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October 26, 2012

BY COURIER, EMAIL AND RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, Suite 2700
Toronto ON M4P 1E4

Dear Ms. Walli:

**Re: Natural Resource Gas Limited Franchise Renewal
EB-2012-0072
Submissions of Integrated Grain Processors Co-operative Inc.**

Pursuant to Procedural Order No. 5 dated September 17, 2012 and the Board's letter dated October 18, 2012, we enclose two (2) hard copies of the Submissions of Integrated Grain Processors Co-operative Inc. in respect of the above-noted proceeding.

Yours truly,

AIRD & BERLIS LLP

Original signed by,

Scott A. Stoll

SAS:ct
Enclosures

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ONTARIO ENERGY BOARD

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.

SUBMISSIONS OF INTEGRATED GRAIN PROCESSORS COOPERATIVE INC. ("IGPC")

PART I. INTRODUCTION

1. Pursuant to Procedural Order No. 5¹, these are the submissions of IGPC in respect of the Natural Resource Gas Limited. ("**NRG**") request for renewal of the franchise for the supply and distribution of natural gas in the Town of Aylmer. IGPC is the largest customer of NRG accounting for approximately \$1,492,305 or 26.7% of NRG's revenue requirement.² IGPC's primary concern is the duration of any renewal of the franchise.
2. On October 11, 2012 IGPC filed an application with the Ontario Energy Board (the "**Board**") seeking inter alia, an order preventing NRG from continuing to abuse its monopolistic powers and requiring it to provide gas distribution services to IGPC. The Board has assigned the application docket No. EB-2012-0406.
3. Given the documented difficulties IGPC has had in dealing with NRG, the problems identified by Ag-Energy Co-operative Inc. ("**Ag-Energy**")³ and the views of the Town of Aylmer and other municipalities regarding NRG, IGPC opposes the renewal of the NRG franchise for a 20 year term as requested. IGPC submits that serious concerns about NRG's service quality and reliability exist which do not support the requested relief. In addition, NRG

¹ Board Procedural Order No. 5 dated September 17, 2012 and Board letter of October 18, 2012

² EB-2012-0342, Table B1.3, revenue from IGPC as percentage of total revenue

³ AG-Energy letter of comment, September 10, 2012 to Honourable Chris Bentley, Minister of Energy

has made assertions in respect of IGPC which lead to the conclusion that NRG is not currently well managed and/or will not be in a position to provide distribution services in future in the event that IGPC discontinues operations.

4. IGPC proposes that the Board continue with the existing interim order⁴ regarding the extension of the franchise and that it forego making a final disposition in this proceeding until:
 - (i) the Board has rendered a decision in EB-2012-0406, and
 - (ii) those franchise agreements for NRG that are the subject to live applications are deferred to a combined future proceeding at which time all of NRG's franchises can be considered contemporaneously.
5. The effect of this is that the Board would then have the ability to consider all of the appropriate facts and evidence and interconnection between the various franchises in one proceeding. As a matter of regulatory efficiency alone, this would be in the public interest. NRG's several franchisors should not be put to the time and expense of having to repeatedly respond to the franchise renewal applications of other franchisors where NRG questions the relevance of its conduct and service quality in other franchise territories. Ultimately, NRG's continuance as a gas distributor should be viewed in light of its conduct throughout all of its relatively small and contiguous areas.
6. In this submission, IGPC will address NRG's unique factual situation, and the appropriate factors which the Board should consider in respect of a franchise renewal application. IGPC will also address the unsubstantiated claims made by NRG.
7. In summary, IGPC submits that NRG's conduct demonstrates that NRG does not respect the authority of its regulator, the regulatory compact or the legitimate interests of its ratepayers. As such, it is not in the public interest to grant the renewal as requested by NRG.

PART II. BACKGROUND AND PROCEEDING

8. NRG is in a unique position in that all of its franchises have expiry dates within a short period of a few years. To the best of IGPC's knowledge, the table below shows the expiry date of all of the franchise agreements (excluding the Town of Aylmer) with NRG, the latest of which expires in 2016. IGPC requested this information from NRG but NRG refused to provide the information. As such, the Board may have more accurate information.

