

E.B.R.O. 492-03
E.B.R.O. 493-03
E.B.R.O. 494-04

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1990, c. O.13, sections 19 and 30;

AND IN THE MATTER OF an Application by The Consumers' Gas Company Ltd. for an order or orders approving rates to be charged for the sale, distribution, transmission and storage of gas for its 1997 fiscal year;

AND IN THE MATTER OF an Application by Centra Gas Ontario Inc. for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas as of January 1, 1997;

AND IN THE MATTER OF an Application by Union Gas Limited for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas as of January 1, 1997.

AND IN THE MATTER OF section 30 and the Board's own Motion to reopen and hear certain matters concerning a Code of Conduct governing the relationship between The Consumers' Gas Company Ltd., Centra Gas Ontario Inc. and Union Gas Limited and Affiliate and Independent Gas Marketers.

BEFORE: M.C. Rounding
Chair and Presiding Member

R.M.R. Higgin
Member

H.G. Morrison
Member

DECISION WITH REASONS

May 15, 1997

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- Appendix A: Interim LDC Code of Conduct
- Appendix B: Alternative Code of Conduct Document Comprising Draft LDC Code and Intervenors Proposed Revisions

1. THE HEARING

- 1.0.1 On December 15, 1995 The Consumers' Gas Company Ltd. ("Consumers Gas") filed its E.B.R.O. 492 Application with the Ontario Energy Board (the "OEB", the "Board") under s. 19 of the OEB Act ("the Act"), for an order or orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of gas for Consumers Gas' 1997 fiscal year commencing October 1, 1996. The Board issued its E.B.R.O. 492-01 Decision on September 10, 1996.
- 1.0.2 On March 27, 1996, Centra Gas Ontario Inc. ("Centra") filed its E.B.R.O. 493 Application with the Board under s. 19 of the Act seeking orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of natural gas for the fiscal year commencing January 1, 1997. The Board issued its E.B.R.O. 493-01 Decision on March 20, 1997.
- 1.0.3 On March 27, 1996 Union Gas Limited ("Union") also filed its E.B.R.O. 494 Application with the Board under s. 19 of the Act seeking orders approving or fixing just and reasonable rates and other charges for the sale, distribution, transmission and storage of natural gas for the fiscal year commencing January 1, 1997. The Board issued its E.B.R.O. 494 Decision on March 20, 1997.
- 1.0.4 On March 26, 1997, the Board sent a letter to Consumers Gas expressing concerns with respect to the creation of Consumers First Ltd., a gas marketing affiliate of Consumers Gas. In the letter, the Board directed Consumers Gas to file a draft Local

Distribution Company ("LDC") Code of Conduct ("LDC Code of Conduct", "LDC Code") for the Board's consideration.

- 1.0.5 The LDC Code of Conduct was to govern the transactions and relationships between the regulated distribution company and affiliate gas marketers as well as independent gas marketers. Consumers Gas was requested to work with the parties to the Board's Ten Year Market Review process in developing the LDC Code.
- 1.0.6 On April 9, 1997, the Board sent a letter to Union/Centra requesting that those utilities also file a draft code of conduct with the Board. As the Board expected that Union/Centra's code would be very similar to Consumers Gas' LDC Code, the Board requested that Union/Centra participate in the development of Consumers Gas' LDC Code. The Union/Centra code was to be filed by the later of April 18, 1997 or the implementation date for Agency Billing and Collection ("ABC") T-Service in their respective franchise areas.
- 1.0.7 A draft LDC Code of Conduct ("Draft LDC Code of Conduct", "Draft LDC Code") was filed by Consumers Gas on April 21, 1997. The Board also received Union/Centra's reply dated April 22, 1997, in which Union and Centra adopted Consumers Gas' Draft LDC Code with the exception of one Principle, namely Principle 4 - advancement of funds to, or guarantees on behalf of, an affiliate under Standard 1 - Physical and Financial Separation.
- 1.0.8 The Board on its own motion, under section 30 of the Act, determined that it would review the requested Draft LDC Code(s) of Conduct under Board File Nos. E.B.R.O. 492-03, (Consumers Gas); E.B.R.O. 493-03, (Centra); and E.B.R.O. 494-04, (Union). (Collectively the "LDCs", "Companies", "Utilities").
- 1.0.9 The Board determined that it would hold a joint proceeding to hear submissions from parties regarding the Draft LDC Code. In order to expedite the proceeding itself, the Board requested that parties with similar positions endeavour to combine for the purposes of making their submissions. The Board also requested that parties, while being prepared to address all matters related to the Draft LDC Code, focus their submissions on areas of principal concern and on those areas which they thought

required a decision prior to the commencement of ABC T-Service in the Consumers Gas' franchise area on May 7, 1997.

1.0.10 Submissions regarding Consumers Gas' Draft LDC Code of Conduct and Union/Centra's letter of April 22, 1997 were heard at the Board's Hearing Room, commencing at 10:00 a.m. on Tuesday, April 29, 1997.

1.0.11 All submissions were completed on Thursday, May 1, 1997.

1.1 APPEARANCES

1.1.1 The following is a list of the Parties to the Proceeding and their representatives who appeared in the Hearing:

Board Technical Staff	Jennifer Lea
The Consumers' Gas Company Ltd.	Jerry Farrell
Centra Gas Ontario Inc./Union Gas Limited	Glenn Leslie
HVAC Coalition ("HVAC") Ian Mondrow	
Corporation of the City of Kitchener ("Kitchener") J. Alick Ryder	
London School Board Consortium and the Ontario Association of School Business Officials ("Schools")	Tom Brett
Consumers Association of Canada ("CAC")	Robert Warren
Suncor Energy Inc. ("Suncor") George Vegh	
IPL Energy Inc. ("IPL"), Consumers Gas Philip Tunley Energy Inc. ("CGEI"), and Consumers First Ltd. ("Consumersfirst")	

Coalition of Eastern Natural Gas Marketers ("CENGAS")	Richard Perdue
ECNG Inc. ("ECNG"), Association of Municipalities of Ontario ("AMO")	Peter F. Scully
PanEnergy Marketing ("PanEnergy")	Peter Budd
Alliance Gas Management ("Alliance") Peter Budd	Paul Woods
Ontario Coalition Against Poverty ("OCAP") Michael Janigan	
Enron Capital and Trade Resources ("Enron") Aleck Dadson	
Energy Probe Mark Mattson	
London GasSave James Gruenbauer	
CIBOLA Canada Energy Marketing Company ("Cibola")	Richard Baker
TransCanada Gas Services Inc. ("TCGS") Mark Stauff	
NGC Canada Inc. ("NGC") Glenn Caughey	
Comsatec Inc. ("Comsatec") David Waque	
Industrial Gas Users Association ("IGUA")	Brian Howell
Ontario Hydro ("Hydro") Bryan Boyce	

1.1.2 The Board also heard a presentation from representatives of the Federal Competition Bureau on May 1, 1997:

2. BACKGROUND TO THE LDC CODE OF CONDUCT

2.1 A BRIEF HISTORY OF THE TRANSITION TO A COMPETITIVE GAS COMMODITY MARKET IN ONTARIO

2.1.1 The development of a deregulated gas commodity market began with the signing of The Agreement on Natural Gas Markets and Prices by the Governments of Canada, Alberta, British Columbia and Saskatchewan on October 31, 1985 ("the Halloween Agreement"). The Halloween Agreement provided that "... consumers may purchase natural gas from producers at negotiated prices, either directly or under buy-sell arrangements with distributors ..."

2.1.2 At the time of the Halloween Agreement, TransCanada PipeLines Limited ("TCPL") was the primary long-term supplier, transporter and marketer of natural gas in eastern Canada and the LDCs in Ontario were under long-term contractual obligations to TCPL for the supply of the commodity and the transportation of the commodity from western Canada to Ontario. These long-term contracts constituted a barrier to the development of a competitive gas commodity market.

2.1.3 A further barrier to the development of a competitive gas commodity market in Ontario was, and continues to be, the existing legislation which regulates the supply of the natural gas commodity to consumers in Ontario. Early in the development of the direct purchase market in Ontario the Board determined that Agents, Brokers and Marketers ("ABMs") were suppliers of gas within the meaning of the relevant sections of the OEB Act. This meant ABMs would be required to operate within the

regulatory framework of the Municipal Franchises Act and Board approved rates, otherwise they could not supply gas directly to end users.

Direct Purchase: T-Service and Buy/Sell

- 2.1.4 Two forms of direct purchase have developed and now comprise the bulk of gas consumed in Ontario. The first involves customers directly purchasing and taking title to gas outside of the province and arranging for transportation of that gas via TCPL and the LDC to the burner tip ("T-service"). Title to the gas commodity is never transferred to the LDC.
- 2.1.5 There are two types of T-service; unbundled T-service, that is, customers simply pay for transportation; and bundled T-service, that is, customers pay a bundled rate for all of the LDC's services except for the provision of the commodity. Unbundled T-service customers are generally large volume customers.
- 2.1.6 The second form of direct purchase, Buy/sell, involves customers, or their ABMs, purchasing gas and selling it to the LDCs either in Western Canada or at the Ontario border. The price paid by the LDCs for the gas is the buy/sell reference price. The gas volumes sold to the LDCs in Western Canada are transported to Ontario via the LDCs' contracted capacity on TCPL where they become part of the LDCs' system supplies. Buy/sell customers remain sales customers of the LDCs and pay the LDC's gas commodity sales price.
- 2.1.7 Buy/sell arrangements enabled ABMs to aggregate the gas commodity needs of small volume customers, making access to the deregulated gas market and direct purchase feasible for those customers. The customer generally receives a rebate of a portion of the difference between the price that the ABM pays for gas and the buy/sell reference price.

Ten Year Market Review

- 2.1.8 In its E.B.R.O. 489 Decision with Reasons - Part II, the Board recognized the inherent difficulties in attempting to regulate the LDCs' gas costs in an environment of price indexing and volatile commodity prices, on the basis of regulatory principles

applicable to annual rates. The Board instructed Board Staff to work with stakeholders and to recommend a mechanism or forum to review the working of the market and the separation of commodity sales (merchant function) from the LDCs' transportation/distribution functions.

2.1.9 The Board held two workshops on the current and future market structure for gas commodity sales. On September 27, 1996, the Board issued the resulting Ten Year Market Review Report in which it stated that it would use a Working Group process followed by a public hearing to continue its review. The Working Group was scheduled to report to the Board by April 30, 1997. This date has been extended to May 31, 1997.

2.1.10 A number of ABMs and customer representatives have urged that the legislation under which the Board obtains its authority be reviewed and updated, and the Board agrees that such a review should be undertaken once the Ten Year Market Review has been completed.

ABC T-Service

2.1.11 In the E.B.R.O. 492 and E.B.R.O. 493/494 proceedings the LDCs proposed and the Board approved the implementation by each utility of Agent, Billing and Collection ("ABC") T-Service.

2.1.12 The Companies' ABC T-Services enable ABMs to bill their customers for their gas commodity directly through the LDCs. ABMs contract with the LDCs, on behalf of their customers, for bundled T-service, a service in which the LDC transports and delivers to customers gas purchased by the ABMs outside of Ontario and provides any requisite storage and load balancing. In addition, the ABM contracts with the LDC for customer billing and accounts receivable collection. Under ABC T-Service, ABMs, as agents for customers, will set the price, terms and conditions of gas supply with their customers, and use the Utilities' billing systems to collect the costs. The gas commodity pricing arrangements are not necessarily tied to the Utilities' buy/sell reference price or the Utilities' Weighted Average Cost of Gas. The ABMs will be paid monthly by the LDCs for the cost of gas supplied to the LDC for ABC T-Service

customers, less administrative charges. The customer pays for the gas it uses each month.

- 2.1.13 When the Board approved the proposed ABC T-Service for Consumers Gas' franchise area it stipulated a number of conditions designed to ensure consumer awareness and protection. These conditions included the development of an ABC Service Code of Conduct to be adhered to by ABMs offering ABC Service, containing principles of consumer protection and detailing the kind of information that must be provided to consumers. The Board also required that a Customer Information Package ("CIP") be developed to be provided to all utility customers by the LDC, and prohibited the use of negative options to switch existing direct purchase customers to ABC T-Service. The Board approved the ABC Service Code of Conduct and CIP for Consumers' Gas' franchise areas on February 28, 1997.
- 2.1.14 In E.B.R.O. 493/494 the Board found Union and Centra's proposed ABC T- Service acceptable, provided that the requirements imposed in E.B.R.O. 492 were met by the companies. On April 22, 1997, the Board approved a CIP for Union and Centra's franchise areas similar to the one developed for use in the Consumers Gas' franchise area.
- 2.1.15 In requiring the development of an information package for all customers, the Board intended that customers would be made aware that the costs of gas contracted with the ABM are not regulated.
- 2.1.16 The Board required that the Utilities in implementing ABC T-Service, satisfy themselves that ABMs have the authority to act for those customers for whom they purport to be agents, and provide, on the first bill for each ABC T-Service customer, a statement to the effect that the customer was now on ABC T-Service with the (named) ABM, a suggestion that the customer contact the ABM for additional information. The name and telephone number of the customer's ABM should appear on all ABC bills.
- 2.1.17 In Union/Centra's case the first ABC T-Service bill will include advice that the customer may, within thirty days of receipt of the bill, advise the LDC and the ABM

that the customer does not wish ABC T-Service and wishes to return either to its previous buy/sell arrangement or to system gas service, as applicable.

- 2.1.18 As noted earlier, the scheduled start date for signing up customers for ABC T-Service in Consumers Gas' franchise area was May 7, 1997 following receipt by all customers of the May gas bill containing the CIP. The start date for Union/Centra is scheduled for June 7, 1997.

2.2 UTILITY DIVERSIFICATION

- 2.2.1 In response to a request from the Minister of Environment and Energy, the Board conducted a public forum on utility diversification. The Board's Advisory Report to the Minister on Utility Diversification ("Diversification Report") dated May 15, 1996 concluded that utility diversification into non-regulated businesses should not be prohibited, provided ratepayers are expected to benefit, or at a minimum are protected by regulatory controls against any adverse consequences of diversification.

- 2.2.2 The Diversification Report concluded that the Utilities should be allowed some degree of flexibility in the form, type and structure of diversification and that the preferred model would be that of non-subsiary affiliates with complete legal, financial and managerial separation. The Report recommended retaining most of the provisions of the Undertakings given by the Utilities and their parents to the Lieutenant Governor in Council ("Undertakings") and additional regulatory controls to protect ratepayers from any rate impacts of diversification through affiliates or subsidiaries, joint ventures or partnerships.

- 2.2.3 The Board recommended that prior approval provisions for affiliate transactions, as required by the Undertakings should be retained for diversification through subsidiaries, joint ventures or partnerships, but could be eliminated for diversification through non-subsiary affiliates once the cost allocation and transfer pricing guidelines and monitoring and reporting guidelines recommended in the Diversification Report were in place.

