EB-2012-0072

ONTARIO ENERGY BOARD

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

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

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LEGAL SUBMISSIONS OF THE TOWN OF AYLMER
October 26, 2012

OVERVIEW

1. Natural Resource Gas Limited ("NRG") has applied to the Board pursuant to s.10 of the *Municipal Franchises Act* (the "*MFAct*") for renewal of an exclusive right to distribute natural gas to customers, originally granted by a franchise agreement with the Corporation of the Town of Aylmer dated February 27, 1984 (the "Franchise Agreement").

2. NRG's request for a 20-year renewal, on the terms of the Board's Model Franchise Agreement, and without further conditions, ignores all of the background facts and proceedings that have led up to the present Application. In addition, by letter to the Board dated October 25, 2012, counsel for NRG takes the position that the evidentiary phase of this proceeding has closed, such that the Board should also not consider recent developments that have occurred in related proceedings before the Board involving matters between the same parties relevant to this Application, while it has been pending. The Town disagrees.

3. Under Procedural Order No. 5, the Town at this time is not limited to "argument", as was

NRG, but rather is entitled to file full "submissions". This appears to provide the Town with its first opportunity to file evidence in this Application. As such, a Statement of Jennifer Raynaert, the Administrator and Deputy Clerk of the Town, reviewing the relevant background and recent developments, is attached to these Legal Submissions as Tab A

4. Moreover, NRG's request relies upon a statement of the law relating to franchise renewal that is self-serving and wrong, and that seriously understates the powers of the Board. NRG's statement of the law assumes and asserts entitlement to renewal of a Franchise Agreement with the Town, while the relevant legislation, court and Board decisions make it clear that no such entitlement exists.

5. In the circumstances outlined below, and unless and until the issues outlined below have been addressed either by NRG or by the Board, the Town does not consider itself to be, nor does it wish to be made, a party to any franchise agreement with NRG. Moreover, it is the position of the Town that the Board should not exercise its discretion under s. 10 of the *MFAct*, to "make an order renewing or extending the term of the right" of NRG to distribute gas in the Town's area, except on an interim and transitional basis. None of the Board's "objectives" in s. 2 of the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15, (Schedule B) (the "*Act*") would be served by renewing NRG's "right" on any more extended basis.

6. However, if the Board's decision is, ultimately, to grant any further extension of NRG's right, then the Town submits that should be done without any further involvement or privity on the part of the Town.

RELEVANT BACKGROUND FACTS AND PROCEEDINGS

7. The Franchise Agreement between the Town and NRG expired on February 27, 2009.

8. At that time, circumstances had arisen which had shaken the confidence of the Town and its constituents in NRG as the incumbent supplier of natural gas to customers within the municipal area of the Town. These concerns related both to the financial viability of NRG, and to the quality and reliability of its service to customers. As a result, the Town was unable to reach agreement with NRG on terms on which it could renew its Franchise Agreement with NRG at that time. The Town had detailed its concerns in four prior proceedings before the Board, and in a comprehensive report to Council.[1]

9. NRG applied for an extension of the Franchise Agreement under EB-2008-0413. After a full evidentiary hearing, the Board issued a Decision and Order dated May 5, 2009 (the "*2009 Franchise Decision and Order*").[2] It provided that, subject to other terms set out therein, the existing Franchise Agreement be extended for a period of 3 years, to expire on February 27, 2012. The existing Franchise Agreement is reproduced as Appendix "A" to the *2009 Franchise Decision and Order*.

10. NRG appealed to the Divisional Court from the *2009 Franchise Decision and Order*, but did not bring its appeal on for hearing until January 20, 2011, when it sought and was granted an adjournment. The Court ordered costs thrown away payable by NRG to the Town in the amount of $600. The appeal (and a motion by the Town to dismiss the appeal as moot) were finally heard by the Court on June 14, 2012, some four months after the three-year renewal period ordered by the Board had expired, and after this Application had been commenced. The Court

1 Statement of Jennifer Raynaert, Tab A, paras. 10-12

2 Attached as Tab B

dismissed NRG's appeal on its merits, with costs payable by NRG to the Town in the amount of $10,000.[3] NRG has not appealed that decision, nor has it paid the costs as ordered.

