OGILVY RENAULT

Direct Dial: (416) 216-2311
Direct Fax: (416) 216-3930
rking@ogilvyrenault.com

SENT BY E-FILING AND COURIER

March 3, 2009

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street, Suite 2700
Toronto, ON M4P 1E4

Dear Ms. Walli:

RE: Natural Resource Gas Limited (EB-2008-0413)
Reply Argument

Please find enclosed Natural Resource Gas Limited's Reply Argument in the above-referenced matter. The Reply Argument is also being filed on the Board's RESS system, and served on all parties to the proceeding.

Please do not hesitate to contact me should you have any questions or concerns.

Yours very truly,

Richard King

/mnm
Encl.

c.c. Mr. Mark Bristoll, President, NRG
Mr. Philip Tunley, Stockwoods LLP
Ms. Heather Adams, Town of Aylmer
Mr. Patrick McMahon, Union Gas Limited
Mr. Scott Stoll, Aird & Berlis
Mr. Jim Grey, IGPC
Ms. Suzanna Mantel, Municipality of Bayham
Mr. Larry Thacker, Lenczner Slaght

EB-2008-0413

ONTARIO ENERGY BOARD

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

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

---

NATURAL RESOURCE GAS LIMITED
REPLY ARGUMENT
March 3, 2009

Ogilvy Renault LLP
200 Bay Street, Suite 3800
Royal Bank Plaza, South Tower
Toronto, Ontario M5J 2Z4
Attention: Richard J. King
(416) 216-2311
(416) 216-3930
rking@ogilvyrenault.com

Lenczner Slaght Royce Smith Griffin LLP
130 Adelaide Street West
Suite 2600
Toronto, Ontario M5H 3P5
Attention: Larry Thacker
(416) 865-3097
(647) 297-6446
lthacker@litigate.com

A. RESPONSE TO THE SUBMISSIONS BY ONTARIO ENERGY BOARD

1. Board staff have correctly set out the purpose and intent of the legislative scheme and the legal and public policies reasons for the 2001 Model Franchise Agreement. NRG agrees entirely with the submissions of Board staff.

2. The 2001 Model Franchise Agreement arose out of a proceeding initiated by the OEB on November 1, 1999. The purpose of the proceeding was to develop a new Model Franchise Agreement to be used across the province. The participants in that proceeding included gas companies, associations representing many municipalities, industrial users, as well as individual cities, municipalities and towns.

3. The OEB had determined that public policy favoured applying a consistent approach to franchise renewals. The proceeding resulted in a report to the OEB dated December 29, 2000 and the 2000 Model Franchise Agreement.

4. The issue of the length of a renewal of a franchise was a key issue in the Model Franchise Agreement. The Board staff is correct in stating that the fundamental consideration is the length of time required by a utility to recover the capital cost of its investment incurred in expanding and replacing assets within the franchise territory. Board staff advises that a 20 year term is a reasonable period within which to recover the costs of capital investment in a distribution system. Board staff also states that shorter renewal periods could be a disincentive to a gas distributor who might otherwise make essential capital investments. This is supported by the fact that the cost recovery period for a typical capital improvement serving a mixture of commercial and residential customers will extend over many years.

5. NRG agrees with the Board staff that the 20 year term in the 2000 Model Franchise Agreement should be implemented between NRG and the Town of Aylmer without any change to the length of term or without any other conditions being added.

6. NRG states that Board staff has correctly set out the law and policy considerations that support granting a 20 year renewal on the terms and conditions set out in the 2000 Model Franchise Agreement.

B. RESPONSE TO THE SUBMISSIONS BY THE TOWN OF AYLMER

7. The Town of Aylmer ("Aylmer" or "the Town") makes submissions with respect to the five outstanding issues in this matter, namely: (a) the appropriate term of a new franchise agreement; (b) the timing for filing NRG's next rate application; (c) whether security deposits from NRG's customers should be held in trust; (d) whether NRG should be required to provide the Town of notice of any proceeding to which NRG is a party; and (e) the GDAR security policy.

8. We will reply to each in turn, as well as to the Town's submissions regarding its conduct during the latter half of 2008 when NRG was seeking to meet with the Town to discuss franchise renewal matters.

(a) Town's Submissions on Appropriate Term of the New Franchise Agreement

9. The Town is of the view that NRG ought to be put "on probation" (paras. 13 and 14, Aylmer Argument) by the Board by limiting the franchise renewal to three years. In support of its position, the Town makes the following arguments:

   (a) there is no "normal", "standard" or "presumptive" renewal period for a franchise agreement (para. 16, Aylmer Argument);

   (b) a shorter renewal period would not jeopardize NRG's ability to re-finance its long-term debt (para. 18, Aylmer Argument); and,

   (c) "circumstances have arisen in which NRG has been in default in its responsibilities to customers and to the electors of the Town" (para. 9, Aylmer Argument);

   (d) the Board should align Aylmer's franchise agreement with other municipality's franchise agreements with NRG.

"Normal" or "Standard" Renewal Term

10. With respect to the Town's argument that there is no "normal" or "standard" renewal term, the Town states that the Board cannot have such a "standard" or "normal" renewal term because the Board has complete discretion when it comes to renewal terms. With respect, this argument makes no sense.

11. Just because a tribunal is relatively consistent in how it decides a particular issue does not mean that the tribunal cannot have full discretion (if such discretion is granted by statute). Statutes grant tribunals broad discretion, but tribunals (for obvious reasons) seek to decide issues in a consistent manner.

12. The Board has full discretion to decide the length of a franchise renewal under section 10 of the *Municipal Franchises Act* (Ontario) ("MFAct"), but its past practice and decisions have demonstrated relative consistency when it comes to terms of franchise renewals. In fact, part of the rationale behind the Board's generic proceeding into franchise renewals (E.B.O. 125) was to develop norms and standards for the Board on franchise renewals.

13. In E.B.O. 125, the Board recommended that first-time franchise agreements should be of a duration of not less than 15 years and no longer than 20 years. For renewals, the Board determined that the duration need not be as long as an initial agreement because the risk to 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, the Board considered that a term of 10 to 15 years would seem adequate. The precise quote from the Board's decision is as follows:

> 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.
>
> 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.

Ontario Energy Board, Decision in *Review of Franchise Agreements*, E.B.O. 125 (1986), paras. 7.36 and 7.37.

14. So, contrary to what the Town argues, there is in fact a "standard" or "normal" term that the Board has articulated in E.B.O. 125 (a proceeding convened by the Board itself in order to deal with generic franchise issues).

15. There is a benchmark – and a three-year renewal would be a marked departure from the Board's standard when it comes to a franchise renewal term.

