OEB Staff Compendium
EB-2024-0134
County of Lennox and Addington

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TAB 1.1

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Enbridge Gas Inc. for an Order approving the terms and conditions upon which, and the period for which, the Corporation of the County of Lennox and Addington is, by by-law, to grant to Enbridge Gas Inc. the right to construct and operate works for the distribution, transmission and storage of natural gas and the right to extend and add to the works in the County of Lennox and Addington;

AND IN THE MATTER OF an Application by Enbridge Gas Inc. for an Order directing and declaring that the assent of the municipal electors of the County of Lennox and Addington to the by-law is not necessary.

APPLICATION

1. Enbridge Gas Inc. (Enbridge Gas), a regulated public utility, is a corporation incorporated under the laws of the Province of Ontario, with its offices in the City of Toronto and the Municipality of Chatham-Kent.

2. The County of Lennox and Addington (Municipality) is a municipal corporation incorporated under the laws of the Province of Ontario. Attached hereto and marked as Schedule "A" is a map showing the geographical location of the Municipality and a customer density representation of Enbridge Gas' service area. Enbridge Gas currently serves approximately 1,800 customers in the Municipality. Enbridge Gas and its predecessors have been providing gas distribution services within the County of Lennox and Addington since approximately 1959.

3. The County of Lennox and Addington is an upper-tier regional municipality comprised of four lower-tier municipalities - the Township of Addington Highlands, the Town of Greater Napanee, the Township of Loyalist and the Township of Stone Mills. Enbridge Gas has Franchise Agreements with and Certificates of Public Convenience and Necessity for each of the lower-tier municipalities within the County of Lennox and Addington, except the Township of Addington Highlands.

4. Enbridge Gas has an existing franchise agreement with the County of Lennox and Addington (RP-2004-0215 / EB-2004-0433) effective December 4, 2004. This franchise agreement and associated by-law (By-law 2997/04) are attached as Schedule "B".

5. Enbridge Gas applied to the Council of the Municipality for a franchise agreement permitting Enbridge Gas to construct and operate works for the distribution, transmission and storage of natural gas and the right to extend and add to the works in the County of Lennox and Addington.

6. On March 20, 2024, the Council of the Municipality gave approval to the form of a Franchise Agreement in favour of Enbridge Gas and authorized Enbridge Gas to apply to the Ontario Energy Board for approval of the terms and conditions upon which and the period for which the franchise agreement is proposed to be granted.

7. Attached hereto as Schedule "C" is a copy of Resolution CC-24-72 of the Council of the Municipality approving the form of the draft by-law and franchise agreement, authorizing this submission to the Ontario Energy Board, and requesting an Order declaring and directing that the assent of the municipal electors to the by-law and franchise agreement is not necessary.

8. Attached hereto as Schedule “D” is a copy of draft By-law XX-24 and the proposed franchise agreement. The County of Lennox and Addington has provided first and second readings of its draft by-law.

9. Enbridge Gas has franchise agreements with and Certificates of Public Convenience and Necessity for the Town of Deseronto, the City of Kingston, the Municipality of Tweed, the County of Prince Edward and the Township of Tyendinaga which are immediately adjacent to the municipality. There is no other natural gas distributor in the area other than Utilities Kingston which provides gas distribution services within the central section of the City of Kingston.

10. The proposed franchise agreement is in the form of the 2000 Model Franchise Agreement with no amendments and is for a term of twenty (20) years.

11. The address of the Municipality is as follows:

County of Lennox and Addington
97 Thomas Street East
Napanee, ON K7R 4B9
Attention: Tracey McKenzie, Clerk
Telephone: (613) 354-4883 ext. 3368
Email: tmckenzie@lennox-addington.on.ca

The address for Enbridge Gas’ regional operations office is:

Enbridge Gas Inc.
400 Coventry Road
Ottawa, ON K1K 2C7
Attention: Nicole Lehto, Director, Regional Operations
Email: nicole.lehto@enbridge.com

12. In recognition of the changes to OEB Notices of Hearing and Related Processes issued on September 28, 2023, Enbridge Gas believes that publishing the Notice in the local newspaper, on the OEB web site, on the Enbridge Gas’ web site and on the municipality’s web site will provide a broad awareness of this application. The newspaper used by the Municipality for its notices is the *Napanee Beaver.* This is the newspaper used by the Municipality for its notices.

13. Enbridge Gas now applies to the Ontario Energy Board for:

(a) an Order under s.9(3) approving the terms and conditions upon which, and the period for which, the County of Lennox and Addington is, by by-law, to grant Enbridge Gas the right to construct and operate works for the distribution, transmission and storage of natural gas and the right to extend and add to the works; and

(b) an Order pursuant to s.9(4) directing and declaring that the assent of the municipal electors of the County of Lennox and Addington is not necessary for the proposed franchise agreement by-law under the circumstances.

DATED at the Municipality of Chatham-Kent, in the Province of Ontario this 5th day of April, 2024.

ENBRIDGE GAS INC.

Patrick McMahon

Digitally signed by Patrick McMahon
Date: 2024.04.05 15:16:09 -04'00'

Patrick McMahon
Technical Manager
Regulatory Research and Records

Comments respecting this Application should be directed to:

Mr. Patrick McMahon
Technical Manager, Regulatory Research and Records
Enbridge Gas Inc.
50 Keil Drive North
Chatham, ON N7M 5M1
patrick.mcmahon@enbridge.com
Telephone: (519) 436-5325

TAB 1.2

2000 Model Franchise Agreement

THIS AGREEMENT effective this 8 day of December, 2004

BETWEEN:

The Corporation of the County of Lennox & Addington

hereinafter called the "Corporation"

- and -

LIMITED

hereinafter called the "Gas Company"

WHEREAS the Gas Company desires to distribute, store and transmit gas in the Municipality upon the terms and conditions of this Agreement;

AND WHEREAS by by-law passed by the Council of the Corporation (the "By-law"), the duly authorized officers have been authorized and directed to execute this Agreement on behalf of the Corporation;

THEREFORE the Corporation and the Gas Company agree as follows:

Part I - Definitions

1. **In this Agreement**

(a) "decommissioned" and "decommissions" when used in connection with parts of the gas system, mean any parts of the gas system taken out of active use and purged in accordance with the applicable CSA standards and in no way affects the use of the term 'abandoned' pipeline for the purposes of the *Assessment Act*;

(b) "Engineer/Road Superintendent" means the most senior individual employed by the Corporation with responsibilities for highways within the

Municipality or the person designated by such senior employee or such other person as may from time to time be designated by the Council of the Corporation;

(c) "gas" means natural gas, manufactured gas, synthetic natural gas, liquefied petroleum gas or propane-air gas, or a mixture of any of them, but does not include a liquefied petroleum gas that is distributed by means other than a pipeline;

(d) "gas system" means such mains, plants, pipes, conduits, services, valves, regulators, curb boxes, stations, drips or such other equipment as the Gas Company may require or deem desirable for the distribution, storage and transmission of gas in or through the Municipality;

(e) "highway" means all common and public highways and shall include any bridge, viaduct or structure forming part of a highway, and any public square, road allowance or walkway and shall include not only the travelled portion of such highway, but also ditches, driveways, sidewalks, and sodded areas forming part of the road allowance now or at any time during the term hereof under the jurisdiction of the Corporation;

(f) "Model Franchise Agreement" means the form of agreement which the Ontario Energy Board uses as a standard when considering applications under the *Municipal Franchises Act*. The Model Franchise Agreement may be changed from time to time by the Ontario Energy Board;

(g) "Municipality" means the territorial limits of the Corporation on the date when this Agreement takes effect, and any territory which may thereafter be brought within the jurisdiction of the Corporation;

(h) "Plan" means the plan described in Paragraph 5 of this Agreement required to be filed by the Gas Company with the Engineer/Road Superintendent prior to commencement of work on the gas system; and

(i) whenever the singular, masculine or feminine is used in this Agreement, it shall be considered as if the plural, feminine or masculine has been used where the context of the Agreement so requires.

Part II - Rights Granted

2. To provide gas service

The consent of the Corporation is hereby given and granted to the Gas Company to distribute, store and transmit gas in and through the Corporation and to the

inhabitants of those local or lower tier municipalities within the Municipality from which the Gas Company has a valid franchise agreement for that purpose.

3. **To Use Highways**

Subject to the terms and conditions of this Agreement the consent of the Corporation is hereby given and granted to the Gas Company to enter upon all highways now or at any time hereafter under the jurisdiction of the Corporation and to lay, construct, maintain, replace, remove, operate and repair a gas system for the distribution, storage and transmission of gas in and through the Municipality.

4. **Duration of Agreement and Renewal Procedures**

(a) If the Corporation has not previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law.

or

(b) If the Corporation has previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law provided that, if during the 20 year term of this Agreement, the Model Franchise Agreement is changed, then on the 7th anniversary and on the 14th anniversary of the date of the passing of the By-law, this Agreement shall be deemed to be amended to incorporate any changes in the Model Franchise Agreement in effect on such anniversary dates. Such deemed amendments shall not apply to alter the 20 year term.

(c) At any time within two years prior to the expiration of this Agreement, either party may give notice to the other that it desires to enter into negotiations for a renewed franchise upon such terms and conditions as may be agreed upon. Until such renewal has been settled, the terms and conditions of this Agreement shall continue, notwithstanding the expiration of this Agreement. This shall not preclude either party from applying to the Ontario Energy Board for a renewal of the Agreement pursuant to section 10 of the *Municipal Franchises Act*.

Part III – Conditions

5. **Approval of Construction**

(a) The Gas Company shall not undertake any excavation, opening or work which will disturb or interfere with the surface of the travelled portion of any highway unless a permit therefore has first been obtained from the Engineer/Road Superintendent and all work done by the Gas Company shall be to his satisfaction.

(b) Prior to the commencement of work on the gas system, or any extensions or changes to it (except service laterals which do not interfere with municipal works in the highway), the Gas Company shall file with the Engineer/Road Superintendent a Plan, satisfactory to the Engineer/Road Superintendent, drawn to scale and of sufficient detail considering the complexity of the specific locations involved, showing the highways in which it proposes to lay its gas system and the particular parts thereof it proposes to occupy.

(c) The Plan filed by the Gas Company shall include geodetic information for a particular location:

(i) where circumstances are complex, in order to facilitate known projects, including projects which are reasonably anticipated by the Engineer/Road Superintendent, or

(ii) when requested, where the Corporation has geodetic information for its own services and all others at the same location.

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

(e) Prior to the commencement of work on the gas system, the Engineer/Road Superintendent must approve the location of the work as shown on the Plan filed by the Gas Company, the timing of the work and any terms and conditions relating to the installation of the work.

(f) In addition to the requirements of this Agreement, if the Gas Company proposes to affix any part of the gas system to a bridge, viaduct or other structure, if the Engineer/Road Superintendent approves this proposal, he may require the Gas Company to comply with special conditions or to enter into a separate agreement as a condition of the approval of this part of the construction of the gas system.

(g) Where the gas system may affect a municipal drain, the Gas Company shall also file a copy of the Plan with the Corporation's Drainage Superintendent for purposes of the *Drainage Act*, or such other person designated by the Corporation as responsible for the drain.

(h) The Gas Company shall not deviate from the approved location for any part of the gas system unless the prior approval of the Engineer/Road Superintendent to do so is received.

(i) The Engineer/Road Superintendent's approval, where required throughout this Paragraph, shall not be unreasonably withheld.

(j) The approval of the Engineer/Road Superintendent is not a representation or warranty as to the state of repair of the highway or the suitability of the highway for the gas system.

6. **As Built Drawings**

The Gas Company shall, within six months of completing the installation of any part of the gas system, provide two copies of "as built" drawings to the Engineer/Road Superintendent. These drawings must be sufficient to accurately establish the location, depth (measurement between the top of the gas system and the ground surface at the time of installation) and distance of the gas system. The "as built" drawings shall be of the same quality as the Plan and, if the approved pre-construction plan included elevations that were geodetically referenced, the "as built" drawings shall similarly include elevations that are geodetically referenced. Upon the request of the Engineer/Road Superintendent, the Gas Company shall provide one copy of the drawings in an electronic format and one copy as a hard copy drawing.

7. **Emergencies**

In the event of an emergency involving the gas system, the Gas Company shall proceed with the work required to deal with the emergency, and in any instance where prior approval of the Engineer/Road Superintendent is normally required for the work, the Gas Company shall use its best efforts to immediately notify the Engineer/Road Superintendent of the location and nature of the emergency and the work being done and, if it deems appropriate, notify the police force, fire or other emergency services having jurisdiction. The Gas Company shall provide the Engineer/Road Superintendent with at least one 24 hour emergency contact for the Gas Company and shall ensure the contacts are current.

8. **Restoration**

The Gas Company shall well and sufficiently restore, to the reasonable satisfaction of the Engineer/Road Superintendent, all highways, municipal works or improvements which it may excavate or interfere with in the course of laying, constructing, repairing or removing its gas system, and shall make good any settling or subsidence thereafter caused by such excavation or interference. If the Gas Company fails at any time to do any work required by this Paragraph within a reasonable period of time, the Corporation may do or cause such work to be done and the Gas Company shall, on demand, pay the Corporation's reasonably incurred costs, as certified by the Engineer/Road Superintendent.

9. **Indemnification**

The Gas Company shall, at all times, indemnify and save harmless the Corporation from and against all claims, including costs related thereto, for all damages or

injuries including death to any person or persons and for damage to any property, arising out of the Gas Company operating, constructing, and maintaining its gas system in the Municipality, or utilizing its gas system for the carriage of gas owned by others. Provided that the Gas Company shall not be required to indemnify or save harmless the Corporation from and against claims, including costs related thereto, which it may incur by reason of damages or injuries including death to any person or persons and for damage to any property, resulting from the negligence or wrongful act of the Corporation, its servants, agents or employees.

10. **Insurance**

(a) The Gas Company shall maintain Comprehensive General Liability Insurance in sufficient amount and description as shall protect the Gas Company and the Corporation from claims for which the Gas Company is obliged to indemnify the Corporation under Paragraph 9. The insurance policy shall identify the Corporation as an additional named insured, but only with respect to the operation of the named insured (the Gas Company). The insurance policy shall not lapse or be cancelled without sixty (60) days' prior written notice to the Corporation by the Gas Company.

(b) The issuance of an insurance policy as provided in this Paragraph shall not be construed as relieving the Gas Company of liability not covered by such insurance or in excess of the policy limits of such insurance.

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

11. **Alternative Easement**

The Corporation agrees, in the event of the proposed sale or closing of any highway or any part of a highway where there is a gas line in existence, to give the Gas Company reasonable notice of such proposed sale or closing and, if it is feasible, to provide the Gas Company with easements over that part of the highway proposed to be sold or closed sufficient to allow the Gas Company to preserve any part of the gas system in its then existing location. In the event that such easements cannot be provided, the Corporation and the Gas Company shall share the cost of relocating or altering the gas system to facilitate continuity of gas service, as provided for in Paragraph 12 of this Agreement.

12. **Pipeline Relocation**

(a) If in the course of constructing, reconstructing, changing, altering or improving any highway or any municipal works, the Corporation deems that it is necessary to take up, remove or change the location of any part of the gas system, the Gas Company shall, upon notice to do so, remove and/or

relocate within a reasonable period of time such part of the gas system to a location approved by the Engineer/Road Superintendent.

(b) Where any part of the gas system relocated in accordance with this Paragraph is located on a bridge, viaduct or structure, the Gas Company shall alter or relocate that part of the gas system at its sole expense.

(c) Where any part of the gas system relocated in accordance with this Paragraph is located other than on a bridge, viaduct or structure, the costs of relocation shall be shared between the Corporation and the Gas Company on the basis of the total relocation costs, excluding the value of any upgrading of the gas system, and deducting any contribution paid to the Gas Company by others in respect to such relocation; and for these purposes, the total relocation costs shall be the aggregate of the following:

(i) the amount paid to Gas Company employees up to and including field supervisors for the hours worked on the project plus the current cost of fringe benefits for these employees,

(ii) the amount paid for rental equipment while in use on the project and an amount, charged at the unit rate, for Gas Company equipment while in use on the project,

(iii) the amount paid by the Gas Company to contractors for work related to the project,

(iv) the cost to the Gas Company for materials used in connection with the project, and

(v) a reasonable amount for project engineering and project administrative costs which shall be 22.5% of the aggregate of the amounts determined in items (i), (ii), (iii) and (iv) above.

(d) The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, in which case the Gas Company shall pay 100% of the relocation costs.

Part IV - Procedural And Other Matters

13. Municipal By-laws of General Application

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

14. Giving Notice

Notices may be delivered to, sent by facsimile or mailed by prepaid registered post to the Gas Company at its head office or to the authorized officers of the Corporation at its municipal offices, as the case may be.

15. Disposition of Gas System

(a) If the Gas Company decommissions part of its gas system affixed to a bridge, viaduct or structure, the Gas Company shall, at its sole expense, remove the part of its gas system affixed to the bridge, viaduct or structure.

(b) If the Gas Company decommissions any other part of its gas system, it shall have the right, but is not required, to remove that part of its gas system. It may exercise its right to remove the decommissioned parts of its gas system by giving notice of its intention to do so by filing a Plan as required by Paragraph 5 of this Agreement for approval by the Engineer/Road Superintendent. If the Gas Company does not remove the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in any highway, the Corporation may remove and dispose of so much of the decommissioned gas system as the Corporation may require for such purposes and neither party shall have recourse against the other for any loss, cost, expense or damage occasioned thereby. If the Gas Company has not removed the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in a highway, the Gas Company may elect to relocate the decommissioned gas system and in that event Paragraph 12 applies to the cost of relocation.

16. Use of Decommissioned Gas System

(a) The Gas Company shall provide promptly to the Corporation, to the extent such information is known:

(i) the names and addresses of all third parties who use decommissioned parts of the gas system for purposes other than the transmission or distribution of gas; and

(ii) the location of all proposed and existing decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas.

(b) The Gas Company may allow a third party to use a decommissioned part of the gas system for purposes other than the transmission or distribution of gas and may charge a fee for that third party use, provided

(i) the third party has entered into a municipal access agreement with the Corporation; and

(ii) the Gas Company does not charge a fee for the third party's right of access to the highways.

(c) Decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas are not subject to the provisions of this Agreement. For decommissioned parts of the gas system used for purposes other than the transmission and distribution of gas, issues such as relocation costs will be governed by the relevant municipal access agreement.

17. Franchise Handbook

The Parties acknowledge that operating decisions sometimes require a greater level of detail than that which is appropriately included in this Agreement. The Parties agree to look for guidance on such matters to the Franchise Handbook prepared by the Association of Municipalities of Ontario and the gas utility companies, as may be amended from time to time.

18. Other Conditions

None.

19. **Agreement Binding Parties**

This Agreement shall extend to, benefit and bind the parties thereto, their successors and assigns, respectively.

IN WITNESS WHEREOF the parties have executed this Agreement effective from the date written above.

THE CORPORATION OF THE COUNTY OF LENNOX AND ADDINGTON

Per: *[Original Signed By Clayton McEwen]*

Clayton McEwen, Warden

Per: *[Original Signed By Larry Keech]*

Larry Keech, CAO/Clerk

UNION GAS LIMITED

Per: *[Original Signed By Christine Jackson]*

Christine Jackson, Assistant Secretary

TAB 1.3

Schedule C

county of
Lennox & Addington

RESOLUTION OF THE COUNCIL OF THE CORPORATION OF THE COUNTY OF LENNOX AND ADDINGTON

Meeting held – March 20, 2024

CC-24-72

That Council direct staff to enter into a franchise agreement with Enbridge Gas Inc. stating the terms and conditions and the period for which the franchise provided in the franchise agreement is proposed to be granted;

and further be it hereby resolved,

That Council approves the form of the draft by-law and franchise agreement attached hereto and authorizes the submission thereof to the Ontario Energy Board for approval pursuant to the provisions of Section 9 of the *Municipal Franchises Act*;

and further,

That Council requests that the Ontario Energy Board make an Order declaring and directing that the assent of the municipal electors to the following draft by-law and franchise agreement pertaining to the Corporation of the County of Lennox and Addington is not necessary pursuant to the provisions of Section 9 (4) of the *Municipal Franchises Act*.

I HEREBY CERTIFY the foregoing to be a true copy of Resolution CC-24-72 passed by the Council of the Corporation of the County of Lennox and Addington on the 20th day of March, 2024.

[Original Signed By Tracey McKenzie]

Tracey McKenzie, Clerk

ADMINISTRATIVE SERVICES

97 THOMAS ST. E., Napanee, Ontario K7R 4B9 tel: 613.354.4883 fax: 613.354.3112 www.lennox-addington.on.ca

TAB 2

Elson
Advocacy

August 2, 2024

Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street, 27th Floor
Toronto, Ontario M4P 1E4
registrar@oeb.ca

Dear Ms. Marconi

Re: County of Lennox and Addington Franchise Agreement
EB-2024-0134

I am writing on behalf of the Concerned Residents pursuant to *Procedural Order #1* to answer the questions posed by the OEB in that procedural order. We have answered the questions below in reverse order as the nature of the proposed evidence (question 1) can be explained more efficiently after discussing the outcomes that the Concerned Residents are seeking.

Question 3: What specific outcome(s) is Concerned Residents seeking in this proceeding, including possible impact(s) on the MFA?

At the highest level, the Concerned Residents are seeking a franchise agreement that is fairer for residents and taxpayers in Lennox and Addington County (the "County"). The Concerned Residents currently have two primary concerns with the agreement proposed by the Applicant.

1. **Locking in free use of highway lands:** The proposed agreement appears to lock the County into an arrangement where it cannot charge any fees for use of its highways for pipelines for 20 years. This is concerning because there is an ongoing campaign by some municipalities to be able to charge fees for use of these lands, including requests that the Province of Ontario amend s. 9 of Ontario Regulation 584/06 to allow for such fees. If the campaign is successful and fees are allowed, the County could still be prevented from charging said fees by being locked into this franchise agreement.

   This could be addressed in a number of ways in the franchise agreement. For example, a new term could be added to the agreement that would give the County the right to trigger a negotiation for said fees in the event that O. Reg. 584/06 is amended to allow those fees, including remedies that the County can exercise if fees cannot be agreed on within a reasonable timeframe.

2. **Payment for relocation:** The proposed agreement requires taxpayers to bear too large of a burden for relocating gas pipelines where they conflict with public works. It appears

that taxpayers must bear 100% of these costs for public works that do not fit the definition of municipal works and 35% of the cost for conflicts with municipal works. This is unreasonable seeing as the gas distributor pays $0 for use of these public lands. Requiring that municipalities use taxpayer dollars to support methane gas pipelines is no longer in the public interest at a time where (a) methane gas is no longer the cheapest heating option and (b) methane gas combustion causes one-third of Ontario's greenhouse gas emissions and needs to be eliminated over the span of approximately 25 years (i.e. by 2050).

This could be addressed in a number of ways in the franchise agreement. First, the cost sharing provisions in section 12 should apply to all public works, not only those public works that can be defined as municipal works. Second, the share of relocation costs borne by taxpayers should be reduced to 0%.

The Concerned Residents would prefer to achieve changes to the County's next franchise agreement to address those issues as soon as possible. However, there may be other alternative outcomes which would not provide as much progress but would represent a step forward. We can imagine two examples of alternative outcomes:

1. **Decline s. 9(4) order:** The OEB could decline to order that the assent of municipal electors can be dispensed with under s. 9(4) of the *Municipal Franchises Act*. This would allow the issues regarding fairness to those municipal electors to be voted on by those municipal electors.

2. **Call a generic hearing:** The OEB could initiate a generic hearing into the model franchise agreement seeing as the previous generic hearing resulting in the current model was approximately 25 years ago.

Although we have identified some potential amendments to the franchise agreement, the Concerned Residents enter this proceeding with an open mind and wish to reserve the right to hone and adjust their requests based on the evidence that comes forward and the discussions that may occur through this proceeding.

Question 2: What is Concerned Residents' position with respect to the OEB's authority, in a franchise renewal proceeding, to prescribe terms and conditions of a municipal franchise agreement that vary from those that the two contracting parties, one of which is the elected council of the citizens of the municipality, have agreed on for the continuation of the franchise and that are consistent with the MFA?

As a preliminary matter, there are a number of options to address the issues noted above without prescribing terms and conditions that vary from those proposed by the Applicant. For instance, the OEB could deny approval of the terms and conditions of the agreement under s. 9(1) of the *Municipal Franchises Act* with reasons addressing the issues above and with leave for the Applicant to re-apply. Alternatively, the OEB could decline to order that the assent of municipal electors can be dispensed with under s. 9(4) of the *Municipal Franchises Act*. In both cases, the

issues would be put back to the parties before they are brought back to the OEB again for reconsideration.

Alternatively, the OEB can impose terms of a franchise agreement. That has been done before in the past over the objections of one party and there is no jurisdictional impediment to it occurring over the objections of two parties. However, as a practical matter, the agreement terms sought by the Concerned Residents are for the benefit of the County, and so it is highly unlikely that the County would object to them. As such, any order imposing terms would likely only be over the objections of the gas distributor.

The power to impose terms is most clearly set out in s. 10(2) of the *Municipal Franchises Act*, which reads as follows:

> The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

In this case, Enbridge has applied under s. 9, which also states that "[t]he Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and may give or refuse its approval." It is not entirely clear based on this wording if specific conditions could be directly imposed in a s. 9 application. We believe they could. However, if we are incorrect, there is no doubt that approval under s. 9 could be denied such that the applicant is required to apply under s. 10, which clearly gives the OEB jurisdiction to impose terms.

In sum, the OEB has the jurisdiction to deny approval and send the matter back to the parties for renegotiation with reasons or, as an alternative, to directly impose terms. Either option could address the issues raised by the Concerned Residents.

Question 1: What is the nature of the evidence that Concerned Residents plans to submit for consideration by the OEB in this proceeding and what is the proposed timing for the filing of such evidence?

The Concerned Residents wish to submit evidence (a) justifying the adjustments to the franchise agreement that they seek as outlined on pages 1 and 2 above and (b) setting out the changes that have occurred since 2000 that would justify deviating from the model franchise agreement. This would include:

1. Evidence in support of the need to allow for a negotiation regarding fees in the event that O. Reg. 584/06 is amended, including evidence that such amendments are a real possibility over the agreement term, such as details of efforts by municipalities to seek those changes;

2. Evidence to justify fees for use of the highways, such as evidence on fees charged in other jurisdictions for use of highways and fees charged to district energy pipelines for use of the highways; and

3. Evidence on why it is no longer in the public interest to require taxpayers to provide free access to highway lands and to pay for pipeline relocations, such as the role of that infrastructure in causing climate change.

The extent of evidence required will depend on the interrogatory responses. We hope to obtain as much of the evidence as possible through interrogatories.

We anticipate that four weeks will be required to prepare the evidence. However, we will work within whatever timelines the OEB may provide. If timing is an issue, the Concerned Residents do not object to an interim extension of the existing franchise agreement to allow the issues in this proceeding to be adequately addressed.

It is not clear to us whether the OEB is currently seeking a fully detailed description, timeline, and budget for the proposed evidence. It appears to us that the OEB is only looking to determine the nature of the evidence at a high level before setting out the next steps in this proceeding and for the purposes of determining whether to grant our request to accept detailed evidence proposals after receiving interrogatory responses. We have therefore provided a high-level response, but we can provide additional details if they are needed at this time and if the OEB declines our request to defer that step until after receipt of the interrogatory responses.

Yours truly,

Kent Elson

TAB 3

E.B.O. 125

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1980, Chapter 332, Sections 13 and 15, and the Municipal Franchises Act R.S.O. 1980, Chapter 309;

AND IN THE MATTER OF the Ontario Energy Board's review of franchise agreements and certificates of public convenience and necessity.

BEFORE: R. W. Macaulay, Q.C.
Chairman and Presiding Member

M. C. Rounding
Member

P. E. Boisseau
Member

May 21, 1986

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Pages are numbered separately for each chapter

1. INTRODUCTION

Preamble

1.1 This hearing was called by the Ontario Energy Board (the Board or the OEB) in order to provide a forum for the discussion of a number of general and specific concerns which have arisen over the last few years regarding municipal franchise agreements for the distribution of gas in Ontario. The Board wanted to determine whether the existing forms of franchise agreements between municipalities and gas distributing companies are adequate, and whether the ways in which these agreements are entered into are appropriate.

1.2 The hearing was in part a response to questions raised as a result of the OEB's decision in the Lambton case (E.B.A. 464 et al), to issues to be considered in the OEB's forthcoming Blenheim/

Lambton case (E.B.A. 472), and to a Brief adopted by the Association of Municipalities of Ontario and directed to the Ministries of Energy and of Municipal Affairs (Appendix A). The Board was persuaded that the underlying principles as well as some recurring contentious issues needed a review by all the parties involved - the municipalities, the gas distributors, the gas consumers and the OEB itself.

1.3 Many of the problems which needed consideration have a historical base. Municipal franchise agreements for the distribution of gas were first introduced in Ontario around the turn of the century, although the majority of them were established after 1957 when natural gas from Western Canada was first transmitted to Ontario and large-scale gas distribution became possible. While a significant number of problems arise in the Union Gas Limited franchise area in southwestern Ontario, which contains most of the oldest gas distributing facilities, there are many aspects of franchise agreements in general which need reconsideration in the light of changing circumstances and policies.

1.4 This hearing provided a fresh opportunity for the parties to understand each other's position. The specific issues which were to be addressed at the hearing are listed later in this chapter.

The more general problems which were revealed in the course of the hearing were:

- the concerns of municipalities, particularly smaller, lower-tier municipalities regarding their relations and their negotiating position with the gas distributors;
- the importance of the municipalities having a clearer understanding of the role, powers and policies of the OEB in relation to various aspects of municipal franchise agreements;
- an appreciation of the concerns of the gas distributors in protecting their initial and continuing capital investment in their franchise areas;
- the concerns of the large volume gas users that they may be restricted in how and where they may purchase gas by the terms of the franchise agreements in the municipalities in which they are located.

1.5 The Board is grateful to all participants at the hearing for their generous and instructive contributions. In particular, the many municipalities which were ably represented throughout the public hearing are to be commended for increasing the Board's understanding, and that of the other participants, as to the present day concerns of the municipal authorities about the presence of utility plant in municipal rights

of way. Appreciation is also extended to the gas utility companies and other participants for their constructive contributions which helped to clarify the spectrum of issues.

1.6 The Board believes that the hearing itself was useful to all the parties who took part in it. It should be emphasized that the most valuable consequence of the hearing is not analysed in the body of this Report. This was the process of mutual education and understanding between the participants that developed during the hearing in the course of discussion of a number of major issues. This is a process that should continue beyond the period of the hearing.

1.7 A major recommendation in this report is the establishment of a special Municipal Franchise Agreement Committee (the recommendation appears in chapter 8). The MFA Committee is to be made up of representatives from the municipalities, the gas distributing companies and the Ontario Energy Board, and it will be requested to resolve a number of the questions about municipal franchise agreements which were raised originally at the hearing but which would be most constructively answered through discussion and negotiation rather than by decisions or orders of the Board.

1.8 In effect, the MFA Committee will extend the process of dialogue between the municipalities and the gas distributors that took place during the hearing. This MFA Committee should also be seen to mirror, at the representative level, the way that Utility Coordinating Committees operate now to great advantage in many municipalities.

1.9 In general, most of the issues raised at the hearing do not have a very significant financial impact in the short term for the parties; it is the future implications of certain policies that seem threatening. For example, some municipalities believe that a change in the principles of sharing relocation costs of gas pipelines might lead to alarming increases of costs to their ratepayers in the future. Likewise the gas distributors resist the principle of introducing permit fees for excavations in municipal rights of way because they believe such fees could become a significant additional cost for the utility companies and the gas customers.

1.10 In a generic hearing of this sort held by the Board, the findings of the Board as stated in its Report are not legally binding on its future deliberations, but are an expression of the Board's policies or guidelines on the various issues discussed.

Contents of the Report

1.11 The remainder of this chapter gives details of the hearing itself, including the Notice, the list of suggested concerns, lists of Participants and lists of Witnesses.

1.12 Chapter 2 outlines the historical background to natural gas franchise agreements and Chapter 3, "The Legislative Background", describes the major pieces of Ontario legislation which have a bearing on questions relating to municipal franchise agreements.

1.13 Chapters 4, 5, and 6 deal with the specific issues raised at the hearing. In Chapter 7, "The Nature of Franchise Agreements", the more general questions raised in the hearing are analysed. Chapter 8 describes the role of the Municipal Franchise Agreement Committee.

Notice of Public Hearing

1.14 The Board made a decision to inquire into and review the form of natural gas franchise agreements and certificates of public convenience and necessity. Accordingly, Notice of Public Hearing was published on August 16, 1985 in 43 Ontario daily newspapers. Concurrently, personal notices were mailed to the 838 municipalities

and all the natural gas distribution companies in Ontario.

1.15 The Notice invited interested individuals, citizens' groups, municipalities, associations and companies to participate in the hearing and outlined the participation procedure. Forty-seven letters were received by September 13, 1985 indicating intentions to participate in the public hearing.

1.16 A mailing list of all participants and a list of suggested concerns were attached to the Amended Notice of Public Hearing dated September 24, 1985.

List of Suggested Concerns

1.17 A list of suggested concerns was provided by the Board to assist participants in considering common issues which could be examined at the hearing. These issues were suggestions only. No one was confined to this list, nor did everyone address every issue. The list is as follows:

1. Franchise exclusivity and flexibility.

2. Obligation of the franchised gas utility to provide service to the entire franchise area.

3. Obligation of the franchised gas utility to purchase and distribute gas produced locally.

4. The implications of a franchise with a regional or county government as compared to a franchise with a local municipality (city, etc.) and the need, if any, for varying provisions in the respective agreements.

Note: In most cases, the regional or county franchise relates to a transmission line using the regional or county road or rights-of-way and is associated with an application for leave to construct. The local municipal franchise relates to the distribution system within the local municipality and is associated with an application for certificate of public convenience and necessity.

5. Elements of franchise agreements that may be standardized.

6. Duration of franchise agreements and uniform expiry dates.

7. Compliance by gas utilities with municipal by-laws of general application.

8. Procedures and rights of renewal of franchise agreements.

9. Filing with the road authority of plans and specifications of all gas distribution works before and after construction.

10. Safety and other implications of pipelines crossing private property.

11. Abandonment of pipe.

12. Notice by the gas utility of all emergency excavations.

13. Responsibility of the gas utility to give prompt service for line locations when a ruptured water or sewer pipe has to be replaced.

14. Required participation of the gas utility in any committee to coordinate operations of all underground utilities.

15. Indemnification and liability insurance.

16. Allocation of responsibility for payment of costs of relocation of old and new gas lines recognizing:
    a) any differences in the treatment between transmission and distribution systems,

b) associated upgrading of the pipeline,

c) any temporary arrangement for the pipeline location, and

d) any existing unwritten agreements.

17. Need for separate agreements for each bridge on which a gas pipeline is installed.

18. Impact of cost-sharing for relocation of lines on the municipality and the gas utility.

19. Municipal control over interference with highways within a certain period after the initial construction of such highways.

20. Municipal control over the locations of utility installations underneath the travelled portion of highways and other municipal property.

21. Municipal control of the timing and manner of construction of utility works under highways and other municipal property.

22. Payment of permit fees for installation, maintenance and repair of lines to defray the cost of municipal inspection and supervision of such operations.

23. Need for a provision in the franchise agreement specifying that proposed marginal service lines in the franchise area may require contributions to construction from the prospective customers.

24. Failure to comply with the terms of franchise agreements.

25. Existing unwritten and other written agreements.

26. Impact at local and provincial levels that proposed revisions may have on existing and future franchise agreements .

27. Implications of the proposed revisions with respect to existing legislation.

28. Other concerns.

Submission of Briefs

1.18 Twenty-six submissions were received by the Board by October 22, 1985. A Procedural Order dated October 17, 1985 instructed the participants on the procedure and timing for obtaining from one another information and material that was in addition to a particular brief filed and that was relevant to the purpose of the hearing.

A late application for participant status was received from the Independent Petroleum Association of Canada and, in the absence of objection, was approved by the Board.

Participants

1.19 The participants for purposes of appearance were arranged in the following categories:

- Municipalities
- Gas Users and Other Interested Parties
- Gas Utility Companies

Municipalities

1.20 The municipalities which actively participated in the hearing and their counsel or representative were as follows:

- Several Cities and Counties in Southwestern Ontario represented by Mr. A.C. Wright

- Corporation of the Town of Blenheim (Blenheim) and Corporation of the County of Lambton (Lambton) represented by Mr. W.R. Herridge, Q.C. and Ms. E.J. Forster.

- Regional Municipality of Ottawa-Carleton and Corporation of the City of Ottawa (RMOC) represented by Mr. W.E. Duce, Q.C. and Mr. P. Hughes.

- Corporation of the City of Sudbury represented by Mr. W.F. Dean

- Regional Municipality of Sudbury represented by Mr. R.M. Swiddle

- Federation of Northern Ontario Municipalities represented by Mr. B.W. Cameron

- Corporation of the Township of Norfolk, without counsel, represented by Mayor C.H. Abbott

- Corporation of the Township of London, without counsel, represented by Mr. A.F. Bannister, Administrator and Clerk

- Corporation of the Township of Zorra, without counsel, represented by Mayor W.W. Hammond

1.21 The following municipalities filed briefs but did not actively participate in the hearing:

- Corporation of the Township of Brantford represented by Mr. J.F. Longley, Township Engineer

- Corporation of the City of London represented by Mr. R.A. Blackwell, Q.C.

- Corporation of the Township of Malahide represented by Mr. R.R. Millard, Clerk-Treasurer

- Corporation of the City of North York represented by Mr. C.E. Onley, Q.C. and Ms. N. Koltun

- County of Oxford represented by Mr. C. Tatham, Warden

- Corporation of the City of Peterborough represented by Mr. R. Taylor

- Corporation of the City of St. Catharines represented by Mr. T.A. Richardson

1.22 The following municipalities filed letters of intent but neither filed briefs nor participated in the hearing:

- County of Brant

- Regional Municipality of Niagara

- County of Simcoe

1.23 The Several Cities and Counties in Southwestern Ontario, also referred to as the Southwestern Ontario Municipal Committee (SWOMC), comprises

the Cities of St. Thomas, Windsor, Chatham and Sarnia and the Counties of Elgin, Essex, Kent, Lambton and Middlesex. Supporters of the SWOMC are the constituent members of the aforementioned counties plus the Regional Municipalities of Haldimand-Norfolk and Waterloo plus the Counties of Brant, Grey, Huron, Perth and Wellington, and, to a limited extent, their constituent municipalities including the Cities of Brantford, Nanticoke, Owen Sound, Woodstock, Stratford and Guelph. In total, the SWOMC comprises or is supported by at least 151 municipalities throughout southwestern Ontario.

1.24 The Townships of Brantford and Malahide and the County of Oxford were supporters of the brief submitted by the Several Cities and Counties of Southwestern Ontario, as were the Townships of Norfolk and London who spoke to their respective briefs at the hearing as well. The Regional Municipality of Niagara indicated that its interests were adequately covered in the briefs of the Regional Municipalities of Ottawa-Carleton and Sudbury.

1.25 The Federation of Northern Ontario Municipalities (FONOM) is a federation of 73 cities, towns, townships, villages and improvement districts that are the constituent municipalities of the Districts of Nipissing, Parry Sound,

Sudbury, Algoma, Cochrane, Manitoulin and Temiskaming and the Regional Municipality of Sudbury.

Gas Users and Other Interested Parties

1.26 The following gas customers and other interested parties participated actively in the public hearing:

- Fernlea Flowers Limited represented by Mr. J.R. Tyrrell, Q.C.
- Independent Petroleum Association of Canada (IPAC) represented by Ms. J.A. Snider

1.27 The following interested parties filed briefs but did not actively participate in the hearing:

- Inco Limited represented by Mr. T.G. Andrews
- Industrial Gas Users Association (IGUA) represented by Mr. P.C.P. Thompson, Q.C.
- Mr. Alphonse G. Mahew on behalf of himself
- Nitrochem Limited represented by Mr. R.C. van Banning

1.28 The following interested parties filed letters of intent but neither filed briefs nor participated actively in the hearing:

- C-I-L Inc. represented by Ms. P.D. Jackson
- Cyanamid Canada Inc. represented by Mr. J. de Pencier, Ms. J. Ryan and Ms. K. Robinson
- Mr. J.I. Davidson on behalf of himself
- Eneroil Research Ltd. represented by Mr. T. Ferenczy
- TransCanada PipeLines Limited represented by Mr. C.C. Black

1.29 The common concern of the large volume gas users dealt with direct purchase arrangements which, they were advised at the outset of the hearing, would be the subject of a separate subsequent hearing. Consequently, any further interest in this hearing was reduced for them to the question of whether any condition of gas franchise agreements might preclude future direct purchase arrangements. Only IPAC's counsel explored this issue with the various witnesses throughout the hearing. Final arguments were made on this issue by IPAC and Nitrochem.

Gas Utility Companies

1.30 The gas utilities participated as follows:

- The Consumers' Gas Company Ltd. (Consumers') represented by Mr. P.Y. Atkinson
- Union Gas Limited (Union) represented by Mr. J.B. Jolley, Q.C. and Mr. A. Mudryj
- Northern and Central Gas Corporation Limited (Northern) (as of May 5, 1986, changed to ICG Utilities (Ontario) Ltd.) represented by Mr. P.F. Scully
- Ontario Natural Gas Association (ONGA) represented by Mr. P.Y. Atkinson

1.31 Natural Resource Gas Limited, without counsel, represented by Mr. K. Greenbeck, neither submitted a brief nor participated in the hearing except in an observer capacity.

Ontario Energy Board

1.32 Special Counsel was Ms. C.L. Cottle.

Appearance and List of Witnesses

1.33 The sequence and identity of witnesses are listed as follows. In the cases of organizations having more than one witness, the witnesses appeared as panels.

Southwestern Ontario Municipal Committee

R. Foulds	Clerk Administrator The County of Kent
J.D. Ferguson	County Engineer The County of Kent
I. Nethercot	Head Subsidy Administration and Operation Municipal Roads Office Ministry of Transportation and Communications
W.E.C. Coulter	City Engineer The City of Chatham
D.H. Husson	County Engineer Middlesex County
R.E. Davies	Engineer The Regional Municipality of Haldimand-Norfolk

C.K. Domker	Commissioner of Works The City of St. Thomas
D.M. Packwood	Ministry of Transportation and Communications

The Corporation of the Town of Blenheim and the Corporation of the County of Lambton

D.W. Derrick	County Engineer The County of Lambton
P. Shillington	Council Member Town of Blenheim
A.C. Gault	Clerk Treasurer Town of Blenheim

Regional Municipality of Ottawa-Carleton

J. Becking	Director of Operations Transportation Department
D.C. Marett	Chief Structural Engineer
B.L.W. Hendricks	Construction Engineer
L. Russell	Deputy Treasurer and Director of Budget and Accounting Services

W. Spooner, Q.C.	Partner Gowling and Henderson
G.G. McFarlane	President Marlin Engineering Limited Vice President SMP Engineering
D. Cramm	Chairman, Bridge Manager C.C. Parker Limited
K.L. Kleinsteiber	Ministry of Transportation and Communications
G. Phillips	President Canadian Subaqueous Pipe-Lines Limited

Corporation of the Township of Norfolk

C.H. Abbott	Mayor

Corporation of the City of Sudbury

H.A. Proudly	Manager of Development, Property and Technical Services

Regional Municipality of Sudbury

J.C. Flook	Regional Roads Engineer

Corporation of the Township of London

A.F. Bannister	Administrator and Clerk

Federation of Northern Ontario Municipalities

R.H. Pope	Financial Consultant Ross, Pope & Company

Corporation of the Township of Zorra

W.W. Hammond	Mayor

Fernlea Flowers Limited

M.W. Bouk	Director of Finance and Operations Manager

The Consumers' Gas Company Ltd.

N. Harte	Manager of Planning and Technical Services, Eastern Region
J.B. Graham	Chief Engineer
H. Townsend	Regional Manager, Eastern Region

Union Gas Limited

D.J. Moore	Vice-President, Operations
B.J. Kemble	Manager, Engineering

Northern and Central Gas Corporation Limited

G. Laidlaw	Company Solicitor
J. Hunter	Director, Controller
M.A. Wolnik	Vice-President, Operations

Hearing Duration

1.34 The hearing started on November 13, 1985, continued in Toronto to November 22, 1985 and concluded in London on November 25, 1985. There were nine public hearing days.

Transcripts and Exhibits

1.35 A verbatim transcript was made of all the proceedings. The full transcript of 1477 pages and all the exhibits filed with the Board in connection with this hearing are held at the Board's offices and are available for public examination.

Final Written Submissions

1.36 Final written submissions, although entirely optional, were invited by December 6, 1985 to provide an opportunity for any participants to respond to the oral submissions of others and specific questions raised by the Board during the hearing. Final submissions were filed by SWOMC, Blenheim/Lambton, RMOC, FONOM, Fernlea Flowers, IPAC, Nitrochem, Consumers', Northern and Union.

2. BACKGROUND

Gas Distribution in Ontario

2.1 There are three major gas distributors in Ontario which together serve approximately 1,462,000 customers. Each gas distributor is granted franchises to operate as a monopoly within a given area: Consumers' operates in southern, central and eastern Ontario, Northern operates in northwestern, northern and eastern Ontario, and Union operates within southwestern Ontario. The enclosed maps illustrate these three operating areas.

2.2 In 1984 the combined assets of the three companies totalled about $3.3 billion and the total revenue of these utilities was approximately $3.7 billion.

Reasons for Regulation

2.3 The distribution of natural gas within Ontario to residents, businesses and industry is fundamental to the economy of the province. It is an essential service, and consequently one with which the Legislature has long had a deep concern.

2.4 Because of the cost of installing the extensive network of gas mains and associated works, the capital required is so great that no gas distribution company would commence its endeavour unless it was granted a distribution monopoly to assure its investors an opportunity to earn a fair return on their investment. Accordingly, the Legislature has granted the three major distribution companies a monopoly framework within which to operate.

