ONTARIO ENERGY BOARD

IN THE MATTER of a Model Natural Gas Franchise Agreement

REPLY SUBMISSION
on behalf of the
ASSOCIATION OF MUNICIPALITIES OF ONTARIO
(AMO)

February 11, 2000

Association of Municipalities of Ontario

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Following the Board's hearing of oral submissions on January 25th, 2000, representatives of AMO and of the Gas Companies have negotiated a resolution to many issues.

With its December 3rd, 1999 written submission to the Ontario Energy Board, AMO included, as Appendix "A", a "red-lined" version of the Model Franchise Agreement showing differences between the Model Franchise Agreement as settled after the 1987 decision of the Ontario Energy Board under Board File No. E.B.O. 125 and changes to the Model Franchise Agreement as it had been negotiated with the Gas Companies as of September 24th, 1999.

Since oral submissions made to the Board on January 25th, 2000, representatives of AMO and of the Gas Companies have undertaken negotiations which have resulted in further proposed changes to the Model Franchise Agreement. For more convenient reference, AMO has attached, as Appendix "A" to this submission, a copy of the model franchise agreement as amended to include the changes that have been agreed to by AMO and the Gas Companies since January 25th. The changes from the December 3rd, 1999 version, with the red-lining removed, have been noted with additions being highlighted and the deletions being identified with ~~[strikeout]~~.

There are now three outstanding issues between AMO and the Gas Companies and they have been identified as such in the appropriate locations in Appendix "A". Those three issues are as follows:

1. Payment of Permit Fees
2. Compensation for the Use of Municipal Rights-of-Way
3. Default Provisions - Termination by Board Order.

This reply will address these issues in the order as they appear above.

1. Payment of Permit Fees

AMO adopts the legal submissions made by counsel for the City of Toronto.

The paramountcy of the "Despite any Act," phrase in subsection 220.1(2) of the *Municipal Act* supercedes the Board's authority under the *Municipal Franchises Act*. The specific authority of section 220.1 was introduced in 1996 and, unless a municipality voluntarily agrees to waive its power to pass by-laws under subsection 220.1(2), the Board cannot limit a municipality's power to do so, at least not based on its jurisdiction under the *Municipal Franchises Act*.

When exercising powers under the *Ontario Energy Board Act, 1998*, the Board may well have jurisdiction to supplant a municipal by-law passed under subsection 220.1 of the *Municipal Act*. The Divisional Court in the Dawn Township case [*Union Gas Ltd. v. Township of Dawn*; (1977) 15 O.R. (2d) 722] held that the paramountcy provisions of what is now section 128 of the *Ontario Energy Board Act, 1998* took precedence over a comparable provision in the *Planning Act*.

If, hypothetically, the Board were exercising jurisdiction under section 101 of the *Ontario Energy Board Act, 1998*, to order access to a road allowance and, incidental to the exercise of that power, the Board established conditions under subsection 101(3) which deprived the municipality of highway access permit fees, then, by virtue of section 128, and perhaps of subsection 101(3) itself, the Order made under the *Ontario Energy Board Act, 1998*, as interpreted in the Dawn Township case, would supercede any municipal by-law.

The Board's jurisdiction in the matter of municipal franchises is not, however, founded on the *Ontario Energy Board Act, 1998*, but rather upon the *Municipal Franchises Act*. There is no paramountcy section to be found in the *Municipal Franchises Act*. As between the *Municipal Franchises Act* and the "Despite any Act," language of subsection 220.1(2) of the *Municipal Act*, it is submitted that the *Municipal Act* provisions take precedence.

At least until the matter is settled by a Court, in order to preserve the opportunity to make such a submission, municipalities ought not to accede to a provision in a franchise agreement which precludes or limits the exercise of municipal power to pass by-laws under section 220.1 of the *Municipal Act*.

Leaving aside legal arguments, there are reasons in principle why the Gas Companies ought to be bound by municipal by-laws of general application that include the payment of highway access permit fees.

