RP-1999-0048

IN THE MATTER OF the *Municipal Franchises Act;*

AND IN THE MATTER OF the 2000 Model Franchise Agreement.

BEFORE: Sheila K. Halladay
Presiding Member

Floyd Laughren
Member and Chair

Judy Simon
Member

A. Catherina Spoel
Member

REPORT TO THE BOARD

December 29, 2000

TABLE OF CONTENTS

1. **BACKGROUND AND THE PROCEEDING** 1
   - 1.1 BACKGROUND 1
   - 1.2 THE PROCEEDING 4

2. **PROPOSED AMENDMENTS SUPPORTED BY ALL OF THE PARTIES** 7
   - 2.1 UPDATING AND CLARIFICATION OF TERMINOLOGY 7
   - 2.2 CONSTRUCTION ISSUES 11
   - 2.3 INSURANCE AND LIABILITY 18
   - 2.4 LEGISLATIVE CHANGE 19
   - 2.5 ABANDONED PIPE 20

3. **ISSUES NOT AGREED TO BY ALL OF THE PARTIES** . . . 25
   - 3.1 RELOCATION COSTS 25
   - 3.2 DURATION OF THE AGREEMENT 27
   - 3.3 DEFAULT PROVISIONS 30

4. **FEES** 33
   - 4.1 BACKGROUND 33
   - 4.2 JURISDICTION OF THE BOARD 35
   - 4.3 OTHER GENERAL ISSUES RELATING TO FEES 41
   - 4.4 SPECIFIC FEES 44

5. **ADDITIONAL MATTERS** 53
   - 5.1 CITY OF TORONTO 53
   - 5.2 FRANCHISE HANDBOOK 56

APPENDICES

Appendix A - 2000 Model Franchise Agreement

1. BACKGROUND AND THE PROCEEDING

1.1 BACKGROUND

1.1.1 The *Municipal Franchises Act* (the "MFAct") was first enacted in 1912. Section 3 of the MFAct provides that a municipal by-law granting, extending or renewing a right to construct or operate a public utility must set forth the terms and conditions upon which and the period for which such right is to be granted, and that the by-law must receive the assent of the electors.

1.1.2 The MFAct was further amended in 1954 with the addition of section 9, which deals with the original grant of the franchise. Section 9 of the MFAct now provides:

> 9(1) No by-law granting,
>
> (a) the right to construct and operate works for the distribution of gas;
> (c) the right to extend or add to the works mentioned in clause (a); or
> (d) a renewal of or an extension of the term of any right mentioned in clause (a)
>
> shall be submitted to the municipal electors for their assent unless the terms and conditions upon which and the period for such right is to be granted, renewed or

> extended have first been approved by the Ontario Energy Board.

1.1.3 Municipal franchise agreements for the distribution of gas were first introduced in Ontario around the turn of the century, although the majority of them were established after 1957 when natural gas from western Canada was first transmitted to Ontario and large-scale gas distribution became possible. Each franchise agreement was negotiated on an individual basis.

1.1.4 Section 10 was added to the MFAct in 1969. Prior to that time both a utility and a municipality had a common law right to terminate a franchise upon the expiry of the franchise agreement. Section 10 is specifically intended to allow the Board to implement a renewal of a franchise where there is no agreement between the municipality and the utility and to allow the Board to determine the terms of the franchise being renewed. Section 10 of the MFAct, as amended, now provides, in part:

> 10(1) Where the term of a right ... to operate works for the distribution of gas has expired or will expire within one year, either the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right.
>
> (2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right.

> ...
>
> (5) An order of the Board heretofore or hereafter made under subsection (2) renewing or extending the term of the right ... shall be deemed to be a valid by-law of the municipality concerned assented to by the municipal electors for the purposes of this Act and section 58 of the *Public Utilities Act*.

1.1.5 In November 1985, the Board held a generic hearing (E.B.O. 125) to provide a forum for the discussion of a number of general and specific concerns which had arisen regarding municipal franchise agreements for the distribution of gas in Ontario. The Board wanted to determine whether the existing forms of franchise agreements between municipalities and gas distributing companies were adequate, and whether the ways in which these agreements were entered into were appropriate.

1.1.6 On May 21, 1986, the Board issued its Report, which described the Board's findings and provided policy guidelines. The findings of the Board were not legally binding on its future deliberations but were expressions of the Board's policies or guidelines on the various issues discussed. E.B.O. 125 recommended the establishment of a special Municipal Franchise Committee ("MFC") to be made up of representatives from the municipalities, the gas distributing companies and the Board to resolve a number of questions about municipal franchise agreements which were raised originally at the hearing, but that the Board felt would be most constructively answered through discussion and negotiation rather than by decisions or orders of the Board.

1.1.7 The Model Franchise Agreement (the "1987 MFA") was published by the MFC with the concurrence of the Board in 1987 and has served as a template for most initial franchise agreements and also for renewal of franchises during the ensuing years.

1.2 THE PROCEEDING

1.2.1 In December 1998, the Association of Municipalities of Ontario ("AMO") sent a letter to Mr. Floyd Laughren, the Chair of the Board, requesting that the Board consider amendments to the 1987 MFA. Representatives of Union Gas Limited ("Union"), The Consumers' Gas Company Ltd., carrying on business as Enbridge Consumers Gas ("Enbridge Consumers Gas" or "ECG") and Natural Resource Gas Limited ("NRG") (collectively, the "Gas Companies") and AMO met to consider mutually agreeable changes to the 1987 MFA.

1.2.2 On September 24, 1999, the parties presented a letter and report entitled "Summary of Discussions Between the Municipal Order of Government (AMO) and the Gas Companies Regarding Amendments to the Model Gas Franchise Agreement" to the Board. The parties agreed on minor changes to the 1987 MFA, but could not agree on any substantive amendments.

1.2.3 On November 1, 1999, the Board issued a "Request for Comment" requesting interested parties to comment on a variety of issues. The Board received written submissions from the following parties on December 6, 1999, and these submissions were posted on the Board's Web site:

AMO
The Gas Companies
The City of Toronto ("Toronto")
The Regional Municipality of Ottawa-Carleton ("Ottawa-Carleton")

The Industrial Gas Users Association ("IGUA")
The Township of Hay ("Hay")
The Township of Sarawak
The City of Thunder Bay
The Ontario Good Roads Association
The Town of Oakville

1.2.4 The Board invited parties to make oral presentations to a Panel of the Board. On January 25, 2000, the representatives of the following parties made oral presentations to the Panel:

The Gas Companies

Glenn F. Leslie	Counsel for Union
Paddy Davies	Director, Marketing Expansion, Enbridge Consumers Gas
Bob Adie	General Manager, Franchise Relations, Union
William Blake	President and General Manager, NRG

AMO

Andrew Wright	Counsel for AMO
Robert Foulds	Consultant
Casey Brendon	Engineer
Patricia Vanini	Director of Policy and Government Relations

Ottawa-Carleton

Ernest McArthur	Counsel
Lorne Ross	Manager Surface Projects

Toronto

Andrew Roman	Counsel
Lorraine Searles-Kelly	Solicitor
Andrew Koropeski	Director of Transportation Services, Department of Works and Emergency Services

Board Staff

Stephen McCann	Board Solicitor
Neil McKay	Manager, Facilities
Wilfred Teper	Regulatory Officer

1.2.5 Written replies to the oral presentations were submitted to the Board by February 11, 2000. The Board allowed further written responses by Ottawa-Carleton and by Toronto on March 22, 2000 and by the Gas Companies on March 28, 2000.

1.2.6 It became apparent to the Panel during the oral presentations that, with some assistance, the parties might be able to reach agreement on a number of additional issues. The parties met with Board Staff on a number of occasions and were able to propose amendments to the 1987 MFA on many of the outstanding issues. The parties also prepared a draft Model Franchise Agreement reflecting the issues that had been agreed upon by the parties and submitted it to the Board.