⁴ Interim Order, EB-2012-0072, dated February 27, 2012

<u>Municipality</u>	<u>Expiry</u>
Township of Malahide	<ul style="list-style-type: none"> • May 5, 2012 (South Dorchester) • October 2, 2014 (Springfield) • December 15, 2014 (Malahide)
Bayham	<ul style="list-style-type: none"> • May 5, 2012 (Port Burwell) • November 22, 2012 (Bayham) • May 9, 2015 (Vienna)
Thames	<ul style="list-style-type: none"> • November 16, 2012 (North Dorchester)
The Corporation of the Township of South-West Oxford	<ul style="list-style-type: none"> • 2013
Corporation of the Municipality of Central Elgin	<ul style="list-style-type: none"> • 2016

9. The necessity for this proceeding results from the inability of NRG and the Town of Aylmer to come to agreement on the renewal of the franchise. The franchise was last extended in 2009, pursuant to an Order of the Board which granted a 3-year franchise period in Board Proceeding EB-2008-0413.
10. Displeased with the 3-year extension, NRG appealed to the Divisional Court. The Divisional Court upheld the Board's Decision indicating that NRG had no basis or foundation for the appeal. As such, the Court ordered NRG to pay costs to IGPC.⁵ To date, NRG has not paid the Court-ordered costs to IGPC.
11. NRG is owned by the Wilsher Trust, and Mr. Anthony Graat. This is unique in the utility industry in Ontario. As such, this unique ownership structure places it in a potentially precarious position. In such a situation, a viable succession plan would be appropriate when seeking a 20 year renewal. No succession plan was provided and NRG refused to respond to interrogatories that would provide relevant information in this regard.⁶
12. In EB-2010-0018, Phase II, the Board learned that NRG's sole supply of local natural gas was from NRG Corp., an entity related to NRG. This was the subject of significant debate and controversy between Board Staff, VECC⁷ and NRG given the premium that NRG Corp. was charging NRG relative to market commodity costs. In the end, the Board permitted NRG to pay a smaller premium for the price of natural gas to its related company rather than spend significant sums to build infrastructure. By virtue of the

⁵ *Natural Resource Gas Limited v. Ontario Energy Board*, Oral Reasons for Decision (Div. Ct.) June 14, 2012.

⁶ For example, see NRG IRR to IGPC IR#2(a) and (b), Ex. 1/T4/S1 (EB-2010-0018, Phase I).

⁷ Vulnerable Energy Consumer Coalition.

physical limitations of its distribution system, NRG was able to extract above-market prices for the sale of its own supply of natural gas – the best example and the very definition of ‘market power’. IGPC submits that this is evidence of NRG’s failure to balance its interest with that of its ratepayers as required by law, as noted by the Court of Appeal in *Toronto Hydro Electric System Limited v. Ontario Energy Board*⁸, at paragraph 50:

“The principles that govern a regulated utility that operates as a monopoly differ from those that apply to private sector companies, which operate in a competitive market. The directors and officers of unregulated companies have a fiduciary obligation to act in the best interests of the company (which is often interpreted to mean in the best interests of the shareholders) while a regulated utility must operate in a manner that balances the interests of the utility’s shareholders against those of its ratepayers. If a utility fails to operate in this way, it is incumbent on the OEB to intervene in order to strike this balance and protect the interests of the ratepayers.”

13. More than four years after the commissioning of the IGPC Pipeline, and more than two years after the required submission date provided in EB-2006-0243, NRG finally submitted a Post Construction Report (the “PCR”). Despite being required to file “Actual Costs”, NRG included contingency costs which it admitted it did not incur in its filing. This would appear to be a deliberate attempt to inflate the NRG rate base.
14. On October 2, 2012, Ag-Energy, a gas marketer, filed a letter with the Board which included a copy of a letter to the Minister of Energy regarding the struggles faced by customers of NRG and seeking the intervention of the Board of appropriate regulatory and governmental authorities to improve the poor quality of service. Ag-Energy stated that it has had a prolonged problem with NRG and that NRG’s behaviour has created a “costly and unfriendly business environment for all” without any real prospect of a change in behaviour. These serious concerns raise issues about NRG’s commitment to service quality.
15. On October 11, 2012, IGPC filed an application seeking the assistance of the Board in respect of IGPC’s request for additional gas distribution services and gas sales from NRG. NRG refused to meet with IGPC or to consider the request unless IGPC resolved all outstanding issues. As the Board is aware, the outstanding issues include:
 - (i) the reconciliation of the cost of the IGPC Pipeline (NRG owes IGPC a refund;
 - (ii) the amount of financial security provided (the security should be reduced); and