If a municipality is restricted in its ability to recover legitimate costs related to highway access permit fees, the municipal ratepayers who are not gas users are subsidizing those who are.

The Gas Companies assert that they pay municipal taxes which should translate into free access to highways. The Gas Companies assert that they are entitled to something for their municipal taxes and, because they claim not to receive much, they assert they must, therefore, be entitled to free access to highways.

In common with most industrial and commercial municipal tax payers, gas companies have no family to send to school or to community centres. Similarly, businesses normally have to pay for their own waste disposal services. On the other hand, they all expect the police and fire services to be on hand to serve their needs as occasion may require and they take for granted the general municipal infrastructure that makes such things possible all across the Province where they operate. Industry and commerce, including the Gas Companies, have employees and customers who are essential to their existence. Those essential employees and customers would not exist but for the municipally funded infrastructure, including community and health services, from which the Gas Companies complain they derive little or no benefit.

AMO submits that industry and commerce, including the Gas Companies, derive considerable benefits and advantages, direct and indirect, from the municipal order of government in the various locations where they do business. While such benefits and advantages cannot be quantified with the accounting precision the Gas Companies bring to the recital of their tax payments, there is nothing that makes the Gas Companies materially different from other industrial and commercial municipal tax payers, much less anything that would justify their notion of free access to highways.

When it comes to municipal taxes, the Gas Companies pay according to the *Assessment Act*. Under that Act and its regulations the Gas Companies are told by the Province the amounts that are due to municipalities. It is beyond the control of the municipalities. It has nothing to do with whether or not the plant is on municipal road allowances or on private property.

In the new agreed upon definition which clarifies the use of the word "decommissioned" gas pipeline in the Model Franchise Agreement, it is recognized that Gas Companies can 'abandon' gas pipeline for the purposes of the *Assessment Act*, and therefore stop paying tax on it, while at the same time retaining rights under the Model Franchise Agreement to protect it, to reactivate it or to use it for other purposes. Clearly the *Assessment Act* is irrelevant to whether the Model Franchise Agreement applies and it is equally irrelevant to the recovery of costs underlying highway access permit fees, as established by by-laws of general application.

Such by-laws apply to telecommunication operators as well as to electrical distribution companies.

They are intended to permit municipalities to recover administrative and other related costs incurred as a result of proposals by Gas Companies to install, remove or repair gas facilities in municipally owned highways. So long as the by-laws are of general application and can be supported as reasonable under the relevant part of subsection 220.1 of the *Municipal Act*, there is no reason why the Gas Companies should not pay as other highway right-of-way users do, including and particularly their competitors the electrical distribution companies.

Highway access permit fees represent the "level playing field" in today's "user pay" world".

In AMO's December 1999 written submission, reference was made to amounts charged by the Ministry of Transportation for access to Provincial Highways and the suggestion was made that such amount might be a useful benchmark. AMO has since been persuaded that no attempt should be made by the Board to set a specific "across the board" amount or to devise a generalized formula or generic approach for establishing such fees. The varying degrees of sophistication of municipal governments and the vastly different degrees of complexity of the locations involved make it impossible.

The appropriate control mechanism is embedded in subsection 220.1(2) of the *Municipal Act* and the judicial requirement that by-laws must be justified by reference to the reasonable exercise of the power under which they are passed.

On that basis, AMO submits that the "save and except ...." clause should be removed from the end of paragraph IV - 1 of the 1987 Model Franchise Agreement.

It is AMO's submission that, if the "save and except ...." clause should be removed from the end of paragraph IV - 1 as proposed, then any legal questions that may arise between the Gas Companies and municipalities that elect to exercise their power under subsection 220.1 of the *Municipal Act* will be left to the Courts - the most appropriate venue for any such questions.

2. Compensation for the Use of Municipal Rights-of Way

There are two essential differences between the question of highway access permit fees and the matter of compensation or charges for the use of municipal highways.

The first is that, by regulation and legislation, telecommunication operators and electrical distribution companies are exempt from the operation of subsection 220.1(2) of the *Municipal Act* as it may apply to charges for the use of highways.

