**RP-1999-0048**

# ONTARIO ENERGY BOARD
## MODEL NATURAL GAS FRANCHISE PROCEEDING

# SUBMISSION OF THE CITY OF TORONTO

## I. BACKGROUND

The Ontario Energy Board approves franchise agreements between gas utilities and the municipalities in which they deliver natural gas to consumers. The purpose of this proceeding is to review the model agreement that has been used as a template for the majority of franchise agreements entered into since 1987.

The City of Toronto ("the City" or "Toronto") is in a different situation from that of most municipalities with gas service in Ontario. To the best of our knowledge, neither the original City of Toronto nor the other municipalities with which it was amalgamated have had any written franchise agreements with either Enbridge Consumers Gas ("ECG") or any of its predecessor companies. Rather, these municipalities and the gas company have operated under essentially voluntary, ad hoc arrangements, governed, in part, by an unusual (if not unique) statute enacted in 1848[i], which is described in more detail below.

The Association of Municipalities of Ontario ("AMO"), of which Toronto is a member, is submitting a brief on behalf of its members. Nothing in the submission by Toronto should be seen as disagreeing with, or contradicting anything in the AMO submission. In fact, Toronto, along with other AMO members, contributed a grant to AMO for the purpose of preparing its submission. However, because of the special statutory and operating framework governing the relationship between ECG and the City, it is necessary for the City to make its own submission.

## II. PURPOSE

The purpose of Toronto's submission is to recommend to the Board that any new model natural gas franchise agreement approved by the Board should explicitly indicate that it does not apply automatically to any agreement that may be negotiated between Toronto and ECG in future.

## III. REASONS FOR SUBMISSION

1. The 1848 statute gave the predecessor of ECG the right to use the former City of Toronto's roads for the purpose of its gas works. The statute was silent on the issue of any compensation or cost recovery. This has created some uncertainty about the legal situation of the present City. The other former municipalities that were amalgamated into the present City were not subject to similar legislation, but made different arrangements over the years with the gas company.

2. City staff continues to collect the documentation that underpins these arrangements (such as contracts and accounting records) but, for a variety of historical reasons, these are proving difficult to locate. As well, as a result of the amalgamation process, some key staff members of the former area municipalities who may have had knowledge of these matters are no longer in the employ of the City.

3. On the basis of the presently available data, it appears that ECG may not have been charged enough to provide reasonable cost-recovery for the costs incurred by the former area municipalities now comprising the City.

4. The utility situation under Toronto's roads, particularly in the downtown area, is extraordinarily complex and congested. There is a real scarcity of space, and City engineers must devote considerable resources to coordinating access, use and maintenance of these subterranean corridors. As well, they must work with all the users respecting the repair and maintenance of the road surfaces, resulting in significant associated costs for the City.

5. The City wishes to avoid cross subsidization of two kinds. First, if ECG does not pay its full and fair share of the costs it imposes on the City as a result of its activities, those residents of Toronto who are not gas customers will pay higher taxes than they otherwise would, and thus, will be subsidizing gas customers. Second, if ECG pays Toronto less than it should, because ECG charges the same rates everywhere in its service territory (postage stamp rates), these savings will be passed on to all of ECG's customers. Thus, Toronto taxpayers will be subsidizing gas users in the rest of ECG's service area. The existence of such cross-subsidies would mean that ECG's rates would not, to the extent of these cross-subsidies, be just and reasonable. The effect of such cross-subsidies would be a transfer of income from those paying the subsidy to those receiving it.

6. It may be necessary for the City to seek legislative amendment to the 1848 Act (and perhaps also to other legislation) if the City is unable, because of such statutory impediments, to negotiate a satisfactory agreement with ECG. At the time this pre-Confederation statute was enacted, the road surfaces were unpaved and the costs to the City then imposed by the gas company – the only utility under the road except for Toronto's own gas company – were very small in comparison to the complex, congested and costly situation today. If this archaic and anomalous statute (or any other law) impedes the receipt of full compensation by the City, and results in the cross subsidies described in the previous paragraph, the law should be changed. While this is not the task of the Board, the Board can, and should, draft its decision in this proceeding to avoid:

> (a) imposing the model agreement upon municipalities and gas companies that have previously not had any comprehensive written agreement; and

(b) using any language that would limit Toronto from receiving appropriate compensation for its costs, and for the use of its property.

## IV. DISCUSSION

### A. The Legal Status of ECG's Access to Toronto's Public Road Allowances

(1) Amalgamation and Documentation

The City's financial, administrative and engineering systems (which varied greatly in the former municipalities) are not yet entirely harmonized. Combined with downsizing, variances in the data collected, and the exit of many staff previously involved in these activities, the City is in a situation that would make entering into formal negotiations with ECG difficult at this time. For these reasons, the City is as yet unable to determine what, if any, contractual arrangements may have been in force (whether under written agreements or course of conduct of the parties) between ECG and each of the former municipalities. In any event, these arrangements will have to be standardized across the City, as the amalgamation is completed.

(2) The 1848 Act and Subsequent Legislation

This Act had two purposes: first, to incorporate the company, and second, in sections 13-15 of the Act, to give the company the power to "open the ground in the streets" in order to lay down the necessary mains and pipes. The company was authorized to do this construction on only two days notice in writing to the mayor of the then-City, a notice period which was extended to 30 days notice in writing in 1853[ii]. Neither the 1848 Act nor its various amendments (the last, to the City's knowledge, having been enacted in 1904) explicitly stated whether the gas company was required to compensate the City for any costs incurred by the City as a result of the activities of the gas company.

The 1848 Act covered the City of Toronto as it then was, and by subsequent amendments, the gas company acquired additional territory, all of it in the pre-amalgamation City of Toronto. We have as yet been unable to determine what special legislation, if any, governed the relationship between the gas company and the other municipalities comprising the present City of Toronto.

