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Your reference
EB-2012-0072

Our reference
01012724-0013

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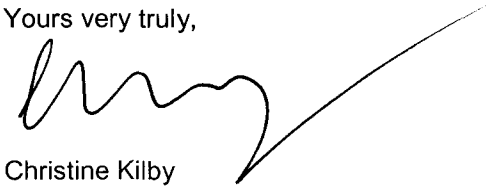
Dear Ms. Walli:

Natural Resource Gas Limited ("NRG")
Aylmer Franchise EB-2012-0072
Argument-in-Chief

We are counsel to NRG. Please find enclosed NRG's argument-in-chief pursuant to Procedural Order No. 5. An electronic copy has been filed with the Board via the RESS system and hard copies will be delivered by courier.

Yours very truly,



Christine Kilby

CK/rp

Enclosure

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All Intervenors

DOCSTOR: 2530386\1

EB-2012-0072

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
ARGUMENT-IN-CHIEF
October 5, 2012

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A. INTRODUCTION

1. In Procedural Order No. 4 dated July 26, 2012, the Board made a determination as to the scope of this franchise renewal proceeding, eliminating from consideration a number of issues proposed by the Town of Aylmer (the "Town" or "Aylmer") and IGPC Ethanol Inc. ("IGPC"). As a result, there are five issues for the Board to determine in connection with this proceeding:

   Issue 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 NRG; and
   (b) NRG's security deposit policy

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

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

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

   Issue 5: Who should bear the costs of this proceeding?

2. The first three issues are related, in that they relate to the form, term and conditions in a franchise agreement. Prior to addressing each of the five issues in this Argument-in-Chief, the very next section below sets out the statutory framework and jurisprudence governing the form, term and conditions in franchise agreements.

B. LAW RELATED TO MUNICIPAL FRANCHISES ACT

3. Section 10 of the *Municipal Franchises Act* (the "MFAct") governs situations in which a municipality and gas utility cannot reach agreement on the renewal of a franchise agreement.

> 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, **either the municipality or the party having the right** may apply to the Ontario Energy Board for an **order for a renewal** of or an extension of the term of the right.

> (2) The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and, if **public convenience and necessity** appear to require it, may make an order **renewing or extending the term** of the right for such period of time and **upon such terms and conditions as may be prescribed by the Board**, or if public convenience and necessity do not appear to require a renewal or extension of the term of the right, may make an order refusing a renewal or extension of the right. (emphasis added)

4. This Board has sole jurisdiction when it comes to determining: (a) whether or not to grant a franchise renewal; and (b) if a renewal is granted, the terms and conditions that it may establish in a franchise agreement.

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

5. The legal test that the Board is to apply in franchise renewal proceedings is whether the "public convenience and necessity" warrant a franchise renewal, and the applicable terms and conditions.

6. The MFAct does not offer any guidance as to the interpretation of, or criteria to guide the interpretation of, the "public convenience and necessity" test. However, the decision of the Supreme Court of Canada in *Baker v. Minister of Citizenship and Immigration* and that Court's earlier decision in *Re Athabasca Tribal Council* makes it clear that two key legal principles govern the exercise of administrative discretion such as the one entrusted to the Board in this case: (a) the exercise of a tribunal's discretion should be made **within the context of its governing statutes**; and (b) the exercise of a tribunal's discretion **should be consistent and governed by the purposes and interests which the statutes seek to protect.**

> *Baker v. Minister of Citizenship and Immigration* (1999), 174 D.L.R. (4th) 193, at pp. 224, 226, 229-230, and 232.
>
> *Re Athabasca Tribal Council and Amoco Canada* (1981), 124 D.L.R. (3d) 1 (S.C.C.).

7. A contextual approach to the MFAct and the *Ontario Energy Board Act, 1998* ("OEB Act") requires that the Board take into account the following factors when exercising its discretion to determine whether the public convenience and necessity requires a franchise renewal:

(a) the purpose of section 10 of the MFAct;

(b) the objectives of the Board vis-à-vis the gas industry in Ontario, as set out in section 2 of the OEB Act;

(c) previous OEB decisions under section 10 of the MFAct; and

(d) previous judicial decisions regarding section 10 of the MFAct.