16. NRG has requested 20 years (longer than the minimum the Board considered adequate in E.B.O. 125) because the risk to NRG has not decreased over the initial term of the franchise agreement with Aylmer. NRG has vastly expanded the asset base of the utility in the initial franchise period. As a result, the risk to NRG has not decreased, because its undepreciated capital assets have increased.

17. As the evidence in this proceeding demonstrates, almost all of NRG's pipelines are new, and since 1979 NRG has grown its customer base from 2,000 customers to nearly 7,000 customers.

NRG Evidence, Exhibit C, Tab 1, p.1, lines 26 to 28.

18. As noted in NRG's response to Aylmer Interrogatory #2, during the fifteen year period from 1991 to 2005, the gross assets of NRG nearly tripled as a result of capital investment in NRG's franchise areas. NRG's rapid recent growth and massive asset expansion was explained at length in RP-2002-0147 (NRG Rates for Fiscal 2003/04) and at the Public Forum held as part of NRG's last rate case, and this explanation was accepted by the Board (see NRG Response to Aylmer Interrogatory #2).

19. Despite this evidence, the Town takes the position that NRG's "alleged" investment in new distribution infrastructure should not justify a lengthy franchise renewal because "[t]here 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." That is simply absurd. The Town appears to be suggesting that of NRG's approximately $10 million invested in its distribution system in the past 15 years, NRG has deliberately spent this money outside

the most populous of all its franchise areas (i.e., Aylmer). NRG has made improvements across its distribution areas, and the Board has reviewed and scrutinized NRG's capital plans at every NRG rate case.

20. As a result of its rapid expansion and increased capital asset base, NRG submits that NRG warrants a renewal term longer than the typical 10 to 15 years.

21. As noted above, facilitating the rational expansion of natural gas distribution systems in Ontario is a statutory objective of the Board.

22. To impose a franchise renewal term on NRG that is shorter than the typical term would not be consistent with the Board's stated rationale for determining the length of a renewal period.

Abnormally Short Renewal and Impact on Re-Financing

23. With respect to the Town's argument that an abnormally short renewal term would not impact NRG's ability to re-finance, the Town simply repeats its reliance on the fact that NRG refinanced towards the end of its current franchise agreement terms.

24. As explained by NRG, there is no analogy between: (a) re-financing towards the end of a typical, lengthy franchise agreement term (as NRG did); and (b) re-financing during an abnormally short "probationary" period.

25. The Town is explicitly asking the Board "to put NRG on probation" (para. 13, Aylmer Argument), yet somehow comes to the conclusion that NRG's lender would not be troubled by such a finding by the Board.

26. On its face, that is an unrealistic position, particularly in light of the fact that the evidentiary record shows that NRG's lender sought to understand the nature of the Board process regarding franchise renewals prior to lending to NRG.

NRG Response to IGPC Interrogatory #1 (Appendix A)

27. NRG should make it clear, as well, that it is not simply a concern about re-financing the bulk of NRG's debt (which will have to be done on or before early 2011), but is also

concerned about NRG's existing debt being called by NRG's lender if it is granted an abnormally short renewal period. As stated in the evidence, NRG's existing financing is in the form of third-party demand loans. Those loans can be called at any time and would have to be repaid in full immediately. No breach of any term of the loan is required.

> NRG Response to Board Staff IR #2(ii)
> NRG Response to IGPC IR#1(d)

NRG's "Default" in its "Responsibilities" to Customers and Electorate

28. At paragraph 9 of their Argument, the Town states "circumstances have arisen in which NRG has been in default in its responsibilities to customers and to the electors of the Town". The Town does not at that point in its Argument elaborate on the specific "defaults" committed by NRG, but does pick up this point at pages 7 through 16 of its Argument. Here, Aylmer outlines what it believes to be past cases/concerns which evidence (according to Aylmer) the "need" for a probationary franchise term.

29. First, Aylmer refers to the Board's proceeding in EB-2006-0243 (IGPC Pipeline – Compliance Order of June 29, 2007), and asserts at paragraph 24 of its Argument that "[t]his Board found NRG to be in breach of its Franchise Agreement with the Town, and ordered that NRG remedy that breach (at p.66)." That is a serious statement for the Town to make, and it is completely false. At page 66, counsel for IGPC is making his submissions to the Board and asking that NRG be found in breach of its franchise agreement with Aylmer. That is not the same as a Board determination. NRG has never been found by this Board to be in breach of its franchise agreement.

30. Second, Aylmer cites the subsequent Board proceeding in EB-2006-0243 (IGPC Pipeline – Amendment to Leave to Construct Order of March 12, 2008). Aylmer asserts here that "NRG's demands were substantially dismissed by the Board at the oral hearing on February 28, and in its subsequent decision of March 12, 2008". It is clear that the Town still does not comprehend what fully happened at this proceeding. The Board's Decision, after outlining the background facts, states:

> The central issue is, first and foremost, IGPC's failure to deliver credit and the dispute as to the proper amount of that letter of credit.

OEB Decision, p.138 of Transcript, lines 20 to 22

31. The outcome of that proceeding was for the Board to establish a Schedule for completion of the IGPC pipeline project, the key item of that Schedule being that IGPC was required to supply the letter of credit during the week of March 10, 2008 (i.e., the week following the Board Order). This outcome can hardly be described as NRG having its demands substantially dismissed. NRG got substantially what it asked for – an Order of the Board compelling IGPC to pay the Letter of Credit immediately.

32. Yet Aylmer's position is that this outcome supports their position that an abnormally short-term renewal is warranted.

33. Not only does this not support their position, but NRG's subsequent actions in relation to this Order demonstrate NRG's commitment to this franchise. Despite being ordered by the Board to provide the letter of credit in the week of March 10, 2008, IGPC did not provide NRG with a letter of credit until April 2008. Nonetheless, NRG proceeded with the design and construction of the pipeline throughout that period, despite having an absolute contractual right to terminate the pipeline. This was a $3 million exposure that NRG took in order to keep IGPC's project moving forward.

34. The Town's reference to the February 2008 hearing in no way supports a shorter renewal period. If anything, that hearing and subsequent actions of NRG support a standard franchise renewal.

35. Third, the Town cites its concerns with NRG's security deposit policy as support for its "need" for a probationary franchise renewal term to be placed on NRG. This issue was canvassed at the oral hearing, and NRG agreed to abide by the Board's security deposit policy that is decided upon in the context of the GDAR proceeding (EB-2008-0313). The security deposit "issue" should be a non-issue going forward.

36. Further, NRG believes that the issue has been substantially dealt with. As the record in the proceeding shows:

- NRG's security deposit policy had always been filed and scrutinized in NRG's past rate applications to the Board.
- NRG only began actively implemented its long-standing security deposit in 2005. NRG did so as prudent business practice, to ensure that bad debts in NRG's franchise areas did not accrue to customers in good standing.
- Since then, the absolute dollar amount of monies held as security deposits has increased significantly, but it appears (as per questioning by Board Member Quesnelle) that this amount may now be in decline because sufficient time has passed that security deposits are starting to be returned.
- Any complaints about NRG's security deposit policy to external sources (the Ontario Energy Board or the Aylmer Police) were investigated and NRG was never found to be at fault.
- NRG has not received a written complaint since November 2008.

