

ONTARIO ENERGY BOARD

STAFF SUBMISSION

**ON A MOTION
BY INTEGRATED GRAIN PROCESSORS CO-OPERATIVE INC.
AND IGPC ETHANOL INC.
IN**

**NATURAL RESOURCE GAS LIMITED
2011 RATES PROCEEDING
EB-2010-0018**

August 24, 2010

Introduction

Natural Resource Gas Limited (“NRG” or the “Company”) filed an Application, dated February 10, 2010, with the Ontario Energy Board under section 36 of the *Ontario Energy Board Act*, S.O. 1998, c.15, Schedule B seeking distribution rates for 2011.

The Board issued a Notice of Application dated March 1, 2010. The Town of Aylmer, Union Gas Limited (“Union”), Integrated Grain Processors Co-Operative Inc. (“IGPC”) and Vulnerable Energy Consumers Coalition (“VECC”) applied for and were granted intervenor status.

On August 3, 2010, IGPC filed a Notice of Motion to resolve certain issues related to the disagreement over the reasonable cost of construction of the 28.5 km pipeline built by NRG to serve natural gas to the IGPC ethanol plant.

IGPC owns and operates an ethanol facility in the Town of Aylmer, Ontario. In the Board Decision dated February 2, 2007 (EB-2006-0243), the Board granted NRG leave to construct the pipeline to supply the facility. In its Motion, IGPC has indicated that to date, IGPC and NRG have not been able to resolve differences over costs and require the Board’s assistance to achieve a resolution on these matters.

The Motion by IGPC seeks a Board determination on several issues primarily:

- A determination of the actual capital cost of the pipeline and the actual aid-to-construct in accordance with the Pipeline Cost Recovery Agreement (“PCRA”), that IGPC was obligated to pay NRG and the resulting net payment required to be made by IGPC.
- The amount of the financial assurance that IGPC is obligated to provide to NRG as financial security for the pipeline and delivery of gas.
- A determination on the costs of Motions filed by IGPC to resolve certain disputes with NRG.
- A determination on the ability of IGPC to recover costs related to the improper nomination of gas by NRG that occurred prior to start-up of the ethanol facility in 2008.

Board as the arbitrator of disputes between NRG and IGPC

IGPC in its Motion refers to the two contracts between NRG and IGPC, namely the PCRA and the Gas Delivery Agreement (“GDC”). In both contracts, the parties agreed to appoint the OEB as the arbitrator of disputes. This is specifically capture in Article IX of the Agreement (“PCRA”) on page 17 as noted below.

ARTICLE IX – DISPUTE RESOLUTION

- 9.1 In the event of any dispute arising between the Parties regarding the subject matter of this Agreement, then the parties shall negotiate in good faith to resolve such matters.
- 9.2 In the event the Parties are unable to resolve a dispute, then either Party may refer to the matter to the OEB for resolution.

Board staff notes that neither IGPC nor NRG appear to have consulted with the Board regarding the Board’s proposed role of dispute arbitrator, nor was the Board aware of this provision until the PCRA was filed with the Board after it had been executed.

Board staff submits that it would not be appropriate for the Board to take on the role of arbitrator of contractual disputes. The Board is a quasi-judicial regulatory tribunal. Its powers, like those of all tribunals, are granted through legislation. The Board can only act in accordance with those powers specifically provided by legislation, either directly or through the doctrine of necessary implication. The Board has no legislative authority to act as an arbitrator for contractual disputes, and no provision in a contract (such as Article IX to the PCRA) can give the Board such a power. The Board should therefore decline the invitation to act as an arbitrator.

This is not to say that all of the issues related to the PCRA are outside the scope of the Board’s powers to address. The reasonable cost of the pipeline is an issue in the rates case, as the Board must determine the appropriate amount to close to rate base. The Board’s decision, however, will be in the context of setting rates.