1.2.7 Chapter 2 of this Report to the Board deals with proposed amendments supported by all of the parties. Chapter 3 deals with proposed amendments not agreed to by all of the parties. Chapter 4 deals with the issue of fees. Chapter 5 deals with additional matters. Appendix "A" sets out the 2000 Model Franchise Agreement ("2000 MFA").

2. PROPOSED AMENDMENTS SUPPORTED BY ALL OF THE PARTIES

2.1 UPDATING AND CLARIFICATION OF TERMINOLOGY

2.1.1 The parties recommended that a number of provisions of the 1987 MFA should be clarified and updated.

2.1.2 The parties suggested that the term "Clerk" is not universally used throughout the province and that the term "Clerk" should be changed to "duly authorized officers" in the 2000 MFA.

2.1.3 The parties noted that MFAct and the *Ontario Energy Board Act, 1998* ("OEB Act") have each been amended to reflect that Gas Companies are primarily engaged in the storage, transmission and distribution of gas. In addition, recent changes to the MFAct have removed the need for the municipality to grant the right to supply gas and similarly the right to sell gas. Therefore, the parties recommended that reference to "supply" and "sell" should be removed in the 2000 MFA.

2.1.4 To address inconsistencies in the 1987 MFA, the parties proposed that the 2000 MFA should replace the words “road allowances” with “highway”.

2.1.5 The parties suggested that Paragraph II 2 of the 1987 MFA (now paragraph 3 of the 2000 MFA) should be clarified by adding the words:

> Subject to the terms and conditions of this Agreement, the consent of the Corporation....

2.1.6 The parties proposed that the last two lines of Paragraph III 3 of the 1987 MFA (now Paragraph 7 of the 2000 MFA) dealing with contacts in an emergency, should be clarified to read “...notify the police force, fire or other emergency services having jurisdiction” and that this paragraph should be amended by adding an additional sentence stating that:

> The Gas Company shall provide the Engineer/Road Superintendent with one or more 24 hour emergency contacts for the Gas Company and shall ensure the contacts are current.

2.1.7 The parties suggested that the wording of the 1987 MFA should be updated by modernizing the gender in the agreement by adding Clause I 1(f) to the 1987 MFA (now Clause1(i) of the 2000 MFA), to read:

> Whenever the singular, masculine or feminine is used in this agreement, it shall be considered as if the plural, feminine or masculine has been used where the context of the agreement so requires.

2.1.8 The parties suggested that the purpose of the Franchise Handbook should be clarified by making reference to it in the 1987 MFA (now Paragraph 17 of the 2000 MFA), which would now read:

> The Parties acknowledge that operating decisions sometimes require a greater level of detail than that which is appropriately included in the Model Agreement. Guidance on such matters may, by agreement between the Gas Companies and AMO, be provided in a Franchise Handbook. Such a Handbook can, by agreement of the parties, be amended from time to time as experience requires, to reflect changing technology.

Panel Recommendations

2.1.9 The Panel generally agrees with these positions of the parties and accordingly recommends that the 1987 MFA should be amended as follows:

- Replace references to "Clerk" with "duly authorized officer" throughout the 2000 MFA.
- Delete references to "supply" and "sell" gas throughout the 2000 MFA.
- Replace references to "road allowances" with "highways" throughout the 2000 MFA.
- Clarify the 1987 MFA by adding the words "Subject to the terms and conditions of this Agreement, the consent of the Corporation..." at the beginning of Paragraph 3 of the 2000 MFA.
- Reword the 1987 MFA, dealing with emergencies, so that Paragraph 7 of the 2000 MFA reads:

> In the event of an emergency involving the gas system, the Gas Company shall proceed with the work required to deal with the emergency, and in any instance where prior approval of the Engineer/Road Superintendent is normally required for the work, the Gas Company shall use its best efforts to immediately notify the Engineer/Road Superintendent of the location and nature of the emergency and the work being done and, if it deems appropriate, notify the police force, fire or other emergency services having jurisdiction. The Gas Company shall provide the Engineer/Road Superintendent with the at least one 24 hour emergency contact for the Gas Company and shall ensure the contacts are current.

- Update the 1987 MFA to reflect differences in number and gender so that Clause 1(i) of the 2000 MFA reads:

> whenever the singular, masculine or feminine is used in this Agreement, it shall be considered as if the plural, feminine or masculine has been used where the context of the Agreement so requires.

- Clarify the purpose of the Franchise Handbook by amending the 1987 MFA so that Paragraph 17 of the 2000 MFA reads:

> The Parties acknowledge that operating decisions sometimes require a greater level of detail than that which is appropriately included in this Agreement. The Parties agree to look for guidance on such matters to the Franchise Handbook prepared by the Association of Municipalities of

> Ontario and the gas utility companies, as may be amended from time to time.

2.2 CONSTRUCTION ISSUES

2.2.1 A number of issues relating to construction of the gas system were raised by the parties.

Construction Standards

2.2.2 The parties proposed that the 1987 MFA should be updated to ensure that it refers to the current construction standard so that Clause 5(b) of the 2000 MFA would read:

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

Geodetic Information

2.2.3 AMO proposed that given the increased complexity of works within the highway, geodetic information is desirable. AMO acknowledged the Gas Companies' concern that additional expense would be incurred if Gas Companies were required to produce geodetic information for a significant portion of the existing gas system. However, AMO felt that the wording in the 1987 MFA was too restrictive, particularly, when

advances in GIS systems and digital surveying technology will continue to make this information more easily available in the future.

2.2.4 At the hearing, the Gas Companies' position was that the limited requirements of the 1987 MFA are valid and strike an appropriate balance between the needs of municipalities and the costs incurred by the Gas Companies and their customers. The Gas Companies submitted that they generally do not possess geodetic information for general use since such geodetic information is not sufficient for the physical locates required for safety reasons when working in close proximity to gas pipes. Their position was that a requirement to provide geodetic information as proposed by AMO could create additional, unnecessary costs, estimated by the Gas Companies at approximately $8 million per year.

2.2.5 The parties subsequently proposed that the following provision be included in Paragraph 5 (a) of the 2000 MFA:

> The plan will include geodetic information when dealing with complex circumstances in order to facilitate known projects, including projects which are reasonably anticipated by the Engineer/Road Superintendent. Geodetic information will also be provided where the Corporation has geodetic information for its own services and all others at the same location.

"As Built" Drawings

2.2.6 AMO's position was that given the complexity of the works within municipal rights-of-way, "as built" drawings, geodetically referenced, may be necessary.

2.2.7 The Gas Companies' initial position was that there was no need to alter the wording of the 1987 MFA as it already provides municipal officials sufficient information on actual plant location.

2.2.8 The parties eventually proposed the following compromise:

> The Gas Company shall not deviate from the approved location for any part of the gas system unless the prior approval of the Engineer/Road Superintendent to do so is received. The Gas Company shall, within six months of completing the installation of any part of the gas system, provide two copies of "as built" drawings to the Engineer/Road Superintendent sufficient to accurately establish the location, depth, (measurement between the top of the gas system and the ground surface at the time of installation) and distance of the gas system. The "as built" plan shall be of equal quality to the pre-construction plan and if the approved pre-construction plan included elevations that were geodetically referenced, the "as built" plan shall similarly include elevations that were geodetically referenced. If requested, one copy of the drawings shall be in an electronic format and one shall be a hard copy drawing.

Warranty

2.2.9 AMO noted that while the 1987 MFA gives the municipality control over the location of the gas system in the highway, AMO wanted the 2000 MFA to explicitly state that the municipality's approved location in the road allowance is to be taken by the Gas Companies on an "as is" basis. AMO also wanted the 2000 MFA to clarify that the municipality's approval is related to standard cross-sections and anticipated road system works, and is not to be taken as a representation that the location is suitable for the Gas Company's purposes, as the approved location may be found to be impractical for environmental or other reasons.