2.5 Since the distribution and sale of natural gas within Ontario are performed by gas utilities which operate as monopoly businesses created in the public interest, the gas utilities have traditionally been subject to provincial regulation through legislation established primarily in the Ontario Energy Board Act and the Municipal Franchises Act.

2.6 Some characteristics common to public gas utilities are:

- o An essential service provided to customers;
- o A physical connection between the utility system and the customer's equipment;
- o A high capital investment in utility plant; and
- o Unit costs that tend to decrease with expanding scale of operation.

2.7 In the absence of competition amongst gas distributors, the customer is protected by the regulation of the gas distributor's entry into the area, construction of its plant, and its rates. The regulatory board must also ensure that the gas distributor maintains a sound financial position.

Requisites for Distribution

2.8 A gas franchise agreement is a contract between an individual municipal corporation and a gas distribution company. There are two aspects of a franchise agreement, gas supply and use of road allowance.

2.9 The gas supply clauses of the agreement grant municipal permission for a specified term to the gas utility to supply gas to the inhabitants of the municipality and to enter upon all

the highways under the jurisdiction of the municipal corporation and to construct, operate and maintain a system for the supply, distribution and transmission of gas in and through the municipality. The foregoing relates to the privileges extended by the municipality to the gas utility.

2.10 The largest part of the agreement deals with the duties of the gas utility to comply with specific municipal requirements related to the occupancy of gas utility plant in and on municipal roads and rights of way.

How a Franchise Agreement is Established

2.11 If the gas distributor and the municipality have agreed on the proposed terms and conditions of a new franchise agreement, or on the terms and conditions of the renewal of an agreement, the procedure is substantially the same.

(a) A draft franchise agreement is prepared by the gas distributor and delivered to the municipality.

(b) Discussions between the municipality and the utility then occur regarding the draft franchise agreement.

(c) In the event the municipality agrees to the proposed franchise, the municipality is usually asked to pass a resolution approving the proposed form of agreement.

(d) When passed, an application must then be prepared by the gas distributor and filed with the Board. For each case, the Board opens a file and issues directions regarding its hearing procedure.

(e) Upon receipt of the Board's directions by the utility, notices of application and hearing must be sent by registered mail and published in a local newspaper by the utility.

(f) The hearing is subsequently convened. In most cases the municipality does not have a representative attend the hearing.

(g) Following a hearing, if the Board approves the franchise and issues an order, the franchise must be sent back to the municipal council, a by-law must be passed and the agreement signed. A copy of the by-law and agreement must be delivered to the Board. The assent of the electors required by the Municipal Franchises Act may be dispensed with by the Board.

2.12 Under section 9 of the Municipal Franchises Act the Board is required to either approve or not approve the agreement. The terms of the Act do not expressly give the Board the power to impose an agreement on the parties.

2.13 In the case of a renewal of a franchise agreement, if the utility and municipality cannot agree on renewal terms, the Board has jurisdiction under section 10 of the Act to order that the agreement be extended on such terms and conditions as the Board deems to be in the public interest. Such an order is deemed to be a valid by-law of the municipality, assented to by the electors.

Pipeline Construction Approval Process

2.14 The public hearing process by the OEB for the following pipeline construction applications is concurrent with the franchise agreement approval process described above:

(a) leave to construct a transmission pipeline is sought in accordance with the Ontario Energy Board Act, and/or

(b) a certificate of public convenience and necessity for the construction of works is sought under the Municipal Franchises Act.

2.15 In dealing with an application for leave to construct a pipeline or for a certificate of public convenience and necessity, the Board must decide whether it is in the public interest that the facilities be constructed. The Board requires the Applicant to identify the least-cost alternative, having regard to relative cost, operational constraints, market access and environmental impact. Other matters that the Board considers include the safety and availability of pipe, security of gas supply, ability to fund the project, construction practices, environmental factors and right of way concerns.

Municipal Structure of Ontario

2.16 A municipality is an area whose inhabitants are incorporated. Its powers are exercised by a council composed of individuals elected by the electors of the municipality. The purpose of municipal government is primarily to ensure local political authority and control over services provided in the local area.

2.17 Local municipality means a city, town, village or township. It is the basic form of local government in Ontario to which is vested the soil and freehold of the road allowances within its territorial jurisdiction (section 258 of the Municipal Act). Local municipalities are also referred to as lower-tier municipalities.

2.18 Roads and municipal rights of way at the local municipal level often include within their boundaries a complex of utilities - gas, telephone, electricity, water, as well as sewers. Together they demand stringent engineering and planning.

2.19 A County is a municipality which is a federation of the towns, villages and townships within its borders, and is also referred to as an upper-tier municipality. Designated members of the elected local municipal councils combine to form the county council which is responsible for a limited number of functions, with major roads being the most important one.

2.20 Cities and separated towns, even though geographically part of the county, do not participate in the county political system.

2.21 Typically, county roads are arterial roads that run between municipalities within the county and beyond the county's boundaries. Some county roads remain within the county road system as they pass through an urban constituent local municipality. However, in some counties, the county road is vested in the urban constituent municipality as it passes through the local municipality on the basis of a connecting link agreement.

2.22 A regional municipality, like a county, is an upper-tier municipality and a federation of all the local municipalities within its boundaries. The major differences between a regional municipality and a county are:

- o the regional municipality is created by a special act of the Ontario Legislature;
- o the regional councils have more responsibilities than do county councils; and
- o cities are full participants in the regional system, in contrast to their separate status in the county system.

2.23 The regional councils are responsible for regional-scale functions such as overall land-use planning, social services, major roads, and trunk sewer and water systems.

2.24 Territorial districts are divisions of that part of Ontario which does not have county organization.

Association of Municipalities of Ontario

2.25 The Association of Municipalities of Ontario (AMO) is a voluntary organization which promotes the values of the municipal government system

and the status of the municipal level of government as a vital and essential component of the total intergovernmental framework of Ontario and Canada.

2.26 The AMO represents 611 of the 838 municipal governments throughout Ontario containing 95 per cent of Ontario's population. The AMO acts as the collective voice of Ontario's municipal governments and is organized to accomplish through cooperation and coordination, what the majority has neither the time nor the resources to do individually.

2.27 The following associated sections of the AMO form an important part of the AMO's structure and play an important part in its activities in terms of the Board of Directors and program and policy development:

- County and Regional Section;
- Large Urban Section;
- Northern Ontario Section (FONOM/NOMA);
- Rural Section (ROMA);
- Organization of Small Urban Municipalities Section.

2.28 The AMO did not take a collective position at this hearing, nor did it participate directly. Rather, it deferred official participation in the proceedings to its member municipalities, individually and by groups. Many parties included in their briefs submitted to the Board a copy of the paper prepared by the AMO and presented to the Ministries of Energy and of Municipal Affairs (Appendix A).

Ontario Natural Gas Association

2.29 ONGA, the Ontario Natural Gas Association, represents the natural gas industry in Ontario and includes the three major gas utilities, The Consumers' Gas Company Ltd., Union Gas Limited and Northern and Central Gas Corporation Limited, as well as TransCanada PipeLines Limited. One of ONGA's stated objectives is to promote, assist and encourage the development and efficiency of the gas industry, including supply, production, transmission, storage and distribution, to the end that it may serve to the fullest possible extent the best interests of the public in Ontario.

3. THE LEGISLATIVE BACKGROUND

3.1 This chapter describes in general terms the major pieces of legislation which, with their regulations, affect gas distribution and municipal franchise agreements in Ontario. These are:

The Municipal Franchises Act
The Ontario Energy Board Act
The Municipal Act
The Public Service Works on Highways Act
The Public Utilities Act
The Energy Act
The Occupational Health and Safety Act
The Ontario Municipal Board Act
The Planning Act, 1983
The Drainage Act
The Assessment Act

The Municipal Franchises Act

3.2 The Municipal Franchises Act (R.S.O. 1980, chapter 309) is administered by the Ministry of Municipal Affairs. It sets out how arrangements are to be made by a municipal corporation for the supply of services by a public utility to the inhabitants of the municipality. "Public utility" is defined to include gas works and distributing works of every kind.

3.3 The Act establishes in subsection 3(1) that in order for a municipality to grant to a gas distributor the right:

1. to occupy a municipal highway (by laying a pipeline along a municipal right-of-way);
2. to construct or operate a public utility; or
3. to supply gas to the corporation or its inhabitants;

a by-law must be assented to by the municipal electors.

3.4 This by-law must contain the terms and conditions of the grant and the period for which the right was granted. This by-law is, in effect, the franchise agreement between the municipality and the gas distributor. The agreement must be approved by the Ontario Energy Board before it is submitted to the electors. The OEB holds a hearing before making an order granting its approval or refusing to do so.

3.5 An application is made under section 9 of the Municipal Franchises Act for a first-time agreement, or on a renewal where the parties have reached agreement on the terms of the renewal. On a section 9 application the OEB has only the power to approve or reject the application. On a section 9 application the OEB may dispense with the assent of the electors.

3.6 Section 10 of the Act is used when the parties cannot agree on the terms of a renewal or extension. Again the OEB holds a hearing before it makes an order renewing or extending the right; the duration and terms and conditions are as prescribed by the Board. The OEB may refuse to renew or extend the right if the public convenience and necessity do not warrant the renewal or extension. This Ontario Energy Board order is deemed to be a valid by-law of the municipality consented to by its electors.

3.7 Section 8 of the Act provides that any person who constructs works to supply or supplies gas in a municipality must obtain a further approval of the OEB in the form of a certificate of public convenience and necessity.

3.8 Section 6 provides that the Act does not apply to a by-law granting the right to pass through a municipality for the purpose of continuing a

line, work or system benefitting another municipality, the right to pass through in order to transmit gas not distributed in the municipality, or the right to construct or operate works required for the transmission of gas not intended for use or sale within the municipality.

The Ontario Energy Board Act

3.9 The Ontario Energy Board Act (R.S.O. 1980, chapter 332) is administered by the Ministry of Energy. In 1960 this Act brought into existence the Ontario Energy Board. The OEB is a regulatory tribunal acting in the public interest and its jurisdiction is set out in a number of statutes including the Municipal Franchises Act.

3.10 The OEB oversees the supply, sale, transmission, distribution and storage of natural gas and the construction of pipelines and works to supply gas. The Board does not regulate the rates of municipal gas distribution systems.

3.11 In the event of conflict, this Act prevails over any other general or specific Ontario statute, including any by-law passed by a municipality.

The Municipal Act

3.12 The Municipal Act (R.S.O. 1980, chapter 302) is the foundation upon which municipal government

in Ontario is built. It is administered by the Ministry of Municipal Affairs. The Act establishes that each elected municipal council acts in the name of the electors and ratepayers of a municipality by resolutions and by-laws. The Act provides that, with certain exceptions, the municipal council cannot grant an exclusive franchise right.

3.13 Councils of local municipalities may pass by-laws in regard to the laying, maintenance and use of gas pipelines on highways under section 210 of the Municipal Act, subject to the Municipal Franchises Act. Councils of counties may pass by-laws permitting and regulating the laying of gas pipes under county highways under section 225 of the Municipal Act, again subject to the Municipal Franchises Act. Regions have a similar power pursuant to individual regional acts.

The Public Service Works on Highways Act

3.14 The Public Service Works on Highways Act (R.S.O. 1980, chapter 420) was originally proclaimed in 1925, and is administered by the Ministry of Transportation and Communications. Section 2 of the Act provides that, in default of agreement, when a municipality wishes to construct, change, or improve one of its roads and the

works of a gas distributor are on the highway and will be affected, the "cost of labour" will be borne by the municipality and the gas distributor in equal proportions.

3.15 This formula of cost sharing has been used extensively in municipal franchise agreements which are of much more recent vintage than the Act, when there is no explicit agreement between the parties on the costs of pipeline relocation. It should be noted that it is the "cost of labour" which is to be shared. When a municipality requires a relocation of gas utility works for other than road work purposes, the municipality, in the absence of any agreement to the contrary, will have to bear the total cost.

3.16 The Act provides that the municipality or the gas distributor may apply to the OMB for relief against such equal distribution of costs where such apportionment is "unfair or unjust".

The Public Utilities Act

3.17 The Public Utilities Act (R.S.O. 1980, chapter 423) is a consolidation of numerous statutes dealing with public utilities; "public utility" is defined in the Act to mean works to transport water, artificial or natural gas, electrical power or energy, steam or hot water.

3.18 Parts IV and V apply to all companies owning or operating public utilities or supplying a public utility. Section 54 imposes a duty on a gas distributor to supply all buildings within a municipality which are close to a gas line, upon request.

3.19 Under section 57, a gas distributor requires a by-law of the municipal council, passed with the assent of the electors as required in the Municipal Franchises Act, to enable it to exercise its statutory powers, as found in the the Public Utilities Act, within the municipality. Section 58 establishes that a gas distributor can stop supplying gas to a consumer with 48 hours notice when the consumer fails to pay. Sections 60 and 21 establish that a gas distributor has the prima facie authority to lay down its works on highways, subject to other legislative requirements.

The Energy Act

3.20 The Energy Act (R.S.O. 1980, chapter 139) is administered by the Ministry of Consumer and Commercial Relations. This Act deals with safety aspects of hydrocarbons (gas). Subsection 18(1) imposes a duty on persons to obtain a "locate" before excavation. (A locate is a service offered by the gas distributor to

determine the exact position of a line.) Every person who interferes with a pipeline without authority, or damages it, is guilty of an offence (sections 19 and 27).

3.21 Subsection 18(2) imposes a duty on the gas distributor to provide a locate within a reasonable time after receiving a request for the same. The gas distributor is required under section 6 of Ontario Regulation 450/84, Gas Pipeline Systems, to file a manual of its standard practices which includes procedures for locating pipelines.

3.22 Under section 28 of the Energy Act, the Lieutenant Governor in Council has the power to make regulations with respect to the handling and use of hydrocarbons and may adopt by reference any code and may require compliance with such an adopted code. The Canadian Standards Association Standard Z184-M1983, Gas Pipeline Systems, (CSA-Z184) (5th edition) is a code which generally provides minimum requirements for the design, fabrication, installation, inspection, testing, operation and maintenance of gas pipeline systems. CSA-Z184 was adopted as part of Ontario Regulation 450/84 (O. Reg. 450/84).

3.23 The Energy Act and its regulations prevail over any municipal by-law.

The Occupational Health and Safety Act

3.24 The Occupational Health and Safety Act (R.S.O. 1980, chapter 321) is administered by the Ministry of Labour. Of particular significance to this hearing is section 53 of Ontario Regulation 659/79 (O. Reg. 659/79), dealing with the safety of the worker on excavations. A gas distributor shall, on request, locate and mark the gas service; where necessary, shut off or discontinue the gas service; and, if that cannot be done, shall supervise the uncovering of the service. Further to subsection 53(2), gas pipes are to be supported to prevent failure or breakage at an excavation.

The Ontario Municipal Board Act

3.25 The Ontario Municipal Board (OMB) is an independent tribunal established under the Ontario Municipal Board Act (R.S.O. 1980, chapter 347) which is administered by the Ministry of the Attorney General. It was originally established in the 1930s to oversee the budgets of municipalities. Since that time it has acquired very broad powers derived from many acts. In addition to the OMB's jurisdiction over land-use planning, its other powers include matters dealing with water and sewage service provided by one municipality to another,

railways, public utilities, assessment appeals, municipal boundary adjustments and municipal amalgamations and annexations.

3.26 The OMB has powers under the Municipal Franchises Act. However, where the franchise is a gas franchise, the Ontario Energy Board takes the place of the OMB. The OMB's authority relating to natural gas distribution comes through the Planning Act, 1983, and the Drainage Act, and also under the Public Service Works on Highways Act which gives the OMB the authority to re-apportion the cost of labour.

The Planning Act, 1983

3.27 The Planning Act, 1983 (S.O. 1983, chapter 1) is administered by the Ministry of Municipal Affairs. Originally introduced in the 1950s, it requires that Ontario municipalities must have an official plan.

3.28 Where the OEB is exercising its authority in a way which may affect a planning matter, it must have regard to any policy statement issued by the Minister of Municipal Affairs. Further, the Board, before it authorizes an undertaking, must also have regard for the planning policies of the relevant municipality. This could relate, for instance, to the building of above-

ground facilities for gas transmission lines, or the need for road right of ways which have not been approved under the official plan.

The Drainage Act

3.29 The Drainage Act (R.S.O. 1980, chapter 126) is administered by the Ministry of Agriculture and Food. Drains are of major importance in agriculture areas, particularly in southwestern Ontario. From time to time gas pipelines intersect with drainage systems and there may be a conflict between the function of the drainage system and of the gas line.

3.30 Drainage works may be constructed by mutual agreement (section 2), by requisition (section 3) or by petition (section 4). In the latter two instances, an engineer is appointed to assess the benefit, outlet liability and injury liability in a report to the respective municipal council (section 21). This report may be adopted by by-law.

3.31 Section 26 of the Act provides that a public utility or road authority may be assessed for all the increase of costs of a drainage work caused by the existence of the public utility or road authority in addition to other sums assessed, and notwithstanding that the public

utility or road authority may not be otherwise assessable under the Drainage Act. Assessments imposed under the Drainage Act are deemed to be taxes and the Municipal Act applies, subsection 61(4).

3.32 The persons affected by the assessment may appeal to the Court of Revision (section 46). An owner of land or a public utility affected by the engineer's report may appeal to the referee under section 47 or appeal to the Ontario Drainage Tribunal pursuant to section 48.

The Assessment Act

3.33 The Assessment Act (R.S.O. 1980, chapter 31) is administered by the Ministry of Revenue. All real property in Ontario is liable to assessment and taxation, subject to the statutory exemptions found in the Act. Land, real property and real estate are defined to include "all structures and fixtures erected or placed upon, in, over, under or affixed to a highway, lane or other public communication or water".

3.34 The gas distributor is subject to a "business assessment" pursuant to paragraph 7(1)(h); namely, a sum equal to 30 percent of the assessed value of the land excluding pipeline liable to assessment under sections 23 or 24.

3.35 Section 23 provides for assessment of the distribution pipelines whether or not situated on a highway, street, road, lane or other public place at market value. The assessment of transmission pipelines is pursuant to the rates established in section 24.

4. MUNICIPAL RIGHT OF WAY CONTROL

Introduction

4.1 The Legislature of Ontario has established local, county and regional municipal corporations to exercise delegated authority with respect to many matters of local interest, including negotiating agreements for natural gas distribution franchises. A municipal gas franchise gives the right to a gas distributor, subject to conditions and terms of the franchise agreement, to distribute and supply gas to a given municipality and, in order to do so, to place gas pipelines within the road allowances of the municipality.

4.2 Lower-tier municipalities generally view a gas franchise as dealing with the distribution of gas to its local citizens and businesses, thereby necessitating the use of local munici-

pal road allowances. Upper-tier municipalities usually perceive the gas franchise as dealing with the use of their arterial road allowances by gas lines in order to supply local municipalities both within and outside of its boundaries; they are not directly concerned with the distribution of gas to consumers. Nevertheless, both upper- and lower-tier municipalities have a common direct interest in the use by gas works of their respective road allowances. In this regard, a number of issues were raised at the hearing by the municipalities. On some of these issues, the positions of the parties were modified in part during the proceedings, as each better understood the position of the other. The issues are presented as follows:

- The Role of Utility Coordinating Committees
- Filing of Plans and Specifications prior to Construction, Location Approval
- Post-Construction Filing of As-Built Drawings
- Safety
- Timing and Methods of Construction; Right of Way Restoration and Maintenance
- Crossings - Bridges
- Crossings - Drainage Ditches and Drains

4.3 A further major issue, the question of the sharing of costs of gas line relocations, is discussed in Chapter 5.

The Role of Utility Coordinating Committees

4.4 The role of a coordinating committee at the regional and municipal level is to ensure an orderly development of utility services within the road and street allowances. Utility coordinating committees, where they exist, are composed of representatives from the municipality and the various utilities which use the road allowances. The utility coordinating committees address the day-to-day issues together with the planning of future projects.

Position of the Municipalities:

4.5 All municipalities were in favour of such committees, even those municipalities which have none in existence. The Southwestern Ontario Municipal Committee (SWOMC) submitted that all utility coordinating committees ought to be voluntary and no provision should mandate municipality and utility participation.

Position of the Utilities:

4.6 The gas distributors were in favour of utility coordinating committees and encouraged their formation. Union contended that the municipality should be responsible for establishing such a committee. Union further proposed that in

smaller municipalities where the volume of work is low, the road superintendent may be made responsible for coordinating all underground activities without the need of a full-fledged committee.

4.7 Union agreed with the SWOMC that there is no need to insert a clause in a franchise agreement about gas distributor and municipal participation on a utility coordinating committee.

Position of the Board:

4.8 The Board agrees that it is not necessary to include in a franchise agreement a clause making it mandatory for both parties to participate in a utility coordinating committee because voluntary participation enhances the worth of these committees. However, the Board urges municipalities and utilities to establish these committees where they are practicable. The Board encourages smaller municipalities where this type of committee is not feasible, to communicate their concerns, problems and future plans, even on an informal basis, to the gas distributor. Conversely, the gas distributors should be receptive to the concerns of the municipalities.

Filing of Plans and Specifications prior to Construction; Location Approval

4.9 The municipalities and the gas distributors agreed that pre-construction drawings and specifications should be filed with the municipalities. As well, the location and relocation of lines should have the concurrence of the Road Superintendent or the municipal Engineer. Some municipalities, however, advocated their ultimate right to designate the locations of pipelines in case of a dispute.

Position of the Municipalities:

4.10 It was submitted that except in case of emergencies, line location and construction timing should be controlled by the municipalities. The municipalities see themselves as owners or custodians of the road allowance. They take the position that the municipality is the sole body to coordinate effectively the activities on, above, along and under roads, and is the sole body which should approve or control the location of gas plant within the road allowance.

4.11 The Southwestern Ontario Municipal Committee submitted that when disputes arise between utilities and municipalities regarding line location (including depth), the municipalities

ought to have the right to apply to the Ontario Energy Board to resolve the disagreement. The SWOMC also submitted that a gas distributor ought not to be given a pre-emptive right to locate pipeline in road allowance by a franchise agreement, and that a municipality ought to have the authority to refuse permission to lay pipes in the road allowance.

Position of the Utilities:

4.12 The utilities agreed to the filing of plans and specifications and to obtaining the approval of the Road Superintendent before undertaking works except in emergencies.

4.13 With regard to the location of lines within the road allowance, Union believed that its current standard franchise agreement and the proposed standard agreement of the Ontario Natural Gas Association are adequate because they do not give either the municipality or the utility the unilateral right to force a specific location upon the other. Union submitted that both agreements give the gas distributor the right to propose a location for its distribution or transmission lines and the municipality has the right to approve such location or to refuse it if it interferes with existing or planned municipal works.

4.14 Union interpreted the role of the municipal Engineer or the Road Superintendent as a coordinator for the orderly utilization of the road allowance, but without the authority to dictate specific locations for the placement of utility plant.

4.15 Northern suggested that sections 21 and 60 of the Public Utilities Act give legislative support to the utilities' right to locate gas line in ". . . any highway, lane or other public communication . . .". Northern did not believe that the Ontario Energy Board should be given the jurisdiction to be the arbiter of any disputes over the interpretation of franchise agreements or the enforcer of their provisions. Northern is of the view that franchise agreements already have certain built-in controls to handle non-compliance and that the courts should settle any questions of contract law.

Position of the Board:

4.16 The Board recommends that pre-construction drawings and specifications should be filed with the Road Superintendent or municipal Engineer.

4.17 The Board believes that the municipality is the custodian of the road allowance and should have the responsibility of coordinating the location

of utilities on its property. Therefore it must be consulted and should agree to the location of new plant (including depth of cover), to the construction technique to be used, especially for crossings, and to the timing of the work to be performed.

4.18 The Board is of the view that the gas distributor should not be given a pre-emptive right by franchise agreement to locate its plant in the road allowance. With regard to Northern's interpretation that sections 21 and 60 of the Public Utilities Act give the gas distributor the primary right to locate gas lines in the road allowance, the Board is of the opinion that these statutory provisions do not give any overriding entitlement to the gas distributor to use the right of way to the detriment of the municipality.

4.19 In the Board's opinion plant location should be negotiated by the gas distributor and the municipality on a case-by-case basis. The Board should not be placed in the position of interpreting franchise or road user agreements; that is the role of the courts. The Board could, however, have a role as an arbitrator in instances where there is a dispute involving line location and there is no other way to resolve the dispute. The Board, therefore, recommends

that the proposed Municipal Franchise Agreement Committee established by this Report consider the means, whether by legislation or otherwise, by which the Board could assume a limited arbitration role for line location disputes.

Post-Construction Filing of As-Built Drawings

4.20 The issue of as-built drawings was raised by the municipalities which were concerned that these be provided by the gas distributor in order to confirm that pipeline installations or relocations have been carried out at the approved location within the road allowance. These plans also serve as a reference in the planning of future road construction and the construction of other utility works.

4.21 The expression "as-built drawing" in this Report is used to describe a plan of a street, road allowance, etc. on which the location of a transmission or distribution line, after being constructed, has been determined by a technician or an engineer, in contrast to a certified land surveyor. No elevation, geodetic data or depth of cover is provided on such an as-built drawing.

4.22 As-built drawings are an important element in the planning of road reconstruction, as well as in the planning of other municipal works which

use the road allowance. In addition, they assist the municipalities in planning the development of the road allowance to its full potential.

Position of the Municipalities:

4.23 The opinions ranged from obtaining from the gas distributor as-built drawings upon request, to making the gas distributor responsible for providing as-built drawings with geodetic information.

4.24 The amount of detail in as-built drawings reporting the location of lines varies depending upon the complexity and the specific location of the line. As-built drawings covering line location in a rural area have fewer details than a drawing showing the location of a line in a congested intersection of a downtown core. The municipalities seemed to agree that the amount of detail to be given on any such drawings should be left to the municipality on a case-by-case basis. The municipalities believed that the level of detail to be shown on as-built drawings including service laterals should be a term or condition of municipal approval.

4.25 During the hearing some municipalities changed their position and most agreed that an as-built drawing of the type provided by Union during the hearing and depicted in Appendix E would be adequate for their purposes.

4.26 The municipalities conceded that only in exceptional circumstances should the utilities be requested to indicate geodetic information or depth of cover on such drawings.

4.27 The municipalities agreed that as-built drawings ought not to be used as a substitute for a gas company's duty to identify the location of its own pipeline upon request.

Position of the Utilities:

4.28 All three gas distributors strongly advocated that geodetic data should not be required on as-built drawings for the following reasons:

1) Minimum depth of cover is prescribed by O. Reg. 450/84. Lines are buried to minimum depth unless some abnormalities are encountered along the path of the gas line.

2) Third party contractors building other utilities or performing road works might rely on the geodetic data and depth of

cover information, and use mechanical equipment in close proximity to the gas line thereby increasing the risk of damaging the pipeline.

3) Even if depth of cover measurements were provided, over time the depth might be altered making the depths shown on drawings misleading.

4) Providing geodetic information on existing lines would cost millions of dollars and cause great disruption by necessitating the digging up of roads.

5) All gas distributors now provide, free-of-charge, on-site location (including depth of cover) of all their plant.

4.29 The gas distributors also submitted that as-built drawings are available upon request but that they are not intended to be a substitute for an on-site location service provided by the gas distributors.

4.30 Union stated that, by law, gas distributors are required to ascertain line location when a third party undertakes work in the vicinity of a gas line. Union also stated that when precise information with regard to depth is a critical

factor, this information is obtained by uncovering the line. This service is a part of the locate service provided by Union and is also free of charge.

4.31 Consumers' recognized that exceptions do exist where geodetic data may be required, such as the major downtown intersections in cities where there is a congestion of underground plants of various utilities.

4.32 Northern agreed with the views of the other two utilities in that it was opposed to a requirement for geodetic data on as-built drawings.

Position of the Board:

4.33 The value of the depth of cover data shown on an as-built drawing provided at time of construction is dubious. As pointed out by the gas distributors, depth of cover may change over time due to erosion or grading work. On the other hand, there are certain advantages to having as-built drawings with geodetic data certified by a licensed land surveyor as follows:

a) The gas distributor knows precisely the location of its plant; and

b) If a municipality plans to reconstruct roads or highways or wants to deepen drainage ditches, the exact location of all gas plant is available to the municipality and thus facilitates the design and construction of municipal works.

4.34 In general, these advantages are overshadowed by the fact that line location and actual depth of cover information is provided free of charge by the gas distributors, thereby reducing the necessity for geodetic data. In addition, in order to minimize third party damage, it is the practice of the gas distributors to expose their lines, or to have them exposed under their supervision, by hand, prior to any construction work undertaken by others. The Board agrees with Consumers' that only in special circumstances would the cost of geodetic data be justified.

4.35 The Board is encouraged that the municipalities, during the course of the hearing, were able to agree that as-built drawings of the type illustrated in Appendix E are adequate and acceptable.

4.36 A number of municipalities, through the efforts of their utility coordinating committees, have established location standards for all utilities and special requirements for pavement cut

work, crossings and permits. Union has consolidated this information in booklet form for the guidance of its field construction workers. The Board commends these practices and urges all municipalities and gas distributors to follow these examples of sound practice.

4.37 The Board recommends that gas distributors make available to all municipalities in their franchise area, a list of information and services provided free of charge, such as the availability of as-built drawings and locate service for pipeline location and depth of cover. Some municipalities indicated that they were not aware of the services that are now available to them. The Board is of the opinion that such conduct will help to improve communication links between the gas distributors and the municipalities.

Safety

4.38 Ontario Regulation 450/84 establishes essential requirements and minimum standards for the design, installation and operation of gas pipeline systems.

4.39 The requirements of the O. Reg. 450/84 are adequate for the design and safe operation of gas pipelines in situations normally encoun-

tered in Ontario. Requirements for abnormal or unusual conditions are not specifically provided for, nor are all details of engineering and construction prescribed. It is intended that all work performed within the scope of the O. Reg. 450/84 should meet or exceed the safety standards expressed in it.

4.40 At the hearing, two subjects related to safety were addressed by the municipalities: the abandonment of lines and locates.

4.41 In addition to O. Reg. 450/84, a regulation under the Occupational Health and Safety Act and other sections of the Energy Act play an important role with regard to worker safety during construction, operation and maintenance of gas pipelines and all gas distributors are bound to comply with their requirements.

Position of the Municipalities:

4.42 Few municipalities presented recommendations regarding the disposition of abandoned lines but those addressing the matter advocated their removal. The reason given was the possible confusion in identifying the abandoned line from one which is in use.

4.43 The Regional Municipality of Sudbury submitted that Northern did not respond promptly on a number of occasions to emergencies involving locates, and at times erroneous information had been provided. The Regional Municipality suggested that there should be a responsibility placed upon gas distributors to give prompt and accurate service for line location.

Position of the Utilities:

4.44 The three gas distributors testified that all lines which are abandoned are subject to the conditions set out in the CSA-Z184, which requires that gas be purged and the segment to be abandoned must be disconnected from the rest of the system. Therefore the gas distributors maintained that with all these precautions, an abandoned line does not create a hazard.

4.45 Under normal conditions, where the line does not interfere with other works, the gas distributors submitted that depth of cover is set by the code.

4.46 Northern refuted the claims of the Regional Municipality of Sudbury and stated that most of the alleged emergency locates were routine matters.

4.47 With regard to providing locates, Union emphasized that section 18(2) of the Energy Act puts the onus on the gas distributors to provide this service. Subsection 18(2) reads:

> Where the owner of a pipeline is requested by any person about to dig, bore, trench, grade, excavate or break ground with mechanical equipment or explosives to give the location of a pipeline for the purpose of subsection (1), he shall within a reasonable time of the receipt of the request and having regard to all the circumstances of the case, furnish reasonable information as to the location of the pipeline.

4.48 Further, Union stated that subsection 18(1) of the Energy Act and subsection 53(1) of O. Reg. 659/79 under the Occupational Health and Safety Act prohibit a third party from conducting work in the proximity of a gas line without first accurately locating it. The Energy Act subsection 18(1) reads:

> No person shall dig, bore, trench, grade, excavate or break ground with mechanical equipment or explosives without first ascertaining the location of any pipeline that may be interfered with.

4.49 O. Reg. 659/79, subsection 53(1) reads:

> Gas, electrical and other services that are likely to endanger a worker having access to an excavation shall be:

(a) accurately located, marked and where practicable the owner of the utility shall be requested to locate and mark the service;

(b) where necessary, shut off and disconnected prior to the commencement of the work on the excavation; and

(c) where an extreme hazard is known to exist and the service cannot be shut off or disconnected the owner of the utility shall be requested to supervise the uncovering of the service.

Position of the Board:

4.50 No work should be undertaken in the vicinity of a gas line without first having determined its location. The responsibility of formulating such a request to the gas distributor rests on the municipality or its contractors, and the gas distributor's obligation is to provide, upon request, the location of its plant. The Board therefore finds that the present safety requirements relating to gas line locates are adequate.

4.51 It is the Board's view that gas distributors and municipalities ought to have a coordinated emergency plan covering in detail the steps to be followed to secure the location of a gas line in the event of a gas line break. A uti-

lity coordinating committee would, in the Board's opinion, be the best body to formulate such plan.

4.52 As long as a line is abandoned in accordance with O. Reg. 450/84, it does not create a hazard. However, in exceptional circumstances, it can be envisaged that a segment of line should be removed. It may be desirable to remove sections of an abandoned line for aesthetic reasons, particularly where the line has been constructed above ground or on a bridge.

4.53 The Board wishes to emphasize that although O. Reg. 450/84 establishes safety requirements for pipelines, including minimum depth of cover, this does not give carte blanche to the gas distributor to construct new lines at the minimum depth without considering other concerns and the needs of other parties.

Timing and Methods of Construction, Right of Way Restoration and Maintenance

4.54 All activities undertaken within the road allowance need to be coordinated in order to avoid conflicts amongst utilities. This applies to the period of construction as well as to restoration of the right of way after construction.

Position of the Municipalities:

4.55 The municipalities submitted that they are in the best position to manage and coordinate the timing, construction, maintenance and right of way restoration within the road allowance. They claimed that they can best arrange traffic detour and minimize public inconvenience. As a coordinating body, they may help in sequencing construction, repair and maintenance work amongst utilities and themselves when road, sewer and water main works are undertaken, thereby reducing road cuts and excavation.

4.56 Municipalities also suggested that they should provide some input on construction methods used by the gas distributors to ensure that road maintenance costs as well as problems associated with soil erosion are minimized in the future.

4.57 The municipalities proposed that gas distributors be required to seek approval from the Road Superintendent for the timing and installation method for any major work performed within the road allowance and that the Road Inspector have the right to inspect the work, including the quality of restoration work as it is underway.

Position of the Utilities:

4.58 As a matter of operating practice the gas distributors submitted that they coordinate their work with the municipalities and other utilities and schedule construction and repair work coincident with other works performed in the road allowance. The gas distributors also stated that they accept the requests of the applicable road authority in regard to traffic interruptions.

4.59 Compliance with construction codes is the responsibility of the gas distributors which have engineers and licensed inspectors fully aware of the many government regulations dealing with gas pipeline construction. The gas distributors further submitted that it is not necessary for a municipality to have an inspector overseeing pipeline construction, as the municipal inspector does not have the necessary training and experience in pipeline construction.

4.60 With regard to right of way restoration, the gas distributors submitted that the municipalities are adequately protected by the standard clause found in each franchise agreement. Further, ONGA proposed on behalf of the three gas distributors the following clause for any

proposed standard franchise agreement. This clause is a consolidation of each of the distributors' standard clauses, otherwise there is no change in substance:

> The Gas Company shall well and sufficiently restore, to the reasonable satisfaction of the Engineer, all highways which it may excavate or interfere with in the course of laying, constructing, repairing or removing its gas system, and shall make good any settling or subsidence thereafter caused by such excavation or interference. If the Gas Company fails at any time to do any work required by this paragraph within a reasonable period of time, the Corporation may have such work done and the Gas Company shall, on demand, pay any reasonable account therefor as certified by the Engineer.

Position of the Board:

4.61 As stated earlier in this chapter, participation in a utility coordinating committee should answer many of the municipalities' concerns in regard to public inconvenience caused by duplication of road cuts and excavation, and also in improving right of way restoration.

4.62 The Board is of the opinion that the municipalities are adequately protected with regard to the restoration of road allowances because all franchise agreements provide that restoration

work is subject to the satisfaction of the Road Superintendent or Road Inspector (or Engineer). Construction, repair and maintenance of a gas line are the responsibility of the gas distributors; the Road Superintendent or Road Inspector is not, in the Board's view, qualified to oversee pipeline construction. However, the Road Superintendent or Road Inspector has power over road construction and repair methods as well as material used. He should be consulted about the construction techniques to be used by the gas distributor in crossing roads in order to minimize potential damage to the road bed. He should be consulted and approve the quality of the road back-fill material and its compaction requirements and ascertain that the road bed has been properly graded and that asphalt and asphalt thickness meet specifications.

Crossings - Bridges

4.63 The installation of gas lines on bridges is a matter of convenience and cost saving to the gas distributors but it can create inconvenience and additional construction and maintenance expenses for the owner of the bridge.

Position of the Municipalities:

4.64 The Regional Municipality of Ottawa-Carleton in particular submitted that the use of a bridge

to support a gas line gives rise to many problems which range from aesthetics to cost and safety. The structural integrity of the bridge, with the added load caused by the pipeline, must be maintained. As well, the feasibility of attaching or supporting the line must be determined and aesthetics must be considered. The difference in thermal expansion between the pipeline and the bridge and access to any part of the bridge and pipeline for maintenance and safety reasons must be provided for in the design. The RMOC submitted that most of the costs associated with these matters are absorbed by the Regional Municipality.

4.65 The RMOC further submitted that each request made by a gas distributor to use a bridge should be considered on a case-by-case basis because conditions differ from one bridge to another. Therefore, it argued that bridges should be excluded from the franchise agreement and be the subject of a separate agreement.

4.66 The inclusion of bridges in franchise agreements, particularly in southwestern Ontario, was a matter addressed in the AMO Brief. Union has been allowed by municipalities to use bridges, mainly because the cost sharing arrangements that exist in franchise agreements require Union to pay 100 per cent of all relo-

cation costs. If the municipality is made responsible for a certain percentage of all relocation costs, this will violate the initial terms of acceptance of franchises. These terms represent the basic reason for the municipality granting permission to a utility to use bridges in the first instance. Therefore if allocation of relocation costs is changed, the AMO submitted that bridges should be the subject of a separate agreement.

4.67 In the meantime, the Southwestern Ontario Municipal Committee modified its position from that of the AMO. The SWOMC recognized the concerns expressed by Ottawa-Carleton but it now contends that a separate bridge agreement is not necessary because "...our [proposed] agreement would accommodate the kinds of requirements that Ottawa-Carleton is concerned about".

Position of the Utilities:

4.68 The gas distributors argued that existing franchise agreements include "bridge" within the definition of highways and there is no reason for changing this. They observed that the use of a bridge generally is the most economically feasible and environmentally effective method of extending gas service. An implied alter-

native is to lay the gas line under the riverbed. Consumers' acknowledged that if a bridge crossing is not feasible, then a water crossing must occur; but, generally, bridge crossings are substantially less costly and ought to be encouraged whenever possible.

Position of the Board:

4.69 With regard to the submission of the Regional Municipality of Ottawa-Carleton, the Board does not believe that the costs in regard to pipelines on bridges should be absorbed by the municipality. It would seem equitable that all these extra costs, where they occur, should be charged to the gas distributor since these expenditures are triggered by the mere presence of the line.

4.70 RMOC, with its many bridges, has acquired a considerable amount of experience with the multitude of problems associated with the construction, maintenance and operation of bridges supporting gas lines. The Board appreciates the argument that lines on bridges create different conditions if the bridge is in the design stage, in which case the line can be more easily incorporated in the design of the bridge. However, if the bridge is under repair, necessary modification can be made at an ad-

ditional cost without creating much inconvenience to the traffic. The Board sees some merit though in excluding some bridges from franchise agreements because of their particular conditions which might indicate that they cannot be treated in a general franchise agreement.

4.71 As a general rule, the Board is of the opinion that bridges should remain in a franchise agreement. However, the Board recommends that provision be made in any franchise agreement to accommodate future bridge crossings where extraordinary circumstances may be encountered. Clause 23 in the SWOMC proposed agreement allows for such other or special conditions in a particular franchise agreement. If this is impractical a separate agreement may be necessary for each bridge. Furthermore, the Board recommends that costs incurred because a new gas line is being installed on a bridge, or because an existing line on the bridge must be relocated should be borne by the gas distributor.

Crossings - Drainage Ditches and Drains

4.72 In agricultural areas there are extensive public and private drainage projects draining farm land and these projects are often located in the road allowance. Gas lines occasionally

interfere with the deepening of open ditches or conflict with drain lines.

Position of the Municipalities:

4.73 The Township of Zorra, the County of Lambton and the Township of London were all concerned about gas lines interferring with drainage works and Zorra submitted that a gas distributor should seek approval from the Drainage Superintendent prior to building or relocating plant. This step was proposed in order to minimize the interference of a pipeline with planned drainage work.

4.74 These municipalities were also concerned with the question of financial responsibility for engineering and constructing drainage works "around" gas lines and the costs incurred by correcting flow characteristics of the drain upstream of a gas line.

Position of the Utilities:

4.75 Union, the gas distributor most affected by drainage works, submitted that when it is assessed under the Drainage Act, it has paid any amounts assessed. Union pointed out that where a gas distributor has a pipeline in the ground which causes the cost of the drainage works to increase, the gas distributor is assessed for that increase in cost.

Position of the Board:

4.76 The position taken by the Township of Zorra which would require the gas distributor to file drawings and specifications for a proposed line with the Drainage Superintendent is a step that, in the future, would decrease the amount of interference of gas lines with drainage works and would reduce costly works to engineer drains "around" pipelines. The Board recommends, therefore, that new construction and relocation drawings should be filed with the Drainage Superintendent.

4.77 It is anticipated that the Drainage Superintendent will actively participate with the utility coordinating committee which, in the view of the Board, can provide a "clearing house" function with regard to any new projects planned within a municipality.

4.78 When gas lines are exposed due to the deepening of work performed by a municipality, the Board recognizes that it has no jurisdiction to require a gas distributor to lower its line in these circumstances, as this falls under the jurisdiction of the Ministry of Consumer and Commercial Relations, Technical Standard Division, Fuels Safety Branch.

5. SHARING THE COSTS OF GAS LINE RELOCATION

5.1 The question of the appropriate sharing of the costs of relocating existing gas pipelines was one of the most contentious issues raised at the hearing and it has been one of the most vexing problems between the municipalities and the gas distributors arising out of the franchise agreements. There are great variations from one situation to another, and there is an absence of an appropriate, generally recognized set of principles. The municipalities, particularly the smaller ones, do not consider themselves in a strong negotiating position regarding this issue. Although the actual sums of money at issue are not large, it would seem that the absence of mutual confidence and the absence of an accepted standard have caused this problem.

5.2 Gas pipelines are generally laid along municipal road rights of way. From time to time a

municipality requires that gas lines be relocated in order to accommodate improvement projects. In upper-tier municipalities the relocation of gas lines invariably results from roadwork. In local municipalities other works involving sewers, water lines, drain systems, as well as roadwork and redevelopment of downtown core areas can necessitate the relocation of gas lines.

5.3 Who should pay for this gas line relocation? The basic position of the gas distributors is that the municipality should share with the company the cost of labour of any gas line relocation required by roadwork, and bear the entire cost of relocations caused by non-roadwork. The municipalities contend that the gas distributor should bear the entire cost of relocation of gas pipelines caused by any municipal works except during the first five years following construction or relocation. During that time, the entire cost would be borne by the municipalities.

5.4 There are in fact a wide range of practices regarding the allocation of costs of gas line relocation and these are described below under the heading Formulae for Relocation Costs Payment. This is followed by the Traditional Practices of the three major gas distributors in Ontario and the positions of each group of

parties, followed by the Board's position and recommendations. The Table at the end of this chapter provides a tally of the relocation cost provisions by gas utility.

Formulae for Relocation Costs Payment

Utility Pays:

5.5 The costs of relocation in this situation are borne entirely by the gas utility. This has been the historic practice of Union. "Utility pays" refers to those franchise agreements that contain a clause that explicitly calls for the gas distributor to pay 100 per cent of gas pipeline relocation costs occasioned by municipal roadwork and non-road projects such as sewers. This was the practice of Union in some municipalities even when the franchise agreement was silent on the question of relocation costs.

Public Service Works on Highways Act (PSWHA) applies:

5.6 The Public Service Works on Highways Act applies to road work only. It does not apply to gas pipeline relocations caused by the need to construct sewer or water works, alter drainage flows and other non-road work. The PSWHA

provides that, in default of agreement, and thus where a franchise agreement is silent on the matter, the "cost of labour" for the relocation project is to be apportioned equally between the road authority and the operating corporation, and "all other costs" are to be borne by the latter (subsection 2(2)).

5.7 This has been the accepted practice in the franchise areas of Consumers' and of Northern. However, in the franchise area of Union, until 1981 the company paid 100 per cent of the costs of relocation even if the franchise agreement with the municipality was silent on the issue of relocation costs.

5.8 A franchise agreement may also contain a clause specifically calling for the allocation of relocation costs occasioned by municipal road work to be done in accordance with the terms of the PSWHA. However, such a specific clause is not necessary in order for the Act to apply.

5.9 The cost of labour is defined in the PSWHA, paragraph 1(b) as:

> (i) the actual wages paid to all workmen up to and including the foremen for their time actually spent on the work and in travelling to and from the work, and the cost of food, lodging and transportation for such work-

men where necessary for the proper carrying out of the work,

(ii) the cost to the operating corporation of contributions related to such wages in respect of workmen's compensation, vacation pay, unemployment insurance, pension or insurance benefits and other similar benefits,

(iii) the cost of using labour-saving equipment in the work,

(iv) necessary transportation charges for equipment used in the work, and

(v) the cost of explosives.

5.10 The gas distributors' interpretation of labour costs under the PSWHA is that contractors' charges, including site-restoration materials, are included in labour costs. "All other costs" referred to in the Act which are borne by the gas distributor comprise costs of pipe and pipé-related items and corporate or general and engineering overhead.

