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RP-1999-0048

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

MODEL FRANCHISE AGREEMENT

B E F O R E :

S.K. HALLADAY Presiding Member
F. LAUGHREN Chair/Member
J.B. SIMON Member
C. SPOEL Member

Hearing held at:
2300 Yonge Street, 25th Floor, Hearing Room No. 1,
Toronto, Ontario on Tuesday, January 25, 2000,
commencing at 0935

VOLUME 1

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APPEARANCES

STEPHEN McCANN	Board Counsel
NEIL MACKAY/ WILF TEPER	Board Staff
GLENN LESLIE/ THOMAS LEDANYI/ BOB ADIE/ PADDY DAVIES/ BILL BLAKE	Union Gas, Consumers Gas and Natural Resource Gas (NRG)
ERNEST McARTHUR/ LORNE ROSS	Regional Municipality of Ottawa-Carleton
ANDREW ROMAN/ LORRAINE SEARLES-KELLY/ ANDREW KOROPESKI	City of Toronto
ANDREW WRIGHT/ ROBERT FOULDS/ CASEY BRENDON PATRICIA VANINI/	Association of Municipalities of Ontario (AMO)

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Toronto, Ontario

--- Upon commencing on Tuesday, January 25, 2000
at 0935

THE PRESIDING MEMBER: Be seated.

Good morning. My name is Sheila Halladay. With me today are Judy Simon, Floyd Laughren and Cathy Spoel.

Before you begin, I would like to just say a few words about the purpose of this meeting.

Over the past few months, the Board has been involved in the process of reviewing the terms of the model natural gas franchise agreement. We have received a number of comments from interested participants, including a report to the Board from the gas utilities and the Association of Municipalities of Ontario.

The purpose, today, is to hear oral presentations from a number of the parties.

We want this proceeding to be as informal as possible, considering that it's being held in a hearing room -- and I should point out that this isn't a hearing, in the formal sense of the word; it will, hopefully, be a dialogue between the parties so that Board Members and Board staff can ask questions of the interested participants so that we have a better understanding of the issues involved and the positions of the parties.

So, before we start, if we could just go around the room and I would ask for people who are

participating in today's presentations to identify themselves.

MR. LESLIE: Good morning, Madam Chair.

My name is Glenn Leslie. I have been asked to introduce the witnesses for the gas companies who, I think by agreement, are going to start off this morning.

THE PRESIDING MEMBER: Good morning, Mr. Leslie.

MR. McARTHUR: Madam Chair, my name is Ernest McArthur. I appear on behalf of the Region of Ottawa-Carleton.

I will be presenting first, on behalf of the municipalities.

THE PRESIDING MEMBER: Thank you, Mr. McArthur.

MR. ROMAN: My name is Andrew Roman. I am representing the City of Toronto.

THE PRESIDING MEMBER: Thank you, Mr. Roman.

MR. WRIGHT: Madam Chairman, my name is Andrew Wright. I appear on behalf of AMO, this morning.

THE PRESIDING MEMBER: Thank you, Mr. Wright.

Are there any other participants? Okay.

Well, I think, as Mr. Leslie said, the utilities have agreed to go first.

MR. LESLIE: Thank you.

Madam Chair, we did distribute, this morning, a document entitled "The Gas Companies' Joint Presentation to the Ontario Energy Board Model Franchise

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Agreement". This is a summary of the comments that will be made this morning. It, essentially, reproduces the content of the earlier submission but was intended to assist the Board, and the others present, following the remarks this morning.

I will hasten to say that I don't plan to say very much, mind you; I will just simply introduce the witnesses and if there are any legal issues that come up.

The witnesses for the gas companies, or the presenters for the gas companies, I should say, are, closest to you, Mr. Paddy Davies, who is Director of Market Expansion with Consumers Gas; sitting in the middle is Mr. Bob Adie, who is General Manager, Franchise Relations, with Union Gas; and next to Mr. Adie is Mr. Bill Blake, who is the President of Natural Resource Gas, or NRG, as it's commonly known.

Mr. Davies and Mr. Adie will share the presentation, this morning, and I will ask them to go ahead and introduce themselves and make their comments.

Thank you.

PRESENTATION

MR. DAVIES: Good morning. My name is Paddy Davies. I have worked for Enbridge Consumers Gas for 33 years. I am currently Director of Market Expansion. For most of the time that I have worked for Consumers Gas, it's been in our regional operations, throughout Ontario, working quite closely with the municipalities

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in which we do our business.

MR. ADIE: Good morning. My name is Bob Adie. I'm the General Manager of Franchise Relations, with Union Gas, and have been employed with Union for some 35 years, 14 of years of which was spent in our head office, in Chatham. I was head of the Industrial and Contract Gas Markets and, during that tenure, had 14 appearances before this Board -- it's nice to be back. The other 21 years has been spent in the regions and the districts -- a number of roles, from residential to commercial sales, human relations, general sales management -- the last seven -- I'm sorry -- the last eight years in general management of the districts. I have been involved in excess of 100 franchise renegotiations.

It's a pleasure to be here.

MR. BLAKE: My name is Bill Blake. I'm with Natural Resource Gas. I'm the President and General Manager.

I have been appearing at this Board for about 20 years, now, on behalf of NRG, in other -- in interventions in other matters.

I am not going to be speaking today but I am here to answer any questions the Board or any others might have, regarding NRG's involvement in municipal franchise in Ontario.

Thank you.

MR. DAVIES: I believe you have a copy of our

presentation, in its written form. We are going to cover the key points, as best we can, and, hopefully, with all the experience as a panel here, provide some practical examples of some of the issues for you.

The municipal franchise agreement is an extremely important issue. It has far-reaching implications for the gas customers in Ontario. It goes to the very core of our business. It, in fact, prescribes the detailed terms and conditions under which the gas companies operate in Ontario.

The specific terms and conditions have significant implications in three areas: They have implications for the gas distribution rates that are charged in Ontario; it has implications for energy choices for the citizens of Ontario; and it has implications on fair competition between gas and electricity.

In fact, these three areas were the guiding principles that we used in our submission to the Board, in December.

The current municipal franchise agreement has served Ontario well -- very well -- over the last 13 or 14 years. It has helped to maintain or contain gas distribution rates. It has also facilitated or enabled the gas companies to expand into many new communities.

In fact, since the municipal franchise agreement was worked out in 1987, we have added over 800,000 new customers, in Ontario. Last year, we paid a

total of $71 million in property and pipeline taxes to the municipalities in which we do our business.

How do we get to be here today?

The Association of Municipalities of Ontario, in late 1998, requested the Ontario Energy Board revisit the municipal franchise agreement, in the light of recent legislative changes. The gas companies' position is that legislative changes do not justify the negative impacts that would result if AMO's proposed changes were adopted.

Indeed, in January of 1999 -- and I'm going to quote from a letter from the Minister of Energy:

> "The intent of the Energy Competition Act provisions relating to easements for utilities is to maintain the status quo. In other words, the government does not intend these provisions to provide new sources of revenue to municipalities; nor does it intend to limit traditional sources of revenue to municipalities."

It goes on to say:

> "My officials have met with staff from the Association of Municipalities of Ontario to clarify the government's policy intent on this issue." (As read)

And we agree. AMO is seeking new sources of revenues from the gas companies, in the form of permit fees and encroachment fees, when we are already paying municipalities over $70 million in the traditional form of property and pipeline taxes.

My colleagues here today with me were part of the gas companies' team which met with representatives of AMO, on six occasions, during 1999. These meetings were productive and a joint report was filed with the Board, I believe, in September of 1999, with some changes that we agreed to. However, there are still 10 outstanding issues which we, and others, have commented on, in submissions to the Board, in December, and what we would like to do, today, is to review our position on these 10 issues and our agenda will be expanded to include comments on the need for the consistency of the application of the municipal franchise agreement, and for completeness of the record, we will also reference Board Decisions and legislations which we feel are relevant to the proceeding and also clarify what we feel may be misrepresentations in the submissions that were made to the Board in September.

So, with that, I will turn it over to my colleague to begin the presentation.

MR. ADIE: My portion of this presentation will be directed to six of the ten issues outstanding in this process and were raised by the Association of Municipalities of Ontario.

Specifically, they are the payment of permit fees, compensation for the use of municipal rights of way, duration of the proposed franchise agreement,

insurance and liability, the effects of legislative change and, finally, the default provisions of the franchise, all of which are requested by AMO and opposed by the gas industries in Ontario.

First I want to speak to the issue of payment fees, of permit fees. The additional fees of any kind will put upward and unwarranted pressure on gas rates. This is true for existing customers and potential customers and communities not yet served with the natural gas alternative.

Let's address unserved communities first. As we extend our distribution system to unserved communities, it is an uphill battle to keep costs low so that it makes economic sense to spend the capital to provide service to these communities. In many instances, a need to construction is required by future customers of the gas system and in some cases, provincial and federal grants are also required in order to provide natural gas service to these communities.

Higher rates resulting from the application of permit and occupancy fees will make this expansion even more difficult as well as negatively impact the residential conversion decision. The payback period of the conversion to a gas fired heating system from either oil or electricity will be lengthened and may defer the decision altogether.

The major efficiencies that we have gained over the years in laying pipeline, for example, the move

from steel to plastic pipe, from digging up every road and every right of way to trenchless technologies where we bore and rocket under roads -- the portfolio approach to expansion and even gas deregulation will be jeopardized, in our view, and it will limit choices to these communities.

I have never been involved in a gas expansion project to an unserved community where municipal officials did not want gas available for development purposes at the lowest possible cost. Further, they are delighted to hear that they get taxes on the gas that we have underground.

Existing customers have imbedded in the rates they pay the taxes the gas company pays to the municipalities on their underground distribution plant. Together, the three gas companies represented here today pay in excess, as Paddy mentioned, $71 million annually. Of our investment, 83 per cent of it's underground, not even seen; 24 per cent of it in fact is on private property. That doesn't influence the rights of way in any way, but we still pay taxes to the community on these piper properties.

An underground pipeline system uses very few of the services municipalities provide in return for their tax dollars. For example, we do not use city libraries, parks, arenas, buses, snow removal, golf courses, garbage pickup and a myriad of other services that you would normally expect to receive for your tax

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dollar. We do, however, use the municipal road allowance, as does the city owned municipal electric utility who pays no taxes versus our $71 million annually.

Others that use road the allowance free, that's at no charge, are the city sewer and the city water systems and the cable companies. AMO proposes, in addition to the $71 million that we pay in taxes now, a permit fee that we forecast would cost the three gas utilities in Ontario an additional $43 million annually, and an occupancy fee that would increase our costs another $14 million annually. All of these, of course, would have to be absorbed in some fashion in our rates.

These permits and occupancy fees will not apply to the telecommunications business, sewer, water or the electric industry. They should not apply to the gas industry. When we compare the cost we pay, $71 million, we more than compensate the municipalities for the use of their road allowance.

Our competitor, the municipal electric utility, pays no taxes on their poles, overhead wires or underground cables. This infers a very unlevel playing field in a competitive market. This is made more so by the very owners of the electric system, the municipalities.

We ask the Board to approve our model franchise agreement as is and not allow for the unwarranted imposition of permit and user fees on the

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gas utilities of Ontario. This will be in keeping with the Board's decision in E.B.O. 125.

A key challenge for the Board is to ensure that all facets of the energy industry, including the model franchise agreement, are reformed in a fair and equitable and consistent manner. AMO uses the example of the gas utilities paying fees to the Ministry of Transportation of Ontario for the use of their highways and the rights of way and for occupancy fees, and we do.

It's an anomaly.

The total costs of these charges, though, by MTO for the three utilities' share are approximately $150,000 annually. We do not, however, pay them taxes on this pipe. We do, however, pay taxes on that pipe as it passes through the townships and as it enters the municipalities.

I will turn next to the duration of the proposed franchise agreement. The gas utilities invest approximately $600 million annually in the municipalities that we serve. These are long term investments and must be protected by long term franchises, if not franchises in perpetuity as supported by the Industrial Gas Users Association in their submission.

Typically, residential investments are evaluated over a 40 year term to ensure the opportunity of a fair return on this investment. The initial first agreement of 20 years for a franchise with a renewal

term of 15 years, or up to 20 if agreed between the parties, is satisfactory to the gas industry. Any reduction of the franchise term would have the effect of increasing investment risk with the resultant increase in gas rates to customers.

We ask the Board to approve the existing term of the model agreement with the inclusion of an automatic renewal, thereby keeping our rates competitive. We have long term debt for long term investments and require long term security through franchises.

I will now address very quickly the issue of insurance liability, quickly because I have absolutely no expertise on this, but I will stumble through.

The existing agreement, the model franchise agreement, indemnifies the municipalities against all claims arising out of the gas companies' operating, constructing and maintenance of their underground gas system. It does not insure the municipality against the negligent or wrongful acts of the municipality's employees, servants or agents. Nor should it. It is the municipality's responsibility to insure itself. Our insurers advise that we cannot name the municipalities to our policies without incurring significant additional cost, and there is an issue between named and just traditional insurers, but name them we cannot do.

The gas companies have no record of issue or concern with this insurance coverage. We are committed

to protecting ourselves and the municipalities that we serve. If it's not broken, please, let's not fix it.

I will now deal with the issue of the effect of the legislative change on franchises. The existing franchises are for a specified period of time and they can be renegotiated and planned, and administratively planned for. Opening all franchises because of legislative change imposes further risk on the gas utilities.

In addition, there are approximately 650 franchises in Ontario and, frankly, the gas companies do not have the resources to renegotiate 650 franchises at once, nor, I suspect, would the Board have the resources to hear the results of 650 franchises were they reopened and renegotiated at one time.

The administrative burden for the utilities and the Board would be excessive and with associated costs. The model franchise agreement already allows municipalities to impose bylaws of general application as long as these bylaws do not contradict or oppose the model franchise agreement.

Again, it's another example, in our view, of the "if it's not broken, don't fix it". These changes as opposed would only add further cost and increase rates for no benefit of the rate paying customers.

Finally, I will turn my comments to the issues of adding default provisions to franchise agreements.

The gas utilities have a long history of cooperation with municipalities that they serve and have absolutely no experience where municipalities have claimed the gas utilities to be in fault of the franchise terms of the agreements.

We must seriously question the purpose of wanting this added to the model agreement. The model agreement provides the municipality under the restoration clause with the right if they are unsatisfied with the work or the repairs that the utilities have done or the time limits of the repairs to either do the work themselves or contract the work to be done and to send the gas utilities a bill for doing that work. In no instance in our discussions have the cities even exercised that right, so there is no reason to have a default clause in contracts.

We work very hard to ensure the satisfaction of the municipality that we serve and this definitely is not broken so please don't fix that. Paddy, I will turn it back to you.

MR. DAVIES: I am going to cover the remaining four issues remaining on the list and they are geodetic information, as-built drawings, no warranty on condition of the highways and abandoned pipe.

With respect to geodetic information, the gas companies have no objection to providing geodetic information where this is required and this is already in the existing municipal franchise agreement. To require this detail of the gas companies alone, is, in

our opinion, unnecessary, it is wasteful, it is costly and to require it of the gas companies on its own is discriminatory. In congested urban settings where the use of geodetics is of value, it is only of value if one of the underground structures were to provide the same information and the existing municipal franchise agreement already provides for this.

Turning now to as-built drawings, these are provided to municipalities and this is again a requirement under the existing municipal franchise agreement. Our concern here is the extended use or the requirement of geodetics where this is of little value for the costs involved. In fact, we estimate that the costs to the gas companies would be of the order of five to eight million dollars annually to provide geodetic information.

Turning now to no warranty on condition of the highway; AMO has proposed wording to be added to the municipal franchise agreement to the effect that municipal approval for works is not a representation as to the state of the highway or the presence or absence of a hazardous substance that is in or beneath the roadway or the suitability of the highway for gas distribution purposes.

The gas companies find it difficult to conceive of circumstances whereby approval of the road engineer would be a representation and warranty as to the absence of a hazardous substance or the suitability

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of a highway for gas distribution purposes. We don't believe this is an argument to amend the municipal franchise agreement as proposed. The gas companies do not want to lose the ability to rely on the knowledge of the municipalities in the diligent performance of its business.

We are concerned that a contractual commitment to use the highways at our own risk could disentitle us to site negligence as a legal course of action or defence in appropriate circumstances. We believe it is unreasonable to require the gas companies to contract out of the common law in matters that are dependent on the specific circumstances as is the case with damage claims and environmental claims.

Turning now to abandoned pipe, AMO have made the distinction in their presentation to the Board or their submission to the Board in December between abandoned pipe and decommissioned pipe. There is no difference between abandoned pipe and decommissioned pipe. It is one and the same.

And the current municipal franchise agreement states that, "In the event that we abandon or decommission pipe that is on bridges or viaducts that we will remove it at our cost." It also states that removal of the pipe from underground is at our discretion. It further says that municipalities can remove abandoned pipe in the ground as part of a construction project that may be taking place on the

roadway. It is efficient to do it then; it is sensible and it is inexpensive and that is the practice that exists today.

It is also inappropriate to forfeit ownership of abandoned or decommissioned pipe to the municipality. Investments are made by the gas companies for the benefit of gas rate payers. In the event that underground conduits are required and an abandoned or decommissioned gas pipe is available for that purpose, we believe that the gas rate payers and the municipality and the company should benefit from the innovative use of an abandoned gas pipe for this purpose. In fact, there is wording in the submission that was jointly made by AMO and the gas companies that contains words to that effect.

That concludes the ten issues, but I would now like to talk about consistency of application at the municipal franchise agreement.

We wish the Board to consider the merits and the benefits of a model franchise agreement that uniformity is applied across the province in large and small municipalities alike. Our costs to operate our business in complex urban areas is already higher than in rural Ontario. Taxation rates are higher in urban areas. Enbridge Consumers Gas, for example, paid the City of Ottawa over $1.2 million in pipeline taxes and property taxes last year. Ottawa-Carleton the total was over $2.8 million.

We believe that greater disparities through the uneven application of the municipal franchise agreement across Ontario could put pressure on the concept to have postage stamp rates throughout the province.

Turning now to legal considerations, there is a few decisions and legal references that we think might be useful to reference here for completeness of the record.

In EBO 125 the Board approved that a franchise agreement cannot be superseded by municipal bylaw. In the Dawn Township/Union Gas case established the primacy of the Ontario Energy Board over municipal bylaws that relate to the transmission, production, distribution and storage of natural gas. This case supports the Board's mandate to safeguard the general public interest as opposed to local interest.

In the renewal applications for Centra Four, which is really Orillia, Gravenhurst, Severn Township and Bracebridge, the Board concluded that it has the authority to prohibit the introduction of municipal fees.

The Board also found that the exchange of services between the province and municipalities and the legislative changes to allow user fees were not sufficient to justify changes to the model agreement. And lastly, section 220.1(4)(e) of the Municipal Act exempts natural gas transported through distribution

pipe from fees and charges as supported by the minister's letter which I referenced earlier.

Turning now to a few clarifications or misinterpretations from the presentations that were submitted to the Board in December. Most permits that are applied for by the gas companies are simply requests for permission to dig. In some cases it is no more than a fellow phone call. It is not permits in the sense of the Environmental Assessment Act. It is simply a log for the municipalities to make note of who in fact dug that hole. In some cases it is a submission of a plan for a construction project but that is the extreme case. Mostly it is just to ask for permission to dig.

Most distribution plant of the gas company is outside the travel portion of the roadway, and once it is stored it requires little or no attention from the municipalities for its existence. Where we cross roads, our installations, we make every effort to bore across the roads as my colleague Bob indicated earlier. We don't know of any installation or any instance where a municipality has exercised its right to restore and bill the gas company for a restoration that wasn't followed up by one of our companies.

MEUs do not pay any right-of-way costs or taxes on their distribution plant. In fact, the lack of equity between gas and electricity extends to the installation of our facilities. The gas companies pay for the costs of their installations in new

developments. The MEUs have their plants paid for them and contributed to them by the developers.

The idle pipe tax, which is referenced by the Association of Municipalities of Ontario, applies only to National Energy Board regulated pipelines, its decommissioning rules. The National Energy Board have regulations requiring the transmission companies to maintain their pipelines to provide cathartic protection and to continue to monitor those pipelines. It doesn't apply to the gas distribution companies of Ontario.

I would like to clarify also the Association of Municipalities of Ontario reference for highway fees. These are nominal fees; $150,000 for all three utilities. This charge is based on an historic anomaly and it is the only amount paid to the MTO. It is important to remember that the gas companies are assessed taxes on all of its pipelines, whether they are on private property, on road allowances or on provincial highways within the municipality.

In summary, we could have made three presentations today and we didn't do this. We felt that it was an efficient use of the Board's time to hear this once from the three utilities. We are unanimous and strong in our opposition to the AMO's proposals that are outstanding. We believe that the municipal franchise agreement was crafted carefully in 1987 and it has worked well.

We trust that we have impressed the Board with our presentation today on the importance and the potential implications of the changes proposed by AMO, and that the proposed fees, the new revenue streams, are not consistent with government policy to create a more level playing field between gas and the electric utilities.

The current municipal franchise agreement was put into place 13 years ago. We won't be back perhaps for another 13 years. A new one may last as long again. It is important, we believe, to urge you to balance the interests of the gas ratepayers in Ontario, the potential expansion market, the municipalities and fair competition with the MEUs when considering any new terms and conditions for the new franchise agreement.

That concludes our remarks, and we would be only too pleased to take questions from you.

Thank you.

MEMBER LAUGHREN: I don't know who wants to answer this question, Mr. Adie or Mr. Davies.

It has to do with section 220 of the legislation and that whole issue of the transportation of a natural resource. I read that several times, and I tried to read it very carefully, and I don't have a steel-trap legal mind, but when I looked at it I didn't know whether it applied to natural gas or not. I'm wondering if you could tell us how you come to the conclusion you have on that section.

MR. DAVIES: Well, we are not lawyers either,

and we are operating people from the gas companies. For that reason, we have along with us Mr. Leslie, who is working with us, and perhaps that question would be best answered by Mr. Leslie.

MR. LESLIE: I'm desperately trying to find the section, but I will do this from memory.

The exemption that has been referred to exempts from any kind of fee the transportation of, among other things, natural gas. I think the municipalities' position is that that would preclude throughput charges but doesn't preclude the kinds of fees that they are proposing. The section is subject to both interpretations.

In the end, I don't think the utilities' position turns on that. I think their position turns more on, one, the Board's already determined ability to continue to provide a prohibition against such fees, as has been done in the past, and also on the fact that the MEUs don't pay such fees and probably can't be required to pay such fees under section 41(8) of the Electricity Act, 1998.

--- Pause

MEMBER SIMON: Mr. Leslie, could you please help us out and tell us what section 41(8) says?

MR. LESLIE: 41(8)? That I can --

MEMBER SIMON: The one you just referred to in the Competition Act, the one --

MR. LESLIE: No. I'm sorry. This is in the

Electricity Act --

MEMBER SPOEL: I'm sorry; in the Electricity Act.

MR. LESLIE: -- 1998, and that I do have in front of me.

MR. McCANN: Can I just interrupt?

Do the Panel Members have a copy of it, because if not we should make an effort to make sure you have it?

THE PRESIDING MEMBER: We do. Thank you.

MR. McCANN: Okay.

MR. LESLIE: The clause I referred to says:

> "Subject to clause 7 (c), the transmitter or distributor..."

That is, of electricity:

> "...is not required to pay any compensation in order to exercise its powers under subsections (1), (2) and (3)..."

Subsections (1), (2) and (3) deal with the installation of electrical infrastructure. That section makes it reasonably clear that they can't be subject to fees in connection with those installations; and the ministerial letter that was referred to by Mr. Davies, I believe, is consistent with that interpretation.

THE PRESIDING MEMBER: Do we have a copy of that?

--- Pause

MR. DAVIES: I have a copy here of the letter.

THE PRESIDING MEMBER: Yes. Is that an extra copy? Thank you.

--- Pause

MEMBER SPOEL: I thought I heard you say that you wanted a right to automatic renewal of the franchise agreement. Was I correct in hearing that?

MR. ADIE: Yes, you did hear that.

MEMBER SPOEL: So you would like this agreement to not --

MR. ADIE: I'm sorry?

MEMBER SPOEL: You would like to have the right to automatic renewal without the ability of the municipality to refuse to renew --

MR. ADIE: Well, yes. We certainly operate under the belief and the historic precedent that they are renewed. I think the automatic renewal would just enforce that, that in fact we will come to an agreement. That would be our wish conversely. We are not -- but it is more important as a 20-year initial term.

MEMBER SPOEL: Right. I just want to think about the implications of that.

If you had an agreement -- let's say we come up with a new form of agreement that includes the right to automatic renewal, what happens if in 15 years from now there is another review of the model franchise agreement and it changes its terms? Does that mean you are entitled to continue operating under the one that is

approved now, or would municipalities have the right to use any new board?

I mean, aren't you saying that "We want whatever is on here"? If you have an automatic right of renewal, doesn't that have the implication that those are going to be the terms forever?

MR. DAVIES: I think in our submission we indicated that there was some merit to perpetual agreements. I think the important thing here is that a year or two prior to the expiration of the municipal franchise agreement we still invest in that community. We may invest a lot of money in that community. We don't use, as a consideration that would inhibit that investment, the fact that the franchise is about to come up for renewal. We presume that upon its expiration that we would be successful in renewing that franchise agreement. So we considered, as part of our operation, that upon expiration, unless there is some very good reason not to, that the renewal would be reasonably automatic.

MEMBER SPOEL: Right.

But what you are asking for, I think, when you ask for an automatic renewal in the agreement, is that the renewal was going to be on exactly the same terms and conditions as the agreement that you signed 20 years earlier, and that's what I'm trying to clarify. Is that what you intend by having an automatic right of renewal?

MR. DAVIES: No, no.

MR. ADIE: No. You would have to have the right to bring it up to date.