11. While NRG's appeal was still pending, and prior to the expiry of the *2009 Franchise Decision and Order* on February 27, 2012, the Town had noted that NRG was making some progress in addressing customer concerns about the service quality and security deposit issues, although it appeared to do so grudgingly, for the most part only in response to specific Board Orders, and in some cases only after appeals from those Orders.[4]

12. In that light, the Town initiated further correspondence with NRG in an effort to resolve outstanding issues and arrive at terms for renewal of the Franchise Agreement.[5] After NRG commenced this Application, and the Franchise Agreement was extended by interim order of the Board, this correspondence continued on a "without prejudice" basis. In that correspondence, the Town undertook to, and did, co-ordinate its position with all five other municipalities with whom NRG has franchise agreements, that together cover the entire NRG service area.[6]

13. Again, however, based upon the positions taken by NRG, the Town and other municipalities were unable to agree with NRG on terms to renew their franchise agreements. That situation continues, and indeed has been aggravated by recent events.

RECENT DEVELOPMENTS RELEVANT TO THIS APPLICATION

14. In its pre-filed evidence in EB-2008-0413, the Town noted that the most alarming

3 The Court's decision on the merits, *NRG v. Ontario Energy Board et al*, 2012 ONSC 3520, together with the ensosements respecting costs, are attached as Tab C

4 Statement of Jennifer Raynaert, Tab A, para. 14

5 Application by NRG, Per-Filed Evidence, at para.. 2 and attachment (letter from Stockwoods LLP , August 18, 2011), para. 5 and attachment (letter from Ms. Raynaert, December 21, 2011), and para. 7 and attachment (letter from Mayor Couckuyt, February 7, 2012)

6 Statement of Jennifer Raynaert, Tab A, paras. 7-9

example of NRG's lack of customer support involved its inexplicable and repeated interference with the development of an ethanol plant within the Town by Integrated Grain Processors Co-Operative Inc. and IGPC Ethanol Inc. (together "IGPC"), and the related new pipeline construction. A succinct description of the ethanol plant development and its significance to the Town and surrounding municipalities was outlined in the Written Submissions of the Town in EB-2006-0243, dated February 27, 2008 (attached, without Exhibits, as Tab D).

15. From its inception, the IGPC plant and pipeline, and more recently its proposed expansion, have been a critical, high profile project for the Town and surrounding areas. It has been an important local economic development success story, which should serve to highlight the best characteristics and opportunities of the area. Instead, however, NRG's approach at every stage of the project has soured this success, and sent exactly the opposite message to anyone considering a development in the area, especially one dependent upon natural gas supply.[7]

16. The Town first addressed that concern in two interventions in EB-2006-0243 (Compliance Order dated June 29, 2007, and Order dated March 12, 2008), which resolved some of the issues that were threatening the completion of the initial plant and pipeline construction.[8]

17. After the 2009 Franchise Decision and Order, NRG continued to avoid addressing the remaining disputes related to the existing pipeline, either before the Board or otherwise. IGPC attempted to raise some remaining issues in EB-2010-0018 (the "Rate Proceedings"), which are now the subject of reconsideration proceedings before the Board in EB-2012-0396. The Town was dismayed to see NRG's resistance to any process that might see a resolution to these issues

7 Statement of Jennifer Raynaert, Tab A, para. 27

8 Statement of Jennifer Raynaert, Tab A, para. 23

at every stage. NRG's position currently in EB-2012-0396 demonstrates that that attitude continues.[9]

18. More recently, the Town was again dismayed to be provided with copies of correspondence between NRG and IGPC dated June 18, July 3, and July 9, 2012, in which IGPC sought to engage NRG in discussions about a possible expansion of its ethanol plant development, which is expected to result in increased demand by IGPC for natural gas supply within the existing unused capacity of the IGPC pipeline. This expansion project apparently involves an investment of between $15 and $20 millions in new monies, with significant potential for related economic and employment benefits within the Town and surrounding areas. However, once again, the response from NRG to IGPC's requests appears to put this expansion project in jeopardy, or subject it to yet further proceedings before the Board or otherwise.[10]

19. Indeed, this is now the subject of proceedings before this Board in EB-2012-0406. Once again, NRG's response (like its responses to IGPC leading to the 2007 and 2008 proceedings in EB-2006-0243, and like its response to Union Gas leading to the proceedings in EB-2008-0273) demonstrates a highly confrontational, self-interested, and opportunistic approach in dealing with the new business and economic development initiatives that the Town and surrounding areas so desperately need.[11]