- 2.2.4 To reduce financial risk to utility ratepayers, the Board also recommended a cap on all financial support arrangements between the Utilities and affiliates in the range of 30-35% of a utility's equity with a 10% cap on individual projects.
- 2.2.5 Following the issuance of the Board's Diversification Report, the Government requested the LDCs to submit draft Monitoring and Reporting Guidelines ("the Guidelines") to the Board. The request was included as part of the exemption from the Undertakings granted to the Utilities in order for them to take part in the public tendering for provision of water management services to York and Halton Regions. The exemption required the Utilities to file Guidelines which dealt with the following matters arising from the Board's Diversification Report: reporting and disclosure, cost allocation, transfer pricing, service quality standards, and tendering practices.
- 2.2.6 The LDCs filed a joint submission with draft Guidelines on January 31, 1997. While the draft Guidelines were expressly developed for the purpose of dealing with the York and Halton Region water projects, the Utilities in their joint submission suggested that the Guidelines should be applied generally to all diversification activities. The Guidelines set out the responsibilities of the Utilities to file information with the Board and with the Board's Energy Returns Officer ("ERO") on all transactions between the Utilities and their diversified activity affiliates, and the rules with respect to the filing of information in the rate cases.
- 2.2.7 The draft Guidelines suggest that tendering practices, cost allocation and transfer pricing rules will be reviewed and established by the Board in the Utilities' respective rate cases. With regard to service quality standards, the Utilities suggest that the Board should continue its review and scrutiny of the capital budgets of the Utilities in order to ensure there is no impact on service quality as a result of diversified activities.
- 2.2.8 The Board approved the Guidelines on an interim basis as of April 10, 1997 for application with respect to the York and Halton projects, as specified in the Undertaking exemptions. The Board noted certain matters which are ongoing, such as the Ten Year Market Review and development of an LDC Code of Conduct, as having a direct relationship with the Guidelines and therefore it expected to review the appropriateness of the Guidelines following resolution of these other matters.

2.3 CODE OF CONDUCT - GAS MARKETING

2.3.1 The Board had requested that the Ten Year Market Review Working Group (the "Working Group") make recommendations in its report about a code of conduct to govern the relationship between the LDCs and Gas Marketers in order to ensure a level playing field for competition in the developing deregulated gas commodity market.

2.3.2 However, Consumers Gas notified the Board on March 24, 1997 that its new gas marketing affiliate, Consumersfirst, would be marketing gas as an ABM in the LDC's franchise area along with other ABMs. The entry of Consumersfirst precipitated the need for such a code to be developed. The Board requested the LDCs to consult with the Working Group before submitting their Draft LDC Code(s) on or before April 18, 1997 (Consumers Gas) or the date for commencement of ABC T-Service (Union and Centra).

2.3.3 The purpose of the proposed LDC Code of Conduct is to put into one document the rules which govern the relationship of the LDCs in the provision of services to affiliate and independent gas marketers i.e. ABMs who are not affiliated with the LDC. The Draft LDC Code filed by Consumers Gas on April 21, 1997 also incorporates rules governing other gas supply-related storage, transportation and transactional services which the LDCs also provide to direct purchasers or their ABMs.

3. DRAFT LDC CODE AND PROPOSED REVISIONS

3.1 DEVELOPMENT OF THE DRAFT LDC CODE AND PROPOSED REVISIONS

3.1.1 The Draft LDC Code of Conduct was submitted by Consumers Gas on April 21, 1997. It contained a number of significant changes and additions from the draft Code filed on March 24, 1997, particularly in the areas of sharing of resources, customer information and reporting. In its covering letter Consumers Gas indicated that the Draft LDC Code filed on April 21, 1997 was in its view adequate, appropriate and fully responsive to the Board's request. It noted, however, that the Working Group had failed to reach a consensus and attached a list of “major deficiencies” which a number of parties to the consultation had identified.

3.1.2 On April 22, 1997 Union and Centra notified the Board that they were willing to adopt Consumers Gas' Draft LDC Code, subject to revision of Standard 1, Principle 4 regarding financial separation and, in particular, the advancement of funds to a gas marketing affiliate. Union and Centra proposed in their letter that the revised Principle mirror the Board's recommendation in the Diversification Report, namely, that there be a cap of 30-35% of a utility's equity placed on any investment in such an affiliate.

3.1.3 By letter dated April 22, 1997, Consumersfirst indicated its support of the Draft LDC Code.

3.1.4 As noted earlier, on April 24, 1997, IGUA indicated its agreement with the major deficiencies in Consumers Gas Draft LDC Code identified by parties to the Working

Group. It also submitted a written argument and proposed revisions to the Draft LDC Code.

- 3.1.5 On April 28, 1997 HVAC submitted a letter to the Board enclosing a document which expanded on the major deficiencies in, and proposed a significant number of revisions to, the Draft LDC Code. This document was entitled Code of Conduct - Revision; ("Alternative Code Document", "Alternative Code"). It was filed on behalf of HVAC, Cibola, Mutual Gas, ECNG, AMO, A.E. Sharpe, Alliance, Natural Gas Wholesalers, Suncor, Enershare, Direct Energy, Municipal Gas and, with one reservation, OCAP ("Parties in Support of the Alternative Code", "Opposing Parties"). The HVAC letter indicated that the subscribing intervenors would present their individual arguments in support of the proposed revisions set out in the Alternative Code Document.
- 3.1.6 In the hearing AMO/ECNG, Schools, Comsatec, Energy Probe, London Gas Save, Ontario Association of Physical Plant Administrators, PanEnergy and TCGS ("Additional Supporters") indicated substantial support of the Alternative Code Document.
- 3.1.7 Subsequently in the hearing, an IGUA representative indicated that, having reviewed the Alternative Code document, IGUA found this "preferable" to its written submission, since it was more stringent and IGUA was of the view that a more stringent code was required at the outset. However, IGUA did not withdraw its submission of April 24, 1997, since it felt that the revisions it had proposed could represent a middle ground between the positions of the LDCs and the supporters of the Alternative Code, and therefore might be of assistance to the Board.

Board Comments

- 3.1.8 The Draft LDC Code is proposed at a time when the transition to development of a deregulated gas commodity market is well underway and yet certain features of a regulated commodity market are still in place, for example the LDCs still provide gas commodity supply service to system gas customers, in parallel with transporting and delivering gas to direct purchase customers, or for the ABMs, including LDC affiliates, acting on behalf of such customers.

- 3.1.9 The Board views the Draft LDC Code as interim with further review to follow the report of the Ten Year Market Review Working Group. The Draft LDC Code has certain features which relate to the regulation of the LDCs' monopoly services, features which relate to the Government's oversight of the activities of the LDCs and their parent and affiliate companies and in addition, features which relate either to creation of a level playing field for competition, or to consumer protection. As such, the Draft LDC Code overlaps with the LDCs' obligations under provincial statutes, the Companies' respective Undertakings and industry codes such as the ABC Service Code of Conduct which is part of the broader ABM industry code developed under the auspices of the Direct Purchase Industry Committee ("DPIC").
- 3.1.10 In its review of the Draft LDC Code and revisions proposed by intervenors, the Board faced extremely tight time constraints in order to render its Decision on the Draft LDC Code and minimize delay in the scheduled start date for ABC Service in Consumers Gas' franchise area. In the Board's view, any significant delay would not be in the public interest, since there is significant potential for this to result in confusion for gas customers who have received the CIP from Consumers Gas and advertising material from the ABMs listed in the attachment to the CIP. The Board is also cognizant of the fact that meeting the Board's conditions for ABC Service has involved considerable time and costs by the parties over the past several months, and that a delay will likely result in additional costs for all ABMs and the LDCs.
- 3.1.11 The Board has been placed in this constrained position because it believes as do many of the parties, that the public interest requires that an appropriate LDC Code of Conduct be put in place immediately. This urgency is as a direct result of the timing of the entry of Consumersfirst into the unregulated gas commodity market a few weeks before the scheduled start date for ABC T-Service. The LDC Code is required immediately since Consumersfirst will begin to sell gas to customers in Consumers Gas' franchise area while the utility continues to provide gas commodity service to several hundred thousand system gas customers.
- 3.1.12 The situation in Union/Centra's franchise area, although similar, is different in that ABC T-Service will not commence until June 7, 1997.

3.1.13 The Board has summarized the positions of the parties only to the extent required for its Findings and has not sought to present a comprehensive summary of the individual submissions presented by the parties to the hearing.

3.1.14 In Chapter 4 the Board presents its detailed findings on the Standards and Principles in the LDC Code and proposed revisions.

3.2 SUMMARY OF THE POSITIONS OF THE PARTIES

The Draft LDC Code and the Alternative Code

3.2.1 Consumers Gas submitted that the Draft LDC Code was developed in the context of the Board's Ten Year Market Review Report and was:

“A code of conduct to define acceptable operating rules between the utilities and their marketing affiliates”.

3.2.2 Consumers Gas submitted that the Draft LDC Code was intended to govern the relationship between the LDCs and their gas marketing affiliates in certain respects and otherwise the relationship between the LDCs and all gas marketers, in order to create a level playing field. In Consumers Gas' view, the Draft LDC Code met the Ten Year Market Review Report requirement, reflected a reasonable consensus on many of the Standards and otherwise addressed the primary areas of concern adequately:

- ! no favouring of affiliates;
- ! no cross-subsidy from utility ratepayers; and
- ! benefits to ratepayers from sharing of resources and services.

3.2.3 However, Consumers Gas stated it was time to “draw a line in the sand” limiting the extent of regulatory controls, including prior Board approval, over certain matters including the sharing of services; separation; relationship advertising; and a disclaimer by gas marketing affiliates. Consumers Gas stated that in its view, Parties Opposed to the Draft LDC Code wanted a more stringent code because they assumed that abuse would occur unless every potential avenue was proscribed by the LDC Code.

- 3.2.4 Union/Centra noted that the Ten Year Market Review Report referred to a code that would ensure that utility gas marketing affiliates do not receive preferential access to monopoly services and customer information and would also govern transactions between the LDCs and their marketing affiliates to protect against cross-subsidization.
- 3.2.5 Union/Centra stated their view that there was a lack of willingness on the part of parties to compromise on the Draft LDC Code since, in Union/Centra's opinion, people have a lot of money at stake and Parties Opposed were seeking to protect their own positions in the market.
- 3.2.6 Union/Centra reiterated the position in their letter of April 22, 1997 that they were prepared to act pursuant to the Draft LDC Code with the exception of the provision prohibiting investment in a gas marketing affiliate.
- 3.2.7 Union/Centra stated that in their opinion, the Board had little jurisdiction over the matters before it. However, in Union/Centra's view, jurisdiction was not an issue with respect to the matters in the Draft LDC Code, since the LDCs had agreed to be bound by that document.
- 3.2.8 Consumersfirst noted that CGEI had established Consumersfirst as a non-subsidiary affiliate, the form of organization recommended in the Diversification Report as the most appropriate structure to achieve separation from the regulated utility. Other than some shared services and resources, there would be complete organizational and financial separation.
- 3.2.9 Consumersfirst submitted that the Draft LDC Code prevents the LDCs from giving preferential treatment to affiliates and provides for equal treatment of all gas marketers serving the direct purchase market. The proposed amendments in the Alternative Code were, in its view, unacceptable since they sought to depart from the principles which the Government set out in the Undertakings. These principles were a factor in IPL's decision to purchase Consumers Gas and departure from them would result in a loss of the value of the goodwill to IPL. Consumersfirst submitted the revisions were based on the false premise of market dominance by LDC affiliates. In Consumersfirst's view the Alternative Code sought to have the Board use its powers to control LDC gas marketing affiliates.

3.2.10 Consumersfirst identified the most important issues upon which there were differences of views as follows:

! Prior Board approval provisions:

- Corporate governance
- Shared management and administrative services.

! Advertising constraints:

- use of Consumers name, trademark and logo
- disclaimer re non-regulated services.

3.2.11 Consumersfirst argued that the objective of the other gas marketers represented in the hearing was to frustrate its entry into the market and that the name, trademark, style and logo of Consumers Gas are the property of the shareholder and not part of the rate base assets of the regulated utility. It stated that, in any event, its objective was to differentiate itself and its services from the regulated utility, as evidenced by its own logo and colour scheme, which were quite distinct from those of Consumers Gas. With respect to the need for a disclaimer, Consumersfirst argued that all ABMs should be required to make such a disclaimer if one were required.

3.2.12 Consumers Gas stated that in January 1996 it had licensed CGEI to use the Consumers Gas trademark, style and logo. On March 20, 1997 it had consented to a sub-licence from CGEI to Consumersfirst, so that Consumersfirst now had the right to use the name, trademark, style and logo of the regulated utility in relationship advertising and marketing.

3.2.13 Kitchener submitted that the Board should adopt the least intrusive approach necessary to achieve a competitive market. In Kitchener's view, a competitive gas market already exists and the Code can be amended later if needed. Kitchener expressed the view that, by advocating a restrictive code, independent gas marketers were attempting to eliminate any competitive advantage of affiliates, whereas there was a need only to eliminate unfair advantages.

- 3.2.14 Kitchener submitted that there was no need for a restriction on relationship advertising by affiliates as there is no similar restriction on non-affiliates.
- 3.2.15 Parties in Support of the Alternative Code, Additional Supporters, CAC and Enron disagreed with Union/Centra's characterization of the reasons for not reaching a consensus on a code, stating that there was a broad consensus on the Alternative Code, but the Utilities were unwilling to compromise.
- 3.2.16 Parties in Support of the Alternative Code, Additional Supporters, CAC and Enron all strongly urged the Board to consider any code as interim and conduct a full evidentiary hearing on contentious issues following receipt of the Report of the Working Group on the Ten Year Market Review.
- 3.2.17 Parties in Support of the Alternative Code, Additional Supporters, CAC, Enron and IGUA took the position that a more stringent code, such as the Alternative Code, was required at the outset of deregulation and argued that the provisions could be relaxed later, if experience indicated this to be appropriate. In these Parties' view it would be very difficult to tighten the provisions of a permissive code such as the Draft LDC Code, if abuses occurred.
- 3.2.18 Enron submitted that the dispute over the wording of the Code stemmed from a debate over competing visions of the public interest. Enron submitted that the Board should impose an appropriate code on the LDCs and commended the rules developed in several other jurisdiction to the Board.
- 3.2.19 Enron submitted that the Board had four options open to it in the circumstances:
- ! prohibit the LDCs from providing services to affiliates until a final LDC Code had been developed;
 - ! postpone ABC Service until a final LDC Code is developed;
 - ! allow the LDCs to proceed to provide ABC Service to all gas marketers on the list with the Draft LDC Code as an Interim Code; and
 - ! allow the LDCs to proceed to provide ABC Service to all gas marketers on the list with the Alternative Code as an Interim Code.

Enron argued that the fourth option was the preferred option.

3.2.20 PanEnergy urged the Board to adopt the Alternative Code as an Interim Code and noted that neighbouring jurisdictions, including Manitoba, are moving to more stringent codes. PanEnergy presented the following reasons for adoption of the Alternative Code:

- ! it best reflects the public interest;
- ! there is no turning back if the Code is too weak;
- ! its provisions can be relaxed based on experience;
- ! it will foster competitive forces;
- ! it provides policy direction consistent with the legislation;
- ! it will reduce regulatory complexity and costs; and
- ! it will provide guidance for utility diversification.