While highway access permit fees represent the "level playing field", charges for the use of highways do not.

The second essential difference is that the "save and except ...." clause at the end of paragraph IV - 1 of the 1987 Model Franchise Agreement refers only to permit fees. It does not speak to usage charges or the payment of compensation for the use of highways and no suggestion or submission has been made that it do so.

Given that the exemptions from payment of usage charges by telecommunication operators and electrical distribution companies are created by regulation and legislation, from AMO's perspective the Gas Companies should be looking to the Government and the Legislature to level the playing field. If the Government and Legislature are not prepared to accord the Gas Companies the same exemptions given comparable users of municipal highways AMO submits that this Board ought not to intervene in what has been a legislative or executive exercise.

What highway access permit fees do have in common with charges for the use of municipal highways is that both are fraught with difficult legal issues.

It is AMO's submission that the Board should either state a case, as suggested by counsel for the City of Toronto, or the Board should avoid the issue by removing the "save and except ...." clause from the end of paragraph IV - 1 of the Model Franchise Agreement.

As indicated in the context of highway access permit fees, either of these approaches has the virtue of leaving the difficult legal questions to the Courts at the behest of the Gas Companies and municipalities that seek to exercise their power under subsection 220.1 of the *Municipal Act*.

Similarly, in the matter of amount, AMO's submission is that the appropriate control mechanism is to be found in subsection 220.1(2) of the *Municipal Act* coupled with the judicial requirement that by-laws must be justified by reference to the reasonable exercise of the power under which they are passed. As a result, it is submitted, the Board ought not to attempt to set an "across the board" amount or to devise a generalized formula or generic approach for establishing such an amount.

In summary, it is AMO's submission that nothing in the current Model Franchise Agreement precludes a municipality from seeking user charges or payments by way of compensation for the use of highways as part of a by-law that has general application and there are no submissions suggesting that the Model Franchise Agreement be amended to preclude such action. Removal of the phrase "save and except ..." from the end of paragraph IV - 1 of the Model Franchise Agreement leaves any legal questions that may arise between the parties before the Courts - the proper forum for such questions.

3. Default Provisions

AMO and the Gas Companies were unable to reach complete agreement with respect to the "Default Provisions" issue. In spite of this, there was a considerable narrowing of the issues.

AMO representatives withdrew their proposed clause IV-6 which dealt with procedural matters such as the giving of notice and put forward an amended provision for a new clause IV - 5 entitled: "Termination by Board Order".

For their part, the Gas Companies recognized that in extreme circumstances a municipality should have some mechanism by which to end a franchise agreement.

The impasse came in identifying the circumstances and the mechanism.

In that respect, AMO and the Gas Companies have agreed to limit their submissions to their respective amended positions on item IV-5 – "Termination by Board Order". Those positions are highlighted as an "ISSUE" under Section IV – 6 of the attached red-lined version of the Model Franchise Agreement.

AMO proposes the following language:

> ***In the event that an order is made by the Ontario Energy Board under section 42 of the Ontario Energy Act, 1998, as the same may be amended from time to time, that an entity other than the Gas Company is to provide gas in the geographic area covered by this Agreement, then the Corporation may terminate this Agreement with the prior approval of the Board so to do.***

In reply, the Gas Companies proposed that Section IV - 6 is that it should read as follows:

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

The debate around a municipality's legitimate need to terminate a Franchise Agreement focussed on the regulatory regime under which Gas Companies operate. The Gas Companies pointed to the array of controls that are accessible to a municipality upon application to the Ontario Energy Board under the *Ontario Energy Act, 1998* and by calling upon the Fuel Safety Division of the Technical Standards and Safety Authority.