2.2.10 The Gas Companies' initial position was that the determination of responsibility for environmental impacts should continue to be judged on the basis of the circumstances surrounding any particular occurrence. The Gas Companies were concerned that AMO's proposed clause may pre-determine responsibility for any adverse environmental impact. The Gas Companies felt that it was unreasonable to require utilities to contract out of the common law or to allow municipalities to remain silent on known hazards. The Gas Companies felt that negligence claims against the municipality might not be possible if use of the rights-of-way is at the utility's own risk.

2.2.11 The parties subsequently proposed that the following sentence should be added to Paragraph 5 (b) of the 2000 MFA:

> This approval is not a representation or warranty as to the state of repair of the highway or the suitability of the highway for the gas system.

Panel Recommendations

2.2.12 For consistency throughout the 2000 MFA, the Panel considers that it would be helpful to include a definition of "Plan" in Paragraph 1. Therefore, the Panel recommends that the following definition be inserted as Clause1 (h):

> Plan means the plan described in Paragraph 5 of this Agreement required to be filed by the Gas Company with the Engineer/Road Superintendent prior to the commencement of work on the gas system.

2.2.13 The Panel recommends that the Board adopt the parties' proposal with respect to providing geodetic information with slight modifications and that the following provision be inserted in Clause 5 (c) of the 2000 MFA:

> The Plan filed by the Gas Company shall include geodetic information for a particular location:
>
> (i) where circumstances are complex, in order to facilitate known projects, including projects which are reasonably anticipated by the Engineer/Road Superintendent, or
>
> (ii) when requested, where the Corporation has geodetic information for its own services and all others at the same location.

2.2.14 The Panel recommends that the Board adopt the parties' proposal with respect to "as built" drawings with minor wording changes.

2.2.15 The Panel recommends acceptance of the parties' proposal with respect to no warranty being provided as to the condition of the highway. The Panel recommends that for clarity this provision should be in a separate clause in Paragraph 5 of the 2000 MFA.

2.2.16 The Panel agrees in principle with the amendments proposed by the parties with respect to Paragraph 5 - Approval of Construction. The Panel recommends that all conditions with respect to approval of construction be in the same paragraph of the 2000 MFA. Therefore, the Panel recommends that Paragraph 5 of the 2000 MFA read as follows:

> (a) The Gas Company shall not undertake any excavation, opening or work which will disturb or interfere with the surface of the travelled portion of any highway unless a permit therefor has first been obtained from the Engineer/Road Superintendent and all work done by the Gas Company shall be to his satisfaction.
>
> (b) Prior to the commencement of work on the gas system or any extensions or changes to it (except service laterals which do not interfere with municipal works in the highway), the Gas Company shall file with the Engineer/Road Superintendent a Plan, satisfactory to the Engineer/Road Superintendent, drawn to scale and of sufficient detail considering the complexity of the specific locations involved, showing the highways in which it proposes to lay its gas system and the particular parts thereof it proposes to occupy.
>
> (c) The Plan filed by the Gas Company shall include geodetic information for a particular location:
>
> > (i) where circumstances are complex, in order to facilitate known projects, including projects which are reasonably anticipated by the Engineer/Road Superintendent, or
> >
> > (ii) when requested, where the Corporation has geodetic information for its own services and all others at the same location.

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

(e) Prior to the commencement of work on the gas system, the Engineer/Road Superintendent must approve the location of the work as shown on the Plan filed by the Gas Company, the timing of the work and any terms and conditions relating to the installation of the work.

(f) In addition to the requirements of this Agreement, if the Gas Company proposes to affix any part of the gas system to a bridge, viaduct or other structure, if the Engineer/Road Superintendent approves this proposal, he may require the Gas Company to comply with special conditions or to enter into a separate agreement as a condition of the approval of this part of the construction of the gas system.

(g) Where the gas system may affect a municipal drain, the Gas Company shall also file a copy of the Plan with the Corporation's Drainage Superintendent for purposes of the *Drainage Act*, or such other person designated by the Corporation as responsible for the drain.

(h) The Gas Company shall not deviate from the approved location for any part of the gas system unless the prior approval of the Engineer/Road Superintendent to do so is received.

(i) The Engineer/Road Superintendent's approval, where required throughout this paragraph shall not be unreasonably withheld.

(j) The approval of the Engineer/Road Superintendent is not a representation or warranty as to the state of

> repair of the highway or the suitability of the highway for the gas system.

2.3 INSURANCE AND LIABILITY

2.3.1 AMO originally proposed that provisions respecting insurance coverage should be made more specific and incorporate standard wording which is similar to that used in other municipal agreements.

2.3.2 The Gas Companies' position was that the wording of the 1987 MFA is adequate and clearly protects the municipality from claims. The Gas Companies claimed that they were in the best position to judge how to maintain adequate insurance to fulfill their obligations. The Gas Companies were concerned that it would be unreasonable and administratively onerous for utilities to include municipalities as named insureds. The Gas Companies were also concerned that an overly prescriptive approach would lead to excessive and unnecessary costs.

2.3.3 The parties subsequently proposed the following:

> The Gas Companies shall maintain Comprehensive General Liability Insurance in sufficient amount and description as will protect the Gas Company and the Corporation from claims for which the Gas Company is obliged to indemnify the Corporation under Section III-5. The insurance policy shall identify the Corporation as an additional named insured, but only with respect to the operation of the named insured (the Gas Company). The insurance policy shall not lapse or be cancelled without sixty (60) days' prior written notice to the Corporation by the Gas Company.

> The issuance of an insurance policy as provided in this section shall not be construed as relieving the Gas Company of liability not covered by such insurance or in excess of the policy limits of such insurance.
>
> Upon request by the Corporation, the Gas Company will confirm that premiums for such insurance have been paid and that such insurance is in full force and effect.

Panel Recommendation

2.3.4 The Panel recommends that the Board adopt the parties' proposal with respect to insurance and liability with a slight modification to reflect changes in the numbering of the paragraphs..

2.4 LEGISLATIVE CHANGE

2.4.1 AMO stated that it was prepared to abide by the guidelines in E.B.O. 125 where the Board stated "that in the case of renewals, a ten to fifteen year term therefore seems to be adequate" provided that a clause dealing with legislative change during the term of the franchise agreement be inserted in the 2000 MFA. AMO proposed that the 2000 MFA require the parties to renegotiate terms if there is a substantial change to the legal regime during the term of the franchise agreement. If the parties could not agree within six months, the matter would be referred to the Board. Alternatively, AMO wanted a renewal term not exceeding ten years.

2.4.2 The Gas Companies suggested that it was not in their interest nor that of gas customers to renegotiate the 2000 MFA every time there is a change in legislation or regulations that "pertain to the subject matter of the Agreement". The Gas Companies submitted that AMO's proposal, if accepted by the Board, would substantially increase the risk associated with investments in natural gas distribution, thereby placing upward pressure on rates and inhibiting further investment and system expansion, since it would create an uncertain and unstable environment for Gas Company operations. The Gas Companies' position was that a franchise agreement should be treated as any other contract where terms and conditions apply for a specified term.

Panel Recommendation

2.4.3 In light of the agreement reached between AMO and the Gas Companies with respect to the duration of the 2000 MFA, discussed below in section 3.2 of this Report, the Panel recommends that a provision dealing with legislative change not be included in the 2000 MFA.

2.5 ABANDONED PIPE

2.5.1 AMO's original position was that in order to establish reasonable timelines relating to disposition (abandonment) of the gas system, the 1987 MFA should be amended to provide that whenever the Gas Company abandons any portion of the gas system, it shall advise the municipality. The municipality, at its option, would decide whether the gas system should remain in the highway, in which case it would become the property of the municipality, or be removed and the highway restored at no cost to the municipality.