20. The Town defers to the Submissions of IGPC for a more detailed statement of the issues raised by EB-2012-0406, and agrees with those Submissions. Regardless of their eventual outcome, the very fact that those disputes exist today is, in the Town's respectful submission,

9 Statement of Jennifer Raynaert, Tab A, para. 24

10 Statement of Jennifer Raynaert, Tab A, para. 25

11 Statement of Jennifer Raynaert, Tab A, para. 26

relevant immediately to the present Application in demonstrating a continuing, pathologically self-interested attitude by NRG towards its customers and the economic growth of the area it serves. That approach, evident since 2007 and continuing today, is simply inconsistent with the public trust NRG owes to the Town, to the Board, and to all interested stakeholders, as a regulated monopoly supplier of natural gas in this Province.

21. When this issue first came to the Town's attention in August, 2012, the Town met with IGPC, with the other municipalities in the NRG service area, and with other affected local interests, to discuss options. That meeting led to the Town in writing to the Minister to request new legislation. The Town's hope was that this might provide the Board with new and better regulatory powers to address some of these ongoing concerns more effectively.[12]

OTHER CONCERNS RELATING TO PRICE, QUALITY OF SERVICE AND FINANCIAL VIABILITY

22. Again, in the current Application, the Town's has other concerns that relate both to the financial viability of NRG, and to the quality of NRG's service to customers.

23. While the Town accepts that some of its concerns have been deemed by the Board to be beyond the scope of the present proceeding, such that no specific relief can be or is anticipated in respect of them, they are still relevant in explaining the basis for the Town's position that NRG's right to distribute gas should not be extended except on an interim and transitional basis.

24. The Town's submissions highlight (and there can be no dispute) that there is a growing disparity between the quality and costs of NRG's supply of gas to the Town and surrounding

12 A copy of the Town's letter to the Minister dated September 4, 2012 is Attachment 1 to the Statement of Jennifer Raynaert, TabA, para. 28.

areas, compared to most other gas distributors serving other areas in Ontario. Specifically, and despite extensive proceedings both prior to and since the *2009 Franchise Decision and Order*, major issues regarding the quality of gas supply to NRG's service area have not been addressed. The following are some of the highlights.

(a) Despite the Board's review of NRG's rates in EB-2010-0018, the rates charged by NRG for gas supply in its area remain higher than in immediately surrounding franchise areas and across the province. These disparities continue to be reported in various local media, including the dedicate blog publication at http://nrg-aylmer.blogspot.ca/p/gas-bill-comparison.html, which reports a 40% difference between NRG and a neighbouring Union Gas service area.

(b) Despite paying these higher-than-normal rates, gas customers in the Town and surrounding areas do not have access to energy conservation programs and billing options that are now standard elsewhere in the Province of Ontario, including major provincially mandated initiatives such as Demand Side Management programs, smart-meters and time-of-use billing.

(c) NRG has sought and continues to be granted exemptions from the Board's GDAR in respect of certain service quality performance obligations, including telephone and call answering performance levels and reporting requirements, that are in place in other areas of Ontario to protect customers.

(d) NRG, alone in the Province among gas and electricity distributors of all sizes, does not have a working website, or other means of customer access to information or online inquiry.

(e) NRG has no true equity capital, because its common shares continue to include a "retractable" feature. Nevertheless, alone among gas distributors, NRG's rates are set on a basis that simply "deems" 40% of its actual capital to be equity (even though it is not) and allows NRG to earn a return on that 40% at the "equity" rate of 9.85% rather than at its actual cost of debt capital (see Decision and Order, December 6, 2010, EB-2010-0018, pages 21-31).

(f) Yet, as the Board has found, disclosure of these "retractable shares" as debt in NRG's financial statements since 2006 "significantly increases the financial risk associated with NRG" (Decision and Order, EB-2008-0273, November 27, 2008 at page 4). As a result, again alone among gas or electricity distributors in Ontario, customers in the NRG service area who are required to post security deposits to obtain natural gas supply will rank behind even NRG's own shareholders in the event of an insolvency.