(a) The Purpose of Section 10 of the *Municipal Franchises Act*

8. Section 10 was added to the MFAct in 1969. Prior to that time a municipality had a common law right to terminate a franchise upon the expiry of the franchise agreement. The provision was introduced in the legislature by The Honourable Darcy McKeough, Minister of Municipal Affairs. In answer to opposition questions regarding the provision, The Honourable Mr. McKeough indicated that section 10 was specifically intended to allow the Board to implement a renewal of a franchise where there is no agreement between the municipality and the utility, and to give the Board authority over the terms of the franchise being renewed.

Hansard, November 26, 1969, at p. 8936.

9. Thus, the purposes of section 10 of the MFAct are to:

(a) provide a mechanism for the resolution of a franchise dispute when the municipality and the utility cannot agree on a franchise renewal;

(b) ensure that the municipality's wishes are not paramount or determinative in the context of a franchise renewal; and,

(c) ensure that franchise renewal determinations are made in the broad public interest.

10. These purposes have been acknowledged and accepted by the Board and Courts in franchise renewal matters.

> *Kingston/Pittsburgh*, OEB Decision with Reasons, E.B.A. 825 (2000), paras. 4.0.2 to 4.0.5 (inclusive).
>
> *Union Gas* v. *Township of Dawn* (1977), 76 D.L.R. 613 at pp.621-622.

11. The importance of section 10's incorporation into the MFAct cannot be overlooked. The establishment of section 10 meant that franchise renewal and franchise terms and conditions were no longer to be decided based on the whims and wishes of an individual municipality, or the status of the municipality-utility relationship at any given point in time.

12. Instead, the Ontario legislature recognized that the Board should determine contested franchise issues based on a public interest test (i.e. the public convenience and necessity), grounded in the Board's statutory objectives.

(b) <u>The Objectives of the Ontario Energy Board</u>

13. Section 2 of the OEB Act sets out the objectives that are to guide the Board in carrying out its responsibilities in relation to gas. The objectives of relevance to this proceeding include:

(a) protecting the interests of consumers with respect to ... the reliability and quality of gas service (section 2(2), OEB Act);

(b) facilitating the rational expansion of ... [gas] distribution systems (section 2(3), OEB Act); and

(c) facilitating the maintenance of a financially viable gas industry for the ... distribution ... of gas (section 2(5.1), OEB Act).

14. These objectives are aimed at protecting the interests of both the gas utility and gas consumers in respect of the distribution of natural gas in Ontario.

(c) Previous Board Decisions under Section 10 of the *Municipal Franchises Act*

15. Contested franchise applications are not common. The most relevant recent contested franchise decision is the Board's Decision and Order in the Kingston/Pittsburgh case (E.B.A. 825).

16. The Kingston/Pittsburgh case set out the following basic criteria to guide Board decision-making on franchise renewal applications:

    (a) "public convenience and necessity" is broader than local, parochial interests and the Board is required to consider matters affecting provincial gas distribution as a whole and not just local interests;

    (b) the Board must balance the specific interests of all stakeholders, including ratepayers, the municipality and the utility shareholder, against the broader public interest; and

    (c) while the views of the municipality should be taken into account by the Board, they are not definitive of the issue of determining where public convenience and necessity lie.

    E.B.A. 825, Decision with Reasons, sections 4.0.2 to 4.0.5.

17. Thus, in its most recent comprehensive examination of a contested franchise renewal (and the "public convenience and necessity" test), the Board recognized that the views of the municipality are but one of a host of considerations that the Board must weigh, all against the backdrop of broader public interests in the natural gas sector.

(d) Previous Court Decisions under Section 10 of the *Municipal Franchises Act*

18. Court decisions under section 10 of the MFAct have focused primarily on the scope of the Board's jurisdiction.

19. The Divisional Court has held that the Board has the jurisdiction to impose the terms of the franchise in situations where the municipality and the utility cannot agree on the terms.

