RP-1999-0048

ONTARIO ENERGY BOARD

IN THE MATTER OF a Model Natural Gas Franchise Agreement

REPLY OF THE CITY OF TORONTO

February 11, 1999

By its Counsel

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I INTRODUCTION

1. The City of Toronto (the "City", or "Toronto") has already made an initial written submission, an oral presentation and a further brief, written submission regarding the *Union Gas v. Dawn* case. The City will not repeat these submissions, but will provide a brief summary of these.

2. In summary, Toronto's submissions are:

i. Because of the unique statutory nature of the relationship between Enbridge Consumers Gas ("ECG") and the City, the Model Natural Gas Franchise Agreement would have no application to that part of the City to which the statutory relationship applied, and it is as yet unclear what the relationship was between ECG and the other municipalities now amalgamated into the City. Accordingly, the Board should make it clear in its decision in this proceeding that it does not apply to Toronto.

ii. Alternatively, if in future the Model Agreement is to apply to any part of Toronto, the practice of requiring municipal property taxpayers to subsidize gas company shareholders and customers, which has been supported by previous Board decisions, must be changed. Today, there is no statutory or policy basis for the continuation of such subsidies.

   a. The property tax argument made by the gas companies is legally irrelevant and thus, cannot be considered by the Board.

   b. The Board's jurisdiction under the *Municipal Franchises Act* is subordinate to the powers granted to municipalities by section 220.1(2) of the *Municipal Act*, from which the gas companies are not excepted or exempted.

   c. The cross subsidies provided by municipal taxpayers represent a transfer of income for which there is no statutory authorization and, therefore, any new municipal charges which end this unlawful transfer should be upheld by the Board; likewise, the Board should uphold reasonable and normal municipal charges for the use of municipal property, so that all users are treated equally, and the current "free rider" status of gas companies is ended.

II THE BOARD'S LIST OF ISSUES

3. The City will now provide its analysis of the list of the ten specific issues upon which the Board is seeking comments, plus one additional issue.

1 Payment of Permit Fees

4. The City has already stated its position on this issue.

2 Compensation for the Use of Municipal Rights-of-way

5. The City has already stated its position on this issue.

3 The Duration of New and Renewable Franchise Agreements

6. If Toronto were to enter into a written agreement with ECG, it would see no reason for an initial 20 year term. Where gas pipes have been in the ground for over 150 years and this long-term arrangement is merely being formalized through a written agreement, this is not, in substance, the granting of a franchise. There are no security of investment reasons for such a long term. There is no practical way this franchise can be terminated.

7. The reason why the gas companies seek such a lengthy agreement where they already have their pipes in the ground has nothing to do with security, and everything to do with inflation. If compensation to municipalities for permit-related costs is locked in for 20 years at the level of costs in the first year, then by the 20th year, the value of this compensation to the municipality is likely to be between 25% and 50% of the then-current cost, depending upon the rate of inflation. On the other hand, if the compensation to be paid by the gas companies is not fixed, but rises each year to cover actual costs, our objection to a lengthy agreement would be unnecessary, with one proviso. There should be a clause permitting re-opening of the agreement for material changes, particularly a legislative change.

8. The same principle should apply to compensation for use of the municipal right-of-way. If municipal charges for such use are generally increased, over the years, by other municipalities in the U.S. and Canada, a 20 year agreement should not preclude increasing these charges.

9. In short, the policy should be that although the franchise will continue virtually indefinitely unless there is substantial non-performance on the part of the gas company, this should not insulate the gas company from paying "the going rate" prevailing from time to time. If the Board's PBR periods are for five years, municipal fees and charges should be reviewed in the fourth year for change at the end of the fifth year, thus avoiding the necessity for repeated exogenous increases.

4 Insurance and Liability

10. The insurance clause agreed to by the gas companies and AMO (Section III-6) would be insufficient for Toronto's purposes. Toronto normally requires, and receives, stronger insurance coverage on all contracts, including consulting services, unless explicitly waived by the City Treasurer.

11. First, the minimum amount of coverage should be specified rather than left vague as "in sufficient amount and description".

12. Second, the indemnity should not be limited to the "operation" of the insured because this is a rather vague and narrow term which could, for example, preclude indemnity for negligent maintenance because maintenance is arguably different from operation. Hence, the indemnity should be for any activity carried on within or in the proximity of the municipal right-of-way.

13. Third, notice of a lapse or cancellation of the policy should come not from the gas company but from the insurance company. The gas company might delay or neglect to provide notice, while the insurance company would be much less likely to do so. Similarly, the confirmation that premiums for insurance have been paid, and that the insurance is in full force an effect, should come from the insurance company, not the gas company. As noted above, these are standard requirements which others with agreements with the City routinely accept.

14. Overall, the insurance and indemnity provisions as negotiated by AMO are rather weak and outdated. Today, the Government of Ontario, when retaining consultants, requires insurance and indemnity provisions that are stronger than those being proposed by the gas companies, and consulting is a far less dangerous activity than gas distribution from a public safety perspective. The OEB may wish to examine its own provisions in contracts with consultants for reference, as we believe these usually set minimum dollar liability requirements, and do not merely ask for “sufficient” coverage.

15. Of greater relevance than consultants’ contracts would be those for other utilities. What follows is an example of a more contemporary insurance/indemnity provision, taken from the telecommunications context, and used by Toronto as part of its standard Municipal Access Agreement:

ARTICLE 1
INSURANCE AND LIABILITY

1.1 Company's Insurance:

(a) The Company shall, at its own expense, take out and keep in force during the Term, (and shall similarly obligate each contractor of the Company prior to and during performance of work on the Public Highways):

(i) comprehensive insurance of the type commonly called general public liability, which shall include coverage for personal injury, broad blanket contractual liability, employer's liability, owner's protective liability, all risks tenant's legal liability, bodily injury, death and property damage, all on a per occurrence basis with respect to the operations carried on in the Public Highways and the Company's use and occupancy of the Public Highways with coverage for any one occurrence or claim of not less than $5,000,000, which insurance shall contain a severability of interest clause and a cross-liability clause.

