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Ontario

BY EMAIL

December 23, 2010

Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Walli:

Re: In the Matter of a hearing on the Board's own motion to review orders made to NRG on June 29, 2007
Board File No. EB-2010-0374

Dear Ms. Walli:

Please find attached the Board Staff submission for the above proceeding. Please immediately forward the attached document to Natural Resource Gas Limited and all intervenors in this proceeding.

Yours truly,

Original Signed By

Khalil Viraney
Case Manager

Encl.

ONTARIO ENERGY BOARD

BOARD STAFF SUBMISSION

IN THE MATTER OF A HEARING ON THE BOARD'S OWN MOTION TO REVIEW ORDERS MADE TO NATURAL RESOURCE GAS LIMITED ON JUNE 29, 2007

EB-2010-0374

December 23, 2010

Background

The Original Motion

On February 2, 2007, the Board approved a leave to construct application (EB-2006-0243) filed by Natural Resource Gas ("NRG"). The application related to a 28.5 kilometre natural gas pipeline to serve an ethanol facility operated by the Integrated Grain Processors Co-operative ("IGPC").

On June 28, 2007, IGPC brought a motion before the Board seeking emergency relief. IGPC indicated through affidavit evidence that the financing for the ethanol facility was at serious risk because of NRG's refusal to execute two contracts: an assignment agreement and a Bundled T-service agreement. It was IGPC's evidence that if the contracts were not executed by June 30, 2007, the financing for the ethanol facility would collapse, thereby placing the entire project in jeopardy. The Board issued an Emergency Notice of Hearing on the afternoon of June 28, for a hearing to be held the next morning.

The Orders

The Board convened an oral hearing on June 29, 2007. After hearing argument from the parties (including requests from counsel for NRG for an adjournment to allow NRG time to prepare), the Board ordered NRG to execute both of the contracts pursuant to its powers under s. 42(3) of the *Ontario Energy Board Act, 1998* (the "Act") (the "Contract Execution Orders"). The Board made these orders at approximately 2:45 p.m. The portion of the transcript of the proceeding which includes the orders (which were made orally) is attached as Appendix "A".

At 4:29 p.m. the hearing re-convened at the request of IGPC. IGPC advised the Board, and NRG confirmed that NRG would not execute the contracts as ordered by the Board. After hearing submissions from the parties, the Board determined that it would be appropriate to impose an administrative penalty, under s. 112.5 of the Act, of $20,000 per day for each day the contracts remained unexecuted (the "Administrative Penalty Order"). A copy of this order (which was made orally) is attached as Appendix "B".

The contracts were ultimately executed on July 6, 2007, and the administrative penalty therefore totalled $140,000.

NRG has appealed both the Contracts Execution Order and the Administrative Penalty Order to the Divisional Court. To date the administrative penalty has not been paid, nor has the Board pursued NRG for payment.

The Motion to Review

On December 7, 2010, the Board issued a notice that it intended to review the Administrative Penalty Order on its own motion. The Board assigned file no. EB-2010-0374 to this review. The Board indicated that it did not intend to review the underlying Contract Execution Orders. The Board requested that interested parties (including Board staff) make submissions on the following question:

> Did the Board follow the procedural requirements of Part VII.1 of the Act in ordering NRG to pay an administrative penalty? If the answer to this question is "no", what steps, if any, should the Board take to correct this error.

In Procedural Order No. 2 (dated December 16, 2010), the Board added a second question for parties to consider:

> Did the Board meet the requirements of procedural fairness in ordering NRG to execute the contracts? If the answer to this questions is "no", what steps, if any, should the Board take to correct this error?

What follows are the submissions of Board staff with respect to these questions.

Question 1 - The Procedural Requirements under Part VII.1 of the Act

The Board's compliance powers are set out in Part VII.1 of the Act (sections 112.1 – 112.7). A copy of Part VII.1 is attached as Appendix "C".

Section 112.5 allows the Board to require a person to pay an administrative penalty for a contravention of an "enforceable provision". Such penalty cannot

exceed $20,000 per day (or part of a day) that the contravention occurs. "Enforceable provision" is defined in section 112.1(a), and includes "a provision of an order of the Board". Although NRG disputes the Board's jurisdiction to have made the Contracts Execution Order, there does not appear to be any dispute that the Board ordered that the contracts be executed on June 29, 2007, and that NRG did not do so until July 6, 2007. The order to execute the contracts was a "provision of an order of the Board".

