

RP-1999-0048

ONTARIO ENERGY BOARD

IN THE MATTER of a Model Natural  
Gas Franchise Agreement

SUBMISSION BY THE  
REGIONAL MUNICIPALITY OF OTTAWA-CARLETON

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- The Regional Municipality of Ottawa-Carleton (“the Region”) makes this submission in response to a request by the Ontario Energy Board (“the Board”) for comments to assist in its review of the existing Model Natural Gas Franchise Agreement.
- The Region has read the Report entitled “*Summary of Discussions Between AMO and the Gas Companies Regarding Amendments to the Model Gas Franchise Agreement*”.
- The Region has read the submission made by the Association of Municipalities of Ontario (“AMO”) to the Board on this matter, and with some minor differences, adopts those submissions.
- The Board has described ten issues on which it invites comment. The Region will comment on them, by the number given each by the Board.

**A     INTRODUCTION**

Before commenting on each of the ten issues, the Region makes the following comments by way of introduction to, and as the basis for, its submissions.

- A-1 The Region views the Model Franchise Agreement (“Model Agreement”) for the purpose of this particular review as a “road access agreement”, and respectfully requests that the Board do the same.
- A-2 The Region appreciates that the Board’s mandate, as outlined in the *Ontario Energy Board Act*, is directed at matters other than municipal road management, but the ten issues designated by the Board for review all clearly relate to road management.
- A-3 In that there has not before been a comprehensive OEB hearing dedicated exclusively to the issue of municipal road management and the effects that proper or improper management might have on the municipality and on the gas company, the Region respectfully requests that the OEB approach this hearing with an eye, not to precedent, but to setting precedent.
- A-4 Again, with the greatest respect, the Region requests 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 its public.
- A-5 Why exactly is there this need for proper road management? Consider the uses made of the road allowance: vehicles, pedestrians, cyclists and transit which travel the roadway; water, sewer and the many other “utilities” located on, above and below it; regulatory, direction, tourist, traffic, and the myriad of other signs; street vending; street cafés; parades and demonstrations; sporting events; donation station; panhandlers; encroachments; and even as a home for the homeless. Management of this asset becomes more challenging and critical by the day, and it is vital that the municipality have the authority to regulate and manage all of these uses to ensure its efficient and safe use. Essentially, this means the ability to:
- keep the road allowance safely repaired;
  - ensure the co-operation and co-ordination of all users;
  - ensure proper pavement restoration;

- ensure at all times the safety of all road users and the public;
- ensure minimal interruption of access to the road by its users, and by the businesses and services which are dependent upon it;
- ensure the roadway's structural integrity; and
- charge and receive compensation for its use.

A-6 Some, and not just the gas companies, view the recent municipal insistence on proper road management as something else. Namely, an opportunity to make money. That is not so. The Region's primary objective is, and always has been, to establish for itself and all municipalities the authority to manage properly its roads on behalf of its tax payers. For the sake of the municipality and of the gas company, it needs direction and certainty in these matters.

A-7 This is not to say that the recovery of fair and reasonable compensation is not an objective of this submission. As an essential ingredient of good road management, it is. Just as the gas companies, with a view to setting their rates and managing their affairs, must know the actual cost of doing business, so must the Region.

A-8 The real stimulus for the Region's interest in a review of the Model Agreement, and all of its Road Access Agreements, is the wide-spread deregulation of the "utility" business at the Federal and Provincial levels, and the resultant surge in demand for the limited space on its road allowances. With the increase in demand has come the obvious and sharp realization that this valuable resource has limits and must be managed accordingly. Figures 5 and 6 are illustrations of this demand. The increase in underground use in the form of a mass of wires, cables and pipes is having severe implications for traffic and business interruption, road reconstruction and repair, work-around costs, pavement degradation, and relocation costs. All at the municipal taxpayer's cost.

A-9 Provincial legislation does not treat users of the road allowance equally. Some "utilities" are assessed for property taxes, while others are not. Some pay a gross receipts tax, but others do not. Some are protected by specific regulation as to

road use fees, others are not. With respect, this hearing is not the place to address inequities in legislative treatment; nor with respect, is this Board the means by which legislative imbalance is rectified. Within the limits of its legislative authority, the Region intends to treat all “utility” road users the same, and Regional Council has set for itself that objective.

A-10 With this as its objective, Regional Council has adopted the following five Federation of Canadian Municipalities (“FCM”) principles:

- a) **In pursuance of bona fide municipal purposes, municipal governments must have the ability to manage the occupancy and uses of rights-of-way, including the establishment of the number, type and location of facilities, while taking into account applicable technical constraints.**
- b) **Municipal governments must recover all costs associated with occupancy and use of rights-of-way by other parties.**
- c) **Municipal governments must not be responsible for the costs of relocating facilities situated along municipal rights-of-way if relocation is required for bona fide municipal purposes.**
- d) **Municipal governments must not be liable for losses associated with the disruption of services or with damage to property as a result of usual municipal activities or the activities of other parties along municipal rights-of-way.**
- e) **Recognizing that rights-of-way have value, municipal governments must receive full compensation for the occupancy and use of municipal rights-of-way by other parties.**

A-11 Regional Council has made it clear that these five principles should serve as the basis for a fair and equitable consent process by which all private utility companies are granted access to its roads. With respect, and recognizing the Board’s absence

of jurisdiction in national matters and in matters related to other “utilities”, it is obvious to the Region that municipal management of road use by “utilities” reaches far beyond that of the gas company in Ontario.