(ii) "all-risks" property insurance covering the Structural Improvements, Telecommunications Improvements, Lateral Piping, trade fixtures and equipment of the Company in the Public Highways on a full replacement basis, with an agreed amount co-insurance clause.

1.2 Form of Insurance:

(a) Each policy shall:

(i) contain a waiver by the insurer of any rights of subrogation or indemnity or any other claim to which the insurer might otherwise be entitled against the City or the officers, agents or employees of the City;

(ii) name the City and its officers, agents and employees as additional named insureds;

(iii) be primary, non-contributory with and not excess of any insurance available to the City;

(iv) contain an undertaking by the insurer that no material change adverse to the City or the Company will be made and the policy will not lapse or be cancelled or not be renewed, except after not less than 30 days' prior written notice by registered mail to the City of the intended change, lapse, cancellation or non-renewal; and

(v) be satisfactory to the City's Chief Financial Officer or other official subsequently delegated the authority by the Council of the City to give this approval.

The Company shall furnish to the City certificates of the policies of insurance on the Effective Date and from time to time effected by the Company and their renewal or continuation in force, and shall similarly obligate each contractor of the Company prior to and during any performance of work on the Public Highways.

1.3 Failure to Carry Insurance

(a) Failure for any reason to furnish the proof required pursuant to Section 9.2 or maintain this insurance for the term of this Agreement shall be a breach of the Agreement, allowing the City to terminate the Agreement or, at the City's option, to supply such insurance and charge the cost to the Company.

5 Geodetic Information

16. The AMO agreement with the gas companies on this issue in Sections III-1 and III-2 is acceptable to the City.

6 As Built Drawings

17. The AMO agreement with the gas companies on this issue in Section III-2 is acceptable to the City.

7 No Warranty as to Condition of Highway

18. The AMO agreement with the gas companies on this issue in Section III-1 is acceptable to the City.

8 Legislative Changes Effects

19. Unlike when the Municipal Franchise Act was first enacted, the Ontario Legislature frequently changes legislation applicable to both municipalities and utilities. Likewise, new regulations or court or tribunal decisions can introduce changes. These changes, if material, should give rise to new negotiations between the parties. If these

negotiations do not succeed, either party should be free to seek a legal interpretation from the court or the Board.

9 Default Provisions

20. Such provisions are normally part of City agreements. There is no reason why the standard provisions required by the City should not also apply to gas companies. If these companies never default, such provisions are superfluous, and will have no impact on the gas companies. If, however, there is a default, there can be no objection to the City wishing to protect itself from such a possibility. The proposal by AMO on page 16 of its December 3, 1999 submission for a new Section IV-5, or something equivalent, would be acceptable to the City.

10 Abandoned/Decommissioned Gas Pipe

21. The City's engineering staff advises that once the gas company stops using any part of the system of mains or lines, it is virtually never used again. Much of this is the old cast iron pipe, which has gone past its useful life, has no real residual value for gas purposes. Its usefulness has ended. While there may be tax, regulatory or other reasons why the gas company wants to label this as "decommissioned" rather than simply scrap, such semantics have no relevance for the relationship between a gas company and the municipality for the purposes of the present proceeding.

22. Section IV-3 of the agreement between the gas companies and AMO would require a municipality to pay for the cost of relocating decommissioned gas lines. Toronto can see no reason why the City should pay anything for relocating something which the gas companies have stopped using and are unlikely to use ever again. The presence of such a requirement in the Model Agreement serves no practical purpose, yet gives the gas companies an economic lever which is most likely to be used not to relocate useless decommissioned plant, but rather, to obtain a cash settlement or payment in lieu of relocating such plant.

23. The use of decommissioned gas pipes is another important topic within this heading. The City would agree that the proposed Section III-4 is generally a fair compromise, but the drafting could be improved by including a requirement that if the gas company is to allow a third party to use decommissioned pipe for non-gas purposes, the gas company itself should enter into a separate agreement with the municipality for this purpose. This requirement is necessary because the gas company's use of municipal property is limited to the purpose of providing gas to the inhabitants of the municipality. If the gas company seeks to continue to use municipal

property for non-gas purposes, it should obtain a license from the municipality for this purpose, which license would include the right to sub-license to the third party.

24. It may be unnecessary for the Board to include any provision dealing with this subject in the Model Agreement for Toronto, as this issue may be best negotiated directly with the gas company. Such negotiations have already been conducted with some success between ECG and Toronto, as evidenced by Report No. 5 of the Works and Utilities Committee of the City, attached as Appendix 1.

11 Relocation Costs

25. The existing agreement allocates relocation costs between the gas companies and municipalities in the proportion of 65% to the former and 35% to the latter. AMO has not contested this allocation. For the reasons mentioned in the Ottawa-Carleton Reply, Toronto would agree that this policy of the Board's is now obsolete.

26. All utilities should be treated equally, and all of them should pay 100 percent of the relocation costs. It is the gas companies that are the "guests", as mere licensees occupying municipal property. Their presence in this property gives rise to no relocation costs until a municipality requires the gas plant to be relocated for its purposes. These purposes would exist whether or not the gas company was there. (Municipalities do not engage in construction projects merely for the joy of requiring gas companies to relocate their plant.) Therefore, the cost of relocation is a cost caused by the presence of the gas company plant, and nothing else. It follows, then, that this cost should be borne by the gas company.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of February, 2000 by:

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