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

20. The Board's jurisdiction to impose the terms of a franchise arrangement contrary to a municipality's wishes demonstrates that a municipality's desire for a particular outcome may not correspond to the broader public interest.

Ontario Energy Board, Decisions in E.B.A. 304 at pp. 10 and 28; and E.B.A. 767,768, 769, 783 at pp. 15-16.

(e) Summary: The Public Interest

21. The "public convenience and necessity" test in section 10 of the MFAct is a public interest test, requiring the Board to balance the interests of all stakeholders in furtherance of the Board's statutory objectives.

22. In the *Township of Dawn* case, the Divisional Court held that the "public interest" is broader than the local, parochial interest:

> I have stressed these points to illustrate firstly how insignificant are the local problems of the Township of Dawn when viewed in the perspective of the need for energy to be supplied to those millions of residents of Ontario beyond the township borders, and to call to mind the potential not only for chaos but the total frustration of any plan to serve this need if by reason of powers vested in each and every municipality by the *Planning Act*, each municipality were able to enact by-laws controlling gas transmission lines to suit what might be conceived to be local wishes.
>
> ...
>
> These are all matters that are to be considered in light of the general public interest and not local or parochial interests. The words "in the public interest" which appear, for example, in s. 40(8), s. 41(3) and s. 43(3), which I have quoted, would seem to leave no room for doubt that it is the broad public interest that must be served.
>
> *Union Gas v. Township of Dawn* (1977), 76 D.L.R. 613 at 619 and 622.

C. ISSUE 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 NRG; AND (B) NRG'S SECURITY DEPOSIT POLICY

23. In 1986, the Board undertook a generic proceeding on franchise renewals, and created a standard-form Model Franchise Agreement that balanced the above considerations in the public interest. In other words, the standard form Model Franchise Agreement reflects what the Board considers to be "in the public interest" when it comes to the term and conditions of a franchise arrangement between municipalities and gas utilities.

24. The first issue in this proceeding, then, is framed appropriately, and essentially asks what factors exist that would warrant a departure from the normal franchise term and standard franchise agreement conditions – specifically with reference to NRG's regulatory compliance record or its security deposit policy.

25. As noted in the evidence, NRG is fully compliant with all regulatory requirements.

> Letter from Daria Babaie to Jack Howley dated March 29, 2011, Exhibit A, Tab 4 of NRG's Pre-Filed Evidence.
>
> NRG Response to Board Staff Interrogatory #2 dated August 23, 2012.

26. In addition, NRG made all of the changes to its security deposit policy that were ordered by the Board in its previous franchise renewal proceeding with Aylmer. NRG is not aware of any complaints about its security deposit policy.

27. NRG is not aware of any complaints about the quality or reliability of NRG's service, and indeed even at the last franchise proceeding with the Town, IGPC's General Manager testified that quality and reliability of service has never been an issue, and there have been no complaints in this proceeding about the quality and reliability of service. The fact is that NRG's system is (on balance) newer than Union Gas Limited's and Enbridge Gas Distribution Inc.'s systems, having been built primarily in the last twenty years.

28. There is no evidence on the record in this proceeding that suggests NRG's regulatory compliance record or its security deposit policy is deficient in any way, let alone deficient to a point that warrants a departure from the standard terms and conditions in the Model Franchise Agreement.

29. On this point of regulatory compliance, NRG further argues that perfect regulatory compliance cannot be the litmus test for departing from the Model Franchise Agreement. That would be unfair and unrealistic. The regulatory burden on regulated utilities (especially smaller ones) is high, and despite the best efforts of management, some minor transgressions from regulatory requirements may happen from time to time. In these situations, the Board has a variety of compliance tools at its disposal. Only chronic or material regulatory non-compliance should warrant a unique franchise term or conditions (or in the case of electricity distributors, unique licence conditions). For example, many electricity distributors miss the deadline for filing their rate applications (including, we note, Erie Thames Powerlines, which is partially owned by the Town), yet it would be unthinkable to suggest that that be the basis for the repeal of a distribution licence, or for the implementation of special conditions in a distribution licence.

