.2.12 For consistency throughout the 2000 MFA, the Panel considers that it would be helpful to include a definition of "Plan" in Paragraph 1. Therefore, the Panel recommends that the following definition be inserted as Clause1 (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 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.

2.2.16 The Panel agrees in principle with the amendments proposed by the parties with respect to Paragraph 5 - Approval of Construction. The Panel recommends that all conditions with respect to approval of construction be in the same paragraph of the 2000 MFA. Therefore, the Panel recommends that Paragraph 5 of the 2000 MFA read as follows:

> (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.

2.3 Insurance and Liability

2.3.1 AMO originally proposed that provisions respecting insurance coverage should be made more specific and incorporate standard wording which is similar to that used in other municipal agreements.

2.3.2 The Gas Companies' position was that the wording of the 1987 MFA is adequate and clearly protects the municipality from claims. The Gas Companies claimed that they were in the best position to judge how to maintain adequate insurance to fulfill their obligations. The Gas Companies were concerned that it would be unreasonable and administratively onerous for utilities to include municipalities as named insureds. The Gas Companies were also concerned that an overly prescriptive approach would lead to excessive and unnecessary costs.

2.3.3 The parties subsequently proposed the following:

> The Gas Companies shall maintain Comprehensive General Liability Insurance in sufficient amount and description as will protect the Gas Company and the Corporation from claims for which the Gas Company is obliged to indemnify the Corporation under Section III-5. 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.
>
> 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.

2.4.2 The Gas Companies suggested that it was not in their interest nor that of gas customers to renegotiate the 2000 MFA every time there is a change in legislation or regulations that "pertain to the subject matter of the Agreement". The Gas Companies submitted that AMO's proposal, if accepted by the Board, would substantially increase the risk associated with investments in natural gas distribution, thereby placing upward pressure on rates and inhibiting further investment and system expansion, since it would create an uncertain and unstable

environment for Gas Company operations. The Gas Companies' position was that a franchise agreement should be treated as any other contract where terms and conditions apply for a specified term.

Panel Recommendation

2.4.3 In light of the agreement reached between AMO and the Gas Companies with respect to the duration of the 2000 MFA, discussed below in section 3.2 of this Report, the Panel recommends that a provision dealing with legislative change not be included in the 2000 MFA.

2.5 Abandoned Pipe

2.5.1 AMO's original position was that in order to establish reasonable timelines relating to disposition (abandonment) of the gas system, the 1987 MFA should be amended to provide that whenever the Gas Company abandons any portion of the gas system, it shall advise the municipality. The municipality, at its option, would decide whether the gas system should remain in the highway, in which case it would become the property of the municipality, or be removed and the highway restored at no cost to the municipality.

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.

Panel Recommendation

2.5.5 The Panel recommends that the proposal of the Gas Companies and AMO with respect to the use of decommissioned parts of the gas system for purposes other

than the transmission and distribution of gas be adopted , with minor changes, so that Paragraph 16 of the 2000 MFA reads as follows:

> 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 and 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 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.

3.1.3 Ottawa-Carleton responded to this concern by pointing out that serious road management and cost implications for the municipality would preclude a municipality from asking a Gas Company to relocate its lines without due thought.

3.1.4 The Township of Hay expressed concern that in some rural municipalities there are recreational developments with dirt or gravelled roadways that have been mainly created by use, and that have not been constructed in the correct location according to a Plan of Subdivision. These roads have not been assumed by nor are they maintained by the municipality. In some of these developments Gas Companies have installed their pipelines along the travelled portion of the roadways. If the municipality assumes liability, the roadways will have to be constructed in the correct location according to a Plan of Subdivision, and that may require relocation of the gas pipelines. The Township of Hay felt that a municipality should not be required to pay any of the costs of relocation of the gas pipelines in these circumstances where the gas pipeline location was not approved by the municipality in the first place.

3.1.5 AMO and the Gas Companies ultimately proposed that there should be no changes to the provisions of the 1987 MFA relating to pipeline relocation.

Panel Recommendation

3.1.6 The Panel recommends that the Board accept the recommendation of AMO and the Gas Companies that the provisions of the 1987 MFA with respect to relocation costs should not be altered, with the modification requested by the Township of Hay that where the municipality has not originally approved the

pipeline location, such as in unassumed road allowances, relocation costs should be paid by the Gas Company.

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 involving a mix of commercial and residential customers, the costs of the project will generally be greater than the revenue for at least 15 years. Therefore, the Gas Companies contended that they do not typically realize a return on the original investment until well beyond the 15-year mark.

3.2.4 Gas Companies argued that the increased risk involved in a shorter duration of franchise renewal would ultimately hinder their ability to add new customers through expansion of the gas system and decrease the feasibility of expansion into new communities.

3.2.5 Ottawa-Carleton took the position that it opposed the proposed 20-year term for new or initial gas franchise agreements. Ottawa-Carleton submitted that a 20-year commitment by the municipality without redress during that time would amount to an abrogation of its road management responsibilities. Where gas pipes have been in the ground for a long time and the utility has already recovered its initial investment there are no issues of “security” or “investment” or “return”.

3.2.6 Ottawa-Carleton submitted that even where the installation is new, the municipality’s ownership rights and management obligations ought not to be subrogated to those of the user of property in the form of a 20-year commitment. Ottawa-Carleton argued that the municipality, as the owner of property, must set the term for the use of its property which is commensurate with the municipality’s

obligations for, and responsibilities to, that property. In Ottawa-Carleton's submission it ought not to be the entity seeking permission to use that property that sets the term. This is especially the case when, in Ottawa-Carleton's submission, the proposed use is for the benefit entirely of the user.

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 agreement between the Gas Company and the municipality will be deemed to have been amended to incorporate the changes in the 2000 MFA.

3.2.10 The Panel therefore recommends that Paragraph 4 - Duration of Agreement and Renewal Procedures- of the 2000 MFA should read as follows:

> (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 of 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.

3.3 Default Provisions

3.3.1 AMO originally suggested that a new provision should be added to the 1987 MFA specifying what would happen in the event that either party defaults on its obligations under the franchise agreement. In particular AMO suggested that a provision be added to the effect that if either party defaults on any of its obligations under the franchise agreement, and fails to correct such default within 60 days, the other party 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 Company is to provide gas in the geographic area covered by this Agreement, then the Corporation may terminate this Agreement with the prior approval of the Board so to do.

