E.B.O. 125

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1980, Chapter 332, Sections 13 and 15, and the Municipal Franchises Act R.S.O. 1980, Chapter 309;

AND IN THE MATTER OF the Ontario Energy Board's review of franchise agreements and certificates of public convenience and necessity.

BEFORE: R. W. Macaulay, Q.C.
Chairman and Presiding Member

M. C. Rounding
Member

P. E. Boisseau
Member

May 21, 1986

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Pages are numbered separately for each chapter

1. INTRODUCTION

Preamble

1.1 This hearing was called by the Ontario Energy Board (the Board or the OEB) in order to provide a forum for the discussion of a number of general and specific concerns which have arisen over the last few years 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 are adequate, and whether the ways in which these agreements are entered into are appropriate.

1.2 The hearing was in part a response to questions raised as a result of the OEB's decision in the Lambton case (E.B.A. 464 et al), to issues to be considered in the OEB's forthcoming Blenheim/

Lambton case (E.B.A. 472), and to a Brief adopted by the Association of Municipalities of Ontario and directed to the Ministries of Energy and of Municipal Affairs (Appendix A). The Board was persuaded that the underlying principles as well as some recurring contentious issues needed a review by all the parties involved - the municipalities, the gas distributors, the gas consumers and the OEB itself.

1.3 Many of the problems which needed consideration have a historical base. 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. While a significant number of problems arise in the Union Gas Limited franchise area in southwestern Ontario, which contains most of the oldest gas distributing facilities, there are many aspects of franchise agreements in general which need reconsideration in the light of changing circumstances and policies.

1.4 This hearing provided a fresh opportunity for the parties to understand each other's position. The specific issues which were to be addressed at the hearing are listed later in this chapter.

The more general problems which were revealed in the course of the hearing were:

- the concerns of municipalities, particularly smaller, lower-tier municipalities regarding their relations and their negotiating position with the gas distributors;
- the importance of the municipalities having a clearer understanding of the role, powers and policies of the OEB in relation to various aspects of municipal franchise agreements;
- an appreciation of the concerns of the gas distributors in protecting their initial and continuing capital investment in their franchise areas;
- the concerns of the large volume gas users that they may be restricted in how and where they may purchase gas by the terms of the franchise agreements in the municipalities in which they are located.

1.5 The Board is grateful to all participants at the hearing for their generous and instructive contributions. In particular, the many municipalities which were ably represented throughout the public hearing are to be commended for increasing the Board's understanding, and that of the other participants, as to the present day concerns of the municipal authorities about the presence of utility plant in municipal rights

of way. Appreciation is also extended to the gas utility companies and other participants for their constructive contributions which helped to clarify the spectrum of issues.

1.6 The Board believes that the hearing itself was useful to all the parties who took part in it. It should be emphasized that the most valuable consequence of the hearing is not analysed in the body of this Report. This was the process of mutual education and understanding between the participants that developed during the hearing in the course of discussion of a number of major issues. This is a process that should continue beyond the period of the hearing.

1.7 A major recommendation in this report is the establishment of a special Municipal Franchise Agreement Committee (the recommendation appears in chapter 8). The MFA Committee is to be made up of representatives from the municipalities, the gas distributing companies and the Ontario Energy Board, and it will be requested to resolve a number of the questions about municipal franchise agreements which were raised originally at the hearing but which would be most constructively answered through discussion and negotiation rather than by decisions or orders of the Board.

1.8 In effect, the MFA Committee will extend the process of dialogue between the municipalities and the gas distributors that took place during the hearing. This MFA Committee should also be seen to mirror, at the representative level, the way that Utility Coordinating Committees operate now to great advantage in many municipalities.

1.9 In general, most of the issues raised at the hearing do not have a very significant financial impact in the short term for the parties; it is the future implications of certain policies that seem threatening. For example, some municipalities believe that a change in the principles of sharing relocation costs of gas pipelines might lead to alarming increases of costs to their ratepayers in the future. Likewise the gas distributors resist the principle of introducing permit fees for excavations in municipal rights of way because they believe such fees could become a significant additional cost for the utility companies and the gas customers.

1.10 In a generic hearing of this sort held by the Board, the findings of the Board as stated in its Report are not legally binding on its future deliberations, but are an expression of the Board's policies or guidelines on the various issues discussed.

Contents of the Report

1.11 The remainder of this chapter gives details of the hearing itself, including the Notice, the list of suggested concerns, lists of Participants and lists of Witnesses.

1.12 Chapter 2 outlines the historical background to natural gas franchise agreements and Chapter 3, "The Legislative Background", describes the major pieces of Ontario legislation which have a bearing on questions relating to municipal franchise agreements.

1.13 Chapters 4, 5, and 6 deal with the specific issues raised at the hearing. In Chapter 7, "The Nature of Franchise Agreements", the more general questions raised in the hearing are analysed. Chapter 8 describes the role of the Municipal Franchise Agreement Committee.

Notice of Public Hearing

1.14 The Board made a decision to inquire into and review the form of natural gas franchise agreements and certificates of public convenience and necessity. Accordingly, Notice of Public Hearing was published on August 16, 1985 in 43 Ontario daily newspapers. Concurrently, personal notices were mailed to the 838 municipalities

and all the natural gas distribution companies in Ontario.

1.15 The Notice invited interested individuals, citizens' groups, municipalities, associations and companies to participate in the hearing and outlined the participation procedure. Forty-seven letters were received by September 13, 1985 indicating intentions to participate in the public hearing.

1.16 A mailing list of all participants and a list of suggested concerns were attached to the Amended Notice of Public Hearing dated September 24, 1985.

List of Suggested Concerns

1.17 A list of suggested concerns was provided by the Board to assist participants in considering common issues which could be examined at the hearing. These issues were suggestions only. No one was confined to this list, nor did everyone address every issue. The list is as follows:

1. Franchise exclusivity and flexibility.

2. Obligation of the franchised gas utility to provide service to the entire franchise area.

3. Obligation of the franchised gas utility to purchase and distribute gas produced locally.

4. The implications of a franchise with a regional or county government as compared to a franchise with a local municipality (city, etc.) and the need, if any, for varying provisions in the respective agreements.

Note: In most cases, the regional or county franchise relates to a transmission line using the regional or county road or rights-of-way and is associated with an application for leave to construct. The local municipal franchise relates to the distribution system within the local municipality and is associated with an application for certificate of public convenience and necessity.

5. Elements of franchise agreements that may be standardized.

6. Duration of franchise agreements and uniform expiry dates.

7. Compliance by gas utilities with municipal by-laws of general application.

8. Procedures and rights of renewal of franchise agreements.

9. Filing with the road authority of plans and specifications of all gas distribution works before and after construction.

10. Safety and other implications of pipelines crossing private property.

11. Abandonment of pipe.

12. Notice by the gas utility of all emergency excavations.

13. Responsibility of the gas utility to give prompt service for line locations when a ruptured water or sewer pipe has to be replaced.

14. Required participation of the gas utility in any committee to coordinate operations of all underground utilities.

15. Indemnification and liability insurance.

16. Allocation of responsibility for payment of costs of relocation of old and new gas lines recognizing:
    a) any differences in the treatment between transmission and distribution systems,

b) associated upgrading of the pipeline,

c) any temporary arrangement for the pipeline location, and

d) any existing unwritten agreements.

17. Need for separate agreements for each bridge on which a gas pipeline is installed.

18. Impact of cost-sharing for relocation of lines on the municipality and the gas utility.

19. Municipal control over interference with highways within a certain period after the initial construction of such highways.

20. Municipal control over the locations of utility installations underneath the travelled portion of highways and other municipal property.

21. Municipal control of the timing and manner of construction of utility works under highways and other municipal property.

22. Payment of permit fees for installation, maintenance and repair of lines to defray the cost of municipal inspection and supervision of such operations.

23. Need for a provision in the franchise agreement specifying that proposed marginal service lines in the franchise area may require contributions to construction from the prospective customers.

24. Failure to comply with the terms of franchise agreements.

25. Existing unwritten and other written agreements.

26. Impact at local and provincial levels that proposed revisions may have on existing and future franchise agreements .

27. Implications of the proposed revisions with respect to existing legislation.

28. Other concerns.

Submission of Briefs

1.18 Twenty-six submissions were received by the Board by October 22, 1985. A Procedural Order dated October 17, 1985 instructed the participants on the procedure and timing for obtaining from one another information and material that was in addition to a particular brief filed and that was relevant to the purpose of the hearing.

A late application for participant status was received from the Independent Petroleum Association of Canada and, in the absence of objection, was approved by the Board.

Participants

1.19 The participants for purposes of appearance were arranged in the following categories:

- Municipalities
- Gas Users and Other Interested Parties
- Gas Utility Companies

Municipalities

1.20 The municipalities which actively participated in the hearing and their counsel or representative were as follows:

- Several Cities and Counties in Southwestern Ontario represented by Mr. A.C. Wright

- Corporation of the Town of Blenheim (Blenheim) and Corporation of the County of Lambton (Lambton) represented by Mr. W.R. Herridge, Q.C. and Ms. E.J. Forster.

- Regional Municipality of Ottawa-Carleton and Corporation of the City of Ottawa (RMOC) represented by Mr. W.E. Duce, Q.C. and Mr. P. Hughes.

- Corporation of the City of Sudbury represented by Mr. W.F. Dean

- Regional Municipality of Sudbury represented by Mr. R.M. Swiddle

- Federation of Northern Ontario Municipalities represented by Mr. B.W. Cameron

- Corporation of the Township of Norfolk, without counsel, represented by Mayor C.H. Abbott

- Corporation of the Township of London, without counsel, represented by Mr. A.F. Bannister, Administrator and Clerk

- Corporation of the Township of Zorra, without counsel, represented by Mayor W.W. Hammond

1.21 The following municipalities filed briefs but did not actively participate in the hearing:

- Corporation of the Township of Brantford represented by Mr. J.F. Longley, Township Engineer

- Corporation of the City of London represented by Mr. R.A. Blackwell, Q.C.

- Corporation of the Township of Malahide represented by Mr. R.R. Millard, Clerk-Treasurer

- Corporation of the City of North York represented by Mr. C.E. Onley, Q.C. and Ms. N. Koltun

- County of Oxford represented by Mr. C. Tatham, Warden

- Corporation of the City of Peterborough represented by Mr. R. Taylor

- Corporation of the City of St. Catharines represented by Mr. T.A. Richardson

1.22 The following municipalities filed letters of intent but neither filed briefs nor participated in the hearing:

- County of Brant

- Regional Municipality of Niagara

- County of Simcoe

1.23 The Several Cities and Counties in Southwestern Ontario, also referred to as the Southwestern Ontario Municipal Committee (SWOMC), comprises

the Cities of St. Thomas, Windsor, Chatham and Sarnia and the Counties of Elgin, Essex, Kent, Lambton and Middlesex. Supporters of the SWOMC are the constituent members of the aforementioned counties plus the Regional Municipalities of Haldimand-Norfolk and Waterloo plus the Counties of Brant, Grey, Huron, Perth and Wellington, and, to a limited extent, their constituent municipalities including the Cities of Brantford, Nanticoke, Owen Sound, Woodstock, Stratford and Guelph. In total, the SWOMC comprises or is supported by at least 151 municipalities throughout southwestern Ontario.

1.24 The Townships of Brantford and Malahide and the County of Oxford were supporters of the brief submitted by the Several Cities and Counties of Southwestern Ontario, as were the Townships of Norfolk and London who spoke to their respective briefs at the hearing as well. The Regional Municipality of Niagara indicated that its interests were adequately covered in the briefs of the Regional Municipalities of Ottawa-Carleton and Sudbury.

1.25 The Federation of Northern Ontario Municipalities (FONOM) is a federation of 73 cities, towns, townships, villages and improvement districts that are the constituent municipalities of the Districts of Nipissing, Parry Sound,

Sudbury, Algoma, Cochrane, Manitoulin and Temiskaming and the Regional Municipality of Sudbury.

Gas Users and Other Interested Parties

1.26 The following gas customers and other interested parties participated actively in the public hearing:

- Fernlea Flowers Limited represented by Mr. J.R. Tyrrell, Q.C.
- Independent Petroleum Association of Canada (IPAC) represented by Ms. J.A. Snider

1.27 The following interested parties filed briefs but did not actively participate in the hearing:

- Inco Limited represented by Mr. T.G. Andrews
- Industrial Gas Users Association (IGUA) represented by Mr. P.C.P. Thompson, Q.C.
- Mr. Alphonse G. Mahew on behalf of himself
- Nitrochem Limited represented by Mr. R.C. van Banning

1.28 The following interested parties filed letters of intent but neither filed briefs nor participated actively in the hearing:

- C-I-L Inc. represented by Ms. P.D. Jackson
- Cyanamid Canada Inc. represented by Mr. J. de Pencier, Ms. J. Ryan and Ms. K. Robinson
- Mr. J.I. Davidson on behalf of himself
- Eneroil Research Ltd. represented by Mr. T. Ferenczy
- TransCanada PipeLines Limited represented by Mr. C.C. Black

1.29 The common concern of the large volume gas users dealt with direct purchase arrangements which, they were advised at the outset of the hearing, would be the subject of a separate subsequent hearing. Consequently, any further interest in this hearing was reduced for them to the question of whether any condition of gas franchise agreements might preclude future direct purchase arrangements. Only IPAC's counsel explored this issue with the various witnesses throughout the hearing. Final arguments were made on this issue by IPAC and Nitrochem.

Gas Utility Companies

1.30 The gas utilities participated as follows:

- The Consumers' Gas Company Ltd. (Consumers') represented by Mr. P.Y. Atkinson
- Union Gas Limited (Union) represented by Mr. J.B. Jolley, Q.C. and Mr. A. Mudryj
- Northern and Central Gas Corporation Limited (Northern) (as of May 5, 1986, changed to ICG Utilities (Ontario) Ltd.) represented by Mr. P.F. Scully
- Ontario Natural Gas Association (ONGA) represented by Mr. P.Y. Atkinson

1.31 Natural Resource Gas Limited, without counsel, represented by Mr. K. Greenbeck, neither submitted a brief nor participated in the hearing except in an observer capacity.

Ontario Energy Board

1.32 Special Counsel was Ms. C.L. Cottle.

Appearance and List of Witnesses

1.33 The sequence and identity of witnesses are listed as follows. In the cases of organizations having more than one witness, the witnesses appeared as panels.

Southwestern Ontario Municipal Committee

R. Foulds	Clerk Administrator The County of Kent
J.D. Ferguson	County Engineer The County of Kent
I. Nethercot	Head Subsidy Administration and Operation Municipal Roads Office Ministry of Transportation and Communications
W.E.C. Coulter	City Engineer The City of Chatham
D.H. Husson	County Engineer Middlesex County
R.E. Davies	Engineer The Regional Municipality of Haldimand-Norfolk

C.K. Domker	Commissioner of Works The City of St. Thomas
D.M. Packwood	Ministry of Transportation and Communications

The Corporation of the Town of Blenheim and the Corporation of the County of Lambton

D.W. Derrick	County Engineer The County of Lambton
P. Shillington	Council Member Town of Blenheim
A.C. Gault	Clerk Treasurer Town of Blenheim

Regional Municipality of Ottawa-Carleton

J. Becking	Director of Operations Transportation Department
D.C. Marett	Chief Structural Engineer
B.L.W. Hendricks	Construction Engineer
L. Russell	Deputy Treasurer and Director of Budget and Accounting Services

W. Spooner, Q.C.	Partner Gowling and Henderson
G.G. McFarlane	President Marlin Engineering Limited Vice President SMP Engineering
D. Cramm	Chairman, Bridge Manager C.C. Parker Limited
K.L. Kleinsteiber	Ministry of Transportation and Communications
G. Phillips	President Canadian Subaqueous Pipe-Lines Limited

Corporation of the Township of Norfolk

C.H. Abbott	Mayor

Corporation of the City of Sudbury

H.A. Proudly	Manager of Development, Property and Technical Services

Regional Municipality of Sudbury

J.C. Flook	Regional Roads Engineer

Corporation of the Township of London

A.F. Bannister	Administrator and Clerk

Federation of Northern Ontario Municipalities

R.H. Pope	Financial Consultant Ross, Pope & Company

Corporation of the Township of Zorra

W.W. Hammond	Mayor

Fernlea Flowers Limited

M.W. Bouk	Director of Finance and Operations Manager

The Consumers' Gas Company Ltd.

N. Harte	Manager of Planning and Technical Services, Eastern Region
J.B. Graham	Chief Engineer
H. Townsend	Regional Manager, Eastern Region

Union Gas Limited

D.J. Moore	Vice-President, Operations
B.J. Kemble	Manager, Engineering

Northern and Central Gas Corporation Limited

G. Laidlaw	Company Solicitor
J. Hunter	Director, Controller
M.A. Wolnik	Vice-President, Operations

Hearing Duration

1.34 The hearing started on November 13, 1985, continued in Toronto to November 22, 1985 and concluded in London on November 25, 1985. There were nine public hearing days.

Transcripts and Exhibits

1.35 A verbatim transcript was made of all the proceedings. The full transcript of 1477 pages and all the exhibits filed with the Board in connection with this hearing are held at the Board's offices and are available for public examination.

Final Written Submissions

1.36 Final written submissions, although entirely optional, were invited by December 6, 1985 to provide an opportunity for any participants to respond to the oral submissions of others and specific questions raised by the Board during the hearing. Final submissions were filed by SWOMC, Blenheim/Lambton, RMOC, FONOM, Fernlea Flowers, IPAC, Nitrochem, Consumers', Northern and Union.

2. BACKGROUND

Gas Distribution in Ontario

2.1 There are three major gas distributors in Ontario which together serve approximately 1,462,000 customers. Each gas distributor is granted franchises to operate as a monopoly within a given area: Consumers' operates in southern, central and eastern Ontario, Northern operates in northwestern, northern and eastern Ontario, and Union operates within southwestern Ontario. The enclosed maps illustrate these three operating areas.

2.2 In 1984 the combined assets of the three companies totalled about $3.3 billion and the total revenue of these utilities was approximately $3.7 billion.

Reasons for Regulation

2.3 The distribution of natural gas within Ontario to residents, businesses and industry is fundamental to the economy of the province. It is an essential service, and consequently one with which the Legislature has long had a deep concern.

2.4 Because of the cost of installing the extensive network of gas mains and associated works, the capital required is so great that no gas distribution company would commence its endeavour unless it was granted a distribution monopoly to assure its investors an opportunity to earn a fair return on their investment. Accordingly, the Legislature has granted the three major distribution companies a monopoly framework within which to operate.

2.5 Since the distribution and sale of natural gas within Ontario are performed by gas utilities which operate as monopoly businesses created in the public interest, the gas utilities have traditionally been subject to provincial regulation through legislation established primarily in the Ontario Energy Board Act and the Municipal Franchises Act.

2.6 Some characteristics common to public gas utilities are:

- o An essential service provided to customers;
- o A physical connection between the utility system and the customer's equipment;
- o A high capital investment in utility plant; and
- o Unit costs that tend to decrease with expanding scale of operation.

2.7 In the absence of competition amongst gas distributors, the customer is protected by the regulation of the gas distributor's entry into the area, construction of its plant, and its rates. The regulatory board must also ensure that the gas distributor maintains a sound financial position.

Requisites for Distribution

2.8 A gas franchise agreement is a contract between an individual municipal corporation and a gas distribution company. There are two aspects of a franchise agreement, gas supply and use of road allowance.

2.9 The gas supply clauses of the agreement grant municipal permission for a specified term to the gas utility to supply gas to the inhabitants of the municipality and to enter upon all

the highways under the jurisdiction of the municipal corporation and to construct, operate and maintain a system for the supply, distribution and transmission of gas in and through the municipality. The foregoing relates to the privileges extended by the municipality to the gas utility.

2.10 The largest part of the agreement deals with the duties of the gas utility to comply with specific municipal requirements related to the occupancy of gas utility plant in and on municipal roads and rights of way.

How a Franchise Agreement is Established

2.11 If the gas distributor and the municipality have agreed on the proposed terms and conditions of a new franchise agreement, or on the terms and conditions of the renewal of an agreement, the procedure is substantially the same.

(a) A draft franchise agreement is prepared by the gas distributor and delivered to the municipality.

(b) Discussions between the municipality and the utility then occur regarding the draft franchise agreement.

(c) In the event the municipality agrees to the proposed franchise, the municipality is usually asked to pass a resolution approving the proposed form of agreement.

(d) When passed, an application must then be prepared by the gas distributor and filed with the Board. For each case, the Board opens a file and issues directions regarding its hearing procedure.

(e) Upon receipt of the Board's directions by the utility, notices of application and hearing must be sent by registered mail and published in a local newspaper by the utility.

(f) The hearing is subsequently convened. In most cases the municipality does not have a representative attend the hearing.

(g) Following a hearing, if the Board approves the franchise and issues an order, the franchise must be sent back to the municipal council, a by-law must be passed and the agreement signed. A copy of the by-law and agreement must be delivered to the Board. The assent of the electors required by the Municipal Franchises Act may be dispensed with by the Board.

2.12 Under section 9 of the Municipal Franchises Act the Board is required to either approve or not approve the agreement. The terms of the Act do not expressly give the Board the power to impose an agreement on the parties.

2.13 In the case of a renewal of a franchise agreement, if the utility and municipality cannot agree on renewal terms, the Board has jurisdiction under section 10 of the Act to order that the agreement be extended on such terms and conditions as the Board deems to be in the public interest. Such an order is deemed to be a valid by-law of the municipality, assented to by the electors.

Pipeline Construction Approval Process

2.14 The public hearing process by the OEB for the following pipeline construction applications is concurrent with the franchise agreement approval process described above:

(a) leave to construct a transmission pipeline is sought in accordance with the Ontario Energy Board Act, and/or

(b) a certificate of public convenience and necessity for the construction of works is sought under the Municipal Franchises Act.

2.15 In dealing with an application for leave to construct a pipeline or for a certificate of public convenience and necessity, the Board must decide whether it is in the public interest that the facilities be constructed. The Board requires the Applicant to identify the least-cost alternative, having regard to relative cost, operational constraints, market access and environmental impact. Other matters that the Board considers include the safety and availability of pipe, security of gas supply, ability to fund the project, construction practices, environmental factors and right of way concerns.

Municipal Structure of Ontario

2.16 A municipality is an area whose inhabitants are incorporated. Its powers are exercised by a council composed of individuals elected by the electors of the municipality. The purpose of municipal government is primarily to ensure local political authority and control over services provided in the local area.

2.17 Local municipality means a city, town, village or township. It is the basic form of local government in Ontario to which is vested the soil and freehold of the road allowances within its territorial jurisdiction (section 258 of the Municipal Act). Local municipalities are also referred to as lower-tier municipalities.

2.18 Roads and municipal rights of way at the local municipal level often include within their boundaries a complex of utilities - gas, telephone, electricity, water, as well as sewers. Together they demand stringent engineering and planning.

2.19 A County is a municipality which is a federation of the towns, villages and townships within its borders, and is also referred to as an upper-tier municipality. Designated members of the elected local municipal councils combine to form the county council which is responsible for a limited number of functions, with major roads being the most important one.

2.20 Cities and separated towns, even though geographically part of the county, do not participate in the county political system.

2.21 Typically, county roads are arterial roads that run between municipalities within the county and beyond the county's boundaries. Some county roads remain within the county road system as they pass through an urban constituent local municipality. However, in some counties, the county road is vested in the urban constituent municipality as it passes through the local municipality on the basis of a connecting link agreement.

2.22 A regional municipality, like a county, is an upper-tier municipality and a federation of all the local municipalities within its boundaries. The major differences between a regional municipality and a county are:

- o the regional municipality is created by a special act of the Ontario Legislature;
- o the regional councils have more responsibilities than do county councils; and
- o cities are full participants in the regional system, in contrast to their separate status in the county system.

2.23 The regional councils are responsible for regional-scale functions such as overall land-use planning, social services, major roads, and trunk sewer and water systems.

2.24 Territorial districts are divisions of that part of Ontario which does not have county organization.

Association of Municipalities of Ontario

2.25 The Association of Municipalities of Ontario (AMO) is a voluntary organization which promotes the values of the municipal government system

and the status of the municipal level of government as a vital and essential component of the total intergovernmental framework of Ontario and Canada.

2.26 The AMO represents 611 of the 838 municipal governments throughout Ontario containing 95 per cent of Ontario's population. The AMO acts as the collective voice of Ontario's municipal governments and is organized to accomplish through cooperation and coordination, what the majority has neither the time nor the resources to do individually.

2.27 The following associated sections of the AMO form an important part of the AMO's structure and play an important part in its activities in terms of the Board of Directors and program and policy development:

- County and Regional Section;
- Large Urban Section;
- Northern Ontario Section (FONOM/NOMA);
- Rural Section (ROMA);
- Organization of Small Urban Municipalities Section.