⁸ *Toronto Hydro Electric System Limited v. Ontario Energy Board* (2010) ONCA 284 (CanLII), at para. 50.

- (iii) a \$20 million defamation claim NRG initiated against IGPC.
16. Notwithstanding NRG's refusal to meet and consider IGPC's request, NRG invoiced IGPC, for costs incurred to refuse to provide service. The costs include charges at extraordinary hourly rates of \$750 and \$500 for what appear to be NRG employees.

PART III. BACKGROUND TO FRANCHISE RENEWALS

17. Under the regulatory regime, the franchise provides a rate regulated natural gas distributor the requisite authority to place its infrastructure in the public right-of-ways of the municipality and to carry on its business. In essence, the franchise is the foundation upon which the utility relies to provide its product to the residents of the municipality.
18. The Board has very broad powers to regulate the storage, distribution and transmission of natural gas in Ontario and the power to approve the renewal of a franchise agreement with or without terms and conditions.
19. The OEB is provided the necessary jurisdiction and power to renew or extend a franchise agreement by the *Municipal Franchises Act*, R.S.O. 1990, c. M-55 (the "**MFA**").

10(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 and order refusing a renewal or extension of the right.

(5) An order of the Board heretofore or hereafter made under subsection (2) renewing or extending the term of the right or an order of the Board under subsection (4) shall be deemed to be a valid by-law of the municipality concerned assented to by the municipal electors for the purposes of this Act and of section 58 of the Public Utilities Act.

20. The purposes of section 10 of the MFA are to:
- (a) provide a mechanism for the resolution of a franchise dispute when the municipality and the utility are unable to reach agreement;
 - (b) ensure that local or parochial interests of the municipality are not determinative of when a franchise should be renewed; and
 - (c) ensure that the franchise renewal determination is made in the broad public interest."
21. These purposes have been accepted by the Board and Courts.

Kingston/Pittsburgh, OEB Decision with Reasons, E.B.A. 825 (2000), para. 4.0.2 to 4.0.5).

Union Gas v. Township of Dawn (1977), 76 D.L.R. 613 at pp. 621-622.

22. The test for determining if a franchise should be renewed or extended is the “public convenience and necessity test”.
23. IGPC submits that the MFA effectively requires the OEB to apply a two-stage analysis:
 - (a) Firstly, does “public convenience and necessity” require that a franchise agreement be renewed or extended?
 - (b) Secondly, where the public convenience and necessity warrant an extension, what are the appropriate terms and conditions that should be included in the franchise agreement? In determining the appropriate terms and conditions, it is submitted that the Board has very broad authority to impose terms and conditions which it determines are consistent with the public interest and the purposes of the statute.
24. Neither the MFA nor the OEB Act provides express guidance about the interpretation of “public convenience and necessity”. Therefore, the OEB must apply the test in furtherance of the purpose of the legislation. In considering the test, the public interest includes the statutory objectives of the Board set out in Section 2 of the OEB Act, which states:

“The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

 1. To facilitate competition in the sale of gas to users.
 2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
 3. To facilitate rational expansion of transmission and distribution systems.
 4. To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.
 5. To promote communication within the gas industry and the education of consumers.”
25. The OEB’s consideration of a franchise occurs only during the initial award of the franchise and at the time of renewal. As such, the Board should not only consider past conduct and events but also future events which may occur during the renewal period.

26. NRG is the applicant in this matter and it therefore bears the onus of adducing sufficient and credible evidence which supports the relief sought. Inconsistent with this, the application to a large measure consists of unsupported and unsubstantiated statements. Rather than address the issues of service quality and reliability that have been raised and set out a viable plan for the future, NRG has to a large extent ignored these matters.

