Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2008-0413

IN THE MATTER OF the *Ontario Energy Board Act 1998*, S.O.1998, c.15, (Schedule B);

AND 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 Resources Gas Limited and the Corporation of the Town of Aylmer.

BEFORE: Gordon Kaiser
Presiding Member and Vice Chair

Ken Quesnelle
Member

Cathy Spoel
Member

DECISION AND ORDER

This is an application by Natural Resources Gas Limited ("NRG") pursuant to Section 10 of the *Municipal Franchises Act*, ("MFA") to renew its existing franchise agreement with the Town of Aylmer ("the Town"). The application is opposed by the Town, the largest municipality in which NRG distributes gas, and the Integrated Grain Processors Cooperative ("IGPC"), the largest customer in the franchise area.

NRG is a privately owned utility that distributes natural gas in Southern Ontario to approximately 6500 customers in Aylmer and surrounding areas. The service territory stretches south from Highway 401 to the shores of Lake Erie. In addition to Aylmer, NRG has franchise agreements with the Township of Malahide, the Municipality of Thames Centre, the Township of Bayham, the Township of South West Oxford, and the Municipality of Central Elgin.

NRG and Aylmer entered into the existing franchise agreement in 1984. The agreement, which expired on February 27, 2009, is attached as Appendix A. This franchise agreement accounts for most of NRG's 6500 customers. The franchise agreements between NRG and the other five municipalities expire at later dates. Three of them, Malahide, Thames Centre and Bayham, expire in 2012.

The Board held an oral hearing on this Application in Aylmer on February 12, 2009, and at the conclusion of the hearing issued an interim order extending the existing franchise agreement for 90 days or until the Board grants a renewal of that franchise agreement under the MFA, whichever comes first.

For some time NRG and the Town of Aylmer have been negotiating the terms of a new franchise agreement but have been unable to reach an agreement. The main point of difference is that NRG wants a 20 year term while Aylmer is prepared to offer only a 3 year term. There are other differences in their positions but they are less important and more easily resolved.

The Board's Jurisdiction

Section 10 was added to the MFA in 1969. Prior to that time both the utility and the municipality had a common law right to terminate a franchise upon expiry of a franchise agreement. Section 10 is intended to allow the Board to intervene and renew a franchise where the municipality and the utility cannot come to an agreement. Either party can apply during the last year of the franchise term. This section allows the Board to determine the term of the new franchise as well as other terms and conditions. Section 10 of the MFA as amended now provides:

> 10(1) Where the term 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.
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> (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. […]

> (5) An order of the Board heretofore or hereafter made under subsection (2) renewing or extending the term of the right 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 section 58 of the Public Utilities Act.

In resolving this dispute the Board must determine what is in the public interest or what "meets public convenience and necessity". That determination must consider the objectives of the Board as set out in Section 2 of the OEB Act. The objectives relevant to this inquiry are set out below;

> The Board in carrying its responsibilities under this or any other Act in relation to gas should be guided by the following objectives;
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> a) To facilitate competition in the sale of gas to users. [Section 2(1)]
>
> b) To protect the interests of consumers with respect to prices and the reliability and quality of gas service. [Section 2(2)]
>
> c) To facilitate the rational expansion of transmission and distribution systems. [Section 2(3)]
>
> d) To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas. [Section 2(5)]

In *Union Gas Limited* v. *Dawn*[1] the court confirmed that the Board has the sole jurisdiction to determine "public convenience and necessity" under section 10 of the MFA. At page 622 the Court stated:

> In my view this statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, location of lines and appurtenance, expropriation of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board and are not subject to legislative authority by municipal councils under the *Planning Act…*

The Board is under no obligation to continue any of the terms in the existing agreement. As the Divisional Court stated in the *Peterborough v. Consumers Gas*[2]

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[1] *Union Gas Limited v. Dawn (Township)* (1977) 76 D.L.R. (3d) 613, Ontario (H.C.J..).

[2] *Peterborough (City) v. Consumers Gas* (1980), 111 DLR (3d) 234, Ontario, (Div. Ct.)

> There is nothing in the statutory provisions to require that the terms and conditions found in the expiring agreement must be continued or that what is prescribed by the Board as a result of its adjudication be agreeable to either or both of the parties. It is for the Board to adjudicate when the matter is set down before them. Assuming the hearing has been properly held, it is immaterial that the terms and conditions imposed are not those either in the expiring agreement or in a new agreement or are acceptable to the contending parties.

In *Centra Gas and the City of Kingston*[3], the Board found that the "public interest" and "public convenience and necessity" are broader than local interests. The Board is required to consider matters affecting the provincial gas distribution system as a whole, and not just local interests. While the views of the municipalities should be taken account by the Board they do not entirely determine public convenience and necessity. By the same token the Board in that case noted that the fact that the utility might feel it has a "reasonable expectation" does not end the matter. "The mere fact that most franchises are renewed without dispute is not sufficient to justify an assumption of automatic renewal of a franchise". [page 26]

This is not the first time the Board has considered a dispute between a municipality and a utility regarding the renewal term of a franchise agreement. In a number of cases a municipality's request for a lesser term was refused by the Board, which instead chose to impose the Model Franchise Agreement. That agreement will be addressed shortly.

There are also a number of cases where the municipality opposed renewal of the franchise because it wanted to take over the gas distribution business itself[4]. Those decisions led to the principle described above that the Board in considering the public interest must look beyond the interest of the specific municipality and also consider broader provincial interests.

It's important to understand the context of those decisions. They invariably relate to Union Gas Ltd. and Enbridge Gas Distribution Inc. or their predecessor corporations. Both companies are substantially larger than NRG. Enbridge for example has

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[3] *Centra and City of Kingston, (E.B.A 825), June 23, 2000.. .See also: Union Gas Limited v. Township of Dawn* (1977) 76 DLR (3d) d13, (Ontario Divisional Court); Surrey *v. British Columbia Electric Company* (1957) SCR 121; and *Sydenham Gas and Petroleum Company v. Union Gas Limited* [1955] O.J.. 234 (C.A.).

