

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15 (Schedule B);

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

**AND IN THE MATTER OF** an Application for the renewal of a franchise agreement between Natural Resource Gas Limited and the Corporation of the Town of Aylmer.

**ARGUMENT OF IGPC ETHANOL INC. AND  
INTEGRATED GRAIN PROCESSORS COOPERATIVE INC. ("IGPC")**

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## Overview

1. IGPC is the largest ratepayer within the Natural Resources Gas Ltd. ("NRG") franchise area and has been involved in a number of proceedings in front of the Ontario Energy Board (the "Board") over the last three years while IGPC struggled to get NRG to complete the pipeline for the ethanol facility.
2. The natural gas distribution utility obtains the right to construct and operate its system within the public rights of way through a franchise agreement entered into with the local municipality. The utility and the municipality thereby become linked in the ongoing development of the municipality. However, over the past few years, NRG has failed to carry its weight and meet its obligations in dealing with the Town, its residents, IGPC and Union Gas Ltd. ("Union Gas").
3. IGPC is supportive of the Town of Aylmer's (the "Town") position for a three year renewal of the franchise agreement and the imposition of certain conditions upon NRG in addition to the standard terms and conditions found in the Board's Model Franchise Agreement.
4. The Board should require NRG to bring forth a full cost of service rate hearing within 6 months and should take steps to ensure that customer security deposits are adequately protected. The Board may use either the franchise agreement or the Board's power under the *Ontario Energy Board Act, 1998*. Further, the Board should require NRG to comply with the requirements, as proposed, in the amendments to the Gas Distribution Access Rule ("GDAR") to help ensure that customers are adequately protected.
5. NRG has demonstrated a pattern of conduct that is not acceptable in a publicly regulated utility. In fact the conduct has been so extreme that this Board ordered NRG to pay the costs of the Town and IGPC for participating in the Union Gas Application to discontinue service, EB-2008-0273.
6. During the last two years, NRG has admitted that it has: (a) failed to comply with its obligations under the GDAR, (b) been the subject of an administrative penalty for contravening an order of the Board; (c) been the subject of an application to discontinue service; and (d) the subject of an unprecedented number of complaints to the Board

such that the Board commenced a review of its security deposit policies. NRG has failed to complete the cost reconciliation required by the Pipeline Cost Recovery Agreement ("PCRA"), which was to be completed within 45 Business Days of commencing gas service to IGPC. Finally, there are still unanswered questions about NRG's financial well-being.

7. Prior to discussing the appropriate test to be applied by the Board in its consideration of this matter, IGPC will provide a brief summary of the stormy history of NRG over the past 3 years. It is against this backdrop that the Board must apply the "public convenience and necessity" test.
8. If ever there was a situation so unique that it warranted the Board departing from its traditional practice, this is such a situation. A three year renewal is appropriate – if not generous. However, to the extent that this Board determines that the conditions requested by the Town are appropriate for and should govern NRG's conduct, IGPC submits that the Board may proceed by way of condition in the franchise agreement as suggested by the Town or by way of an enforceable order of the Board.

#### **2006 Rate Case – EB-2005-0544**

9. IGPC first participated in an OEB proceeding involving NRG during the 2006 Rates proceeding, EB-2005-0544. During that proceeding, the Board heard from the Mayor of Aylmer as well as citizens unhappy about the current disparity between NRG and Union Gas in terms of rates. A citizen also raised an issue regarding the transfer of the account to the marketer which had taken an unnecessarily long time. NRG committed to improving its relationship with the customers.
10. This was the first hearing during which Mr. Bristoll, the new President, testified on behalf of NRG.
11. At the time NRG only applied for rates for a one year term. The Board had requested NRG to bring forward a multi-year application. NRG had indicated that uncertainty in the tobacco industry made it difficult to bring forward a multi-year rate case. NRG's rate

base was set at \$9,693,286.<sup>1</sup> Three years later, the Board is now asking if NRG can make an application within the next six months.