5.11 The SWOMC noted other items which have been included as labour costs by the gas distributor which are not apparent from the PSWHA definition, for example, the costs of assuring continuing service during gas pipeline relocation. In 1983, Union invoiced Chatham for the Lacroix Street Bridge work and included the cost of the construction for a temporary service line as well as for sod, asphalt, abandonment and numerous items described as meter work.

5.12 The Regional Municipality of Ottawa-Carleton observed that although the Legislature has attempted to define the cost of labour in the PSWHA, the determination of cost distribution continues to be difficult in particular situations. The RMOC contended that the cost of labour defined by the PSWHA clearly excludes such items as the cost of fill, sod or pavement used in restoring the excavation conducted by the gas distributor or its contractor. The RMOC said the cost of any materials used in relocation or temporary location works should be excluded from labour costs unless these materials are used in place of manual labour conducted by workmen on the site.

PSWHA applies including other municipal works:

5.13 The PSWHA relocation cost sharing formula applies to municipal works, in addition to roadwork, only when it is specifically addressed in the franchise agreement. There are several such agreements. However, it is assumed, unless otherwise specified in the franchise agreement, that relocation costs resulting from sewer or water plant construction will be borne entirely by the municipality.

MTC formula:

5.14 The Ontario Ministry of Transportation and Communications (MTC) has a standard pipeline agreement form for provincial highways. The form includes the provision that if new gas lines have to be relocated within five years of the date of the original agreement, the entire cost of that relocation is borne by the MTC. After the five year period, any relocation costs are borne entirely by the gas utility. A separate agreement, using the standard MTC form, is entered by both parties each time a gas utility proposes to locate a new pipeline installation on a King's Highway. All three gas distribution companies have entered into this agreement with the MTC.

5.15 At the hearing, the municipalities expressed a preference for the use of the MTC formula.

Ontario Hydro Formula:

5.16 Ontario Hydro has a standard agreement for users of its lands such as gas distributors. When relocations of the user's plant are requested by Ontario Hydro, the following cost allocations apply:

(i) if the request is made during the initial five-year period of the

agreement, Ontario Hydro pays the full cost;

(ii) if the request is made during the second five-year period, Ontario Hydro pays 50 per cent of the cost of labour and the gas utility pays the balance;

(iii) if the request is made after the initial ten-year period, the gas utility pays the full cost.

5.17 A separate agreement, using a standard Ontario Hydro form is entered into by the parties each time a gas utility proposes to use Ontario Hydro's right of way.

5.18 Both Northern and Consumers', but not Union, have entered into such agreements with Ontario Hydro.

5.19 Special Counsel offered the use of this formula for the sharing of relocation costs as an additional alternative.

Traditional Practices

5.20 With the advent of western Canadian gas supply to Ontario in the late 1950s, the three gas utilities began using almost identical gas plant and pipeline installation practices.

From 1957 onward, pipelines were laid generally in standard locations in municipal road allowances. Pipelines which were coated and cathodically protected were adopted as the standard construction material, and technical innovations and new materials such as plastic pipe were utilized.

5.21 As a result, gas plant constructed from 1957 onward is less likely to require relocation as it has usually been laid in standard or municipally-approved locations, and the pipeline itself is unlikely to deteriorate. This is generally the case in the Consumers' and Northern franchise areas. It is less so in the franchise area of Union, where a significant proportion of the original pipeline system was installed prior to 1957. Union's past practice of paying all relocation costs tended to relax municipal insistence on standard locations.

The Consumers' Gas Franchise Area:

5.22 The PSWHA formula has been applied to nearly all Consumers' franchise agreements for decades. Most of the agreements, 134 out of 155, are silent on the question of relocation costs because the company believes to do otherwise would be redundant and unnecessary.

5.23 In general, the costs of relocations other than those resulting from highway improvement are borne entirely by the municipality requesting the relocation. At least one exception is Consumers' franchise agreement with the City of Niagara Falls where the PSWHA formula is applied to all municipal works. Other exceptions include one agreement in which Consumers' pays all the relocation costs, and three other agreements in which the company pays 90 per cent of the labour costs.

5.24 While Consumers' has pre-1957 pipe, the costs of its relocation has not been an issue in its franchise area, as it has been for Union, because of Consumers' continuity of management over the years and its implementation of a well-established policy of replacing and relocating obsolete pipeline on an ongoing basis.

5.25 Relocation costs represent about 2 per cent of Consumers' total capital construction budget. The evidence indicated that the actual dollars involved in relocations is not significant and generally averages about $2.4 million per year for Consumers' share. The total relocation costs averaged about $3.2 million per year over the three years 1983/84/85, with an average of 168 annual relocations. This results in an average annual municipal share per relocation of about $4,800.

The Northern and Central Franchise Area:

5.26 Virtually all of Northern's gas pipeline system was laid after 1957. Nearly all (134 out of 137) of Northern's franchise agreements are under the 50 per cent formula of the PSWHA. Of these, 133 are silent on the question of relocation costs. In three agreements with counties, Northern pays all relocation costs but two of these apply only to new pipe laid after a specified date. The policy of Northern is to bill the municipality 100 per cent of the costs of relocation due to non-road works.

5.27 Northern's net capital budget for line relocations averages about $158,000 per year, after allowing for an average annual contribution from municipalities of about $76,000. The annual average municipal share per relocation (24 average annual relocations over the 3 year period 1983/84/85) is about $3,200.

The Union Gas Franchise Area:

5.28 The distribution system of Union came about in part from the amalgamation of many small older local gas utilities, each with its own methods of operation and often lacking technical sophistication. Some of these had been operating from as early as the turn of the century. For

this reason, many years prior to 1980, each time the relocation of a Union pipeline was required by a municipality, whether for road-works or non-road projects, Union was replacing pipe that was obsolete or that had not been laid to any right of way location standards. Union did not consider it appropriate to charge the municipality for such relocations. Consequently Union had traditionally paid 100 per cent of all relocation costs.

5.29 However, all lines installed after 1957 are cathodically protected and coated or are plastic and, as a result, have indefinite life. In addition, much of the remaining pre-1957 pipe has been cathodically protected, giving it longer life as well. Consequently, relocations of Union's gas lines have evolved from the replacement of old and corroded pipes to the replacement of newer protected pipes. The evidence was that 84 percent of all the lines are newer than 1957; 16 percent of the system is old pipe, but only 7 percent is unprotected. Of pipe relocated in 1985, 21 percent was newer than 1957.

5.30 Union has 285 franchise agreements with municipalities, of which 215 stipulate that Union pays all relocation costs resulting from municipal roadwork and non-road projects such as

sewer works. Of the remaining 70 agreements, 53 are silent, but Union has usually paid 100 percent of relocation costs before it introduced, in 1981, its new policy of applying the PSWHA.

5.31 Because an increasingly large proportion of its gas pipelines was of indefinite life, Union in 1981 discontinued its policy of paying 100 percent of relocation costs. A new policy was introduced of applying the PSWHA in those agreements which were silent on relocations costs, and requiring its application in new agreements.

5.32 This unilateral action on the part of Union has not sat well with the municipalities in question. Union has invoiced twelve municipalities whose agreements are silent on relocation costs during the past five years, but only three have paid.

5.33 In addition, seventeen agreements specifically applying the PSWHA have been signed since 1980. Twelve of these were approved by the Ontario Energy Board but only three of these agreements are operative while nine are currently under review by the Board.

5.34 Union currently budgets about $1.3 million for its share of annual relocation costs. Assuming

the PSWHA applies across Union's franchise area (and that pre-1957 pipe is eliminated from consideration as agreed to by Union during the hearing) the portion of the $1.3 million attributable to municipal relocations to be shared with municipalities is approximately $260,000 based on 1957 and newer pipe comprising 20 per cent of total line relocations. The municipal share, based on 50 per cent of the labour costs, averages out to about 30 per cent of the total relocation costs. The municipal 30 per cent share of the $260,000 is about $75,000 spread among all municipalities in the Union franchise area requiring the relocation of post-1956 pipe. On the other hand, should all municipal relocations in a year be for reasons other than roadwork, resulting in the municipality paying 100 per cent of relocation costs, the municipalities would be billed a maximum of $260,000. In this PSWHA scenario, the relocation costs borne by the municipalities range from $75,000 to $260,000. Both figures represent small percentages of the total annual roadwork costs for the municipalities in Southwestern Ontario. Based on 66 average annual relocations over the past three years and the municipalities paying 100 per cent of the $260,000, the average annual municipal cost per relocation would have been about $4,000.

Position of the Utilities

5.35 The position of the three utilities is as expressed in the ONGA brief: the sharing of the costs of relocations for highway improvement should be governed by the provisions of the PSWHA. Relocations not for the purposes of highway improvement should be paid for entirely by the municipality.

5.36 Despite the unanimity of the gas utilities in support of the PSWHA provisions, the municipalities have generally opposed the use of the PSWHA and in some cases have successfully negotiated more favourable terms even though the PSWHA has been the standard provision for sharing relocation costs, as in the cases of Consumers' and Northern.

5.37 Contrary to Consumers' assertion that relocation cost sharing is not negotiable, four municipalities in the Consumers' area have negotiated cost sharing in their agreements: one municipality bears no costs and three municipalities pay only 10 per cent of labour costs.

5.38 Similarly, four municipalities in the Northern area have negotiated cost sharing in their agreements. Three of these bear no costs for relocations of gas line and one municipality

bears no costs for relocation on one specific road, otherwise the PSWHA applies to any municipal works.

5.39 The municipalities in the Union franchise area have been conditioned over many years to expect that Union would continue to pay all relocation costs. While this practice gave the municipalities less concern about control over new pipeline works and future relocations, which in turn eased the process for local approvals, it did provide an incentive to Union to adhere more closely to standard locations wherever possible and thereby minimize the likelihood of future relocations. With the introduction of the PSWHA provision, particularly with respect to the re-interpretation of the silence of existing agreements on the question of relocation costs (pre-1981 Union pays, 1981 and after PSWHA applies), Union has been confronted by municipal resistance in an ambiance of betrayal and mistrust.

5.40 Consequently, while Union subscribes to the PSWHA provision for all pipe installed within Union's system subsequent to 1957, it has offered to continue to pay 100 per cent of the cost when pipe laid prior to 1957 must be relocated because of road and sewer work.

5.41 Union acknowledges that current relocations are generally in the downtown core areas where streets are being reconstructed and where old pipe is predominantly encountered.

Position of Municipalities - Consumers' Franchise Area

5.42 Although Consumers' is the largest gas distributor in Ontario, the following municipalities are the only ones in Consumers' franchise area which participated or submitted briefs in the hearing.

5.43 The Regional Municipality of Ottawa-Carleton has no existing user agreement with Consumers'. Relocation costs have been administered pursuant to the PSWHA.

5.44 The RMOC contends that the municipal road authority has responsibilities that differ little from those of the Ministry of Transportation and Communications. The RMOC, on behalf of itself and the City of Ottawa, proposed the MTC formula, in that it provides greater cost certainty and more equitable distribution of relocation costs.

5.45 The City of St. Catharines presently has an agreement with Consumers' which is silent on the subject of relocation costs, and hence the

PSWHA applies. However, it contended that the PSWHA should also apply to non-road works as is the case in the agreement between Consumers' and the City of Niagara.

5.46 Consumers' operates in the City of North York under a number of Private Acts dealing with the Consumers' Gas Company of Toronto. The present arrangement is silent on relocation costs, and so the PSWHA applies. The City of North York recommends that the Consumers' Gas Acts be amended to provide that "the Company shall pay an equal share of any of the costs associated with the relocation of a gas pipeline at any time that the municipality performs work within the municipal road allowances. The cost payable by the Company shall not be restricted to 1/2 of the cost of labour and labour-saving equipment".

Positions of Municipalities - Northern Franchise Area

5.47 All the municipal representation (FONOM, City of Sudbury, Regional Municipality of Sudbury) support the application of the MTC formula for much the same reasons as RMOC: that municipal roads are comparable to provincial highways and each road authority, or municipality or the Province (MTC), should be reimbursed similarly.

Positions of Municipalities - Union Franchise Area

5.48 The largest municipal representation at the hearing by far was from Union's franchise area (Town of Blenheim, SWOMC, Townships of London and of Zorra, Counties of Oxford and of Lambton and City of London). The unanimous position of that group was that Union should continue to "pay all". There were a variety of qualifications such as:

- at least for pipe laid up to 1981, when Union changed its policy and began applying the PSWHA provision;
- subject to the municipality paying all relocation costs during the first five years of a new gas line according to the MTC formula;
- if the PSWHA is to apply, it should be restricted to the cost of relocation of pipe laid in the future and necessitated by any municipal works. The cost of relocation of pipe already laid should be borne entirely by Union; or
- if the PSWHA is applied, it should be subject to all pipeline having a useful life of 25 years, after expiration of which, Union pays all. In this case, pre-1961 pipe would qualify for the Union-pay-all provision.

5.49 These municipalities were concerned that the implementation of the PSWHA and its resulting costs would mean that needed roadwork projects would have to be curtailed. It is evident that the municipalities in Union's franchise area are in agreement with the municipalities in the franchise areas of Consumers' and Northern in favouring the MTC formula, particularly since Union's old pipe is automatically excluded by the 5-year moratorium on paying the relocation costs of new pipe.

Position of the Board

5.50 The municipality's share of gas pipeline relocation costs varies from 0 to 100 per cent as a result of franchise agreements negotiated at different times and under different circumstances.

5.51 Many factors influence the terms of the agreements. Some agreements reflect the readiness of a municipality to concede to a gas distributor's standard relocation cost provision in order to get gas service for its impatient citizens. Sometimes specific proposals by the gas distributor for new gas lines can be a significant influence when new agreements and, to a lesser extent, renewals are concurrently being negotiated. Other agreements, particularly at the upper tier municipal level where a

new franchise is being established, show a similar urgency on the part of the gas company to relax and even dispense with municipal relocation cost sharing so that a gas pipeline system expansion, not directly related to new gas service in a municipality, may proceed.

5.52 A municipality does not have the same position of negotiating strength as do MTC, Ontario Hydro, or a private landowner, because, unlike the latter group, the municipality does not negotiate a specific agreement each time there is a new encroachment by a gas utility. As a matter of fact, a franchise negotiation is an infrequent event for any municipality.

5.53 The Board has concluded from the evidence that, generally, the upper-tier municipalities are in a better negotiating position, particularly with respect to relocation cost provisions, than the lower-tier municipalities. However, both upper- and lower-tier municipalities may find themselves in vulnerable negotiating positions with a gas distributor when specific proposals for gas lines are associated with a new agreement or a renewal.

5.54 The use of the PSWHA provision for allocating relocation costs is a last resort: in the absence of a specific agreement between the

parties, this is how costs will be shared. But there is a basic onus on the parties to negotiate an agreement that is realistic, relevant and consistent relative to prevailing conditions and practices.

5.55 The utilities have adopted the PSWHA as a given and have presented it to the municipalities as a non-negotiable method "prescribed by the legislature --- and in effect for over 60 years". The Board finds it significant that neither the Ministry of Transportation and Communications nor Ontario Hydro have generally adopted this method but have established their own unique formulae which are standard for each organization and to which the gas utilities are parties.

5.56 Union, in proposing to change from "Union pays" to the PSWHA formula, has argued that the latter will make the municipalities more responsible and less wasteful by avoiding unnecessary demands for relocations. Union cited as evidence of this, the significant reduction in relocation activity beginning in 1981 when it unilaterally introduced and began applying the PSWHA.

5.57 However, use of the PSWHA formula has not discouraged relocations in the Consumers' area,

the annual number of which has consistently exceeded that of Union, even during the pre-1981 period and despite the fact that each has about the same length of pipe in the ground. It seems to the Board that the reduction of relocation activity in the Union area may have resulted more from a reaction of uncertainty, confusion and resentment to this unilateral imposition by Union of a dramatic change from Union's traditional practice.

5.58 In the last five years, only four out of fourteen municipalities which have been billed in Union's franchise area have paid their share of relocation costs as interpreted by Union. In twelve of these fourteen municipal agreements there is silence on the matter of relocation costs and the PSWHA is invoked because of that silence. Despite Union's claim that "It [the PSWHA formula] is well understood by those who use it and provides an incentive towards a cooperative approach in municipal planning," there has been strong evidence presented during the hearing to refute both claims. In particular, there is neither a consensus on what does or should qualify under "cost of labour and labour-saving equipment" (City of Chatham/Union) nor a rapport conducive to good municipal planning (RMOC/Consumers').

5.59 Despite the attempt to define the cost of labour in the PSWHA, the costs to be distributed continue to be subjects of disagreement between the municipalities and the gas companies.

5.60 The municipalities interpret the cost of labour as set out in the PSWHA to be those costs as incurred directly by the gas company or by its contractor in performing relocation work. Contrary to the gas companies, the municipalities do not agree that the cost of labour should include such items as the cost of fill, sod or asphalt used in restoring the excavation conducted by the gas company or its contractor. Further, municipalities disagree that the cost of labour should include any administrative or overhead charges or the cost of any materials unless these materials displace manual labour conducted by a workman on the site of relocation.

5.61 It is evident to the Board that a cost sharing formula in which the cost of labour is not the criterion of relocation cost sharing would be a vast improvement. The municipal share of total relocation costs has been estimated by Consumers' to vary between 29 and 37 per cent. Union's evidence shows the actual municipal share over the past four years to vary from 27 to 34 per cent, with an average of 29 per cent.

5.62 The evidence also shows that Union's material costs are, on average, 15 per cent of the total relocation cost. This suggests to the Board that while the material costs are significant they are not so large that it would be greatly to the municipalities' disadvantage if they were included in a formula for total cost sharing, as opposed to one which involved only the cost of labour.

5.63 The 60 year old PSWHA method of relocation cost allocation has outlived its usefulness and begs to be allowed to revert to its intended secondary role as a back-up provision activated only in default of an agreement on the method of allocating relocation costs.

5.64 The Ontario Hydro formula did not receive any significant support from anyone. While it works well for Hydro because each agreement is project specific, the task of maintaining records of pipeline age was not viewed with any enthusiasm.

5.65 The use of the MTC formula has been favoured by the municipalities. The Board acknowledges that there is little, if any, difference between the responsibilities of road authorities, be they municipalities or a province, except that the latter has consolidated the responsibility for the King's Highways within one body,

the Ministry of Transportation and Communications. However, the MTC agreements, like the Ontario Hydro agreements, are specific to individual pipelines, whereas the franchise agreements between the municipalities and the gas distibutors refer to an entire developing pipeline network. Thus, if the MTC formula were used, the municipality would have to rely almost entirely on the gas utility to identify the age of specific pipe that may be subject to relocation.

5.66 Two other major utilities, telephones and electric power, are obliged to use municipal lands. Bell Canada ((1880) 43 Vict., chapter 67 and Railway Act, R.S.C. 1970, chapter R-2, section 318) and Ontario Hydro (Power Corporation Act, R.S.O. 1980, chapter 384, subsection 23(2)) both provide comprehensive services and have special powers to enter any municipal lands, but they are required to obtain municipal consent as to the location of their works. There is no franchise agreement or, in general, any road-user agreement with a municipality. However, in practice, both normally proceed under the provisions of the PSWHA regarding the costs of relocation of telephone and electric plant when requested by a municipality.

5.67 The Board notes with interest that both Bell Canada and Ontario Hydro accept the principle and practice of cost sharing for relocations.

5.68 The Board views the question of relocation costs in the following terms. All utilities - natural gas, electric power, telephone - share common municipal rights of way. An orderly and responsible occupancy by each utility member is therefore imperative. The privilege is balanced with duties. That, after all, is what a franchise agreement is all about, namely the granting of a right and the identification of the terms and conditions of occupancy. There is also an implied onus on the utility company to be a fair and responsible corporate citizen in the municipal right of way. The growth and development of municipalities place increasing and frequent demands on municipal rights of way and their users. Each user utility, by its very presence in the right of way, must be prepared to relocate its plant when necessary and requested to do so by the municipality. Future relocation is one of the risks associated with the right to enter and occupy any municipal roadway.

5.69 As so aptly stated in FONOM's final submission:

> Utilities enjoy the same indulgence of being permitted to place pipes on property not owned by them whether the right is granted by the MTC, a private landowner or a municipality ... the corresponding burden on the grantor of such right should be no greater.

5.70 In the franchise areas of the three gas utilities, the percentage of the total costs of relocation which are borne by the municipalities vary enormously:

0 (the utility pays all);
6 (10 per cent of labour costs);
30 (50 per cent of labour costs);
100 (the municipality pays all).

5.71 It is important that any method of allocating relocation costs be simple, clear and fair. The Board therefore concludes that a prescribed or standard method of allocating the costs of pipeline relocations in Ontario in future franchise agreements should be in accordance with the following guidelines:

1. The agreement provision for relocation costs should be negotiable.

2. Agreements should not be silent on the disposition of relocation costs.

3. There should be no distinction made between relocations due to roadwork and non-roadwork.

4. There should be a monetary incentive to encourage the municipality to consider alternatives to gas-line relocation.

5. Relocation costs should be shared by the gas utility and the municipality, with the major portion of costs being borne by the gas utility.

6. The cost sharing method should be simple, preferably a fixed percentage of the total relocation costs, exclusive of any upgrading costs, to each party.

7. There should be an established range of percentages within which a fixed percentage may be negotiated; the lower limit would be close to 0 per cent, and the upper limit would reflect the average upper limits under current cost-sharing arrangements.

5.72 None of the formulae for relocation cost payments (Utility Pays, PSWHA, MTC or Ontario Hydro) discussed meet these recommended guidelines and, consequently, none are recommended by the Board. Rather, the Board recommends that, for all pipeline relocations in a municipal right of way necessitated by any municipal works, the municipality should bear a share of the total cost of relocation within the range of up to 35 per cent, the exact figure to be negotiated by the municipality and gas utility. The average municipal share, on this basis,

would be about 20 per cent of the total relocation cost. The Board recommends that the proposed Municipal Franchise Agreement Committee established by this Report consider developing a more precise formula within this range.

5.73 The Board recommends that the negotiated cost sharing should begin with new franchises and renewals starting immediately, including existing franchise agreements which have not yet been approved by the Board or have not yet been signed.

5.74 Existing agreements with specific relocation cost provisions and those agreements which are silent and to which the PSWHA provision has been consistently applied should be allowed to continue unchanged to the end of their terms. However, the Board would urge both parties to an agreement to consider renegotiation of that provision in view of the guidelines listed above.

5.75 The Board also believes that its recommendation should apply to existing agreements which are silent on the question of relocation costs, but which have been subject to unilateral policy change by Union in its interpretation of silence. The Board recommends that Union continue to pay 100 per cent of the cost when pipe

laid prior to 1981 must be relocated because of road and sewer works. While Union's preference is to limit this policy to pre-1957 pipe, the Board believes that the Union policy in effect up to 1981 (Union pays) has a more compelling rationale which reflects the legitimate municipal expectations up to that time.

Table 1

Relocation Provisions per Gas Franchise Agreements in Ontario

	Utility Pays	PSWHA Explicit	Silent	Other	Total
Consumers'	1(a)	17	134(b)	3(c)	155
Northern	3	1(d)	133	0	137(e)
Union: Perpetual	32	0	50	0	82
Fixed Term	183	17	3	0	203
Total	215	17(f)	53(g)	0	285(h)
Total	219	35	320	3	577

(a) Mississauga City (annexed portion from Town of Oakville).

(b) Includes one perpetual agreement, Mississauga City un-annexed part.

(c) Municipality pays 10 per cent of labour costs.

(d) PSWHA applies to relocations necessitated by constructing or improving any public property in Township of Hope agreement with exception of one specific road where Northern pays 100 per cent of cost.

(e) Letter of Mr. George Laidlaw of November 29, 1985 amending total number of franchises.

(f) New or renewed agreements signed since 1980. Twelve of 17 have been approved by the Board but 9 of these are currently under appeal. In effect, only 3 are approved and operative. During the past 5 years, Union invoiced 2 municipalities, 1 has paid.

(g) Formerly, Union paid 100 per cent in most cases. Because these agreements are silent, Union's new policy since 1981 is that the PSWHA applies. During the past 5 years, Union has invoiced 12 municipalities, only 3 have paid.

(h) Letter of Mr. John Jolley of December 19, 1985 plus attached schedules 1-12.

6. LEGAL ISSUES

6.1 There were a number of issues raised during the hearing which are mainly legal questions, and which are discussed in this chapter. They are:

- Insurance and Indemnity
- Definition of Supply
- Jurisdiction of the Ontario Energy Board
- Section 30 of the Ontario Energy Board Act
- Compliance with By-laws

Insurance and Indemnity

6.2 Very large increases in premiums for insurance coverage have occurred throughout North America in the past year and this has included insurance coverage for gas distribution systems. As a result, the responsibility for insurance coverage for liability relating to gas distribution in Ontario, and the nature of that coverage has become a renewed subject of concern between the municipalities and the gas distribution companies.

Position of the Municipalities:

6.3 In general the municipalities sought a considerably broader acceptance of liability on the part of the gas companies. This position was expressed in the FONOM final submission as follows:

> The fact that a utility is operating an inherently dangerous undertaking on municipal property without municipal control over the maintenance or method of operation of such gas works should require the utility to accept full responsibility for all liability arising from negligence on the part of the utility or from forces beyond the control of either the utility or the municipality. Accordingly, the appropriate scope of the utilities' indemnification of the host municipality should be defined negatively by excluding only that liability arising from municipal negligence.

6.4 This position is one of the absolute liability of the gas company for any damage which may arise irrespective of who caused it, unless it can be traced to the negligence of the municipality, its employees or its agents. In short the prime responsibility is upon the gas utility to show that the injury was caused by the negligence of the municipality, its employees or agents.

6.5 Such a provision is similar to what is known as the "Ministry of Transportation and Communi-

cations Indemnity Clause". The concept underlying that view of indemnification and liability is that gas is a dangerous substance, and having been brought on to the public right of way for the convenience of the gas company, the company should be absolutely liable, except in the case of the proven negligence of the municipality, its employees or agents.

Position of the Utilities:

6.6 The utilities generally hold the view that they should be responsible only for their own negligence and that of their servants and agents. This view is defined in a number of existing franchise agreements by an indemnity clause as follows:

> The gas company shall at all times indemnify the Corporation from and against all loss, damage and injury and expense to which the Corporation may be put by reason of any damage or injury to persons or property resulting from the imprudence, neglect or want of skill of the employees or agents of the gas company in connection with the construction, repair, maintenance or operation by the gas company of its system in the municipality.

6.7 This is also the clause submitted by ONGA in its proposed standard agreement. It is noteworthy that this liability is limited to the

negligence of employees or agents of the gas company and only in connection with construction, repair, maintenance or operation.

Position of the Board:

6.8 By virtue of franchise agreements between gas distributors and municipalities, the distributors' gas lines occupy land which is owned by municipalities or over which they have control. Increasingly, the municipalities fear that they may be found liable in an action for damages relating to these gas lines. Thus it is their opinion that they should be fully indemnified by the gas companies except for the negligence of their own municipal employees or agents.

6.9 The Board agrees with the position of the municipalities. The Board cannot anticipate a court decision on the degree of liability that a municipality may have in any particular agreement. Nor does the Board have the jurisdiction to require in advance that a clause in a franchise agreement relating to liability and indemnification follow a specific form. However, the Board is concerned that liability and indemnification be the primary responsibility of the gas distributor and it will look at the provisions dealing with insurance and indemnification in first time agreements or renewals in this light.

6.10 Moreover, the Board is concerned that, as much as is possible, there should be consistency as regards liability and indemnification across each utility franchise area. Otherwise, the ratepayers of different municipalities might be required to contribute unequally towards the costs of damages caused by a utility's plant.

6.11 The Board recommends that the MFA Committee proposed in this Report develop a model clause regarding insurance and indemnification as part of its model franchise agreement.

Definition of "Supply"

6.12 Fernlea Flowers Limited is a large commercial nursery company in southwestern Ontario which has developed its own local source of natural gas which it wishes to transmit to its own premises.

Position of Fernlea Flowers:

6.13 Fernlea Flowers submitted that the word "supply" as used in the Municipal Franchises Act created a problem for it as a producer and consumer of its own gas. Fernlea Flowers requested:

a) that the Board recommend that section 8 of the Municipal Franchises Act be amended to remove any doubt that a producer has the

right to consume its own natural gas without the need to apply to the Board for a limited franchise and a certificate of convenience and necessity;

b) that the Board recommend that subsection 3(1) of the Municipal Franchises Act and subsection 210(112) of the Municipal Act be amended to remove any doubt that a producer may enter into an agreement with a municipality to lay gathering lines for the purpose of moving its own production of natural gas to its place of business to be consumed at that location solely by it.

Position of Union:

6.14 Union was of the opinion that the Municipal Franchises Act does require a producer such as Fernlea Flowers to obtain a certificate of public convenience and necessity and enter into a franchise agreement with the municipality. This means that the onus is on the producer to prove to the Board that it is in the public interest for the producer to have a certificate of public convenience and necessity and a franchise agreement with a municipality. Such a franchise agreement may be a second agreement within the municipality, and the loss of the new producer as a customer of the original gas distributor may have an effect on that gas

distributor. In this instance, Union submitted that the loss of Fernlea Flowers as a major customer could have a significant impact on it.

Position of the Board:

6.15 Although sympathetic to the position of Fernlea Flowers, the Board's mandate requires it to act in the public interest in the broadest sense. The issue here has implications beyond the case in question and is a complex one which goes, in the opinion of the Board, beyond the scope of this hearing. The Board therefore did not examine this issue in detail during this hearing and is not in a position to make the recommendations requested by Fernlea Flowers.

Jurisdiction of the Ontario Energy Board

6.16 Under the Municipal Franchises Act (see chapter 3) the Ontario Energy Board must approve franchise agreements between gas distribution companies and municipalities. A distinction is made in the Act between first-time franchise agreements and renewals for which the parties have agreed on terms, on the one hand, and renewals in which the parties cannot agree on the terms, on the other. Section 9 of the Act applies to first-time agreements and to renewals on which the parties have agreed, and gives the

Board the power to approve or reject a proposed franchise agreement but not to impose a settlement. Section 10 applies to renewals where the parties cannot agree on terms and gives the Board the power to impose a settlement if the two parties cannot agree. However, subsection 10(6) restricts its application to agreements which expired after December 2, 1969.

Position of the Municipalities:

6.17 The municipalities all agreed that the Board did not have jurisdiction to alter or modify a proposed by-law placed before it on a section 9 application. They were also of the opinion that the Board could not compel a municipality to enact or amend a franchise by-law. The municipalities did not address this issue so as to recommend any legislative change.

Position of the Utilities:

6.18 The consensus of the utilities was that section 9 of the Municipal Franchises Act should be amended to allow either party to apply to the Board to have the terms and conditions of a franchise agreement settled. Union also submitted that section 10 should be amended so as to apply to a franchise agreement which expired before December 2, 1969.

Position of the Board:

6.19 The Board recognizes that the probable intention in the Municipal Franchises Act of distinguishing between first-time agreements and renewals was that in the case of a first-time agreement, for the Board to have the power to impose a settlement would be to interfere with the contractual rights of the parties. In the case of a renewal, when the gas plant is in the ground and service is being supplied and depended upon, it is essential that an agreement between the parties be reached, and if necessary, be imposed by the Board.

6.20 In practice the Board is now able to impose a first-time agreement by giving a conditional approval under section 9; that is, the Board can indicate to the parties that the proposed franchise agreement is not acceptable, but would be if certain terms or conditions were met. Although the Board is reluctant to interfere with contractual rights, there may be instances where it is appropriate for it to decide terms and conditions of a franchise agreement.

6.21 The Board will refer this question to the proposed MFA Committee to consider whether the Board's present conditional power under section

9 for first-time agreements is sufficient, or whether new legislation should be requested giving the Board the additional power to impose a settlement if a municipality seeking gas distribution and the relevant gas company cannot reach an agreement. In addition, the Board will ask the proposed MFA Committee to consider the implications of removing subsection 10(6) of the Act and thereby making section 10 applicable to all franchise agreements whenever they expired.

Section 30 of the Ontario Energy Board Act

6.22 Section 30 of the Ontario Energy Board Act provides for the Board to rehear or review matters on which it has previously made an order and to rescind or vary an order. The issue is whether section 30 applies to all orders of the Board, including those made under the Municipal Franchises Act, or only those orders of the Board made under the Ontario Energy Board Act.

Position of the Municipalities:

6.23 Although the issue was raised during this hearing, counsel for SWOMC and for the Town of Blenheim and the County of Lambton deferred taking a position, as the issue was to be argued in the OEB hearing E.B.A. 472 in which they were involved.

6.24 The Regional Municipality of Ottawa-Carleton submitted that the Board's jurisdiction under section 30 is not restricted to orders and applications made under the Ontario Energy Board Act. However, the Board's power is restricted in that it cannot amend the terms of an existing agreement between a municipality and a gas utility.

Position of the Utilities:

6.25 The view of the utilities is that section 30 applies only to the Ontario Energy Board Act itself, and that the Board does not have the power to rehear or review or to rescind or vary orders it has made under the Municipal Franchises Act.

Position of the Board:

6.26 The opinion of the Board is that section 30 should apply to any order of the Board, including those made under the Municipal Franchises Act. The Board has taken the position that it presently has that jurisdiction. However, the Board will seek an amendment to section 30 of the Ontario Energy Board Act in order to remove any ambiguity.

Compliance with By-laws

6.27 This issue was raised by some municipalities. While in general terms there is little difference of opinion between the municipalities and the gas distributors on the question of compliance with by-laws, the issue arises when a municipality wishes to introduce by-laws which require the payment of permit fees for undertaking work on municipal roads.

Position of the Municipalities:

6.28 Overall, the municipalities argued that the gas distributors should comply with by-laws of general application. Some supported this requirement with the added qualification that the general by-laws be both present and future by-laws as long as there is no conflict with provincial and federal legislation or, in effect, no amendment to an existing franchise agreement. Others held the view that compliance be limited to by-laws that exist at the time of installation of a gas pipeline or any subsequent works.

6.29 No municipality took the position that a gas distributor should be required to comply with any municipal by-law that singled out the gas distributor in a particular manner or directly or indirectly amended an existing franchise agreement.

6.30 FONOM proposed in its final submission "that the determination of whether a particular municipal by-law effectively amends an existing franchise agreement be a matter exclusively committed to the jurisdiction of the OEB".

6.31 The collective evidence of the municipalities shows that they view the inclusion in the franchise agreement of the matter of 'compliance with by-laws' as a desirable reinforcement of municipal authority and control concerning municipal road allowances. Municipal by-laws permit the municipality to exercise control over the continuing quality and serviceability of the road allowance to ensure free flow of traffic, orderly occupancy of the road allowance by the gas distributors, prudent financial management of public property and overall public convenience.

6.32 Several municipalities insisted that gas distributors should comply with by-laws of general application requiring the payment of road-cut permit fees and impost charges, the former to cover inspection and supervision by the municipality and the latter to assist the municipal road maintenance program because road cuts reduce the quality of the road and shorten its useful life.

6.33 The conundrum here is that Ontario Hydro and Bell Canada are exempted from local by-laws by provincial and federal statutes respectively. However, in the one instance cited, both of them voluntarily comply with municipal by-laws.

Position of the Utilities:

6.34 The gas distributors, in their joint brief and in individual submissions, stated that they are willing to continue to comply with municipal by-laws of general application. However, exceptions to voluntary compliance exist where municipalities seek to impose permit fees or other additional financial burdens upon the gas distributors, or seek to pass general by-laws fixing the location of utility plant. In these situations the gas distributors take the position that such by-laws interfere with the exclusive jurisdiction of the Board over all matters relating to natural gas distribution, or conflict with the terms and conditions of the franchise agreement.

Position of the Board:

6.35 In general, all gas distributors should comply with municipal by-laws of general application. However, where compliance with a by-law would, in effect, amend a franchise agreement between

the municipality and the gas distributor, the Board is of the opinion that the franchise agreement as approved by the Board would supersede such a by-law. In other words, there is no requirement on the gas distributor to comply. The Board is of the view that the interpretation of a by-law or a contract, or the enforceability of either should rest with the courts. As a matter of policy, the Board does not support the introduction of permit fees by municipalities.

7. THE NATURE OF FRANCHISE AGREEMENTS

7.1 The preceding chapters have dealt with specific issues which were addressed in this hearing and which, for the most part, relate to already existing or proposed clauses in franchise agreements. A number of issues however, were raised that involve the overall nature of franchise agreements; these included:

- o Exclusivity in Franchise Agreements,
- o Separate Road-User Agreements; Multi-Party Agreements,
- o Duration of Franchise Agreements,
- o Standardization.

Exclusivity in Franchise Agreements

7.2 Are franchise agreements exclusive? Are customers who are located within a municipality which has a franchise agreement with a gas distribution company obliged to buy gas from that com-

pany, or may they buy it from some other source? This question was raised at the hearing primarily by the major gas consuming companies that wanted to ensure that no clause in any franchise agreement would preclude contract carriage and the availability of direct sales to end-use consumers.

7.3 All participants agreed that municipalities do not have the right to grant exclusive franchises permitting one gas distributor the sole right to distribute gas in a franchise area. To support this position, some arguments relied on section 111 of the Municipal Act, which prohibits the creation of exclusive franchises by a municipality for any trade, calling or business.

Position of the Municipalities:

7.4 The municipalities agreed that franchise agreements are not exclusive. However, FONOM pointed out that the granting of a franchise or right to a public utility to operate within a municipality generally makes it uneconomic for another utility to duplicate a gas distribution system. Therefore, franchises in practice tend to be exclusive with two types of exceptions:

a) where a competing supplier of gas seeks to supply a particular unserviced area within a franchised municipality; or

b) where a competing supplier seeks to supply a large volume user within a franchised municipality.

7.5 FONOM submitted that such a secondary supply of gas within a franchised municipality would require the passage of a by-law by the host municipality under section 3 of the Municipal Franchises Act. The competing supplier would also have to establish to the OEB that public convenience and necessity required the approval of the construction of works to supply gas under section 8 of the Municipal Franchises Act. If approved, dual franchises within a single municipality could result in the different rate bases and costs of service of each utility being reflected in different rates for the same class of consumers in the same municipality.

Position of the Large-Volume Gas Users:

7.6 IPAC, Nitrochem, IGUA and Inco all submitted briefs solely to address this issue. They submitted that the form of franchise agreements should in no way interfere with contract carriage or direct purchase arrangements. Inco added that any impediments to direct purchase arrangements presently included in any franchise agreements should be deleted or amended.

7.7 Nitrochem opposed the recommendation of Northern (outlined below) that exclusivity of franchises be established through legislation. Nitrochem argued that such exclusivity would appear to prevent direct purchase arrangements between natural gas producers and users and therefore would not be in line with recent indications of public policy as expressed by provincial and federal ministers.

7.8 IPAC took the position that the clause granting the right to supply gas in ONGA's proposed standard franchise agreement (described in the following section on Standardization) could be interpreted to mean that no other party would have the right to supply gas during the term of the agreement. IPAC, therefore, recommended that each franchise agreement should contain a clause stating that a corporation or other legal entity situate in or an inhabitant of the municipality is not precluded from purchasing gas from a party other than the gas company, subject to approval of the OEB.

Position of the Utilities:

7.9 Union submitted that if a municipality proposes to grant a second franchise, whether to another gas distributor, a producer or a consumer, the Board must determine if the separation, carving

out or overlapping of an area previously franchised to one gas distributor in favour of another is to the overall benefit of the public, and must weigh, for example, the effect on the remaining distribution system and the customers of the first franchised utility against any benefits accrued by permitting a subsequent franchise.

7.10 Northern was concerned that "fragmentation" of franchises and certificates, with the attendant duplication of costs and what was termed "artificial plant obsolescence", would not be in the public interest and recommended that the Board request an amendment to section 111 of the Municipal Act (which prohibits the creation of exclusive franchises by a municipality) to exclude its application to a natural gas distribution franchise. Northern also recommended that the Board, in its future franchise and certificate orders, declare that such grants are exclusive and that a general legislative enactment be recommended for existing franchises.

Position of the Board:

7.11 The Board accepts that, in the absence of express legislative authority, a municipal corporation cannot grant to anyone the

exclusive privilege to supply natural gas. In the Board's opinion, the grant of a natural gas franchise is not an exclusive right, but merely a right to supply gas according to the franchise agreement.

7.12 Accordingly, the Board believes that franchise agreements do not need to contain a clause stipulating that direct purchases of gas from a party other than the gas company are not precluded.

7.13 However, the Board acknowledges that it would be required to determine if it is in the public interest to approve the construction of works for a second franchise in an already franchised municipality. Considerations could include the economic feasibility of such supply and the impact on the system and customers of the first franchised utility.

7.14 The Board accepts that franchise agreements should not preclude contract carriage and direct purchase arrangements and, therefore, does not agree with Northern that exclusivity be permitted through a recommended legislative amendment.

Separate Road User Agreements; Multi-Party Agreements

7.15 In a franchise agreement between a municipality and a gas distributor there are two elements: the franchise rights which refer to the distribution of gas; and the road-user rights which allow the gas distributor to use the municipalty's road rights of way for gas pipelines. Should the road-user rights be separated from gas franchise rights?

7.16 When a gas utility is contemplating service to an unfranchised municipality, it must enter into agreements with all municipalities through which its pipelines pass. These may include, for example, an upper-tier municipality and lower-tier municipalities within the upper-tier municipality. Should there be multi-party franchise agreements between related lower-tier and upper-tier municipalities and the gas distributor?

7.17 These two questions were addressed together by the parties at the hearing.

Position of the Municipalities:

7.18 The City of Sudbury and the Regional Municipality of Sudbury, supported by FONOM, proposed that local and regional municipalities negotiate together with the gas utility in order to reach

one multi-party agreement. They submitted that this would avoid the present situation of drafting two different types of agreements - the franchise agreement and the road authority agreement - and would result in consistent application of rules and regulations respecting the installation of gas services on all roads within the regional area. A multi-party agreement could also avoid any problems arising from transferred ownership of roads.

7.19 The Regional Municipality of Ottawa-Carleton, however, did not support this proposal. It took the position that local municipalities and regional municipalities have separate areas of jurisdiction and separate concerns to be dealt with in negotiation of any gas franchise or road user agreement. Even among the lower-tier municipalities there may be varying interests and concerns depending on whether the municipality is, for instance, urban or rural. It felt that the increased number of parties could prolong the negotiations unduly.

7.20 The RMOC further maintained that it has the power to grant to gas distributors the right to use regional arterial highways but has no power to grant actual franchises to gas distributors and that only local municipal corporations within the Regional Municipality have the power

to enter into franchise agreements. Nevertheless, the RMOC acknowledged that generally its concerns in granting a licence to a gas distributor to use the regional road system are very similar to those of the local or lower-tier municipalities in granting a franchise and submitted that the terms and conditions of the road user and franchise agreements should be similar in many respects.

7.21 The Southwestern Ontario Municipal Committee submitted that the OEB is authorized to deal with municipal franchises with gas distributors and also the road user aspects of them. For lower-tier municipalities, both aspects should be included in the same by-law and in the case of an upper-tier municipality where the franchise portion may not be necessary, its inclusion with the road user aspects in the same by-law does no harm. SWOMC added that a multi-party agreement was possible in principle but not a politically feasible option. Even if a multi-party arrangement were made, each municipality would be required to enact separate franchise by-laws under the Municipal Franchises Act.

7.22 In contrast, the County of Lambton maintained that as an upper-tier municipality it would be more appropriate for it to be party to a road

user agreement with Union, rather than to a franchise agreement which purports to give Union distribution rights within Lambton.

7.23 FONOM brought to the Board's attention that if there is any supply of gas in a municipality, whether lower- or upper-tier, the construction of works to supply such gas would be subject to section 8 of the Municipal Franchises Act. However, if there is no supply within the municipality, the Municipal Franchises Act does not apply according to subsection 6(1) of that Act. Thus, the OEB's jurisdiction over transmission lines in areas where distribution or supply of gas is restricted to land owners abutting the line is unclear. Accordingly, FONOM submitted that in order to implement multi-party agreements, legislative amendments would be necessary to expressly confer jurisdiction on the Board:

i) to grant certificates of public convenience and necessity in relation to the construction of transmission lines which do not supply gas within the municipality; and,

ii) to set the terms, conditions and period for the granting of a right to lay transmission lines in a municipality which does not receive supply of gas.

Position of the Utilities:

7.24 Consumers' submitted that the Municipal Franchises Act should be amended in order to make it clear that it does apply to regional and county franchise agreements. Union took the position that under sections 210 and 225 of the Municipal Act, both lower- and upper-tier municipalities have the right to pass by-laws granting transmission and distribution rights, subject only to the Municipal Franchises Act. Union suggested that if there is any doubt, the Municipal Franchises Act should be amended in the same way suggested by Consumers'. Northern submitted that because of subsection 6(1) of the Municipal Franchises Act, county franchise agreements are not subject to that Act with the exception of section 2 and except where otherwise expressly provided.

7.25 None of the utilities supported the idea of separate road user agreements. They submitted that general franchise and user rights should be contained in one agreement regardless of the nature of the municipality involved. Union argued that separate road user agreements could place the control of pipelines beyond the purview of the OEB if municipalities were to insist that road user disputes should more properly be put before the Ontario Municipal Board. The gas

distributors are of the opinion that one franchise agreement can encompass both concerns.

7.26 With regard to multi-party agreements, Union maintained that any such agreement must involve all local municipalities, the County/Regions, and the utility, to be effective, and all would have to agree to a common termination date of existing franchises. Union was prepared to re-negotiate such franchises, but pointed out that, in practice, negotiating one agreement with up to 24 local municipalities, as in Essex County, would be very difficult.

Position of the Board:

7.27 There appears to be a great deal of confusion as to whether the OEB has jurisdiction in all instances over regional and county franchise agreements, especially in those situations where the municipality is the host to the pipeline but does not itself receive gas. The Board agrees that a recommendation should be made to amend the Municipal Franchises Act, so that it is clear that the OEB does have such jurisdiction and the Board suggests that the MFA Committee recommended later in this chapter develop such an amendment. In making this recommendation, the Board confirms that it does not believe that it is necessary to separate the

road user rights and the franchise rights into separate agreements for either lower- or upper-tier municipalities.

