

IN THE MATTER OF the *Municipal Franchises Act*, R.S.O.  
1980, c. 309, as amended;

AND IN THE MATTER OF the application by Natural  
Resource Gas Limited (“NRG”) for a Franchise Agreement  
Renewal with the Town of Aylmer.

**TOWN OF AYLMER**

**FINAL WRITTEN SUBMISSIONS**

***The Legal Regime for Establishing and Renewing a Gas Distribution Franchise***

1. The “right” of any person to distribute or to operate works for the distribution of natural gas in any municipality in Ontario is one that derives from the electors of that municipality. Any such right can only be acquired from or granted by that municipality under a by-law that has been assented to by the municipal electors. Any such by-law must set forth both “the terms and conditions upon which” and “the period for which” such right is granted or acquired.

**Reference:** *Municipal Franchises Act*, R.S.O. 1990, c. M.55, ss. 3(1) (“MFA”)  
Franchise Agreement, February 27, 1984, ss. 1 and 11: NRG Ev. Tab C2  
OEB “Model” Franchise Agreement, s. 2, 3, and 4: Town Ev., Tab L

2. That is the source of the right, term and conditions at issue in this case. That is also the interest that the Town of Aylmer seeks to represent in this intervention.

3. The essentially contractual nature of such right and relationship is maintained in the current legislative regime governing gas franchises, despite recent, fundamental changes to the broader regime of gas regulation. It is maintained despite the practical reality that, historically and over time, the scope of all gas distribution undertakings in Ontario have outgrown any one

municipality and expanded to encompass several or many municipalities and franchise agreements. As a result, the relationship is typically no longer one between parties of comparable size and bargaining power, nor even one of shared geographical area and responsibility.

4. Also, the contractual right and relationship between the parties is now subject to the powers given to this Board set out in the *MFA* and in other statutes relating to the functions of this Board. Over time, this Board has assumed many of the oversight responsibilities for the gas distribution system, including responsibility for rate-setting and for the terms and conditions of access to and provision of gas service. In terms of its oversight of the contractual relationships between municipalities and gas distributors, specifically, the Board's powers under the *MFA* now include the powers:

- (a) under ss. 9(1), to approve the terms and conditions and term of any new by-law granting a franchise *before* it is submitted to the electors for approval;
- (b) under ss. 10(2), if "public convenience and necessity appear to require it", to make an order "renewing or extending the term of" any such right "for such period of time and upon such terms and conditions" as the Board determines;
- (c) under ss. 10(2), "if public convenience and necessity do not appear to require" such extension or renewal, to make an order refusing such renewal or extension;  
and
- (d) under ss. 9(4) and 10(5), after holding a public hearing, to dispense with the requirement for assent of the electors to any such order.

5. The Town fully adopts the "public convenience and necessity" test set out in the *MFA* and in the decisions of this Board and of the courts that are referred to by NRG, as being

consistent with and supportive of its position in this proceeding. The Town's position is not, and has never been, based upon any "local" or "parochial" interests of the Town, itself, as a municipal corporation, as NRG implies. It has always been based on the broader public interests in the financial viability, service reliability, quality of service to customers, communication and responsiveness of NRG, as an essential partner in the economic recovery and development of Aylmer and surrounding communities.

6. Moreover, the Town accepts that any rights or powers it may have had or might wish to have to acquire NRG's gas distribution undertaking within its area have been diminished by the repeal of s. 62 of the *Public Utilities Act* in 1979, and by the decision in *City of Sudbury v. Union Gas Ltd.* (2001), 54 O.R. (3d) 439 (C.A.) which makes even such express rights in a Franchise Agreement subject to this Board's power to renew or extend under ss. 10(2) of the *MFA*. In effect, the Board's discretion under ss. 10(2) of the *MFA* to renew or extend, or to refuse renewal or extension of a right in a Franchise Agreement, are now the only effective legal means to replace an incumbent gas distributor that is defaulting in its responsibilities to customers and to the electors of a municipality which it serves.

7. The Town also agrees that the decision to renew or extend, the decision to refuse such renewal or extension, the period of time of any such renewal, and the terms and conditions imposed, are all matters "entirely within the Board's discretion".

**Reference:** *Re City of Peterborough and Consumers Gas*, (1980), 111 D.L.R. (3d) 234 (Div. Ct.)

8. Given this scheme, NRG's suggestion that a dispute with respect to terms in the Franchise Agreement be resolved before the courts is untenable. The Board has full authority to address those issues now, when the Franchise Agreement is due for renewal, and it can hear a grievance with respect to a breach of that agreement at any time. Both considerations of judicial

economy and the relevant statutes require that the Board's jurisdiction in that regard be exclusive, just as most other powers and responsibilities that the Board exercises are exclusive.