- A-12 The Canadian Radio-television and Telecommunications Commission (“CRTC”) is about to issue a public notice requesting submissions from Canadian municipalities on the merits of an Application by the City of Vancouver, which Application requests direction from the CRTC as to its road management authority when granting road access to telecommunication companies. Thus, we have hearings at the Federal and Provincial levels, taking place at the same time, which deal with the identical issue of road management.

While proceedings at the Federal level may be viewed by some as irrelevant to this hearing, to Regional Council, they are relevant and important. The CRTC and the OEB will determine the same issues, and hopefully will share Council’s view that all private utility companies should be granted access to its roads on the same equitable and fair basis.

Accordingly, cross reference in this submission to the Region’s position on access to its roads by telecommunication companies, electricity companies, and other “utilities”, is intentional. Similarly, use of the words “gas company” and “utility” or “utilities” interchangeably is intentional and reflects the Region’s belief that this issue is not limited to use of the roads by gas companies.

## **PAYMENT OF PERMIT FEES; COMPENSATION (NOS. 1 AND 2)**

- B-1 Compensation: In joining the first two “issues” listed by the OEB, the Region suggests that reimbursement be examined under the general description “compensation” and that fair and reasonable compensation is comprised of three components:
- a) Permit Fee Costs - the administrative cost of issuing a permit to cut or occupy the road. Normally, this is reflected in a municipality’s by-law, the primary

purpose of which is to establish basic conditions for a utility road cut.

Examples of these costs appear in paragraphs B-11, B-12 and B-13.

- b) Costs - these are the direct and indirect costs of the gas company's presence in the road, and comprise those costs referred to in paragraphs B-14 to B-28 of this Submission and include work-around costs, relocation costs and pavement degradation costs. These costs could be included in the road cut permit fee, but generally speaking they are not, probably because they have not been the subject of sufficient analysis by municipalities.
- c) Road Use Fee - a licence fee which represents the value of municipal land, and the value attributed to the gas company's use and occupation of an increasingly finite resource.

B-2 Recognition of the Cost Recovery Principle: The concept of municipalities levying permitting and other fees to recoup their costs of public rights-of-way management is well established in practice throughout North America and supported by most utilities and public agencies. Numerous public agency organizations such as the American Public Works Association, the Federation of Canadian Municipalities, the Ontario Good Roads Association, the National Association of Telecommunications Officers and Advisors, and the Association of Municipalities of Ontario have adopted policies, statements and procedures with respect to the principle of cost recovery. In the United States, the concept of a public agency's right to the recovery of actual costs has been frequently upheld by the courts.

Decisions with respect to the matter of public agencies levying an additional licence fee that is based on the value of the public rights-of-way occupied by a utility have not been as consistent. While the regulatory regime in the province of Ontario may differ somewhat from that of other jurisdictions, the Region suggests that legislative support for a municipality recovering fair and reasonable compensation in the form of a road use licence fee is found in Sections 308 and 220.1 of the *Municipal Act*.

- B-3 Subsidization: It is the Region's submission that recovery of fair and reasonable compensation, as contemplated in the FCM principles, and as outlined above, is based upon the expectation that the municipal tax payer ought no longer subsidize gas companies, telecommunication companies, and any other profit making user of the road.
- B-4 This subsidization of certain industries is a disincentive to the development of alternative technologies, such as boring instead of trenching, and in the telecommunications industry, wire instead of wireless. It is also unfair to those competitors not using the public road allowances.
- B-5 "Compensation" and "Rates": Just as the gas companies are concerned about increases in costs and the effect on their customers, so too is the Region concerned about the road costs incurred on behalf of its tax payers. With respect, it seems reasonable that of the two, it is the user that should carry the costs incurred by the road authority which arise from the gas company's presence in the road. Of interest is a statement, in an application by Omnipoint Communications Inc., by a New York Court that, **"compensation is not rendered unfair or unreasonable simply because it does not fit Omnipoint's current business plan and pricing schedule"** *Omnipoint Communications Inc. v. Port Authority of New York and New Jersey*, 1999 U.S. Dist. LEXIS 10534 (S.D.N.Y July 13, 1999). When Omnipoint argued that the fees charged for its use of the tunnel would exceed its revenues from providing service in the tunnels the Court found this insignificant, and noted that Omnipoint could always raise its rates.

"Rates" and "Taxes" must be differentiated. A common reaction to the suggestion that gas companies pay their road use costs, and a road use licence fee, is that if forced to do so, rates will increase. In other words, whether by way of increased road costs or by way of increased gas rates, the taxpayer pays. This is not so. Whereas all tax payers pay for roads, not all taxpayers use, and pay for, gas. There is no justification whatsoever for equating "taxpayer" with "ratepayer".