AMO was persuaded that the Board has the necessary power and authority to compel much that would need to be dealt with in the worst case scenario. That includes the power under section 42 of the *Ontario Energy Act, 1998* to prohibit a Gas Company from operating, and the power to order another entity to supply natural gas. Such matters could be brought to the Board upon application by a municipality and there was a consensus that such things might be referred to in the Franchise Handbook. AMO is of the view that, without the need to say so, repeated, persistent and material defaults by a Gas Company and operations that put the safety of persons at risk, would be factors which the Board would take into account when considering any such application. No doubt there are many other factors which would point to the fact that a "bad actor" Gas Company should be replaced.

It is hard to imagine that such an application would not have a salutary affect upon any Gas Company called upon to respond to it. That said, if, for whatever reason, the regulatory regime is frustrated such that the Board would make such an Order, the affected Gas Company should not be permitted to "trump" the Board's authority by standing on an exclusive franchise agreement with the affected municipality or municipalities.

AMO could find no authority by which a municipal Franchise Agreement could be terminated before it expires and no one has pointed out to AMO that any such provision exists.

It is AMO's submission that the Model Franchise Agreement should include a provision that permits its termination in the event that the regulatory regime becomes sufficiently frustrated with a Gas Company that the Board makes an Order under section 42 of the *Ontario Energy Act, 1998*, that an entity other than the franchise-holder should provide gas in the geographic area covered by the agreement.

Termination would not be automatic; it would depend upon the Board's prior approval. The intent is to give the Board some flexibility in dealing with problems while affording municipalities assurances that they can safeguard their interests, including public safety, security of natural gas supply to its inhabitants and highway right-of-way management.

The Gas Companies' proposal is different in two ways. One of the differences is the "trigger" event and the other has to do with process.

The Gas Companies want the "trigger" to be a Board Order under section 42(3) of the *Ontario Energy Act, 1998* that requires the Gas Company to cease providing gas in the geographic area covered by this Agreement. This compares with AMO's proposal that it be tied to a Board Order that another entity provide gas. In either case, the result will be that the affected Gas Company will cease to operate under the Franchise Agreement.

Either or some combination of the two "trigger" events would be satisfactory to AMO.

The serious problem which AMO has with the Gas Companies' proposal is the process by which the franchise agreement would be brought to an end. The Gas Companies' proposal requires the municipality to apply to a Court for a declaration that there has been a fundamental breach of contract. The problems relate to the need for recourse to another forum, as well as the difficulty of establishing a "fundamental breach of contract" with all that such legal term of art implies.

The phrase "fundamental breach of contract" is a legal term of art which may not be so easily established after a Gas Company has operated in a municipality for numerous years and has invested in plant and equipment in the municipality.

Such a Court application would involve unnecessary delays and expense for the municipality and would compromise the effectiveness and efficiency with which the Board would otherwise be able to deal with a bad situation.

In AMO's submission, once the Board is satisfied that a Gas Company should be replaced and the Board is prepared to exercise its power and authority to make that happen, there is no need for recourse to the Courts for a debate of the intricacies of contract law surrounding the phrase "fundamental breach of contract". Such Court process would only serve to interfere with the Board's decision to replace the Gas Company. There should, therefore, be a provision in the Model Franchise Agreement which completes the Board jurisdiction and permits the municipality to terminate a franchise agreement when the agreement can no longer serve a purpose.

All of which is respectfully submitted this 11th day of February, 2000.

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APPENDIX "A"

THIS AGREEMENT made this day of , ~~[19]~~ 20

BETWEEN:

hereinafter called the "Corporation"

- and -

hereinafter called the "Gas Company"

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

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

THEREFORE the Corporation and the Gas Company agree as follows:

Definitions

1. In this Agreement:

(a) "decommissioned" gas pipelines means pipelines that have been taken out of active use and purged in accordance with the applicable CSA standards and in no way affects the use of the term 'abandoned' pipeline for the purposes of the *Assessment Act*;

(b~~[e]~~) "Engineer/Road Superintendent" means the most senior individual employed by the Corporation with responsibilities for highways within the Municipality or the person designated by such senior employee or such other person as may from time to time be designated by the Council of the Corporation;

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

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

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

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

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

(h~~[f]~~) Whenever the singular, masculine or feminine is used in this agreement, it shall be considered as if the plural, feminine or masculine has been used where the context of the agreement so requires.