(g) Unlike both Union Gas and Enbridge, which service most of the rest of the Province, NRG has not been ordered by the Board to fully separate its regulated gas distribution business and its ancillary business of providing unregulated

> energy services and products, although it has recognized this situation is "generally inconsistent with good regulatory practice" (see Decision and Order, December 6, 2010, EB-2010-0018, pages 5-6).[13]

25. It is equally clear that there is no willingness on the part of NRG to address any of these deficiencies in terms of price or service quality. NRG simply has no current plan to address any of them, even where the Board has already recognized that the current situation is anomalous and inconsistent with its own usual standards for gas utilities elsewhere in this Province. Instead, NRG's posture and approach has been, and remains, one of hostility to customer interests, and resistance to any service quality, price or accountability initiatives by the Board or others that may better reveal, let alone diminish, the financial returns it derives from the current franchise. Quite simply, NRG benefits from these continued deficiencies in the quality of its gas supply services, and from the increased prices it is allowed to charge. NRG has repeatedly demonstrated that it has no wish to meet Provincial standards in these areas.

26. While there is no single decision of the Board that is responsible for all of the current disparities, it is submitted that their cumulative effect currently could be claimed by ratepayers in the Town's area to amount to discrimination in an administrative law sense.

27. Regardless of its proper legal characterization, this situation is simply not acceptable to the Town as a *status quo*, and it is a significant factor leading to the position of the Tow.

ALIGNMENT OF THE FRANCHISE RENEWAL DATES OF ALL MUNICIPALITIES

28. As noted in EB-2008-0413, the Town is one of six municipalities that are served by the natural gas distribution system operated by NRG. Approximately 6,000 of NRG's 7,500 rate

13 Statement of Jennifer Raynaert, Tab A, para.29

payers, including its largest rate payer IGPC, are situated in the Town. The NRG service area also includes parts of the areas currently served by the Corporations of the Townships of Malahide ("Malahide"), and South-West Oxford ("SW Oxford"), and of the Municipalities of Bayham ("Bayham"), Central Elgin ("Elgin") and Thames Centre ("Thames"). NRG had signed one or more Franchise Agreements with predecessors to each of these municipalities, and each of these Agreements have different renewal dates. The relevant renewal dates appear to be as follows:

a. Malahide: (South Dorchester) May 5, 2012; (Springfield) October 2, 2014, (Malahide) December 15, 2014
b. Thames: (North Dorchester) November 16, 2012
c. Bayham: (Port Burwell) May 5, 2012; (Bayham) November 22, 2012, (Vienna) May 9, 2015
d. SW Oxford: 2013
e. Elgin: 2016[14]

29. The Town was generally supported by the other municipalities in the NRG service area with respect to its goals and position in EB-2008-0413. Specific letters and resolutions of support from Thames, Bayham, SW Oxford and Malahide were attached at Tab "D" to the Town's pre-filed evidence in that proceeding.[15]

30. In its *2009 Franchise Decision and Order* at pages 11-12, the Board agreed with the Town's proposal for a 3-year renewal term, in part at least, to permit the next renewal of the Town's Franchise Agreement with NRG to come up in 2012, at a time to coincide with the pending renewals of several of NRG's other Franchise Agreements, specifically with Malahide, Thames, and Bayham. Specifically, the Board accepted that the Town's purpose in seeking such

14 Statement of Jennifer Raynaert, Tab A, paras..2 and 7

15 Statement of Jennifer Raynaert, Tab A, para..13

alignment was proper, as a means to remove an artificial barrier to municipalities together seeking alternative supply of gas in appropriate circumstances.[16]

31. The Town again advanced the interest of aligning all the franchise agreement terms in its negotiations with NRG surrounding the commencement of this Application, and again it was supported by the other five municipalities in that position.[17] Among other things, this simply makes sense. Otherwise, the Board and NRG will have to face up to 9 further proceedings involving the same issues as this one, with the other municipalities, in the next four years. Indeed, the Town believes that two of those agreements have expired while this proceeding has been pending, and two others are due to expire within a period of weeks. Nevertheless, NRG has refused to act on this issue. It is confident of its ability to pass any costs on to ratepayers, and has no interest in conceding anything to the municipalities or to the Board.