PART IV. SUBMISSIONS.

27. NRG's position that there are no service quality or service reliability concerns is incorrect. The record in EB-2008-0413 confirms the Board accepted there were historical issues regarding service quality.⁹

Service Quality

28. IGPC asserts there are serious concerns regarding the service quality provided by NRG including:
- (a) the denial of service to IGPC; and
 - (b) the lack of service quality described by Ag-Energy Co-operative Inc.
29. The historical issues of NRG's conduct towards IGPC is well documented, including NRG's refusal to sign certain agreements¹⁰, the imposition of the administrative penalty for failing to comply with an order of the Board¹¹, the unsupported demand for \$32,000,000 for constructing a \$8,000,000 pipeline.¹² In addition, without IGPC's authorization, NRG nominated approximately \$1,000,000 of natural gas on IGPC's behalf resulting in a cost to IGPC approximately of \$100,000.
30. In addition, Union Gas Ltd. had problems dealing with NRG which necessitated an application to discontinue service.¹³
31. IGPC and other market participants had hoped that NRG would have "taken the message" from these prior proceedings and decisions to build more constructive relationships with the municipalities, service providers and ratepayers. However, recent conduct of NRG indicates that nothing has changed.
32. For example, IGPC requested that NRG confirm that it would permit IGPC to replace the letter of credit in the amount of \$5,214,173.00 to the current value of the undepreciated value of the IGPC Pipeline, which is

⁹ EB-2008-0413, Decision and Order, May 5, 2009.

¹⁰ EB-2006-0243, Decision and Order, dated June 29, 2007.

¹¹ EB-2006-0243, Order (Administrative Penalty) dated June 29, 2007.

¹² EB-2006-0243, Board Motion to Review and Vary, February and March 2008.

¹³ EB-2008-0273.

approximately \$3,978,949.¹⁴ IGPC based the requested value on information provided by NRG in EB-2010-0018 and sought confirmation of the new amount and NRG's agreement for the replacement of the letter of credit.

33. In response, NRG provided a letter dated May 9, 2012 in which it refused to confirm the amount of the undepreciated value and NRG threatened to bring an application to the OEB for additional security. The provision of financial assurance which exceeds the Board-approved amount has cost IGPC in excess of \$150,000.
34. Subsequent to this refusal, IGPC wrote to NRG to request additional service for expansion purposes. NRG's response, being a letter authored by its President, Mr. Graat, states that:

"NRG cannot enter into any discussions regarding possible new business or changes to existing business arrangements until major disagreements have been resolved"¹⁵ (emphasis added).

35. In other words, IGPC will not be permitted to discuss its expansion plans nor will NRG entertain any discussions regarding additional gas distribution services or gas sales until IGPC abdicates in respect of the three issues identified in paragraph 15 above.
36. Not only does the letter indicate that NRG will not meet and provide services contrary to ss. 42(2) of the OEB Act, it issued two invoices for unspecified costs in a situation where it has refused to do anything. Simply stated, NRG is abusing its monopoly position by using its denial to provide gas distribution services to pressure IGPC into "caving in" on its valid requests. A utility should be working with, not threatening and bullying its customers as NRG has done.
37. In response to IGPC IR#1(c), NRG stated it had not refused service. This statement is completely at odds with what NRG's has stated.
38. Finally, as noted earlier, Ag-Energy has expressed long-standing service quality concerns.

Service Reliability

39. Another of the Board's considerations in a franchise renewal is service reliability. NRG has acknowledged this fact.
40. NRG believes that this issue is limited to a review of whether NRG has historically been able to provide natural gas to its customers without undue interruption. This is a very narrow consideration of service reliability. It

¹⁴ IGPC letter dated March 14, 2012 to NRG (with attachment), and NRG email response dated March 23, 2012.

¹⁵ NRG letter dated July 9, 2012 to IGPC.

ignores the forward nature of a franchise renewal - in this situation – potentially a 20-year horizon.