The procedural requirements for orders made under section 112.5 are set out in section 112.2. Orders under section 112.5 can only be made on the Board's own motion (s. 112.2(1)). The Board is required to give a written notice to a person against whom such an order is to be directed (s. 112.2(2)). This notice must set out the reasons for the proposed order and must advise the person that, within 15 days of receiving the notice, the person may give notice requiring the Board to hold a hearing (s. 112.2(3)). If the person provides notice within the 15 days, a hearing must be held (s. 112.2(4)). If not, the Board may make an order without further process (s. 112.2(5)).

Section 112.2(6) allows the Board to make interim orders, with or without a hearing that may take effect before the time for giving notice under s. 112.2(4) (i.e. 15 days) has expired. However, interim orders can only be made with regard to s. 112.3 – a section which allows the Board to order a person to take action to remedy a contravention of an enforceable provision or to take action to prevent a contravention from occurring. Section 112.2(6) does not empower the Board to make interim orders pursuant to s. 112.5.

Although section 7 of the Board's *Rules of Practice and Procedure* (the "Rules") allows the Board to extend or abridge certain time limits, this power extends only to time limits established through the Rules or established by the Board itself. The time periods set out in s. 112.2 are requirements of the statute, and cannot be abridged by the Board pursuant to section 7 of the Rules.

The Administrative Penalty Order and Section 112.2

Board staff respectfully submits that the Board did not follow the procedural requirements of Part VII.1 of the Act in making the Administrative Penalty Order. Despite the requirements of s. 112.2(2), no written notice of an intention to make

an order was ever provided to NRG. NRG was not provided with 15 days to consider its position and provided with an option to request a hearing.

The Board in its decision recognized that the notice provisions of s. 112.2(2) were not followed. The Board therefore purported to act through an interim order pursuant to s. 112.2(6). However, s. 112.2(6) does not permit the Board to issue interim orders under s. 112.5. The Board also does not have the power to abridge the time limits in s. 112.2(2) through section 7 of the Rules. The notice requirements under section 112.2(2), therefore, must be followed prior to making an order under section 112.5. These requirements were not met.

Proposed Remedy

Board staff submits that a high level of procedural fairness is required in proceedings under Part VII.1 of the Act. Compliance proceedings are not the same as proceedings held under other parts of the Act: they seek findings relating to contraventions of enforceable provisions, and they seek specific remedies against specific, identified parties. As the Supreme Court stated in *Baker v. Canada*:

> I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained with the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker. […]
> The more important the decision is to the lives of those affected and the greater its impact on that person or persons, the more stringent the procedural protections that will be maintained.[1]

[1] *Baker v. Canada* (1999), 174 D.L.R. (4th) 193 at 211.

Indeed, the Legislature has recognized the importance of process in compliance proceedings by formally codifying the procedural fairness requirements through s. 112.2.

To be clear, Board staff is not suggesting that a proceeding under Part VII.1 of the Act is akin to a criminal proceeding, or that any fundamental human rights were at stake here. The Board has recognized, however, that additional procedural safeguards are appropriate in compliance proceedings because of the nature of these cases. In the Toronto Hydro compliance proceeding, for example (EB-2009-0308), the Board established a comprehensive protocol governing the interactions between Board staff and the Board panel to ensure that there were no inappropriate communications between the two.[2] While such a protocol was not a relevant consideration in the current proceeding (Board staff's only role during the motion was to answer certain questions on the record put to it by the Board panel in the oral hearing), it does demonstrate that the Board considers proceedings under Part VII.1 to require enhanced procedural safeguards.

It is the respectful submission of Board staff that the Administrative Penalty Order should be overturned, and the administrative penalty vacated. As the subject of a compliance proceeding, NRG was owed a high degree of procedural fairness. The procedural requirements of the Act were not met. The appropriate remedy in this case, therefore, is to rescind the order.

Given the circumstances, it is also Board staff's submission that the Board should decline to take any further steps under Part VII.1 of the Act with regard to the Contracts Execution Order. The contracts were in fact executed in July 2007, almost three and a half years ago. The pipeline has been built and is currently supplying natural gas to the IGPC ethanol facility. Board staff sees little merit in the Board pursuing this matter any further.

Question 2 – Did the Board meet the requirements of procedural fairness in ordering NRG to execute the two contracts?