12. During the rate proceeding, NRG filed evidence in respect of its financing with the Bank of Nova Scotia. There was considerable discussion about the propriety of using over \$1million of the proceeds from the loan as a payment to the NRG shareholder. NRG indicated that the shareholder had gone without a dividend for several years and that such payment merely was allowing the shareholder to catch up.
13. The capital spending plan put into evidence by NRG did not include any plant expansion within the Town of Aylmer.
14. NRG did not provide any indication that it was about to embark upon a dramatic change in the collection and retention of security deposits. As such, the rate base for NRG was approved by the Board based upon the lower amount of security deposits. NRG would earn its return on the rate base that would soon become overstated.
15. NRG indicated during the proceeding that it was doing better at servicing its customers and that it was going to continue to improve. As time has gone by, NRG has failed to meet this commitment.

### **Leave to Construct – EB-2006-0243**

16. In 2006 NRG made an application to the Board in respect of an approximately 28.5km gas pipeline to connect the Union Gas distribution system to the proposed IGPC ethanol facility in Aylmer. This leave to construct predicted the pipeline would cost \$9.1 million and would add approximately \$5 million to NRG's rate base. This project represented a significant opportunity for the Town and for NRG's shareholders to earn significantly more revenue from the utility.
17. NRG was ultimately granted leave to construct the natural gas pipeline and customer station on February 2, 2007. This hearing required several appearances, which is unusual for a leave to construct proceeding.

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<sup>1</sup> EB-2005-0544, Rate Order Arising from the 2007 Test Year Decision with Reasons, dated September 28<sup>th</sup>, 2006.

18. During that hearing, the Board requested that NRG file the contracts, the Pipeline Cost Recovery Agreement (the "PCRA") and the Gas Delivery Contract ("GDC"), with the Board prior to rendering a decision on the granting of leave. IGPC, the commercial entity competing with other ethanol producers, readily agreed to the filing of such documents in confidence. However, NRG resisted and only agreed to submit the documents when it became clear that the Board would not render a favourable decision without having reviewed the PCRA and the GDC.
19. After the leave to construct, IGPC and NRG continued negotiations on the Bundled T Agreement and consent to assignment agreement for the PCRA and the GDC for financing purposes. The necessity of signing a Bundled T Agreement was made known to IGPC at the 2006 Rate hearing. During discussions with NRG, IGPC was repeatedly told this agreement was not controversial – essentially it dealt with upstream transportation and provided a contractual obligation for IGPC to pay NRG, at cost, if NRG incurred upstream transportation costs on behalf of IGPC. However, it took five months to get NRG's legal counsel to agree to this non-controversial agreement.
20. NRG then inexplicably refused to sign the Bundled T Agreement. As the funding for the entire ethanol project was coming to a head, NRG's deliberate actions jeopardized years of work, millions of dollars and the future economic growth of the community. IGPC had no option but to bring an emergency motion with the Board to compel NRG to sign the agreement. At the end of the emergency motion, NRG refused to sign the document and refused to shed any light on its actions.
21. This failure resulted in the Board levying an administrative penalty against NRG in the amount of \$20,000/day. The largest penalty that the Board could impose. NRG subsequently signed after seven days. The penalty was \$140,000. These actions nearly caused the failure of the ethanol facility and, but for the Board's strong condemnation of NRG's actions, it is likely the ethanol plant would not be up and operating today.
22. The words of the Board at the conclusion of the hearing deserve repeating:

NRG has been franchised to provide natural gas service in this municipality, in the Town of Aylmer. This is an exclusive franchise. Natural gas is not available from anyone else. But that exclusivity carries with it certain responsibilities to act in the public interest. It

is not apparent that NRG understands those responsibilities at all.

The failure to comply with this Board's order signals a complete disregard for the Board and its processes. It also signals a complete disregard for the people of Aylmer, many of whom are out of work as a result of the decline in the tobacco industry. It looked like this ethanol facility would offer considerable relief in that regard.

It is also a complete disregard for the federal government, the province of Ontario, and the investors, the farmers that have invested in this facility, and of course, IGPC, all of whom have invested considerable time over a considerable period to bring about the agreements which would result in the construction of this facility.