9. The issues in this case relate to the factors that should affect the Board's exercise of that discretion, both generally, and in the particular circumstances reviewed at the hearing. As the evidence shows, circumstances have arisen in which NRG has been in default in its responsibilities to customers and to the electors of the Town. These circumstances have raised concerns about both the financial viability of NRG and the quality and reliability of its service to customers. They have severely shaken the Town's confidence, and that of the Town's constituents, in NRG as their incumbent gas supplier and distributor.

10. The Town submits that these circumstances warrant the inclusion of additional terms and conditions in the current franchise renewal under s. 10(2) of the *MFA*.

11. This is not, however, because the inclusion of service-related terms and conditions in a Franchise Agreement would in any way add to this Board's already broad regulatory powers and remedies in respect of its oversight of NRG's monopoly gas distribution business. That is not the Town's intent. What the Town intends is:

- (a) to ensure that in the event of any continued breach by NRG of these added terms and conditions, the Town will have the same right and status to complain directly to this Board as it currently has under s. 7 of its existing Franchise Agreement; and
- (b) to ensure that any such continued breach will also be relevant to this Board's discretion under s. 10(2) of the *MFA*, if appropriate, to make an order refusing any further renewal or extension.

12. The Town agrees with NRG that the circumstances today do **not** give rise to considerations of public convenience and necessity that warrant an order refusing any renewal or extension, at least at the present time. The Town does not seek that relief. Customers have to be supplied with gas.

13. Rather, the Town is simply asking this Board, in these specific circumstances, to put NRG on probation. The Town is pleased that NRG has agreed to several of the specific terms and conditions it has sought in that regard. However, the following issues remain:

(a) **Renewal Term:** What are the appropriate considerations regarding the renewal term, and specifically:

- (i) Is there any “normal”, “typical” or presumptive renewal period of 10-years, 15-years, or 20-years to which an incumbent supplier is somehow entitled regardless of its conduct, as NRG suggests, or
- (ii) is a shorter renewal period of approximately 3-years appropriate in this case, in order to give NRG a probationary period in which to rebuild its customers’ confidence; and
- (iii) is a shorter renewal period of approximately 3-years appropriate in this case, in order to align the renewal period of the Town’s Franchise Agreement with those in neighbouring municipalities?

(b) **Rate Application Filing:** As a term and condition of renewal, should the Board require NRG to file a new rate application within 6 months (as proposed by the Board), or not before the 2009 year-end (as proposed by NRG)?

- (c) **Security Deposit Policy Issues:** As a term and condition of renewal, should the Board require NRG to implement the Board's proposed revisions to its customer deposit policy, and in addition to hold all security deposits in a trust account?
- (d) **Notice of Proceedings:** Whether, as a term and condition of renewal, to require NRG to give the Town notice of any proceedings before the Board in which NRG is involved, whether as an applicant, respondent, intervenor or otherwise?

14. The Town will also respond, albeit briefly, to the extravagant allegations made by NRG in its written submissions suggesting bad faith, improper purposes and other misconduct by the Town. Those allegations are entirely without merit.

15. These issues are addressed in turn.

#### ***A. The Renewal Term***

##### **(i) No Presumptive Minimum Renewal Term**

16. The Town submits there is, no "normal", "standard" or presumptive renewal period, to which an incumbent gas distributor is somehow entitled, as NRG argues. That is so, whether it be for 10, 15, or 20 years or otherwise.

17. Nothing in this Board's prior decisions supports any such presumption. To the contrary, as noted, the matter is "entirely" one of discretion.

18. Nor does the evidence led by NRG support any finding by this Board, or even any concern, that a shorter renewal period would in any way jeopardize NRG's ability to re-finance its long term debt. In fact, NRG has no debt over a 5-year term, and even that is on a demand basis. NRG recently refinanced that debt in 2006 and again in 2008, in each case with less than

5-years remaining on its Franchise Agreement with the Town, and in the latter case with less than 5-years remaining on each of its four largest Franchise Agreements. NRG's purported evidence on this issue is speculative, self-serving, and refuted these admitted facts.

19. In fact, the recent findings by this Board with respect to NRG's financial viability and conduct, as detailed in the evidence and below, are far more likely to affect the terms on which NRG is able to re-finance its debt than is the position advanced by the Town herein with respect to renewal of one of its Franchise Agreements.