32. In the *2009 Franchise Decision and Order*, the Board specifically rejected concerns raised by NRG that such a short renewal may affect its ability to refinance its long term debts in the interim. It noted that NRG itself had been arranging financing on a relatively short term (5-year on-demand) basis and not on anything like a 20-year term. NRG has continued to be able to conclude such arrangements both prior to and between 2009 and 2012, even when all of NRG's franchise agreements with the Town and other municipalities have had shorter terms than 5-years remaining. That situation had no impact on NRG's ability to refinance its debt, or to finance new construction, in 2006 and 2008. Nevertheless, despite their rejection by the Board, NRG continues to raise these same concerns, without any new evidentiary basis.[18]

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16 *2009 Franchise Decision and Order*, Tab B, at p.12

17 Statement of Jennifer Raynaert, Tab A, paras.. 8 and 17

18 *2009 Franchise Decision and Order*, Tab B, at p.11, and see NRG's Argument-In-Chief, at paras. 42 and 47

33. The Town continues to believe that, if there is to be any renewal of a franchise ***agreement*** with NRG, then alignment of renewal terms is not only desirable, but a necessary first step. It is necessary for affected municipalities to consider the full range of alternatives with respect to the future supply of gas in their areas, including the option of renewal with NRG for any term of 10, 15 or 20 years that the Board (and NRG) might prefer in more normal circumstances. It would also enable all of the municipalities to exercise greater collective influence upon NRG, particularly with respect to the quality and reliability of its service to customers, which in turn may assist the Board in its oversight of NRG.

34. The failure of NRG to resolve this issue by agreement, even in the current proceeding, only further underscores the need for the Board to resolve the issue once and for all, by Order. However, this raises a question about how, practically, an alignment of all of the terms of the seven municipalities' franchise agreements can be accomplished by the Board.

35. NRG suggests somehow the onus was on the other municipalities, if they truly wished this relief, to have intervened in this proceeding to obtain it. Yet, predictably, NRG itself also takes the position that s.10 of the *Municipal Franchises Act* precludes proceedings by those other municipalities to renew or amend their own franchise agreements earlier than a year before those agreements are scheduled to expire.[19] In other words, it is very clear that that if those municipalities had actually taken the steps NRG suggests they should have taken to advance this issue, then NRG would object. As usual, NRG's position offers no solution, only impasse.

36. The Town, however, submits there are at least two ways to achieve this desirable and necessary result without engaging NRG's logic.

19 Statement of Jennifer Raynaert, Tab A, para. 19, and see NRG Argument-In-Chief, at para. 55(a)

(a) First, in paragraph 3(b) of its Draft Issues List, the Town suggested that this proceeding could simply be adjourned (with the current extension Order remaining in place) until it can be joined with renewal proceedings in respect of all the other Franchise Agreements in the NRG service area. At that time, the issue of an alignment and the issue of the term of any renewal could be addressed together, in one combined proceeding, with all affected parties before the Board.

(b) Finally, the Town acknowledges that the Board's ultimate authority with respect to its area would include the ability simply to pick a renewal date, at or after the anticipated expiry date of the last of the franchise agreements within NRG's service area, with the intention that each of the other agreements, as they come up for renewal, would be also be extended to that date.

37. The Town commends these alternatives to the Board, and acknowledges that the choice of how best, practically, to achieve an alignment of the various franchise terms is for the Board.

THE LAW RELATING TO FRANCHISE RENEWAL

38. NRG's statement of the law relating to franchise renewal is self-serving, and seriously understates the powers of the Board.

39. The Board has the exclusive jurisdiction to determine all matters under s. 10 of the *MFAct* relating to the renewal or non-renewal of a gas distribution franchise. The decision to renew or extend the term of such right, or to refuse such renewal or extension, and any other terms and conditions imposed, are all matters "entirely within the Board's discretion".[20]

40. The legal test applicable under s. 10 is simply whether "public convenience and necessity" appear, or do not appear, to the Board to require an extension of the right.[21]

41. In making that determination, the Board must consider its "objectives" in relation to gas as set out in the *Act*, and particularly those in ss. 2(1) ("facilitate competition"), ss.2(2) ("protect

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

21 *MFAct*, ss. 10(2)

the interests of consumers with respect to prices and the reliability and quality of gas service"), ss.2(3) ("rational expansion of ... distribution systems"), and ss.2(5) "financially viable gas industry for the ... distribution ... of gas".[22]

42. Neither the views of affected municipalities nor any expectations of any incumbent right-holder are determinative. Contrary to NRG's arguments, there is no assumption of an automatic renewal of a franchise. Indeed, in this case the fact that NRG is not a province-wide distributor of gas may mean that the Board is less reluctant to make determinations based upon the legitimate interests of affected local municipalities.[23]

43. Moreover, even where (as here) no "agreement" is possible between the distributer and the municipality, the wording of s. 10 is clear that the Board retains sole and exclusive authority in terms of extending or not extending "the term of the right" to distribute gas, even in the absence of and apart from any franchise agreement between those parties.