3.2.21 Schools cautioned the Board about applying all of the rules in the Diversification Report since the matter before the Board deals with a very particular form of diversification, namely that of an affiliate of the regulated gas utility selling gas on an unregulated basis at the same time as the regulated utility is in the business of selling gas on a regulated basis. This, they argued, is not the same as an affiliate providing water service. In the present case the utility has more opportunity to affect the future of the gas marketing affiliate by what it does and does not do and by what benefit it conveys, or withholds, relative to others in the same business.

3.2.22 HVAC submitted that the Board should adopt an interim code which, to err on the side of caution, should be a restrictive code. It argued that, if someone had to be prejudiced, it should be Consumersfirst through adoption of a restrictive code, since it and its parents waited to announce their plans until the last minute before the introduction of ABC T-Service, even though they knew it was coming for some time.

3.2.23 HVAC submitted that an affiliate gas marketer had a number of advantages relative to independent gas marketers by virtue of access to, and sharing of, rate base assets of the utility, such as the Customer Information System of Consumers Gas.

- 3.2.24 HVAC disputed the LDCs' claim that the Draft LDC Code was “exemplary” and argued that many other jurisdictions have gone further in the provisions of like codes.
- 3.2.25 OCAP submitted that if the Code fails to prevent anti-competitive behaviour on the part of affiliates, then the competitiveness of the market will be compromised and, if the market is less competitive, then residential customers will be disadvantaged. In OCAP’s view, any time an LDC is affiliated with a competitive business, there will be both an incentive and opportunity to engage in anti-competitive activities. In OCAP's view, a stringent LDC Code is needed to counter-balance this incentive.
- 3.2.26 OCAP stated its support of the Alternative Code except for Standard 6, Principle 4 regarding relationship advertising. OCAP believes that customers want to know about the relationship between the LDCs and affiliates and therefore it was not, in principle, opposed to a common or similar name, or to relationship advertising, provided that the affiliate clearly states in all advertising that it is not regulated by the OEB.
- 3.2.27 OCAP submitted that the Board has to be interested in more than cost allocation and protection of ratepayers - it has to be interested in issues of market dominance as well.
- 3.2.28 Energy Probe submitted that with the advent of affiliate gas marketers, LDCs can no longer be seen as a facilitators of the direct purchase market and expressed concern about who will now act as facilitator. Energy Probe suggested that this issue should be addressed as part of the Ten Year Market Review.
- 3.2.29 Energy Probe accepted OCAP’s revision to Principle 4 under Standard 6.
- 3.2.30 CAC submitted that an LDC code was needed to protect against cross-subsidization and unfair competition, but that any Code adopted now should be interim with a final Code to be based on evidence adduced at a public hearing.
- 3.2.31 In CAC’s view the Board should adopt a stringent, broad interim LDC Code, but at the same time should not unduly restrict affiliate gas marketers. To indicate the interim nature of the LDC Code, the preamble should include a statement that the Code is interim pending the outcome of the Ten Year Market Review. CAC supported OCAP’s position on relationship advertising and encouraged the Board to

indicate in its Decision that all marketers should voluntarily comply with the provision regarding a disclaimer.

- 3.2.32 Suncor indicated that it subscribed to the major deficiencies in the attachment to the Draft LDC Code and was a party in support of the Alternative Code as an interim code. It submitted that issues raised by the Draft LDC Code were important for the long-run regulation of competition.
- 3.2.33 Suncor submitted that, although the LDCs made extensive reference to the Diversification Report, that Report does not address competition. If the LDCs are allowed to go ahead with the Draft LDC Code, then by the time the Board addresses competition, the matter could well be academic, since existing players may exit the market and other potential competitors may not enter at all.
- 3.2.34 Suncor indicated that its major concerns were with the use of the Consumers name and with relationship advertising, in particular the way in which the LDCs and their gas marketing affiliates hold themselves out to consumers in general and to ratepayers. A related matter was the need for a clear disclaimer by both the LDCs and their affiliates to inform consumers and ratepayers that the services offered by the LDCs' affiliates were unregulated.
- 3.2.35 Alliance stated its support of the Alternative Code and argued that the Board should adopt this as an interim code. Alliance indicated its primary concerns as the use of the Consumers and Union names by unregulated marketing affiliates and the potential for delay in the implementation of ABC T-Service.
- 3.2.36 Alliance argued that by authorizing relationship advertising by Consumersfirst, Consumers Gas was already giving preferential treatment to its affiliate in spite of the voluntary code of conduct offered by the utility on March 24, 1997.
- 3.2.37 Alliance urged the Board to adopt the Alternative Code and allow ABC T-Service sign ups to occur on May 7, 1997 as planned. Alliance expressed concern over potential delays to the implementation of ABC T-Service as a result of the late entry of Consumersfirst. It pointed out that the independent gas marketers were working

to a timetable established by the Board, that they had already invested large amounts of time and money, and that any further delay would seriously harm these plans.

3.2.38 In response to a Board inquiry, Alliance indicated a one week delay to allow the Board to give its Decision on the Code would not be too problematic, but any longer delay would be a major difficulty, since the CIP and ABM marketing efforts had raised customer expectations to a high level.

3.2.39 CENGAS was highly critical of the actions of Consumers Gas and Consumersfirst and described the voluntary code submitted by Consumers Gas on March 24, 1997 as a “decoy”. CENGAS submitted that the May 7, 1997 date for ABC T-Service should be honoured and that the Alternative Code should be adopted as an interim code pending a full hearing. As another option, the Draft LDC Code could be adopted, provided provisions to prohibit the use of the LDC name, and relationship advertising and sharing of any staff with affiliates were added.

The Board’s Jurisdiction

3.2.40 The parties to the hearing made submissions and presented argument on the extent of the Board’s jurisdiction over matters in the Draft LDC Code and the Alternative Code.

3.2.41 In general, the LDCs and IPL/CGEI/Consumersfirst argued that the Board did not have the power to impose a Code on the LDCs because of limitations in its mandating legislation. Although certain provisions of both the Draft LDC Code and the Alternative Code were covered by the Ontario Energy Board Act or by the Undertakings, when taken in its entirety, compliance with the Draft LDC Code was, in their view, voluntary.

3.2.42 Parties in Support of The Alternative Code, Additional Supporters and Enron argued that the Board had the power to impose a Code on the LDCs by virtue of its statutory powers, the Undertakings and by necessary implication arising from its statute and its overall public interest mandate.

3.2.43 CAC argued that the Board should not concern itself with jurisdiction now, but establish an interim code to allow ABC T-Service to begin.

Revisions To The Standards And Principles Of The Draft LDC Code

3.2.44 Parties in Support of the Alternative Code, Additional Supporters, CAC, Enron and IGUA presented arguments for adoption of the revisions contained in the Alternative Code. CAC suggested some additional revisions.

3.2.45 Consumers Gas, Union/Centra and IPL/CGEI/Consumersfirst presented argument and Consumers Gas and Union/Centra presented reply argument, as to why the majority of revisions in the Alternative Code should be rejected.

3.2.46 The Board has summarized the main positions on revisions to the Standards and Principles in the Draft LDC Code as part of its Findings in Chapter 4.

3.3 THE COMPETITION ACT AND THE CODE OF CONDUCT

3.3.1 The presentation by the Competition Bureau provided an explanation of Canadian competition law and the provisions of the Competition Act, and of the interface between competition law and regulation. The Bureau also made some general comments with respect to issues that may need to be considered in developing a code of conduct. With respect to the Competition Act, the Bureau representatives highlighted a number of the civil and criminal provisions which may come into play in the development of the natural gas market and a code of conduct. These provisions included rules concerning the abuse of dominant position, merger, misleading or deceptive advertising, and conspiracy, as well as provisions relating to price-fixing, predatory pricing, and bid-rigging. Each of these provisions has different tests and requires different analyses.

3.3.2 With regard to the issue of the interface between competition law and regulation, the Bureau noted that, under competition law, the market is allowed to operate and the law is used to correct inappropriate business conduct, while under regulation the business conduct is subject to prior approval. The Bureau representatives explained that in any industry subject to stages of deregulation, or where there are significant

assets subject to economic regulation, there will be overlap between regulation and competition, and potential for questions of jurisdiction.

- 3.3.3 In order to deal with the overlap issue, the courts have defined a regulatory conduct defence which permits conduct that may otherwise contravene the Competition Act. In order for the defence to be used, the specific activity must be carried out within a valid scheme of regulation and four tests must be met: the relevant legislation must be valid; the activity or conduct must fall within the scope of, and be mandated by, the legislation; the regulator must exercise its power; and the conduct must not frustrate or obstruct the exercise of the regulator's power.
- 3.3.4 With respect to the Draft LDC Code of Conduct the Bureau had two specific areas of comment: the use of the LDC brand-names by marketing affiliates and the potential sharing of personnel between the LDCs and their affiliates.
- 3.3.5 The Bureau representatives cautioned that they had not done any analysis of the issues and particular circumstances of the Ontario LDCs. The two underlying principles in any analysis are ensuring that efficient and effective competition is established and protected and that a level playing field is established for all market participants. The Bureau stressed the need for clear and concise rules regarding the operation of the market in order to constrain anti-competitive conduct. Its view was that the Board may not have the necessary jurisdiction in order to implement and police the Draft LDC Code of Conduct. Its primary concern was that the Board would only be able to regulate the conduct of the LDCs. The Bureau looked for the Board to give a clear pronouncement identifying the matters over which it would exercise jurisdiction.
- 3.3.6 In order to determine if the LDCs, or their marketing affiliates were exhibiting anti-competitive behaviour, the Bureau would have to first conduct a market analysis. With regard to the issue of using the brand name of the LDC, the Bureau stated that concerns would be raised if it was determined that the use of the name: caused a competitive advantage which allowed the affiliate to extract higher prices from the market; if the strong connection to the LDC created a barrier to entry; or if the use of the name misled customers to assume they were being served by the LDC. The use of the name may however be permitted because of the Trademarks Act or otherwise and would therefore not constitute a violation of the Competition Act. It would not,

in the Bureau's opinion, be misleading or inappropriate to advertise the factual relationship between the utility and its affiliate and to clarify that the affiliate is unregulated.

- 3.3.7 On the issue of sharing of facilities, personnel, or services, anti-competitive conduct would occur if inappropriate cross-subsidization caused the market to become uncompetitive. The Bureau stressed that the actual situations would have to be looked at prior to determining if there was in fact any anti-competitive behaviour. Therefore there would have to be an analysis which led to a clear conclusion that the use of the name or sharing of personnel led to an unfair competitive advantage and a lessening of competition.
- 3.3.8 The Bureau stressed that its responsibility is to let the market operate and not to prejudge the activity or behaviour, given that in any market there will be businesses that have competitive advantages and not all will constitute an unfair competitive advantage.
- 3.3.9 The Board appreciates the assistance and information provided by the Director and Bureau staff upon short notice.

4. BOARD FINDINGS

- 4.0.1 Having set out the historical context, and the Board’s general role at this point in the transition of the industry towards deregulation of the gas commodity market, it is necessary to consider the specific situation which the Board is addressing in the reopened E.B.R.O. 492 and E.B.R.O. 493/494 hearings, and whether the Draft LDC Code of Conduct and the various proposed revisions provide an appropriate response.
- 4.0.2 Other parties broadened the scope of their submissions beyond the issues required for a decision on an interim LDC code to allow ABC T-Service to proceed. The Board in this Chapter has focussed on matters related to the Code.

4.1 DEREGULATION OF THE GAS COMMODITY MARKET

4.1.1 The Board notes that a hierarchy of requirements is placed upon the LDCs as a result of their preferred position as suppliers of monopoly services fulfilling public interest objectives in today’s complex energy market:

- C the Ontario Energy Board Act;
- C other applicable Provincial and Federal Legislation and Regulations;
- C the respective LDC Undertakings; and
- C Codes of Conduct.

4.1.2 As deregulation of the natural gas commodity market proceeds the Board’s first concern is to protect utility ratepayers from any resultant financial risk and to prevent any cross subsidization of unregulated services. Otherwise all customers, including

those seeking to benefit from a competitive gas market, would pay higher prices for regulated services, such as transportation, storage and distribution of gas, which still comprise the major proportion of a typical gas customer's bill.

4.1.3 The Board's second concern is to ensure that all Ontario gas users and their ABMs continue to benefit from just and reasonable rates, non discriminatory terms and conditions of service and have equal access to both regulated services and services which rely on utility rate base assets.

4.1.4 The Board's third concern is to ensure that no financial risk or rate impact results from either diversification or the activities of affiliates.

4.1.5 In its Report on the Ten Year Market Review the Board had the following comments about development of a competitive gas commodity market and the role of LDCs in the transition:

! "The Board believes that a fully competitive gas commodity market will be more efficient than a regulated market. The Board concludes that a more competitive market for natural gas could improve customer choice and market efficiency as well as reducing the need for regulation." p.7;

! "While agreeing that a more competitive market should be developed, the Board believes that the market changes will need to be more gradual and managed to ensure that customers are protected and that the public interest is maintained during and after the transition." p.9;

! "The Board concludes that a code of conduct should be developed to describe the appropriate operating rules between the utility and its marketing affiliate" Such a code of conduct is expected to reduce the possibility of cross-subsidization and unfair competition, but allow the utilities to act as facilitators. p.8 (paraphrase of the last two paragraphs); and

! "The Board believes that many of the problems related to the dominant market position of the LDCs can be mitigated during the transition if the utilities are limited to providing a standard gas supply service during the transition and an

acceptable code of conduct can be put in place to govern transactions between the LDCs and their marketing affiliates." p.11

4.2 UTILITY DIVERSIFICATION, UNDERTAKINGS AND CODES OF CONDUCT

- 4.2.1 The Board views those recommendations in the Diversification Report which apply to matters at issue in this proceeding, such as separation, sharing of services and prior Board approval, as having no status until the Government decides either to adopt or modify the recommendations. Until the LDCs' respective Undertakings are changed, the recommendations in the Diversification Report are just recommendations and do not replace the provisions of the existing Undertakings. The existing Undertakings set out a number of provisions related to diversification, all of which acknowledge the requirement for prior Board approval.
- 4.2.2 The Board understands that the Government is considering the Board's recommendations for changes to the Undertakings resulting from the Board Diversification Report and the E.B.O. 195 Union/Centra merger proceeding. If the Undertakings are changed, this may impact on the extent to which the provisions of the interim Code address the Board's concerns, especially in the areas of separation and sharing and transfer of resources.
- 4.2.3 The Board also agrees with the submissions of Schools that it may not be appropriate to apply all of the recommendations in the Diversification Report to the diversification of LDC affiliates into providing unregulated gas commodity supply at the same time that the LDCs continue to provide regulated gas commodity supply to many system gas customers.
- 4.2.4 In the Board's view, the primary benefit of either LDC or industry Codes of Conduct is to protect consumer interests and to ensure a level playing field for competition in unregulated areas which rely on, or interface with, the LDCs' franchised monopoly services. However it accepts that, without diminishing the remedies and protections already in place in the OEB Act and Undertakings, there is also a benefit to drawing together these aspects of such an LDC Code with the conditions which the LDCs are required to meet in providing monopoly services.

4.2.5 The Board has already accepted an ABC Service Code of Conduct to govern the general offering of ABC T-Service. The ABC Service Code is designed to be an industry self regulatory code to ensure, to the extent possible, that consumers are provided with sufficient information to make an informed choice about ABC T-Service, and that the ABMs will conduct their business with consumer interests in mind.

