ONTARIO ENERGY BOARD

IN THE MATTER of a Model Natural Gas Franchise Agreement

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

December 3, 1999

Association of Municipalities of Ontario

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The Association of Municipalities of Ontario (AMO) makes this submission in connection with the Board's current review of a Model Natural Gas Franchise Agreement.

AMO participated in the development of the model franchise agreement following the Board's decision under EBO 125. AMO has also co-authored the report submitted to the Board in September of 1999. That report (Summary of Discussions Report) was entitled *Summary of Discussions between AMO and the Gas Companies Regarding Amendments to the Model Gas Franchise Agreement*. The Summary of Discussions Report identified issues that have been settled and issues that remain outstanding. 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 Company participants in Summary of Discussions Report. The changes from the 1987 model agreement have been noted with additions being highlighted and the deletions being identified with ~~strikeout~~.

The Board has identified the following ten issues upon which it desires comments:

1. Payment of Permit Fees
2. Compensation for the Use of Municipal Rights-of-Way
3. Duration of new and Renewable Franchise Agreements
4. Insurance and Liability
5. Geodetic Information
6. As-Built Drawings
7. No Warranty as to Condition of Highway
8. Legislative Changes Effects
9. Default Provisions
10. Abandoned Gas Pipe

AMO will comment by number on each of these 10 issues.

In this submission AMO has refined its position from that outlined in the Summary of Discussion Report. For convenience, there is attached to this submission as Appendix 'B' a second version of the model franchise agreement based on the "agreed to" version (Appendix 'A') but showing AMO's further proposed additions to that "agreed to" version as highlighted text and proposed deletions as ~~strikeouts~~.

Appendix 'B', therefore, represents AMO's recommended format for a new model franchise agreement.

December 3, 1999

1. PAYMENT OF PERMIT FEES

This issue relates to the recovery by municipalities of administrative and related costs arising from applications by Gas Companies for authority to install, use, remove, or repair natural gas facilities in municipally owned highway allowances. That recovery is sought by way of highway access permit fees. The model franchise agreement settled in 1987 following EBO 125 includes the following provision as paragraph IV-1:

> IV-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. (Emphasis added)

The exception emphasised in the above extract from the 1987 model franchise agreement would preclude municipalities from passing by-laws to impose highway access permit fees.

Recent amendments to the *Municipal Act* in 1996 and 1998 clearly authorize municipalities in Ontario to impose fees and charges to those who benefit from services provided by the municipality and for the use of its property. Subsections 220.1(2), (3), (4) and (5) read as follows:

220.1(2) Despite any Act, a municipality and a local board may pass by-laws imposing fees or charges on any class of persons,

- (a) for services or activities provided or done by or on behalf of it;
- (b) for costs payable by it for services or activities provided or done by or on behalf of any other municipality or local board; and
- (c) for the use of its property including property under its control.

220.1(3) No by-law under this section shall impose a poll tax or similar fee or charge, including a fee or charge which is imposed on an individual by reason only of his or her presence or residence in the municipality or part of it.

220.1(4) No by-law under this section shall impose a fee or charge that is based on, is in respect of or is computed by reference to,

- (a) the income of a person, however it is earned or received, except that a municipality or local board may exempt, in whole or in part, any class of persons from all or part of a fee or charge on the basis of inability to pay;

(b) the use, purchase or consumption by a person of property other than property belonging to or under the control of the municipality or local board that passes the by-law;

(c) the use, consumption or purchase by a person of a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law;

(d) the benefit received by a person from a service other than a service provided or performed by or on behalf of or paid for by the municipality or local board that passes the by-law; or

(e) the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources.

220.1(5) Nothing in this section authorizes a municipality or local board to impose a fee or charge for distributing or retailing electrical power, including electrical energy, which exceeds the amount permitted by the Ontario Energy Board.

While the legislation is permissive and, arguably, merely a clarification of what may have previously been permitted as a power incidental to the municipalities' highway jurisdiction, its importance is that it is representative of and is part of a general policy shift which the Provincial Government has directed to the municipal order of government. This new direction involves a re-aligning of who does what and who pays for what in this Province. A principal thrust of this changed policy direction is that municipalities should be recovering the costs of their services and property from those who use the service or property.

As a part of this change in the scheme of things, the municipal order of government does not want to be precluded, by the terms of a franchise agreement, from exercising the statutory authority to pass by-laws imposing fees or charges on any class of persons for services or activities provided to or done for the benefit of the Gas Companies as contemplated by clause 220.1(2)(a) of the *Municipal Act*. Specifically, the municipal order of government asks that the new model franchise agreement recognize this new legislative regime by eliminating the prohibition against permit fees as it is found in clause IV-1 of the model franchise agreement.

This request is borne of a desire to recover the administrative and other related costs incurred by municipalities as a result of proposals by Gas Companies to install, use, remove or repair natural gas facilities in municipally owned highways. Such an application requires the municipal staff, often engineers, to review the detail of the proposed location to ascertain its conformity with standard cross-sections and its compatibility with other municipal, transportation and utility infrastructure, both then in place and as planned.

Permit fees, therefore, represent cost recovery in a "user pay" world.

The Ontario Ministry of Transportation (MTO) charges the Gas Companies an access permit fee to process such an application for location in a Provincial Highway. Currently that fee is $350.00.