44. As confirmed by the Divisional Court in its June 14, 2012 decision on NRG's appeal from the *2009 Franchise Decision and Order*, the factors affecting the Board's discretion are "primarily matters of policy and specialized facts and relationships that are within the expertise of the Board and are at the core of its exclusive jurisdiction" under ss. 19(6) of the *Act*. The Board's inquiry is "fact-intensive", and will not be subject to appeal unless an extricable issue of law or jurisdiction is raised for purposes of s. 33 of the *Act*.[24]

45. The Town agrees with the submissions of IGPC to the effect that, read in the context of the Board's broad statutory mandate under the *Act* and related legislation, these provisions

22 *2009 Franchise Decision and Order*, Tab B, at p. 8

23 *2009 Franchise Decision and Order*, Tab B, at pp. 3-5, citing *Centra Gas v. City of Kingston*, E.B.A. 825, June 23, 2000 at p. 26 and other cases

24 *NRG v. Ontario Energy Board et al*, Tab C, at paras. 7-8

include a power on the part of the Board, expressly and by necessary implication, to determine whether NRG can continue to own and operate the gas distribution system that it currently holds as a public trust.

46. However, for the reasons outlined below, at this time the Town proposes that the Board simply make an order under s. 10 of the *MFAct* "refusing a renewal or extension of the right" of NRG to operate the gas distribution system in the area of the Town, except on an interim or transitional basis and subject to the conditions:

(a) that NRG either prepare to effect an orderly sale of that system, subject to Board approval, or

(b) that it prepare and submit to the Board a Plan for addressing the issues raised in this Application.

CONCLUSIONS ON THE ISSUES RAISED

47. The current situation is simply not acceptable to the Town as a *status quo*.[25] Nor should it be acceptable to the Board.

48. While the Town acknowledges that the Board's ultimate authority with respect to NRG s franchise is not affected, the Town itself cannot and will not consider signing any new Franchise Agreement with NRG unless and until:

(a) NRG takes significant steps to address the current issues respecting IGPC's proposed expansion of the Ethanol plant and related gas supplies;

(b) NRG takes significant steps to address the current disparities between NRG's price and quality of gas supply within the Town of Aylmer and that provided elsewhere in the Province; and

(c) the alignment of the renewal periods of all franchises in the NRG service area has been achieved.[26]

25 Statement of Jennifer Raynaert, Tab A, para.. 31

26 Statement of Jennifer Raynaert, Tab A, para.. 3

49. Until these issues have been addressed, the Town does not consider itself to be, nor does it wish to be made, a party to any franchise agreement with NRG. To take any other approach would be to condone the *status quo*, which the Town simply cannot and will not do.

50. The Town acknowledges that the Board has authority under s. 10 of the *MFAct* to nevertheless extend the term of NRG's right to distribute gas in the Town's area. However, the Town submits that the Board should not do so, except on interim and transitional basis.

51. None of the Board's objectives as set out in section 2 of the *Act* would be served by renewing NRG's "right" on any more extended basis in the current circumstances. In particular:

(a) It does nothing to advance the objective in ss. 2(1) of the *Act* to "facilitate competition" in the distribution of gas in this Province to prolong the franchise of a utility that cannot meet provincial standards of gas supply at competitive rates.

(b) Indeed, to do so would be directly contrary to the objectives in ss.2(2) of the Act to "protect the interests of consumers with respect to prices and the reliability and quality of gas service".

(c) With respect to the objective in ss.2(3) of the Act to promote the "rational expansion of ... distribution systems", NRG's experience and record with the IGPC ethanol plant demonstrates that in any significant new industrial development NRG is entirely reliant upon external, project-specific sources of supply and infrastructure; that NRG is incapable of managing its relationship with the supplier of such gas effectively;[27] and that NRG is irresponsible and antagonistic in its relationships with customers.[28] In these circumstances, any rational new industrial customer would certainly want to examine alternatives, including by-pass arrangements, rather than deal with NRG. As pointed out in IGPC's submissions, there has in fact been little, if any, other new investment in NRG's distribution system servicing the approximately 6,000 customers in NRG's core service area within the Town in recent years.