4.3 DRAFT LDC CODE OF CONDUCT

4.3.1 With the entry of Consumersfirst into the unregulated gas commodity market, stakeholders, including the Utilities, and the Board agreed that an additional LDC Code of Conduct should be put in place. This Code was regarded as necessary to set out the relations between the LDCs and their gas marketing affiliates and also between the LDC and independent gas marketers. While the Draft LDC Code contains elements which clearly relate to the Board's regulatory role, and elements which relate to the Board's supervisory role under the Undertakings, the Utilities characterize the Code when taken in its entirety as "voluntary", i.e. a self regulatory code.

4.3.2 For reasons already noted, the Board disagrees with the voluntary characterization and prefers to view the LDC Code of Conduct as a compilation of a number of mandatory requirements stemming from the Act and Undertakings and rules for effective and responsible corporate behaviour in dealing with existing gas customers and with the ABMs. The LDCs have received and continue to receive, sole and exclusive franchises to provide monopoly services within their respective service areas. In the circumstances the Board views the LDC Code of Conduct as meeting public interest requirements for the operation of franchised monopoly gas services.

4.3.3 The Board has not had time to consider Parties' submissions on jurisdiction in detail. In making its Findings which follow, the Board has focussed its attention on the provisions of the Draft LDC Code and proposed revisions. It is the Board's view that putting in place an appropriate code of conduct to allow ABC T-Service to proceed must take priority over legal arguments concerning jurisdiction at this time. To the extent that jurisdiction remains an issue, the Board will address this at the time of development of a final Code.

- 4.3.4 The Board has proceeded to analyze the proposed Standards and Principles in the Draft LDC Code, and the issues which arise out of each section of it, to determine:
- C the underlying concern that the Board is being asked to address;
 - C whether this concern is already addressed through the Board's regulatory or supervisory role; if not
 - C whether the concern needs to be addressed immediately; and
 - C the way in which it should be addressed.
- 4.3.5 The Board has structured its findings on the Standards and Principles in the Draft LDC Code with reference to the Alternative Code document in Appendix B which contains both the Draft LDC Code provisions and wording and the revisions proposed by the Parties in Support of the Alternative Code. Where appropriate the Board has made reference to other proposed revisions or alternatives such as those put forward by CAC, OCAP and IGUA. Accordingly the Board's discussion of the issues should be read in conjunction with Appendix B.
- 4.3.6 In the interest of brevity and expediency the Board has addressed only those matters which were the subject of significant differences of view and those matters for which, in the Board's view, the public interest requires revision or clarification of the Standards and Principles in the Draft LDC Code.
- 4.3.7 As the Board noted at the end of the hearing, it believes the parties' suggestion for an interim Code is a good one in order to allow ABC T-Service to proceed. The Board agrees with the submissions of parties that such an important matter will need a more comprehensive proceeding. The Code may also require revisions as a result of any changes to the Undertakings and it will, in any event, be reviewed further in the light of experience and the recommendations of the Working Group on the Ten Year Market Review.
- 4.3.8 The Board's Findings are reflected in Appendix A which contains a copy of the Draft LDC Code with the Board's revisions marked. For reasons noted earlier, the LDC

Code of Conduct with Board revisions in Appendix A will be titled "Interim LDC Code of Conduct".

4.4 STANDARDS & PRINCIPLES IN THE DRAFT LDC CODE

Title:

4.4.1 The LDCs propose: that the secondary title of the LDC Code read "*LDC Relationships with Gas Marketers (Including Gas Marketing Affiliates)*".

Intervenors¹ propose: that the references to Gas Marketers and Gas Marketing affiliates in the secondary title be reversed to better reflect that the Code is to define acceptable operating rules between the utilities and their marketing affiliates as proposed in the Ten Year Market Review Report.

The Board finds that, having reviewed the Draft LDC Code to determine which provisions of the Code are generic and apply to all gas marketers and which are specific to gas marketing affiliates, the balance of provisions is clearly towards provisions which relate to affiliates. Accordingly the Board finds that the LDC Code secondary title should reflect this balance.

The Board finds that the secondary title should read: "*LDC Relationships with Affiliate and Independent Gas Marketers*". (N.B. An Independent Gas Marketer means independent from the utility, i.e. not an affiliate)

Preamble:

4.4.2 The LDCs propose: that the second paragraph begin *This Code is intended to ensure that the LDCs do not use their monopoly position to create unfair competitive advantages for any Gas Marketer, including a Gas Marketing Affiliate.*

Intervenors propose: that the word "*unfair*" should be removed, contending that *any* competitive advantage of an affiliate created by virtue of the monopoly position of the LDCs is unfair.

¹ Where the word "intervenors" is used this is meant to apply as appropriate to Parties in Support of the Alternative Code and any other parties who supported the change indicated.

To the extent that the intervenors are attempting to address the concern about cross-subsidization of an affiliate, the Board's regulatory role is invoked; such issues are appropriately addressed in the requisite rates cases. To the extent that the concern is one of assuring there is a level playing field for all competitors, quite apart from any cross-subsidization, the Board would have to be satisfied that *any* advantage the affiliate might have was an unfair one, and further, that there was some regulatory or supervisory power or remedy that the Board could use to prevent the unfairness.

In the Board's view all competitors in the developing deregulated gas commodity market have advantages of one kind or another, some because their name will be first on the list provided to potential customers, some because they have a reputation in other markets, some because they own the gas, and some because they have superior market strategists guiding their entry into the market. In the Board's view, the affiliate may have a competitive advantage because of its association with the LDC, but this advantage is not, absent misinformation to system gas and direct purchase customers, necessarily unfair. The customer information issue is addressed later.

IGUA suggested rewording the paragraph to include the words "*or to restrict any market participant from competing fairly and in an efficient and responsive manner*". The LDCs accepted this wording.

The Board finds IGUA's proposed wording to be appropriate.

4.4.3 The LDCs propose: that the third paragraph begin with "*The primary responsibility for administering this Code lies with the LDCs and the administration of the Code must, in some instances, take account of the particular circumstances faced by each LDC. This Code provides that the [Ontario Energy] Board may review complaints in relation to this Code.*"

Intervenors propose: Deletion of this paragraph since in their view, the primary responsibility for oversight of the Code should rest with the Board and the Code should be mandated by the Board.

The Board believes that the LDC Code will be a document that may require periodic changes to keep up with the changing marketplace and industry. The Board should

be involved in its drafting and as part of the complaint resolution function of the Code, but the responsibility of administering the Code will, more and more, rest with the LDCs and the industry at large.

CAC suggested addition of the following words to the paragraph "*Subject to the powers of the Board as elsewhere articulated in the Code*". This change was accepted by the Companies.

The Board finds that these words provide clarification and should be incorporated with a modification to reflect the powers of the Board which are not articulated in the Code: "*Subject to the powers of the Board elsewhere and as articulated in the Code*".

In recognition of the changes to Standards 9 and 10 regarding reporting and disclosure of compliance, the Board also requires the addition of the following sentence in the third paragraph: "*This Code provides for reporting and disclosure with respect to employee compliance and the complaints process*".

Definitions:

4.4.4 The LDCs propose: a definition of "*Gas Marketer*" which includes reference to "*carry on the business, on an unregulated basis, of marketing or selling of natural gas*".

Intervenors propose: an expansion of the definition of Gas Marketer to include the marketing of "*transportation or storage capacity for natural gas, or natural gas transportation, storage or distribution related products or services*".

The Board does not believe that inclusion of distribution related products or services is appropriate at this stage of the development of the deregulated market. The Board does agree that transportation and storage *per se* should be included, for consistency with the definition of [Utility] Services (see below) and also to reflect other aspects of deregulation of the upstream market. Therefore this definition should be expanded to include "*transportation or storage capacity, and transportation and storage related services*."

The issue of the LDC franchise area geographic limitation, as it applies to the definition of Gas Marketer and which was raised by intervenors, should be addressed in a final Code.

4.4.5 The LDCs propose: the definition *"LDC Resources means the employees and the property of the type for which costs are included in an LDC's cost of service and rate base for rate-making purposes under the OEB Act"*.

Intervenors propose: the definition *"LDC Resources means all things, assets, administrative systems, data or other information, and like resources owned, controlled or accessed by the LDC, including trade names, logos and trademarks."*

The Board understands that, by changing the definition, the intervenors seek to prohibit the use of the LDC name, logo and trademark by an affiliate through the application of this definition to other Standards dealing with sharing of services and preferential treatment.

The Board finds that the proposed additions raise the issues of ownership of the name and trademarks and jurisdiction over affiliates and it has previously indicated that such matters must be addressed at a later time in reference to a final Code.

Accordingly the Board finds that the definition proposed by the LDCs will be utilized for the interim LDC Code.

4.4.6 The LDC's propose: a definition of "Services" which encompasses the *"distribution, transmission and storage of gas by the LDCs for which rates and other charges are approved or fixed by the Board pursuant to the Ontario Energy Board Act and, in addition, the Agent Billing and Collection Service approved by the Board"*.

Intervenors propose: that the definition of Services be expanded to *"Market Services"*, and include *"any transactional services or opportunity sales for transportation and storage capacity, and any other services offered by the LDC"*.

In E.B.R.O. 492 the Board approved Consumers Gas' proposal to offer transactional services such as gas loans, off-peak storage, exchanges and transportation

assignments within a widened range rate under Rate 330. This approval was conditioned on:

- C detailed reporting to ensure ratepayers are kept harmless and utility assets employed are surplus to in-franchise requirements;
- C a review of the status of these services within the regulated utility and the degree of competition in storage markets in Ontario; and
- C the establishment of a Transactional Services Deferral/Variance Account with future review of the balances by the Board prior to disposition.

In E.B.R.O. 494 the Board approved a widening of Union's C1 Rate for storage and transportation services to ex-franchise customers and, in addition, directed Union to establish a deferral account for revenues from other transactional services in order that the Board could examine the balances and disposition of these in the next rates case.

The Board is of the view that given its consideration of transactional services as described above, these services fit within the Utilities' proposed definition.

For greater clarity concerning "Services" which is used in several contexts in the Draft LDC Code, the Board finds that the defined term should be "Utility Services". This defined term should also appear in the definition of "Rate Schedules".

The Board's change clarifies that the Services referred to in the Code are those related to the sale, distribution, transportation and storage of natural gas which are subject to review of rates and other charges, costs and revenues in the Utilities' rates cases.

The addition of the word "*sale*" makes this definition consistent with the core business of the regulated Utilities.

For reasons noted earlier, since the Code is intended to apply to gas marketing related activities, distribution related products and services should be excluded.

Standard 1. Physical Separation

4.4.7 The LDCs propose: the Standard should read *"There shall be physical and financial separation between an LDC and its Gas Marketing Affiliates"*.

Intervenors propose: the addition of the word *"complete"* to the phrase *"physical and financial separation"*.

In the Board's view, the revision proposed by intervenors does not add anything significant to the Standard. Therefore the original wording should be retained.

4.4.8 Principle 1 appears to address organizational separation, and might be better placed under Standard 2. The Board has made this change at this time to improve clarity and structure while also recognizing that the placement of this Principle should be addressed again in a final Code.

4.4.9 Principle 2 (which becomes Principle 1 in Appendix A)

The LDCs propose: *"An LDC's office facilities, including office equipment will be physically separate from a Gas Marketing Affiliate's office facilities"*.

Intervenors propose: the addition of the phrase *"and computer systems"* to the description of the LDC's office facilities.

Having been assured by Counsel for Consumers Gas that "[the affiliate] does in fact have its own computer system... And that was intended to be included in the concept of a separate office, including equipment" [tr 482]. Union/Centra did not comment on this change. The Board believes the addition of the words *"and computer systems"* is appropriate, for an abundance of clarity.

4.4.10 Principle 4 (which becomes Principle 3 in Appendix A)

Consumers Gas proposes: *"An LDC will not loan or advance funds to or guarantee or become responsible for the indebtedness or obligation of a Gas Marketing Affiliate."*

Union/Centra proposes: *"The sum total of equity, loans and guarantees provided by an LDC to gas marketing affiliates shall not exceed 35% of the utility's common equity and individual investments shall not exceed 10% of the utility's common equity"*.

Intervenors propose: that Principle 4 should also preclude *"any joint financial transaction, including procurement"*.

Counsel for Consumers Gas argued that the preclusion argued for by intervenors would be contrary to ratepayer benefits to be obtained through economies of scale and scope, as foreseen by the Board in its Diversification Report [tr 39 and tr 483].

Union was not supportive of the Principle as worded by either Consumers Gas or the intervenors and proposed to adopt the relevant provisions recommended in the Diversification Report.

In the Board's view, this matter is largely addressed through the existing Undertakings given by the Utilities to the Government, and supervised by the Board. As noted earlier this provision may require review if the Undertakings are changed.

The Board believes there would be a problem, both actual and of perception, should the Utilities engage in joint procurement of gas supply, transportation or storage. These are the very things the LDCs offer to customers as part of their regulated monopoly services and it is in the Board's view inappropriate for LDCs to use their regulated monopoly activities to benefit affiliates.

The Board therefore finds that any joint procurement of the commodity, transportation or storage should be precluded.

The revision to the definition of Utility Services is intended, when applied in conjunction with other Standards in the Code, to address this concern. However, if there are ongoing concerns that these revisions have not effectively precluded joint procurement of gas supply, transportation and storage, then this matter should be considered further as part of the development of the final Code.

On the other hand, in the Board's view, any joint procurement of support services, for example, computers, or the services of computer technical advisors, or other similar services needed by the utility and the affiliate should provide savings for ratepayers through economies of scale or scope. While the ability to make such purchases in association with an affiliate may confer a small competitive advantage on the affiliate, it is open to other competitors to make similar arrangements, with their parent corporations or other partners, and the Board does not believe the LDC Code should prohibit such activities.

The Board finds that addition of the words “*except as provided for in the existing Undertakings*” would reference the Undertaking provisions and also address Union's proposed amendment.

Standard 2. Organizational Separation

4.4.11 The LDCs propose: that this Standard be limited to “*organizational separation between an LDC and its Gas Marketing Affiliates.*”

Intervenors propose: that the Standard be expanded so that “*organizational separation*” be replaced with “*complete functional separation*”.

The Board finds that given other changes to Definitions and Principles, the broadening to complete functional separation is unnecessary absent any clear indication of potential harm from the original wording.

4.4.12 As stated above, Principle 1 of Standard 1 should appear under this Standard. The other Principles outlined under this Standard must then be consistent with the commitment that no Gas Marketing Affiliate shall be a subsidiary.

4.4.13 Principle 2: (which becomes Principle 3 in Appendix A)

The LDCs propose: that “*An LDC will not provide the services of its executives to act as executives of a Gas Marketing Affiliate, other than executives who perform non-operational functions.*”

Intervenors, except for CAC and Kitchener, propose: that “*An LDC and a Gas Marketing Affiliate will not share executives.*” CAC and Kitchener indicated that sharing of executives with prior Board approval was acceptable. This position was also taken by IGUA in its written argument.

