Reply Submission of Enbridge Consumers Gas, Union Gas Ltd. And Natural Resource Gas

Introduction

1. Following completion of the parties' oral presentations on January 25, 2000, representatives of Union Gas Ltd., Enbridge Consumers Gas and Natural Resource Gas ["the Gas Companies"] met with representatives of the Association of Municipalities of Ontario ["AMO"], the City of Toronto and the Region of Ottawa-Carleton ["the Region"] to negotiate and resolve the outstanding issues brought before the Board.

2. The Gas Companies and AMO met on three occasions at the Boards offices (January 28, 31 and February 7) and resolved all of the technical issues except fee and default provisions. Ottawa-Carleton and Toronto attended the initial meetings but did not take an active role in the negotiations. Both disagreed with AMO's position on relocation charges. A copy of the Model Franchise Agreement, with all agreed-to changes identified in "black-line", is attached as Appendix 1.

3. By way of this Reply Submission, the Gas Companies will respond to the positions put forth by AMO, the City of Toronto and the Region on the remaining issues: permit fees, compensation for municipal rights-of-way, default provisions, relocation costs and existing agreements.

4. At the presentations on January 25, the Region of Ottawa-Carleton spoke on behalf of the municipalities regarding the issues of the payment of permit fees and compensation for the use of municipal rights-of-way fees (identified as issues 1 and 2). The City of Toronto made submissions on behalf of the municipalities about legal, jurisdiction and legislation matters and AMO representing all of the municipalities in Ontario made submissions on the remaining issues (numbers 3 to 10) and two new issues, existing agreements and the need for a Board-directed mediation process.

5. Because each of these groups represented the interests of all municipalities, except for relocation costs and duration, the Gas Companies will address their response to the remaining issues collectively and will refer to the above-noted parties as "the Municipalities".

Payment of Permit Fees

6. At the oral presentations on January 25, 2000, the Region of Ottawa-Carleton summarized the Municipalities' position by noting that this is a "road management hearing" and that the issues of rates and taxes "are irrelevant" (tr. p. 52, 53). In their written submissions, the Region requested that the "OEB be guided not by the effect its directions may have on gas rates, but by the effect on the municipality's obligation as a

trustee of its roads to manage them properly on behalf of all rights-of-way users and in the best interests of the public" (Region of Ottawa-Carleton written submissions – para. A-4).

7. The Gas Companies submit that tax payments and rate impacts are entirely relevant and important considerations that the Board must take into account when considering whether or not to accept the municipal proposal that would allow the provision of permit fee charges and right-of–way charges in the Model Franchise Agreement.

8. Any additional charges imposed on the Gas Companies in the operation of their business will have direct and significant impacts on natural gas ratepayers throughout the province. It is the Gas Companies' position that under the Board's mandate to "maintain just and reasonable rates for the transmission, distribution and storage of gas" and "to facilitate rational expansion of transmission and distribution systems" (Ontario Energy Board Act ("OEB Act") S. 2(2)and 2(3)), the Board cannot disregard the resulting increase in gas rates and the potential decline in natural gas distribution expansion if the current Model Agreement is changed to allow for the provision of municipal fees.

9. The Municipalities contend that they "have the authority to manage their roads and that this be recognized" (tr. p. 61). While this authority is evident in the Model Franchise Agreement, it is in no way precluded by the presence of natural gas pipelines in the road allowance.

10. The Model Franchise Agreement ["MFA"] grants, to the Gas Companies, the right to use municipal road allowances *subject* to certain conditions. Section III(1) of the Agreement outlines the requirement for municipal approval of the Gas Companies' construction activities in the road allowance.

> *"The location of the work as shown on the said plan must be approved by the Engineer/Road Superintendent before the commencement of work and the timing, terms and conditions relating to the installation of such works shall be to his satisfaction".*

11. This section of the Agreement further acknowledges the Municipalities' right to manage use of their roads by including the provision that:

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

12. The MFA further guarantees the Municipalities' road management rights with the "Restoration" clause (Section 3) which states that :

> *"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 therefore as certified by the Engineer/Road Superintendent".*

13. The Municipalities have contended that the imposition of municipal fees on the Gas Companies is a "realistic look at what the use of the road allowances is costing the taxpayers" and is "not a money grab"(tr. p. 59). In light of the above-noted guarantees that are built into the MFA and the fact that municipalities do not pay to acquire their road allowances, the Gas Companies consider this latest pursuit of fees to be strictly revenue driven rather than cost-based.