Section 21 of the 1848 Act provided that nothing in that Act would affect, in any way, the rights of any person, except as mentioned in the Act. Therefore, if the original City of Toronto then had, or any of its successors up to the current day later acquired, the authority to charge the gas company any fees or charges for costs imposed upon the City by the activities of the gas company, the 1848 Act would not preclude such fees or charges.

While it might be of historical interest to review all of the legislation from 1848 to today, this is unnecessary, for two reasons. First, it is clear that at least in the

former Toronto (as distinct from the other five amalgamated area municipalities and the former Municipality of Metropolitan Toronto), despite the 1848 Act, there have been working arrangements made with ECG respecting compensation. These arrangements have resulted in payments towards the cost of permanent pavement and sidewalk restoration, plus some administration and overhead costs (approximately $4.1 million in 1998).

Second, recent amendments to the *Municipal Act* in 1996 and 1998 created the present subsections 220.1 (2) - (5) which explicitly authorize a municipality to pass by-laws imposing fees or charges for services for activities provided by the municipality or for the use of its property. These provisions apply "Despite any Act…", according to the opening words of subsection 220.1 (2). This language is broad enough to mean despite both the 1848 Act and the *Municipal Franchises Act*. It should be noted that subsection 220.1 (2) explicitly authorizes the City to charge both a permit fee (i.e. for the cost of services provided by the City arising from or related to a permit) and a usage fee (i.e. for the use of the City's property). The only statutory condition precedent to charging such fees is passing a by-law. This new addition to the *Municipal Act* is an important change in the law.

## B. The Actual Arrangements with ECG

The legal research completed and information collected as of the date of this submission concerning the arrangements with ECG is for the former area municipality of Toronto only, but has implications for any future negotiation of a new agreement with ECG for the amalgamated City. Such negotiation is dependent upon amalgamation being sufficiently completed to permit costs to be estimated on a City-wide basis.

### (1) Costs – Recovered in Whole or in Part

All or part of the costs in the former City of Toronto related to:

i. restoring sidewalks and pavements with permanent repairs (as distinguished from temporary patches made by ECG);

ii. inspecting temporary and permanent repairs;

iii. issuing, reviewing and keeping track of permits; and

iv. coordinating construction by gas companies, other utilities and other users of the City's roads.

### (2) Costs – Not Being Recovered

There is likely little or no recovery of costs for items such as:

i. pavement degradation requiring accelerated reconstruction of the road; and

ii. lost productivity in City works such as subway construction or repair of City utilities under the roads; and

iii. traffic disruption.

(3) Next Steps

Information obtained to date on what the other former area municipalities billed ECG in recent years seems to confirm that items listed under the two previous headings were not billed to ECG on the same basis as the former City of Toronto. In fact, the total billing by the other area municipalities appears disproportionately small vis-à-vis the likely costs to the municipalities. On the other hand, without a detailed analysis of the particular construction projects of ECG in each former municipality it would be difficult to indicate definitively what the level of cost-recovery should have been, versus what it actually was, in each case.

The AMO submission refers to Ontario's Ministry of Transportation charging gas companies $350 for processing highway access fees for Provincial Highways. Toronto urges the Board to avoid imposing any fixed fee in a model agreement. This fee would be grossly insufficient in the case of Toronto, recovering less than 10% of the former City's costs billed to ECG in 1998. A fixed fee would have to be based on some sort of provincial "average", and could be significantly wrong for the majority of municipalities. As well, the imposition by the Board of such a fixed fee could effectively pre-empt a municipality from exercising its statutory authority to charge a higher fee by enacting a by-law, under subsection 220.1 (2) of the *Municipal Act*. Such a fixed fee could, therefore, call into question the scope of the jurisdiction of the Board under the *Municipal Franchises Act*, given the new scheme of the *Municipal Act*, under which the powers of municipalities to set fees and charges can be exercised under subsection 220.1 (2), despite any other Act.

Toronto's difficulty in estimating its City-wide costs indicates the importance of completing the municipal amalgamation process (or at least moving it forward further than today) before developing a new arrangement with ECG. When the amalgamation is completed, the City will be able to estimate with greater accuracy its post-amalgamation staff and overhead costs associated with the relevant activities. The City will also conduct studies to enable it to estimate what its costs are for pavement degradation, lost productivity and any other costs.

## V. CONCLUSION

Toronto has no material disagreements with the AMO submission, to the extent that the arguments are presented. As presented herein, however, the degree of demand for and use of Toronto's rights-of-ways, its unusual statutory framework, and current amalgamation process, requires a somewhat broader approach than the parameters set out in the AMO submission. Within the next year, the City will have completed the amalgamation process and the necessary costing exercise, and

also, will have completed a legal analysis to determine whether any legislative amendments are necessary. Within that timeframe, the City may determine that it desires to initiate discussions with ECG with respect to these matters.

While this process is going on, the City would respectfully request the Board to be mindful of Toronto's situation, and to protect the City's interests by ensuring that nothing in the new model agreement would pre-empt or limit the City's ability to negotiate with ECG. The best and most direct way to do this would be for the Board to state explicitly that the model agreement does not apply to any future agreements that might be negotiated between Toronto and ECG, unless Toronto and ECG so decide.

The City of Toronto reserves its right to appear at any oral presentation scheduled by the Board and to make any final written submission that the Board may permit.

All of which is respectfully submitted this 6th day of December, 1999.

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[i] On March 23, 1848, the Legislative Assembly of the Province of Canada enacted *An Act to Incorporate the Consumers' Gas Company of Toronto*, 11 Vict. c. 14.

[ii] By 16 Vict. c. 142