3.3.4 The Gas Companies subsequently proposed that the Board adopt the following provision with respect to termination by Board order:

> In the event that an order is made by the Ontario Energy Board under section 42(3) of the *Ontario Energy Board Act, 1998*, requiring the Gas Company to cease to provide gas in the geographic area covered by this Agreement, the Corporation may apply to the court to terminate the franchise agreement for fundamental breach of contract.

Panel Recommendation

3.3.5 The Panel notes that there are no provisions in the 1987 MFA dealing specifically with the right of either party to terminate the franchise agreement during its term due to the default of the other party. The Panel is not aware that silence on this matter has caused problems. In the Panel's view the common law principles dealing with breach of contract are adequate to protect the municipality in the event that a Gas Company defaults in the performance of its obligations.

3.3.6 The Panel recommends that the Board accept neither suggestion put forward by the parties and that 2000 MFA should remain silent on the matter.

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.

4.1.3 AMO's position was that the Gas Companies should no longer be exempt from paying fees. Initially, AMO supported a common fee structure for permit fees across all municipalities, but then changed its position to support Toronto and

Ottawa-Carleton's position that permit fees should be set by each municipality to reflect local conditions.

4.1.4 Toronto's position was that permit fees and fees for the use and occupation of municipally-owned property by gas pipelines and other infrastructure should be charged by municipalities. Toronto also argued that the Board could not impose terms and conditions in the 2000 MFA which would restrict the ability of municipalities to pass by-laws imposing such fees.

4.1.5 Ottawa-Carleton supported AMO and Toronto and in addition took the position that the Gas Companies should be required to compensate municipalities for damage caused to their road infrastructure when gas works are installed or repaired.

4.1.6 The Gas Companies' position was that the provisions of the 1987 MFA should continue and that Gas Companies should be exempt from any municipal by-laws imposing fees. The Gas Companies suggested that rates would have to increase by a minimum of $43 million per year to cover the permit fee of $350 proposed by AMO, and that rates would have to increase by a minimum of $14 million to cover the per kilometer charge proposed by AMO.

4.1.7 IGUA's position was in support of the Gas Companies that no fees should be charged.

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.

4.2.2 Toronto argued that subsection 220.1(2) of the *Municipal Act* explicitly authorizes municipalities to charge both permit fees (i.e. for the cost of services provided by the municipality arising from or related to a permit) and a usage fee (i.e. for the use of the municipality's property), and that the only statutory condition precedent to charging such fees is that the municipality must pass a by-law.

4.2.3 Toronto argued that because the opening words of subsection 220.1(2) are that these provisions apply "despite any Act" subsection 220.1(2) has paramountcy over any legislation, including the MFAct. Therefore, Toronto's position is that the effect of subsection 220.1(2) of the *Municipal Act* is to exclude the Board from determining under the MFAct whether Gas Companies should be exempt from municipal by-laws which impose charges on them. Toronto contended that the MFAct cannot restrict a municipality from passing a by-law under subsection 220.1(2) of the *Municipal Act* to impose a reasonable fee or charge for the use of its property or for property under its control.

4.2.4 The Gas Companies argued that subsection 19(6) of the OEB Act, which provides that "[t]he Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act." gives the Board exclusive jurisdiction over the granting and renewal of franchises, and that the Board's decisions take precedence over conflicting municipal by-laws. Their position was that this provision provided the jurisdictional basis for the Board's determination to exempt the Gas Companies from municipal by-laws imposing permit fees contained in the 1987 MFA.

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 MFAct;
- 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.

4.2.8 The Gas Companies argued that this provision preserves the Board's exclusive authority over these matters in cases when transmission or distribution facilities are installed, maintained or replaced under the OEB Act.

4.2.9 Toronto responded by arguing that unlike the OEB Act the MFAct is not a regulatory statute; so, in applying the MFAct the Board should not apply a

regulatory model and thus should not seek to control revenues or returns of municipalities as it might seek to do those of gas or electric utilities.

4.2.10 The Gas Companies also argued that in E.B.A. 767, 768, 769, & 783 (the "Orillia Four Case") the Board reaffirmed the preeminence of the franchise agreement and the prohibition on permit fees. They argued that the Board was not persuaded in these cases that the new statutory provisions allowing municipalities to charge fees would preclude the inclusion of a prohibition on such fees in a new franchise agreement. They argued that the Board also found that municipal claims of "downloading costs" and municipalities' ability to charge user fees did not constitute "unusual" circumstances which would justify introducing different terms and conditions into the 1987 MFA. Accordingly, the Gas Companies argued that the Board found that the franchise agreements for all four municipalities should be in the model form without the amendments for permit fees or a shorter term as requested by the municipalities.

4.2.11 The Gas Companies submitted that the right of municipalities to levy fees on gas utilities is brought further into doubt by paragraph 220.1(4)(e) of the *Municipal Act*, which provides that activities related to the "generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources" are exempt from fees and charges. They argued that transportation of gas includes its transmission and distribution, which would be covered by this exemption. The Gas 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.

4.2.15 Toronto also argued that the owner of property has the right to charge whatever it wants for what amounts to a licence to use and occupy. Toronto conceded that there are practical and legal limits on the amount municipalities can charge, but that those limits are not specified in the MFAct. Toronto argued that under

section 10 of the MFAct, if that legislation gives the Board jurisdiction over charges that would otherwise be applicable under section 220.1(2) of the *Municipal Act*, the Board should operate on the presumption that the municipal charges are prima facie reasonable and that they were developed in good faith. Toronto noted that it has established a standard set of terms for use of its property, which it argued the Gas Companies should adhere to including paying the "going rate". Toronto also argued that if the Board is going to look at the rates charged, it shouldn't look at the Gas Companies in isolation; it should look at the public interest and the "going rate".

Panel Findings on the Board's Jurisdiction

4.2.16 The Panel has considered the submissions of the parties on the extent of the Board's jurisdiction to govern the relationship between the municipalities and the Gas Companies.

4.2.17 In the Panel's view, section 220.1 of the *Municipal Act* is enabling legislation that allows municipalities to pass by-laws charging fees. The phrase "despite any other Act" contained in this section means at most that no other legislative provision can take away the ability of the municipality to pass such a by-law.

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 MFAct 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 MFAct 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.

4.3.2 The Gas Companies argued that introducing municipal fees will increase natural gas rates, impair the economic expansion of natural gas, and widen the property tax disparity between natural gas and electricity distribution in the province without adding any public benefit. They claimed that in fact the public may be worse off since shifting costs from taxpayers to natural gas ratepayers adds little to the economy while the Gas Companies' abilities to provide the economic and environmental benefits of natural gas would be impaired.