I go back to my experience, I guess, in industrial markets when we dealt with contracts with customers that had automatic renewal but the right to cancel when it came due in order to bring the terms and conditions of sale up to the current standard. But the right to be there we think should be embedded in perpetuity and the issues of the day-to-day operations should be reviewed on occasion, as we are reviewing them now.

MR. LESLIE: If I may?

This is dealt with on page 5 of the document we had this morning, and what was contemplated was that the model franchise would be subject to review periodically by the Board as a generic matter and updated, and that that would replace whatever had existed before, so that the evergreen principle would not preclude changes and revisions.

MEMBER SPOEL: Thank you.

I had another question about the cost implications -- I think it was you, Mr. Davies -- no, Mr. Adie, I think; anyway, it doesn't matter -- the question of the expansion to new communities and the cost implications for and the payback time for conversion. I just wondered if you have any estimate of what the cost implications of AMO's proposal to have permit and occupancy fees might be. We have heard how

much you pay in taxes already, but I don't have any feeling for what the costs might be.

MR. ADIE: We did a rough cut on it, because that would be, I think -- 43 and 14 and eight -- roughly -- we thought that would be somewhere between $20 and $30 a year, over all of the customers.

MR. DAVIES: So the total cost implication of the permit fees, as per AMO's proposal, would be an additional $43 million a year, annually, to the gas companies.

MEMBER SPOEL: Okay. On top of the $71 million you pay in taxes?

MR. DAVIES: On top of the 71. And the encroachment fees, as per the schedule submitted by AMO, was a further 14 million.

I think these are included in the table that we had at the end of our written presentation.

MEMBER SPOEL: Yes, they are. Thank you.

MEMBER SIMON: Mr. Adie, I think you were mentioning that the telecommunications companies, the cable companies, aren't subject to user fees.

Why is that? And is that likely to continue, in the future?

MR. ADIE: That was lifted out of the AMO submission and my understanding is that they are not subject -- they are protected, by legislation, against these fees.

MEMBER LAUGHREN: I just have a question on

the difference between the private landowner and the municipalities.

It's my understanding that the utilities pay the private landowner a once-only fee for access to the use of properties. Is that correct?

MR. DAVIES: No. All the plant that is

buried -- all the gas distribution plant which is buried in the ground is either on private property -- for example, service lines that go through the road allowance to the residences -- or, in some cases, very few cases, on easements. We pay taxes on all of that plant, whether it's on private properties, road allowances or, as I referenced earlier, even on provincial highways that exist in municipalities. All of the underground plant attracts taxation.

MEMBER LAUGHREN: But I was asking about: is there a fee paid to the private landowners when you put a line into their property?

MR. LESLIE: Perhaps I could deal with that, since I'm in the middle of a facilities case.

My understanding, in Union's case, at least -- I don't know what the practice is at Consumers, but in Union's case, at least, if it was a private landowner and it was an easement for a transmission line, there would be an amount paid for the easement, which would be a lump-sum payment, normally, as well as disturbance damages and crop loss damages, if it was agricultural property.

Union's practice is to pay the fee simple value of the acreage that's subject to the easement; and that is a lump-sump payment that's made to the owner.

Consumers, apparently, do the same thing.

MEMBER LAUGHREN: And that kind of fee is not paid to the municipalities; it's paid in the form of taxes. Is that correct?

MR. LESLIE: Yes, that's -- there is also tax on the private easement, but the municipality gets tax on any use of it.

Any property that's in the road allowances -- which is what we are talking about -- is also subject to municipal tax.

MEMBER LAUGHREN: Thank you.

MEMBER SPOEL: I'm sorry. I forgot to ask this before.

With respect to the representation and warranty as to the condition of the highway, I wondered if your concern was that the granting of the approval by a municipality did not imply any representation or warranty as to condition, or your concern was with the phrase at the end saying that the gas company was going to use the highway at its own risk, on an "as is" basis?

Is there a distinction, in your minds, between those two?

MR. DAVIES: The concern we have is that when construction takes place in a road allowance, we do as everyone else who digs on a road; that is, to try and

establish any obstacles or things that should be known about before we do any construction or excavation. We don't know of any circumstances whereby a municipality warrantees the suitability of the highway. We submit plans and they grant approval, if it's suitable, and we proceed with construction. Before we do that, we attempt to ascertain where every other underground obstacle will be and anything we may come across during the construction of our activities. What we hope to continue to do, of course, is to take advantage of any known situation that the municipality has in its knowledge about what obstacles would be underground.

MEMBER SPOEL: Well, if the municipality doesn't provide any warranty, or you don't expect them to, why would you have a problem with putting that in agreement, actually mentioning that in the agreement, that the mere granting of the approval doesn't provide such -- or shouldn't be taken to imply such representation or warranty?

MR. DAVIES: Again, I'm not a lawyer. I believe that we would not want to give up our rights under common law for any situation which could occur that may lead to a claim from a damage or environmental situation that could occur in that road allowance.

MR. LESLIE: I think the municipality's position is based on the premise that by telling the utilities they can dig in a given location there's a representation that it's okay to do so, not only since they have permission but that it's safe and other things. We don't take that position.

But, on the other hand, if the municipality has, or ought to have, positive knowledge that there's some impediment doing work there, either from a risk standpoint or environmental, whatever, they should have some obligation to disclose that -- and that's really what the common law would dictate.

If you start putting in specific language that says they are not representing or warranteeing, then you probably have to have a proviso that says that they are not -- that doesn't exclude liability for their own negligence or recklessness, and it all gets kind of complicated.

The common law basically protects both parties, as matters now stand.

I don't think the premise on which the AMO position is based is a realistic one. The utilities certainly don't take the position that by being told they can dig in a certain location that that involves an absolute guarantee that it's okay to do so, from a risk standpoint.

THE PRESIDING MEMBER: Mr. McCann, do you have any questions?

MR. McCANN: Yes; there are a couple of things I would like to follow up.

Just for the sake of clarity -- I think that we have already been over this, but just so we are very

clear on it, I want to go over the increased costs that the gas utilities, jointly, would incur, as a result of the AMO proposals, as they came to be, and I'm looking at the table which you have included on page 8 of your material, and I think there are three numbers that are relevant. One occurs in No. 1, "Payment of permit fees" -- and that amount is estimated to be $43 million. I take it that's based on using the $350 permit fee times the number of permits you estimate would be?

MR. DAVIES: That's correct.

MR. ADIE: Yes.

MR. McCANN: The second is under No. 2, "Compensation for use"; and there, it says that:

> "Rates would have to increase by a minimum of $14M per year to cover the $250/km charge proposed by AMO".

And, again, I take it that's length of pipeline multiplied by 250 kilometres?

And, then, under No. 5, "Geodetic Information", there's a statement that:

> "Rates would have to increase by approximately $8M per year to cover the geodetic data requirements proposed by AMO."

And I think you have explained that, at least in the previous submission that you made and possibly in here.

So that we have three amounts, 43, 14 and

eight, which, I think, adds up to $65 million -- which is what you see as the increased costs to the gas companies that would be occasioned by implementation of these changes to the municipal franchise agreement?

MR. DAVIES: That's correct.

MR. McCANN: Okay. Now, one issue that I did want to just dig into a little bit was the issue of property taxes.

If I understood rightly, you said that -- again, this is, I take it, a joint figure that the gas companies pay roughly $71 million annually in property taxes.

Just so we understand this, my understanding is that the Assessment Act, which is provincial legislation, lays out the basis for the assessment and I think there's a table which lays out the diameter of pipeline and the assessment per square foot, I guess it is, or per foot.

MR. ADIE: Lineal foot.

MR. McCANN: I'm sorry?

MR. ADIE: Lineal foot.

MR. McCANN: Lineal foot. Then the mill rate is applied by the municipality, as it would be to other property owners in the municipality and that's how the tax is determined.

MR. DAVIES: That's right.

MR. McCANN: Now, I hear you when you say that the gas companies get no direct benefit from this in the

sense that they don't make use of garbage pickup and libraries and other services of the municipality, but would you agree with me that there's at least some indirect benefit to the gas companies in the sense that along with other businesses which are located in the municipality, if people have services such as garbage pickup, police, libraries, parks, people will want to live in those communities, do business with the businesses that are in those communities, which includes the gas company, so that to the extent that municipal taxes make a municipality a good place to live, there is at least some indirect benefit to the gas companies in the payment of those taxes.

MR. DAVIES: I believe there is, but $71 million is what we think is more than our fair share.

MR. McCANN: Okay. That's fair. Could I just have your indulgence for one moment. One issue which I wanted to -- this may be more appropriately addressed to Mr. Leslie. I don't know that a lot turns on it in this particular matter.

I'm looking at the model franchise agreement, section 4, "Procedural and other matters". What it says -- I'm hoping people have copies -- is:

> "This agreement in respect of rights and obligations hereunto of the parties are hereby declared to be subject to the provisions of all regulating statutes and all municipal bylaws of general

> application." (As read)

It then goes on to except from that permit fee. That's the famous exception. I'm not so concerned about the permit fees at the moment. I'm concerned about the language "all municipal bylaws of general application".

I think I heard you say in your presentation, and I am looking at page 6, the Dawn versus Union Gas case, which is a well known case in Ontario:

" -- established the primacy of the Ontario Energy Board over municipal by-laws that relate to the transmission, production, distribution or storage of natural gas. The case stands for the proposition that the higher authority of the Board is reflective of the Board's mandate to safeguard the general public interest as opposed to local interests."

Is there an inconsistency between these two statements, the one saying that the gas company in doing business in the municipality is subject to the municipal bylaws and general application, except permit fees, the other saying that the authority of the Board takes precedence over municipal bylaws.

MR. LESLIE: I see your point, but I don't think so in the end. What the Dawn case stands for is bylaws or other municipal instruments which purport to regulate gas, not bylaws of general application, that

purport to regulate gas in the specific -- required some kind of planning approval for the location of gas facilities. They do not apply because the Board has authority over those matters.

The specific reference to bylaws imposing permit fees may in a sense be redundant if Dawn is applied to its fullest extent, but I'm not sure that it is. It's probably better there. I don't think there is necessarily an inconsistency.

MR. McCANN: Okay. That's fine. Those are all the questions I have, Madam Chair.

MEMBER SIMON: I have some questions regarding the $43 million and the $14 million. I was wondering what assumptions you made in calculating the $43 million. Why was the same $350 level per permit as MTO uses -- the results are nominal. I was wondering how many permits -- I was wondering what the assumptions were behind the calculation. If you could help me out, please.

MR. DAVIES: The highways in Ontario, mostly just road crossings, there are very few highways that we actually parallel the highway right of way, so there's very few of these. That's why it's such a nominal amount that goes to the MTO, whereas as the work that we do in the municipality, every single day we are excavating within municipalities to either install service lines to homes and residences, or we are doing maintenance work on our pipelines and all of the

activities that require us to excavate in the roadway or anywhere requires us to apply for a permit. As I mentioned earlier, this in some cases is simply an administrative thing to make sure that there is a record of who in fact of the utilities that could excavate in the road allowance in fact excavated in that particular location, this for reinstatement purposes later on.

What we did is we looked at all of the instances where we think that a permit or an application to do an excavation would -- be it Consumers Gas Company or Enbridge Consumers Gas and Union and NRG, and multiplied by that by $350 to come up with the number of $43 million.

MEMBER SIMON: Are you assuming that for any given pipeline in a municipality you would have to get more than on permit to dig the entire route?

MR. DAVIES: No. If you were to install a major project, that would be one permit. In fact, going to a new community, it would be one permit, but after you have installed the pipelines into that community, there are permits for every single service installation as a record of the location of where we would dig later to install a service line into each premises.

Every occasion where we excavate in a municipal road allowance is an application to that municipality for permission to dig.

MEMBER SIMON: Thank you.

THE PRESIDING MEMBER: I just have a few questions. I guess getting back to the same permit fees. What fees exactly do utilities pay right now to municipalities? Can you help me with that? For example, if you are building a district regulator station, do you pay a permit fee to build that facility?

MR. DAVIES: With respect to -- I don't believe it will apply to a regulator facility. The $71 million that we referenced is taxation, as was referenced by Board staff. This is the province's requirement with respect to taxation and it's on a per footage basis.

We pay $71 million. I believe it's 83 per cent of that that is on the distribution pipes. The balance is on buildings or facilities which would be regulator stations and other buildings.

THE PRESIDING MEMBER: No, I appreciate that you pay -- under the Assessment Act you pay certain assessed values based on the lineal footage and the table and the Assessment Act and the mill rate. I guess what I'm trying to find out is what additional fees do you pay right now for operating your gas utilities?

MR. DAVIES: We pay for obviously the cost of our construction. We pay for all of the reinstatement costs. In other words, when we have excavated, we fix up the road if it's in the travel portion of the road or the sidewalk. We pay for that. We receive a bill from the municipalities who want to do that permanent

reinstatement themselves and bill us for it. We pay for that. I don't know of any other cost that we pay. We do not pay permit fees, we do not pay occupation fees. We pay taxes and we pay for the costs in total of the installation of our pipelines and for the maintenance work that we do, plus the reinstatement of the roads in those cases.

THE PRESIDING MEMBER: All right.

If you were doing building, then you don't pay to get a building permit then from the municipality.

MR. LESLIE: I think we do.

THE PRESIDING MEMBER: You do?

MR. LESLIE: Yes. I think any buildings that are erected are subject to building permits and whatever fees, associated fees.

THE PRESIDING MEMBER: All right. Would that include district regulator stations and that type of thing that are not really a building per se, but --

MR. LESLIE: I don't think we know the answer to that, I'm afraid. We can supply it.

THE PRESIDING MEMBER: Could you, please. Thank you. Is it your position that -- well, not your position -- you shouldn't pay any fees at all. For example, if the municipality incurs additional costs and expense just for providing services to a gas utility, are you saying that under no circumstances should you have to pay for those services?

MR. DAVIES: Essentially yes, we are. We are

saying that the amount that we pay every municipality in the form of taxes more than covers the cost that they incur on behalf of the gas company dealing with the administration of our business.

THE PRESIDING MEMBER: Would it be possible for the utilities and the municipalities to estimate the additional cost to a municipality to provide services on some sort of basis?

MR. DAVIES: Well, that might be a question to ask of the municipalities. But as much as we -- with respect to the applications, the work associated with that is done by the utilities and it is simply in most cases an administrative just, "yes, it is okay to dig," and they give us approval and it is logged and so on. Not much work. It is not an environmental assessment application or a permit that requires a lot of consideration. Most of the gas company's work is on standard line locations, does not require a great deal of consideration on the part of the municipalities to consider and to approve.

THE PRESIDING MEMBER: Thank you.

MR. ADIE: And that is work -- I am sorry, I will just add too if you don't mind -- that is work that they also do for the municipal electrics at no cost which they own. So it is this level playing field that is really in jeopardy as we are exposed to additional costs that aren't exposed to our competitors. It is a real issue with us.

THE PRESIDING MEMBER: I appreciate the fact that the level playing field is an important issue, especially in this area of transition.

Can you help me with the issue of insurance? I appreciate that there are issues about the unreasonable administrative onus of adding on each municipality as a named insured and I guess I am not an expert at insurance law either. So have you done an estimate -- you also said that there was an issue of additional cost of naming municipalities on as co-insured. Is that an additional end cost that your insurer would require you to pay? And if so, do you have an estimate of what that would cost?

MR. ADIE: No, I don't have an estimate. We were advised that that was not something you would do. If you did, then it would have to be like taking out additional policy on behalf of the city if it is additional named insured as opposed to additional insured. My understanding from our insurance people are additional insured is already covered within the franchise agreement. It is the named that is the issue.

THE PRESIDING MEMBER: Right. And do you know how much naming would -- an estimate of how much that would cost?

MR. LESLIE: I think the position the insurance companies took was that they wouldn't do it. That is to say they wouldn't create a policy that showed all the municipalities as the named insured. Because

that would in essence be taking out insurance for each of the municipalities and a premium -- I don't know what the effect -- my experience is insurance companies will do anything for money. So there probably is an answer to your question. But the immediate answer was no, we wouldn't that. We could go back and get some indication of what they charge if we absolutely had to have it done.

THE PRESIDING MEMBER: I would appreciate it because for me it makes a difference as to whether it would be impossible to get this insurance or whether it wouldn't be impossible and what the additional costs would be --

MR. LESLIE: Yes.

THE PRESIDING MEMBER: -- so that we can do a cost benefit analysis. Thank you.

With respect to the term, if in fact the Board agreed with an evergreen-type of renewal provision on the same terms and conditions, would the utilities be amenable to shorter terms of agreement?

In other words, if in fact your concern is that you want some sort of protection for your investment over a long period of time and we agreed that in fact there would be a type of evergreen renewal on your franchise agreement, is there any reason why you would be prejudiced by granting a shorter time so that if there were changes as they went along that they municipalities would have an opportunity to catch up

more quickly than they would with a longer term franchise agreement.

MR. ADIE: That seems reasonable. One issue that we have then is because of the number of franchises that we have, albeit they are shrinking but they are not shrinking that much at this point in time, is the administrative change required of each franchise. If you are suggesting, you know, we had a franchise in perpetuity and we had some of the operating components outside of the agreement, then we suspect that would be a reasonable expectation. I'm not sure. We haven't really thought out the time, like every seven years or every eight years. We haven't thought that through.

THE PRESIDING MEMBER: The municipalities, of course, are saying that because of this legislative change and because of this downloading that in fact that they need a more regular update, I guess, for lack of better words, to the franchise agreements than they would get every 15 to 20 years.

Can you help me with this geodetic information and these as-built drawings? It is the position of the utilities that they won't give it to the municipalities, that they shouldn't have to give it to the municipalities. In other words, if you have got this information, what is the additional cost to the utility of providing it to the municipality and what would be the downside of doing that?

MR. DAVIES: We don't have this information

for all of our facilities. The existing franchise agreement that is in place today requires it for complex urban intersections and we provide it in those situations and so do other utilities in those complex urban situations so that the record is complete. And where that is required we provide that information.

Our concern is that that would be extended to all of our facilities and that is estimate that we have given you as far as the costs are concerned. We believe that it is just not necessary to have this information for all of our facilities in a municipality. It is of little value if it is just our facilities and not the other utilities and the costs therefore are not just warranted.

So it already allows for the municipality to have this where there is a reason for it and that is provided by us. We don't have information on geodetics for the balance of our facilities. We only do it when it is required by the municipality for such complex intersections.

THE PRESIDING MEMBER: Okay. So you are saying you only -- you don't have this additional information unless the municipality requires it?

MR. DAVIES: That is correct.

THE PRESIDING MEMBER: And it is not necessary unless the municipality requires it and provisions of the franchise agreement are sufficient to protect the municipalities for the complex urban areas.

MR. DAVIES: That is right.

THE PRESIDING MEMBER: Can you help me here? Is there a large incremental cost of supplying this information if, in fact, you did have it for whatever reason and if, in fact, the municipality requested it?

MR. DAVIES: If we had it, it would be not much more of an incremental cost to provide it. We just don't have it and we propose we do not spend the money necessary to have geodetic information on our plant.

Geodetic information is a referencing system that provides both a vertical and a horizontal axis, you know, to tie to a framework. It is not a -- it is not a geographical -- a geographic system. That is just a mapping system. Geodetics is a tying in to reference points absolutely where each point of your plant is and we simply don't have that. We only do that when it is required of us by the municipality for complex intersections. What we have we are prepared to share.

MEMBER LAUGHREN: What I don't understand is why would a municipality ask you for it if they didn't need it if it wasn't important for them to have it?

MR. DAVIES: Well, that may be a question to ask of the municipality too.

MEMBER LAUGHREN: Okay. But you are fearful that they will obviously. Because you say that if they need it you will provide it if you have it. But that if you don't, then you don't want to get locked into that kind of arrangement. But I can't -- you can't answer

it, I guess, as to why they would even ask you for it if it wasn't important to have it.

MR. DAVIES: Indeed there are some municipalities who do not have any information on geodetics for any of the plant. And to require it of us as part of the agreement we feel is, as we said, unnecessary and costly and wasteful. But where it is required for purposes of managing complex urban intersections, we and the other utilities provide it.

THE PRESIDING MEMBER: Can I just ask one last question about abandoned pipe?

It is your position that -- now, I understand that if it is on bridges or under passes or whatever, you will remove the pipe as abandoned. Right?

MR. DAVIES: Right. That is correct.

THE PRESIDING MEMBER: Assuming you have

abandoned it. If it is in the ground, presumably you can remove it if you want to, the municipality can remove if they want to, the landowner can remove it if they want to if it has been abandoned?

MR. DAVIES: In practice, what happens is this. When we decommission or abandon -- same thing -- a gas pipeline because it is no longer required, maybe through an alteration or because it has been replaced, we are required to cut it up into sections that make it non-continuous. This is in accordance with the codes in Ontario. And we leave it in place in the road allowances, because to remove it could be very costly

and be intrusive and cause more trouble and inconvenience than the original installation maybe. So it is left there.

In the event that there is some construction work by another utility or the municipality, and this abandoned or decommissioned pipe is exposed and in the way, it is removed as part of the construction project, at which time it is inexpensive and efficient to do that. And the current agreement doesn't require us to pay for that. That's just part of the job of doing the construction project that is at hand at the time.

THE PRESIDING MEMBER: Right.

But your position is, for ratemaking purposes, you have written off that pipe that is abandoned. Is that --

MR. DAVIES: Well, no, not exactly.

THE PRESIDING MEMBER: Okay.

MR. DAVIES: There is still some residual value that could be -- in fact, in the event that there was a use for this, and we have talked to representatives of AMO about this -- in the event that it provided a useful conduit for purposes of fibre optic cable or other cables in the future, then the convenience for the municipality is that the road doesn't get excavated. As long as we can connect the disconnections that we have put in the ground because of the codes, we reconnect the pipe and make it continuous again, it could be used for innovative purposes like this. And we have agreed, and the submission indicates, that we have made some agreement with AMO that would equitably share the revenues of that use.

THE PRESIDING MEMBER: Okay.

I understand that even though you have abandoned it for gas facility purposes there may be some value and you just don't want to give up the rights in that additional value potentially down the road.

MR. DAVIES: That's right.

THE PRESIDING MEMBER: Do you know if, for ratemaking purposes, abandoned pipes have been totally written off?

MR. LESLIE: If it's judged to be not used or useful for the purposes of the utility it is not in rate base. The difficulty is usually around quantifying how much comes out.

THE PRESIDING MEMBER: All right. I appreciate that. Thank you.

Thank you very much for your presentation. We appreciate it.

Now I think would be a good time to take a short break. We will reconvene at five after 11:00.

I believe the next people we are going to hear from are the Ottawa-Carleton people.

MR. McARTHUR: That's right, Madam Chair. Thank you.

THE PRESIDING MEMBER: Thank you.

--- Upon recessing at 1050

--- Upon resuming at 1110

THE PRESIDING MEMBER: Mr. McArthur.

MR. McARTHUR: Thank you, Madam Chair.

With your indulgence, we would like to do a joint presentation, myself and Mr. Lorne Ross, who is an engineer.

Also, with your indulgence, we would like to do it by way of PowerPoint, if we might.

PRESENTATION

MR. McARTHUR: As I have said, my name is Ernest McArthur, counsel for the Region of Ottawa-Carleton. With me is Lorne Ross, an engineer and

Manager of Surface Projects at Ottawa-Carleton.

A little diagram of Ottawa-Carleton, just in case some of you are not sure where it is. I think most of you are.

A little bit of information. Twelve municipalities in the region -- very soon to become one municipality, as you are all aware. Approximately a million people in the total, the whole Ottawa-Carleton area; and there is some kilometres, mileage of the roads, regional roads that we are talking about today.

Madam Chair, the municipalities intend to present, in the fashion shown before you -- and, by the way, before I go any further, I did give a copy of this presentation to you. Each of you have a copy of it in front of you, and staff have a copy of it, and there's a limited number gone out to the gas companies.

As I have said, the Region of Ottawa-Carleton will go first and make some preliminary observations; and, secondly, address the Energy Board issues Nos. 1 and 2, which we have roughly labelled compensation.

Following Ottawa-Carleton, will be a submission on behalf of the City of Toronto by Mr. Andrew Roman, counsel, and he will address legal issues, jurisdiction, legislation.

Thirdly, the Association of Municipalities of Ontario, AMO, a submission will be made by Mr. Andrew Wright covering the balance of the issues, the Energy Board issues 3 to 10.

I suggest that the questions may be a little bit tricky and maybe they should be left until the completion of all three submissions on behalf of the municipalities, but of course, Madam Chair, that is up to you and your discretion.

Before turning to my next slide, I would like to make an opening comment about Ottawa-Carleton's position.

Basically, Madam Chair, the position, our position, is that there is very clear legislative authority both for us to manage our roads and, secondly, to recover our costs and charge a fee. That legislation is clear, with respect.

Secondly, this is a road management hearing, Madam Chair. I have reviewed the 10 issues raised by the Energy Board presented to us for discussion.

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Clearly, they are road management issues.

With respect to my colleagues and friends from the gas companies, the purpose of this hearing is not advanced, with respect, by the two tired old arguments: taxes and rates.

I was involved in negotiations with the gas companies. This was the subject of their discussion and their negotiations: rates and taxes. It's also clear from their submissions that this is what they perceive this hearing to be: rates and taxes. It's also clear from the submissions we have heard this morning that what they are concerned about is rates and taxes.

With the greatest respect, Madam Chair, to the Board and to the gas companies, these issues are irrelevant. Obviously, it is the Board's mandate to consider rates. Obviously, the gas companies are concerned about rates. But how does that advance the issue of road management, proper road management?

Of course rates will be affected, that goes without saying, but the issue before us, Madam Chair, is road management.