- B-6 Taxes: A discussion of fair and reasonable compensation is met by some utilities with the statement that “we pay taxes”. However, payment of taxes does not equate to the right to operate one’s business on the road allowance. This is obvious.
- B-7 Compensation Generally: Municipal rights-of-way management/administrative expenses must be paid for by someone. If expenses are not allocated to the utility provider who can pass them on to the users of the service, the burden of the costs will be left to the taxpayer who may not benefit from the service provided. Also, allocating costs in this “user-pay” fashion gives a better indication of the true costs of service to all concerned. As well as placing an unfair burden on the general taxpayers, because the true cost of service is not apparent in the consumption of the commodity, good decision making in choice of product and in selecting among competing technologies is distorted. This phenomenon is a disbenefit for society as a whole. The lack of appropriate costing encourages inefficiencies.
- B-8 The historical relationship between municipalities and utility companies has resulted in many of the costs incurred by municipalities not being identified, isolated or monitored. Recently, however, municipalities have come to understand the need to evaluate costs associated with private sector use of rights-of-way.
- B-9 “Costs” Generally: This second category of compensation comprises the direct and indirect costs not included in the permit fee and which are incurred by municipalities as a result of the presence of a utility in the municipal rights-of-way. These include increased planning and co-ordination costs, maintenance and construction delay costs for locating, hand exposing, shoring, tunneling and working around utility plant as well as repairs when unmarked lines are damaged. These costs are often referred to as “work around” costs.

Closely affiliated with “work-around” costs are costs associated with public transit delays and traffic management (police officers and municipal staff) when

utility projects are underway and when municipal projects are extended in time. Municipalities also incur direct and indirect costs associated with the administration of insurance and damage claims, providing signs for detours and road closures and, administering franchise agreements

Municipalities incur significant costs associated with the degradation of pavements due to utility trenching works and reduced revenues from lost opportunities. The latter includes parking revenues lost during construction in the streets. Further, municipalities often incur costs associated with the relocation of a utility's infrastructure when this is required to accommodate new municipal works or for maintenance and repair purposes.

In addition to the above-noted costs, there are societal costs borne by the community as a whole. Businesses experience disruptions and the public is exposed to work zone hazards, noise, visual and air pollution. Even though these are not direct municipal costs, it is useful to note that these societal costs can be very high. Some communities in North America levy disruption and obstruction fees to utility companies in an attempt to keep these types of costs to an absolute minimum. It is common practice for municipalities to try and control these costs by prohibiting or severely limiting utility works during peak traffic hours.

B-10 The following sections elaborate on the permit fee costs and the “other” costs incurred by a municipality due to the presence of a utility in its public rights-of-way and discuss mechanisms for municipalities to realize recovery of these costs.

B-11 **General Administration (Permit) Costs.**

General administrative costs for municipal utility right-of-way management relate to the following:

- Permit issuance (clerical)
- Record keeping and administration (permits, maps, plans, insurance certificates, bonds, correspondence, inspection etc)

- Field inspection for compliance with restoration requirements, traffic requirements and compliance with legal line (location) assignment
- Co-ordination and technical review of applications for municipal consent (includes the circulation of plans and drawings to agencies and other utilities for co-ordination with municipal planning/construction/maintenance schedules, traffic management, protection of green assets, approve line assignment etc)
- Legal advice
- Associated general overhead (staff benefits, supervisors' and management time, support services such as telephone, computers, fax machines etc, office space, general corporate services such as processing receipts, printing costs etc)

B-12 An Ontario Good Roads Association report entitled "Report of the OGRA Task Force On Utilities Using Municipal Rights-of-Way - recovery of costs associated with issuance of consent permits", August 1999, proposes that general administrative costs be recovered by a consent (permit) fee and that this fee be determined by dividing total general administrative costs by the number of consents (permits) processed annually.

With one refinement, this is the method the Region proposes for the recovery of the general administration costs noted above. The refinement is simply to have a two level minor/major permit fee that recognizes the different level of municipal costs associated with large substantive utility works versus relatively minor works (e.g. installing a service connection that does not involve cutting the pavement, produces less traffic disruption and is of a much shorter duration). Since minor projects do not normally require the circulation of maps and drawings for detailed technical review, the costs for this process would not be included in a permit fee for minor works.

B-13 Each municipality's general administrative costs differ for many valid reasons. However, it is recognized that not all municipalities may wish to undertake a costing exercise to determine a permit fee. In view of this, the Region suggests

that the Board may wish to establish a “general” permit fee, that would apply to all municipalities, except those municipalities that adopt a specific fee schedule by by-law. The Region proposes that the general municipal consent permit fee be established at the amounts outlined in OGRA’s August 1999 taskforce report as follows:

Village/Township	\$100
City/Town	\$200
County/Region	\$300

**Table 1 - General Permit Fee suggested by Ontario Good Roads Association’s Taskforce**

The Region’s current permit fee is \$107.50. However, the Region is just completing a major review of all utility public rights-of-way management issues on Regional roads and as part of this review a thorough costing analysis was carried out. The Region’s general administrative costs for utility rights-of-way management are:

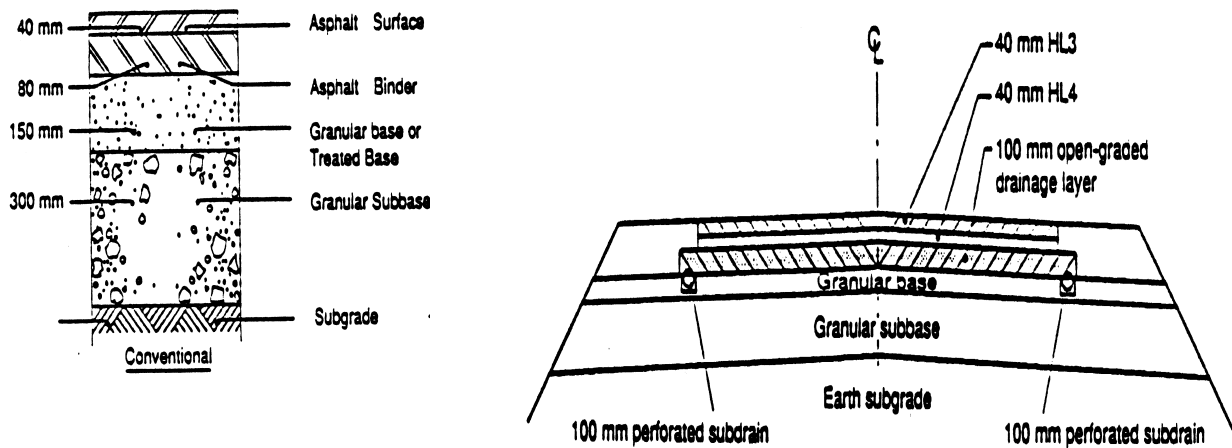
Basic permitting costs (minor projects):	\$395
Additional costs for major projects:	\$165

**Table 2 - Utility Permitting Costs in Ottawa-Carleton**

Thus a permit fee of \$560 would recover all the Region’s general administrative costs associated with a major utility project requiring the circulation of maps, plans and drawings for detailed technical review.

- B-14 **Non-Administrative Costs:** As noted above, this is the second category of costs, arising directly and indirectly from the Gas Company’s presence in the road, and are itemized below.
- B-15 **Pavement Degradation Costs:** As illustrated in Figure 1, typical road pavement structures are made up of layers of granular (gravel) subbase, granular base and surfacing (generally asphalt or concrete). Pavements are designed to support the

specific traffic loadings, subgrade and environmental conditions of a site. They are engineered structures just as are the pipes, wires and other plant of the utility companies. In fact, in many ways, due to the complex and varying ways that the various constituent materials interact depending on the specific environment and application (traffic, subgrade, drainage, climate etc), pavements may be much more complex engineering structures than the wires and pipes of most traditional utilities.



**Figure 1 - Typical asphalt pavement structure**

B-16 Utilities using the public rights-of-way often need to trench the road pavement structure to install or maintain their plant. The National Research Council of Canada and other agencies have identified many scientific studies showing that utility trenching permanently damages the pavement structure no matter how well restored. Like the human body, the pavement structure exhibits a permanent scar and, what is most significant, the pavement structure within and in the immediate vicinity of the scar area exhibits a much shorter life than the undisturbed pavement. Figure 2 shows the structural damage and shortened pavement life at a utility trench in the Region.



**Figure 2 - Utility trenching damage to a pavement in Ottawa-Carleton**

B-17 Past research on this subject indicates that up to 60 % of the pavement life can be lost due to utility trenching. The Region has just completed its own state-of-the-art study (**Impact of Utility Trenching and Appurtenances on Pavement Performance in Ottawa-Carleton, S. Q. S. Lee and K. A. Lauter, 29 July 1999, revised 13 August 1999**) using the most sophisticated testing equipment and analysis methods available. This study shows an average minimum reduced pavement life of 32 % for trenched pavement areas on the Region's urban Regional roads. It is estimated that lost pavement life costs due to utility trenching costs the taxpayers within the Region of Ottawa-Carleton at least \$1 million annually.

The Region's study of the impacts of utility trenching identified the minimum life cycle economic loss in terms of dollars per square metre. The pavement damage costs arising from the Region's study are as follows:

<b>Time since last Resurfacing (years)</b>	<b>Economic life cycle loss (minimum) due to utility trenching (per m<sup>2</sup>)</b>
2 or less	\$24.00
>2 to 4	\$20.00
> 4 to 7	\$16.00
>7 to 10	\$10.00
More than 10	\$ 4.00

**Table 3 - Pavement Life cycle costs due to utility trenching in Ottawa-Carleton**

B-18 The costs of pavement degradation can be most effectively recovered in conjunction with the general administrative permit fee, and may be added to the amounts appearing in Tables 1 and 2. The permit application can simply request the utility proponent to indicate the number of square metres of pavement area to be excavated, and the pavement degradation fee can be assessed on this basis. Since, the trenching life cycle costs vary depending on the length of time since the last resurfacing of the road in question, a simple look-up table, such as Table 3, can be used for administrative ease.

B-19 **Relocation and Adjustment Costs** While neither the Board’s “issues” nor AMO’s submission refer to relocation and adjustment costs specifically, the Region requests that this matter be reviewed by the Board as a “cost/compensation” issue.