14. The Municipalities would like the Board to disregard the fact that the Gas Companies already remit a significant amount of money to the Municipalities in the form of property taxes (tr. p. 53). The fact that the Gas Companies pay these taxes and other users don't is one of the very reasons why they should not be subject to additional municipal fees.

15. When considering the property tax issue, it is important to realize the way in which each public utility is assessed for use of municipal road allowances.

Utility	Manner of Assessment	Statutory References *
Bell Canada	Bell Canada pays a "Gross Receipts Tax" to the Province of Ontario (4%) They are assessed on their real estate holdings (land and buildings) in the same manner as the general public. Bell Canada does not pay tax on any poles, wires or underground cables.	S.159 of the *Municipal Act* S. 3(1) of the *Assessment Ac* (O.R 320/99)
Cable Companies	Cable companies are assessed on their real estate holdings in the same manner as the general public. They do not pay any tax on their cable lines.	S. 3(1) of the *Assessment Act*
Hydro	Prior to April1, 1999, Ontario Hydro made payments in lieu of property taxes to the Province of Ontario. As of April 1, Ontario Hydro no longer makes payments in lieu of taxes on its property and is assessed on its real estate holdings only in the same manner as the general public. Hydro does not pay taxes or fees on its transmission towers or wires.	S. 368.3(1) of the *Municipal Act* (O.R. 387/98) S. 41(8) Electricity Act adjustment for property tax

Municipal Electric Utilities	MEU's are assessed and taxed on their land and buildings in the same manner as the general public. Tax payments are a "grant-in-lieu" . MEU's do not pay taxes or fees on any utility poles, wires or underground cables.	S. 3(1) of the *Assessment Act*
Gas Utilities	Gas utility companies are assessed on their real estate holdings ***and*** their pipeline networks (on a lineal or per metre basis) whether located on private property or provincial road allowances. Adding new fees would widen the current payment disparity.	S. 3(1) of the *Assessment Act* S. 25(4) of the *Assessment Act* (O.R 282/98 Part VIII)
* Excerpts of the Statutory References are found in Appendix 2		

16. As illustrated in this table, the Gas Companies are the only utilities that pay property taxes on their pipeline or distribution facilities. These facilities are assessed on a lineal basis and the majority are buried and do not employ municipal services. Any remedial or restoration work is paid for by the Gas Companies.

17. The Municipalities have suggested that "it is inappropriate for private profit seeking companies to be subsidized by municipal taxpayers and that it is only fair and reasonable that the users of the public rights of way be responsible for all costs arising from that use" (tr. p. 62). This "user pay" approach presented by the Municipalities in no way represents a fair and equitable method for recovery of costs for municipal services and in fact, is immensely unfair to the Gas Companies.

18. The Municipalities forget that they are already the recipients of more than $71 million annually in property taxes from the Gas Companies and as such are well compensated for the use of road allowances. If the user pay approach were appropriately applied, the Gas Companies would pay less, not more, as these property tax payments more than cover the costs of any municipal services provided and other private profit seeking companies would be required to pay an equitable share for their use of the roads.

19. For example, the concept of "just-in-time delivery" has significantly increased the number of heavy transport trucks using the traveled portion of municipal roads on a daily basis. These vehicles use municipal roads for the purpose of private profit seeking companies and likely cause pavement degradation and damage, yet are not required to remit any sort of payment to the municipality. If municipalities want to charge for pavement costs on a user pay basis, they must charge all users for their share of the degradation.

20. The Municipalities have put forth the idea that based on the five Federation of Canadian Municipalites ["FCM"] principles found at page 4 of the Region of Ottawa-Carleton submission, "all users of the road, utilities should be treated fair and equally" but they acknowledge that this is not possible. They recognize the unequal playing field, but say its not their place to correct taxation inequities (tr. p. 60). They fail to point out that the inequities extend to fees, and instead ask that the Gas Companies pay

even higher premiums for use of the road allowance while MEUs are shielded from fees under Section 41(8) of the Electricity Act.

21. It is the Gas Companies' position that while fair treatment is a desirable goal, it must be evident in practice to have any value. The current tax treatment is already inconsistent with this goal as gas utilities are taxed on a different basis than any other utility or other users of the traveled portion of the road and/or road allowance. Any additional municipal charges imposed on them will further advance this inconsistency.