20. Nor does NRG's alleged investment in new distribution infrastructure justify any lengthy renewal of the Town's Franchise Agreement, as it suggests. There is no evidence that any such investment has been in the Town's franchise area, as opposed to those of other municipalities served by NRG. Indeed, the Town Administrator, Heather Adams has reported to Council that:

"In recent years, the Town has not been advised of any distribution system improvements in the pipelines within the Town's boundaries." (Town Ev., Tab B, page 3)

That evidence was not challenged in cross-examination.

## **(ii) The Need for a Probationary Period**

21. The recent conduct by NRG in respect of its regulated gas supply business is clearly relevant to this Board's discretion with respect to the length of any renewal term.

22. As the Board and all interested parties well know, since 2005 circumstances and concerns have arisen which have severely shaken the confidence of the Town and its constituents in NRG as the incumbent supplier of natural gas to customers within the municipal area of the Town. That fact is, however, nowhere acknowledged in NRG's written submissions.

23. These concerns, relating both to the financial viability of NRG and to the quality and

reliability of its service to customers, have largely arisen in recent proceedings before this Board and are a matter of public record as follows.

24. **EB-2006-0243 IGPC Ethanol Plant, Compliance Order dated June 29, 2007:** The Town intervened in this proceeding to support the request of a major new industrial customer for emergency Orders of this Board, requiring NRG to sign Board-approved documentation necessary to complete the financing for this vital regional economic development project. Prior to the hearing, (and contrary to NRG's response to Board Staff IR #1 herein), the Town's solicitor had written to NRG advising that their failure to execute the documents would be a breach of its Franchise Agreement with the Town (Transcript, June 29, 2007, at p. 29-30). NRG ignored that letter, and maintained its refusal. This Board found NRG to be in breach of its Franchise Agreement with the Town, and ordered that NRG remedy that breach (at p. 66). Yet NRG ignored that Order as well, and maintained its refusal. The project was delayed for some further time, before NRG at last relented.

25. The Town's consideration with legal counsel of its rights and remedies under the Franchise Agreement began immediately following this extraordinary demonstration by NRG.

26. **EB-2006-0243 IGPC Ethanol Plant, Review Order dated March 12, 2008:** The Town had to intervene again in this proceeding, initiated on the Board's own motion to review alleged irregularities and non-compliance by NRG with the terms of the now-signed agreements respecting this same project. NRG had demanded a letter of credit from IGPC in an amount of some \$30 million, as well as other payments. IGPC alleged these demands were unreasonable, and a hearing was convened because, again, these disputes were threatening to delay and even derail the project. The Town took no position on the merits of the disputes, except with respect to keeping the project alive and on schedule. NRG's demands were substantially dismissed by



the Board at the hearing on February 28, and in its subsequent decision of March 12, 2008. The Board also made an order on consent establishing a schedule for completion of the project.

27. **Customer concerns Regarding NRG Security Deposit Policy:** At its meeting on July 7, 2008, Council received a letter to all municipalities within NRG's service area from the Township of Malahide, advising of concerns it had received about NRG's security deposit policy and practices, inquiring whether other municipalities had similar concerns, and raising the question whether municipalities might work together to pursue these concerns through their franchise agreements (Town Ev. Tab B, page. 1 and Attachment A 1-6)

28. Then, at its July 21 meeting, Council received a petition with 457 written and 65 on-line signatures, complaining about NRG's customer deposit policy and practices (Town Ev. Tab B, page 1 and Attachment B, and Tab H). The comments by petitioners described NRG's practices as "unfair", "stealing", "robbery", "fraud", "rip off", "scandalous", "disgraceful", "disgusting", and even "criminal". A police investigation launched in response to these complaints was deflected by NRG claiming, unjustifiably, that its security deposit policy had been approved by the Board at NRG's most recent rate hearing (NRG IR Responses, Appendix "F").

29. In fact, Mr. Bristoll admitted that NRG in that rate proceeding had projected no change in the level its security deposits taken from customers from 2005, at some \$105,000, to the test year of 2007 (Transcript, February 12, 2009, page 40, and EB-2005-0544, Decision with Reasons, September 20, 2006, at Appendix "A" page 3 of 5). NRG did not disclose to this Board during that proceeding that, after filing its submission, NRG had in fact embarked upon a major "ramp up" of its security deposit holding, or that by September 2006, when the Board released its decision, NRG was in fact holding almost three times that amount, or \$280,000. Rather, NRG continued to claim allowance for a projected bad debt expense based on its lower 2005 security

deposit levels, which Mr. Bristoll admitted at p. 91 of the Transcript would have the effect of increasing its 2007 rates. In addition, of course, NRG also had the use of more of its customers' money as working capital, which if disclosed to this Board ought properly to have reduced NRG's rate base and its 2007 rates still further, as NRG effectively admits in its written submissions at paras. 110-113.