The other issue is taxes. Well, of course they pay taxes. This is a provincial issue. This is an Assessment Act issue. This is not an Energy Board issue. This is not a municipal issue. The fact that the gas companies pay taxes, so do the hot dog vendors -- they pay taxes. I have never heard a hot dog vendor coming to a municipality and say, "Whoa. We pay

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taxes. Why are you charging us a fee?" It's laughable.

Moving on to my next slide, Madam Chair, why are we here now reviewing the franchise agreement? Why is it important now?

Well, I understand the basis for it, that several of them are coming up for renewal and the Board and the gas companies would like to have them standardized and settled so that we are not having hundreds of them floating around out there, but it is a tired, old agreement. It has run its course.

We think, the municipalities think, it is time to review them now for the reasons listed in front of you: changing uses of the road. The road, in the last generation, has become a mass of wires and pipes and ducts, and there are many other uses which I will elaborate on in a moment.

Secondly, deregulation -- the buzz word is "privatization" -- both at the federal level and the provincial level. They want competition. There are people everywhere, companies everywhere, utilities everywhere clamouring for the use of our roads.

Times have changed and at times changed drastically. That has resulted in the third bullet before you in rights of way management, the need for us to sit down as municipalities and consider how best to manage these roads and rights of way.

In the fourth bullet, the fiscal realities have hit us. There is no longer the funding that we

used to have. The mass intrusion into our rights of way by utility companies, in general, is made obvious to the fiscal realities of having to keep these roads in repair, maintain them, resurface them. Together with that, we are faced with the idea that in fact we, as municipalities and taxpayers, are subsidizing multimillion dollar companies. I'm not just talking about the gas companies, for all utilities, telecommunication companies -- we are subsidizing them.

Why should that be? Madam Chair, with respect, this has got to stop.

In the next bullet, we have become more aware of our costs. We start to sit down and think about what it's actually costing us to have the gas companies use our roads. Urbanization is a factor. Environmental concerns -- I won't elaborate; they are all obvious. Legislative changes. We have always had Section 111 of the Municipal Act, which says assistance is prohibited. A municipality is prohibited from assisting private companies. But, now, that's being reinforced by Section 320.1 of the Municipal Act, which Mr. Roman will address, which clearly, with respect, allows us to charge for our services -- it says that -- and it also allows us to charge for use of our lands -- it says that. We have clear legislative authority now, with respect, Madam Chair.

That's another reason why this old agreement needs to be reviewed.

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Finally, with the FCM's five principles. I won't elaborate on those; they have been outlined in Ottawa-Carleton's submission, on page 25.

Basically, what they say is that a municipality must exercise its legislative authority to manage its roads.

Secondly, and importantly, is that this management and right to manage the roads, and the use of the roads by utilities, should not cost the municipality and the taxpayer. This is what we are talking about.

In the next slide, an example of an intersection in Ottawa-Carleton: Kent Street and Slater Street; a mass of intrusion beneath the surface of the roadway -- especially at these intersections.

This is an old photo. Back in 1917, I believe, in New York City. Maybe things have changed now. It's a very clear depiction of what the municipalities are faced with, and what they have been faced with for 100 years: extreme use of its roads and a need to manage it efficiently and properly.

Moving on to the next slide. Just listing a few of the multiple uses for their road allowances, Madam Chair: Pedestrians; vehicles; shade trees; signs -- a mass of signs and signals; street lights; electric wires; communication systems; sanitary sewers, storm sewers; water mains; gas lines; pipelines; street furniture; and many others -- and under the "many others", I could name: the homeless; squeegee kids;

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~ McARTHUR/ROSS, Presentation

panhandlers; sporting events; parades -- it goes on and on.

This, Madam Chair, is a massive undertaking for municipalities, in terms of management. It's easy to say, well, maybe the legislation didn't give us the authority; maybe it forgot about us; maybe the Telecommunications Act, the Municipal Act, the Energy Board Act, forgot about us. But I don't think so. There's clear wording in that legislation -- especially the Municipal Act and the Telecommunications Act -- with respect to consent. The municipality must be allowed to exercise that consent and properly manage its roads.

I didn't mean to go beyond this Board's jurisdiction in referring constantly to the telecommunications companies, but they are relevant, they do use our roads and, as far as we are concerned, their Act is relevant, also.

Moving on to the next slide, I will elaborate a little on what I have just said.

What is management? It's a balancing of interests. I just outlined some of the interests. There's many of them. We have to balance those interests. They are essential in competing demands we have to manage. We have to come up with by-laws, practices, policies; take care of matters of health, safety, welfare, economics. This is a finite resource, Madam Chair. We are running out of room in a lot of areas, especially urban areas. It's time we started to

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manage this finite resource and manage it responsibly, on behalf of our taxpayers. What we have to consider is a benefit to all users of that road allowance.

A little example of what happens if we don't manage a road allowance properly.

A statement I have thrown in here, from the U.S. Federal Communications Commission's Notice of

Inquiry:

"The comments filed reveal the tensions that naturally arise with surging demand for a scarce and valuable resource which is necessarily devoted to multiple and sometimes conflicting uses. It's no surprise --"

the writer says:

"-- that private enterprises chafe under rules that protect the public, health, safety and welfare and fiscal interests of the taxpaying public."

Ottawa-Carleton's submission -- which you have had for a while, now, Madam Chair -- is based on a few basic premises. Number one, road management -- and this is the "Road Management Matter", the first bullet before you -- and that's reflected in the 10 issues that the Energy Board has requested that we address.

Moving down to the fourth bullet, "Gas Rate vs Road Management", I have already addressed the matter of gas rates. Sure, they are going to affect on gas rates.

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But the legislation doesn't say anything about that when it talks about our right to manage our roads and consent to the use of our roads. There's no legislation which says the municipal taxpayer -- that's you, Madam Chair, and me -- should finance these companies. This is a cost of doing business.

In the second bullet, Madam Chair, we have the authority to manage our roads. It's clear in the Municipal Act. We have the obligation to manage our roads efficiently and effectively.

"Relevance of Precedent". I suggested that the franchise agreement is out of date; it's seen better days. Precedent should be created, with respect, not relied on, in this particular case. There's been too many changes. There's been too many technological changes, changes to the legislation, changes in every aspect of road use, to be turning back to precedent over the last 100 years.

"Compensation" -- the next bullet. Sure.

What are the utilities saying? And I don't say just the gas companies, but what are the utilities saying? This is a money grab.

Well, it's not, Madam Chair. It's a realistic look at what the use of our roads is costing the taxpayers and what we should be recovering, because of those costs.

The gas companies are concerned about the bottom line and what it costs them to operate. Doesn't

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it make sense that the municipalities should take a similar approach?

The next bullet, "Utilities - Taxation Differences". Sure, there's unequal playing fields. But as I suggested, in Ottawa-Carleton's submission, this is not the place to correct those taxation differences and inequities. That's the plain fact.

Second-last bullet, "All Road Users". Ottawa-Carleton has come up with a policy -- as has Toronto and other municipalities, I'm sure -- of fair and equal treatment. This is based on the five FCM principles and Ottawa-Carleton's belief that all users of the road, utilities, should be treated fair and equally.

Finally, on this page, this is more than a gas issue -- and I have already alerted -- well, mentioned that. There's a hearing before the CRTC on identical issues, with respect to the telecommunications issues. I'm not sure how the Board might choose to handle that fact, that it's more than a gas issue, but they might handle it by telling the municipalities and the gas companies to go away and negotiate fair and reasonable terms and conditions of access to our roads and only to return if any of those terms and conditions are obviously prohibitive, obviously totally unreasonable; then the Board might be in a position to consider that particular term of condition of use of the road.

Madam Chair, I have said and made my

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preliminary comments. I'm going to move into OEB issues No. 1 and 2, which we have labelled "Compensation" -- oops! I jumped over myself here a bit. I apologize.

I'm going to back up and say what the preferred position of the municipalities is; and that is, that the municipalities have the authority to manage their roads and this be recognized. Every municipality is different, every thing is going to be different, every cost is going to be different. Let the municipalities manage their roads. Let them pass a by-law. There are protections in-built in that process. The gas companies and all utilities are free to challenge those by-laws; it's an open process. It's done as a public process; they can challenge them. And that's the place for the gas companies to look into what the municipality is doing or how it's managing its roads, with respect to terms and conditions.

Now, that's the preferred position, Madam Chair, of the municipalities: let us do our thing.

Having said that, we have been asked to speak Issues 1 and 2, which is compensation; that is, costs, and use and occupancy licence fee -- and as you can see on the slide, we have tried to make clear that they are entirely separate issues. The first one, cost recovery, relates to direct and indirect costs which the municipality incurred. And, secondly, a use and occupancy licence fee; that is, for the use of our roads.

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While we would like to be able to decide for ourselves what those fees should be and what the costs are, and we will do it, we have here, in the next few minutes, going to present to you and indicate to you what, in fact, some of those costs are.

So, here, I would like to hand it over to Mr. Lorne Ross, if I might.

Thank you.

MR. ROSS: Thank you, Mr. McArthur.

The use of municipal rights of way by utility companies imposes many significant costs on municipalities. As stewards of the public rights of way and to minimize taxpayers' subsidization of utility operations, it is a well established practice throughout North America for municipalities to levy permits and other fees to recover the direct and indirect costs of the public rights of way management efforts resulting from utility use.

Ottawa-Carleton submits that it is inappropriate for private profit seeking companies to be subsidized by municipal taxpayers and that it is only fair and reasonable that the users of the public rights of way be responsible for all costs arising from that use.

The economic transfer from a taxpayer's pocket to a utility shareholder's pocket that subsidization implies is not only exceedingly unfair, but has a very serious societal and global competitive impact since the

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underpricing of scarce invaluable resources promotes inefficient consumption and presents a significant disincentive to the development of unsubsidized competing technologies.

As mentioned earlier, Ottawa-Carleton envisions two types of compensation. Firstly, fees to recover the direct and indirect costs of the use of public rights of way by the gas company. These costs fall into five categories: general administrative costs, pavement degradation costs, relocation and adjustment costs, direct quantifiable costs and what we call work-around in other costs that are unquantifiable.

The second type of compensation proposed is a licence fee in consideration of the market value of the municipal property occupied by the gas company. I will now touch on each one of these.

Firstly, general administration costs. General administration costs arising from the use of public rights of way by utilities relate to the following: permit issuance, record keeping, field inspection, coordination and technical review of plans, legal advice and general overhead.

Last year an Ontario Good Roads Association task force report on utilities using municipal rights of way proposed that municipalities recover general administrative costs by means of a permit fee and that this fee be determined by dividing the total general administrative costs incurred by a municipality by the 65

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number of permits processed annually.

With one refinement, this is the method Ottawa-Carleton would propose for the recovery of general administrative costs. The refinement is simply to have a two level minor-major permit fee that recognizes the different level of municipal costs associated with large utility projects versus relatively minor works.

Ottawa-Carleton's current permit fee is $107.50. However, the region is just completing a major review of all utility public rights of way management issues. As part of this review, a thorough costing exercise was carried out. The region's general administrative cost for utility rights of way management are, as shown here, a basic permit fee -- a basic cost of $395 which applies to all projects and an additional cost for major projects of $165. Thus a permit fee of $560 would recover all of the general administrative costs associated with a major utility project.

However, each municipality's general administrative costs differ for many valid reasons and not all municipalities may wish to undertake a costing exercise to determine an appropriate permit fee. In view of this, Ottawa-Carleton suggests that the Board may wish to recommend a general permit fee that would apply to all municipalities, except those municipalities that adopt a specific fee schedule by bylaw.

Ottawa-Carleton proposes that such a 66

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recommended municipal consent permit fee could be as outlined in O.D.R.A.'s August 1999 task force report and as shown here, $100 for a village or township, $200 for a city or town and $300 for a county or region.

Pavement degradation is another cost.

Utilities using municipal rights of way often need to trench the road pavement structure in order to install or maintain their plant. A literature review conducted by the National Research Council of Canada last year uncovered studies showing that up to 60 per cent of the pavement life can be lost due to the effects of utility trenching.

Pavement damage caused by utility trenching results in municipalities having to resurface roadways at more frequent intervals at great expense to the municipal taxpayer. The financing of this work can result in funds being diverted from other needed parts of the municipal budget or limited researching budgets can mean that there are insufficient funds to undertake all the needed work with the result that pavement conditions can rapidly deteriorate to the point where reconstruction is required at ten times the cost of resurfacing.

It is estimated that lost pavement life through utility trenching costs the taxpayers of Ottawa-Carleton alone at least $1 million annually. In addition to this, deteriorated pavements result in communities having to endure increased noise, vibration,

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vehicle repair costs and a decrease in the safety of travel.

Increased user costs due to poor pavement can far exceed the cost of pavement repairs, so the impact of utility activities on public rights of way can affect the entire economic and social wellbeing of a community.

As shown here, typical road pavement structures are made up of layers of gravel, sub-base and base and surfacing, generally asphalt or concrete. Pavements are designed to support the specific traffic loadings, subgrade, environmental conditions of the site. They are engineered structures just as are the pipes, wires and other plant of utility companies.

This slide here shows the structural damage, the shortened pavement life of the gas utility trench in Ottawa-Carleton. Like the human body, the pavement structure exhibits a permanent scar after being cut deeply and what is most significant, the pavement structure within and in the immediate vicinity of the starred area exhibits a much shorter life than the undisturbed pavement.

There are several ways that utility trenching reduces road life, but perhaps the most insidious is the introduction of new joints that allow the entry of water into the very hard pavement structure. The presence of water weakens the ability of a road to sustain heavy loads and makes the pavement very susceptible to damage, but worse. When water freezes, it expands and exerts

the pushing force of 120,000 pounds per square inch. This is an incredible force that over time reduces even mountains to sand and exerts this force time and again as the water alternately freezes and thaws, as it does many times each winter season in our climate. This gives a new meaning to a utility company's right to enter and break up a municipal road.

Ottawa-Carleton has just completed its own state-of-the-art pavement degradation study. This study shows an average minimum reduced pavement life of 32 per cent for trenched pavement areas in Ottawa-Carleton's urban road systems.

For cost recovery purposes, Ottawa-Carleton's study quantified the 32 per cent loss in pavement life in terms of dollars per square metre of road cut. As shown here, this pavement degradation cost ranges from a high of $24 per square metre for pavements that have just been resurfaced or have been resurfaced for less than two years at the time of cutting the road to $4 per square metre for pavements that have been resurfaced for more than ten years.

It must be emphasized that the pavement degradation costs shown here are very much minimum values. Any time there was any doubt in this study about any effect, the analyses were presented in favour of utilities. The cost of pavement degradation can be most effectively recovered in conjunction with the general administrative permit fee discussed earlier. A 69

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simple look-up table such as shown here can be used for administrative ease.

A third cost item relates to costs for relocating and adjusting the gas company's equipment occupying the municipal rights of way. While the Board's issues do not refer to relocation and adjustment costs specifically, Ottawa-Carleton requests that this matter be reviewed by the Board as a cost compensation issue.

Regional Council by its adoption of the Federation of Canadian Municipalities principle No. 3 takes the position that where relocation or adjustment is required for bona fide municipal purposes, the utility will be 100 per cent responsible for the costs.

The 1987 model agreement accommodates this position when a gas plant is located on a bridge, viaduct or structure. However, at other locations, except for any upgrade costs which are to be borne by the gas company, relocation costs are paid 35 per cent by the municipality and 65 per cent by the gas company.

Why should not the gas company pay 100 per cent of relocation costs on the municipal rights of way?

With reference to our previous comments concerning subsidization, why should the municipal taxpayer incur expenses because of the gas company's use of the municipal rights-of-way.

However, should the Board find that allocating 100 per cent of relocation costs to the gas company not 70

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to be acceptable, Ottawa-Carleton proposes in the alternative that a five year sliding scale of cost allocation be implemented as shown here. This involves a decrease from the gas company's current proportion of the cost for the first two years, no change from the present allocation for the next three years and an increase after that.

A sliding scale for the allocation of relocation cost responsibility would result in a fair sharing of risks. In the early years the municipality would take the greatest risk. Should a municipality request the gas company to relocate soon after providing municipal consent, the municipality would pay a higher percentage of the relocation costs. Likewise, after a reasonable period of time, say five years, the gas company would assume the full cost of relocation.

What we call work around and other unquantifiable costs is a fourth cost item. This slide shows two shallow utility installations obstructing the progress of a contractor installing a water main in Ottawa-Carleton. One of these is the utility duct, I think one is telecom and the other is a double hydro duct.

Here, Ottawa-Carleton workers called out to repair a water main discovered a natural gas line installed directly on top of the water pipe. That would be the gas line and there is the water pipe. Both of these situations occur routinely on municipal

reconstruction and maintenance purposes. These encounters add significantly to the time and expense of municipal works.

Work around costs are the additional costs incurred by the municipality due to the physical presence of utilities in the municipal rights-of-way. These include costs for increased planning and coordination. These include costs for construction and maintenance delays associated with locating and exposing, working around, shoring, tunnelling and repair costs when unmarked lines are damaged.

Other costs incurred by municipalities include those associated with public transit delays, traffic management, administering franchise agreements and responding to general queries with respect to utility activities on the municipal rights-of-way.

These costs have not been quantified by most municipalities because of the difficulty in doing so, but nonetheless, these costs are very real and substantial. We have been advised by an expert that Ottawa-Carleton retained, having more than 30 years experience in the contracting business, that these extra costs imposed by municipalities due to the presence of utility plant in the municipal rights-of-way can be as high 20 per cent if our tendered construction costs.

The derivation of a recovery mechanism for work around and other difficult to quantify direct and indirect costs is a challenge. However, Ottawa-Carleton

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requests that the Board recognized firstly that municipalities do incur costs of this nature, and secondly, that the Board direct that the gas utility and the municipality negotiate and agree on an appropriate amount to be paid to the municipality by the gas company as compensation for these costs.

The fifth and final cost item is for all other quantifiable costs. There are also other quantifiable costs incurred by municipalities due to the use of municipal rights-of-way by utility companies such as payment restoration, damage to municipal infrastructure or other works carried out under the terms of the franchise agreement and these should be built for the gas utility at cost.

We have just discussed costs. The second category of compensation is a road use license fee.

Municipal rights-of-way are scarce, invaluable public assessments. Municipal rights-of-way are valuable to both the municipality and the gas company. To the municipality as a finite and diminishing resource; to the gas company as the only viable location in many cases for its plant. The slides we saw earlier of the underground utility plant in New York City 83 years ago and Ottawa today show just how limited is the space in our municipal rights-of-way.

A road use license fee can be derived from the value of the lands occupied by the gas company. While some may profess difficulty in attributing land value in

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the ordinary sense to lands occupied by a road, there are many indicators of its value. Vendors pay to use it as do restaurant owners and advertisers, untravelled portions may be leased, encroachments must be paid for if utility companies need it, when closed it is sold at market value.

In recognition of the role of municipalities as owners and stewards of public property, some municipal organization such as the Federation of Canadian Municipalities have adopted several important municipal rights-of-way management principles. The fifth right-of-way management principle adopted by the Federation of Canadian Municipalities reads as follows:

> "Recognizing that rights-of-way have value, municipal governments must receive full compensation for the occupancy and use of municipal rights-of-way by other parties." (as read)

The National Association of Telecommunication Officers and Advisers, an organization of local government officials in the United States, has also adopted several rights-of-way management principles and one especially relevant example is as follows:

> "Local government has a duty under general legal principles governing property rights not to give away public property for private use without just compensation." (as read)

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They go on to say:

> "Limiting compensation to the recovery of costs would also result in giving away public land for private use and gain." (as read)

Compensation for municipal rights-of-way is not unique. The private use for rights-of-way owned by municipalities is comparable to the private use of property owned by other governmental units for which compensation is expected and not questioned. In order for finite and scarce public resources to be used for commercial purposes, governmental units as standard practice require reasonable compensation from the commercial users of this resource.

For example, the federal government recognizing the limited availability of radio spectrum utilizes an auction process, declining payments considerably in its excess of its cost for administration. Due recognition is given to the value of the property right that is being auctioned. In addition, governments at the municipal, provincial and federal level all expect and receive market value payments for the sale and lease of real property.

There are many examples in models of rights-of-way use license fees in the literature. There are at least six different models for determining a value for rights-of-way that can be used to develop a reasonable fee. The region favours the method which can

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be referred to as the easement model and which attributes value by comparison with abutting or neighbouring vacant land.

Adjustments of that value can be made as in any comparative land valuation for relative factors. Canadian data indicates a reasonable compensation range in the order of two dollars to twenty dollars per linear metre of rights-of-way use, with the high end being appropriate for the core area of large urban centres and the lower end being in rural locations.

In view of this, Ottawa-Carleton requests that the Board recognize that municipalities as owners and stewards of the public rights-of-way should receive fair and reasonable compensation for the use of municipal rights-of-way by private companies for profit purposes having due regard for the value of the municipal property used.

Although Ottawa-Carleton would prefer a rights-of-way use license fee that is truly reflective of the market value of the property occupied, the region supports an initial general rights-of-way license fee of $2.50 per metre as proposed by the Association of

Municipalities of Ontario. This fee is in line with rights-of-way use fees received by public jurisdictions elsewhere.

In summary on the compensation issues, Ottawa-Carleton has identified two main financial compensation categories: cost recovery and a road use

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license fee. Five categories of cost have been presented along with several compensation mechanisms.

Mr. McArthur will continue on with Ottawa-Carleton's presentation.

MR. McARTHUR: Madam Chair, there are just two minor points or points where we differ slightly, where Ottawa-Carleton differs slightly from the AMO presentation and the first one is the duration of the franchise agreement. It is Ottawa-Carleton's position that once in the ground, once the gas company is servicing its customers it is pretty well protected. What municipality is going to order the removal of gas service to customers throughout its municipality and what Energy Board will allow it.

In those circumstances it doesn't make sense to Ottawa-Carleton at all that we should be talking about perpetuity or 40 years or 20 years or even 10 years. We think that five years is a more appropriate term. This allows for proper management of our roads, to take into account the frequent technological changes that occur, to take into account legislative changes which have become more frequent recently and generally to allow municipalities to properly manage their roads. We think five years is adequate.

The second issue where we differ but only slightly from AMO is with respect to abandoned pipe. The present agreement says that abandoned pipe may be removed by the gas company. With respect in terms of

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good road management and in terms of not allowing our roads to be cut more often than necessary, we suggest that the gas company not be permitted at its discretion to remove its equipment and pipes but that it be done at the direction of the municipality and that is at reconstruction of the road.

So those are two minor points where we differ from AMO slightly. Well, not minor points, important points but where we differ slightly is what I am trying to say. Mr. Wright will address those matters soon.

In conclusion, Madam Chair, it is Ottawa-Carleton's position that as a provider of an essential facility to the gas company the region requests, with respect, that as the owner and stewart of the road allowance its authority to manage that facility safely and in the best interests of the municipality, the public, the utility companies and all users in a way which best protects all of these interests be recognized. In other words, we are asking the Energy Board to recognize the municipality's authority to recognize its roads in the best interest of all users.

That's the presentation, Madam Chair. I hope we haven't gone over time too much.

As I said before, with questions it might be better that we finish our three presentations but, again, I will leave that to the Board.

THE PRESIDING MEMBER: Thank you, Mr. McArthur.

--- Pause

THE PRESIDING MEMBER: I think that we feel that we would like to ask you a few questions now while your presentation is still fresh in our minds.

MR. McARTHUR: Yes, Madam Chair.

THE PRESIDING MEMBER: I assume that you will be available to answer any of the questions we might have at the end of the other --

MR. McARTHUR: Yes.

--- Pause

MEMBER LAUGHREN: Mr. McArthur, I believe it was Mr. Ross made the point -- I believe you said that the OEB should send the utilities and AMO away to hammer out their differences, words to that effect, on fees and so forth. Don't let me put words in your mouth.

MR. McARTHUR: At least that would be the preferred objective.

MEMBER LAUGHREN: But I thought that that has basically already happened with the committee that looked at proposals for changing the model franchise agreement anyway. I'm wondering what gives you the optimism that if you did it again that the results would be different.

MR. McARTHUR: I will try not to speak for AMO, but as far as Ottawa-Carleton is concerned, I think, with a little bit of incentive and direction from this Board, subsequent negotiations may be a little more fruitful, especially on the issue of compensation.

MEMBER LAUGHREN: Okay.

Another question had to do with the permit fees. You indicated that you thought that this could be approved, three different levels of permit fees. I think you said: village, 100; city, 200; region or county, 300. I think that's what they are.

Why would there not be some economies of scale in the big ones, like the region or the county, that would make up for the increased complexity of dealing with permit fees?

MR. McARTHUR: I think I will let Mr. Ross answer that.

But certainly the information available to municipalities at this stage is lacking. Ottawa-Carleton has been working for two years on this kind of question precisely. I think it is a good question and I think there could be economies of scale in large urban areas, but that also has to be offset against the increased costs of operating and building in a highly urbanized area of the municipality. So while there might be economies of scale, there are also vastly increased costs in certain areas of a city or a town.

Lorne?

MR. ROSS: Yes, I would agree with that. I think that there isn't an awful lot of cost information available from other municipalities unfortunately, so it is hard to kind of maybe draw that conclusion with factual information, but the complexities and difficulty 80

of managing rights of way in downtown Toronto is a world removed from what happens in some of the smaller rural municipalities and I think that would tend to perhaps move costs in an upward direction. There are more activities, there are more permits, so perhaps you are right on a kind of a volume basis.

The other thing is Ottawa-Carleton does very much favour setting a permit fee based on actual costs that the municipality does have. There are many reasons why these costs will vary from municipality to municipality.

The Ontario Good Roads Association work is a fall-back position because, again, there is some effort involved in undertaking these costing analyses and studies and, for want of having some kind of a generic framework, we see that as probably being the best that's available.

MEMBER LAUGHREN: I still don't understand it, I guess.

When it comes to relocation costs, relocation of a line, is that invariably or always because the municipality has requested it or demanded it, or is it ever at the initiative of the utility?