30. With respect to financial viability, NRG is on sound financial footing. As noted in the response to IGPC's interrogatory #3(f), the only material financial risk to NRG may be the financial viability of its largest customer, IGPC.

31. IGPC relies on government-funded operating grants in order to maintain operations of its ethanol plant. As set out in the May 9, 2012 letter attached to NRG's responses to IGPC's interrogatories, based on its financial statements, IGPC's ethanol plant may not be able to operate but for these grants. The grants are due to expire in 2016, however, budgetary constraints and political uncertainty could intervene to cause the grants to be modified in advance of 2016.

32. If the ethanol plant ceases to operate for any reason, the decommissioning of the natural gas pipeline serving the ethanol plant will ultimately be required. NRG has not succeeded in securing financial provision for such an event, and as such, is at risk to the extent that IGPC's operations are in a precarious position. The risks to the ethanol plant's continued operation are also insufficiently protected by the security deposit IGPC has paid to NRG.

ISSUE 2: WHAT CONDITIONS OF APPROVAL, IF ANY, ARE TO BE ATTACHED TO THE BOARD'S ORDER, IF THE BOARD APPROVES THE APPLICATION?

33. The only unique condition set out in NRG's proposed franchise agreement is the requirement on NRG to complete and file a new cost allocation study for the Board's

consideration by no later than NRG's second cost-of-service rate proceeding from the day following the date of the franchise agreement.

34. NRG is prepared to conduct this cost allocation study in part to address the Town's concerns, and in part to update its previous cost allocation studies.

ISSUE 3: IF THE BOARD APPROVES THE APPLICATION, WHAT IS THE APPROPRIATE TERM FOR THE BOARD'S ORDER?

35. In the Board's 1986 review proceeding on franchise renewals, the Board recommended that first-time franchise agreements should be of a duration of up to 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.

> Ontario Energy Board, Decision in *Review of Franchise Agreements*, E.B.O. 125 (1986).

36. Since the Board's findings in E.B.O. 125, however, we understand that 20 year franchise renewals have become the norm. NRG has requested 20 years because the risk to NRG has not decreased over the initial term of the franchise agreement with the Town. 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.

37. NRG's system is new, and since 1979, NRG has grown its customer base from 2,000 customers to nearly 7,500 customers.

38. During the 15 year period from 1991 to 2005, the gross assets of NRG nearly tripled as a result of capital investment in NRG's franchise areas. As noted above, this makes NRG unique among gas distributors in Ontario. The fact is that NRG did not start with an extensive system that merely depreciated over the term of the franchise agreement. Rather, NRG has spent the past 20 years or so improving and developing what was essentially a gathering system for local production into a true gas distribution utility.

39. As a result of its rapid expansion and increased capital asset base, NRG submits that a standard renewal term of 20 years is warranted in this case.

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

41. 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.

42. Moreover, a second abnormally short renewal term (particularly in light of NRG's excellent regulatory record) would be difficult to explain to NRG's lenders, and would require NRG to examine amortizing its remaining asset base over the shortened period.

43. There is, simply put, no public interest in a shorter-than-normal franchise renewal period.

(a) Financial Risk of a Short Renewal Term

44. In the past, the Board has recognized that the length of a franchise term is of critical importance to a utility's ability to finance.

> Ontario Energy Board, Decision in *Northern and Central Gas Corporation Limited*, E.B.A. 194 (December 3, 1976).

45. Given that the Town is the main urban centre in NRG's franchise area, an abnormally short renewal period would not be viewed favourably by any potential lenders to NRG.

(b) NRG Would Have to Amortize its Assets Over a Much Shorter Term

46. As noted above, if the NRG franchise with the Town were renewed for an unusually short period of time (e.g., three years), NRG would have to examine the need to amortize its assets (at least those in the Town) over that period of time in its next rate application.

47. The rationale for this is straightforward. If the Board were to establish another abnormally short renewal period for NRG's franchise with the Town, it would likely be viewed by NRG's existing financing institution and other potential lenders as a truly unprecedented step, and would clearly send the signal that any further renewal was clearly at risk. Consequently, NRG would have to treat an unusually short renewal period as a *de facto* final franchise term and file a rate application on that basis.