Regional Council, by its adoption of FCM principle # 3, takes the position that where relocation or adjustment is required for bona fide municipal purposes the utility will be 100% responsible for the costs.

The 1987 model agreement accommodates this position when gas plant is located on a bridge, viaduct or structure. However, with respect to locations other than on a bridge, viaduct or structure, except for any upgrade costs, which are to be borne

by the gas company, relocation costs are paid 35% by the municipality and 65% by the gas company.

With respect, why should not the gas company pay 100% of relocation costs on the road? Canada wide, utilities are clamouring to use municipal roads, and;

- there is no reason to interpret the gas company's right to use the road as meaning "at the municipal taxpayer's expense". Not all taxpayers use gas.
- but for the gas company's presence this would not be a cost.
- any Municipal sharing of the gas company's costs is a subsidization of that company to the disadvantage of those not using the road allowance, and to competitors such as suppliers of wood burners, solar power, wind power, oil and electricity.
- the utility is well aware that its occupation of the road allowance will be disturbed by road maintenance, repair and reconstruction. It is equally aware that this disturbance and the resultant costs must be borne by either it or the municipality.
- while it goes without saying that the gas company provides a valuable and essential public commodity, there is today no reason to treat it differently from private non-utility business which must confront and accept daily its costs of doing business.
- there are obvious cost implications of the gas company not using the road allowance in urban areas. Which is all the more reason why it should accept, integrate, and pay the actual costs of it using that road allowance.

B-20 In the event that the Board finds that the 100 % across the board allocation of relocation costs to the gas company not to be acceptable, the Region proposes in



the alternative that a five year sliding scale of cost allocation be implemented as outlined in the following table:

<b>Time Since Utility Installation (months)</b>	<b>Relocation Cost Allocation to Gas Company (%) *</b>
less than 24	50**
24 to 59	65**
60 or greater	100
Notes: * Surface ironwork adjustment costs and other adjustment costs required for municipal maintenance works such as road resurfacing should be 100% at the cost of the gas company. **100 % if the gas company decides to proceed notwithstanding municipal advice to wait for a known project.	

**Table 4 - Alternative relocation cost proposal**

A sliding scale for relocation cost responsibility as outlined in Table 4 would result in a fair sharing of risks. In the early years the municipality would take the greatest risk. Should a municipality request the gas company to relocate soon after providing municipal consent, the municipality would pay a higher percentage of the relocation costs. Likewise after a reasonable period of time, i.e. five years, the gas company would assume the full cost of relocations.

Relocation costs would be either incurred directly by the utility, if it undertakes the work, or be invoiced to the utility by the municipality if the municipality undertakes any of the relocation work. These costs are very project specific and should be dealt with on a project by project basis.

B-21 **Direct and Indirect Quantifiable Costs** Other costs such as any restoration works carried out by the municipality for the utility, winter maintenance works undertaken by the municipality with respect to maintaining temporary trench restorations, any costs for damage to municipal infrastructure or any other works carried out under the terms of the franchise agreement ( e.g. default) would be billed to the utility at cost (including overhead and benefits). Traffic signing, striping, meter hooding and lost parking meter revenue costs (this latter cost could

possibly be built into a hooding cost) could also be invoiced on an as occurred basis.

B-22 **“Work-Around” and Other Direct and Indirect Costs (not easily**

**quantifiable)** As outlined earlier, “work-around” costs are the additional costs incurred by the municipality due to the physical presence of utilities in the public right-of-way. These include costs for:

- a) Increased planning and co-ordination
- b) Construction and maintenance delay costs associated with utility plant such as:
  - i) locating
  - ii) hand exposing
  - iii) working around (underground, surface and overhead plant)
  - iv) shoring
  - v) tunneling
- c) Repair costs when unmarked lines are damaged.

B-23 Figures 3 and 4 illustrate some of the extra effort required by municipalities in working around private utility plant located in the public right-of-way. In Figure 3, a contractor installing a municipal water main struggles to maneuver an excavator bucket between two shallow utility installations to reach the water pipe below. In Figure 4, the Region’s staff discovered a natural gas line installed directly on top of a water main needing repairs. Both of these situations are typical of the many such encounters that occur routinely on municipal reconstruction and maintenance projects, thus adding significantly to the time and expense of the works. In the case of natural gas plant in particular, safety considerations demand extreme care. As an example, there have been situations where gas personnel have located live lines in response to locate requests, but unbeknownst to both the gas company and the contractor, an abandoned line lies nearby. The contractor may encounter the abandoned gas line during his work and thinking that the live line had been found,

very carefully hand dig around it, then proceed to rupture the live line with his power equipment.



Figure 3 - Slowly working around shallow utility plant on Elgin Street in Ottawa-Carleton



Figure 4 - Gas line (yellow, smaller pipe on top of the larger pipe ) situated on top of water main in Ottawa-Carleton

- B-24 Closely affiliated with “work-around” costs are costs associated with public transit delays and traffic management (police officers and municipal staff) when utility projects are underway and when municipal projects are extended in time.
- B-25 In addition, municipalities incur further costs associated with administering franchise agreements (negotiating, preparing maintaining etc), processing insurance and damage claims and responding to general queries with respect to utility activities in the public rights-of-way.