[4] *Sudbury (City) v. Union Gas Limited* (2001), 54 O.R. (3d) 439 , (CA); *Kingston (City) v. Ontario Energy Board and Union Gas Limited*, [2001] O.J. No. 3485, (Div. Ct.)

approximately 1.8 million customers and 150 franchise agreements, while Union has approximately 1.3 million customers and 800 franchise agreements.

NRG is not a province wide utility. Nor is the Town of Aylmer attempting to take over and operate the franchise itself. In the case of province wide distribution systems the Board understandably has been reluctant to divide territory based on profit maximizing initiatives of a local municipality. It is significant that in none of the previous decisions was the quality of service or financial integrity of the utility a major issue. That is not the case here.

The Model Franchise Agreement

Prior to 1988 franchise agreements between municipalities and utilities were negotiated between the parties on an individual basis. In November 1985 the Board held a generic hearing to provide guidance on issues frequently arising in franchise agreements. As a result a Model Franchise Agreement was developed[5], which has since formed the template for most new and renewed franchises.

The Board Report stated that the term of a first time agreement should not be less than 15 years and no longer than 20 years. In the case of renewals, a term of 10 to 15 years was considered adequate. The Board issued another Report on the Model Franchise Agreement in December of 2000[6] that confirmed, with minor differences, the view of the Board in the 1986 Report.

The 1998 Decision of the Board[7] in the application by Centra Gas[8] for renewal of franchise agreements in the City of Orillia, the Town of Gravenhurst, the Township of Severn, and the Town of Bracebridge, reviewed the municipalities' request for a reduced term within the context of the 1986 Report. There the parties were also unable to reach agreement on the term. The utility requested a 20 year term while the municipalities offered 10 years. The Board concluded at page 16 of the Decision:

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[5] *Report of the Board on the Review of Franchise Agreements, E.B.O. 125, May 21, 1986*

[6] *Report to the Board, December 29, 2000 Re: The Municipal Franchise Act and the 2000 Model Franchise Agreement*

[7] *Board Decision with Reasons, March 31,1988 Re: Application by Centra Gas Ontario Inc. for franchise renewals with the Corporations of the City of Orillia, the Town of Gravenhurst, the Township of Severn and the Town of Bracebridge. The Board File Numbers are: E.B.A. 767, E.B.A. 768, E.B.A. 769, E.B.A. 783*

[8] Centra Gas Ontario Inc. merged with Union Gas Limited on January 1, 1998.

> The Board finds that the four Municipalities have not demonstrated unusual[9] circumstances specific to these Municipalities which would justify different terms and conditions in their agreements from those in the Model Agreement. The Board therefore finds that the franchise agreement for each of the Municipalities should be in the model form without the requested amendments. As to the term of the agreement, for the same reasons given by the Board in E.B.A. 795, terms of 15 years are ordered in each of the four agreements.

Service Quality

In this proceeding both NRG and Board staff submit that the Board should not depart from the terms set by the Model Franchise Agreement. The municipality however is only prepared to offer a 3 year term.

The Town's position is set out in page 4 of its argument[10];

> Circumstances have arisen in which NRG has been in default in its responsibilities to customers and to the electors of the Town. These circumstances have raised concerns about both the financial viability of NRG and the quality and reliability of its service to customers. They have severely shaken the Town's confidence, and that of the Town's constituents in NRG as their incumbent gas supplier and distributor.

The Town's concern with service quality and financial viability were supported by IGPC, largest customer in the franchise area. The IGPC concerns are summarized at page 2 of its argument;

> NRG has demonstrated a pattern of conduct that is not acceptable in a publicly regulated utility…During the last two years, NRG has admitted that it has: (a) failed to comply with its obligations under the GDAR; (b) been the subject of an administrative penalty for contravening an order of the Board; (c) been the subject of an application to discontinue service; and (d) the subject of an unprecedented number of complaints to the Board such that the Board commenced a review of its security deposit policies. NRG has failed to complete the cost reconciliation required by the Pipeline Cost Recovery Agreement ("PCRA"), which was to be completed within 45 Business Days of commencing gas service to IGPC. Finally, there are still unanswered questions about NRG's financial well-being…..If ever there was a situation so unique that it

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[9] *Ten years earlier in Township of Moore and Union Gas Limited, the Board had also rejected a short term because there were no "unusual circumstances", E.B.A. 304, December 21, 1978, page 16*

[10] *Town of Aylmer, Final Written Submissions dated February 27, 2009, Paragraph 9, page 4*

> warranted the Board departing from its traditional practice, this is such a situation. A three year renewal is appropriate – if not generous.

Two main reasons are offered for the proposed shorter term. First, the Town and IGPC say that a shorter period, of 3 years is appropriate in order to give NRG a probationary period in which to rebuild customer confidence regarding service quality.

The second ground is that the Town believes that a three year period is necessary in order to align the renewal period of the Town's franchise agreement with those of the neighbouring municipalities.

Quality of service is a broad and a general term. The Town and IGPC site a number of examples which they claim demonstrate that NRG has been unresponsive to the interests of the Town, its gas consumers, and IGPC. A number of them relate to the difficulty both the Town and IGPC have faced in dealing with NRG regarding a new ethanol plant in Aylmer.

In 2006, NRG applied to the Board to construct approximately 28 kilometres of gas pipeline to connect the Union Gas distribution system to the new ethanol facility being developed by IGPC in the Town of Aylmer. The Board granted leave on February 2, 2007[11] after reviewing the financial viability of the project and receiving assurances that there would be no negative impact on existing ratepayers.

Months later in June 2007, NRG refused to execute a necessary assignment. Without the assignment, IGPC could not proceed with the financing of the ethanol plant. An Emergency Motion was brought on June 29, 2007. The Board[12] ordered NRG to execute the necessary documentation on the grounds that the assignment had been agreed to by the parties and the Board had approved the Agreements when granting the leave to construct[13].