This Panel is unable to understand what appears to be the capricious behaviour of this utility.<sup>2</sup>

23. In December 2007, the leave to construct was about to expire as construction of the pipeline had not yet started. However, NRG took no steps to seek an extension of the leave to construct prior to its expiry; rather IGPC initiated the process with the Board to arrange for the extension of the leave to construct.
24. Early in January 2008, IGPC received an invoice for over \$400,000 from NRG. This amount included costs from NRG related to Mark Bristoll, legal costs (including costs for the emergency motion) and the administrative penalty. NRG had the audacity to charge its customer for NRG's non-compliance with an order of the Board. IGPC immediately disputed the costs. This dispute remains outstanding.

### **The Demand for \$32million**

25. In early 2008, NRG demanded that IGPC provide a letter of credit for an amount in excess of \$32million despite no contractual basis for such a demand. IGPC having already paid almost \$2 million and having commenced construction on the ethanol facility could not jeopardize the facility.
26. After once again trying, but failing to resolve the issues with NRG, IGPC was forced to again seek the aid of the Board. In response to IGPC's notice of motion, the Board convened a hearing on its own motion in the Town of Aylmer which was attended by many of the local residents.

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<sup>2</sup> Transcript, Emergency Motion date June 29, 2007, page 28 and 29.

27. Over \$30million in claims lacked merit and were quickly cast aside. However, in the end, the Board considered four issues worthy of comment. Three issues were decided in favour of IGPC. In the remaining issue, IGPC was required to provide additional financial assurance beyond the contracted amounts to Union Gas.
28. As a result of this hearing, IGPC was required to provide financial assurance to Union Gas for the construction of approximately 1.6 km of pipeline and custody transfer station to connect to the NRG pipeline and for 2 months of gas delivery service.
29. Pursuant to the terms of the GDC, IGPC was required to provide \$232,000 to NRG as financial assurance to cover the distribution service provided by NRG. However, approximately one quarter of this amount was to protect Union Gas in respect of the Union Gas delivery service. NRG has never acknowledged that its failure has resulted in IGPC providing financial assurance twice in respect of Union Gas' distribution service.
30. The issue of certain costs claimed by NRG was set aside for the parties to try and resolve without the further intervention of the Board. The issue remains outstanding to this day.

### **Union Application to Discontinue Service EB-2008-0273**

31. During the summer of 2008, Union Gas brought forward an application to discontinue service to NRG for failing to negotiate a supply agreement despite several months of requests from Union Gas to discuss the appropriate financial assurance that NRG should provide to Union Gas in respect of the value that accumulates in the Banked Gas Account that Union Gas maintains for NRG.
32. NRG denied there was any issue even though the recording of the retractable shares were now appropriately considered debt for GAAP auditing purposes rather than equity as claimed by NRG. This was a significant factor in the credit risk assessment of NRG by Union Gas. Union Gas offered a couple of solutions which NRG never really addressed until the hearing wherein it stated that such solutions would have costs that ratepayers would have to bear if imposed. At no time prior to the hearing did NRG offer the postponement agreement that NRG had given the Bank of Nova Scotia.
33. In the end, the Board found Union Gas was justified to be concerned about the financial health of NRG and Union's exposure. The Board stated:

The Board agrees that Union's concerns are serious. Any allegation that a utility faces financial difficulties must always be addressed carefully by the Board. In this connection, the Board is very concerned that NRG's financial reporting is invariably late. NRG's year end is September 30<sup>th</sup>. Under the Board's Rules, NRG is required to file its audited Financial Statements within four months of year end, i.e. by January 31<sup>st</sup> of the following year. In 2007 this filing did not occur until July 16<sup>th</sup>, almost six months late.