The Contract Execution Order was made pursuant to s. 42(3) of the Act. Section 42 does not fall under Part VII.1 of the Act, and therefore the procedural

[2] EB-2009-0308, Decision and Order on Motion, October 14, 2009, pp. 11-12.

requirements under s. 112.2 do not apply. The analysis presented above, therefore, cannot be carried over directly to this question.

Despite the fact that s. 112.2 does not apply, however, the Board is of course still required to follow the common law rules of procedural fairness: this is an overarching duty that applies to virtually all orders of the Board. Indeed, s. 112.2 of the Act is in effect nothing more than a codification of procedural fairness requirements for orders under Part VII.1.

Statutory Provisions

In order to determine the degree to which the Board met the requirements of procedural fairness, we must look to both the statute and the common law. Section 21(2) of the Act states: "[s]ubject to any provision to the contrary in this or any other Act, the Board shall not make an order under this or any other Act until it has held a hearing after giving notice in such a manner and to such persons as the Board may direct." Similar language appears in section 6(1) of the *Statutory Powers Procedure Act*: "[t]he parties to a proceeding shall be given reasonable notice of the hearing by the tribunal."

The Board's Rules of Practice and Procedure discuss notice issues at Rule 21; however no particular period of time for notice is provided. Rule 7 permits the Board to abridge or extend any timelines.

The statutes, therefore, provide limited guidance regarding the specific temporal requirements for notice, other than to say that such notice must be "reasonable".

Common Law Notice Requirements

There is jurisprudence from the courts regarding what constitutes a "reasonable" notice. Generally speaking, notice must enable an affected party to learn of and respond to issues affecting their interests. As the Divisional Court has explained, a tribunal's "notice must be sufficient to give those whose rights may be affected knowledge of the allegations made against them, the grounds upon which it is relying on its decision, the nature of the evidence in support of the decision, and

adequate time to fairness [sic] respond".[3] The Court continued: "[t]he opportunity to be heard is meaningless unless information is provided upon which a meaningful response can be based. Only then are the applicants afforded a truly meaningful opportunity to respond to 'the case to be met'.[4]"

A good overview of notice requirements to as they apply to tribunals was provided by the Nova Scotia Utilities and Review Board in *Re Bulley*:

> Under the common law, the adequacy of the notice of an application is a component of the right of disclosure of information and the requirements for procedural fairness in an administrative hearing. If inadequate notice is given, the hearing may not proceed.
>
> The common law requires there is sufficient information "to permit meaningful participation in the hearing process", (Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159, para. 29). Applying this to the notice portion of the proceedings, there should be sufficient information for the person to meaningfully decide whether to participate in the hearing process.
> What constitutes meaningful participation will vary in each case. As recently stated by the Supreme Court in May v. Ferndale Institution, 2005 SCC 82, Justices Lebel and Fish, speaking for the Court on this issue, state at para. 90:
>
> We share the respondents' view. The requirements of procedural fairness must be assessed contextually in every circumstance: Ruby v. Canada (Solicitor General), [2002] 4 S.C.R. 3, 2002 SCC 75, at para. 39; Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, at p. 682; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at para. 21; Chiarelli v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.R. 711, at p. 743; Therrien (Re), [2001] 2 S.C.R. 3, 2001 SCC 35, at para. 82.
>
> The contextual circumstances for each case will include an assessment of various issues, such as, the type of decision to be made and the nature of the hearing (Quebec (Attorney General)) supra, par. 29; the person's rights affected by the hearing; the

[3] *Gratton-Masuy Environmental Technologies Inc. v. Building Materials Evaluation Commission* (2002), 60 O.R. (3d) 245
[4] *Ibid*., para. 39.

> complexity of the issues; and the person's case to be made at, or their participation in, the hearing. In relation to the latter, authors Robert W. Macaulay, Q.C. and James L.H. Sprague, in Practice and Procedure Before Administrative Tribunals, Toronto, Carswell, section 12.3(c)(I), note that if a person is merely providing their views, as opposed to having their individual rights affected, a lower level of disclosure is required. Context may also include a balance of competing interests.[5]

Application of the law to the facts of this case

There is little question that the notice provided for the proceeding was short. IGPC's notice of motion was filed with the Board on the afternoon of June 28, 2007. The notice of motion was not served on NRG until 7:15 p.m. that evening. The hearing of the motion commenced on June 29 – the next morning. NRG retained counsel on the evening of June 28 for attendance at the Board the next morning. It is NRG's position (as expressed in its factum filed with the Divisional Court) that it did not have time to properly instruct counsel, it did not have time to fully consider its position, it did not have time to review the evidence or prepare responding evidence, and that it had no opportunity to address the Board as to whether the hearing of the motion should proceed on an expedited basis.