2.28 The AMO did not take a collective position at this hearing, nor did it participate directly. Rather, it deferred official participation in the proceedings to its member municipalities, individually and by groups. Many parties included in their briefs submitted to the Board a copy of the paper prepared by the AMO and presented to the Ministries of Energy and of Municipal Affairs (Appendix A).

Ontario Natural Gas Association

2.29 ONGA, the Ontario Natural Gas Association, represents the natural gas industry in Ontario and includes the three major gas utilities, The Consumers' Gas Company Ltd., Union Gas Limited and Northern and Central Gas Corporation Limited, as well as TransCanada PipeLines Limited. One of ONGA's stated objectives is to promote, assist and encourage the development and efficiency of the gas industry, including supply, production, transmission, storage and distribution, to the end that it may serve to the fullest possible extent the best interests of the public in Ontario.

3. THE LEGISLATIVE BACKGROUND

3.1 This chapter describes in general terms the major pieces of legislation which, with their regulations, affect gas distribution and municipal franchise agreements in Ontario. These are:

The Municipal Franchises Act
The Ontario Energy Board Act
The Municipal Act
The Public Service Works on Highways Act
The Public Utilities Act
The Energy Act
The Occupational Health and Safety Act
The Ontario Municipal Board Act
The Planning Act, 1983
The Drainage Act
The Assessment Act

The Municipal Franchises Act

3.2 The Municipal Franchises Act (R.S.O. 1980, chapter 309) is administered by the Ministry of Municipal Affairs. It sets out how arrangements are to be made by a municipal corporation for the supply of services by a public utility to the inhabitants of the municipality. "Public utility" is defined to include gas works and distributing works of every kind.

3.3 The Act establishes in subsection 3(1) that in order for a municipality to grant to a gas distributor the right:

1. to occupy a municipal highway (by laying a pipeline along a municipal right-of-way);
2. to construct or operate a public utility; or
3. to supply gas to the corporation or its inhabitants;

a by-law must be assented to by the municipal electors.

3.4 This by-law must contain the terms and conditions of the grant and the period for which the right was granted. This by-law is, in effect, the franchise agreement between the municipality and the gas distributor. The agreement must be approved by the Ontario Energy Board before it is submitted to the electors. The OEB holds a hearing before making an order granting its approval or refusing to do so.

3.5 An application is made under section 9 of the Municipal Franchises Act for a first-time agreement, or on a renewal where the parties have reached agreement on the terms of the renewal. On a section 9 application the OEB has only the power to approve or reject the application. On a section 9 application the OEB may dispense with the assent of the electors.

3.6 Section 10 of the Act is used when the parties cannot agree on the terms of a renewal or extension. Again the OEB holds a hearing before it makes an order renewing or extending the right; the duration and terms and conditions are as prescribed by the Board. The OEB may refuse to renew or extend the right if the public convenience and necessity do not warrant the renewal or extension. This Ontario Energy Board order is deemed to be a valid by-law of the municipality consented to by its electors.

3.7 Section 8 of the Act provides that any person who constructs works to supply or supplies gas in a municipality must obtain a further approval of the OEB in the form of a certificate of public convenience and necessity.

3.8 Section 6 provides that the Act does not apply to a by-law granting the right to pass through a municipality for the purpose of continuing a

line, work or system benefitting another municipality, the right to pass through in order to transmit gas not distributed in the municipality, or the right to construct or operate works required for the transmission of gas not intended for use or sale within the municipality.

The Ontario Energy Board Act

3.9 The Ontario Energy Board Act (R.S.O. 1980, chapter 332) is administered by the Ministry of Energy. In 1960 this Act brought into existence the Ontario Energy Board. The OEB is a regulatory tribunal acting in the public interest and its jurisdiction is set out in a number of statutes including the Municipal Franchises Act.

3.10 The OEB oversees the supply, sale, transmission, distribution and storage of natural gas and the construction of pipelines and works to supply gas. The Board does not regulate the rates of municipal gas distribution systems.

3.11 In the event of conflict, this Act prevails over any other general or specific Ontario statute, including any by-law passed by a municipality.

The Municipal Act

3.12 The Municipal Act (R.S.O. 1980, chapter 302) is the foundation upon which municipal government

in Ontario is built. It is administered by the Ministry of Municipal Affairs. The Act establishes that each elected municipal council acts in the name of the electors and ratepayers of a municipality by resolutions and by-laws. The Act provides that, with certain exceptions, the municipal council cannot grant an exclusive franchise right.

3.13 Councils of local municipalities may pass by-laws in regard to the laying, maintenance and use of gas pipelines on highways under section 210 of the Municipal Act, subject to the Municipal Franchises Act. Councils of counties may pass by-laws permitting and regulating the laying of gas pipes under county highways under section 225 of the Municipal Act, again subject to the Municipal Franchises Act. Regions have a similar power pursuant to individual regional acts.

The Public Service Works on Highways Act

3.14 The Public Service Works on Highways Act (R.S.O. 1980, chapter 420) was originally proclaimed in 1925, and is administered by the Ministry of Transportation and Communications. Section 2 of the Act provides that, in default of agreement, when a municipality wishes to construct, change, or improve one of its roads and the

works of a gas distributor are on the highway and will be affected, the "cost of labour" will be borne by the municipality and the gas distributor in equal proportions.

3.15 This formula of cost sharing has been used extensively in municipal franchise agreements which are of much more recent vintage than the Act, when there is no explicit agreement between the parties on the costs of pipeline relocation. It should be noted that it is the "cost of labour" which is to be shared. When a municipality requires a relocation of gas utility works for other than road work purposes, the municipality, in the absence of any agreement to the contrary, will have to bear the total cost.

3.16 The Act provides that the municipality or the gas distributor may apply to the OMB for relief against such equal distribution of costs where such apportionment is "unfair or unjust".

The Public Utilities Act

3.17 The Public Utilities Act (R.S.O. 1980, chapter 423) is a consolidation of numerous statutes dealing with public utilities; "public utility" is defined in the Act to mean works to transport water, artificial or natural gas, electrical power or energy, steam or hot water.

3.18 Parts IV and V apply to all companies owning or operating public utilities or supplying a public utility. Section 54 imposes a duty on a gas distributor to supply all buildings within a municipality which are close to a gas line, upon request.

3.19 Under section 57, a gas distributor requires a by-law of the municipal council, passed with the assent of the electors as required in the Municipal Franchises Act, to enable it to exercise its statutory powers, as found in the the Public Utilities Act, within the municipality. Section 58 establishes that a gas distributor can stop supplying gas to a consumer with 48 hours notice when the consumer fails to pay. Sections 60 and 21 establish that a gas distributor has the prima facie authority to lay down its works on highways, subject to other legislative requirements.

The Energy Act

3.20 The Energy Act (R.S.O. 1980, chapter 139) is administered by the Ministry of Consumer and Commercial Relations. This Act deals with safety aspects of hydrocarbons (gas). Subsection 18(1) imposes a duty on persons to obtain a "locate" before excavation. (A locate is a service offered by the gas distributor to

determine the exact position of a line.) Every person who interferes with a pipeline without authority, or damages it, is guilty of an offence (sections 19 and 27).

3.21 Subsection 18(2) imposes a duty on the gas distributor to provide a locate within a reasonable time after receiving a request for the same. The gas distributor is required under section 6 of Ontario Regulation 450/84, Gas Pipeline Systems, to file a manual of its standard practices which includes procedures for locating pipelines.

3.22 Under section 28 of the Energy Act, the Lieutenant Governor in Council has the power to make regulations with respect to the handling and use of hydrocarbons and may adopt by reference any code and may require compliance with such an adopted code. The Canadian Standards Association Standard Z184-M1983, Gas Pipeline Systems, (CSA-Z184) (5th edition) is a code which generally provides minimum requirements for the design, fabrication, installation, inspection, testing, operation and maintenance of gas pipeline systems. CSA-Z184 was adopted as part of Ontario Regulation 450/84 (O. Reg. 450/84).

3.23 The Energy Act and its regulations prevail over any municipal by-law.

The Occupational Health and Safety Act

3.24 The Occupational Health and Safety Act (R.S.O. 1980, chapter 321) is administered by the Ministry of Labour. Of particular significance to this hearing is section 53 of Ontario Regulation 659/79 (O. Reg. 659/79), dealing with the safety of the worker on excavations. A gas distributor shall, on request, locate and mark the gas service; where necessary, shut off or discontinue the gas service; and, if that cannot be done, shall supervise the uncovering of the service. Further to subsection 53(2), gas pipes are to be supported to prevent failure or breakage at an excavation.

The Ontario Municipal Board Act

3.25 The Ontario Municipal Board (OMB) is an independent tribunal established under the Ontario Municipal Board Act (R.S.O. 1980, chapter 347) which is administered by the Ministry of the Attorney General. It was originally established in the 1930s to oversee the budgets of municipalities. Since that time it has acquired very broad powers derived from many acts. In addition to the OMB's jurisdiction over land-use planning, its other powers include matters dealing with water and sewage service provided by one municipality to another,

railways, public utilities, assessment appeals, municipal boundary adjustments and municipal amalgamations and annexations.

3.26 The OMB has powers under the Municipal Franchises Act. However, where the franchise is a gas franchise, the Ontario Energy Board takes the place of the OMB. The OMB's authority relating to natural gas distribution comes through the Planning Act, 1983, and the Drainage Act, and also under the Public Service Works on Highways Act which gives the OMB the authority to re-apportion the cost of labour.

The Planning Act, 1983

3.27 The Planning Act, 1983 (S.O. 1983, chapter 1) is administered by the Ministry of Municipal Affairs. Originally introduced in the 1950s, it requires that Ontario municipalities must have an official plan.

3.28 Where the OEB is exercising its authority in a way which may affect a planning matter, it must have regard to any policy statement issued by the Minister of Municipal Affairs. Further, the Board, before it authorizes an undertaking, must also have regard for the planning policies of the relevant municipality. This could relate, for instance, to the building of above-

ground facilities for gas transmission lines, or the need for road right of ways which have not been approved under the official plan.

The Drainage Act

3.29 The Drainage Act (R.S.O. 1980, chapter 126) is administered by the Ministry of Agriculture and Food. Drains are of major importance in agriculture areas, particularly in southwestern Ontario. From time to time gas pipelines intersect with drainage systems and there may be a conflict between the function of the drainage system and of the gas line.

3.30 Drainage works may be constructed by mutual agreement (section 2), by requisition (section 3) or by petition (section 4). In the latter two instances, an engineer is appointed to assess the benefit, outlet liability and injury liability in a report to the respective municipal council (section 21). This report may be adopted by by-law.

3.31 Section 26 of the Act provides that a public utility or road authority may be assessed for all the increase of costs of a drainage work caused by the existence of the public utility or road authority in addition to other sums assessed, and notwithstanding that the public

utility or road authority may not be otherwise assessable under the Drainage Act. Assessments imposed under the Drainage Act are deemed to be taxes and the Municipal Act applies, subsection 61(4).

3.32 The persons affected by the assessment may appeal to the Court of Revision (section 46). An owner of land or a public utility affected by the engineer's report may appeal to the referee under section 47 or appeal to the Ontario Drainage Tribunal pursuant to section 48.

The Assessment Act

3.33 The Assessment Act (R.S.O. 1980, chapter 31) is administered by the Ministry of Revenue. All real property in Ontario is liable to assessment and taxation, subject to the statutory exemptions found in the Act. Land, real property and real estate are defined to include "all structures and fixtures erected or placed upon, in, over, under or affixed to a highway, lane or other public communication or water".

3.34 The gas distributor is subject to a "business assessment" pursuant to paragraph 7(1)(h); namely, a sum equal to 30 percent of the assessed value of the land excluding pipeline liable to assessment under sections 23 or 24.

3.35 Section 23 provides for assessment of the distribution pipelines whether or not situated on a highway, street, road, lane or other public place at market value. The assessment of transmission pipelines is pursuant to the rates established in section 24.

4. MUNICIPAL RIGHT OF WAY CONTROL

Introduction

4.1 The Legislature of Ontario has established local, county and regional municipal corporations to exercise delegated authority with respect to many matters of local interest, including negotiating agreements for natural gas distribution franchises. A municipal gas franchise gives the right to a gas distributor, subject to conditions and terms of the franchise agreement, to distribute and supply gas to a given municipality and, in order to do so, to place gas pipelines within the road allowances of the municipality.

4.2 Lower-tier municipalities generally view a gas franchise as dealing with the distribution of gas to its local citizens and businesses, thereby necessitating the use of local munici-

pal road allowances. Upper-tier municipalities usually perceive the gas franchise as dealing with the use of their arterial road allowances by gas lines in order to supply local municipalities both within and outside of its boundaries; they are not directly concerned with the distribution of gas to consumers. Nevertheless, both upper- and lower-tier municipalities have a common direct interest in the use by gas works of their respective road allowances. In this regard, a number of issues were raised at the hearing by the municipalities. On some of these issues, the positions of the parties were modified in part during the proceedings, as each better understood the position of the other. The issues are presented as follows:

- The Role of Utility Coordinating Committees
- Filing of Plans and Specifications prior to Construction, Location Approval
- Post-Construction Filing of As-Built Drawings
- Safety
- Timing and Methods of Construction; Right of Way Restoration and Maintenance
- Crossings - Bridges
- Crossings - Drainage Ditches and Drains

4.3 A further major issue, the question of the sharing of costs of gas line relocations, is discussed in Chapter 5.

The Role of Utility Coordinating Committees

4.4 The role of a coordinating committee at the regional and municipal level is to ensure an orderly development of utility services within the road and street allowances. Utility coordinating committees, where they exist, are composed of representatives from the municipality and the various utilities which use the road allowances. The utility coordinating committees address the day-to-day issues together with the planning of future projects.

Position of the Municipalities:

4.5 All municipalities were in favour of such committees, even those municipalities which have none in existence. The Southwestern Ontario Municipal Committee (SWOMC) submitted that all utility coordinating committees ought to be voluntary and no provision should mandate municipality and utility participation.

Position of the Utilities:

4.6 The gas distributors were in favour of utility coordinating committees and encouraged their formation. Union contended that the municipality should be responsible for establishing such a committee. Union further proposed that in

smaller municipalities where the volume of work is low, the road superintendent may be made responsible for coordinating all underground activities without the need of a full-fledged committee.

4.7 Union agreed with the SWOMC that there is no need to insert a clause in a franchise agreement about gas distributor and municipal participation on a utility coordinating committee.

Position of the Board:

4.8 The Board agrees that it is not necessary to include in a franchise agreement a clause making it mandatory for both parties to participate in a utility coordinating committee because voluntary participation enhances the worth of these committees. However, the Board urges municipalities and utilities to establish these committees where they are practicable. The Board encourages smaller municipalities where this type of committee is not feasible, to communicate their concerns, problems and future plans, even on an informal basis, to the gas distributor. Conversely, the gas distributors should be receptive to the concerns of the municipalities.

Filing of Plans and Specifications prior to Construction; Location Approval

4.9 The municipalities and the gas distributors agreed that pre-construction drawings and specifications should be filed with the municipalities. As well, the location and relocation of lines should have the concurrence of the Road Superintendent or the municipal Engineer. Some municipalities, however, advocated their ultimate right to designate the locations of pipelines in case of a dispute.

Position of the Municipalities:

4.10 It was submitted that except in case of emergencies, line location and construction timing should be controlled by the municipalities. The municipalities see themselves as owners or custodians of the road allowance. They take the position that the municipality is the sole body to coordinate effectively the activities on, above, along and under roads, and is the sole body which should approve or control the location of gas plant within the road allowance.

4.11 The Southwestern Ontario Municipal Committee submitted that when disputes arise between utilities and municipalities regarding line location (including depth), the municipalities

ought to have the right to apply to the Ontario Energy Board to resolve the disagreement. The SWOMC also submitted that a gas distributor ought not to be given a pre-emptive right to locate pipeline in road allowance by a franchise agreement, and that a municipality ought to have the authority to refuse permission to lay pipes in the road allowance.

Position of the Utilities:

4.12 The utilities agreed to the filing of plans and specifications and to obtaining the approval of the Road Superintendent before undertaking works except in emergencies.

4.13 With regard to the location of lines within the road allowance, Union believed that its current standard franchise agreement and the proposed standard agreement of the Ontario Natural Gas Association are adequate because they do not give either the municipality or the utility the unilateral right to force a specific location upon the other. Union submitted that both agreements give the gas distributor the right to propose a location for its distribution or transmission lines and the municipality has the right to approve such location or to refuse it if it interferes with existing or planned municipal works.

4.14 Union interpreted the role of the municipal Engineer or the Road Superintendent as a coordinator for the orderly utilization of the road allowance, but without the authority to dictate specific locations for the placement of utility plant.

4.15 Northern suggested that sections 21 and 60 of the Public Utilities Act give legislative support to the utilities' right to locate gas line in ". . . any highway, lane or other public communication . . .". Northern did not believe that the Ontario Energy Board should be given the jurisdiction to be the arbiter of any disputes over the interpretation of franchise agreements or the enforcer of their provisions. Northern is of the view that franchise agreements already have certain built-in controls to handle non-compliance and that the courts should settle any questions of contract law.

Position of the Board:

4.16 The Board recommends that pre-construction drawings and specifications should be filed with the Road Superintendent or municipal Engineer.

4.17 The Board believes that the municipality is the custodian of the road allowance and should have the responsibility of coordinating the location

of utilities on its property. Therefore it must be consulted and should agree to the location of new plant (including depth of cover), to the construction technique to be used, especially for crossings, and to the timing of the work to be performed.

4.18 The Board is of the view that the gas distributor should not be given a pre-emptive right by franchise agreement to locate its plant in the road allowance. With regard to Northern's interpretation that sections 21 and 60 of the Public Utilities Act give the gas distributor the primary right to locate gas lines in the road allowance, the Board is of the opinion that these statutory provisions do not give any overriding entitlement to the gas distributor to use the right of way to the detriment of the municipality.

4.19 In the Board's opinion plant location should be negotiated by the gas distributor and the municipality on a case-by-case basis. The Board should not be placed in the position of interpreting franchise or road user agreements; that is the role of the courts. The Board could, however, have a role as an arbitrator in instances where there is a dispute involving line location and there is no other way to resolve the dispute. The Board, therefore, recommends

that the proposed Municipal Franchise Agreement Committee established by this Report consider the means, whether by legislation or otherwise, by which the Board could assume a limited arbitration role for line location disputes.

Post-Construction Filing of As-Built Drawings

4.20 The issue of as-built drawings was raised by the municipalities which were concerned that these be provided by the gas distributor in order to confirm that pipeline installations or relocations have been carried out at the approved location within the road allowance. These plans also serve as a reference in the planning of future road construction and the construction of other utility works.

4.21 The expression "as-built drawing" in this Report is used to describe a plan of a street, road allowance, etc. on which the location of a transmission or distribution line, after being constructed, has been determined by a technician or an engineer, in contrast to a certified land surveyor. No elevation, geodetic data or depth of cover is provided on such an as-built drawing.

4.22 As-built drawings are an important element in the planning of road reconstruction, as well as in the planning of other municipal works which

use the road allowance. In addition, they assist the municipalities in planning the development of the road allowance to its full potential.

Position of the Municipalities:

4.23 The opinions ranged from obtaining from the gas distributor as-built drawings upon request, to making the gas distributor responsible for providing as-built drawings with geodetic information.

4.24 The amount of detail in as-built drawings reporting the location of lines varies depending upon the complexity and the specific location of the line. As-built drawings covering line location in a rural area have fewer details than a drawing showing the location of a line in a congested intersection of a downtown core. The municipalities seemed to agree that the amount of detail to be given on any such drawings should be left to the municipality on a case-by-case basis. The municipalities believed that the level of detail to be shown on as-built drawings including service laterals should be a term or condition of municipal approval.

4.25 During the hearing some municipalities changed their position and most agreed that an as-built drawing of the type provided by Union during the hearing and depicted in Appendix E would be adequate for their purposes.

4.26 The municipalities conceded that only in exceptional circumstances should the utilities be requested to indicate geodetic information or depth of cover on such drawings.

4.27 The municipalities agreed that as-built drawings ought not to be used as a substitute for a gas company's duty to identify the location of its own pipeline upon request.

Position of the Utilities:

4.28 All three gas distributors strongly advocated that geodetic data should not be required on as-built drawings for the following reasons:

1) Minimum depth of cover is prescribed by O. Reg. 450/84. Lines are buried to minimum depth unless some abnormalities are encountered along the path of the gas line.

2) Third party contractors building other utilities or performing road works might rely on the geodetic data and depth of

cover information, and use mechanical equipment in close proximity to the gas line thereby increasing the risk of damaging the pipeline.

3) Even if depth of cover measurements were provided, over time the depth might be altered making the depths shown on drawings misleading.

4) Providing geodetic information on existing lines would cost millions of dollars and cause great disruption by necessitating the digging up of roads.

5) All gas distributors now provide, free-of-charge, on-site location (including depth of cover) of all their plant.

4.29 The gas distributors also submitted that as-built drawings are available upon request but that they are not intended to be a substitute for an on-site location service provided by the gas distributors.

4.30 Union stated that, by law, gas distributors are required to ascertain line location when a third party undertakes work in the vicinity of a gas line. Union also stated that when precise information with regard to depth is a critical

factor, this information is obtained by uncovering the line. This service is a part of the locate service provided by Union and is also free of charge.

4.31 Consumers' recognized that exceptions do exist where geodetic data may be required, such as the major downtown intersections in cities where there is a congestion of underground plants of various utilities.

4.32 Northern agreed with the views of the other two utilities in that it was opposed to a requirement for geodetic data on as-built drawings.

Position of the Board:

4.33 The value of the depth of cover data shown on an as-built drawing provided at time of construction is dubious. As pointed out by the gas distributors, depth of cover may change over time due to erosion or grading work. On the other hand, there are certain advantages to having as-built drawings with geodetic data certified by a licensed land surveyor as follows:

a) The gas distributor knows precisely the location of its plant; and

b) If a municipality plans to reconstruct roads or highways or wants to deepen drainage ditches, the exact location of all gas plant is available to the municipality and thus facilitates the design and construction of municipal works.

4.34 In general, these advantages are overshadowed by the fact that line location and actual depth of cover information is provided free of charge by the gas distributors, thereby reducing the necessity for geodetic data. In addition, in order to minimize third party damage, it is the practice of the gas distributors to expose their lines, or to have them exposed under their supervision, by hand, prior to any construction work undertaken by others. The Board agrees with Consumers' that only in special circumstances would the cost of geodetic data be justified.

4.35 The Board is encouraged that the municipalities, during the course of the hearing, were able to agree that as-built drawings of the type illustrated in Appendix E are adequate and acceptable.

4.36 A number of municipalities, through the efforts of their utility coordinating committees, have established location standards for all utilities and special requirements for pavement cut

work, crossings and permits. Union has consolidated this information in booklet form for the guidance of its field construction workers. The Board commends these practices and urges all municipalities and gas distributors to follow these examples of sound practice.

4.37 The Board recommends that gas distributors make available to all municipalities in their franchise area, a list of information and services provided free of charge, such as the availability of as-built drawings and locate service for pipeline location and depth of cover. Some municipalities indicated that they were not aware of the services that are now available to them. The Board is of the opinion that such conduct will help to improve communication links between the gas distributors and the municipalities.

Safety

4.38 Ontario Regulation 450/84 establishes essential requirements and minimum standards for the design, installation and operation of gas pipeline systems.

4.39 The requirements of the O. Reg. 450/84 are adequate for the design and safe operation of gas pipelines in situations normally encoun-

tered in Ontario. Requirements for abnormal or unusual conditions are not specifically provided for, nor are all details of engineering and construction prescribed. It is intended that all work performed within the scope of the O. Reg. 450/84 should meet or exceed the safety standards expressed in it.

4.40 At the hearing, two subjects related to safety were addressed by the municipalities: the abandonment of lines and locates.

4.41 In addition to O. Reg. 450/84, a regulation under the Occupational Health and Safety Act and other sections of the Energy Act play an important role with regard to worker safety during construction, operation and maintenance of gas pipelines and all gas distributors are bound to comply with their requirements.

Position of the Municipalities:

4.42 Few municipalities presented recommendations regarding the disposition of abandoned lines but those addressing the matter advocated their removal. The reason given was the possible confusion in identifying the abandoned line from one which is in use.

4.43 The Regional Municipality of Sudbury submitted that Northern did not respond promptly on a number of occasions to emergencies involving locates, and at times erroneous information had been provided. The Regional Municipality suggested that there should be a responsibility placed upon gas distributors to give prompt and accurate service for line location.

Position of the Utilities:

4.44 The three gas distributors testified that all lines which are abandoned are subject to the conditions set out in the CSA-Z184, which requires that gas be purged and the segment to be abandoned must be disconnected from the rest of the system. Therefore the gas distributors maintained that with all these precautions, an abandoned line does not create a hazard.

4.45 Under normal conditions, where the line does not interfere with other works, the gas distributors submitted that depth of cover is set by the code.