MR. ROSS: Again, that is probably a good question to ask the gas industry. I know there have been situations where it has occurred at the request of the utility for various reasons, maybe an upgrade or things of that nature. So I think the pure answer is 81

no, it wouldn't be invariably at the request of the municipality, but I would defer to the gas industry a bit on that one.

MEMBER LAUGHREN: I just wondered whether that would change your view on the proportion of costs or the relocation, depending on who it was that was demanding the relocation.

MR. McARTHUR: I don't think so. A gas company knows, like every other utility, when it asks for the use of our roads, that this is highly likely, there will be restructuring of the road, rebuilding, repaving. It knows that there is probably going to be relocation sooner or later. It is a cost that it surely should build into its business plan.

MEMBER LAUGHREN: Thank you.

MEMBER SIMON: Mr. McArthur, I was wondering if you could provide us with a little bit more information on what the CRTC proceeding is all about with regard to -- I assume it has some relationship to user fees and payment for the services and municipal roads. Is that correct?

MR. McARTHUR: Okay.

This is a little difficult to answer. I will answer it as briefly and as simply as I can.

Ledcor started using roads in the City of Vancouver to lay its pipe. Vancouver asked it to remove its wires and, as a result, Ledcor made an application to the CRTC for permission to use city streets. The

hearing will involve all aspects of terms and conditions -- or, I should say, will involve all terms and conditions proposed by Vancouver. Basically, they are identical to the issues before this Board. They involve the municipality's right to manage its roads in all of the 10 points that we have referred to, and certainly we believe that the right to manage properly and efficiently includes the right to recover costs and charge a fee.

So, yes, compensation is squarely before the CRTC in its hearing with Ledcor in Vancouver. Someone else might want to elaborate on the hearing and the nature of the hearing.

--- Pause

MR. ROSS: Madam Chair, could I add something on the question on the relocation issue?

The question was: Are relocations sometimes at the initiative of the gas utility? The answer is yes, but I don't believe in a case like that that we would be expected, the municipality, to pay part of the cost. If I could just clarify that.

MEMBER SIMON: I just had some general questions about good roads management within the context of the principles that you have outlined, looking at subsidization, user-pay issues, and the true costs of doing business.

I was wondering if Ottawa-Carleton had given any thought to applying those principles to its own

sewage and waterworks and the municipal electric utility's functions as far as it applies to good roads management. Recognizing that you own those facilities, but in the interests of good roads management, have you thought about looking at how much those costs would apply to those utilities and how you might deal with that issue to implement a user-pay for those utilities as well?

MR. McARTHUR: Again, I'm going to let Mr. Ross answer that, but I will preface it by saying certainly we have thought about it and certainly there are costs for the road by installing water and sewer, which are, generally, essential services applicable to all of our residents, not just some. So there is a much more widespread use and need for water and sewer than there are for some other utilities. But, yes, I think Mr. Ross can confirm that we certainly thought of that and there are implications.

MR. ROSS: That's true, we certainly have thought about it, and it would be our preference that, in terms of the permit fee and the cost recovery mechanisms we outlined, that would apply equally to all utilities, including public utilities that would use the municipal rights of way.

The road-use licence fee would be a more difficult issue to deal with, and that would be a policy issue that our council would have to deal with. That hasn't really been addressed per se, but in terms of

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cost recovery, my own group who resurface roadways, our contractors pay permit fees the same as everybody else.

MEMBER SIMON: Is the municipality doing any research now to actually do the costs? So, for example, if this Board went along with the proposal for the user fees as you have suggested, how quickly could you implement the same level, the same sort of fee practice for the other municipally-owned utilities that you have?

MR. ROSS: The way we establish our permit fee is via our by-law, and it's currently at $107.50. So it would be simply a matter of going to our committee and council and outlining the costs concerned; and that fee would apply, I would expect, equally to all users of the rights of way -- "public utilities", say, our water utility as opposed to the gas.

MEMBER SIMON: So the utility figures -- I will just make sure I understand this -- the utility figure costs that you have included in your submission, they are utility costs, not natural gas utility-specific costs, so they would be the same costs that you would be seeking recovery for on a municipal, sewer and water side, and on the MEU side, as well?

MR. ROSS: That is correct.

MEMBER SIMON: Thank you. That's very helpful. Those are my questions for now.

MEMBER SPOEL: I have a couple of questions that I just wanted some clarification information, if I could, on the tax issues.

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Do you have any idea, Mr. McArthur or Mr. Ross, how much in realty taxes the gas utilities -- I'm not even sure which one serves Ottawa-Carleton; whether it's Enbridge or Union -- what is paid in realty taxes, annually, by whichever gas utility it is?

MR. McARTHUR: I don't know.

MR. ROSS: I think we heard some figures

earlier. I think it was one point -- in Ontario or --
MEMBER SPOEL: No.
MR. ROSS: -- Ottawa-Carleton?
MEMBER SPOEL: To Ottawa-Carleton, specifically.
MR. ROSS: I forgot the number. Two point...?
MR. DAVIES: Two point eight, in total.
MEMBER SPOEL: Two point eight, in total. That's your total realty taxes, including schools and everything, for the whole Regional Municipality of Ottawa-Carleton.
Mr. McArthur or Mr. Ross, do you have any idea if you have other businesses located in Ottawa-Carleton that pay municipal taxes that are greater than that or in that sort of order of magnitude?
MR. McARTHUR: I have no idea.
MR. ROSS: I'm not sure if it's relevant to the question but our own utilities, there's "in lieu of taxes" that are levied; for example, our water. So, again, there's a bit of a level playing field there.
MEMBER SPOEL: So what do your utilities pay

in lieu of taxes?
MR. ROSS: I can't answer that. We would have to -- I don't have that information. But there is a figure that they do pay in a kind of a lieu.
MEMBER SPOEL: Would it be possible to provide that information -- get that information and provide it to us later?
MR. ROSS: Yes, I would expect that would be --
MR. McARTHUR: So, the question relates to other businesses and what they might pay, in comparison to the gas companies?
MEMBER SPOEL: Well, it depends -- I didn't realize that your own utilities paid payments -- made payments in lieu of tax --
MR. ROSS: Specifically, the utilities?
MEMBER SPOEL: Specifically, utilities.
MR. ROSS: That information --
MEMBER SPOEL: I narrow it down to that, because I didn't know that existed.

Specifically, utilities' payments in lieu of taxes, your own utilities, what they pay in lieu of taxes to Ottawa-Carleton.

The other question I had was relating to the term of the agreement.

One of the slides you used refers to the five years, or the opening clause, and then automatic extensions.

So, I assume, Mr. McArthur, that what you would like is that there be an automatic -- that it would be recognized in the agreement that the franchise would automatically be renewed but that it be renegotiated or the terms be renegotiated on a five-year basis. Do I have that correct?

MR. McARTHUR: Yes.

MEMBER SPOEL: Those are all my questions.

THE PRESIDING MEMBER: Mr. McCann?

MR. McCANN: There's one area I would like to explore.

On the last page of your presentation or, I guess, it's the third- and fourth-last slides, you make some points about some differences with AMO's submission. But to my reading of things, there are some other fairly major differences, too -- and by that I mean you have presented slides indicating that the model franchise agreement should be amended to deal with cost recovery, and then you have a number of items under "Cost Recovery", and then you have the "Road Use Licence Fee".

I think your position, with regard to the road use licence fee, is very similar or identical to AMO's. But when I read AMO's submission -- and AMO may wish to address this later on -- I don't see much in there about pavement degradation costs, relocation costs, direct quantifiable costs and work-around costs. What I saw in AMO's submission was permit fees and a position that's

similar, though not quite identical, to yours and compensation for use of roads. But I don't see, in AMO's submission, treatment of these other costs.

I was not -- I mean I wasn't at the sessions at which discussions took place between the gas utilities and AMO, but at least on the surface of things, it would appear that AMO is not seeking changes in this regard and so, there is a difference between your submission, today, and AMO's. Is that a fair statement?

MR. McARTHUR: I will not speak for AMO, but I will say that I was at the negotiations which included AMO and the gas companies and my understanding, all along, is that Ottawa-Carleton and AMO do not differ, at all, in this respect, in the sense that a permit fee is proposed and the permit fee is to cover all costs, period. It's just that Ottawa-Carleton has been a little more thorough, a little more elaborate, in its outlining of those costs and we include pavement degradation and work-around costs, which are direct costs to the municipalities. But I don't think that flies in the face, whatsoever, of AMO's position that a permit fee should reflect all costs.

MR. McCANN: Sorry to push this a little bit further, but -- so the amounts that are suggested, that might be as much as $560 for a major utility project, in terms of a permit fee -- which is, I think, I understand that's what your view was of that -- that that amount is

intended to compensate, at least partly, for all of these related costs to the municipality of managing its roads; it's not a case of, there will be further fees levied in regard to pavement degradation or relocation or the other matters?

MR. McARTHUR: I will back up somewhat. I think the municipality should decide exactly what its permit fee will cover, what particular costs. What Ottawa-Carleton has in mind -- and as Mr. Ross outlined -- is that our permit fee will cover administrative costs, and possibly pavement degradation costs, but that all other costs will be a charge upon the gas company or the utility. And, in fact, that's the way we are negotiating with the telecommunication companies: one, a permit fee, which covers our administrative costs and which they will pay; two, other costs -- and they are paying that in a lump sum, annual sum, to be negotiated between the Region of Ottawa-Carleton and the telecommunications company; three, the road use licence fee.

MR. McCANN: Just to give you one more example of what I'm trying to get at here is -- and, again, I'm referring to the AMO's submission, and I realize you are making a separate submission and AMO may want to address this issue later -- but I believe you referred to a recommendation that 100 per cent of relocation costs should be paid for by the gas utility?

MR. McARTHUR: Yes.

MR. McCANN: The current agreement is the 65 gas utility 35 per cent split --

MR. McARTHUR: Yes.

MR. McCANN: -- as contemplated by the 1987 model franchise agreement.

Now, AMO, in its submission, has submitted two appendices; one of which is intended to show the model franchise -- Appendix A, which is intended to show the model franchise agreement as it would be if the agreed-on things were done that were agreed on by the gas utilities and AMO; and Appendix B is to show what the model franchise agreement would be like if AMO's recommendations were adopted. And when I look at the pipeline relocation section in those, I don't see any difference, particularly in regard to the 65-35 split. So, I have to assume that that is something that AMO, at least, is not seeking in this particular model franchise agreement negotiation.

MR. McARTHUR: I think you are right. I won't speak for AMO, but I will speak for Regional Council, which has passed -- which has approved a report which says that all utilities should be treated equally, fairly and the same. And Regional Council's position is that the FCM principle on relocation should apply; and that is, 100 per cent.

MR. McCANN: Thank you very much.

Those are my questions, Madam Chair.
THE PRESIDING MEMBER: Thank you, Mr. McCann.

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I just have a few questions, to wrap up.

In your presentation, you referred to a number of reports, including the "good roads" report, et cetera.

Have you provided copies of those reports to Board staff? Or would it be possible for us to see those reports?

MR. McARTHUR: Yes.

THE PRESIDING MEMBER: We would appreciate that. Thank you.

With respect to -- I know neither of you are lawyers, but could you please --

MR. McARTHUR: Yes.

THE PRESIDING MEMBER: Oh, you are a lawyer.

--- Laughter

THE PRESIDING MEMBER: Mr. McArthur, then, could you please comment on, without qualification, on the utilities' position that Section 220.1 of the Municipal Act does not apply to gas utilities.

MR. McARTHUR: It clearly applies and exempts the transportation of gas. This has nothing to do with the transportation of gas whatsoever. It only relates to use of a road allowance, that exception. Clearly, in my opinion, there is no relevance whatsoever.

THE PRESIDING MEMBER: So you are saying that it has nothing to do with transportation of gas.

MR. McARTHUR: Yes. It deals with transportation. I don't have it in front of me, but if

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the words are that transportation of -- can someone help me? It refers to the transportation. It doesn't refer to use of land.

> "No by-law under this section shall impose a fee or a charge that is based on or is computed by reference to the generation -- "

It is clearly not that.

" -- the exploitation -- "

It's clear not that.

" -- the extraction, harvesting, processing, renewal or transportation of natural resources." (As read)

None of this has anything to do with any of those categories, with respect, Madam Chair. What we are talking about and what we are dealing with is use of a road allowance, occupancy of land.

THE PRESIDING MEMBER: Isn't that to transport gas?

MR. McARTHUR: It may be to transport gas. It may be to store gas, yes, but the issue before the Board is use of land.

THE PRESIDING MEMBER: Not for land use. With respect to the fees charged, you talk about reasonable compensation for actual costs. Is there any upward limit on the fees that you think the municipality should be able to charge these gas utilities?

MR. McARTHUR: I think I missed a little bit

of the question, but yes, there's obviously a common, well established, legal principle that a municipality cannot charge more than it's entitled to charge. That is, it has to calculate the costs to make a fair and reasonable assessment of its costs and charge only that amount. Certainly there's an upper limit, yes.

THE PRESIDING MEMBER: Would there then be any limit as far as protecting the gas utilities concerned about the reasonableness of the costs that municipalities incurred? In other words, even if you said they had to reimbursed for the costs you have incurred, what would the position of the municipality be vis-a-vis the utilities to ensure that that was a reasonable cost, that you weren't allocating too much for these costs, that you weren't incurring additional costs?

MR. McARTHUR: Ottawa-Carleton has been studying the cost to its roads, the road cuts for two years. The utilities are part of that study. They are taking part in it, they are contributing to that study. Obviously they will contribute to the formulation of the bylaw. That is they will have a say in it. There will be public hearings.

They will be able to study and examine any estimate that the municipality comes up with respect to its costs and comment.

THE PRESIDING MEMBER: But the region's position is that the region determines these costs, that

the Boards don't determine the costs, that it's up to them to participate in the public process, but aside from that, gas utilities have no say in the reasonableness of the cost that the regional municipality wants to impose. Is that correct?

MR. McARTHUR: Again, I have to take care not to speak for the other participants in this hearing, but my position would be that a gas company could always return to this Board and say that the costs are prohibitive and bear no resemblance to the actual costs and that the Board should direct the municipality to see that the costs are reflective of actual costs.

THE PRESIDING MEMBER: Excuse me, sir, but since you are a lawyer, I can ask this question. What jurisdiction would the Board would have to do that? Under what provision would you say that we could do that?

MR. McARTHUR: Under the Ontario Energy Board Act. Again, I don't want to intrude on Mr. Roman's discussion of jurisdiction and legislation, but my interpretation of that Act is that the Board has jurisdiction to consider terms and conditions. It clearly says that in there.

I think that that jurisdiction must be limited to terms and conditions which are obviously, shall I say, outrageous. I don't think the Board wants to be involved in every trivial term and condition that the municipality and the gas companies are trying to thresh out. I think it has to be made clear that this is a road management matter within the jurisdiction of the municipality, but there is the overlying jurisdiction of the Board there anyway.

THE PRESIDING MEMBER: With respect to the user fee, is that for only on road allowances or would that be levied on any municipal property?

MR. McARTHUR: As far as Ottawa-Carleton is concerned, this relates to road allowances only. When utilities come to us to use so-called private municipal lands, that is other than the road allowance, we negotiate with the utility just as any other piece of land. That is, we say to them "This is the market value of the land. You want an easement, this is the value of it". That's how we deal with public lands other than roadways.

THE PRESIDING MEMBER: As I understand it, when I get gas in my house, part of the pipe, the attachment, goes across the municipal road allowance to my house. Are you saying that the gas utilities would pay for that portion as well based on the number of meters that they have, or is that something that I -- I don't live in Ottawa-Carleton, but that the municipality would have the right to charge individual landowners the same $2.50 per metre per year for the right to use the property.

MR. McARTHUR: You are speaking that very small portion on the road allowance.

THE PRESIDING MEMBER: I'm talking about conceptually if it is the municipality's position that you are using our road allowance, that's a right, that's a public resource that therefore we should be compensated for, does that not necessarily in principle apply to everyone, regardless of whether they are a gas utility, an individual homeowner, the owner of a business?

MR. McARTHUR: There's a very clean line, property line, between the road allowance and private property. On the road allowance, we are suggesting that the gas company pay the cost of being on the road allowance. Once we get to the private property line, to your property line, the gas company must approach you and deal with you as a private property owner.

I'm not sure how that's done under legislation. Maybe they have a right to be there. If they don't have a right to be there under legislation, then they would be expropriating or negotiating with you as a private a property owner, but I don't know if that's the case. You will have to ask the gas companies.

THE PRESIDING MEMBER: With respect to relocation costs, I want to clarify. Your position is that if the municipality requests that the utility move a pipeline, that the utility must pay 100 per cent of those costs.

MR. McARTHUR: Yes.

THE PRESIDING MEMBER: Do you see any rights of the gas utility to argue that that relocation is not necessary or is challenged, or is it just that the municipality decides to relocate this pipeline, so they have got to do it and bear the cost.

MR. McARTHUR: Absolutely. That's a condition of being on the road allowance and the cost of locating on a road allowance. It's a well anticipated, well known cost. There's nothing strange about it or unusual about it.

THE PRESIDING MEMBER: With respect to these costs, I assume that the road allowances are used for other utilities, including obviously water, sewage, et cetera. I understand the whole issue about pavement degradation and the cost of maintaining the road. The roads are used for other purposes as well, including roads.

MR. McARTHUR: Yes.

THE PRESIDING MEMBER: My question is: Has there been an allocation, in your costing has there been an allocation among the various utilities as far as these costs are concerned in managing the road? For example, it seems to me as though having big sewers in a road would lead to more -- what was the word you used -- joints in the road that lead to the degradation, would lead to more subsidence in the road because the pipe would be bigger than the gas utility's pipes are.

I'm just wondering in determining these costs

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whether those factors have been taken into account for that.

MR. McARTHUR: You are absolutely right. Actual costs are calculated in that manner, that is attributing degradation of the costs to the utilities in the road, whether it's water or sewer or gas or telecommunications.

I will let Mr. Ross elaborate on that, but yes. We can only charge actual costs.

MR. ROSS: Yes. First of all, because we have translated the impact into a square metre impact, so the larger the excavation, the larger the economic impact of the damage it costs due to the insulation going in the roadway. That's about as far as I guess we can take it at this time.

In terms of a larger installation, by its very definition deeper and perhaps by inherently causing more damage, that doesn't necessarily hold true. In fact, some of the smaller types of excavations are the more difficult to deal with because they are very narrow. It's very hard to get proper compaction equipment in very narrow trenches.

In fact, if you disturb the road enough, you are effectively rebuilding a roadway. Some of our large sewer and large projects in essence give us a brand new road when they are done. In actual fact, the effect can be completely the opposite of what you might think.

I think the fairest approach as we had derived

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is to look at the amount of road disturbed and that would be a square metre impact. So the larger utilities would be disturbing a larger square metre impact. So therefore they would be commensurately responsible for a larger portion of the costs.

THE PRESIDING MEMBER: The utilities have given us some numbers as far as the impact is concerned and I realize that you just deal with Ottawa-Carleton but could you give this Board a view as to whether those numbers sound reasonable and in line with what you would anticipate the impact of your proposals would be on the province?

MR. ROSS: Okay. I remember the numbers, the numbers on geodetic information I believe on permitting.

We could provide something similar for Ottawa-Carleton. I think it would be beyond our scope to deal with the province.

THE PRESIDING MEMBER: That would be very helpful. Thank you.

I guess one of the challenges before the Board right now in general terms is the balancing of interests between local authorities to be able to manage their own utilities including electric utilities and the overall public interests of the province as far as managing the utilities on a province-wide basis. The utilities made a comment on the fact that this would have an impact or could have an impact on the traditional postage stamp rate for gas utilities and I am wondering if you could

briefly comment on that or if you have a comment?

MR. ROSS: I think again we heard some numbers earlier about potential impacts. I forgot what the actual numbers were. I believe you were talking about the effect on the rate payer, the utility rate payer versus the gas rate payer?

THE PRESIDING MEMBER: Right. Yes.

MR. ROSS: Yes. I think --

THE PRESIDING MEMBER: -- costs are based on --

MR. ROSS: I think the gas company is in a position to -- we don't have the information to be able to translate these impacts into the actual rate, the impact it might be on the consumer.

THE PRESIDING MEMBER: I appreciate that. Thank you.

MEMBER SIMON: I just had a couple of follow-up questions to the relocation cost discussion that we just had. I was wondering what in your view was the principle behind the cost sharing arrangement now between the municipality and the utilities?

MR. McARTHUR: Mr. Andrew Wright may be able to answer that better. He was involved in the original hearings or the hearings back in 1987. I don't know how they came to 65.35. I read the report and I read the discussion but I'm not sure exactly how they fixed on 65.35.

MEMBER SIMON: Well, actually I'm not really

asking about the specifics of the 65.35, more if you had a view on the principle behind a sharing arrangement versus 100 per cent cost arrangement and what the principle was behind the sharing rather than the specific level of sharing.

MR. McARTHUR: All I can say is that the Gas made a good presentation, and despite their request to the use of the road and their presence their and despite the fact that their presence is the reason for the relocation and the relocation costs they convinced the Board that they shouldn't have to pay total.

MEMBER SIMON: Could you foresee a situation in Ottawa-Carleton where there was -- say it was a municipal sewer issue and you need to cut open the road and in order to repair the municipal sewer you had a choice of relocating the electricity wires or the gas pipe and in that specific situation it could go either way, 50/50. In this scenario that you are proposing where the gas utility would pay 100 per cent, do you think there would be a predisposal on the municipality's part to choose to relocate the gas pipe in that situation or is this not a realistic scenario? What is your view on how you would make those decisions?

MR. ROSS: You are talking about a municipal utility water/sewer project as opposed to a road project, a roadway construction project. There would be a different approach there.

MEMBER SIMON: Well, whatever --

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MR. ROSS: In essence, if there is a relocation -- I will come at it from maybe a bit obliquely -- if our water and sewer utility wishes to relocate or it is an actual road job and there is relocation of our water and sewer utility, they would pay the cost of that. So I would think when you look at projects, what you just said would have to be taken into account.

Every project is very specific, but there should be some attempt to take into account the overall societal sort of impact. It would not be, I think, fair to say just because you pay 100 per cent and that is an automatic better deal for us that we do something that is maybe not the best thing to do. I could answer it that way.

So there wouldn't be an automatic decision to go in the direction that you are suggesting. I would hope not anyway.

MEMBER SIMON: But if it was equal except for who pays, in who would pay the relocation -- in what needed to be relocated, if, you know, it was 50/50 either way but there was a difference of who pays, how do you think the municipality might be disposed to make that decision?

MR. ROSS: I can't really answer that. I still think that one really would have to look at all the aspects of the project. There are just too many unknowns. It is a very specific thing that would have

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to be looked at at that time. It would be speculative for me to give an answer to that.

MEMBER SIMON: Okay, thank you.

THE PRESIDING MEMBER: I just have one further question. I'm sorry I didn't ask it before.

In the utilities' presentation, they indicated that in fact the municipalities don't require a lot of services as far as their interaction with the utilities are concerned.

I am not talking about road management and I realize that your presentation has focused on road management. I am talking in terms of permits or submitting drawings or consents or locates or various sundry sorts of things. Could you please comment on whether in your experience there is a lot of interaction with utilities, a little less interaction with utilities, whether utilities do most of the work, whether there is a burden on the municipalities?

MR. ROSS: You mean in terms of the process of a utility proceeding with an initiative to do some work on the right-of-way and what happens? How much work they do versus what effort is involved in our part as the municipality's part of that?

THE PRESIDING MEMBER: Right.

MR. ROSS: Well, normally what would happen would be the utility would send us a copy of some drawings or plans and essentially a covering letter or an application stating what work they would like to

undertake. And then we as a municipality, at least in Ottawa-Carleton anyway, we proceed to circulate all those maps, plans and drawings to all the interested municipal entities as well as all the other utilities.

Things are done a little differently in different places, but we undertake to do that effort and consolidate all the comments, do a technical review of the maps, plans and drawings and at the end of the day if everything looks okay we would actually give formal municipal consent to that and that in turn would pave the way for an issuance of an excavation or a construction permit. And of course our effort is undertaking all that clerical, record keeping, reviewing exercise, right down to the permitting action, including after the fact doing some inspections of the field of restoration and traffic inspection and safety inspection and things of that nature. So that is all the effort we are talking about in terms of cost recovery.

THE PRESIDING MEMBER: Do the utilities pay for that right now?

MR. ROSS: We have a permit fee now that ostensibly should cover our costs in that regard, but they do not. And in terms of gas, no, with the decision that gas -- gas does not pay anything at all in that regard right now.

THE PRESIDING MEMBER: But are there similar utilities that pay --

MR. ROSS: Yes. Yes.

THE PRESIDING MEMBER: Thank you.

I think now would be an appropriate time for a lunch break.

MR. LESLIE: Madam Chair, I wonder if I could request through you that any filings that are made to the Board that the gas utilities get copies of that material. That may be implicit. There was reference earlier there are some reports and whatnot that are to be produced and we would like to get copies of them.

THE PRESIDING MEMBER: Certainly. I think Board staff can coordinate that, Mr. Leslie, if that is convenient with you. Is there a problem, Mr. McCann?

MR. McCANN: No, I guess I had understood that there is going to be a subsequent phase to this in terms of submission of further reply or further submissions. So material of this nature could form part of those submissions or be attached to it. Certainly if any material is filed with the Board prior to those final submissions, it should be shared with all the parties to this and I think that is a fair comment. And if there is any problems in the logistics of it, Board staff can assist in making sure that it gets to the right people.

THE PRESIDING MEMBER: Is that satisfactory to you, Mr. Leslie?

MR. LESLIE: That is perfect. Thank you.

THE PRESIDING MEMBER: Okay. Thank you very much.

Now would be a good time for a lunch break.