It is also NRG's position that it was not provided with the documents that were relevant to the motion in a timely manner. In particular, some of the documents which demonstrated the imminent peril to the financing arrangements had not been provided with the motion record. These documents were provided to counsel for NRG at the motion hearing on June 29, though initially in an incomplete form. NRG argues that it was not given adequate time to review the complete set of relevant documents.

Board staff submits that, although abbreviated notice is to be avoided wherever possible, it will not in all cases amount to a breach of procedural fairness. As the cases cited above note, what is "reasonable" will depend on the circumstances. The motion materials filed by IGPC indicated that there was a serious risk to the ethanol facility's financing arrangements, which could have jeopardized the entire project. The motion materials stated that the contracts had to be executed by June 29 (i.e. the next day) in order to preserve the financing arrangements.

[5] *Re Bulley*, [2006] N.S.U.R.B.D. 24, paras. 54-57.

Under such circumstances, it was not necessarily unreasonable for the Board to attempt to accelerate the normal timelines associated with a motion.

In addition to the short notice, however, it appears that NRG did not receive copies of all relevant materials until part way through the hearing of the motion. IGPC may comment in its submissions on the reason for this delay or the ultimate relevance of the documents; however in Board staff's submission this delay in providing NRG with all documents appears to exacerbate the difficulties caused by the already abbreviated notice.

Conclusion re: Question 2

Board staff submits that there may have been breaches of procedural fairness with respect to the Board's Contracts Execution Order. The notice period was very short, and NRG did not have immediate access to all of the relevant documents.

The answer to question 2 is not as clear as the answer to question 1, however. The order to execute the contracts was not made under Part VII.1, and therefore the codified notice requirements do not apply. Although notice was certainly abbreviated, the reasonableness of notice will depend on the circumstances, and the Board did have reasons for seeking to move quickly. In addition, as this order did not result from a compliance proceeding, the considerations outlined in the Baker case (cited above) would not appear to apply.

If the Board determines that there were breaches of procedural fairness, Board staff submits that the order should be overturned.

- All of which is respectfully submitted –

APPENDIX "A"

TO

BOARD STAFF SUBMISSION

TRANSCRIPT OF JUNE 29, 2007

PAGE 1-3 and PAGE 81-90

BOARD FILE NO. EB-2010-0374

DATED: December 23, 2010

ONTARIO ENERGY BOARD

FILE NO.: **EB-2006-0243**

VOLUME: **MOTION HEARING**

DATE: **June 29, 2007**

BEFORE:	**Gordon Kaiser**	**Presiding Member and Vice Chair**
	Ken Quesnelle	**Member**
	Cathy Spoel	**Member**

EB-2006-0243

THE ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Natural Resource Gas Limited for an Order pursuant to Section 90(1) of the *Ontario Energy Board Act, 1998,* granting leave to construct a natural gas pipeline and ancillary facilities in the Township of Malahide, Municipality of Thames Centre and the Town of Aylmer.

Hearing held at 2300 Yonge Street, 25th Floor,
Toronto, Ontario, on Friday,
June 29, 2007, commencing at 8:32 a.m.

Motion Hearing

B E F O R E:

GORDON KAISER	PRESIDING MEMBER and VICE CHAIR
KEN QUESNELLE	MEMBER
CATHY SPOEL	MEMBER

A P P E A R A N C E S

KRISTI SEBALJ	Board Counsel
NABI MIKHAIL	Board Staff
DENNIS O'LEARY MARTIN KOVNATS BERNIE McGARVA SCOTT STOLL	Integrated Grain Processors Co-Operative
LAWRENCE THACKER	Natural Resource Gas Limited

ALSO PRESENT:

JOEL CRAWFORD BRENT McBLAIN	Integrated Grain Processors Co-Co-Operative
GEORGE ALKALAY	
ROBERT HABKIRK	Mayor, Town of Aylmer
HEATHER ADAMS	Chief Administrative Officer, Town of Aylmer

--- Upon resuming at 2:25 p.m.

MR. KAISER: Please be seated.

DECISION

MR. KAISER: The Board, this afternoon and this morning, has heard a motion filed yesterday on an urgent basis by Integrated Grain Processors Co-Operative, an Ontario cooperative, known as IGPC.