37. Moreover, this issue could have been dealt with a lot sooner had the Town been willing to work with NRG on the Town's issues of concern. When the Town finally agreed to meet with NRG on September 11, 2008 (after repeated requests from NRG dating back to the beginning of June 2008), NRG provided a copy of its security deposit policy to the Mayor and Ms. Adams and requested the Town to provide comments to NRG on the policy. The Town never did.

Pre-filed Evidence of NRG, EB-2008-0273, para. 42.

38. Finally (on the security deposit policy issue), Aylmer states in its Argument that despite collecting large amounts of security deposits, that NRG's last audited financial statements indicate that NRG has no cash on hand (para. 31, Aylmer Argument). There are two responses to this: First, the reason why there was no cash on hand at the end of September 2008 is that NRG was essentially self-financing the ethanol pipeline work at

that point in time via NRG's cash-on-hand, operating line and accounts payable. NRG was forced to self-finance because IGPC was slow in getting certain consents to NRG to enable the loan facility associated with the pipeline to flow. So, Aylmer's position seems to be that NRG should be punished with a short renewal term because NRG was using its own cash to keep the pipeline project on time. The second response is that since September 2008, the loan facility with respect to the ethanol pipeline has been funded, and as a result, the last quarterly financial statements that NRG filed with the Board indicate that NRG has in excess of $3 million in cash.

39. The fourth issue cited by Aylmer as evidence of NRG "defaulting" in its responsibilities to its customers and the electorate is the recent Union Application to Discontinue Service to NRG (EB-2008-0273), which dealt with the matter of NRG's retractable Class C shares.

40. First of all, there is no "default" to customers or the "electorate" associated with this issue.

41. Further, from NRG's perspective, the issue has been dealt with to the satisfaction of the Board. NRG was required to provide a Postponement Agreement to Union, to cover of any financial risk concerns created by the retractable nature of NRG's Class C shares. NRG offered to provide this Postponement Agreement to Union, but Union declined, insisting on a letter of credit as financial assurance.

OEB Transcript (EB-2008-0273), p.93, line 8 to p. 94, line 12.

42. NRG's basis for declining to provide the letter of credit was that it would have cost consequences to NRG's ratepayers, whereas the Postponement Agreement would not. For some reason, the Town's position appears to be that NRG should have simply agreed to provide financial assurance to Union. NRG certainly could have, and passed the costs associated with the financial assurance on to its ratepayers. From a corporate perspective, NRG had nothing to gain by arguing for a Postponement Agreement as opposed to simply providing the financial assurance. NRG took this position solely for the benefit of its customers – to keep rates lower. For this, the Town thinks that NRG ought to be "put on probation".

Alignment of Franchise Renewal Periods with Other Municipalities

43. Despite Aylmer's contention that aligning franchise renewal periods is only one of a few issues that warrant a three-year franchise renewal period, NRG submits that this is the true motive to a three-year renewal request by the Town.

44. Counsel for the Town of Aylmer effectively admitted the true motive and strategy behind Aylmer's demand for renewal term restricted to three years. In response to a question from the Chair about the purpose of the Town in selecting a 3-year renewal term, Mr. Tunley was candid in admitting the true motive behind the Town's strategy:

> MR. TUNLEY: It's not. The three years takes us to 2012, when the township of Malahide, Corporation of Municipality of Thames Centre, and Bayham all come up.
>
> MR. KAISER: So are those the big ones? I mean, if you are trying to coordinate them – I am just trying to understand the proposition there. If the deal is that we want to have them all terminate at the same date, three years isn't going to get us there anyway, right? As this is set out. But it will get some of them there.
>
> MR. TUNLEY: Right.
>
> MR. KAISER: So is your logic that, well, awe at least want the big ones to come up at the same date, or what?
>
> MR. TUNLEY: The problem is that if you go past 2012, then you are going to have to have three applications from three municipalities, because of the wording of section 10 of the Municipal Franchises Act, which requires an application with the year preceding or prior – at the time of expiry.
>
> So we are trying to pick a date that would bring the first group in, and then presumed that the Board would take it forward from there, a step at a time. That's the thinking. But –
>
> MR. KAISER: so the first year was to get you to 2012.
>
> MR. TUNLEY: Yes.
>
> MR. KAISER: The three years –
>
> MR. TUNLEY: Three years is to get us to 2012 –
>
> MR. KAISER: All right.

> MR. TUNLEY: when three other municipalities come available.
>
> MR. KAISER: All right.

45. The Town's attempt to maintain that the three years was selected to allow NRG to "regain the trust" of the Town is simply false, and is now admitted to be false by the Town's own counsel. The only purpose for the three year renewal term is to ensure that the expiry of the next renewal coincides with the expiry of the franchise agreements for each of Malahide, Thames Centre and Bayham.

46. Mr. Tunley confirmed this again as follows:

> MR. KAISER: And as I understand it, it is to, if I can use the vernacular, put NRG on a short leash, number one, to see if some of these matters can be dealt with to your satisfaction, the satisfaction of your client. And the other is, you've said, to coincide – to line up some of these renewal dates.
>
> And my question simply was, the three years that you have proposed would do that, I guess, at least with respect to two of the additional ones. They may decide to join with you or not join with you, but at least on the face of it, three of the six on a three-year renewal would be on the same timeline, more or less.
>
> MR. TUNLEY: Yes. Can I just comment on a couple of things? One that Mr. Thacker said, which I think is not correct, and I would like to just be clear, the letter from the township of Malahide, February the 5th, clearly – it's in tab D, second from the back – clearly does endorse the position in my letter to the Board –

47. The evidence relied upon by the Town is contradictory. The Town seeks to rely on Heather Adams' December 11 report to the Town council. At the same time, Ms. Adams has admitted that she deliberately omitted from all of her reports to Town council, including the December 11 report, any reference to the real motive behind the Town's three year strategy, which the Town has now admitted through counsel. A deliberately and admittedly false incomplete report cannot form the basis for factual findings.

48. Moreover, at paragraphs 54 and 57 of the Town's Reply, the Town once again concedes the real purpose of the three year renewal term is to improve the Town's chances of persuading the Board to refuse any subsequent renewal of NRG's franchise agreement.

49. The other "issues" raised by Aylmer as justification for a three-year period are either past issues or resolvable by other means.