The Town in its submissions relies on the Board's Decision on the Motion where the Board stated;

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[11] *Board Decision and Order, dated February 2, 2007 Re Application by NRG for Leave to Construct 28.5 km natural gas pipeline to supply natural gas to the ethanol plant owned by Integrated Grain Processors Co-operatives Inc. in the Town of Aylmer*

[12] *Transcript, Motion Hearing, June 29, 2007 page 81, line 21 to page 82 line 14* ***and*** *page 85, line 3 to page 86, line 9*

[13] *Decision and Order, February 2, 2007, granting leave to construct the pipeline, page 2,"Proceeding" Section, 2nd Paragraph (EB-2006-0243)*

> There is no basis on this record to conclude that a refusal to execute the consent is reasonable. The agreement specifically contemplated it and the parties agreed that a consent would be executed to the benefit of the company's lenders and, as such, would be considered reasonable. We see no basis for this refusal and hereby order NRG to execute the consent in the form provided by the applicant.

Despite the Order, NRG refused to sign the Agreement[14]. As a result the Board levied an administrative penalty[15]. The Town and IGPC in their submissions rely on the Board's findings in that Decision;

> NRG has been franchised to provide natural gas service in this municipality, in the Town of Aylmer. .This is an exclusive franchise. Natural gas is not available from anyone else. But that exclusivity carries with it certain responsibilities to act in the public interest. It is not apparent that NRG understands those responsibilities at all.
>
> The failure to comply with this Board's order signals a complete disregard for the Board and its processes. It also signals a complete disregard for the people of Aylmer, many of whom are out of work as a result of the decline in the tobacco industry. It looked like this ethanol facility would offer considerable relief in that regard.
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> It is also a complete disregard for the federal government, the province of Ontario, and the investors, the farmers that have invested in this facility, and of course, IGPC, all of whom have in vested considerable time over a considerable period to bring about the agreements which would result in the construction of this facility.

Another incident both IGPC and the Town cite regarding service quality is the failure of NRG to deal in a timely manner with the request of its gas supplier, Union Gas, for adequate security, under its gas supply contract with NRG. This ultimately led to an application by Union Gas[16] to the Board to discontinue the supply of gas to NRG – a matter of considerable concern to both the Town and IGPC.

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[14] *Transcripts, Motion Hearing, (Addendum) June 29, 2007(Afternoon), page 22, line 21 to page 23 line 18*

[15] Note, NRG has appealed the fine

[16] *Union Gas Limited Application on August 1, 2008 seeking the Board's approval to discontinue service to Natural Resource Gas Limited ("NRG")*

The issue turned in part on the state of NRG's financial accounts and, NRG's claim that redeemable shares should be regarded as equity as opposed to debt. The evidence by NRG's own accountants recognized that under Generally Accepted Accounting Principles ("GAAP") redeemable shares were properly classified as debt rather than equity. This meant NRG had little or no equity and Union Gas had no security for the outstanding balances.

It turned out that the Bank of Nova Scotia, the main lender to NRG, had the same concern. Those concerns were addressed months earlier when NRG provided the Bank with a postponement agreement by which the security interest of the redeemable preference shares was postponed to the interest of the bank[17]. The Board ordered NRG to provide Union Gas with a similar postponement agreement.

The arguments of both IGPC and the Town rely on the Board's Decision[18] as further evidence of the lack of adequate service quality;

> Union's concern with the financial stability of NRG was well founded, given NRG's decision to reclassify the preferred shares. The Scotia Bank had a similar concern and NRG addressed it promptly by providing a Postponement Agreement.
>
> In the case of Union's request for security, NRG did not act in a timely manner. The record suggests that NRG essentially stone-walled Union. This resulted in significant cost for Union, the Board, the Town of Aylmer and the Integrated Grain Processors Co-operative. This type of brinkmanship is not helpful where 6,500 customers and a recently activated ethanol plan supported by substantial Federal and provincial funding are involved.

IGPC and the Town also note that the conduct of NRG was sanctioned by the Board by an administrative penalty against NRG in the case of refusal to sign the assignment and a cost award against the NRG shareholders in the case of Union's application to discontinue supply to NRG.

The arguments above were advanced by both the Town and IGPC. However the Town raised an additional complaint relating to NRG's security deposit policy.

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[17] The redeemable preferred shares are owned by the shareholders of NRG

[18] *Board Decision and Order dated November 27, 2008, pages 5-7 Re: Union Gas Limited's Application seeking the Board's approval to discontinue service to Natural Resource Gas Limited ("NRG"),. (EB-2008-0273)*

In 2008, the Town received a petition with 457 written and 65 on-line signatures complaining about NRG's customer deposit policy. The evidence before us is that the level of security deposits which the Board approved for test year 2007 was $105,000. By September 2006 NRG was holding security deposits of $280,000 which increased to $603,000 by September 2007 and further to $757,000 by September 2008. The 650% increase in security deposits demanded by NRG from its customers in this three year period led to widespread customer complaints and the petition to the Town Council.

The NRG response to the security deposit issue is that NRG was unaware of the petition notwithstanding that it was advertised in the local newspaper. Second, NRG states that it is prepared to comply with new rules the Board has been considering with respect to security deposits.

NRG further submits that the increases in deposits resulting from the initiation of the new deposit policy and the amount of deposits held will decline as the program matures and refunds are made to those demonstrating a good payment record.

NRG offered little response to the allegations that the utility's quality of service failed to meet minimum standards. The main response seemed to be that the Town was acting in bad faith and failed to advise NRG earlier that the Town was not prepared to grant NRG the requested 20 year term. It was suggested that the Town was in some fashion coordinating a takeover of NRG facilities with Union Gas and the failure to advise NRG of the Town's position earlier was part of that exercise.

There is no evidence that Union Gas was involved in any way in these discussions. Moreover, the evidence of Ms. Adams, the Town's Chief Administrative Officer, is clear. She was not at liberty to disclose the Council's position regarding the renewal of franchise agreement, until such time as the Council had voted on the matter. There is no evidence that she misled NRG.

Financial Viability

Both the Town and IGPC also question the financial viability of NRG. These submissions rely for the most part on the application by Union to discontinue supply.

Union claimed that NRG's financials demonstrated that there was no equity and therefore no security for the debt NRG was incurring to Union under its gas supply

contract. IGPC and the Town agreed. They argued that without the security deposits NRG had little or no working capital. Finally, they point to the Board's findings in that Motion that NRG was late in providing the Board with the financial statements required under the Board's rules.