4.46 Northern refuted the claims of the Regional Municipality of Sudbury and stated that most of the alleged emergency locates were routine matters.

4.47 With regard to providing locates, Union emphasized that section 18(2) of the Energy Act puts the onus on the gas distributors to provide this service. Subsection 18(2) reads:

> Where the owner of a pipeline is requested by any person about to dig, bore, trench, grade, excavate or break ground with mechanical equipment or explosives to give the location of a pipeline for the purpose of subsection (1), he shall within a reasonable time of the receipt of the request and having regard to all the circumstances of the case, furnish reasonable information as to the location of the pipeline.

4.48 Further, Union stated that subsection 18(1) of the Energy Act and subsection 53(1) of O. Reg. 659/79 under the Occupational Health and Safety Act prohibit a third party from conducting work in the proximity of a gas line without first accurately locating it. The Energy Act subsection 18(1) reads:

> No person shall dig, bore, trench, grade, excavate or break ground with mechanical equipment or explosives without first ascertaining the location of any pipeline that may be interfered with.

4.49 O. Reg. 659/79, subsection 53(1) reads:

> Gas, electrical and other services that are likely to endanger a worker having access to an excavation shall be:

(a) accurately located, marked and where practicable the owner of the utility shall be requested to locate and mark the service;

(b) where necessary, shut off and disconnected prior to the commencement of the work on the excavation; and

(c) where an extreme hazard is known to exist and the service cannot be shut off or disconnected the owner of the utility shall be requested to supervise the uncovering of the service.

Position of the Board:

4.50 No work should be undertaken in the vicinity of a gas line without first having determined its location. The responsibility of formulating such a request to the gas distributor rests on the municipality or its contractors, and the gas distributor's obligation is to provide, upon request, the location of its plant. The Board therefore finds that the present safety requirements relating to gas line locates are adequate.

4.51 It is the Board's view that gas distributors and municipalities ought to have a coordinated emergency plan covering in detail the steps to be followed to secure the location of a gas line in the event of a gas line break. A uti-

lity coordinating committee would, in the Board's opinion, be the best body to formulate such plan.

4.52 As long as a line is abandoned in accordance with O. Reg. 450/84, it does not create a hazard. However, in exceptional circumstances, it can be envisaged that a segment of line should be removed. It may be desirable to remove sections of an abandoned line for aesthetic reasons, particularly where the line has been constructed above ground or on a bridge.

4.53 The Board wishes to emphasize that although O. Reg. 450/84 establishes safety requirements for pipelines, including minimum depth of cover, this does not give carte blanche to the gas distributor to construct new lines at the minimum depth without considering other concerns and the needs of other parties.

Timing and Methods of Construction, Right of Way Restoration and Maintenance

4.54 All activities undertaken within the road allowance need to be coordinated in order to avoid conflicts amongst utilities. This applies to the period of construction as well as to restoration of the right of way after construction.

Position of the Municipalities:

4.55 The municipalities submitted that they are in the best position to manage and coordinate the timing, construction, maintenance and right of way restoration within the road allowance. They claimed that they can best arrange traffic detour and minimize public inconvenience. As a coordinating body, they may help in sequencing construction, repair and maintenance work amongst utilities and themselves when road, sewer and water main works are undertaken, thereby reducing road cuts and excavation.

4.56 Municipalities also suggested that they should provide some input on construction methods used by the gas distributors to ensure that road maintenance costs as well as problems associated with soil erosion are minimized in the future.

4.57 The municipalities proposed that gas distributors be required to seek approval from the Road Superintendent for the timing and installation method for any major work performed within the road allowance and that the Road Inspector have the right to inspect the work, including the quality of restoration work as it is underway.

Position of the Utilities:

4.58 As a matter of operating practice the gas distributors submitted that they coordinate their work with the municipalities and other utilities and schedule construction and repair work coincident with other works performed in the road allowance. The gas distributors also stated that they accept the requests of the applicable road authority in regard to traffic interruptions.

4.59 Compliance with construction codes is the responsibility of the gas distributors which have engineers and licensed inspectors fully aware of the many government regulations dealing with gas pipeline construction. The gas distributors further submitted that it is not necessary for a municipality to have an inspector overseeing pipeline construction, as the municipal inspector does not have the necessary training and experience in pipeline construction.

4.60 With regard to right of way restoration, the gas distributors submitted that the municipalities are adequately protected by the standard clause found in each franchise agreement. Further, ONGA proposed on behalf of the three gas distributors the following clause for any

proposed standard franchise agreement. This clause is a consolidation of each of the distributors' standard clauses, otherwise there is no change in substance:

> The Gas Company shall well and sufficiently restore, to the reasonable satisfaction of the Engineer, all highways which it may excavate or interfere with in the course of laying, constructing, repairing or removing its gas system, and shall make good any settling or subsidence thereafter caused by such excavation or interference. If the Gas Company fails at any time to do any work required by this paragraph within a reasonable period of time, the Corporation may have such work done and the Gas Company shall, on demand, pay any reasonable account therefor as certified by the Engineer.

Position of the Board:

4.61 As stated earlier in this chapter, participation in a utility coordinating committee should answer many of the municipalities' concerns in regard to public inconvenience caused by duplication of road cuts and excavation, and also in improving right of way restoration.

4.62 The Board is of the opinion that the municipalities are adequately protected with regard to the restoration of road allowances because all franchise agreements provide that restoration

work is subject to the satisfaction of the Road Superintendent or Road Inspector (or Engineer). Construction, repair and maintenance of a gas line are the responsibility of the gas distributors; the Road Superintendent or Road Inspector is not, in the Board's view, qualified to oversee pipeline construction. However, the Road Superintendent or Road Inspector has power over road construction and repair methods as well as material used. He should be consulted about the construction techniques to be used by the gas distributor in crossing roads in order to minimize potential damage to the road bed. He should be consulted and approve the quality of the road back-fill material and its compaction requirements and ascertain that the road bed has been properly graded and that asphalt and asphalt thickness meet specifications.

Crossings - Bridges

4.63 The installation of gas lines on bridges is a matter of convenience and cost saving to the gas distributors but it can create inconvenience and additional construction and maintenance expenses for the owner of the bridge.

Position of the Municipalities:

4.64 The Regional Municipality of Ottawa-Carleton in particular submitted that the use of a bridge

to support a gas line gives rise to many problems which range from aesthetics to cost and safety. The structural integrity of the bridge, with the added load caused by the pipeline, must be maintained. As well, the feasibility of attaching or supporting the line must be determined and aesthetics must be considered. The difference in thermal expansion between the pipeline and the bridge and access to any part of the bridge and pipeline for maintenance and safety reasons must be provided for in the design. The RMOC submitted that most of the costs associated with these matters are absorbed by the Regional Municipality.

4.65 The RMOC further submitted that each request made by a gas distributor to use a bridge should be considered on a case-by-case basis because conditions differ from one bridge to another. Therefore, it argued that bridges should be excluded from the franchise agreement and be the subject of a separate agreement.

4.66 The inclusion of bridges in franchise agreements, particularly in southwestern Ontario, was a matter addressed in the AMO Brief. Union has been allowed by municipalities to use bridges, mainly because the cost sharing arrangements that exist in franchise agreements require Union to pay 100 per cent of all relo-

cation costs. If the municipality is made responsible for a certain percentage of all relocation costs, this will violate the initial terms of acceptance of franchises. These terms represent the basic reason for the municipality granting permission to a utility to use bridges in the first instance. Therefore if allocation of relocation costs is changed, the AMO submitted that bridges should be the subject of a separate agreement.

4.67 In the meantime, the Southwestern Ontario Municipal Committee modified its position from that of the AMO. The SWOMC recognized the concerns expressed by Ottawa-Carleton but it now contends that a separate bridge agreement is not necessary because "...our [proposed] agreement would accommodate the kinds of requirements that Ottawa-Carleton is concerned about".

Position of the Utilities:

4.68 The gas distributors argued that existing franchise agreements include "bridge" within the definition of highways and there is no reason for changing this. They observed that the use of a bridge generally is the most economically feasible and environmentally effective method of extending gas service. An implied alter-

native is to lay the gas line under the riverbed. Consumers' acknowledged that if a bridge crossing is not feasible, then a water crossing must occur; but, generally, bridge crossings are substantially less costly and ought to be encouraged whenever possible.

Position of the Board:

4.69 With regard to the submission of the Regional Municipality of Ottawa-Carleton, the Board does not believe that the costs in regard to pipelines on bridges should be absorbed by the municipality. It would seem equitable that all these extra costs, where they occur, should be charged to the gas distributor since these expenditures are triggered by the mere presence of the line.

4.70 RMOC, with its many bridges, has acquired a considerable amount of experience with the multitude of problems associated with the construction, maintenance and operation of bridges supporting gas lines. The Board appreciates the argument that lines on bridges create different conditions if the bridge is in the design stage, in which case the line can be more easily incorporated in the design of the bridge. However, if the bridge is under repair, necessary modification can be made at an ad-

ditional cost without creating much inconvenience to the traffic. The Board sees some merit though in excluding some bridges from franchise agreements because of their particular conditions which might indicate that they cannot be treated in a general franchise agreement.

4.71 As a general rule, the Board is of the opinion that bridges should remain in a franchise agreement. However, the Board recommends that provision be made in any franchise agreement to accommodate future bridge crossings where extraordinary circumstances may be encountered. Clause 23 in the SWOMC proposed agreement allows for such other or special conditions in a particular franchise agreement. If this is impractical a separate agreement may be necessary for each bridge. Furthermore, the Board recommends that costs incurred because a new gas line is being installed on a bridge, or because an existing line on the bridge must be relocated should be borne by the gas distributor.

Crossings - Drainage Ditches and Drains

4.72 In agricultural areas there are extensive public and private drainage projects draining farm land and these projects are often located in the road allowance. Gas lines occasionally

interfere with the deepening of open ditches or conflict with drain lines.

Position of the Municipalities:

4.73 The Township of Zorra, the County of Lambton and the Township of London were all concerned about gas lines interferring with drainage works and Zorra submitted that a gas distributor should seek approval from the Drainage Superintendent prior to building or relocating plant. This step was proposed in order to minimize the interference of a pipeline with planned drainage work.

4.74 These municipalities were also concerned with the question of financial responsibility for engineering and constructing drainage works "around" gas lines and the costs incurred by correcting flow characteristics of the drain upstream of a gas line.

Position of the Utilities:

4.75 Union, the gas distributor most affected by drainage works, submitted that when it is assessed under the Drainage Act, it has paid any amounts assessed. Union pointed out that where a gas distributor has a pipeline in the ground which causes the cost of the drainage works to increase, the gas distributor is assessed for that increase in cost.

Position of the Board:

4.76 The position taken by the Township of Zorra which would require the gas distributor to file drawings and specifications for a proposed line with the Drainage Superintendent is a step that, in the future, would decrease the amount of interference of gas lines with drainage works and would reduce costly works to engineer drains "around" pipelines. The Board recommends, therefore, that new construction and relocation drawings should be filed with the Drainage Superintendent.

4.77 It is anticipated that the Drainage Superintendent will actively participate with the utility coordinating committee which, in the view of the Board, can provide a "clearing house" function with regard to any new projects planned within a municipality.

4.78 When gas lines are exposed due to the deepening of work performed by a municipality, the Board recognizes that it has no jurisdiction to require a gas distributor to lower its line in these circumstances, as this falls under the jurisdiction of the Ministry of Consumer and Commercial Relations, Technical Standard Division, Fuels Safety Branch.

5. SHARING THE COSTS OF GAS LINE RELOCATION

5.1 The question of the appropriate sharing of the costs of relocating existing gas pipelines was one of the most contentious issues raised at the hearing and it has been one of the most vexing problems between the municipalities and the gas distributors arising out of the franchise agreements. There are great variations from one situation to another, and there is an absence of an appropriate, generally recognized set of principles. The municipalities, particularly the smaller ones, do not consider themselves in a strong negotiating position regarding this issue. Although the actual sums of money at issue are not large, it would seem that the absence of mutual confidence and the absence of an accepted standard have caused this problem.

5.2 Gas pipelines are generally laid along municipal road rights of way. From time to time a

municipality requires that gas lines be relocated in order to accommodate improvement projects. In upper-tier municipalities the relocation of gas lines invariably results from roadwork. In local municipalities other works involving sewers, water lines, drain systems, as well as roadwork and redevelopment of downtown core areas can necessitate the relocation of gas lines.

5.3 Who should pay for this gas line relocation? The basic position of the gas distributors is that the municipality should share with the company the cost of labour of any gas line relocation required by roadwork, and bear the entire cost of relocations caused by non-roadwork. The municipalities contend that the gas distributor should bear the entire cost of relocation of gas pipelines caused by any municipal works except during the first five years following construction or relocation. During that time, the entire cost would be borne by the municipalities.

5.4 There are in fact a wide range of practices regarding the allocation of costs of gas line relocation and these are described below under the heading Formulae for Relocation Costs Payment. This is followed by the Traditional Practices of the three major gas distributors in Ontario and the positions of each group of

parties, followed by the Board's position and recommendations. The Table at the end of this chapter provides a tally of the relocation cost provisions by gas utility.

Formulae for Relocation Costs Payment

Utility Pays:

5.5 The costs of relocation in this situation are borne entirely by the gas utility. This has been the historic practice of Union. "Utility pays" refers to those franchise agreements that contain a clause that explicitly calls for the gas distributor to pay 100 per cent of gas pipeline relocation costs occasioned by municipal roadwork and non-road projects such as sewers. This was the practice of Union in some municipalities even when the franchise agreement was silent on the question of relocation costs.

Public Service Works on Highways Act (PSWHA) applies:

5.6 The Public Service Works on Highways Act applies to road work only. It does not apply to gas pipeline relocations caused by the need to construct sewer or water works, alter drainage flows and other non-road work. The PSWHA

provides that, in default of agreement, and thus where a franchise agreement is silent on the matter, the "cost of labour" for the relocation project is to be apportioned equally between the road authority and the operating corporation, and "all other costs" are to be borne by the latter (subsection 2(2)).

5.7 This has been the accepted practice in the franchise areas of Consumers' and of Northern. However, in the franchise area of Union, until 1981 the company paid 100 per cent of the costs of relocation even if the franchise agreement with the municipality was silent on the issue of relocation costs.

5.8 A franchise agreement may also contain a clause specifically calling for the allocation of relocation costs occasioned by municipal road work to be done in accordance with the terms of the PSWHA. However, such a specific clause is not necessary in order for the Act to apply.

5.9 The cost of labour is defined in the PSWHA, paragraph 1(b) as:

> (i) the actual wages paid to all workmen up to and including the foremen for their time actually spent on the work and in travelling to and from the work, and the cost of food, lodging and transportation for such work-

men where necessary for the proper carrying out of the work,

(ii) the cost to the operating corporation of contributions related to such wages in respect of workmen's compensation, vacation pay, unemployment insurance, pension or insurance benefits and other similar benefits,

(iii) the cost of using labour-saving equipment in the work,

(iv) necessary transportation charges for equipment used in the work, and

(v) the cost of explosives.

5.10 The gas distributors' interpretation of labour costs under the PSWHA is that contractors' charges, including site-restoration materials, are included in labour costs. "All other costs" referred to in the Act which are borne by the gas distributor comprise costs of pipe and pipé-related items and corporate or general and engineering overhead.

5.11 The SWOMC noted other items which have been included as labour costs by the gas distributor which are not apparent from the PSWHA definition, for example, the costs of assuring continuing service during gas pipeline relocation. In 1983, Union invoiced Chatham for the Lacroix Street Bridge work and included the cost of the construction for a temporary service line as well as for sod, asphalt, abandonment and numerous items described as meter work.

5.12 The Regional Municipality of Ottawa-Carleton observed that although the Legislature has attempted to define the cost of labour in the PSWHA, the determination of cost distribution continues to be difficult in particular situations. The RMOC contended that the cost of labour defined by the PSWHA clearly excludes such items as the cost of fill, sod or pavement used in restoring the excavation conducted by the gas distributor or its contractor. The RMOC said the cost of any materials used in relocation or temporary location works should be excluded from labour costs unless these materials are used in place of manual labour conducted by workmen on the site.

PSWHA applies including other municipal works:

5.13 The PSWHA relocation cost sharing formula applies to municipal works, in addition to roadwork, only when it is specifically addressed in the franchise agreement. There are several such agreements. However, it is assumed, unless otherwise specified in the franchise agreement, that relocation costs resulting from sewer or water plant construction will be borne entirely by the municipality.

MTC formula:

5.14 The Ontario Ministry of Transportation and Communications (MTC) has a standard pipeline agreement form for provincial highways. The form includes the provision that if new gas lines have to be relocated within five years of the date of the original agreement, the entire cost of that relocation is borne by the MTC. After the five year period, any relocation costs are borne entirely by the gas utility. A separate agreement, using the standard MTC form, is entered by both parties each time a gas utility proposes to locate a new pipeline installation on a King's Highway. All three gas distribution companies have entered into this agreement with the MTC.

5.15 At the hearing, the municipalities expressed a preference for the use of the MTC formula.

Ontario Hydro Formula:

5.16 Ontario Hydro has a standard agreement for users of its lands such as gas distributors. When relocations of the user's plant are requested by Ontario Hydro, the following cost allocations apply:

(i) if the request is made during the initial five-year period of the

agreement, Ontario Hydro pays the full cost;

(ii) if the request is made during the second five-year period, Ontario Hydro pays 50 per cent of the cost of labour and the gas utility pays the balance;

(iii) if the request is made after the initial ten-year period, the gas utility pays the full cost.

5.17 A separate agreement, using a standard Ontario Hydro form is entered into by the parties each time a gas utility proposes to use Ontario Hydro's right of way.

5.18 Both Northern and Consumers', but not Union, have entered into such agreements with Ontario Hydro.

5.19 Special Counsel offered the use of this formula for the sharing of relocation costs as an additional alternative.

Traditional Practices

5.20 With the advent of western Canadian gas supply to Ontario in the late 1950s, the three gas utilities began using almost identical gas plant and pipeline installation practices.

From 1957 onward, pipelines were laid generally in standard locations in municipal road allowances. Pipelines which were coated and cathodically protected were adopted as the standard construction material, and technical innovations and new materials such as plastic pipe were utilized.

5.21 As a result, gas plant constructed from 1957 onward is less likely to require relocation as it has usually been laid in standard or municipally-approved locations, and the pipeline itself is unlikely to deteriorate. This is generally the case in the Consumers' and Northern franchise areas. It is less so in the franchise area of Union, where a significant proportion of the original pipeline system was installed prior to 1957. Union's past practice of paying all relocation costs tended to relax municipal insistence on standard locations.

The Consumers' Gas Franchise Area:

5.22 The PSWHA formula has been applied to nearly all Consumers' franchise agreements for decades. Most of the agreements, 134 out of 155, are silent on the question of relocation costs because the company believes to do otherwise would be redundant and unnecessary.

5.23 In general, the costs of relocations other than those resulting from highway improvement are borne entirely by the municipality requesting the relocation. At least one exception is Consumers' franchise agreement with the City of Niagara Falls where the PSWHA formula is applied to all municipal works. Other exceptions include one agreement in which Consumers' pays all the relocation costs, and three other agreements in which the company pays 90 per cent of the labour costs.

5.24 While Consumers' has pre-1957 pipe, the costs of its relocation has not been an issue in its franchise area, as it has been for Union, because of Consumers' continuity of management over the years and its implementation of a well-established policy of replacing and relocating obsolete pipeline on an ongoing basis.

5.25 Relocation costs represent about 2 per cent of Consumers' total capital construction budget. The evidence indicated that the actual dollars involved in relocations is not significant and generally averages about $2.4 million per year for Consumers' share. The total relocation costs averaged about $3.2 million per year over the three years 1983/84/85, with an average of 168 annual relocations. This results in an average annual municipal share per relocation of about $4,800.

The Northern and Central Franchise Area:

5.26 Virtually all of Northern's gas pipeline system was laid after 1957. Nearly all (134 out of 137) of Northern's franchise agreements are under the 50 per cent formula of the PSWHA. Of these, 133 are silent on the question of relocation costs. In three agreements with counties, Northern pays all relocation costs but two of these apply only to new pipe laid after a specified date. The policy of Northern is to bill the municipality 100 per cent of the costs of relocation due to non-road works.

5.27 Northern's net capital budget for line relocations averages about $158,000 per year, after allowing for an average annual contribution from municipalities of about $76,000. The annual average municipal share per relocation (24 average annual relocations over the 3 year period 1983/84/85) is about $3,200.

The Union Gas Franchise Area:

5.28 The distribution system of Union came about in part from the amalgamation of many small older local gas utilities, each with its own methods of operation and often lacking technical sophistication. Some of these had been operating from as early as the turn of the century. For

this reason, many years prior to 1980, each time the relocation of a Union pipeline was required by a municipality, whether for road-works or non-road projects, Union was replacing pipe that was obsolete or that had not been laid to any right of way location standards. Union did not consider it appropriate to charge the municipality for such relocations. Consequently Union had traditionally paid 100 per cent of all relocation costs.

5.29 However, all lines installed after 1957 are cathodically protected and coated or are plastic and, as a result, have indefinite life. In addition, much of the remaining pre-1957 pipe has been cathodically protected, giving it longer life as well. Consequently, relocations of Union's gas lines have evolved from the replacement of old and corroded pipes to the replacement of newer protected pipes. The evidence was that 84 percent of all the lines are newer than 1957; 16 percent of the system is old pipe, but only 7 percent is unprotected. Of pipe relocated in 1985, 21 percent was newer than 1957.

5.30 Union has 285 franchise agreements with municipalities, of which 215 stipulate that Union pays all relocation costs resulting from municipal roadwork and non-road projects such as

sewer works. Of the remaining 70 agreements, 53 are silent, but Union has usually paid 100 percent of relocation costs before it introduced, in 1981, its new policy of applying the PSWHA.

5.31 Because an increasingly large proportion of its gas pipelines was of indefinite life, Union in 1981 discontinued its policy of paying 100 percent of relocation costs. A new policy was introduced of applying the PSWHA in those agreements which were silent on relocations costs, and requiring its application in new agreements.

5.32 This unilateral action on the part of Union has not sat well with the municipalities in question. Union has invoiced twelve municipalities whose agreements are silent on relocation costs during the past five years, but only three have paid.

5.33 In addition, seventeen agreements specifically applying the PSWHA have been signed since 1980. Twelve of these were approved by the Ontario Energy Board but only three of these agreements are operative while nine are currently under review by the Board.

5.34 Union currently budgets about $1.3 million for its share of annual relocation costs. Assuming

the PSWHA applies across Union's franchise area (and that pre-1957 pipe is eliminated from consideration as agreed to by Union during the hearing) the portion of the $1.3 million attributable to municipal relocations to be shared with municipalities is approximately $260,000 based on 1957 and newer pipe comprising 20 per cent of total line relocations. The municipal share, based on 50 per cent of the labour costs, averages out to about 30 per cent of the total relocation costs. The municipal 30 per cent share of the $260,000 is about $75,000 spread among all municipalities in the Union franchise area requiring the relocation of post-1956 pipe. On the other hand, should all municipal relocations in a year be for reasons other than roadwork, resulting in the municipality paying 100 per cent of relocation costs, the municipalities would be billed a maximum of $260,000. In this PSWHA scenario, the relocation costs borne by the municipalities range from $75,000 to $260,000. Both figures represent small percentages of the total annual roadwork costs for the municipalities in Southwestern Ontario. Based on 66 average annual relocations over the past three years and the municipalities paying 100 per cent of the $260,000, the average annual municipal cost per relocation would have been about $4,000.

Position of the Utilities

5.35 The position of the three utilities is as expressed in the ONGA brief: the sharing of the costs of relocations for highway improvement should be governed by the provisions of the PSWHA. Relocations not for the purposes of highway improvement should be paid for entirely by the municipality.

5.36 Despite the unanimity of the gas utilities in support of the PSWHA provisions, the municipalities have generally opposed the use of the PSWHA and in some cases have successfully negotiated more favourable terms even though the PSWHA has been the standard provision for sharing relocation costs, as in the cases of Consumers' and Northern.

5.37 Contrary to Consumers' assertion that relocation cost sharing is not negotiable, four municipalities in the Consumers' area have negotiated cost sharing in their agreements: one municipality bears no costs and three municipalities pay only 10 per cent of labour costs.

5.38 Similarly, four municipalities in the Northern area have negotiated cost sharing in their agreements. Three of these bear no costs for relocations of gas line and one municipality

bears no costs for relocation on one specific road, otherwise the PSWHA applies to any municipal works.

5.39 The municipalities in the Union franchise area have been conditioned over many years to expect that Union would continue to pay all relocation costs. While this practice gave the municipalities less concern about control over new pipeline works and future relocations, which in turn eased the process for local approvals, it did provide an incentive to Union to adhere more closely to standard locations wherever possible and thereby minimize the likelihood of future relocations. With the introduction of the PSWHA provision, particularly with respect to the re-interpretation of the silence of existing agreements on the question of relocation costs (pre-1981 Union pays, 1981 and after PSWHA applies), Union has been confronted by municipal resistance in an ambiance of betrayal and mistrust.