50. Moreover, the issue of uniform expiry rates was raised in the Board's generic proceeding on franchise agreements in E.B.O. 125. The Board considered arguments that uniform expiry dates might provide municipalities with a better negotiating position with the utility, and appears to have weighed that against the practicality of utilities having to negotiate many renewals all at once. Ultimately, what has transpired since then (through the MFA Committee) is not a move to uniform termination dates for franchise agreements but instead a Model Franchise Agreement as the means by which to "level the playing field" in negotiations between municipalities and utilities.

51. That is why the Board does not, in NRG's submission, easily deviate from standard renewal terms or the specific terms and conditions in the Model Franchise Agreement. The Model Franchise Agreement was developed with a great deal of input and consideration of the balance of obligations to be placed on utilities and municipalities in such arrangements.

52. This historical context to franchise agreements and renewals (and the issues that sometimes arise on franchise renewals) ought to given substantial weight. The Board has previously put their mind to these issues in a very direct way, and made determinations. The Town would have us re-litigate all of these issues at every franchise renewal.

53. That this is the case is evident in the Town's role in Union's recent renewal of its franchise agreement in the County of Elgin. Since the close of the oral phase of this proceeding, the Elgin County councillors voted to approve Union's franchise agreement in the County of Elgin for a twenty year term. The only councillors opposed were Aylmer's Mayor Habkirk and Malahide's Mayor John Wilson. According to an article in the February 25, 2009 Aylmer Express (attached as Schedule B to this Reply Argument), Mayor Habkirk's position was that a twenty year term was "far too long", especially concerning the current "economic dip".

54. It is clear that Aylmer has its own unique views as to standard terms for franchise agreements, that have no regard to the fact that these issues have been dealt with by the Board in a comprehensive, generic hearing.

55. Aylmer contextualizes its Argument by asserting that its position has never been based upon any "local" or "parochial" interests of the Town (para. 5, Aylmer Agrument). With respect, the position of the Town vis-à-vis NRG and subsequently Union (in the County of Elgin renewal) suggests otherwise. It suggests that Aylmer has a very specific, local view of how franchise arrangements should be dealt with in the province, which runs contrary to this Board's determinations in E.B.O. 125 (a proceeding that took a far broader, public interest approach to franchise renewal issues).

Conduct of Aylmer During Renewal "Negotiations"

56. For over six months, NRG made many requests that the Town provide its position on the renewal of the NRG franchise. The chronology of those requests are set out in paragraphs 41-68 of NRG's Argument-in-Chief. On no less than 11 separate occasions, NRG requested that the Town advise whether or not it would oppose a renewal of NRG's franchise and requested an opportunity to address any concerns that the Town might have.

57. The Town over a period of six months refused to provide its position to NRG. It was not until December 16, 2008 that the Town advised NRG that it would oppose the renewal of the franchise agreement for the usual 20 year term and would be insisting on a three year term with additional conditions. The Town has now admitted that it had taken this position since at least October 1 but deliberately refused to disclose its position to NRG.

58. The Town's conduct demonstrates a lack of good faith and transparency in negotiating with NRG that falls far below the standard required of a municipal government.

59. The factual evidence is not in dispute. On cross-examination, Ms. Adams confirmed each of the 11 written requests made by NRG and the truth of their contents. She also confirmed that throughout all of that period of time, the Town never disclosed to NRG its

position, despite knowing that NRG was requesting the Town to do so, and knowing why it was important for NRG to know.

60. Mark Bristoll testified that the Town at no time ever told NRG that they would not renew the Franchise Agreement in the standard form. The Town told NRG they would provide comments but they failed to do so until December 16. Mr. Bristoll was clear in his testimony that any qualifications as to the length of the renewal term were never raised by Aylmer until December 16, 2008.

MR. TUNLEY:	Right.
	And the other thing that they were going to talk to you about was about the length of the term of the contract, right, of the renewal term?
MR. BRISTOLL:	That was never brought forward.
MR. TUNLEY:	That was never brought forward?
MR. BRISTOLL:	No.
MR. TUNLEY:	Never brought forward to you, then?
MR. BRISTOLL:	It was not.
MR. TUNLEY:	Did you bring it up?
MR. BRISTOLL:	I had assumed that we would go with a standard renewal term.

61. Mr. Tunley at no time confronted Mr. Bristoll with Heather Adams' allegations that she had about "off the record" discussions prior to December 16 in which she disclosed to NRG that the Town would be seeking a three year renewal term.

62. Having failed to confront Mark Bristoll on cross-examination with this allegation, it would be contrary to the evidentiary rule in *Browne v. Dunn*, as well as unfair to Mr. Bristoll, to ask for a finding that the three year renewal strategy was disclosed to NRG at any time before December 16, 2008.

63. Mr. Bristoll was clear and forthright in his evidence. Moreover, the conduct of NRG at the time supports the conclusion that NRG was never advised until December 16 that the

Town would insist on the three year renewal term. As soon as the Town revealed its position on December 16, NRG moved immediately to commence this application.

64. By contrast, Heather Adams' evidence was evasive and frequently self-contradictory. Moreover, Ms. Adams' allegation of "off the record" discussions were raised only when the history of refusing to deal with NRG openly and in good faith was proved. It was merely an attempt by Ms. Adams to justify the Town's improper conduct. There is not one email, note or any other documentary evidence to suggest that the Town's three year renewal strategy was ever disclosed to NRG before December 16.

65. NRG submits that the Board should prefer the evidence of Mark Bristoll over the evidence of Heather Adams and find as a fact that the Town at no time disclosed to NRG before December 16 that it would be seeking a three year renewal term.

(b) <u>Timing for Filing of NRG's Next Rates Application</u>

66. Aylmer takes the position that NRG should file a rate application within six months, although it is not clear as to whether this is six months from the date of Aylmer's Argument or from a final decision of the Board in this proceeding. Either way, this is a change from its earlier position, which asked for a filing "immediately".

67. NRG's preference, as stated at the oral hearing, would be to file an application by December 31, 2009. This would allow NRG to: (a) understand any rate implications arising from the Board's decision in this case; and (b) utilize its existing rates consultant (Mr. Randy Aiken) to properly prepare a comprehensive application.

68. NRG has made inquiries of its rate expert, Mr. Aiken. Mr. Aiken has been NRG's rate consultant and witness for NRG for many years. As a result, Mr. Aiken has extensive knowledge of NRG's business, cost structure and customer demographics. NRG believes that Mr. Aiken is the most experienced and effective rate consultant available, and, because of his previous work with NRG, he is in a position to provide expert advice to, and evidence on behalf of, NRG at a lower cost than any other rate consultant.

69. Mr. Aiken has advised NRG that due to previously scheduled commitments, including a number of OEB rate hearings, he is not able to complete the work necessary for NRG to have a rate hearing before December 31, 2009. Accordingly, if NRG is required to proceed with a rate hearing before then, it would not be able to fully utilize Mr. Aiken, and would be required to retain a new rate consultant which would significantly increase NRG's costs of the rate hearing. The effect of that would ultimately be to increase NRG's rate base and the rates charged to NRG's customers.