(d) Finally, with respect to the objective in ss.2(5) of the *Act* to promote a "financially viable gas industry for the ... distribution ... of gas,"[29] the Town submits that a utility that cannot meet the prevailing provincial standards of gas distribution service, while charging rates that are comparable or competitive with those

27 See the Application by Union Gas under EB-2008-0273

28 See the proceedings in EB-2006-0243, especially the Compliance Order dated June 29, 2007, and Order dated March 12, 2008, as well as the pending allegations in EB-2012-0406

29 *2009 Franchise Decision and Order*, Tab B, at p. 8

> charged elsewhere in the Province, cannot be considered "viable" within ss. 2(5). NRG does not face any geographic, demographic, commercial or infrastructural barriers to viability. Yet, as IGPC's submissions point out and the Board has expressly found, NRG's own conduct in matters of concern to the Town actually increases NRG's financial risk, and undermines its claim to viability.[30]

52. To the extent that NRG, itself, continues to take no responsibility or initiative to address the matters of concern to the Town set out above, but rather continues its pattern of doing so only in response to specific Board Orders, and only after appeals from those Orders, the Town submits that NRG only further demonstrates its unsuitability to continue in the position of public trust that it was granted, originally, by the Franchise Agreement with the Town. Of course, the Town encourages the Board to make Orders to rectify the deficiencies it has identified in NRG's organization and services: however, grudging compliance with those Orders by NRG should ***not*** be seen as qualifying NRG to retain the privileges it currently has.

53. The Town also accepts that franchise regulation under s. 10 of the *MFAct* may not be the best, and certainly should not be the only, regulatory tool available to the Board to address some of the issues of concern to the Town. As noted, the Town supports legislative changes, where necessary to enhance the Board's supervisory powers.

54. However, in all the circumstances, the Town submits that the Board, in exercising its discretion under s. 10, can only properly consider extending NRG's right to distribute gas in the municipal area of the Town, either on an interim basis, until NRG has committed to a plan to address the concerns identified by the Town, or on a transitional basis, until a new gas supplier is found that is prepared to do so.

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30 See the Decision and Order dated November 27, 2008 in EB-2008-0273, Tab E, at pp. 4-5, and the *2009 Franchise Decision and Order*, Tab B, at pp. 10-11

55. As an initial interim/transitional measure, the Town submits that the Board should simply adjourn this Application (with the current interim extension Order remaining in place) until it can be joined with renewal proceedings in respect of all the other Franchise Agreements in the NRG service area. At that time, the issue of alignment and the issue of the term of any renewal could be addressed together, in one combined proceeding, with all affected parties before the Board. In the meantime, as a condition of the extension, the Board could require NRG either to prepare and file a Plan to address some or all of the issues raised by the Town, or prepare for an orderly sale of its distribution system to another eligible party subject to the Board's approval.

56. However, if the Board's preference is, ultimately, to extend NRG's right to distribute gas in its area without any plan in place to address those issues, then the Town submits that should be done without any further involvement or privity on the part of the Town.

WHO SHOULD BEAR THE COSTS OF THIS PROCEEDING

57. The Town respectfully submits that this Application, and the opposition to it by the Town and IGPC, have been necessitated by the conduct of NRG as outlined above.

58. The letter on behalf of the Town dated August 18, 2011 made a reasonable offer to NRG that would, if accepted, have avoided any need for this (or any other) proceeding in respect of NRG's franchises for a 10 year period. Instead of accepting that reasonable offer, while this application has been pending NRG has renewed and continued its old pattern of self-interested, antagonistic brinksmanship, particularly in respect of its largest customer, IGPC. In light of that conduct, it would now be irresponsible for the Town to renew that same offer.

59. NRG appears to have equal contempt for the electors and municipal ratepayers of the Town of Aylmer, as it has shown towards its own customers and rate payers. It will be unfortunate if either of them have to bear the costs of this proceeding, directly or indirectly.

60. The Town submits that, as in EB-2008-0243, and for substantially the reasons there set out, the reasonable costs of intervenors including the Town should be paid by NRG, together the other costs of this Application, and those costs should not be passed on to the NRG rate payers.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Date: October 26, 2012

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