5.40 Consequently, while Union subscribes to the PSWHA provision for all pipe installed within Union's system subsequent to 1957, it has offered to continue to pay 100 per cent of the cost when pipe laid prior to 1957 must be relocated because of road and sewer work.

5.41 Union acknowledges that current relocations are generally in the downtown core areas where streets are being reconstructed and where old pipe is predominantly encountered.

Position of Municipalities - Consumers' Franchise Area

5.42 Although Consumers' is the largest gas distributor in Ontario, the following municipalities are the only ones in Consumers' franchise area which participated or submitted briefs in the hearing.

5.43 The Regional Municipality of Ottawa-Carleton has no existing user agreement with Consumers'. Relocation costs have been administered pursuant to the PSWHA.

5.44 The RMOC contends that the municipal road authority has responsibilities that differ little from those of the Ministry of Transportation and Communications. The RMOC, on behalf of itself and the City of Ottawa, proposed the MTC formula, in that it provides greater cost certainty and more equitable distribution of relocation costs.

5.45 The City of St. Catharines presently has an agreement with Consumers' which is silent on the subject of relocation costs, and hence the

PSWHA applies. However, it contended that the PSWHA should also apply to non-road works as is the case in the agreement between Consumers' and the City of Niagara.

5.46 Consumers' operates in the City of North York under a number of Private Acts dealing with the Consumers' Gas Company of Toronto. The present arrangement is silent on relocation costs, and so the PSWHA applies. The City of North York recommends that the Consumers' Gas Acts be amended to provide that "the Company shall pay an equal share of any of the costs associated with the relocation of a gas pipeline at any time that the municipality performs work within the municipal road allowances. The cost payable by the Company shall not be restricted to 1/2 of the cost of labour and labour-saving equipment".

Positions of Municipalities - Northern Franchise Area

5.47 All the municipal representation (FONOM, City of Sudbury, Regional Municipality of Sudbury) support the application of the MTC formula for much the same reasons as RMOC: that municipal roads are comparable to provincial highways and each road authority, or municipality or the Province (MTC), should be reimbursed similarly.

Positions of Municipalities - Union Franchise Area

5.48 The largest municipal representation at the hearing by far was from Union's franchise area (Town of Blenheim, SWOMC, Townships of London and of Zorra, Counties of Oxford and of Lambton and City of London). The unanimous position of that group was that Union should continue to "pay all". There were a variety of qualifications such as:

- at least for pipe laid up to 1981, when Union changed its policy and began applying the PSWHA provision;
- subject to the municipality paying all relocation costs during the first five years of a new gas line according to the MTC formula;
- if the PSWHA is to apply, it should be restricted to the cost of relocation of pipe laid in the future and necessitated by any municipal works. The cost of relocation of pipe already laid should be borne entirely by Union; or
- if the PSWHA is applied, it should be subject to all pipeline having a useful life of 25 years, after expiration of which, Union pays all. In this case, pre-1961 pipe would qualify for the Union-pay-all provision.

5.49 These municipalities were concerned that the implementation of the PSWHA and its resulting costs would mean that needed roadwork projects would have to be curtailed. It is evident that the municipalities in Union's franchise area are in agreement with the municipalities in the franchise areas of Consumers' and Northern in favouring the MTC formula, particularly since Union's old pipe is automatically excluded by the 5-year moratorium on paying the relocation costs of new pipe.

Position of the Board

5.50 The municipality's share of gas pipeline relocation costs varies from 0 to 100 per cent as a result of franchise agreements negotiated at different times and under different circumstances.

5.51 Many factors influence the terms of the agreements. Some agreements reflect the readiness of a municipality to concede to a gas distributor's standard relocation cost provision in order to get gas service for its impatient citizens. Sometimes specific proposals by the gas distributor for new gas lines can be a significant influence when new agreements and, to a lesser extent, renewals are concurrently being negotiated. Other agreements, particularly at the upper tier municipal level where a

new franchise is being established, show a similar urgency on the part of the gas company to relax and even dispense with municipal relocation cost sharing so that a gas pipeline system expansion, not directly related to new gas service in a municipality, may proceed.

5.52 A municipality does not have the same position of negotiating strength as do MTC, Ontario Hydro, or a private landowner, because, unlike the latter group, the municipality does not negotiate a specific agreement each time there is a new encroachment by a gas utility. As a matter of fact, a franchise negotiation is an infrequent event for any municipality.

5.53 The Board has concluded from the evidence that, generally, the upper-tier municipalities are in a better negotiating position, particularly with respect to relocation cost provisions, than the lower-tier municipalities. However, both upper- and lower-tier municipalities may find themselves in vulnerable negotiating positions with a gas distributor when specific proposals for gas lines are associated with a new agreement or a renewal.

5.54 The use of the PSWHA provision for allocating relocation costs is a last resort: in the absence of a specific agreement between the

parties, this is how costs will be shared. But there is a basic onus on the parties to negotiate an agreement that is realistic, relevant and consistent relative to prevailing conditions and practices.

5.55 The utilities have adopted the PSWHA as a given and have presented it to the municipalities as a non-negotiable method "prescribed by the legislature --- and in effect for over 60 years". The Board finds it significant that neither the Ministry of Transportation and Communications nor Ontario Hydro have generally adopted this method but have established their own unique formulae which are standard for each organization and to which the gas utilities are parties.

5.56 Union, in proposing to change from "Union pays" to the PSWHA formula, has argued that the latter will make the municipalities more responsible and less wasteful by avoiding unnecessary demands for relocations. Union cited as evidence of this, the significant reduction in relocation activity beginning in 1981 when it unilaterally introduced and began applying the PSWHA.

5.57 However, use of the PSWHA formula has not discouraged relocations in the Consumers' area,

the annual number of which has consistently exceeded that of Union, even during the pre-1981 period and despite the fact that each has about the same length of pipe in the ground. It seems to the Board that the reduction of relocation activity in the Union area may have resulted more from a reaction of uncertainty, confusion and resentment to this unilateral imposition by Union of a dramatic change from Union's traditional practice.

5.58 In the last five years, only four out of fourteen municipalities which have been billed in Union's franchise area have paid their share of relocation costs as interpreted by Union. In twelve of these fourteen municipal agreements there is silence on the matter of relocation costs and the PSWHA is invoked because of that silence. Despite Union's claim that "It [the PSWHA formula] is well understood by those who use it and provides an incentive towards a cooperative approach in municipal planning," there has been strong evidence presented during the hearing to refute both claims. In particular, there is neither a consensus on what does or should qualify under "cost of labour and labour-saving equipment" (City of Chatham/Union) nor a rapport conducive to good municipal planning (RMOC/Consumers').

5.59 Despite the attempt to define the cost of labour in the PSWHA, the costs to be distributed continue to be subjects of disagreement between the municipalities and the gas companies.

5.60 The municipalities interpret the cost of labour as set out in the PSWHA to be those costs as incurred directly by the gas company or by its contractor in performing relocation work. Contrary to the gas companies, the municipalities do not agree that the cost of labour should include such items as the cost of fill, sod or asphalt used in restoring the excavation conducted by the gas company or its contractor. Further, municipalities disagree that the cost of labour should include any administrative or overhead charges or the cost of any materials unless these materials displace manual labour conducted by a workman on the site of relocation.

5.61 It is evident to the Board that a cost sharing formula in which the cost of labour is not the criterion of relocation cost sharing would be a vast improvement. The municipal share of total relocation costs has been estimated by Consumers' to vary between 29 and 37 per cent. Union's evidence shows the actual municipal share over the past four years to vary from 27 to 34 per cent, with an average of 29 per cent.

5.62 The evidence also shows that Union's material costs are, on average, 15 per cent of the total relocation cost. This suggests to the Board that while the material costs are significant they are not so large that it would be greatly to the municipalities' disadvantage if they were included in a formula for total cost sharing, as opposed to one which involved only the cost of labour.

5.63 The 60 year old PSWHA method of relocation cost allocation has outlived its usefulness and begs to be allowed to revert to its intended secondary role as a back-up provision activated only in default of an agreement on the method of allocating relocation costs.

5.64 The Ontario Hydro formula did not receive any significant support from anyone. While it works well for Hydro because each agreement is project specific, the task of maintaining records of pipeline age was not viewed with any enthusiasm.

5.65 The use of the MTC formula has been favoured by the municipalities. The Board acknowledges that there is little, if any, difference between the responsibilities of road authorities, be they municipalities or a province, except that the latter has consolidated the responsibility for the King's Highways within one body,

the Ministry of Transportation and Communications. However, the MTC agreements, like the Ontario Hydro agreements, are specific to individual pipelines, whereas the franchise agreements between the municipalities and the gas distibutors refer to an entire developing pipeline network. Thus, if the MTC formula were used, the municipality would have to rely almost entirely on the gas utility to identify the age of specific pipe that may be subject to relocation.

5.66 Two other major utilities, telephones and electric power, are obliged to use municipal lands. Bell Canada ((1880) 43 Vict., chapter 67 and Railway Act, R.S.C. 1970, chapter R-2, section 318) and Ontario Hydro (Power Corporation Act, R.S.O. 1980, chapter 384, subsection 23(2)) both provide comprehensive services and have special powers to enter any municipal lands, but they are required to obtain municipal consent as to the location of their works. There is no franchise agreement or, in general, any road-user agreement with a municipality. However, in practice, both normally proceed under the provisions of the PSWHA regarding the costs of relocation of telephone and electric plant when requested by a municipality.

5.67 The Board notes with interest that both Bell Canada and Ontario Hydro accept the principle and practice of cost sharing for relocations.

5.68 The Board views the question of relocation costs in the following terms. All utilities - natural gas, electric power, telephone - share common municipal rights of way. An orderly and responsible occupancy by each utility member is therefore imperative. The privilege is balanced with duties. That, after all, is what a franchise agreement is all about, namely the granting of a right and the identification of the terms and conditions of occupancy. There is also an implied onus on the utility company to be a fair and responsible corporate citizen in the municipal right of way. The growth and development of municipalities place increasing and frequent demands on municipal rights of way and their users. Each user utility, by its very presence in the right of way, must be prepared to relocate its plant when necessary and requested to do so by the municipality. Future relocation is one of the risks associated with the right to enter and occupy any municipal roadway.

5.69 As so aptly stated in FONOM's final submission:

> Utilities enjoy the same indulgence of being permitted to place pipes on property not owned by them whether the right is granted by the MTC, a private landowner or a municipality ... the corresponding burden on the grantor of such right should be no greater.

5.70 In the franchise areas of the three gas utilities, the percentage of the total costs of relocation which are borne by the municipalities vary enormously:

0 (the utility pays all);
6 (10 per cent of labour costs);
30 (50 per cent of labour costs);
100 (the municipality pays all).

5.71 It is important that any method of allocating relocation costs be simple, clear and fair. The Board therefore concludes that a prescribed or standard method of allocating the costs of pipeline relocations in Ontario in future franchise agreements should be in accordance with the following guidelines:

1. The agreement provision for relocation costs should be negotiable.

2. Agreements should not be silent on the disposition of relocation costs.

3. There should be no distinction made between relocations due to roadwork and non-roadwork.

4. There should be a monetary incentive to encourage the municipality to consider alternatives to gas-line relocation.

5. Relocation costs should be shared by the gas utility and the municipality, with the major portion of costs being borne by the gas utility.

6. The cost sharing method should be simple, preferably a fixed percentage of the total relocation costs, exclusive of any upgrading costs, to each party.

7. There should be an established range of percentages within which a fixed percentage may be negotiated; the lower limit would be close to 0 per cent, and the upper limit would reflect the average upper limits under current cost-sharing arrangements.

5.72 None of the formulae for relocation cost payments (Utility Pays, PSWHA, MTC or Ontario Hydro) discussed meet these recommended guidelines and, consequently, none are recommended by the Board. Rather, the Board recommends that, for all pipeline relocations in a municipal right of way necessitated by any municipal works, the municipality should bear a share of the total cost of relocation within the range of up to 35 per cent, the exact figure to be negotiated by the municipality and gas utility. The average municipal share, on this basis,

would be about 20 per cent of the total relocation cost. The Board recommends that the proposed Municipal Franchise Agreement Committee established by this Report consider developing a more precise formula within this range.

5.73 The Board recommends that the negotiated cost sharing should begin with new franchises and renewals starting immediately, including existing franchise agreements which have not yet been approved by the Board or have not yet been signed.

5.74 Existing agreements with specific relocation cost provisions and those agreements which are silent and to which the PSWHA provision has been consistently applied should be allowed to continue unchanged to the end of their terms. However, the Board would urge both parties to an agreement to consider renegotiation of that provision in view of the guidelines listed above.

5.75 The Board also believes that its recommendation should apply to existing agreements which are silent on the question of relocation costs, but which have been subject to unilateral policy change by Union in its interpretation of silence. The Board recommends that Union continue to pay 100 per cent of the cost when pipe

laid prior to 1981 must be relocated because of road and sewer works. While Union's preference is to limit this policy to pre-1957 pipe, the Board believes that the Union policy in effect up to 1981 (Union pays) has a more compelling rationale which reflects the legitimate municipal expectations up to that time.

Table 1

Relocation Provisions per Gas Franchise Agreements in Ontario

	Utility Pays	PSWHA Explicit	Silent	Other	Total
Consumers'	1(a)	17	134(b)	3(c)	155
Northern	3	1(d)	133	0	137(e)
Union: Perpetual	32	0	50	0	82
Fixed Term	183	17	3	0	203
Total	215	17(f)	53(g)	0	285(h)
Total	219	35	320	3	577

(a) Mississauga City (annexed portion from Town of Oakville).

(b) Includes one perpetual agreement, Mississauga City un-annexed part.

(c) Municipality pays 10 per cent of labour costs.

(d) PSWHA applies to relocations necessitated by constructing or improving any public property in Township of Hope agreement with exception of one specific road where Northern pays 100 per cent of cost.

(e) Letter of Mr. George Laidlaw of November 29, 1985 amending total number of franchises.

(f) New or renewed agreements signed since 1980. Twelve of 17 have been approved by the Board but 9 of these are currently under appeal. In effect, only 3 are approved and operative. During the past 5 years, Union invoiced 2 municipalities, 1 has paid.

(g) Formerly, Union paid 100 per cent in most cases. Because these agreements are silent, Union's new policy since 1981 is that the PSWHA applies. During the past 5 years, Union has invoiced 12 municipalities, only 3 have paid.

(h) Letter of Mr. John Jolley of December 19, 1985 plus attached schedules 1-12.

6. LEGAL ISSUES

6.1 There were a number of issues raised during the hearing which are mainly legal questions, and which are discussed in this chapter. They are:

- Insurance and Indemnity
- Definition of Supply
- Jurisdiction of the Ontario Energy Board
- Section 30 of the Ontario Energy Board Act
- Compliance with By-laws

Insurance and Indemnity

6.2 Very large increases in premiums for insurance coverage have occurred throughout North America in the past year and this has included insurance coverage for gas distribution systems. As a result, the responsibility for insurance coverage for liability relating to gas distribution in Ontario, and the nature of that coverage has become a renewed subject of concern between the municipalities and the gas distribution companies.

Position of the Municipalities:

6.3 In general the municipalities sought a considerably broader acceptance of liability on the part of the gas companies. This position was expressed in the FONOM final submission as follows:

> The fact that a utility is operating an inherently dangerous undertaking on municipal property without municipal control over the maintenance or method of operation of such gas works should require the utility to accept full responsibility for all liability arising from negligence on the part of the utility or from forces beyond the control of either the utility or the municipality. Accordingly, the appropriate scope of the utilities' indemnification of the host municipality should be defined negatively by excluding only that liability arising from municipal negligence.

6.4 This position is one of the absolute liability of the gas company for any damage which may arise irrespective of who caused it, unless it can be traced to the negligence of the municipality, its employees or its agents. In short the prime responsibility is upon the gas utility to show that the injury was caused by the negligence of the municipality, its employees or agents.

6.5 Such a provision is similar to what is known as the "Ministry of Transportation and Communi-

cations Indemnity Clause". The concept underlying that view of indemnification and liability is that gas is a dangerous substance, and having been brought on to the public right of way for the convenience of the gas company, the company should be absolutely liable, except in the case of the proven negligence of the municipality, its employees or agents.

Position of the Utilities:

6.6 The utilities generally hold the view that they should be responsible only for their own negligence and that of their servants and agents. This view is defined in a number of existing franchise agreements by an indemnity clause as follows:

> The gas company shall at all times indemnify the Corporation from and against all loss, damage and injury and expense to which the Corporation may be put by reason of any damage or injury to persons or property resulting from the imprudence, neglect or want of skill of the employees or agents of the gas company in connection with the construction, repair, maintenance or operation by the gas company of its system in the municipality.

6.7 This is also the clause submitted by ONGA in its proposed standard agreement. It is noteworthy that this liability is limited to the

negligence of employees or agents of the gas company and only in connection with construction, repair, maintenance or operation.

Position of the Board:

6.8 By virtue of franchise agreements between gas distributors and municipalities, the distributors' gas lines occupy land which is owned by municipalities or over which they have control. Increasingly, the municipalities fear that they may be found liable in an action for damages relating to these gas lines. Thus it is their opinion that they should be fully indemnified by the gas companies except for the negligence of their own municipal employees or agents.

6.9 The Board agrees with the position of the municipalities. The Board cannot anticipate a court decision on the degree of liability that a municipality may have in any particular agreement. Nor does the Board have the jurisdiction to require in advance that a clause in a franchise agreement relating to liability and indemnification follow a specific form. However, the Board is concerned that liability and indemnification be the primary responsibility of the gas distributor and it will look at the provisions dealing with insurance and indemnification in first time agreements or renewals in this light.

6.10 Moreover, the Board is concerned that, as much as is possible, there should be consistency as regards liability and indemnification across each utility franchise area. Otherwise, the ratepayers of different municipalities might be required to contribute unequally towards the costs of damages caused by a utility's plant.

6.11 The Board recommends that the MFA Committee proposed in this Report develop a model clause regarding insurance and indemnification as part of its model franchise agreement.

Definition of "Supply"

6.12 Fernlea Flowers Limited is a large commercial nursery company in southwestern Ontario which has developed its own local source of natural gas which it wishes to transmit to its own premises.

Position of Fernlea Flowers:

6.13 Fernlea Flowers submitted that the word "supply" as used in the Municipal Franchises Act created a problem for it as a producer and consumer of its own gas. Fernlea Flowers requested:

a) that the Board recommend that section 8 of the Municipal Franchises Act be amended to remove any doubt that a producer has the

right to consume its own natural gas without the need to apply to the Board for a limited franchise and a certificate of convenience and necessity;

b) that the Board recommend that subsection 3(1) of the Municipal Franchises Act and subsection 210(112) of the Municipal Act be amended to remove any doubt that a producer may enter into an agreement with a municipality to lay gathering lines for the purpose of moving its own production of natural gas to its place of business to be consumed at that location solely by it.

Position of Union:

6.14 Union was of the opinion that the Municipal Franchises Act does require a producer such as Fernlea Flowers to obtain a certificate of public convenience and necessity and enter into a franchise agreement with the municipality. This means that the onus is on the producer to prove to the Board that it is in the public interest for the producer to have a certificate of public convenience and necessity and a franchise agreement with a municipality. Such a franchise agreement may be a second agreement within the municipality, and the loss of the new producer as a customer of the original gas distributor may have an effect on that gas

distributor. In this instance, Union submitted that the loss of Fernlea Flowers as a major customer could have a significant impact on it.

Position of the Board:

6.15 Although sympathetic to the position of Fernlea Flowers, the Board's mandate requires it to act in the public interest in the broadest sense. The issue here has implications beyond the case in question and is a complex one which goes, in the opinion of the Board, beyond the scope of this hearing. The Board therefore did not examine this issue in detail during this hearing and is not in a position to make the recommendations requested by Fernlea Flowers.

Jurisdiction of the Ontario Energy Board

6.16 Under the Municipal Franchises Act (see chapter 3) the Ontario Energy Board must approve franchise agreements between gas distribution companies and municipalities. A distinction is made in the Act between first-time franchise agreements and renewals for which the parties have agreed on terms, on the one hand, and renewals in which the parties cannot agree on the terms, on the other. Section 9 of the Act applies to first-time agreements and to renewals on which the parties have agreed, and gives the

Board the power to approve or reject a proposed franchise agreement but not to impose a settlement. Section 10 applies to renewals where the parties cannot agree on terms and gives the Board the power to impose a settlement if the two parties cannot agree. However, subsection 10(6) restricts its application to agreements which expired after December 2, 1969.

Position of the Municipalities:

6.17 The municipalities all agreed that the Board did not have jurisdiction to alter or modify a proposed by-law placed before it on a section 9 application. They were also of the opinion that the Board could not compel a municipality to enact or amend a franchise by-law. The municipalities did not address this issue so as to recommend any legislative change.

Position of the Utilities:

6.18 The consensus of the utilities was that section 9 of the Municipal Franchises Act should be amended to allow either party to apply to the Board to have the terms and conditions of a franchise agreement settled. Union also submitted that section 10 should be amended so as to apply to a franchise agreement which expired before December 2, 1969.

Position of the Board:

6.19 The Board recognizes that the probable intention in the Municipal Franchises Act of distinguishing between first-time agreements and renewals was that in the case of a first-time agreement, for the Board to have the power to impose a settlement would be to interfere with the contractual rights of the parties. In the case of a renewal, when the gas plant is in the ground and service is being supplied and depended upon, it is essential that an agreement between the parties be reached, and if necessary, be imposed by the Board.

6.20 In practice the Board is now able to impose a first-time agreement by giving a conditional approval under section 9; that is, the Board can indicate to the parties that the proposed franchise agreement is not acceptable, but would be if certain terms or conditions were met. Although the Board is reluctant to interfere with contractual rights, there may be instances where it is appropriate for it to decide terms and conditions of a franchise agreement.

6.21 The Board will refer this question to the proposed MFA Committee to consider whether the Board's present conditional power under section

9 for first-time agreements is sufficient, or whether new legislation should be requested giving the Board the additional power to impose a settlement if a municipality seeking gas distribution and the relevant gas company cannot reach an agreement. In addition, the Board will ask the proposed MFA Committee to consider the implications of removing subsection 10(6) of the Act and thereby making section 10 applicable to all franchise agreements whenever they expired.

Section 30 of the Ontario Energy Board Act

6.22 Section 30 of the Ontario Energy Board Act provides for the Board to rehear or review matters on which it has previously made an order and to rescind or vary an order. The issue is whether section 30 applies to all orders of the Board, including those made under the Municipal Franchises Act, or only those orders of the Board made under the Ontario Energy Board Act.

Position of the Municipalities:

6.23 Although the issue was raised during this hearing, counsel for SWOMC and for the Town of Blenheim and the County of Lambton deferred taking a position, as the issue was to be argued in the OEB hearing E.B.A. 472 in which they were involved.

6.24 The Regional Municipality of Ottawa-Carleton submitted that the Board's jurisdiction under section 30 is not restricted to orders and applications made under the Ontario Energy Board Act. However, the Board's power is restricted in that it cannot amend the terms of an existing agreement between a municipality and a gas utility.

Position of the Utilities:

6.25 The view of the utilities is that section 30 applies only to the Ontario Energy Board Act itself, and that the Board does not have the power to rehear or review or to rescind or vary orders it has made under the Municipal Franchises Act.

Position of the Board:

6.26 The opinion of the Board is that section 30 should apply to any order of the Board, including those made under the Municipal Franchises Act. The Board has taken the position that it presently has that jurisdiction. However, the Board will seek an amendment to section 30 of the Ontario Energy Board Act in order to remove any ambiguity.

Compliance with By-laws

6.27 This issue was raised by some municipalities. While in general terms there is little difference of opinion between the municipalities and the gas distributors on the question of compliance with by-laws, the issue arises when a municipality wishes to introduce by-laws which require the payment of permit fees for undertaking work on municipal roads.

Position of the Municipalities:

6.28 Overall, the municipalities argued that the gas distributors should comply with by-laws of general application. Some supported this requirement with the added qualification that the general by-laws be both present and future by-laws as long as there is no conflict with provincial and federal legislation or, in effect, no amendment to an existing franchise agreement. Others held the view that compliance be limited to by-laws that exist at the time of installation of a gas pipeline or any subsequent works.

6.29 No municipality took the position that a gas distributor should be required to comply with any municipal by-law that singled out the gas distributor in a particular manner or directly or indirectly amended an existing franchise agreement.

6.30 FONOM proposed in its final submission "that the determination of whether a particular municipal by-law effectively amends an existing franchise agreement be a matter exclusively committed to the jurisdiction of the OEB".