30. This situation continued, with NRG admittedly increasing its security deposit holdings still further to some \$603,000 by the end of its test year in September 2007, and further again to \$757,000 by September 2008. This 650% increase in the security deposits demanded by NRG from its customers within a 3-year period obviously gave rise to the widespread customer complaints it received in June of 2008. Yet, Mr. Bristoll could barely acknowledge any connection between the two (Transcript, p. 40 and 54-56).

31. Despite this initiative by NRG, it appears there is no cash available on NRG's most recent audited balance sheet (Town Ev., Tab E, page 2). Rather, the Town and this Board have learned in this proceeding that all of NRG's excess capital in 2008 has been used to make a sizeable loan to a related company, on which NRG earned some \$27,000 in interest in the year (Transcript, p. 96 and Town Ev., Tab E, page 15 Note 6). That interest income is surely due in part to NRG's customers who have been required to post security deposits.

32. These admitted facts simply do not square with any claim by NRG that its recent security deposit policies and practices are just a normal or prudent part of its gas distribution business.

33. On October 8, 2008, this Board initiated a consultation under EB-2008-0313 on proposed amendments to its Gas Distribution Access Rule ("GDAR") provisions on the collection and administration of customer deposits. The Town's response enclosed a complete copy of the written and on-line petition it had received. Incredibly, despite its public filing with Council in

July, and with the Board in November 2008, Mr. Bristoll claimed not to have seen this petition until it was filed by the Town in this proceeding in February, 2009 (Transcript, page 11).

**34. EB-2008-0273 Union Gas and NRG, Decision and Order dated November 27, 2008:**

Further concerns about NRG were raised in August, 2008, when Union Gas commenced this Application, seeking relief including permission to cease gas supply to NRG, based on allegations that NRG was in breach of contract and financially insecure, and that Union's efforts to resolve these issues had been stone-walled by NRG. Again, the Town intervened, taking no position on the merits of the contractual dispute. Again, the Board's Decision and Order substantially upheld Union's claim, and granted relief against NRG short of terminating gas supply. Of specific concern to the Town are:

- (a) the qualified Auditors' Report on NRG's September 30, 2006 and subsequent financial statements, indicating that the presentation of some \$13,461,418 in retractable Class C shares as equity, rather than as a liability as required by GAAP, did not fairly present the financial position of NRG (see for example, Town Ev., Tab E, p. 2);
- (b) this Board's findings, at p. 4, that this reduction in equity and increase in liability means that "NRG is now in a negative equity position" and "significantly increases the financial risk associated with NRG";
- (c) this Board's findings, at p. 5, that Union's concerns were serious, that NRG's financial reporting was "invariably late", and that this suggested that NRG faces financial difficulties which had to be carefully addressed by the Board in its Order;

- (d) this Board's apparent acknowledgement, at pages 4 and 5, that its Order requiring NRG to provide Union with a Postponement Agreement relating to the redemption of the Class C shares "is of little assistance to an unsecured creditor" who does not have any such protection, such as those of NRG's customers who have been required to post security deposits; and
- (e) this Board's findings at p. 7 that NRG "did not act in a timely manner" in response to Union's concerns, "essentially stone-walled Union", and engaged in unhelpful "brinksmanship" where customer interests were involved.

35. The Town has emphasized that none of these concerns originated with the Town or its own municipal or corporate interests. Rather, they are concerns raised by NRG's own customers, both individual and industrial/commercial, who have requested that the Town bring them to the attention of the Board forcefully and urgently.

36. The Town's concerns up to October 8, 2008 were documented in a comprehensive Report by Ms. Adams to Council, and the recommendations set out in that Report were adopted by Resolution of Council dated October 14, 2008 (Town Ev., Tabs B and C). The concerns were summarized, at p. 3, as:

- Quality of infrastructure
- Rates not competitive
- Reluctance to serve new commercial/industrial customers
- Significant customer service issues
- Financial issues raised by customers and suppliers are troubling
- Deterrent to local economic development.