22. The Municipalities have indicated a request for fees to "recover the direct and indirect costs of the use of public rights of way by the gas company which fall into five categories….general administrative costs, pavement degradation costs, relocation and adjustment costs, direct quantifiable costs and work-around costs that are unquantifiable". (tr. p. 63)

23. The Municipalities have defined general administrative costs as costs related to permit issuance, record keeping, field inspection, co-ordination and technical review of plans, legal advice and general overheads. The Gas Companies acknowledge that there may be some costs associated with the above-noted activities. However, the Gas Companies noted in their oral submissions and reiterate that most permits that are applied for by the Gas Companies are simply requests for permission to dig and frequently, it is no more than a phone call. It is the Gas Companies' position that if the property tax payments remitted to the municipalities on natural gas pipelines were earmarked for specific costs associated with any administrative costs incurred by the municipalities in the provision of services to the gas companies, these costs would be more than covered.

24. The Municipalities indicate that they experience direct quantifiable and work-around costs that are not quantifiable as a result of a gas utility constructing in municipal road allowances. The Gas Companies submit that when a gas utility constructs in a road allowance, it is required and guaranteed by the restoration clause in the MFA that the gas company "shall well and sufficiently restore, to the reasonable satisfaction of the Engineer/Road Superintendent, all highways, municipal works or improvements 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".

25. This restoration clause protects the municipality from any permanent negative impacts to its roads as a result of gas company construction. If a municipal Engineer/Road Superintendent is not reasonably satisfied with the restoration of a construction area the gas company is required to return and repair the area to municipal satisfaction. This clause even includes a provision that the work must be completed in a "reasonable time period" or the municipality may do the work and charge the gas company for it. The Gas Companies are not aware of any instance where a municipality has exercised its

right to restore and bill the gas company for the restoration that was not satisfactorily completed in accordance with the provisions set out in this clause of the MFA.

26. The Gas Companies submit that any allowance for provision of municipal fees in the MFA would amount to "double taxation" on the gas utilities as any administrative costs and costs associated with gas company construction are amply addressed with the significant property tax revenues remitted to municipalities and guaranteed satisfactory restoration of any construction activity.

Impacts to Natural Gas Ratepayers

27. The Municipalities have suggested a number of ways to allow for the provision of municipal charges on the Gas Companies in the MFA.

28. The preferred position of the Municipalities, according to AMO, would be to "eliminate from the MFA any constraining provisions….which would 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 written submission, p. 4).

29. AMO, in their written submission suggested an alternative to the above-noted suggestion. This alternative requires that if a specified fee is to be entrenched in the MFA, it should be $350.

30. At the oral presentations, the Region of Ottawa-Carleton, suggested yet another alternative for the Board to consider. "The Board may wish to recommend a general permit fee that would apply to all municipalities, except those municipalities that adopt a specific fee schedule by bylaw." (tr. p. 64) The Region's proposal recommended a municipal consent permit fee on the order of "$100 for a village or township, $200 for a city or town and $300 for a county or region" (tr. p. 65).

31. Despite the Municipalities' many claims that these proposed municipal fees are required to recover costs associated with provision of municipal services and the effects of gas pipelines located in road allowances, their proposals for a general permit fee that would apply to all municipalities eliminates any justification for charging these fees on a cost-recovery basis since a "general fee" cannot be attributed to the specific costs incurred as a result of the provision of a specific service.

32. The Municipalities have cited Section 220.1 of the Municipal Act as the legislative authority that allows municipalities in Ontario "to impose fees and charges to those who benefit from services provided by the municipality and for use of its property". (AMO written submission, p. 2)

33. It should be noted that Section 220.1 does not expressly require municipalities to justify the reasons or necessity for a particular fee or charge, nor does it require that any fees or charges for services be linked or based upon the actual costs of the services.

Additionally, Section 220.1 pertains not only to fees and charges for services, but also to the use of the municipality's property or property that it controls. If the Board grants the requested amendments to the MFA, and removes the constraining prohibition of municipalities to pass bylaws which impose permit fees, it is granting the municipalities the power to unilaterally levy undetermined and unlimited charges and fees for any current or future municipal service.

34. Giving the Municipalities the ability to charge permit fees, whether on a municipality by municipality or common general permit fee basis, will result in significant supplementary costs to natural gas ratepayers and further cross-subsidization across franchise areas throughout Ontario.