34. Tragically, the solution arrived at by the Board could have easily been offered by NRG had it wanted to engage in the discussion with Union Gas rather than taking an antagonistic approach. NRG's conduct was so reprehensible that the Board took the extraordinary step to order NRG to pay the costs of the Town and IGPC and further explicitly stated that such costs were not to be passed on to ratepayers.
35. Further evidence of NRG's combative attitude was evidenced during this proceeding. During this hearing, NRG again alleged a breach of the PCRA on the basis that IGPC did not provide a letter of credit to NRG. This was irrelevant to the proceeding. This argument was wrong at the time and continues to be wrong. NRG never requested a letter of credit prior to demanding \$32 million dollars in financial assurance. IGPC provided cash payments for up-front soft costs in designing the pipeline, the steel for the pipe, Union Gas financial assurance and the customer meter station. The payment of cash reduced any obligation to provide a letter of credit and that is expressly provided in the PCRA.
36. Despite failing to negotiate in any meaningful way, NRG had the audacity to make an argument that it should be entitled to costs. Such a position was completely contrary to the ultimate decision of the Board

### **The Franchise Renewal Application**

37. There are several issues that should be highlighted about NRG which are found in the evidentiary record of the Town and NRG.
  - (a) The Audited Financial statements indicate that NRG had \$0 cash and yet it is holding security deposits of over \$750,000. Mr. Bristoll testified that "We have



strong financials. We have good cash reserves.”<sup>3</sup> These two positions are inconsistent.

- (b) The Audited Financial statements do not comply with the GAAP requirement to note the financing in October of 2008 despite a clear requirement that such a note be included.
- (c) The Audited Financial statements contain the same qualification regarding the classification of the retractable shares that was the subject of the Union Gas financial assurance hearing.
- (d) NRG lent money to an affiliated company. The terms of such loan, the use of the proceeds are not detailed.
- (e) NRG has failed to put into place a proper complaints system to ensure that customer complaints were resolved in a proper manner and has failed to comply with GDAR as admitted during cross-examination:

MR. TUNLEY: Isn't the problem, though, as I understand your response again to Board Interrogatory No. 4, is there is a GDAR at the moment as unamended and you are not even complying with that, as I read your answers?

You don't comply with section 2.3.1. You don't comply with section 7.3.1.

MR. BRISTOLL: Hmm-hmm.<sup>4</sup>

- (f) NRG has not made any significant capital expenditure within the Town of Aylmer in the last two years. It should be noted the construction of the pipeline to serve the ethanol plant is over 95% outside the Town of Aylmer.
38. There has been significant discussion regarding NRG's security deposit policy and the difficulty that it has caused with customers. There were many letters printed in the Aylmer Express detailing customer troubles in dealing with NRG and security deposits. One particular item. An excerpt from one story, which was not challenged in any way by NRG, indicated the former Malahide Township “tried to establish five-year terms on the franchise agreements to ensure customer concerns were resolved but was forced into

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<sup>3</sup> EB-2008-0413, Transcript, page 24, ll. 27-8.

<sup>4</sup> EB-2008-0413, Transcript, p. 66, ll. 1-8.

25-year terms by Ontario Energy Board.”<sup>5</sup> It appears that customers and municipalities have been down this road before. A short leash is warranted.

39. NRG indicated that before the Union Gas Application, it was unaware of the petition circulated by customers regarding NRG and its security deposits. This is not credible as the existence of the petition was advertised in the local newspaper<sup>6</sup> and available in several public locations. Further, the petition was presented to Town Council in a public meeting, yet NRG remained oblivious to the customers’ concern. NRG has 18 employees working in the Town of Aylmer; how could it not be aware of such a petition?
40. NRG criticized the Town for not acting sooner – for deliberately delaying the negotiations of the franchise renewal. However, NRG never responded to NRG’s request for a description of the franchise renewal process and NRG never requested the opportunity to address Town Council.
41. NRG’s main contention is the Town failed to negotiate in good faith – that it conspired with Union Gas and the other municipalities surrounding Aylmer to set the stage for Union to swoop in and take over the franchise in three years. However, the stories in the Aylmer Express indicate that area municipalities had concerns and that various municipalities would be discussing what could be done and what to do. This argument demonstrates the distrustful nature of NRG which lies at the heart of many of its troubled relationships with Union, the Town and the customers. Furthermore, NRG’s position is untenable because:
  - (a) There is no evidence the Town has ever discussed the possibility of Union Gas providing distribution service to the residents of Aylmer.
  - (b) The Franchise is not exclusive – that is explicit and NRG has admitted such - so the Town could, if it desired, negotiate a franchise agreement with any third party. There is no act in bad faith on the part of the Town.