NRG responds that the short term proposed by the municipality will in fact limit the utility's ability to finance and creates no incentive for NRG to invest in facilities.

It's true that the Board in previous decisions has linked the term of the franchise agreement to the financing of the utility[19]. This is particularly true for original franchise agreements as opposed to renewals. Here the situation is different. This utility, unlike any other in the province, has no long term financing. All the financing is short term. In fact the financing is a demand note.

NRG then argues that if the Board only awards a three year term its lender will likely call the demand note placing the utility in financial jeopardy. There is no convincing evidence that this is likely.

The fact that NRG chooses to finance its operations by way of a demand note (which is admittedly unusual) cannot be used as the basis for arguing for a longer term. Moreover, when this note was put in place NRG had less than 5 years remaining on its existing 20 year franchise agreement. Nor does the Board accept that a shorter term will reduce the incentive of the utility to maintain its facilities. The Town's position is exactly the opposite; a shorter term may encourage NRG to pay more attention to its service quality and financial integrity.

The Alignment of Franchise Agreements

Another rationale offered by the Town for a shorter term of three years is that this will allow the Town of Aylmer to align renewal of its franchise agreements with the neighbouring municipalities. NRG responds that this is merely a strategy to allow the Town to more easily replace NRG with an alternative supplier. NRG claims this is an improper motive.

The Town admits that this was one of the reasons for the 3 year term. The Town, however argues that a municipality should, if it is in the public interest, have the option to contract with a different supplier. The Town argues while a municipality no longer

[19] *Re Northern and Central Gas, E.B.A 194, December 3, 1976*

has the unilateral right to terminate an agreement, the right to terminate always exists provided that the Board finds it in the public interest. The Town also notes that whatever happens three years from now will still be subject to Board approval.

The Board does not accept NRG's position that the alignment of expiration dates in the franchise agreements of adjacent municipalities is an improper motive. Different dates are simply an artificial barrier to municipalities seeking alternative supply in the appropriate circumstances, a rationale the Board accepted in the 1986 Report[20] that created the Model Franchise Agreement;

> A uniform expiry date within a regional area could help achieve two goals. It might place the local municipalities in a better negotiating position with the utility and it would contribute to the standardization of franchise agreements at least within each regional municipality or county.

Board Findings - Term of the Franchise Agreement

The Board accepts that the Model Franchise Agreement serves an important and useful purpose. And the Board agrees that the term should be reduced only in "unusual" circumstances. The question is: do unusual circumstances arise in this case?

The Board finds that unusual circumstances do exist in this case and they warrant a term substantially less than the standard term specified in the Model Franchise Agreement.

The Town and IGPC question both the financial viability and quality of service of NRG. The Board agrees that there are serious concerns with respect to both. However there is no evidence to support the Town claim that NRG's service was unreliable.

The Board accepts the arguments of both IGPC and the Town that the conduct of NRG, as confirmed in previous Board decisions, failed to meet the standard expected of a public utility in this Province. There was no apparent reason for refusing to sign the assignment to contracts involved in the construction of the ethanol plant. That refusal placed in jeopardy an asset which doubled the size of NRG and offered

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[20] *Report of the Board on the Review of Franchise Agreements, E.B.O. 125, May 21, 1986, page 7/16, paragraph 7.39*

increased financial stability to the entire franchise area. Furthermore when the Board ordered the assignment to be signed, the utility refused.

The NRG contract with respect to the Union gas supply contract was equally disturbing. Union was forced to bring an application to discontinue supply which placed the entire franchise in jeopardy. In reviewing the evidence it was clear to the Board that NRG could have solved the problem expeditiously without confrontation by supplying Union with a postponement agreement similar to the one provided to the Bank of Nova Scotia months earlier. In the Board's view the Town and IGPC are entitled to raise these concerns as questions of service quality in this proceeding.

The Union proceeding also raised valid concerns regarding the financial viability of NRG. It appears that this utility has little or no working capital outside of the customer deposits. When proper accounting treatment is applied, the utility has little or no equity.

The Board's concerns are only heightened by NRG's pattern of non-disclosure. The reports the utility is required to file with the Board were months late. The rate application has been delayed. In these circumstances the Board believes it is not in the public interest to renew this franchise agreement for a term greater than the three years proposed by the Town of Aylmer.

For the reasons stated above the Board orders that the franchise agreement between Natural Resource Gas Limited and the Town of Aylmer be extended for a period of three years and expire on February 27, 2012.

It is not the intention of the Board in this decision to diminish the importance of the Model Franchise Agreement. The Model Franchise Agreement is an important tool to efficiently administer the many franchise agreements across this Province. The Model Franchise Agreement should be departed from only in exceptional and unusual circumstances. This, however, is such a case.

Board Findings - Other Conditions

In addition to limiting the term to three years, the Town asked the Board to impose four other conditions on renewing this franchise:

1. The Board should require NRG to file a new rate application within 6 months.

2. The Board should require NRG to implement the Board proposed revisions to its customer deposit policy.

3. NRG must give the Town notice of any proceedings brought before the Board in which NRG is involved.

4. The security deposits should be placed in a trust account.

The Board agrees that NRG should file a rate application within 6 months for rates to be effective October 1, 2010. The last NRG rate decision[21] was rendered in 2006. It is difficult to understand why NRG has not filed a rate application. The utility has just embarked on a capital expansion that doubled its rate base. The project is completed. Those assets now appear to be used and useful. Most utilities would be anxious to have the additions to rate base approved by the Board so they can earn a rate of return on those assets.

The Board will order NRG to bring a rate application within six months. That hearing will allow the Board to more completely examine the financial status of NRG. That examination will materially assist any future Board Panel examining the renewal of this franchise agreement three years from now.

The next matter relates to security deposits. That issue has been canvassed earlier in this decision. It is a concern of the Town and its residents. In this proceeding, NRG has agreed to comply with new rules. Accordingly, the Board will order that as a condition of approving this franchise extension NRG within a period of 60 days amend its security deposit policies to comply with the rules set out in Appendix B of this decision.