70. Finally, the gap between the two positions is not significant – six months from now is September, and obviously six months from a Board decision would likely be October or November.

(c) <u>Holding Security Deposits in a Trust Account</u>

71. Aylmer continues to request that security deposit monies be held by NRG in a trust account, because the Town considers NRG's financial risk to have increased (in light of the Union Gas Application to discontinue service). Specifically, the Town now states:

> 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 customers.
>
> Para. 70, Aylmer Argument.

72. Thus, Aylmer's argument on this point is based on customer protection in the highly unlikely event that NRG has to liquidate its assets in priority to the Bank, followed by Union.

73. Yet what Aylmer is proposing (holding these deposits in a trust fund) will mean that these security deposits will no longer be able to reduce NRG's rate base through working capital. The Board has always treated security deposits as a reduction in utility rate base on the basis that it is a source of operating funds.

74. So if accepted, Aylmer's position will absolutely result in increased rates for its customers. Yet Aylmer is justifying their position on a remote scenario. Aylmer did not address this issue in their Argument.

75. NRG's view is that Aylmer's position converts a remote, potential harm (financial loss to NRG's customers) to actual harm (higher rates for NRG's customers). On this basis, NRG took the position at the oral hearing that it would not voluntarily consent to establishing a trust account to hold security deposit monies.

76. Similarly, the Town's allegations about the financial viability or the quality and reliability of NRG's serve to its customers are unfounded. First, since being purchased by its current owners out of bankruptcy in 1979, NRG has operated continuously for 30 years. During that time, NRG has not ever missed a payment owing to its natural gas supplier, Union Gas. This was admitted by Union Gas at the October 2008 hearing. For thirty years NRG has never missed a single payment.

77. Second, the Town admitted that it cannot identify even one instance where NRG was unable to supply natural gas to a customer. NRG's reliability is not disputed by the Town's evidence. Any argument by the Town to this effect is completely contradicted by the admission of NRG's reliability record, the absolute lack of any contrary evidence and NRG's 30 year operating history. The Town has not presented any evidence, not even one example, of an instance in which NRG failed to provide natural gas service to its customers.

78. Third, Union Gas brought an application seeking additional financial security alleging that NRG's financial position was less stable than it had previously been. The Board rejected Union Gas' request and refused to order NRG to provide any additional security. The Board did require NRG to provide periodic financial statements, which NRG has done in accordance with the Board's order. Union Gas has never complained since that the financial statements of NRG indicate any deterioration in NRG's financial position. Once again, the Town has presented no evidence that NRG's financial position is any different than it has been in the past 30 years.

(d) <u>Mandatory Notification of Aylmer</u>

79. Aylmer's submissions are very brief on this point. The Town appears to be saying that this is a relatively easy condition to agree to, so why won't NRG agree?

80. NRG's answer is simple. A franchise agreement is the most important agreement that any utility enters into, and so conditions in franchise agreements are important.

81. This particular condition being requested by the Town is not sufficiently material to be included as a special condition to a renewed franchise agreement, for the following reasons: (a) the Board has existing notice procedures that operate to ensure that stakeholders who would reasonably be expected to have a particular interest in a given proceeding actually get notice; (b) all NRG applications typically get published in the Aylmer Express, and NRG rate applications are required to be served on the Aylmer Town Clerk; and (c) such a condition is so minor that it could easily be overlooked or "fall between the cracks", ultimately have little consequence to Aylmer, but nevertheless be a breach of the franchise agreement.

82. This last point is significant. It would not be in anyone's interest for NRG to be in breach of its franchise agreement merely because NRG inadvertently failed to notify Aylmer about a generic proceeding that NRG was only tangentially involved in.

(e) Proposed GDAR Security Deposit Policy

83. NRG's security deposit policy must as a matter of fundamental fairness be considered in the context of the security deposit policies utilized by other natural gas utilities, including Union Gas and Enbridge. Union Gas and Enbridge have essentially identical security deposit policies.

84. It is well-known that the OEB has been considering a new security deposit policy that would be implemented and approved by the OEB and would be mandatory for all utilities. NRG has at all times said that it will comply with the new GDAR security deposit policy that was anticipated to be approved by the OEB. That remains the case.

85. By contrast, Union Gas and Enbridge have opposed the proposed GDAR security deposit policy and have even challenged the jurisdiction of the OEB to impose a new security deposit policy.

86. Mr. Bristoll was clear in his explanation of the purpose for security deposits. Mr. Bristoll testified as follows:

> MR. BRISTOLL: I do agree with that, yes. The security deposits are not intended to be a cash grab of any sort. They're intended to ensure that none of the ratepayers are harmed by those ratepayers that show cracks in their financial armour, if I could put it that way.
>
> The policy is designed to return security deposits to those who should have them returned to them.
>
> I would like to point out that in 2008 we collected $292,000 in security deposits and refunded $138,000 in security deposits. I would like to point out that in 2009 year to date, we have collected $40,000 in security deposits and have refunded $83,220 in security deposits.
>
> We are only doing it to protect everybody's interest. Prior to that point in time, when you saw the number of 105 and 280, security deposits weren't taken as seriously as they should be, but we ran into a few circumstances with tobacco farmers, in particular, who had quite large bills who did not pay those bills for significant periods of time, and those bills ran up to really large sums of money.
>
> And it dawned upon us that in a community that unfortunately is finding itself in somewhat of an economic downturn, that it was incumbent upon us to ensure that the rest of our ratepayers did not suffer as a result of those ratepayers that could not afford to pay their bills.

87. Moreover, Mr. Bristoll explained the unique exposure faced by NRG as a result of credit risk and customers who default on payments.

> MR. BRISTOLL: Our exposure with security deposits actually lies with the gas commodity more than anything. With the price of natural gas at times being very high, what has happened – or what we experienced was, is that one-third of our bill would be distributed and two-thirds of our bill would be commodity-based.
>
> But we earn no return on natural gas itself. It's a pass-through. We pay a dollar for gas. We pass through a dollar to the customer, effectively.
>
> And if there's a bad debt associated with a bill, the lion's share of that debt has to be recouped, which – so the lion's share of that debt would be non-profit-producing receivable. It would have to be recouped from a very small percentage of our business that runs profits.
>
> So the risk for us is a lot higher than it actually appears to be on the surface, as a result of that relationship between the commodity and the distribution on the bill.

88. NRG's security deposit policy protects NRG ratepayers who pay their bills by ensuring that those who default do not cause NRG to suffer losses that other customers will ultimately pay.