48. Such an outcome is not in the interests of NRG's gas customers (both within and outside the Town).

(c) No Incentive to Add Capital Assets

49. As noted above, if NRG were granted a short renewal for a second time, it would have no incentive to add to, or improve, its capital assets.

50. This incentive runs contrary to the Board's statutory objective to facilitate the rational expansion of the gas distribution system in Ontario.

F. ISSUE 4: IF THE BOARD DOES NOT APPROVE THE APPLICATION, WHAT ARE THE IMPLICATIONS?

51. Although section 10 of the MFAct provides the Board with exclusive jurisdiction to determine who is entitled to *operate* a gas system, it does not provide the Board with any jurisdiction to determine who is entitled to *ownership* of the gas system. Moreover, in its decision in *Re Centra and City of Kingston*, the Board noted that while it can terminate a franchise under section 10, it does not have the power to transfer the operation of the assets to a third party. The Board, which regarded such a transfer as being akin to an expropriation, held that its governing legislation did not provide the Board with the clear or unambiguous power that it would require in order to approve such an expropriation.

> *Sudbury (City) v. Union Gas Ltd.* (2000), 47 O.R. (3d) 654 (S.C.J.) at p. 664, leave to appeal to S.C.C. refused 163 O.A.C. 396n (as cited in D.M. Brown, *Energy Regulation in Ontario*, Canada Law Book at section 4:90:30).
>
> *Re Centra and City of Kingston*, E.B.A. 825, June 22, 2000, para. 4.0.11.

52. Also relevant to this application is section 8 of the MFAct, which provides that no person shall construct any works to supply natural gas or gas in any municipality in which that person was not supplying gas on April 1, 1933, without the approval of the Board, which approval shall not be given unless "public convenience and necessity" appear to require that such approval be given. Approval under section 8 to construct works to supply natural gas shall be given by the Board in the form of a certificate of public convenience and necessity. A distributor may apply for such a certificate under subsection 8 of the

MFAct and, after providing appropriate notice and holding a public hearing, the Board may grant or refuse to grant the certificate. The requirement for a certificate of public convenience and necessity, which authorizes the construction of works to supply gas in a municipality, is in addition to the requirement to obtain or maintain franchise rights from the municipality.

Municipal Franchises Act, ss. 8(2), 8(3).

53. Two main rights are provided to gas utilities in Part II of the typical franchise agreement (i.e., based on the Model Franchise Agreement): (a) the ability to distribute, store and transmit gas in a municipality; and (b) the ability to enter upon highways in the municipality to lay, construct, maintain, replace, remove, operate and repair the distributor's gas system.

54. As a result, if there is no franchise renewal in the Town, then NRG has no right to provide gas service in the Town, and no right to carry out the physical work necessary to the provision of gas service. Gas customers would not receive service until a new gas distribution system was built by an entity with a franchise arrangement with the Town.

(a) Aligning Franchise Renewals

55. The Town has maintained its desire to align the renewal dates of franchise agreements for various municipalities within NRG's service area. The alignment of various municipalities' franchise agreements is not an appropriate matter for consideration in this proceeding because:

(a) under the MFAct, the Board has no jurisdiction over other franchise agreements until they are brought forward by NRG or the relevant municipality within one year of their expiry (see bolded text in subsection 10(1), MFAct at para. 3 of this Argument-in-Chief). If in the future, another municipality seeks to align its franchise agreement end date with the end date applicable to the Town's franchise agreement, it is free to propose such an alignment in the context of its renewal proceeding. Until then, the Board cannot interfere with those franchise agreements; and

(b) this application is simply about the Town's franchise agreement with NRG. If the broader public interest stood to be served by the alignment of the renewal dates

for a variety of municipalities' franchise agreements, it is reasonable to assume that the municipalities in question would have taken steps to seek or arrange such alignment prior to the filing of this application, and if not, that those municipalities would join with the Town in seeking such relief, as intervenors in this proceeding. Neither action has been taken.