The Board considered the various affiliate relations in its hearing on diversification. In its Diversification Report, the Board recognized, as was pointed out by Counsel to Consumers Gas that “the ideal protection for the ratepayer would be provided by the use of a non-subsiary affiliate that is separately financed, physically separated and independently managed”.

The Board is of the view that it is inconsistent with the non-subsiary relationship for the LDC and the affiliate to share the services of executives who provide "Utility Services" including operational functions as the Board would define these (see below). Sharing, in the Board’s view, includes either provision of the services of LDC executives *to the affiliate*, or provision of the services of executives of the affiliate *to the LDC*.

The Board therefore finds that the wording should be amended to read "*An LDC will not provide the services of its executives who provide Utility Services to act as executives of a Gas Marketing Affiliate and shall not accept the services of executives of a Gas Marketing Affiliate, other than executives who perform non-operational functions*".

4.4.14 Principle 3: (which becomes Principle 4 in Appendix A)

The LDCs proposed that “*An LDC will not have employees and payroll records in common with a Gas Marketing Affiliate, except as permitted by the foregoing two principles, but an LDC may share services with a Gas Marketing Affiliate as permitted by Part II of this Code.*”

Intervenors, except for CAC and Kitchener, proposed that “*An LDC and a Gas Marketing Affiliate will not share staff or employees, notwithstanding any other provisions of this Code.*” CAC and Kitchener indicated that sharing of employees with

prior Board approval was acceptable. This position was also taken by IGUA in its written argument.

The Board finds that the new definition of Utility Services and changes to the wording of Standard 3, should address these concerns.

4.4.15 Principle 4: (which becomes Principle 5 in Appendix A)

The LDCs propose: that “*An LDC will not share its computer systems with a Gas Marketing Affiliate in any way that would give the Gas Marketing Affiliate access to the LDC's confidential information, including the information that the LDC must keep confidential in accordance with Standard No. 7 of this Code.*”

Intervenors propose: that this Principle should be deleted consistent with their position under Standard 1, Principle 2.

The Board finds that in this Principle the words “computer systems” should be changed to “*computer services*” to recognize the clarifications provided by Counsel to Consumers Gas. Such a change would encompass the sharing of “common standards and methodologies, reduced costs for hardware and software, and shared knowledge base” as enumerated by Counsel to Consumers Gas [tr 482].

The Board notes that its amendment of Standard 1, Principle 2 regarding the separation of office equipment and computer systems of the LDC and affiliate may address the primary concerns of intervenors.

Standard 3. Sharing of LDC Resources

4.4.16 The LDC's propose: “*The LDC will not use operating employees in the areas of gas supply acquisition, gas control, nominations, and gas storage operations, to provide management and administrative services to a Gas Marketing Affiliate. Otherwise, an LDC may use LDC Resources to provide such services. The costs of providing such services shall be allocated in accordance with cost allocation guidelines determined by the Board from time to time, which guidelines shall form part of this Code*”.

The Intervenor propose: *“An LDC shall not share LDC Resources with, or permit [the] use of LDC Resources by its Gas Marketing Affiliates, without prior Board Approval”.*

Under Principles the Intervenor propose to define the criteria the Board shall apply to its consideration of prior approval including:

- ! cost/benefit analysis;
- ! no detriment to the utility;
- ! not a driver for expansion of staff, property or technology choices;
- ! no undue disadvantage to any gas marketer;
- ! shared resources available to all gas marketers on similar terms; and
- ! shared resources cannot be provided to affiliate by either a parent or the marketplace cost effectively.

4.4.17 OCAP, CAC and Kitchener were prepared to accept the LDCs' wording provided the prior approval of the Board was required. This position was supported by IGUA in its written argument. These parties supported reporting and filing requirements but did not necessarily agree that specific criteria should be defined.

The sharing of LDC Resources with an affiliate is already the subject of two types of control: prior Board approval under the Undertakings of transactions which are forecast to exceed \$100,000, and review by the Board in rates cases of cost of service, particularly its review of non-utility eliminations. The \$100,000 “materiality” limit applies to total forecast transactions with an affiliate over a fiscal year; the Board would review all contributing transactions if that limit were forecast to be exceeded. The exemption in the undertakings for transactions “in the normal course of business” does not preclude the Board’s subsequent review of these in the rates cases, and in any event, the preclusion of resource sharing in certain areas set out in the LDC’s proposed Standard (i.e. gas supply acquisition, gas control, nominations, and gas storage operations) appears to the Board to encompass the LDC’s “normal course of business”.

In its prior approval review of significant shared service transactions such as those of the Union/Centra Shared Services initiative, or the Westcoast Corporate Centre

Charges, the Board applies a methodology which includes criteria proposed by the intervenors, except for criteria of: no undue disadvantage to any gas marketer; and making shared resources available to all gas marketers on similar terms. The first concern is adequately addressed under Standard 6 - Preferential Treatment. The second concern is addressed under Standard 5 as it pertains to Utility Services. The Board therefore does not consider it necessary to enumerate these criteria in the Code.

For non-Utility Services, including such services as on-bill invoicing for merchandise, or access to computer services, the Board accepts making these services available to independent gas marketers as well as affiliates, provided such sharing results in significant benefits to ratepayers, such as lower O&M costs due to economies of scale. However the Board must leave it to LDC management to apply the principle to specific proposals that gas marketers may wish to make.

In summary, the Board believes that suggested wording proposed by the intervenors is unnecessary, given that the Board's prior approval is required by the Undertakings for transactions over the \$100,000 limit, that the exemption in the Undertakings for transactions "in the normal course of business" has been augmented by the LDCs' proposed Standard, and that the Board may review transactions after the fact in rates cases. The cost allocation guidelines referred to in the Standard are set by the Board in rates proceedings, and adherence to them is also subject to Board review.

Therefore in the Board's view, given the current reporting and review procedures in place and the monitoring Guidelines there is no need for a more stringent restriction on sharing of LDC Resources.

The Board is however concerned that the operations of an affiliate in the gas marketing business not divert the attention of executives and employees of the LDC from conducting the LDC's business efficiently in the best interests of the ratepayer. Therefore, the Board will add the following to this Standard "*employees providing Utility Services, including*". Appropriate review of non-utility eliminations will also be required to allow the Board to assure itself that no such diversion occurs.

The change to the definition of services [Utility Services] also provides a broader definition of the scope of Executive services which are inappropriate to share with gas marketing affiliates.

Standard 4. Transfer of LDC Resources

4.4.18 The LDCs propose: “*An LDC may sell or otherwise transfer assets, goods or services to, and may purchase assets, goods or services from, a Gas Marketing Affiliate. The price for all such transfers shall be determined in accordance with transfer pricing guidelines determined by the Board from time to time, which guidelines shall form part of this Code*”.

Intervenors propose: “*Subject to Standard 2, an LDC may sell or otherwise transfer LDC Resources to, and may purchase assets, goods or services from, a Gas Marketing Affiliate. The price for all such transfers shall be determined in accordance with the transfer pricing guidelines determined by the Board from time to time, which guidelines shall form part of this Code*”.

OCAP and CAC were prepared to accept the LDCs' wording provided the prior approval of the Board and a public filing requirement were added. IGUA supported this in its written argument.

The Board's comments on Standard 3 apply equally to this Standard. The Board scrutinizes resource transfers both in rates cases and through its supervision of the Undertakings, and may, through the use of deferral accounts, for example, ensure scrutiny between rates cases. Transfer pricing guidelines will be developed in each utility's rate case. The monitoring Guidelines will require appropriate disclosure of such transfers.

Accordingly the Board accepts the wording proposed by the LDCs.

The Board is however very concerned that the increase in shared services and resource transfers with LDC affiliates, will significantly increase the regulatory burden with associated increases in review time and cost. This reason alone suggests that the LDCs and their parent corporations should seek to minimize such transactions by

adopting greater separation through organizational structures, the restriction of shared utility services and resources and the provision of cost effective shared services by the parent corporation to non-subsidiary affiliates as well as the LDCs. The latter must be fully justified in accordance with the Board's current cost allocation and cost/benefit criteria such as those applied to the review of 1996 and 1997 Westcoast Corporate Centre charges to Union/Centra.

Standard 5. Equitable Access to Services

4.4.19 Principle 1

The LDCs propose: *“The LDC shall not provide any preference to any Gas Marketer, or any customers of such Gas Marketer, with respect to the processing of requests for, or the provision of, [Utility] Services except as set out in the Rate Schedules”.*

Intervenors propose: *“The LDC shall not provide directly or indirectly, any preference to any Gas Marketer, or any customers of such Gas Marketer, with respect to the processing of requests for, or the provision of Market Services except as set out in the Rate Schedules”.*

The LDC's were prepared to accept the additional words *“directly or indirectly”* proposed by the intervenors. The Board finds that these words should be added to Principle 1.

Standard 6. Preferential Treatment

4.4.20 In order to more completely explain the matters included under "preferences" the Board requires the Standard to include a reference to the price and service quality offered by the LDC, such that the first sentence would read: "The LDCs shall not state or imply to any of their customers or to potential or current customers of Gas Marketers that preferences will be given to any such customer *or that such customer will receive a lower price or a higher quality of service from the LDC*".

4.4.21 Principle 4 (new)

Intervenors propose: that a new Principle 4 be added: “*An LDC shall not allow its Gas Marketing Affiliates to advertise the affiliates’ relationships with the LDC. An LDC shall ensure that its Gas Marketing Affiliates clearly state in all media correspondence and contacts that the affiliates’ activities are not regulated by the Board*”.

The Board understands that the primary concerns of intervenors were the use of the Consumers name by Consumersfirst and the use of the Consumers Gas trademark, style, logo and reputation in relationship advertising and marketing by the unregulated gas marketing affiliate. Two potential harms were raised:

- creation of confusion on the part of consumers and ratepayers about the respective businesses of the regulated utility and the unregulated affiliate; and
- creation of an unlevel playing field because of a market advantage to the affiliate by virtue of its use of the relationship to the regulated utility.

The Board believes that the former concern is more pressing at this time. Whether the confusion about the roles of the LDCs and the unregulated gas marketing affiliates will lead to a market advantage relative to other competitors as the LDCs' parents clearly hope, and if so, whether this could be deemed “unfair” may have to be reviewed as part of the development of a final Code.

The Board is of the view that, although the potential for confusion is greatly enhanced in the case of a gas marketing affiliate of the LDCs, there is also significant potential for confusion about unregulated gas supply alternatives and the role of all ABMs relative to the regulated utilities. The latter concerns were the primary reason that the Board preconditioned its approval of ABC T-Service upon development of an ABC Code of Conduct and a Customer Information Package.

The Board is also very concerned about apparently inaccurate and potentially misleading representations, which have come to the Board's attention, in advertising and promotions, of the Utilities' system gas portfolio by the LDC gas marketing affiliates and ABMs.

The Board therefore requires as an interim measure that a new Principle 4 be included under Standard 6: *"The LDCs will take all reasonable and appropriate steps to ensure that any representations made by Gas Marketers operating under ABC T-Service as to the nature, quality and price of Utility Services constitute fair representations."*

The Board expects that this Principle will be incorporated into an additional Standard 11: Relationship Marketing and Advertising in the final Code. (See Other Board Findings).

While not requiring any other changes to the wording of Standard 6, the Board is of the view that, given the market entry by LDC gas marketing affiliates, the CIP, while an important and necessary start towards customer education, is not sufficient to correct or offset potential confusion in the marketplace. The Board addresses this under Standard 8 and under Other Board Findings, Section 4.5.

Standard 7. Provision of Information

4.4.22

Principle 4:

The LDCs propose: *"When an LDC provides leads or information about specific market opportunities, the LDC will provide such leads or information, in a non-preferential manner, in terms of timing, price and all other conditions of availability, to all Gas Marketers that are known to the LDC unless a party specifically requests that its needs be disclosed on a restricted basis, in which case the LDC will comply with the party's request"*.

Intervenors propose: Deletion of the last phrase - *"unless a party specifically requests that its needs be disclosed on a restricted basis, in which case the LDC will comply with the party's request"*.

The Board does not agree with the suggestion of intervenors that there be no exceptions to the LDCs' obligation to provide information to all Gas Marketers. If a party specifically requests restricted disclosure, that request should be respected by the LDC.

Therefore the Board finds that no change to Principle 4 is needed.

Standard 8. Preferential Direction of Customers

4.4.23 The LDCs propose: *“The LDC will not preferentially direct customers seeking any services provided by Gas Marketers to any specific Gas Marketer”.*

Intervenors propose: No change.

In order to more completely explain the matters included under "preferential direction" the Board requires the addition of the words *“nor imply in any information they provide that any Gas Marketer will receive preferential treatment from the LDC”* to the sentence setting out the Standard. Taken together with Standard 6, in the Board's view all currently identified reasonable concerns about preferential treatment and direction of either customers or Gas Marketers appear to have been addressed.

4.4.24 Principle 2

The LDCs propose: *“When providing a directory to customers, the LDC is not responsible for the completeness or accuracy of the information it receives from Gas Marketers”.*

Intervenors propose: No change

The Board finds that for greater clarity the wording should be changed to: *“When providing a directory of unregulated gas supply service providers to customers, the LDC is not responsible for the completeness or accuracy of the information it receives from Gas Marketers”.*

As part of Principle 2, the Board requires the addition of the following:

"The directory shall provide information on the choices available to customers and clearly indicate which services (choices) and service providers are regulated and not regulated by the OEB."

This addition complements the short-term measures referred to in the discussion of Standard 6 and also addresses some of the Board's concerns with regard to the provision of comprehensive and comprehensible consumer information on gas commodity supply alternatives.

4.4.25

Principle 3

The LDCs propose: *"The LDC will not initiate or engage in any joint advertising with any Gas Marketer other than advertising aimed at the promotion of the use of natural gas. Participation in any such promotion will be offered on proportionate terms to all other Gas Marketers that are known to the LDC"*.

Intervenors propose: *"The LDC will not engage in any joint advertising with any Gas Marketer"*.

Principle 3 provides for "proportionate" participation by Gas Marketers in joint advertising (advertising jointly paid for by the LDC and the Marketer) aimed at the promotion of natural gas. The Board is not inclined at this time to preclude this form of advertising.

The Board understands "proportionality" to be based on volume of gas marketed, so that small marketers would pay less to be included in the promotion in proportion to their sales revenues than the larger marketers. This provision appears to the Board to address the problems raised by some intervenors of the potential inability of the smaller brokers to participate. [tr 199] Should problems be identified in the future the Board will review this as part of the development of a final Code.

The Board therefore accepts the LDCs proposed wording. However, it believes that the word "other" in the second sentence is unnecessary.

Standard 9. Employee Compliance

4.4.26

Intervenors propose: the Title of this Standard be changed to *"Employee Compliance and Record Keeping"*.

Although the LDCs were prepared to accept this change, the Board does not accept the proposed change for reasons set out below under Principle 4.

4.4.27 Principle 3

The LDCs propose: *“Annual reviews will be conducted by the LDC’s management and the results of such reviews will be made available to the Board”.*

Intervenors propose: *“Annual reviews will be conducted by the LDC’s management and the results of such reviews will be filed in rates cases or such other reasonableness reviews in the formats specified by the Board, which formats shall form part of this Code”.*

The LDCs have accepted the intervenors’ proposed changes to Principle 3. The Board understands that this Principle would require the LDC to provide independent evidence of employee compliance with the Code, such as that which might be obtained through employee interviews or contacts by an independent auditor, and to file such evidence in its rates case.