IGPC, together with its wholly owned subsidiary, IGPC Ethanol Inc., has completed the financing necessary to design, develop and build and operate an ethanol production in Aylmer, Ontario.

This motion was supported by affidavit evidence by Gordon Baird, a partner at McCarthy, Tetrault, counsel for the syndicate of lenders to IGPC; Martin Kovnats, a partner with the law firm of Aird & Berlis acting for the applicant; and Heather Adams, the chief administrative officer for the Corporation of the Town of Aylmer.

NRG, the utility that serves in this jurisdiction, was represented by counsel, but no witness was provided from the company or evidence filed.

This matter relates to an earlier decision of this Board on February 2nd, 2007, at which time NRG filed an application for a leave to construct approximately 28.5 kilometres of 6-inch-diameter steel pipe which was necessary to meet the natural gas distribution requirements of the proposed ethanol facility.

That leave to construct was granted by the Board, and in that decision the Board relied on two executed

contracts, one known as the Gas Delivery Contract dated January 30th, 2007, the other the Pipeline Cost Recovery Agreement dated January 31st, 2007.

The gas delivery contract ensured revenues to the utility over the term of the agreement sufficient to ensure the Board that there would be no adverse consequences to ratepayers.

With respect to the Pipeline Cost Recovery Agreement, the Board found that to protect the ratepayers of NRG, a capital contribution of approximately $3.8 million was required from IGPC to achieve the required profitability. The PCRA agreement, or the pipeline recovery agreement, between NRG and IGPC provided for such a capital contribution.

The financing that has been put in place for this pipeline is provided by a number of sources. Approximately 11.9 million is from the federal government under its Ethanol Expansion Program administered by Natural Resources Canada. The project is also receiving a $14 million capital grant and ongoing operating grants from the Ontario Ethanol Growth Fund. The Co-Op, through its 840 farmer and rural community members, have invested over 45 million of their own funds in this project.

The dispute before us today relates to certain terms of the escrow arrangement that relate to those funds.

The financing which IGPC has arranged is subject to certain conditions in the escrow arrangement, which is being administered by Canada Trust.

One of the terms is that IGPC will contribute a combination of cash and value of at least $42.5 million, to be fully utilized before any advance is made under the credit facilities. IGPC intends to satisfy, in part, this contribution by assessing approximately 27.3 million of cash currently held in escrow, being part of the proceeds that have been raised from the sale of shares to the public.

The terms of this escrow agreement under the Co-Operatives Act provide that the escrow agreement cannot be amended without consent of members of IGPC. The escrow agreement provides, as it currently states, that all monies held in escrow must be returned to the subscribers of shares if, on or before June 30th, 2007, IGPC has not arranged sufficient funds to complete the ethanol facility and satisfied all conditions precedent to the first draw under the credit lines.

NRG has apparently refused to consent to an assignment contemplated in both of the agreements referred to, and, as a result, IGPC will not be able to satisfy the conditions precedent for the release of the escrow funds.

I want to turn next to the actual agreements. First, the question of whether the Board has jurisdiction, was raised by counsel for NRG.

Section 9.1 and 9.2 of the Pipeline Cost Recovery Agreement provides that:

> "In the event of any disputes arising between the parties regarding the subject matter of this

agreement, then the parties shall negotiate in good faith to resolve such matters. In the event the parties are unable to resolve a dispute, then either party may refer the matter to the OEB for resolution."

The Pipeline Recovery Agreement, which was the basis by which the funding was made available for the pipeline. I referred you to the Board's decision with respect to the aid of construction that was necessary and mandated by this Board in order to allow the leave to construct to be granted. That agreement contains certain terms and conditions, one of which was in 11.2(d):

"Provide this agreement will not be assigned without the prior written consent of the other party, such consent not to be unreasonably withheld. For greater certainty, an assignment by way of security to the customers' lenders shall be considered reasonable."

A similar section exists in the Gas Delivery Contract, also approved by the Board as part of the February 2nd decision. There section 7.4 says:

"This contract shall be binding on and enure to the benefit of the parties hereto and their respective successors and assigns, shall not be assigned or be assignable by the customer without the prior written consent of the utility. The utility agrees that such consent shall not be unreasonably withheld. For greater certainty, an

> assignment by way of security to the customers' lenders shall be considered reasonable."

We have heard evidence that the assignment in the form contemplated by the applicant has been in the hands of NRG's lawyers for over a month. To date, NRG has apparently refused to execute that consent to assignment.