The Town has also asked the Board to order NRG to hold the customer security deposits in a trust account. The Town's concern is that NRG has limited or no equity and the customer security deposits represent most of the working capital of the utility. NRG's response is that there will be costs involved in setting up a trust account. The Board recognizes the Town's concern, but at the same time believes that the new security deposit rules set out in Appendix B will address the problem. Accordingly, the Board, will not order that a trust account be created.

The final matter relates to the Town's request that the franchise agreement be amended to require NRG to provide the Town notice of any regulatory proceedings.

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[21] *Board Decision with Reasons, September 20, 2006, approving the rates for Test Year 2007 (EB-2005-0544)*

The Board does not believe it's appropriate to add this type of term to the franchise agreement. The Town presumably believes this would provide greater security because non compliance would constitute a breach in the agreement. That, however, would create unnecessary risks for the customers.

The Board will however, order that as a condition of approving the franchise agreement that NRG provide notice to the Town of any applications it makes to the Board. In all likelihood the Town will receive this notification in the ordinary course. There is little harm, however, in making this clear to both the Town and NRG.

IT IS THEREFORE ORDERED THAT:

1. The existing franchise agreement between Natural Resource Gas Limited and the Town of Aylmer shall be extended for a period of three years and expire on February 27, 2012.

2. Natural Resource Gas Limited shall on or before July 6, 2009 amend its security deposit policy to comply with the procedures set out in Appendix B.

3. NRG shall file an application for new rates within six months of this decision for rates to be effective October 1, 2010**.**

4. NRG shall provide notice to the Town of Aylmer and its duly authorized representatives, of any regulatory application or proceeding coming under the jurisdiction of the Board.

DATED at Toronto, May 5, 2009

ONTARIO ENERGY BOARD

Original signed by

Kirsten Walli
Board Secretary

Appendix A

Copy of Expired Franchise Agreement (February 27, 2009)
[Natural Resource Gas Limited and The Corporation of the Town of Aylmer]

Board Decision and Order
Re: Natural Resource Gas Limited Application for Franchise Renewal with the Town of Aylmer (EB-2008-0413)

May 5, 2009

THIS AGREEMENT made the 27th day of February , 1984

B E T W E E N:

NATURAL RESOURCE GAS LIMITED

Hereinafter called the "Company"

OF THE FIRST PART

-and-

THE CORPORATION OF THE TOWN OF AYLMER

Hereinafter called the "Municipality"

OF THE SECOND PART

WHEREAS the Company desires to distribute and sell gas (which term shall mean and include natural gas, manufactured gas, synthetic gas, or liquefied petroleum gas, and includes any mixture of natural gas, manufactured gas, synthetic gas, or liquefied petroleum gas, but does not include a liquefied petroleum gas that is distributed by means other than a pipe line) in the Municipality upon the terms and conditions hereinafter set forth.

AND WHEREAS by By-law passed by the Council of the Municipality, the Mayor and Clerk of the Municipality have been authorized and directed to execute, seal and deliver this Agreement on behalf of the Municipality.

NOW THEREFORE THIS AGREEMENT WITNESSETH that for valuable consideration (the receipt and sufficiency of which is hereby acknowledged):

1. The consent, permission and authority of the Municipality are hereby given and granted to the Company, to lay down, maintain and use pipes and other necessary works for the transmission and distribution of gas, on, in, under, along or across any highway under the jurisdiction of the Council of the Municipality, including therein the right from time to time and at any time, to survey, construct, lay, maintain, inspect, alter, repair, renew, remove, abandon, replace, reconstruct, extend, use and operate in, through,

upon, under, along and across the same or any of them or any part or parts of them, such transmission and distribution mains, pipes, lines, services and works (with any and all necessary or incidental apparatus, attachments, appliances, arrangements for cathodic protection, regulators, valves, curb boxes, safety appliances and other suchlike appurtenances) which the Company may desire from time to time and at any time for the transmission of gas in and through the Municipality and for a gas distribution system and any extension or extensions from time to time thereto and together with the further right from time to time and at any time to enter upon, open up, dig, trench, use and occupy such highways or any part or parts of them for any of the purposes aforesaid and further together with the right from time to time and at all times to use and operate a gas transmission and distribution system in the Municipality and to transmit gas in and through the Municipality and to provide gas service to any resident or residents of the Municipality, and to bring in, transmit, produce, distribute, supply and sell gas in and through the Municipality for fuel, heat and power.

2. The company shall well and sufficiently restore forthwith to as good condition as they were in before the commencement of the Company's operation to the satisfaction of the Municipal Engineer (which term means from time to time such employee of the Municipality as the Municipality shall have designated as such for the purposes of this Agreement, or failing such designation, the senior employee of the Municipality for the time being charged with the administratic of public works and highways in the Municipality) all highways, squares and public places which it may excavate or interfere with in the course of laying, constructing, or repairing or removing of its mains, pipes, regulators, valves, curb boxes, safety appliances and other appurtenances and shall make good any settling or subsidence thereafter caused by such excavation, and further, in the event of the Company failing at any time to do any work required by this Section the Municipality may forthwith have such work done and charged to and collect from the Company the cost thereof and the

Company shall on demand pay any reasonable account therefor certified by the Municipal Engineer.

3. The Company shall at all times wholly indemnify the Municipality from and against all loss, damage and injury and expense to which the Municipality may be put by reason of any damage or injury to persons or property resulting from the imprudence, neglect or want of skill of the employees or agents of the Company in connection with the construction, repair, maintenance or operation by the Company of any of its works in the Municipality.