7.28 The Board appreciates that some municipalities are trying to achieve consistency by advocating multi-party agreements within a region or county, but also notes that the municipalities themselves have differing views as to the feasibility and effectiveness of multi-party agreements. The Board is not opposed to the principle of multi-party agreements, but would leave this to the parties to decide as to whether or not such an alternative is workable. The Board is of the opinion, however, that in the case of separate agreements, the road user agreements for the region and the franchise agreements for the local municipality should, where possible, generally contain similar provisions.

Duration of Franchise Agreements

7.29 Most franchise agreements between gas distributors and municipalities are for 20 to 30 years and some franchises are said to be in perpetuity. What is the most appropriate term for a franchise agreement or renewal? A variety of views were presented at the hearing.

Position of the Municipalities:

7.30 There was a wide variance of opinion among the municipalities. The City of Sudbury recommended that the term of the franchise agreement be limited to a five-year period whereas the Township of Zorra proposed a term of not less than 20 years.

7.31 The Regional Municipality of Ottawa-Carleton submitted that a separate road user agreement be created for a proposed term of 10 years. Additionally, this municipality and others proposed that termination dates for road user agreements and gas franchise agreements should be uniform within a regional area.

7.32 FONOM differentiated between the initial franchise agreement and a renewal. In the first case FONOM advocated a twenty-year term and for the second, a ten-year period.

Position of the Utilities:

7.33 The gas distributors represented by ONGA were in support of a twenty-year term for a franchise agreement and no differentiation was made between the duration of an initial agreement and its renewal.

7.34 The principle of uniform termination dates for franchise agreements within a regional area was not opposed by the utilities, but it was pointed out that there could be a practical problem of having to negotiate a great many renewals at the same time.

Position of the Board:

7.35 While some advantage to the municipalities may result from shorter term franchise agreements, these may result in more complicated documents, which in the end, may not decrease the financial exposure of the municipalities. When a utility commences distribution in a new franchise area, it expects a return on its investment over time. If the term of the agreement is too short, the utility's risk may increase, which could lead to increased costs of capital and in turn might increase the cost of gas throughout the franchise area.

7.36 The Board is of the opinion that a first time agreement should be of a duration of not less than fifteen years and no longer than twenty years. The minimum duration seems adequate to give security to the utility whereas a maximum term has been established by the Public Utilities Act (sections 24 and 60) which sets the upper limit of a contract to a twenty-year term.

7.37 The duration of a renewal agreement may not necessarily need to be the same as the initial agreement; the risk of the utility is substantially lower since the plant has been depreciated to a large extent during the initial term of the agreement. In the case of renewals a ten to fifteen-year term would, therefore, seem to be adequate.

7.38 There are 83 agreements said to be perpetual in Ontario, 82 of which are found in the Union franchise area. The Board has no jurisdiction to declare that perpetual agreements should be terminated. That is a matter either for the courts, the Legislature, or the parties involved. The Board's view, however, is that in the future new franchise agreements or renewals thereof, ought not to be in perpetuity.

7.39 A uniform expiry date within a regional area could help to achieve two goals. It might place the local municipalities in a better negotiating position with the utility and it would contribute to the standardization of franchise agreements at least within each regional municipality or county. The Board is of the opinion that this subject should be addressed by the MFA Committee in order to explore the practicality of this concept.

Standardization

7.40 A large portion of this Report has dealt with specific issues that have led to difficulties in negotiating franchise agreements. Underlying these specific concerns was always the question of whether the Board could or should impose a standard form of franchise agreement either on a franchise-wide or province-wide basis.

Position of the Municipalities:

7.41 SWOMC stated very clearly that:

> The OEB has no jurisdiction to establish a standard form of franchise to be required in every case or in every case involving a particular gas utility as otherwise it declines jurisdiction by prejudging the result before the prescribed public hearing.

7.42 However, SWOMC added that the OEB may establish policy by which to test the appropriateness of specific franchise provisions. SWOMC submitted that it would prefer to work within the existing legislative framework, rather than accede to the gas utilities' solution which was to have a standard form of franchise agreement legislated.

7.43 Nevertheless, SWOMC did propose a draft franchise agreement for the Union franchise area in

its original brief on the premise that present "standard" agreements favoured the gas utility's interests. The suggested clauses included those which could form the usual basis of an agreement and also those which represent SWOMC's proposed solution to outstanding issues. Although SWOMC's proposals were set forth in the form of a standard agreement, SWOMC submitted that the agreement provided for additional negotiated clauses that would pertain to local concerns and as such would be required to be approved by the OEB on a case-by-case basis.

7.44 Other municipalities that addressed the issue agreed that the OEB has no jurisdiction under the Municipal Franchises Act to impose a standard agreement on all municipalities, but must determine each case on its merits after holding a public hearing. Most municipalities also submitted, however, that the OEB does have the jurisdiction to adopt a policy or guidelines indicating the usual provisions to be included in franchise agreements. It would be left open to any municipality or utility to make submissions as to why such a policy should not be adopted in its particular case, and the Board would be able to exercise its discretion in dealing with specific concerns of particular municipalities or utilities.

7.45 Blenheim and Lambton relied upon the 1965 Ontario Court of Appeal case Re: Hopedale Developments Ltd. and Town of Oakville as support for the proposition that an administrative tribunal has a right to formulate general principles provided that it gives a full hearing to the parties in every case before it and decides each case on its merits.

7.46 FONOM was the only municipal representative that supported the position that gas franchise agreements be standardized throughout the province at the expiry of current agreements by means of a standard form agreement adopted by the Board either by way of incorporation into its Rules of Procedure or as a regulation under the Ontario Energy Board Act. FONOM did agree with other municipal representatives that special terms and provisions to meet particular local conditions would remain the subject of negotiation and be subject to review and approval by the Board. FONOM cited a number of advantages to a standardized form of franchise agreement. A uniform franchise agreement would:

1) simplify the franchise approval process;

2) eliminate inconsistency in franchise provisions among municipalities within the market area serviced by a single utility and between market areas serviced by different utilities;

3) redress the imbalance in bargaining power between municipalities of all sizes and a utility; and

4) promote certainty in the interpretation and the parties' understanding of franchise terms to restore confidence and trust which is presently lacking between the parties to franchise agreements.

7.47 FONOM did not, however, support uniformity for its own sake nor the imposition of standardized terms on parties who had not had the opportunity to affect their substance. It cited the Board's decision in the Lambton case E.B.A. 464 as illustrating the danger of imposing standardized terms on an unwilling party solely for the sake of standardization.

7.48 FONOM recommended that a special committee be appointed consisting of representatives of the gas utilities, the OEB and the municipalities. The committee would work within the framework of definitive policy guidelines established by the OEB in this Report to develop contractual language for a uniform franchise agreement. FONOM suggested that the agreement so generated should then be circulated to the participants in this hearing for comments and eventual approval by the Board.

7.49 FONOM also recommended that a standing advisory committee be established to report on a regular basis (between two and five years) upon recommended amendments to the uniform franchise agreement. Comments on the proposed modifications could then be solicited and a public hearing held if deemed warranted. FONOM suggested that any such amended form of franchise agreement could be adopted upon the expiry of existing franchises.

Position of the Utilities:

7.50 The utilities agreed that the Board at present does not have the jurisdiction to impose or adopt a standard form of franchise agreement. ONGA submitted a draft standard franchise agreement prepared by the three major gas utilities to the Board for consideration and recommended that it should become a legislated agreement to come into effect for all new franchise agreements and all future renewals.

7.51 Consumers' and Northern suggested that if the Board was not prepared to recommend adoption of a standard agreement through specific amendments to the Municipal Franchises Act because such a standard agreement would fetter its discretion, the Board could generally express its opinion on the various issues discussed in

the proceeding, making it clear that future cases would be resolved on their own particular fact situations.

7.52 In order to accommodate the concern that standardization might not always be appropriate, Consumers' and Northern proposed that legislative amendments could be drafted in such a way as to make it clear that the standard terms and conditions were to prevail, unless the Board was satisfied that it was in the public interest to vary the terms in the particular case before it.

7.53 Union pointed out that historically franchise agreements have for the most part been uniform, especially within the Consumers' and Northern franchise areas and that most participants generally agreed that standardization of franchise terms was desirable as long as their proposed terms and conditions were the ones adopted by the Board.

7.54 ONGA, however, submitted that the present process is no longer suitable because there will probably be relatively few new franchise agreements proposed in the future, but an increasing number of renewals. It argued that it is an expensive and time-consuming process with little real room for negotiation in view

of the Board's past policy in favour of standardization and the utilities' desire to treat all municipalities in their franchise area the same. If the Board were to choose an agreement that is a fair compromise and balance between the interests of the municipality, the utility and the public of Ontario, then, in the opinion of ONGA, there should not be any need for negotiation nor for giving any one particular municipality a "better deal" than others.

7.55 Union took the position that a major portion of the franchise could be standardized, since most terms were not in contention, but added that local issues such as bridges would still be negotiated. Union suggested that standardization would accomplish:

1) consistency within each utility's franchise area;

2) a reduction if not elimination of the concern of smaller municipalities as to their bargaining power with the utility compared to that of larger municipalities, since they would be all treated the same;

3) reduction of franchise negotiation time and costs for all parties involved; and

4) reduction of the Board's time in approval of franchises.

7.56 Union stated that it was prepared to re-open any franchise, including those in perpetuity, if a municipality wished to convert to a new legislated standard form.

7.57 Northern argued that there is no regulation-making power in the Municipal Franchises Act or the Ontario Energy Board Act that would allow the Board to adopt a standard form of franchise agreement through a regulation or Rules of Procedure as suggested by FONOM.

7.58 Northern did, however, support FONOM's recommendation regarding the appointment of a special committee to consider and develop a recommended standard franchise agreement. Northern stipulated though that the OEB would need to indicate specific guidelines respecting the purpose of such a special committee, the matters to be considered and a timetable for deliberations and reporting in order for it to be effective.

Position of the Board:

7.59 Both the utilities and the municipalities listed a number of advantages to uniformity in agreements and the Board does recognize those advantages. However, it does not appear to be possible to achieve uniformity of agreements across the province, unless certain municipalities forgo or are forced to forgo rights which

they now enjoy and which do not necessarily conform to any proposed uniform agreement. This is especially relevant in the Union franchise area where some agreements, including some of those in perpetuity, require Union to pay all costs of relocation of pipeline. Nevertheless, some municipalities might be pleased to be relieved of other provisions in existing agreements.

7.60 The Board is also aware that a large number of franchise agreements have recently been renewed for a twenty-year term and it therefore would take some time before uniformity could be achieved.

7.61 The Board acknowledges that in the past it has attempted to avoid unnecessary discrimination between municipalities by tending to standardize the terms and conditions of gas franchise agreements. In light of the evidence presented in this hearing, the Board recognizes that utilities and municipalities do see merit in standardization. However, the terms and conditions of a standard agreement which seem fair and acceptable to all parties have not yet been established.

7.62 The Board agrees that it does not have the jurisdiction to impose a uniform agreement

either across the province or throughout a franchise area. A completely standard agreement would be tantamount to a predetermination of the decisions which this Board is required to make under the Municipal Franchises Act. Moreover, the Board has some concerns about recommending legislative amendments or regulations to achieve standardization. Uniformity, if legislated, would tend to impair the concept of voluntary agreements in that, for example, predetermined uniform conditions of delivery would be forced upon a municipality where a new agreement is at issue.

7.63 The Board recommends an ongoing process of working within the existing legislative framework to develop a "model" agreement based on the Board's policy and containing the usual provisions to be included in a franchise agreement. Such a model agreement will, it is anticipated, be developed by the proposed MFA Committee. In accordance with the Hopedale decision, the Board will continue to deal with franchise agreements on a case-by-case basis, considering submissions from municipalities or utilities that address specific local concerns or that argue that the Board's policy or model agreement should not apply in that particular case.

7.64 In this way, the municipalities' main concern regarding unequal bargaining power in negotiations should be alleviated once basic clauses that represent a fairer balance between the parties have been developed.

7.65 The Board concludes that to ensure that a balance between the parties to franchise agreements is established and maintained, it will accept the recommendation of FONOM and establish a special committee, the Municipal Franchise Agreement Committee as discussed in the following chapter.

8. THE MUNICIPAL FRANCHISE AGREEMENT COMMITTEE

8.1 Many of the questions raised during this hearing are, in the opinion of the Board, most constructively answered through discussion and negotiation rather than by decisions or orders of the Board. The Board therefore will establish a special committee, the Municipal Franchise Agreement Committee to consider the policy guidelines established in the Board's review of specific issues in this Report with a view to developing the language for a basic model agreement. The Board will then solicit comments on the proposed model agreement and approve a final draft, either with or without another hearing. The Board also expects the MFA Committee to consider the legislative amendments commented upon by the Board in this Report and, where necessary, to draft the appropriate legislation.

8.2 The Board will appoint a Chairman for the MFA Committee from the Board's staff. The Chairman will, after receiving recommendations from the utilities and the municipalities, determine and select the membership of the MFA Committee. The Board suggests that the MFA Committee, in addition to the Chairman, be composed of one to two (perhaps one operating person and one legal counsel) representatives of each of the three major utilities and one to two representatives of municipalities in each of the three major franchised areas, including representation from both upper- and lower-tier municipalities. The Chairman of the MFA Committee may wish to consult the AMO and ONGA for suggested nominees and/or may wish to consult and select members from among the participants to this proceeding. The Board is prepared to offer some financial contribution towards the municipalities' costs incurred in participating in the MFA Committee.

8.3 In this Report the Board has indicated its preferred solution to the major issues that were brought before it in the hearing. In most instances the Board has dealt with an issue by establishing broad policy guidelines and leaving the specific resolution either to be negotiated between the parties or dealt with by the MFA Committee. For example, the Board has recommended that the cost of relocating pipelines be

shared to some degree and has recommended a range of percentages of the total cost of relocation that should represent a municipality's share. The Board has left the specific percentage to be fixed by negotiation between a municipality and utility. The MFA Committee may, however, wish to develop this policy and establish a fixed percentage or percentages that would apply in specific franchise areas or in particular circumstances, so as to further reduce inequity in bargaining power and to develop consistency where circumstances are similar.

8.4 In the course of this Report the Board has specifically referred a number of issues to the MFA Committee, requesting it to:

- o consider the means, whether by legislation or otherwise, by which the Board could assume a limited arbitration role for line location disputes (4.19);

- o consider developing a formula for relocation cost sharing within the range established in this Report (5.72);

- o develop a model clause for franchise agreements regarding insurance and indemnification (6.11);

- consider whether the Board's present conditional power under section 9 of the Municipal Franchises Act for first-time agreements is sufficient, or whether new legislation should be requested giving the Board the additional power to impose a settlement (6.21);

- consider the implications of removing subsection 10(6) from the Municipal Franchises Act (6.21);

- develop a proposed amendment to the Municipal Franchises Act to make it clear that the Board has jurisdiction over regional and county franchise agreements in which the municipality is the host to the pipeline but does not itself receive gas (7.27);

- explore the practicality of establishing a uniform expiry date for franchise agreements within a regional area (7.39);

- develop a model agreement based on the Board's policy and containing the usual provisions to be included in a franchise agreement (7.63).

8.5 Although the Board believes that it has addressed in this Report the issues that were of most

concern to the participants, there were some provisions in agreements, such as force majeure clauses, that were addressed in briefs but were not the subject of discussion during the hearing. The Board expects the MFA Committee to consider the positions of all participants on any outstanding issues for which the Board has not offered any policy guidance, including any recommended legislative amendments not dealt with, and recommend provisions to deal with them in the model franchise agreement and recommend any legislative amendments deemed necessary or appropriate.

8.6 The Board recognizes that, although a general consensus was reached on a few issues during the hearing, developing contractual language to express that consensus or to interpret the Board's policy advice on other issues into specific provisions for a model agreement, may require considerable time and effort.

8.7 The Board notes, however, that these matters should be resolved expediently as a number of franchise agreements remain outstanding because the negotiation process has broken down. The Board, therefore, believes that the MFA Committee should report to the Board with a recommended model agreement within six months of its formation. The Board expects, as Northern

suggested, that the Chairman at the outset establish an actual timetable for reporting and terms of reference in accordance with the Board's advice herein.

8.8 The Board agrees with FONOM that any model agreement should be reviewed periodically to make sure provisions have not become outdated, but the Board prefers to leave the process for that review, whether by advisory committee or otherwise, to be determined after a model agreement has been developed.

8.9 As previously stated, the Board accepts that uniformity will take some time to achieve and encourages municipalities and utilities to consider renegotiating existing franchise agreements which will not expire for some time, once a model agreement has been approved. The Board also notes Union's offer to re-open franchise agreements in perpetuity and encourages those affected municipalities to enter into negotiations.

Dated at Toronto this 21st day of May, 1986.

ONTARIO ENERGRY BOARD

R.W. Macaulay, Q.C.
Chairman and Presiding
Member

M.C. Rounding
Member

P.E. Boisseau
Member

APPENDIX A

Municipalities and the Provision of Gas Services

- Adopted by the Board of Directors of the Association of Municipalities of Ontario on November 30, 1984

AMO

Association of Municipalities of Ontario

Suite 902 • 100 University Avenue, Toronto, Ontario M5J 1V6 • Telephone 593-1441

December 10, 1984

The Honourable Claude F. Bennett
Minister of Municipal Affairs and
Housing
17th Floor
777 Bay Street
Toronto, Ontairo
M5G 2E5

Dear Minister:

On behalf of the Association of Municipalities of Ontario enclosed please find a copy of a report concerning gas services and related franchise agreements that was adopted at the November 30, 1984 meeting of the AMO Board of Directors.

The enclosed report documents many of the municipal concerns associated with gas franchise agreements and related legislation and procedures.

The Association would appreciate receiving your comments and those of your colleague, the Honourable Philip Andrewes, Minister of Energy, with respect to the contents of the report and AMO's request for further study of the matter.

Yours truly,

Ron Eddy
President

RE/11

c.c.: The Honourable Philip Andrewes,
Minister of Energy

MUNICIPALITIES AND THE PROVISION OF GAS SERVICES

Adopted by the Board of Directors of the Association of Municipalities of Ontario on November 30, 1984

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MUNICIPALITIES AND THE PROVISION OF GAS SERVICES

Background

AMO's involvement in the matter of gas services originated with a study session at the annual meeting of the County and Regional Section of AMO in October, 1983, at which time the matter of cost-sharing arrangements for gas line relocations was discussed. Subsequent to this a resolution was received by AMO from the Regional Municipality of Ottawa-Carleton requesting that AMO, in conjunction with the Ministry of Energy and the Ministry of Municipal Affairs and Housing, review the extent of municipal control over public utilities, especially as it relates to the installation and maintenance of gas distribution systems in public roads systems and the adequacy of gas utility contributions under the Assessment Act. This resolution was endorsed by the AMO Board of Directors in November, 1983 and forwarded to the Minister of Municipal Affairs and Housing for consideration. (Appendix 1)

In March, 1984 the Minister responded by suggesting that representatives from AMO meet with staff of the Local Government Organization Branch of the Ministry of Municipal Affairs and Housing to discuss the nature and extent of the problems being experienced with gas franchise agreements to allow the Ministry to better assess the need for an extensive study.

This meeting took place in August, 1984 and involved representatives from the Regional Municipality of Ottawa-Carleton, the County of Kent, AMO and the Ministry. Discussion centered on the need for AMO to identify specific concerns with respect to the present agreements, legislation and procedures governing the provision of gas services, to record these concerns and to present them to the Minister as a means of illustrating the need for some action to be taken.

As a result of this discussion an ad hoc committee was formed with representation from the Counties of Kent and Lambton, the Regional Municipalities of Ottawa-Carleton and Sudbury and the City of Chatham.

Areas of Concern

1. Relocation Costs

One of the most significant concerns identified is the cost-sharing arrangements embodied in the gas franchise agreements relative to gas line relocations that are necessitated by municipal road construction. At present there are three basic methods used to allocate costs associated with relocation:

- o 100% paid by gas utility company;

- application of the provisions of the Public Service Works on Highways Act - ie. the "cost of labour" shared 50%/50% between the road authority and the utility operating authority;

- the "MTC option" - ie. 100% paid by road authority if relocation required within five (5) years of installation and 100% paid by the utility operating authority if relocation is required any time after this initial period.

The problems identified with respect to cost-sharing include:

- the fact that three different methods are utilized within the Province;

- concerns related to changes in the cost-sharing formulae, particulary in southwestern Ontario, from those that applied when the gas lines were originally installed (ie. installations were permitted based on the understanding that all relocations, when required, would be 100% funded by the utility operating authority);

- the definition of "cost of labour" in the Public Service Works on Highways Act.

The so-called "MTC clause" is suggested as a compromise that would satisfy the problems identified above and provide a reasonable solution to the concerns expressed by municipalities. The result would be a uniform methodology, applicable across the Province, that would require municipalities to undertake some medium range planning and make a commitment and that would allow the utility companies to recover their costs.

Another concern expressed by municipalities relative to relocation costs is the allocation of costs, by a gas company to a municipality, for gas line relocation or upgrading which is not required as a result of road construction but done in conjunction with this road work. Future agreements must ensure that such costs are borne 100% by the gas company. Any disputes relative to the reason for the relocation or upgrading of a line should be arbitrated by the Ontario Municipal Board.

2. Location of Gas Lines

The authority to control the vertical and horizontal (from the centre line) location of gas lines within the road allowance is an issue in many jurisdictions. This concern is related to the relocation cost issue. Often in the past what could have been termed "temporary"

locations were permitted by municipalities on the basis that the line would be moved, at no cost to the municipality, if some future road alteration or reconstruction required it. Any new cost-sharing arrangement, such as the application of the provisions of the Public Service Works on Highways Act, would require that such "temporary" arrangements be discontinued and that existing cases be rectified.

A related concern is for the operating authority to provide accurate "as installed" drawings for all installations. These are absolutely necessary to prevent serious and costly accidents due to inaccurate information concerning the location of such lines. This should be a requirement, either in the agreements or in legislation.

3. Gas Lines on Bridges

The question of allowing the installation of gas lines on bridges is one of convenience and cost to the operator initially versus eventual costs to the municipality as a result of any new cost sharing arrangement. Again making reference to southwestern Ontario primarily, gas companies were allowed to use bridge crossings for their lines due mainly to the cost sharing arrangements that existed in franchise agreements requiring the gas companies to pay 100% of all relocation costs.

The proposed new agreements would alter this situation and require municipalities to pay 50% of the costs of labour as defined in the Public Service Works on Highways Act for any relocation necessitated by the municipality. This is significant given the following:

- municipalities permitted many lines to be installed on bridges initially, because of the favourable "cost-sharing" arrangements in some existing gas-franchise agreements (applicable primarily to Union Gas)

- many bridges are or may soon be in need of significant repairs or reconstruction thus requiring some form of "relocation" of any utilities presently on the bridge.

Municipalities would again like to see amendments to the present franchise agreements to include provisions similar to those in MTC agreements, which exclude bridges and require a separate agreement for each bridge in order to install the gas line on that bridge.

4. Jurisdiction

The Association believes that jurisdiction over the right to distribute and sell gas and the terms and conditions governing these activities can and must be separated from jurisdiction over the right to locate in and use public roads and rights-of-way.

AMO contends that the Ontario Energy Board (OEB) is the approriate body to deal with matters related to the establishment of distribution areas and the selling price for gas, among other things, but that the Ontario Municipal Board should more appropriately be the body concerned with matters related to the use of public roads and rights-of-way for the location of gas lines (land use) and matters related to municipal finance.

For this reason the Association would submit that the Ontario Municipal Board (OMB) should be the arbitrator in all matters related to gas franchise agreements, including the terms and conditions of the agreements and the rights and priviledges associated with the use of public roads and rights-of-way. The Public Service Works on Highways Act (R.S.O. 1980; Chapter 420) recognizes this concept by naming the OMB as the arbitrator in cases where there is disagreement between a road authority and an operating corporation as to the level of compensation to be provided where a road authority incurs a loss as a result of neglect on the part of the operating authority. This principle should be extended to cover all matters related to municipal gas franchise agreements and related disputes.

There is also a need to clarify the difference between "user" and "fracnchise" agreements as they relate to the agreements signed by county and regional governments as compared to those signed by local municipalities.

5. Agreement Expiry Dates

The lack of uniform expiry dates for franchise agreements within the Province and even within many counties or regions creates a concern relative to the provision of a consistent level of service at an equitable cost to all consumers within any given service area. As a means of correcting such inequities it is recommended that all franchise agreements within any given county, regional or district municipality or any similarly defined area be given uniform expiry dates.

6. Adherence to Municipal By-laws

AMO believes that the operating authority must be required to adhere to any municipal by-laws that exist at the time of installation of a gas line or any subsequent works.

7. Utility Co-ordinating Committees

The formation of utility co-ordinating committees at the municipal level should be encouraged, as should participation in such committees by

the private utility companies. This would facilitate the co-ordination of road work and utility work so as to cause the least disruption to those being served.

Participation on a utility co-ordinating committee by all utilities may also reduce the incidents of road deterioration resulting from the installation of individual service lines. Where such service lines are installed, franchise agreements should include a provision that would permit the municipality to levy a penalty charge against the utility requiring the road cut if the cut is required within a specified time after the completion of the road work. This would encourage all operating authorities to co-operate in the planning and co-ordination of undertakings in a particular right-of-way.

Conclusion

The above report documents of the concerns identified by municipalities relative to the provision of gas services and the legislation and agreements governing the use of public highways and rights-ofway by utility companies. Based on the above the Association would recommend that:

> "the Ministry of Municipal Affairs and Housing in co-operation with the Ministry of Energy and in consultation with the Association of Municipalities of Ontario undertake an in-depth review of the rights and obligations of those concerned with supplying and distributing gas in Ontario and the regulation of the use of public roads and highways for this purpose and the costs associated with such activities."

APPENDIX 1

Resolution

GEN-4-83

REQUEST FOR PROVINCIAL-MUNICIPAL STUDY WITH RESPECT TO PUBLIC UTILITY FRANCHISES

Be it resolved that the Ministry of Municipal Affairs and Housing and the Ministry of Energy, in consultation with the Association of Municipalities of Ontario (AMO), conduct a study reviewing municipal control of public utilities, the adequacy of municipal control over the installation and maintenance of gas distribution systems in the public roads system and the adequacy of contributions by gas utilities under the Assessment Act.

APPENDIX B

Brief Submitted on Behalf of The Consumers' Gas Company Ltd., Union Gas Limited, Northern and Central Gas Corporation Limited and The Ontario Natural Gas Association containing a draft standard form franchise agreement

ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1980, Chapter 332, section 13 and 15;

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

AND IN THE MATTER OF a public hearing convened by the Ontario Energy Board to inquire into and review the form of natural gas franchise agreements and certificates of public convenience and necessity.

BRIEF SUBMITTED ON BEHALF OF THE CONSUMERS' GAS COMPANY LIMITED, UNION GAS LIMITED, NORTHERN AND CENTRAL GAS CORPORATION LIMITED AND THE ONTARIO NATURAL GAS ASSOCIATION

A. MUNICIPAL FRANCHISES ACT

1. The Municipal Franchises Act (the "Act") was first enacted in 1909. It has remained substantially in its present form since that time.

2. The jurisdiction of the Ontario Energy Board (the "OEB") under the Act is broad and all encompassing. In determining whether or not to approve franchises or issue certificates of public convenience and necessity it is up to the Board, after a hearing, to make a determination on the basis of the evidence as to whether or not it is in the public interest to issue the order sought.

Reference to:

Union Gas Company of Canada Limited v. Sydenham Gas & Petroleum Company Limited, [1957] S.C.R. 185 (Supreme Court of Canada)

3. In renewing a franchise agreement under section 10 of the Act, the OEB is not bound by the terms of prior agreements or by the particular provisions sought by a municipality.

Reference to:

City of Peterborough and Consumers' Gas Co. et al. (1980), 28 O.R. (2d) 573 (Divisional Court). See in particular the following passage from the judgment of Henry, J. (at pp. 575-576):

> In the sections that I have cited there is no requirement that the "terms and conditions" must be reached by agreement. No doubt this route will frequently be followed in circumstances such as these and there will be agreement between the parties as to the terms and conditions that ought to be imposed and it may be that the Board will adopt them. If, however, there is no agreement, it is obviously a matter for adjudication by the Board and they must decide the terms and conditions that the Act contemplates. This is a matter that is entirely within the Board's discretion, to be exercised after a proper hearing, and in our opinion that discretion was properly exercised. There is nothing in the statutory provisions to require that the terms and conditions found in the expiring agreement must be continued or that what is prescribed by the Board as a result of its adjudication be agreeable to either or both of the parties. It is for the Board to adjudicate when the matter is set down before them. Assuming that the hearing has been properly held, it is immaterial that the terms and conditions imposed are not those either in the expiring agreement or in a new agreement or are acceptable to the contending parties.

4. The Board's broad jurisdiction under the Act is similar to that which it exercises under the Ontario Energy Board Act. While local municipal concerns are relevant matters for the Board's consideration, in the final analysis it must be

guided by what is in the best interests of the residents of Ontario.

Reference to:

Union Gas Ltd. and Tecumseh Gas Storage v. Township of Dawn (1977), 15 O.R. (2d) 722 (Divisional Court). See in particular the following passages from the judgment of Keith, J. (p. 728 and p. 731):

> I have stressed these points to illustrate firstly how insignificant are the local problems of the Township of Dawn when viewed in the perspective of the need for energy to be supplied to those millions of residents of Ontario beyond the township borders, and to call to mind the potential not only for chaos but the total frustration of any plan to serve this need if by reason of powers vested in each and every municipality by the Planning Act, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. We were informed that other township councils have only delayed enacting their own by-laws pending the outcome of this appeal.
>
> ...
>
> In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the Planning Act.
>
> These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in s. 40(8), s. 41(3) and s. 43(3), which I have quoted, would seem to leave no room for doubt that it is the broad public interest that must be served.

5. In past decisions respecting applications to approve the terms and conditions of franchise agreements, the Board has made the following determinations:

(a) Generally speaking, only one gas utility should receive the franchise rights for any particular municipality.

Reference to:

Reasons for Decision of the OEB, Applications by Consumers' Gas and Union Gas for approval of a franchise agreement to supply gas to a portion of Mississauga, E.B.A. 337 and 341 and E.B.C. 110, October 23, 1979. See page 7 of the Board's decision:

> The Board does not think it appropriate or in the public interest to endorse more than one franchise in a specific municipality if it can be avoided.

(b) Franchise agreements should not contain any provisions which require a gas utility to make franchise fee payments to the municipality. Nor should such agreements attempt to require the gas utility to pay administration fees, road crossing fees or other costs which may be incurred by the municipality.

Reference to:

Reasons for Decision of the OEB, Application by Union Gas to renew a franchise in the Township of Moore pursuant to s. 10 of the Act, E.B.A. 304, December 21, 1978.

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise in the City of Peterborough pursuant to s. 10 of the Act, E.B.A. 316, June 26, 1979.

Reasons for Decision of the OEB, Application by Consumers' Gas to renew the franchise for the City of Ottawa, pursuant to s. 10 of the Act, E.B.A. 352, June 10, 1981. See, in particular, the following passage at p. 7 of the decision:

> In recent years, the Board has consistently denied municipalities the right to include, as a term and condition of a franchise agreement, a requirement of additional payments from a distributor of natural gas over and above the normal municipal taxes.

(c) Generally speaking, the term of a franchise agreement should be twenty years.

Reference to:

Reasons for Decision of the OEB, Application by Northern and Central to approve a franchise for the Village of Morrisburg, E.B.A. 194, December 3, 1976.

Reasons for Decision of the OEB, Application by Union Gas to renew a franchise in the Township of Moore pursuant to s. 10 of the Act, E.B.A. 304, December 21, 1978.

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise in the Township of Westmeath pursuant to s. 10 of the Act, E.B.A. 312, December 22, 1978.

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise in the City of Ottawa pursuant to s. 10 of the Act, E.B.A. 352, June 10, 1981.

(d) The Board has determined that the public interest requires that the costs of operation of a gas system should be kept as low as possible. The Board will therefore not approve a franchise agreement which contains an indemnity clause which would require the gas utility to indemnify the municipality in the event of incidents caused by the municipality's own negligence.

Reference to:

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise with the City of Niagara Falls, E.B.A. 311, June 14, 1979.

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise with the Town of Midland, E.B.A. 338, November 9, 1979.

(e) The Board has concluded that "there is merit in standardizing the terms and conditions of gas franchise agreements in general, and the

indemnity provisions of such agreements in particular, in order to ensure uniformity in the treatment accorded to the various municipalities served by (the utility) so as to eliminate the cross-subsidization among customers that would result from averaging of costs if the treatment of the municipalities was not uniform".

Reference to:

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise with the City of Niagara Falls, E.B.A. 311, June 14, 1979.

Reasons for Decision of the OEB, Applications by Union Gas relating to Lambton County and a number of related municipalities, E.B.A. 454, May 17, 1985 (rehearing pending).

(f) The Board will not approve a franchise agreement which contains a provision which would require the gas utility to be bound by present and future by-laws of the municipality.

Reference to:

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise in the City of Ottawa pursuant to s. 10 of the Act, E.B.A. 352, June 10, 1981. See in particular, the following passage from p. 9 of the decision:

> Clearly the Board and not the municipality is the final arbiter in determining the terms and conditions of a franchise agreement under the Act. If the Board were to approve the by-law clause proposed by the City, it could unwittingly be abdicating its jurisdiction in favour of the City if at some future time the City chose to enact by-laws which would have the effect of amending the franchise agreement. The board should not, and indeed cannot, delegate its statutory jurisdiction to determine the terms and conditions of a franchise agreement to another authority.

(g) The Board has determined that the cost of relocations of gas works for the purposes of highway improvement should be shared pursuant to the provisions of the Public Service Works on Highways Act.

Reference to:

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise agreement with the City of Peterborough pursuant to s. 10 of the Act, E.B.A. 316, June 26, 1979.

Reasons for Decision of the OEB, Applications by Union Gas relating to Lambton County and a number of related municipalities, E.B.A. 454, May 17, 1985 (rehearing pending).

B. PROCEDURE FOR THE APPROVAL OF A FRANCHISE AGREEMENT UNDER THE MUNICIPAL FRANCHISES ACT

6. If the applicant and municipality have agreed on the proposed terms and conditions of the franchise agreement, the procedure respecting the approval of a new franchise agreement or the renewal of an existing agreement is substantially the same. The procedure is generally as follows:

(a) A standard form franchise proposal is prepared by the utility and delivered to the municipality in question;

(b) Discussions between the municipality and the utility then occur with respect to the draft franchise agreement;

(c) In the event the municipality agrees to the proposed franchise, the municipality is usually asked to pass a resolution approving the proposed form of agreement;

(d) In the event the resolution is passed, an application must be prepared by the utility and filed with the Board. In each case, the Board opens a docket and issues directions regarding its hearing procedure;

(e) Upon receipt of the directions by the utility, notices of application and hearing must be sent by registered mail and published in a local newspaper;

(f) The hearing is subsequently convened. In most cases the municipality does not have a representative attend the hearing;

(g) After the Board approves the franchise and issues an order, the franchise must be sent back to the municipal council, a by-law must be passed and the agreement signed. A copy of the by-law and agreement must be delivered to the Board.

7. In the event the gas utility and municipality cannot agree on the terms and conditions of a new franchise agreement, the Board has no jurisdiction to impose an agreement, regardless of the wishes of the residents of the municipality.

8. In the case of a renewal of a franchise agreement, if the utility and municipality cannot agree on renewal terms, the Board has jurisdiction under s. 10 of the Act to order that the agreement be extended on such terms and conditions as the Board deems to be in the public interest.

C. PARTICULAR ISSUES

i) Public Service Works on Highways Act
(List of Suggested Concerns - No. 16)

9. The Public Service Works on Highways Act (the "PSWH Act") establishes the basis for apportioning the cost of relocating gas works where such relocations become necessary "in the course of constructing, reconstructing, changing, altering or improving a highway" (s. 2(1)).

10. The PSWH Act provides that in the absence of an agreement between the municipality and the utility the "cost of labour" for the project is to be apportioned equally and all other costs are to be borne by the utility (s. 2(2)).

11. "Cost of labour" is defined in s. 1(b) as follows:

> "Cost of labour" means,
>
> (i) the actual wages paid to all workmen up to and including the foremen for their time actually spent on the work and in travelling to and from the work, and the cost of food, lodging and transportation for such workmen where necessary for the proper carrying out of the work,
>
> (ii) the cost to the operating corporation of contributions related to such wages in respect of workmen's compensation, vacation pay, unemployment insurance, pension or insurance benefits and other similar benefits,
>
> (iii) the cost of using mechanical labour-saving equipment in the work,
>
> (iv) necessary transportation charges for equipment used in the work, and
>
> (v) the cost of explosives;

12. Due to the fact that for such relocations the municipality pays only the cost of labour defined above, most relocations for highway improvements generally result in the municipality paying approximately one-third and the utility two-thirds of the total cost of such relocations.

13. Where the relocation is requested by the municipality but is not for the purposes of highway improvement, the relocation must be paid for entirely by the municipality. As a result, relocations caused by the need to construct a sewer, alter drainage flows, etc. are not covered by the Act.

Reference to:

Consumers' Gas v. City of Toronto, 1941 S.C.R. 584 (Supreme Court of Canada)

Consumers' Gas v. City of Barrie (1980), 31 O.R. (2d) 242 (County Court)

Consumers' Gas v. Town of Aurora, unreported decision of His Honour Judge Conant, January 22, 1951

Consumers' Gas v. Borough of Etobicoke, unreported decision of His Honour Judge Hawkins, April 8, 1982.

14. The practice under the PSWH Act is generally well understood within the various franchise areas of each of the gas utilities. The Act represents the Legislature's policy in this area and also operates as an incentive towards a co-operative approach in utility planning. The Board, as set out above, has approved the application of the Act in cases where it has been the subject of debate during franchise renewal applications. It is our respectful submission that there is no reason to alter this practice and that relocations for highway improvements should be governed by the provisions of the PSWH Act.

ii) System Expansion

(List of Suggested Concerns - No. 2)

15. It is sometimes argued that gas utilities have an obligation to serve all potential customers within their franchise areas. The franchise agreements themselves do not contain any such requirement and the Board has concluded that no such requirement exists.

Reference to:

Reasons for Decision of the OEB, Consumers' Gas rate case, EBRO 369-I (1980). See, in particular, the following extract from p. 44 of the decision:

> The question as to whether a utility has an obligation to serve in its franchise area was dealt with in the Board's Reasons for Decision in EBRO 341-I at pages 28 and 29. From these it is clear that no such obligation exists under the franchise agreements...

16. The Public Utilities Act requires each utility to supply gas to all buildings located along the route of an existing pipeline, provided there is a sufficient supply of gas available to the utility.

Reference to:

Public Utilities Act, R.S.O. 1980, chapter 423, s. 54:

> Where there is a sufficient supply of the public utility, the corporation shall supply all buildings within the municipality situate upon land lying along the line of any supply pipe, wire or rod, upon the request in writing of the owner, occupant or other person in charge of any such building.

17. Generally speaking, it is the policy of the Board to discourage system expansion which is not economically feasible. Otherwise, undue cross-subsidization occurs.

18. The Board is able to control uneconomic expansions in several ways. First, it is the standard practice of the Board, during applications for certificates of public convenience and necessity to require the applicant to prepare an economic feasibility analysis of the proposed expansion. This analysis attempts to project the number of gas customers who will be attracted to the system, the volume of gas which will be consumed by them, the cost of extending gas service to them and the rate of return which can therefore be anticipated as a result of the expansion. If the rate of return projected is unacceptable, the Board will normally discourage the expansion. Alternatively, capital contributions may be required from the proposed customers in order to make the rate of return acceptable.

19. Second, the Board deals with system expansion in the utilities' rate cases under the Ontario Energy Board Act. In these cases it is usually argued, on behalf of large volume customers, that only economically feasible expansions

should occur. Otherwise, they argue that their rates will be unreasonably high if they are forced to subsidize uneconomic expansions.

20. In a number of its decisions, the Board has reiterated its concerns that system expansion should only be undertaken when it is economically feasible to do so.

Reference to:

Reasons for Decision of the OEB, Consumers' Gas rate case, EBRO 341-I, 1976. See, in particular, the following extracts from that decision.

> The Board is of the opinion that section 55 (of the Public Utilities Act) requires a gas utility to supply all buildings located along the route of an existing pipeline if a sufficient supply of gas is available over and above the requirements of existing customers. The section does not, in the Board's opinion, require or support the expansion of the distribution system into new areas. (pp. 28-29)
>
> ...
>
> ...Consumers' should not make extensions to its existing system unless the revenue to be generated by the new business provides a return on the marginal investment at least as great as that allowed by the Board on the rate case with full provision for the incremental costs associated with the new business. This may require capital contributions in order to ensure economic feasibility.

Reasons for Decision of the OEB, Consumers' Gas rate case, EBRO 363-I. See, in particular, the following extract from p. 34 of the decision:

> As a general rule, existing customers should not be called upon to subsidize, through higher rates, premature or other non-sustaining extensions.

Reasons for Decision of the OEB, Consumers' Gas rate case, EBRO 386-I (1982). See, in particular, the extract from p. 39 of the decision:

> The Board notes that large sums continue to be invested in system expansion. The evidence before it should support the economics of the investment and demonstrate that costs are being minimized.

21. In more recent decisions, the Board has stated that on applications for leave to construct or applications for a certificate of public convenience and necessity, economic feasibility should be considered but "it should not be the sole criterion examined, nor the determining factor in the approval process".

Reference to:

Reasons for Decision of the Ontario Energy Board, applications by Northern and Central for leave to construct and certificates for the Town of Valley East and Township of Brighton, EBLO 194 to 197, June 15, 1985.

22. It is respectfully submitted that the policy of the Board with respect to system expansion has been carefully developed and properly balances the competing interests of present customers, who wish to avoid undue cross-subsidization and potential customers who wish to obtain a supply of natural gas. In some respects this policy was recognized by the federal government in its recent Distribution System Expansion Program. Through this program capital contributions were made by the government in order to allow system expansion to areas where, without such grants, it would not be economically feasible to extend gas service.

iii) Franchise Exclusivity and Flexibility
(List of Suggested Concerns - No. 1)

23. As noted above, it is the Board's general policy to allow only one gas utility to have franchise rights within any particular municipality.

24. While this rule should be maintained, exceptions may arise, particularly in the case of large rural municipalities where, although one gas distribution utility may hold the franchise for the municipality, another gas distribution utility in a neighbouring municipality may be able to serve a portion of

the first municipality on a more economically feasible basis. In such a case the Board may feel it would be in the public interest to provide for a limited franchise and certificate of public convenience and necessity to the second utility, particularly where the first utility does not object to such a procedure.

25. Under no circumstances should anyone, other than a gas distribution utility regulated by the Ontario Energy Board be permitted to distribute gas within a municipality or within an unorganized area.

iv) Regional and County Franchises
(List of Suggested Concerns - No. 4)

26. The list of suggested concerns enclosed with the Board's notice of hearing sets out this issue as item number 4. The note to such issue correctly states:

> In most cases, the regional or county franchise relates to a transmission line using the regional or county road or rights of way and is associated with an application for leave to construct. The local municipal franchise relates to the distribution system within the local municipality and is associated with an application for a certificate of public convenience and necessary.

27. In the past, it was generally not considered necessary to submit regional and county franchises to the OEB for approval pursuant to the Act. This was due to the fact, already noted, that such agreements usually relate to transmission facilities and it was considered that the Act applied only to distribution franchises.

28. Recently, some utilities are now submitting regional and county agreements to the Board for approval and in many such instances, the franchise procedure as outlined above is being followed. Since "municipal corporation" is not defined in the Act, this is the most prudent course of action to follow.

29. In our submission, regional and county franchise agreements should be subject to the provisions of the Municipal Franchises Act. The Act could be amended to clarify this requirement.

v) Compliance by Gas Utilities with Municipal By-Laws of General Application

(List of Suggested Concerns - No.7)

30. The characterization of this issue is misleading because, generally speaking, gas utilities voluntarily comply with municipal by-laws of general application. The exceptions to this are where municipalities seek to impose permit fees or other additional financial burdens upon the utilities or seek to pass general by-laws fixing the location of utility plant. In these situations the utilities take the position that the municipality is unilaterally seeking to vary the provisions of the franchise agreement and the utilities refuse to make these payments or to comply with such location restrictions.

31. The Board correctly characterized the first situation concerning permit fees in its decision involving Consumers' Gas and the City of Ottawa - EBA 352, June 10, 1981. In that case the Board stated as follows, at pp. 5 and 6 of its decision.

> The second matter in contention between the parties arises out of Consumers' refusal to accept as part of the terms of the franchise agreement the by-law clause requiring it to be bound by present and future by-laws passed by the City. At the first blush, the clause looks innocent. Consumers' evidence is that it does comply with City by-laws of general application as they apply to it. There was no evidence presented by Ottawa which refuted or put in question that this was so. However, as the hearing unfolded, the real purposes of the by-law clause became clearer. Consumers' reluctance to be bound by existing or future by-laws passed by the City is based on the fact that Ottawa has a by-law, (now By-law 362-78 filed as Exhibit 13) which would require, among other things, that Consumers'

obtain and pay for a road-cut permit each time Consumers' had to do any work on municipal streets. Mr. Sims confirmed that Consumers' complies with this detailed road-cut by-law in all other respects except that it has refused to pay for road-cut permits.

32. The Board then went on to state as follows at page 7 of its decision:

In recent years, the Board has consistently denied municipalities the right to include, as a term and condition of a franchise agreement, a requirement of additional payments from a distributor of natural gas over and above the normal municipal taxes. (See Reasons for Decision E.B.A. 304, re Township of Moore; and E.B.A. 316, re City of Peterborough.) It appears to the Board that in this instance the City is attempting to do indirectly that which the Board has specifically refused to allow to be done directly.

But the ramifications of the by-law clause go beyond just the matter of additional payments to the City. Mr. Atkinson has rightly pointed out that, if the proposed by-law clause is approved, the municipality may effectively amend the franchise agreement in a manner not now foreseen and possibly in a manner which would not be approved by the Board if the specific terms and conditions were put before it for consideration.