II. Rights Granted

1. To provide gas service.

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

or

The consent of the Corporation is hereby given and granted to the Gas Company to distribute, store and transmit gas in and through the Corporation and to the inhabitants of those local or lower tier municipalities within the Municipality from which the Gas Company has a valid franchise agreement for that purpose.

* Footnote: Choose one only.

2. To use Highways.

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

3. Duration of Agreement and Renewal Procedures.

The rights hereby given and granted for an initial agreement shall be for a term of 20 ~~[*]~~ years from the date of final passing of the By-law.

The rights hereby given and granted for any subsequent renewal franchise agreement shall be for a term of 20 years from the date of final passing of the by-law provided that, if during the 20-year term of this renewal agreement, the Model Franchise Agreement is changed, then on the 7th anniversary and on the 14th anniversary of the date of the passing of the by-law, this renewal agreement shall be deemed to be amended to incorporate any changes in the Model Franchise Agreement in effect on such anniversary dates. Such deemed amendments shall not apply to alter the 20-year duration of the renewal term.

~~[* Footnote: The rights given and granted for a first agreement shall be for a term of 20 years. The rights given and granted for any subsequent agreement shall be for a term of not more than 15 years, unless both parties agree to extend the term to a term of 20 years maximum.]~~

At any time within two years prior to the expiration of this Agreement, either party may give notice to the other that it desires to enter into negotiations for a renewed franchise upon such terms and conditions as may be agreed upon. Until such renewal has been settled, the terms and conditions of this Agreement shall continue, notwithstanding the expiration of this Agreement. Nothing herein stated shall preclude either party from applying to the Ontario Energy Board for a renewal of the Agreement pursuant to section 10 of the *Municipal Franchises Act*.

III. Conditions

1. Approval of Construction

Before beginning construction, of or any extension or change to, the gas system (except service laterals which do not interfere with municipal works in the highway), the Gas Company shall file with the Engineer/Road Superintendent a plan, satisfactory to the Engineer/Road Superintendent, drawn to scale and of sufficient detail considering the complexity of the specific location, showing the highways in which it proposes to lay its gas system and the particular parts thereof it proposes to occupy. The plan will include geodetic information when dealing with complex circumstances ~~[Geodetic information will not be required except in complex urban intersections]~~ in order to facilitate known projects, including ~~[being]~~ projects which are reasonably anticipated by the Engineer/Road Superintendent. Geodetic information will also be provided where the Corporation has geodetic information for its own services and all others at the same location.

The Engineer/Road Superintendent may~~[, to facilitate known projects or to correct known highway deficiencies,]~~ require sections of the gas system to be laid at a greater depth than required by the latest CSA standard for gas pipeline systems to facilitate known projects or to correct known highway deficiencies. The location of the work as shown on the said plan must be approved by the Engineer/Road Superintendent before the commencement of the work and the timing, terms and conditions relating to the installation of such works shall be to his satisfaction. This approval is not a representation or warranty as to the state of repair of the highway or the suitability of the highway for the gas system.

Notwithstanding the provisions of the above noted paragraph, in the event it is proposed to affix a part of the gas system to a bridge, viaduct or structure, the Engineer/Road Superintendent may, if the Engineer/Road Superintendent approves of such location, require special conditions or a separate agreement.

No excavation, opening or work which shall disturb or interfere with the surface of the travelled portion of any highway shall be made or done unless a permit therefor has first been obtained from the Engineer/Road Superintendent and all works shall be done to his satisfaction.

The Engineer/Road Superintendent's approval, where required throughout this section, shall not be withheld unreasonably.