The Board does not conduct “other reasonableness reviews” and believes these words should be omitted. The Board, through the office of the ERO, already monitors many activities of the Utilities, including compliance with its decisions.

4.4.28 Principle 4 (new)

Intervenors propose a new principle 4: *“The LDCs shall maintain records of all transactions with their Gas Marketing Affiliates with sufficient detail to permit an evaluation of the compliance of such transactions with the Standards and Principles of the Code”.*

The Board accepts the Utilities’ argument that the addition of Principle 4 proposed by the intervenors would require the LDC to provide information which could potentially be analyzed to provide details of an individual broker’s transactions with the LDC, prices, etc. The Board therefore agrees that the additional words in the title are inappropriate, as is Principle 4 proposed by intervenors.

As discussed earlier, the Utilities have filed draft Monitoring and Reporting Guidelines which have been given interim approval by the Board. The Guidelines contain provisions with respect to record-keeping by the Utilities and inspection of the records by the ERO in regular monitoring reports and summary information filed with the Board. The type of material cited in the Guidelines includes accounts payable records, purchase orders, time sheets, as well as all supporting documents. The Board, in its Diversification Report, indicated the importance of having records and information available for review and audit. The Guidelines should ensure that the Board will have access to all relevant information regarding transactions between the Gas Marketing Affiliate and the LDC.

Therefore the Board finds the proposed new Principle to be unnecessary at this time.

Standard 10. Complaint Process

4.4.29 Principle 6

The LDCs propose: *“The LDC will file an annual summary of complaints. The summary shall set out the number of complaints received, the nature of the complaints received, and the resolution of the complaints”.*

Intervenors propose: *“The LDC will file an annual summary of complaints in its rates cases or other reasonableness reviews. The summary shall set out the number of complaints received, the nature of the complaints received and the resolution of the complaints”.*

The LDCs accepted this change.

The Board does not conduct “other reasonableness reviews”, and as above, believes these words should be omitted. Otherwise the Board accepts the proposed wording.

4.4.30 Principle 8

The LDCs propose: *“After receiving a request for a review, the Board may decide, in its sole discretion, whether or not to review the complaint, then following such a*

review the Board may make findings and, within the limits of its jurisdiction, issue such orders as it considers proper”.

Intervenors propose: No change

The Board finds the proposed wording of Principle 8 to be too restrictive for effective dispute resolution. It believes it to be in the public interest that by prior agreement of the parties, its findings should be binding on the complainant and the LDC in the same way as an arbitration, regardless of whether the appropriate remedy is, in the Board’s view, within its mandated legislative powers to make an order or not.

The Board therefore requires the following addition: *“issue such orders, or, by prior agreement of the parties, make such findings of a binding nature on the parties, as it considers proper”.*

Appendix A

The LDC Code of Conduct, incorporating the Board's changes set out above, appears as the Interim LDC Code of Conduct in Appendix A to this Decision.

4.5 OTHER BOARD FINDINGS

4.5.1 The Board believes that two additional actions are necessary to correct customer confusion about the respective services and roles of the LDCs and the ABMs, particularly affiliates of the LDCs:

1. Disclaimer:

The Board finds that a necessary term and condition of ABC T-Service shall be the use of a disclaimer by all ABMs delivering gas to Consumers Gas, Union and Centra under this Service.

This Finding requires that the LDCs receive a warranty that the advertising, promotion and direct representations (e.g. telemarketing) to potential customers

about ABC T-Service will include the following prominent disclaimer: *The price of gas under this service is not regulated by the Ontario Energy Board.*

For greater certainty, this disclaimer provision should also be added to the ABC Service Code of Conduct by DPIC.

The Board recognizes that print and television advertising and promotion material for ABC T-Service may already be prepared and therefore a separate printed disclaimer may be used until the end of May, 1997 to allow the disclaimer to be incorporated into print advertising. TV and radio advertising should be adjusted as soon as possible. No such grace period is warranted or necessary for telemarketing or door to door sales messages.

2. Corrective Customer Information Program by the LDCs:

As noted previously, the Board believes that the CIP provided important information to customers about direct purchase options and ABC T-Service. The Board believes that the CIP now needs to be augmented, since it does not address the potential confusion created by the sale of gas by gas marketing affiliates of the LDCs at the same time as the LDCs are offering regulated gas commodity supply.

4.5.2 In the interim, the Board directs the Utilities to include the respective CIPs in both the first and subsequent gas bills following the introduction of ABC T-Service in their franchise areas. This will result in a total of three insertions.

4.5.3 It also directs Consumers Gas to produce the CIP in the form of a flyer to be included in Toronto area and local newspapers in its franchise area before the end of May 1997. The new bill insert and flier will prominently display the disclaimer that:

“The prices paid for natural gas under any direct purchase arrangement including ABC Service, are not regulated by the Ontario Energy Board and the listed ABMs offering such services, including Consumersfirst, are not subject to the control or oversight of the Board”.

- 4.5.4 The Board also directs the LDCs to prepare plans to undertake an additional customer information campaign which, while reinforcing the choices available to direct purchase customers, clearly delineates the respective businesses and roles of the regulated Utilities and the services they provide from those of their unregulated gas marketing affiliates. The plans for such a customer information program should be submitted to the Board no later than June 15, 1997.
- 4.5.5 The Board finds that the final LDC Code should contain an additional Standard 11 - Relationship Marketing and Advertising. This Standard should be developed by the Utilities in conjunction with their ABM clients and the Working Group and address how both independent and affiliate Gas Marketers utilizing ABC T-Service may represent their relationship with the utility, in order to provide greater clarity concerning the respective roles of the regulated utility and unregulated ABMs. The new Standard should incorporate the interim Principle 4 regarding fair representation, under Standard 6 of the Interim Code.

5. COSTS AND COMPLETION OF THE PROCEEDINGS

5.1 COSTS

5.1.1 The deadline established by the Board for submissions on costs was May 15, 1997, close of business.

5.1.2 The following parties submitted that they should receive 100% of their legitimately incurred eligible costs of participation in the proceeding:

CAC, Energy Probe, Enron, HVAC, IGUA, Kitchener, OCAP, PanEnergy, Schools and Suncor.

Board Findings

5.1.3 The Board finds that this proceeding has a number of unique aspects such as the nature of the matters at issue, the lack of an evidentiary phase and the deadlines created by the urgent need for an LDC Code. Accordingly the Board's findings on costs should be viewed in this special context and not as a precedent for other proceedings.

- 5.1.4 The Board finds that the following parties claiming costs have a significant commercial or financial interest in the outcome of the proceeding and should bear their own costs:
- Enron, PanEnergy and Suncor.
- 5.1.5 However, Enron provided a large brief of cases and other codes of conduct which was relied upon by parties and therefore Enron should receive 100% of its disbursements related to the preparation of this brief.
- 5.1.6 The Board finds that HVAC provided unique assistance to the Board in preparation of the Alternative Code and as leader of the Parties in Support of the Alternative Code. It also has no immediate direct commercial interest in deregulation of the gas commodity market. Accordingly the Board finds that HVAC should receive 100% of its legitimately incurred eligible costs of this proceeding.
- 5.1.7 The Board finds that CAC, Energy Probe, IGUA, Kitchener, OCAP and Schools who represent either utility customers or the public interest, should receive 100% of their legitimately incurred eligible costs.
- 5.1.8 The Board orders Consumers Gas to pay 75% of the costs of HVAC, CAC, Energy Probe, IGUA, Kitchener, OCAP and Schools, and, the Board's costs of, and incidental to the hearing, upon receipt of the respective approved statements of account from the Board's Assessment Officer and the Board's invoice.
- 5.1.9 The Board finds that the proceeding was convened directly as a result of actions by Consumers Gas' shareholders and therefore orders that neither Consumers Gas' own costs nor the awarded costs are to be recovered from ratepayers, but are for the account of the shareholder.
- 5.1.10 The Board orders that Union/Centra pay 25% of the above intervenors' and Board costs and not recover either these costs as their own costs of the proceeding from ratepayers as a normal regulatory expense. The Board finds that these costs are

primarily related to the operations of gas marketing affiliates and are appropriately for the account of the shareholder.

- 5.1.11 The Board directs both Consumers Gas and Union/Centra to file a statement of their respective regulatory costs with the Board's Energy Returns Officer and to provide such other information that the ERO may require to ensure compliance with the Board's findings on costs.

5.2 COMPLETION OF THE PROCEEDINGS

- 5.2.1 As noted previously, the Board requested the LDCs' position on a one week delay in implementation of ABC Service to allow its Decision to be issued. Counsel for the LDCs, having received instructions, agreed to this on behalf of their clients. Some other intervenors indicated that a one week delay in sign-ups for ABC T-Service could be accommodated. No party in the hearing raised an objection or indicated that they could not accommodate this short delay.
- 5.2.2 To codify this understanding the Board issued a letter dated May 5, 1997 to all parties to the hearing which advised them that it would be unable to issue its Decision before the May 7, 1997 scheduled commencement date for ABC T-Service in the Consumers Gas franchise area. The Board's letter stated that it would be in the public interest for parties to delay sign-up of new customers or conversion of existing customers until May 17, 1997.
- 5.2.3 On May 6, 1997, Consumersfirst sent a marketing flier to readers of the Toronto newspapers. The flier included a prepaid mail-in sign up card for ABC T-Service. In response to Board Staff inquiries, Consumersfirst sent a letter to the Board in which it informed the Board it had not received the Fax copy of the Board's letter of May 5, 1997, and that it would abide by the Board's letter and commitments made by Counsel for Consumers Gas in the hearing.

Board Findings

- 5.2.4 The Board finds the actions of Consumersfirst to be inappropriate and does not find the reasons stated in Consumersfirst's letter of May 7, 1997 to be an adequate explanation for the appearance of bad faith and additional confusion which it has created. If there was any doubt about the meaning of the Board's expectations, expressed in the hearing, or the commitments of Consumers Gas' Counsel to await the Board's direction regarding a delay in the implementation of ABC T-Service, then Counsel for Consumersfirst should have sought clarification immediately in the hearing.
- 5.2.5 The Board is most concerned that the early start to sign up of customers could have given Consumersfirst an unfair advantage relative to other ABMs who have complied with the Board's request to forebear signups until May 17, 1997.
- 5.2.6 The Board therefore directs Consumers Gas not to process paperwork related to any customers signed up by Consumersfirst or other ABMs for ABC T-Service between April 29, 1997 (start of hearing) and May 17, 1997.
- 5.2.7 The Board accepts the Draft LDC Code with the Board's revisions as an Interim LDC Code and directs Consumers Gas and Union/Centra to comply with the Interim LDC Code as set out in Appendix A hereto as a condition of providing ABC T-Service in their respective franchise areas.
- 5.2.8 The Board directs Consumers Gas to carry out the corrective customer information activities outlined in paragraphs 4.5.1, 4.5.2 and 4.5.3 of the Board's Findings herein.
- 5.2.9 The Board directs Consumers Gas, Union and Centra to submit a Customer Information Program Plan in accordance with the Board's Findings in paragraph 4.5.4 herein, for the Board's review, by June 15, 1997.
- 5.2.10 The Board directs the Utilities to develop with the appropriate stakeholders, by June 30, 1997, a new Standard 11: Relationship Marketing and Advertising in accordance with the Board's Findings herein.

DATED AT TORONTO, May 15, 1997.

M.C. Rounding
Chair and Presiding Member

R.M.R. Higgin
Member

H.G. Morrison
Member

INTERIM LDC CODE OF CONDUCT
(LDC Draft Code of Conduct with Board Revisions)

CODE OF CONDUCT
LDC Relationships with **Affiliate and Independent Gas**
Marketers
~~(Including Gas Marketing Affiliates)~~

Preamble

This Code is intended to govern the relationships between the LDCs and their Gas Marketing Affiliates, in certain respects, and otherwise between the LDCs and all Gas Marketers. This Code is not intended, however, to create any new or additional rights of action, at law or in equity, against an LDC.

This Code is intended to ensure that the LDCs do not use their monopoly position to create unfair competitive advantages for any Gas Marketer, including a Gas Marketing Affiliate. On the other hand, this Code is not intended to limit competition unduly or **to restrict any market participant from competing fairly and in an efficient and responsive manner** consistent with the standards and principles set out in the Code.

Subject to the powers of the Board elsewhere and as articulated in the Code, the primary responsibility for administering this Code lies with the LDCs and the administration of the Code must, in some instances, take account of the particular circumstances faced by each LDC. This Code provides that the Board may review complaints in relation to this Code. **This Code provides for reporting and disclosure with respect to employee compliance and the complaints process.**

This Code consists of standards and the principles found under each standard. The breach of a standard or principle constitutes a breach of the Code.

Definitions

6. "Board" means the Ontario Energy Board.
7. "Code" means this Code of Conduct.
8. "Designated Executive" means the executive of the LDC designated from time to time by the LDC, for the purposes of this Code, and identified as such to the Board.
9. "Gas Marketer" means any corporation, body corporate, partnership, person or other legal entity, or a division thereof, regardless of form, ownership or control, that carries on or intends to carry on the business, on an unregulated basis, of marketing or selling natural gas, transportation or storage capacity, and transportation and storage related services within an LDC's franchise area.
10. "Gas Marketing Affiliate" means a Gas Marketer that is an affiliate or an associate of an LDC and, for this purpose, "affiliate" and "associate" have the meanings ascribed to the terms in subsections 1(1) and 1(4) and subsection 1(1), respectively, of the Business Corporations Act (Ontario).
11. "LDCs" means The Consumers' Gas Company Ltd., Centra Gas Ontario Inc., and Union Gas Limited.
7. "LDC Resources" means the employees and the property of the type for which costs are included in an LDC's cost of service and rate base for rate-making purposes under the Ontario Energy Board Act.

8. "Rate Schedules" means the rate schedules that are approved by an Order of the Board and that are in effect for the provision of **Utility Services**.

9. "**Utility Services**" means the **sale**, distribution, transmission and storage of gas by the LDCs for which rates and other charges are approved or fixed by the Board pursuant to the Ontario Energy Board Act and, in addition, the Agent Billing and Collection Service approved by the Board.

Standards and Principles

PART I - DEGREE OF SEPARATION

Standard No. 1: Physical and Financial Separation

There shall be physical and financial separation between an LDC and its Gas Marketing Affiliates.

Principles

1. An LDC's office facilities, including office equipment and computer systems, will be physically separate from a Gas Marketing Affiliate's office facilities.
2. An LDC's books of account shall be separate from a Gas Marketing Affiliate's books of account.
3. An LDC will not loan or advance funds to or guarantee or become responsible for the indebtedness or obligation of a Gas Marketing Affiliate except as provided for in the existing Undertakings.²

1. Footnote:

Consumers Gas: Undertakings given by IPL Energy Inc, and The Consumers' Gas Company Ltd. to the LGIC dated June 21, 1994 and amendments thereto dated December 1995 and September 1996.