Ontario Regulation 34/98, passed under subsection 220.1(2) of the *Municipal Act*, entitles municipalities to charge telecommunication businesses, such as cable TV companies, a fee or charge to recover the reasonable cost of the municipality for issuing permits with respect to the location of its facilities on municipal highways.

Similarly, the municipal order of government is entitled to charge electric utilities a fee to recover the reasonable cost of the municipality for issuing permits with respect to the location of its facilities on municipal highways.

On the "level playing field" principle, the Gas Companies should also pay an access permit fee to cover the reasonable cost of the municipality issuing it.

In the discussions leading up to the Summary of Discussions Report an attempt was made to settle upon an access permit fee amount. Having regard for the varying degrees of sophistication of municipal governments and the vastly different degrees of complexity of the locations involved across the Province, it was difficult to devise a generalized formula or generic approach for establishing such fees. It was equally difficult to establish a specific amount for general application across the Province.

The preferred position, from the perspective of the municipal order of government, would be to eliminate from the model franchise agreement any constraining provisions. This would then leave the matter of access permit fees to be established under the authority of subsection 220.1(2) on a municipality by municipality basis. AMO therefore respectfully submits that Section IV-1 be replaced with the following:

> **IV-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.**

If a specified fee is to be entrenched in the model franchise agreement, the municipal order of government submits that the initial amount should be set by reference to what MTO charges Gas Companies for processing highway access fees in the case of Provincial Highways. As previously mentioned, it is understood that this amount is currently $350.00. Whatever amount is settled upon it should then be indexed or, alternatively, it should be adjusted to parallel changes made by the MTO from time to time.

2. COMPENSATION FOR THE USE OF MUNICIPAL HIGHWAYS

This issue relates to the desire by the municipal order of government to impose fees or charges for the use of its property by the Gas Companies for its facilities. Again the genesis for this request is found in the recent revisions to the *Municipal Act*.

Without repeating subsection 220.1(2), (3), (4) and (5), subsection 220.1(2) provides that municipalities may pass by-laws imposing fees or charges for the use of its property.

Currently the MTO has agreements with the Gas Companies under which the Gas Companies have agreed to pay $250.00 annually per kilometre of pipe for the use of a Provincial Highway for its facilities. AMO understands that this amount was carefully calculated by MTO to reflect the resources of time and money used to obtain and manage the highway system.

The Province has recently "down-loaded" to municipalities over 5,000 kilometres of heretofore Provincial Highway and numerous related bridges. Many of those highways and bridges are host to natural gas pipes which are covered by agreements whereby the Gas Company has agreed to pay $250.00 annually per kilometre of pipe as compensation to the Province, as owner of the highway, for that use. Subsection 29(4) of the *Public Transportation and Highway Improvement Act* establishes that where provincial highways are transferred to municipal control, the receiving municipalities inherit the agreements to pay $250.00 annually per kilometre of pipe. In AMO's view this fairly speaks to the principle that has been established under the new legislative regime and, in its submission, the same ground rules should be permitted to apply generally to municipal highways.

In AMO's discussions with the Gas Companies leading to the Summary of Discussions Report, on this point the Gas Companies referred to clause 220.1(4)(e). That clause stipulates that no by-law under Section 220.1 may impose a fee or charge that is based on, is in respect of or is computed by reference to "the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources." It is AMO's submission that this prohibits a fee or charge based on the amount of natural gas that is distributed through the pipe; it does not preclude a charge or fee for the occupation by the Gas Company for gas pipeline on land that is owned by the municipality.

AMO acknowledges that, while telecommunication businesses, such as cable TV, and electric utilities, may be required to pay highway access permit fees under section 220.1 of the *Municipal Act*, various other regulations and legislation prevents municipalities from using section 220.1 to impose user charges or fees for their occupation of municipal highways.

The preferred position, from the perspective of the municipal order of government, would be to make it clear that nothing in the model franchise agreement derogates from the authority of the municipal order of government to pass by-laws under section 220.1 of the *Municipal Act* to impose user charges or fees for occupation of municipal highways.

If the Board is inclined to limit the amount of any user fee or charge for compensation that a municipality may impose, AMO submits that the amount should be no less than what MTO charges Gas Companies for the use of Provincial Highways, and that any amount specified must be indexed over time, or allowed to change when the MTO figure changes, to parallel our proposal regarding permit fees. As previously mentioned, it is understood that this amount is currently $250.00 annually per kilometre of pipe.

3. DURATION OF NEW AND RENEWABLE FRANCHISE AGREEMENTS

This issue is integrally inter-related with the issue identified as "Legislative Changes Effects".

Franchise agreements are settled in the context of a legal environment. When the contextual regime changes, by some means and over a transitional time period, extant franchise agreements should be amenable to adjustment to reflect the new regime.

This proposition serves both parties to the franchise agreement as well as the public interest. For example, since the Board's generic hearing and the development of the 1987 model franchise agreement, legislative changes have obviated the need for municipal authority to sell natural gas. There should be an opportunity for new franchise agreements to be adjusted to reflect that change and, as outlined in the Summary of Discussions Report, it has been agreed to and is recommended to the Board.

Having availed themselves of this opportunity to make adjustments to incorporate items they desire to have changed in the model franchise agreement, it is not reasonable for the Gas Companies to resist further opportunities, from time to time in the future, to make other adjustments as future legislative changes may suggest.

