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BY E-MAIL

April 10, 2017

Attention: Ms. Kirsten Walli, OEB Secretary

Dear Ms. Walli:

**Re: Natural Resource Gas Limited
Application for approval to sell natural gas distribution system
OEB File Number: EB-2016-0351**

In accordance with Procedural Order No. 1 issued on March 29, 2017, please find attached the OEB staff submission on the confidentiality requests that have been made in this proceeding.

Yours truly,

Original Signed By

Judith Fernandes
Project Advisor

cc: Parties to EB-2016-0351

OEB STAFF SUBMISSION

NATURAL RESOURCE GAS LIMITED

EB-2016-0351

**Confidentiality
Requests**

April 10, 2017

Background

Natural Resource Gas Limited (Natural Resource Gas) filed an application with the Ontario Energy Board (OEB) on December 1, 2016 under section 43(1)(a) of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, (Schedule B), seeking approval to sell its natural gas distribution system to EPCOR Natural Gas Limited Partnership (EPCOR Natural Gas). The application was amended on January 25, 2017.

As part of its application, and pursuant to Rule 10 of the OEB's *Rules of Practice and Procedure* and in accordance with the OEB's *Practice Direction on Confidential Filings* (Practice Direction), Natural Resource Gas filed a request for confidentiality relating to certain information contained in the Asset Purchase Agreement (APA) between Natural Resource Gas and EPCOR Natural Gas, included as Attachment 5 to the application.

According to Natural Resource Gas, certain redacted information constitutes “personal information” within the meaning of the *Freedom of Information and Protection of Privacy Act (Ontario)*(FIPPA). Other redacted information is considered by Natural Resource Gas and EPCOR Natural Gas to be confidential and commercially sensitive. Natural Resource Gas advises that this latter information includes bank account information, equipment serial numbers, financial details regarding contracts with persons who are not parties to the application, and limitations of liability for both Natural Resource Gas and EPCOR Natural Gas. In its November 30, 2016 cover letter to the application, Natural Resource Gas submitted that public disclosure of this information could reasonably be expected to result in financial harm to Natural Resource Gas, EPCOR Natural Gas or its third party contractors, and is not relevant to the OEB's consideration of the application.

Natural Resource Gas filed a non-confidential redacted version of the APA and two confidential unredacted versions of the APA – one in which the commercially sensitive information proposed for redaction was highlighted and the personal information remained redacted; and another fully unredacted version, reflecting both the commercially sensitive information and the personal information.

Submission

As can be seen above, Natural Resource Gas makes two claims about the redacted commercially sensitive information. First, that its public disclosure could reasonably be expected to result in financial harm to Natural Resource Gas, EPCOR Natural Gas or its third party contractors; and second, that it is not relevant to the OEB's consideration of this application. OEB staff submits that it is appropriate to maintain

as much of the APA as possible on the record of this proceeding, as the APA forms the basis for the transaction in respect of which approval is being sought. Accordingly, OEB staff submits that while personal information should not be available to any person, even if that person has executed an undertaking with respect to confidentiality, it is preferable that the non-personal confidential information be available to the OEB and individuals from whom the OEB has accepted a Declaration and Undertaking under section 6.1 of the Practice Direction. This approach is in keeping with the OEB's view, as expressed in the Practice Direction, that its proceedings should be open, transparent and accessible.

OEB staff submits that there are two issues to consider:

- I. Should the proposed confidential material be placed on the public record or be treated as confidential?
- II. Should the identified personal information be treated as confidential?

Should the proposed confidential material be placed on the public record or be treated as confidential?

The OEB's general policy as stated in its Practice Direction is that all evidence should be on the public record. The OEB has also recognized that some information may be of a confidential nature and should be protected.