6.31 The collective evidence of the municipalities shows that they view the inclusion in the franchise agreement of the matter of 'compliance with by-laws' as a desirable reinforcement of municipal authority and control concerning municipal road allowances. Municipal by-laws permit the municipality to exercise control over the continuing quality and serviceability of the road allowance to ensure free flow of traffic, orderly occupancy of the road allowance by the gas distributors, prudent financial management of public property and overall public convenience.

6.32 Several municipalities insisted that gas distributors should comply with by-laws of general application requiring the payment of road-cut permit fees and impost charges, the former to cover inspection and supervision by the municipality and the latter to assist the municipal road maintenance program because road cuts reduce the quality of the road and shorten its useful life.

6.33 The conundrum here is that Ontario Hydro and Bell Canada are exempted from local by-laws by provincial and federal statutes respectively. However, in the one instance cited, both of them voluntarily comply with municipal by-laws.

Position of the Utilities:

6.34 The gas distributors, in their joint brief and in individual submissions, stated that they are willing to continue to comply with municipal by-laws of general application. However, exceptions to voluntary compliance exist where municipalities seek to impose permit fees or other additional financial burdens upon the gas distributors, or seek to pass general by-laws fixing the location of utility plant. In these situations the gas distributors take the position that such by-laws interfere with the exclusive jurisdiction of the Board over all matters relating to natural gas distribution, or conflict with the terms and conditions of the franchise agreement.

Position of the Board:

6.35 In general, all gas distributors should comply with municipal by-laws of general application. However, where compliance with a by-law would, in effect, amend a franchise agreement between

the municipality and the gas distributor, the Board is of the opinion that the franchise agreement as approved by the Board would supersede such a by-law. In other words, there is no requirement on the gas distributor to comply. The Board is of the view that the interpretation of a by-law or a contract, or the enforceability of either should rest with the courts. As a matter of policy, the Board does not support the introduction of permit fees by municipalities.

7. THE NATURE OF FRANCHISE AGREEMENTS

7.1 The preceding chapters have dealt with specific issues which were addressed in this hearing and which, for the most part, relate to already existing or proposed clauses in franchise agreements. A number of issues however, were raised that involve the overall nature of franchise agreements; these included:

- o Exclusivity in Franchise Agreements,
- o Separate Road-User Agreements; Multi-Party Agreements,
- o Duration of Franchise Agreements,
- o Standardization.

Exclusivity in Franchise Agreements

7.2 Are franchise agreements exclusive? Are customers who are located within a municipality which has a franchise agreement with a gas distribution company obliged to buy gas from that com-

pany, or may they buy it from some other source? This question was raised at the hearing primarily by the major gas consuming companies that wanted to ensure that no clause in any franchise agreement would preclude contract carriage and the availability of direct sales to end-use consumers.

7.3 All participants agreed that municipalities do not have the right to grant exclusive franchises permitting one gas distributor the sole right to distribute gas in a franchise area. To support this position, some arguments relied on section 111 of the Municipal Act, which prohibits the creation of exclusive franchises by a municipality for any trade, calling or business.

Position of the Municipalities:

7.4 The municipalities agreed that franchise agreements are not exclusive. However, FONOM pointed out that the granting of a franchise or right to a public utility to operate within a municipality generally makes it uneconomic for another utility to duplicate a gas distribution system. Therefore, franchises in practice tend to be exclusive with two types of exceptions:

a) where a competing supplier of gas seeks to supply a particular unserviced area within a franchised municipality; or

b) where a competing supplier seeks to supply a large volume user within a franchised municipality.

7.5 FONOM submitted that such a secondary supply of gas within a franchised municipality would require the passage of a by-law by the host municipality under section 3 of the Municipal Franchises Act. The competing supplier would also have to establish to the OEB that public convenience and necessity required the approval of the construction of works to supply gas under section 8 of the Municipal Franchises Act. If approved, dual franchises within a single municipality could result in the different rate bases and costs of service of each utility being reflected in different rates for the same class of consumers in the same municipality.

Position of the Large-Volume Gas Users:

7.6 IPAC, Nitrochem, IGUA and Inco all submitted briefs solely to address this issue. They submitted that the form of franchise agreements should in no way interfere with contract carriage or direct purchase arrangements. Inco added that any impediments to direct purchase arrangements presently included in any franchise agreements should be deleted or amended.

7.7 Nitrochem opposed the recommendation of Northern (outlined below) that exclusivity of franchises be established through legislation. Nitrochem argued that such exclusivity would appear to prevent direct purchase arrangements between natural gas producers and users and therefore would not be in line with recent indications of public policy as expressed by provincial and federal ministers.

7.8 IPAC took the position that the clause granting the right to supply gas in ONGA's proposed standard franchise agreement (described in the following section on Standardization) could be interpreted to mean that no other party would have the right to supply gas during the term of the agreement. IPAC, therefore, recommended that each franchise agreement should contain a clause stating that a corporation or other legal entity situate in or an inhabitant of the municipality is not precluded from purchasing gas from a party other than the gas company, subject to approval of the OEB.

Position of the Utilities:

7.9 Union submitted that if a municipality proposes to grant a second franchise, whether to another gas distributor, a producer or a consumer, the Board must determine if the separation, carving

out or overlapping of an area previously franchised to one gas distributor in favour of another is to the overall benefit of the public, and must weigh, for example, the effect on the remaining distribution system and the customers of the first franchised utility against any benefits accrued by permitting a subsequent franchise.

7.10 Northern was concerned that "fragmentation" of franchises and certificates, with the attendant duplication of costs and what was termed "artificial plant obsolescence", would not be in the public interest and recommended that the Board request an amendment to section 111 of the Municipal Act (which prohibits the creation of exclusive franchises by a municipality) to exclude its application to a natural gas distribution franchise. Northern also recommended that the Board, in its future franchise and certificate orders, declare that such grants are exclusive and that a general legislative enactment be recommended for existing franchises.

Position of the Board:

7.11 The Board accepts that, in the absence of express legislative authority, a municipal corporation cannot grant to anyone the

exclusive privilege to supply natural gas. In the Board's opinion, the grant of a natural gas franchise is not an exclusive right, but merely a right to supply gas according to the franchise agreement.

7.12 Accordingly, the Board believes that franchise agreements do not need to contain a clause stipulating that direct purchases of gas from a party other than the gas company are not precluded.

7.13 However, the Board acknowledges that it would be required to determine if it is in the public interest to approve the construction of works for a second franchise in an already franchised municipality. Considerations could include the economic feasibility of such supply and the impact on the system and customers of the first franchised utility.

7.14 The Board accepts that franchise agreements should not preclude contract carriage and direct purchase arrangements and, therefore, does not agree with Northern that exclusivity be permitted through a recommended legislative amendment.

Separate Road User Agreements; Multi-Party Agreements

7.15 In a franchise agreement between a municipality and a gas distributor there are two elements: the franchise rights which refer to the distribution of gas; and the road-user rights which allow the gas distributor to use the municipalty's road rights of way for gas pipelines. Should the road-user rights be separated from gas franchise rights?

7.16 When a gas utility is contemplating service to an unfranchised municipality, it must enter into agreements with all municipalities through which its pipelines pass. These may include, for example, an upper-tier municipality and lower-tier municipalities within the upper-tier municipality. Should there be multi-party franchise agreements between related lower-tier and upper-tier municipalities and the gas distributor?

7.17 These two questions were addressed together by the parties at the hearing.

Position of the Municipalities:

7.18 The City of Sudbury and the Regional Municipality of Sudbury, supported by FONOM, proposed that local and regional municipalities negotiate together with the gas utility in order to reach

one multi-party agreement. They submitted that this would avoid the present situation of drafting two different types of agreements - the franchise agreement and the road authority agreement - and would result in consistent application of rules and regulations respecting the installation of gas services on all roads within the regional area. A multi-party agreement could also avoid any problems arising from transferred ownership of roads.

7.19 The Regional Municipality of Ottawa-Carleton, however, did not support this proposal. It took the position that local municipalities and regional municipalities have separate areas of jurisdiction and separate concerns to be dealt with in negotiation of any gas franchise or road user agreement. Even among the lower-tier municipalities there may be varying interests and concerns depending on whether the municipality is, for instance, urban or rural. It felt that the increased number of parties could prolong the negotiations unduly.

7.20 The RMOC further maintained that it has the power to grant to gas distributors the right to use regional arterial highways but has no power to grant actual franchises to gas distributors and that only local municipal corporations within the Regional Municipality have the power

to enter into franchise agreements. Nevertheless, the RMOC acknowledged that generally its concerns in granting a licence to a gas distributor to use the regional road system are very similar to those of the local or lower-tier municipalities in granting a franchise and submitted that the terms and conditions of the road user and franchise agreements should be similar in many respects.

7.21 The Southwestern Ontario Municipal Committee submitted that the OEB is authorized to deal with municipal franchises with gas distributors and also the road user aspects of them. For lower-tier municipalities, both aspects should be included in the same by-law and in the case of an upper-tier municipality where the franchise portion may not be necessary, its inclusion with the road user aspects in the same by-law does no harm. SWOMC added that a multi-party agreement was possible in principle but not a politically feasible option. Even if a multi-party arrangement were made, each municipality would be required to enact separate franchise by-laws under the Municipal Franchises Act.

7.22 In contrast, the County of Lambton maintained that as an upper-tier municipality it would be more appropriate for it to be party to a road

user agreement with Union, rather than to a franchise agreement which purports to give Union distribution rights within Lambton.

7.23 FONOM brought to the Board's attention that if there is any supply of gas in a municipality, whether lower- or upper-tier, the construction of works to supply such gas would be subject to section 8 of the Municipal Franchises Act. However, if there is no supply within the municipality, the Municipal Franchises Act does not apply according to subsection 6(1) of that Act. Thus, the OEB's jurisdiction over transmission lines in areas where distribution or supply of gas is restricted to land owners abutting the line is unclear. Accordingly, FONOM submitted that in order to implement multi-party agreements, legislative amendments would be necessary to expressly confer jurisdiction on the Board:

i) to grant certificates of public convenience and necessity in relation to the construction of transmission lines which do not supply gas within the municipality; and,

ii) to set the terms, conditions and period for the granting of a right to lay transmission lines in a municipality which does not receive supply of gas.

Position of the Utilities:

7.24 Consumers' submitted that the Municipal Franchises Act should be amended in order to make it clear that it does apply to regional and county franchise agreements. Union took the position that under sections 210 and 225 of the Municipal Act, both lower- and upper-tier municipalities have the right to pass by-laws granting transmission and distribution rights, subject only to the Municipal Franchises Act. Union suggested that if there is any doubt, the Municipal Franchises Act should be amended in the same way suggested by Consumers'. Northern submitted that because of subsection 6(1) of the Municipal Franchises Act, county franchise agreements are not subject to that Act with the exception of section 2 and except where otherwise expressly provided.

7.25 None of the utilities supported the idea of separate road user agreements. They submitted that general franchise and user rights should be contained in one agreement regardless of the nature of the municipality involved. Union argued that separate road user agreements could place the control of pipelines beyond the purview of the OEB if municipalities were to insist that road user disputes should more properly be put before the Ontario Municipal Board. The gas

distributors are of the opinion that one franchise agreement can encompass both concerns.

7.26 With regard to multi-party agreements, Union maintained that any such agreement must involve all local municipalities, the County/Regions, and the utility, to be effective, and all would have to agree to a common termination date of existing franchises. Union was prepared to renegotiate such franchises, but pointed out that, in practice, negotiating one agreement with up to 24 local municipalities, as in Essex County, would be very difficult.

Position of the Board:

7.27 There appears to be a great deal of confusion as to whether the OEB has jurisdiction in all instances over regional and county franchise agreements, especially in those situations where the municipality is the host to the pipeline but does not itself receive gas. The Board agrees that a recommendation should be made to amend the Municipal Franchises Act, so that it is clear that the OEB does have such jurisdiction and the Board suggests that the MFA Committee recommended later in this chapter develop such an amendment. In making this recommendation, the Board confirms that it does not believe that it is necessary to separate the

road user rights and the franchise rights into separate agreements for either lower- or upper-tier municipalities.

7.28 The Board appreciates that some municipalities are trying to achieve consistency by advocating multi-party agreements within a region or county, but also notes that the municipalities themselves have differing views as to the feasibility and effectiveness of multi-party agreements. The Board is not opposed to the principle of multi-party agreements, but would leave this to the parties to decide as to whether or not such an alternative is workable. The Board is of the opinion, however, that in the case of separate agreements, the road user agreements for the region and the franchise agreements for the local municipality should, where possible, generally contain similar provisions.

Duration of Franchise Agreements

7.29 Most franchise agreements between gas distributors and municipalities are for 20 to 30 years and some franchises are said to be in perpetuity. What is the most appropriate term for a franchise agreement or renewal? A variety of views were presented at the hearing.

Position of the Municipalities:

7.30 There was a wide variance of opinion among the municipalities. The City of Sudbury recommended that the term of the franchise agreement be limited to a five-year period whereas the Township of Zorra proposed a term of not less than 20 years.

7.31 The Regional Municipality of Ottawa-Carleton submitted that a separate road user agreement be created for a proposed term of 10 years. Additionally, this municipality and others proposed that termination dates for road user agreements and gas franchise agreements should be uniform within a regional area.

7.32 FONOM differentiated between the initial franchise agreement and a renewal. In the first case FONOM advocated a twenty-year term and for the second, a ten-year period.

Position of the Utilities:

7.33 The gas distributors represented by ONGA were in support of a twenty-year term for a franchise agreement and no differentiation was made between the duration of an initial agreement and its renewal.

7.34 The principle of uniform termination dates for franchise agreements within a regional area was not opposed by the utilities, but it was pointed out that there could be a practical problem of having to negotiate a great many renewals at the same time.

Position of the Board:

7.35 While some advantage to the municipalities may result from shorter term franchise agreements, these may result in more complicated documents, which in the end, may not decrease the financial exposure of the municipalities. When a utility commences distribution in a new franchise area, it expects a return on its investment over time. If the term of the agreement is too short, the utility's risk may increase, which could lead to increased costs of capital and in turn might increase the cost of gas throughout the franchise area.

7.36 The Board is of the opinion that a first time agreement should be of a duration of not less than fifteen years and no longer than twenty years. The minimum duration seems adequate to give security to the utility whereas a maximum term has been established by the Public Utilities Act (sections 24 and 60) which sets the upper limit of a contract to a twenty-year term.

7.37 The duration of a renewal agreement may not necessarily need to be the same as the initial agreement; the risk of the utility is substantially lower since the plant has been depreciated to a large extent during the initial term of the agreement. In the case of renewals a ten to fifteen-year term would, therefore, seem to be adequate.

7.38 There are 83 agreements said to be perpetual in Ontario, 82 of which are found in the Union franchise area. The Board has no jurisdiction to declare that perpetual agreements should be terminated. That is a matter either for the courts, the Legislature, or the parties involved. The Board's view, however, is that in the future new franchise agreements or renewals thereof, ought not to be in perpetuity.

7.39 A uniform expiry date within a regional area could help to achieve two goals. It might place the local municipalities in a better negotiating position with the utility and it would contribute to the standardization of franchise agreements at least within each regional municipality or county. The Board is of the opinion that this subject should be addressed by the MFA Committee in order to explore the practicality of this concept.

Standardization

7.40 A large portion of this Report has dealt with specific issues that have led to difficulties in negotiating franchise agreements. Underlying these specific concerns was always the question of whether the Board could or should impose a standard form of franchise agreement either on a franchise-wide or province-wide basis.

Position of the Municipalities:

7.41 SWOMC stated very clearly that:

> The OEB has no jurisdiction to establish a standard form of franchise to be required in every case or in every case involving a particular gas utility as otherwise it declines jurisdiction by prejudging the result before the prescribed public hearing.

7.42 However, SWOMC added that the OEB may establish policy by which to test the appropriateness of specific franchise provisions. SWOMC submitted that it would prefer to work within the existing legislative framework, rather than accede to the gas utilities' solution which was to have a standard form of franchise agreement legislated.

7.43 Nevertheless, SWOMC did propose a draft franchise agreement for the Union franchise area in

its original brief on the premise that present "standard" agreements favoured the gas utility's interests. The suggested clauses included those which could form the usual basis of an agreement and also those which represent SWOMC's proposed solution to outstanding issues. Although SWOMC's proposals were set forth in the form of a standard agreement, SWOMC submitted that the agreement provided for additional negotiated clauses that would pertain to local concerns and as such would be required to be approved by the OEB on a case-by-case basis.

7.44 Other municipalities that addressed the issue agreed that the OEB has no jurisdiction under the Municipal Franchises Act to impose a standard agreement on all municipalities, but must determine each case on its merits after holding a public hearing. Most municipalities also submitted, however, that the OEB does have the jurisdiction to adopt a policy or guidelines indicating the usual provisions to be included in franchise agreements. It would be left open to any municipality or utility to make submissions as to why such a policy should not be adopted in its particular case, and the Board would be able to exercise its discretion in dealing with specific concerns of particular municipalities or utilities.

7.45 Blenheim and Lambton relied upon the 1965 Ontario Court of Appeal case Re: Hopedale Developments Ltd. and Town of Oakville as support for the proposition that an administrative tribunal has a right to formulate general principles provided that it gives a full hearing to the parties in every case before it and decides each case on its merits.

7.46 FONOM was the only municipal representative that supported the position that gas franchise agreements be standardized throughout the province at the expiry of current agreements by means of a standard form agreement adopted by the Board either by way of incorporation into its Rules of Procedure or as a regulation under the Ontario Energy Board Act. FONOM did agree with other municipal representatives that special terms and provisions to meet particular local conditions would remain the subject of negotiation and be subject to review and approval by the Board. FONOM cited a number of advantages to a standardized form of franchise agreement. A uniform franchise agreement would:

1) simplify the franchise approval process;

2) eliminate inconsistency in franchise provisions among municipalities within the market area serviced by a single utility and between market areas serviced by different utilities;

3) redress the imbalance in bargaining power between municipalities of all sizes and a utility; and

4) promote certainty in the interpretation and the parties' understanding of franchise terms to restore confidence and trust which is presently lacking between the parties to franchise agreements.

7.47 FONOM did not, however, support uniformity for its own sake nor the imposition of standardized terms on parties who had not had the opportunity to affect their substance. It cited the Board's decision in the Lambton case E.B.A. 464 as illustrating the danger of imposing standardized terms on an unwilling party solely for the sake of standardization.

7.48 FONOM recommended that a special committee be appointed consisting of representatives of the gas utilities, the OEB and the municipalities. The committee would work within the framework of definitive policy guidelines established by the OEB in this Report to develop contractual language for a uniform franchise agreement. FONOM suggested that the agreement so generated should then be circulated to the participants in this hearing for comments and eventual approval by the Board.

7.49 FONOM also recommended that a standing advisory committee be established to report on a regular basis (between two and five years) upon recommended amendments to the uniform franchise agreement. Comments on the proposed modifications could then be solicited and a public hearing held if deemed warranted. FONOM suggested that any such amended form of franchise agreement could be adopted upon the expiry of existing franchises.

Position of the Utilities:

7.50 The utilities agreed that the Board at present does not have the jurisdiction to impose or adopt a standard form of franchise agreement. ONGA submitted a draft standard franchise agreement prepared by the three major gas utilities to the Board for consideration and recommended that it should become a legislated agreement to come into effect for all new franchise agreements and all future renewals.

7.51 Consumers' and Northern suggested that if the Board was not prepared to recommend adoption of a standard agreement through specific amendments to the Municipal Franchises Act because such a standard agreement would fetter its discretion, the Board could generally express its opinion on the various issues discussed in

the proceeding, making it clear that future cases would be resolved on their own particular fact situations.

7.52 In order to accommodate the concern that standardization might not always be appropriate, Consumers' and Northern proposed that legislative amendments could be drafted in such a way as to make it clear that the standard terms and conditions were to prevail, unless the Board was satisfied that it was in the public interest to vary the terms in the particular case before it.

7.53 Union pointed out that historically franchise agreements have for the most part been uniform, especially within the Consumers' and Northern franchise areas and that most participants generally agreed that standardization of franchise terms was desirable as long as their proposed terms and conditions were the ones adopted by the Board.

7.54 ONGA, however, submitted that the present process is no longer suitable because there will probably be relatively few new franchise agreements proposed in the future, but an increasing number of renewals. It argued that it is an expensive and time-consuming process with little real room for negotiation in view

of the Board's past policy in favour of standardization and the utilities' desire to treat all municipalities in their franchise area the same. If the Board were to choose an agreement that is a fair compromise and balance between the interests of the municipality, the utility and the public of Ontario, then, in the opinion of ONGA, there should not be any need for negotiation nor for giving any one particular municipality a "better deal" than others.

7.55 Union took the position that a major portion of the franchise could be standardized, since most terms were not in contention, but added that local issues such as bridges would still be negotiated. Union suggested that standardization would accomplish:

1) consistency within each utility's franchise area;

2) a reduction if not elimination of the concern of smaller municipalities as to their bargaining power with the utility compared to that of larger municipalities, since they would be all treated the same;

3) reduction of franchise negotiation time and costs for all parties involved; and

4) reduction of the Board's time in approval of franchises.

7.56 Union stated that it was prepared to re-open any franchise, including those in perpetuity, if a municipality wished to convert to a new legislated standard form.

7.57 Northern argued that there is no regulation-making power in the Municipal Franchises Act or the Ontario Energy Board Act that would allow the Board to adopt a standard form of franchise agreement through a regulation or Rules of Procedure as suggested by FONOM.

7.58 Northern did, however, support FONOM's recommendation regarding the appointment of a special committee to consider and develop a recommended standard franchise agreement. Northern stipulated though that the OEB would need to indicate specific guidelines respecting the purpose of such a special committee, the matters to be considered and a timetable for deliberations and reporting in order for it to be effective.

Position of the Board:

7.59 Both the utilities and the municipalities listed a number of advantages to uniformity in agreements and the Board does recognize those advantages. However, it does not appear to be possible to achieve uniformity of agreements across the province, unless certain municipalities forgo or are forced to forgo rights which

they now enjoy and which do not necessarily conform to any proposed uniform agreement. This is especially relevant in the Union franchise area where some agreements, including some of those in perpetuity, require Union to pay all costs of relocation of pipeline. Nevertheless, some municipalities might be pleased to be relieved of other provisions in existing agreements.

7.60 The Board is also aware that a large number of franchise agreements have recently been renewed for a twenty-year term and it therefore would take some time before uniformity could be achieved.

7.61 The Board acknowledges that in the past it has attempted to avoid unnecessary discrimination between municipalities by tending to standardize the terms and conditions of gas franchise agreements. In light of the evidence presented in this hearing, the Board recognizes that utilities and municipalities do see merit in standardization. However, the terms and conditions of a standard agreement which seem fair and acceptable to all parties have not yet been established.

7.62 The Board agrees that it does not have the jurisdiction to impose a uniform agreement

either across the province or throughout a franchise area. A completely standard agreement would be tantamount to a predetermination of the decisions which this Board is required to make under the Municipal Franchises Act. Moreover, the Board has some concerns about recommending legislative amendments or regulations to achieve standardization. Uniformity, if legislated, would tend to impair the concept of voluntary agreements in that, for example, predetermined uniform conditions of delivery would be forced upon a municipality where a new agreement is at issue.

7.63 The Board recommends an ongoing process of working within the existing legislative framework to develop a "model" agreement based on the Board's policy and containing the usual provisions to be included in a franchise agreement. Such a model agreement will, it is anticipated, be developed by the proposed MFA Committee. In accordance with the Hopedale decision, the Board will continue to deal with franchise agreements on a case-by-case basis, considering submissions from municipalities or utilities that address specific local concerns or that argue that the Board's policy or model agreement should not apply in that particular case.

7.64 In this way, the municipalities' main concern regarding unequal bargaining power in negotiations should be alleviated once basic clauses that represent a fairer balance between the parties have been developed.

7.65 The Board concludes that to ensure that a balance between the parties to franchise agreements is established and maintained, it will accept the recommendation of FONOM and establish a special committee, the Municipal Franchise Agreement Committee as discussed in the following chapter.

8. THE MUNICIPAL FRANCHISE AGREEMENT COMMITTEE

8.1 Many of the questions raised during this hearing are, in the opinion of the Board, most constructively answered through discussion and negotiation rather than by decisions or orders of the Board. The Board therefore will establish a special committee, the Municipal Franchise Agreement Committee to consider the policy guidelines established in the Board's review of specific issues in this Report with a view to developing the language for a basic model agreement. The Board will then solicit comments on the proposed model agreement and approve a final draft, either with or without another hearing. The Board also expects the MFA Committee to consider the legislative amendments commented upon by the Board in this Report and, where necessary, to draft the appropriate legislation.

