



EB-2012-0072

IN THE MATTER OF the *Municipal Franchises Act*, R.S.O. 1990, c. M.55, as amended;

AND IN THE MATTER OF an application by Natural Resources Gas Limited for an order approving the terms and conditions upon which, and the period for which, the Corporation of the Town of Aylmer is, by by-law, to grant to Natural Resources Gas Limited the right to construct and operate works for the distribution, transmission and storage of natural gas and the right to extend and add to the works in the Town of Aylmer;

AND IN THE MATTER OF an application by Natural Resources Gas Limited for an order directing and declaring that the assent of the municipal electors of the Town of Aylmer to the by-law is not necessary.

**DECISION ON ISSUES LIST AND PROCEDURAL ORDER NO. 4
July 26, 2012**

On February 22, 2012, Natural Resources Gas Limited (“NRG”) filed an application with the Ontario Energy Board under the *Municipal Franchises Act*, R.S.O. 1990, c. M55 as amended (the “Act”). The application is for an order of the Board renewing NRG’s right to operate works and add to works for the distribution of gas in the Town of Aylmer for a period of 20 years. The Board has assigned file number EB-2012-0072 to the application.

NRG holds a Certificate of Public Convenience and Necessity to operate works and add to works for the distribution of gas in the geographical area comprising the Town of Aylmer (E.B.C. 111).

On March 29, 2012 the Board issued a Notice of Application. NRG served and published the Notice of Application as directed by the Board.

The NRG prefiled evidence indicated that there had been ongoing negotiations between NRG and the Town of Aylmer related to the Franchise Agreement that is the subject of the application. On May 1, 2012, the Board issued Procedural Order No. 1, ordering NRG to report to the Board, and copy to all intervenors, on the progress of its negotiation discussions with intervenors by May 11, 2012.

On May 11, 2012 NRG reported that the negotiations were still ongoing and proposed that the next update be reported to the Board in the week of May 21, 2012. The Board granted the proposed extension in Procedural Order No. 2. on May 25, 2012. NRG reported to the Board that no agreement was reached between the parties.

To establish the specific scope of the proceeding the Board issued Procedural Order No. 3 on June 7, 2012, and required NRG to provide a proposed issues list by June 13, 2012. The Board made provision for submissions by intervenors and Board staff to be filed by June 20, 2012, and provided an opportunity for NRG to reply to these submissions by June 27, 2012.

In accordance with the Procedural Order No. 3 the following filings were received by the Board:

- NRG filed the Proposed Issues List;
- Integrated Grain Processor Co-operative Inc. ("IGPC") filed proposed additional issues to be included in the NRG Proposed Issues List;
- Town of Aylmer filed comments and proposed additional issues to be included in the NRG Proposed Issues List;
- NRG filed a reply on the filings by IGPC and the Town of Aylmer.

The proposed issues by NRG, the Town and IGPC filed as part of the submissions noted above are included in Appendix A to this document.

Board Findings

The Board has considered the submissions of the parties and has concluded that it will adopt the issues proposed by NRG with three additions. To NRG's proposed list the Board will add the following:

- *What are the appropriate conditions of approval, if any, to be attached to the Board's order, if the Board approves the application?*
- *If the Board approves the application, what is the appropriate term for the Board's order?*
- *If the Board does not approve the application, what are the implications?*

These additional issues capture those items from the additional issues proposed by the Town and IGPC which the Board has determined are appropriately within the scope of this proceeding. The last issue is not a matter for evidence, but is rather a matter for argument, and the Board will hear submissions on this issue when it hears submissions on the application as a whole.

The Town and IGPC also proposed the addition of a number of other issues, which the Board will not adopt. These proposed issues fall into two categories:

- (A) Issues beyond the scope of the proceeding
- (B) Issues subsumed within the approved Issues List

(A) Issues beyond the Scope of the Proceeding

In the Board's view, the following proposed issues are beyond the scope of a franchise agreement proceeding: limiting the geographic territory of the franchise within the municipality (IGPC proposed issue 6); issues related to the development of a new cost-allocation study, issues related to the "retractable" feature of NRG's Class "C" shares" and complete separation of NRG's utility gas distribution business from its non-utility ancillary businesses as proposed by the (Town proposed issue 5). These issues have either been reviewed and decided by the Board in recent proceedings or are more appropriately addressed in other proceedings such as NRG rate proceedings.

The Board does not find reconsidering the 2009 Franchise Decision proposed by the Town to be an issue within the scope of the current proceeding (Town proposed issue 4 and IGPC proposed issue 7). The 2009 Franchise Decision has already expired. It was

also the subject of a failed NRG appeal to the Divisional Court. NRG has filed a fresh franchise application and the Board will consider that application. There is no utility in a further review of the 2009 Franchise Decision.

To the extent that the Town's proposed issues 1 and 2 are relevant to the proceeding, they have been captured in issue 4 on the approved Issues List.