89. In deciding whether to require NRG (as a term of this Franchise Agreement) to abide by a security deposit policy that Union and Enbridge do not have to adhere to the Board must consider whether doing so would require NRG's ratepayers to bear a greater risk of their rates increasing due to credit losses than the ratepayers of Union Gas and Enbridge are expected to bear. There is no reason why NRG or its ratepayers should be required to expose itself to credit risk and the resulting increased rates that Union Gas and Enbridge are permitted to eliminate.

90. Finally, in response to the Town's security deposit policy allegations, the Town's conduct with respect to the security deposit demonstrates a clear lack of good faith. First, the Town relies on a petition that it admits it never disclosed to NRG. The one page that was made available to NRG only because it was filed in evidence with the OEB in October 2008 was analyzed by NRG and determined to be riddled with inaccuracies, including:

- there are several instances where there is more than one signatory per account;
- some of the 12 customers have a recent late payment history; and
- some of the 12 customers have had their security deposit policy refunded.

C. RESPONSE TO THE SUBMISSIONS BY IGPC

91. Counsel for IGPC confirmed to the Chair at the hearing that there were no outstanding issues between NRG and IGPC that required the intervention of the Board. Counsel for IGPC said that the parties are "down to the final bits of information that need to be exchanged". Moreover, counsel for IGPC confirmed that there was no need to add any conditions to the renewal of the franchise agreement. Mr. Stoll told the Chair that:

> MR. STOLL: Yes. So I don't see a need to add any conditions to this. Quite frankly, we are not a party to the agreement, so I don't think it is our place to add a condition.

92. Accordingly, IGPC admitted at the hearing that NRG and IGPC were exchanging additional information that NRG requires to complete its final accounting. To date, IGPC has refused to provide this information, despite repeated requests from NRG. But for this required information, NRG is in a position to provide the final costs reconciliation to IGPC immediately. The information NRG requested relates to the cost of the Lakeside Control Station. If IGPC is unwilling to provide the information, NRG will make the appropriate assumption and deliver the final costs reconciliation to IGPC immediately. The delay has been caused solely by IGPC's refusal to provide essential information to IGPC.

93. Based on this, NRG sees relatively little utility in responding to the bulk of IGPC's submissions in the main portion of this Reply Argument.

94. A detailed chronology of the defaults and delays caused by IGPC's conduct is set out in Schedule A hereto.

D. COSTS

95. The Town makes no argument as to the basis for its request that NRG's shareholder pay the costs of this proceeding.

96. NRG re-iterates its submission that this hearing was necessary only because of the Town's failure to negotiate with the Town in good faith.

97. As the record shows, since June 2008, NRG had repeatedly requested that the Town provide NRG with its position on franchise renewal. The evidence in this proceeding established beyond any doubt that the Town deliberately refused, over a period of six months, to tell NRG whether or not it would approve a renewal of the franchise. Moreover, the Town concealed from NRG its hidden agenda and the position it would eventually take concerning a demand for a three-year renewal term.

98. Finally, the Town deliberately allowed time to run and did not disclose its position until the latest possible moment, which required NRG to commence this application for a contested hearing.

99. NRG submits that, in these circumstances, any presumption that the applicant should be responsible for the costs of the hearing does not apply. Instead, this Board should determine costs liability by examining the degree of success in the outcome of the hearing and the conduct of the parties prior to and during the hearing.

100. As a result, NRG respectfully submits that the Towns should bear its own costs of this hearing. NRG also submits that the Town should pay the costs of NRG and the Board.

All of which is respectfully submitted this 3rd day of March, 2009,

NATURAL RESOURCE GAS LIMITED

By its Counsel, Ogilvy Renault LLP
Per: Richard J. King

for

By its Counsel, Lenczner Slaght Royce Smith Griffin LLP
Per: Lawrence E. Thacker

SCHEDULE A

FINANCING THE PIPELINE

1. Pursuant to the Pipeline Cost Recovery Agreement dated as of January 31, 2007 ("PCRA") (Appendix E) among NRG and IGPC, NRG and IGPC agreed to construct the Pipeline on certain terms and conditions. The OEB approved the PCRA and granted NRG leave to construct by Decision and Order dated February 2, 2007.

2. As a regulated utility whose stakeholders include commercial and industrial consumers, customers and municipalities, NRG has an obligation to ensure that any transaction it enters into does not expose it to inappropriate financial liabilities and/or other unacceptable risks. Accordingly, the purpose and intent of the PCRA was to ensure that NRG would at all times be fully secured for all costs related to the construction of the Pipeline. Acknowledging this fundamental principle, the OEB approved the PCRA and other documents necessary to enable NRG and IGPC to work together to construct the Pipeline.

Letter of Credit

3. The PCRA provides for NRG to be fully secured for all costs, obligations and risks by way of letters of credit. There are two letters of credit required:

(a) Customer Letter of Credit (Section 7.1); and

(b) Delivery Letter of Credit (Section 7.3).

4. Article 7.1 of the PCRA provides that IGPC will, prior to NRG ordering the pipe and stations, provide NRG "an irrevocable letter or letters of credit ("Customer Letter of Credit") in an amount equal to the quoted cost of the pipe and the stations minus any payments made by the Customer to the Utility in respect of the pipe and the stations."

5. IGPC failed to comply with its obligations under Article 7.1. IGPC never delivered a Customer Letter of Credit.

6. IGPC's failure to provide the Customer Letter of Credit caused numerous delays with construction. For example, NRG was unable to order components and materials from Lakeside Controls Process Controls Ltd. ("Lakeside Controls") for the stations, and IGPC refused to pay Lakeside Controls directly the amounts it required to deliver components and materials according to the construction schedule.

7. Article 7.3 of the PCRA provides that prior to the award of the construction agreement by NRG, IGPC will provide to NRG an irrevocable Letter of Credit ("Delivery Letter of Credit") in an amount equal to the difference between the Revised Estimated Capital Cost and the Revised Estimated Aid-to-Construct.

8. As of February 28, 2008, despite repeated requests by NRG, IGPC continued to refuse to provide NRG with the Delivery Letter of Credit.

9. The failure to provide the Delivery Letter of Credit put NRG and its ratepayers at risk. It was fundamentally unfair to place the risk of this project on the shoulders of NRG customers.

10. By letter dated February 15, 2008, counsel for NRG pointed out that an earlier January 31, 2008 letter – outlining the proposed terms and conditions of the proposed Delivery Letter of Credit – was intended to "form the basis for good faith negotiations towards mutually acceptable terms and conditions for a letter of credit".

11. Instead of responding to NRG's February 15 proposal, which was provided by NRG at IGPC's specific request, IGPC delivered a 3 volume "Motion Record" to the OEB that contained numerous false and misleading statements. On February 28, 2008, the OEB held a hearing in Aylmer.