41. IGPC is of the view that the concept of service reliability is much broader than a historical review of delivering natural gas but must consider whether there are known significant threats to the utility be it governance, financial distress or availability of resources for continued delivery of natural gas.
42. In this respect there are 3 significant issues:
 - (a) NRG's ownership raises issues regarding the long-term governance and control of the utility;
 - (b) NRG has alleged it has a material risk as a result of IGPC; and
 - (c) Local supply.

i) Long-term Governance and Control

43. IGPC notes that NRG refused to provide answers to certain interrogatories, especially, where the subject matter dealt with the long-term control and ownership of the utility.¹⁶
44. The NRG ownership structure is unique. This appropriately raises unique issues about the control and management of NRG into the future. Unlike publicly owned or large utilities which are part of a larger corporate undertaking, NRG is controlled by Wilsher Trust and potentially the beneficiaries.
45. Unfortunately, as a result of NRG refusing to respond to appropriate questions about its ownership structure, IGPC and other parties in this proceeding are making submissions in a vacuum as NRG has refused to provide information regarding the Wilsher Trust. This refusal to reveal the particulars of the trust structure is a further reason to question and deny the relief sought by NRG in its proceeding.
46. A trust is administered by the Trustees and the beneficiaries of the trust have certain rights related to the trust.
47. In certain circumstances the beneficiaries of a trust may act to collapse a trust and wrest control of the assets from the Trustees. Professor Waters, the leading authority on trusts, in his book *Waters' Law of Trusts in Canada*, 3rd edition states:

“The broader statement of the rule is this: if there is only one beneficiary, or if there are several (whether entitled concurrently or successively), and they are all of one mind, and he or they are not under any disability, the specific performance of the trust may be

¹⁶ IGPC IR# 2(a), (b), (d) and IR# 3(a), (b).

arrested, and the trust modified or extinguished by him or them without reference to the wishes of the settlor or the trustees ... There are two keys to a *Saunders v. Vautier* termination of a trust: first, that the beneficiary, or all the beneficiaries, when there is more than one, are fully capacitated, in the sense of being adult and of sound mind; second, that the person or persons seeking to terminate do indeed represent the full beneficial interest, actual and possible, in the trust property.”

48. *The OEB Act*, Section 42, restricts changes in ownership and control without approval of the Board. The fact that NRG has refused to respond to relevant questions about its ownership structure and succession plans raises questions about NRG’s observance of this requirement.
49. There are real questions about the potential control and governance of the Wilsher Trust and thereby the control and governance of NRG. Further, IGPC is of the view that it is a legitimate concern for a municipality being asked to enter into a long-term franchise agreement and for the Board to understand these ownership issues and the potential impact it may have for ratepayers in the future.

ii) Financial Viability

50. NRG has stated that it faces a material risk to its financial viability¹⁷ as a result of the IGPC Pipeline and IGPC. This makes absolutely no sense for the following reasons:
- (a) IGPC makes its own direct commodity purchases. NRG is at no risk in respect of the commodity.
 - (b) IGPC has provided a letter of credit in the amount of \$5,214,173.00 which NRG has refused to permit to be reduced despite this requirement being included in the Pipeline Cost Recovery Agreement that was reviewed and approved by the Board when it granted NRG leave to construct the IGPC Pipeline. The undepreciated cost of the IGPC Pipeline is \$3,978,949. The fact is that NRG has security well in excess of 130% of the undepreciated value of the IGPC Pipeline.
 - (c) IGPC has provided a letter of credit for a billing cycle to protect NRG in respect of distribution charges to reduce the risk related to non-payment of monthly charges. NRG is therefore at no risk for distribution charges.
 - (d) When properly invoiced, IGPC has paid its distribution service charges promptly. The fact is that IGPC has remained a responsible customer.