35. The economic state of each municipality will determine which natural gas ratepayers will subsidize growth in other communities. For example, if one community is enjoying economic health and consistent growth and construction, under the Municipalities' proposal, they will be charging permit fees to the gas company on a more frequent basis than a community that may not be as economically healthy with less growth. As such, the community experiencing an economic "decline" will further subsidize a community experiencing more economic growth.

36. This point is further illustrated with the Municipalities' suggestion that permit fees charged in cities and regions be exponentially higher than those charged in villages or townships (tr. p. 65). In this case, the gas customers in the smaller communities (many of whom already pay contributions in aid of construction) will be required to subsidize construction in the larger, more economically healthy communities in Ontario.

37. The likelihood of this occurring is also illustrated by the fact that AMO has suggested a general fee in the amount of $350 and the Region of Ottawa-Carleton has suggested a permit fee of $560.

38. If the Municipalities are given the ability to charge municipal fees to the Gas Companies, the result will be significant supplementary costs to natural gas ratepayers and further cross-subsidization across franchise areas. These costs will add at least $43 million (a conservative estimate) to the $71 million of pipeline and property taxes already paid to municipalities by the Gas Companies.

Compensation for the Use of Municipal Highways

39. In addition to charging the Gas Companies permit fees, the Municipalities wish to charge the Gas Companies an additional $250.00/kilometre of natural gas pipeline on an annual basis. The Gas Companies have estimated this cost to be approximately $14 million per year. There is no substantiated cost basis for this occupancy fee. Pavement degradation results from the use of the road by all users, including daily transportation.

Using land costs to estimate the amount of the charge is misleading since municipalities do not pay for the road allowances.

40. The Municipalities have requested that the "Board recognize that municipalities as owners and stewards of the public rights-of-way should receive fair and reasonable compensation for the use of municipal rights-of-way for profit purposes having due regard for the value of the municipal property used" (tr. p. 74). Again, the Municipalities forget that they are already being compensated by the Gas Companies for their use of the rights-of-way with the significant monies remitted to them on an annual basis in the form of property taxes. If these payments are not intended to compensate the municipality for use of the rights-of-way and costs associated with that use, why then, are the property taxes paid on *each* kilometre of natural gas pipeline?

41. In their written submissions, the AMO admits 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" (tr. p. 5).

42. Not only are the other various utilities that use road allowances exempt from paying property tax on their distribution facilities, AMO has admitted that they will not be asked to pay user fees or compensation for municipal rights-of-way.

43. A realistic look at the Municipalities proposals shows that if their requested amendments to the MFA are accepted, the Gas Companies will be the *only* utility required to pay undetermined and unlimited user fees *and* occupation fees for use of the rights-of-way in addition to the property taxes paid on each kilometre of their distribution facilities.

44. If this is truly a question of fairness, the Gas Companies submit that the Board must consider the fact that there is already a significant discrepancy in the payments currently made to the municipalities by the Gas Companies for use of the rights-of-way. If the Gas Companies are required to provide further compensation to the municipalities, this will only exacerbate this discrepancy.

45. Municipal rights-of-way are public assets which have been entrusted to the municipalities to be used for the benefit of the public. The Gas Companies submit that their use of these rights-of-way serves that purpose. Any compensation required for such use is addressed with the significant payments remitted to each municipality in the form of property taxes.

Relocation Costs

46. The Region of Ottawa-Carleton requested that the Board treat the matter of relocating and adjusting the Gas Companies' equipment occupying the municipal rights-of-way as a cost compensation issue. (tr. p. 68)

47. The Board, in their issues list, did not identify relocation costs as an issue that should be addressed and for this reason, the Gas Companies have not made submissions on this issue. It must be noted that the Region is the only municipal representative requesting that this issue be revisited.

48. The question of the appropriate sharing of the costs of relocating existing gas pipelines was a very contentious issue at the E.B.O. 125 proceeding and received a significant amount of attention This issue was thoroughly tested and examined, and after reviewing the evidence and the positions of all parties, the Board prescribed a list of guidelines to be followed from which the current method of allocating the costs of pipeline relocations was developed.

49. The Board developed these guidelines to ensure that the allocation of relocation costs was done in a simple, clear and fair manner and the current 35%/65% cost allocation formula serves that purpose.

50. It is the Gas Companies' position that the underlying principles that influenced the current allocation of relocation costs have not changed since the E.B.O. 125 proceeding and thus, further review of this issue is not warranted.