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<sup>5</sup> Evidence, Town, Tab G, Aylmer Express, June 25, 2008, article “Malahide Council: Wants NRG policies looked at”, page 2 of 2.

<sup>6</sup> Evidence, Town, Tab H, Advertisement of Citizen Meeting and Petition Signing from the Aylmer Express dated June 11, 2008.

- (c) The Town has a long history of supporting locally owned utilities. Ms. Adams testified of the Town's support for the local electricity distribution company, Erie Thames and the telecommunications company.
  - (d) The Town has offered to renew the franchise. The Town has indicated that the three year timeframe is to permit NRG the opportunity to restore confidence. The three year timeframe also means that the NRG-Aylmer franchise agreement would expire at the same time as three other NRG franchise agreements (Township of Malahide, Municipality of Thames Centre, Municipality of Bayham).<sup>7</sup> Coincident renewal makes sense for the various municipalities.
42. The issue of the length of the franchise renewal is the primary contentious issue. NRG's argument is necessarily very carefully described. NRG complains that the "evidentiary record" does not disclose that the Town was going to seek a three year renewal. This was "an ambush" with the Town springing this crucial item on NRG at the last second, December 2008. Ms. Adams indicated that this condition was discussed during confidential negotiations between the Town and NRG. Negotiations are conducted in confidence. It can't be expected that Town Council will pass a public resolution about their final negotiating position during active negotiations.
43. NRG seeks to pressure the Board into granting a long-term renewal of the franchise agreement based upon the "dire ramifications" of a three year renewal. Again, each argument advanced by NRG lacks merit:
- (a) NRG indicated that its debt would be called if only a three year renewal was granted. However, when asked about this statement, NRG indicated that this was its belief.<sup>8</sup> It had not raised the issue nor had NRG had any discussions with its lender about the consequences of a three year franchise renewal. So, despite closing a financing for more than \$5million in October of 2008; well after the Union Gas application to discontinue service, and within 5 months of the end of the of Aylmer franchise agreement there is no evidence that the Bank has shown any concern about the status of the franchise.

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<sup>7</sup> Evidence of H. Adams, pp.1-2.

<sup>8</sup> EB-2008-0413, Transcript, pp 75-6, ll. 24-5, 1-6.

- (b) Rates will increase as NRG will be forced to recoup the capital over the remaining life of the franchise. NRG provided no impact of such a rate increase. It provided no indication of the assets in the Town of Aylmer (over 95% of the IGPC pipeline lies outside the Town). It indicated that the assets would be worthless – ignoring any possibility of any salvage value. Most telling though, NRG never indicated that it had even considered the option of selling its assets to a new distributor to recover its investment. NRG has provided no precedent for such a rate-making methodology.
44. Over the past four years NRG has systematically increased the customer security deposits being held from approximately \$105,000 to over \$750,000. This represents a more than 6% reduction in the approved rate base. While NRG indicates that it is deeply concerned about ratepayers, NRG has not taken any steps to reduce rates as the rate base has decreased as a result of the security deposits. Nor has it taken any steps to reduce the amount of bad debt allowance included in rates. NRG has therefore been over recovering from the very ratepayers that it claims to be protecting.
45. NRG had committed to IGPC to bring forth a new rate. There is no evidence that NRG has taken even the smallest of steps to develop a new rate. It appears that NRG is in no hurry to bring forth a rate application as such an application may highlight that the current Rate 3 is inappropriately high for IGPC.
46. When asked by the Board Panel about bringing forward a rate application, NRG indicated that 6 months was an insufficient amount of time and it resisted any notion that it should file sooner than January 2010. Given that timing, it would be unlikely that new rates would be in place prior to June 2010 or four years since the Board last approved NRG's rates. Again, the delay indicates that NRG does not wish to disclose to the Board its true financial position and cost of service.
47. NRG has had difficulty in retaining employees to manage the NRG operations. The evidence is that since 2005, NRG has had 7 managers. Such an unusually high turnover rate indicates there may be a problem at NRG.
48. During the hearing, NRG admitted that it failed to comply with the requirements of GDAR. Compliance with GDAR is a legal requirement, not an option.