So we will reconvene at a quarter to two. Thank you.

--- Luncheon recess at 1232

--- Upon resuming at 1350

THE PRESIDING MEMBER: Next I think it is the City of Toronto.

Mr. Roman.

PRESENTATION

MR. ROMAN: Thank you, Madam Chairman.

I would like to introduce the people that are appearing with me today. On my immediate left is Ms Lorraine Searles-Kelly, who is a lawyer with the City Solicitor's Office; and on my right is Mr. Andrew Koropeski, who is the Director of Transportation Services in the City of Toronto's Department of Works and Emergency Services. He would be roughly equivalent to Mr. Ross in Ottawa-Carleton and would love it if you would ask him some of the same or similar questions so that he can give you the technically correct answers for the City of Toronto that I certainly couldn't give you. These would be questions relating to permitting, restoration, contracting, engineering, those sorts of things.

I have provided the Board with some statutory materials relating to the Municipal Franchises Act and the Municipal Act. Also, I will be providing your counsel with three cases that I will not be referring to as such, but letting you know that they exist and will just be mentioning them in passing. I won't spend any

time on them, but I will leave a copy with the Board, and we will also make copies available to other parties.

I believe I have handed up a copy of the agenda, if I may call it that, of the topics I intend to cover, but I would just like to take you through those very briefly.

First of all, at the beginning of my presentation I will be presenting our conclusions so that you know where you are going and I will be referring briefly to the written submissions which we made earlier, which we have no intention of repeating. We will just take those as having been read or available to be read.

I will mention right now that, in general terms, the City of Toronto supports the positions taken by the Regional Municipality of Ottawa-Carleton with the exception of possibly some legal interpretations that I will be getting into in greater detail, and also the position of AMO that the focus of today's presentation for the city will be jurisdictional and statutory interpretation issues, and then finally a response to both the legal and the policy arguments submitted by the gas companies and by the Industrial Gas Users' Association.

So I would like to start first then by presenting our conclusions. There are in fact seven of these. I haven't got a detailed, written text, so I will just be giving these to you orally.

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Our first conclusion is that the city would request the OEB, in its decision in this proceeding, to state clearly that any model franchise agreement does not apply to the City of Toronto because of the legislated, virtually perpetual or perpetual arrangement with Enbridge Consumers Gas, but began with the legislation in 1848 and continues to this day. So, in that sense, we are a special case, and the reasons for that are set out in our written brief.

The second point and perhaps the contentious one is that the Ontario legislature intentionally changed the law when in enacted section 220.1(2) of the Municipal Act. This section has paramountcy over any Act, which includes section 10 of the Municipal Franchises Act. Thus, the effect of subsection (2) is to exclude the Board from the role that it would otherwise have under section 10 of the MFA in overruling municipal by-laws which impose charges.

The legislature has taken away this control from both the Ontario and Municipal Board and the Ontario Energy Board and, in subsection 13 of that section, has placed control over municipalities at the political level, not at the regulatory level. That's our second conclusion.

Our third conclusion is that subsection 220.1(4), which the gas companies have relied on, is not an exemption clause, as stated by the gas companies. It does not exempt any class of persons or businesses.

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What it does do is limit 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 subclause (4)(e) of 220.1, charges by municipalities that would be in the nature of timber stumpage fees or a per-MCF tax on the transportation of gas, for example, by TCPL.

However, subsection (4) was not intended to legislate mandatory cross-subsidy, whether inter or intramunicipal, and there are such cross-subsidies today. Subsection (4) in no way limits municipal cost recovery from the distribution and retailing of gas via any charge -- not a tax, but a charge -- for services or activities associated with the permitting process or charges for the use of municipal property.

So the situation in which we find ourselves today, then, is that subclause (e) has no application and the OEB, therefore, would have no jurisdiction to use subclause (e) to limit the municipal use of subsection (2) of 220.1. The result would be that if a gas company believes that a municipality is misinterpreting or exceeding its powers under subsection (2), its remedy lies not with this Board but in an application to the court or at the political level. That's our third conclusion.

Our fourth conclusion would be alternative to the third, which is that if this argument is incorrect and if the OEB does have jurisdiction over 220.1(2) and (4), the Board has no duty to decide what are pure questions of law. A court would have concurrent jurisdiction with the Board and the Board should either leave such questions to the court or state a case to the court under section 32 of your Act, which would authorize you to state a case, not just under the OEB Act but under any other Act that the Board has jurisdiction from.

Our fifth conclusion is that the policy goal for all municipalities should be to 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 city. The policy will be one of no more subsidies.

The resulting increase in cost to the gas companies, if it is even noticeable, will be equal to the amount of the subsidy they and/or their customers have been enjoying. That is really an important point. When you eliminate a subsidy by asking someone to pay more and they complain about the amount that they are paying, what they are really pointing you to is the amount of the benefit that they have been enjoying as a subsidy to date.

Number six, and this deals with perhaps a

technical issue, given that the gas companies have postage stamp rates, to the extent that a municipality underrecovers its costs, it will cross-subsidize other municipalities which underrecover by a smaller margin. The OEB's decision in the Centra Orillia case sought to avoid any inconsistency between municipalities. Unfortunately, it did this by perpetuating the problem of cross-subsidies by requiring Orillia and other municipalities to continue underrecovering.

It is our submission that it would be better for the Board to accept that on the road to the correct cost recovery by all some municipalities will reduce or eliminate their cross-subsidies sooner than others. There will therefore be a transitional period during which some municipalities will charge the right amount and some will still be undercharging. Despite this, it is better to be right in a growing number of municipalities than to be wrong in all of them. So, for that reason, the transition period should be seen as a transition only.

Finally, number seven, the submissions of the gas companies and of IGUA are designed to perpetuate the status quo and therefore are wrong in law and wrong in public policy.

Well, that is where we end up and I will now proceed to take us in that direction.

First of all, my new topic deals with the scope and limits of a model gas franchise agreement. In

that regard, as you have already heard from our friends at RMOC, one size does not fit all.

The OEB's jurisdiction does not include making a rule or regulation 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.

The status quo in most, if not all, of the City of Toronto, and I can't speak for all of it because there may be some old arrangements with some of the other pre-amalgamation municipalities, but in most of Toronto the situation is that the gas company pays permit fees on actual permitting-related costs. After completion of amalgamation, this will be the situation across the city. We have more detail about that in our written brief on page 4.

These permit fees will vary from year to year. It's not an annual fee. They will vary from year to year in Toronto depending on the level of construction activity of the company. These permitting fees include the gas company's share of the cost of permit review, inspection staff and related overhead, and the costs of the permanent restoration of pavement. This latter item of course is a significant one. Nevertheless, this is a partial cost recovery only. It does not include other costs such as the accelerated pavement degradation from repeated cuts in the pavement, which costs are more

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difficult to attribute causally.

The model agreement should not turn back at least the present level of Toronto's cost recovery, which may be greater than it is in some other municipality.

But despite all this, as we point out in our written brief, some of the costs that you saw in the earlier presentation are not recovered and so, non-users of gas, in the City of Toronto, are still somewhat subsidizing the users of gas because not all of the costs are recovered.

Our submission would be that the OEB should not work in the direction of increasing their subsidy by imposing the terms of the model arrangement on the City of Toronto.

I turn now to the central issue, perhaps: the Board's jurisdiction under the Municipal Franchises Act. Not one of the easiest acts, I found, to read or understand.

The Municipal Franchises Act is an old act, but it was recently revised by the legislature when it undertook the Energy Competition Act.

Despite that, it does need substantial rethinking. Much of it is archaic and much of it is very badly drafted. If the Board has any influence, in this regard, up at Queen's Park, you might tell them to redraft it and rethink it.

Leafing to Section 9 of the Act, this section

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covers by-laws granting a right, or a renewal of right, to construct, operate, extend, add to, et cetera, works for the distribution of gas where such by-laws are required to be presented to electors for their assent. OEB approval, there, is a pre-condition to presentation to electors. However, Toronto's relationship with the predecessor of Enbridge Consumers Gas -- or ECG, for short -- dates back to an 1848 act, which is cited in our written submission -- which act said, by the way, that what was then called the Consumers Gas Company of Toronto could dig up the streets on two days' written notice, in writing, to -- on two days' notice in writing to the mayor of the municipality. It was subsequently amended to 30 days -- and they don't have to bother the mayor; they can bother Mr. Koropeski and his staff.

Now, Section 10, of course, is the key section. And there's a bunch of words in there about Section 6 which, really, are irrelevant, so I tried to give you the words with the irrelevant words or inapplicable words omitted; and I would read it this way:

> "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 Board --"

et cetera.

Now, there is no expiry in the legislation covering Toronto and ECG; it goes on in perpetuity.

So, as a pure question of law, it would be my first submission that Section 10 doesn't apply -- and, on that basis, the Board has no role vis-…-vis the City of Toronto, because Toronto is not subject to this section; the other legislation deals with its situation.

And we could all go home if that was all I had to say but, unfortunately, it's not going to be that quick; and that's because we have not yet been able to clarify the relationship between the ECG and the former municipalities now amalgamated into the City.

So, we will assume, for the purposes of this submission, that Section 10 may apply to some of them; and that's why it's necessary for us to go on to interpret Section 10.

Section 10(2) gives the OEB a special jurisdiction of a permanent nature to renew or extend the right, if public convenience and necessity appear to require it. It would be difficult to find a real-world situation where renewal would not be granted; that apropos of the evergreen situation you mentioned, Madam Chair, it is at least legally possible that the Board might come to the conclusion that it would not be in the public interest to renew a franchise and would call for proposals for someone else to take over that franchise -- presumably, at book value or whatever basis -- and there may be some difficult, therefore, in

jurisdictional terms, in the Board granting a perpetual contract because that would take away the Board's ability to use this provision of this section.

So that's sort of a jurisdictional footnote that I leave with you because of the question you asked earlier.

But, in the real world, I would suggest that that's not very likely, and no one is going to tell people to remove their lines or abandon them.

Section 11 does create a right of appeal of an OEB decision, to the Divisional Court, with leave. But the important point is that it does not oust your jurisdiction, under Section 32 of the Act, to state a case to the court on your motion on any question of law -- and I will return to the possibility of a stated case later.

Before trying to interpret the various sections of the Municipal Franchises Act, let's consider its purpose.

The purpose of the Act, originally, was to protect electors from improvident or improper long-term contracts entered into by municipalities for the introduction of new monopoly public utilities services; hence, the need for the assent of the electors which, today, has largely been replaced by OEB approval.

But fast forward from when the MFA was

enacted, to today. Very few contracts today, except in fairly remote areas, are for initial services. The 117

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removal of gas lines is unthinkable; hence, lengthy contracts are unnecessary.

The only major issues for both parties, if there are such contracts, are the adequacy and impact of compensation levels and municipal control over the use of highways. The franchise itself is not likely to be an issue.

The MFA is not a regulatory statute like the OEB Act; and it's important to point out that the Board does not license or regulate rates of municipalities, or, for that matter, gas companies, under this Act. So, in applying Section 10(1), the Board should not apply a regulatory model, or a regulatory mind set, and, thus, should not seek to control revenues or returns of municipalities, as it might seek to do those of gas or electric utilities.

For reasons that I will elaborate on later, when we come to the details of statutory interpretation, Section 10 cannot restrict municipalities from requiring -- under the Municipal Act Section 220.1(2) -- a reasonable fee or charge for the use of their property, or for property under their control. And there's no statutory requirement that such charges be cost-based.

And, for that reason, the OEB would have no basis, in law, for reading such limitations into the Act.

Ordinarily, the owner of any property would 118

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have the right to charge whatever it wants for the right to what amounts to a licence to use and occupy. There are practical and legal limits on this for municipalities, but those limits are not specified in the Municipal Franchises Act. Hence, in its role, under Section 10 of the MFA, if that section gives the Board jurisdiction over charges, under 220.1(2), the Board should operate under a presumption that the municipal charges are prima facie reasonable and that they were developed in good faith, rather than operating on some other assumption.

Therefore, the burden of proof should be on the users of municipal property to show why, in some detail, it would be contrary to the public interest, not just their interest, for them to meet these terms. This is especially true when, as you will hear -- and Mr. Koropeski can tell you more about this -- the City of Toronto has developed a kind of standard set of terms that I can refer to colloquially as "the going rate". And if others pay the going rate, why shouldn't gas companies?

And if the Board is going to look at that question, it shouldn't look at the question of gas companies in isolation; it should look at the public interest and the issue of the going rate. And if the going rate has been developed by the use of market mechanisms, or reasonable proxies for market mechanisms, the Board ought to be reluctant to impose its own

judgment on those things, absent some clear-cut showing by the users of the property that there's some serious public policy reason against such charges -- all of which, of course, presumes that the Board has the jurisdiction to review these matters.

In that regard, section 10 provides no guaranteed right of renewal, as I have said, no guaranteed right of occupancy unless public convenience and necessity appear to require it.

The test is public convenience and necessity, not the private convenience of gas companies or their largest users. The Municipal Franchises Act, section 10, gives the OEB a dispute resolution role which is not there to protect gas company shareholders, but the public. The public includes municipal taxpayers, both gas users and non-users. The municipality's charges to users of its property must be fair to both.

Now I'm shifting to a new topic, which is the legal effect of the three magic words in section 220.1, subsection 2, of the Municipal Act. These three magic words are "despite any Act".

At the risk of boring the lawyers on the panel, let me start by pointing out that there is an important difference in statutory interpretation between statutory phrases like "subject to" and phrases like "despite".

When a statute says that one section or subsection is subject to another, the two provisions

normally have to be read together. "Despite" is a different situation. The phrase in this legislation "despite any Act" is the lean and mean modern version of these words.

Older statutes used to say "Notwithstanding any provision in any other Act under the jurisdiction of the Legislature of Ontario". That was found to be too wordy. They cut it down to "Notwithstanding any other Act". Today it's down to "despite any Act".

All three have the same general intention. "Despite" indicates paramountcy. In the event of a conflict between the paramount provision and any other provisions, the one with the "despite" in it applies and the others do not. That's the significance of "despite".

Where the wording is a limited version of that, such as "despite section 'x' or statute 'y'", the paramountcy is limited to that specific provision, but here the expression "despite any Act" means what it says, despite any section of any other Act, unless there is something in that section of that Act that also says "despite any Act", in which case the legislature has perhaps untidily spoken out of both corners of its mouth at the same time, but you don't have that situation here.

What you see with "despite any Act" is a situation of total paramountcy with the sole exception being if the provision is unconstitutional in the event 121

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of a conflict over any other provision of any provincial Act. What does this mean for you and your Act?

Well, the phrase "despite any Act" in section 220.1(2) of the Municipal Act means that it applies despite any part of the Municipal Franchises Act which conflicts with it. This would mean that the OEB's jurisdiction under section 10 of the MFA cannot apply or restrict any terms and conditions for the renewal of a gas franchise which are fees or charges under a validly enacted bylaw under section 220.1(2).

Subsection (5) of 220.1 supports this interpretation. Such subsection creates an exception which requires OEB approval for municipal fees or charges, but that exception is limited to distributing the retailing of electricity.

It's highly significant that when the legislature most recently turned its mind to this section of the Municipal Act, and this was at the end of 1998, it only imposed this limitation on municipal authority, namely OEB approval, in relation to distributing and retailing of electricity, not gas.

This indicates a legislative intention that municipal authority for charges as set out in subsection (2) for distribution of gas should fall outside the OEB's jurisdiction. I do draw a distinction here between transportation and distribution, which I will come to in a minute.

I then have to deal with precedent because my 122

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friends form the gas companies dealt with this too, in particular the OEB decision of March 31, 1998, which is E.B.A. 767, 768, 769 and 783, which I will refer to as the Centra Orillia decision.

In my respectful submission, the decision in that case, the correctness of the decision in that case is legally questionable. In paragraph 4.01 of that decision, the Board stated that user fees can well be excluded under the municipal franchise agreement. In our submission, that would be true only if the municipalities agreed. It could not be coerced on them.

Similarly, the Board stated in paragraph 4.02 that it is not persuaded that the new statutory provisions preclude the prohibition on such fees in a new franchise arrangement agreement. Again, I would submit that's true, but only if the municipalities agree.

The bottom line is that the Board has no jurisdiction to impose under the Municipal Franchises Act, whether through a model agreement or by other means, any provision that restricts or, worse still, renders nugatory municipal powers under the Municipal Act that apply despite any Act.

I said the Board's decision was questionable. I didn't go so far as to say it was wrong because the Board did not decide a certain issue which it expressly felt it had no need to decide, but I do point out that the Board's decision did not provide any statutory

rationale under which it justified ignoring these three words "despite any Act".

The Board then went on to give a bunch of policy reasons for its decision in paragraphs 4.03 to 4, but in our respectful submission, policy reasons cannot justify interpreting section 10 of the MFA as if it had parallelcy over section 221.2 of the MA. In other words, the Board cannot ignore or overrule legislation with policy arguments.

This raises the question as to whether the Board should follow its earlier decision. In our respectful submission, there is value in applying a consistent policy to Board decisions whenever possible, but there is no value in the Board exceeding its jurisdiction. For that reason, the earlier decision should not be followed in the present case if the result would be to cause the Board to exceed its jurisdiction.

The three gas companies submitted in paragraph 20 of their brief the same point that Centra did in the earlier case, namely, that they are exempt from this provision in the Municipal Act. I will respond to that argument shortly.

Before we get to that, the first question really is whether the Board should even attempt to decide this legal issue. The scope of municipal jurisdiction under section 220.1(2), having regard to the limits in (4) on certain kinds of charges is a pure question of statutory interpretation. It involves no

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energy policy. It involves no issues of public interest.

The OEB has probably got the power to engage in this statutory interpretation exercise as part of deciding its own jurisdiction, but the Board doesn't have a duty to do so. The Board may quite properly leave such legal questions up to the court, either by not deciding the issue and letting one of the parties take it to the court, or by stating a case to the court itself.

The Board could apply a policy and leave the pure law as opposed to the law on policy issues to the judge. If the Board does not do that, or if the Board does not wish to do that, we will be providing legal argument on the subsection (4) issue that was raised by the gas companies.

The Board discussed but explicitly declined to decide the so-called exemption issue in the Centra Orillia case on the ground that it was unnecessary to decide that question. However, in paragraph 4.08 of the Board's decision, it expressed its concern that the interpretation of the so-called exemption clause might require inconsistent interpretation of two exemption clauses in similar language to avoid conflict with the Board's exclusive jurisdiction to regulate gas distributors, transmitters and storage companies.

I would now like to address that concern which the Board didn't decide but raised only as a concern.

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In our submission, this is an unnecessary concern. The Municipal Act does not affect the OEB Act or the Board's jurisdiction under that Act. Nor are the two clauses really exemption clauses, nor are they really parallel because they arise in two different statutory contexts in the Municipal Act.

The first appearance of this clause is in section 220.1(4), which we have all been dealing with, under subclause (e). This is in the context of the limitation on municipal fees, charges and taxes.

The second appearance, later on in the Municipal Act, is in the context of business licensing. The latter limits municipal powers to require business licensing by excluding the right to require licenses for wholesale operations of certain kinds and natural resource activities which take place essentially at the wholesale level.

Therefore, this second clause is of no relevance to the OEB and does not require your interpretation.

But conspicuously absent from either of these limits on municipal power is any language referring to principles of statutory interpretation. The main principle of statutory interpretation used today is that every provision must be interpreted in the context of the surrounding provisions and the entire act. The section we have been discussing falls in part 17 of the Municipal Act which is really called the power to pass 126

bylaws.

Subsection (1) of section 220 deals with definitions and subsection (2) which is the central one grants a broad power to municipalities and certain local boards to pass bylaws imposing fees or charges on any class of persons for certain services provided, costs payable and so on for the use of its property including property that it does not own but that is under its control.

Fees or charges people normally impose for the use of their property are either called rent if there is a lease or rental agreement or a license fee if it is a license. And under subsection (2) there is no requirement for a formal executed license. The only prerequisite is a passing of a bylaw and the use of city property.

Now, as municipalities are permitted to charge any class of persons, this would include gas companies in general, and no class of persons, including gas companies, is exempted. The limits on municipal powers in subsection (4) relate to types of charges, not really to classes of persons. And the types of charges that they relate to are not really charges either but charges that are called charges but that are in reality taxes.

So these limits that are found in subsection (4) are narrow and specific. First of all, subsection (3) says you can't impose a poll tax and that goes without saying. Then if you look at section (4) it

excludes bylaws which impose taxes related to income, taxes related to sales or consumption or like transactions.

The obvious policy rationale behind this is not to protect gas companies but to prevent municipal duplication of federal and provincial income tax and federal and provincial GST or PST through a municipal tax which is masquerading as a charge but is really an income tax or a sales tax. That is the purpose of subsection (4).

That is why you see in the opening words of subsection (4) they prohibit bylaws imposing a fee or charge that is "based on, is in respect of or is computed by reference to," and then there are five items which follow it. Let's look at each of these briefly to consider their generic similarity.

Subclause (a) prohibits charging municipal income tax, plain and simple. Subclause (b) prohibits a municipal sales tax on the use, purchase or consumption of property, and that really refers to a sales tax on goods or such things as a land transfer tax. Item (c) prohibits a municipal sales tax on purchase -- use, purchase or consumption of services. That would be such things as a penalty for legal services, again a type of sales tax.

Item (d) prohibits a consumption tax on the benefit of the service, and this unusual language closes what would otherwise be a loophole in (c) because 128

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otherwise they could tax not the vendor at the time of purchase but the purchaser for the benefit received by the purchaser. So (c) and (d) are really related and they are designed to prevent a certain kind of tax.

And now we come to (e). In general the purpose of (e) is to prevent municipal duplication of federal or provincial natural resource-based sales taxes calculated on units of resources such as stumpage fees for harvesting timber or charges to hydro generators per MCF of water, or in the case of gas per MCF of gas transported. This would be intended to prevent a form of municipal sales tax on international, interprovincial or intermunicipal pipelines.

In this regard the transportation that is referred to, the transportation of gas is roughly analogous to the transmission -- the word "transmission" used in the electricity context. And the first thing to notice about (e) therefore in this context is that it does not mention distribution and it does not mention retailing of a natural resource, as does subsection (5).

Subsection (5) shows that the legislature was aware of the difference between transportation and distribution. Therefore charges on distribution are within municipal power under subsection (2) and that is really what the gas companies do within the city, they distribute it.

Now, that is our principal argument and in addition to that we have an alternative argument if the 129

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Board rejects that argument.

So our alternative argument would be that if the Board chooses to interpret the word "transportation" in subsection (4) so broadly as to include within it distribution, even in that case the gas companies' argument should not prevail. Because it must be noted that only certain types of municipal charges, but not all charges on the distribution of gas would be excluded. A charge that is based on or in respect of or computed by reference to transportation would be excluded and this would be the type of charge that, as I said earlier, would be based on the volume of gas such as dollars per MCF.

But that is not how Toronto and many municipalities charge gas companies. First, Toronto's charges to recover its costs, the costs of cutting up the streets, those charges would apply regardless of the volume of gas transported into or distributed in Toronto. They are totally unrelated to those things. These costs are caused by the gas company's construction and maintenance of its facilities by cuts in the sidewalk and the pavement. They do not vary with the amount of gas flowing through the lines and neither do the charges. Such charges are not income taxes, they are not sales taxes and they are not any other kind of taxes.

The second point we would make is charges for the use of city property. These are also not a tax

based on, in respect of or computed by reference to transportation. They are a charge in the nature of a license fee. These charges would be a license fee for the use of city property calculated in one of several possible ways.

For example, in relation to the length of pipe occupying city property or as a percentage of gross revenue received in Toronto or as a result of those or possibly a mix of the two. And this is how the charges have been developed through an RFP process with Metronet which is a large telecom company and the Metronet agreement has become the template for the City of Toronto with other telecom companies. So that is what we now call the going rate in the City of Toronto.

And this is similar to commercial license agreements for the use of property in other fields such as space in shopping centres or even the use of intellectual property. And the city would like to treat people consistently whether they distribute food on sidewalk cafes or provide telecom services or distribute natural gas.

If they are using the services for commercial services, and I emphasize the word "commercial" here, for their commercial purposes, they should pay something for it. We are not saying they should pay the same but they should pay something for it. And in our respectful submission, a reasonable interpretation of subsection (4)(e) does not preclude municipalities from such

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charges.

So let me summarize our conclusion then on the statutory interpretation matters. Summing this up.

Section 220.1(2) has changed the law and it has paramountcy over section 10 of the Municipal Franchise Act. A model agreement under the MFA cannot be imposed by the Board so as to preclude or limit the municipal exercise or statutory powers under section 220.1(2). Subsection 220.1(4)(e) does not affect the right of a municipality to recover its costs and to charge a gas company which uses municipal property for that use. Such a charge can be a license fee calculated in a variety of ways.

The OEB has no statutory role under section 10 of the Municipal Franchises Act to control municipal fees or charges under subsection 220.1(2). Subsection 12 of that section explicitly excludes the jurisdiction of the Ontario Municipal Board.

So if you look at the OMB and the OEB together, the clear legislative intention is to exclude regulatory intervention by either the OEB or the OMB and to put control at the political level, and you can see that in subsection (13) where it talks about the minister having the power to make regulations to limit what the minister or the government might consider to be abuses or over enthusiastic use of these powers by the municipality.

Now I want to change the topic and respond to

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the submissions of the gas companies.

First of all, they made a number of submissions on legal issues and, in that regard, as we have said, I have addressed the legal issues and I wanted to turn, therefore, to their policy arguments. But to the extent that their policy arguments assume that the OEB's jurisdiction is paramount over the Municipal Act, these arguments are contrary to law and therefore are inapplicable. Unfortunately, the assumption of Municipal Franchises Act paramountcy underlies most if not all of their brief.