4.3.3 Ottawa-Carleton argued that the Gas Companies have not presented any information to support the statements that any additional charges will have direct and significant impacts on natural gas ratepayers throughout the province including increases in gas rates and the potential decline in natural gas distribution expansion if the 1987 MFA is changed to allow for the provision of municipal fees.

4.3.4 Ottawa-Carleton's position was that the Board should adopt a "user-pay" approach, and that the Gas Companies should reimburse the municipality for all financial impacts of the presence of the gas distribution facilities in the municipality.

4.3.5 The Gas Companies argued that by properly applying the "user pay" approach, the Gas Companies would pay less rather than more; since they are already paying more than is required to cover the costs of the services they receive. To be equitable, the "user pay" principle would require municipalities to charge all utilities equally for using the road allowance, including municipally-owned utilities. It would also require municipalities to pay developers for road allowances and infrastructure (roads, water, sewer & electric distribution plant) that municipalities currently receive at no cost. They argued that a "user pay" approach, based on cost recovery, should not be used to collect occupancy fees for rights-of-way that were acquired at no cost to the municipality.

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 municipalities operating under existing agreements would be subsidizing taxpayers in the municipalities collecting fees.

4.3.10 Toronto's position was that it is better to reduce the level of cross-subsidization gradually through the renewal of franchise agreements, rather than not at all.

4.4 Specific Fees

Permit Fees

4.4.1 AMO, Ottawa-Carleton and Toronto argued that the issuing of permits and monitoring and inspecting field work is a significant burden on municipal staff, particularly in urban areas with complex, underground infrastructure. They submitted that the effort involved in issuing a permit can vary from a routine approval given over the telephone, to an intensive review of detailed plans. They argued that the municipal taxpayer should not bear the burden of these costs, and that a standard province-wide fee for every permit is inappropriate given the broad range of conditions from one municipality to another.

4.4.2 AMO originally recommended a set fee for permits; however, that position was amended and AMO and Ottawa-Carleton recommended that each municipality establish its own fees based on its actual costs. They acknowledged that there are legal limitations on what the municipality can charge, and that the charges must be reasonable. Ottawa's position is that the permit fees should reflect a municipality's administrative costs.

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.

4.4.6 The Gas Companies argued that the characterization of the Gas Companies' right to be on the highways as a "licence" granted by the municipality is fundamentally wrong. They argued that licences are voluntary transactions, but that gas utilities have no choice in the matter.

4.4.7 The Gas Companies argued that the taxes they are currently paying more than cover the administration costs associated with gas distribution use of municipal rights-of-way. In 1998, the Gas Companies collectively paid $71 million in property taxes to Ontario municipalities.

4.4.8 The Gas Companies argued that they are the only utilities that pay property taxes on their distribution systems to the municipalities. Bell Canada pays a gross receipts tax, but this goes directly to the province. Municipal electric, water and sewer utilities are not required to pay anything for their use of the road allowance. The Gas Companies submitted that while it would be appropriate to use the gas model as a guide for the electricity industry, it would be unfair to implement changes in the gas industry that would put it at a further competitive disadvantage. Section 27(10) of the *Assessment Act* exempts the poles, towers and lines of the Municipal Electric Utilities (MEUs) from tax assessment, while sections 24 and 25 of the *Assessment Act* establish the right of municipalities to assess and tax natural gas distribution and transmission pipelines. MEUs also appear to be protected from paying fees by section 41(8) of the *Electricity Act*. They argued that this unfair advantage should not be exacerbated through the introduction of additional fees charged solely to the natural gas industry.

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.

4.4.13 Ottawa-Carleton contended scientific studies support the position that utility trenching reduces the life of a road no matter how well the attempted restoration is done. Ottawa-Carleton submitted that there is a vast difference between normal road wear and tear, and the accelerated deterioration which results from road cuts. Roads are designed for the movement of traffic, including trucks and transit vehicles, and have a corresponding life span.

4.4.14 Ottawa-Carleton submitted that there is no complete protection from the permanent negative impacts of road cuts. The costs attributable to work-around requirements and those attributable to pavement degradation are entirely separate.

4.4.15 Ottawa-Carleton also submitted that any road use fee should be based on "land value" not on costs. Pavement degradation is a cost and as such has nothing to do with the road use licence fee.

4.4.16 Gas Companies submitted that payment of a road use fee would be inequitable because municipally-owned utilities do not pay the cost of road use. This assumes there is benefit in transferring money from one municipal pocket to the other. It also assumes non-payment by water and sewer users.

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.

Compensation for the Use of Municipal Rights-of-Way

4.4.21 The Panel recommends that municipalities should not be permitted to charge fees for the use of municipal rights-of-way.

4.4.22 The Panel agrees with the Gas Companies that the highways do not belong to a municipality in the same way land belongs to a private owner. A municipality holds the highways in trust for the public, and the municipality is required to allow those highways to be used for the furtherance of the public interest.

4.4.23 As a practical matter, once the pipelines are laid, neither the municipality nor the Gas Company has any choice in the matter. Any attempt by the municipality to retroactively impose user fees on a Gas Company for facilities laid in the highway years ago is unreasonable.

Compensation for Damage to the Highway

4.4.24 The Panel recommends that the municipalities should not be permitted to charge fees for any long-term damage to the roadway resulting from the installation or maintenance of the gas works located on them.

4.4.25 While the Panel accepts that repeated boring and excavation may have some impact on the long-term quality of the highway infrastructure, the Panel is of the view that this impact does not exceed what is reasonable to provide the public with gas and other services that use the road allowances.

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.

5.1.4 Toronto stressed that the Board should avoid:

- imposing the model agreement upon municipalities and gas companies that have previously not had any comprehensive written agreement; and
- using any language that would limit Toronto from receiving appropriate compensation for its costs and for the use of its property.

5.1.5 Presently the former City of Toronto recovers the following costs:

- restoring sidewalks and pavements with permanent repairs (as distinguished from temporary patches made by ECG);
- inspecting temporary and permanent repairs;
- issuing, reviewing and keeping track of permits; and
- coordinating construction by gas companies, other utilities and other users of roads.

5.1.6 There is little or no recovery of costs for items such as:

- pavement degradation requiring accelerated reconstruction of the road;
- loss productivity in municipal works such as subway construction or repair of municipal utilities under the roads; and
- traffic disruption.