From AMO's perspective there are two alternative mechanisms for providing such an opportunity. The one means of doing so is to embed in the model franchise agreement a provision that permits either party to re-open the franchise agreement in the event of a significant alteration in the legal landscape or some other material change in circumstances. The alternative mechanism, which AMO prefers, is to have reasonably short terms in the franchise agreements to be sure there is a chance to review the appropriateness of the terms and conditions on a regular basis. In the meantime, between reviews, the parties to the franchise agreement will have the security of knowing their respective rights and obligations for its term and can order their respective affairs accordingly.

It is recognized that, because of the fresh investment usually involved, new franchise agreements warrant a longer term to give Gas Companies comfort about their tenure in the municipality. After the initial term, however, the municipal order of government believes the balance between certainty and the opportunity to revisit and up-date the provisions of franchise agreements suggests shorter terms for renewals.

Assigning time periods to these general statements of principle is difficult and inevitably arbitrary. AMO considers that the Board, in its May 1986 decision in EBO 125, struck a good balance. In that decision, the Board said the following at pages 7/15 and 7/16:

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

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

The counter-parts of sections 24 and 60 of the *Public Utilities Act*, R.S.O. 1980 chapter 423 are now to be found in section 25 and 61 of the *Public Utilities Act*, R.S.O. 1990 chapter P.52.

As indicated in that Board decision, new franchise agreements should be for a 15 to 20 year term and renewals should be for a 10 to 15 year term. The history of this case is consistent with a general review of municipal franchise agreements every 10 or so years.

In the event that the Board is not persuaded in this respect by the Board's decision in EBO 125, then AMO would seek to incorporate a franchise agreement provision which gives the parties a right to re-open the contract in the circumstances of a material change of circumstances. More will be said in this connection under Issue 8: "Legislative Changes Effects".

4. INSURANCE AND LIABILITY

There is really no issue about liability of which AMO is aware. The focus of the discussion relates to insurance coverage of the liability the Gas Companies assume under the model franchise agreement. Section III - 5 prescribes the indemnification liability the Gas Companies assume in favour of municipalities under the model franchise agreement. It provides as follows:

> III-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.

No changes to Section III - 5 are proposed by either the Gas Companies or AMO.

What AMO requests is evidence that the Gas Companies have and maintain liability insurance coverage to respond to this Section III - 5 obligation to indemnify and that the municipality be endorsed as a named insured.

The Gas Companies insist that they are in the best position to judge how to maintain adequate insurance to fulfill the terms of Section III - 5 of the model franchise agreement. AMO is prepared to accept that and is prepared to have the standard for insurance established by reference to what a prudent gas distribution utility should maintain for its operations in a Canadian municipality comparable to the municipal party to the franchise agreement.

The Gas Companies maintain that they have such insurance in effect. Without intending to offend or to question veracity, integrity or credibility, municipalities routinely require proof of insurance coverage from those with whom they have contracts, most particularly when those contracts include indemnification provisions. It is simply a matter of prudent business practice.

Similarly, it is good business practice to have the person contractually entitled to indemnification to be named as an insured by the underwriter of the party that is responsible to provide the indemnity. The value of being a named insured is that the municipality then has a direct contractual relationship with the Gas Company's liability underwriter and can pursue the claim directly even if there is some difficulty as between the underwriter and the Gas Company. There is little or no cost to this addition because the underwriter is not undertaking any additional risk.

AMO proposes that a new Section III - 6 be added and that the balance of Section III be renumbered accordingly. AMO proposes that the Section III - 6 would read as follows:

> **III-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. Such insurance shall be maintained to cover liability for personal injury, death, bodily injury and property damage, including loss of use thereof, with combined limits in an amount which a prudent gas distribution utility should maintain in connection with operations in a Canadian municipality comparable to the Corporation. The insurance policy shall identify the Corporation as an additional named insured and shall include the underwriter's commitment to the Corporation that the insurance policy is not subject to lapse or cancellation without sixty (60) days' prior written notice to the Corporation. The Gas Company shall satisfy the Corporation from time to time that the premiums for such insurance policy have been paid and that such insurance policy is in full force and effect. The issuance of an insurance policy as provided in this section shall not be construed as relieving the Gas Company from responsibility for indemnity of the Corporation for liability not covered by such insurance or in excess of the policy limits of such insurance.**

5. GEODETIC INFORMATION

This issue relates to the level of construction detail to be provided by the Gas Companies to the municipal highway authorities as they apply for authority to install gas pipe. The issue lies in establishing the circumstances in which geodetic data is to be provided by the Gas Companies to municipalities and who decides when those circumstances exist.

Geodetic information involves identifying the location of the natural gas pipe on the vertical plane and the horizontal plane by reference to an established benchmark. Heretofore the cost of providing geodetic information has been high and the cost-benefit trade-off has been that geodetic information is only required of the Gas Companies in relation to "complex urban intersections".

The model franchise agreement settled in 1987 following EBO 125 includes the following provision as paragraph III-1:

> **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. **Geodetic information will not be required except in complex urban intersections in order to facilitate known projects**, being projects which are reasonably anticipated by the Engineer/Road Superintendent. The Engineer/Road Superintendent may require sections of the gas system to be laid at a greater depth than required by CAN/CSA-ZI84-MB6 to facilitate known projects. 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.
>
> 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. (Emphasis Added)

Increasingly, with the use of GPS technology, the cost of providing locational information at a geodetic level of detail is declining. Increasingly municipalities are documenting their infrastructure digitally with GIS mapping that relies upon geodetic detail.