2. As Built Drawings

The Gas Company shall not deviate from the approved location for any part of the gas system unless the prior approval of the Engineer/Road Superintendent to do so is received. The Gas Company shall, within six months of completing the installation of any part of the gas system, provide two copies of "as built" drawings to the Engineer/Road Superintendent sufficient to accurately establish the location, depth and distance of the gas system. ~~[After completion of the construction, where plans were initially filed, an]~~ The "as built" plan shall be of equal quality to the pre-construction plan and, if the approved pre-construction plan included elevations that were geodetically referenced, the "as built' plan shall similarly include elevations that are geodetically referenced. If requested, one copy of the drawings shall be in an electronic format and one shall be a hard copy drawing. ~~[or certification that the pre-construction plan is "as built" will be filed with the Engineer/Road Superintendent.]~~

3. Emergencies

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

4. Restoration

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

5. Indemnification

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

6. Insurance

The Gas Company shall maintain Comprehensive General Liability Insurance in sufficient amount and description as will protect the Gas Company and the Corporation from claims for which the Gas Company is obliged to indemnify the Corporation under Section III - 5. The insurance policy shall identify the Corporation as an additional named insured, but only with respect to the operation of the named insured (the Gas Company). The insurance policy shall not lapse or be cancelled without sixty (60) days' prior written notice to the Corporation by the Gas Company.

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

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

7[~~6~~]. Alternative Easement

The Corporation agrees, in the event of the proposed sale or closing of any highway or any part of a highway where there is a gas line in existence to give the Gas Company reasonable notice of such proposed sale or closing and to provide, if it is feasible, the Gas Company with easements over that part of the highway proposed to be sold or closed sufficient to allow the Gas Company to preserve any part of the gas system in its then existing location. In the event that such easements cannot be provided, the Corporation will share, as provided in clause III - 8[~~7~~] of this Agreement, in the cost of relocating or altering the gas system to facilitate continuity of gas service.

8[~~7~~]. Pipeline Relocation

If in the course of constructing, reconstructing, changing, altering or improving any highway or any municipal works, the Corporation deems that it is necessary to take up, remove or change the location of any part of the gas system, the Gas Company shall, upon notice to do so, remove and/or relocate within a reasonable period of time such part of the gas system to a location approved by the Engineer/Road Superintendent.

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

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

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

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

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

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

(e) a reasonable amount for project engineering and project administrative costs which shall be 22.5% of the aggregate of the amounts determined in items (a), (b), (c) and (d) above.

The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company.

9[~~8~~]. Notice to Drainage Superintendent

In a case where the gas system may affect a municipal drain, the Gas Company shall file with the Drainage Superintendent, for purposes of the Drainage Act, or other person responsible for the drain, a copy of the plan required to be filed with the Engineer/Road Superintendent.

10[~~9~~]. Other Conditions

IV. Procedural And Other Matters

1. Municipal By-laws of General Application

This Agreement and the respective rights and obligations hereunto of the parties hereto are hereby declared to be subject to the provisions of all regulating statutes and all municipal by-laws of general application and to all orders and regulations made thereunder from time to time remaining in effect save and except by-laws which impose permit fees and by-laws which have the effect of amending this Agreement.

ISSUE: The Gas Companies seek to preserve the current wording.

AMO proposes the removal of the phrase: "save and except by-laws which impose permit fees and by-laws which have the effect of amending this Agreement".

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2. Giving Notice

Notices may be given by delivery or by mail, and if mailed, by prepaid registered post, to the Gas Company at its head office or to the Clerk of the Corporation at its municipal offices, as the case may be.

3. Disposition of Gas System

During the term of this Agreement, if the Gas Company decommissions[~~ abandons~~] a part of its gas system affixed to a bridge, viaduct or structure, the Gas Company shall, at its sole expense, remove that part of its gas system affixed to the bridge, viaduct or structure.

If at any time the Gas Company decommissions[abandons] any other part of its gas system, it shall [deactivate that part of its gas system in the Municipality. Thereafter, the Gas Company shall] have the right, but nothing herein contained shall require it, to remove its gas system. It may exercise its right to remove the decommissioned parts of its gas system by giving notice to the Corporation of its intention to do so as required by Section III - 1 for approval by the Engineer/Road Superintendent. If the Gas Company does not [fails to] remove the part of the [its] gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in any highway, the Corporation may remove and dispose of so much of the decommissioned [deactivated] gas system as the Corporation may require for such purposes and neither party shall have recourse against the other for any loss, cost, expense or damage occasioned thereby. If the Gas Company has not removed the part of the gas system it has decommissioned and the Corporation requires the removal of all or any part of the decommissioned gas system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in any highway, the Gas Company may elect to relocate the decommissioned gas system and in that event section III - 8 applies to the cost of relocation.