2.5.2 The Gas Companies' position was that the wording in the 1987 MFA strikes an appropriate balance between the interests of the utilities and the municipalities and that AMO's proposal could give rise to unnecessary and excessive costs. The Gas Companies also expressed concern that it may be unsafe to remove all abandoned gas pipelines and that removal is best done as part of roadway construction. The Gas Companies submitted that differentiating between abandoned and decommissioned pipe is unhelpful and that neither term should be interpreted as relinquishing ownership. The Gas Companies argued that future revenues relating to the use of the pipe should benefit gas ratepayers since municipalities have the ability to levy fees on non-gas users through municipal access agreements.

2.5.3 Ottawa-Carleton submitted that abandoned pipe should remain in the road until the road is reconstructed, at which time it should be removed by the Gas Company at its cost. If not removed at that time, it would become the municipality's property. Ottawa-Carleton also proposed that use of pipe for purposes other than gas should require a separate municipal access agreement. Ottawa-Carleton supported the submission made by Toronto that if a Gas Company uses its plant for purposes other than the transmission of gas a new access agreement is required.

2.5.4 After discussion, AMO and the Gas Companies proposed that a section be added to the 2000 MFA to deal with the use of deactivated gas pipelines as a telecommunications conduit or for any other purposes.

Panel Recommendation

2.5.5 The Panel recommends that the proposal of the Gas Companies and AMO with respect to the use of decommissioned parts of the gas system for purposes other than the transmission and distribution of gas be adopted , with minor changes, so that Paragraph 16 of the 2000 MFA reads as follows:

Use of Decommissioned Gas System

(a) The Gas Company shall provide promptly to the Corporation, to the extent such information is known:

(i) the names and addresses of all third parties who use decommissioned parts of the gas system for purposes other than the transmission or distribution of gas; and

(ii) the location of all proposed and existing decommissioned parts of the gas system used for purposes other than the transmission or distribution of gas.

(b) The Gas Company may allow a third party to use a decommissioned part of the gas system for purposes other than the transmission and distribution of gas and may charge a fee for that third party use, provided:

(i) the third party has entered into a municipal access agreement with the Corporation; and

(ii) the Gas Company does not charge a fee for the third party's right of access to the highways.

(c) Decommissioned parts of the gas system used for purposes other than the transmission and distribution of gas are not subject to the provisions of this Agreement. For decommissioned parts of the gas system used for purposes other than the transmission and distribution of gas, issues such as relocation costs will be governed by the relevant municipal access agreement.

3. ISSUES NOT AGREED TO BY ALL OF THE PARTIES

3.1 RELOCATION COSTS

3.1.1 Ottawa-Carleton submitted that it was reasonable for the Gas Companies to pay all costs associated with the relocation of gas pipelines since the Gas Companies know when they request the use of rights-of-way for pipelines that relocation is a distinct possibility. Ottawa-Carleton also submitted that relocation costs are no different from other utility related rights-of-way costs, which should be paid by the user, not the taxpayer. Ottawa-Carleton indicated that the Federation of Canadian Municipalities ("FCM") supports the position that telecommunication and private utility companies should pay 100% of relocation costs, where required for bona fide municipal purposes. If the Board decides that municipal taxpayers should share Gas Companies' relocation costs, Ottawa-Carleton requested that consideration be given to the sliding scale presented in its submissions.

3.1.2 The Gas Companies contended that the provisions of the 1987 MFA are reasonable. If Gas Companies were required to pay all of the costs of relocation, the municipality would not be at financial risk for any part of the decision to relocate the pipeline.

3.1.3 Ottawa-Carleton responded to this concern by pointing out that serious road management and cost implications for the municipality would preclude a municipality from asking a Gas Company to relocate its lines without due thought.

3.1.4 The Township of Hay expressed concern that in some rural municipalities there are recreational developments with dirt or gravelled roadways that have been mainly created by use, and that have not been constructed in the correct location according to a Plan of Subdivision. These roads have not been assumed by nor are they maintained by the municipality. In some of these developments Gas Companies have installed their pipelines along the travelled portion of the roadways. If the municipality assumes liability, the roadways will have to be constructed in the correct location according to a Plan of Subdivision, and that may require relocation of the gas pipelines. The Township of Hay felt that a municipality should not be required to pay any of the costs of relocation of the gas pipelines in these circumstances where the gas pipeline location was not approved by the municipality in the first place.

3.1.5 AMO and the Gas Companies ultimately proposed that there should be no changes to the provisions of the 1987 MFA relating to pipeline relocation.

Panel Recommendation

3.1.6 The Panel recommends that the Board accept the recommendation of AMO and the Gas Companies that the provisions of the 1987 MFA with respect to relocation costs should not be altered, with the modification requested by the Township of Hay that where the municipality has not originally approved the pipeline location, such as in unassumed road allowances, relocation costs should be paid by the Gas Company.

3.1.7 The Panel recommends that Clause 12 (d) of the 2000 MFA be as follows:

> The total relocation costs as calculated above shall be paid 35% by the Corporation and 65% by the Gas Company, except where the part of the gas system required to be moved is located in an unassumed road or in an unopened road allowance and the Corporation has not approved its location, in which case the Gas Company shall pay 100% of the relocation costs.

3.2 DURATION OF THE AGREEMENT

3.2.1 In E.B.O. 125 the Board stated it was of the opinion that:

> ... a first time agreement should be of a duration of not less than fifteen and no longer than twenty years. ... In the case of renewals, a ten to fifteen-year term would therefore seem to be adequate.

3.2.2 As discussed above, AMO was originally prepared to accept the ten to fifteen-year renewal term provided the Board accepted its proposal for allowing the franchise agreement to be amended if there is a legislative change. If this is not the case, AMO requested a maximum ten-year term for renewal of franchise agreements.

3.2.3 The Gas Companies felt that franchise agreements and renewals should not be shorter than they are currently (20 and 15 years respectively). The Gas Companies pointed out that they evaluate the economic feasibility for system expansion to recover the costs of an investment in the distribution system to provide service to residential customers over a period of 40 years or more. For a typical expansion project

involving a mix of commercial and residential customers, the costs of the project will generally be greater than the revenue for at least 15 years. Therefore, the Gas Companies contended that they do not typically realize a return on the original investment until well beyond the 15-year mark.

3.2.4 Gas Companies argued that the increased risk involved in a shorter duration of franchise renewal would ultimately hinder their ability to add new customers through expansion of the gas system and decrease the feasibility of expansion into new communities.

3.2.5 Ottawa-Carleton took the position that it opposed the proposed 20-year term for new or initial gas franchise agreements. Ottawa-Carleton submitted that a 20-year commitment by the municipality without redress during that time would amount to an abrogation of its road management responsibilities. Where gas pipes have been in the ground for a long time and the utility has already recovered its initial investment there are no issues of "security" or "investment" or "return".

3.2.6 Ottawa-Carleton submitted that even where the installation is new, the municipality's ownership rights and management obligations ought not to be subrogated to those of the user of property in the form of a 20-year commitment. Ottawa-Carleton argued that the municipality, as the owner of property, must set the term for the use of its property which is commensurate with the municipality's obligations for, and responsibilities to, that property. In Ottawa-Carleton's submission it ought not to be the entity seeking permission to use that property that sets the term. This is especially the case when, in Ottawa-Carleton's submission, the proposed use is for the benefit entirely of the user.

3.2.7 AMO and the Gas Companies subsequently proposed a compromise that the original term of the franchise should be for 20 years. The renewal term should also be for 20 years with subsequent updates in year 7 and year 14 of any renewal term to make allowances for revised conditions arising from Board-approved changes to the Model Franchise Agreement in the interim period. A 20-year term would provide stability for both parties with respect to the duration of the franchise agreement. The ability to modify the franchise agreement in years 7 and 14 of any renewal term, in order to incorporate all model franchise agreement changes other than term, would provide some opportunity to update the terms and conditions of the franchise agreement on a regular basis.