One can imagine urban highways with complex accumulation of municipal and utility pipes, wires and conduits such that geodetic information is warranted, even though it may not involve an

intersection. Similarly the provision of geodetic information at complex rural intersections should not be refused because it is rural as opposed to urban.

In AMO's submission, the standard should relate to the complexity of the situation rather than whether it is at an intersection or is in a rural setting. Complexity should be established on the basis of the number, nature and proximity of other existing or planned utility or service installations in the same highway or on the basis of non-standard highway widths, alignments or cross-sections.

The provisions of the franchise agreement should attempt to incorporate some flexibility to address the declining cost of providing geodetic information and the parallel increasing frequency with which municipalities are using digital mapping to record the inventory of services in highways.

AMO has attempted to devise some fair ground-rules about the provision of geodetic information. To that end AMO makes the following submissions:

- The Gas Companies should be required to provide the municipality with geodetic information in locations where the municipality has geodetic information with respect to municipal services at the same location. In more sophisticated urban settings where GIS mapping is being completed for all servicing, it is reasonable to expect the Gas Companies to keep pace. This approach provides an element of fiscal responsibility, in that a municipality cannot ask the Gas Companies to do something the municipality is not doing itself.

- The Gas Company should be required to provide the municipality with geodetic information if the Gas Company has obtained such information for its own purposes. This would include a situation when the municipality specifies in its approval a geodetic location in order to achieve horizontal and vertical alignments for anticipated projects. To AMO it does not seem unreasonable to expect the Gas Company to provide municipalities with geodetic information if it has it on hand.

- The Gas Companies should be required to provide the municipality with geodetic information when requested by the municipality in the case of complex situations. For these purposes, as previously mentioned, whether a highway is "complex" shall be determined having regard for the number, nature and proximity of other existing or planned utility or service installations in the same highway or for non-standard highway widths, alignments or cross-sections at the location in question. As mentioned above in this submission, the Gas Companies have been providing geodetic information for complex urban intersections and, in AMO's submission, it is reasonable to extend that obligation to complex highway settings whether or not at an intersection or in a rural setting.

To that end, AMO proposes that the first paragraph of Section III-1 be replaced with the following:

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 or when requested in order to facilitate known projects, being projects which are reasonably anticipated by the Engineer/Road Superintendent, or to correct known highway deficiencies. For these purposes complexity shall depend upon the number, nature and proximity of other existing or planned utility or service installations in the same highway allowance or upon non-standard highway widths, alignments or cross-sections at the location in question. Geodetic information will also be required where the Corporation has geodetic information for its own services at the same location or when the Corporation specifies in its approval a geodetic location in order to achieve horizontal and vertical alignments for known projects. The Gas Company will also include geodetic information on the plan whenever it has such information available to it.

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

These provisions would not have retroactive implications for existing Gas Company facilities. It is intended that they would only apply to the installation of natural gas facilities into the future under the terms of a new model franchise agreement.

6. AS-BUILT DRAWINGS

Like the issue relating to the provision of geodetic information as part of the approval of location in the highway allowance, this "as-built" drawing issue relates to the level of construction detail to be provided by the Gas Companies to the municipal highway authorities after the natural gas pipe has been installed. Again, the issue lies in establishing the circumstances in which geodetic data is to be provided by the Gas Companies to municipalities and who decides when those circumstances exist.

Much that was said in support of providing geodetic information before construction has similar application to the level of detail to be provided in the "as-built" plans after construction. This information is very valuable to the Highway authority. It, together with similar information about other infrastructure located in or on highways, permits the municipality to facilitate planning for future work in the vicinity and to readily provide information about affected services in the event of an emergency. As previously mentioned, the cost of providing geodetic information in the past has been high and the cost-benefit trade-off has been that geodetic information is only required of the Gas Companies in relation to "complex urban intersections".

The model franchise agreement settled in 1987 following EBO 125 includes the following provision as paragraph III-2:

> 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. After completion of the construction, where plans were initially filed, an "as built" plan of equal quality to the pre-construction plan or certification that the pre-construction plan is "as built" will be filed with the Engineer/Road Superintendent.

The essence of this provision is that the level of detail provided in the plans submitted to the municipality for approval of a location in the highway allowance will be the same in the "as-built" drawings filed with the municipality after construction.

If the approval documentation includes geodetic information, then so too must the "as-built" drawings. AMO wishes to retain the essence of this approach but wishes to address two additional points.

The first issue relates to the timeliness of the delivery of the "as-built" drawings. AMO submits that it is reasonable to establish a time frame within which the Gas Companies should provide the "as-built" plans. Two months after completion of the gas line installation seems reasonable, but AMO would be open to discussion if two months is inappropriately optimistic from the Gas Companies' perspective.

The other point which is important to the municipalities is the provision of this "as built" information in digital form where municipalities are integrating their servicing information in data base form such as GIS mapping or equivalent.

AMO therefore respectfully submits that the second sentence of Section III - 2 be replaced with the following:

> **III - 2. As Built Drawings**
>
> **The Gas Company shall, within two 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, elevation, and distance of the gas system. The "as built" plan shall be of quality equal 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 acceptable to the Engineer/Road Superintendent and one shall be a hard copy drawing.**

7. NO WARRANTY AS TO CONDITION OF HIGHWAY

This matter arose during the talks leading to the Summary of Discussions Report. The concern originated out of questions about responsibility for environmental problems encountered in a highway in the course of a gas pipe installation.