4. All new (or renewal) mains, pipes, lines and works inst by the Company under this By-law shall be constructed and laid in accordance with good engineering and constructing practices. Expect in case of emergency,

(a) no excavation, opening or work (exclusive of service connections from the street main to the property line) which will disturb or interfere with the travelled surf of any highway shall be undertaken or commenced by the Company without written notice to such officer of the Municipality as may from time to time be appointed by th Council of the Municipality for the purpose of general supervision over its highways (hereinafter referred to a "the said officer of the Municipality", which term shal include the person acting in his stead in the event of his absence from duty), such notice to be given at least 24 hours in advance of commencing such work unless other wise agreed to by the said officer of the Municipality and

(b) before laying or installing any new (or renewal) mai pipes, lines and works (exclusive of service connections from the street main to the property line), the Company shall first file with the said officer of the Municipali a preliminary map or plan showing what it proposes to la or install and the proposed location thereof and shall a check with and obtain the written approval of the said officer of the Municipality as to such proposed location

Not later than three months after the close of the Compa second fiscal year, the Company shall file with the clerk of the Municipality, a map or plan showing the location and size of mains, pipes, lines and works laid or installed or existing in the Town, exclusive, however, of service connections from the street main to the property line. Not later than three months after the close of each of its fiscal years thereafter, the Company shall file with

Clerk of the Municipality maps or plans showing the location and size of all mains, pipes, lines and works laid or installed by the Company in the highways during the previous fiscal year, exclusive however, of service connections from the street main to the property line. The Company shall further up=date and compile this plan once every fifth fiscal year thereafter during the term of this agreement, the said up-dating being completed not later than three months after the close of each of the aforesaid fifth fiscal year periods.

5. Insofar as it is reasonably practicable, all lines and w constructed or installed by the Company shall be placed underground, and, except where it shall be necessary to cross a highway, along the sides of the highway. All lines and works constructed by the Company shall be so constructed as when completed not to obstruct or interfere with or render more difficult or dangerous the use of the highway or any municipal sewers, water pipes, drains, bridges, culverts or ditches thereon or therein, or other municipal works or improvements thereon or therein or the improvement or repair thereof, or with the roads or bridges to property fronting thereon, and wherever any such line shall be carried across an open drainage ditch, it shall be carried either wholly under the bottom thereof or above the top thereof, so as not in any way to interfere with the carrying capacity of such ditch.

6. The Company shall use at all times proper and practical means to prevent the excape or leakage of gas from its mains and pipes and the causing of any damage or injury therefrom to any person or property.

7.The rates to be charged and collected and the terms of services to be provided by the Company for gas supplied by it under this franchise shall be the rates and the terms of service approved or fixed by the Ontario Energy Board or by any other person or body having jurisdiction to approve or fix such rates

or terms of service. Any application to approve or fix rates to be charged and collected or terms of services to be provided by the Company for gas supplied by it shall be made in accordance with the Ontario Energy Board Act, R. S. O. 1980, Chapter 332, as amended from time to time or any other statute regulating such application.

8. The Municipality will not build or permit any Commission or other public utility or person to build any structure or structures encasing any mains or pipes of the Company.

9. (a) This Agreement and the respective rights and obligations hereunto of the parties hereto are hereby delcared to b subject to the provisions of all regulating statutes and to all ord and regulations made thereunder and from time to time remaining in effect; and in the event of any dispute or disagreement between the parties hereto as to the meaning or interpretation of anything herein contained or as to the performance or non-performance by either of such parties of any of the provisions hereof or as to the respective rights and obligations of the parties hereto hereunder, either or such parties may refer such dispute or disagreement to arbitration under the provisions of Paragraph 9(b) hereof.

(b) Whenever the Municipal Arbitrations Act, R. S. O. 198 Chapter 304, shall extend and apply to the Municipality any references to arbitration pursuant to the provisions of Paragraph 9(a) hereof shall be to the Official Arbitrator appointed under the Act and shall be governed by the provisions of that Act. At any other time the procedure upon an arbitration pursuant to the provisions of the said Paragraph 9(a) shall be as follows:

> Within twenty days after the written request of either of the parties hereto for arbitration each of them shall appoint one arbitrator and the two so appointed shall, within twenty days after the expiring of such twenty-day period select a third. In case either of the parties hereto shall fail to name an arbitrator within twenty days after the said written request for arbitration, the arbitrator appointed shall be the

only arbitrator. In case the two arbitrators so appointed are unable to agree on a third arbitrator withi twenty days after the expiry of the first twenty-day period above mentioned, application shall be made as soon as reasonably possible to any Judge of the Supreme Court of Ontario for the appointment of such third arbitrator. The arbitrator or arbitrators so appointed shall have all the powers accorded arbitrators by the Arbitration Act, R. S. O. 1980, Chapter 25, as from time to time amended, or any Act in substitution therefor. The decisi of the said arbitrator or arbitrators (or of a majority of such arbitrators) shall be final and binding on the parties hereto.

10. In the event of the Company being prevented from carrying out its obligations under this Agreement by reason of any cause beyond its control, the Company shall be relieved from such obligations while such disability continues and in the event of dispute as to the existence of such disability, such dispute shall be determined as hereinbefore provided. Provided, however, that the provisions of this Paragraph 10 shall not relieve the Company from any of tis obligations as set out in Paragraph 3 hereof.

11. The franchise hereby granted shall be for a term of twenty-five (25) years from and after the final passing of the By-la provided that if at any time prior to the expiration of the said term of twenty-five (25) years or prior to the expiration of any renewal thereof, the Company shall notify the Municipality in writing that it desires a renewal thereof for a further period, the Municipality may but shall not be obligated to renew by By-law this Agreement from time to time for further periods not exceeding twenty-five (25) years at any time.

12. For the purpose of this Agreement and of any matters arising out of the same, the Municipality shall act by the Council thereof.

13. Wherever the word "highway" is used in this Agreement or i the said By-law, it shall mean common and public highways and shall include any bridge forming part of a highway on or over and across which a highway passes and any public square, or road allowance and shall include not only the travelled portion of such highway,

but also ditches, driveways, sidewalks, and sodded areas forming part of the road allowance.

14. Upon the expiration of this franchise or any renewal thereof, the Company shall have the right, but nothing herein contained shall require it, to remove its mains, pipes, plant and works laid in the said highway. Provided that forthwith upon the expiration of this franchise or any renewal thereof, the Company shall deactivate such pipeline in the Municipality. Provided further that if the Company should leave its mains, pipes, plants and works in the highway as aforesaid and the Municipality at any time after a lapse of one year from termination, require the removal of all or any of the Company's said facilities for the purpose of altering or improving the highway or in order to facilitate the construction of utility or other works in the highway the Municipality may remove and dispose of so much of the Company's said facilities as the Municipality may require for such purposes and neither party shall have recourse against the other for any loss, cost or expense occasioned thereby.