Panel Recommendations

3.2.8 The Panel recommends that the Board accept in principle the compromise reached between AMO and the Gas Companies. The Panel is of the view that the 20-year term will provide stability for municipalities, gas utilities, and their respective stakeholders. The 7 and 14 year modification capability will provide the opportunity during the 20-year period to bring the terms and conditions of the franchise agreement up to new standards. The Panel notes that AMO and the Gas Companies have agreed that there will be no updates during the initial term of the franchise agreement for municipalities who did not previously have gas service and that this will address the needs of Gas Companies with respect to system expansion.

3.2.9 The Panel is concerned that the wording suggested by AMO and the Gas Companies is ambiguous. It is important to clarify that the initial term is 20 years if the municipality has not previously received gas distribution services. In all other circumstances the term is for 20 years, and if the 2000 MFA is changed, except for the 20-year term, then on the 7th anniversary and the 14th anniversary the franchise

agreement between the Gas Company and the municipality will be deemed to have been amended to incorporate the changes in the 2000 MFA.

3.2.10 The Panel therefore recommends that Paragraph 4 - Duration of Agreement and Renewal Procedures- of the 2000 MFA should read as follows:

> (a) If the Corporation has not previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-law.
>
> or
>
> (b) If the Corporation has previously received gas distribution services, the rights hereby given and granted shall be for a term of 20 years from the date of final passing of the By-Law; provided that if, during the 20-year term of this Agreement the Model Franchise Agreement is changed, then on the 7th anniversary and on the 14th anniversary of the date of the passing of the By-Law, this Agreement shall be deemed to be amended to incorporate any changes in the Model Franchise Agreement in effect on such anniversary dates. Such deemed amendments shall not apply to alter the 20-year term.

3.3 DEFAULT PROVISIONS

3.3.1 AMO originally suggested that a new provision should be added to the 1987 MFA specifying what would happen in the event that either party defaults on its obligations under the franchise agreement. In particular AMO suggested that a provision be added to the effect that if either party defaults on any of its obligations under the franchise agreement, and fails to correct such default within 60 days, the other party

would have the option of performing the obligation at the defaulting party's expense, or taking action for an order of specific performance directing the defaulting party to fulfill its obligations under the franchise agreement, and, if successful, all legal costs related to such court action would be paid by the defaulting party to the non-defaulting party on a solicitor/client basis. In addition, the municipality could terminate the franchise agreement if the Gas Company repeatedly and persistently defaulted on its obligations in a material way or in a manner that put the safety of any person at risk, or if the Gas Company was in financial distress.

3.3.2 The Gas Companies did not believe that it is in the interests of the Gas Companies or gas customers to potentially subject the franchise agreement to termination each time a municipality claimed that the Gas Company is in default of any provision of the franchise agreement. The Gas Companies claimed that they have a long history of successful cooperation with municipalities on operating issues and that these good relations, along with the obligations contained in the 1987 MFA, provide sufficient incentive for Gas Companies to operate in a manner that meets the municipalities' needs. The Gas Companies were concerned that it is unnecessary and risky to suggest that a municipality could terminate a franchise as a result of a relatively minor operating issue. The Gas Companies noted that a franchise agreement is the same as any other contract and accordingly suggested that common law principles governing default should prevail.

3.3.3 AMO subsequently amended its proposal to suggest that the following provision should be included in the 2000 MFA:

> In the event that an order is made by the Ontario Energy Board under section 42 of the *Ontario Energy Board Act, 1998*, as the same may be amended from time to time, that an entity other than the Gas

> Company is to provide gas in the geographic area covered by this Agreement, then the Corporation may terminate this Agreement with the prior approval of the Board so to do.

3.3.4 The Gas Companies subsequently proposed that the Board adopt the following provision with respect to termination by Board order:

> In the event that an order is made by the Ontario Energy Board under section 42(3) of the *Ontario Energy Board Act, 1998*, requiring the Gas Company to cease to provide gas in the geographic area covered by this Agreement, the Corporation may apply to the court to terminate the franchise agreement for fundamental breach of contract.

Panel Recommendation

3.3.5 The Panel notes that there are no provisions in the 1987 MFA dealing specifically with the right of either party to terminate the franchise agreement during its term due to the default of the other party. The Panel is not aware that silence on this matter has caused problems. In the Panel's view the common law principles dealing with breach of contract are adequate to protect the municipality in the event that a Gas Company defaults in the performance of its obligations.

3.3.6 The Panel recommends that the Board accept neither suggestion put forward by the parties and that 2000 MFA should remain silent on the matter.

4. FEES

4.1 BACKGROUND

4.1.1 In E.B.O. 125 the Board decided that the gas utilities should not be required to pay fees to municipalities for permits. The 1987 MFA provided that the Gas Company was subject to "all municipal by-laws of general application and all orders and regulations made thereunder from time to time remaining in effect save and except by-laws which impose permit fees and by-laws which have the effect of amending this Agreement."

4.1.2 While the Gas Companies do not pay fees, their pipeline assets are assessed under the *Assessment Act* and they pay municipal taxes on those assets. The total amount of these taxes paid to municipalities throughout Ontario was estimated by the Gas Companies to be $71 million in 1998. The 1987 MFA also requires the Gas Companies to pay restoration costs when they undertake work in a municipality.

4.1.3 AMO's position was that the Gas Companies should no longer be exempt from paying fees. Initially, AMO supported a common fee structure for permit fees across all municipalities, but then changed its position to support Toronto and Ottawa-

Carleton's position that permit fees should be set by each municipality to reflect local conditions.

4.1.4 Toronto's position was that permit fees and fees for the use and occupation of municipally-owned property by gas pipelines and other infrastructure should be charged by municipalities. Toronto also argued that the Board could not impose terms and conditions in the 2000 MFA which would restrict the ability of municipalities to pass by-laws imposing such fees.

4.1.5 Ottawa-Carleton supported AMO and Toronto and in addition took the position that the Gas Companies should be required to compensate municipalities for damage caused to their road infrastructure when gas works are installed or repaired.

4.1.6 The Gas Companies' position was that the provisions of the 1987 MFA should continue and that Gas Companies should be exempt from any municipal by-laws imposing fees. The Gas Companies suggested that rates would have to increase by a minimum of $43 million per year to cover the permit fee of $350 proposed by AMO, and that rates would have to increase by a minimum of $14 million to cover the per kilometer charge proposed by AMO.

4.1.7 IGUA's position was in support of the Gas Companies that no fees should be charged.

4.2 JURISDICTION OF THE BOARD

4.2.1 In 1996 and 1998, the *Municipal Act* was amended to create the present section 220.1 which provides, in part, as follows:

> 220.1(2) Despite any Act, a municipality and a local board may pass by-laws imposing fees or charges on any class of persons,
>
> > (a) for services or activities provided or done by or on behalf of it;
> >
> > (b) for costs payable by it for services or activities provided or done by or on behalf of any other municipality or local board; and
> >
> > (c) for the use of its property, including property under its control.
>
> ...
>
> 220.1(4) No by-law under this section shall impose a fee or charge that is based on, is in respect of or is computed by reference to...
>
> > (e) the generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources.
>
> 220.1(5) Nothing in this section authorizes a municipality or local board to impose a fee or charge for distributing or retailing electrical power, including electrical energy, which exceeds the amount permitted by the Ontario Energy Board.

4.2.2 Toronto argued that subsection 220.1(2) of the *Municipal Act* explicitly authorizes municipalities to charge both permit fees (i.e. for the cost of services provided by the municipality arising from or related to a permit) and a usage fee (i.e. for the use of the municipality's property), and that the only statutory condition precedent to charging such fees is that the municipality must pass a by-law.