(B) Issues Subsumed within Approved Issues List

The issues with respect to NRG's quality of service, reliability, financial viability (Town proposed issue # 6 and IGPC proposed issues 1, 4, and 9) and compliance with the Gas Distribution Service Rule (IGPC proposed issue 2) can be addressed under issue 1 in the approved Issues List.

With regard to the proposal to add the issue of aligning the expiration dates of the franchise agreement for all of the municipalities served by NRG (Town proposed issue 3), and the appropriate overall term of any franchise renewal (Town proposed issue 7), these issues are subsumed within issue 4 on the approved Issues List.

The IGPC suggested a number of issues to be included that the Board finds are more in the nature of interrogatories which can be posed to NRG as part of a written discovery process (IGPC proposed issues 3, 5, 8, 10, 11, 12, 13, and 14).

Having set the scope of the proceeding, the Board will, by way of this procedural order, set the schedule for the first phase of the written discovery process, starting with interrogatories on the evidence filed by NRG and replies to these interrogatories.

The Board considers it necessary to make provision for the following procedural matters. The Board may issue further procedural orders from time to time.

THE BOARD ORDERS THAT:

1. The scope of the proceeding EB-2012-0072 is defined by the Board approved Issues List attached as Appendix B.

2. Intervenor and Board staff written interrogatories on NRG's pre-filed evidence shall be filed with the Board and copies delivered to NRG and all intervenors on or before **August 9, 2012**. All interrogatories must reference the specific evidence on which the interrogatory is based and indicate the issue number according to the Board approved Issues List.
3. Responses to the interrogatories shall be filed with the Board and delivered to intervenors on or before **August 23, 2012**.
4. All interrogatories filed in this proceeding must reference the specific evidence on which the interrogatory is based and indicate the issue number according to the Board approved Issues List attached as Appendix B.

All filings to the Board must quote file numbers **EB-2012- 0072**, be made through the Board's web portal at www.errr.ontarioenergyboard.ca, and consist of two paper copies and one electronic copy in searchable / unrestricted PDF format. Filings must clearly state the sender's name, postal address and telephone number, fax number and e-mail address.

Please use the document naming conventions and document submission standards outlined in the RESS Document Guideline found at www.ontarioenergyboard.ca. If the web portal is not available you may email your document to the BoardSec@ontarioenergyboard.ca. Those who do not have internet access are required to submit all filings on a CD in PDF format, along with two paper copies. Those who do not have computer access are required to file seven paper copies. If you have submitted through the Board's web portal an e-mail is not required.

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

ADDRESS:

Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto ON M4P 1E4
Attention: Board Secretary
Tel: 1-888-632-6273 (toll free)
Fax: 416-440-7656
E-mail: Boardsec@ontarioenergyboard.ca

DATED at Toronto, July 26, 2012

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary

APPENDIX A

Proposed Issues by NRG, the Town of Aylmer and the Integrated Grain Processors Co-operative

EB-2012-0072

July 26, 2012

Natural Resource Gas Limited Proposed Issues

Form of Franchise Agreement

1. Is there any reason, based on the following factors, that the standard terms and conditions in the Model Franchise Agreement should not be used in this case?
 - (a) regulatory compliance by Natural Resource Gas Limited (NRG); and
 - (b) NRG's security deposit policy.

Costs

2. Who should bear the costs of this proceeding?

Town of Aylmer Proposed Issues

1. The Board's Decision and Order dated May 5, 2009 in EB-2008-0413 (the "2009 Franchise Decision") at page 12 refers to the Board's 1986 Report in acknowledging the legitimacy of "municipalities seeking alternative supply in the appropriate circumstances".
 - a. What is the process for municipalities seeking alternative supply to follow?
 - b. What are the "appropriate circumstances" in which the Board would order that municipalities be permitted to not renew their Franchise Agreement(s) in order to seek alternative supply?
2. Subsection 10(2) of the Municipal Franchises Act clearly gives the Board jurisdiction to make an order refusing a renewal or extension of the rights contained in a Franchise Agreement. Section 2.2 of the OEB Act requires that the Board in exercising such power have regard to, among other things, the interests of consumers with respect to the reliability of gas service.
 - a. What powers does the Board have to ensure the reliability of gas service in the period of transition between the making of an order refusing the renewal or extension of a Franchise Agreement and the commencement of service by a new supplier under a new Franchise Agreement?
 - b. What is the appropriate process for municipalities seeking alternative supply to request the exercise of those powers?
3. The 2009 Franchise Decision, at page 12, acknowledges the legitimacy of municipalities in the NRG service area seeking to align the expiration dates of all of their respective Franchise Agreements.