8.2 The Board will appoint a Chairman for the MFA Committee from the Board's staff. The Chairman will, after receiving recommendations from the utilities and the municipalities, determine and select the membership of the MFA Committee. The Board suggests that the MFA Committee, in addition to the Chairman, be composed of one to two (perhaps one operating person and one legal counsel) representatives of each of the three major utilities and one to two representatives of municipalities in each of the three major franchised areas, including representation from both upper- and lower-tier municipalities. The Chairman of the MFA Committee may wish to consult the AMO and ONGA for suggested nominees and/or may wish to consult and select members from among the participants to this proceeding. The Board is prepared to offer some financial contribution towards the municipalities' costs incurred in participating in the MFA Committee.

8.3 In this Report the Board has indicated its preferred solution to the major issues that were brought before it in the hearing. In most instances the Board has dealt with an issue by establishing broad policy guidelines and leaving the specific resolution either to be negotiated between the parties or dealt with by the MFA Committee. For example, the Board has recommended that the cost of relocating pipelines be

shared to some degree and has recommended a range of percentages of the total cost of relocation that should represent a municipality's share. The Board has left the specific percentage to be fixed by negotiation between a municipality and utility. The MFA Committee may, however, wish to develop this policy and establish a fixed percentage or percentages that would apply in specific franchise areas or in particular circumstances, so as to further reduce inequity in bargaining power and to develop consistency where circumstances are similar.

8.4 In the course of this Report the Board has specifically referred a number of issues to the MFA Committee, requesting it to:

- consider the means, whether by legislation or otherwise, by which the Board could assume a limited arbitration role for line location disputes (4.19);

- consider developing a formula for relocation cost sharing within the range established in this Report (5.72);

- develop a model clause for franchise agreements regarding insurance and indemnification (6.11);

- consider whether the Board's present conditional power under section 9 of the Municipal Franchises Act for first-time agreements is sufficient, or whether new legislation should be requested giving the Board the additional power to impose a settlement (6.21);

- consider the implications of removing subsection 10(6) from the Municipal Franchises Act (6.21);

- develop a proposed amendment to the Municipal Franchises Act to make it clear that the Board has jurisdiction over regional and county franchise agreements in which the municipality is the host to the pipeline but does not itself receive gas (7.27);

- explore the practicality of establishing a uniform expiry date for franchise agreements within a regional area (7.39);

- develop a model agreement based on the Board's policy and containing the usual provisions to be included in a franchise agreement (7.63).

8.5 Although the Board believes that it has addressed in this Report the issues that were of most

concern to the participants, there were some provisions in agreements, such as force majeure clauses, that were addressed in briefs but were not the subject of discussion during the hearing. The Board expects the MFA Committee to consider the positions of all participants on any outstanding issues for which the Board has not offered any policy guidance, including any recommended legislative amendments not dealt with, and recommend provisions to deal with them in the model franchise agreement and recommend any legislative amendments deemed necessary or appropriate.

8.6 The Board recognizes that, although a general consensus was reached on a few issues during the hearing, developing contractual language to express that consensus or to interpret the Board's policy advice on other issues into specific provisions for a model agreement, may require considerable time and effort.

8.7 The Board notes, however, that these matters should be resolved expediently as a number of franchise agreements remain outstanding because the negotiation process has broken down. The Board, therefore, believes that the MFA Committee should report to the Board with a recommended model agreement within six months of its formation. The Board expects, as Northern

suggested, that the Chairman at the outset establish an actual timetable for reporting and terms of reference in accordance with the Board's advice herein.

8.8 The Board agrees with FONOM that any model agreement should be reviewed periodically to make sure provisions have not become outdated, but the Board prefers to leave the process for that review, whether by advisory committee or otherwise, to be determined after a model agreement has been developed.

8.9 As previously stated, the Board accepts that uniformity will take some time to achieve and encourages municipalities and utilities to consider renegotiating existing franchise agreements which will not expire for some time, once a model agreement has been approved. The Board also notes Union's offer to re-open franchise agreements in perpetuity and encourages those affected municipalities to enter into negotiations.

Dated at Toronto this 21st day of May, 1986.

ONTARIO ENERGRY BOARD

R.W. Macaulay, Q.C.
Chairman and Presiding
Member

M.C. Rounding
Member

P.E. Boisseau
Member

APPENDIX A

Municipalities and the Provision of Gas Services

- Adopted by the Board of Directors of the Association of Municipalities of Ontario on November 30, 1984

AMO

Association of Municipalities of Ontario

Suite 902 • 100 University Avenue, Toronto, Ontario M5J 1V6 • Telephone 593-1441

December 10, 1984

The Honourable Claude F. Bennett
Minister of Municipal Affairs and
Housing
17th Floor
777 Bay Street
Toronto, Ontairo
M5G 2E5

Dear Minister:

On behalf of the Association of Municipalities of Ontario enclosed please find a copy of a report concerning gas services and related franchise agreements that was adopted at the November 30, 1984 meeting of the AMO Board of Directors.

The enclosed report documents many of the municipal concerns associated with gas franchise agreements and related legislation and procedures.

The Association would appreciate receiving your comments and those of your colleague, the Honourable Philip Andrewes, Minister of Energy, with respect to the contents of the report and AMO's request for further study of the matter.

Yours truly,

Ron Eddy
President

RE/11

c.c.: The Honourable Philip Andrewes,
Minister of Energy

MUNICIPALITIES AND THE PROVISION OF GAS SERVICES

Adopted by the Board of Directors of the Association of Municipalities of Ontario on November 30, 1984

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MUNICIPALITIES AND THE PROVISION OF GAS SERVICES

Background

AMO's involvement in the matter of gas services originated with a study session at the annual meeting of the County and Regional Section of AMO in October, 1983, at which time the matter of cost-sharing arrangements for gas line relocations was discussed. Subsequent to this a resolution was received by AMO from the Regional Municipality of Ottawa-Carleton requesting that AMO, in conjunction with the Ministry of Energy and the Ministry of Municipal Affairs and Housing, review the extent of municipal control over public utilities, especially as it relates to the installation and maintenance of gas distribution systems in public roads systems and the adequacy of gas utility contributions under the Assessment Act. This resolution was endorsed by the AMO Board of Directors in November, 1983 and forwarded to the Minister of Municipal Affairs and Housing for consideration. (Appendix 1)

In March, 1984 the Minister responded by suggesting that representatives from AMO meet with staff of the Local Government Organization Branch of the Ministry of Municipal Affairs and Housing to discuss the nature and extent of the problems being experienced with gas franchise agreements to allow the Ministry to better assess the need for an extensive study.

This meeting took place in August, 1984 and involved representatives from the Regional Municipality of Ottawa-Carleton, the County of Kent, AMO and the Ministry. Discussion centered on the need for AMO to identify specific concerns with respect to the present agreements, legislation and procedures governing the provision of gas services, to record these concerns and to present them to the Minister as a means of illustrating the need for some action to be taken.

As a result of this discussion an ad hoc committee was formed with representation from the Counties of Kent and Lambton, the Regional Municipalities of Ottawa-Carleton and Sudbury and the City of Chatham.

Areas of Concern

1. Relocation Costs

One of the most significant concerns identified is the cost-sharing arrangements embodied in the gas franchise agreements relative to gas line relocations that are necessitated by municipal road construction. At present there are three basic methods used to allocate costs associated with relocation:

- o 100% paid by gas utility company;

- o application of the provisions of the Public Service Works on Highways Act - ie. the "cost of labour" shared 50%/50% between the road authority and the utility operating authority;

- o the "MTC option" - ie. 100% paid by road authority if relocation required within five (5) years of installation and 100% paid by the utility operating authority if relocation is required any time after this initial period.

The problems identified with respect to cost-sharing include:

- o the fact that three different methods are utilized within the Province;

- o concerns related to changes in the cost-sharing formulae, particulary in southwestern Ontario, from those that applied when the gas lines were originally installed (ie. installations were permitted based on the understanding that all relocations, when required, would be 100% funded by the utility operating authority);

- o the definition of "cost of labour" in the Public Service Works on Highways Act.

The so-called "MTC clause" is suggested as a compromise that would satisfy the problems identified above and provide a reasonable solution to the concerns expressed by municipalities. The result would be a uniform methodology, applicable across the Province, that would require municipalities to undertake some medium range planning and make a commitment and that would allow the utility companies to recover their costs.

Another concern expressed by municipalities relative to relocation costs is the allocation of costs, by a gas company to a municipality, for gas line relocation or upgrading which is not required as a result of road construction but done in conjunction with this road work. Future agreements must ensure that such costs are borne 100% by the gas company. Any disputes relative to the reason for the relocation or upgrading of a line should be arbitrated by the Ontario Municipal Board.

2. Location of Gas Lines

The authority to control the vertical and horizontal (from the centre line) location of gas lines within the road allowance is an issue in many jurisdictions. This concern is related to the relocation cost issue. Often in the past what could have been termed "temporary"

locations were permitted by municipalities on the basis that the line would be moved, at no cost to the municipality, if some future road alteration or reconstruction required it. Any new cost-sharing arrangement, such as the application of the provisions of the Public Service Works on Highways Act, would require that such "temporary" arrangements be discontinued and that existing cases be rectified.

A related concern is for the operating authority to provide accurate "as installed" drawings for all installations. These are absolutely necessary to prevent serious and costly accidents due to inaccurate information concerning the location of such lines. This should be a requirement, either in the agreements or in legislation.

3. Gas Lines on Bridges

The question of allowing the installation of gas lines on bridges is one of convenience and cost to the operator initially versus eventual costs to the municipality as a result of any new cost sharing arrangement. Again making reference to southwestern Ontario primarily, gas companies were allowed to use bridge crossings for their lines due mainly to the cost sharing arrangements that existed in franchise agreements requiring the gas companies to pay 100% of all relocation costs.

The proposed new agreements would alter this situation and require municipalities to pay 50% of the costs of labour as defined in the Public Service Works on Highways Act for any relocation necessitated by the municipality. This is significant given the following:

- municipalities permitted many lines to be installed on bridges initially, because of the favourable "cost-sharing" arrangements in some existing gas-franchise agreements (applicable primarily to Union Gas)

- many bridges are or may soon be in need of significant repairs or reconstruction thus requiring some form of "relocation" of any utilities presently on the bridge.

Municipalities would again like to see amendments to the present franchise agreements to include provisions similar to those in MTC agreements, which exclude bridges and require a separate agreement for each bridge in order to install the gas line on that bridge.

4. Jurisdiction

The Association believes that jurisdiction over the right to distribute and sell gas and the terms and conditions governing these activities can and must be separated from jurisdiction over the right to locate in and use public roads and rights-of-way.

AMO contends that the Ontario Energy Board (OEB) is the approriate body to deal with matters related to the establishment of distribution areas and the selling price for gas, among other things, but that the Ontario Municipal Board should more appropriately be the body concerned with matters related to the use of public roads and rights-of-way for the location of gas lines (land use) and matters related to municipal finance.

For this reason the Association would submit that the Ontario Municipal Board (OMB) should be the arbitrator in all matters related to gas franchise agreements, including the terms and conditions of the agreements and the rights and priviledges associated with the use of public roads and rights-of-way. The Public Service Works on Highways Act (R.S.O. 1980; Chapter 420) recognizes this concept by naming the OMB as the arbitrator in cases where there is disagreement between a road authority and an operating corporation as to the level of compensation to be provided where a road authority incurs a loss as a result of neglect on the part of the operating authority. This principle should be extended to cover all matters related to municipal gas franchise agreements and related disputes.

There is also a need to clarify the difference between "user" and "fracnchise" agreements as they relate to the agreements signed by county and regional governments as compared to those signed by local municipalities.

5. Agreement Expiry Dates

The lack of uniform expiry dates for franchise agreements within the Province and even within many counties or regions creates a concern relative to the provision of a consistent level of service at an equitable cost to all consumers within any given service area. As a means of correcting such inequities it is recommended that all franchise agreements within any given county, regional or district municipality or any similarly defined area be given uniform expiry dates.

6. Adherence to Municipal By-laws

AMO believes that the operating authority must be required to adhere to any municipal by-laws that exist at the time of installation of a gas line or any subsequent works.

7. Utility Co-ordinating Committees

The formation of utility co-ordinating committees at the municipal level should be encouraged, as should participation in such committees by

the private utility companies. This would facilitate the co-ordination of road work and utility work so as to cause the least disruption to those being served.

Participation on a utility co-ordinating committee by all utilities may also reduce the incidents of road deterioration resulting from the installation of individual service lines. Where such service lines are installed, franchise agreements should include a provision that would permit the municipality to levy a penalty charge against the utility requiring the road cut if the cut is required within a specified time after the completion of the road work. This would encourage all operating authorities to co-operate in the planning and co-ordination of undertakings in a particular right-of-way.

Conclusion

The above report documents of the concerns identified by municipalities relative to the provision of gas services and the legislation and agreements governing the use of public highways and rights-ofway by utility companies. Based on the above the Association would recommend that:

> "the Ministry of Municipal Affairs and Housing in co-operation with the Ministry of Energy and in consultation with the Association of Municipalities of Ontario undertake an in-depth review of the rights and obligations of those concerned with supplying and distributing gas in Ontario and the regulation of the use of public roads and highways for this purpose and the costs associated with such activities."

APPENDIX 1

Resolution

GEN-4-83

REQUEST FOR PROVINCIAL-MUNICIPAL STUDY WITH RESPECT TO PUBLIC UTILITY FRANCHISES

Be it resolved that the Ministry of Municipal Affairs and Housing and the Ministry of Energy, in consultation with the Association of Municipalities of Ontario (AMO), conduct a study reviewing municipal control of public utilities, the adequacy of municipal control over the installation and maintenance of gas distribution systems in the public roads system and the adequacy of contributions by gas utilities under the Assessment Act.

APPENDIX B

Brief Submitted on Behalf of The Consumers' Gas Company Ltd., Union Gas Limited, Northern and Central Gas Corporation Limited and The Ontario Natural Gas Association containing a draft standard form franchise agreement

ONTARIO ENERGY BOARD

IN THE MATTER OF the Ontario Energy Board Act, R.S.O. 1980, Chapter 332, section 13 and 15;

AND IN THE MATTER OF the Municipal Franchises Act, R.S.O. 1980, Chapter 309;

AND IN THE MATTER OF a public hearing convened by the Ontario Energy Board to inquire into and review the form of natural gas franchise agreements and certificates of public convenience and necessity.

BRIEF SUBMITTED ON BEHALF OF THE CONSUMERS' GAS COMPANY LIMITED, UNION GAS LIMITED, NORTHERN AND CENTRAL GAS CORPORATION LIMITED AND THE ONTARIO NATURAL GAS ASSOCIATION

A. MUNICIPAL FRANCHISES ACT

1. The Municipal Franchises Act (the "Act") was first enacted in 1909. It has remained substantially in its present form since that time.

2. The jurisdiction of the Ontario Energy Board (the "OEB") under the Act is broad and all encompassing. In determining whether or not to approve franchises or issue certificates of public convenience and necessity it is up to the Board, after a hearing, to make a determination on the basis of the evidence as to whether or not it is in the public interest to issue the order sought.

Reference to:

Union Gas Company of Canada Limited v. Sydenham Gas & Petroleum Company Limited, [1957] S.C.R. 185 (Supreme Court of Canada)

3. In renewing a franchise agreement under section 10 of the Act, the OEB is not bound by the terms of prior agreements or by the particular provisions sought by a municipality.

Reference to:

City of Peterborough and Consumers' Gas Co. et al. (1980), 28 O.R. (2d) 573 (Divisional Court). See in particular the following passage from the judgment of Henry, J. (at pp. 575-576):

> In the sections that I have cited there is no requirement that the "terms and conditions" must be reached by agreement. No doubt this route will frequently be followed in circumstances such as these and there will be agreement between the parties as to the terms and conditions that ought to be imposed and it may be that the Board will adopt them. If, however, there is no agreement, it is obviously a matter for adjudication by the Board and they must decide the terms and conditions that the Act contemplates. This is a matter that is entirely within the Board's discretion, to be exercised after a proper hearing, and in our opinion that discretion was properly exercised. There is nothing in the statutory provisions to require that the terms and conditions found in the expiring agreement must be continued or that what is prescribed by the Board as a result of its adjudication be agreeable to either or both of the parties. It is for the Board to adjudicate when the matter is set down before them. Assuming that the hearing has been properly held, it is immaterial that the terms and conditions imposed are not those either in the expiring agreement or in a new agreement or are acceptable to the contending parties.

4. The Board's broad jurisdiction under the Act is similar to that which it exercises under the Ontario Energy Board Act. While local municipal concerns are relevant matters for the Board's consideration, in the final analysis it must be

guided by what is in the best interests of the residents of Ontario.

Reference to:

Union Gas Ltd. and Tecumseh Gas Storage v. Township of Dawn (1977), 15 O.R. (2d) 722 (Divisional Court). See in particular the following passages from the judgment of Keith, J. (p. 728 and p. 731):

> I have stressed these points to illustrate firstly how insignificant are the local problems of the Township of Dawn when viewed in the perspective of the need for energy to be supplied to those millions of residents of Ontario beyond the township borders, and to call to mind the potential not only for chaos but the total frustration of any plan to serve this need if by reason of powers vested in each and every municipality by the Planning Act, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes. We were informed that other township councils have only delayed enacting their own by-laws pending the outcome of this appeal.
>
> ...
>
> In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the Planning Act.
>
> These are all matters that are to be considered in the light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in s. 40(8), s. 41(3) and s. 43(3), which I have quoted, would seem to leave no room for doubt that it is the broad public interest that must be served.

5. In past decisions respecting applications to approve the terms and conditions of franchise agreements, the Board has made the following determinations:

(a) Generally speaking, only one gas utility should receive the franchise rights for any particular municipality.

Reference to:

Reasons for Decision of the OEB, Applications by Consumers' Gas and Union Gas for approval of a franchise agreement to supply gas to a portion of Mississauga, E.B.A. 337 and 341 and E.B.C. 110, October 23, 1979. See page 7 of the Board's decision:

> The Board does not think it appropriate or in the public interest to endorse more than one franchise in a specific municipality if it can be avoided.

(b) Franchise agreements should not contain any provisions which require a gas utility to make franchise fee payments to the municipality. Nor should such agreements attempt to require the gas utility to pay administration fees, road crossing fees or other costs which may be incurred by the municipality.

Reference to:

Reasons for Decision of the OEB, Application by Union Gas to renew a franchise in the Township of Moore pursuant to s. 10 of the Act, E.B.A. 304, December 21, 1978.

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise in the City of Peterborough pursuant to s. 10 of the Act, E.B.A. 316, June 26, 1979.

Reasons for Decision of the OEB, Application by Consumers' Gas to renew the franchise for the City of Ottawa, pursuant to s. 10 of the Act, E.B.A. 352, June 10, 1981. See, in particular, the following passage at p. 7 of the decision:

> In recent years, the Board has consistently denied municipalities the right to include, as a term and condition of a franchise agreement, a requirement of additional payments from a distributor of natural gas over and above the normal municipal taxes.

(c) Generally speaking, the term of a franchise agreement should be twenty years.

Reference to:

Reasons for Decision of the OEB, Application by Northern and Central to approve a franchise for the Village of Morrisburg, E.B.A. 194, December 3, 1976.

Reasons for Decision of the OEB, Application by Union Gas to renew a franchise in the Township of Moore pursuant to s. 10 of the Act, E.B.A. 304, December 21, 1978.

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise in the Township of Westmeath pursuant to s. 10 of the Act, E.B.A. 312, December 22, 1978.

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise in the City of Ottawa pursuant to s. 10 of the Act, E.B.A. 352, June 10, 1981.

(d) The Board has determined that the public interest requires that the costs of operation of a gas system should be kept as low as possible. The Board will therefore not approve a franchise agreement which contains an indemnity clause which would require the gas utility to indemnify the municipality in the event of incidents caused by the municipality's own negligence.

Reference to:

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise with the City of Niagara Falls, E.B.A. 311, June 14, 1979.

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise with the Town of Midland, E.B.A. 338, November 9, 1979.

(e) The Board has concluded that "there is merit in standardizing the terms and conditions of gas franchise agreements in general, and the

indemnity provisions of such agreements in particular, in order to ensure uniformity in the treatment accorded to the various municipalities served by (the utility) so as to eliminate the cross-subsidization among customers that would result from averaging of costs if the treatment of the municipalities was not uniform".

Reference to:

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise with the City of Niagara Falls, E.B.A. 311, June 14, 1979.

Reasons for Decision of the OEB, Applications by Union Gas relating to Lambton County and a number of related municipalities, E.B.A. 454, May 17, 1985 (rehearing pending).

(f) The Board will not approve a franchise agreement which contains a provision which would require the gas utility to be bound by present and future by-laws of the municipality.

Reference to:

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise in the City of Ottawa pursuant to s. 10 of the Act, E.B.A. 352, June 10, 1981. See in particular, the following passage from p. 9 of the decision:

> Clearly the Board and not the municipality is the final arbiter in determining the terms and conditions of a franchise agreement under the Act. If the Board were to approve the by-law clause proposed by the City, it could unwittingly be abdicating its jurisdiction in favour of the City if at some future time the City chose to enact by-laws which would have the effect of amending the franchise agreement. The board should not, and indeed cannot, delegate its statutory jurisdiction to determine the terms and conditions of a franchise agreement to another authority.

(g) The Board has determined that the cost of relocations of gas works for the purposes of highway improvement should be shared pursuant to the provisions of the Public Service Works on Highways Act.

Reference to:

Reasons for Decision of the OEB, Application by Consumers' Gas to renew a franchise agreement with the City of Peterborough pursuant to s. 10 of the Act, E.B.A. 316, June 26, 1979.

Reasons for Decision of the OEB, Applications by Union Gas relating to Lambton County and a number of related municipalities, E.B.A. 454, May 17, 1985 (rehearing pending).

B. PROCEDURE FOR THE APPROVAL OF A FRANCHISE AGREEMENT UNDER THE MUNICIPAL FRANCHISES ACT

6. If the applicant and municipality have agreed on the proposed terms and conditions of the franchise agreement, the procedure respecting the approval of a new franchise agreement or the renewal of an existing agreement is substantially the same. The procedure is generally as follows:

(a) A standard form franchise proposal is prepared by the utility and delivered to the municipality in question;

(b) Discussions between the municipality and the utility then occur with respect to the draft franchise agreement;

(c) In the event the municipality agrees to the proposed franchise, the municipality is usually asked to pass a resolution approving the proposed form of agreement;

(d) In the event the resolution is passed, an application must be prepared by the utility and filed with the Board. In each case, the Board opens a docket and issues directions regarding its hearing procedure;

(e) Upon receipt of the directions by the utility, notices of application and hearing must be sent by registered mail and published in a local newspaper;

(f) The hearing is subsequently convened. In most cases the municipality does not have a representative attend the hearing;

(g) After the Board approves the franchise and issues an order, the franchise must be sent back to the municipal council, a by-law must be passed and the agreement signed. A copy of the by-law and agreement must be delivered to the Board.

7. In the event the gas utility and municipality cannot agree on the terms and conditions of a new franchise agreement, the Board has no jurisdiction to impose an agreement, regardless of the wishes of the residents of the municipality.

8. In the case of a renewal of a franchise agreement, if the utility and municipality cannot agree on renewal terms, the Board has jurisdiction under s. 10 of the Act to order that the agreement be extended on such terms and conditions as the Board deems to be in the public interest.

C. PARTICULAR ISSUES

i) Public Service Works on Highways Act
(List of Suggested Concerns - No. 16)

9. The Public Service Works on Highways Act (the "PSWH Act") establishes the basis for apportioning the cost of relocating gas works where such relocations become necessary "in the course of constructing, reconstructing, changing, altering or improving a highway" (s. 2(1)).

10. The PSWH Act provides that in the absence of an agreement between the municipality and the utility the "cost of labour" for the project is to be apportioned equally and all other costs are to be borne by the utility (s. 2(2)).

11. "Cost of labour" is defined in s. 1(b) as follows:

> "Cost of labour" means,
>
> (i) the actual wages paid to all workmen up to and including the foremen for their time actually spent on the work and in travelling to and from the work, and the cost of food, lodging and transportation for such workmen where necessary for the proper carrying out of the work,
>
> (ii) the cost to the operating corporation of contributions related to such wages in respect of workmen's compensation, vacation pay, unemployment insurance, pension or insurance benefits and other similar benefits,
>
> (iii) the cost of using mechanical labour-saving equipment in the work,
>
> (iv) necessary transportation charges for equipment used in the work, and
>
> (v) the cost of explosives;

12. Due to the fact that for such relocations the municipality pays only the cost of labour defined above, most relocations for highway improvements generally result in the municipality paying approximately one-third and the utility two-thirds of the total cost of such relocations.

13. Where the relocation is requested by the municipality but is not for the purposes of highway improvement, the relocation must be paid for entirely by the municipality. As a result, relocations caused by the need to construct a sewer, alter drainage flows, etc. are not covered by the Act.

Reference to:

Consumers' Gas v. City of Toronto, 1941 S.C.R. 584 (Supreme Court of Canada)

Consumers' Gas v. City of Barrie (1980), 31 O.R. (2d) 242 (County Court)

Consumers' Gas v. Town of Aurora, unreported decision of His Honour Judge Conant, January 22, 1951

Consumers' Gas v. Borough of Etobicoke, unreported decision of His Honour Judge Hawkins, April 8, 1982.