¹⁷ IGPC IR#3

51. A financial analysis was undertaken of the IGPC Pipeline in the leave to construct application. It included a 7-year revenue horizon to achieve a profitability index of 1.0. NRG commenced billing full distribution charges in July 2008. Payments made subsequent to the 7 year anniversary in July 2015 means that NRG will have achieved a profitability index greater than 1.0.
52. There is, therefore, no basis for any financial viability concerns as a result of the IGPC Pipeline. It is far more likely that the financial viability concerns expressed by NRG are either related to its ownership structure or its management. Certainly the fact that NRG has refused to meet with IGPC to discuss IGPC's expansion plans which will result in enhanced revenues in future is consistent with a utility management issue.
53. In such circumstances, it would be imprudent for the Board to grant a 20 year extension when NRG has stated in its evidence that NRG faces a serious financial threat and NRG has provided no plan or indication that it has a plan on how to avoid such an issue. Further, if NRG has intentionally mischaracterized the risk, the Board should be concerned about the integrity and governance of NRG.
54. If the Board acknowledges there is a material potential risk that NRG is ill-equipped to manage, then it should order NRG to consider selling the IGPC Pipeline, such sale being subject to obtaining the necessary approvals of the Board. Another option is for the Board to consider the renewal of the franchise of the Town of Aylmer and the renewal of the franchise to service IGPC separately.

iii) Long-Term Supply

55. In EB-2010-0018, the Board became aware of the premium being paid by NRG's system gas customers to NRG Corp, while the premium for the natural over prevailing market prices was reduced, the smaller premium was permitted to continue as this option was less impactful than requiring NRG to construct infrastructure to provide gas supply from less costly sources. The concern to IGPC is that this may represent a long term supply problem within some of NRG's franchises. This may ultimately impact NRG and its ability to provide service to the residence of Alymer including IGPC.
56. The fact is that given NRG's small size, it does not have the financial depth and there is no evidence of a corporate parent willing to assist or invest in significant capital projects in future. NRG does not have a long term plan detailing how it will provide supply to those unfortunate customers that receive gas from NRG Corp. It is submitted that this is a material risk which must be regularly monitored and the Board. This supports what IGPC is recommending namely that the current interim order continue until all of the various franchise agreements can be considered in one hearing in 2016.

Alignment of Expiration Dates

57. The Town of Aylmer has indicated there is merit in aligning the expiration dates of the Aylmer Franchise with those of the surrounding municipalities in respect of which NRG has franchise agreements. This issue was considered by the Board in EB-2008-0413. The Board determined there is merit in the alignment of franchise agreements – even absent the other issues identified in this proceeding.
58. IGPC agrees there is merit in aligning all the expiration dates of the various franchises as it will allow for a more efficient review of the issues surrounding the franchise renewals, provides a more equal bargaining power between the utility and the municipalities and, if NRG is successful, would provide long-term security to NRG.

No Evidence of a Threat to Financing

59. NRG has indicated that a short renewal would cause grave issues for its lenders and would have significant adverse impacts on distribution rates. This is not the first time this threat has been raised by NRG. In EB-2008-0413, NRG made bald statements and was similarly unable or unwilling to provide any third party evidence or corroboration.
60. If this issue were a real concern for NRG's secured lenders, then there would either be provisions in loan agreements or correspondence that could be produced. The fact that neither exists now and in respect of past applications, despite various parties like IGPC requesting that NRG substantiate the claims, is a basis for the Board to completely disregard the statements. At the very least, an adverse inference should be drawn.

Long-term Assets and Recovery on Investment

61. In this proceeding, it appears to be NRG's position that it is either granted a long-term franchise or NRG will be forced to shorten the recovery period in its next rates proceeding for various capital expenditures to a term equal to the term of the franchise granted. NRG suggests that this would be disastrous for ratepayers.
62. The fact is that the depreciation rates approved by the Board and included in rates are not tied to the term of any franchise renewal. Indeed that is what is currently happening. The Alymer franchise is continuing on an interim basis but it has had no impact on depreciation rates.
63. In addition, NRG points to capital spending occurring outside the municipal boundaries of the Town of Aylmer.
64. In EB-2010-0018, NRG filed a map showing its investment in capital projects since 1998. A review of the map shows that virtually all of the capital projects lie outside the Town of Aylmer.