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- a. What is the process for municipalities to follow in order to seek orders of the Board aligning the expiration dates of their respective Franchise Agreements?
 - b. Should this proceeding be adjourned, with the Interim Order herein dated February 27, 2012 remaining in effect, until such time as similar applications have been commenced in respect of each of the Franchise Agreements of the other municipalities in the NRG service area, so that the issue of the alignment of the renewal and expiry dates can be addressed in a consolidated hearing?
4. Whether the Board should reconsider the 2009 Franchise Decision in light of its February 11, 2011 Decision and Order in EB-2010-0374?
 5. If the Franchise Agreement with NRG is to be renewed, should the Board make it a condition of renewal that:
 - a. NRG be required to commit to conduct and adopt a new cost-allocation study to ensure that all costs and revenues are properly allocated between rate classes prior to its next rate hearing;
 - b. Either,
 - i. NRG's shareholder be required to remove the "retractable" feature of NRG's Class "C" shares; or
 - ii. NRG be required to provide to the municipalities a Postponement Agreement in favour of NRG's security deposit holders relating to the redemption of the Class "C" retractable shares in a form substantially similar to the Postponement Agreement that NRG provided to the BNS on August 26, 2008 and that it provided to Union Gas pursuant to the Board's Decision and Order dated November 27, 2008 in EB-2008-0273; and
 - c. NRG be required to implement a complete separation of its utility gas distribution business from its non-utility ancillary businesses such as hot water heater rentals?
 6. Whether there are continuing concerns regarding NRG's quality of service, reliability, and financial viability that affect the renewal terms sought by NRG?
 7. If the Franchise Agreement with NRG is to be renewed, is there any reason to renew it for a term greater than the 10 years, that was considered adequate for a renewal agreement in the 2009 Franchise Decision at page 5, and in the Board's 1986 and 2000 Reports?
 8. Who should bear the costs of this proceeding?

Integrated Grain Processors Co-operative Inc. Proposed Issues

1. What are the elements and standards of quality of service the Board considers during a renewal of a franchise agreement? Has NRG satisfied each of the required elements and standards in providing service to the ratepayers?
2. Has NRG complied, and is it in compliance, with the requirements of the Gas Distribution Access Rule?
3. Are there any outstanding Board orders or directives pertaining to NRG?
4. Should NRG provide an annual certification as to its compliance with paragraphs 2 and 3 to the Board and to the municipalities in which it operates?
5. Should NRG and Aylmer be obligated to participate in regular meetings (i.e. quarterly, on a pre-scheduled basis) to discuss and resolve any issues that may arise? Should Board Staff be present at such meetings and in what role? Should these meetings include other municipalities or result in a public report to ensure ratepayers are kept informed?
6. Does a Franchise Agreement have to be renewed for the entire geographic territory of the municipality? If not, in what circumstances would the Board consider splitting a franchise and what process would be used for such?
7. Should the Board consider the events that preceded the 2009 Franchise Decision which renewed the franchise agreement for a term of 3 years in light of its February 11, 2011 Decision and Order in EB-2010-0374?
8. Has NRG had any discussions with its lenders regarding this proceeding and will the outcome potentially impact its ability to carry on operations?
9. If there are concerns regarding service quality or other factors to be considered by the Board in the renewal of a franchise agreement, should the Board deal with such concerns by way of: (i) order; (ii) the franchise agreement; or (iii) both mechanisms?
10. Is NRG involved in any significant lawsuits, claims, actions or applications or similar proceedings? If so, could or do any of the proceeding(s) create a risk of an adverse impact to NRG or ratepayers?
11. Are all other franchise agreements to which NRG is a party in effect and in good standing?

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12. Excluding general industry reliability issues, are there any circumstances which pose a risk to the reliability of gas service within the franchise area? If so, what are the risks and what is being done to mitigate such risks?
 13. In previous proceedings, NRG has indicated that it was discussing the potential to sell the utility. Given such statements by NRG, is there any sale (in whole or in part) or change of control of NRG being contemplated? If so, on what timelines should such a process be completed and are further Board approvals required?
 14. NRG has indicated that its ownership structure is unique, being a trust, and so it is unlike other utilities in the province. IGPC understood from prior proceedings that the health of the trustees may be an issue. Is there a succession plan for the trustees that administer the trust that owns NRG to ensure ratepayers are not exposed to any significant risk? If not, should there be an obligation to develop such a plan? Is there any obligation for the trust to be wound up during the requested term of the franchise agreement?

APPENDIX B

Approved Issues List

EB-2012-0072

July 26, 2012

Natural Gas Resources Limited
EB-2012-0072
Approved Issues List

1. Is there any reason, based on the following factors, that the standard terms and conditions in the Model Franchise Agreement should not be used in this case?
 - (a) regulatory compliance by Natural Resources Gas Limited (NRG); and
 - (b) NRG's security deposit policy

2. What conditions of approval, if any, are to be attached to Board's order, if the Board approves the application?

3. If the Board approves the application, what is the appropriate term for the Board's order?

4. If the Board does not approve the application, what are the implications?

5. Who should bear the costs of this proceeding?