In essence the issue now before the Board boils down to the question of which authority - the Board or the municipality - has the jurisdiction to determine for a specific period of time the terms and conditions which should constitute a franchise agreement.

33. The Board therefore concluded as follows, at page 9 of its decision:

Clearly the Board and not the municipality is the final arbiter in determining the terms and conditions of a franchise agreement under the Act. If the Board were to approve the by-law clause proposed by the City, it could unwittingly be abdicating its jurisdiction in favour of the City if at some future time the City chose to enact by-laws which would have the effect of amending the franchise agreement. The Board should not, and indeed cannot, delegate its statutory jurisdiction to determine the terms and conditions of a franchise agreement to another authority.

34. While the municipalities may argue that they ought to be able to insist that the gas utilities pay permit fees at any rate specified by such municipalities, this argument ignores the substantial taxes paid by the utilities to each municipality within their franchise area.

35. The municipal taxes paid by the three major Ontario natural gas distributors in 1984 exceeded $25,000,000.

36. With respect to municipal by-laws which purport to fix the location of utility plant, the Divisional Court has ruled that such by-laws are beyond the jurisidiction of local municipalities.

Reference to:

Union Gas Ltd. and Tecumseh Gas Storage v. Township of Dawn (1977), 15 O.R. (2d) 722 (Divisional Court).

37. As a result, the issue is not whether gas utilities will comply with municipal by-laws of general application. Gas utilities will do so provided that such compliance does not impose obligations upon them inconsistent with the provisions of the franchise agreements or contrary to law.

vi) Other Issues

38. Many of the suggested concerns set out in the attachment to the Board's notice of hearing have already been addressed or will be considered in the section below dealing with our recommendations. However, there are certain specific issues which will be briefly addressed as follows:

(a) Issue 3 - Obligation of the franchised gas utility to purchase and distribute gas produced locally - There should continue to be no obligation upon a gas utility to purchase and distribute gas produced

locally. This should continue to be a matter left to utility management as part of their overall obligation to purchase a secure supply of gas on the most economical basis possible.

(b) Issue 6 - Duration of franchise agreements and uniform expiry dates - We continue to support the position, set out above, that franchise agreements should be for terms of twenty years. We do not see any reason why expiry dates should be uniform.

(c) Issue 9 - Filing with the road authority of plans and specifications of all gas distribution works before and after construction - The provision to municipalities of plans and specifications of pipeline works should be as covered by existing and proposed franchise agreements.

(d) Issue 10 - Safety and other implications of pipelines crossing private property - We do not see any basis for distinguishing safety issues as between the use of pipelines for purposes of private or public property. In both cases existing provincial safety regulations must be complied with. Wherever possible, the utilities utilize public as opposed to private rights-of-way.

(e) Issue 11 - Abandonment of pipe - It is currently dealt with in existing franchise agreements.

(f) Issue 12 - Notice by the gas utility of all emergency excavations - This is covered in our proposed franchise agreement.

(g) Issue 13 - Service for line locations - Gas utilities always give prompt line locates when a ruptured water or sewer pipe has to be replaced.

(h) Issue 14 - Required participation on utility co-ordinating committees - Gas utilities have encouraged the formation of utility co-ordinating committees and have actively participated in such committees.

(i) Issue 15 - Indemnification and liability insurance - The franchise agreements contain a provision as to indemnification and each utility maintains liability insurance.

(j) Issue 17 - Need for separate agreements for each bridge on which a gas pipeline is installed - The existing franchise agreements include "bridge" within the definition of highways. There is no reason for changing this. The use of a bridge may be the most economically feasible and environmentally effective method of extending gas service.

(k) Issues 16, 18, 19 and 21 - Relocation costs and interference with highways - Issues 16 and 18 have, for the most part, been dealt with above.

We recognize that relocations and street cuts are sensitive municipal issues. Wherever possible the utilities work with the municipality and other utilities to avoid future relocations or to carry out street cuts prior to any new municipal road paving programs. Where street cuts are necessary, pursuant to the franchise agreements the utilities have a clear obligation to reinstate to the same condition as prior to the cut. While there will inevitably be tensions in this area, it is our submission that the existing practice works well and should continue.

There is no basis for any municipal involvement in the "manner of construction of utility works under highways and other municipal property". The manner of doing work of this nature is solely the responsibility of the gas utility and is subject to extensive government regulation.

(l) Issue 20 - Location of utility installations under highways and other municipal property - Under the existing and proposed franchise relationship, the approval of works must be obtained from the municipal engineer. For example, the proposed standard form franchise agreement provides that, except in the event of an emergency, the said plans and specifications must be approved by the Engineer before the commencement of work.

The proposed form of franchise agreement also provides that where work is done in an emergency situation, the utilities shall use their best efforts to notify the Engineer immediately of the location and nature of the emergency and the work being done.

(m) Issue 23 - Capital contributions - The requirement of obtaining a capital contribution in order to make an extension economically feasible is an issue between the gas utilities and their prospective customers. It is not a matter which should form any part of a franchise agreement between a municipality and the utility.

(n) Issue 24 - Failure to comply with the terms of franchise agreements - The failure of either side to comply with the provisions of the franchise agreement would give rise to all of the usual remedies in a breach of contract action.

D. RECOMMENDATIONS

39. It is our respectful submission that the policy of the Board in approving the terms and conditions of franchise agreements has reached the point where a standard form franchise agreement should be adopted. Alternatively, the Act should be amended so that the standard terms and conditions of the franchise relationship could be specified by the statute itself.

40. The present process has served all interested parties very well in the past but some changes are necessary now. In the future, there will probably be relatively few new franchise agreements proposed but there are hundreds of franchises which will have to be renewed as they expire. This is an expensive and time consuming process and there is a certain unreality to it in that few, if any, changes to the standard franchise agreement can be negotiated due to the Board's policy in favour of standardization and the desire on the part of the utilities to treat all municipalities in their franchise territory the same.

41. There is no need for negotiation if the standard form agreement is considered by the Board to be a fair compromise and balance between the interests of the municipality, the utility and the public of Ontario. There is simply no room for the argument that any one particular municipality deserves a "better deal" than any other municipality within the utilities' franchise area.

42. The expense to the gas utilities of franchise renewals is high and, of course, is eventually paid for by gas company customers. In addition to the time involved on the part of company officials, there are legal expenses, the expenses of advertising the Board's notices of hearing and the expense of the Board's hearing costs. It would certainly be in the best interests of the public to avoid or minimize these costs wherever possible.

In an effort to seek agreement on a standard form franchise agreement, Consumers' Gas, Union Gas and Northern and Central Gas have prepared the draft franchise agreement which is attached as Schedule "A" to this brief. Each of these utilities has approved Schedule "A".

44. It is our submission that Schedule "A" should become the legislated franchise agreement to come into effect for all new franchise agreements and all future renewals. Further, the Board should have jurisdiction to impose a franchise relationship wherever the Board concludes that such a relationship would be in the public interest.

45. Finally, the Act should be amended to make it clear that it applies to regional and county franchise agreements.

October 18, 1985
Submitted by:

THE CONSUMERS' GAS COMPANY LTD.
by its counsel
AIRD & BERLIS
145 King Street West, 15th Floor
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M5H 2J3

Attention: Mr. P.Y. Atkinson

UNION GAS LIMITED
50 Keil Drive North
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N7M 5M1

Attention: Mr. J.B. Jolley, Q.C.
Vice President and General Counsel

NORTHERN AND CENTRAL GAS
CORPORATION LIMITED
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M2J 1R1

Attention: Mr. P.F. Scully,
General Counsel and Corporate Secretary

ONTARIO NATURAL GAS ASSOCIATION
77 Bloor Street West, Suite 1104
Toronto, Ontario
M5S 1M2

Attention: Mr. Paul E. Pinnington,
Managing Director

DRAFT STANDARD FORM FRANCHISE AGREEMENT

THIS AGREEMENT made this day of , 19

B E T W E E N :

hereinafter called the "Corporation"

- and -

hereinafter called the "Gas Company"

WHEREAS the Gas Company desires to distribute and sell gas in the Municipality upon the terms and conditions of this Agreement;

AND WHEREAS by by-law passed by the Council of the Corporation (the "By-law"), the and Clerk have been authorized and directed to execute this Agreement on behalf of the Corporation;

THEREFORE the Corporation and the Gas Company agree as follows:

1. In this Agreement:

(a) "Engineer" means the person designated by the Corporation for the purposes of this Agreement, or failing such designation, or in the absence from duty of such person, the senior employee of the Corporation charged with the administration of public works and highways in the Municipality;

(b) "gas" includes natural gas, manufactured gas, synthetic gas, liquefied petroleum gas or propane-air gas, or a mixture of any of them, but does not include a liquefied petroleum gas that is distributed by means other than a pipeline;

(c) "highway" includes all common and public highways, any bridge, viaduct or structure forming part of a highway, and any public square, road allowance or sidewalk;

(d) "Municipality" means the territorial limits of the Corporation on the date when this Agreement takes effect, and any territory which may thereafter be brought within the jurisdiction of the Corporation;

(e) "system" includes such mains, plants, pipes, conduits, services, valves, regulators, curb boxes, stations, drips or such other equipment as the Gas Company may require or deem desirable for the supply, transmission and distribution of gas in or through the Municipality.

2. The consent of the Corporation is hereby given and granted to the Gas Company to supply gas in the Municipality to the Corporation and to the inhabitants of the Municipality, and to enter upon all highways now or at any time hereinafter under the jurisdiction of the Corporation and to lay, construct, maintain, replace, remove, operate and repair a system for the supply, distribution and transmission of gas in and through the Municipality.

3. The rights hereby given and granted shall be for a term of twenty years from and after the final passing of the By-law.

4. Before beginning construction of or any extension or change to the system (except service laterals), the Gas Company shall file with the Engineer a plan showing the highways in which it proposes to lay its system and the particular parts thereof it proposes to occupy together with written specifications of the materials to be used and their dimensions. Except in the event of an emergency, the location of the work as shown on the said plan must be approved by the Engineer before the commencement of work. The Engineer's approval shall not be withheld unreasonably. In the event of an emergency, where approval is normally

quired, the Gas Company will proceed with the work and shall use its best efforts to immediately notify the Engineer of the location and nature of the emergency and the work being done.

5. The Gas Company shall well and sufficiently restore, to the reasonable satisfaction of the Engineer, all highways which it may excavate or interfere with in the course of laying, constructing, repairing or removing its gas system, and shall make good any settling or subsidence thereafter caused by such excavation or interference. If the Gas Company fails at any time to do any work required by this paragraph within a reasonable period of time, the Corporation may have such work done and the Gas Company shall, on demand, pay any reasonable account therefor as certified by the Engineer.

6. The Gas Company shall at all times indemnify the Corporation from and against all loss, damage and injury and expense to which the Corporation may be put by reason of any damage or injury to persons or property resulting from the imprudence, neglect or want of skill of the employees or agents of the Gas Company in connection with the construction, repair, maintenance or operation by the Gas Company of its system in the Municipality.

7. The Corporation agrees, in the event of the sale or closing of any highway, to give the Gas Company reasonable notice of such sale or closing and to provide the Gas Company with easements over that part of the highway sold or closed sufficient to allow the Gas Company to preserve any part of the system in its then existing location, and to enter upon the highway to maintain and repair such part of its system. If it is impractical to grant such an easement, the Corporation agrees, at its cost, to acquire for the Gas Company an alternate easement and, in any event, to pay the cost of new facilities for such system.

8. The Corporation will not knowingly build or permit anyone to build any structure over or encasing any part of the system.

9. Upon the expiration of this Agreement or any renewal thereof, the Gas Company shall deactivate its system in the Municipality. Thereafter, the Gas Company shall have the right, but nothing herein contained shall require it, to remove its system. If the Gas Company fails to remove its system and the Corporation at any time after a lapse of one year from the expiration of this Agreement requires the removal of all or any of the system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in any highway, the Corporation may remove and dispose of so much of the system as the Corporation may require for such purposes and neither party shall have recourse against the other for any loss, cost, expense or damage occasioned thereby.

10. Notices may be sufficiently given if mailed by prepaid registered post to the Gas Company at its head office or to the Clerk of the Corporation at its municipal offices, as the case may be.

11. This Agreement shall extend to, benefit and bind the parties thereto, their successors and assigns, respectively.

IN WITNESS WHEREOF the parties hereto have duly executed these presents with effect from the date first above written.

THE CORPORATION OF

_____

_____

Clerk

_____

_____

APPENDIX C

Franchise Agreement Proposed by the Southwestern Ontario Municipal Committee

THIS AGREEMENT made this day of , 19

BETWEEN:

THE CORPORATION OF THE

Hereinafter called the "Corporation"

OF THE FIRST PART

- and -

UNION GAS LIMITED, a corporation incorporated under the laws of the Province of Ontario and having its Head Office in the City of Chatham,

Hereinafter called the "Gas Company"

OF THE SECOND PART

WHEREAS the Gas Company desires to distribute and sell gas in the Municipality upon the terms and conditions hereinafter set forth;

AND WHEREAS by By-law No. passed the day of 19 by the Council of the Corporation (the "By-law"), the Corporation agreed to these presents;

IN CONSIDERATION of the undertakings and agreement hereinafter expressed and upon the terms hereinafter set forth, the Corporation and the Gas Company mutually covenant and agree as follows:

1. In this Agreement:

(a) "Board" means the Ontario Energy Board or its successors;

(b) "Gas" means natural gas, substitute natural gas, synthetic natural gas, manufactured gas, propane-air gas, or any mixture of them;

(c) "Gas system" means such mains, pipes, conduits, services, valves, regulators, curb boxes, stations and drips (with other necessary or incidental appurtenances, arrangements for cathodic protection, structures, apparatus, equipment, appliances and works) situate in the Municipality as the Gas Company may from time to time require or deem desirable for the supply, transmission and distribution of gas in or through the Municipality;

(d) "Highway" means all common and public highways and shall include any bridge, viaduct or structure forming part of a highway, and any public square, road allowance or sidewalk and shall include not only the travelled portion of such highway, but also ditches, driveways, sidewalks, and sodded areas forming part of the road allowance now or at any time during the term hereof under the jurisdiction of the Corporation;

(e) "Municipality" means and includes the territorial limits under and subject to the jurisdiction of the

Corporation on the date when this Agreement takes effect;

(f) "Engineer/Road Superintendent" means most senior individual employed by the Corporation with responsibilities for highways within the Municipality, such as the City Engineer, the County Engineer, the Commissioner of Works or the Road Superintendent, or the person designated by such senior employee or such other person as may from time to time be designated by the Council of the Corporation.

2. The consent, permission and authority of the Corporation are hereby given and granted to the Gas Company to supply gas in the Municipality to the Corporation and to the inhabitants of the Municipality.

3. The consent, permission and authority of the Corporation is hereby given and granted to the Gas Company to enter upon all highways now or at any time hereafter under the jurisdiction of the Corporation to lay, construct, maintain, replace, remove, operate and repair a gas system for the supply, distribution and transmission of gas in and through the Municipality. The consent, permission and authority hereby given extends only to the right-of-way of highways and the Corporation need not provide any other right-of-way for the gas system.

4. The rights hereby given and granted shall be for a term ending December 31st, 1999.

5. The consent, permission and authority hereby given and granted shall be subject to the right of free use of all highways and road allowances by all persons entitled to it, and subject to the rights of the owners of the property adjoining highways of full access to and from the highways and road allowances and of constructing crossings and approaches from their properties, and subject to the rights and privileges that the Corporation may grant to other persons on highways and road allowances, all of which rights are expressly reserved.

6. Save as hereinafter provided, the consent, permission and authority hereby given and granted to the Gas Company to enter upon all highways under the jurisdiction of the Corporation shall be at all times under the direction and control of and with the approval of the Engineer/Road Superintendent. All work done under this Agreement is subject to the approval and direction of the Engineer/Road Superintendent who has full power and authority to give directions and orders that he considers in the best interest of the Corporation, and the Gas Company will follow the directions and orders that the Engineer/Road Superintendent gives.

7. Before commencing any work the Gas Company will deposit with the Engineer/Road Superintendent a plan, drawn to scale, showing the highway or road where the work is proposed and the location, including its depth, of the proposed gas system or part thereof, together with specifications relating to the proposed gas system or part thereof. For the purposes of this paragraph, works of the Gas Company include not only original installations, including lateral service lines, but also any and all repair or relocation work or additions to or replacements of any part of the gas system.

8. The Engineer/Road Superintendent shall review and consider the plans and specifications submitted by the Gas Company and may not approve the work or may approve the work with such, if any, modifications to the plans and specifications and upon such terms and conditions as he considers in the best interest of the Corporation. No work, including any excavation, opening or other work which may disturb or interfere with the road or highway or its travelled surface, shall be undertaken by the Gas Company until the plans and specification therefor have been approved in writing by the Engineer/Road Superintendent and then the work shall be undertaken and completed in accordance with the approved plans and specifications with

modifications, if any, as may have been made by the Engineer/Road Superintendent and in accordance with any terms and conditions that may have been included by the Engineer/Road Superintendent.

9. In connection with work undertaken by the Gas Company,

(a) The Gas Company will not cut, trim or interfere with any trees on the road allowance without the specific written approval of the Engineer/Road Superintendent;

(b) Wherever a gas line is carried across any open drainage ditch, it shall be carried either wholly under the bottom thereof or above the top thereof, so as not to interfere with the carrying capacity of such ditch;

(c) In general, all crossings of the travelled portion of roads shall be constructed by boring and jacking methods;

(d) In placing its gas system, the Gas Company shall use those parts of the road allowance adjacent to the fence lines or other boundaries of the road allowance.

10. Notwithstanding the foregoing, in the event of an emergency involving the gas system, the Gas Company shall do all that is necessary and desirable to control the emergency, including such excavation, opening and other work in and to the highways in the Municipality as may be required for the purpose. If traffic is or is likely to be affected by the emergency, the Gas Company shall notify the responsible police force immediately upon becoming aware of the situation. As soon as it is convenient after the emergency is discovered, the Gas Company shall advise the Engineer/Road Superintendent by telephone and shall keep him advised throughout the emergency. The Gas Company shall re-imburse the Corporation for any and all costs incurred in connection with the emergency. Forthwith after it has become necessary of the Gas Company to exercise its emergency powers under this paragraph, the Gas Company shall make a written report to the Engineer/Road Superintendent of what work was done and the further work to be undertaken, if any, and seek the approval of the Engineer/Road Superintendent for the further work as contemplated in the preceding paragraphs.

11. Notwithstanding the requirements of the preceding paragraphs regarding the approvals of the Engineer/Road Superintendent and his control of work by the Gas Company in

highways or roads, the parties recognize that in the event of a disagreement as to the approval or non-approval of plans or as to the terms and conditions upon which they may be approved, either party may apply to the Board. It is recognized that the Board may authorize the works of the Gas Company in the highway on such terms and conditions as the Board may impose; and it is also recognized that the Board has the authority to authorize the acquisition of an easement over private property if such an easement is more appropriate.

12. The Gas Company shall well and sufficiently restore, to the reasonable satisfaction of the Engineer/Road Superintendent, all highways which it may excavate or interfere with in the course of laying, constructing, repairing or removing its gas system, and shall make good any settling or subsidence thereafter caused by such excavation or interference. Such restoration shall be to the same standard, as nearly as may be possible, as was in existence on the highway when the excavation or interference commenced. If the Gas Company fails at any time to do any work required by this paragraph within a reasonable time, the Corporation may do or may cause such work to be done and the Gas Company shall on demand pay any reasonable account therefor as certified by the Engineer/Road Superintendent.

13. In the placing, maintaining, operating and repairing the gas system or any part thereof the Gas Company will use care and diligence to ensure that there will be no unnecessary interference with any highway or any drain, sewer, main, ditch, culvert, bridge or any other municipal works or improvements. If any additional municipal works or improvements are made necessary by reason of any work done or omitted to be done by the Gas Company they will be constructed and maintained by the Gas Company at its own expense during the term of this Agreement.

14. The Gas Company will indemnify and save harmless the Corporation from and against all claims, liabilities, loss, costs, damages or other expenses of every kind that the Corporation may incur or suffer as a consequence of or in connection with the placing, maintenance, operation or repair of the gas system or any part thereof.

15. If either party is prevented from carrying out its obligations under this Agreement by reason of any cause beyond its control, such party shall be relieved from such obligations while such disability continues; provided, however, that this Paragraph ~~10~~ shall not relieve the Gas Company from any of its obligations to indemnify the Corporation as contemplated in the preceding paragraph, and

provided further that nothing herein shall require either party to settle any labour or similar dispute unless it is in the best interests of such party to do so.

16. The Corporation agrees, in the event of closing of any highway, to give the Gas Company reasonable notice of such closing and to provide, if it is practical, the Gas Company with easements over that part of the highway closed sufficient to allow the Gas Company to preserve any part of the gas system in its then existing location, and to enter upon the closed highway to maintain and repair such part of the gas system.

17. If the Corporation, in pursuance of its statutory powers, decides to alter the construction of any highway or of any municipal works or improvements, or to construct, lay down, or establish any municipal works or improvements, and if the location of any part of the gas system interferes with the location of construction of such alteration, work or improvement, in a substantial manner, then upon receipt of reasonable notice in writing from the Corporation specifying the point where such part of the gas system interferes with the plans of the Corporation the Gas Company shall alter or relocate such part of the gas system at the point specified to a location designated by the

Engineer/Road Superintendent within a reasonable period of time and, in default of the Gas Company complying with the notice, the Corporation may remove, relocate or alter the part of the gas system described in the notice and recover the cost of so doing from the Gas Company regardless of the provisions hereafter concerning the party responsible for the costs of the alteration or relocation. If any part of the gas system is relocated in accordance with this paragraph within five years of the date when approval was given by the Corporation of the location of such part of the gas system, the Corporation shall reimburse the Gas Company for the cost of the alteration or relocation, but if the notice specifying the alteration or relocation is given after the said five year period, the Gas Company shall alter or relocate, at its expense, such part of the gas system at the point specified to the location designated by the Corporation.

18. At any time within two (2) years prior to the termination of this Franchise Agreement, either party to this Agreement may by notice given to the other request that the other enter into negotiations for new terms and conditions. Until terms of a new franchise agreement have been settled and approved by the Board, the terms and

conditions of this Agreement shall continue in full force and effect notwithstanding the termination date previously mentioned in this Agreement.

19. Upon the expiration of this franchise or any renewal thereof the Gas Company shall have the right, but nothing herein contained shall require it, to remove its gas system laid in the highways. Upon the expiration of this franchise or any renewal thereof the Gas Company shall deactivate the gas system in the Municipality. If the Gas Company should leave its gas system in the highways and the Corporation at any time after a lapse of one year from termination requires the removal of all or any of the gas system for the purpose of altering or improving the highway or in order to facilitate the construction of utility or other works in any highway the Corporation may remove and dispose of so much of the gas system as the Corporation may require for such purposes and neither party shall have recourse against the other for any loss, cost, expense or damages occasioned thereby.

20. This Agreement and the respective rights and obligations hereunto of the parties hereto are hereby declared to be subject to the provisions of all regulating statutes and to all orders and regulations made thereunder and from time to time remaining in effect.

21. Any notice to be given under any of the provisions hereof may be effectually given to the Corporation by delivering the same to the Clerk of the Corporation or by sending the same by registered mail, postage prepaid, addressed to the attention of the Clerk of the Corporation, and to the Gas Company by delivering the same to its head office, or by sending the same to its head office by registered mail, postage prepaid, addressed to the attention of the Corporate Secretary. If any notice is sent by mail, the same shall be deemed to have been given on the fourth day next following the posting thereof, provided that in the event of a disruption in postal service, by reason of a strike or work slowdown or other element of labour dispute, either at the point of mailing or the point of delivery, any notice sent by mail shall be deemed to have been given on the day when it is actually received by the addressee of such notice.

22. The Gas Company may not assign any part of this Agreement unless the assignee covenants in favour of the Corporation to assume full responsibility for this Agreement and such assignment shall be effective only upon the delivery of such Assumption Agreement to the Corporation.

23. Other or special conditions, if applicable:

_____

_____

_____

24. This Agreement shall extend to, benefit and bind the parties thereto, their successors and assigns, respectively.

IN WITNESS WHEREOF the parties hereto have duly executed these presents with effect from the day first above written.

THE CORPORATION OF THE

Per:_____

Per:_____

UNION GAS LIMITED

Per:_____

Per:_____

APPENDIX D

Municipal Franchises Act

CHAPTER 309

Municipal Franchises Act

Interpretation

1. In this Act,

(*a*) "franchise" includes any right or privilege to which this Act applies;

(*b*) "gas" means natural gas, manufactured gas or any liquefied petroleum gas, and includes any mixture of natural gas, manufactured gas or liquefied petroleum gas, but does not include a liquefied petroleum gas that is distributed by a means other than a pipe line;

(*c*) "highway" includes a street and a lane;

(*d*) "public utility" includes waterworks, natural and other gas works, electric light, heat or power works, steam heating works, and distributing works of every kind. R.S.O. 1970, c. 289, s. 1.

Assent to contracts for supply of electric power

2. A municipal corporation shall not enter into or renew any contract for the supply of electrical power or energy to the corporation or to the inhabitants thereof until a by-law setting forth the terms and conditions of the contract has been first submitted to, and has received the assent of the municipal electors in the manner provided by the *Municipal Act*. R.S.O. 1970, c. 289, s. 2.

R.S.O. 1980, c. 302

Where assent required

3.—(1) A municipal corporation shall not grant to any person nor shall any person acquire the right to use or occupy any of the highways of the municipality except as provided in the *Municipal Act*, or to construct or operate any part of a transportation system or public utility in the municipality, or to supply to the corporation or to the inhabitants of the municipality or any of them, gas, steam or electric light, heat or power, unless a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted or acquired has been assented to by the municipal electors. R.S.O. 1970, c. 289, s. 3 (1).

Ontario Hydro exempt

(2) Subsection (1) does not apply to Ontario Hydro. R.S.O. 1970, c. 289, s. 3 (2); 1973, c. 57, s. 19.

In police villages

(3) Where the trustees of a police village request the council of the township in which the village is situate to grant any such right with respect to the village, or where the board of

trustees of a police village desire to grant such a right, it is a sufficient compliance with subsection (1) if the by-law receives the assent of the municipal electors of the village.

Renewals and extensions

(4) This section applies to the renewal or extension of an existing franchise. R.S.O. 1970, c. 289, s. 3 (3, 4).

Consent of council of city, when required

4.—(1) The council of a local municipality shall not grant a franchise upon any highway of the municipality within a radius of eight kilometres of the boundary of any city without notice in writing to the council of the city, and if the council of the city, within four weeks after the receipt of the notice, gives a notice in writing to the council of the local municipality that it objects to the granting of the franchise the approval of the Ontario Municipal Board shall be obtained, and if the council of the city does not give such notice within such time, it shall be deemed to have no objection and the council of the local municipality may grant the franchise with the assent of the municipal electors of the local municipality as provided by section 3. R.S.O. 1970, c. 289, s. 4 (1); 1978, c. 87, s. 41.

Gas franchises

(2) Where the franchise referred to in subsection (1) is a gas franchise, the Ontario Energy Board shall take the place of the Ontario Municipal Board for the purposes of this section. R.S.O. 1970, c. 289, s. 4 (2).

Extension of certain existing works not to be made without by-law

5.—(1) Where a by-law granting a franchise or right in respect of any of the works or services mentioned in subsection 3 (1), that has not been assented to by the municipal electors as provided by that subsection, was passed before the 16th day of April, 1912, no extension of or addition to the works or services constructed, established or operated under the authority of such by-law as they existed and were in operation at that date shall be made except under the authority of a by-law hereafter passed with the assent of the municipal electors, as provided by subsection 3 (1) or (3), and such consent is necessary, notwithstanding that such last-mentioned by-law is expressly limited in its operation to a period not exceeding one year.

Exceptions as to franchises granted before 16th March, 1909

(2) Subsection (1) does not apply to a franchise or right granted by or under the authority of any general or special Act of the Legislature before the 16th day of March, 1909, but no such franchise or right shall be renewed, nor shall the term thereof be extended by a municipal corporation except by by-law passed with the assent of the municipal electors as provided in section 3. R.S.O. 1970, c. 289, s. 5.

Exceptions:

6.—(1) Subject to section 2 and except as therein provided and except where otherwise expressly provided, this Act does not apply to a by-law,

(*a*) granting the right of passing through the municipality for the purpose of continuing a line, work or system that is intended to be operated in or for the benefit of another municipality and is not used or operated in the municipality for any other purpose except that of supplying gas in a township to persons whose land abuts on a highway along or across which the same is carried or conveyed, or to persons whose land lies within such limits as the council by by-law passed from time to time determines should be supplied with any of such services; works originating in another municipality

(*b*) granting the right of passing through the municipality with a line to transmit gas not intended to be distributed from such line in the municipality or only intended to be distributed from such line in the municipality to a person engaged in the transmission or distribution of gas; gas transmission lines

(*c*) conferring the right to construct, use and operate works required for the transmission of oil, gas or water not intended for sale or use in the municipality; or oil, gas and waterworks

(*d*) that is expressly limited in its operation to a period not exceeding three years and is approved by the Ontario Municipal Board. limited to three years

(2) Where the by-law within the meaning of clause (1) (*d*) is a gas franchise by-law, the Ontario Energy Board shall take the place of the Ontario Municipal Board for the purposes of the clause. R.S.O. 1970, c. 289, s. 6. Gas franchises

7.—(1) Where a by-law to which clause 6 (1) (*d*) applies is passed, that clause does not apply to any subsequent by-law in respect of the same works or any part of them or to an extension of or addition to them, although the subsequent by-law is expressly limited in its operation to a period not exceeding three years, and no such subsequent by-law has any force or effect unless it is assented to by the municipal electors as provided by subsection 3 (1). Extension of franchise

(2) Notwithstanding subsection (1), clause 6 (1) (*d*) applies to a subsequent by-law or by-laws in respect of the same works or any part of them or to an extension of or addition to them if the period of operation of such subsequent by-law or by-laws is expressly limited so that the total period of operation of the original by-law and the subsequent by-law or by-laws does not exceed three years. R.S.O. 1970, c. 289, s. 7. Idem

Approval for construction of gas works or supply of gas in municipality

8.—(1) Notwithstanding any other provision in this Act or any other general or special Act, no person shall construct any works to supply or supply,

(*a*) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas; or

(*b*) gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas and in which gas was then being supplied,

without the approval of the Ontario Energy Board, and such approval shall not be given unless public convenience and necessity appear to require that such approval be given.

Form of approval

(2) The approval of the Ontario Energy Board shall be in the form of a certificate.

Jurisdiction of Energy Board

(3) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and to grant or refuse to grant any certificate of public convenience and necessity, but no such certificate shall be granted or refused until after the Board has held a public hearing to deal with the matter upon application made to it therefor, and of which hearing such notice shall be given to such persons and municipalities as the Board may consider to be interested or affected and otherwise as the Board may direct. R.S.O. 1970, c. 289, s. 8.

Gas franchise by-law to be approved by Energy Board

9.—(1) No by-law granting,

(*a*) the right to construct or operate works for the distribution of gas;

(*b*) the right to supply gas to a municipal corporation or to the inhabitants of a municipality;

(*c*) the right to extend or add to the works mentioned in clause (*a*) or the services mentioned in clause (*b*); or

(*d*) a renewal of or an extension of the term of any right mentioned in clause (*a*) or (*b*),

shall be submitted to the municipal electors for their assent unless the terms and conditions upon which and the period for which such right is to be granted, renewed or extended have first been approved by the Ontario Energy Board.

Jurisdiction of Energy Board

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and may give or refuse its approval.

Hearing to be held

(3) The Ontario Energy Board shall not make an order granting its approval under this section until after the Board has held a public hearing to deal with the matter upon application therefor and of which hearing such notice shall be given in such manner and to such persons and municipalities as the Board may direct.

Electors' assent may be dispensed with

(4) The Board, after holding a public hearing upon such notice as the Board may direct and if satisfied that the assent of the municipal electors can properly under all the circumstances be dispensed with, may in any order made under this section declare and direct that the assent of the electors is not necessary. R.S.O. 1970, c. 289, s. 9.

Application to Energy Board for renewal, etc., of gas franchise

10.—(1) Where the term of a right referred to in clause 6 (1) (*a*), (*b*) or (*c*) that is related to gas or of a right to operate works for the distribution of gas or to supply gas to a municipal corporation or to the inhabitants of a municipality has expired or will expire within one year, either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right. R.S.O. 1970, c. 289, s. 10 (1); 1974, c. 59, s. 1.

Powers of Energy Board

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

Hearing

(3) The Board shall not make an order under subsection (2) until after the Board has held a public hearing upon application therefor and of which hearing such notice shall be given in such manner and to such persons and municipalities as the Board may direct.

Interim order

(4) Notwithstanding subsection (3), where an application has been made under subsection (1) and the term of the right has expired or is likely to expire before the Board disposes of the application, the Board, on the written request of the applicant, and without holding a public hearing, may make such order as may be necessary to continue the right until an order is made under subsection (2). R.S.O. 1970, c. 289, s. 10 (2-4).

Order deemed by-law assented to by electors

(5) An order of the Board heretofore or hereafter made under subsection (2) renewing or extending the term of the right or an

order of the Board under subsection (4) shall be deemed to be a valid by-law of the municipality concerned assented to by the municipal electors for the purposes of this Act and of section 57 of the *Public Utilities Act*. 1979, c. 83, s. 1.

R.S.O. 1980, c. 420

Right expired before commencement of section

(6) An application may not be made under this section in respect of a right that has expired before the 2nd day of December, 1969. R.S.O. 1970, c. 289, s. 10 (6).

Appeal

11. With leave of a judge thereof, an appeal lies upon any question of law or fact to the Divisional Court from any certificate granted under section 8 or any order made under section 9 or 10 if application for leave to appeal is made within fifteen days from the date of the certificate or order, as the case may be, and the rules of practice of the Supreme Court apply to any such appeal. R.S.O. 1970, c. 289, s. 11.

APPENDIX E

Exhibit 29.6 - Example of as-built drawing
provided by Union Gas Limited

UNION GAS LIMITED

*0228 1984/02

LINE CHANGE OR EXTENSION REPORTS

Region: WESTERN	System: WOLFE WELL LINE	Classification: DISTRIBUTION	Date Commenced: 84 - 04 - 01 / Date Completed: 84 - 07 - 13 / Sheet No.: 1 / Total No.: 1
Division: CHATHAM	Line:		
Branch: CHATHAM	Municipality: HARWICH TOWNSHIP	Job No.: 3-545662 & 645662-33	C - 15

No.	Street	Side	From	To	Pressure	Pipe Size NPS	Pipe Length m	Pipe Specification	Wall Thickness mm	Type of Joint	Pipe Depth m	Soil	Coating Specification
1	County Road 18	S.	In Lot 9	Easterly	I.P.	2	42.8	SDR11 TR418	5.49	Fused	1.0	-	Yellow Jacket
2	County Road 18	S.	In Lot 9	Easterly	I.P.	2	18.4	Cat. 1 Gr. 173	3.91	Welded	1.0	-	Yellow Jacket

Material Recovered

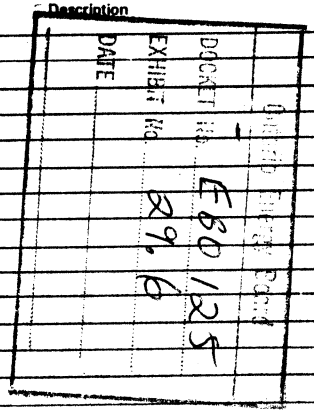
Size NPS	Length m	Job No. & Fiscal Year-End Pipe Laid

Material Abandoned

Size NPS	Length m	Job No. & Fiscal Year-End Pipe Laid
2	60.8	54 - 363 (1955)

Material - Valves, Couplings, Fittings, Etc.

No.	Stock No.	Quantity m	Size NPS	Description	No.	Stock No.	Quantity m	Size NPS	Description
1	01002608	18.3	2	Pipe Yellow Jacket					
2	01104005	41.8	2	Pipe TR-418					
3	01100252	7.0	4	Pipe M - 8000					
4	NIS	2	2	CAPS					
5	01043490	4	2	90 deg. Elbow					
6	01130254	1		20/60 Hynode					
7	01104156	4	2	Trans. Fitting					
8	01103168	4	2	CPLG. Tr-418					
9	01070404	1	2	Plasti - Lok Dr.					
10	NIS	43.0		Tracer Wire					



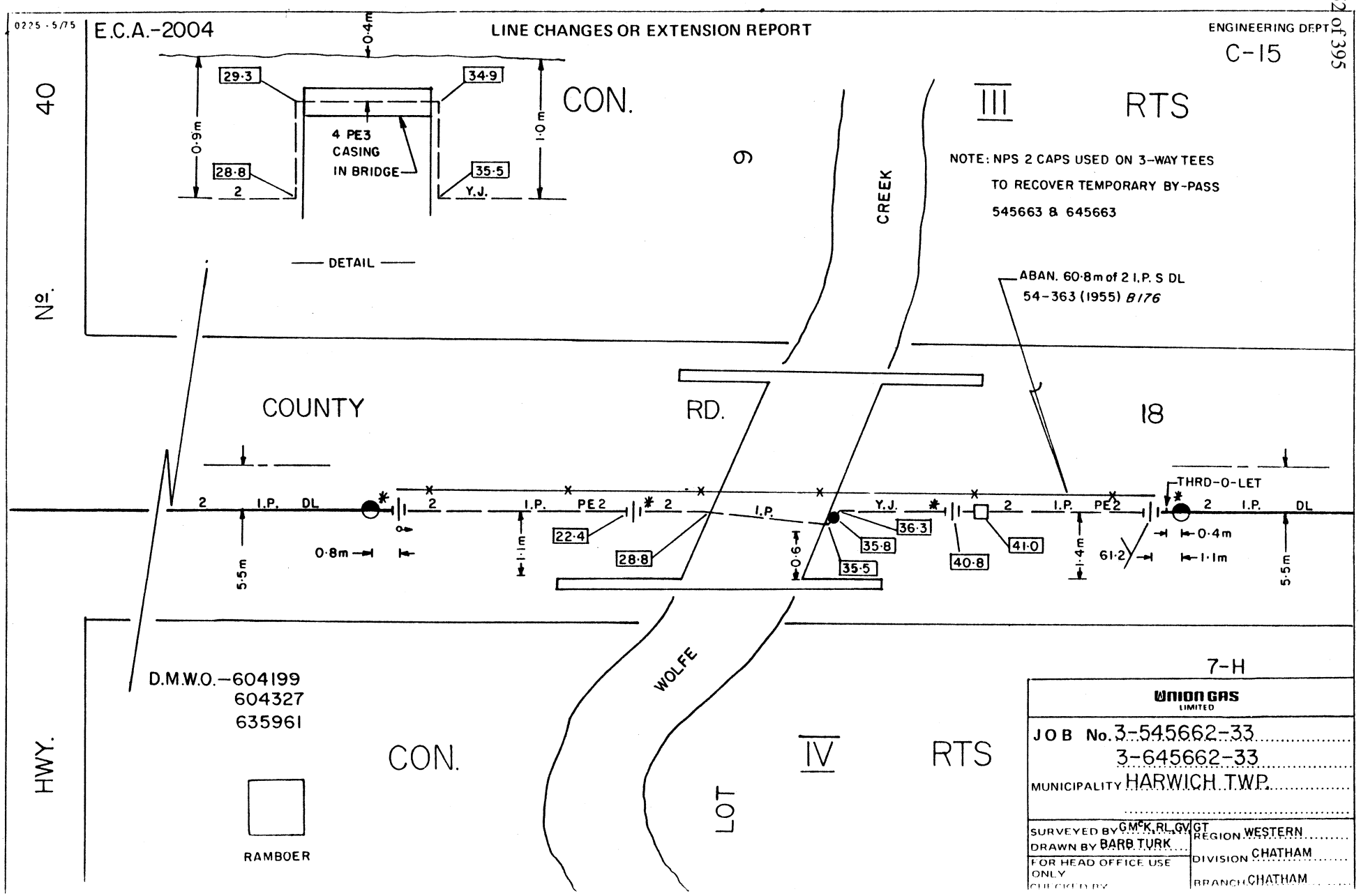
0225 - 5/75

E.C.A.-2004

LINE CHANGES OR EXTENSION REPORT

ENGINEERING DEPT.

C-15



7-H

UNION GAS LIMITED

JOB No. 3-545662-33
3-645662-33

MUNICIPALITY HARWICH TWP.

SURVEYED BY GMCK, RL, GV, GT

DRAWN BY BARB TURK

REGION WESTERN

DIVISION CHATHAM

FOR HEAD OFFICE USE ONLY

CHECKED BY

BRANCH CHATHAM

APPENDIX F

Maps

1) The Province of Ontario - counties, districts, regional and district municipalities

2) Gas Distribution Systems

   (a) Consumers'
   (b) Northern
   (c) Union

3) Gas Franchise Areas *

   (a) Consumers'
   (b) Northern
   (c) Union

* Located in pocket.

TAB 4

Français

Municipal Franchises Act

R.S.O. 1990, CHAPTER M.55

Consolidation Period: From August 1, 2003 to the e-Laws currency date.

Last amendment: 2003, c. 3, s. 1.

Legislative History: 1996, c. 1, Sched. M, s. 25; 1998, c. 15, Sched. E, s. 21; 1999, c. 14, Sched. F, s. 7; 2001, c. 25, s. 480; 2002, c. 17, Sched. F, Table; 2003, c. 3, s. 1.

Definitions

1 In this Act,

"franchise" includes any right or privilege to which this Act applies; ("concession")

"gas" means natural gas, manufactured gas or any liquefied petroleum gas, and includes any mixture of natural gas, manufactured gas or liquefied petroleum gas, but does not include a liquefied petroleum gas that is distributed by a means other than a pipe line; ("gaz")

"highway" includes a street and a lane; ("voie publique")

"public utility" means natural and other gas works. ("service public") R.S.O. 1990, c. M.55, s. 1; 1998, c. 15, Sched. E, s. 21 (1); 2001, c. 25, s. 480 (1).

Section Amendments with date in force (d/m/y)

1998, c. 15, Sched. E, s. 21 (1) - 01/04/1999

2001, c. 25, s. 480 (1) - 01/01/2003

1.1 REPEALED: 2001, c. 25, s. 480 (2).

Section Amendments with date in force (d/m/y)

1996, c. 1, Sched. M, s. 25 - 30/01/1996

2001, c. 25, s. 480 (2) - 01/01/2003

2 REPEALED: 1999, c. 14, Sched. F, s. 7.

Section Amendments with date in force (d/m/y)

1999, c. 14, Sched. F, s. 7 - 22/12/1999

Restriction

3 (1) A municipal corporation shall not grant to any person nor shall any person acquire the right to use or occupy any of the highways of the municipality for a public utility or to construct or operate any part of a public utility in the municipality unless a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted or acquired has been assented to by the municipal electors. 2001, c. 25, s. 480 (3).

(2) REPEALED: 1998, c. 15, Sched. E, s. 21 (3).

(3), (4) REPEALED: 2001, c. 25, s. 480 (4).

Section Amendments with date in force (d/m/y)

1998, c. 15, Sched. E, s. 21 (2, 3) - 01/04/1999

2001, c. 25, s. 480 (3, 4) - 01/01/2003

Consent of council of city, when required

4 (1) The council of a local municipality shall not grant a franchise upon any highway of the municipality within a radius of eight kilometres of the boundary of any city without notice in writing to the council of the city, and if the council of the city, within four weeks after the receipt of the notice, gives a notice in writing to the council of the local municipality that it objects to the granting of the franchise the approval of the Ontario Energy Board shall be obtained, and if the council of the city does not give such notice within such time, it shall be deemed to have no objection and the council of the local municipality may grant the franchise with the assent of the municipal electors of the local municipality as provided by section 3. R.S.O. 1990, c. M.55, s. 4 (1); 2001, c. 25, s. 480 (5).

Definition

(1.1) In subsection (1),

"city" means a local municipality that was a city on December 31, 2002. 2002, c. 17, Sched. F, Table.

(2) REPEALED: 2001, c. 25, s. 480 (6).

Section Amendments with date in force (d/m/y)

2001, c. 25, s. 480 (5, 6) - 01/01/2003

2002, c. 17, Sched. F, Table - 01/01/2003

Extension of certain existing works not to be made without by-law

5 (1) Where a by-law granting a franchise or right in respect of a public utility under subsection 3 (1), that has not been assented to by the municipal electors as provided by that subsection, was passed before the 16th day of April, 1912, no extension of or addition to the works or services constructed, established or operated under the authority of such by-law as they existed and were in operation at that date shall be made except under the authority of a by-law hereafter passed with the assent of the municipal electors, as provided by subsection 3 (1), and such consent is necessary, although such last-mentioned by-law is expressly limited in its operation to a period not exceeding one year. R.S.O. 1990, c. M.55, s. 5 (1); 2001, c. 25, s. 480 (7).

Exceptions as to franchises granted before 16th March, 1909

(2) Subsection (1) does not apply to a franchise or right granted by or under the authority of any general or special Act of the Legislature before the 16th day of March, 1909, but no such franchise or right shall be renewed, nor shall the term thereof be extended by a municipal corporation except by by-law passed with the assent of the municipal electors as provided in section 3. R.S.O. 1990, c. M.55, s. 5 (2).

Section Amendments with date in force (d/m/y)

2001, c. 25, s. 480 (7) - 01/01/2003

Exceptions:

6 (1) Except where otherwise expressly provided, this Act does not apply to a by-law,

works originating in another municipality

(a) granting the right of passing through the municipality for the purpose of continuing a line, work or system that is intended to be operated in or for the benefit of another municipality and is not used or operated in the municipality for any other purpose except that of supplying gas in a municipality to persons whose land abuts on a highway along or across which the same is carried or conveyed, or to persons whose land lies within such limits as the council by by-law passed from time to time determines should be supplied with any of such services;

gas transmission lines

(b) granting the right of passing through the municipality with a line to transmit gas not intended to be distributed from such line in the municipality or only intended to be distributed from such line in the municipality to a person engaged in the transmission or distribution of gas;

works required for transmission of gas

(c) conferring the right to construct, use and operate works required for the transmission of gas not intended for sale or use in the municipality; or

limited to three years

(d) that is expressly limited in its operation to a period not exceeding three years and is approved by the Ontario Energy Board. R.S.O. 1990, c. M.55, s. 6 (1); 2001, c. 25, s. 480 (8-11).