In effect, the gas companies make numerous policy arguments that rest on the assumption that the OEB can effectively repeal or ignore subsection (2) of 220.1 and can stretch the meaning of subsection (4) to exempt them. I would submit that that assumption is incorrect and the policy arguments which rest on it should not be given any weight.

Now, however, in the alternative, I want to address their policy arguments, particularly the issue of subsidies.

The gas companies' submissions, we would submit, are wrong in policy because they are designed to maintain a system under which the Toronto property taxpayers continue to subsidize the gas company. Now, that may have been all right at the turn of the century when they were all the same people and when it was really desperately important to get some gas under the

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streets so that there could be light and there could be gas available for homes, but those days are over. To the extent that the subsidies are passed through to consumers, we have taxpayers who are not gas consumers subsidizing taxpayers who are gas consumers. This is not justified by any legislation or by any principle.

Similarly, to the extent the different municipalities recover different percentages of their total costs, there are unauthorized intramunicipal cross-subsidies arising from the postage rate tariff. Paragraph 4.03 of the Orillia case, in that paragraph the Board stated that uniform conditions for all the municipalities prevent unfairness. With respect, that is only true if the uniform conditions are themselves fair. If the uniform conditions are unfair, as at present, they will create unfairness in every municipality.

Under the status quo, where full costs are not recovered, taxpayers who are not gas users will subsidize those who are, and will also, to some extent, subsidize gas company shareholders whose costs will be lower and whose income will be higher than they might otherwise be. If municipalities can, over time, eliminate such cross-subsidies, eventually the entire province will be charging the right rate after these contracts have been renewed.

Now, the city is aware that the timing of the introduction of new or increased charges may be a

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sensitive issue for gas companies because of the way the Board's PBR regime works. In that regard, we would consult carefully with the gas companies to avoid triggering a hit to their shareholders. This may require a consideration of not changing the status quo and thus avoiding the need for an exogenous adjustment, as you call it, within the current terms of the current PBR regime.

The Board's other concern about the Centra Orillia case was about the increased cost to ratepayers of charging the right amount if there was full cost recovery. In our respectful submission, such a concern is misplaced.

If charging the gas companies full cost

recovery results in higher rates, the amount of that increase is equal to the subsidy now being received, and reducing any cross-subsidy will always create higher costs for those who have been receiving the subsidy and lower costs for those who have been paying it, but that is not a reason not to do it. Unless the quantification of this amount shows that there will be a serious price shock, which is unlikely considering how relatively minor the charges would be as a per cent of total gas company costs -- when you add the three gas companies' total costs, this is a very small amount. The present cross-subsidy could be eliminated without needing to be phased in over several years in any municipality.

We have also heard a lot of arguments about

equivalents with electricity under the new legislation and the so-called level playing field. Those arguments, I would submit, have misstated the situation.

The OEB now expects, under its PBR regime, for MEUs, when they restructure to become local distribution companies, to earn a market return on their equity. Equity is property, but so is land, whether it is above or below the highway. If the municipalities should earn a return on their capital property, why not on their land? Why charge 10 per cent plus per annum for the use of municipal property to its own electric company and charge a zero licence fee for the use and occupation of its real property by strangers? What's the logic of that. Or worse, in the situation today, why charge zero for the use of municipal property and also fail to recover full out-of-pocket costs from road restoration and pavement degradation, and so on?

The big, big thing to consider with electricity consumers is that they will be paying relatively large competition transition charges, or CTCs, between one-and-a-quarter and one-and-a-half cents per kilowatt hour, which is 20 to 25 per cent of the cost of electricity, and they will be paying this to the tune of billions of dollars for many years to pay off the stranded debt. This is not a charge that will be paid by gas customers.

Electricity customers will also face higher rates for distribution costs from LDCs to permit a

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commercial return on their capital. Again, this will change the level playing field. These amounts, when put together, will swamp many times over any effect that would be experienced by gas consumers.

The other thing to look at is, of course, all this talk about level playing and competition. Who are we really talking about? We are talking about distribution companies that distribute gas that are monopolies, and we are talking about wires cos and gas pipes cos, both of which are monopolies. They don't compete with any one. Competition occurs, if at all, at the commodity level.

So many of these arguments attempting to apply the philosophy of competition under the Energy Competition Act are taken out of context and are in the wrong context. When we look at the real amounts of dollars here and what will be required to recover such charges, those are so small as to be insignificant and would not affect the playing field at all. The levelists of any playing field is the result of many offsetting factors. In the big picture, the municipal charges we are talking about are largely insignificant.

A brief comment on permit fees.

Paragraphs 11 and 12 of the gas companies' brief opposes paying $350 for each permit fee as proposed by AMO on the basis that this would make gas uncompetitive with electricity. In our submission, this argument is alarmist and without substance. Toronto

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must represent a sizeable portion of the total volume and dollar revenue of ECG, perhaps 35 to 50 per cent. Yet in most parts of the city, ECG has, for many years, been paying many times, or at least that amount, in permit fees which cover road restoration costs and permit issuance costs -- all of this without apparently any ill effects. The sky has not fallen down, no one has gone bankrupt and they haven't had to stop providing services everywhere else in the province.

Does ECG now propose to stop paying this and to pay less than $350, thereby increasing the present subsidy in Toronto from non-users to users, or do they propose to pay other municipalities their permitting costs on an inconsistent basis? Such a proposal should not be taken seriously.

Paragraph 12 of the gas companies' brief states that any increase in project permit cost recovery would directly increase gas rates. The OEB's response to that has to be that if that's true it's about time the rates were increased to the right level. As with NHL hockey teams, the idea of subsidies to privately-owned gas companies is no longer acceptable.

Paragraph 14 of the brief states that the gas companies are opposed in principal to any new municipal fees, regardless of their magnitude. What is lacking in this statement, in our submission, is any statement of what that principle is. It would have been more accurate to have said that the opposition to full cost

recovery is not based on any principle beyond reflexive resistance to any change even if justified.

Paragraphs 16 and 17 of the brief threaten -- and this was also the response to some questions to the panel, without any quantification -- that expansion projects will be reduced. Why would that be the case if the costs can be passed through; and would it matter if marginal projects were cancelled because of the cross-subsidization from taxpayers and other municipalities ended?

Under the old Power Corporation Act there was a 15 per cent mandatory rule subsidy by Ontario Hydro, but there is no such thing in the new legislation, and there is no mandatory underrecovery of costs by municipalities today in order to fund uneconomic expansion in other municipalities.

So, in our submission, in reality, as opposed to hypothesis, the number of marginal expansion projects that would be rendered uneconomic if the gas companies paid their way in their existing service territories would be few, if any.

I want to come, now, to the red herring about municipal property taxes -- a couple of the Panel Members have asked questions about this -- and it's dealt with in paragraph 18 and 19 of the gas companies' brief.

Our submission on this issue is that it would require a detailed social benefit cost analysis to

provide any basis for the truth of the statement that, in the aggregate, if you add property taxes and non-tax charges, municipalities are more than fully compensated.

We have not seen any such study and the hypothesis remains unsubstantiated.

Nor could such a study be determinative because the argument attempts to aggregate apples and oranges -- namely, taxes and charges. Aggregating two different fruits does not produce a logical argument; it produces fruit salad.

Logic requires not mixing property taxes with cost recovery fees.

Let's consider some examples.

People with no children pay school tax and people who are never sick for a day pay taxes to support Medicare for the chronically ill. Such taxes are never justified by the economic benefit to the taxpayer but only by the indirect benefits that we all derive from being members of a society in which there is universal public schooling or with whatever delays we now experience universal health care. But, by definition, a tax is not a fee for service and is not related to recovering an individual cost. That would be a fee or a charge.

The property taxes municipalities charge gas companies, and any other companies, are not within the jurisdiction of the OEB. They are subject to the control of the legislature and the Ministries of Revenue 140

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and Municipal Affairs and Housing -- to which ministries the gas companies seem to have adequate access.

If someone wants to make municipal -- commercial use of municipal property, for example, to create a sidewalk cafe or to have city crews shovel a sidewalk without charging, it would seem irrelevant for such a person to argue that he, unlike others, should pay nothing because he has no children and, therefore, pays school tax with no benefit, or spends half the year in Florida and uses fewer municipal taxes during that time.

Municipalities cannot be expected to reduce their standard going rate to recover the cost of specific services or charges for the use of municipal property for everyone who wants to describe himself as a special case because of alleged under-utilization of some of the benefits supported by property taxes.

When a gas main blows up, doesn't the ambulance arrive or doesn't the Fire Department come to put out the fire? Of course they do. But there's no way to quantify what those benefits are.

So, there's no principal basis for treating gas distributors as a special case for cost of road recovery cuts and there's no empirical basis for quantifying how much less than cost they should pay.

What the gas companies are proposing is arbitrary discrimination by municipalities in their favour; especially the preservation of the unjustifiable 141

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status quo.

Finally, we want to make a couple of brief comments about the IGUA brief, which really made three points: first, that it would be disastrous to have gas companies pay even a $350 construction permit fee -- and we have discussed that issue; second, that the use of municipal property on the same basis that others do is, quote, an odious attempt for a cash grab; and, third, that the proposed charge would be taxation without representation.

Now, as for the odious cash grab, this is colourful rhetoric, without substance. Every cash grab -- whatever that is -- is odious; hence, the term "odious" is redundant.

But what exactly is a cash grab? Where do we draw the line between a justifiable charge for the use of municipal property and a mere cash grab? -- whatever that is.

Well, IGUA offers no suggestion, arguing that any charge for the use of municipal property is a cash grab.

Well, we have two responses to this.

First of all, at the rhetorical level, a cash grab is a meaningless comparative, merely an emotional use of semantics, intended to evoke attitudes of disapproval on the part of the reader. For example: I am firm, but my opponent is stubborn; my costs are unavoidable, those of my suppliers are exorbitant; my

children are precocious and his children are brats; and, finally, what I charge for the use of my property is a modest fee, what others charge is an odious cash grab.

Such over-the-top semantic binges in the brief provide us with some amusing heat but not with light.

The OEB cannot accept IGUA's blanket condemnation of such charges.

THE PRESIDING MEMBER: Excuse me, Mr. Roman. I think that you are over time. Could you --

MR. ROMAN: Thank you.

THE PRESIDING MEMBER: -- wrap it up quickly?

MR. ROMAN: Perhaps I can just wrap up, then.

IGUA's condemnation of these charges was somewhat premature because they have not yet seen what the proposed charges are -- "Before we even know what they are, we are opposed to them".

Fortunately, the Board does not prejudge these things.

And, in essence, the IGUA argument is an opposition to the legislation itself -- which argument is too late.

As to the tax and taxation with representation, I believe that was an import from the American colonists at the Boston Tea Party, and our proposal would be that that should be left floating with the cases of tea in Boston's harbour.

So, at bottom, the IGUA brief in support of the gas companies could be summarized as "me, too, but

with attitude", and it was fun to read, but I would submit that it adds little to the Board's rhetoric -- to the Board's record, in this case.

That concludes our, I apologize, overly long presentation and we are now open for any questions on law or City practices or costs, which I would ask you to address to Mr. Koropeski.

THE PRESIDING MEMBER: Thank you.

MR. ROMAN: All the hard stuff is for him.

MEMBER SIMON: Mr. Roman, I wonder if you could provide a little bit more information on the Metronet agreement and how that's led to the going rate, in the City of Toronto, and --

MR. ROMAN: I will try --

MEMBER SIMON: -- who that now applies to.

MR. ROMAN: -- and explain that and Mr. Koropeski will try and explain it, to the extent that we can.

The agreement itself is a confidential agreement but we can talk about the general principles of it.

What happened was that the City conducted an RFP process and Metronet's proposal was the one that was deemed to be the best, as a result of which the City entered into extended negotiations with Metronet and came up with a long, detailed, complicated, contract which has now become what we call the "MAA", the municipal access agreement, template, and that was used

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to negotiate other agreements with other companies, such as Ledcor and Stream, where slightly shorter versions of the agreement were used because their circumstances were less complicated. This is not an agreement where the policy is, "You must sign all the clauses"; it's the template used for negotiating purposes.

--- Pause

MR. ROMAN: In the standard MAA, then, I'm at liberty to disclose that there is a per metre charge and, also, a gross revenue charge of 2 per cent in the first few years, rising to 3 per cent in subsequent years, of the revenues obtained within the City of Toronto boundaries.

So, those would be payments for the use of City property, to the City. That would be a user fee.

Now, we are not suggesting that that is necessarily the right rate or the wrong rate to charge other users, but that's the kind of template, and the right or wrong rate would be determined by such things as the value to the company of having access to property of that density.

There is another CRTC proceeding going on right now, which I should mention, which is perhaps of as great or greater interest than even the Vancouver hearing, and that was the -- it began on December 23rd, with a Christmas present we got from a company called Telus, which filed an urgent interim application against the City of Toronto, with the CRTC, to which the City of

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Toronto has responded -- and we could make copies of those briefs available to you.

The issue, in that case, is more interesting, to some extent, than the Ledcor one because, in the Ledcor case, the company was already there and it didn't involve any construction. Here, Telus was asking for construction permits, to dig up city streets. Therefore, it involved issues more like those that we are dealing with today. Again, Telus took the position that it will pay only the actual out of pocket costs for permit fees, not restoration costs, and no charges for the use of municipal property. It took the position that in western Canada, where it is an incumbent carrier, it doesn't pay these things and, therefore, it shouldn't have to in Ontario because once an incumbent, always an incumbent.

The Toronto position, of course, is you may be an incumbent there, but you aren't here and you are not going to dig up our streets without paying for it. That's another set of issues that you may wish to consider.

There is the issue then of full cost recovery for quantifiable out of cost things and then some payment for the use of municipal property. To some extent the payment for the use of municipal property can help to compensate for the fact that you can't quantify all your costs on your cost recovery side or, if you can quantity the costs, those quantifications may be

debatable and the allocation of those cost responsibilities causally to individual companies when there are maybe a dozen cutting up your streets over a 20 year period, it may be very difficult to do. The use of municipal property theme may represent a reasonable proxy for that.

MEMBER SIMON: This MAA, is that also going to apply to municipal utilities using municipal property or is this just going to be applied to private companies?

MR. ROMAN: The intention is to have a level playing field with everybody, but you don't necessarily have to have a written contract with yourself. On the basis of the policy of the level playing field, and that is a municipal resolution that we could provide you with, the intention, if I understand it correctly and you can correct me if I'm wrong, is that everyone will be treated alike.

There are certain statutory limitations there where you can't level the playing field totally by eliminating all statutory differences. The municipality doesn't have that jurisdiction. Subject to the statutory framework in which we find ourselves, there is an attempt to make these things apply in an approximate equivalent basis.

The general principles in the MAA should also be applied with whatever changes are legally or practically necessary to others. In other words, the city is not giving itself or its own creatures better or

preferential treatment versus anyone else.

MEMBER SIMON: Could I expect then, as someone who lives in Toronto paying sewage and water costs, that eventually my costs are going to go up as the city takes into account road cuts that the city's utility would make in constructing and carrying sewage and water works.

MR. ROMAN: No, you wouldn't expect that because the costs are fully recovered already. Given that there is full cost recovery, there would be no need to raise the cost.

MEMBER SIMON: Municipal costs recovered by the municipality, but the price that I pay for my water may not necessarily reflect the true cost of the water.

MR. ROMAN: Well, if water is priced properly, it will. I don't have any knowledge of whether it is or isn't priced properly, but if it is priced properly, which it should be, it should recover all its costs. Counsel Moscoe, who is sitting at the back of the room and who understands the policy issues better than I do, advises me that it is charged properly and there is full cost recovery.

The other point, however, is that sewers are not a commercial undertaking. They don't represent a commercial use of the city's property, so there may be some difference in that regard for sewers.

MEMBER SIMON: What about for Toronto Hydro?

MR. ROMAN: Well, that again is subject to a specific legislative situation, but of course Toronto Hydro will be paying dividends to the city, so the city will be obtaining some substantial benefits there, albeit that is to offset the city's investment, but there will be some cash come in there that the city has not been receiving so far.

MEMBER SIMON: How will Toronto Hydro be -- how will you be dealing with the road cut issue vis-a-vis Toronto Hydro construction?

--- Pause

MR. ROMAN: I'm sorry?

MEMBER SIMON: I was just wondering how you were going to be applying the road cut/sidewalk cut issue to Toronto Hydro.

MR. ROMAN: I will pass to Mr. Koropeski.

MR. KOROPESKI: Yes. Perhaps I can explain briefly how the cost recovery or the whole operation for road cuts and sidewalk cuts occurs in Toronto.

First of all, the same process is applicable to all utilities, be it the city water system, the sewer system, Toronto Hydro, the telephone companies, cable TV companies and consumers, Enbridge Consumers Gas. It's consistent.

Unfortunately at the moment I have to qualify everything by saying that generally speaking this is the case because we have just amalgamated seven different approaches. However, six of them are very similar in that the city contracts to do all of the permanent

repairs on the sidewalks and road cuts, so we put a tender out. Whoever was responsible for making that cut is billed for the cost of that work to restore the pavement.

Added on top of that cost is a fee or an additional amount that covers the city's permit processing, the inspection of the work when the utility is initially doing it, the costs of administering the city's repair contract and also the costs of inspections of the city's contractor.

There's not a permit fee per se. If in any given year, for example, any given utility is in a capital expansion mode, that utility would be paying the higher proportion of the overall cost of that operation because they are the ones that are responsible for those costs.

With that being said, the city's recovery of direct costs through that program is fairly comprehensive, but it doesn't take into account things like Mr. Ross talked about this morning of pavement degradation, in other words when a cut is made, the reduced life cycle of the pavement and the need for earlier reconstruction.

THE PRESIDING MEMBER: Mr. McCann.

MR. McCANN: Yes. I would just like to clarify a couple of things. If I could turn your attention to the model franchise agreement -- do you have a copy of that handy, Mr. Roman, the model

franchise agreement?

Could we just have a moment, Madam Chair, while we sort that out?

MR. ROMAN: Sorry, what clause or paragraph?

MR. McCANN: You have the model franchise agreement. I'm looking at section 4 which is titled "Procedural and Other Matters", section 1, municipal bylaws of general application.

MR. ROMAN: We have the Web site version, but it will take me a second to find it.

MR. McCANN: I don't have the Web site version here, but it should be the same.

MR. ROMAN: Okay. "Procedural and Other Matters", yes.

MR. McCANN: Okay. Just to set the context of this -- I won't read the whole of it, but the pertinent part.

> "This Agreement and the respective -- "

Sorry. Perhaps I should say I am reading section 1, municipal bylaws of general application.

> "This Agreement and the respective rights and obligations hereunto of the parties are hereby declared to be subject to the provisions of all regulating statutes and

all municipal by-laws of general application and to all orders and regulations made thereunder ... save and except by-laws which impose permit

fees --"

This is the famous clause which has been much debated about permit fees, one of the reasons why this discussion is taking place today. The issue I am trying to focus on is this. You have made the argument that section 220.1 of the Municipal Act, particularly subsection (2), because it says "despite any Act" in effect prevents the Board from imposing conditions in a municipal franchise that would prevent the municipality from charging a fee that it's entitled to under 220.1.

Municipalities are entering into this model franchise agreement all the time. They have even done so since this agreement was -- or sorry -- this proceeding to discuss the model franchise agreement was undertaken. Admittedly there are some which have sought interim renewals.

But my question is what is the effect of those words "save and except bylaws which impose permit fees" in the light of 220.1. Does a municipality which signs an agreement, a franchise agreement in this form sort of contractually undertake not to impose the fees it would otherwise be entitled to impose under section 220.1?

MR. ROMAN: I think so. I think what it would amount to is a contractual waiver for the duration of the agreement of its right to charge such fees under that section of the Municipal Act.

MR. McCANN: So AMO's submission as I understand it, and AMO will be coming next, is that

those words that I have read, "except bylaws which impose permit fees" should be removed from the municipal franchise agreement. And it would be your view, I guess, that if you don't do that, if you leave those words in, it will then prevent any municipality which signs on to the municipal franchise agreement from exercising its rights under 220.1?

MR. ROMAN: That is correct.

MR. McCANN: Thank you.

One other comment you made which I just wanted to ask about was you said that the Board in -- you said that the Municipal Franchises Act is not exactly a regulatory statute and you said something to the effect that the OEB should not apply a regulatory mindset when it exercises jurisdiction under sections 9 and 10 in particular of the Municipal Franchises Act.

Well, I guess I am going to ask you why shouldn't the Board apply a regulatory mindset, at least in the sense that it would be proper, would it not, for the Board in examining the terms and conditions of a municipal franchise agreement or in being asked to in effect refashion a municipal franchise agreement under section 10, it would be proper, would it not, for the Board to be mindful of the effect on rates? I mean it is not itself a rate setting exercise. I think that would be common ground.

But the effect on rates, the effect on the rate payer would be something that the Board should very

much have in consideration in those proceedings. Would you agree with that?

MR. ROMAN: Well, with certain qualifications, yes. If there was going to be a sudden shock to the rate payer, the Board should consider that. But if the higher rate results in people charging the right amounts for the right things, then the Board should be mindful not only of the fact that people who are gas customers are going to pay higher rates, but that people who are municipal taxpayers are no longer going to be subsidizing them. And it should look at both aspects of that because it is not part of the regulatory mindset to insist that there be cross-subsidies. If anything, it is the reverse of that.

But what my comment was directed to is really more the use of city property fee or charge because there isn't anything that I understand in the normal regulatory theories that people apply that deals with that. Regulation would normally deal with the right to somebody to receive a return on their capital invested in a public utility or something of that sort. And what we are talking about, which is license fees or rent for the use of municipal properties, whether it be a hot dog stand or a pipe under the highway, is something that normally isn't dealt with by regulators.

And what we would want you not to do therefore is to reject such charges out of hand on the basis that you are not familiar with them and that they are truly

cost based. Because there could be such a regulatory impulse that says, "Gee, we wouldn't let Consumers Gas charge that so why should we let the city charge that?"

And we are saying that that is not the right way to look at the question. Because the Municipal Act does not say, "Municipal rates must at all times be just and reasonable." That is not the way the Board is supposed to look at it. The municipal costs cover a variety of things and sometimes they may be just and reasonable in accordance with regulatory standards and other times they may not be. Certainly the many decades of under recovery would not be considered just and reasonable.

MR. McCANN: And one last area, and I am sorry, I am going a little out of order here. I think you have already covered this but just so I am clear on it.

What we know as the former City of Toronto, the situation there is covered by 1848 legislation, which without having seen it, without going into it in too much detail, allow certain rights to be exercised by the gas company. But as that situation has grown up, as Mr. Koropeski outlined, there is a recovery of costs from the gas company by some sort of arrangement.

And with regard to the other municipalities that amalgamated to form the current City of Toronto, the situation is being researched and developed to determine just what the arrangements are there and I

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assume that the Board will be hearing more about that at some point. I take it there is a little bit of uncertainty about that.

MR. ROMAN: We are not even sure where to find the answer now because some of the people who knew the answer have gone. And some of these agreements might have been entered into 50 years ago or there might have been special legislation in the "Township of Something-or-Other Act" that got amalgamated with the "Township of Something Else Act" and those old statutes are not easy to find. It is a little bit like looking for a needle in a haystack when the persons who knew about them and where they were aren't around any more.

So maybe what we will have to tell the Board at some point is unless our friends at the gas company can help us, we give up. We don't know what the basis is. But ultimately it may become irrelevant if all of it is merged or amalgamated together.

MR. McCANN: So what you are looking for the Board to do here is with regard to the current City of Toronto as it exists today to in some way ensure that, at least for the time being, the model franchise agreement, whatever the Board recommends about the model franchise agreement should not apply to the City of Toronto?

MR. ROMAN: That is correct.

MR. McCANN: Those are my questions, Madam Chair.

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THE PRESIDING MEMBER: Thank you.

Mr. Roman, I just have a couple of questions. I would be remiss to my friends at Union Gas if I didn't ask for your comments on the Dawn/Union Gas case vis-a-vis the jurisdiction of the Board as I am sure that they will raise it. You mentioned our famous Centra Four case but not the Gas Companies favourite case.

MR. ROMAN: I didn't deal with that in my written submission. I must admit I haven't read that case recently and I don't remember the details of it when I did read it.

I would be surprised if that case came to the conclusion, however, that the words "despite any act" don't mean "despite any act." That is to me about as clear statutory language as you can find.

Now, there are certain provisions in the Municipal Franchises Act that also say "despite any act," but those are not provisions that apply in the present situation. They are provisions that apply in other situations.

What I might like to do if you wouldn't mind, Madam Chair, is to provide a written response on that one issue to your question if it changes what I have just told you.

THE PRESIDING MEMBER: Certainly. I think we would appreciate your comments on the case.

MR. ROMAN: I will do that.

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THE PRESIDING MEMBER: Because I would anticipate that the utilities dealing with the jurisdictional issue will raise that case in their argument. So you might want to as far as that is concerned.

Is it your position then that vis-a-vis section 10 of the Municipal Franchises Act that under the terms of section 10 of the Municipal Franchises Act the Board has authority to impose or to agree upon the terms of a franchise agreement between the municipality and the utility? Is that -- can I say that that is fair subject to the requirement that it be within a year? That that is the basic framework that the Board has authority to impose the terms?

MR. ROMAN: Yes, but with one perhaps minor implied qualification and that is that really this section or this subsection (2) deals with public convenience and necessity. And in the legal and economic literature around that subject, that has come to take on a particular kind of meaning which is not the same kind of regulation as that rates must at all times be just and reasonable. It is rather the necessity of a permitting process.

So I would say where it says, "upon such terms and conditions as may be prescribed by the Board," those terms and conditions should be as to public convenience and necessity and can deal with such things as restoration after construction, compensation to

landowners, rates charged to customers by a pipeline company or distribution company and so on. But it is not primarily again a rate regulating type of jurisdiction.