Initial Term of the Model Franchise Agreement

51. The Region of Ottawa-Carleton stated their opinion that "five years is a more appropriate term" (tr. p. 75) for an initial franchise agreement. Again, the Region has raised an issue that was not identified on the Board's issues list and is not raised as a concern by any other municipality or municipal representative. In addition, the issue of initial agreements does not apply to Ottawa-Carleton as all the constituent municipality's in the Region have existing franchise agreements. AMO has agreed to 20 years as the appropriate term for the initial franchise agreement.

52. The issue of the term of an initial franchise agreement was thoroughly tested at the EBO 125 proceeding. The Board recognized that " when a utility commences distribution in a new franchise area, it expects a return on its investment over time. If the term is too short, the utility's risk may increase, which could lead to increased costs of capital and in turn might increase the cost of gas throughout the franchise area". (EBO 125, Final Report of the Board – 7.35)

53. It is the Gas Companies position that the underlying principles that influenced the term of 20 years for an initial franchise agreement have not changed since the EBO 125 proceeding and thus, further review of this issue is not warranted.

Updates to Existing Agreements

54. The agreement between the Gas Companies and the Municipalities on the issue of renewal duration, applies prospectively to renewal agreements signed following the Board's approval of the new model agreement. Existing franchise agreements will not be impacted by the new model agreement and will remain in force until their renewal dates. The Board has indicated in E.B.O. 125 that it does not have the necessary authority to revise existing contracts.

Default Provisions

55. The Gas Companies could find no valid reason for inserting a default clause in the new Model Franchise Agreement. There is no evidence or expectation of default and the existing regulatory and legal structure provide adequate protection to ensure that default will not be a concern in the future.

56. The Gas Companies simply cannot agree to any clause that would terminate the franchise agreement. The Gas Companies have a statutory obligation to continue to serve their customers and a regulatory right to provide fair return to their shareholder. Asking the Board to insert a termination clause in the model franchise agreement, which is triggered by a Board order under Section 42 of the Ontario Energy Board, would extend the intent of Section 42. This section confers on the Board the power to order a distributor to provide a number of services, but its authority to order a distributor to cease to provide a service is limited to gas sale service.

57. The reference to poor performance of a predecessor company of NRG was inappropriate and not representative of the current situation in Ontario. Any concerns with safety or operational performance are quickly addressed by the Gas Companies. The Gas Companies have a vested interest in making sure they deliver safe and reliable service. Any municipal concerns on safety can be raised with the TSSA Director. Issues related to operational and financial performance can be raised with the Board. Disputes related to contract terms and performance can be addressed in the courts. Problems with remedial work can be corrected to the satisfaction of the municipalities and the costs billed to the Gas Companies under the current Model Franchise Agreement. And finally, and most importantly, any operational or roadwork problems can be (and have been) worked out locally with the people in the field.

58. For these reasons, the Gas Companies respectfully submit that there is no foundation for AMO's request for a termination clause.

Board Jurisdiction and Authority

The Board's Jurisdiction is Paramount

59. Counsel for the City of Toronto made lengthy submissions to the Board about section 220.1 of the *Municipal Act* (*e.g.*, tr. 105-130). These submissions were focussed on the wording of section 220.1, but they did not address the relevant provisions of the statutory frame-work which establishes the jurisdiction of the Ontario Energy Board and, in particular, the OEB Act. The points made by counsel for Toronto about section 220.1 of the *Municipal Act* are answered completely by the provisions of the OEB Act.

60. Section 2 of the OEB Act lists the objectives by which the Board is to be guided. Section 2 states explicitly that these objectives apply when the Board is "carrying out its responsibilities under this or any other Act". In other words, the objectives listed in section 2 of the OEB Act apply when the Board is carrying out its responsibilities under the *Municipal Franchises Act*

61. The recovery of permit fees by municipalities does not fall within any of the objectives which guide the Board when it carries out its responsibilities under the *Municipal Franchises Act*. On the contrary, the submissions made to the Board in this proceeding about the recovery of permit fees cannot be reconciled with the Board's objective to "maintain just and reasonable rates" and the objective to "facilitate rational expansion of transmission and distribution systems".

62. Counsel for Toronto confirmed that his client's position on permit fees does not meet the Board's objective to maintain just and reasonable rates. He said that the fees charged by a municipality do not have to be just and reasonable "in the regulatory sense" (tr. 160) and he also went so far as to say that the Board would not have jurisdiction to require, by way of the model franchise agreement, that the fees charged by municipalities be just and reasonable (tr. 161).