(2) REPEALED: 2001, c. 25, s. 480 (12).

Section Amendments with date in force (d/m/y)

2001, c. 25, s. 480 (8-12) - 01/01/2003

Extension of franchise

7 (1) Where a by-law to which clause 6 (1) (d) applies is passed, that clause does not apply to any subsequent by-law in respect of the same works or any part of them or to an extension of or addition to them, although the subsequent by-law is expressly limited in its operation to a period not exceeding three years, and no such subsequent by-law has any force or effect unless it is assented to by the municipal electors as provided by subsection 3 (1). R.S.O. 1990, c. M.55, s. 7 (1).

Idem

(2) Despite subsection (1), clause 6 (1) (d) applies to a subsequent by-law or by-laws in respect of the same works or any part of them or to an extension of or addition to them if the period of operation of such subsequent by-law or by-laws is expressly limited so that the total period of operation of the original by-law and the subsequent by-law or by-laws does not exceed three years. R.S.O. 1990, c. M.55, s. 7 (2).

Approval for construction of gas works or supply of gas in municipality

8 (1) Despite any other provision in this Act or any other general or special Act, no person shall construct any works to supply,

(a) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas; or

(b) gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas and in which gas was then being supplied,

without the approval of the Ontario Energy Board, and such approval shall not be given unless public convenience and necessity appear to require that such approval be given. R.S.O. 1990, c. M.55, s. 8 (1); 1998, c. 15, Sched. E, s. 21 (4).

Form of approval

(2) The approval of the Ontario Energy Board shall be in the form of a certificate. R.S.O. 1990, c. M.55, s. 8 (2).

Jurisdiction of Energy Board

(3) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and to grant or refuse to grant any certificate of public convenience and necessity, but no such certificate shall be granted or refused until after the Board has held a public hearing to deal with the matter upon application made to it therefor, and of which hearing such notice shall be given to such persons and municipalities as the Board may consider to be interested or affected and otherwise as the Board may direct. R.S.O. 1990, c. M.55, s. 8 (3).

Section Amendments with date in force (d/m/y)

1998, c. 15, Sched. E, s. 21 (4) - 07/11/1998

Gas franchise by-law to be approved by Energy Board

9 (1) No by-law granting,

(a) the right to construct or operate works for the distribution of gas;

(b) REPEALED: 1998, c. 15, Sched. E, s. 21 (5).

(c) the right to extend or add to the works mentioned in clause (a); or

(d) a renewal of or an extension of the term of any right mentioned in clause (a),

shall be submitted to the municipal electors for their assent unless the terms and conditions upon which and the period for which such right is to be granted, renewed or extended have first been approved by the Ontario Energy Board. R.S.O. 1990, c. M.55, s. 9 (1); 1998, c. 15, Sched. E, s. 21 (5-7).

Jurisdiction of Energy Board

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and may give or refuse its approval. R.S.O. 1990, c. M.55, s. 9 (2).

Hearing to be held

(3) The Ontario Energy Board shall not make an order granting its approval under this section until after the Board has held a public hearing to deal with the matter upon application therefor and of which hearing such notice shall be given in such manner and to such persons and municipalities as the Board may direct. R.S.O. 1990, c. M.55, s. 9 (3).

Electors' assent may be dispensed with

(4) The Board, after holding a public hearing upon such notice as the Board may direct and if satisfied that the assent of the municipal electors can properly under all the circumstances be dispensed with, may in any order made under this section declare and direct that the assent of the electors is not necessary. R.S.O. 1990, c. M.55, s. 9 (4).

Section Amendments with date in force (d/m/y)

1998, c. 15, Sched. E, s. 21 (5-7) - 07/11/1998

Application to Energy Board for renewal, etc., of gas franchise

10 (1) Where the term of a right referred to in clause 6 (1) (a), (b) or (c) that is related to gas or of a right to operate works for the distribution of gas has expired or will expire within one year, either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right. R.S.O. 1990, c. M.55, s. 10 (1); 1998, c. 15, Sched. E, s. 21 (8).

Powers of Energy Board

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right. R.S.O. 1990, c. M.55, s. 10 (2).

Hearing

(3) The Board shall not make an order under subsection (2) until after the Board has held a public hearing upon application therefor and of which hearing such notice shall be given in such manner and to such persons and municipalities as the Board may direct. R.S.O. 1990, c. M.55, s. 10 (3).

Interim order

(4) Despite subsection (3), where an application has been made under subsection (1) and the term of the right has expired or is likely to expire before the Board disposes of the application, the Board, on the written request of the applicant, and without holding a public hearing, may make such order as may be necessary to continue the right until an order is made under subsection (2). R.S.O. 1990, c. M.55, s. 10 (4).

Order deemed by-law assented to by electors

(5) An order of the Board heretofore or hereafter made under subsection (2) renewing or extending the term of the right or an order of the Board under subsection (4) shall be deemed to be a valid by-law of the municipality concerned assented to by the municipal electors for the purposes of this Act and of section 58 of the *Public Utilities Act*. R.S.O. 1990, c. M.55, s. 10 (5).

Right expired before commencement of section

(6) An application may not be made under this section in respect of a right that has expired before the 2nd day of December, 1969. R.S.O. 1990, c. M.55, s. 10 (6).

Section Amendments with date in force (d/m/y)

1998, c. 15, Sched. E, s. 21 (8) - 07/11/1998

11 REPEALED: 2003, c. 3, s. 1.

Section Amendments with date in force (d/m/y)

2003, c. 3, s. 1 - 01/08/2003

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TAB 5

Ontario Energy Board

Natural Gas Facilities Handbook

EB-2022-0081 | **MARCH 31, 2022**

Ontario

Ontario Energy Board

Table of CONTENTS

1 GENERAL

This Natural Gas Facilities Handbook (Handbook) sets out the Ontario Energy Board's (OEB) expectations in relation to the following natural gas facilities and related applications:

1. Under the *Municipal Franchises Act*
    a. Section 8, Certificate of Public Convenience and Necessity (certificate) Applications
    b. Sections 9 and 10, Municipal Franchise Agreement (franchise) Applications
2. Under the *Ontario Energy Board Act, 1998* (OEB Act)
    a. Section 38, Designated Storage Area (DSA) Applications[1]
    b. Section 40, DSA Well Drilling Licence Application Referrals
    c. Section 90 and 91, Leave to Construct (LTC) Applications
    d. Section 95, Exemption from the Requirements for Section 90 LTC
    e. Section 99, Expropriation Applications related to LTC approvals

This Handbook provides legislative and OEB policy context for, and outlines key principles and expectations generally applicable to, the applications listed above. The OEB expects applicants[2] to file these applications in a manner that is consistent with this Handbook, unless they can demonstrate a cogent rationale for departing from it. The OEB may require an applicant to file evidence in addition to what is identified in the filing requirements for a given application. An applicant may combine its requests for various types of approvals into a single application where it is appropriate to do so.

There are other types of natural gas related applications that are not covered in detail in this Handbook that proponents should be aware of and apply for, if required.[3]

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1 A Designated Storage Area means an area of land designated by the OEB for the development and operation of a natural gas storage pool or reservoir.

2 Applicants are also variously referred to in this Handbook as persons, proponents, utilities or distributors.

3 These include compensation for gas or oil rights under section 38 of the OEB Act; the right to enter land under section 98 of the OEB Act; and authority to construct upon, under or over a highway etc. under section 101 of the OEB Act. Other approvals or permits, such as those required under the *Technical Standards and Safety Act, 2000* may also be required. Applicants are expected to address these types of applications on a case-by-case basis as required and can contact OEB staff to discuss them before filing.

1.1 The OEB's Statutory Objectives with respect to Natural Gas

In considering any application it receives that is related to natural gas, the OEB is guided by its statutory objectives for gas as set out in the OEB Act. Specifically, section 2 of the OEB Act provides that the OEB, in carrying out its responsibilities under the OEB Act or any other act in relation to gas, will be guided by the following statutory objectives:

1. To facilitate competition in the sale of gas to users
2. To inform consumers and protect their interests with respect to prices and the reliability and quality of gas service
3. To facilitate rational expansion of transmission and distribution systems
4. To facilitate rational development and safe operation of gas storage
5. To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario, including having regard to the consumer's economic circumstances

   5.1. To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas

6. To promote communication within the gas industry

1.2 Completeness and Accuracy of an Application

An application to the OEB must provide sufficient evidence to enable the OEB to determine whether the application should be approved. The onus is on the applicant to demonstrate to the OEB's satisfaction that the application should be approved. A clearly written, accurate and complete application that presents information and data consistently across all exhibits, and clearly demonstrates the appropriateness of the relief sought (e.g., approval or permission) is essential for an effective regulatory review and timely decision making. The OEB's examination of an application and its subsequent decision are based on the evidence filed in that case. A complete and accurate evidentiary record is essential.

The filing requirements set out in this Handbook provide the minimum information that an applicant must file for a complete application. However, an applicant should provide any additional information that is necessary to justify the approvals being sought in the application.

The OEB will consider an application complete if it meets the applicable filing requirements. If an applicant cannot provide the required information, or it believes the required information is not applicable, it must provide an explanation of why it cannot provide the information or why the information is not applicable.

Upon the filing of an application, the OEB will undertake a completeness check of the application to assess whether the application includes all the information required by the applicable filing requirements. If so, the OEB will issue a letter to the applicant indicating the application is complete, and the OEB will begin its review of the application. If the application does not include all the information required by the applicable filing requirements, the OEB will issue a letter to the applicant identifying which information is missing. The OEB will not commence its review of the application until all the necessary information has been provided or a satisfactory explanation has been provided as to why certain information should not or cannot be provided.

1.3 Pre-Application Meetings

As is the case with any type of application, OEB staff is available to meet with applicants prior to an application being filed to discuss the OEB's expectations and requirements for that application type, including those contained in this Handbook. A pre-application meeting can be arranged by writing to registrar@oeb.ca and providing contact information and a brief description of the potential application including the legislative provision(s) that apply.

1.4 General Filing Requirements

The Handbook contains specific filing requirements for each of the application types listed in section 1 (General). In addition to the specific filing requirements, every application must contain the information set out below to the extent applicable to the application.

1.4.1 Contact Information

The applicant must provide the contact information (name, title, mailing address, telephone number and email address) for the applicant's primary representative and its legal representative, if any.

1.4.2 Relief Requested

The applicant must provide a description of the relief (e.g., approval or permission) being requested from the OEB and the specific legislative provision(s) under which the relief is being sought.

1.4.3 Confidential Information

The OEB relies on full and complete disclosure of all relevant material to ensure that its decisions are well-informed. To ensure a transparent and accessible review process, applicants should make every effort to file all material publicly and completely.

However, the OEB's *Rules of Practice and Procedure* (Rules) and the *Practice Direction on Confidential Filings* (Practice Direction) allow applicants and other parties to request that certain filings be treated as confidential.[4] Where such a request is made, participants are expected to review and follow the Rules and Practice Direction.

Applicants and other parties must ensure that filings for which they request confidential treatment are genuinely in need of confidential treatment.

1.4.4 Personal Information

All parties are reminded of the OEB's rules regarding personal information in any filing they make as part of a proceeding. Parties should consult Rule 9A of the OEB's Rules and Part 10 of the Practice Direction regarding how to file documents (including interrogatories) that have personal information in them.

Rule 9A of the OEB's Rules states that "any person filing a document that contains personal information, as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*, of another person who is not a party to the proceeding shall file two versions of the document." There must be one version of the document that is a redacted version of the document from which the personal information has been deleted or stricken, and a second version of the document that is un-redacted (i.e., that includes the personal information) and should be marked "Confidential—Personal Information".

The OEB does not expect that personal information would typically need to be filed beyond any that may be required by the applicable filing requirements. If an applicant must file personal information as part of its application, the onus is on the applicant to ensure that the application and any evidence filed in support of the application does not include any personal information unless it is filed in accordance with Rule 9A of the OEB's Rules and Part 10 of the Practice Direction applicable.

An application filed with the OEB must include a certification by a senior officer of the applicant stating that the application and any evidence filed in support of the application does not include any personal information unless it is filed in accordance with Rule 9A of the OEB's Rules and Part 10 of the Practice Direction.

An applicant is required to provide a similar certification when filing interrogatory responses or other evidence as part of a proceeding.

[4] The Rules and Practice Direction deal with confidential information and personal information differently. Among other things, confidential information is usually made available to representatives of parties from whom the OEB has accepted a Declaration and Undertaking, whereas personal information is not.

1.4.5 Certification of Evidence

An application must include a certification by a senior officer of the applicant that the information filed is accurate, consistent and complete to the best of their knowledge.

1.4.6 Additional Evidence

Applicants should include any other information that may be relevant to the application beyond that required by the filing requirements in this Handbook.

1.4.7 Electronic Filings

All materials filed with the OEB must be submitted in a searchable / unrestricted PDF format with a digital signature through the OEB's web portal. Filings must clearly state the sender's name, postal address, telephone number and email address. Parties must use the document naming conventions and document submission standards outlined in the Regulatory Electronic Submission System (RESS) Document Guidelines.

1.4.8 Duplicative Information When Filing Two or More Applications

The filing requirements for certain application types are similar (e.g., certificates and franchises). If an applicant is requesting more than one approval in a single application, then there is no need for the applicant to provide any required information more than once.

1.4.9 Updating an Application

When changes or updates to an application are necessary, a thorough explanation of the changes must be provided, along with revisions to the affected evidence and related schedules. This process is contemplated in Rule 11.02 of the *Rules of Practice and Procedure*. When these changes or updates are contemplated in later stages of a proceeding, applicants should proceed with the update only if there is a material change to the evidence already before the OEB. Rule 11.03 states that any such updates should clearly indicate the date of the revision and the part(s) revised.

1.4.10 Interrogatories

The OEB is aware of the number of interrogatories (i.e., information requests) that the regulatory review process can generate. The OEB advises applicants to consider the clarity, completeness and accuracy of their evidence to reduce the need for interrogatories. Furthermore, the OEB expects that applicants and other parties filing evidence will file appropriate, relevant, accurate and complete evidence. A sub-standard or inaccurate application, and the re-filing or updating of evidence can extend the time for the OEB's review. Applicants should not file information that they consider not relevant to the proceeding. The OEB also advises all parties to carefully consider the relevance and materiality of information before requesting it through interrogatories.

The OEB reminds parties not to engage in detailed exploration of items that do not appear to be material. In making its decision on cost awards, the OEB will consider whether intervenors made reasonable efforts to ensure that their participation in the hearing was focused on material issues.

Parties should consult Rules 26 and 27 of the OEB's *Rules of Practice and Procedure,* for additional information on the filing of interrogatories and responses, and matters related to such filings.

1.5 Indigenous Consultation

The OEB is committed to ensuring that Indigenous peoples (First Nations, Inuit, and Métis peoples) have an opportunity to bring their views forward and to participate in any proceedings that may impact their rights or interests. This includes potential adverse impacts on established or asserted Aboriginal or treaty rights, which triggers the Constitutional duty to consult and, when required, to accommodate.

With respect to natural gas facilities applications, the duty to consult most often arises in the context of applications for leave to construct natural gas facilities under section 90 or 91 of the OEB Act. For this reason, the OEB has for many years had a specific Indigenous consultation policy for those applications, which requires the Crown and project proponents to undertake certain activities to ensure that the duty to consult is adequately discharged. This process is set out in the OEB's *Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario*, and is summarized in section 4.4.6 below. In cases where the duty to consult is triggered, the OEB cannot issue a final decision approving an application unless it is satisfied, based on the evidence before it, that the duty to consult has been discharged.

Impacts on Indigenous rights or interests can arise in other proceedings. Where that is the case, representatives of affected Indigenous communities are encouraged to participate in the proceeding and make their views known to the OEB. Further information regarding the OEB's role and how to participate is set out on the OEB's Consultation with Indigenous People's webpage.

2 MUNICIPAL FRANCHISE AGREEMENT

2.1 Introduction

A person is not permitted to provide gas distribution service within a municipality in Ontario unless the requirements of the *Municipal Franchises Act* have been met. These include obtaining a franchise from the municipality in which the works are to be located and having the terms and conditions of the franchise approved by the OEB. These terms and conditions are typically set out in the form of a franchise agreement.

A municipal franchise agreement deals primarily with the relationship between the municipality and the gas distributor with respect to issues such as the use of the municipal road allowances for the construction of the facilities. Virtually all municipal franchise agreements in Ontario are in the form of the OEB's standard Model Franchise Agreement.

A municipal franchise does not grant exclusive rights to the gas distributor, although in most cases only one utility will hold a franchise agreement for any particular area. As a result of municipal reorganizations and consolidations over the years, in some cases a municipality will have franchise agreements with more than one gas distributor for different parts of its territory. The fact that a person holds a franchise agreement with a municipality is not a bar to another person also obtaining a franchise agreement with the same municipality, although the OEB will generally not issue certificates to different persons that cover the same geographic area within a municipality. The rights granted through a franchise agreement are not necessarily exclusive.

It is important to note that a franchise agreement, in and of itself, does not authorize the construction of facilities. Construction of facilities is only permitted after a utility has obtained from the OEB a valid certificate under the *Municipal Franchises Act* and, where applicable, leave to construct, as well as obtaining any permits, approvals and agreements from other agencies or bodies that may be required for construction to proceed. An application for the approval of a municipal franchise agreement may be made at the same time as an application for a certificate.

2.2 Legislation

Section 3 of the *Municipal Franchises Act* states that a municipal corporation may not grant any person the right to use or occupy any municipal highway or construct or operate any natural and other gas works[5] in a municipality unless a by-law setting out the terms and conditions applicable to such right has been assented to by the municipal

[5] The *Municipal Franchises Act* defines "gas" as follows: "natural gas, manufactured gas or any liquified petroleum gas, and includes any mixture of natural gas, manufactured gas or liquified petroleum gas, but does not include a liquified petroleum gas that is distributed by means other than a pipe line".

electors. As noted above, these terms and conditions are typically set out in the form of a franchise agreement.

Section 9 of the *Municipal Franchises Act* states that no by-law granting the right to construct or operate gas facilities shall be submitted to the municipal electors for their assent unless the terms and conditions related to the by-law have first been approved by the OEB. However, section 9 (4) of the Act provides that the OEB may by order declare and direct that the assent of the electors is not necessary if the OEB is satisfied that such assent may be properly dispensed with.

In the vast majority of cases, the OEB declares and directs that the assent of the municipal electors is not necessary. The OEB will typically do so upon having reviewed a resolution issued by municipal council (and filed with the application) approving the form of draft by-law and draft franchise agreement and authorizing the applicant to submit them to the OEB for approval. Accordingly, where an applicant is seeking to dispense with the assent of the municipal electors, it should include, as part of its franchise application, the municipality's resolution, draft by-law and draft franchise agreement.

Most franchise agreements are for a term of 20 years. Section 10 of the *Municipal Franchises Act* allows either the municipality or the gas distributor to apply for a renewal of the franchise agreement up to a year before the expiration of their current franchise agreement. Where the OEB approves the renewal or extension of a franchise by issuing an order under section 10, the order is deemed to be a valid by-law of the municipality.

2.3 Model Franchise Agreement

The OEB adopted the Model Franchise Agreement following significant input from interested stakeholders, including the Association of Municipalities of Ontario and natural gas distributors, to provide guidance to applicants and municipalities regarding the standard terms of a franchise agreement and as a tool to efficiently administer the many franchise agreements across the Province.[6] The Model Franchise Agreement provides a template to guide applicants and municipalities regarding the terms that the OEB finds reasonable under the *Municipal Franchises Act*[7], including a term of 20 years. Accordingly, the OEB expects that franchises will be based on the Model Franchise Agreement, unless there is a compelling reason for deviation.[8]

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6 RP-1999-0048

7 Part II of the Model Franchise Agreement requires the applicant to select one of two wording options depending on whether the agreement is with an upper or lower tier municipality.

8 An example of a case in which the OEB allowed a deviation is EB-2008-0413. An example of a case in which the OEB did not allow a deviation is EB-2017-0232.

The Gas Franchise Handbook is a supplement to the Model Franchise Agreement and serves as a consolidated guide for dealing with operating issues that sometimes require a greater level of detail than appears in the franchise agreement itself.

2.4 Filing Requirements

When applying for approval or renewal of a franchise agreement under section 9 or 10 of the *Municipal Franchises Act*, the application must include the following.

1. Confirmation as to whether the application is for a new franchise area, or a renewal or extension of an existing franchise area.

2. A brief written description of the proposed franchise area[9], including the physical boundaries (e.g., municipal boundaries, metes and bounds, on-from-to) and the number and general location of any customers to be served or currently served in the proposed franchise area.

3. A map of the boundaries of the requested franchise area, the municipal boundaries, major roads and other geographic features marked clearly, and, at the discretion of the applicant, illustrating either:

    a. The applicant's natural gas facilities in the proposed franchise area and the number and general location of customers to be served or currently served by the applicant in the proposed franchise area

    b. The customer density of the proposed franchise area (often provided in the form of a colour coded map that illustrates customer density or "heat map")

4. Documentation on any existing franchise agreements and certificates:

    a. Where applicable, a copy of any existing certificate(s) pertaining to the proposed franchise area.

    b. Where applicable, a copy of the current by-law and franchise agreement.

5. Where applicable, a description of any embedded and adjacent franchise areas and the name of any person who serves them.

6. In the case of an application under section 10, a detailed description of any material amendments to the municipality's boundaries (e.g., municipal amalgamations or annexations) within the period of the existing franchise agreement and how such amendments relate to the franchise application.

[9] A franchise area is the geographical territory within a municipality that the franchise agreement is intended to cover

7. A copy of the draft by-law and the proposed franchise agreement (which should be in the form of the Model Franchise Agreement unless a compelling reason exists for departing from it).

    a. A copy of the resolution of the Council of the Municipality approving the form of the draft by-law.

    b. Where applicable, a description of any proposed variance from the Model Franchise Agreement and the supporting rationale outlining the circumstances that would warrant such consideration.

2.5 Post-hearing Filings

An applicant is required to file the certified electronic copy of the signed franchise agreement by-law and an affidavit confirming delivery to the municipality within four months of the issuance of the OEB's decision granting the franchise. If the applicant is not able to do so, it must provide the OEB with a letter outlining the reasons for the delay and an expected date by which it will file the signed documents.

TAB 6

The Corporation of the City of Sudbury v. Union Gas Limited*

Union Gas Limited v. The Corporation of the City of Sudbury

[Indexed as: Sudbury (City) v. Union Gas Ltd.]

54 O.R. (3d) 439
[2001] O.J. No. 2099
Docket No. C34115

Court of Appeal for Ontario
Morden, Moldaver and Goudge JJ.A.
June 6, 2001

* Application for leave to appeal to the Supreme Court of Canada was dismissed with costs January 31, 2002 (Gonthier, Major and Binnie JJ.). S.C.C. File No. 28770. S.C.C. Bulletin, 2002, p. 157.

Public utilities--Franchises--Extension of franchise--Company owned and operated natural gas distribution system in city pursuant to franchise agreement with city--Franchise agreement provided that city could buy system at any time following termination of franchise--Section 10 of Municipal Franchises Act provides that where franchise agreement is about to expire gas distribution company or municipality may apply to Ontario Energy Board to extend right to operate gas distribution system --Company applied for extension prior to expiration of franchise--City's right to purchase gas distribution system did not arise until end of any extension ordered by Ontario Energy Board--Municipal Franchises Act, R.S.O. 1990, c. M.55, s. 10.

The appellant owned and operated the natural gas distribution system in the municipality pursuant to a franchise agreement

with the municipality. Paragraph 22 of the franchise agreement provided that the municipality had the right to buy the distribution system "at any time following the termination of the franchise". Section 10 of the Municipal Franchises Act, R.S.O. 1990, c. M.55 provides that where a franchise agreement is about to expire, either the gas distribution company or the municipality may apply to the Ontario Energy Board ("OEB") to extend the right to operate the gas distribution system. Just prior to the expiry of the franchise agreement, the appellant applied to the OEB to extend its right to operate the system pursuant to s. 10 of the Act. The municipality then sought a declaration that its right to purchase the gas distribution system provided for in para. 22 of the franchise agreement arose on the expiry of the term of that agreement. The appellant brought a cross-application fo r a declaration that that right did not arise until the end of any extension ordered by the OEB. The municipality's application was allowed. The appellant appealed.

Held, the appeal should be allowed.

The franchise conferred by the agreement was the bundle of rights and privileges granted to the appellant to construct and operate the gas distribution system in the municipality. The appellant's obligation to sell its gas distribution system was explicitly subject to s. 10 of the Act. The clear meaning of para. 22 of the agreement was that if the OEB made an order pursuant to s. 10 of the Act, the franchise was not terminated and the precondition for the municipality's right to compel a sale was not met.

Cases referred to

Union Gas Ltd. v. Dawn (Township) (1977), 15 O.R. (2d) 722, 76 D.L.R. (3d) 613, 2 M.P.L.R. 23 (Div. Ct.)

Statutes referred to

Municipal Franchises Act, R.S.O. 1990, c. M.55, ss. 9 [as am.], 10

Public Utilities Act, R.S.O. 1990, c. P.52, s. 62 [repealed S.O. 1999, c. 14, Sch. F, s. 9]

APPEAL from a judgment of Molloy J. (2000), 47 O.R. (3d) 654 granting a declaration that the respondent's right to purchase a gas distribution system from the appellant under a franchise agreement arose on expiry of the term of that agreement.

Glenn Leslie and Sharon S. Wong, for appellant.
John F. Rook, Q.C. and Mahmud Jamal, for respondent.

The judgment of the court was delivered by

[1] GOUDGE J.A.:--The appellant Union Gas ("Union") Limited is the successor company to Northern and Central Natural Gas Corporation Limited. It provides natural gas distribution service to more than 400 municipalities throughout Ontario.

[2] For some 40 years, Union and its predecessor company have owned and operated the natural gas distribution system in the City of Sudbury ("Sudbury") pursuant to two successive franchise agreements with Sudbury and under the regulatory authority of the Ontario Energy Board ("OEB"), the statutory body assigned by provincial law to regulate the natural gas industry in Ontario.

[3] The most recent franchise agreement was made on December 11, 1979. Its 20-year term expired on December 11, 1999. Just prior to that date, in October 1999, Union applied to the OEB to extend its right to operate the natural gas system in Sudbury pursuant to s. 10 of the Municipal Franchises Act, R.S.O. 1990, c. M.55. Sudbury then sought a declaration that its right to purchase the gas distribution system from Union, provided for in para. 22 of the franchise agreement, arose on the expiry of the term of that agreement. Union brought a cross-application for a declaration that this right does not arise until the end of any extension ordered by the OEB.

[4] On April 10, 2000, Molloy J. issued reasons for judgment in favour of Sudbury, which are reported at 47 O.R. (3d) 654. With respect, for the reasons that follow, I have come to the opposite conclusion. I would therefore allow the appeal, dismiss Sudbury's application and allow Union's cross-application.

Statutory and Factual Background

[5] Before turning to an analysis of the central issue in this appeal, namely the proper meaning of para. 22 of the franchise agreement, it is helpful to highlight both the agreement's legislative context and the history leading up to it.

[6] As Molloy J. said, it is clear that the natural gas industry is a closely regulated one. The Municipal Franchises Act and the Ontario Energy Board Act, 1998, S.O. 1998, c. 15 make clear that the Legislature has accorded to the OEB the widest powers to regulate the supply and distribution of natural gas in the public interest. See Union Gas Ltd. v. Dawn (Township) (1977), 15 O.R. (2d) 722, 76 D.L.R. (3d) 613 (Div. Ct.) at p. 734 O.R., p. 625 D.L.R.

[7] More particularly, s. 9 of the Municipal Franchises Act requires that any franchise agreement between a natural gas distribution company and a municipality must be approved by the OEB. Subsections 10(1) and (2) of this Act provide that where such a franchise agreement is about to expire, either the gas distribution company or the municipality may apply to the OEB to extend the right to operate the gas distribution system and the OEB may do so on such terms and conditions as public convenience and necessity appear to require.

[8] Subsections 10(1) and (2) read as follows:

10(1) Where the term of a right referred to in clause 6(1)(a), (b) or (c) that is related to gas or of a right to operate works for the distribution of gas or to supply gas to a municipal corporation or to the inhabitants of a municipality has expired or will expire within one year,

either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right.

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

[9] The final legislative provision of relevance to this matter is s. 62 of the Public Utilities Act, R.S.O. 1990, c. P.52. It empowered a municipality to acquire at any time a privately owned gas distribution system serving its residents at a price calculated according to a legislated formula. This provision was in effect in 1979 when the franchise agreement was made but was repealed effective January 1, 1999.

[10] The 1979 franchise agreement sets out the following grant to Union in para. 2:

2. Subject to the terms and conditions hereinafter set forth, the Corporation hereby grants to the Gas Company the franchise, right and privilege to construct and operate a gas distribution system within the Municipality and to supply gas to the Corporation and to the inhabitants of the Municipality, and to enter upon any public property for the purpose of the construction, operation, maintenance and repair of the gas distribution system and for the transmission of gas in and through the Municipality and to perform any other services that may be necessary in connection with the transmission and supply of gas in the Municipality.

[11] Paragraph 3 of the franchise agreement provides that the franchise granted shall be for a term of 20 years.

[12] Paragraph 20 gives Union the right, prior to the end of the 20-year term, to give notice requesting the grant of a new franchise on terms to be agreed. It then requires Sudbury to advise whether it is willing to do so. It reads as follows:

> 20. At any time within the twelve-month period commencing twenty-four months and ending twelve months prior to the termination of the term of the franchise hereby granted, the Gas Company may by notice given to the Corporation request the Corporation to grant to the Gas Company a new franchise upon such terms as may be agreed upon and subject to the approval of the Board. The Corporation shall, by notice in writing given to the Gas Company within three months of the date of the request for a new franchise, advise the Gas Company as to whether or not it is willing to grant a new franchise to permit the Gas Company to carry on its business in the Municipality.

[13] Paragraphs 21 and 22 then address possible outcomes where there is no agreement on a new franchise. These paragraphs are in the following terms:

> 21. If the Corporation fails to grant a new franchise on terms agreeable to both parties hereto and the Ontario Energy Board has not made an order for a renewal of or an extension of the term of the right, then the Gas Company may, subject to the provisions of paragraph 22 and to section 10 of The Municipal Franchises Act, at its option, either:
>
> (a) sell or dispose of the gas distribution system forthwith to any person, firm or corporation and at such price and on such conditions as the Gas Company may deem advisable; or
>
> (b) within twelve months following such termination of the term of this franchise remove the gas distribution system or any portion or portions thereof from the public property, provided that failure to effect such removal shall not deprive the Gas Company of title to the gas distribution system or any portion or portions thereof.

Should the Municipality, at any time after a lapse of one year from termination, require the removal of all or any of the Gas Company's said facilities for the purpose of altering or improving public property or in order to facilitate the construction of utility or other works in the highway, the Municipality may remove or dispose of so much of the Gas Company's said facilities as the Municipality may require for such purposes, and neither party shall have recourse against the other for any loss or expense occasioned thereby.

22. At any time following the termination of the franchise, the Corporation may, by notice given to the Gas Company, require the Gas Company to sell the Gas Distribution System, or such portion or portions thereof as shall not have been removed as provided in paragraph 21, to the Corporation or to any person, firm or corporation designated in such notice by the Corporation; and with all reasonable dispatch after the giving of such notice, but subject to section 10 of The Municipal Franchises Act, the Gas Company shall sell such system or such portion thereof accordingly, at such price as may be agreed between the parties hereto or, if the parties hereto shall be unable to agree upon such price and one of them shall refer the determination thereof to arbitration under the provisions of paragraph 19 hereof, at such price as the arbitrator or arbitrators appointed under the said paragraph 19 shall fix as fairly representing the value of such gas distribution system or such portion thereof, as a going concern and as though the Gas Company were still entitled to use the public property for the operation of such system or portion.

[14] The language in these two paragraphs was first approved by the OEB in 1978 in a test case involving a franchise agreement for the City of Timmins brought by a group of northern Ontario municipalities including Sudbury. The phrase in para. 22 ". . . but subject to s. 10 of the Municipal Franchises Act . . ." was not in the draft agreement submitted by the parties, but was added without explanation by the OEB when it rendered its decision approving the agreement.

[15] As I have indicated, the 20-year term of Sudbury's franchise agreement was due to expire on December 11, 1999. Prior to that date, Sudbury gave Union notice that it intended to exercise its contractual right to acquire the gas distribution system pursuant to para. 22. However, Union had launched an application before the OEB to extend the term of its franchise. Union asserted that Sudbury's right of acquisition under para. 22 did not arise until the end of any extension ordered by the OEB or until such an extension had been refused. On October 28, 1999, the OEB issued an interim order extending Union's franchise to June 30, 2000 to permit these court proceedings. That interim order was further extended on consent pending this appeal.

[16] In deciding in favour of Sudbury, Molloy J. found the surrounding factual circumstances and statutory provisions of little or no assistance. She focused on the language of the franchise agreement itself and determined that the most reasonable construction of para. 22 is that it provides to Sudbury the right to purchase the gas distribution system upon the expiry of the term of the agreement irrespective of any order that may be made by the OEB under s. 10 of the Municipal Franchises Act. The essence of her conclusion is as follows [at p. 672 O.R.]:

> Paragraph 22, as currently drafted, does not clearly reflect the position of either of the parties. However, if para. 22 had been drafted to provide a right to purchase the system upon the "termination of the franchise hereby granted", I would have little hesitation in interpreting the provision as providing to Sudbury a right to purchase the gas distribution system at the expiry of the rights granted under the agreement, whether by the expiry of the 20-year term or otherwise. The addition of the words "hereby granted" is, in my view, a minor amendment. On the other hand, in order to amend para. 22 so as to clearly reflect the meaning advocated by Union Gas, one would have to say that Sudbury's right to purchase arises upon the "termination of the franchise hereby granted if the OEB has not made an order for a renewal or extension under s. 10 of the Municipal Franchises Act, or, if such an order has been made by the OEB, upon the expiry of

the term of such order". In my view, this would constitute a much more significant amendment than merely adding the words "hereby granted". Further, the rights granted under para. 21 are expressly stipulated to arise only if "the OEB has not made an order for a renewal of or an extension of the term of the right". If the drafters had intended that the very next paragraph be subject to the same restriction, one would expect them to have said so expressly.

In my opinion, adding the gloss suggested by Union Gas strains the ordinary meaning of the words used beyond what is reasonable in the overall context of the agreement. On the other hand, the interpretation advanced by Sudbury is more consistent with the dealings between the parties, the terms of their earlier contract and the language of the 1979 agreement itself. While in hindsight one can suggest language that would have conveyed this meaning more clearly, I find that the most reasonable construction of para. 22 of the agreement is that it provides to Sudbury the right to purchase the gas distribution system upon the expiry of the rights granted under the agreement, irrespective of any order that may be made by the OEB under s. 10 of the Act.

(Emphasis in the original)

[17] In this court the basic positions of the parties were as they have been throughout these proceedings. Union argued that Sudbury's right to purchase its gas distribution system under para. 22 only arises following the termination of its franchise and that the franchise will not terminate if the OEB orders an extension pursuant to s. 10 of the Municipal Franchises Act. On the other hand, Sudbury argued that the franchise is for a 20-year term expiring on December 11, 1999 at which point it terminates and Sudbury's right to purchase arises, subject to s. 10 of the Act. Thus, if the OEB orders that Union's right to operate the system is extended, Sudbury argued that it will nonetheless have the contractual right to acquire ownership of the system, subject only to Union's right to remain in possession of the system as operator.

Analysis

[18] In my view, an examination of the language of the franchise agreement, in particular para. 22 in the context of the role played by s. 10 of the Municipal Franchises Act, demonstrates that the appellant's position is correct. It is useful to set out para. 22 again, adding emphasis to those parts of it that assist in compelling this conclusion:

> 22. At any time following the termination of the franchise, the Corporation may, by notice given to the Gas Company, require the Gas Company to sell the Gas Distribution System, or such portion or portions thereof as shall not have been removed as provided in paragraph 21, to the Corporation or to any person, firm or corporation designated in such notice by the Corporation; and with all reasonable dispatch after the giving of such notice, but subject to section 10 of The Municipal Franchises Act, the Gas Company shall sell such system or such portion thereof accordingly, at such price as may be agreed between the parties hereto or, if the parties hereto shall be unable to agree upon such price and one of them shall refer the determination thereof to arbitration under the provisions of paragraph 19 hereof, at such price as the arbitrator or arbitrators appointed under the said paragraph 19 shall fix as fairly representing the value of such gas distribution system or such portion thereof, as a going concern and as though the Gas Company were still entitled to use the public property for the operation of such system or portion.

(Emphasis added)

[19] It is clear that the driving force behind this legal dispute is Sudbury's desire to exercise its right to require Union to sell its system for the distribution of gas to the residents of Sudbury. That right, found in para. 22, arises "[a]t any time following the termination of the franchise . . .". The precondition for Sudbury's right is the termination of the franchise. It is the meaning of that phrase that is at the heart of this case.

[20] I agree with Molloy J. that the interpretative task

derives no assistance from the factual context giving rise to the franchise agreement. The only fact of possible relevance is that Union appears to have represented to Sudbury in 1978 that Sudbury would have the right under s. 62 of the Public Utilities Act to purchase the gas distribution system at any time. However, that section was repealed effective January 1, 1999. While the representation was true when it was made, it is of no assistance in giving meaning to the phrase "the termination of the franchise" in para. 22. For that task it is necessary to examine the franchise agreement itself.

[21] Paragraph 2 makes clear that the franchise conferred by the agreement is the bundle of rights and privileges granted to Union to construct and operate the gas distribution system in the City of Sudbury. Paragraph 3 fixes the term of that franchise at 20 years.

[22] Union's obligation to sell its gas distribution system, which is provided for in para. 22, is explicitly subject to s. 10 of the Municipal Franchises Act. Under that section, the OEB has the power to order the renewal or extension of the bundle of rights granted to Union by the franchise agreement. In my view, the meaning of para. 22 is clear: if the OEB makes an order pursuant to s. 10, the franchise is not terminated and the precondition for Sudbury's right to compel a sale has not been met.

[23] Section 10 of the Municipal Franchises Act clearly gives the OEB the power, if public convenience and necessity require it, to renew or extend the right of Union to operate the gas distribution system in Sudbury. The section operates where a franchise agreement reaches the end of its term and the parties have been unable to agree on the conditions for extending it. It protects the interests of those who depend on the gas distribution system by allowing either the municipality or the gas utility company to seek a renewal or extension of the bundle of rights that is the franchise. The OEB may make the order on the terms it determines necessary to protect the public interest. In my view, a purposive reading of the section gives to the OEB a broad power to impose the terms of renewal or extension of the franchise so that service to the public

will not be interrupted simply because the municipality and the utility have been unable to agree on the terms for carrying on the service. If the OEB makes such an order in this case, Union's franchise will not have terminated.

[24] In her reasons for judgment, Molloy J. finds that at the end of the 20-year term, Sudbury has the right to require Union to sell the gas distribution system but that under s. 10, the OEB could grant Union the right to operate Sudbury's system thereafter. With respect, I do not agree. The right of Union to operate a gas distribution system owned by Sudbury is not a right which Union had under the franchise agreement and therefore not one which can be renewed or extended pursuant to s. 10. However, it is not necessary to come to a conclusion on this issue. What is clear is that s. 10 does give the OEB the power to renew or extend Union's franchise and if it were to do so, the franchise would not be terminated, and Sudbury's right to require Union to sell would not arise.

[25] In my view, there are three other aspects of the franchise agreement that support this interpretation.

[26] First, under para. 22, if Union and Sudbury cannot agree on a sale price for the gas distribution system, the price is to be fixed by an arbitration valuing the system "as a going concern and as though the gas company were still entitled to use the public property for the operation of such system . . .". The clear implication is that Sudbury would be acquiring both the gas distribution system and the right to operate it. It would not make commercial sense for Sudbury to agree to buy the system without the right to operate it, but to have to pay for it as a going concern. Thus I think the payment formula provided in para. 22 confirms the parties' agreement that Sudbury's right to require Union to sell the gas distribution system arises only when Union's right to operate the system terminates and not simply at the end of the 20-year term.

[27] Second, para. 22 has para. 21 as its companion piece. Both set out what happens when Union's franchise terminates. Paragraph 21 gives Union certain rights at that point to sell

or remove the gas distribution system failing which Sudbury may remove it. Paragraph 22 gives Sudbury the right to require Union to sell the system. Paragraph 21 is express in stating that the rights it grants do not arise if the OEB has made an order of renewal or extension under s. 10 of the Municipal Franchises Act. While para. 22 is more succinct, making Union's obligation to sell "subject to s. 10 of the Municipal Franchises Act", I think the meaning is the same. If an order is made under s. 10, the franchise does not terminate, and neither the rights accorded to Union by para. 21 nor the right accorded to Sudbury by para. 22 arises.

[28] Third, the language of para. 20 of the franchise agreement provides a revealing contrast to the language of para. 22. Paragraph 20 demonstrates that when the parties wished to precondition a right simply on the expiry of the 20-year term of the agreement, they did not speak of "the termination of the franchise" but, rather, of "the termination of the term of the franchise hereby granted". Indeed, I agree with Molloy J. that Sudbury's position effectively requires that this wording from para. 20 be read into para. 22. On the other hand, for the reasons I have given, I find that para. 22 as written does not give Sudbury the right it seeks if Union's franchise is renewed or extended pursuant to s. 10 of the Municipal Franchises Act. Unlike Molloy J., I think the language of para. 22 is clear and requires no words to be read in in order to convey this meaning as contended for by the appellant. This meaning must prevail over one that requires words to be read into the text.

[29] In summary, I conclude that Sudbury's right to require Union to sell its gas distribution system arises only on the termination of Union's franchise and if the OEB issues an order of renewal or extension at the end of the 20-year term of the franchise agreement that precondition is simply not met.

[30] I would therefore allow the appeal, set aside the order below and order that Sudbury's application be dismissed and Union's cross-application be allowed. Union is entitled to its costs here and below.

Appeal allowed.

TAB 7

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

DECISION AND ORDE

EB-2022-0201

ENBRIDGE GAS INC.

Application for Approval of a Municipal Franchise Agreement with, and Certificate Amendment for, the Municipality of Leamington

BEFORE: Robert Dodds
Presiding Commissioner

Michael Janigan
Commissioner

David Sword
Commissioner

March 30, 2023

1 OVERVIEW

This is the Decision and Order of the Ontario Energy Board (OEB) regarding an application filed by Enbridge Gas Inc. (Enbridge Gas) for renewal of the term of its natural gas franchise with the Municipality of Leamington (Municipality).

Enbridge Gas and the Municipality were parties to a municipal gas franchise agreement that took effect on January 20, 2003 and expired on January 20, 2023 (2003 Agreement). Enbridge Gas sought a renewal based on the terms of the Model Franchise Agreement (Model Agreement), for a duration of 20 years.

The Municipality intervened in the proceeding and opposed the renewal application, submitting that such renewal should not be granted unless the terms and conditions included an amendment to the cost-sharing provisions of the Model Agreement.

The OEB does not accept the reasons for an amendment to the Model Agreement advanced by the Municipality. The OEB approves the application as filed by Enbridge Gas under section 10 of the *Municipal Franchises Act* for the renewal of its gas franchise with the Municipality, based on the terms and conditions of the Model Agreement, without amendment, for a further 20-year term, with an effective date of March 30, 2023, and expiry March 30, 2043.

The OEB also grants a new certificate of public convenience and necessity (certificate) to Enbridge Gas in respect of the Municipality, pursuant to section 8 of the *Municipal Franchises Act.* Effective on the date of this Decision and Order, those parts of the existing certificate (F.B.C. 259) held by Enbridge Gas for the former municipalities within the Municipality will be cancelled and replaced with a new certificate to construct works to supply gas in the Municipality. The new certificate does not change the area within the Municipality to which Enbridge Gas's certificate rights pertain but will be geographically aligned with the current municipal boundaries of the Municipality.

2 CONTEXT AND PROCESS

2.1 Application Overview

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

The Municipality is a municipal corporation incorporated under the laws of the Province of Ontario. It is a lower-tier municipality located in the County of Essex. The Municipality was formed in 1999 upon the amalgamation of the former Town of Leamington and former Township of Mersea.

In this Decision and Order, a reference to the Municipality is a reference to the municipal corporation or its geographical area, as the context requires.

Enbridge Gas and the Municipality were parties to a municipal gas franchise agreement that took effect on January 20, 2003. The duration of the term of the 2003 Agreement was 20 years and, thus, the agreement expired by its terms and conditions on January 20, 2023. The 2003 Agreement was based on the Model Agreement, with no amendments.[1]

Prior to the expiry of the 2003 Agreement, Enbridge Gas approached the Municipality to discuss the renewal of the franchise. The Municipality advised that it did not agree to a renewal unless Enbridge Gas consented to a deviation from the cost-sharing provisions of paragraph 12 (d) of the Model Agreement.

Enbridge Gas subsequently filed an application for a franchise renewal under section 10 of the *Municipal Franchises Act.* The section operates where a franchise agreement reaches the end of its term and the parties to the agreement have been unable to agree on the terms and conditions for renewing or extending it. Specifically, section 10 gives the OEB the power, “if public convenience and necessity appear to require it”, to renew the right of a gas company to operate the gas distribution system in a municipality, “upon such terms and conditions as may be prescribed by the OEB”.

[1] The Model Agreement was adopted by the OEB in 2000, following significant input from interested stakeholders, including the Association of Municipalities of Ontario and natural gas distributors, to provide guidance to applicants and municipalities regarding the standard terms of a franchise agreement and as a tool to efficiently administer the many franchise agreements across the Province.