4.2.3 Toronto argued that because the opening words of subsection 220.1(2) are that these provisions apply "despite any Act" subsection 220.1(2) has paramountcy over any legislation, including the MFAct. Therefore, Toronto's position is that the effect of subsection 220.1(2) of the *Municipal Act* is to exclude the Board from determining under the MFAct whether Gas Companies should be exempt from municipal by-laws which impose charges on them. Toronto contended that the MFAct cannot restrict a municipality from passing a by-law under subsection 220.1(2) of the *Municipal Act* to impose a reasonable fee or charge for the use of its property or for property under its control.

4.2.4 The Gas Companies argued that subsection 19(6) of the OEB Act, which provides that "[t]he 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." gives the Board exclusive jurisdiction over the granting and renewal of franchises, and that the Board's decisions take precedence over conflicting municipal by-laws. Their position was that this provision provided the jurisdictional basis for the Board's determination to exempt the Gas Companies from municipal by-laws imposing permit fees contained in the 1987 MFA.

4.2.5 The Gas Companies argued that the words "despite any Act" in subsection 220.1(2) of the *Municipal Act* do not override the power granted to the Board under subsection 19(6) of the OEB Act, but simply remove any question that a municipality is otherwise competent to pass by-laws imposing fees or charges. They argued that the authority of the municipalities is still subject to the Board's exclusive jurisdiction over the terms and conditions of gas transmission and distribution franchises.

4.2.6 The Gas Companies noted that in E.B.O. 125 the Board found that:

- the OEB Act prevails over any other general or specific statute, including any by-law passed by a municipality;
- municipalities may pass by-laws relating to the laying, maintenance and use of gas pipelines on highways under the *Municipal Act*, subject to the MFAct;
- the terms and conditions of such a by-law must be approved by the Board before it can be assented to by the municipal electors;
- the interpretation of a by-law or an existing agreement as a contract or the enforceability of either is the role of the courts; and
- the Board can impose a settlement on the two parties if they cannot agree on the terms by ordering a renewal or extension of an existing franchise agreement on such terms and conditions as the Board deems to be in the public interest.

4.2.7 The Gas Companies noted that section 128 of the OEB Act provides as follows:

> (1) In the event of conflict between this Act and any other general or special Act, this Act prevails.
>
> (2) This Act and the regulations prevail over any by-law passed by a municipality.

4.2.8 The Gas Companies argued that this provision preserves the Board's exclusive authority over these matters in cases when transmission or distribution facilities are installed, maintained or replaced under the OEB Act.

4.2.9 Toronto responded by arguing that unlike the OEB Act the MFAct is not a regulatory statute; so, in applying the MFAct the Board should not apply a regulatory model and thus should not seek to control revenues or returns of municipalities as it might seek to do those of gas or electric utilities.

4.2.10 The Gas Companies also argued that in E.B.A. 767, 768, 769, & 783 (the "Orillia Four Case") the Board reaffirmed the preeminence of the franchise agreement and the prohibition on permit fees. They argued that the Board was not persuaded in these cases that the new statutory provisions allowing municipalities to charge fees would preclude the inclusion of a prohibition on such fees in a new franchise agreement. They argued that the Board also found that municipal claims of "downloading costs" and municipalities' ability to charge user fees did not constitute "unusual" circumstances which would justify introducing different terms and conditions into the 1987 MFA. Accordingly, the Gas Companies argued that the Board found that the franchise agreements for all four municipalities should be in the model form without the amendments for permit fees or a shorter term as requested by the municipalities.

4.2.11 The Gas Companies submitted that the right of municipalities to levy fees on gas utilities is brought further into doubt by paragraph 220.1(4)(e) of the *Municipal Act,* which provides that activities related to the "generation, exploitation, extraction, harvesting, processing, renewal or transportation of natural resources" are exempt from fees and charges. They argued that transportation of gas includes its transmission and distribution, which would be covered by this exemption. The Gas Companies claimed that their position is supported by the Board's decision in the

Orillia Four Case, where they argued, the Board expressed its concern that interpreting subsection 220.1(4) of the *Municipal Act* in a contrary manner might be inconsistent with the exemption in clause 257.1(1)(c) of the *Municipal Act.* which uses the same words and has been interpreted to exempt Gas Companies from the definition of "business" for the purposes of general municipal licensing powers.

4.2.12 Toronto argued that subsection 220.1(4) of the *Municipal Act* is not an exemption clause, as it does not exempt any class of person or businesses. Toronto argued that this clause limits the use of municipal powers to duplicate certain federal and provincial taxes, namely income taxes, GST and PST, by precluding fees and charges in the nature of income, consumption, transaction or sales taxes. This would preclude, under clause (4)(e) of section 220.1, charges by municipalities that would be in the nature of timber stumpage fees or tolls on the transportation of gas through the municipality for example, by TranCanada Pipelines Limited.

4.2.13 Ottawa-Carleton submitted that the reference to "transport" in section 220.1(4)(e) of the *Municipal Act* has nothing to do with the transportation of gas but relates to property and land use.

4.2.14 The Gas Companies argued that the Board is fully competent to regulate the use of public rights-of-way and to determine the appropriate compensation to be paid by the Gas Companies for such use. They argued that numerous entities, such as telephone and telecommunication companies, as well as gas and electric utilities, have statutory rights to place their facilities on, over, or under the highway, and that each of these entities is regulated as to the manner and conditions of the use of the highways.

4.2.15 Toronto also argued that the owner of property has the right to charge whatever it wants for what amounts to a licence to use and occupy. Toronto conceded that there are practical and legal limits on the amount municipalities can charge, but that those limits are not specified in the MFAct. Toronto argued that under section 10 of the MFAct, if that legislation gives the Board jurisdiction over charges that would otherwise be applicable under section 220.1(2) of the *Municipal Act*, the Board should operate on the presumption that the municipal charges are prima facie reasonable and that they were developed in good faith. Toronto noted that it has established a standard set of terms for use of its property, which it argued the Gas Companies should adhere to including paying the "going rate". Toronto also argued that if the Board is going to look at the rates charged, it shouldn't look at the Gas Companies in isolation; it should look at the public interest and the "going rate".

Panel Findings on the Board's Jurisdiction

4.2.16 The Panel has considered the submissions of the parties on the extent of the Board's jurisdiction to govern the relationship between the municipalities and the Gas Companies.

4.2.17 In the Panel's view, section 220.1 of the *Municipal Act* is enabling legislation that allows municipalities to pass by-laws charging fees. The phrase "despite any other Act" contained in this section means at most that no other legislative provision can take away the ability of the municipality to pass such a by-law.

4.2.18 The mere fact that the municipality has the ability to pass a by-law imposing fees does not restrict the Board's jurisdiction under the MFAct to determine the reasonable terms and conditions that govern the relationship between the municipality and the Gas Company.

4.2.19 The Board's jurisdiction under the MFAct is to approve or impose terms and conditions of a franchise agreement. The Panel finds that the Board continues to have the jurisdiction to include terms and conditions dealing with all aspects of the relationship between the parties, including the extent to which municipalities can require Gas Companies to pay fees for activities related directly to the presence of the gas works in the municipality.

4.2.20 The Panel therefore finds that the Board has the jurisdiction to determine the extent to which Gas Companies should be required to pay permit fees, fees for the use of municipal property, and compensation for damage caused to municipal property.

4.2.21 The Panel recommends that the Board adopt these findings.

4.3 OTHER GENERAL ISSUES RELATING TO FEES

4.3.1 The Gas Companies submitted that legislative changes do not justify the introduction of new municipal fees and charges to natural gas ratepayers. They argued that the government's stated intent of the *Energy Competition Act* is to create jobs and protect consumers by promoting low-cost energy through competition and not to provide new sources of revenue for municipalities.

4.3.2 The Gas Companies argued that introducing municipal fees will increase natural gas rates, impair the economic expansion of natural gas, and widen the property tax disparity between natural gas and electricity distribution in the province without adding any public benefit. They claimed that in fact the public may be worse off since shifting costs from taxpayers to natural gas ratepayers adds little to the economy while the Gas Companies' abilities to provide the economic and environmental benefits of natural gas would be impaired.