5.1.7 Toronto did not want anything in the 2000 MFA to pre-empt or limit Toronto's ability to negotiate with ECG. Toronto argued that the best and most direct way to do this would be for the Board to state explicitly that the 2000 MFA does not

apply to any future agreements that might be negotiated between Toronto and ECG.

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 MFAct 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 MFAct. 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 MFAct.

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 MFAct nor the current arrangements between the Toronto and ECG. Toronto is free to negotiate the terms of its relationship with ECG.

5.1.12 The Panel recommends that it is not necessary to include a provision that the 2000 MFA does not apply to Toronto.

5.2 Franchise Handbook

5.2.1 The Franchise Handbook is an operational guide to implementing the 1987 MFA. Although AMO and the Gas Companies did not conduct a thorough review of the Franchise Handbook, the "Summary of Discussions between the Municipal Order Of Government (AMO) and the Gas Companies Regarding Amendments to the Model Gas Franchise Agreement" contains a number of proposed amendments to the Franchise Handbook, including provision for regular updates to the Franchise Handbook, depth of pipeline cover, references to construction and engineering codes, cost sharing arrangements for participation in the local Public Utilities Coordinating Committees, and minimization of costs related to road cuts.

5.2.2 The Panel recognizes that changes to the Franchise Handbook could not be finalized until this Report and the 2000 MFA have been released. The Panel recommends that AMO and the Gas Companies should meet to discuss proposed changes to the Franchise Handbook which are compatible with the recommendations in this Report and the 2000 MFA. Should the parties wish, Board Staff will be available to assist with such discussions.

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
{tc \l1 "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
{tc \l1 "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
{tc \l1 "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.

{tc \l1 "}
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: _____

TAB 5

RP-1999-0048

IN THE MATTER OF the *Municipal Franchises Act*, R.S.O. *1990, c.M55, as amended*;

AND IN THE MATTER OF proposed changes to the Model Franchise Agreement

BEFORE: Sheila K. Halladay
Presiding Member

Floyd Laughren
Chair and Member

Judy B. Simon
Member

A. Catherina Spoel
Member

SUPPLEMENTAL REPORT TO THE BOARD

Appendices: Ontario Regulation 61/01
2000 Model Franchise Agreement
(Revised)

1. BACKGROUND

1.1 On December 31, 2000 the Panel issued its Report to the Board with respect to proposed changes to the 1987 Model Franchise Agreement.

1.2 The 1987 Model Franchise Agreement 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". (emphasis added)

1.3 With respect to the imposition of fees the Panel recommended 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;
- should not be permitted to charge fees for the use of municipal rights-of-way; and
- should not be permitted to charge fees for any long-term damage to the roadway resulting from the installation or maintenance of the gas works located on them.

1.4 The 2000 Model Franchise Agreement, adopted by the Board, reflects the Panel's recommendations.

1.5 On March 16, 2001 the Government filed O. Reg. 61/01 made under the *Municipal Act*. This regulation amends O.Reg. 26/96 which lists circumstances in which municipalities may not impose fees and charges under section 220.1 of the *Municipal Act*.

1.6 The new regulation states that a municipality cannot impose a fee or a charge on a generator, transmitter, distributor or retailer in the electricity sector or a producer, distributor, transmitter or storage company in the gas sector for services or activities, costs payable or the use of property with respect to equipment located on a municipal highway.

2. PANEL RECOMMENDATIONS

2.1 While the Panel believes that there is no legal need to change the 2000 Model Franchise Agreement, the Panel is of the view that changes to the 2000 Model Franchise Agreement are preferable for a number of reasons.

- The 2000 Model Franchise Agreement may be misleading, because it makes reference to permit fees that the municipality is not presently legally entitled to charge.

- Deleting reference to fees does not affect a municipality's legal ability to validly pass a by-law to charge such fees. If, in the future the legislation is changed to allow municipalities to charge permit fees, the proposed amendments to the 2000 Model Franchise Agreement would not prevent the municipality from charging such fees.

2.2 The Panel also notes that Gas Companies are reluctant to sign the 2000 Model Franchise Agreement with municipalities, because it makes reference to permit fees. As a result, there is a backlog of interim franchise orders that must be processed by the Board.

2.3 The Panel therefore recommends that Paragraph 13 of the 2000 Model Franchise Agreement be amended to delete reference to fees, so that it reads as follows:

> The Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, except by-laws which have the effect of amending this Agreement.

THIS REPORT IS RESPECTFULLY SUBMITTED, April 11, 2001

Sheila K. Halladay
Presiding Member

Floyd Laughren
Member and Chair

Judy Simon
Member

A. Catherina Spoel
Member

Français

ONTARIO REGULATION 61/01

made under the

MUNICIPAL ACT

Made: March 15, 2001
Filed: March 16, 2001
Printed in *The Ontario Gazette:* March 31, 2001

Amending O. Reg. 26/96
(FEES AND CHARGES BY-LAWS)

1. Ontario Regulation 26/96 is amended by adding the following section:

12. A municipality and a local board do not have the power under section 220.1 of the Act to impose a fee or charge on a generator, transmitter, distributor or retailer, as these terms are defined in section 2 of the *Electricity Act, 1998*, or on a producer, gas distributor, gas transmitter or storage company, as these terms are defined in section 3 of the *Ontario Energy Board Act, 1998*, for services or activities, costs payable or the use of property with respect to wires, cables, poles, conduits, pipes, equipment, machinery or other works which,

(a) are or will be located on a municipal highway; and

(b) are or will be used as part of the business of the generator, transmitter, distributor, retailer, producer, gas distributor, gas transmitter or storage company, as the case may be.

CHRIS HODGSON
Minister of Municipal Affairs and Housing

Dated on March 15, 2001.

Français

Back to top

2000 MODEL FRANCHISE AGREEMENT (Revised)

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
{tc \l1 "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
{tc \l1 "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
{tc \l1 "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.

{tc \l1 "}
Part IV - Procedural And Other Matters

13. Municipal By-laws of General Application

The Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, except by-laws which have the effect of amending this Agreement.

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: _____

TAB 6

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

EBA 767
EBA 768
EBA 769
EBA 783

TABLE OF CONTENTS

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

TAB 7

Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2008-0413

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

AND IN THE MATTER OF the *Municipal Franchises Act*, R.S.O. 1980, Chapter 309, as amended;

AND IN THE MATTER OF an Application for the renewal of a franchise agreement between Natural Resources Gas Limited and the Corporation of the Town of Aylmer.