2.2 Process

On June 30, 2022, Enbridge Gas filed an application under the *Municipal Franchises Act* for an order of the OEB approving a renewal of its gas franchise with the Municipality, based on the terms and conditions of the Model Agreement. Enbridge Gas also applied for an amendment to its certificate in respect of the Municipality. Specifically, Enbridge Gas applied to the OEB under the *Municipal Franchises Act* for the following:

> (a) an Order pursuant to s.10 approving the terms and conditions upon which, and the period for which, the Municipality of Leamington is, by by-law, to grant Enbridge Gas the right to construct and operate works for the distribution, transmission and storage of natural gas and the right to extend and add to the works; and
>
> (b) an Order pursuant to s.9(4) directing and declaring that the assent of the municipal electors of the Municipality of Leamington is not necessary for the proposed franchise agreement by-law under the circumstances[2]; and
>
> (c) an Order pursuant to s.8 cancelling and superseding those parts of the existing Certificate of Public Convenience and Necessity held by Enbridge Gas Inc. for the former municipalities within the Municipality of Leamington and replacing them with a Certificate of Public Convenience and Necessity to construct works to supply natural gas in the Municipality of Leamington.

On July 27, 2022, the OEB issued a notice of hearing advising, among other things, that requests from interested persons to intervene in the proceeding would be accepted until August 8, 2022.

On August 5, 2022, the Municipality filed an intervention request, advising of its intention to file evidence, interrogatories, and argument in the proceeding.

On August 12, 2022, and August 23, 2022, the OEB issued letters to the Municipality requesting additional information pertaining to the nature of its intervention request in order to assist the OEB in establishing the procedural timeline for the hearing.

Through its responses dated August 19, 2022, and August 29, 2022, the Municipality

[2] In its Reply Argument, Enbridge Gas withdrew this request. Section 10 (5) of the *Municipal Franchises Act* provides that an order of the OEB under section 10 (2) is deemed to be a valid by-law of the Municipality, assented to by municipal electors.

advised that its interest in the proceeding would be focused on Enbridge Gas's request in respect of the franchise renewal, that it would be arguing for a deviation from the standard terms and conditions of the Model Agreement, and that it reserved its right to make additional arguments.

On September 8, 2022, the OEB issued Procedural Order No. 1, wherein it approved the Municipality as an intervenor and set the dates for, among other things, the filing of interrogatories, interrogatory responses, and evidence from the Municipality.

On November 18, 2022, the OEB issued Procedural Order No. 2, wherein it set the dates for the filing of reply evidence from Enbridge Gas, interrogatories, and written submissions.

All of the required documents were filed by the parties in accordance with the dates established by the OEB.

3 REQUEST FOR RENEWAL OF THE GAS FRANCHISE

3.1 Do Public Convenience and Necessity Require that the Franchise be Renewed?

Enbridge Gas submitted that it has been providing access to gas services in the Municipality since 1889[3] and that its franchise should be renewed.[4] Enbridge Gas also submitted that it currently serves 9,520 customers within the Municipality[5] and that there is no other natural gas distributor in the area.[6]

OEB staff submitted that public convenience and necessity require a renewal of the franchise given that the existing 2003 Agreement is expired, and that the OEB should exercise its jurisdiction under section 10 (2) of the *Municipal Franchises Act* to renew the term of the franchise.[7]

The Municipality submitted that it was being forced by Enbridge Gas to enter into a form of franchise agreement to which the Municipality objects. The Municipality's submissions were focused in support of its position that it did not agree with a renewal of the gas franchise based on Model Agreement, unless the terms and conditions thereof were amended such that matters involving the *Drainage Act*[8] would be governed by the costs sharing provision of the *Drainage Act.*[9]

Findings

For the reasons set out herein, the OEB finds Enbridge Gas's franchise with the Municipality should be renewed.

The franchise agreement to which Enbridge Gas and the Municipality were a party to expired in January 2023. Because the franchise agreement has expired, the OEB has the legislative power to intervene and issue an order in respect of a renewal even if

[3] Application, para 5
[4] Application, para 14
[5] Application, para
[6] Application, para 15
[7] OEB Staff Submission, page 8
[8] R.S.O. 1990, c. D. 17
[9] Municipality of Leamington Submission, paras 2 and 10

there is no agreement between the municipality and Enbridge Gas. Sections 10 (1) and (2) of the *Municipal Franchises Act* provide the following pertaining to the OEB's legislative powers:

> **Application to Energy Board for renewal, etc., of gas franchise**
> 10 (1) Where the term of a right referred to in clause 6 (1) (a), (b) or (c) that is related to gas or of a right to operate works for the distribution of gas has expired or will expire within one year, either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right.
>
> **Powers of Energy Board**
> 10 (2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

The nature and scope of the OEB's powers under s. 10 of the *Municipal Franchises Act* have been confirmed by a number of decisions of the courts.[10]

When determining an application under section 10 of the *Municipal Franchises Act*, the OEB must address whether public convenience and necessity require the renewal or extension of the term of the franchise. The OEB is guided by the objectives of the *Ontario Energy Board Act, 1998* (OEB Act) relating to supply, distribution, storage and transmission in determining public convenience and necessity.[11] Section 2 of the OEB Act provides that, when carrying out its responsibilities in relation to gas, the OEB shall be guided by certain objectives, including:

- To inform consumers and protect their interests with respect to prices and the reliability and quality of gas service. (Section 2(2))

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[10] *Sudbury (City of) v Union Gas Ltd.*, 2001 CanLII 2886. See also: *Re City of Peterborough and Consumers Gas (1980),* 111 D.L.R.. (3d) 234, wherein the Divisional Court stated: "If however there is no [Franchise] agreement, it is obviously a matter for adjudication by the Board and they must decide the terms and conditions that the [Municipal Franchises] Act contemplates. This is a matter that is entirely within the Board's discretion, to be exercised after a proper hearing."
[11] E.B.A. 825/872 , para. 4.0.3

- To facilitate the rational expansion of transmission and distribution systems. (Section 2(3))

- To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas. (Section 2(5))

There is no evidence that would support a denial of the application. The OEB finds that public convenience and necessity require renewal of the term of the gas franchise between Enbridge Gas and the Municipality.

The dispute with respect to the appropriate terms and conditions of the renewed franchise agreement is discussed in the next section of the Decision and Order.

3.2 If Public Convenience and Necessity Require a Renewal of the Franchise, upon what Terms and Conditions should the Renewal be Ordered?

In its application, Enbridge Gas advised that, on June 8, 2022, it met with the Municipality to discuss concerns that the Municipality had with the Model Agreement, and to review the regulatory process associated with having a franchise agreement approved by the OEB. The Municipality was informed that Enbridge Gas currently has franchise agreements in place with 312 lower and single-tier municipalities and that all are the current Model Agreement without amendments (except for one that contains a service area limitation).

Enbridge further advised that, on June 28, 2022, the Council of the Municipality voted not to approve the form of draft by-law and Model Agreement proposed by Enbridge Gas, and instead requested that any order of the OEB renewing or extending the term of the rights within the Model Agreement include an order directing an amendment to paragraph 12 (d) of the Model Agreement (with proposed new language underlined) as follows:

> *The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the*

> *Corporation has not approved its location, or the relocation is required pursuant to the report of an engineer appointed under the Drainage Act, R.S.O. 1990, c. D.17 or the costs have been assessed pursuant to section 26 of the Drainage Act, R.S.O. 1990, c. D.17 in which case the Gas Company shall pay 100% of the relocation costs.*

Enbridge Gas stated that it did not support the proposed amendment to paragraph 12 (d) of the Model Agreement, and that it took this position given the consistency of franchise agreements currently in place throughout Ontario and given a decision in 2018 by the Ontario Court of Appeal related to the specific *Drainage Act* issue being raised by the Municipality.[12]

Drainage System in the Municipality

Enbridge Gas submitted that the Municipality failed to provide evidence to support its assertion that its drainage systems are unique and that deviation from the Model Agreement is warranted. Enbridge Gas stated that there are drainage issues that have impacted natural gas infrastructure in other municipalities in which it provides services, and that it works directly with municipalities (and their consultants) to assess design options with respect to municipal drainage projects. Enbridge Gas added that it has paid 100% of relocation costs in instances where it was determined that natural gas infrastructure was installed in a manner that impacted drainage infrastructure and that there have been instances where it has worked with a municipal drainage engineer to avoid relocating natural gas infrastructure. Enbridge Gas submitted that it follows the cost-sharing provisions of the Model Agreement in all municipalities in which it provides gas services.[13]

OEB staff submitted that, even if the Municipality's position in respect of its unique topography is accepted, the cost-sharing provisions of the Model Agreement should still apply to the Municipality.[14] OEB staff noted that the cost-sharing provisions of the Model Agreement were intended to apply uniformly throughout the Province. If the cost-sharing formula in paragraph 12 (d) of the Model Agreement does not apply in the Municipality, then it will result in an increase in the share of costs to be borne by Enbridge Gas, with the likely result that these costs will be passed on to Enbridge Gas's ratepayers. OEB staff submitted that it would not be in the public interest for all of Enbridge Gas's

[12] *Union Gas Limited v. Norwich Township*, 2018 Carswell Ont 55 (C.A.)
[13] Enbridge Gas Argument-in Chief, paras 5-7
[14] OEB Staff Submission, page 7

customers to pay for additional costs where those costs are attributable to the unique topography of the Municipality (assuming this is the case).[15]

The Municipality submitted that, due to its unique geography and drainage systems, it would be faced with paying 35% of the costs of pipeline relocations more often than other municipalities, and that this would place an unnecessary burden upon its taxpayers.[16] The Municipality advised that it has 445 municipal drains and that many of the drains are along roads.[17] The Municipality further submitted that "an exemption from the cost sharing provisions related to relocations caused as a result of drainage works is reasonable in these circumstances and public policy would dictate such costs should be spread amongst the Enbridge ratepayers, rather than the Municipality's taxpayers".[18]

In its reply argument, Enbridge Gas reiterated its position that the Municipality did not provide any evidence to demonstrate that the topography in the Municipality presents drainage-related operational challenges that are unique compared to other municipalities in Ontario, and that the Municipality is not unique with respect to Enbridge Gas's operations as compared to other municipalities within the province.[19]

Paragraph 12 of the Model Agreement

Enbridge Gas submitted that the renewal of the 2003 Agreement should be based on the terms and conditions of the Model Agreement, without amendment. Enbridge Gas stated that it disagreed with the Municipality's submission that the agreement to operate under the existing franchise agreement has always been based upon the understanding that matters involving the *Drainage Act* would be governed by the costs sharing provision of the *Drainage Act*. Enbridge Gas submitted that it has always maintained that the franchise agreement between the parties operates as an "exception to the cost allocation provisions set out in the *Drainage Act*" and that this position is supported by the Ontario Court of Appeal's decision in *Union Gas Limited v. The Corporation of the Township of Norwich (Norwich).*[20]

[15] OEB Staff Submission, page 7
[16] Municipality of Leamington, Letter, August 29, 2022
[17] Evidence of the Municipality of Leamington, para 4
[18] Municipality of Leamington, Letter, August 29, 2022
[19] Enbridge Gas Reply Argument, para 5
[20] Enbridge Gas Reply Argument, para 8

Enbridge Gas submitted that the *Norwich* decision provides that the cost-sharing mechanism in the Model Agreement prevails over any assessment that was or could be made under the *Drainage Act* (against a utility as a result of the relocation of its pipeline to accommodate municipal work). Enbridge Gas argued that the Court of Appeal also found that the *Drainage Act* is not a public policy statute; that there is nothing in the legislative scheme to suggest that the ability to contract for the allocation of relocation costs between a municipality and a utility is contrary to public policy; and that the OEB explicitly found that the franchise agreement was "in the public interest".[21] Enbridge Gas further submitted that the Model Agreement outlines the terms that the OEB finds reasonable under the *Municipal Franchises Act* and has advised natural gas distributors that they are to follow the form of the agreement.[22]

OEB staff's views on the *Norwich* decision generally aligned with those of Enbridge Gas. In addition, OEB staff stated that, in that decision, the Court of Appeal also acknowledged that the cost-sharing mechanism in paragraph 12 of the Model Agreement was developed by the OEB as a disincentive to municipalities to require gas pipeline relocation. In OEB staff's view, renewal of the franchise between Enbridge Gas and the Municipality based on the terms and conditions of the Model Agreement, including the cost-sharing provisions in paragraph 12, would preserve the balancing of interests that the OEB sought to achieve when approving the Model Agreement.

The Municipality argued that, if the OEB orders a renewal of the 2003 Agreement, the terms and conditions of the Model Agreement should be amended in respect of the cost-sharing provisions at paragraph 12 (d), as described in detail previously in this decision.

The Municipality took the position that the cost-sharing provisions of the Model Agreement are open to negotiation, based on the ruling in *Norwich*. The Municipality submitted that the Court upheld the cost-sharing provisions of the franchise agreement in *Norwich* because the municipality in that case voluntarily contracted out the *Drainage Act* cost-sharing provisions. The Municipality stated that, in objecting to the renewal at this time, the Municipality "is clearly articulating that it does not agree to contract out of the *Drainage Act*".[23] The Municipality also submitted that it has operated under the terms of the 2003 Agreement but with the understanding that the cost-sharing

[21] Enbridge Gas Reply Argument para 10
[22] Enbridge Gas Reply Argument para 7
[23] Municipality of Leamington Submission, para 8, 9

provisions in the *Drainage Act* would govern matters involving the *Drainage Act*.[24] In summary, the Municipality argued that "the decision in *Norwich* changed the landscape with respect the Franchise Agreement where drainage works are involved" and "Enbridge has failed to recognize the change from the decision and has in turn sought to take advantage of the decision of the Court of Appeal by refusing to negotiate changes to the model Franchise Agreement".[25]

In its reply argument, Enbridge Gas confirmed that additional costs would be passed on to Enbridge Gas's ratepayers throughout the province if the cost-sharing formula in paragraph 12 (d) of the Model Agreement does not apply in the Municipality. Enbridge Gas submitted that there is no compelling reason to amend the Model Agreement for the Municipality.[26]

Findings

The OEB finds that the renewal of the gas franchise between Enbridge Gas and the Municipality shall be based on the standard terms and conditions of the Model Agreement, providing for a twenty-year term, without amendment.

The standard terms that address cost-sharing in the Model Agreement were developed to provide certainty and resolve any dispute in an equitable manner. While the OEB understands that the *Drainage Act* may provide a more favourable result for the Municipality, the OEB finds that the *Norwich* decision supported a view of the Model Agreement, in general, as best meeting the public interest by providing fair treatment of both the civic duties of the Municipality and the fair treatment of Enbridge Gas's ratepayers. This is preferable to a piecemeal approach of negotiating terms specific to a franchise. The OEB is ultimately not convinced that topographic difficulties referenced by the Municipality are sufficient to initiate a renegotiating of cost-sharing provisions in the Model Agreement. Moreover, the OEB notes that the cost-sharing arrangement in the Model Agreement is not an outlier, as such arrangements to share costs of necessary public requirements in which the municipality may have an interest exist in multiple contexts (see for example, the *Public Service on Highways Act*[27]).

[24] Municipality of Leamington Submission, para 2
[25] Municipality of Leamington Submission, para 10
[26] Enbridge Gas Reply Argument, para 6, 9
[27] R.S.O. 1990, c. P.49

4 REQUEST FOR A NEW CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The Municipality is a lower-tier municipality located in the County of Essex, and was formed on January 1, 1999 with the amalgamation of the former Town of Leamington and the former Township of Mersea. In its application, Enbridge Gas provided the context of its certificate rights in the Municipality, as follows:

> Enbridge Gas has a Certificate of Public Convenience and Necessity (FBC 259 dated March 17, 1959) that applies to several municipalities including the former Town of Leamington and the former Township of Mersea which is attached as Schedule "C". Enbridge Gas and its predecessors have been providing access to gas distribution services within the Municipality of Leamington since approximately 1889 in the former Township of Mersea and since approximately 1904 in the former Town of Leamington.

Enbridge Gas applied for an Order pursuant to section 8 of the *Municipal Franchises Act* cancelling those parts FBC 259 for the former municipalities within the Municipality (i.e. the historic Town of Leamington and the historic Township of Mersea), and replacing them with a new certificate to construct works to supply natural gas in the Municipality.

In its argument-in-chief, Enbridge Gas submitted that the requested certificate will not change the area within the Municipality to which Enbridge Gas's certificate rights pertain but will be geographically aligned with the current municipal boundaries of the Municipality. Enbridge Gas added that a new certificate would avoid any confusion of references to former municipalities.[28]

OEB staff noted that it is an established practice of the OEB to grant applications from gas distributors seeking to cancel and supersede old certificates where a new certificate may better align with municipal changes. OEB staff submitted that, in this case, the certificate was issued in 1959, and the requested amendment aligns with current

[28] Enbridge Gas, Argument-in-Chief, para 11.

municipal boundaries and avoids potential confusion that may arise from references to the historic municipalities that were amalgamated to create the Municipality in 1999.[29] The Municipality did not make submissions on Enbridge Gas's certificate request.

Findings

The OEB approves Enbridge Gas's request to cancel and supersede those parts of the Certificate held by Enbridge Gas for the former municipalities within the Municipality and replacing them with a Certificate of Public Convenience and Necessity to construct works to supply natural gas in the Municipality.

The OEB accepts the submissions made by Enbridge Gas and OEB staff that this approval may serve to avoid any potential confusion that might arise from the reliance of an old certificate that references historic (and since-amalgamated former) municipalities.

[29] See, for example: EB-2022-0172, Decision and Order, issued September 8, 2022, wherein the OEB approved Enbridge Gas's request for a new certificate that was "geographically aligned with the current municipal boundaries of the Township of North Dumfries [and stated that the] approach is reasonable given the evidence provided by Enbridge Gas regarding the coverage associated with the historical certificates and the location of its current infrastructure, specifically in the former Township of Beverly".

See also: EB-2022-0253, Decision and Order, issued January 24, 2023, wherein the OEB approved the issuance of a new certificate that "is geographically aligned with the current municipal boundaries of the Town of Bracebridge" and found the "approach is reasonable given that the company has also demonstrated its plans for system expansion within the municipality."

5 ORDER

THE ONTARIO ENERGY BOARD ORDERS:

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

2. This order shall be deemed to be a valid by-law of the Municipality of Leamington assented to by the municipal electors, with an effective date of March 30, 2023, and expiry date of March 30, 2043.

3. A new certificate of public convenience and necessity, attached as Schedule C, is granted to Enbridge Gas Inc. to construct works or supply natural gas in the Municipality of Leamington. This certificate of public convenience and necessity cancels and supersedes those parts of FBC 259 relating to the former Town of Leamington and the former Township of Mersea.

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

DATED at Toronto March 30, 2023

ONTARIO ENERGY BOARD

Nancy Marconi

Digitally signed by Nancy Marconi
Date: 2023.03.30 13:20:30 -04'00'

Nancy Marconi
Registrar

TAB 8

CITATION: Leamington (Municipality of) v. Enbridge Gas Inc., 2024 ONSC 867
DIVISIONAL COURT FILE NO.: 23-259
DATE: 20240212

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Sachs, Backhouse and Lococo JJ.

BETWEEN:	
THE CORPORATION OF THE MUNICIPALITY OF LEAMINGTON Appellant	*Jameson S. Pritiko* and *Matthew R. Todd*, for the Appellant
– **and** –	
ENBRIDGE GAS INC. and ONTARIO ENERGY BOARD Respondents	*Arlen Sternberg* and *Emily Sherky*, for the Respondent Enbridge Gas Inc. *M. Philip Tunley* and *Flora Yu*, for the Respondent Ontario Energy Board
	HEARD in Toronto: January 18, 2024

REASONS FOR JUDGMENT

R. A. LOCOCO J.

I. Introduction

[1] The appellant The Corporation of the Municipality of Leamington appeals the order of the respondent Ontario Energy Board ("OEB") as set out in the OEB's Decision and Order EB-2022-0201 dated March 30, 2023 ("OEB Decision").

[2] In the OEB Decision, the OEB approved the application of the respondent Enbridge Gas Inc. to renew the existing natural gas franchise between Leamington and Enbridge on the terms and conditions set out in the OEB's Model Franchise Agreement.

[3] The Model Franchise Agreement includes a provision relating to the sharing of costs ("gas system relocation costs") if Leamington requires Enbridge to remove or relocate any part of the gas system to permit Leamington to carry out municipal works, including drainage works. The relocation costs sharing provision would require Leamington to pay part of the costs increase for

drainage works that would otherwise be payable entirely by Enbridge under the *Drainage Act*, R.S.O. 1990, c. D.17.

[4] Leamington submits that OEB did not have the authority to contract Leamington out of the *Drainage Act*. Leamington asks the court to set aside the OEB's order and direct the OEB to amend the relocation costs sharing provision to the extent that it would require Leamington to pay part of the gas system relocation costs required for drainage works that would otherwise be payable entirely by Enbridge under the *Drainage Act*.

[5] For the reasons below, I would dismiss the appeal.

II. Background

A. The parties

[6] Leamington is a municipal corporation under the laws of Ontario. It is one of the lower-tier municipalities whose areas comprise the County of Essex.

[7] Enbridge is an OEB-regulated natural gas storage, transmission, and distribution company that provides natural gas services to homes and businesses in Leamington and elsewhere in Ontario.

[8] The OEB is the independent regulator of electricity and natural gas sectors in Ontario. The *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B. ("*OEB Act*"), along with the *Municipal Franchises Act*, R.S.O. 1990, c. M.55 ("*MF Act*"), set out the OEB's regulatory mandate and powers that are relevant for the purposes of this appeal.

[9] The OEB's approval is required for gas companies to construct any works to supply natural gas in any Ontario municipality pursuant to "certificates of public convenience and necessity" issued by the OEB: *MF Act*, s. 8. Enbridge is authorized to construct works to supply natural gas to persons within the municipal boundaries of Leamington pursuant to such a certificate granted to Enbridge's predecessor corporation, Union Gas Limited, on March 17, 1959.

[10] Since that time, Enbridge (or its predecessor corporation) has delivered natural gas distribution services to customers in Leamington under the terms of a franchise agreement between Leamington and Enbridge, as described further below. Prior to the application that is the subject of this appeal, the most recent franchise agreement between Leamington and Enbridge was entered into on January 20, 2003.

B. Regulatory framework

[11] The OEB is an independent quasi-judicial regulatory body with broad statutory powers to regulate the natural gas industry. In doing so, the OEB exercises a public interest mandate, which includes promoting a financially viable and efficient energy sector that provides the public with reliable energy services at a reasonable cost: *OEB Act*, ss. 1, 2

[12] As part of its mandate, the OEB regulates natural gas distributors (including Enbridge) and their transmission and distribution of gas through and within municipalities (including Leamington). The OEB's regulatory powers are broad, and include: regulating the terms of franchise agreements between municipalities and utilities; approving applications for "certificates of public convenience and necessity" for the construction of works to supply gas; and approving the construction, expansion or reinforcement of pipelines.

[13] Under the *OEB Act*, the OEB has "exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act": *OEB Act*, s. 19(6). In all matters within its jurisdiction, the OEB has authority to hear and determine all questions of law and of fact: *OEB Act*, s. 19(1).

C. Natural gas franchise agreements

[14] A utility is not permitted to provide gas transmission and distribution services through or within an Ontario municipality unless the requirements of the *MF Act* have been met. The *MF Act* requires the municipality to enter into a franchise agreement with a natural gas distributor: *MF Act*, s. 3. The terms and conditions of the franchise agreement must be approved by the OEB: *MF Act*, s. 9.

[15] Where a franchise agreement has expired or is about to expire within a year, either the municipality or the utility may make an application to the OEB for a renewal or an extension of the franchise rights, including in circumstances where the parties are not able to agree on the terms and conditions for renewing or extending the franchise agreement: *MF Act*, s. 10. In that regard, s. 10(2) provides as follows:

> **Powers of Energy Board**
>
> (2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right. [Emphasis added.]

[16] As s. 10 and related provisions in the *MF Act* make clear, the *MF Act* confers on the OEB a broad and highly discretionary power to make decisions about the renewal of natural gas franchises, based on "public convenience and necessity", and to decide the terms of such renewal. In *Sudbury (City) v. Union Gas Ltd.* (2001), 54 O.R. (3d) 439 (C.A.), at para. 6, the Court of Appeal for Ontario stated that the *MF Act* and the *OEB Act* "make clear that the Legislature has accorded to the OEB the widest powers to regulate the supply and distribution of natural gas in the public interest" (emphasis added). At para. 23, the court went on to state the following about the OEB's authority with respect to a franchise renewal or extension:

> Section 10 of the Municipal Franchises Act … protects the interests of those who depend on the gas distribution system by allowing either the municipality or the gas

> utility company to seek a renewal or extension of the bundle of rights that is the franchise. The OEB may make the order on the terms it determines necessary to protect the public interest. In my view, a purposive reading of the section gives to the OEB a broad power to impose the terms of renewal or extension of the franchise so that service to the public will not be interrupted simply because the municipality and the utility have been unable to agree on the terms for carrying on the service. [Emphasis added.]

D. Model Franchise Agreement

[17] After an extensive public consultation and hearing process (including oral and written submissions from municipalities and other interested parties), the OEB developed a Model Franchise Agreement in order to standardize the format and content of franchise agreements between natural gas distributors and Ontario municipalities. Following a public hearing in 1985 and a resulting OEB report, the OEB approved the initial version of the model agreement in 1987, which was revised in 2000 following a further public hearing in 1999 and a subsequent OEB report.

[18] The purpose of the Model Franchise Agreement is to provide a template to guide natural gas distributors and municipalities as to the terms and conditions that the OEB generally finds reasonable: OEB, *Guidelines for Gas Expansion in Ontario*, OEB-2015-0156, February 18, 2015, at p. 4. The OEB has advised that natural gas distributors "are expected to follow the form of the Model Agreement when filing applications for the approval of franchise agreements, unless there is a compelling reason for deviation": *Epcor Natural Gas Limited Partnership*, Decision and Order EB-2021-0269, February 17, 2022, at p. 8. Virtually all municipal franchise agreements in Ontario are currently in the form of the OEB's Model Franchise Agreement: see OEB, *Natural Gas Facilities Handbook*, EB-2022-0081, March 31, 2022, at p. 10.

E. Gas system relocation costs

[19] Section 12 of the Model Franchise Agreement addresses how municipalities and natural gas distributors will share the costs of relocating gas works where such works are relocated at the request of the municipality. Section 12(d) provides that such costs will generally be paid 35 percent by the municipality and 65 percent by the utility company.

[20] The issue of costs allocation for the relocation of gas works received a significant amount of attention and consideration as part of the consultation and hearing process that led to the adoption of the Model Franchise Agreement in 1987 and its amendment in 2000. At the 1999 hearing, the issue of relocation costs was again heavily contested, but the resulting OEB report rejected a request that the utility companies be required to pay 100 percent of the relocation costs required for municipal purposes. The OEB concluded that it continued to be generally appropriate that the municipality should bear 35 percent of the relocation costs "as a disincentive to municipalities to require gas line relocation" as a result of their municipal works: *Union Gas Limited v. Norwich (Township)*, 2018 ONCA 11, 140 O.R. (3d) 712, at para. 30. As a result, the costs sharing provision for relocation costs in the 1987 Model Franchise Agreement was confirmed (with minor differences) in the 2000 version of the agreement.

[21] The relevant portions of the Model Franchise Agreement are as follows (emphasis added):

> 12. Pipeline Relocation
>
> a. If in the course of constructing, reconstructing, changing, altering or improving any highway or any municipal works, the [municipal] Corporation deems that it is necessary to take up, remove or change the location of any part of the gas system, the Gas Company shall, upon notice to do so, remove and/or relocate within a reasonable period of time such part of the gas system to a location approved by the Engineer/Road Superintendent.
>
> b. ….
>
> c. Where any part of the gas system relocated in accordance with this Paragraph is located other than on a bridge, viaduct or structure, the costs of relocation shall be shared between the Corporation and the Gas Company on the basis of the total relocation costs …. [calculation method omitted]
>
> d. The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, in which case the Gas Company shall pay 100% of the relocation costs.

III. OEB Decision under appeal

[22] The most recent franchise agreement in place between Enbridge and Leamington was dated January 20, 2003 (the "2003 Agreement") and had a term of 20 years (running until January 2023). This agreement was based on the terms of the OEB's Model Franchise Agreement, without amendment.

[23] Prior to expiry of the 2003 Agreement, Enbridge made an application under s. 10 of the *MF Act*, seeking an order approving a renewal of its gas franchise with Leamington, based on the terms and conditions of the Model Franchise Agreement and consistent with the terms of the 2003 Agreement, including s. 12 of the Model Franchise Agreement relating to pipeline relocation costs.

[24] Leamington was granted intervenor status as a party in the application. Leamington objected to s. 12(d) of the Model Franchise with respect to relocation costs that fall within the scope of s. 26 of the *Drainage Act*. Section 26 of that Act provides as follows:

> 26. In addition to all other sums lawfully assessed against the property of a public utility or road authority under this Act, and despite the fact that the public utility or road authority is not otherwise assessable under this Act, the public utility or road authority shall be assessed for and shall pay all the increase of cost of such drainage works caused by the existence of the works of the public utility or road authority.

[25] Under s. 26 of the *Drainage Act* (if applicable), Enbridge would be required to pay the entire amount of any increase in gas system relocation costs if relocation of the gas system was required to allow Leamington to perform drainage works. Under s. 12(d) of the Model Franchise Agreement, Leamington would be required to pay 35 percent of that costs increase. Leamington objected to s. 12(d) to the extent that it would require Leamington to pay part of the relocation costs required for drainage works that would otherwise be payable by Enbridge under s. 26 of the *Drainage Act*.

[26] At the OEB hearing, Leamington argued that deviation from the Model Franchise Agreement was warranted because of its "unique" drainage systems and because paying such relocation costs would place an unnecessary burden on its taxpayers. Leamington submitted that "public policy would dictate that such costs should be spread amongst the Enbridge ratepayers, rather than the Municipality's taxpayers": OEB Decision, at p. 9. Leamington asserted that it previously agreed to the terms of the Model Franchise Agreement based on the understanding that the *Drainage Act* would govern matters involving drainage works. However, the 2018 Court of Appeal decision in *Norwich* "changed the landscape", with the result that Leamington did not agree to contract out of the *Drainage Act*.

[27] In the OEB Decision, the OEB found that "public convenience and necessity" required the renewal of the natural gas franchise between Leamington and Enbridge: OEB Decision, at pp. 5-7. The OEB also found that that the renewal of the gas franchise would be based on the terms of the Model Franchise Agreement, without amendment.

[28] The OEB concluded that although Leamington may prefer the *Drainage Act* because it is a more favourable result for municipalities, there was no basis in these circumstances to deviate from the relocation costs sharing provision contained in the Model Franchise Agreement:

> The standard terms that address cost-sharing in the Model Agreement were developed to provide certainty and resolve any dispute in an equitable manner. While the OEB understands that the *Drainage Act* may provide a more favourable result for the Municipality, the OEB finds that the *Norwich* decision supported a view of the Model Agreement, in general, as best meeting the public interest by providing fair treatment of both the civic duties of the Municipality and the fair treatment of Enbridge Gas's ratepayers. This is preferable to a piecemeal approach of negotiating terms specific to a franchise. The OEB is ultimately not convinced that topographic difficulties referenced by the Municipality are sufficient to initiate a renegotiating of cost-sharing provisions in the Model Agreement. Moreover, the OEB notes that the cost-sharing arrangement in the Model Agreement is not an outlier, as such arrangements to share costs of necessary public requirements in which the municipality may have an interest exist in multiple contexts (see for example, the Public Service on Highways Act). [Emphasis added.]

[29] By Notice of Appeal dated April 24, 2023, Leamington appeals the OEB Decision.

IV. Jurisdiction and standard of review

[30] The Divisional Court has jurisdiction to hear this appeal, but only on a question of law or jurisdiction: *OEB Act*, ss. 33(1), 33(2). Absent an extricable error of law, the OEB's findings of fact and its findings of mixed fact and law (which include the application of correct legal principles to the evidence) cannot be appealed.

[31] The standard of review is correctness for questions of law or jurisdiction, including legal principles extricable from questions of mixed fact and law: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 34-37; *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 37.

[32] When the decision under appeal is fact-intensive or involves the exercise of discretion, care must be taken in identifying extricable errors of law since the process of severing out legal issues can undermine the standard of review analysis. An arguably unreasonable exercise of discretion is not an error of law or jurisdiction: *Wood Buffalo (Regional Municipality) v. Alberta (Energy and Utilities Board)*, 2007 ABCA 192, 80 Alta. L.R. (4th) 229, at para. 8; *Natural Resource Gas Limited v. Ontario (Energy Board)*, 2012 ONSC 3520 (Div. Ct.), at para. 8; *Conserve Our Rural Environment v. Dufferin Wind Power Inc.*, 2013 ONSC 7307 (Div. Ct.), at para. 13.

[33] While the court is empowered to replace a tribunal's opinion on questions of law with its own, the correctness standard does not detract from the need to respect the tribunal's specialized function. The tribunal's subject matter experience and expertise relating to the requirements of its home statute should be taken into account: *Reisher v. Westdale Properties*, 2023 ONSC 1817 (Div. Ct.), at paras. 9-10, citing *Planet Energy (Ontario) Corp. v. Ontario (Energy Board)*, 2020 ONSC 598 (Div. Ct.), at para. 31, in which the court stated as follows:

> While the Court will ultimately review the interpretation of the [Ontario Energy Board] Act on a standard of correctness, respect for the specialized function of the [Ontario Energy] Board still remains important. One of the important messages in *Vavilov* is the need for the courts to respect the institutional design chosen by the Legislature when it has established an administrative tribunal (at para. 36).

V. Issues to be determined

[34] In this appeal, Leamington asks the court to set aside the OEB Decision and direct the OEB to amend that costs sharing provision of the Model Franchise Agreement to the extent that it would require Leamington to pay part of the gas system relocation costs required for drainage works that would otherwise be payable entirely by Enbridge under the *Drainage Act*. In particular, Leamington asks that s. 12(d) of the franchise agreement be amended to add the additional words indicated below:

> The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, or the relocation is required pursuant to the report of an engineer appointed under the *Drainage Act*, R.S.O. 1990, c. D.17

> or the costs have been assessed pursuant to section 26 of the *Drainage Act*, R.S.O. 1990, c. D.17, in which case the Gas Company shall pay 100% of the relocation costs. [Emphasis added.]

[35] Leamington submits that the OEB exceeded its jurisdiction by contracting Leamington out of s. 26 of the *Drainage Act* without Leamington's approval. Leamington argues that the OEB incorrectly interpreted the 2018 Court of Appeal decision in *Norwich*, which Leamington says changed the landscape with respect to costs sharing in franchise agreements when drainage works are involved. Leamington submits that following *Norwich*, the law is now clear that if a municipality and utility voluntarily agree to share relocation costs, the municipality is bound by that agreement and cannot rely on s. 26 of the *Drainage Act* to escape that obligation. Leamington has not agreed to contract out of the *Drainage Act*. Leamington also submits that had the Legislature intended to give the OEB authority over matters relating to drainage, it would have done so within the *Drainage Act*.

VI. Analysis and conclusion

[36] As explained below, I have concluded that the OEB had the authority and jurisdiction to determine the terms of the renewed franchise agreement between Enbridge and Leamington, including prescribing terms over the objection of either party. The OEB's authority included prescribing the terms of the relocation cost sharing provision, including whether the form of that provision in the parties' previous franchise agreement should be modified.

[37] On the face of s. 10 of the *MF Act*, the OEB has that authority. As noted above, s. 10 allows either party to apply to the OEB to renew the franchise, including when they are not able to agree on the terms and conditions of renewal. If the OEB determines it is in the public interest to do so, it may make an order renewing the franchise right "upon such terms and conditions as may be prescribed by the Board": *MF Act*, s. 10(2).

[38] Accordingly, the plain language of s. 10(2) authorizes the OEB, in exercising its public interest mandate, to decide upon and "prescribe" the terms and conditions that will govern the renewed franchise agreement. This matter falls within the OEB's exclusive jurisdiction: *OEB Act*, s. 19(6).

[39] As noted previously, the Ontario courts have consistently confirmed the OEB's broad and discretionary mandate to regulate the natural gas industry, describing it as "the OEB the widest possible powers to regulate the supply and distribution of natural gas in the public interest": *Sudbury*, at para. 6. That authority includes the "broad power to impose the terms of renewal or extension of the franchise" under s. 10 of the *MF Act*: *Sudbury*, at para. 23.

[40] In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21, the Supreme Court of Canada concisely set out the modern principle of statutory interpretation, as previously formulated in Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at p. 87, as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense

> harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[41] Given the wording of s. 10 of the *MF Act* and the case law that has consistently confirmed the broad scope of the OEB's powers (consistent with the objects of the *OEB Act* and the *MF Act*), the OEB clearly had the authority on Enbridge's s. 10 application to determine the terms and conditions of the parties' renewal agreement, including ordering terms over Leamington's objections. The OEB held a full hearing where both parties adduced evidence and made submissions regarding what the terms and conditions should be, including whether the relocation costs sharing provision in s. 12(d) of the Model Franchise Agreement should be altered. The OEB considered whether there was any compelling reason to change the costs sharing provision and concluded on the evidence that it was not in the public interest to do so. That was a discretionary determination by the OEB, acting within its exclusive jurisdiction.

[42] Leamington is not permitted to appeal the OEB's discretionary determination, as appeals only lie on questions of law or jurisdiction: *OEB Act*, s. 33(2). Which specific terms of renewal agreement are appropriate and are in the public interest is not a question of law or jurisdiction. Even if an exercise of discretion is arguably unreasonable – which is not the case here – it would still not give rise to an error of law or jurisdiction: *Wood Buffalo*, at para. 8; *Conserve Our Rural Environment*, at para. 13.

[43] I am also not persuaded by the submission that the OEB misinterpreted the Court of Appeal's decision in *Norwich* in deciding that the OEB had the authority to prescribe a term of the franchise agreement that was not consistent with s. 26 of the *Drainage Act*. As well, contrary to Leamington's submission, I am not persuaded that the court's conclusion in *Norwich* was dependent on both parties agreeing to contract out of the *Drainage Act*.

[44] Leamington is essentially arguing that s. 26 of the *Drainage Act* should take precedence over s. 12(d) of the Model Franchise Agreement and over the OEB's authority to prescribe what the renewal terms of the franchise agreement should be. In *Norwich*, the Court of Appeal determined that there is nothing in the *Drainage Act* that limits the OEB's broad authority. The court rejected the argument that the *Drainage Act* "is a regulating statute to which the franchise agreement is subject", finding instead that it "is not a public interest statute": *Norwich*, at paras. 31, 34. The court upheld the OEB's determination that the cost sharing provision in s. 12(d) of the Model Franchise Agreement was in the public interest: *Norwich*, at para. 31.

[45] I agree with the respondents that it is not open to Leamington to relitigate the issue of which costs sharing provision is preferable or to ask this court to substitute its exercise of discretion for that of the OEB.

VII. Disposition

[46] Accordingly, I would dismiss the appeal, with costs in the agreed amount of $12,500 payable by Leamington to Enbridge and no costs payable for or against the OEB.

_____
Lococo J.

I agree: _____
Sachs J.

I agree: _____
Backhouse J.

Date: February 12, 2024

CITATION: Leamington (Municipality of) v. Enbridge Gas Inc., 2024 ONSC 867
DIVISIONAL COURT FILE NO.: 23-259
DATE: 20240212

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Backhouse and Lococo JJ.

BETWEEN:

THE CORPORATION OF THE MUNICIPALITY OF LEAMINGTON

Appellant

– **and** –

ENBRIDGE GAS INC. and ONTARIO ENERGY BOARD

Respondents

REASONS FOR JUDGMENT

R. A. LOCOCO J.

Date: February 12, 2024

TAB 9

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

EB-2024-0134

Enbridge Gas Inc.

Application for the renewal of a Municipal Franchise Agreement with the County of Lennox and Addington

PROCEDURAL ORDER NO. 4
November 19, 2024

Enbridge Gas Inc. (Enbridge Gas) filed an application with the Ontario Energy Board (OEB) on April 8, 2024, under section 9 of the *Municipal Franchises Act.* The application is for an order approving the terms and conditions of the renewal of Enbridge Gas's natural gas franchise (franchise) with the County of Lennox and Addington (County), based on the OEB's Model Franchise Agreement without amendment, and for an order declaring and directing that the assent of the municipal electors to the by-law approving the renewal is not necessary.

On July 22, 2024, the OEB issued Procedural Order No. 1 which, among other things, granted intervenor status to Concerned Residents of the County of Lennox and Addington (Concerned Residents) in this proceeding. On September 2, 2024, the OEB issued Procedural Order No. 2 which, among other things, established the hearing process related to interrogatories, evidence, and submissions.

In accordance with the dates established in Procedural Order No. 2, Concerned Residents filed its interrogatories on September 16, 2024 and Enbridge Gas responded on September 30, 2024. In its interrogatory responses, Enbridge Gas declined to answer a number of Concerned Residents' inquiries on the basis that they exceeded the scope of the proceeding as established by the OEB.

On October 3, 2024, Concerned Residents filed a Notice of Motion (Motion) under Rule 27 of the OEB's *Rules of Practice and Procedure* seeking an order of the OEB that would require Enbridge Gas to provide full and adequate responses to all of the interrogatories it filed. Through the Motion, Concerned Residents also posed an additional interrogatory.

On October 10, 2024, the OEB issued Procedural Order No. 3, advising that (a) it would hear the Motion and, in the meantime, suspend the remaining procedural steps set out in Procedural Order No. 2 and (b) make its determination on Concerned Residents' proposed evidence request together with its decision on the Motion.

On October 18, 2024, Enbridge Gas and OEB staff filed their respective submissions on the Motion.

Enbridge Gas requested that the Motion be dismissed, submitting that it had answered all of the interrogatories that were within the scope of the proceeding, as established by Procedural Order No. 2. Enbridge Gas further submitted that its refusals were fair and proper in light of the scope of the proceeding, the lack of specificity of the interrogatories to the County, the failure by Concerned Residents to address the relevance of the interrogatories and, the reliance on the potential future repeal of O. Reg 584/06, Fees and Charges, made under the *Municipal Act, 2001,* which Enbridge argued is not merely hypothetical but also fails to raise issues specific to the County. Enbridge Gas stated that it was willing to provide further information in response to the additional interrogatory request, CR-11, “in accordance with an OEB Order”.

OEB staff submitted that the Motion should be granted on a limited and partial basis. OEB staff took the view that, in the light of Procedural Order No. 2, the majority of Concerned Residents’ interrogatories appeared to be out of scope because they raised issues that were speculative or not specific to the circumstances of the County. OEB staff submitted that while Enbridge Gas’s limited responses to interrogatories CR-1 to CR-4, CR-5(b) and CR-6 to CR-10 were appropriate, Enbridge Gas should be required to provide a full and adequate response to part (a) of interrogatory CR-10 and all of interrogatory CR-11 both of which are within scope of the proceeding.

Concerned Residents filed its reply submission on the Motion on October 25, 2024. Concerned Residents stated that it disagreed with Enbridge Gas’s submission that deviation from the Model Franchise Agreement can only be justified based on factors that are unique to a specific municipality and submitted that there is no legal basis to warrant such a restriction. Concerned Residents also submitted that “deviation may be warranted because of new facts or new considerations that did not apply when the model agreement was developed 25 years ago” and that “even if those new considerations would apply to many or all municipalities, that should not prevent them from being raised in a proceeding such as this”. Concerned Residents argued that the *Municipal Franchises Act* treats residents (and not merely municipalities and utilities) as having rights and interests in franchise renewal proceedings and reiterated its “significant concern that the proposed franchise agreement would lock the County into providing use of the municipal highways for free for the duration of the 20-year franchise agreement even if [O. Reg 584/06] is changed to allow for such fees to be charged”.

Having reviewed the submissions of all parties, the OEB sets out its findings below on Concerned Residents’ Motion and request to file evidence, together with the OEB’s determination on the next steps in this proceeding.

The Motion

The OEB grants the Motion filed by Concerned Residents on a partial basis.

The OEB finds Enbridge Gas's limited responses to interrogatories CR-1 to CR-4, CR-5(b) to CR-9, and CR-10(b) appropriate in the light of the scope of this proceeding. The OEB is of the view that these interrogatories either failed to raise issues specific to the County that could justify a deviation from the standard terms of the Model Franchise Agreement or were based on speculation of a legislative change that is not reflective of the current circumstances of the application.

Notwithstanding the OEB's general acceptance of Enbridge Gas's position on the Motion, the OEB agrees with the submissions of Concerned Residents and OEB staff that interrogatory CR-10(a) falls within scope of this proceeding and that Enbridge Gas should also be required to respond to the incremental interrogatory CR-11. CR-10(a) asks for examples where the OEB has previously accepted a deviation from the terms of the Model Franchise Agreement and CR-11 seeks information on the status of discussions between Enbridge Gas and the County. Enbridge Gas shall provide a response to these two interrogatories, in accordance with the timelines set out below. The evidence provided in response to these two interrogatories may be of assistance to the OEB's assessment of issues raised in this proceeding.

Request to File Evidence

The OEB denies Concerned Residents' request to file evidence.

The purpose of Concerned Residents' proposed evidence would be to justify amendments to the terms of the Model Franchise Agreement, namely in respect of issues relating to fees for the use of highways (such as fees charged in other jurisdictions), free highway access no longer being in the public interest (given the role of pipeline infrastructure in climate change), and the need to negotiate fees in the event that O. Reg 584/06 is amended (including evidence on the likelihood that the regulation itself would be amended).

The OEB finds that the evidence proposed is not material to the specific circumstances of the County such that it could justify deviation from the terms of the Model Franchise Agreement. For example, the OEB accepts that right-of-way fees may be paid by utilities to municipalities in other jurisdictions, however, the OEB does not require evidence on this matter for the purposes of this proceeding.

Next Steps

Enbridge Gas shall provide a further response to the interrogatories in accordance with this Procedural Order.

At this time, the OEB is also making provision for a one-day transcribed oral hearing of argument. The hearing shall include the opportunity for Enbridge Gas to present an oral argument-in-chief, oral submissions from Concerned Residents, OEB staff and the County (should it wish to participate), and oral reply submissions from Enbridge Gas. The OEB finds that the presentation of oral argument will provide an opportunity for direct interaction between the parties and the OEB, allowing the Panel to expeditiously explore and question the parties' positions.