(Town Ev., Tab B, page 3 and Recommendation 1)

37. That Report made recommendations, focussed upon bringing these concerns to the attention of this Board, and also including a recommendation to circulate the Report among other municipalities served by NRG “for their consideration and endorsement”. Ms. Adams testified she had already met with the CAOs of these other municipalities on October 1, which included a discussion of having the Franchise Agreements renew at the same time, so that they could work together (Transcript, p. 150). Her evidence confirms that her October 8 Report reflected her understanding of concerns that were generally shared to varying degrees by the other municipalities served by NRG based on discussions with them since 2007 (Transcript, pp. 109-110 and 130-138). The Town has received letters reflecting that general support by other municipalities with respect to the matters set out in that Report (Town Ev., Tab D).

38. Subsequently, the Town’s position and proposal specifically with respect to renewal of its Franchise Agreement was developed, based on these concerns, in a further Report to Council dated December 11, 2008, and approved by Council on December 15 (Town Ev., Tab L). That Report, as adopted by Council, recommended that its representatives meet with NRG and offer a renewal of the Franchise Agreement for 3 years, “with the addition of a list of conditions Council wants to have NRG commit to undertake during that 3 years”. It attached a Draft Franchise Agreement, on the Board’s Model form, but with the 3 year term and with those additional conditions proposed in Schedule “A”.

39. The conditions proposed are relevant to address the concerns with NRG’s conduct and performance identified by the Town, by other surrounding municipalities, and by their respective electors and constituents.

40. Indeed, in the course of this proceeding, the Town has confirmed or learned of additional concerns about NRG that are relevant to, and support its position herein, as follows.

- (a) Mr. Bristoll admitted that NRG's current practices do not comply even with this Board's existing GDAR requirements, and specifically the requirements in s. 2.3.1 that it maintain records documenting compliance with all aspects of the GDAR, and the requirements of ss. 7.3.1 and 7.3.6 dealing with customer complaint response (Response to Board Staff IR #4, Transcript, pp. 64-66); and
- (b) Despite admitting that NRG's customer complaint process "is not documented or verifiable in any fashion", and despite reviewing the customer petition submitted to the Town, Mr. Bristoll continued to insist even at the hearing under oath that NRG has received "very few" complaints (Transcript, p. 61-64).

41. All of these concerns, from June 2007 through to today, individually and collectively, are **very** serious. They indicate that NRG, repeatedly and in a variety of ways, is or has recently been defaulting in significant areas of its responsibilities to its customers and to the electors of the Town. They indicate that NRG is and has been in significant breach of its Franchise Agreement with the Town. They also indicate that NRG is still and ever in denial of these facts.

42. That is why the Town submits that a 3 year term is an appropriate "probationary" period, in all the circumstances. It is to require NRG to commit to and implement those remedial conditions (both those which it has agreed to and those it has not) which may enable NRG to show some improvement on the concerns that have been identified.

43. The suggestion by NRG that this position is punitive, rather than remedial, or is motivated by improper considerations rather than the broader public interest, is completely without merit. In particular, the suggestion that the Town is already secretly determined to replace NRG with Union or some other provider is pure speculation, contrary to all the evidence.

44. All of those suggestions are refuted by the “goals” of the proposal set out in Ms. Adams’ December 11 Report, and adopted by Council (Town Ev., Tab L, page 3). Those goals are as follows:

- Ensure the continued supply of cost-effective natural gas to Aylmer
- Ensure that the customer service and security deposit concerns expressed by the residents of Aylmer are dealt with effectively and efficiently
- Respect the role of the Ontario Energy Board as the regulator of monopoly natural gas distributors in Ontario
- Ensure that the economic development opportunities for the community are enhanced by having **a supportive natural gas distributor** who supplies a cost-effective alternative source of energy
- **Repair the negative image of Aylmer in the context of our natural gas distributor**
- **Restore confidence in and respect for the natural gas distributor by their consumers, other residents and the Town as they put in place a permanent acceptable customer relations policy** (Emphasis added)

45. They are refuted by the history and goals of the community as outlined by Ms. Adams in her testimony, at p. 122:

“If you look at the Town of Aylmer, we’re in a very important and unique position, where we have small, local utilities in all of the sectors. We have a local bred and born telephone company, A&M Telecom [*sic*]. We have a local born and bred electric utility in Erie Thames, and we have a local born and bred gas utility in NRG.

That’s a really important [*sic* feature] to sell to people, that it’s a community that works together, that breeds good companies and supports good companies.

And we would like to get back to the situation pre 2005 where we could be in that kind of a positive supportive relationship with all three of our utility suppliers.”

46. Indeed, even Mr. Bristoll admitted this point in cross examination, as follows.

“MR. TUNLEY: Okay. Again, you understand that the Town isn’t – doesn’t want to go back and revisit past grievances, we are only interested in a go-forward commitment where these issues disappear. That’s what Schedule A is about.