- B-26 Generally, the “work-around” and the other direct and indirect costs noted above have not been quantified by most municipalities to date. One reason for this is that these costs are not always easily quantifiable. Nonetheless they are very real and substantial. The Region hired a consultant with more than 30 years contracting experience to provide an expert opinion as to the magnitude of the “work-around” costs only. It was estimated that the additional “work-around” costs to municipalities in having to deal with the presence of utilities in the public right-of-way could reach 20 % of tendered construction costs.
- B-27 The derivation of a recovery mechanism for “work-around” and the other difficult to quantify direct and indirect costs is a challenge. However, the Region requests the Board recognize first, that municipalities do incur costs of this nature and, secondly, that the Board direct that the gas utility and the municipality negotiate and agree on an appropriate amount to be paid to the municipality by the gas company on an annual basis to represent compensation for these costs. For guidance, the Region suggests an amount in the order of \$0.15 per metre of pipeline. This approximates the amount which the Region is negotiating with telecommunication companies using Regional Roads for these costs.
- B-28 In future, as “costs” are quantified with greater certainty, they could be built directly into the permit fee outlined earlier. Of course, if this were done, to preclude double charging, the general agreed upon amount for compensation just referred to would be reduced accordingly. But until the municipality builds it into the permit fee, it is suggested that the general cost recovery figure be specified in the franchise agreement. Possible wording could be as follows:
- a) **Access Costs: The gas company covenants and agrees to pay to the municipality upon execution of this Agreement an annual access fee to cover the costs incurred by the municipality which arise from the gas company’s installation of its Equipment, its presence in the right-of-way, and the costs of the approval and administration of the Agreement, and**

the fee shall be paid regardless of whether any Equipment has been installed. This fee shall be in the amount of \$ \_\_\_\_\_ Dollars per annum plus applicable federal Goods and Services and any other applicable tax.

- b) **Permit Fees:** For greater certainty, the fees identified above and all other amounts payable by virtue only of this Agreement are in addition to, and not in lieu of, all amounts generally applicable to Private Entities which may be lawfully imposed on the gas company by a Public Body including permit fees and charges, and realty, business and gross receipt taxes. In the event that the rights-of-way are assessed in the future as a result of the gas company 's use of the rights-of-way, the gas company agrees to indemnify the municipality for any taxes due and payable by the municipality as a result of this assessment.
- c) For greater certainty, the gas company is not liable to pay any encroachment fees under the municipality's by-law for installations permitted under this Agreement.
- d) Except as otherwise provided in this Agreement, all amounts set out in this Agreement are exclusive of Taxes. All applicable goods and services taxes, provincial sales taxes and any and all other value added, sales or other transaction taxes attributable to the licence granted by this Agreement or the fees paid by the gas company pursuant to this Agreement are recoverable under this Agreement in the same manner as the amounts on which they are based.

B-29 **The Road Use Licence Fee** There is no question that the road allowance has a value to both the municipality and to the gas company. To the municipality as a finite and diminishing resource. To the gas company as the only viable location, in many cases, for its plant.

As the third element of fair and reasonable compensation, the road use licence fee can be derived from the value of the lands upon which the road is built. While some may profess difficulty in attributing land value in the ordinary sense to lands occupied by a road, there are many indicators of its value. Vendors pay to use it, as do restaurant owners and advertisers. Untravelled portions may be leased. Encroachments must be paid for. The Utility companies need it. When closed, it is sold at market value.

- B-30 In recognition of the role of municipalities as owners and trustees of public property, some municipal organizations such as the Federation of Canadian Municipalities have adopted several important principles with respect to municipal rights-of-way management. (See paragraph A-10).

The National Association of Telecommunications Officers and Advisors, an organization of local government officials in the United States, articulates these principles as well and one especially relevant example with respect to the value of the public rights-of-way is as follows:

**“Local government has a duty under general legal principles governing property rights not to give away public property for private use without just compensation.”**

They go on to say:

**“Limiting compensation to the recovery of costs would also result in giving away public land for private use and gain.”**

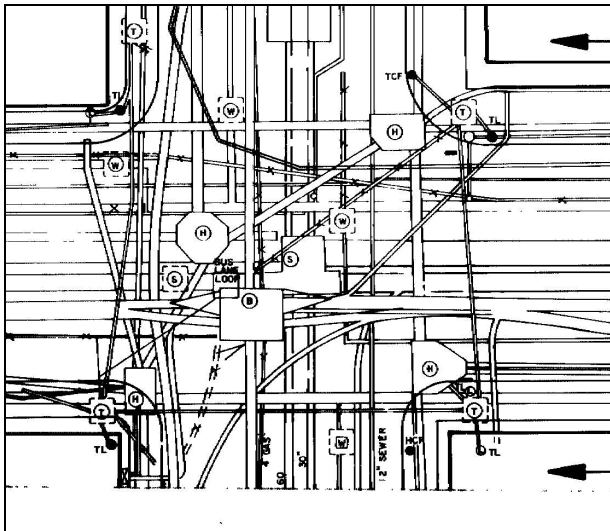
The fifth right-of-way management principle adopted by the FCM reads as follows:

**“Recognizing that rights-of-way have value, municipal governments must receive full compensation for the occupancy and use of municipal rights-of-way by other parties”.**

- B-31 From a municipality's perspective, the question is not whether or not it is fair and reasonable for the public to receive compensation for the use of a public asset by private profit seeking corporations. The real question is how this is accomplished. There are many examples and models of road use licence fees in the literature. There are at least six different models for determining a value for rights-of-way that can be used to develop a reasonable use fee. These models range from using the assessed value of adjacent private lands to calling for proposals and/or auctioning the right to use the rights-of-way. There have been some surveys done that show what municipalities in other parts of North America are receiving in compensation. The Region favours that which attributes value by comparison with abutting or neighbourhood vacant land. Adjustments to that value can be made, as in any comparative land valuation method, for relevant factors.
- B-32 Canadian data indicates a reasonable compensation range in the order of \$2 to \$20.00 per linear metre of rights-of-way use with the high end being appropriate for the core area of large urban centres and the lower end being in rural locations.
- B-33 Compensation for rights-of-way use is not unique. Private use of rights-of-way owned by municipalities is comparable to private use of property owned by other governmental units for which compensation is expected and not questioned. In order for finite and scarce public resources to be used for commercial purposes, governmental units, as standard practice, require reasonable compensation from the commercial users of the resource. For example, the Federal Government, recognizing the limited availability of radio spectrum, utilizes an auction process requiring payments considerably in excess of its costs for administration. Due recognition is given to the value of the property right being auctioned. In addition, governments at the municipal, provincial and Federal level all expect and receive market value payments for the sale and lease of real property.
- B-34 Figures 5 and 6 vividly illustrate the principle of public rights-of-way being a scarce and valuable resource that requires municipal co-ordination and

management for the most efficient and best use. Some cities in the United States are requiring utility plant to be placed overhead because there is no more viable space underground. Obviously, aerial placement is not an option for natural gas plant, but the U.S. experience is indicative of the degree that existing public rights-of-way are being encumbered.

B-35 In view of the above, the Region requests that the Board recognize that municipalities, as stewards of the public rights-of-way, should receive fair and reasonable compensation for their use by private companies for profit purposes having due regard for their value. Although the Region would prefer a rights-of-way use licence fee that is truly reflective of the market value of the property occupied (the available literature outlines details associated with various models for determining a market value for utility uses. A municipality could develop several market value zones within its boundaries, e.g. urban core area, suburbs, rural etc) the Region supports an initial general rights-of-way licence fee of \$2.50 per metre as proposed by AMO. This fee is in line with rights-of-way use fees received by public jurisdictions elsewhere.



**Figure 5- Underground utilities at the intersection of Kent Street and Slater Street in Ottawa-Carleton**



**Figure 6 - Underground infrastructure in New York City 1917**



B-36 **Compensation Summary** A summary of the compensation mechanisms discussed earlier is presented in Annex “A” .

B-37 **Assistance Prohibited** Having submitted that fair and reasonable compensation is appropriate, the Region wishes to bring to the Board’s attention Section 111 of the *Municipal Act*, which provides:

**“111.(1) Despite any general or special Act, a council shall not assist directly or indirectly any manufacturing business or other industrial or commercial enterprise through the granting of bonuses in aid thereof, and, without restricting the generality of the foregoing, the council shall not grant assistance by,**

- a) giving or lending any property of the municipality, including money;**
- b) guaranteeing borrowing;**
- c) leasing or selling any property of the municipality at below fair market value;**
- d) giving a total or partial exemption from any levy, charge or fee.**

B-38 The failure by a municipality, it is submitted, to recover its costs and to charge an appropriate road use fee, amounts to an improper bonus or assistance to a gas company and to any private utility company which is a commercial enterprise.

### **C DURATION OF FRANCHISE AGREEMENTS (No. 3)**

C-1 Because changes in technology and legislation have become the standard it is essential that a road access agreement, whether new or renewed, be not more than five years. If more than five years, then the Region requests that it be subject to a re-opening clause, in a form similar to that proposed by AMO. Again, this allows for good road management, and for good road business operations. The proposed

five year term could be expanded by allowing annual automatic extensions subject to termination by either party.

- C-2 A five year term is fair protection for both parties. And furthermore, the municipality must be permitted the normal good business practice of protecting its assets by requiring a term suitable to its needs. The gas company speaks of a need to ensure its investors that a long term deal is in place, but in the event of a termination by the municipality it has the protection of public opinion and of this Board. While short-term agreements might be an investment security concern for private non-utility business, that is not a legitimate concern of the gas company. Once gas is installed, in business, and operating, what municipality is going to jeopardize service of this commodity to its constituents by terminating an agreement without very good reason? What OEB would allow it?

#### **D ISSUES 4 - 9**

The Region makes no submissions at this time on the issues listed by the Board as Nos. 4 through to 9, other than it endorses those of AMO.