THE PRESIDING MEMBER: Is it your view that the Board should not take a holistic approach and look at the entire industry and say we deal with rates. Obviously we would have to set just and reasonable distribution rates, but we should sort of ignore that in terms of our interpretation of section 10 and --

MR. ROMAN: I wouldn't go so far as to say ignore. I think it is more a difference of emphasis. The emphasis here would be, and if you look at the second part of it, you will see the part that none of us have wanted to talk about. If public convenience and necessity do not appear to require a renewal or extension of the term or the right, may make an order refusing a renewal or extension of the right.

So you have a binary choice. Either it is granted or it is not granted. And when it is granted, it is on certain terms and conditions. The National Energy Board by way of comparison grants the right to build a pipeline and that would be considered a certificate of public convenience and necessity.

When they do that, they don't look in enormous detail at rates. What they look at it is if you are going to build a pipeline or build facilities or if you are going to have a franchise that is renewed, are you being fair to other people. You should look at questions like the externalities. For example, if you dig up the roads and the streets are blocked for weeks at a time, those are things that fall on other people who don't receive compensation.

So when you say a holistic view, and I am agreeing with you, but I think that holistic view is not just the same kind of holistic view as you look at when you look at whether rates are just and reasonable, but rather should deal more with the construction aspects and the compensation to the public for any inconvenience caused and perhaps also cost recovery.

THE PRESIDING MEMBER: Am I understanding your argument that because of the use of "despite of" in section 220.1, a combination of subsection (2) and subsection (4) together, that the Board does not have jurisdiction to have any provisions in an agreement that it would impose under section 10 of the Municipal Franchises Act dealing with these types of fees that the municipality can charge?

MR. ROMAN: Yes. And by that I would mean that the Board cannot say here is the standard agreement and you must all sign it, including the City of Toronto, must all sign it. And if that standard agreement precludes, as Mr. McCann's question indicated, precludes the things that we are permitted to charge, then what you would really be doing is in effect either repealing that section or treating it as if it gave the city no

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rights.

And if you do that you are in effect creating a conflict between that draft contract or that imposed contract and subsection (2) of section 220.1. And in the event of such a conflict, then it is the Municipal Act provision that would prevail.

If there is no such conflict, the problem doesn't arise. It only arises if there is a conflict.

THE PRESIDING MEMBER: You said -- I'm sorry. I understand what you are saying. I think I understand what you are saying.

MR. McCANN: Could I just ask one question to follow up yours, Madam Chair.

Let me try this question. We don't have an actual application before us today. We have a discussion.

MR. ROMAN: Right.

MR. McCANN: But if we had an application by a municipality -- if we had an application by either the municipality or the utility, in circumstances where they agreed on every term of the model franchise agreement except the utility wish to continue the language "save and except permit fees" and the municipality wished to drop that language, that was the only matter in disagreement. And that application came before the Board under section 10, is it your view that there would be -- this is a hypothetical question. Let me put it this way.

There would be very strong arguments given the wording of 220.1(2) that the Board could not in exercising its jurisdiction under section 10 in fact require that the "save and except permit fees" language be put in the franchise agreement to be imposed on the municipality because that would run counter to section 220.1?

MR. ROMAN: That is right.

MR. McCANN: Thank you.

THE PRESIDING MEMBER: So it is your position though I think you said earlier that the parties could waive the imposition of these fees if they wanted to. You are just saying that the Board could not as a provision of the franchise agreement have jurisdiction to have a permanent waiver, so to speak, as part of its model franchise agreement?

MR. ROMAN: That is right. Waiver is a voluntary act and it can't be imposed by the Board under the Municipal Franchises Act because that would, in effect, either repeal or render nugatory the benefit the legislature intended to give the municipalities under subsection (2) of 220.1.

THE PRESIDING MEMBER: Right. You have said that the fees charged by the municipality do not have to be just and reasonable.

MR. ROMAN: I mean that in the regulatory sense. In the very special sense in which you use it in the regulatory sphere.

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I don't mean by that, and I am glad you raise it just in case there is anybody from the press here, that municipalities have a right to charge rates that are unjust or unreasonable. But those words have a technical meaning in the regulatory context that deal with certain kinds of costs that are acceptable for regulatory purposes and so on. And really what I am saying is that they don't have to comply with those technical regulatory standards that are applicable to public utilities under a rate of return regulation regime.

THE PRESIDING MEMBER: Are you saying then -- I understand that it is not the cost to service type of regulatory regime that we are dealing with or the new model PBR that we are introducing now, et cetera, for just and reasonable rates for distribution rates for example.

But are you saying that the Board would not have jurisdiction in a model franchise agreement to say, "Municipalities you can charge these fees but they have got to be just and reasonable"? Are you saying that the field has been sort of totally occupied by section 220.1 and therefore the Board has no jurisdiction to make any comment on the fees that can be charged under the terms of the model franchise agreement?

MR. ROMAN: That is our position that the remedy, if any, in terms of whether municipalities are applying a tax or are charging a fee, because really

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what subsection (4) does is it deals with taxes, is really a question of law for the courts. And there are three cases, I am embarrassed to say I forgot to mention, that I was going to bring to your counsel's attention.

One is Carson's Camp Limited v. Amabel Township and I guess I can give the cites to the reporter later. We don't need to do that now.

The second one is Re: Ontario Private Campground Association and the Corporation of the Township of Harvey. And the third is Re: Urban Outdoor Trans Ad and the Corporation of the City of Scarborough. And that last one is the most recent of the three.

And those three deal with the question of municipal laws as to when something is a fee, when something is a charge and when something is a tax. And those are important legal questions. Also Re: Eurig's Estate dealt with that question as well in a slightly different context.

So that issue is an important one and if a municipality steps outside of its boundaries in that regard, people are not reluctant to make quick applications to the court to say that is a tax, that falls afoul of section (4). So it isn't as though the Board is the only protection the gas companies and their customers have.

As well, if you look at the end of -- if you look at subsection (13) in 220.1, it says:

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"The Minister may make regulations,"

And then underneath that there is item (b):

"imposing conditions and limitations on the powers of a municipality or local board under this section..."

So if the government wants to limit municipal powers under that section, that's the way it does it. But, with respect, it hasn't authorized the Board to do that. The minister has kept that power to the minister.

--- Pause

THE PRESIDING MEMBER: I have a number of questions, but unfortunately we don't have -- our time is running out, and you raised a number of interesting legal arguments that, again, unfortunately, we didn't have an opportunity to review in advance of your presentation, so there will be lots of other questions that we will have once we have an opportunity to review your submissions.

MR. ROMAN: Now, I understand from Mr. McCann that there will be a final written response, or something of that sort, so if there is any concern that in my rapid delivery there were certain questions that may not have been understood clearly, or if the Board has any questions to put to me in writing through Mr. McCann, I would be pleased to respond to them, either in time for the final submission or earlier if necessary, so that other parties can make responses to it.

MR. McCANN: Yes. I think that's fine and I think the only further thing to say would be we would make these questions available to all parties so they would know what was going on and could respond accordingly. We will have to think this through, but if we had to modify the procedure we have laid out previously we will do that. I think the important thing, though, is that, you know, we want to make sure we have all of the relevant considerations before we proceed to making a decision.

THE PRESIDING MEMBER: I do, though, have one -- and I'm not saying that I'm talking on behalf of the other Members of the Board, but I do have one concern, just generally speaking, and that is, we talked about fees, fees for service, and the gas companies, utilities will say, "We don't use the schools, we don't use all other services", and you will say, "But that's part of living in a society and living in the city, and that is, generally speaking, what taxes are for." But then you turn around and you say, "But you do use road cuts and you do cause -- you know, carrying on your business does cause problems with the roads, et cetera", and you are saying "and you should pay for those services that you are using." So, in fact, you are dividing up -- the ones that the utilities say, "Well, we use", you say, "Well, you should pay for", and the ones that they say they don't use, you are saying, "Well, that's just part of being in the city."

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Is not part of being in a city, like the City of Toronto, having access to gas and gas utilities and the pipelines that are there, the ability of members to be able to attach to that? Is that not something that is -- even though I appreciate that it is run by a private company -- that is regulated, so to that extent we try not to allow the shareholders to have exorbitant rates of return on their investment -- so there is that -- and we do have the problem of public convenience and necessity as far as section 8 of the Municipal Franchises Act is concerned --

MR. ROMAN: I think the answer to your question lies in the three cases I have just mentioned to you. In two of those three cases the municipal by-law was struck down, in one of them it was upheld.

In the two cases, it was struck down because something that was described as a fee or a charge was held not to be a fee or a charge, but really a tax. The reason for that was that it wasn't for any specific service, it was just for the general revenues of the municipality, and you can't call something a fee or a charge if it isn't something specific for a service.

So when we have a charge for road cuts or permit fees, that isn't a form of municipal tax. That doesn't go to the general body of taxpayers. That goes, in one very specific instance, as Mr. Koropeski mentioned, when the bill comes in from the person who patched -- the contractor who patches the road, that

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gets sent straight to the gas company. So that is a direct connection. It's not a tax, it's a direct payment for a specific service.

On the other hand, a tax is something where, if I may put it this way, you really get nothing in return. If you look in those cases, and in the Eurig case, at what is the definition of a tax, you will see that it is something that is applicable to everybody, not just to somebody who cuts the road, and it's applicable to everybody for nothing that they get in particular in return. So it's not a fee for a service. And everybody pays those things, that's why they are called taxes, whereas when it comes to this, it is a different situation.

So there is no double payment except in the way that we all have a double payment if we pay for specific services and if we don't.

THE PRESIDING MEMBER: One last question. Ms Simon touched on it before.

I don't understand -- and perhaps you can help me -- this municipal access agreement. Right now you do not have a franchise agreement for the City of Toronto with Enbridge Consumers Gas. Are they paying these fees on an ongoing basis?

MR. ROMAN: No.

THE PRESIDING MEMBER: So they are not paying the fees.

MR. ROMAN: Consumers Gas does not have a

municipal access agreement with the City of Toronto of the type that we would have with Metronet. We are not saying that it should immediately either. What we are saying is that, under the laying playing field policy, the intention over time is to look at the various terms and conditions of those and, to the extent that they are applicable, to use a legal expression here, is mutatis mutandis -- to the extent that they are applicable in this other area, negotiate with a company and see if we can work out an arrangement that is satisfactory to both parties. The intention is not to brow-beat people into this, but to see if these things can be negotiated.

THE PRESIDING MEMBER: So who are Metronet? Can you help me with that?

MR. ROMAN: Well, Metronet is a very large telecommunications company that has many kilometres of fibre optic cable under the City of Toronto streets and, in fact, has built up a whole national network of that. They are now owned by AT&T and they are part of what would be called a competitive local exchange carrier, or CLEC, which can provide you with telephone service in competition with Bell Canada and other telephone companies.

THE PRESIDING MEMBER: So they are a competitive entity as opposed to --

MR. ROMAN: Of...?

THE PRESIDING MEMBER: They are a competitive

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entity?

MR. ROMAN: Yes. And they are using it for their commercial purposes. If you look at share values of companies like Ledcor and Metronet and AT&T, as a result of these fibre optic services, some of them are almost as good as Amazon.com. They have done extremely well with building a very substantial corporate empire in a very short time on municipal rights of way.

THE PRESIDING MEMBER: So they have come into business relatively recently, have they?

MR. ROMAN: Yes.

THE PRESIDING MEMBER: And have been laying these cables relatively recently and that's why you are charging them these fees now?

MR. ROMAN: Three years ago they have started.

THE PRESIDING MEMBER: As opposed to -- and this was so that you would permit them to use it? Is this a sort of entry into the new territory type of agreement?

MR. ROMAN: Yes, because without that they would be trespassers. Nobody can put something under or over city streets without permission and, in return for obtaining that permission, they were required to offer certain commercial terms that were better than those offered by other people who did not do as well as they did in the RFP process.

THE PRESIDING MEMBER: So I appreciate that you will say there is no difference, but there is an

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argument that there is a difference between a new technology that wants your permission to come in and trespass, as far as the fees are concerned, and a gas utility that had the pipes in the ground for -- how many years?

MR. McCANN: Fifty.

MR. ROMAN: There is a difference. We are not saying that there isn't and we are not saying that the rates or the terms should be the same. What I believe the city is saying is that over time there should be some analogous if not equivalent kinds of agreements so that some people who use city property don't use it free and other people pay for it, so that where there are clear out-of-pocket costs, all of those are clearly recovered.

THE PRESIDING MEMBER: Thank you.

I think now might be an appropriate time to have a short break and we will reconvene at a quarter to four.

--- Upon recessing at 1534

--- Upon resuming at 1550

THE PRESIDING MEMBER: Last, but not least, Mr. Wright.

PRESENTATION

MR. WRIGHT: Thank you, Madam Chairman.

I have with me, on my right, Mr. Robert Foulds, who has been in the municipal administration business for a lot of years, including being involved

with the negotiation of the last round of municipal franchise agreements.

On my left is Mr. Casey Brendon, who, until very recently, was with AMO. He's an engineer by trade and has been instrumental in helping me understand some of these issues as we have gone along and he will -- when we get into technical engineering issues, if the questions go in that direction, he will come to my aid.

Also, Ms Pat Vanini, who is behind me, is with AMO, and to the extent that AMO position becomes pertinent to questions, I will look to her.

Over the break, I have laid before you a four-page summary of the points that I wish to highlight. Largely, they reflect what is in AMO's submission.

My primary focus is going to be on the Issues 3 to 10.

Before doing that, let me speak just a little bit about Points 1 and 2.

Essentially, AMO finds itself associating its submissions with Ottawa-Carleton and Toronto. I would say two things -- two or three things.

With respect to the question raised by you, Madam Chair, with Mr. Roman, about the effect of a municipality entering into an agreement voluntarily amounting to a waiver of their right, under the Municipal Act, to impose permit fees, I would agree with his response, that if there is a voluntary entering into

a municipal franchise agreement that contains that waiver of permit fees, it has the effect of, at least for the duration, standing in the way of their exercising their rights under 220.1.

If, however, they do not voluntarily enter into such an agreement and the Board imposes it, I also agree with Mr. Roman that there is the problem of the conflict that would have to be resolved in a court, and I think the importance of that, from the perspective of AMO, is that, until that point is decided, it would be a wise municipality that would ask the Board to order an agreement so that they leave open their right to have a discussion with a court about the paramountcy argument.

Now, the other point that I would raise relates to the question of the amount of the fees and the just and equatability or the reasonableness of the rates or the permit fees under 220.

My friend, Mr. Roman, I don't think intentionally, but may have left the impression that municipalities are, short of ministerial intervention, left largely to their own devices and discretion. And to the extent that this Panel has that impression, I disagree that that is the case.

In my view, Section 220.1(2) deals with the specific things for which the by-law can be passed and a municipality that is not able to -- in the jurisdiction of a court, on a challenge of the by-law -- produce the basis upon which they came up with the number, that

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by-law is at serious risk. A municipality cannot simply pull a number out of the air in order to, for instance, pass a by-law imposing fees for services or activities done by or on its behalf, that it would have to be able to establish, to the satisfaction of a court, on the basis of evidence, that it truly reflects the cost of providing that service.

I just wanted to make that observation to the extent that -- to the extent that the Board may have the impression that there are no constraints on the municipality's exercise of that jurisdiction.

I think another point that I would make is that, insofar as permit fees are concerned -- and there was some discussion about telecos and electrical distributors -- those highway users are exposed to permit fees.

Now, the telecos and the electrical distribution companies are not exposed to the user fees, but they are exposed, under the legislative regime we have, to permit fees.

And in my respectful submission, whatever else you may do, with respect, the gas company should be -- on the level playing field theory -- exposed to permit fees that are reasonably based and founded on a justification, as would be required by Section 220.1.

Now, in AMO's initial submission, in December, the suggestion was there should be a fall-back position to -- and the figures of some sort of default amounts

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were proposed, if the Board -- if the Board decided that they were going to wade into an amount question.

Having heard the submissions, AMO's position is that the best course for this Board is to avoid the legal quagmire of the conflicts between its jurisdiction under the Municipal Franchise Act and the Municipal Act provision that we have heard about from Mr. Roman and that the Board should simply remove that "save and except" clause, leaving it to the courts, at some time, to decide, after a municipality passes a buy-law, one, whether 220.1(4)(e), in fact, stands in the way of the by-law; and if so, whether or not the municipality has been able to sufficiently demonstrate the underpinnings for the charge as to avoid the problem of it being a tax. In that way, each municipality can tailor its own charges according to its own costs and, in that way, avoid cross-subsidization as between gas users and non-gas users within the municipality and as between municipalities for their service by the same gas company.

In my respectful submission, that is the position that this Panel should take on that issue.

Now, let me speak, briefly, about the relocation costs.

AMO has not revisited that question, which was -- there were really two nugget issues 13 years ago. One of them had to do with municipal authority over its road allowances; and the other had to do with cost

sharing on relocation. And if the Board wishes, in their questions, to get into that in detail, Mr. Foulds, who was there, and I, who was there, will attempt an historical backgrounder but, effectively, on the issue of relocation costs, the decision that was negotiated then -- and it was negotiated -- was to avoid the problems of the Public Service Works and Highways Act, which was then the governing legislation, in a silent franchise agreement and to come up with something that approximated it -- and that's where the numbers fell out. And we are not revisiting. That is not to be reopened, as far as AMO is concerned.

I digress for a moment, in that context, to say that, however, the matter of permit fees was not an issue of significant, or any, negotiation, at that time and, at that time, there was an expression of preference by the Board -- it's in E.B.O. 125 in paragraph 635. It's right at the end. "As a matter of policy, the Board does not support the introduction of permit fees by municipalities", so it was stated as a matter of policy. It wasn't an issue as far as the municipalities were concerned at that time. It wasn't an issue to be negotiated.

That, Madam Chairman and Members of the Panel, however, was before section 220.1 of the Municipal Act. It was at a time when the MTO was subsidizing municipal highway costs up to about 50 per cent. Now it is an issue, an unlikely location cost. AMO believes that

this was not negotiated then to the extent that it was discussed at all, which was very little. The ground rules have changed. Enough on points one and two, subject to questions which we will come back to.

With respect to the question of duration of new and renewable franchise agreements, there are a couple of sections of the Public Utilities Act which were referenced both in my summary and in the brief, in my respectful submission, suggests strongly that 20 years is a maximum. AMO is rather of the view that the rationale expressed in E.B.O. 125 strikes the balance.

As to the notion of automatic renewability, I share my friend, Mr. Roman's concerns that that creates some difficulties as to the Board's jurisdiction under the Municipal Franchises Act. I will leave it there.

It seems to me that this is one of those issues where the business of term, largely the gas companies and AMO are in the same place: 15 to 20 years, 20 years for the first term 15 for renewal, unless the municipality wants more, but in the normal course, I don't think I'm being unfair about this, in the normal course, most municipalities are simply presented with something.

If this Board is inclined to say 15 years for renewal, staff should at least be saying to the municipal clerk when they get a 20 year contract "But did you know you could get it for 15 and do you really want it to be 20?" It's a question of clerks who

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probably deal with this, municipal staff who deal with this perhaps once or twice in their career and simply wouldn't know. It's incumbent, in my submission, on Board staff to be sure that the municipal staff are alerted to the 15 year term as being Board policy if they want it.

On insurance and liability, let me start as we did in the brief and, as I say, near the top of page 2 of the summary. There is no intention on AMO's part to alter the indemnity provision as found in the current municipal franchise agreement and that includes the obligation of a gas company to indemnify the municipality for anything relating to the gas company's operations, except where it flows out of municipal negligence. That is not something we propose to change.

What we ask is two things. I don't mean to impute improper motives, but there is, in my submission, and my sense is that the gas companies are deliberately not understanding what the municipalities want. In effect they say "Oh, well, they want to be named insured so the gas companies are insuring them". That's not and never has been the issue.

What we want is to be added as an additional named insured, which is what I think they are agreeing they will do, so that the municipality will have a direct claim on the insurance policy, so that they won't have to involve their own insurance company when it is clear that there is no municipal negligence involved.

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That should add virtually no additional cost. There is no change in risk, no change in coverage. It may be that there is a modest administrative charge for doing it, but in the experience of municipalities for which I have acted over a lot of years, it's fairly standard procedure, whether they are construction contracts or subdivision agreements or whatever they may be, to have a contractor put up insurance for their obligations and have the municipality named as an insured, again for the reason of not involving their insurance companies when clearly there is no municipal responsibility.

We are not seeking to avoid responsibility for municipal negligence which is the song you are hearing from the gas companies. It never has been. We simply want to know that -- simply. We want to know that there is coverage and we want to be able to deal directly with the insurance company when we have been named because we are sort of in the vicinity and there's no negligence.

Again, it's not unusual to ask for evidence of insurance coverage of the indemnity obligation which they have agreed to provide. In the course of negotiations leading to this proceeding, there was some discussion about how much that insurance should be. Huge numbers were bandied about. Probably those huge numbers were justified if you were in Ottawa-Carleton or Toronto. They probably aren't justified if you are in,

with respect to my client, Middlesex Centre, just out of London, a rural township. The numbers are different.

AMO's submission is that the standard of coverage ought to be that of a prudent Canadian gas utility operating in the municipality in question. If there is some dispute, as I can't imagine there would be, somebody could adduce evidence in a court as to what a prudent Canadian utility would do, but I can't imagine that.

In any event, it is for the gas companies to decide. The municipalities should not be in the business of telling them what kind of coverage they as a prudent gas utility should have, but they should use that as the test, produce evidence of that insurance and have the municipality added as an additional named insured. In my respectful submission, that's one of those things that ought to have been dealt with in the negotiations.

Let me deal with geodetic information. Let me describe geodetic information as I understand it because I think it's important that there be understanding.

Geodetic information is locational information. Normally when we talk about geodetic information in the context of the existing municipal franchise agreement, it is very precise locational information that is provided, normally by a surveyor, that establishes longitude, latitude and altitude by reference to a predetermined bench mark.

Geodetic information is normally prescribed within inches, if you are of the old school, within millimetres if you are of the new, so it's very precise. Normally it's not required.

Let me just stop for a minute and talk about GIS, the information that municipalities have to track services within their road allowances. The GIS information, as I am instructed, normally has longitudinal and latitudinal information. It has that information.

What it has a blank data item for is the altitude. So if you go to most municipalities -- I will put it this way -- most urbanized municipalities, you are going to have GIS information that locate in a road allowance where most of the servicing is located.

Now, the municipalities don't ask for that level of detail, the geodetic level of detail for the purposes of input to their GIS system in situations where they are not providing it for their own services. But when they are providing it for their own services so that there is some -- there is fiscal responsibility. If the municipality is doing it for its own services, then it is not unreasonable for them to ask that all of the other services that are around them provide the same level of information and that is what we ask.

We also ask that if the gas company has for whatever reason that level of detail for its own purposes, that they provide that information which they 181

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already have to the municipality.

Now, you heard on the Gas Company presentation that they are already providing geodetic information in complex urban -- the test is it has got to be complex, undefined, urban and intersection. And from the municipality's perspective the test should be complex. It shouldn't matter if it is a complex situation that it be at an intersection, and from the municipality's perspective it shouldn't matter if it is a complex situation at some particularly complicated intersection of county roads out beyond an urbanized area.

So the test that the municipalities ask for is let's leave urban and intersection out of it and let's be a little bit more precise about what we mean by complex. And as you will see in the notes in the middle of page 2, we would propose that "complex" relate to the number, nature and proximity of existing or planned -- and I see all sorts of spelling errors in there -- planned utilities and services, or if the highway is in some particularly complex non-standard width, alignment or cross-section.

Now, Madam Chairman, if the Board is going to ask questions about what they mean by complex, my friend Mr. Brendon is going to answer all those questions.

But the Gas Companies position on this is, "We don't want to be treated differently. We don't want to be discriminated against." It is not -- and to be fair to them that came out of an earlier situation where the 182

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municipalities were saying, "No, no, we will tell you when we want geodetic information," and leaving it entirely in the municipalities' discretion.

And to the extent that AMO in their materials in December have migrated from that position, their submission hasn't reflected it. We don't intend to discriminate. It is not going to be done haphazardly.

And in our submission, it is important that as we are talking about long-term contracts we anticipate improved technologies and needs and abilities as the technology costs decrease, and I am thinking particularly of the satellite-driven GPS equipment, increasingly municipalities will begin to use it for its own purposes and this should all fit in. It is not discrimination. It is anticipation of future technology.

Now, with respect to as-built drawings, and they are linked, to the extent that approval with -- the geodetic information required in connection with approvals is reasonable, not discriminatory, reasonable, all those kinds of things, to the extent that the approval is based on geodetics, the as-builts should come in with the same level of detail and that is the principal point. The additional two points are in this day and age we would like -- the municipalities would like the as-builts to come in in compatible, you know, on a disk so that we can put it into our GIS system so that it is compatible.

Again, if they have got the information, that

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shouldn't be a major difficulty. And again, we would like to have some sense of the time of the delivery. AMO suggested two months in its submission. I haven't heard anything to the contrary as to why that might be regarded as inappropriately aggressive. So essentially on the as-builts, in my submission, AMO simply asks that we get the same level of detail as our approval was based on, that we get it, in addition to the standard mylar, in electronic format and that we get within a couple of months after they are completed.

Now, let me deal with -- in my summary I am on the top of page 3 and it deals with this warranty as to completion of the highway. And this one is a difficult one. And the Gas Companies in responding, and I won't speak from my notes, but when asked about their position, they say, "We want to be able to sue the municipalities because that is our common law right if they knew or ought to have known of some problem in the road allowance." Then they hasten to say, "But of course that would never happen." But the test is "knew or ought to have known."

And I wasn't at the negotiating table that led to this but my understanding is that this whole discussion came out of a discussion of the responsibility -- who was responsible if when somebody opens the road, we find, lo and begore, there is some terrible environmental problem. Say a patch of coal tar or something that we find.