MR. BRISTOLL: I know. And I agree with you.” (Transcript, p. 66)

47. The Town also notes that IGPC, a significant new industrial customer, specifically supports the Town's proposal for a 3 year renewal, in terms that reflect a similar, conciliatory, forward-looking focus (Transcript, p. 79-80).

48. The Town commends this proposal to the Board's discretion in the public interest.

**(iii) Alignment of the Various Franchise Agreements with NRG**

49. The second factor underlying the Town's request for a 3 year renewal is to align the next term of its Franchise Agreement with those of other municipalities in NRG's service area.

50. As the first of the six municipalities served by the gas distribution system of NRG to have a Franchise Agreement come up for renewal since these concerns have arisen, the Town has taken note of the degree to which its own concerns and interests are shared by the other five.

51. It is obvious, both as a matter of legal analysis and of common sense, that all municipalities would be better able to address those concerns and interests before this Board if they could act together. However, the current legislative regime and process for renewal of franchise agreements actually prevent any such concerted action.

52. Thus, practically speaking and as a matter of jurisdiction, the Board has no power under s. 10 of the *MFA* or otherwise actually to do anything with respect to the Franchise Agreements between NRG and the other five municipalities at this time, or at any time until the year before they expire. That will not arise until 2011, in the case of the next earliest to come up for renewal, and not until 2015 in the case of the last (Town Ev., Tab 1, para. 3).

53. This misalignment in the renewal dates of related Franchise Agreements is a natural result of the historical development of local gas distribution systems, which typically have their



origins in a more urbanized centre (such as Aylmer), and then grow outward as an integrated system into surrounding areas. Renewal thereafter, particularly for a “standard” term to 10, 15 or 20 years as advocated by NRG, simply perpetuates that status quo.

54. Again practically speaking, given this integrated nature of a distribution system such as NRG’s throughout the six municipalities, it then becomes actually impossible for this Board to refuse a renewal or extension of one municipality’s Franchise Agreement, despite its powers under ss. 10(2) of the *MFA*, without adversely affecting all the others. Both the franchise rights of those other municipalities, and the supply of gas to their electors and other constituents, would potentially be affected. These impediments, and potential challenges, to any real exercise of the Board’s jurisdiction to refuse renewal, only serve to contribute to the sense that the system is outdated and ineffective, and to resulting inaction by municipalities.

55. These considerations, and the legislative history referred to in paragraphs 3, 4 and 6 of these submissions, are the legal and practical realities experienced by the Town in this case, that lie behind the third recommendation in its Report of October 8/14, 2008:

“3. Request that the OEB establish a process for a review of the legislation and regulations which require that municipalities and natural gas distributors enter into franchise agreements. The realities of the current process for these agreements do not operate such that they improve the distribution of natural gas to its customers. The municipality has no real ability to negotiate even the minimum of service delivery requirements, and no realistic ability to enforce the provisions of a franchise agreement when a distribution company does not meet them and no real ability to change who provides the service. The legislation guiding franchises is outdated and its provisions such as the requirement for a public vote typically are replaced with the OEB approval process.” (Town Ev., Tab B, p. 6: Transcript, p. 142)

56. These systemic impediments, together with the cost of these proceedings and highly adversarial posture of NRG, fully explain why the other five municipalities have not intervened – this Board can do nothing with respect to any of their Franchise Agreements until 2011 at the

very earliest, without the consent of NRG.

57. These realities also lie behind the Town's second reason for requesting a 3-year renewal term, in effect to coincide with the renewal of the next three Franchise Agreements up for renewal in 2012, with the Township of Malahide, and the Municipalities of Bayham and Thames Centre. As expressed in the letter dated January 9, 2009 from counsel for the Town to the Board, parties and intervenors herein, the purpose is as follows:

“The Town believes that, in order to allow all affected municipalities to consider the full range of alternatives for the future supply of gas in these areas, **including the option of renewal with NRG for a longer term**, it is important to make provision for these Franchise Agreements to have the same renewal terms.” (Emphasis added, Town Ev. Tab D)

58. The Town cannot and does not purport to speak for other municipalities in this proceeding. They can and will speak for themselves when, inevitably, their agreements come up for renewal.