56. Accordingly, the only entity that appears to be concerned about the alignment of franchise agreements at this time is the Town, and it has failed to take the necessary steps to make that issue relevant in this proceeding.

G. COSTS

(a) Determination of who should bear costs of this proceeding

57. The determination of who should bear the costs of this proceeding is interrelated with its origins. This franchise application is not like most Board proceedings related to utility rates and services. Subsection 10(1) of the MFAct grants either party to a franchise agreement the right to bring an application within a year of franchise expiry. Such a step may be taken where, as in this case, negotiations for a renewal are unsuccessful. Accordingly, either the Town or NRG could have been the applicant in this proceeding; NRG simply took the initiative to bring the application in order to protect the continuity of its service.

58. Ultimately, the outcome of this proceeding will affect the interests and rights of NRG and the Town. Therefore, this proceeding, unlike other applications made to the Board, is more in the nature of a civil dispute between two parties. Similarly, this proceeding is unlike most applications before the Board because the Board's authority to resolve the matter is granted by the MFAct and not the OEB Act. Accordingly, the costs of this application should be awarded in line with civil litigation principles—the successful party should be entitled to its costs.

59. In any event, section 3.07 of the Board's *Practice Directions on Costs* provides that an applicant can be eligible to recover its costs in "special circumstances." This contested application arose because the Town has steadfastly rejected, without credible basis, standard terms for the renewal of a franchise agreement, thereby jeopardizing the natural gas supply by NRG to its residents. The Town has maintained its position

throughout this proceeding, causing NRG to incur further unwarranted costs in order to secure a renewal of the franchise agreement. IGPC similarly has prolonged this proceeding by focusing on extraneous and out of scope issues that have no bearing on the renewal of the Town's franchise. Accordingly, NRG should be entitled to receive its costs of this proceeding and should not be ordered to pay the costs of any intervener in this proceeding.

> Ontario Energy Board, *Practice Direction on Costs* (Revised March 19, 2012), s. 3.07.

(b) <u>The Town's Conduct Prolonged this Process</u>

60. The Town's refusal to agree to a renewal of the franchise agreement, and its immovable position on issues that are ultimately irrelevant to the renewal, caused NRG to incur unnecessary expenses.

61. Beginning in August 2011, only six months before the expiry of the existing franchise agreement, the Town's counsel wrote to NRG's counsel indicating that the Town was prepared to support a mere 10 year renewal, and only if the following conditions were met:

(a) the Town aligns its franchise agreement renewal date with those of surrounding municipalities;

(b) NRG removes the retractable feature of its common shares in order to protect security deposits made by Town residents;

(c) NRG commits to conduct a new cost allocation study; and

(d) NRG separates its utility from its non-utility business.

> NRG's Pre-filed Evidence, Exhibit A, Tab 3.

62. NRG sent a detailed point-by-point response to each of the issues raised by the Town in a letter dated October 17, 2011. NRG carefully explained why the Town's conditions were either inappropriate for a franchise renewal application and/or harmful to ratepayers. NRG also indicated its view that there is no reason to depart from the standard 20-year franchise term in this case. The Town did not respond to NRG until

December 21, 2011, when it baldly rejected NRG's proposed franchise agreement (which was based on the Board's Model Franchise Agreement). The Town stated that it was not swayed by NRG's response and asked NRG to reconsider the conditions proposed by the Town.

NRG's Pre-filed Evidence, Exhibit A, Tab 3.

63. On January 5, 2012, NRG again wrote to the Town and reiterated the reasons why the Town's conditions could not, and in some cases, should not, be met. NRG stated:

> ...we are disappointed at having provided an extensive response to try to explain some of the issues the Town raised, only to have the Town simply reassert its position. From our perspective, the Town appears to have spent no time considering in any thoughtful way our explanation of the issues. In order to have a meaningful dialogue, we would ask that you explain why such conditions are requested (in light of our reply of October 17, 2011 and the OEB's past and current positions on these issues.) As you may know, the Town's current position on this matter will result in serious cost to the Towns' [sic] tax payers and NRGs' [sic] customers. (emphasis added)
>
> January 5, 2012 letter from NRG to Town, p. 2; NRG's Pre-filed Evidence, Exhibit A, Tab 3.