As set out in the Practice Direction, it is the OEB's general policy that all records should be open for inspection by any person unless disclosure of the record is prohibited by law. This reflects the OEB's view that its proceedings should be open, transparent and accessible. The Practice Direction seeks to balance these objectives with the need to protect information that has been properly designated as confidential. In short, placing materials on the public record is the rule and confidentiality is the exception. The onus is on the person requesting confidentiality to demonstrate why confidentiality is appropriate.¹

OEB staff submits that while the practice of the OEB is to have as much information as possible on the public record, the OEB relies on full and complete disclosure of all relevant information in order to ensure that its decisions are well-informed. OEB staff submits that some of that information, such as information which, if disclosed, could interfere with commercial negotiations are of a confidential nature and should be protected as such. OEB staff also notes that in prior OEB decisions, the OEB

¹ EB-2013-0115; EB-2013-0159; EB-2013-0174 Decision and Order of the OEB on Confidentiality dated May 29, 2014

has found that where confidentiality is sought for commercially sensitive financial information concerning non-regulated businesses then that information should be treated as confidential.²

OEB staff has carefully reviewed the requests made and submits that it is appropriate for the OEB to treat the information that is the subject of the applicant's confidentiality request as confidential, for the reasons set out below:

- a. Subsection 8.2(b) – the redacted material in this subsection deals with certain rights of the parties in the event of the termination of the APA. If the APA is terminated, then OEB staff would expect that the current application would not proceed. This raises a question about whether the subject information is relevant to this proceeding, but this submission pertains to the applicant's confidentiality request. OEB staff submits that it is important that the OEB have the entire agreement before it (subject to the redaction of personal information). OEB staff considers it reasonable to expect that these rights could be the subject of negotiation were Natural Resource Gas to negotiate a sale with another potential purchaser in the future, so that their disclosure may prejudice Natural Resource Gas' competitive position in a future negotiation. This is among the OEB's considerations in determining requests for confidentiality in Appendix A of the Practice Direction.
- b. Section 9.16 – the redacted material in this section deals with the maximum values for indemnification as between the Vendor and Purchaser under the APA. As with the items identified in subsection 8.2(b), OEB staff considers it reasonable to expect that these amounts could be the subject of negotiation were Natural Resource Gas to negotiate a sale with another potential purchaser in the future if the current transaction were not completed. OEB staff can accept that their disclosure may prejudice Natural Resource Gas' competitive position in a future negotiation.
- c. Schedule 1.1B – the redacted material in this Schedule consists of the VIN numbers and serial numbers of various vehicles and pieces of equipment. The descriptions of the vehicles themselves have not been redacted. The applicant has not provided any further comments as to why this information requires confidential treatment, but OEB staff submits that it is appropriate that the VIN and serial numbers remain confidential in the interest of maintaining the security of that property.

² EB-2009-0408 Decision and Order of the OEB on Confidentiality dated April 30, 2010

- d. Schedule 1.1F – this Schedule is a term sheet for a Transitional Regulatory Services agreement between Ayerswood Development Corp. (Ayerswood) as service provider and EPCOR Natural Gas or an affiliate thereof. The only redacted information is the total amount of compensation payable by EPCOR Natural Gas to Ayerswood. OEB staff agrees that the disclosure of that third-party pricing information may reasonably be expected to prejudice Ayerswood’s competitive position, and that it is appropriate to maintain that information in confidence. Vendor pricing information is among the types of information that have previously been held confidential by the OEB, as noted in Appendix B to the Practice Direction.

- e. Schedule 4.1.17 – this Schedule sets out the account number and branch information for a bank account to be assigned to EPCOR Natural Gas by Natural Resource Gas. OEB staff submits that the public disclosure of this commercial information could reasonably be expected to cause undue loss to the parties to the transaction.

- f. Schedule 4.1.25 – this Schedule identifies certain of Natural Resource Gas’ intellectual and industrial property. The only redacted information is the total value of licence and maintenance fees related to a Merchant Services package acquired from a third party, Continental Utility Solutions, Inc. As with the redaction from Schedule 1.1F discussed above, OEB staff agrees that the disclosure of this third-party pricing information may reasonably be expected to prejudice Continental Utility Solutions, Inc.’s competitive position, and that it is appropriate to maintain that information in confidence.

Should the identified personal information be treated as confidential?

OEB staff submits that the information identified as personal information should be treated as confidential as it is protected from public disclosure under the FIPPA. It should not be placed on the public record or provided to any other party, including a person from whom the OEB has accepted a Declaration and Undertaking in respect of confidentiality under Section 6.1 of the Practice Direction.

-All of which is respectfully submitted-