Needless to say neither the municipalities nor the Gas Companies wished to pre-determine the issue of responsibility for potentially large clean-up costs.

From that discussion, however, arose the spectre that the Gas Companies could interpret a municipal approval of a location in a highway as including a representation or warranty as to the suitability of that location for the purposes of the Gas Company. This notion needs to be put to rest as it would, if successfully asserted, impose upon municipalities responsibility for any problems, environmental or otherwise, which the Gas Company may encounter in the field during an installation. Such an imposition upon municipalities would result in a very much more demanding approval process for a highway access permit, including a requirement that the Gas Company carry out soil and groundwater testing as part of such process.

The approval process is found in section III - 1 of the current Model Agreement which is quoted above on page 9. The first paragraph of section III - 1 gives the municipality important control over the location of the gas system in the highway. In exercising this approval power, the municipalities need to be explicitly clear that the approved location in the Highway allowance is to be taken by the Gas Company on an "as is" basis. The approval is based on the municipalities' standard cross-sections, existing conditions, and anticipated highway system. It is not reasonable to suggest that it may be taken as a representation that the location is suitable for the Gas Company's purpose. As indicated, a different conclusion would lead to a much more rigorous approval process.

For the purpose of providing the desired clarification, AMO proposes to add an additional sentence to the first paragraph of section III - 1 of the Model Agreement so that this section will conclude as follows:

> The Engineer/Road Superintendent may require sections of the gas system to be laid at a greater depth than required by CAN/CSA-ZI84-MB6 to facilitate known projects. 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, the suitability of the highway for any business activity or purpose whatsoever, or the presence or absence of hazardous substances on or under the highway and the Gas Company agrees to use the highway at its own risk, on an 'as is' basis.**

8. LEGISLATIVE CHANGES EFFECTS

As indicated in the above discussion of Issue 3, "Duration of New and Renewable Franchise Agreements", this issue and that are integrally inter-related.

As mentioned in the discussion of Issue 3, franchise agreements are settled in the context of a legal environment. When that changes, by some means, extant franchise agreements should be amenable to adjustment to reflect the new regime.

This proposition serves both parties to the franchise agreement as well as the public interest. For example, since the Board's 1986 generic hearing and the development of the 1987 model franchise agreement, legislative changes have obviated the need for municipal authority to sell natural gas. There should be an opportunity for new franchise agreements to be adjusted to reflect that change and, as outlined in the Summary of Discussions Report, it has been agreed to and is recommended to the Board.

Having availed themselves of this opportunity to make adjustments to incorporate items they desire to have changed in the model franchise agreement, it is not reasonable for the Gas Companies to resist further opportunities, from time to time in the future, to make other adjustments as future legislative changes may suggest.

From AMO's perspective there are two alternative mechanisms for providing such an opportunity. One is to embed in the model franchise agreement a provision that permits either party to re-open the franchise agreement in the event of a significant alteration in the legal landscape or some similar material change in circumstances. The alternative mechanism, which AMO prefers, is to have reasonably short terms for the franchise agreements to provide a chance to review the appropriateness of the terms and conditions on a regular basis.

In the event that the Board is not persuaded to follow the Board's decision in EBO 125, as AMO has urged in its submission under Issue 3, then AMO seeks to incorporate a franchise agreement provision which give the parties a right to re-open the contract on the basis of a material change of circumstances. In that case AMO proposes that a new Section IV-4 be added and the balance of Section IV renumbered accordingly, as follows:

IV - 4. Change in Regulatory Regime

If at any time

(i) the provincial or federal government or a regulatory authority, acting within its jurisdiction, enacts, repeals or amends any legislation or regulation, or orders, directs or mandates anything which pertains to the subject matter of this Agreement, or

(ii) there is rendered any decision of a court of final appeal or tribunal which pertains to the subject matter of this Agreement;

that results in the alteration, in a substantial way, of a material aspect of the legal regime under which this Agreement was concluded, then either party may notify the other of its intention to require the other party to enter into good faith negotiations to amend this Agreement or to enter into a new Agreement reflecting such legislative or regulatory action or court or tribunal decision, as the case may be. If within six months of the giving of such a notice a new Agreement has not been concluded and presented to the Ontario Energy Board for approval, then either party may apply to the Board for an amendment to this Agreement to reflect the legislative or regulatory action or court or tribunal decision, as the case may be, and section 10 of the *Municipal Franchises Act* will apply *mutatis mutandis* to such application to the Board.

9. DEFAULT PROVISIONS

There are two aspects to this issue. The one issue relates to the rare circumstances when a Gas Company becomes a "bad actor", either generally or with respect to a particular municipality, in so far as its obligations are concerned, or it becomes so financially crippled that it cannot function.

The other aspect of the default issue relates to enforcement mechanisms.

This first part of this submission deals with a "bad actor" or financially debilitated Gas Company.

With indignation the Gas Companies protest that they would never be bad corporate citizens and that, in any event, in the remote event of default, municipalities have recourse to the Courts. As for the matter of financial strength, the Gas Companies simply cannot countenance the notion that they may some day in the future fall by the wayside with the likes of Massey-Ferguson and Eatons.