49. This litany of issues warrants close scrutiny and an ability to have NRG appear before the Board in the near future to ensure that NRG is conducting itself as promised.

### **The Municipal Franchises Act**

50. The Municipal Franchises Act (the "MFA") governs the renewal process and test to be applied by the Board when considering the renewal of a franchise agreement. Section 10 of the MFA provides the following:

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 has expired or will expire within one year, the municipality or the party having the right may apply to the Ontario Energy Board for an order for a renewal of or an extension of the term of the right.

(2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if public convenience and necessity appear to require it, may make an order renewing or extending the term of the right for such period of time and upon such terms and conditions as may be prescribed by the Board, or if the 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.

51. Prior to considering the "public convenience and necessity" test, it is worth considering when and how often the Board is able to consider whether a utility has earned the right to have the franchise extended. The Board only becomes seized of the power to consider the issue of renewing a franchise agreement in the twelve month period prior the end of a franchise agreement. Therefore, if the Board were to award a 20 year franchise it would not have the opportunity to re-visit that decision for two decades. Based upon events of the past three years, IGPC submits that it is in everyone's interest to maintain a closer watch on NRG.
52. NRG unsuccessfully attempted to demonstrate a lack of support for the Town as no other municipality attended the hearing and only a few residents were in attendance. The Town provided letters of support from several municipalities and had a customer petition with over 450 signatures. There were several letters to the Aylmer Express complaining of the security deposit policy and NRG's customer service. NRG had no parties providing support for its position.

53. The Board's decision in this matter comes down to determining what does satisfying the "public convenience and necessity" test require? The interest of any single party, is not determinative of the issue.
54. IGPC agrees that the Board's consideration of the issue must be consistent with the statutory objectives of the Board found in the *Ontario Energy Board Act, 1998* and the MFA.
55. The MFA provides the Board with the exclusive authority to decide whether or not to renew or extend the franchise agreement, and if so, the terms and conditions (including term) that are to be imposed. These matters reside "entirely within the Board's discretion".<sup>9</sup>
56. The Board has broad powers to impose terms of renewal or extension of the franchise agreement. The Court of Appeal stated:
- "The section operates where a franchise agreement reaches the end of its term and the parties have been unable to agree on the conditions for extending it. It protects the interests of those who depend on the gas distribution system by allowing either the municipality or the gas utility company to seek a renewal or extension of the bundle of rights that is the franchise. The OEB may make the order on the terms it determines necessary to protect the public interest. In my view a purposive reading of the section gives to the OEB a broad power to impose the terms of renewal or extension of the franchise so that service to the public will not be interrupted...."<sup>10</sup>
57. These objectives include the protection of the utility consumer – the ratepayers of NRG – the residents of the Town – the very people who have requested the Town to come before this Board. The evidence is clear and compelling that these consumers need protection from NRG. Over the past three years, NRG has consistently chosen a path of confrontation and abused its monopolistic position with its customers, including IGPC.
58. The public interest is also served by public confidence that the Board is effectively regulating utilities in the delivery of distribution services. Granting a 20 year franchise may reduce public confidence in the effectiveness of the Board.

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<sup>9</sup> *Re City of Peterborough and Consumers Gas*, (1980), 111 D.L.R. (3d) 234 (Div. Ct.).

<sup>10</sup> *The Corporation of the City of Sudbury v. Union Gas Limited*, (2001) Docket: C34115, Ont. C.A.