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Ken Quesnelle
Member

Cathy Spoel
Member

DECISION AND ORDER

This is an application by Natural Resources Gas Limited ("NRG") pursuant to Section 10 of the *Municipal Franchises Act*, ("MFA") to renew its existing franchise agreement with the Town of Aylmer ("the Town"). The application is opposed by the Town, the largest municipality in which NRG distributes gas, and the Integrated Grain Processors Cooperative ("IGPC"), the largest customer in the franchise area.

NRG is a privately owned utility that distributes natural gas in Southern Ontario to approximately 6500 customers in Aylmer and surrounding areas. The service territory stretches south from Highway 401 to the shores of Lake Erie. In addition to Aylmer, NRG has franchise agreements with the Township of Malahide, the Municipality of Thames Centre, the Township of Bayham, the Township of South West Oxford, and the Municipality of Central Elgin.

NRG and Aylmer entered into the existing franchise agreement in 1984. The agreement, which expired on February 27, 2009, is attached as Appendix A. This franchise agreement accounts for most of NRG's 6500 customers. The franchise agreements between NRG and the other five municipalities expire at later dates. Three of them, Malahide, Thames Centre and Bayham, expire in 2012.

The Board held an oral hearing on this Application in Aylmer on February 12, 2009, and at the conclusion of the hearing issued an interim order extending the existing franchise agreement for 90 days or until the Board grants a renewal of that franchise agreement under the MFA, whichever comes first.

For some time NRG and the Town of Aylmer have been negotiating the terms of a new franchise agreement but have been unable to reach an agreement. The main point of difference is that NRG wants a 20 year term while Aylmer is prepared to offer only a 3 year term. There are other differences in their positions but they are less important and more easily resolved.

The Board's Jurisdiction

Section 10 was added to the MFA in 1969. Prior to that time both the utility and the municipality had a common law right to terminate a franchise upon expiry of a franchise agreement. Section 10 is intended to allow the Board to intervene and renew a franchise where the municipality and the utility cannot come to an agreement. Either party can apply during the last year of the franchise term. This section allows the Board to determine the term of the new franchise as well as other terms and conditions. Section 10 of the MFA as amended now provides:

> 10(1) Where the term of a right […] to operate works for the distribution of gas has expired or will expire within one year, either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right.
>
> (2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right. […]

> (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.

In resolving this dispute the Board must determine what is in the public interest or what "meets public convenience and necessity". That determination must consider the objectives of the Board as set out in Section 2 of the OEB Act. The objectives relevant to this inquiry are set out below;

> The Board in carrying its responsibilities under this or any other Act in relation to gas should be guided by the following objectives;
>
> a) To facilitate competition in the sale of gas to users. [Section 2(1)]
>
> b) To protect the interests of consumers with respect to prices and the reliability and quality of gas service. [Section 2(2)]
>
> c) To facilitate the rational expansion of transmission and distribution systems. [Section 2(3)]
>
> d) To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas. [Section 2(5)]

In *Union Gas Limited* v*. Dawn*[1] the court confirmed that the Board has the sole jurisdiction to determine "public convenience and necessity" under section 10 of the MFA. At page 622 the Court stated:

> In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenance, expropriation of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the *Planning Act…*

The Board is under no obligation to continue any of the terms in the existing agreement. As the Divisional Court stated in the *Peterborough v. Consumers Gas*[2]

---

[1] *Union Gas Limited v. Dawn (Township)* (1977) 76 D.L.R. (3d) 613, Ontario (H.C.J..).

[2] *Peterborough (City) v. Consumers Gas* (1980), 111 DLR (3d) 234, Ontario, (Div. Ct.)

> There is nothing in the statutory provisions to require that the terms and conditions found in the expiring agreement must be continued or that what is prescribed by the Board as a result of its adjudication be agreeable to either or both of the parties. It is for the Board to adjudicate when the matter is set down before them. Assuming the hearing has been properly held, it is immaterial that the terms and conditions imposed are not those either in the expiring agreement or in a new agreement or are acceptable to the contending parties.

In *Centra Gas and the City of Kingston*[3], the Board found that the "public interest" and "public convenience and necessity" are broader than local interests. The Board is required to consider matters affecting the provincial gas distribution system as a whole, and not just local interests. While the views of the municipalities should be taken account by the Board they do not entirely determine public convenience and necessity. By the same token the Board in that case noted that the fact that the utility might feel it has a "reasonable expectation" does not end the matter. "The mere fact that most franchises are renewed without dispute is not sufficient to justify an assumption of automatic renewal of a franchise". [page 26]

This is not the first time the Board has considered a dispute between a municipality and a utility regarding the renewal term of a franchise agreement. In a number of cases a municipality's request for a lesser term was refused by the Board, which instead chose to impose the Model Franchise Agreement. That agreement will be addressed shortly.

There are also a number of cases where the municipality opposed renewal of the franchise because it wanted to take over the gas distribution business itself[4]. Those decisions led to the principle described above that the Board in considering the public interest must look beyond the interest of the specific municipality and also consider broader provincial interests.

It's important to understand the context of those decisions. They invariably relate to Union Gas Ltd. and Enbridge Gas Distribution Inc. or their predecessor corporations. Both companies are substantially larger than NRG. Enbridge for example has

---

[3] *Centra and City of Kingston, (E.B.A 825), June 23, 2000.. .See also: Union Gas Limited v. Township of Dawn* (1977) 76 DLR (3d) d13, (Ontario Divisional Court); Surrey *v. British Columbia Electric Company* (1957) SCR 121; and *Sydenham Gas and Petroleum Company v. Union Gas Limited* [1955] O.J.. 234 (C.A.).

[4] *Sudbury (City) v. Union Gas Limited* (2001), 54 O.R. (3d) 439 , (CA); *Kingston (City) v. Ontario Energy Board and Union Gas Limited*, [2001] O.J. No. 3485, (Div. Ct.)

approximately 1.8 million customers and 150 franchise agreements, while Union has approximately 1.3 million customers and 800 franchise agreements.

NRG is not a province wide utility. Nor is the Town of Aylmer attempting to take over and operate the franchise itself. In the case of province wide distribution systems the Board understandably has been reluctant to divide territory based on profit maximizing initiatives of a local municipality. It is significant that in none of the previous decisions was the quality of service or financial integrity of the utility a major issue. That is not the case here.