63. Another provision of the OEB Act which was not addressed by counsel for Toronto is section 128. Subsection 128(1) states that, in the event of a conflict between the OEB Act and any other general or special Act, the OEB Act prevails. Subsection 128(2) states that the OEB Act and the regulations prevail over any by-law passed by a municipality.

64. It is noteworthy that section 220.1 of the Municipal Act does not in any way require municipalities to impose or recover fees or charges. The section simply states that a municipality "may pass by-laws" imposing fees or charges on any class of persons. Should a municipality purport to pass a by-law imposing fees or charges on gas distribution companies, it is clear from subsection 128(2) of the OEB Act that the OEB Act would prevail over any such by-law.

65. Finally, and perhaps most importantly, subsection 19(6) of the OEB Act states that the Board has exclusive jurisdiction "in all cases and in respect of all matters in which

jurisdiction is conferred on it by this or any other Act". In other words, the Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by the *Municipal Franchises Act*. Under subsection 9(1) of the *Municipal Franchises Act*, the Board must approve the terms and conditions of franchises and under subsection 9(2), the Board has and may exercise such jurisdiction and power as is necessary for the purposes of section 9. Subsection 19(6) of the OEB Act establishes that, when the Board exercises this authority under the *Municipal Franchises Act*, it has "exclusive" jurisdiction.

66. This conclusion is further reinforced by section 20 of the OEB Act, which states that, subject to any provision to the contrary, the powers of the Board set out in Part II of the OEB Act apply to all matters before the Board under this "or any other Act". This would include, for example, the power of the Board pursuant to subsection 19(4) of the OEB Act to determine, of its own motion, any matter that it may determine on an application. Thus, by virtue of the combination of subsection 19(4) and section 20 of the OEB Act, the Board can determine, of its own motion, any matter that it could determine on an application under the *Municipal Franchises Act*. Also, by virtue of the combination of sections 20 and 23 of the OEB Act, the Board can make an order under the *Municipal Franchises Act* imposing such conditions as the Board considers proper and the order may be general or particular in its application. Again, in exercising any of these powers, the Board has an exclusive jurisdiction pursuant to subsection 19(6) of the OEB Act.

67. The decision of the Ontario Divisional Court in *Union Gas Limited v. Township of Dawn*[1] confirms that the exclusive jurisdiction of the Board is paramount. The *Township of Dawn* case concerned the validity of a by-law passed by Dawn Township under the *Planning Act* which purported to require that transmission lines be laid in specified corridors. At the time of the *Township of Dawn* case, the provisions now found in subsections 128(1) and 128(2) of the OEB Act were found in subsections 57(1) and 57(2) of the predecessor statute (see page 726 of the *Township of Dawn* decision). However, as pointed out by the Divisional Court (at page 727), section 46 of the *Planning Act* was identical to subsection 57(1) of the predecessor to the OEB Act.

68. For present purposes, it is of some importance that Section 46 of the *Planning Act*, as considered by the Divisional Court in the *Township of Dawn* case, contained a provision stating that it prevailed over other legislation. This is stronger and more explicit language than the mere use of the words "despite any other Act" in section 220.1 of the *Municipal Act*. Notwithstanding the explicit language of section 46 of the *Planning Act*, the Divisional Court decided that the powers granted to municipalities under that statute must always be read as being subject to special legislation such as is contained in the OEB Act and related legislation (page 734 of the *Township of Dawn* decision). The Court said that all matters relating to or incidental to the production, distribution,

[1] (1977), 15 O.R. (2d) 722

transmission or storage of natural gas are under the exclusive jurisdiction of the Board and not subject to legislative authority by municipal councils under the *Planning Act*.

Proposed Levy is an Unlawful Tax

69. The authority under section 220.1 of the *Municipal Act* is to charge a "fee or charge" for certain municipal services, or for the use of municipal property.

70. Charges or fees are different from taxes, and what the Municipalities have proposed in this case would be a tax, not a "fee or charge". It would therefore be unlawful, even apart from its conflict with the specific energy legislation.

71. There are several relevant and recent decisions on this important distinction. The highest judicial authority is the Supreme Court of Canada decision in *Re Eurig Estate*[2], which held that probate fees are a tax, not a charge. (Having found that the probate "fees" were not really fees at all but rather a form of taxation, the Court ruled them to be an unlawful tax.)