4.3.3 Ottawa-Carleton argued that the Gas Companies have not presented any information to support the statements that any additional charges will have direct and significant impacts on natural gas ratepayers throughout the province including increases in gas rates and the potential decline in natural gas distribution expansion if the 1987 MFA is changed to allow for the provision of municipal fees.

4.3.4 Ottawa-Carleton's position was that the Board should adopt a "user-pay" approach, and that the Gas Companies should reimburse the municipality for all financial impacts of the presence of the gas distribution facilities in the municipality.

4.3.5 The Gas Companies argued that by properly applying the "user pay" approach, the Gas Companies would pay less rather than more; since they are already paying more than is required to cover the costs of the services they receive. To be equitable, the "user pay" principle would require municipalities to charge all utilities equally for using the road allowance, including municipally-owned utilities. It would also require municipalities to pay developers for road allowances and infrastructure (roads, water, sewer & electric distribution plant) that municipalities currently receive at no cost. They argued that a "user pay" approach, based on cost recovery, should not be used to collect occupancy fees for rights-of-way that were acquired at no cost to the municipality.

4.3.6 The Gas Companies claimed that municipal taxes are meant to help to recover the costs of services provided by the municipality, such as snow removal, garbage pick-up, parks, sewage treatment, arenas etc. The Gas Companies argued that they do not employ any of these services and, therefore, imposing additional municipal fees on gas pipelines is not justifiable and would unfairly shift municipal costs to natural gas ratepayers. The Gas Companies pointed out that they pay property taxes to the municipalities regardless of whether their pipelines are located on municipal road allowances, provincial highways or private property.

4.3.7 Toronto argued that municipalities should eliminate undesirable cross-subsidization between property taxpayers who are gas customers, and property taxpayers who are not gas customers. To achieve this, Toronto wants to charge the Gas Companies full cost recovery for the costs that their activities impose on the municipality. Toronto argued that the resulting increase in cost to the Gas Companies would be equal to the amount of the subsidy that they and/or their customers have been enjoying.

4.3.8 It was the position of the Gas Companies that fees that merely shift costs from the municipal taxpayer to the gas ratepayer without adding any economic benefit are clearly not in the public interest.

4.3.9 The Gas Companies argued that under the “no cross-subsidization” approach, the urban gas customer would end up paying more overall, as the gas rate increases required to recover the new municipal fees would be only partially offset by lower taxes, which at best would be fully allocated across all municipal taxpayers. They claimed that the concept of postage stamp rates would come under pressure depending on the resulting disparity between large and small municipalities. If fees were introduced over time as franchise agreements were renewed, gas ratepayers in

municipalities operating under existing agreements would be subsidizing taxpayers in the municipalities collecting fees.

4.3.10 Toronto's position was that it is better to reduce the level of cross-subsidization gradually through the renewal of franchise agreements, rather than not at all.

4.4 SPECIFIC FEES

Permit Fees

4.4.1 AMO, Ottawa-Carleton and Toronto argued that the issuing of permits and monitoring and inspecting field work is a significant burden on municipal staff, particularly in urban areas with complex, underground infrastructure. They submitted that the effort involved in issuing a permit can vary from a routine approval given over the telephone, to an intensive review of detailed plans. They argued that the municipal taxpayer should not bear the burden of these costs, and that a standard province-wide fee for every permit is inappropriate given the broad range of conditions from one municipality to another.

4.4.2 AMO originally recommended a set fee for permits; however, that position was amended and AMO and Ottawa-Carleton recommended that each municipality establish its own fees based on its actual costs. They acknowledged that there are legal limitations on what the municipality can charge, and that the charges must be reasonable. Ottawa's position is that the permit fees should reflect a municipality's administrative costs.

4.4.3 The Gas Companies pointed out that Gas Companies usually pay substantially higher property taxes per metre of gas pipeline in larger cities than in the rest of the province due to typically higher mill rates. They argued that while some municipalities have suggested that higher permit fees are necessary in larger communities to cover the higher cost of dealing with the congestion and complexity in their road allowances and to eliminate taxpayer subsidization of gas use, the gas Companies claimed that, in fact, gas ratepayers in smaller municipalities subsidize natural gas ratepayers in larger more congested municipalities because operating and maintenance costs are higher in urbanized areas.

4.4.4 The Gas Companies argued that allowing one municipality to pass by-laws which override the franchise agreement would diminish the benefits of standardization, and that by-laws such as those introducing new fees, should not be used in a way that could amend the franchise agreement.

Compensation for the Use of Municipal Rights-of-Way

4.4.5 Ottawa-Carleton submitted that times have changed and that the 1987 MFA no longer serves its purpose. Ottawa-Carleton argued that the concept perpetuated by the 1987 MFA that the community as a whole should subsidize a large and profitable business which uses public property without payment is anachronistic. In an environment of deregulation, competition, financial constraint, user-pay and accountability, its relevance is limited. Ottawa-Carleton requested that the Board recognize the municipality's authority over its roads and its responsibility to exercise "Good Road Management" in the best interests of its taxpayers.

4.4.6 The Gas Companies argued that the characterization of the Gas Companies' right to be on the highways as a "licence" granted by the municipality is fundamentally wrong. They argued that licences are voluntary transactions, but that gas utilities have no choice in the matter.

4.4.7 The Gas Companies argued that the taxes they are currently paying more than cover the administration costs associated with gas distribution use of municipal rights-of-way. In 1998, the Gas Companies collectively paid $71 million in property taxes to Ontario municipalities.

4.4.8 The Gas Companies argued that they are the only utilities that pay property taxes on their distribution systems to the municipalities. Bell Canada pays a gross receipts tax, but this goes directly to the province. Municipal electric, water and sewer utilities are not required to pay anything for their use of the road allowance. The Gas Companies submitted that while it would be appropriate to use the gas model as a guide for the electricity industry, it would be unfair to implement changes in the gas industry that would put it at a further competitive disadvantage. Section 27(10) of the *Assessment Act* exempts the poles, towers and lines of the Municipal Electric Utilities (MEUs) from tax assessment, while sections 24 and 25 of the *Assessment Act* establish the right of municipalities to assess and tax natural gas distribution and transmission pipelines. MEUs also appear to be protected from paying fees by section 41(8) of the *Electricity Act*. They argued that this unfair advantage should not be exacerbated through the introduction of additional fees charged solely to the natural gas industry.

4.4.9 While the Gas Companies pay the Ministry of Transportation a nominal charge for the use of provincial highways, the Gas Companies argued that it is applied mainly to road crossings, and has a total impact of less than $150,000 per year for all three gas utilities. They argued that this charge is based on an historic anomaly and is the only amount of this sort paid to the Ministry of Transportation. The Gas Companies urged that this should not be used to justify the payment of licence fees to municipalities.

4.4.10 Ottawa-Carleton submitted that the payment of taxes does not entitle any commercial entity to free use of the rights-of-way. Whether or not the Gas Companies should be assessed for property taxes is irrelevant to the issue of fair and reasonable compensation for use of the rights-of -way.

Compensation for Damage to Highways

4.4.11 Ottawa-Carleton submitted that the failure of Gas Companies to pay the full cost of their presence in municipal highways means that municipalities must incur those costs, and that this is not an effective management of the public's assets or finances.

4.4.12 The Gas Companies claimed that the majority of distribution pipelines facilities are located outside the travelled portion of the road and that the Gas Companies often bore under the road rather than dig up the surface. They pointed out that in all cases the affected road allowance is at a minimum "well and sufficiently restored to the reasonable satisfaction of the Engineer/Road Superintendent" as is guaranteed by the restoration clause in the 1987 MFA.

4.4.13 Ottawa-Carleton contended scientific studies support the position that utility trenching reduces the life of a road no matter how well the attempted restoration is done. Ottawa-Carleton submitted that there is a vast difference between normal road wear and tear, and the accelerated deterioration which results from road cuts. Roads are designed for the movement of traffic, including trucks and transit vehicles, and have a corresponding life span.