15. Any notice to be given under any of the provisions hereof may be effectually given to the Municipality by delivering the same to the Municipal Clerk or by sending the same to him by registered mail, postage prepaid, addressed to "46 Talbot Street West, Aylmer, Ontario, N5H 1J7", and to the Company by delivering the same to its Manager or other Chief Officer in charge of its place of business in the Town of Aylmer, or by sending the same by registered mail, postage prepaid, addressed to "Natural Resource Gas Limited, P. O. Box 3117, Terminal A, London, Ontario, N6A 4J4." If any notice is sent by mail the same shall be deemed to have been given on the say succeeding the posting thereof.

16. It is recognized that gas is a public utility, the use of which may be essential to the proper development of any new area of subdivision and industrial developments. The Municipality,

therefore may notify the Company of each new plan of subdivision before the same has been approved by the Council and to take any reasonable steps to ensure that in each new plan of subdivision, adequate provision is made for the reservation of lands for gas regulator sites. Insofar as is reasonably practicable the Company shall endeavour to construct its main in new areas of subdivision and industrial developments at the same time as the Municipality is constructing its public services therein.

17. This Agreement shall extend to, benefit and bind the parties thereto, their successors and assigns, respectively.

IN WITNESS WHEREOF the said Company has hereunto caused its Corporate Seal to be affixed and these presents signed by its proper officers in that behalf and the said Corporation has hereunto caused its Corporate Seal to be affixed and these presents signed by the Municipality and the Clerk.

NATURAL RESOURCE GAS LIMITED

Per A

THE CORPORATION OF THE TOWN OF AYLMER

Roger Verburgt

Charles S. Krapp

DATED: Feburary 27 ,1984

BETWEEN:

NATURAL RESOURCE GAS LIMITED

-and-

THE CORPORATION OF THE TOWN OF AYLMER

FRANCHISE AGREEMENT

BELANGER, CASSINO & BENSON
Barristers and Solicitors
153-759 Hyde Park Road
London, Ontario
N6H 3S2

BY-LAW NO. 9-84

OF THE CORPORATION OF THE TOWN OF AYLMER

Being a By-Law to authorize a Franchise Agreement between the Corporation and Natural Resource Gas Limited.

WHEREAS the Council of the Corporation of the Town of Aylmer deems it expedient to enter into the attached franchise agreement with Natural Resource Gas Limited;

AND WHEREAS, the Ontario Energy Board, by its Order issued pursuant to The Municipal Franchises Act on the 5th day of May, 1982, has approved the terms and conditions upon which and the period for which, the franchise provided for in the attached agreement, is proposed to be granted, and has declared and directed that the assent of the municipal electors in respect of this By-Law is not necessary.

NOW THEREFORE, BE IT ENACTED:

1. That the attached franchise agreement between the Corporation and Natural Resource Gas Limited, is hereby authorized and the franchise provided for therein is hereby granted.

2. That the Mayor and Clerk are hereby authorized and instructed on behalf of the Corporation to enter into and execute under, its corporate seal and deliver the aforesaid agreement which agreement is hereby incorporated into and shall form part of this By-Law.

READ A First and Second time this 27th day of February, 1984.

ACTING MAYOR

CLERK

READ A Third time and finally passed this 27th day of February, 1984.

ACTING MAYOR

CLERK

CERTIFIED TRUE COPY

DATE May 2/84 CLERK/TREAS.

Appendix B

Security Deposit Policy for Natural Resource Gas Limited ("NRG")

Board Decision and Order
Re: Natural Resource Gas Limited Application for Franchise Renewal with the Town of Aylmer (EB-2008-0413)

May 5, 2009

Appendix B

Security Deposit Policy for Natural Resource Gas Limited ("NRG")

Definitions

(a) "general service consumer" means a consumer that is not a residential consumer and that annually consumes no more than 100,000 m^3 of gas; and

(1) In managing consumer non-payment risk, NRG shall not discriminate among consumers with similar risk profiles or risk related factors except where expressly permitted under this Security Deposit Policy.

(2) NRG may require a security deposit from a consumer who is not billed by a gas vendor under gas vendor-consolidated billing unless the consumer has a good payment history of 1 year in the case of a residential consumer, 5 years in the case of a general service consumer and 7 years in the case of any other consumer. The time period that makes up the good payment history must be the most recent period of time and some of the time period must have occurred in the previous 24 months. NRG shall provide a consumer with the specific reasons for requiring a security deposit from the consumer.

(3) For the purposes of section (2), a consumer is deemed to have a good payment history unless, during the relevant period of time referred to in section (2) any of the following has occurred other than by reason of an error by NRG:

(a) the consumer has received more than one disconnection notice from NRG indicating that NRG intends to disconnect the consumer for non-payment;

(b) more than one cheque given to NRG by the consumer has been returned by reason of insufficient funds;

(c) more than one pre-authorized payment from the consumer to NRG has failed to be made by reason of insufficient funds; or

(d) at least one visit to the consumer's premises has been made by or on behalf of NRG for the purpose of demanding payment of an overdue amount or to shut off or limit the supply of gas to the consumer's premises for non-payment.

(4) Despite section (2), NRG shall not require a security deposit from a consumer where:

(a) the consumer provides a letter from another gas distributor or an electricity distributor in Canada confirming a good payment history with that distributor for the most recent relevant time period set out in section (2) where some of the time period that makes up the good payment history has occurred in the previous 24 months; or

(b) the consumer is a residential consumer or a general service consumer and provides a satisfactory credit check conducted at the consumer's own expense.

(5) Subject to sections (6) and (7), the maximum amount of a security deposit that NRG may require a consumer to pay shall be calculated as follows: billing cycle factor x consumer's estimated bill. For this purpose:

(a) the billing cycle factor shall be 2.5 if the consumer is billed monthly and shall be 1.75 if the consumer is billed bi-monthly; and

(b) a consumer's estimated bill shall be determined based on:

i. NRG's rates and charges in effect at the relevant time; and

ii. the consumer's average monthly consumption of gas during the most recent 12 consecutive months within the past two years. Where the relevant gas consumption information is not available for a consumer for 12 consecutive months within the past two years or where the distributor does not have systems capable of making this calculation, the consumer's average monthly consumption shall be based on a reasonable estimate made by NRG.