Union: Undertakings given by Westcoast Energy Inc., 1001142 Ontario Inc., Union Energy Inc., Union Gas Limited and Union Shield Resources Ltd., to the LGIC dated November 27, 1992, and amendments thereto dated December 6, 1995 and September 19, 1996.

Centra: Undertakings given by Centra, Centra Gas Inc., Westcoast Energy Inc., Westcoast Gas Inc. and Centra Gas Holdings Inc., to the LGIC dated July 22, 1992 and amendments thereto dated September 19, 1996.

Standards and Principles

PART I - DEGREE OF SEPARATION

Standard No. 2: Organizational Separation

There shall be organizational separation between an LDC and its Gas Marketing Affiliates.

Principles

1. No Gas Marketing Affiliate shall be a subsidiary of an LDC and, for this purpose, the term "subsidiary" has the meaning ascribed to the term in subsection 1(2) of the Business Corporations Act (Ontario).
2. An LDC will not provide the services of the members of its board of directors to comprise more than 30 percent of the members of a Gas Marketing Affiliate's board of directors.
3. An LDC will not provide the services of its executives who provide Utility Services to act as executives of a Gas Marketing Affiliate and shall not accept the services of executives of a Gas Marketing Affiliate, other than executives who perform non-operational functions.
4. An LDC will not have employees and payroll records in common with a Gas Marketing Affiliate, except as permitted by the foregoing two principles, but an LDC may share services with a Gas Marketing Affiliate as permitted by Part II of this Code.
5. An LDC will not share its computer ~~systems~~ services with a Gas Marketing Affiliate in any way that would give the Gas Marketing Affiliate

access to the LDC's confidential information, including the information that the LDC must keep confidential in accordance with Standard No. 7 of this Code.

Standards and Principles

PART II - LDC RESOURCES

Standard No. 3: Sharing of LDC Resources

*The LDC will not use **employees providing Utility Services, including** operating employees in the areas of gas supply acquisition, gas control, nominations, and gas storage operations, to provide management and administrative services to a Gas Marketing Affiliate. Otherwise, an LDC may use LDC Resources to provide such services. The costs of providing such services shall be allocated in accordance with cost allocation guidelines determined by the Board from time to time, which guidelines shall form part of this Code.*

Standard No. 4. Transfer of LDC Resources

An LDC may sell or otherwise transfer assets, goods or services to, and may purchase assets, goods or services from, a Gas Marketing Affiliate. The price for all such transfers shall be determined in accordance with the transfer pricing guidelines determined by the Board from time to time, which guidelines shall form part of this Code.

Standards and Principles

PART III - EQUITABLE ACCESS TO **UTILITY SERVICES**

Standard No. 5: Equitable Access to **Utility Services**

*The LDCs shall not discriminate in their application or offering of their **Utility Services**.*

Principles

1. The LDC **shall** ~~{will}~~ not, **directly or indirectly**, provide any preference to any Gas Marketer, or any customers of such Gas Marketer, with respect to the processing of requests for, or the provision of, **Utility Services** except as set out in the Rate Schedules.
2. The processing of service requests from similarly situated parties will be subject to similar administrative procedures and evaluation criteria. The Rate Schedules and administrative procedures will be consistently applied.
3. If a Rate Schedule provides for discretion in its application, the LDC will apply such rate schedule in a like manner to similarly situated parties.
4. The LDC may impose reasonable creditworthiness or similar requirements on any party requesting any **Utility Service**. These requirements must be imposed in a consistent manner for similarly situated parties.

Standards and Principles

PART III - EQUITABLE ACCESS TO UTILITY SERVICES

Standard No. 6: Preferential Treatment

The LDCs shall not state or imply to any of their customers or to potential or current customers of Gas Marketers that preferences will be given to any such customer, or that such customer will receive a lower price or a higher quality of service from the LDC, as a result of such customer appointing, or conferring a benefit on, a specific Gas Marketer. If a Gas Marketer states or implies the contrary, the LDCs shall take steps to correct any misconceptions left by such conduct.

Principles

1. The LDC will not link any agreement in respect of the assignment or release of transportation service entitlements or storage rights held by the LDC or any agreement in respect of the expansion or reinforcement of the LDC distribution system to a requirement that the customer deal with or confer a benefit on a specific Gas Marketer.
2. The LDC will refrain from giving any appearance that it speaks on behalf of any specific Gas Marketer.
3. Where a Gas Marketer states or implies favoured treatment from an LDC and the LDC is aware of such conduct, the LDC will take such steps as are reasonable and appropriate, under the circumstances, to cause such person to refrain from such conduct and take other appropriate

action to correct any misconceptions left by such conduct.

4. The LDCs will take all reasonable and appropriate steps to ensure that any representations made by Gas Marketers operating under ABC T-Service as to the nature, quality and price of Utility Services constitute fair representations.

Standards and Principles

PART IV - CUSTOMER RELATIONSHIPS AND INFORMATION

Standard No. 7: Provision of Information

The LDC shall not disclose, without prior authorization, information obtained from parties who are or could be customers, suppliers or Gas Marketers.

Principles

1. This standard is intended to apply to any information obtained by the LDC in the course of carrying out or providing **Utility** Services.
2. This standard precludes the LDCs from releasing confidential customer, marketer or supplier information without the consent of that customer, marketer or supplier.
3. The LDC may disclose information that is aggregated or summarized in such a way that confidential information would not ordinarily be ascertained by third parties. Where the LDC discloses such aggregate information to a Gas Marketer, such information shall be made available, in a non-preferential manner, in terms of timing, price and all other conditions of availability, to all Gas Marketers that are known to the LDC. Such aggregated information could relate to future facilities plans and availability of capacity, and will be posted by way of electronic or other media when appropriate.
4. When an LDC provides leads or information about specific market opportunities, the LDC will provide such leads or information, in a

non-preferential manner, in terms of timing, price and all other conditions of availability, to all Gas Marketers that are known to the LDC unless a party specifically requests that its needs be disclosed on a restricted basis, in which case the LDC will comply with the party's request.

Standards and Principles

PART IV - CUSTOMER RELATIONSHIPS AND INFORMATION

Standard No. 8: Preferential Direction of Customers

The LDCs shall not preferentially direct customers seeking any services provided by Gas Marketers to any specific Gas Marketer nor imply in any information they provide that any Gas Marketer will receive preferred treatment from the LDC.

Principles

1. Where a customer requests information about Gas Marketers, the LDC will provide an unbiased directory of Gas Marketers and will make reasonable efforts to update the directory regularly to include all Gas Marketers who ask to be listed.
2. When providing a directory of **unregulated gas supply service providers** to customers, the LDC is not responsible for the completeness or accuracy of information it receives from Gas Marketers. **The directory shall provide information on the choices available to customers and clearly indicate which services (choices) and service providers are regulated and not regulated by the OEB.**
3. The LDC will not initiate or engage in any joint advertising with any Gas Marketer other than advertising aimed at the promotion of the use of natural gas. Participation in any such promotion will be offered on proportionate terms to all ~~other~~ Gas Marketers that are known to the LDC.

Standards and Principles

PART V - COMPLIANCE

Standard No. 9: Employee Compliance

The LDCs shall advise all of their employees of expected conduct relative to the Code and shall perform periodic compliance reviews.

Principles

1. The management of the LDC will require compliance from all employees and use its best efforts to have the Code communicated to, and understood by, all of the LDC's employees and will monitor employee compliance.
2. Employees will be instructed to refrain from indicating a preference when providing information to customers about Gas Marketers.
3. Annual compliance reviews will be conducted by the LDC's management and the results of such reviews will be **filed in rates cases in the formats specified from time to time by the Board, which formats shall form part of this Code.**

Standards and Principles

PART V - COMPLIANCE

Standard No. 10: Complaint Process

The LDCs shall establish a procedure for addressing complaints by any person respecting the administration of the Code.

Principles

1. Complaints respecting the application of the Code will be submitted to the LDC. Complaints in writing will set out the specifics of the complaint. The specifics of verbal complaints will be transcribed by the LDC.
2. All complaints regarding the Code will be referred to the immediate attention of the Designated Executive.
3. The Designated Executive will ensure acknowledgement of the complaint in writing, within five working days, unless the complainant states that written acknowledgement is not required.
4. The Designated Executive will be responsible for preparing a report outlining the specifics of the complaint. The report will include a statement of the complaint, the name of the complainant, and all relevant dates and involved parties. A response will be communicated in writing within 21 days, including a description of any course of action taken.

5. A record of all complaints and the response of the LDC will be kept and will be available for inspection by the Board. Complainants may inspect the record regarding their individual complaints.
6. The LDC will file an annual summary of the complaints **in its rates cases**. The summary ~~will~~ **shall** set out the number of complaints received, the nature of the complaints received, and the resolution of the complaints.
7. If a complaint has not been resolved within 30 days of the referral of the complaint to the LDC, then the complainant may seek a review of the complaint by the Board.
8. After receiving a request for a review, the Board may decide, in its sole discretion, whether or not to review the complaint. If the Board decides to review the complaint, then following such a review the Board may make findings and, within the limits of its jurisdiction, issue such orders **or, by prior agreement of the parties, make such findings of a binding nature on the parties**, as it considers proper.

APPENDIX B

E.B.R.O. 492-03

E.B.R.O. 493-03

E.B.R.O. 494-04

**ALTERNATE CODE OF CONDUCT DOCUMENT COMPRISING
DRAFT LDC CODE AND INTERVENORS PROPOSED REVISIONS**

CODE OF CONDUCT - REVISIONS

Filed on behalf of:

**HVAC Coalition
Cibola Canada Energy Marketing Company
Mutual Gas Association
ECNG
Association of Municipalities of Ontario
A.E. Sharpe Limited
Alliance Gas Services
Natural Gas Wholesalers
Sunoco
Enershare Technology Corporation
Direct Energy Limited
Municipal Gas Corporation
OCAP***

- * **OCAP does not endorse the first sentence of added Principle 4 of Standard No. 6 of this document.**

E.B.R.O. 492-03
E.B.R.O. 493-03
E.B.R.O. 494-04

CODE OF CONDUCT - REVISIONS

Reproduced in the left hand column of this document is the Code of Conduct submitted by Consumers Gas to the Board by letter dated 21 April 1997 (the "LDC Code"). Suggested revisions (in bold and underlined) and, where appropriate, explanatory commentary for the suggested revisions, are set out in the right hand column of this document.

CODE OF CONDUCT

LDC Relationships With Gas Marketers
(Including Gas Marketing Affiliates)

REVISIONS/COMMENTARY

LDC Relationships With Gas **Marketing**
Affiliates
(and **other Gas Marketers**)

Commentary:

Pursuant to the Board's Advisory Report on LDC Diversification and the Board's Report on the Ten-Year Market Review, September 1996, the primary purpose of this Code is to define acceptable operating rules between the utilities and their marketing affiliates. The subtitles of the LDC Code have been revised to reflect this priority.

Preamble

This Code is intended to govern the relationships between the LDCs and their Gas Marketing Affiliates, in certain respects, and otherwise between the LDCs and all Gas Marketers. This Code is not intended, however, to create any new or additional rights of action, at law or in equity, against an LDC.

This Code is intended to ensure that the LDCs do not use their monopoly position to create unfair competitive advantages for any Gas Marketer, including a Gas Marketing Affiliate. On the other hand, this Code is not intended to limit competition unduly or, consistent with the standards and principles set out in the Code, to restrict any market participant from competing fairly and in an efficient and responsive manner.

The primary responsibility for administering this Code lies with the LDCs and the administration of the Code must, in some instances, take account of the particular circumstances faced by each LDC. This Code provides that the Board may review complaints in relation to this Code.

Commentary:

The qualifier "unfair" to the phrase "competitive advantage" in the third sentence should be removed. All competitive advantages created by virtue of the monopoly position of LDCs are "unfair". The balancing of this concern with the goal of maximizing competition in the marketplace, including competition by the affiliate, is covered in the following sentence.

[PARAGRAPH DELETED]

Commentary:

The Code should be mandated by the Board as a "roadmap" for the governance of the LDC/affiliate relationship. Primary responsibility for oversight of this Code lies with the Board.

Definitions

1. "Board" means the Ontario Energy Board.
2. "Code" means this Code of Conduct.
3. "Designated Executive" means the executive of the LDC designated from time to time by the LDC, for the purposes of this Code, and identified as such to the Board.
4. "Gas Marketer" means any corporation, body corporate, partnership, person or other legal entity, or a division thereof, regardless of form, ownership or control, that carries on or intends to carry on the business, on an unregulated basis, of marketing or selling natural gas within an LDC's franchise area.

"Gas Marketer" means any corporation, body corporate, partnership, person or other legal entity, or a division thereof, regardless of form, ownership or control, that carries on or intends to carry on the business, on an unregulated basis, of marketing or selling natural gas **transportation or storage capacity for natural gas, or natural gas transportation or storage or distribution related products services** [^].

Commentary:

This definition in turn sets the parameters for the definition of Gas Marketing Affiliate and as such the geographic limitation posited by the LDCs is inappropriate. Further, the nature of the business of selling natural gas (which includes, for example, transportation and storage issues) makes such a geographic limitation inappropriate.

5. "Gas Marketing Affiliate" means a Gas Marketer that is an affiliate or an associate of an LDC and, for this purpose, "affiliate" and "associate" have the meanings ascribed to the terms in subsections 1(1) and 1(4) and subsection 1(1), respectively, of the Business Corporations Act (Ontario).
6. "LDCs" means Centra Gas Ontario Inc., The Consumers' Gas Company Ltd., and Union Gas.
7. "LDC Resources" means the employees and the property for which costs are included in an LDC's cost of service and rate base for rate-making purposes under the Ontario Energy Board Act.

"LDC Resources" means **all things, assets, administrative systems, data or other information, and like resources owned, controlled or accessed by the LDC, including trade names, logos and trade marks.**

Commentary:

This alternative definition of LDC Resources includes resources of the regulated company. Express inclusion of intangible assets is inserted to underscore the importance, in the view of many parties, of appropriate regulation of intangible assets.

8. "Rate Schedules" means the rate schedules that are approved by an Order of the Board and that are in effect for the provision of Services.
9. "Services" means the distribution, transmission and storage of gas by the LDCs for which rates and other charges are approved or fixed by the Board pursuant to the Ontario Energy Board Act and, in addition, the Agent Billing and Collection Service approved by the Board.

"Market Services" means the distribution, transmission and storage of gas by the LDCs for which rates and other charges are approved or fixed by the Board pursuant to the Ontario Energy Board Act and, in addition, the Agent Billing and Collection Service **any transactional services or opportunities for transportation and storage capacity and any other services offered by the LDC**

Commentary:

The word "Market" is added to the defined "Services" in order to more clearly demarcate services sold by the LDC into the marketplace distinguished from internal "services" sought to be provided to an affiliate. The latter are captured under II, as revised, of this Code.

Standards and Principles

PART I - DEGREE OF SEPARATION

Standard No. 1: Physical and Financial Separation

There shall be physical and financial separation between an LDC and its Gas Marketing Affiliates.

There shall be **complete** physical and financial separation between an LDC and its Marketing Affiliates.

Principles

1. No Gas Marketing Affiliate shall be a subsidiary of an LDC and, for this purpose, the term "subsidiary" has the meaning ascribed to the term in subsection 1(2) of the Business Corporations Act (Ontario).
2. An LDC's office facilities, including office equipment, will be physically separate from a Gas Marketing Affiliate's office facilities.