59. NRG seeks to have the Board ignore the customer interests advanced by the Town on behalf of the more than 450 persons that signed a petition complaining about NRG's policies. Rather, NRG seeks to shift the consideration of the public interest from the residents of the Town to some other segment of society but there is no basis for such a change in focus.
60. The Board should be cautious in examining the facts of previous cases where franchise renewals have been disputed. The Sudbury<sup>11</sup> case was entirely different than the present situation. In that case the City of Sudbury sought to deny the renewal of the franchise of Union Gas and purchase the existing plant from Union pursuant to an alleged right to compel such a transaction. There the municipality sought to end the franchise where, in the present, the Town has been abundantly clear that it was willing to renew but that it wanted to ensure that NRG is truly committed to improvement and that it has the ability to follow through on its statements. Second, the motive of Sudbury was purely commercial; there were no significant consumer complaints as in the present case and there was no assertion that Union Gas had failed to work diligently with the City of Sudbury on the economic development of the municipality and expansion of the distribution system.
61. The *Dawn v. Union Gas*<sup>12</sup> was also very different and provided a clear case of the two interests to be balanced; the local interests of the Township of Dawn which would be impacted by the facilities and the interests of the thousands of consumers in the remainder of the province that would be able to benefit from the use of natural gas transported by the facilities. The Board and the courts were alive to the ability of a local municipality to place its interests ahead of the remainder of the province. This is not the case in the present circumstances.
62. IGPC agrees that in normal circumstances the Board's history has been to extend or renew a franchise agreement for a longer term. These are not normal circumstances.
63. NRG argues that these precedents substantiate a predisposition for the Board to grant a long-term franchise renewal. However, the circumstances in the present situation are "unique"; NRG has admitted it. The uniqueness should remove any predisposition and

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<sup>11</sup> *The Corporation of the City of Sudbury v. Union Gas Limited*, (2001) Docket: C34115, Ont. C.A.

<sup>12</sup> *Union Gas Limited v. the Township of Dawn* (1977), 76 D.L.R. (3d) 613 (Ont. Div. Ct.).

the Board should consider what terms should be included in the franchise agreement. The shorter term is appropriate for this specific situation.

## Summary

64. NRG would have the Board believe that its alleged compliance with the terms of current franchise agreement is sufficient to grant a 20 year renewal without any additional conditions. However, the model franchise agreement is intended to provide the utility with the right to use the public rights of way for its plant in exchange for an obligation on the utility to ensure the property is repaired satisfactorily and the municipality is indemnified from the damages resulting from the utility. It is not intended as a comprehensive contract to ensure the municipality and utility are *ad idem* on pursuing economic growth, customer service standards or rates. Therefore, mere compliance is insufficient to guarantee a 20 year renewal. Other issues, compliance with Board orders and rules, customer satisfaction and financial viability are just some of the issues that must be considered.
65. The record over the past three years is clear. NRG has clashed with Union Gas, IGPC, the Town of Aylmer, its customers and this Board. It has abdicated its responsibility to work in concert with the Town and its customers and has chosen a path of confrontation and antagonism. NRG has failed to meet its legal obligations (compliance with a Board order, GDAR, filing requirements) and now wishes to obtain a 20 year pass from future review. Such failings do not justify a long-term renewal. The residents of Aylmer deserve better – the Board should demand more from this utility.
66. The public convenience and necessity require that the Board have the means to ensure NRG fulfills its obligations. A 20 year renewal removes the level of oversight of the Board that is necessary given the present circumstances.
67. There should be a high level of respect and trust between a municipality and the utility. Events of the past three years have dramatically reduced the level of respect and trust between NRG and its ratepayers and between NRG and the Town. Respect and trust must be earned. The Town is providing NRG with the opportunity to restore that trust and respect over the next 3 years




68. The Board should require NRG to bring forward a rate application within 6 months, either, by way of a condition in the franchise agreement or by way of an enforceable order of the Board. By the time such a proceeding is concluded it will be approximately 4 years since the last rate decision. The time has come for NRG to come before the Board to have "just and reasonable" rates established once again.

**All of which is respectfully submitted.**

Dated: February 27, 2009.

**INTEGRATED GRAIN PROCESSORS CO-OPERATIVE INC.**

By it Counsel

  
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Scott Stoll