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Well, at the end of the day the resolution of that was well, we don't -- nobody is going to prejudge the issue of who put it there or why, and it certainly isn't the responsibility of the discoverer of it because they were the discoverer of it. So we are not going to prejudge any issues about that.

But the Gas Company if they discover it while they have the opportunity to take up their pipes and go some place else, come in for another approval in another location, shouldn't be in a position to demand that the municipality because they approved that location, clean it up. Because the municipality may be earmarked by the Ministry of the Environment to clean it up, but if the generator is in sight, it may be the generator.

And those issues shouldn't be prejudged on the basis of the fact that the municipality gave the approval to be one foot off the property boundary which is normally where gas lines live as I understand it -- of one metre, I am corrected.

The point of the exercise is that coming out of that it was what in my respectful submission is a reasonable position that nobody -- that the finder ought not to be responsible, the municipality, however, ought not necessarily be responsible to clean it up so that the gas company can get into the location. And we then found ourselves in the position where the gas company was taking, and again I don't mean to be inappropriate, but an almost perverse position that this issue having

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been raised, we darn well want to be able to assert our common law rights if we find some piece of paper that is 20 years old that somebody has filed but everybody has forgotten that says you ought to have known.

It is like a building permit. There is a representation and warranty that, you know, this thing complies with all applicable law.

Well, we don't want and I don't think anybody should want the consequences of the position that the gas companies are now taking. And if that position is sustained, then AMO would be saying to prudent road authorities that you should be making darn sure before you issue a permit that the gas company can in fact use it for the purpose for which it is intended, which would involve a suite of borings and testings and other things that are quite out of line with the problem that is trying to be solved.

And in our respectful submission the way to solve the problem is make it clear that the -- when the municipality approves a gas company proposal for location it is not intended to be any kind of a representation and that the gas company finds the road allowance as it is whenever they find it. And if they don't like what they find, their option is to come back with a new location.

With respect to the legislative changes, I think I will limit myself to saying this, and I think the Board understands the thrust of this point from some

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questions that were asked earlier.

The legal regime in which these things are negotiated is an evolutionary thing. If there are rests when the question can be revisited and the terms of the agreement tailored to the new legislative regime and their reasonable periods, as in 20 years for a new contract and 15 years for renewal, then there is no need for what I will call a reopener. If we were to get into perpetual contracts or even evergreen clauses in shorter term contracts, then the sort of language proposed by AMO would be a fair response to the need to reopen in the event of an altered legal regime. If the Board, however, is doing the 20-15 years, then AMO is not pursuing that provision.

Now, let me deal with the default provisions.

The municipal position is not that these things are to be opened or reopened at a whim. There is no -- the gas companies' presentation is based on the notion that they and this Board would be tied up with reopener after reopener in constant allegations of default, and so on and so forth. That is not, never was, the position of AMO. We are, however, looking at the problem of, what I have styled in the vernacular, a bad actor, and the terms of that actor are pretty strong: repeated, persistent material defaults, safety of persons put at risk or a financial disaster.

I'm now casting myself back a decade or more where there was a bad actor out there that was in very

serious financial difficulty that was putting pipe with not enough cover in locations that would scare road superintendents as they were ploughing roads, and we are talking NRG down in the Aylmer area. The difficulty that that municipality -- that that and those municipalities had, they either had to wait for the bad actor to figure out how to get the financing to do it right or sell to somebody who knew how to do it. The municipality had no control over that situation and they should. There is a bad actor that is putting people at risk persistently with material faults. They should be able to go to a court and say, "This one is off", so that they can then strike up discussions with somebody else and come here for new franchise provisions.

That is what this is all about. This has to do with the bad actor and municipalities being locked to people that can't do it right.

Now, that is vastly different from the business about having notice of disputes and, in my respectful -- let me start with this. I should have probably started my whole submission with this.

The history between municipalities and the gas distribution companies has been excellent over many, many years. The bad actor is a reflection of one bad actor. The 60-day notice is, in part, a reflection of the kind of mechanics that normally are to be found in commercial contracts and municipal agreements of various sorts, has the advantage -- the 60-day notice provision

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has -- first of all, I emphasize it doesn't prejudge the issues. That's not the intention.

The intention is that there be some orderly process, and that if it is in writing and it has to be sent up to head office so that things won't get out of hand, as personality conflicts -- the unusual personality conflicts in the field get people into entrenched positions that are difficult to back away from.

This is really -- in my submission, if the gas companies kind of really thought about it in these terms, my sense is that they -- instead of knee-jerk reacting and saying no, they thought about it, they might say, "Hey, well that may be not a bad idea. Maybe head office should hear it before somebody issues a statement of claim." But the problem with these negotiations is that they bog down on the first two points, so lots wasn't heard on the last seven or eight that, in my submission, ought to have been heard.

Now, let me deal with 10, which is abandoned pipe and the difference between abandoned and decommissioned pipe.

What you heard today from the gas companies was that "abandoned" pipe and "decommissioned" pipe are the same thing.

I'm just going to wait for a minute for the Chair. The Chair and the Chair are in --

THE PRESIDING MEMBER: I apologize.

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MR. WRIGHT: Are you all right?

THE PRESIDING MEMBER: Continue. I'm sorry.

MR. WRIGHT: What you heard today from the gas company was that decommissioned pipe and abandoned pipe were the same thing, and the municipal understanding of the situation is that that is not the case.

The municipal understanding is that decommissioned pipe has been rendered safe, the gas has been purged, it has been left in the ground, but it remains on the tax roll because the municipalities -- excuse me -- the gas companies are saying, "You know, that's still part of the system; it could be part of the system. We reserve the right to put gas back into it." That's decommissioned pipe. They pay tax on it, it's part of the system, it's there, and they negotiated with AMO special provisions about that. Those special provisions appear and basically they say, "It's there, we may use it again, but in the meantime we may let other people use it." The municipalities have said, "Well, okay. If you tell us about that and get them to enter into an agreement, that's all right too."

But what was not negotiated was the business of abandoned pipe. The whole discussion about abandoned pipe and the definition of "abandoned" pipe, by the way, and I go to that, the definition of "abandoned" pipe is that it has been determined by the gas companies to be waste. It's no longer useful. It's taken off the tax roll. They are no longer paying taxes on it. It will

never be used again.

Under the municipal franchise agreement, that regime says, on abandoned pipe, the gas companies have the choice to leave it or take it. If they want to take it, then they are at liberty to do so so long as they restore to original position. If they don't take it, then the next time the municipalities are in that area doing something else, if they encounter an abandoned gas pipe, they can jerk it out and throw it away because it has been off the tax roll, it's waste.

And in taking it and throwing it away, there is no responsibility to the gas company, because they have abandoned it. It's waste to them. It's not worth their while to take it out. But if we are there and it's easy to take it, we should be able to take it.

Now, the municipalities ask for only two changes in the regime about "abandoned" -- which I will emphasize is waste pipe that has been left in the ground by the gas companies; they have had the choice to take it and they decided to leave it because it's worth more to take it out than to just leave it in the ground. We ask two things. One, we ask that when pipe is abandoned that we told about it so that we know what's waste and what's not waste, so that when we come to do our projects, we know that we are taking it up and throwing it away or we are not.

Now, we can find that information by carefully tracking from their assessment rolls that they file each 191

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year with the Assessment Office, or it would be really helpful if they would provide that information to the municipalities as they go. We are asking that it be done once a year, which would -- whoever's doing the tax roll would make up a separate sheet to say, "Well, this came off the tax roll, so we will tell the municipality that". So, we are asking for notification where there's been abandonment, in the sense that I have described it.

The other thing is to clarify what probably doesn't need to be clarified; and that is, if the municipality exercises its right to take up the pipe, the abandoned pipe, that they do so with the same kind of approval process, as to timing and scheduling and all of that sort of thing, that they would when they were installing in, so that there would be a liaison between the municipality and the gas company and other users, users of the highway so that traffic can be stopped when it has to, and all those sorts of things.

I think it is implicit, and I think that it is the practice -- I'm instructed that it is the practice that when gas companies take up their abandoned pipe that they do go through that process.

We ask that the franchise agreement be adjusted to reflect that practice.

Again, I would say, it seems to me, again, that if the gas companies -- and it may be that some of these ideas got a little better refined as we got prepared for this exercise, but, again, it seems

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difficult for us to hear the gas companies here, today, saying that "decommissioned" and "abandoned" are completely different, given our understanding, as we came in.

I have two final things, and then I will open this to questions.

Item No. 11 is not on the list that appeared on the Board's Web site, but it reflects the notion that if there are to be some changes -- I'm not sure what the answer to this is -- but if there are to be some changes to some of these provisions, that municipalities who have recently been ordered by the Board to have something that a new suite of model agreements are going to be different about, we request that some consideration be given about how to have a reopener on those issues. I'm not sure how we would do that, short of the parties agreeing that if the municipalities and the gas companies wish to bring it back that they could bring it in to get it brought up to date. I raise it only because there is some concern about municipalities who signed up because they are anxious to get on with other projects.

Enough said on that.

Point No. 12. I make this point -- and it may be a reflection of the fact that I have, in the last two or three years, had some good success with mediation that is tribunal-driven -- I'm thinking of the Environmental Appeal Board; I'm thinking of the Ontario

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Municipal Board -- where board members who ultimately don't make the final decision are requiring people to hear what the other person is saying.

It may be, for instance, that we are going to have a Board hearing that's finally going to decide how much a permit fee should be, hypothetically, but there are eight or nine other issues here that ought not to have been ignored because they were being used as bargaining chips for the first issue.

In my respectful submission, having not been at the table, that is what I think happened here.

And early in the piece, the suggestion was made, on behalf of AMO, by me, that this process might be delayed a very little bit by Board-led mediation. The impression that I had, in response to that, was that it was not something that the Board did much or, in fact, at all, so that wasn't part of the program.

But at the end of all this, the trick is going to be to get a franchise agreement that municipalities will want to bring in to be renewed in the new form.

At the end of all this, this Board should be attempting to have the parties find their own solutions rather than trying to be Solomon and ordering the solutions.

While I understand that the Board has a large, and probably increasingly large, slate of municipal franchise agreements that are backlogged against the disposition of this, my view is that, on some of these

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issues, if we could set aside the financial questions, some of these issues -- if a Board member was saying, "Well," you know, on the insurance question, as an example, "if you are not changing the indemnity and it's truly not costing you more than $9 a municipality to get them as additional named insureds, why wouldn't you do that?". That's the sort of thing that a Board Member should have said, could have said and would have forced the parties not to have to have that issue before you today, in my respectful submission.

Madam Chairman, I have said more than I probably should have. I'm open for questions.

THE PRESIDING MEMBER: Thank you, Mr. Wright.

Excuse us, just a second.

--- Pause

THE PRESIDING MEMBER: Mr. Laughren?

MEMBER LAUGHREN: Thank you.

Mr. Wright.

MR. WRIGHT: Yes, Mr. Laughren.

MEMBER LAUGHREN: When you were going through your presentation, I was -- it was funny the way you ended up your presentation because I was scratching my head, up here, and saying to myself, "How come those weren't settled? They seem to be very close. They seem to be what you say is the special request the utilities were also thinking -- and I'm thinking of the insurance and liability, the geodetic information, the as-built drawings, perhaps even the default provisions and the

conditions of the highway -- I could go on, but it seemed to me there was a lot there that I'm surprised was not settled before you got here, in that process that was set up, which was Board, not -- whether you say it was Board-led or driven, but it was set up by the Board, that process where the utilities and AMO sat down and talked about franchise agreements, and so that was really puzzling me as you went through your presentation. I wonder if you could shed any more light on that other than it was people holding back bargaining chips for the end of the day. Is it really that simple?

MR. WRIGHT: Yes. Mr. Chairman, my difficulty in responding is twofold. One, I wasn't there and, two, I don't want to be heard to be casting aspersions on those who were.

Against that background, it seems to me that often parties can only get so close together on their own before, and this is reflecting some ABR experience that I had in another context, before they need the help of somebody to go through a bit of a process and to isolate some of the issues that truly probably have to be decided by a panel and say "Now, just stop talking" -- I'm repeating what I said earlier, but my experience is that if -- I am again repeating myself.

My experience with those other Tribunals is that if, to use the Municipal Board as an example, a Board member comes down, says "I'm not going to hear this case, but I'm here and you can count on my

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understanding what might happen". Again, I am using a land use case to say that some ratepayer -- "You know, this developer is offering you something that the Municipal Board can't give you, so put some weight on that", and then leans on the developer for something else.

There's a process that can produce results that, if achieved by the parties, is a happier result than one that is imposed.

MEMBER LAUGHREN: I don't disagree with that. I'm just surprised that these issues would fit into that category we have gone through.

MR. WRIGHT: My reaction is they should have. To be as candid as I can be, what should have happened is they should have put the money issues off to one side and said "All right, now let's talk about this" and then talked about it. If they had to get an insurance agent to tell them what the detail was, do that. Have a surveyor in.

Most of these issues, in my judgment, at some point in the negotiations stop.

MEMBER LAUGHREN: Thank you.

MEMBER SIMON: Just one question, Mr. Wright, for completion of the record. I was wondering if you could shed some light based on your historical experience for the principle of cost sharing for relocation costs. It's somewhat incomplete, the record on that issue.

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MR. WRIGHT: All right. Historically, in the Union Gas trading area, the franchise agreements included provisions that required the gas company to take up their pipes and go at gas company expense when requested by the municipality.

Now, the quid pro quo on that was that road authorities were less concerned about approving location that perhaps wobbled around tree roots or around rocks or whatever it was because they knew that if it came to putting in a municipal ditch in that location or some other road work, they didn't have to worry about the cost. The gas company was taking the risk. If they wanted to do that, that was fine.

That was the Union approach, perhaps because Union Gas historically grew out of a bunch of small municipal operations down there.

Consumers, on the other hand, had municipal franchise agreements that were silent on the question of relocation. That put them in the position where, if they wanted to move their pipe for their own purposes, they did it at their own expense. If they moved their pipe at the request of the municipality for road work, then the municipality was required to pay under the Public Service Works and Highways Act half of the cost of labour and labour saving devices.

Labour saving devices covered a lot of ground, so there was a very large portion of the relocation cost being shared as to half by the municipalities under the

Public Service Works and Highways Act.

There were some problems about the Public Service Works and Highways from the municipal perspective because it related to work, relocations required for highway purposes but not for other municipal purposes, like relocation of sewers or water. If it was a water main project, a municipality was paying it all.

It sort of came to a head ten or 15 years ago when some of the senior people with experience in Consumers found themselves down in Union territory and started negotiating franchise agreements and said "What's this about paying costs of relocation?" and started to strike them out.

The result was a number of cases where the

Union experience was being compared with the Consumers experience and the Board said at one point "Enough. We want consistency across the province".

There was also this notion that if there were municipal works, regardless of whether they were roads or other pipes, that it should be the same ground rules if it was a municipally requested relocation.

The notion was to get away from the Public Service Works and Highways Act and to devise a formula that somewhat emulated the result, which is the formula that you see in the agreement. You will also see in the agreement that there is out of regard for the past practice in Union territory, at the back page there is a

phase-in where in Union territory, a different proportion of the cost was borne, depending upon when the location was approved.

How did I do?

MEMBER SIMON: Thank you very much.

MR. McARTHUR: Madam Chair, if I might, we have a train to meet. If we might be excused, could we please leave?

THE PRESIDING MEMBER: Certainly. I guess the next step before we continue, because I know that the Board has got other questions and I know that you are in a hurry.

First I want to thank all of the participants for coming today. You have obviously spent a lot of time and effort preparing your submissions and preparing your presentations. The Board has been gratefully enlightened and appreciates the amount of effort that you have spent in helping us with these issues.

We are proposing that there be written submissions by February 4, if that is still a convenient time for written submissions. In light of Mr. Roman's extensive legal argument, Mr. Leslie, would you like additional time to prepare?

MR. LESLIE: Madam Chair, I have discussed this with the gas companies. To be frank, apart from the submissions on behalf of AMO, everything we heard today we heard for the first time.

We think we can still file by the fourth. We

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don't think that's going to be a problem. The one thing that did occur to us though was if people are filing additional documents, we would like to have those by the end of the week so that we can integrate that into whatever comments we make on what we have heard today from Ottawa-Carleton and Mr. Roman.

THE PRESIDING MEMBER: Thank you. Unfortunately, of course, now Ottawa-Carleton have --

MR. LESLIE: Well, they will read the transcript. We will communicate with them.

THE PRESIDING MEMBER: You will communicate with them. Thank you.

The purpose of this is it's not a hearing, it's not a proceeding, it's merely enlightening the Board so that the Members of the Board who are here will be making a recommendation to the full Board based on the submissions that we have heard as to our recommended changes to the proposed model agreement.

That being the case, we are very open to process and to additional time if it is required.

MR. LESLIE: Well, there was some legal arguments today from Mr. Roman that need to be addressed.

THE PRESIDING MEMBER: I think that's right, Mr. Leslie.

Continuing on. Ms Spoel.

MEMBER SPOEL: I have a couple of questions about insurance that I just wanted to clarify.

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Where I understand the problem is if you -- if there is a problem with let's say a gas leak or something, that the municipality typically is named as an additional defendant in a lawsuit because they own the roadway in which the accident or the incident, let me call it that, the incident occurred and they are as a matter as the owner --

MR. WRIGHT: As a matter of course.

MEMBER SPOEL: -- they get named whether there is any real claim against the municipality or not and that is why the municipality is seeking to be an additional named insured on the insurance?

MR. WRIGHT: That is correct.

MEMBER SPOEL: Okay. I just wanted to clarify that.

With respect to the clause about the warranty as to the condition of the highway, I wondered, Mr. Wright, whether you would -- your client would be adequately served in your view if the words at the end about using it "as is at their own risk" were taken out and it merely stated that the approval was not to be taken as a representation or a warranty, which would leave open the question of whose ultimate responsibility it is --

MR. WRIGHT: Yes. I think the "as is where is" is perhaps gilding the lily a little bit. I think the point is -- you have taken the point.

And let me go back just to answer a little

bit. It occurred to me on the question of insurance.

In the normal course insurance -- municipal insurance companies eventually recover over a period of time the costs that are going -- that go out on that municipality. You know it may be five years or six years but eventually they recover the costs that are laid out. Some of the costs that are laid out, in fact, often the majority of the costs that are laid out are the costs of legal defence. So the key is to keep the municipal insurance counsel out of the equation and to let the whole thing be covered by the people who have the primary, and in the situation that we are postulating, the only responsibility.

MEMBER SPOEL: No, I assumed that that was one of the advantages.

Thank you. Those are all the questions I have.

THE PRESIDING MEMBER: Mr. McCann.

MR. McCANN: Yes, just a couple of questions for Mr. Wright.

We have heard considerable discussion today, Mr. Wright, about section 220.1 of the Municipal Act. But are there other authorities in the Municipal Act or other legislation which municipal governments might use to impose fees in the nature of permit fees on gas utilities if the model franchise agreement were amended to allow for permit fees, or is it all section 220.1 now? Is that the whole game?

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MR. WRIGHT: Well, Mr. McCann, it seems to me that the possibility that permit fees might be charged was extant 13 years ago when we had the discussion or that notwithstanding clause wouldn't have been in there.

Now, where one finds the authority for permit fees in the Municipal Act at that time, which is sort of the question is --

MR. McCANN: Yes.

MR. WRIGHT: -- really has to be founded on an adjunct to the authority to operate roads. And it would have been nebulous, it would have been -- it would have been something that some road superintendent or county engineer somewhere would have said, "Want to get in my road, I got to have my people process the application. That is going to cost you 50 bucks."

MR. McCANN: So it would be fair to say then that the situation is sort of uncertain in the past. But in the future if the model franchise agreement were modified as AMO would like, the fees that we are talking about, the charges that we are talking about, the permit fees would be imposed under section 220.1. I mean that would be cited as the legal authority to do so, not other sections of the Municipal Act or other legislation?

MR. WRIGHT: I think that is right. And while I may stand to be corrected by others with more extensive knowledge than I, any permit fees that I have been familiar with have been done as a matter of almost

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administrative decision making rather than to be found entrenched in some bylaw, probably because some solicitor who would have to find the authority to pass the bylaw couldn't find it.

MR. McCANN: Yes, I know. I know. I know the limitations of legal advice all too well. If there is anything, you know, you think further thoughts about that, you might include them in the submission on February the 4th.

MR. WRIGHT: All right.

MR. McCANN: There is one other area -- now, here again I want to make reference to the model franchise agreement as it currently exists. Do you have a copy of that?

MR. WRIGHT: Yes, I have. I am looking at Schedule "A" to the AMO submission, but you give me the clause and I will find it.

MR. McCANN: All right. It is part 2, clause 3. It is the duration of the agreement and the renewal procedure.

MR. WRIGHT: Part 2. Yes. That is the footnote.

MR. McCANN: Yes, that is right. It is the footnote that I want to refer to. So this is paragraph 3. It is entitled "Duration of Agreement and Renewal Procedures" and it says:

"The rights hereby given and granted shall be for a term of * years from the

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date of final passing of the By-law."

And then the footnote, which I think is part of the agreement and which was part of the negotiations in 1987 says:

"The rights given and granted for a first agreement shall be for a term of 20 years. The rights given and granted for any subsequent agreement shall be for a term of not more than 15 years, unless both parties agree to extend the term to a term of 20 years maximum."

So leaving aside the first agreements and concentrating on the renewal, it suggests that 15 years is what might be called the default these days, I guess, but there can be an agreement to extend the term to 20 years.

My question is, if that footnote were simply left untouched, would AMO be content? Because that seems to be the impression I got from listening to what you were saying today although I got a different impression from reading AMO's submission, which suggested to me that you were seeking something more in the nature of a 10-year renewal period. I am trying to pin AMO down, I guess, to put it bluntly on what your submission is on this.

MR. WRIGHT: No, no, that is fine. Mr. Foulds, is trying to help me find the provision of or a part of EBO 125 where --

MR. FOULDS: The position of the Board was 10 to 15 years --

MR. WRIGHT: For renewal.

MR. FOULDS: -- EBO 125 for renewals.

MR. McCANN: Okay. That is not quite what this footnote says though.

MR. FOULDS: It is up to a maximum of 15 years.

MR. McCANN: No, it shall be for a term of not more than 15 years.

MR. FOULDS: Not more than. So the 10 to 15, the proposal from the Board is what we allude to.

MR. McCANN: Okay. But I guess -- I mean, you are not -- you therefore are not asking the Board to change this footnote?

MR. WRIGHT: I think that is fair.

MR. McCANN: So there would be no change in the model franchise agreement on this issue of duration in that scenario?

MR. WRIGHT: And I think the point that is made is if some municipality came forward and said I read from McAuley back in this and he said 10 to 15 years and I want 10, that they won't be dismissed out of hand.

MR. FOULDS: Well, municipality is a good example. I think that was the argument there --

THE COURT REPORTER: Sorry, Mr. Foulds, you are not coming across on the microphone.

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MR. FOULDS: In the Innisfil situation I believe it was a 10-year renewal after hearing the arguments. And this -- and the Board in EBO 125 said a 10 to 15 year period seems reasonable for a renewal. The footnote says up to 15 years.

MR. McCANN: I'm sorry to be so pedantic about this. But I am getting the impression that there is in fact no disagreement on the drafting of this footnote between the Gas Companies and AMO and therefore my, you know, recommendation might be we just take it off the issues list. Because we are here today to talk about changes to the model franchise agreement and I don't hear anybody recommending a change to this particular clause.

But there may be some variation in renewal terms in different --

MR. WRIGHT: I think we can't take it off the table having regard for what we heard from Ottawa-Carleton. I don't think we should presume to speak as if we can sell, you know, they said five years but don't mind them.

I mean AMO's position is this footnote is fine, have regard to what was said back here that you could go to 10. But we are not in a position to and wouldn't suggest that Ottawa-Carleton should, that we are in a position to negotiate away their submission.

MR. McCANN: That is fine. Thank you very much. Those are all my questions, Madam Chair.

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THE PRESIDING MEMBER: Thank you, Mr. McCann.

Mr. Leslie, to the extent that Mr. Wright has raised two additional issues dealing with the mechanisms for existing agreements to be traded in and the ADR mediation issues number 11 and 12 and has submission on it, do the utilities have any comments on those points?

MR. LESLIE: I certainly don't at this time. We will put that in our written material that we are to file by next Friday I guess it is, a week Friday.

THE PRESIDING MEMBER: Mr. Wright, you raised a number of issues with respect to ADR and the utility of ADR and coming to -- helping parties to come to an agreement. And I guess we would like to reiterate that we certainly support the negotiation process. The Board has supported it all along. The Board commends the parties to the extent they have been able to settle on certain issues and we would like to encourage the parties, notwithstanding the oral presentations that we have heard today to continue to negotiate in the interim. The more issues you take off the table, the fewer submissions you will have to make, the less issues there will be for us to decide. There is nothing to preclude the parties from continuing to negotiate and we would encourage you to do that.

If you require the assistance of a member of the Board's staff, we are willing to make Board staff available to assist you in the ADR process. It had been our understanding that Board staff were encouraged not

to be part of this process. For whatever reason, I don't know. But if the parties would wish Board staff to be made available, then I suggest that you should talk probably with -- Mr. McCann would be a good person to work with to continue on with your negotiations.

I would like to reiterate what I said earlier that we certainly appreciate all the time and effort that the parties have spent in preparing their submissions and their oral presentations. It certainly has been enlightening I think for all members of the Board present here. And we would like to remind you again that written submissions are due on February the 4th subject to obtaining all of the additional information by this February -- by this Friday. Thank you. It is late in the afternoon and I think everyone is thinking it is late in the afternoon.

So that having been said -- oh, I would like to, before I forget, thank Board staff as always and thank the Court Reporter for their assistance here today. And that being said we are now adjourned. Thank you.

--- Whereupon the hearing concluded at 1705

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