From the perspective of the municipal order of government it is reasonable, in dealing with long-term commitments, to contemplate the worst case scenario in which the franchise contracting party is either unwilling or unable to perform properly or at all. Municipalities should be able to terminate the arrangement in order to make alternative arrangements with a distributor who is willing and able to perform. The default and termination language contemplated is the sort regularly seen in long-term commercial agreements, such as leases and service agreements.

To this end AMO proposes the addition of a new Section IV-5 to the model franchise agreement with the subsequent provisions of Section IV renumbered accordingly, as follows:

> **IV - 5. Termination in the Event of Default or Bankruptcy**
>
> **If the Gas Company defaults, repeatedly and persistently, in its obligations under this Agreement in a material way or in a manner that puts or has put at risk the safety of any person or if there is a filing by or against the Gas Company in any Court of an uncontested petition in bankruptcy or insolvency or for reorganization or for the appointment of a liquidator of the Gas Company's property, or if the Gas Company makes an assignment or petitions for or enters into an arrangement for the benefit of creditors and any such petition remains undismissed after thirty (30) days or stayed on appeal, then the Corporation may, at its option, terminate this Agreement on sixty (60) days notice to the Gas Company.**

The second branch of the discussion of default provisions relates to enforcement mechanisms. Either party to the franchise agreement have access to the Courts where either alleges the other is in breach of contract. AMO does not propose to alter this access to the Courts nor to pre-determine a dispute as to whether the Gas Company is in default. However, given that the subject of disputes will normally relate to its highway, the municipal order of government desires clarification in the franchise agreement that the municipality, as the owner agent responsible for the management and maintenance of the highway, has the alternative of doing whatever work is alleged to be required and then looking to the Gas Company for the cost of so doing. This effectively converts the dispute to a claim for money. If a Court determines the Gas Company was not in default, then, quite simply, the rectification costs incurred by the municipality will not be recoverable.

AMO also submits that it is desirable that franchise agreements include a notification scheme so the Gas Companies will not be confronted with a complaint or dispute for the first time when Court process is served on its head office. There has not been a history of complaints, disputes or litigation about operational issues. Normally there is cooperation between the Gas Companies and the municipal order of government, through PUCCs and other means. The purpose of a notification arrangement is not intended to change what has usually worked in the past but rather it is intended to ensure that a formal documentation of the problem is exchanged at more senior levels of governance at each of the parties before adversarial and confrontational positions are entrenched in Court proceedings. If this notification scheme is coupled with a reasonable "cooling off" period, the momentary angst of a disagreement may dissipate and give way to more sober second thoughts about how to negotiate a solution that will preserve the important goodwill that has been the tradition between Gas Companies and the municipal order of government.

As with the above proposed language relating to termination, contract provisions establishing an orderly arrangement for notice before moving to enforcement are regularly seen in long-term commercial agreements, such as leases and service agreements, and in development agreements, such as subdivision agreements.

To achieve these objectives AMO proposes a further addition to Section IV of the model franchise agreement. The suggestion is that it follow the proposed language about termination so that it would become new Section IV-6 with appropriate re-numbering of the subsequent provisions of Section IV. The new proposed section IV-6 is as follows:

IV - 6. Remedies in the Event of Default

If the Gas Company defaults in any of its obligations under this Agreement and fails to correct the default within sixty (60) days of written notice from the Corporation or fails to commence correcting the default within sixty (60) days of written notice from the Corporation and fails to complete the correction within a reasonable time after the written notice is received, the Corporation may, at its option, after written notice to the Gas Company:

(i) perform the obligation at the Gas Company's expense; or

(ii) take action for damages and/or an order of specific performance directing the Gas Company to fulfill its obligations under this Agreement.

10. ABANDONED GAS PIPE

For the purposes of this discussion it is useful to describe AMO's understanding of the distinction made by the Gas Companies between "abandonment" as opposed to "decommisioning" of parts of the gas system.

When a Gas Company abandons a part of its gas system, it de-activates it with the intention of never using it again. The Gas Company removes abandoned parts of its gas system from the annual return it files with the Regional Assessment Office so the Gas Company is no longer assessed or taxed upon those pipes. Essentially, abandoned parts of the gas system become waste to be disposed of as such. The model franchise agreement deals with abandoned parts of the gas system in Section IV - 3 in the following way:

> 3. Disposition of Gas System
>
> During the term of this Agreement, if the Gas Company 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 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. If the Gas Company fails to remove its gas system and the Corporation requires the removal of all or any of the 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 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.

When a Gas Company decommissions part of the gas system, it is treated differently than when it is abandoned. Decommissioned pipe is deactivated so it no longer carries natural gas, at least temporarily. Decommissioned parts of the gas system remain on the assessment rolls and the Gas Companies continue to be liable for taxes, albeit at a reduced rate. Essentially the difference between abandoned pipe and decommissioned pipe is that, whereas abandoned pipe is waste never to be used again, the Gas Companies reserve the right to re-activate decommissioned gas pipe for the purpose of carrying gas and, in the meantime, they may let others use it as conduit pipe. The ground rules for decommissioned gas system was not addressed in the 1987 model franchise agreement and, in the course of negotiations leading to the Summary of Discussions Report, new provisions for decommissioned gas system were developed. They are set out in the Summary of Discussions Report and involve the introduction into the model franchise agreement of a new Section IV - 5 as follows:

> 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.

Having negotiated a recommendation to the Board for the handling of decommissioned parts of gas system, the Gas Companies and AMO were unable to resolve their differences about abandoned parts of the gas system as found in the above quoted Section IV - 3.