#### **E ABANDONED GAS PIPE (No. 10)**

- E-1 The Region's concern about abandoned pipe arises first, from the uncertainty which presently exists as to ownership and control of the abandoned pipe; and secondly, its wish to avoid unnecessary road cuts. The Model Agreement permits removal of the pipe, which requires a road cut, and it is unclear as to responsibilities for abandoned pipe.
- E-2 The Region suggests that the existing IV-3 be limited to "abandoned pipe" as that is defined by AMO in its submission, and re-written as follows:

#### **3. Disposition of Abandoned Gas Pipe**

**During the term of this Agreement, or at its termination, if the Gas Company abandons a part of its gas system affixed to a bridge,**

**viaduct or structure, the Gas Company shall at its expense remove that part of its gas system.**

**If at any time the Gas Company abandons any other part of its gas system it shall remain in the road until the road is reconstructed, at which time it may be removed by the Gas Company at its cost. If not removed by the Gas Company at that time it shall become the municipality's property.**

**The Gas Company shall notify the municipality of an abandonment within two (2) months of abandonment**

- E-3 AMO's suggestions as to decommissioned pipe and its proposed use by a third party are acceptable to the Region. However, the proposed clause IV-5 should include a requirement that the gas company not use a decommissioned pipe without the consent of the municipality, which of course, will require revision of the existing Gas Franchise Agreement or a new Municipal Access Agreement.
- E-4 Whether a pipe is abandoned or decommissioned, if used for another purpose, the municipality requires two Agreements. One with the gas company for the alternative use, and one with the third party for its use of the roadway.

## **F CONCLUSION**

- F-1 As the provider of an essential facility to the gas company the Region requests, with respect, that as a Trustee and a Steward of the road allowance, it be permitted to manage that facility safely and in the best interests of the municipality, the public, the utility companies, and all users, in a way which best protects all of these interests.

These best interests will only be met if the municipality has the clear authority to,

- a) manage responsibly its roads;

- b) prevent unnecessary road cuts; and
  - c) obtain fair and reasonable compensation for the use of its roads.
- F-2 The Region trusts that this submission, and that of AMO, provide justification for and the means by which the Board can ensure the municipality has that authority.
- F-3 The Region welcomes the opportunity to speak to its submission, and to respond to the questions and concerns of the Board and the gas companies.

All of which is submitted respectfully this 3<sup>rd</sup> day of December, 1999

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**Summary of the Region of OttawaCarleton's Compensation Proposal for the use of Public Rights-of-Way by the Natural Gas Industry**

<b>Compensation Item</b>	<b>Mechanism</b>	<b>Compensation (\$) (Ottawa-Carleton)</b>
Recovery of General Administrative costs	Sum quantifiable administrative costs and divide by the appropriate units (either number of permits or number of consent applications)	\$395 basic permit fee \$165 additional fee for major works (as an example)
Pavement Degradation (life cycle losses)	Use results of Ottawa-Carleton's Pavement Degradation study.  Levy at the time of permitting. Adjust based on actual extent of trenching if necessary.	Based on pavement age: \$24 per m <sup>2</sup> for 2 years or less \$20 for 2 to 4 years \$16 for 4 to 7 years \$10 for 7 to 10 years \$4 for 10 or more years
Relocation and Adjustment Costs	100 % responsibility of gas company or use 5 year sliding scale. Invoiced on a project by project basis, unless the gas company undertakes the work.  Surface ironwork adjustment costs and other adjustment costs required for municipal maintenance works such as road resurfacing should be 100% at the cost of the gas company.	Relocation based on months since utility installation. Percentage to be paid by gas company: 50 % if less than 24* 65 % for 24 to 59* 100 % for 60 or greater  *100 % if the gas company decides to proceed notwithstanding municipal advice to wait for a known project.
Direct Quantifiable costs not covered above (e.g. damage to municipal plant, winter reinstatement etc)	Quantify costs and invoice on a periodic basis.	Invoice gas company for actual costs including overhead.
"Work-around" and other direct and indirect costs (that are difficult to quantify or that have not been quantified to date). Includes municipal disruption costs.	Negotiate a "surrogate" reasonable amount with the gas company to be paid on an agreed upon frequency.	Consider an annual fee of \$0.15 per linear metre of pipe.
Road Use Licence Fee	Based on value of the rights-of-way area occupied. Could use standard "easement" model to establish value. Essentially involves market value (\$/m <sup>2</sup> ) X area occupied (linear length x 2m width) X annual rate of return (0.10) X non-exclusive factor (0.50). Two or three market value zones, such as urban core, suburban and rural, could be developed.	Propose an initial annual licence fee of \$2.50 per linear metre of gas pipe across the board.

## Notes:

1. No separate fee is proposed at this time for disruption costs incurred by the municipality. For now these costs would be recovered in conjunction with the negotiated "work-around" cost surrogate. It is noted that disruption costs to the community at large can be very high but only a portion of these are incurred by the municipal corporate entity itself.

2. Some municipalities levy both disruption (disturbances to traffic, transit, emergency services etc) and obstruction (related to the street area occupied for the utility works) fees to recover costs to the municipality and the community as well as to minimize the effects of the utility works on the community at large.
3. It is expected that municipalities would establish permit fees and costs by by-law, which would be reviewed periodically.