The February 28, 2008 OEB Hearing

12. The OEB stated in its Decision rendered on February 28, 2008 (EB-2006-0243) that IGPC had failed to deliver the required Delivery Letter of Credit. The OEB defined the central issue as follows:

> "The central issue is, first and foremost, IGPC's failure to deliver credit and the dispute as to the proper amount of that Letter of Credit" (Transcript of Proceedings of OEB Hearing held February 28, 2008, page 138, line 20)."

13. Despite the OEB's ruling, it was not until April 2008 that IGPC provided the required Delivery Letter of Credit to NRG. IGPC had been in default of its obligations owed to NRG continuously until April 2008. Nonetheless, NRG proceeded with the design and construction of the Pipeline throughout that period, despite having an absolute contractual right to terminate the Pipeline due to IGPC's ongoing default and breach of its contractual obligations owed to NRG.

14. Notwithstanding IGPC's failure to provide security, NRG contracted for and started construction on the Pipeline (in the amount of $3 million) to keep the project moving forward. This was a $3 million exposure that NRG took for IGPC's project.

Union Gas

15. As a result of IGPC's failure to provide the required Delivery Letter of Credit to NRG, NRG was unable to pay amounts demanded by Union as aid-to-construct for a 1.6 kilometre extension that was an integral part of the Pipeline located in the Union franchise area. This was recognized by the OEB. When NRG demonstrated that the complaints of Union Gas were caused solely by IGPC's default, the OEB directed IGPC to pay the required amount to Union directly. That solution was suggested by NRG, because NRG did not wish to have its progress impaired by IGPC's default of its financial obligations.

16. Subsequently, after being ordered to do so by the OEB, IGPC paid Union $736,000 as an Aid-To-Construct and delivered a Letter of Credit to Union in the amount of $73,100. The uniqueness of the situation was caused solely by IGPC's default and breach of its contractual

obligation to provide NRG with the Delivery Letter of Credit. IGPC simply refused or failed to comply with its financial obligations.

Union Gas and Lakeside

17. Despite IGPC's failure to provide NRG with the Customer Letter of Credit and the consequent breach of the PCRA, NRG continued to move forward with construction of the Facility. NRG obtained quotes from both Union Gas and Lakeside Process Controls for essential components of the pipeline construction that were required to be purchased in advance to ensure timely delivery. NRG forwarded details about the quotes to IGPC as it acquired that information, and conveyed the requests for payment as well.

18. The PCRA does not specifically contemplate a system whereby NRG makes arrangements with subcontractors and asks IGPC for payment to fulfill the contracts. That is because under the PCRA, NRG was required to have received, by that stage, the Customer Letter of Credit from IGPC, thus enabling NRG to remit the payments directly to the subcontractors without delay. However, because IGPC refused to deliver the Customer Letter of Credit, NRG was required to seek ad hoc financing or security from IGPC for each advance payment or liability that it incurred to keep the construction on the required timeline.

19. These delays and frustrations were exacerbated by IGPC's refusal to cooperate with NRG. NRG initially asked IGPC to pay directly to Union the $700,000 it required. IGPC refused to do so. It was not until after the OEB's February 28 decision that IGPC finally made the required payments to Union.

20. The inefficiency inherent in such a process was evident in the inevitable delays in reviewing invoices, requisitioning payments and remitting those payments through multiple parties. Despite NRG's best efforts to relay information as soon as possible, all parties ended up feeling that they were not accorded sufficient time to deal with the demands placed upon them. However, these delays were all caused by IGPC's refusal to provide the Letters of Credit it was contractually bound to deliver.

IGPC Fails to Pay Security Deposit

21. A history of negotiations between NRG and IGPC about the security deposit IGPC is required to pay to NRG was set out in detail in a letter dated August 15, 2008.

22. By letter dated July 8, NRG issued an invoice to IGPC for the security deposit required pursuant to the Gas Delivery Agreement dated January 30, 2007 ("GDA").

23. By letters dated July 10 and 17, NRG advised IGPC that the security deposit was required to secure amounts payable by IGPC to NRG. The pipeline was completed and fully commissioned by July 10 and NRG had performed all of its obligations relating to the construction of the pipeline.

24. To accommodate IGPC, NRG had previously agreed with IGPC that the in-service date would be July 15. As a result, IGPC was required to pay NRG all delivery charges commencing

July 15. For that reason, IGPC was required to pay the security deposit to NRG by July 15 regardless of whether IGPC was ready to receive gas on that day.

25. NRG again requested that IGPC pay the security deposit. IGPC again refused to pay the security deposit.

26. On July 17, NRG again repeated its request that IGPC pay the security deposit required under the GDA. NRG and IGPC had several discussions subsequently about the form and timing of the delivery of the security deposit. IGPC advised NRG that it was financially unable to pay the security deposit due to limitations on its ability to draw down cash due to the terms and conditions of its credit facility.

27. July 28, IGPC told NRG that it would provide a letter of credit that could be cashed immediately so that NRG would be in the same position as if IGPC had paid a cash deposit.

28. Subsequently, IGPC demanded that any security paid by IGPC be segregated in a special account and not be accessed by NRG for any purpose until IGPC defaults. On August 13, before NRG could respond to IGPC, IGPC delivered a letter of credit in the amount of $232,666.84.

29. At no time between July 8 and August 13 did IGPC ever provide NRG with a copy of the proposed letter of credit so that NRG could review its terms and conditions. To the contrary, IGPC had advised that it was prepared to pay a cash deposit, but simply could not do so until the next regularly scheduled draw down against its credit facility at the end of July.

30. If NRG had known IGPC was refusing to pay the security deposit in cash, it would have demanded an opportunity to review the proposed letter of credit.

31. The letter of credit delivered by IGPC on August 13 contains numerous deficiencies. For example, the letter of credit expires in December 2008. Clearly, the amounts required to be secured will be owing for many years beyond 2008. Accordingly, the current form of letter of credit is not acceptable to NRG.

32. August 14, 2008, IGPC, through counsel, responded.

33. By letter dated August 15, 2008, NRG responded to the new allegations raised by IGPC. As mentioned earlier, NRG was ready to commission the IGPC facility throughout July, but was unable to do so due to technical problems that are the fault of IGPC's (failure to purge lines, water contamination of lines, and non-complaint equipment). IGPC is still not ready to be commissioned.

34. On September 17, 2008, NRG provided IGPC with a proposed form of Letter of Credit.

35. On September 24, 2008, IGPC, through counsel provided its comments on NRG's proposed draft Letter of Credit.

36. On September 24, 2008, NRG provided its response to IGPC on the draft Letter of Credit, and provided a revised draft Letter of Credit.

37. IGPC did not provide NRG with the required security deposit until late October 2008. Despite being in a position to terminate service, NRG continued to provide service to IGPC continuously since the agreed in-service date of July 15, except where specifically directed by IGPC not to deliver gas.