There is no dispute about the first paragraph of Section IV - 3. The problem lies in the second paragraph that deals with abandoned parts of the gas system which are not affixed to a bridge, viaduct or structure.

AMO advances two propositions which, in its submission, ought to be addressed by the model franchise agreement in connection with those abandoned parts of the gas system which are not affixed to a bridge, viaduct or structure.

The first point is that the Gas Company should have an obligation to provide timely advice to the municipalities of the abandonment of a part of its gas system. Abandonment is obvious when it involves a part of the gas system that is affixed to a bridge, viaduct or structure, because it is removed. It is not at all clear when other parts of the system are abandoned.

Not only for the purpose of planning future highway related projects but also for the assistance and safety of emergency response personnel, it is important that this information be in the hands of the municipality as soon as possible.

While a municipality could glean abandonment details by comparing a Gas Company's annual return filed with the Regional Assessment office against its return from the previous year, this seems an unreasonable expectation when the convenient solution is for the Gas Companies to make a report to the affected municipality from time to time as the Gas Company abandons pipe. The reporting could be done annually, concurrently with the annual return filing with the Regional Assessment office or it could be done as part of the abandonment exercise following the deactivation of the abandoned gas system.

The second issue of concern about the second paragraph of Section IV - 3 relates to clarifying that, if the Gas Company exercises its option to remove all or parts of the abandoned gas system, then it may do so only on the basis of an approval by the Engineer/Road Superintendent as contemplated by Section III - 1 in accordance with such terms and conditions, including a requirement to restore the Highway to its pre-removal condition, as the Engineer/Road Superintendent may require.

For the purpose of addressing these two issues, AMO proposes adjustments to the second paragraph of Section IV - 3 so that it will become two paragraphs which read as follows:

If at any time the Gas Company abandons any other part of its gas system, it shall deactivate that part of its gas system in the Municipality and shall report to the Corporation that it has done so. Such report shall be made within one year after the deactivation or sooner if possible. Thereafter, the Gas Company shall have the right, but nothing herein contained shall require it, to remove its gas system. The Gas Company shall have a year from the time of deactivation to exercise its right to remove the abandoned parts of its gas system by giving notice to the Corporation of its intention to do so accompanied by a plan of the proposed change to the gas system as required by Section III - 1 for approval by the Engineer/Road Superintendent.

If the Gas Company does not remove the part of the gas system it has abandoned or if the Gas Company fails to do so in accordance with the terms and conditions attached by the Engineer/Road Superintendent to his approval, then, if the Corporation requires the removal of all or any of the abandoned 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 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.

In the course of developing this submission, AMO concluded that the Model Agreement may benefit from the inclusion of definitions for both “abandoned gas pipe” and “decommissioned gas pipe” under Section I, Definitions, of the agreement. AMO is confident that mutually satisfactory definitions for these terms could be developed in consultation with the Gas Companies.

SUMMARY

AMO looks forward to the opportunity to address the Board when it convenes its generic hearing of oral presentations. On that occasion AMO will speak to these submissions, and will provide elaboration and response to questions that may be posed by the Board or others.

In the course of its presentation AMO will speak to how municipalities, whether they have recently renewed their franchise agreements or not, could elect to "trade-in" their existing franchise agreements for a new one that reflects changes resulting from the Board's decision in this matter. This issue was touched upon by Chairman Laughren in his December 24th, 1998 letter to AMO's President. AMO is particularly sensitive to this issue as it relates to the municipalities that appeared before the Board in E.B.A 767, 768, 769 and 783 in March 1998, and other municipalities that have recently renewed gas franchise agreements under the existing model format.

In addition AMO will, by leave of the Board, deal with any submissions by others that touch upon matters of interest to the municipal order of government.

All of which is respectfully submitted this 3rd day of December, 1999.

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APPENDIX "A"

THIS AGREEMENT made this day of , 19

BETWEEN:

hereinafter called the "Corporation"

- and -

hereinafter called the "Gas Company"

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

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

THEREFORE the Corporation and the Gas Company agree as follows:

Definitions

1. In this Agreement:

(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;

(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 ~~supply, transmission and distribution~~ distribution, storage and transmission of gas in or through the Municipality,

(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;

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

(e) "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.

(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 ~~supply~~ 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 ~~supply~~ distribute, store and transmit gas in and through ~~to~~ 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 ~~road allowances~~ Highways.

Subject to the terms and conditions of this agreement ~~T~~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 ~~supply,~~ distribution, storage and transmission of gas in and through the Municipality.

3. Duration of Agreement and Renewal Procedures.

The rights hereby given and granted shall be for a term of * years from the date of final passing of the By-law.

** 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. Geodetic information will not be required except in complex urban intersections in order to facilitate known projects, being projects which are reasonably anticipated by the Engineer/Road Superintendent. 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 ~~CAN/CSA-Z184-MB6 to facilitate known projects.~~ the latest CSA standard for gas pipeline systems. 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.

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. After completion of the construction, where plans were initially filed, an "as built" plan of equal quality to the pre-construction plan 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. 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 - 7 of this Agreement, in the cost of relocating or altering the gas system to facilitate continuity of gas service.

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.

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.

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.

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 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 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.

If the Gas Company fails to remove its gas system and the Corporation requires the removal of all or any of the 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 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.

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 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.

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.