4[5]. Use of Decommissioned Gas Pipes

The Gas Company shall provide promptly to the Corporation, to the extent information is known:

- The names and addresses of all third parties who utilize decommissioned gas pipes for purposes other than the transmission and distribution of gas;

- The location of all proposed and existing decommissioned pipes utilized for purposes other than the transmission and distribution of gas.

The Gas Company may allow a third party to utilize a decommissioned gas pipe for purposes other than the transmission and distribution of gas and may charge a fee for that third party use, provided

- The third party has entered into a Municipal Access Agreement with the Corporation;

- The Gas Company does not charge a fee for the third party's right of access to the highways; and

- Decommissioned gas pipes used for purposes other than the transmission and distribution of gas are not subject to the provisions of the Model Franchise Agreement. For decommissioned gas pipes used for purposes other than the transmission and distribution of gas, issues such as relocation costs will be governed by the relevant Municipal Access Agreement.

5[~~4~~]. Franchise Handbook

The Parties acknowledge that operating decisions sometimes require a greater level of detail than that which is appropriately included in the Model Franchise Agreement. Guidance on such matters may, by agreement between the Gas Companies and AMO, be provided in a Franchise Handbook. Such a Handbook can, by agreement of the parties, be amended from time to time as experience requires, to reflect changing technology.

ISSUE: 6. Termination by Board Order

Gas Companies' Proposal

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

AMO Proposal

In the event that an order is made by the Ontario Energy Board under section 42 of the *Ontario Energy Act, 1998*, as the same may be amended from time to time, that an entity other than the Gas Company is to provide gas in the geographic area covered by this Agreement, then the Corporation may terminate this Agreement with the prior approval of the Board so to do.

7[~~6~~]. Agreement Binding Parties

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

IN WITNESS WHEREOF the parties hereto have duly executed these presents with effect from the date first above written.

THE CORPORATION OF THE

_____

Clerk

_____

_____

III - 10~~[9]~~. Other Conditions

The following paragraph would be inserted as a special condition in the Union Gas trading area.

"Notwithstanding the cost sharing arrangements described in Paragraph III-8~~[7]~~, if any part of the gas system altered or relocated in accordance with Paragraph III-8~~[7]~~ was constructed or installed ~~[with]~~ prior to January 1, 1981, the Gas Company shall alter or relocate, at its sole expense, such part of the gas system at the point specified, to a location satisfactory to the Engineer/Road Superintendent. Municipal cost sharing for relocations requested by the Corporation involving any part of the gas system installed on or after January 1st, 1981 shall be phased-in as follows for projects completed:

i) Prior to May 21st, 1986, the Corporation shall bear none of the total relocation costs.

ii) Between ~~[to]~~ May 21st, 1986 and May 20th, 1987, the Corporation shall bear 5% of the total relocation costs.

iii) Between ~~[to]~~ May 21st, 1987 and May 20th, 1988, the Corporation shall bear 10% of the total relocation costs.

iv) Between ~~[to]~~ May 21st, 1988 and May 20th, 1989, the Corporation shall bear 15% of the total relocation costs.

v) Between ~~[to]~~ May 21st, 1989 and May 20th, 1990, the Corporation shall bear 20% of the total relocation costs.

vi) Between ~~[to]~~ May 21st, 1990 and May 20th, 1991, the Corporation shall bear 25% of the total relocation costs.

vii) Between ~~[to]~~ May 21st, 1991 and May 20th, 1992, the Corporation shall bear 30% of the total relocation costs.

viii) On and after May 21st, 1992, Paragraph III-8~~[7]~~ herein applies.