14. The practice under the PSWH Act is generally well understood within the various franchise areas of each of the gas utilities. The Act represents the Legislature's policy in this area and also operates as an incentive towards a co-operative approach in utility planning. The Board, as set out above, has approved the application of the Act in cases where it has been the subject of debate during franchise renewal applications. It is our respectful submission that there is no reason to alter this practice and that relocations for highway improvements should be governed by the provisions of the PSWH Act.

ii) System Expansion

(List of Suggested Concerns - No. 2)

15. It is sometimes argued that gas utilities have an obligation to serve all potential customers within their franchise areas. The franchise agreements themselves do not contain any such requirement and the Board has concluded that no such requirement exists.

Reference to:

Reasons for Decision of the OEB, Consumers' Gas rate case, EBRO 369-I (1980). See, in particular, the following extract from p. 44 of the decision:

> The question as to whether a utility has an obligation to serve in its franchise area was dealt with in the Board's Reasons for Decision in EBRO 341-I at pages 28 and 29. From these it is clear that no such obligation exists under the franchise agreements...

16. The Public Utilities Act requires each utility to supply gas to all buildings located along the route of an existing pipeline, provided there is a sufficient supply of gas available to the utility.

Reference to:

Public Utilities Act, R.S.O. 1980, chapter 423, s. 54:

> Where there is a sufficient supply of the public utility, the corporation shall supply all buildings within the municipality situate upon land lying along the line of any supply pipe, wire or rod, upon the request in writing of the owner, occupant or other person in charge of any such building.

17. Generally speaking, it is the policy of the Board to discourage system expansion which is not economically feasible. Otherwise, undue cross-subsidization occurs.

18. The Board is able to control uneconomic expansions in several ways. First, it is the standard practice of the Board, during applications for certificates of public convenience and necessity to require the applicant to prepare an economic feasibility analysis of the proposed expansion. This analysis attempts to project the number of gas customers who will be attracted to the system, the volume of gas which will be consumed by them, the cost of extending gas service to them and the rate of return which can therefore be anticipated as a result of the expansion. If the rate of return projected is unacceptable, the Board will normally discourage the expansion. Alternatively, capital contributions may be required from the proposed customers in order to make the rate of return acceptable.

19. Second, the Board deals with system expansion in the utilities' rate cases under the Ontario Energy Board Act. In these cases it is usually argued, on behalf of large volume customers, that only economically feasible expansions

should occur. Otherwise, they argue that their rates will be unreasonably high if they are forced to subsidize uneconomic expansions.

20. In a number of its decisions, the Board has reiterated its concerns that system expansion should only be undertaken when it is economically feasible to do so.

Reference to:

Reasons for Decision of the OEB, Consumers' Gas rate case, EBRO 341-I, 1976. See, in particular, the following extracts from that decision.

> The Board is of the opinion that section 55 (of the Public Utilities Act) requires a gas utility to supply all buildings located along the route of an existing pipeline if a sufficient supply of gas is available over and above the requirements of existing customers. The section does not, in the Board's opinion, require or support the expansion of the distribution system into new areas. (pp. 28-29)
>
> ...
>
> ...Consumers' should not make extensions to its existing system unless the revenue to be generated by the new business provides a return on the marginal investment at least as great as that allowed by the Board on the rate case with full provision for the incremental costs associated with the new business. This may require capital contributions in order to ensure economic feasibility.

Reasons for Decision of the OEB, Consumers' Gas rate case, EBRO 363-I. See, in particular, the following extract from p. 34 of the decision:

> As a general rule, existing customers should not be called upon to subsidize, through higher rates, premature or other non-sustaining extensions.

Reasons for Decision of the OEB, Consumers' Gas rate case, EBRO 386-I (1982). See, in particular, the extract from p. 39 of the decision:

> The Board notes that large sums continue to be invested in system expansion. The evidence before it should support the economics of the investment and demonstrate that costs are being minimized.

21. In more recent decisions, the Board has stated that on applications for leave to construct or applications for a certificate of public convenience and necessity, economic feasibility should be considered but "it should not be the sole criterion examined, nor the determining factor in the approval process".

Reference to:

Reasons for Decision of the Ontario Energy Board, applications by Northern and Central for leave to construct and certificates for the Town of Valley East and Township of Brighton, EBLO 194 to 197, June 15, 1985.

22. It is respectfully submitted that the policy of the Board with respect to system expansion has been carefully developed and properly balances the competing interests of present customers, who wish to avoid undue cross-subsidization and potential customers who wish to obtain a supply of natural gas. In some respects this policy was recognized by the federal government in its recent Distribution System Expansion Program. Through this program capital contributions were made by the government in order to allow system expansion to areas where, without such grants, it would not be economically feasible to extend gas service.

iii) Franchise Exclusivity and Flexibility
(List of Suggested Concerns - No. 1)

23. As noted above, it is the Board's general policy to allow only one gas utility to have franchise rights within any particular municipality.

24. While this rule should be maintained, exceptions may arise, particularly in the case of large rural municipalities where, although one gas distribution utility may hold the franchise for the municipality, another gas distribution utility in a neighbouring municipality may be able to serve a portion of

the first municipality on a more economically feasible basis. In such a case the Board may feel it would be in the public interest to provide for a limited franchise and certificate of public convenience and necessity to the second utility, particularly where the first utility does not object to such a procedure.

25. Under no circumstances should anyone, other than a gas distribution utility regulated by the Ontario Energy Board be permitted to distribute gas within a municipality or within an unorganized area.

iv) Regional and County Franchises
(List of Suggested Concerns - No. 4)

26. The list of suggested concerns enclosed with the Board's notice of hearing sets out this issue as item number 4. The note to such issue correctly states:

> In most cases, the regional or county franchise relates to a transmission line using the regional or county road or rights of way and is associated with an application for leave to construct. The local municipal franchise relates to the distribution system within the local municipality and is associated with an application for a certificate of public convenience and necessary.

27. In the past, it was generally not considered necessary to submit regional and county franchises to the OEB for approval pursuant to the Act. This was due to the fact, already noted, that such agreements usually relate to transmission facilities and it was considered that the Act applied only to distribution franchises.

28. Recently, some utilities are now submitting regional and county agreements to the Board for approval and in many such instances, the franchise procedure as outlined above is being followed. Since "municipal corporation" is not defined in the Act, this is the most prudent course of action to follow.

29. In our submission, regional and county franchise agreements should be subject to the provisions of the Municipal Franchises Act. The Act could be amended to clarify this requirement.

v) Compliance by Gas Utilities with Municipal By-Laws of General Application

(List of Suggested Concerns - No.7)

30. The characterization of this issue is misleading because, generally speaking, gas utilities voluntarily comply with municipal by-laws of general application. The exceptions to this are where municipalities seek to impose permit fees or other additional financial burdens upon the utilities or seek to pass general by-laws fixing the location of utility plant. In these situations the utilities take the position that the municipality is unilaterally seeking to vary the provisions of the franchise agreement and the utilities refuse to make these payments or to comply with such location restrictions.

31. The Board correctly characterized the first situation concerning permit fees in its decision involving Consumers' Gas and the City of Ottawa - EBA 352, June 10, 1981. In that case the Board stated as follows, at pp. 5 and 6 of its decision.

> The second matter in contention between the parties arises out of Consumers' refusal to accept as part of the terms of the franchise agreement the by-law clause requiring it to be bound by present and future by-laws passed by the City. At the first blush, the clause looks innocent. Consumers' evidence is that it does comply with City by-laws of general application as they apply to it. There was no evidence presented by Ottawa which refuted or put in question that this was so. However, as the hearing unfolded, the real purposes of the by-law clause became clearer. Consumers' reluctance to be bound by existing or future by-laws passed by the City is based on the fact that Ottawa has a by-law, (now By-law 362-78 filed as Exhibit 13) which would require, among other things, that Consumers'

obtain and pay for a road-cut permit each time Consumers' had to do any work on municipal streets. Mr. Sims confirmed that Consumers' complies with this detailed road-cut by-law in all other respects except that it has refused to pay for road-cut permits.

32. The Board then went on to state as follows at page 7 of its decision:

In recent years, the Board has consistently denied municipalities the right to include, as a term and condition of a franchise agreement, a requirement of additional payments from a distributor of natural gas over and above the normal municipal taxes. (See Reasons for Decision E.B.A. 304, re Township of Moore; and E.B.A. 316, re City of Peterborough.) It appears to the Board that in this instance the City is attempting to do indirectly that which the Board has specifically refused to allow to be done directly.

But the ramifications of the by-law clause go beyond just the matter of additional payments to the City. Mr. Atkinson has rightly pointed out that, if the proposed by-law clause is approved, the municipality may effectively amend the franchise agreement in a manner not now foreseen and possibly in a manner which would not be approved by the Board if the specific terms and conditions were put before it for consideration.

In essence the issue now before the Board boils down to the question of which authority - the Board or the municipality - has the jurisdiction to determine for a specific period of time the terms and conditions which should constitute a franchise agreement.

33. The Board therefore concluded as follows, at page 9 of its decision:

Clearly the Board and not the municipality is the final arbiter in determining the terms and conditions of a franchise agreement under the Act. If the Board were to approve the by-law clause proposed by the City, it could unwittingly be abdicating its jurisdiction in favour of the City if at some future time the City chose to enact by-laws which would have the effect of amending the franchise agreement. The Board should not, and indeed cannot, delegate its statutory jurisdiction to determine the terms and conditions of a franchise agreement to another authority.

34. While the municipalities may argue that they ought to be able to insist that the gas utilities pay permit fees at any rate specified by such municipalities, this argument ignores the substantial taxes paid by the utilities to each municipality within their franchise area.

35. The municipal taxes paid by the three major Ontario natural gas distributors in 1984 exceeded $25,000,000.

36. With respect to municipal by-laws which purport to fix the location of utility plant, the Divisional Court has ruled that such by-laws are beyond the jurisidiction of local municipalities.

Reference to:

Union Gas Ltd. and Tecumseh Gas Storage v. Township of Dawn (1977), 15 O.R. (2d) 722 (Divisional Court).

37. As a result, the issue is not whether gas utilities will comply with municipal by-laws of general application. Gas utilities will do so provided that such compliance does not impose obligations upon them inconsistent with the provisions of the franchise agreements or contrary to law.

vi) Other Issues

38. Many of the suggested concerns set out in the attachment to the Board's notice of hearing have already been addressed or will be considered in the section below dealing with our recommendations. However, there are certain specific issues which will be briefly addressed as follows:

(a) Issue 3 - Obligation of the franchised gas utility to purchase and distribute gas produced locally - There should continue to be no obligation upon a gas utility to purchase and distribute gas produced

locally. This should continue to be a matter left to utility management as part of their overall obligation to purchase a secure supply of gas on the most economical basis possible.

(b) Issue 6 - Duration of franchise agreements and uniform expiry dates - We continue to support the position, set out above, that franchise agreements should be for terms of twenty years. We do not see any reason why expiry dates should be uniform.

(c) Issue 9 - Filing with the road authority of plans and specifications of all gas distribution works before and after construction - The provision to municipalities of plans and specifications of pipeline works should be as covered by existing and proposed franchise agreements.

(d) Issue 10 - Safety and other implications of pipelines crossing private property - We do not see any basis for distinguishing safety issues as between the use of pipelines for purposes of private or public property. In both cases existing provincial safety regulations must be complied with. Wherever possible, the utilities utilize public as opposed to private rights-of-way.

(e) Issue 11 - Abandonment of pipe - It is currently dealt with in existing franchise agreements.

(f) Issue 12 - Notice by the gas utility of all emergency excavations - This is covered in our proposed franchise agreement.

(g) Issue 13 - Service for line locations - Gas utilities always give prompt line locates when a ruptured water or sewer pipe has to be replaced.

(h) Issue 14 - Required participation on utility co-ordinating committees - Gas utilities have encouraged the formation of utility co-ordinating committees and have actively participated in such committees.

(i) Issue 15 - Indemnification and liability insurance - The franchise agreements contain a provision as to indemnification and each utility maintains liability insurance.

(j) Issue 17 - Need for separate agreements for each bridge on which a gas pipeline is installed - The existing franchise agreements include "bridge" within the definition of highways. There is no reason for changing this. The use of a bridge may be the most economically feasible and environmentally effective method of extending gas service.

(k) Issues 16, 18, 19 and 21 - Relocation costs and interference with highways - Issues 16 and 18 have, for the most part, been dealt with above.

We recognize that relocations and street cuts are sensitive municipal issues. Wherever possible the utilities work with the municipality and other utilities to avoid future relocations or to carry out street cuts prior to any new municipal road paving programs. Where street cuts are necessary, pursuant to the franchise agreements the utilities have a clear obligation to reinstate to the same condition as prior to the cut. While there will inevitably be tensions in this area, it is our submission that the existing practice works well and should continue.

There is no basis for any municipal involvement in the "manner of construction of utility works under highways and other municipal property". The manner of doing work of this nature is solely the responsibility of the gas utility and is subject to extensive government regulation.

(l) Issue 20 - Location of utility installations under highways and other municipal property - Under the existing and proposed franchise relationship, the approval of works must be obtained from the municipal engineer. For example, the proposed standard form franchise agreement provides that, except in the event of an emergency, the said plans and specifications must be approved by the Engineer before the commencement of work.

The proposed form of franchise agreement also provides that where work is done in an emergency situation, the utilities shall use their best efforts to notify the Engineer immediately of the location and nature of the emergency and the work being done.

(m) Issue 23 - Capital contributions - The requirement of obtaining a capital contribution in order to make an extension economically feasible is an issue between the gas utilities and their prospective customers. It is not a matter which should form any part of a franchise agreement between a municipality and the utility.

(n) Issue 24 - Failure to comply with the terms of franchise agreements - The failure of either side to comply with the provisions of the franchise agreement would give rise to all of the usual remedies in a breach of contract action.

D. RECOMMENDATIONS

39. It is our respectful submission that the policy of the Board in approving the terms and conditions of franchise agreements has reached the point where a standard form franchise agreement should be adopted. Alternatively, the Act should be amended so that the standard terms and conditions of the franchise relationship could be specified by the statute itself.

40. The present process has served all interested parties very well in the past but some changes are necessary now. In the future, there will probably be relatively few new franchise agreements proposed but there are hundreds of franchises which will have to be renewed as they expire. This is an expensive and time consuming process and there is a certain unreality to it in that few, if any, changes to the standard franchise agreement can be negotiated due to the Board's policy in favour of standardization and the desire on the part of the utilities to treat all municipalities in their franchise territory the same.

41. There is no need for negotiation if the standard form agreement is considered by the Board to be a fair compromise and balance between the interests of the municipality, the utility and the public of Ontario. There is simply no room for the argument that any one particular municipality deserves a "better deal" than any other municipality within the utilities' franchise area.

42. The expense to the gas utilities of franchise renewals is high and, of course, is eventually paid for by gas company customers. In addition to the time involved on the part of company officials, there are legal expenses, the expenses of advertising the Board's notices of hearing and the expense of the Board's hearing costs. It would certainly be in the best interests of the public to avoid or minimize these costs wherever possible.

In an effort to seek agreement on a standard form franchise agreement, Consumers' Gas, Union Gas and Northern and Central Gas have prepared the draft franchise agreement which is attached as Schedule "A" to this brief. Each of these utilities has approved Schedule "A".

44. It is our submission that Schedule "A" should become the legislated franchise agreement to come into effect for all new franchise agreements and all future renewals. Further, the Board should have jurisdiction to impose a franchise relationship wherever the Board concludes that such a relationship would be in the public interest.

45. Finally, the Act should be amended to make it clear that it applies to regional and county franchise agreements.

October 18, 1985
Submitted by:

THE CONSUMERS' GAS COMPANY LTD.
by its counsel
AIRD & BERLIS
145 King Street West, 15th Floor
Toronto, Ontario
M5H 2J3

Attention: Mr. P.Y. Atkinson

UNION GAS LIMITED
50 Keil Drive North
Chatham, Ontario
N7M 5M1

Attention: Mr. J.B. Jolley, Q.C.
Vice President and General Counsel

NORTHERN AND CENTRAL GAS
CORPORATION LIMITED
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M2J 1R1

Attention: Mr. P.F. Scully,
General Counsel and Corporate Secretary

ONTARIO NATURAL GAS ASSOCIATION
77 Bloor Street West, Suite 1104
Toronto, Ontario
M5S 1M2

Attention: Mr. Paul E. Pinnington,
Managing Director

DRAFT STANDARD FORM FRANCHISE AGREEMENT

THIS AGREEMENT made this day of , 19

B E T W E E N :

hereinafter called the "Corporation"

- and -

hereinafter called the "Gas Company"

WHEREAS the Gas Company desires to distribute and sell gas in the Municipality upon the terms and conditions of this Agreement;

AND WHEREAS by by-law passed by the Council of the Corporation (the "By-law"), the and Clerk have been authorized and directed to execute this Agreement on behalf of the Corporation;

THEREFORE the Corporation and the Gas Company agree as follows:

1. In this Agreement:

(a) "Engineer" means the person designated by the Corporation for the purposes of this Agreement, or failing such designation, or in the absence from duty of such person, the senior employee of the Corporation charged with the administration of public works and highways in the Municipality;

(b) "gas" includes natural gas, manufactured gas, synthetic gas, liquefied petroleum gas or propane-air gas, or a mixture of any of them, but does not include a liquefied petroleum gas that is distributed by means other than a pipeline;

(c) "highway" includes all common and public highways, any bridge, viaduct or structure forming part of a highway, and any public square, road allowance or sidewalk;

(d) "Municipality" means the territorial limits of the Corporation on the date when this Agreement takes effect, and any territory which may thereafter be brought within the jurisdiction of the Corporation;

(e) "system" includes such mains, plants, pipes, conduits, services, valves, regulators, curb boxes, stations, drips or such other equipment as the Gas Company may require or deem desirable for the supply, transmission and distribution of gas in or through the Municipality.

2. The consent of the Corporation is hereby given and granted to the Gas Company to supply gas in the Municipality to the Corporation and to the inhabitants of the Municipality, and to enter upon all highways now or at any time hereinafter under the jurisdiction of the Corporation and to lay, construct, maintain, replace, remove, operate and repair a system for the supply, distribution and transmission of gas in and through the Municipality.

3. The rights hereby given and granted shall be for a term of twenty years from and after the final passing of the By-law.

4. Before beginning construction of or any extension or change to the system (except service laterals), the Gas Company shall file with the Engineer a plan showing the highways in which it proposes to lay its system and the particular parts thereof it proposes to occupy together with written specifications of the materials to be used and their dimensions. Except in the event of an emergency, the location of the work as shown on the said plan must be approved by the Engineer before the commencement of work. The Engineer's approval shall not be withheld unreasonably. In the event of an emergency, where approval is normally

quired, the Gas Company will proceed with the work and shall use its best efforts to immediately notify the Engineer of the location and nature of the emergency and the work being done.

5. The Gas Company shall well and sufficiently restore, to the reasonable satisfaction of the Engineer, all highways which it may excavate or interfere with in the course of laying, constructing, repairing or removing its gas system, and shall make good any settling or subsidence thereafter caused by such excavation or interference. If the Gas Company fails at any time to do any work required by this paragraph within a reasonable period of time, the Corporation may have such work done and the Gas Company shall, on demand, pay any reasonable account therefor as certified by the Engineer.

6. The Gas Company shall at all times indemnify the Corporation from and against all loss, damage and injury and expense to which the Corporation may be put by reason of any damage or injury to persons or property resulting from the imprudence, neglect or want of skill of the employees or agents of the Gas Company in connection with the construction, repair, maintenance or operation by the Gas Company of its system in the Municipality.

7. The Corporation agrees, in the event of the sale or closing of any highway, to give the Gas Company reasonable notice of such sale or closing and to provide the Gas Company with easements over that part of the highway sold or closed sufficient to allow the Gas Company to preserve any part of the system in its then existing location, and to enter upon the highway to maintain and repair such part of its system. If it is impractical to grant such an easement, the Corporation agrees, at its cost, to acquire for the Gas Company an alternate easement and, in any event, to pay the cost of new facilities for such system.

8. The Corporation will not knowingly build or permit anyone to build any structure over or encasing any part of the system.

9. Upon the expiration of this Agreement or any renewal thereof, the Gas Company shall deactivate its system in the Municipality. Thereafter, the Gas Company shall have the right, but nothing herein contained shall require it, to remove its system. If the Gas Company fails to remove its system and the Corporation at any time after a lapse of one year from the expiration of this Agreement requires the removal of all or any of the system for the purpose of altering or improving a highway or in order to facilitate the construction of utility or other works in any highway, the Corporation may remove and dispose of so much of the system as the Corporation may require for such purposes and neither party shall have recourse against the other for any loss, cost, expense or damage occasioned thereby.

10. Notices may be sufficiently given if mailed by prepaid registered post to the Gas Company at its head office or to the Clerk of the Corporation at its municipal offices, as the case may be.

11. This Agreement shall extend to, benefit and bind the parties thereto, their successors and assigns, respectively.

IN WITNESS WHEREOF the parties hereto have duly executed these presents with effect from the date first above written.

THE CORPORATION OF

_____

_____

Clerk

_____

_____

APPENDIX C

Franchise Agreement Proposed by the
Southwestern Ontario Municipal Committee

THIS AGREEMENT made this day of , 19

BETWEEN:

THE CORPORATION OF THE

Hereinafter called the "Corporation"

OF THE FIRST PART

- and -

UNION GAS LIMITED, a corporation incorporated under the laws of the Province of Ontario and having its Head Office in the City of Chatham,

Hereinafter called the "Gas Company"

OF THE SECOND PART

WHEREAS the Gas Company desires to distribute and sell gas in the Municipality upon the terms and conditions hereinafter set forth;

AND WHEREAS by By-law No. passed the day of 19 by the Council of the Corporation (the "By-law"), the Corporation agreed to these presents;

IN CONSIDERATION of the undertakings and agreement hereinafter expressed and upon the terms hereinafter set forth, the Corporation and the Gas Company mutually covenant and agree as follows:

1. In this Agreement:

(a) "Board" means the Ontario Energy Board or its successors;

(b) "Gas" means natural gas, substitute natural gas, synthetic natural gas, manufactured gas, propane-air gas, or any mixture of them;

(c) "Gas system" means such mains, pipes, conduits, services, valves, regulators, curb boxes, stations and drips (with other necessary or incidental appurtenances, arrangements for cathodic protection, structures, apparatus, equipment, appliances and works) situate in the Municipality as the Gas Company may from time to time require or deem desirable for the supply, transmission and distribution of gas in or through the Municipality;

(d) "Highway" means all common and public highways and shall include any bridge, viaduct or structure forming part of a highway, and any public square, road allowance or sidewalk and shall include not only the travelled portion of such highway, but also ditches, driveways, sidewalks, and sodded areas forming part of the road allowance now or at any time during the term hereof under the jurisdiction of the Corporation;

(e) "Municipality" means and includes the territorial limits under and subject to the jurisdiction of the

Corporation on the date when this Agreement takes effect;

(f) "Engineer/Road Superintendent" means most senior individual employed by the Corporation with responsibilities for highways within the Municipality, such as the City Engineer, the County Engineer, the Commissioner of Works or the Road Superintendent, or the person designated by such senior employee or such other person as may from time to time be designated by the Council of the Corporation.

2. The consent, permission and authority of the Corporation are hereby given and granted to the Gas Company to supply gas in the Municipality to the Corporation and to the inhabitants of the Municipality.

3. The consent, permission and authority of the Corporation is hereby given and granted to the Gas Company to enter upon all highways now or at any time hereafter under the jurisdiction of the Corporation to lay, construct, maintain, replace, remove, operate and repair a gas system for the supply, distribution and transmission of gas in and through the Municipality. The consent, permission and authority hereby given extends only to the right-of-way of highways and the Corporation need not provide any other right-of-way for the gas system.

4. The rights hereby given and granted shall be for a term ending December 31st, 1999.

5. The consent, permission and authority hereby given and granted shall be subject to the right of free use of all highways and road allowances by all persons entitled to it, and subject to the rights of the owners of the property adjoining highways of full access to and from the highways and road allowances and of constructing crossings and approaches from their properties, and subject to the rights and privileges that the Corporation may grant to other persons on highways and road allowances, all of which rights are expressly reserved.

6. Save as hereinafter provided, the consent, permission and authority hereby given and granted to the Gas Company to enter upon all highways under the jurisdiction of the Corporation shall be at all times under the direction and control of and with the approval of the Engineer/Road Superintendent. All work done under this Agreement is subject to the approval and direction of the Engineer/Road Superintendent who has full power and authority to give directions and orders that he considers in the best interest of the Corporation, and the Gas Company will follow the directions and orders that the Engineer/Road Superintendent gives.