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

_____

_____

_____

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-7, if any part of the gas system altered or relocated in accordance with Paragraph III-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-7 herein applies.

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APPENDIX "B"

THIS AGREEMENT made this day of , 19

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) "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;

(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,

(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;

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

(e) "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.

(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 shall be for a term of * years from the date of final passing of the By-law.

** 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 or when requested ~~(Geodetic information will not be required except in complex urban intersections)~~ in order to facilitate known projects, being projects which are reasonably anticipated by the Engineer/Road Superintendent, or to correct known highway deficiencies. For these purposes complexity shall depend upon the number, nature and proximity of other existing or planned utility or service installations in the same highway allowance or upon non-standard highway widths, alignments or cross-sections at the location in question. Geodetic information will also be required where the Corporation has geodetic information for its own services at the same location or when the Corporation specifies in its approval a geodetic location in order to achieve horizontal and vertical alignments for known projects. The Gas Company will also include geodetic information on the plan whenever it has such information available to it.

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

~~the gas system to be laid at a greater depth than required by the latest CSA standard for gas pipeline systems.)~~ 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, the suitability of the highway for any business activity or purpose whatsoever, or the presence or absence of hazardous substances on or under the highway and the Gas Company agrees to use the highway at its own risk, on an 'as is' basis.

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 two 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, elevation, and distance of the gas system. The "as built" plan shall be of quality equal 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 acceptable to the Engineer/Road Superintendent and one shall be a hard copy drawing. ~~(After completion of the construction, where plans were initially filed, an "as built" plan of equal quality to the pre-construction plan 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. Such insurance shall be maintained to cover liability for personal injury, death, bodily injury and property damage, including loss of use thereof, with combined limits in an amount which a prudent gas distribution utility should maintain in connection with operations in a Canadian municipality comparable to the Corporation. The insurance policy shall identify the Corporation as an additional named insured and shall include the underwriter's commitment to the Corporation that the insurance policy is not subject to lapse or cancellation without sixty (60) days' prior written notice to the Corporation. The Gas Company shall satisfy the Corporation from time to time that the premiums for such insurance policy have been paid and that such insurance policy is in full force and effect. The issuance of an insurance policy as provided in this section shall not be construed as relieving the Gas Company from responsibility for indemnity of the Corporation for liability not covered by such insurance or in excess of the policy limits of such insurance.

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)~~.

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 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 abandons any other part of its gas system, it shall deactivate that part of its gas system in the Municipality and shall report to the Corporation that it has done so. Such report shall be made within one year after the deactivation or sooner if possible. Thereafter, the Gas Company shall have the right, but nothing herein contained shall require it, to remove its gas system. The Gas Company shall have a year from the time of deactivation to exercise its right to remove the abandoned parts of its gas system by giving notice to the Corporation of its intention to do so accompanied by a plan of the proposed change to the gas system as required by Section III - 1 for approval by the Engineer/Road Superintendent.

If the Gas Company does not remove the part of the gas system it has abandoned ~~(fails to remove its gas system and)~~ or if the Gas Company fails to do so in accordance with the terms and conditions attached by the Engineer/Road Superintendent to his approval, then, if the Corporation requires the removal of all or any of the abandoned 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 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.

4. Change in Regulatory Regime

If at any time

(i) the provincial or federal government or a regulatory authority, acting within its jurisdiction, enacts, repeals or amends any legislation or regulation, or orders, directs or mandates anything which pertains to the subject matter of this Agreement, or

(ii) there is rendered any decision of a court of final appeal or tribunal which pertains to the subject matter of this Agreement;

that results in the alteration, in a substantial way, of a material aspect of the legal regime under which this Agreement was concluded, then either party may notify the other of its intention to require the other party to enter into good faith negotiations to amend this Agreement or to enter into a new Agreement reflecting such legislative or regulatory action or court or tribunal decision, as the case may be. If within six months of the giving of such a notice a new Agreement has not been concluded and presented to the Ontario Energy Board for approval, then either party may apply to the Board for an amendment to this Agreement to reflect the legislative or regulatory action or court or tribunal decision, as the case may be, and section 10 of the *Municipal Franchises Act* will apply *mutatis mutandis* to such application to the Board.

5. Termination in the Event of Default or Bankruptcy

If the Gas Company defaults, repeatedly and persistently, in its obligations under this Agreement in a material way or in a manner that puts or has put at risk the safety of any person or if there is a filing by or against the Gas Company in any Court of an uncontested petition in bankruptcy or insolvency or for reorganization or for the appointment of a liquidator of the Gas Company's property, or if the Gas Company makes an assignment or petitions for or enters into an arrangement for the benefit of creditors and any such petition remains undismissed after thirty (30) days or stayed on appeal, then the Corporation may, at its option, terminate this Agreement on sixty (60) days notice to the Gas Company.

6. Remedies in the Event of Default

If the Gas Company defaults in any of its obligations under this Agreement and fails to correct the default within sixty (60) days of written notice from the Corporation or fails to commence correcting the default within sixty (60) days of written notice from the Corporation and fails to complete the correction within a reasonable time after the written notice is received, the Corporation may, at its option, after written notice to the Gas Company:

(i) perform the obligation at the Gas Company's expense; or

(ii) take action for damages and/or an order of specific performance directing the Gas Company to fulfill its obligations under this Agreement.

7. ~~(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 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.

8. ~~(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.

9. ~~(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

_____

_____

_____

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.