65. As such, the vast majority of the capital spent for the last 15 years has not been within the Town of Aylmer. Therefore, there is no connection between recent and future investments elsewhere and the Town of Aylmer. Plain and simply, there is no connection between the length of the franchise renewal in this application and the depreciation rates in respect of capital spending in other franchises.
66. Further, IGPC notes that NRG has not provided any regulatory precedent that creates a fixed link between the remaining franchise life and the rates charged by the utility. Once again, NRG has made statements to raise fear without any evidentiary support regarding the impact such a change would have on rates, service or reliability.

PART IV. BOARD AUTHORITY

67. NRG has made the assertion that the Board has no jurisdiction to order NRG to sell its distribution system. IGPC disagrees and identifies numerous statutory provisions which give the Board the power to:
- (a) determine all matters of fact and law before it¹⁸;
 - (b) determine which utility has the right to supply gas within a franchise¹⁹;
 - (c) impose conditions upon both the utility and municipality in granting a franchise²⁰;
 - (d) order a utility to provide or cease to provide service and the conditions for such; and²¹
 - (e) to approve changes in ownership of a gas distributor²².
68. The OEB is a specialized tribunal with exclusive jurisdiction over all matters related to the distribution and transmission of natural gas in Ontario as provided by the OEB Act, section 19. In addition, the OEB has exclusive jurisdiction to determine all issues in respect of franchises and the OEB oversees in excess of 950 franchise agreements that are currently in place in the Province.
69. When read in the context of the purpose of the Board's powers, it is submitted that the Board has the ability to determine if NRG can continue to own or independently operate its distribution system. To be clear, IGPC is not stating that NRG would not be entitled to fair and reasonable compensation in such circumstances but in the face of continued prolonged

¹⁸ *OEB Act*, s. 19.

¹⁹ *MFA*, s.10.

²⁰ *MFA*, s.10(2).

²¹ *OEB Act*, s 42

²² *OEB Act*, Section 42

improper behaviour, the Board, by the statutory provisions noted above and by necessary implication, has the jurisdiction to establish a process that will protect consumers which is in the public interest.

70. NRG's position that it could walk away and abandon the franchise and distribution system in Aylmer is untenable for the following reasons:

- (a) It would require Board approval pursuant to section 42 of the OEB Act to cease providing service;
- (b) It would be contrary to the purposes of the OEB Act,
- (c) It lacks any commercial reasonableness that a company would destroy its asset rather than selling it; and
- (d) It is inconsistent with the legal duty of all rate regulated utilities as confirmed by the Ontario Court of Appeal in *Toronto Hydro-System Limited v. Ontario Energy Board*.²³

71. The Board has the express powers provided in statute and the necessarily implied powers in order to fulfill its regulatory role. IGPC asserts that the Board has the jurisdiction and authority to order a sale of NRG's assets. IGPC submits that this is made clear by Section 19 of the OEB Act which states:

19.(1) The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact.

(6) The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act.

72. The Board has the power to determine which utility will enjoy the franchise right to supply natural gas in a municipality and to renew that franchise subject to appropriate terms and conditions, it also has the right to terminate and deny the continuance. This is consistent with Sections 42 and 43 of the Act which state:

42.(3) Upon application, the Board may order a gas transmitter, gas distributor or storage company to provide any gas sale, transmission, distribution or storage service or cease to provide any gas sale service.

43(1) No gas transmitter, gas distributor or storage company, without first obtaining from the Board an order granting leave, shall,

- (a) sell, lease or otherwise dispose of its gas transmission, gas distribution or gas storage system as an entirety or substantially as an entirety;

²³ Supra

(b) sell, lease or otherwise dispose of that part of a system described in paragraph (a) that is necessary in serving the public; or

(c) amalgamate with any other corporation.