7. Before commencing any work the Gas Company will deposit with the Engineer/Road Superintendent a plan, drawn to scale, showing the highway or road where the work is proposed and the location, including its depth, of the proposed gas system or part thereof, together with specifications relating to the proposed gas system or part thereof. For the purposes of this paragraph, works of the Gas Company include not only original installations, including lateral service lines, but also any and all repair or relocation work or additions to or replacements of any part of the gas system.

8. The Engineer/Road Superintendent shall review and consider the plans and specifications submitted by the Gas Company and may not approve the work or may approve the work with such, if any, modifications to the plans and specifications and upon such terms and conditions as he considers in the best interest of the Corporation. No work, including any excavation, opening or other work which may disturb or interfere with the road or highway or its travelled surface, shall be undertaken by the Gas Company until the plans and specification therefor have been approved in writing by the Engineer/Road Superintendent and then the work shall be undertaken and completed in accordance with the approved plans and specifications with

modifications, if any, as may have been made by the Engineer/Road Superintendent and in accordance with any terms and conditions that may have been included by the Engineer/Road Superintendent.

9. In connection with work undertaken by the Gas Company,

(a) The Gas Company will not cut, trim or interfere with any trees on the road allowance without the specific written approval of the Engineer/Road Superintendent;

(b) Wherever a gas line is carried across any open drainage ditch, it shall be carried either wholly under the bottom thereof or above the top thereof, so as not to interfere with the carrying capacity of such ditch;

(c) In general, all crossings of the travelled portion of roads shall be constructed by boring and jacking methods;

(d) In placing its gas system, the Gas Company shall use those parts of the road allowance adjacent to the fence lines or other boundaries of the road allowance.

10. Notwithstanding the foregoing, in the event of an emergency involving the gas system, the Gas Company shall do all that is necessary and desirable to control the emergency, including such excavation, opening and other work in and to the highways in the Municipality as may be required for the purpose. If traffic is or is likely to be affected by the emergency, the Gas Company shall notify the responsible police force immediately upon becoming aware of the situation. As soon as it is convenient after the emergency is discovered, the Gas Company shall advise the Engineer/Road Superintendent by telephone and shall keep him advised throughout the emergency. The Gas Company shall re-imburse the Corporation for any and all costs incurred in connection with the emergency. Forthwith after it has become necessary of the Gas Company to exercise its emergency powers under this paragraph, the Gas Company shall make a written report to the Engineer/Road Superintendent of what work was done and the further work to be undertaken, if any, and seek the approval of the Engineer/Road Superintendent for the further work as contemplated in the preceding paragraphs.

11. Notwithstanding the requirements of the preceding paragraphs regarding the approvals of the Engineer/Road Superintendent and his control of work by the Gas Company in

highways or roads, the parties recognize that in the event of a disagreement as to the approval or non-approval of plans or as to the terms and conditions upon which they may be approved, either party may apply to the Board. It is recognized that the Board may authorize the works of the Gas Company in the highway on such terms and conditions as the Board may impose; and it is also recognized that the Board has the authority to authorize the acquisition of an easement over private property if such an easement is more appropriate.

12. The Gas Company shall well and sufficiently restore, to the reasonable satisfaction of the Engineer/Road Superintendent, all highways which it may excavate or interfere with in the course of laying, constructing, repairing or removing its gas system, and shall make good any settling or subsidence thereafter caused by such excavation or interference. Such restoration shall be to the same standard, as nearly as may be possible, as was in existence on the highway when the excavation or interference commenced. If the Gas Company fails at any time to do any work required by this paragraph within a reasonable time, the Corporation may do or may cause such work to be done and the Gas Company shall on demand pay any reasonable account therefor as certified by the Engineer/Road Superintendent.

13. In the placing, maintaining, operating and repairing the gas system or any part thereof the Gas Company will use care and diligence to ensure that there will be no unnecessary interference with any highway or any drain, sewer, main, ditch, culvert, bridge or any other municipal works or improvements. If any additional municipal works or improvements are made necessary by reason of any work done or omitted to be done by the Gas Company they will be constructed and maintained by the Gas Company at its own expense during the term of this Agreement.

14. The Gas Company will indemnify and save harmless the Corporation from and against all claims, liabilities, loss, costs, damages or other expenses of every kind that the Corporation may incur or suffer as a consequence of or in connection with the placing, maintenance, operation or repair of the gas system or any part thereof.

15. If either party is prevented from carrying out its obligations under this Agreement by reason of any cause beyond its control, such party shall be relieved from such obligations while such disability continues; provided, however, that this Paragraph ~~10~~ shall not relieve the Gas Company from any of its obligations to indemnify the Corporation as contemplated in the preceding paragraph, and

provided further that nothing herein shall require either party to settle any labour or similar dispute unless it is in the best interests of such party to do so.

16. The Corporation agrees, in the event of closing of any highway, to give the Gas Company reasonable notice of such closing and to provide, if it is practical, the Gas Company with easements over that part of the highway closed sufficient to allow the Gas Company to preserve any part of the gas system in its then existing location, and to enter upon the closed highway to maintain and repair such part of the gas system.

17. If the Corporation, in pursuance of its statutory powers, decides to alter the construction of any highway or of any municipal works or improvements, or to construct, lay down, or establish any municipal works or improvements, and if the location of any part of the gas system interferes with the location of construction of such alteration, work or improvement, in a substantial manner, then upon receipt of reasonable notice in writing from the Corporation specifying the point where such part of the gas system interferes with the plans of the Corporation the Gas Company shall alter or relocate such part of the gas system at the point specified to a location designated by the

Engineer/Road Superintendent within a reasonable period of time and, in default of the Gas Company complying with the notice, the Corporation may remove, relocate or alter the part of the gas system described in the notice and recover the cost of so doing from the Gas Company regardless of the provisions hereafter concerning the party responsible for the costs of the alteration or relocation. If any part of the gas system is relocated in accordance with this paragraph within five years of the date when approval was given by the Corporation of the location of such part of the gas system, the Corporation shall reimburse the Gas Company for the cost of the alteration or relocation, but if the notice specifying the alteration or relocation is given after the said five year period, the Gas Company shall alter or relocate, at its expense, such part of the gas system at the point specified to the location designated by the Corporation.

18. At any time within two (2) years prior to the termination of this Franchise Agreement, either party to this Agreement may by notice given to the other request that the other enter into negotiations for new terms and conditions. Until terms of a new franchise agreement have been settled and approved by the Board, the terms and

conditions of this Agreement shall continue in full force and effect notwithstanding the termination date previously mentioned in this Agreement.

19. Upon the expiration of this franchise or any renewal thereof the Gas Company shall have the right, but nothing herein contained shall require it, to remove its gas system laid in the highways. Upon the expiration of this franchise or any renewal thereof the Gas Company shall deactivate the gas system in the Municipality. If the Gas Company should leave its gas system in the highways and the Corporation at any time after a lapse of one year from termination requires the removal of all or any of the gas system for the purpose of altering or improving the highway or in order to facilitate the construction of utility or other works in any highway the Corporation may remove and dispose of so much of the gas system as the Corporation may require for such purposes and neither party shall have recourse against the other for any loss, cost, expense or damages occasioned thereby.

20. This Agreement and the respective rights and obligations hereunto of the parties hereto are hereby declared to be subject to the provisions of all regulating statutes and to all orders and regulations made thereunder and from time to time remaining in effect.

21. Any notice to be given under any of the provisions hereof may be effectually given to the Corporation by delivering the same to the Clerk of the Corporation or by sending the same by registered mail, postage prepaid, addressed to the attention of the Clerk of the Corporation, and to the Gas Company by delivering the same to its head office, or by sending the same to its head office by registered mail, postage prepaid, addressed to the attention of the Corporate Secretary. If any notice is sent by mail, the same shall be deemed to have been given on the fourth day next following the posting thereof, provided that in the event of a disruption in postal service, by reason of a strike or work slowdown or other element of labour dispute, either at the point of mailing or the point of delivery, any notice sent by mail shall be deemed to have been given on the day when it is actually received by the addressee of such notice.

22. The Gas Company may not assign any part of this Agreement unless the assignee covenants in favour of the Corporation to assume full responsibility for this Agreement and such assignment shall be effective only upon the delivery of such Assumption Agreement to the Corporation.

23. Other or special conditions, if applicable:

_____

_____

_____

24. This Agreement shall extend to, benefit and bind the parties thereto, their successors and assigns, respectively.

IN WITNESS WHEREOF the parties hereto have duly executed these presents with effect from the day first above written.

THE CORPORATION OF THE

Per:_____

Per:_____

UNION GAS LIMITED

Per:_____

Per:_____

APPENDIX D

Municipal Franchises Act

CHAPTER 309

Municipal Franchises Act

Interpretation

1. In this Act,

(*a*) "franchise" includes any right or privilege to which this Act applies;

(*b*) "gas" means natural gas, manufactured gas or any liquefied petroleum gas, and includes any mixture of natural gas, manufactured gas or liquefied petroleum gas, but does not include a liquefied petroleum gas that is distributed by a means other than a pipe line;

(*c*) "highway" includes a street and a lane;

(*d*) "public utility" includes waterworks, natural and other gas works, electric light, heat or power works, steam heating works, and distributing works of every kind. R.S.O. 1970, c. 289, s. 1.

Assent to contracts for supply of electric power

2. A municipal corporation shall not enter into or renew any contract for the supply of electrical power or energy to the corporation or to the inhabitants thereof until a by-law setting forth the terms and conditions of the contract has been first submitted to, and has received the assent of the municipal electors in the manner provided by the *Municipal Act*. R.S.O. 1970, c. 289, s. 2.

R.S.O. 1980, c. 302

Where assent required

3.—(1) A municipal corporation shall not grant to any person nor shall any person acquire the right to use or occupy any of the highways of the municipality except as provided in the *Municipal Act*, or to construct or operate any part of a transportation system or public utility in the municipality, or to supply to the corporation or to the inhabitants of the municipality or any of them, gas, steam or electric light, heat or power, unless a by-law setting forth the terms and conditions upon which and the period for which such right is to be granted or acquired has been assented to by the municipal electors. R.S.O. 1970, c. 289, s. 3 (1).

Ontario Hydro exempt

(2) Subsection (1) does not apply to Ontario Hydro. R.S.O. 1970, c. 289, s. 3 (2); 1973, c. 57, s. 19.

In police villages

(3) Where the trustees of a police village request the council of the township in which the village is situate to grant any such right with respect to the village, or where the board of

trustees of a police village desire to grant such a right, it is a sufficient compliance with subsection (1) if the by-law receives the assent of the municipal electors of the village.

Renewals and extensions

(4) This section applies to the renewal or extension of an existing franchise. R.S.O. 1970, c. 289, s. 3 (3, 4).

Consent of council of city, when required

4.—(1) The council of a local municipality shall not grant a franchise upon any highway of the municipality within a radius of eight kilometres of the boundary of any city without notice in writing to the council of the city, and if the council of the city, within four weeks after the receipt of the notice, gives a notice in writing to the council of the local municipality that it objects to the granting of the franchise the approval of the Ontario Municipal Board shall be obtained, and if the council of the city does not give such notice within such time, it shall be deemed to have no objection and the council of the local municipality may grant the franchise with the assent of the municipal electors of the local municipality as provided by section 3. R.S.O. 1970, c. 289, s. 4 (1); 1978, c. 87, s. 41.

Gas franchises

(2) Where the franchise referred to in subsection (1) is a gas franchise, the Ontario Energy Board shall take the place of the Ontario Municipal Board for the purposes of this section. R.S.O. 1970, c. 289, s. 4 (2).

Extension of certain existing works not to be made without by-law

5.—(1) Where a by-law granting a franchise or right in respect of any of the works or services mentioned in subsection 3 (1), that has not been assented to by the municipal electors as provided by that subsection, was passed before the 16th day of April, 1912, no extension of or addition to the works or services constructed, established or operated under the authority of such by-law as they existed and were in operation at that date shall be made except under the authority of a by-law hereafter passed with the assent of the municipal electors, as provided by subsection 3 (1) or (3), and such consent is necessary, notwithstanding that such last-mentioned by-law is expressly limited in its operation to a period not exceeding one year.

Exceptions as to franchises granted before 16th March, 1909

(2) Subsection (1) does not apply to a franchise or right granted by or under the authority of any general or special Act of the Legislature before the 16th day of March, 1909, but no such franchise or right shall be renewed, nor shall the term thereof be extended by a municipal corporation except by by-law passed with the assent of the municipal electors as provided in section 3. R.S.O. 1970, c. 289, s. 5.

Exceptions:

6.—(1) Subject to section 2 and except as therein provided and except where otherwise expressly provided, this Act does not apply to a by-law,

(*a*) granting the right of passing through the municipality for the purpose of continuing a line, work or system that is intended to be operated in or for the benefit of another municipality and is not used or operated in the municipality for any other purpose except that of supplying gas in a township to persons whose land abuts on a highway along or across which the same is carried or conveyed, or to persons whose land lies within such limits as the council by by-law passed from time to time determines should be supplied with any of such services; works originating in another municipality

(*b*) granting the right of passing through the municipality with a line to transmit gas not intended to be distributed from such line in the municipality or only intended to be distributed from such line in the municipality to a person engaged in the transmission or distribution of gas; gas transmission lines

(*c*) conferring the right to construct, use and operate works required for the transmission of oil, gas or water not intended for sale or use in the municipality; or oil, gas and waterworks

(*d*) that is expressly limited in its operation to a period not exceeding three years and is approved by the Ontario Municipal Board. limited to three years

(2) Where the by-law within the meaning of clause (1) (*d*) is a gas franchise by-law, the Ontario Energy Board shall take the place of the Ontario Municipal Board for the purposes of the clause. R.S.O. 1970, c. 289, s. 6. Gas franchises

7.—(1) Where a by-law to which clause 6 (1) (*d*) applies is passed, that clause does not apply to any subsequent by-law in respect of the same works or any part of them or to an extension of or addition to them, although the subsequent by-law is expressly limited in its operation to a period not exceeding three years, and no such subsequent by-law has any force or effect unless it is assented to by the municipal electors as provided by subsection 3 (1). Extension of franchise

(2) Notwithstanding subsection (1), clause 6 (1) (*d*) applies to a subsequent by-law or by-laws in respect of the same works or any part of them or to an extension of or addition to them if the period of operation of such subsequent by-law or by-laws is expressly limited so that the total period of operation of the original by-law and the subsequent by-law or by-laws does not exceed three years. R.S.O. 1970, c. 289, s. 7. Idem

Approval for construction of gas works or supply of gas in municipality

8.—(1) Notwithstanding any other provision in this Act or any other general or special Act, no person shall construct any works to supply or supply,

(*a*) natural gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas; or

(*b*) gas in any municipality in which such person was not on the 1st day of April, 1933, supplying gas and in which gas was then being supplied,

without the approval of the Ontario Energy Board, and such approval shall not be given unless public convenience and necessity appear to require that such approval be given.

Form of approval

(2) The approval of the Ontario Energy Board shall be in the form of a certificate.

Jurisdiction of Energy Board

(3) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and to grant or refuse to grant any certificate of public convenience and necessity, but no such certificate shall be granted or refused until after the Board has held a public hearing to deal with the matter upon application made to it therefor, and of which hearing such notice shall be given to such persons and municipalities as the Board may consider to be interested or affected and otherwise as the Board may direct. R.S.O. 1970, c. 289, s. 8.

Gas franchise by-law to be approved by Energy Board

9.—(1) No by-law granting,

(*a*) the right to construct or operate works for the distribution of gas;

(*b*) the right to supply gas to a municipal corporation or to the inhabitants of a municipality;

(*c*) the right to extend or add to the works mentioned in clause (*a*) or the services mentioned in clause (*b*); or

(*d*) a renewal of or an extension of the term of any right mentioned in clause (*a*) or (*b*),

shall be submitted to the municipal electors for their assent unless the terms and conditions upon which and the period for which such right is to be granted, renewed or extended have first been approved by the Ontario Energy Board.

Jurisdiction of Energy Board

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and may give or refuse its approval.

Hearing to be held

(3) The Ontario Energy Board shall not make an order granting its approval under this section until after the Board has held a public hearing to deal with the matter upon application therefor and of which hearing such notice shall be given in such manner and to such persons and municipalities as the Board may direct.

Electors' assent may be dispensed with

(4) The Board, after holding a public hearing upon such notice as the Board may direct and if satisfied that the assent of the municipal electors can properly under all the circumstances be dispensed with, may in any order made under this section declare and direct that the assent of the electors is not necessary. R.S.O. 1970, c. 289, s. 9.

Application to Energy Board for renewal, etc., of gas franchise

10.—(1) Where the term of a right referred to in clause 6 (1) (*a*), (*b*) or (*c*) that is related to gas or of a right to operate works for the distribution of gas or to supply gas to a municipal corporation or to the inhabitants of a municipality 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. R.S.O. 1970, c. 289, s. 10 (1); 1974, c. 59, s. 1.

Powers of Energy Board

(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.

Hearing

(3) The Board shall not make an order under subsection (2) until after the Board has held a public hearing upon application therefor and of which hearing such notice shall be given in such manner and to such persons and municipalities as the Board may direct.

Interim order

(4) Notwithstanding subsection (3), where an application has been made under subsection (1) and the term of the right has expired or is likely to expire before the Board disposes of the application, the Board, on the written request of the applicant, and without holding a public hearing, may make such order as may be necessary to continue the right until an order is made under subsection (2). R.S.O. 1970, c. 289, s. 10 (2-4).

Order deemed by-law assented to by electors

(5) An order of the Board heretofore or hereafter made under subsection (2) renewing or extending the term of the right or an

order of the Board under subsection (4) 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 of section 57 of the *Public Utilities Act*. 1979, c. 83, s. 1.

R.S.O. 1980, c. 420

Right expired before commencement of section

(6) An application may not be made under this section in respect of a right that has expired before the 2nd day of December, 1969. R.S.O. 1970, c. 289, s. 10 (6).

Appeal

11. With leave of a judge thereof, an appeal lies upon any question of law or fact to the Divisional Court from any certificate granted under section 8 or any order made under section 9 or 10 if application for leave to appeal is made within fifteen days from the date of the certificate or order, as the case may be, and the rules of practice of the Supreme Court apply to any such appeal. R.S.O. 1970, c. 289, s. 11.

APPENDIX E

Exhibit 29.6 - Example of as-built drawing
provided by Union Gas Limited

UNION GAS LIMITED

*0228 1984/02

LINE CHANGE OR EXTENSION REPORTS

Region	System	Classification	Date Commenced	Sheet No.
WESTERN	WOLFE WELL LINE	DISTRIBUTION	84 - 04 - 01	1
Division	**Line**		**Date Completed**	**Total No.**
CHATHAM			84 - 07 - 13	1
Branch	**Municipality**	**Job No.**		
CHATHAM	HARWICH TOWNSHIP	3-545662 & 645662-33	C - 15	

No.	Street	Side	From	To	Pres-sure	Pipe Size NPS	Pipe Length m	Pipe Specification	Wall Thickness mm	Type of Joint	Pipe Depth m	Soil
1	County Road 18	S.	In Lot 9	Easterly	I.P.	2	42.8	SDR11 TR418	5.49	Fused	1.0	-
2	County Road 18	S.	In Lot 9	Easterly	I.P.	2	18.4	Cat. 1 Gr. 173	3.91	Welded	1.0	-

Coating Specification

Yellow Jacket

Yellow Jacket

Material Recovered

Size NPS	Length m	Job No. & Fiscal Year-End Pipe Laid

Material Abandoned

Size NPS	Length m	Job No. & Fiscal Year-End Pipe Laid
2	60.8	54 - 363 (1955)

Material - Valves, Couplings, Fittings, Etc.

No.	Stock No.	Quantity m	Size NPS	Description
1	01002608	18.3	2	Pipe Yellow Jacket
2	01104005	41.8	2	Pipe TR-418
3	01100252	7.0	4	Pipe M - 8000
4	NIS	2	2	CAPS
5	01043490	4	2	90 deg. Elbow
6	01130254	1		20/60 Hynode
7	01104156	4	2	Trans. Fitting
8	01103168	4	2	CPLG. Tr-418
9	01070404	1	2	Plasti - Lok Dr.
10	NIS	43.0		Tracer Wire

No.	Stock No.	Quantity m	Size NPS	Description

Description

DOCKET No. E-80/25
EXHIBIT No. 29.6
DATE

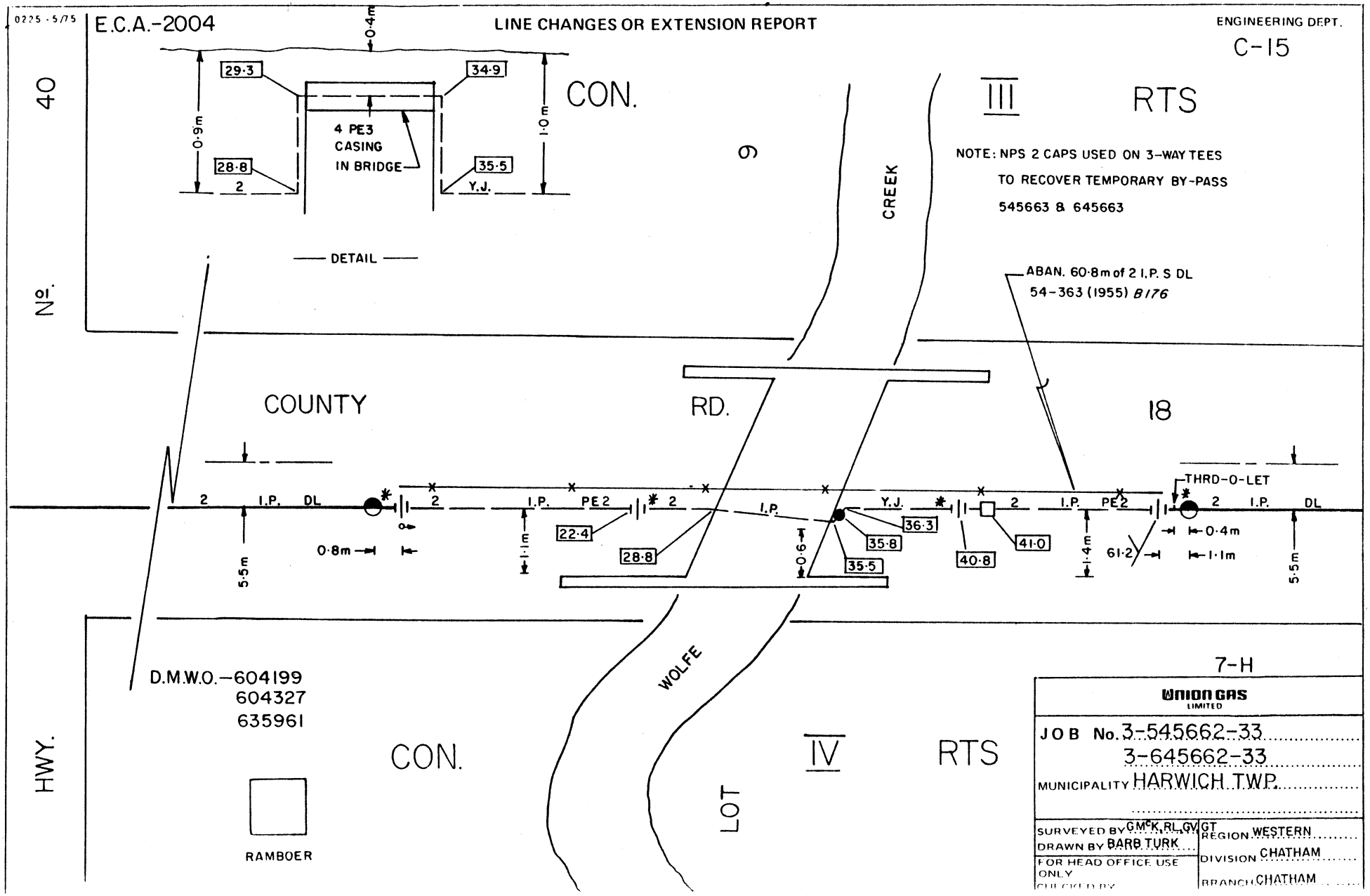
0225 - 5/75

E.C.A.-2004

LINE CHANGES OR EXTENSION REPORT

ENGINEERING DEPT.

C-15



7-H

UNION GAS LIMITED

JOB No. 3-545662-33
3-645662-33

MUNICIPALITY HARWICH TWP.

SURVEYED BY GMCK, RL, GV, GT

DRAWN BY BARB TURK

REGION WESTERN

DIVISION CHATHAM

FOR HEAD OFFICE USE ONLY

CHECKED BY

BRANCH CHATHAM

APPENDIX F

Maps

1) The Province of Ontario - counties, districts, regional and district municipalities

2) Gas Distribution Systems

   (a) Consumers'
   (b) Northern
   (c) Union

3) Gas Franchise Areas *

   (a) Consumers'
   (b) Northern
   (c) Union

* Located in pocket.