(6) Where in a relevant 12-month period a consumer has received more than one disconnection notice from NRG indicating that NRG intends to disconnect the consumer for non-payment, the consumer's estimated bill may be determined based on the consumer's highest actual or estimated monthly consumption in the most recent 12 consecutive months within the past two years.

(7) Where a consumer other than a residential consumer or a general service consumer has a credit rating from a recognized credit rating agency, the maximum amount of a security deposit that NRG may require the consumer to pay shall be reduced in accordance with the following table:

Credit Rating (Using Standard and Poor's Rating Terminology)	**Allowable Reduction In Security Deposit**
AAA- and above or equivalent	100%
AA-, AA, AA+ or equivalent	95%
A-, From A, A+ to below AA or equivalent	85%
BBB-, From BBB, BBB+ to below A or equivalent	75%
Below BBB- or equivalent	0%

(8) Subject to section (1) NRG may reduce the amount of a security deposit that it requires a consumer to pay for any reason, including where the consumer pays under an interim payment arrangement or where the consumer makes pre-authorized payments.

(9) NRG shall accept payment of a security deposit by any consumer in the form of cash or cheque, and shall also accept from a non-residential consumer security in the form of an automatically renewing, irrevocable letter of credit from a bank as defined in the Bank Act (Canada). In either case, the form shall be at the discretion of the consumer. NRG may also accept other forms of security.

(10) NRG shall permit a consumer to provide a security deposit in equal instalments paid over at least four months, or over such shorter period as the consumer may choose.

(11) Interest shall accrue monthly on security deposits paid by way of cash or cheque, commencing on the date of receipt of the total amount of the security deposit required by NRG. The interest rate shall be the Prime Business Rate published on the Bank of Canada website less 2 percent, updated quarterly. For any quarter that the noted Prime Business Rate is 2 percent or less, the interest rate shall be zero percent. Any accrued interest shall be paid out to the consumer at least once every twelve months and shall be paid out earlier upon the return or application of the security deposit, in whole or in part, or the closure of the consumer's account. Payment of accrued interest may be effected by crediting the consumer's account or by other means.

(12) NRG shall, at least once in each calendar year, review each consumer's security deposit to determine whether:

(a) the security deposit is to be returned to the consumer by reason of

the fact that the consumer has become entitled to the benefit of the exemption set out in section (2) or (4) or

(b) the amount of the security deposit is to be adjusted based on a re-calculation of the maximum amount of the security deposit in accordance with section (5).

This section applies to all security deposits, whether paid by a consumer before or after this Security Deposit Policy came into force (not later than **July 6, 2009)**.

(13) Subject to section (14), upon being requested to do so by a consumer NRG shall review the consumer's security deposit to determine whether:

(a) the security deposit is to be returned to the consumer by reason of the fact that the consumer has become entitled to the benefit of the exemption set out in section (2) or (4); or

(b) the amount of the security deposit is to be adjusted based on a re-calculation of the maximum amount of the security deposit in accordance with section (5).

This section applies to all security deposits, whether paid by a consumer before or after this Security Deposit Policy came into force (not later than **July 6, 2009**).

(14) NRG shall not be required to review a security deposit at the request of a consumer under section (13) where less than 12 months has elapsed since:

(a) the date on which the total amount of the security deposit was paid; or

(b) the date on which the consumer last made a request for review under that section.

(15) Subject to section (16), where a review conducted under section (12) or (13) reveals that some or all of a security deposit must be returned to a consumer, NRG shall promptly return the relevant amount to the consumer, with interest where applicable, by crediting the consumer's account or otherwise.

(16) Where a review conducted under section (12) or (13) reveals that a consumer other than a residential consumer or a general service consumer has become entitled to the benefit of the exemption set out in section (2) or (4), NRG may nonetheless retain up to 50% of the security deposit.

(17) Where a review conducted under section (12) or (13) reveals that additional security may be sought from a consumer based on the re-calculation of the maximum amount of the security deposit, NRG may require that the additional security be paid at the same time as the consumer's next regular bill comes due.

(18) NRG shall return any security deposit received from a consumer, with interest where applicable, within six weeks of closure of the consumer's account, subject to the right of NRG to use all or a part of the security deposit and interest to set off other amounts owing by the consumer to NRG.

(19) NRG shall apply a security deposit, with interest where applicable, to the final bill prior to a change in service where a consumer changes supply from system gas to a gas vendor that uses gas vendor-consolidated billing or where a consumer changes billing options from NRG-consolidated billing to split billing or gas vendor-consolidated billing. However, where a consumer changes billing options from NRG-consolidated billing to split billing, NRG may retain that portion of the security deposit amount that reflects NRG's reasonable assessment of the non-payment risk associated with the new billing option. In all cases, NRG shall promptly return any remaining portion of the security deposit and interest where applicable to the consumer. NRG shall not pay any portion of a consumer's security deposit to a gas vendor.

(20) Despite sections (12), (13), (15), (18) and (19), where all or part of a security deposit has been paid by a third party on behalf of a consumer, NRG shall return the amount of the security deposit paid by the third party, including interest where applicable, to the third party. This obligation shall apply where and to the extent that:

(a) the third party paid all or part (as applicable) of the security deposit directly to NRG;

(b) the third party has requested, at the time the security deposit was paid or within a reasonable time thereafter, that NRG return all or part (as applicable) of the security deposit to it rather than to the consumer; and

(c) there is not then any amount overdue for payment by the consumer that NRG is permitted by this Rule to off set using the security deposit.

(21) A consumer that is a corporation within the meaning of the Condominium Act, 1998 who has an account with NRG that:

(a) relates to a property defined in the Condominium Act, 1998 and comprised predominantly of units that are used for residential purposes; and

(b) relates to more than one unit in the property,

shall be deemed to be a residential consumer for the purposes of sections (2)and (9) provided that the consumer has filed with NRG a declaration in a form approved by the Board attesting to the consumer's status as a corporation within the meaning of the Condominium Act, 1998.

(22) Sections (12) and (13) shall be applied on the basis that a consumer referred to in section (21) is a residential consumer even if the consumer paid the security deposit prior to the date on which section (21) came into force.