73. The Board, through the express provisions of the OEB Act, controls who provides service, in what area service is provided, under what conditions service is provided, and in what circumstances service may be discontinued. The Court of Appeal recognized the breadth and extent of the Board's regulatory authority over the energy sector, wherein it provided the following:

"It is clear that the Act constitutes the OEB as a specialized expert tribunal with the broad authority to regulate the energy sector in Ontario. In carrying out its mandate, the OEB is required to balance a number of sometimes competing goals. On the one hand, it is required to protect consumers with respect to prices and the reliability and quality of gas service, but on the other hand, it is to facilitate a financially viable gas industry. The legislative intent is evident: the OEB is to have the primary responsibility for setting gas rates in the province."²⁴

74. When sections 42 and 43 of the OEB Act are read together, it is reasonable to conclude the Board can order a process to have a gas distributor transfer its assets and cease providing service in the appropriate circumstances.
75. The Court is to be guided by the principles of statutory interpretation as set forth in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed., (Toronto: Butterworths, 1994) at 131:

"There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

The words of the *Act* are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the legislation and the Legislature's

²⁴ *Natural Resource Gas Ltd. v. Ontario Energy Board*, 2006 CanLII 24440 (ON CA), page 6, paragraph 18.

intent.” *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006 SCC 4 \(CanLII\)](#), [2006] 1 S.C.R. 140 at para. 37²⁵

76. As such, given the Board’s expansive powers and public interest mandate, IGPC submits the Board can require a utility to discontinue service or to cede control to another entity. This includes requiring NRG to be operated by a third party caretaker manager for such period as the Board considers just and reasonable. While the ownership structure, whatever that is, might remain in place, by installing competent professional managers, the Board will ensure the protection of NRG’s ratepayers and the long-term viability of the gas distribution industry in NRG’s franchised territories.
77. The fact is that when significant amendments were made to the OEB Act in the late 1990s and provisions were added at Section 59 giving the Board specific powers to require a licensed electricity distributor to surrender possession and control of the business, the legislature did not believe that it was necessary to include such language in respect of gas utilities given the municipal franchise regime in place and the above-noted sections of the OEB Act. The amendments to the OEB Act also included the objectives at Section 2 by which the Board, in carrying out its responsibilities “shall be guided”.
78. NRG’s position is inconsistent with the Board being able to comply with its statutory objectives in that, according to NRG, the Board could not take necessary actions to deal with a gas utility whose conduct and behaviour is unacceptable and contrary to the stated objectives. In short, NRG argues that the Board is, in some respects, incapable of complying with its statutorily imposed objectives. This simply cannot be the case. NRG’s submissions are tantamount to saying that it may continue to operate in virtual disregard to the standards expected of a rate regulated utility without risk of intervention by the regulator.

Costs Submissions

79. NRG, at paragraphs 57 to 70, makes submissions that NRG should be entitled to costs. NRG erroneously asserts this proceeding is not subject to the Board’s *Practice Direction on the Award of Costs*.
80. The Board’s authority to order costs is derived from section 30 of the OEB Act which states:

30. (1) The Board may order a person to pay all or part of a person’s costs of participating in a proceeding before the Board, a notice and comment process under section 45 or 70.2 or any other consultation process initiated by the Board. 2004, c. 23, Sched. B, s. 8.

²⁵ *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, 2008 CanLII 23487 (ON SCDC)

(2) The Board may make an interim or final order that provides,

(a) by whom and to whom any costs are to be paid;

(b) the amount of any costs to be paid or by whom any costs are to be assessed and allowed; and

(c) when any costs are to be paid. 2003, c. 3, s. 25 (1).

(3) The rules governing practice and procedure that are made under section 25.1 of the *Statutory Powers Procedure Act* may prescribe a scale under which costs shall be assessed.

81. IGPC's participation has been to raise issues that are squarely within the Board's consideration in a franchise renewal. IGPC denies that it has prolonged the process or caused undue costs to be incurred by any party. IGPC's interrogatories to NRG were targeted at the issues of service quality, reliability, and cost of service which are statutory objectives of the Board and integral to the franchise issue.
82. IGPC notes that NRG refused to provide answers to certain interrogatories, especially where the subject matter dealt with the long-term ownership and governance of this closely held private utility. Not only should such inappropriate conduct not be rewarded with a costs order in NRG's favour, this is one of the rare circumstances where the Board should reconsider IGPC's eligibility for costs. In the event that the Board concludes that costs should be paid to IGPC, they should be to the account of NRG's owner.

CONCLUSION

83. Given the facts before the Board, IGPC submits that it would be imprudent for the Board to grant a 20-year extension.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

October 26, 2012

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