59. However, Ms. Adams has testified that, at least at the staff level among the CAOs she deals with, there has been discussion about the concept of having these agreements renew at the same time so that municipalities can work together, and they generally support that concept for a number of reasons (Transcript pp. 108-109, 120-121, 134 and 150). Indeed, that concept was raised long before these proceedings by Malahide in its letter of June 23, 2008 (Town Ev., Tab B, Attachments pp. A-2 to A-3), and is supported by the letter from Bayham dated January 29, 2009, the resolutions of Malahide Township Council and from the South-West Oxford Township Council dated February 5, 2009 (Town Ev., Tab D, last three items).

60. Contrary to NRG's submissions, the reasons supporting this approach are entirely consistent with this Board's broader public interest mandate, and with the municipalities'

interests in representing the interests and concerns of their electors and other constituents in this kind of proceeding. They are:

- (a) the hope that this would enable the municipalities together to exercise greater collective influence upon NRG, particularly with respect to the quality and reliability of its service to customers;
- (b) the efficiencies and economies of scale in having one hearing before the Board, rather than six;
- (c) the ability to focus on issues of broader, common concern rather than more particular, local issues;
- (d) the ability to canvas those interests over a broader and more representative group of the affected stakeholders;
- (e) [others?]; and
- (f) in any event, if there were any merit NRG's concern about franchise terms and debt renewal or investment in its operations, it would surely be preferable even from NRG's perspective to have all of these renewals occurring at one time.

61. Further, it is respectfully submitted that the current *misalignment* of the franchise renewal dates actually operates as an improper fetter on the Board's discretion under ss. 10(2) of the *MFA* to *refuse* renewal in proper circumstances. As noted above, the status quo actually leaves the Board in the position of being unable to exercise a discretion that the legislature *clearly* intended it should have, *even if* the circumstances were such as to fully warrant and require such an Order in the public interest.

62. NRG's position, in effect, asks this Board to perpetuate this unsatisfactory situation.

63. Practically speaking, if this Board *orders* a 3 year extension of the Town's Franchise Agreement, as it requests, to align with those of Malahide, Bayham and Thames Centre in 2012, then it would be open to NRG to *consent* to have those with South-West Oxford and Central Elgin renewed at the same time. The case for a 20 year renewal, as requested by NRG, could then be fully canvassed at that time.

64. The Town submits that this is outcome is in the best possible interests of all parties, including NRG, and in the interests of this Board, and the effectiveness of its process, and all of the public interests it serves.

***B. Requiring NRG to Apply to the Board for a Comprehensive Rate Hearing***

65. The second aspect of the Town's proposal that is opposed by NRG is that in paragraph 1 of Schedule "A" to its proposed Draft Franchise Agreement, asking that NRG immediately apply to the Board for a comprehensive rate hearing.

66. All parties and the Board appear to agree that a rate hearing is required, shortly. The Town seeks such a hearing primarily in order to address:

- (a) whether NRG is currently receiving an excessive rate of return on some \$4 million of its capital represented by the Class C retractable shares, on the basis that they should be considered a liability for rate-making purposes, and not "equity";
- (b) whether the increased financial risk associated with this disclosure since 2007, which results from its capital structure and not from its underlying gas distribution business, should disentitle NRG to the 50-basis point risk premium it was allowed in the prior rate case;

- (c) whether NRG's new customer security deposit policies and practices since 2005 should reduce both the allowance it received for projected bad debt expense, and its rate base requirements, below the levels accepted by this Board in the prior rate case;
- (d) whether NRG's affiliate loan and shared cost arrangements are fair and appropriate as between NRG's regulated gas distribution business and its affiliates' non-regulated business, including the treatment of intercompany loans for purposes of NRG's capital structure, the treatment of any interest income to NRG on those loans, and the allocation of senior management staff costs;
- (e) whether any reductions in rates resulting from these or other issues that may be raised and entertained in such proceeding should be applied to NRG's 2007, 2008 and 2009 rate years, as well as future years; and
- (f) whether the resulting rates are competitive.

67. These are substantive issues. A proceeding to address them should be commenced as soon as possible, certainly before the end of NRG's current fiscal year in September 2009. The Town accepts the Board's suggestion (Transcript, p. 52-53) that filing within 6 months, rather than immediately, would be reasonable. The Town is not aware of any reason, including matters relating to the IGPC Ethanol Plant development, why that time frame cannot be met.

### ***C. Security Deposit Policy Issues***

68. The Town's concerns in this regard are not fully met by requiring NRG to comply with the proposed revisions to the GDAR made by this Board in its consultation under EB-2008-0313, although that does go some way. The Town understands those changes will limit deposits to one

month's gas supply, rather than two and a half months as provided in NRG's current policy, calculated based on an annual average monthly gas charge, rather than the average of the highest three months. That will moderate the amounts of these deposits, and the associated hardships to customers.