4.4.14 Ottawa-Carleton submitted that there is no complete protection from the permanent negative impacts of road cuts. The costs attributable to work-around requirements and those attributable to pavement degradation are entirely separate.

4.4.15 Ottawa-Carleton also submitted that any road use fee should be based on "land value" not on costs. Pavement degradation is a cost and as such has nothing to do with the road use licence fee.

4.4.16 Gas Companies submitted that payment of a road use fee would be inequitable because municipally-owned utilities do not pay the cost of road use. This assumes there is benefit in transferring money from one municipal pocket to the other. It also assumes non-payment by water and sewer users.

Panel Recommendations

Permit Fees

4.4.17 The Panel finds that permit fees are not fees "based on, in respect of or computed by reference to the transportation of natural resources" and therefore are not prohibited by subsection 220.1(4) of the *Municipal Act.* Rather they are fees or charges on Gas Companies for "services or activities provided or done by or on behalf of" the municipality and are therefore permitted pursuant to clause 220.1(2)(a) of the *Municipal Act*.

4.4.18 The Panel recommends that the municipality should be permitted to charge fees which reasonably reflect the costs incurred by the municipality in issuing permits to the Gas Companies. The Panel has determined that it is reasonable for Gas Companies to pay fees that directly relate to the costs incurred by the municipalities in providing these services.

4.4.19 The reasonable costs to a municipality arising from approval of construction activities of Gas Companies in the course of their businesses should be borne by the Gas Companies (and ultimately by the gas ratepayers) and not by the municipal tax payers.

4.4.20 The Panel does not recommend that a fixed charge should be set by the Board since the actual costs to the municipality will vary greatly depending on the nature, location and complexity of the construction activity.

Compensation for the Use of Municipal Rights-of-Way

4.4.21 The Panel recommends that municipalities should not be permitted to charge fees for the use of municipal rights-of-way.

4.4.22 The Panel agrees with the Gas Companies that the highways do not belong to a municipality in the same way land belongs to a private owner. A municipality holds the highways in trust for the public, and the municipality is required to allow those highways to be used for the furtherance of the public interest.

4.4.23 As a practical matter, once the pipelines are laid, neither the municipality nor the Gas Company has any choice in the matter. Any attempt by the municipality to retroactively impose user fees on a Gas Company for facilities laid in the highway years ago is unreasonable.

Compensation for Damage to the Highway

4.4.24 The Panel recommends that the municipalities should not be permitted to charge fees for any long-term damage to the roadway resulting from the installation or maintenance of the gas works located on them.

4.4.25 While the Panel accepts that repeated boring and excavation may have some impact on the long-term quality of the highway infrastructure, the Panel is of the view that this impact does not exceed what is reasonable to provide the public with gas and other services that use the road allowances.

4.4.26 The Panel is of the view that the requirement in the 1987 MFA that the Gas Companies undertake restoration work to the satisfaction of the municipal authorities is sufficient protection for the municipalities and the public.

4.4.27 The Panel recommends that paragraph 13 of the 2000 MFA should be amended as follows:

> This Agreement is subject to the provisions of all regulating statutes and all municipal by-laws of general application, including by-laws which charge permit fees intended to recover the reasonable costs of the Corporation related to the issuing, monitoring and enforcing of permits, and to all orders and regulations made thereunder from time to time, except by-laws which have the effect of amending this Agreement, or which require payment for the occupancy of highways by the gas system.

5. ADDITIONAL MATTERS

5.1 CITY OF TORONTO

5.1.1 Toronto requested that the Board make it clear in its Report that the 2000 MFA does not apply to Toronto because it is a special case.

5.1.2 Toronto advised the Board that legislation was enacted in 1848 (the “1848 Act”) which incorporated a company (a predecessor of ECG) and gave the company the power to “open the ground in the streets” in the former City of Toronto in order to lay down the necessary mains and pipes. The 1848 Act was silent on the issue of any compensation or cost recovery.

5.1.3 The other former municipalities that were amalgamated into the present City of Toronto were not subject to similar legislation but made different arrangements over the years with the gas companies. To the best of its knowledge neither the old City of Toronto, nor the other municipalities with which it was amalgamated, have had any written franchise agreements with either ECG or any of its predecessor companies. These municipalities and the gas companies have operated under essentially voluntary ad hoc arrangements.

5.1.4 Toronto stressed that the Board should avoid:

- imposing the model agreement upon municipalities and gas companies that have previously not had any comprehensive written agreement; and
- using any language that would limit Toronto from receiving appropriate compensation for its costs and for the use of its property.

5.1.5 Presently the former City of Toronto recovers the following costs:

- restoring sidewalks and pavements with permanent repairs (as distinguished from temporary patches made by ECG);
- inspecting temporary and permanent repairs;
- issuing, reviewing and keeping track of permits; and
- coordinating construction by gas companies, other utilities and other users of roads.

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

- pavement degradation requiring accelerated reconstruction of the road;
- loss productivity in municipal works such as subway construction or repair of municipal utilities under the roads; and
- traffic disruption.

5.1.7 Toronto did not want anything in the 2000 MFA to pre-empt or limit Toronto's ability to negotiate with ECG. Toronto argued that the best and most direct way to do this would be for the Board to state explicitly that the 2000 MFA does not apply to any future agreements that might be negotiated between Toronto and ECG.

5.1.8 Toronto pointed out that the Board's jurisdiction does not include making rules or regulations that the terms of the model agreement must govern all relationships between municipalities and gas companies. Each case must be decided on its own merits despite the fact that the Board can use certain general policies.

5.1.9 Toronto submitted that there is no expiry in the legislation covering Toronto; it goes on in perpetuity. Therefore, it is a pure question of law whether section 10 of the MFAct applies to Toronto because the opening words of section 10 are "where the term of a right to operate works for the distribution of gas has expired or will expire within one year".

Panel Recommendation

5.1.10 The Panel notes that the Board does not have the jurisdiction to impose a uniform agreement on the parties. That would be tantamount to a predetermination of the decisions which the Board is required to make under the MFAct. The purpose of the 2000 MFA is to provide a template to guide the Gas Companies and municipalities as to terms and conditions the Board generally finds reasonable in applications under the MFAct.

5.1.11 For the purposes of this proceeding, it is not necessary for the Panel to determine the effect of the 1848 Act, the effect of the amalgamation of the former municipalities, the legal import of the MFAct nor the current arrangements between the Toronto and ECG. Toronto is free to negotiate the terms of its relationship with ECG.

5.1.12 The Panel recommends that it is not necessary to include a provision that the 2000 MFA does not apply to Toronto.

5.2 FRANCHISE HANDBOOK

5.2.1 The Franchise Handbook is an operational guide to implementing the 1987 MFA. Although AMO and the Gas Companies did not conduct a thorough review of the Franchise Handbook, the "Summary of Discussions between the Municipal Order Of Government (AMO) and the Gas Companies Regarding Amendments to the Model Gas Franchise Agreement" contains a number of proposed amendments to the Franchise Handbook, including provision for regular updates to the Franchise Handbook, depth of pipeline cover, references to construction and engineering codes, cost sharing arrangements for participation in the local Public Utilities Coordinating Committees, and minimization of costs related to road cuts.

5.2.2 The Panel recognizes that changes to the Franchise Handbook could not be finalized until this Report and the 2000 MFA have been released. The Panel recommends that AMO and the Gas Companies should meet to discuss proposed changes to the Franchise Handbook which are compatible with the recommendations in this Report and the 2000 MFA. Should the parties wish, Board Staff will be available to assist with such discussions.

THIS REPORT IS RESPECTFULLY SUBMITTED December 29, 2000.

____

Sheila K. Halladay
Presiding Member

____

Floyd Laughren
Member and Chair

____

Judy Simon
Member

____

A Catherina Spoel
Member