Delay/Moving Forward

38. IGPC was in breach of the PCRA from October 2007 to April 2008. Despite this continuing failure, NGR did everything possible to continue with the project, and ensured that the project could proceed. By letter dated February 22, 2008, NRG described the continuing and deliberate breaches of the PCRA by IGPC:

> "IGPC has absolutely failed to comply with its obligations under Article 7.1 and, as a result, IGPC is in breach of the PCRA. Moreover, IGPC's failure to comply with Article 7.1 has caused delays with construction, and may cause additional delays in the future. For example, despite repeated warnings, IGPC has not provided the letter of credit to NRG, so that NRG can order components and materials from Lakeside Process Controls Ltd. ("Lakeside") for the stations, and has failed to pay Lakeside directly the amounts required by Lakeside to deliver components and materials in time to allow construction to proceed in a timely manner.
>
> As you know, under Section 3.7 of the PCRA, given IGPC's failure to make payments required and failure to provide the letter of credit required under Section 7.1, NRG has the right to elect not to proceed further with any of its obligations under the PCRA. Moreover, if NRG elects to exercise this right, the PCRA expressly provides that NRG "shall not be liable for any liabilities, damages, losses, payments, costs or expense that may be incurred by [IGPC] as a result".
>
> To date, NRG has been proceeding with its obligations under the PCRA and moving forward with construction, despite IGPC's failure to comply with its obligations under the PCRA. NRG is doing so in order to cooperate with IGPC and move the project forward as fast as possible. However, NRG has obligations to all of its stakeholders and ratepayers and cannot continue with this process indefinitely, given IGPC's continuing and deliberate failures to comply with its obligations under the PCRA."

39. The Pipeline was completed by NRG as agreed by July 3, 2008.

IGPC Fails to Complete Construction by the Agreed Date

40. Throughout the design and tendering stages, IGPC repeatedly alleged that NRG was incapable of completing the project on time. As a result, at the February 28, 2008 hearing, IGPC demanded that NRG commit to a fixed date for the completion of the Pipeline. NRG was willing to do so, provided that IGPC commit to a fixed date to complete its ethanol facility, or agree to pay for the delivery of gas commencing on the fixed date. IGPC agreed.

41. Accordingly, NRG and IGPC agreed at the February 28, 2008 hearing that the in-service date would be July 15, 2008. Based on that agreement, IGPC was required to commence making payments to NRG for gas on July 15, 2008 whether or not IGPC had completed its ethanol facility.

42. NRG demanded a commitment to a fixed in-service date, because NRG was very concerned based on IGPC's past defaults, delays and failures that IGPC would not complete its ethanol facility by the agreed date. NRG would then be in the position of having incurred unnecessary costs to ensure completion by a specific date, only to face a loss of revenue due to IGPC's failure to complete the ethanol facility by that same date.

43. NRG completed and commissioned the Pipeline on July 3, 2008, well before the agreed in-service date of July 15, 2008. By contrast, IGPC failed to complete the construction and commissioning of its ethanol facility by July 15, 2008.

44. Pursuant to the agreement, NRG delivered an invoice to IGPC for the minimum quantity of natural gas commencing on July 15, 2008.

45. IGPC's liability to pay for the minimum quantity of natural gas commencing on the in-service date was caused solely by IGPC's inability to complete the construction and commissioning of its own ethanol facility in a timely and competent manner, and by July 15, 2008.

46. NRG performed all of its obligations relating to the construction of the pipeline servicing the IGPC facility. The agreed-upon in-service date was initially July 1, 2008 and NRG had its work completed by July 3, 2008, but IGPC was not ready to accept delivery then. NRG has since July 3, 2008 been ready to deliver to IGPC, but IGPC has consistently been the source of delay for several reasons including:

- on August 20, the commissioning of the facility could not proceed because IGPC had not purged its system;

- on August 25, the commissioning could not proceed because NRG's inspection of the IGPC facility revealed Code infractions for virtually all of IGPC's equipment (including their hot water heater and furnace)(see Appendix D hereto);

- on September 4, IGPC requested inspection of their hot water heater but NRG's inspection on September 5th revealed it still to be non-compliant;

- NRG was asked to visit IGPC's facility on September 15 because of water in the gas line (to determine whether the source was from IGPC or NRG), and it was determined that IGPC had connected a water line to their gas line; and

- due to IGPC's construction delays, Lakeside could not install the permanent custody transfer station until October 25.

47. IGPC seems to expect NRG and ultimately NRG's ratepayers to pay for its own lack of adequate financing, construction mismanagement, and commissioning failures. NRG was simply trying to ensure that the interests of all of its ratepayers are protected by insuring that NRG did not suffer a revenue shortfall due to IGPC's conduct.

SCHEDULE B

Attached.

County, over opposition from Wilson, Habkirk, renews gas agreement

Elgin County councillors last week approved a 20-year renewal of a franchise agreement allowing Union Gas to distribute natural gas here, despite the opposition of Aylmer Mayor Bob Habkirk and Malahide Mayor John R. Wilson.

Mayor Habkirk said 20 years was "far too long," especially considering the current "economic dip."

Engineering Services Director Clayton Watters recommended the 20-year renewal, allowing Union Gas to use county road allowance for its supply and distribution pipes.

Adoption of the renewal was subject to the approval of Ontario Energy Board, he noted.

He said staff had reviewed the proposed renewal agreement "and it generally meets the County of Elgin's needs.

"The county has had a very positive working relationship with Union Gas in the past, and we expect that to continue with the new agreement."

He added, "We've never had issues with Union Gas in my 21 years here."

The current 15-year agreement expired on June 28, he said.

Central Elgin Deputy Mayor Tom Marks said Union Gas was "a good corporate citizen," but the county would be tying its own hands for 20 years.

County Administrator Mark McDonald said a 20-year agreement was "standard" in the gas industry.

Deputy Mayor Marks said in that case, he would support the renewal.

Mayor Bob Habkirk objected, noting the town had just gone through an Ontario Energy Board hearing over the renewal of the town's franchise agreement with Natural Resource Gas Ltd.

(The town wants a three-year renewal, while NRG is calling for 20 years. The board has not yet made a ruling.)

He noted that during the hearing, Aylmer was accused by NRG of being in bed with Union Gas, a claim he found "outlandish."

Central Elgin Mayor Sylvia Hofhuis said Union Gas planned to have pipes in the ground along county roadsides for many years, and needed a long-term commitment from the county.

Mayor Habkirk called for a recorded vote on approving a 20-year renewal for Union Gas.

Voting for the renewal were: Warden Graham Warwick, mayor of Central Elgin; Dutton-Dunwich Mayor Bonnie Vowel, Southwold Mayor Jim McIntyre, Mayor Hofhuis, Deputy Mayor Marks, Malahide Deputy Mayor David Mennill and Bayham Mayor Lynn Acre.

Mayor Habkirk and Mayor Wilson cast the only votes in opposition to the renewal.