69. In addition, however, these customers' funds are not held in secure, segregated trust accounts, but rather are used as working capital in NRG's day-to-day business.

70. This is of concern, because the Board's Decision and Order dated November 27, 2008 in the Union Application (Town Ev., Tab F) which specifically found that Union was justified in its concerns that NRG's creditworthiness had become unsatisfactory, and that a significant increase in the financial risk associated with NRG had been disclosed. The Town is concerned that, in the default scenario entertained by this Board in giving relief to Union, after repayment of the Bank and Union, there will be no assets within NRG with which to repay these customer deposits.

71. The Town notes that provincial legislation routinely requires businesses, including small family business such as real estate brokers and travel agencies in which individual amounts in issue are small, to hold customer funds in a separate trust account. As these businesses can routinely and cost-effectively administer trust accounts, there is absolutely no good reason why a substantial regulated monopoly like NRG cannot do the same.

72. Again, the Town itself has no wish to hold these deposits, itself. It is content that NRG do so.

73. The Town commends this to the Board's discretion on these particular facts, recognizing that the Board may at this time choose not to impose a similar requirement on other gas utilities.

***D. Notice of Proceedings***

74. The Town simply does not understand the reluctance of NRG to give it notice of any proceeding before this Board in which it seeks to participate, as an applicant, respondent, intervenor or otherwise. What is the problem?

75. The purpose is simply so that the Town can more effectively monitor any proceedings before this Board that may affect its rights or those of its electors and constituents. The Town believes that should be encouraged

***E. Response to NRG's Allegations of Misconduct by the Town***

76. There is absolutely no merit whatsoever to NRG's allegations of bad faith, improper purposes and other misconduct by the Town.

77. Indeed, these allegations are farfetched and overblown, almost to the point of clinical paranoia.

78. More important, these allegations simply continue the extremely adversarial posture and gamesmanship that NRG has unfortunately adopted, not only before this Board but seemingly in its daily dealings with customers and stakeholders, since 2007. That posture is inappropriate. It is designed to intimidate, and to discourage resort to and participation in this Board's processes.

79. Unfortunately, particularly when it comes to public participation, this tactic is all too effective.

80. Ms. Adams has responded in detail to NRG's allegations as to the sequence of events in paragraphs 37-44 of her pre-filed evidence, and has expanded on that account consistently in her oral testimony. There is no mystery, contradiction, or implausibility anywhere in that account.

81. Leaving aside its fanciful elements, NRG's interpretation and critique of that sequence of

events demonstrates, first, a complete lack of understanding about how decision-making occurs within a democratically accountable municipality, let alone of the sensitivities involved in properly reflecting the discussions that have occurred among the six such municipalities.

82. NRG's account is also frankly unfair to Ms. Adams. Her evidence is clear that from September 11, 2008, when she first met with NRG, to December 16, when Council's decisions arising from her second Report were presented to NRG, she and other representatives of the Town were having "off the record", without prejudice, discussions with NRG on a regular basis. The purpose of those meetings was to present, and provide an opportunity to respond to all of the Town's concerns and proposals, including the Town's proposal for a 3 year renewal. They were "trying to reach a deal" (Transcript, p. 168-175). Those discussions were not just with Mr. Bristoll, but with other NRG staff such as Mr. Howley, who were not called to testify (Transcript, para. 172-173, and see NRG Ev. Tab D2, letter dated September 16, 2008). It is also quite clear counsel for both NRG and the Town had been involved in the arrangements for these meetings since at least July (NRG Ev. Tab D1, letter dated July 8, 2008).

83. This is all actually quite normal.

84. There is also no suggestion of any prejudice of any kind to NRG. It had the right to apply at any time to the Board under s. 10 of the *MFA*, and it chose the moment for doing so.

85. The Town is completely satisfied that the process it has followed with respect to this matter was entirely proper, and that the attack on Ms. Adams is misplaced and gratuitous.

### ***Conclusion***

86. For the reasons outlined, the conditions which the Town has proposed for renewal of its Franchise Agreement with NRG are all consistent with this Board's broad, public interest



mandate, and they involve no material difficulty for NRG. Public convenience and necessity weighs heavily in the Town's favour. The Town's position is supported by its constituents and electors, and by the customers and rate payers of NRG, and by the other affected municipalities, to the extent that any of those stakeholders have been able to express a view.

***F. Costs***

87. In the circumstances, the Town will request an order for payment of its costs of this proceeding, to be paid by NRG's shareholder and not passed on to the NRG rate payers.

Date: February 27, 2009

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