The Model Franchise Agreement

Prior to 1988 franchise agreements between municipalities and utilities were negotiated between the parties on an individual basis. In November 1985 the Board held a generic hearing to provide guidance on issues frequently arising in franchise agreements. As a result a Model Franchise Agreement was developed[5], which has since formed the template for most new and renewed franchises.

The Board Report stated that the term of a first time agreement should not be less than 15 years and no longer than 20 years. In the case of renewals, a term of 10 to 15 years was considered adequate. The Board issued another Report on the Model Franchise Agreement in December of 2000[6] that confirmed, with minor differences, the view of the Board in the 1986 Report.

The 1998 Decision of the Board[7] in the application by Centra Gas[8] for renewal of franchise agreements in the City of Orillia, the Town of Gravenhurst, the Township of Severn, and the Town of Bracebridge, reviewed the municipalities' request for a reduced term within the context of the 1986 Report. There the parties were also unable to reach agreement on the term. The utility requested a 20 year term while the municipalities offered 10 years. The Board concluded at page 16 of the Decision:

---

[5] *Report of the Board on the Review of Franchise Agreements, E.B.O. 125, May 21, 1986*

[6] *Report to the Board, December 29, 2000 Re: The Municipal Franchise Act and the 2000 Model Franchise Agreement*

[7] *Board Decision with Reasons, March 31,1988 Re: Application by Centra Gas Ontario Inc. for franchise renewals with the Corporations of the City of Orillia, the Town of Gravenhurst, the Township of Severn and the Town of Bracebridge. The Board File Numbers are: E.B.A. 767, E.B.A. 768, E.B.A. 769, E.B.A. 783*

[8] Centra Gas Ontario Inc. merged with Union Gas Limited on January 1, 1998.

> The Board finds that the four Municipalities have not demonstrated unusual[9] 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. 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 in each of the four agreements.

Service Quality

In this proceeding both NRG and Board staff submit that the Board should not depart from the terms set by the Model Franchise Agreement. The municipality however is only prepared to offer a 3 year term.

The Town's position is set out in page 4 of its argument[10];

> Circumstances have arisen in which NRG has been in default in its responsibilities to customers and to the electors of the Town. These circumstances have raised concerns about both the financial viability of NRG and the quality and reliability of its service to customers. They have severely shaken the Town's confidence, and that of the Town's constituents in NRG as their incumbent gas supplier and distributor.

The Town's concern with service quality and financial viability were supported by IGPC, largest customer in the franchise area. The IGPC concerns are summarized at page 2 of its argument;

> NRG has demonstrated a pattern of conduct that is not acceptable in a publicly regulated utility…During the last two years, NRG has admitted that it has: (a) failed to comply with its obligations under the GDAR; (b) been the subject of an administrative penalty for contravening an order of the Board; (c) been the subject of an application to discontinue service; and (d) the subject of an unprecedented number of complaints to the Board such that the Board commenced a review of its security deposit policies. NRG has failed to complete the cost reconciliation required by the Pipeline Cost Recovery Agreement ("PCRA"), which was to be completed within 45 Business Days of commencing gas service to IGPC. Finally, there are still unanswered questions about NRG's financial well-being…..If ever there was a situation so unique that it

---

[9] *Ten years earlier in Township of Moore and Union Gas Limited, the Board had also rejected a short term because there were no "unusual circumstances", E.B.A. 304, December 21, 1978, page 16*

[10] *Town of Aylmer, Final Written Submissions dated February 27, 2009, Paragraph 9, page 4*

> warranted the Board departing from its traditional practice, this is such a situation. A three year renewal is appropriate – if not generous.

Two main reasons are offered for the proposed shorter term. First, the Town and IGPC say that a shorter period, of 3 years is appropriate in order to give NRG a probationary period in which to rebuild customer confidence regarding service quality.

The second ground is that the Town believes that a three year period is necessary in order to align the renewal period of the Town's franchise agreement with those of the neighbouring municipalities.

Quality of service is a broad and a general term. The Town and IGPC site a number of examples which they claim demonstrate that NRG has been unresponsive to the interests of the Town, its gas consumers, and IGPC. A number of them relate to the difficulty both the Town and IGPC have faced in dealing with NRG regarding a new ethanol plant in Aylmer.

In 2006, NRG applied to the Board to construct approximately 28 kilometres of gas pipeline to connect the Union Gas distribution system to the new ethanol facility being developed by IGPC in the Town of Aylmer. The Board granted leave on February 2, 2007[11] after reviewing the financial viability of the project and receiving assurances that there would be no negative impact on existing ratepayers.

Months later in June 2007, NRG refused to execute a necessary assignment. Without the assignment, IGPC could not proceed with the financing of the ethanol plant. An Emergency Motion was brought on June 29, 2007. The Board[12] ordered NRG to execute the necessary documentation on the grounds that the assignment had been agreed to by the parties and the Board had approved the Agreements when granting the leave to construct[13].

The Town in its submissions relies on the Board's Decision on the Motion where the Board stated;

---

[11] *Board Decision and Order, dated February 2, 2007 Re Application by NRG for Leave to Construct 28.5 km natural gas pipeline to supply natural gas to the ethanol plant owned by Integrated Grain Processors Co-operatives Inc. in the Town of Aylmer*

[12] *Transcript, Motion Hearing, June 29, 2007 page 81, line 21 to page 82 line 14* ***and*** *page 85, line 3 to page 86, line 9*

[13] *Decision and Order, February 2, 2007, granting leave to construct the pipeline, page 2,"Proceeding" Section, 2nd Paragraph (EB-2006-0243)*

> There is no basis on this record to conclude that a refusal to execute the consent is reasonable. The agreement specifically contemplated it and the parties agreed that a consent would be executed to the benefit of the company's lenders and, as such, would be considered reasonable. We see no basis for this refusal and hereby order NRG to execute the consent in the form provided by the applicant.

Despite the Order, NRG refused to sign the Agreement[14]. As a result the Board levied an administrative penalty[15]. The Town and IGPC in their submissions rely on the Board's findings in that Decision;

> NRG has been franchised to provide natural gas service in this municipality, in the Town of Aylmer. .This is an exclusive franchise. Natural gas is not available from anyone else. But that exclusivity carries with it certain responsibilities to act in the public interest. It is not apparent that NRG understands those responsibilities at all.
>
> The failure to comply with this Board's order signals a complete disregard for the Board and its processes. It also signals a complete disregard for the people of Aylmer, many of whom are out of work as a result of the decline in the tobacco industry. It looked like this ethanol facility would offer considerable relief in that regard.
>
> It is also a complete disregard for the federal government, the province of Ontario, and the investors, the farmers that have invested in this facility, and of course, IGPC, all of whom have in vested considerable time over a considerable period to bring about the agreements which would result in the construction of this facility.