64. Over one month later, and less than three weeks before the expiry of the existing franchise term, the Town responded to NRG maintaining its disagreement on the issues. The Town's letter revealed that it had not yet taken steps to align the renewal dates of the various municipalities' franchise agreements. As a result of this deadlock, NRG was forced to commence this application and seek an interim extension of the Aylmer franchise term to ensure the uninterrupted supply of natural gas to the Town's residents.

> February 7, 2012 letter from Town to NRG; NRG's Pre-filed Evidence, Exhibit A, Tab 3.

65. During the application, the Town has maintained its arguments against a 20 year renewal term, repeating them in its proposed issues list as follows:

(a) The alignment of renewal dates for surrounding municipalities;

(b) NRG conducting a cost allocation study;

(c) NRG's retractable shares; and

(d) The separation of NRG's utility and non-utility businesses.

Town Proposed Issues 3, 5(a), 5(b), and 5(c).

66. NRG was forced to file a response to the Town's proposed issues reiterating its position as to why these issues were inappropriate for this proceeding. In its Procedural Order No. 4, the Board decided that issues relating to a cost allocation study, NRG's retractable shares, and the separation of NRG's utility and non-utility businesses were beyond the scope of a franchise agreement proceeding. Indeed, the Board held that those issues had either been reviewed and decided by the Board in recent proceedings or were best addressed in the context of a rate proceeding. This had been NRG's argument to the Town all along.

> Ontario Energy Board, Decision on Issues List and Procedural Order No. 4 dated July 26, 2012, p. 3.

67. Notwithstanding the Board's decision, the Town proceeded to file interrogatories related to the very issues that were determined to be outside the scope of this proceeding.[1] IGPC filed similarly irrelevant interrogatories which ignored the Board's decision on the issues list.[2] Once again, NRG spent time reviewing and responding to these clearly irrelevant interrogatories in an effort to further clarify its position on the key question to be decided—is there any reason to depart from the standard Model Franchise Agreement and 20 year renewal term in this case?

(c) NRG is Entitled to Costs

68. NRG was forced to bring this application and incur expenses beyond what would normally arise in a franchise renewal because of the Town's staunch rejection of NRG's explanations as to why its issues were not pertinent to this proceeding. NRG's goal is to run its business as efficiently as possible in order to keep costs, which are ultimately borne by the ratepayers, to a minimum. Franchise renewals are a routine part of NRG's business and (with the exception of the Town in recent years) generally proceed in a straightforward manner.

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[1] See, for example, Town interrogatories 1, 2, 3 and 4.

[2] See, for example, IGPC interrogatories 2 and 4.

69. A municipality such as the Town ought to be aligned in interest with NRG in respect of minimizing costs to its residents, the ratepayers. In this case, however, the Town and IGPC have acted in an irresponsible manner by driving up costs for all parties. Irrespective of whether the Town, NRG, or IGPC bears the costs of this proceeding, the ultimately responsible party is the same: Ontario taxpayers in southwestern Ontario whose taxes support some of the government grants received by IGPC, including ratepayers residing in the Town. Accordingly, the Town and IGPC have acted in a manner that is contrary to the interests of ratepayers by raising issues and filing interrogatories that (a) are not relevant to this proceeding, (b) have lengthened the proceeding unnecessarily, and (c) do not raise matters within the scope of the issues list in this proceeding for the Board's consideration, such as evidence of issues with NRG's service. The Town and IGPC, by ignoring or misinterpreting the Board's approved issues list, caused NRG to expend resources in responding to irrelevant and out-of-scope interrogatories; resources which would be better spent running NRG's business.

70. NRG should not have to bear the costs of this proceeding, and in any event, should not be forced to pay the costs of either intervener to this proceeding in light of their conduct, which tended to lengthen unnecessarily the duration of the process.

All of which is respectfully submitted this 5th day of October, 2012

NATURAL RESOURCE GAS LIMITED

By its Counsel, Norton Rose Canada LLP
Per: Richard J. King

Per: Christine Kilby