The OEB also requires that parties file a written summary of their argument, that is limited to two single-spaced pages, by the date set in this Procedural Order. The OEB intends that the oral hearing of argument will complete the record for this proceeding.

IT IS THEREFORE ORDERED THAT:

1. Enbridge Gas shall file with the OEB complete written responses to part (a) of interrogatory CR-10 and all of interrogatory CR-11 and serve them on all parties by **December 3, 2024**.

2. Enbridge Gas, Concerned Residents, OEB staff and the County (should it choose to participate) shall file with the OEB a maximum two-page (single-spaced) written summary of their oral argument and serve it on all parties by **January 6, 2025**.

3. A transcribed oral hearing shall be convened on **January 13, 2025**. The OEB will communicate additional information on how to participate in the hearing following the issuance of this Procedural Order.

Parties are responsible for ensuring that any documents they file with the OEB, such as applicant and intervenor evidence, interrogatories and responses to interrogatories or any other type of document, **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with rule 9A of the OEB's Rules of Practice and Procedure.

Please quote file number, **EB-2024-0134** for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the OEB's online filing portal.

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the Regulatory Electronic Submission System (RESS) Document Guidelines found at the File documents online page on the OEB's website.
- Parties are encouraged to use RESS. Those who have not yet set up an account, or require assistance using the online filing portal can contact registrar@oeb.ca for assistance.
- Cost claims are filed through the OEB's online filing portal. Please visit the File documents online page of the OEB's website for more information. All participants shall download a copy of their submitted cost claim and serve it on all required parties as per the Practice Direction on Cost Awards.

All communications should be directed to the attention of the Registrar and be received by end of business, 4:45 p.m., on the required date.

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

Email: registrar@oeb.ca
Tel: 1-877-632-2727 (Toll free)

DATED at Toronto, **November 19, 2024**

ONTARIO ENERGY BOARD

Nancy Marconi

Digitally signed by Nancy Marconi
Date: 2024.11.19 16:27:09 -05'00'

Nancy Marconi
Registrar

TAB 10

IN THE MATTER OF the *Municipal Franchises Act;*

AND IN THE MATTER OF the 2000 Model Franchise Agreement.

BEFORE: Sheila K. Halladay
Presiding Member

Floyd Laughren
Member and Chair

Judy Simon
Member

A. Catherina Spoel
Member

REPORT TO THE BOARD

December 29, 2000

2000 MODEL FRANCHISE AGREEMENT

THIS AGREEMENT effective this day of 20

BETWEEN:

hereinafter called the "Corporation"

- and -

hereinafter called the "Gas Company"

WHEREAS the Gas Company desires to distribute, store and transmit gas in the Municipality upon the terms and conditions of this Agreement;

AND WHEREAS by by-law passed by the Council of the Corporation (the "By-law"), the duly authorized officers have been authorized and directed to execute this Agreement on behalf of the Corporation;

THEREFORE the Corporation and the Gas Company agree as follows:

Part I - Definitions
{tc \l1 "Part I - Definitions}

1. In this Agreement:

(a) “decommissioned” and “decommissions” when used in connection with parts of the gas system, mean any parts of the gas system taken out of active use and purged in accordance with the applicable CSA standards and in no way affects the use of the term ‘abandoned’ pipeline for the purposes of the *Assessment Act*;

(b) "Engineer/Road Superintendent" means the most senior individual employed by the Corporation with responsibilities for highways within the Municipality or the person designated by such senior employee or such other person as may from time to time be designated by the Council of the Corporation;

(c) "gas" means natural gas, manufactured gas, synthetic natural gas, liquefied petroleum gas or propane-air gas, or a mixture of any of them, but does not include a liquefied petroleum gas that is distributed by means other than a pipeline;

(d) "gas system" means such mains, plants, pipes, conduits, services, valves, regulators, curb boxes, stations, drips or such other equipment as the Gas Company may require or deem desirable for the distribution, storage and transmission of gas in or through the Municipality;

(e) "highway" means all common and public highways and shall include any bridge, viaduct or structure forming part of a highway, and any public square, road allowance or walkway and shall include not only the travelled portion of such highway, but also ditches, driveways, sidewalks, and sodded areas forming part of the road allowance now or at any time during the term hereof under the jurisdiction of the Corporation;

(f) “Model Franchise Agreement” means the form of agreement which the Ontario Energy Board uses as a standard when considering applications under the *Municipal Franchises Act*. The Model Franchise Agreement may be changed from time to time by the Ontario Energy Board;

(g) "Municipality" means the territorial limits of the Corporation on the date when this Agreement takes effect, and any territory which may thereafter be brought within the jurisdiction of the Corporation;

(h) “Plan” means the plan described in Paragraph 5 of this Agreement required to be filed by the Gas Company with the Engineer/Road Superintendent prior to commencement of work on the gas system; and

(i) whenever the singular, masculine or feminine is used in this Agreement, it shall be considered as if the plural, feminine or masculine has been used where the context of the Agreement so requires.

Part II - Rights Granted
{tc \l1 "Part II - Rights Granted}

2. To provide gas service:

The consent of the Corporation is hereby given and granted to the Gas Company to distribute, store and transmit gas in and through the Municipality to the Corporation and to the inhabitants of the Municipality.

or

The consent of the Corporation is hereby given and granted to the Gas Company to distribute, store and transmit gas in and through the Corporation and to the inhabitants of those local or lower tier municipalities within the Municipality from which the Gas Company has a valid franchise agreement for that purpose.

* Footnote: Choose one only.

3. To Use Highways.

Subject to the terms and conditions of this Agreement the consent of the Corporation is hereby given and granted to the Gas Company to enter upon all highways now or at any time hereafter under the jurisdiction of the Corporation and to lay, construct, maintain, replace, remove, operate and repair a gas system for the distribution, storage and transmission of gas in and through the Municipality.

4. Duration of Agreement and Renewal Procedures.

(a) If the Corporation has not previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law.

or

(b) If the Corporation has previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law provided that, if during the 20-year term this Agreement, the Model Franchise Agreement is changed, then on the 7th anniversary and on the 14th anniversary of the date of the passing of the By-law, this Agreement shall be deemed to be amended to incorporate any changes in the Model Franchise Agreement in effect on such anniversary dates. Such deemed amendments shall not apply to alter the 20-year term.

(c) At any time within two years prior to the expiration of this Agreement, either party may give notice to the other that it desires to enter into negotiations for a renewed franchise upon such terms and conditions as may be agreed upon. Until such renewal has been settled, the terms and conditions of this Agreement shall continue, notwithstanding the expiration of this Agreement. This shall not preclude either party from applying to the Ontario Energy Board for a renewal of the Agreement pursuant to section 10 of the *Municipal Franchises Act*.

Part III - Conditions
{tc \l1 "Part III - Conditions}

5. Approval of Construction

(a) The Gas Company shall not undertake any excavation, opening or work which will disturb or interfere with the surface of the travelled portion of any highway unless a permit therefor has first been obtained from the Engineer/Road Superintendent and all work done by the Gas Company shall be to his satisfaction.

(b) Prior to the commencement of work on the gas system, or any extensions or changes to it (except service laterals which do not interfere with municipal works in the highway), the Gas Company shall file with the Engineer/Road Superintendent a Plan, satisfactory to the Engineer/Road Superintendent, drawn to scale and of sufficient detail considering the complexity of the specific locations involved, showing the highways in which it proposes to lay its gas system and the particular parts thereof it proposes to occupy.

(c) The Plan filed by the Gas Company shall include geodetic information for a particular location:

(i) where circumstances are complex, in order to facilitate known projects, including projects which are reasonably anticipated by the Engineer/Road Superintendent, or

(ii) when requested, where the Corporation has geodetic information for its own services and all others at the same location.

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

(e) Prior to the commencement of work on the gas system, the Engineer/Road Superintendent must approve the location of the work as shown on the Plan filed by the Gas Company, the timing of the work and any terms and conditions relating to the installation of the work.

(f) In addition to the requirements of this Agreement, if the Gas Company proposes to affix any part of the gas system to a bridge, viaduct or other structure, if the Engineer/Road Superintendent approves this proposal, he may require the Gas Company to comply with special conditions or to enter into a separate agreement as a condition of the approval of this part of the construction of the gas system.

(g) Where the gas system may affect a municipal drain, the Gas Company shall also file a copy of the Plan with the Corporation's Drainage Superintendent for purposes of the *Drainage Act*, or such other person designated by the Corporation as responsible for the drain.

(h) The Gas Company shall not deviate from the approved location for any part of the gas system unless the prior approval of the Engineer/Road Superintendent to do so is received.

(i) The Engineer/Road Superintendent's approval, where required throughout this

Paragraph, shall not be unreasonably withheld.

(j) The approval of the Engineer/Road Superintendent is not a representation or warranty as to the state of repair of the highway or the suitability of the highway for the gas system.

6. As Built Drawings

The Gas Company shall, within six months of completing the installation of any part of the gas system, provide two copies of “as built” drawings to the Engineer/Road Superintendent. These drawings must be sufficient to accurately establish the location, depth (measurement between the top of the gas system and the ground surface at the time of installation) and distance of the gas system. The "as built" drawings shall be of the same quality as the Plan and, if the approved pre-construction plan included elevations that were geodetically referenced, the “as built” drawings shall similarly include elevations that are geodetically referenced. Upon the request of the Engineer/Road Superintendent, the Gas Company shall provide one copy of the drawings in an electronic format and one copy as a hard copy drawing.

7. Emergencies

In the event of an emergency involving the gas system, the Gas Company shall proceed with the work required to deal with the emergency, and in any instance where prior approval of the Engineer/Road Superintendent is normally required for the work, the Gas Company shall use its best efforts to immediately notify the Engineer/Road Superintendent of the location and nature of the emergency and the work being done and, if it deems appropriate, notify the police force, fire or other emergency services having jurisdiction. The Gas Company shall provide the Engineer/Road Superintendent with at least one 24 hour emergency contact for the Gas Company and shall ensure the contacts are current.

8. Restoration

The Gas Company shall well and sufficiently restore, to the reasonable satisfaction of the Engineer/Road Superintendent, all highways, municipal works or improvements which it may excavate or interfere with in the course of laying, constructing, repairing or removing its gas system, and shall make good any settling or subsidence thereafter caused by such excavation or interference. If the Gas Company fails at any time to do any work required by this Paragraph within a reasonable period of time, the Corporation may do or cause such work to be done and the Gas Company shall, on demand, pay the Corporation’s reasonably incurred costs, as certified by the Engineer/Road Superintendent.

9. Indemnification

The Gas Company shall, at all times, indemnify and save harmless the Corporation from and against all claims, including costs related thereto, for all damages or injuries including death to any person or persons and for damage to any property, arising out of the Gas Company operating, constructing, and maintaining its gas system in the Municipality, or utilizing its gas system for the carriage of gas owned by others. Provided that the Gas Company shall not be required to indemnify or save harmless the Corporation from and against claims, including costs related thereto, which it may incur by reason of damages or injuries including death to any person or persons and for damage to any property, resulting from the negligence or wrongful act of the Corporation, its servants, agents or employees.

10. Insurance

(a) The Gas Company shall maintain Comprehensive General Liability Insurance in sufficient amount and description as shall protect the Gas Company and the Corporation from claims for which the Gas Company is obliged to indemnify the Corporation under Paragraph 9. The insurance policy shall identify the Corporation as an additional named insured, but only with respect to the operation of the named insured (the Gas Company). The insurance policy shall not lapse or be cancelled without sixty (60) days' prior written notice to the Corporation by the Gas Company.

(b) The issuance of an insurance policy as provided in this Paragraph shall not be construed as relieving the Gas Company of liability not covered by such insurance or in excess of the policy limits of such insurance.

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

11. Alternative Easement

The Corporation agrees, in the event of the proposed sale or closing of any highway or any part of a highway where there is a gas line in existence, to give the Gas Company reasonable notice of such proposed sale or closing and, if is feasible, to provide the Gas Company with easements over that part of the highway proposed to be sold or closed sufficient to allow the Gas Company to preserve any part of the gas system in its then existing location. In the event that such easements cannot be provided, the Corporation and the Gas Company shall share the cost of relocating or altering the gas system to facilitate continuity of gas service, as provided for in Paragraph 12 of this Agreement.

12. Pipeline Relocation

(a) If in the course of constructing, reconstructing, changing, altering or improving any highway or any municipal works, the Corporation deems that it is necessary to take up, remove or change the location of any part of the gas system, the Gas Company shall, upon notice to do so, remove and/or relocate within a reasonable period of time such part of the gas system to a location approved by the Engineer/Road Superintendent.

(b) Where any part of the gas system relocated in accordance with this Paragraph is located on a bridge, viaduct or structure, the Gas Company shall alter or relocate that part of the gas system at its sole expense.

(c) Where any part of the gas system relocated in accordance with this Paragraph is located other than on a bridge, viaduct or structure, the costs of relocation shall be shared between the Corporation and the Gas Company on the basis of the total relocation costs, excluding the value of any upgrading of the gas system, and deducting any contribution paid to the Gas Company by others in respect to such relocation; and for these purposes, the total relocation costs shall be the aggregate of the following:

(i) the amount paid to Gas Company employees up to and including field supervisors for the hours worked on the project plus the current cost of fringe benefits for these employees,

(ii) the amount paid for rental equipment while in use on the project and an amount, charged at the unit rate, for Gas Company equipment while in use on the project,

(iii) the amount paid by the Gas Company to contractors for work related to the project,

(iv) the cost to the Gas Company for materials used in connection with the project, and

(v) a reasonable amount for project engineering and project administrative costs which shall be 22.5% of the aggregate of the amounts determined in items (i), (ii), (iii) and (iv) above.

(d) The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened

road allowance and the Corporation has not approved its location, in which case the Gas Company shall pay 100% of the relocation costs.

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

13. Municipal By-laws of General Application

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

14. Giving Notice

Notices may be delivered to, sent by facsimile or mailed by prepaid registered post to the Gas Company at its head office or to the authorized officers of the Corporation at its municipal offices, as the case may be.

15. Disposition of Gas System

(a) If the Gas Company decommissions part of its gas system affixed to a bridge, viaduct or structure, the Gas Company shall, at its sole expense, remove the part of its gas system affixed to the bridge, viaduct or structure.

(b) If the Gas Company decommissions any other part of its gas system, it shall have the right, but is not required, to remove that part of its gas system. It may exercise its right to remove the decommissioned parts of its gas system by giving notice of its intention to do so by filing a Plan as required by Paragraph 5 of this Agreement for approval by the Engineer/Road Superintendent. If the Gas Company does not remove the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in any highway, the Corporation may remove and dispose of so much of the decommissioned gas system as the Corporation may require for such purposes and neither party shall have recourse against the other for any loss, cost, expense or damage occasioned thereby. If the Gas Company has not removed the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in a highway, the Gas Company may elect to relocate the decommissioned gas system and in that event Paragraph

12 applies to the cost of relocation.

16. Use of Decommissioned Gas System

(a) The Gas Company shall provide promptly to the Corporation, to the extent such information is known:

(i) the names and addresses of all third parties who use decommissioned parts of the gas system for purposes other than the transmission or distribution of gas; and

(ii) the location of all proposed and existing decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas.

(b) The Gas Company may allow a third party to use a decommissioned part of the gas system for purposes other than the transmission or distribution of gas and may charge a fee for that third party use, provided

(i) the third party has entered into a municipal access agreement with the Corporation; and

(ii) the Gas Company does not charge a fee for the third party's right of access to the highways.

(c) Decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas are not subject to the provisions of this Agreement. For decommissioned parts of the gas system used for purposes other than the transmission and distribution of gas, issues such as relocation costs will be governed by the relevant municipal access agreement.

17. Franchise Handbook

The Parties acknowledge that operating decisions sometimes require a greater level of detail than that which is appropriately included in this Agreement. The Parties agree to look for guidance on such matters to the Franchise Handbook prepared by the Association of Municipalities of Ontario and the gas utility companies, as may be amended from time to time.

18. Other Conditions

The following paragraph shall be inserted as a special condition in the old Union Gas franchise area, which is understood to be the franchise area of Union Gas in southwestern Ontario prior to its merger with Centra Gas.

Notwithstanding the cost sharing arrangements described in Paragraph 12, if any part of

the gas system altered or relocated in accordance with Paragraph 12 was constructed or installed prior to January 1, 1981, the Gas Company shall alter or relocate, at its sole expense, such part of the gas system at the point specified, to a location satisfactory to the Engineer/Road Superintendent.

19. Agreement Binding Parties

This Agreement shall extend to, benefit and bind the parties thereto, their successors and assigns, respectively.

IN WITNESS WHEREOF the parties have executed this Agreement effective from the date written above.

THE CORPORATION OF _____

By:

_____
Duly Authorized Officer

[Insert name of Gas Company]

By: _____

1. BACKGROUND AND THE PROCEEDING

{tc \l1 "Field result goes here BACKGROUND AND THE PROCEEDING}

Background

1.1.1 The *Municipal Franchises Act* (the "MFAct") was first enacted in 1912. Section 3 of the MFAct provides that a municipal by-law granting, extending or renewing a right to construct or operate a public utility must set forth the terms and conditions upon which and the period for which such right is to be granted, and that the by-law must receive the assent of the electors.

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

> 9(1) No by-law granting,
>
> (a) the right to construct and operate works for the distribution of gas;
> (c) the right to extend or add to the works mentioned in clause (a); or
> (d) a renewal of or an extension of the term of any right mentioned in clause (a)
>
> shall be submitted to the municipal electors for their assent unless the terms and conditions upon which

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

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

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

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

> extension of the term of the right, may make an order refusing a renewal or extension of the right.
>
> ...
>
> (5) An order of the Board heretofore or hereafter made under subsection (2) renewing or extending the term of the right ... shall be deemed to be a valid by-law of the municipality concerned assented to by the municipal electors for the purposes of this Act and section 58 of the *Public Utilities Act*.

1.1.5 In November 1985, the Board held a generic hearing (E.B.O. 125) to provide a forum for the discussion of a number of general and specific concerns which had arisen regarding municipal franchise agreements for the distribution of gas in Ontario. The Board wanted to determine whether the existing forms of franchise agreements between municipalities and gas distributing companies were adequate, and whether the ways in which these agreements were entered into were appropriate.

1.1.6 On May 21, 1986, the Board issued its Report, which described the Board's findings and provided policy guidelines. The findings of the Board were not legally binding on its future deliberations but were expressions of the Board's policies or guidelines on the various issues discussed. E.B.O. 125 recommended the establishment of a special Municipal Franchise Committee ("MFC") to be made up of representatives from the municipalities, the gas distributing companies and the Board to resolve a number of questions about municipal franchise agreements which were raised originally at the hearing, but that the Board felt would be most constructively answered through discussion and negotiation rather than by decisions or orders of the Board.

1.1.7 The Model Franchise Agreement (the "1987 MFA") was published by the MFC with the concurrence of the Board in 1987 and has served as a template for most initial franchise agreements and also for renewal of franchises during the ensuing years.

The Proceeding

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

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

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

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

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

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

The Gas Companies

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

AMO

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

Ottawa-Carleton

Ernest McArthur	Counsel
Lorne Ross	Manager Surface Projects

Toronto

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

Board Staff

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

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

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

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

2. PROPOSED AMENDMENTS SUPPORTED BY ALL OF THE PARTIES

{tc \l1 "Field result goes here PROPOSED AMENDMENTS SUPPORTED BY ALL OF THE PARTIES}

2.1 Updating and Clarification of Terminology

{tc \l2 "Updating and Clarification of Terminology}

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

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

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

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

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

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

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

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

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

> Whenever the singular, masculine or feminine is used in this agreement, it shall be considered as if the plural, feminine or masculine has been used where the context of the agreement so requires.

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

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

Panel Recommendations

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

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

> In the event of an emergency involving the gas system, the Gas Company shall proceed with the work required to deal with the emergency, and in any instance where prior approval of the Engineer/Road Superintendent is normally required for the work, the Gas Company shall use its best efforts to immediately notify the Engineer/Road Superintendent of the

> location and nature of the emergency and the work being done and, if it deems appropriate, notify the police force, fire or other emergency services having jurisdiction. The Gas Company shall provide the Engineer/Road Superintendent with the at least one 24 hour emergency contact for the Gas Company and shall ensure the contacts are current.

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

> whenever the singular, masculine or feminine is used in this Agreement, it shall be considered as if the plural, feminine or masculine has been used where the context of the Agreement so requires.

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

> The Parties acknowledge that operating decisions sometimes require a greater level of detail than that which is appropriately included in this Agreement. The Parties agree to look for guidance on such matters to the Franchise Handbook prepared by the Association of Municipalities of Ontario and the gas utility companies, as may be amended from time to time.

2.2 Construction Issues

{tc \l2 "Construction Issues}

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

Construction Standards

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

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

Geodetic Information

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

2.2.4 At the hearing, the Gas Companies' position was that the limited requirements of the 1987 MFA are valid and strike an appropriate balance between the needs of municipalities and the costs incurred by the Gas Companies and their customers. The Gas Companies submitted that they generally do not possess geodetic information for

general use since such geodetic information is not sufficient for the physical locates required for safety reasons when working in close proximity to gas pipes. Their position was that a requirement to provide geodetic information as proposed by AMO could create additional, unnecessary costs, estimated by the Gas Companies at approximately $8 million per year.

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

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

"As Built" Drawings

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

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

2.2.8 The parties eventually proposed the following compromise:

> The Gas Company shall not deviate from the approved location for any part of the gas system

> unless the prior approval of the Engineer/Road Superintendent to do so is received. The Gas Company shall, within six months of completing the installation of any part of the gas system, provide two copies of "as built" drawings to the Engineer/Road Superintendent sufficient to accurately establish the location, depth, (measurement between the top of the gas system and the ground surface at the time of installation) and distance of the gas system. The "as built" plan shall be of equal quality to the pre-construction plan and if the approved pre-construction plan included elevations that were geodetically referenced, the "as built" plan shall similarly include elevations that were geodetically referenced. If requested, one copy of the drawings shall be in an electronic format and one shall be a hard copy drawing.

Warranty

2.2.9 AMO noted that while the 1987 MFA gives the municipality control over the location of the gas system in the highway, AMO wanted the 2000 MFA to explicitly state that the municipality's approved location in the road allowance is to be taken by the Gas Companies on an "as is" basis. AMO also wanted the 2000 MFA to clarify that the municipality's approval is related to standard cross-sections and anticipated road system works, and is not to be taken as a representation that the location is suitable for the Gas Company's purposes, as the approved location may be found to be impractical for environmental or other reasons.

2.2.10 The Gas Companies' initial position was that the determination of responsibility for environmental impacts should continue to be judged on the basis of the circumstances surrounding any particular occurrence. The Gas Companies were

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

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

> This approval is not a representation or warranty as to the state of repair of the highway or the suitability of the highway for the gas system.

Panel Recommendations

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

> Plan means the plan described in Paragraph 5 of this Agreement required to be filed by the Gas Company with the Engineer/Road Superintendent prior to the commencement of work on the gas system.

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

> The Plan filed by the Gas Company shall include geodetic information for a particular location:
>
> (i) where circumstances are complex, in order to facilitate known projects, including projects which are reasonably anticipated by the Engineer/Road Superintendent, or
>
> (ii) when requested, where the Corporation has geodetic information for its own services and all others at the same location.

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

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

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

> (a) The Gas Company shall not undertake any excavation, opening or work which will disturb or interfere with the surface of the travelled portion of any highway unless a permit therefor has first been obtained from the Engineer/Road Superintendent and all work done by the Gas Company shall be to his satisfaction.

(b) Prior to the commencement of work on the gas system or any extensions or changes to it (except service laterals which do not interfere with municipal works in the highway), the Gas Company shall file with the Engineer/Road Superintendent a Plan, satisfactory to the Engineer/Road Superintendent, drawn to scale and of sufficient detail considering the complexity of the specific locations involved, showing the highways in which it proposes to lay its gas system and the particular parts thereof it proposes to occupy.

(c) The Plan filed by the Gas Company shall include geodetic information for a particular location:

> (i) where circumstances are complex, in order to facilitate known projects, including projects which are reasonably anticipated by the Engineer/Road Superintendent, or
>
> (ii) when requested, where the Corporation has geodetic information for its own services and all others at the same location.

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

(e) Prior to the commencement of work on the gas system, the Engineer/Road Superintendent must approve the location of the work as shown on the Plan filed by the Gas Company, the timing of the work and any terms and conditions relating to the installation of the work.

(f) In addition to the requirements of this Agreement, if the Gas Company proposes to affix any part of the

gas system to a bridge, viaduct or other structure, if the Engineer/Road Superintendent approves this proposal, he may require the Gas Company to comply with special conditions or to enter into a separate agreement as a condition of the approval of this part of the construction of the gas system.

(g) Where the gas system may affect a municipal drain, the Gas Company shall also file a copy of the Plan with the Corporation's Drainage Superintendent for purposes of the *Drainage Act*, or such other person designated by the Corporation as responsible for the drain.

(h) The Gas Company shall not deviate from the approved location for any part of the gas system unless the prior approval of the Engineer/Road Superintendent to do so is received.

(i) The Engineer/Road Superintendent's approval, where required throughout this paragraph shall not be unreasonably withheld.

(j) The approval of the Engineer/Road Superintendent is not a representation or warranty as to the state of repair of the highway or the suitability of the highway for the gas system.

2.3 Insurance and Liability

{tc \l2 "Insurance and Liability}

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

2.3.2 The Gas Companies' position was that the wording of the 1987 MFA is adequate and clearly protects the municipality from claims. The Gas Companies claimed that they

were in the best position to judge how to maintain adequate insurance to fulfill their obligations. The Gas Companies were concerned that it would be unreasonable and administratively onerous for utilities to include municipalities as named insureds. The Gas Companies were also concerned that an overly prescriptive approach would lead to excessive and unnecessary costs.

2.3.3 The parties subsequently proposed the following:

> The Gas Companies shall maintain Comprehensive General Liability Insurance in sufficient amount and description as will protect the Gas Company and the Corporation from claims for which the Gas Company is obliged to indemnify the Corporation under Section III-5. The insurance policy shall identify the Corporation as an additional named insured, but only with respect to the operation of the named insured (the Gas Company). The insurance policy shall not lapse or be cancelled without sixty (60) days' prior written notice to the Corporation by the Gas Company.
>
> The issuance of an insurance policy as provided in this section shall not be construed as relieving the Gas Company of liability not covered by such insurance or in excess of the policy limits of such insurance.
>
> Upon request by the Corporation, the Gas Company will confirm that premiums for such insurance have been paid and that such insurance is in full force and effect.

Panel Recommendation

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

2.4 Legislative Change

{tc \l2 "Legislative Change}

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

2.4.2 The Gas Companies suggested that it was not in their interest nor that of gas customers to renegotiate the 2000 MFA every time there is a change in legislation or regulations that "pertain to the subject matter of the Agreement". The Gas Companies submitted that AMO's proposal, if accepted by the Board, would substantially increase the risk associated with investments in natural gas distribution, thereby placing upward pressure on rates and inhibiting further investment and system expansion, since it would create an uncertain and unstable environment for Gas Company operations. The Gas Companies' position was that a franchise agreement should be treated as any other contract where terms and conditions apply for a specified term.

Panel Recommendation

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

2.5 Abandoned Pipe

{tc \l2 "Abandoned Pipe}

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

2.5.2 The Gas Companies' position was that the wording in the 1987 MFA strikes an appropriate balance between the interests of the utilities and the municipalities and that AMO's proposal could give rise to unnecessary and excessive costs. The Gas Companies also expressed concern that it may be unsafe to remove all abandoned gas pipelines and that removal is best done as part of roadway construction. The Gas Companies submitted that differentiating between abandoned and decommissioned pipe is unhelpful and that neither term should be interpreted as relinquishing ownership. The Gas Companies argued that future revenues relating to the use of the pipe should benefit gas ratepayers since municipalities have the ability to levy fees on non-gas users through municipal access agreements.

2.5.3 Ottawa-Carleton submitted that abandoned pipe should remain in the road until the road is reconstructed, at which time it should be removed by the Gas Company at its

cost. If not removed at that time, it would become the municipality's property. Ottawa-Carleton also proposed that use of pipe for purposes other than gas should require a separate municipal access agreement. Ottawa-Carleton supported the submission made by Toronto that if a Gas Company uses its plant for purposes other than the transmission of gas a new access agreement is required.

2.5.4 After discussion, AMO and the Gas Companies proposed that a section be added to the 2000 MFA to deal with the use of deactivated gas pipelines as a telecommunications conduit or for any other purposes.

Panel Recommendation

2.5.5 The Panel recommends that the proposal of the Gas Companies and AMO with respect to the use of decommissioned parts of the gas system for purposes other than the transmission and distribution of gas be adopted , with minor changes, so that Paragraph 16 of the 2000 MFA reads as follows:

> Use of Decommissioned Gas System
>
> (a) The Gas Company shall provide promptly to the Corporation, to the extent such information is known:
>
> (i) the names and addresses of all third parties who use decommissioned

parts of the gas system for purposes other than the transmission or distribution of gas; and

(ii) the location of all proposed and existing decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas.

(b) The Gas Company may allow a third party to use a decommissioned part of the gas system for purposes other than the transmission and distribution of gas and may charge a fee for that third party use, provided:

(i) the third party has entered into a municipal access agreement with the Corporation; and

(ii) the Gas Company does not charge a fee for the third party's right of access to the highways.

(c) Decommissioned parts of the gas system used for purposes other than the transmission and distribution of gas are not subject to the provisions of this Agreement. For decommissioned parts of the gas system used for purposes other than the transmission and distribution of gas, issues such as relocation costs will be governed by the relevant municipal access agreement.

3. ISSUES NOT AGREED TO BY ALL OF THE PARTIES

{tc \l1 "Field result goes here ISSUES NOT AGREED TO BY ALL OF THE PARTIES}

3.1 Relocation Costs

{tc \l2 "Relocation Costs}

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

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

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

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

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

Panel Recommendation

3.1.6 The Panel recommends that the Board accept the recommendation of AMO and the Gas Companies that the provisions of the 1987 MFA with respect to relocation costs should not be altered, with the modification requested by the Township of Hay that where the municipality has not originally approved the pipeline location, such as in unassumed road allowances, relocation costs should be paid by the Gas Company.

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

> The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, in which case the Gas Company shall pay 100% of the relocation costs.

3.2 Duration of the Agreement

{tc \l2 "Duration of the Agreement}

3.2.1 In E.B.O. 125 the Board stated it was of the opinion that:

> ... a first time agreement should be of a duration of not less than fifteen and no longer than twenty years. ... In the case of renewals, a ten to fifteen-year term would therefore seem to be adequate.

3.2.2 As discussed above, AMO was originally prepared to accept the ten to fifteen-year renewal term provided the Board accepted its proposal for allowing the franchise agreement to be amended if there is a legislative change. If this is not the case, AMO requested a maximum ten-year term for renewal of franchise agreements.

3.2.3 The Gas Companies felt that franchise agreements and renewals should not be shorter than they are currently (20 and 15 years respectively). The Gas Companies pointed out that they evaluate the economic feasibility for system expansion to recover the costs of an investment in the distribution system to provide service to residential customers over a period of 40 years or more. For a typical expansion project involving a mix of commercial and residential customers, the costs of the project will

generally be greater than the revenue for at least 15 years. Therefore, the Gas Companies contended that they do not typically realize a return on the original investment until well beyond the 15-year mark.

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

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

3.2.6 Ottawa-Carleton submitted that even where the installation is new, the municipality's ownership rights and management obligations ought not to be subrogated to those of the user of property in the form of a 20-year commitment. Ottawa-Carleton argued that the municipality, as the owner of property, must set the term for the use of its property which is commensurate with the municipality's obligations for, and responsibilities to, that property. In Ottawa-Carleton's submission it ought not to be the entity seeking permission to use that property that sets the term. This is especially the case when, in Ottawa-Carleton's submission, the proposed use is for the benefit entirely of the user.

3.2.7 AMO and the Gas Companies subsequently proposed a compromise that the original term of the franchise should be for 20 years. The renewal term should also be for 20

years with subsequent updates in year 7 and year 14 of any renewal term to make allowances for revised conditions arising from Board-approved changes to the Model Franchise Agreement in the interim period. A 20-year term would provide stability for both parties with respect to the duration of the franchise agreement. The ability to modify the franchise agreement in years 7 and 14 of any renewal term, in order to incorporate all model franchise agreement changes other than term, would provide some opportunity to update the terms and conditions of the franchise agreement on a regular basis.

Panel Recommendations

3.2.8 The Panel recommends that the Board accept in principle the compromise reached between AMO and the Gas Companies. The Panel is of the view that the 20-year term will provide stability for municipalities, gas utilities, and their respective stakeholders. The 7 and 14 year modification capability will provide the opportunity during the 20-year period to bring the terms and conditions of the franchise agreement up to new standards. The Panel notes that AMO and the Gas Companies have agreed that there will be no updates during the initial term of the franchise agreement for municipalities who did not previously have gas service and that this will address the needs of Gas Companies with respect to system expansion.

3.2.9 The Panel is concerned that the wording suggested by AMO and the Gas Companies is ambiguous. It is important to clarify that the initial term is 20 years if the municipality has not previously received gas distribution services. In all other circumstances the term is for 20 years, and if the 2000 MFA is changed, except for the 20-year term, then on the 7th anniversary and the 14th anniversary the franchise agreement between the Gas Company and the municipality will be deemed to have been amended to incorporate the changes in the 2000 MFA.

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

> (a) If the Corporation has not previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law.
>
> or
>
> (b) If the Corporation has previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-Law; provided that if, during the 20-year term of this Agreement the Model Franchise Agreement is changed, then on the 7th anniversary and on the 14th anniversary of the date of the passing of the By-Law, this Agreement shall be deemed to be amended to incorporate any changes in the Model Franchise Agreement in effect on such anniversary dates. Such deemed amendments shall not apply to alter the 20-year term.

3.3 Default Provisions

{tc \l2 "Default Provisions}

3.3.1 AMO originally suggested that a new provision should be added to the 1987 MFA specifying what would happen in the event that either party defaults on its obligations under the franchise agreement. In particular AMO suggested that a provision be added to the effect that if either party defaults on any of its obligations under the franchise agreement, and fails to correct such default within 60 days, the other party would have the option of performing the obligation at the defaulting party's expense, or taking action for an order of specific performance directing the defaulting party to

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

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

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

> In the event that an order is made by the Ontario Energy Board under section 42 of the *Ontario Energy Board Act, 1998*, as the same may be amended from time to time, that an entity other than the Gas Company is to provide gas in the geographic area covered by this Agreement, then the Corporation may

> terminate this Agreement with the prior approval of the Board so to do.

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

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

Panel Recommendation

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

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

4. FEES

{tc \l1 "Field result goes here FEES}

4.1 Background

{tc \l2 "Background}

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

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

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

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

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

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

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

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

4.2 Jurisdiction of The Board

{tc \l2 "Jurisdiction of The Board}

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

> 220.1(2) Despite any Act, a municipality and a local board may pass by-laws imposing fees or charges on any class of persons,
>
> > (a) for services or activities provided or done by or on behalf of it;
> >
> > (b) for costs payable by it for services or activities provided or done by or on behalf of any other municipality or local board; and
> >
> > (c) for the use of its property, including property under its control.
>
> ...
>
> 220.1(4) No by-law under this section shall impose a fee or charge that is based on, is in respect of or is computed by reference to...
>
> > (e) the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources.
>
> 220.1(5) Nothing in this section authorizes a municipality or local board to impose a fee or charge for distributing or retailing electrical power, including electrical energy, which exceeds the amount permitted by the Ontario Energy Board.

4.2.2 Toronto argued that subsection 220.1(2) of the *Municipal Act* explicitly authorizes municipalities to charge both permit fees (i.e. for the cost of services provided by the municipality arising from or related to a permit) and a usage fee (i.e. for the use of the

municipality's property), and that the only statutory condition precedent to charging such fees is that the municipality must pass a by-law.

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

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

4.2.5 The Gas Companies argued that the words "despite any Act" in subsection 220.1(2) of the *Municipal Act* do not override the power granted to the Board under subsection 19(6) of the OEB Act, but simply remove any question that a municipality is otherwise competent to pass by-laws imposing fees or charges. They argued that the

authority of the municipalities is still subject to the Board's exclusive jurisdiction over the terms and conditions of gas transmission and distribution franchises.

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

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

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

> (1) In the event of conflict between this Act and any other general or special Act, this Act prevails.
>
> (2) This Act and the regulations prevail over any by-law passed by a municipality.

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

4.2.9 Toronto responded by arguing that unlike the OEB Act the MFAct is not a regulatory statute; so, in applying the MFAct the Board should not apply a regulatory model and thus should not seek to control revenues or returns of municipalities as it might seek to do those of gas or electric utilities.

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

4.2.11 The Gas Companies submitted that the right of municipalities to levy fees on gas utilities is brought further into doubt by paragraph 220.1(4)(e) of the *Municipal Act,* which provides that activities related to the "generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources" are exempt from fees and charges. They argued that transportation of gas includes its transmission and distribution, which would be covered by this exemption. The Gas Companies claimed that their position is supported by the Board's decision in the Orillia Four Case, where they argued, the Board expressed its concern that interpreting subsection 220.1(4) of the *Municipal Act* in a contrary manner might be inconsistent with the exemption in clause 257.1(1)(c) of the *Municipal Act.* which

uses the same words and has been interpreted to exempt Gas Companies from the definition of "business" for the purposes of general municipal licensing powers.

4.2.12 Toronto argued that subsection 220.1(4) of the *Municipal Act* is not an exemption clause, as it does not exempt any class of person or businesses. Toronto argued that this clause limits the use of municipal powers to duplicate certain federal and provincial taxes, namely income taxes, GST and PST, by precluding fees and charges in the nature of income, consumption, transaction or sales taxes. This would preclude, under clause (4)(e) of section 220.1, charges by municipalities that would be in the nature of timber stumpage fees or tolls on the transportation of gas through the municipality for example, by TranCanada Pipelines Limited.

4.2.13 Ottawa-Carleton submitted that the reference to "transport" in section 220.1(4)(e) of the *Municipal Act* has nothing to do with the transportation of gas but relates to property and land use.

4.2.14 The Gas Companies argued that the Board is fully competent to regulate the use of public rights-of-way and to determine the appropriate compensation to be paid by the Gas Companies for such use. They argued that numerous entities, such as telephone and telecommunication companies, as well as gas and electric utilities, have statutory rights to place their facilities on, over, or under the highway, and that each of these entities is regulated as to the manner and conditions of the use of the highways.

4.2.15 Toronto also argued that the owner of property has the right to charge whatever it wants for what amounts to a licence to use and occupy. Toronto conceded that there are practical and legal limits on the amount municipalities can charge, but that those limits are not specified in the MFAct. Toronto argued that under section 10 of the

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

Panel Findings on the Board's Jurisdiction

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

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

4.2.18 The mere fact that the municipality has the ability to pass a by-law imposing fees does not restrict the Board's jurisdiction under the MFAct to determine the reasonable terms and conditions that govern the relationship between the municipality and the Gas Company.

4.2.19 The Board's jurisdiction under the MFAct is to approve or impose terms and conditions of a franchise agreement. The Panel finds that the Board continues to

have the jurisdiction to include terms and conditions dealing with all aspects of the relationship between the parties, including the extent to which municipalities can require Gas Companies to pay fees for activities related directly to the presence of the gas works in the municipality.

4.2.20 The Panel therefore finds that the Board has the jurisdiction to determine the extent to which Gas Companies should be required to pay permit fees, fees for the use of municipal property, and compensation for damage caused to municipal property.

4.2.21 The Panel recommends that the Board adopt these findings.

4.3 Other General Issues Relating to Fees

{tc \l2 "Other General Issues Relating to Fees}

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

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

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

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

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

4.3.6 The Gas Companies claimed that municipal taxes are meant to help to recover the costs of services provided by the municipality, such as snow removal, garbage pick-up, parks, sewage treatment, arenas etc. The Gas Companies argued that they do not employ any of these services and, therefore, imposing additional municipal fees on gas pipelines is not justifiable and would unfairly shift municipal costs to natural gas

ratepayers. The Gas Companies pointed out that they pay property taxes to the municipalities regardless of whether their pipelines are located on municipal road allowances, provincial highways or private property.

4.3.7 Toronto argued that municipalities should eliminate undesirable cross-subsidization between property taxpayers who are gas customers, and property taxpayers who are not gas customers. To achieve this, Toronto wants to charge the Gas Companies full cost recovery for the costs that their activities impose on the municipality. Toronto argued that the resulting increase in cost to the Gas Companies would be equal to the amount of the subsidy that they and/or their customers have been enjoying.

4.3.8 It was the position of the Gas Companies that fees that merely shift costs from the municipal taxpayer to the gas ratepayer without adding any economic benefit are clearly not in the public interest.

4.3.9 The Gas Companies argued that under the "no cross-subsidization" approach, the urban gas customer would end up paying more overall, as the gas rate increases required to recover the new municipal fees would be only partially offset by lower taxes, which at best would be fully allocated across all municipal taxpayers. They claimed that the concept of postage stamp rates would come under pressure depending on the resulting disparity between large and small municipalities. If fees were introduced over time as franchise agreements were renewed, gas ratepayers in municipalities operating under existing agreements would be subsidizing taxpayers in the municipalities collecting fees.

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

4.4 Specific Fees

{tc \l2 "Specific Fees}

Permit Fees

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

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

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

in fact, gas ratepayers in smaller municipalities subsidize natural gas ratepayers in larger more congested municipalities because operating and maintenance costs are higher in urbanized areas.

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

Compensation for the Use of Municipal Rights-of-Way

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

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

4.4.7 The Gas Companies argued that the taxes they are currently paying more than cover the administration costs associated with gas distribution use of municipal rights-of-

way. In 1998, the Gas Companies collectively paid $71 million in property taxes to Ontario municipalities.

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

4.4.9 While the Gas Companies pay the Ministry of Transportation a nominal charge for the use of provincial highways, the Gas Companies argued that it is applied mainly to road crossings, and has a total impact of less than $150,000 per year for all three gas utilities. They argued that this charge is based on an historic anomaly and is the only amount of this sort paid to the Ministry of Transportation. The Gas Companies urged that this should not be used to justify the payment of licence fees to municipalities.

4.4.10 Ottawa-Carleton submitted that the payment of taxes does not entitle any commercial entity to free use of the rights-of-way. Whether or not the Gas Companies should be

assessed for property taxes is irrelevant to the issue of fair and reasonable compensation for use of the rights-of -way.

Compensation for Damage to Highways

4.4.11 Ottawa-Carleton submitted that the failure of Gas Companies to pay the full cost of their presence in municipal highways means that municipalities must incur those costs, and that this is not an effective management of the public's assets or finances.

4.4.12 The Gas Companies claimed that the majority of distribution pipelines facilities are located outside the travelled portion of the road and that the Gas Companies often bore under the road rather than dig up the surface. They pointed out that in all cases the affected road allowance is at a minimum "well and sufficiently restored to the reasonable satisfaction of the Engineer/Road Superintendent" as is guaranteed by the restoration clause in the 1987 MFA.

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

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

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

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

Panel Recommendations

Permit Fees

4.4.17 The Panel finds that permit fees are not fees "based on, in respect of or computed by reference to the transportation of natural resources" and therefore are not prohibited by subsection 220.1(4) of the *Municipal Act.* Rather they are fees or charges on Gas Companies for "services or activities provided or done by or on behalf of" the municipality and are therefore permitted pursuant to clause 220.1(2)(a) of the *Municipal Act*.

4.4.18 The Panel recommends that the municipality should be permitted to charge fees which reasonably reflect the costs incurred by the municipality in issuing permits to the Gas Companies. The Panel has determined that it is reasonable for Gas Companies to pay fees that directly relate to the costs incurred by the municipalities in providing these services.

4.4.19 The reasonable costs to a municipality arising from approval of construction activities of Gas Companies in the course of their businesses should be borne by the Gas Companies (and ultimately by the gas ratepayers) and not by the municipal tax payers.

4.4.20 The Panel does not recommend that a fixed charge should be set by the Board since the actual costs to the municipality will vary greatly depending on the nature, location and complexity of the construction activity.

Compensation for the Use of Municipal Rights-of-Way

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

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

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

Compensation for Damage to the Highway

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

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

4.4.26 The Panel is of the view that the requirement in the 1987 MFA that the Gas Companies undertake restoration work to the satisfaction of the municipal authorities is sufficient protection for the municipalities and the public.

4.4.27 The Panel recommends that paragraph 13 of the 2000 MFA should be amended as follows:

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

5. ADDITIONAL MATTERS

{tc \l1 "Field result goes here ADDITIONAL MATTERS}

5.1 City of Toronto

{tc \l2 "City of Toronto}

5.1.1 Toronto requested that the Board make it clear in its Report that the 2000 MFA does not apply to Toronto because it is a special case.

5.1.2 Toronto advised the Board that legislation was enacted in 1848 (the "1848 Act") which incorporated a company (a predecessor of ECG) and gave the company the power to "open the ground in the streets" in the former City of Toronto in order to lay down the necessary mains and pipes. The 1848 Act was silent on the issue of any compensation or cost recovery.

5.1.3 The other former municipalities that were amalgamated into the present City of Toronto were not subject to similar legislation but made different arrangements over the years with the gas companies. To the best of its knowledge neither the old City of Toronto, nor the other municipalities with which it was amalgamated, have had any written franchise agreements with either ECG or any of its predecessor companies. These municipalities and the gas companies have operated under essentially voluntary ad hoc arrangements.

5.1.4 Toronto stressed that the Board should avoid:

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

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

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

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

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

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

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

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

Panel Recommendation

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

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

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

5.2 Franchise Handbook

{tc \l2 "Franchise Handbook}

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

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

THIS REPORT IS RESPECTFULLY SUBMITTED December 29, 2000.

_____
Sheila K. Halladay
Presiding Member

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Floyd Laughren
Member and Chair

_____
Judy Simon
Member

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A Catherina Spoel
Member