Another incident both IGPC and the Town cite regarding service quality is the failure of NRG to deal in a timely manner with the request of its gas supplier, Union Gas, for adequate security, under its gas supply contract with NRG. This ultimately led to an application by Union Gas[16] to the Board to discontinue the supply of gas to NRG – a matter of considerable concern to both the Town and IGPC.

---

[14] *Transcripts, Motion Hearing, (Addendum) June 29, 2007(Afternoon), page 22, line 21 to page 23 line 18*

[15] Note, NRG has appealed the fine

[16] *Union Gas Limited Application on August 1, 2008 seeking the Board's approval to discontinue service to Natural Resource Gas Limited ("NRG")*

The issue turned in part on the state of NRG's financial accounts and, NRG's claim that redeemable shares should be regarded as equity as opposed to debt. The evidence by NRG's own accountants recognized that under Generally Accepted Accounting Principles ("GAAP") redeemable shares were properly classified as debt rather than equity. This meant NRG had little or no equity and Union Gas had no security for the outstanding balances.

It turned out that the Bank of Nova Scotia, the main lender to NRG, had the same concern. Those concerns were addressed months earlier when NRG provided the Bank with a postponement agreement by which the security interest of the redeemable preference shares was postponed to the interest of the bank[17]. The Board ordered NRG to provide Union Gas with a similar postponement agreement.

The arguments of both IGPC and the Town rely on the Board's Decision[18] as further evidence of the lack of adequate service quality;

> Union's concern with the financial stability of NRG was well founded, given NRG's decision to reclassify the preferred shares. The Scotia Bank had a similar concern and NRG addressed it promptly by providing a Postponement Agreement.
>
> In the case of Union's request for security, NRG did not act in a timely manner. The record suggests that NRG essentially stone-walled Union. This resulted in significant cost for Union, the Board, the Town of Aylmer and the Integrated Grain Processors Co-operative. This type of brinkmanship is not helpful where 6,500 customers and a recently activated ethanol plan supported by substantial Federal and provincial funding are involved.

IGPC and the Town also note that the conduct of NRG was sanctioned by the Board by an administrative penalty against NRG in the case of refusal to sign the assignment and a cost award against the NRG shareholders in the case of Union's application to discontinue supply to NRG.

The arguments above were advanced by both the Town and IGPC. However the Town raised an additional complaint relating to NRG's security deposit policy.

---

[17] The redeemable preferred shares are owned by the shareholders of NRG

[18] *Board Decision and Order dated November 27, 2008, pages 5-7 Re: Union Gas Limited's Application seeking the Board's approval to discontinue service to Natural Resource Gas Limited ("NRG"),. (EB-2008-0273)*

In 2008, the Town received a petition with 457 written and 65 on-line signatures complaining about NRG's customer deposit policy. The evidence before us is that the level of security deposits which the Board approved for test year 2007 was $105,000. By September 2006 NRG was holding security deposits of $280,000 which increased to $603,000 by September 2007 and further to $757,000 by September 2008. The 650% increase in security deposits demanded by NRG from its customers in this three year period led to widespread customer complaints and the petition to the Town Council.

The NRG response to the security deposit issue is that NRG was unaware of the petition notwithstanding that it was advertised in the local newspaper. Second, NRG states that it is prepared to comply with new rules the Board has been considering with respect to security deposits.

NRG further submits that the increases in deposits resulting from the initiation of the new deposit policy and the amount of deposits held will decline as the program matures and refunds are made to those demonstrating a good payment record.

NRG offered little response to the allegations that the utility's quality of service failed to meet minimum standards. The main response seemed to be that the Town was acting in bad faith and failed to advise NRG earlier that the Town was not prepared to grant NRG the requested 20 year term. It was suggested that the Town was in some fashion coordinating a takeover of NRG facilities with Union Gas and the failure to advise NRG of the Town's position earlier was part of that exercise.

There is no evidence that Union Gas was involved in any way in these discussions. Moreover, the evidence of Ms. Adams, the Town's Chief Administrative Officer, is clear. She was not at liberty to disclose the Council's position regarding the renewal of franchise agreement, until such time as the Council had voted on the matter. There is no evidence that she misled NRG.

Financial Viability

Both the Town and IGPC also question the financial viability of NRG. These submissions rely for the most part on the application by Union to discontinue supply.

Union claimed that NRG's financials demonstrated that there was no equity and therefore no security for the debt NRG was incurring to Union under its gas supply

contract. IGPC and the Town agreed. They argued that without the security deposits NRG had little or no working capital. Finally, they point to the Board's findings in that Motion that NRG was late in providing the Board with the financial statements required under the Board's rules.

NRG responds that the short term proposed by the municipality will in fact limit the utility's ability to finance and creates no incentive for NRG to invest in facilities.

It's true that the Board in previous decisions has linked the term of the franchise agreement to the financing of the utility[19]. This is particularly true for original franchise agreements as opposed to renewals. Here the situation is different. This utility, unlike any other in the province, has no long term financing. All the financing is short term. In fact the financing is a demand note.

NRG then argues that if the Board only awards a three year term its lender will likely call the demand note placing the utility in financial jeopardy. There is no convincing evidence that this is likely.

The fact that NRG chooses to finance its operations by way of a demand note (which is admittedly unusual) cannot be used as the basis for arguing for a longer term. Moreover, when this note was put in place NRG had less than 5 years remaining on its existing 20 year franchise agreement. Nor does the Board accept that a shorter term will reduce the incentive of the utility to maintain its facilities. The Town's position is exactly the opposite; a shorter term may encourage NRG to pay more attention to its service quality and financial integrity.

The Alignment of Franchise Agreements

Another rationale offered by the Town for a shorter term of three years is that this will allow the Town of Aylmer to align renewal of its franchise agreements with the neighbouring municipalities. NRG responds that this is merely a strategy to allow the Town to more easily replace NRG with an alternative supplier. NRG claims this is an improper motive.

The Town admits that this was one of the reasons for the 3 year term. The Town, however argues that a municipality should, if it is in the public interest, have the option to contract with a different supplier. The Town argues while a municipality no longer

[19] *Re Northern and Central Gas, E.B.A 194, December 3, 1976*

has the unilateral right to terminate an agreement, the right to terminate always exists provided that the Board finds it in the public interest. The Town also notes that whatever happens three years from now will still be subject to Board approval.