72. The Court adopted and elaborated upon the characteristics of a tax, as established previously by the Supreme Court of Canada in *Lawson v. Interior Tree Fruit*[3]:

    1. A tax is enforceable by law. It is compulsory. (A levy, by contrast, is a price attached to a voluntary transaction.)

    2. A tax is imposed under the authority of the legislature. This includes the authority of a City to pass by-laws. It is, in other words, imposed as part of the lawmaking function.

    3. A tax is levied by a public body. This includes a municipality.

    4. A tax is intended for a public purpose.

73. The *Municipal Act* expressly states that the only fee or charge authorized by section 220.1 is a fee or charge "for" a service, or "for" a use of property. The payment is made in exchange for the right to use the property. Absent the payment of the charge, there is no right to the service or to the use of the land. To be characterized as a "fee or charge" the fee or charge must be linked to a privilege or service of some kind, and the person asked to pay must have some means of declining the privilege or service. A valid example of a user fee for the use of property under this section would be a

[2] [1998] 2 S.C.R. 565

[3] [1931] S.C.R. 357

charge for entrance to a municipal swimming pool or a municipal recreational facility.

74. The requirement for this transactional quality – that a charge under section 220.1 must be "for" a privilege or service - has been emphasized in all of the judicial considerations of the scope of municipal authority under section 220.1. (*OPCA v. Harvey*[4]*, Carson's Camp v. Amabel*[5] and *Urban Outdoor Trans Ad v. Scarborough*[6]).

75. It is important to note that the setting of the amount of user fees is in the discretion of municipal Councils. It is not subject to review by the Ontario Municipal Board. There is therefore no recourse against an unreasonable user fee, if it is otherwise lawful. This observation reinforces the conclusion that the charges under section 220.1 must be for privileges or services which the person charged elects to take voluntarily. The recourse against unreasonable user fees under section 220.1 is therefore to decline to purchase the privilege or service for which the charge is made.

76. The submissions made by counsel for Toronto in support of these charges concede that the gas works are permanent. Removal of them is not an option. (tr. p. 114/115) Any attempt to charge gas works for their mere presence in the public highway therefore is immediately seen to lack any characteristics of a voluntary transaction. The gas company cannot decline, either practically or legally, to use the highway and the municipality cannot require it to vacate the highway. The levy would therefore be a pure tax, indistinguishable from a property tax.

77. The levy proposed by Toronto therefore meets all of the criteria of being a "tax" within the principles laid down by the Supreme Court of Canada. It does not have the fundamental quality of a "fee or charge", set out in such cases as *Ontario Private Campground Association v. Harvey Township*, which is that it must be part of a voluntary transaction with the municipality for services, or for a permission to use municipal property, (or be ancillary to a valid form of municipal regulation.)

Conclusion

78. The Model Franchise Agreement was created in 1987 in the interest of fairness and consistency to the benefit of both municipalities and gas utilities in Ontario. To amend the Model agreement and allow the provision of permit and occupancy fees will adversely impact natural gas ratepayers and eliminate the elements of fairness and equity currently protected by the Model Agreement.

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[4] (1997), 33 O.R. (3d) 578

[5] (1998), 159 D.L.R. (4th) 180

[6] (1999), 43 O.R. (3d) 673

79. The Municipalities wish to disregard the property taxes paid to them as "an assessment issue not to be considered by the Board" (tr. p. 53). This, however, is a key factor, relevant to the issue of fairness that must be considered, as the Gas Companies are the only users of municipal road allowances who already remit significant dollars to the municipalities due to the presence of their distribution facilities in the road allowance.

80. The Gas Companies submit that allowing municipalities to charge additional fees will result in cross-subsidization, inequity and significant additional annual costs to natural gas consumers.

81. The course to be followed in response to the municipal submissions is clear. The Board should continue to exercise its exclusive jurisdiction, and should determine all of the terms and conditions for the placement of gas works in highways.

82. It therefore is entirely practical and sensible that the Model Franchise Agreement enunciate for all interested parties that the Board does not intend that extraneous charges will be added to its terms and conditions by municipal councils. In doing so the Board is stating its policy and is acting fully within its powers.

83. The Gas Companies respectfully request that the Board reject the proposed introduction of fees and approve the current Model Franchise Agreement with the changes agreed to by all parties as identified in the "black-line" version and filed at Appendix 1 of this submission.