Board staff therefore recommends that the Board address any rate related issues arising out of IGPC’s motion in the context of the current rates case. To the extent that issues in the motion are not related to rates, they are outside of the Board’s purview, and should not be considered.

Actual Capital Cost of the Pipeline

IGPC in its Motion has indicated that while IGPC does not dispute many of the costs claimed by NRG, the reconciliation required by section 3.13 of the PCRA has not yet been completed to the satisfaction of the Parties. NRG is seeking recovery through the PCRA of over \$1.1 million of costs which IGPC claims are not reasonable. These disputed costs include: inappropriate direct costs (such as contingency), inappropriate indirect costs (administrative penalty, excessive fees), costs without sufficient documentation/evidence (land rights, bank fees, legal costs) and certain unreasonable costs (excessive project management fees and interest). IGPC has provided a summary of the costs claimed by NRG and has identified specific items for which IGPC disputes the amount claimed.

Board staff submit that while many of the costs are already being reviewed as part of the cost of the pipeline that will be added to rate base in the 2011 rates proceeding, the other cost items appear contractual in nature that is a dispute between two parties similar to any other business agreement. The Board should only become involved to the extent that is necessary to determine the appropriate amount to close the rate base.

However, Board staff does have some comments on the issue of NRG's recovery of certain regulatory costs and administrative penalties imposed by the Board.

The Board on June 29, 2007 issued a Compliance Order on its own motion and determined that NRG was in contravention of an enforceable provision under the Act because it had failed to execute the agreements as required by a previous order of the Board. The Board had previously granted NRG leave to construct a pipeline (EB-2006-0243) to serve the IGPC facility. NRG refused to execute the necessary consents pursuant to the PCRA and the GDC agreements, and as a result IGPC was at risk to be unable to complete its financing.

The Board in its Compliance Order imposed a penalty of \$20,000 per day on NRG until execution of the required consents and the Bundled T agreements. The administrative penalty had reached \$140,000 when NRG complied with the Board's order. NRG is now seeking to recover the administrative penalty from IGPC.

Board staff submit that the intent of the administrative penalty would be defeated if NRG is able to recover the cost from a ratepayer. This was clearly not the Board's intent

when it imposed a penalty for contravening a Board order. Similarly, NRG has sought to recover amounts from IGPC through the PCRA related to regulatory costs for a number of motions that IGPC filed in order to obtain a Board order requiring NRG to execute agreements that were part of the Leave to Construct Decision. Board staff submits that these costs were not intended to be recovered from ratepayers, and it would be counterintuitive to assume that they could be recovered from IGPC through the PCRA. However, the contractual terms of the PCRA are not within the Board's mandate, and the Board should decline to analyze or seek to impose remedies under that contract. Board staff submits that none of these costs should be recovered from ratepayers through rates (whether they be base rates, rate riders, or clearances from deferral accounts). However, NRG's current rates application does not seek recovery of these amounts through rates.

In the event the Board accepts the Motion of IGPC and reviews all the costs, this would mean that the Board would have to review a large number of invoices that have been filed in Tab 7 of the motion evidence. The Board would then be making a determination on the individual invoices or individual items within an invoice. The Board usually does not make determination at such a micro level. The Board's mandate is to set just and reasonable rates and in this case, the base rates of NRG. It would be arduous to ask the Board to review individual invoices, hear arguments and make a determination on items that in many cases do not even impact rates. Furthermore, if the Board were to make a determination, the specific clause in the agreement between IGPC and NRG do not indicate whether the Board's dispute resolution mechanism is binding on the two parties. This means that if one party does not like the decision, they would presumably be free to pursue other means to resolve the dispute. This could lead to the dispute not being resolved even after the Board has expended a considerable amount of time and resources.

Board staff submit that only those costs that impact rates should be reviewed. These costs will be reviewed in the current rate proceeding. Consequently, Board staff submits that the Board should dismiss the Motion and continue the 2011 rates proceeding.

- All of which is respectfully submitted -