The Board does not accept NRG's position that the alignment of expiration dates in the franchise agreements of adjacent municipalities is an improper motive. Different dates are simply an artificial barrier to municipalities seeking alternative supply in the appropriate circumstances, a rationale the Board accepted in the 1986 Report[20] that created the Model Franchise Agreement;

> A uniform expiry date within a regional area could help achieve two goals. It might place the local municipalities in a better negotiating position with the utility and it would contribute to the standardization of franchise agreements at least within each regional municipality or county.

Board Findings - Term of the Franchise Agreement

The Board accepts that the Model Franchise Agreement serves an important and useful purpose. And the Board agrees that the term should be reduced only in "unusual" circumstances. The question is: do unusual circumstances arise in this case?

The Board finds that unusual circumstances do exist in this case and they warrant a term substantially less than the standard term specified in the Model Franchise Agreement.

The Town and IGPC question both the financial viability and quality of service of NRG. The Board agrees that there are serious concerns with respect to both. However there is no evidence to support the Town claim that NRG's service was unreliable.

The Board accepts the arguments of both IGPC and the Town that the conduct of NRG, as confirmed in previous Board decisions, failed to meet the standard expected of a public utility in this Province. There was no apparent reason for refusing to sign the assignment to contracts involved in the construction of the ethanol plant. That refusal placed in jeopardy an asset which doubled the size of NRG and offered

[20] *Report of the Board on the Review of Franchise Agreements, E.B.O. 125, May 21, 1986, page 7/16, paragraph 7.39*

increased financial stability to the entire franchise area. Furthermore when the Board ordered the assignment to be signed, the utility refused.

The NRG contract with respect to the Union gas supply contract was equally disturbing. Union was forced to bring an application to discontinue supply which placed the entire franchise in jeopardy. In reviewing the evidence it was clear to the Board that NRG could have solved the problem expeditiously without confrontation by supplying Union with a postponement agreement similar to the one provided to the Bank of Nova Scotia months earlier. In the Board's view the Town and IGPC are entitled to raise these concerns as questions of service quality in this proceeding.

The Union proceeding also raised valid concerns regarding the financial viability of NRG. It appears that this utility has little or no working capital outside of the customer deposits. When proper accounting treatment is applied, the utility has little or no equity.

The Board's concerns are only heightened by NRG's pattern of non-disclosure. The reports the utility is required to file with the Board were months late. The rate application has been delayed. In these circumstances the Board believes it is not in the public interest to renew this franchise agreement for a term greater than the three years proposed by the Town of Aylmer.

For the reasons stated above the Board orders that the franchise agreement between Natural Resource Gas Limited and the Town of Aylmer be extended for a period of three years and expire on February 27, 2012.

It is not the intention of the Board in this decision to diminish the importance of the Model Franchise Agreement. The Model Franchise Agreement is an important tool to efficiently administer the many franchise agreements across this Province. The Model Franchise Agreement should be departed from only in exceptional and unusual circumstances. This, however, is such a case.

Board Findings - Other Conditions

In addition to limiting the term to three years, the Town asked the Board to impose four other conditions on renewing this franchise:

1. The Board should require NRG to file a new rate application within 6 months.

2. The Board should require NRG to implement the Board proposed revisions to its customer deposit policy.

3. NRG must give the Town notice of any proceedings brought before the Board in which NRG is involved.

4. The security deposits should be placed in a trust account.

The Board agrees that NRG should file a rate application within 6 months for rates to be effective October 1, 2010. The last NRG rate decision[21] was rendered in 2006. It is difficult to understand why NRG has not filed a rate application. The utility has just embarked on a capital expansion that doubled its rate base. The project is completed. Those assets now appear to be used and useful. Most utilities would be anxious to have the additions to rate base approved by the Board so they can earn a rate of return on those assets.

The Board will order NRG to bring a rate application within six months. That hearing will allow the Board to more completely examine the financial status of NRG. That examination will materially assist any future Board Panel examining the renewal of this franchise agreement three years from now.

The next matter relates to security deposits. That issue has been canvassed earlier in this decision. It is a concern of the Town and its residents. In this proceeding, NRG has agreed to comply with new rules. Accordingly, the Board will order that as a condition of approving this franchise extension NRG within a period of 60 days amend its security deposit policies to comply with the rules set out in Appendix B of this decision.

The Town has also asked the Board to order NRG to hold the customer security deposits in a trust account. The Town's concern is that NRG has limited or no equity and the customer security deposits represent most of the working capital of the utility. NRG's response is that there will be costs involved in setting up a trust account. The Board recognizes the Town's concern, but at the same time believes that the new security deposit rules set out in Appendix B will address the problem. Accordingly, the Board, will not order that a trust account be created.

The final matter relates to the Town's request that the franchise agreement be amended to require NRG to provide the Town notice of any regulatory proceedings.

---

[21] *Board Decision with Reasons, September 20, 2006, approving the rates for Test Year 2007 (EB-2005-0544)*

The Board does not believe it's appropriate to add this type of term to the franchise agreement. The Town presumably believes this would provide greater security because non compliance would constitute a breach in the agreement. That, however, would create unnecessary risks for the customers.

The Board will however, order that as a condition of approving the franchise agreement that NRG provide notice to the Town of any applications it makes to the Board. In all likelihood the Town will receive this notification in the ordinary course. There is little harm, however, in making this clear to both the Town and NRG.

IT IS THEREFORE ORDERED THAT:

1. The existing franchise agreement between Natural Resource Gas Limited and the Town of Aylmer shall be extended for a period of three years and expire on February 27, 2012.

2. Natural Resource Gas Limited shall on or before July 6, 2009 amend its security deposit policy to comply with the procedures set out in Appendix B.

3. NRG shall file an application for new rates within six months of this decision for rates to be effective October 1, 2010**.**

4. NRG shall provide notice to the Town of Aylmer and its duly authorized representatives, of any regulatory application or proceeding coming under the jurisdiction of the Board.

DATED at Toronto, May 5, 2009

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Appendix A

Copy of Expired Franchise Agreement (February 27, 2009)
[Natural Resource Gas Limited and The Corporation of the Town of Aylmer]

Board Decision and Order
Re: Natural Resource Gas Limited Application for Franchise Renewal with the Town of Aylmer (EB-2008-0413)

May 5, 2009