An LDC's ^ facilities, including office equipment **and computer systems**, will be physically separate from a Gas Marketing Affiliate's ^ facilities.

Commentary:

The definition has been broadened to capture the standard complete separation. Computer systems have specifically identified as of particular concern to some parties.

3. An LDC's books of account shall be separate from a Gas Marketing Affiliate's books of account.

4. An LDC will not loan or advance funds to or guarantee or become responsible for the indebtedness or obligation of a Gas Marketing Affiliate.

An LDC will not loan or advance funds to guarantee or become responsible for indebtedness or obligation of a Gas Marketing Affiliate, **or directly or indirectly engage in joint financial transaction, including procurement, with a Gas Marketing Affilia**

Commentary:

The prohibition has been broadened to preclude, inter joint purchasing leading to bulk discounts, and other for financial sharing of LDC financial resources or sp financial or credit status.

Standards and Principles

PART I - DEGREE OF SEPARATION

Standard No. 2: Organizational Separation

There shall be organizational separation between an LDC and its Gas Marketing Affiliates.

Principles

1. An LDC will not provide the services of the members of its board of directors to comprise more than 30 percent of the members of a Gas Marketing Affiliate's board of directors.
2. An LDC will not provide the services of its executives to act as executives of a Gas Marketing Affiliate, other than executives who perform non-operational functions.

Standard No. 2: **Functional** Separation

Commentary:

The term "functional" is used to more precisely define intent of segregation of affiliate from LDC operations.

There shall be **complete functional** separation between an LDC and its Gas Marketing Affiliates.

An LDC **and a Gas Marketing Affiliate will share executives.**

Commentary:

As well as altering the prohibition on sharing executive: complete one, the wording of this principle has been restructured to more clearly reflect the two-direct preclusion on sharing between an LDC and its Gas Marketing Affiliate.

3. An LDC will not have employees and payroll records in common with a Gas Marketing Affiliate, except as permitted by the foregoing two principles, but an LDC may share services with a Gas Marketing Affiliate as permitted by Part II of this Code.

An LDC and a Gas Marketing Affiliate will share staff or employees, notwithstanding other provisions of this Code.

Commentary:

As well as altering the prohibition on sharing executive: complete one, the wording of this principle has restructured to more clearly reflect the two-directional preclusion on sharing between an LDC and its Gas Marketing Affiliate. The reference to "other provisions" clarifies employees as such should not be shared, despite the limited scope of sharing of resources contemplated in Part revised.

4. An LDC will not share its computer systems with a Gas Marketing Affiliate in any way that would give the Gas Marketing Affiliate access to the LDC's confidential information, including the information that the LDC must keep confidential in accordance with Standard No. 7 of this Code.

[PRINCIPLE DELETED]

Commentary:

Sharing of computer systems is expressly prohibited under Standard No. 1, Principle 2. The LDC language is aimed at confidential information only, and many parties are concerned that other market advantages of access to the external computer systems and data banks possessed by the LDC in virtue of its monopoly franchise status are not addressed in the LDC Code.

Standards and Principles

PART II - LDC RESOURCES

Standard No. 3: Sharing of LDC Resources

The LDC will not use operating employees in the areas of gas supply acquisition, gas control, nominations, and gas storage operations to provide management and administrative services to a Gas Marketing Affiliate. Otherwise, an LDC may use LDC Resources to provide such services. The costs of providing such services shall be allocated in accordance with cost allocation guidelines determined by the Board from time to time, which guidelines shall form part of this Code.

An LDC shall not share LDC Resources with or permit use of LDC Resources by, its Marketing Affiliates, without prior Board Approval.

Principles

- 1. The criteria to be applied by Board when determining when LDC Resources may be shared shall include:**
 - 6.1 The exact nature of economies of scale and scope resulting from the sharing of any LDC Resources must be determined by means of a cost-benefit analysis.**
 - 6.2 The sharing of LDC Resources must not be to any detriment of the regulated utility, and should not be the driver for increased staffing, capital expansion or technological choices by the LDC.**
 - 6.3 The sharing of LDC Resources must not result in an disadvantage to any Gas Marketer.**
 - 6.4 The LDC Resources shall be made available to Gas Marketers on similar terms.**

terms and conditions as timing, price and all other conditions of availability applicable to the Marketing Affiliate.

6.5 The LDC Resources to be shared cannot be provided to the parent company of the Marketing Affiliate or to the marketplace at the current time or at some time in the future in a reasonable and cost effective manner.

2. Costs for any shared resources to be allocated in accordance with allocation guidelines determined by the Board from time to time, with such guidelines shall form part of the Code.

Commentary:

The LDC Code permits sharing of all resources, save those services that would be provided by certain employee positions directly connected with gas molecule and Market Services functions. It should be noted that employees whose core function is customer interface, a particularly sensitive area in the context of competition, would not be caught by the proposed wording. Further, the LDCs have provided a definition of the term "operating employee".

The provisions under this standard are completely revised as a general rule, preclude sharing of resources. The revision does, however, allow for exception in instances where economies of scope and scale in the provision of energy services might accrue to the benefit of the public without material detriment to ratepayers of the LDC or the competitive dynamic of the energy services marketplace.

The conceptual structure of this standard, as well as the specific criteria suggested as benchmarks for prior approval of sharing, are substantially in accord with the structure of criteria defined by the Manitoba PUB in its recent Order 110/96.

Standards and Principles

PART II - LDC RESOURCES

Standard No. 4: Transfer of LDC Resources

An LDC may sell or otherwise transfer assets, goods or services to, and may purchase assets, goods or services from, a Gas Marketing Affiliate. The price for all such transfers shall be determined in accordance with the transfer pricing guidelines determined by the Board from time to time, which guidelines shall form part of this Code.

Subject to Standard No. 2, an LDC may sell or otherwise transfer **LDC Resources** to, and may purchase assets, goods or services from a Gas Marketing Affiliate. The price for all such transfers shall be determined in accordance with the transfer pricing guidelines determined by the Board from time to time, which guidelines shall form part of this Code.

Commentary:

The cross-reference to Standard No. 2 is intended to prevent misinterpretation of this permissive provision as an exception of the prohibition on sharing of employees found in the referenced standard.

Principles

- 1. The LDC shall disclose, in rates cases or other reasonableness reviews, each transaction between the LDC and its Gas Marketing Affiliates, sufficient information on the terms and conditions of each transaction to permit an evaluation of the nature and potential ratepayer impacts of such transactions.**

- 2. Such disclosure will be in the form specified from time to time by the Board, which formats shall form part of this Code.**

Commentary:

These two principles codify a "public window" on adherence to the operating rules between an LDC and its affiliates. Further "public window" provisions are found in the revisions to Standards 9 (Employee Compliance) and 10 (Compliance Process), below.

Standards and Principles

PART III - EQUITABLE ACCESS TO SERVICES

PART III - EQUITABLE ACCESS TO **MARI** SERVICES

Commentary:

See comments following revised definition #10, above.

Standard No. 5: Equitable Access to Services.

Standard No. 5: Equitable Access to **Ma** Services.

The LDCs shall not discriminate in their application or offering of their Services.

The LDCs shall not discriminate in their application or offering of their **Market** Servi

Principles

1. The LDC shall not provide any preference to any Gas Marketer, or any customers of such Gas Marketer, with respect to the processing of requests for, or the provision of, Services except as set out in the Rate Schedules.
2. The processing of service requests from similarly situated parties will be subject to similar administrative procedures and evaluation criteria. The Rate Schedules and administrative procedures will be consistently applied.
3. If a Rate Schedule provides for discretion in its application, the LDC shall apply such rate schedule in a like manner to similarly situated parties.
4. The LDC may impose reasonable creditworthiness or similar requirements on any party requesting any Service. These requirements must be imposed in a consistent manner for similarly situated parties.

The LDC shall not provide, directly indirectly, any preference to any Marketer, or any customers of such Marketer, with respect to the processing requests for, or the provision of, Ma Services except as set out in the F Schedules.

The LDC may impose reasonable creditworthiness or similar requirements any party requesting any Market Serv. These requirements must be imposed in consistent manner for similarly situated parties.

Standards and Principles

PART III - EQUITABLE ACCESS TO
SERVICES

PART III - EQUITABLE ACCESS TO **MARI**
SERVICES

Commentary:

See comments following revised definition #10, above.

Standard No. 6: Preferential Treatment

The LDCs shall not state or imply to any of their customers or to potential or current customers of Gas Marketers that preferences will be given to any such customer as a result of such customer appointing, or conferring a benefit on, a specific Gas Marketer. If a Gas Marketer states or implies the contrary, the LDCs shall take steps to correct any misconceptions left by such conduct.

1. The LDC will not link any agreement in respect of the assignment or release of transportation service entitlements or storage rights held by the LDC or any agreement in respect of the expansion or reinforcement of the LDC distribution system to a requirement that the customer deal with or confer a benefit on a specific Gas Marketer.
2. The LDC shall refrain from giving any appearance that it speaks on behalf of any specific Gas Marketer.
3. Where a Gas Marketer states or implies favoured treatment from an LDC and the LDC is aware of such conduct, the LDC shall take such steps as are reasonable and appropriate, under the circumstances, to cause such person to refrain from such conduct and take other appropriate action to correct any misconceptions left by such conduct.

4. **An LDC shall not allow its Marketing Affiliates to advertise affiliates' relationships with the LDC**
An LDC shall ensure that its Marketing Affiliates clearly state in media, correspondence and contr:

that the affiliates' activities are regulated by the Board.

Commentary:

*This added principle tracks provisions 9. and 10. of Man
PUB Order No. 110/96.*

Standards and Principles

PART IV - CUSTOMER RELATIONSHIPS AND INFORMATION

Standard No. 7: Provision of Information

The LDC shall not disclose, without prior authorization, information obtained from parties who are or could be customers, suppliers or Gas Marketers.

Principles

1. This standard is intended to apply to any information obtained by the LDC in the course of carrying out or providing Services.

This standard is intended to apply to information obtained by the LDC in the course of carrying out or providing **Market** Services.

Commentary:

See comments following revised definition #10, above.

2. This standard precludes the LDCs from releasing confidential customer, marketer or supplier information without the consent of that customer, marketer or supplier.

3. The LDC may disclose information that is aggregated or summarized in such a way that confidential information would not ordinarily be ascertained by third parties. Where the LDC discloses such aggregate information to a Gas Marketer, such information shall be made available, in a non preferential manner, in terms of price and all other conditions of availability, to all Gas Marketers that are known to the LDC. Such aggregated information could relate to future facilities plans and availability of capacity, and may be posted by way of electronic or other media when appropriate.

4. When an LDC provides leads or information about specific market opportunities, the LDC will provide such leads or information, in a non-preferential manner, in terms of

When an LDC provides leads or information about specific market opportunities, the LDC will provide such leads or information, in a non-preferential manner, in terms of price and all other conditions of availability

timing, price and all other conditions of availability, to all Gas Marketers that are known to the LDC unless a party specifically requests that its needs be disclosed on a restricted basis, in which case the LDC will comply with the party's request.

all Gas Marketers that are known to the LDC.

Commentary:

The exception put forward in the LDC Code for restriction of leads at the request of a party has been removed in the revised principles. It is the view of many parties that the exception would simply provide too much of an opportunity for a breach of the Code, in letter and in spirit, even if unintended. The result of the revision is that the LDC is simply prohibited from forwarding restricted or target selective leads, and a party in question would call the intended recipient of the leads directly.

The revision is also consistent with the letter and spirit of the LDC's Standard No. 8, below.

Standards and Principles

PART IV - CUSTOMER RELATIONSHIPS AND PROVISION OF INFORMATION

Standard No. 8: Preferential Direction of Customers

The LDCs will not preferentially direct customers seeking any services provided by Gas Marketers to any specific Gas Marketer.

Principles

1. Where a customer requests information about Gas Marketers, the LDC will provide an unbiased directory of Gas Marketers and will make reasonable efforts to update the directory regularly to include all Gas Marketers who ask to be listed.
2. When providing a directory to customers, the LDC is not responsible for the completeness or accuracy of information it receives from Gas Marketers.
3. The LDC will not initiate or engage in any joint advertising with any Gas Marketer other than advertising aimed at the promotion of the use of natural gas. Participation in any such promotion will be offered on proportionate terms to all other Gas Marketers that are known to the LDC.

The LDC will not ^ engage in any j advertising with any Gas Marketer ^.

Standards and Principles

PART V - COMPLIANCE

Standard No. 9: Employee Compliance

Standard No. 9: Employee Compliance
Record Keeping.

The LDCs shall advise all of their employees of expected conduct relative to the Code and perform periodic compliance reviews.

Principles

1. The management of the LDC shall require compliance from all employees and use its best efforts to have the Code communicated to, and understood by, all of the LDC's employees and will monitor employee compliance.
2. Employees will be instructed to refrain from indicating a preference when providing information to customers about Gas Marketers.
3. Annual reviews will be conducted by the LDC's management and the results of such reviews will be made available to the Board.

Annual reviews will be conducted by the LDC's management and the results of such reviews will be **filed in rates cases or other reasonableness reviews in the form specified from time to time by the Board, which formats shall form part of this Code.**

Commentary:

This is the second "public window" to provide a next Board, and public, review of compliance with the Code to the LDC and particularly vis a vis its affiliates.

- 4. The LDCs shall maintain records of all transactions with their Marketing Affiliates with sufficient detail to permit an evaluation of compliance of such transactions with the standards and principles of Code.**

Standards and Principles

PART V - COMPLIANCE

Standard No. 10: Complaint Process

The LDCs shall establish a procedure for addressing complaints by any person respecting the administration of the Code.

Principles

1. Complaints respecting the application of the Code shall be submitted to the LDC. Complaints in writing and will set out the specifics of the complaint. The specifics of verbal complaints will be transcribed by the LDC.
2. All complaints regarding the Code will be referred to the immediate attention of the Designated Executive.
3. The Designated Executive will ensure acknowledgement of the complaint in writing, within five working days, unless the complainant states that written acknowledgement is not required.
4. The Designated Executive will be responsible for preparing a report outlining the specifics of the complaint. The report will include a statement of the complaint, the name of the complainant, and all relevant dates and involved parties. A response will be communicated in writing within 21 days, including a description of any course of action taken.
5. A record of all complaints and the response of the LDC will be kept and will be available for inspection by the Board. Complainants may inspect the record regarding their individual complaints.

6. The LDC will file an annual summary of the complaints with the Board. The summary shall set out the number of complaints received, the nature of the complaints received, and the resolution of the complaints.

The LDC will file an annual summary of complaints in its rates cases or of reasonableness reviews. The summary shall set out the number of complaints received, nature of the complaints received, and resolution of the complaints.

Commentary:

This is the third "public window" provision for addition to the LDC Code.

7. If a complaint has not been resolved within 30 days of the referral of the complaint to the LDC, then the complainant may seek a review of the complaint by the Board.

8. After receiving a request for a review, the Board may decide, in its sole discretion, whether or not to review the complaint, then following such a review the Board may make findings and, within the limits of its jurisdiction, issue such orders as it considers proper.