This Board believes it has jurisdiction to enforce the two contracts before us. Section 42(3) of the Ontario Energy Board Act provides that:

> "Upon application, the Board may order a gas transmitter, gas distributor or storage company to provide any gas sale, transmission, distribution or storage service or cease to provide any gas sales service."

What we have are two linked agreements. One is a Gas Distribution Agreement in favour of the applicant. The other is a Pipeline Cost Recovery Agreement by which the applicant has agreed and NRG has accepted certain funding which will make the pipeline viable.

While we may or may not have jurisdiction over an ethanol plant, the Board certainly has jurisdiction over this pipeline and has rendered a decision with respect to it; namely, a leave to construct, and has approved the very funding that is at issue.

It is now apparent this funding will not flow through and the transaction cannot be completed unless the requested consent is executed in the form requested by the applicant.

There is no basis in this record to conclude that a refusal to execute the consent is reasonable. The agreement specifically contemplated 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.

Objection has been made by counsel for NRG as to the lack of notice. The Board's rules in section 7 clearly provide that the Board can abridge time. That is section 7.01 and 7.2, and we have done so. The urgency of the matter is clear.

In conclusion, we should add that various parties to this proceeding, include the Town of Aylmer as well as IGPC, have invested substantial sums in the expectation that this contract would proceed and this plant would be built. We are aware, from the main case, that the economic base of the Town of Aylmer is disintegrating, as a result of the problems in the tobacco industry. It was the expectation of all parties as well as the Board’s that the parties would proceed expeditiously to develop this facility within the expected timelines. As stated, we see no reason for the refusal by NRG to execute the requested agreement. It was clearly provided for in the contracts which are binding on NRG and subject to the jurisdiction of this Board.

That completes the Board's rulings with respect to the consent.

We have a collateral matter. There is a second agreement before us that is unexecuted, and to which a dispute arises. That is called the bundled T service receipt contract, which is Exhibit J1.5.

The evidence before us suggests that this is a standard form agreement, and not unique to this particular proceeding. We also note, and this is of some moment, that the contract to which the parties have agreed and executed namely J1.3, the Gas Delivery Agreement, specifically contemplates the bundled direct purchase delivery. That is set out in Schedule A, section 4.

This, again, is a service agreement, an agreement to provide service which the Board has clear jurisdiction over. The Board orders NRG to provide the service contemplated in that agreement.

That completes the Board's rulings with respect to the second agreement at issue.

With respect to costs and administrative penalties, we have heard certain submissions from counsel for the applicant. On those, we intend to reserve.

That completes the Board's ruling in this matter.

Any questions?

MR. THACKER: Do you want to hear submissions from me on costs?

MR. KAISER: Yes.

Please go ahead.

SUBMISSIONS BY MR. THACKER:

MR. THACKER: I guess I would submit that in the nature and manner in which this matter proceeded was served on short notice, and the manner in which the record was a bit of a moving target, there ought to be no order as to costs. We have done our best to respond under very trying circumstances. The evidentiary record was thin, and indeed it was fundamentally inadequate as it was served even on the abridged notice period. It was coopered-up throughout the proceeding and we have objected to the manner in which that was done, but it would be compounding unfairness to order costs against my client. That would be my submission.

MR. KAISER: Thank you, Mr. Thacker.

MR. THACKER: There should be no order as to costs.

MR. KAISER: Any submissions on costs, Mr. O'Leary?

MR. O'LEARY: Yes. Mr. Chair, I would be very brief in that regard.

SUBMISSIONS BY MR. O'LEARY:

Before I get to that, there is one question we have in respect to your order. That was in the draft we provided, we were looking for a specific time today by which time the agreements would be executed, because if it does not occur today, then this deal is in jeopardy. So we're wondering if you are in a position now to amend your order to require that it be executed forthwith and no later than 3 o'clock.

MR. KAISER: Well, let's make it 4:00. That gives Mr. Thacker some time to contact his client.

MR. O'LEARY: Yes. And in respect of costs, sir, I will not repeat my comments earlier, but I ask you to consider the record and the pattern of conduct exhibited by NRG, and in particular Mr. Bristoll, and the fact that we're here today and the costs have been incurred by the town, not only in respect to this litigation but in all of the attempts that it has made through its counsel to get NRG's attention to deal with these documents and to sign them, knowing that they have, as a utility, an obligation to execute these documents.

We submit that it is an appropriate time to send a message to this utility that it needs to wake up and start to run itself in accordance with the appropriate standards as a good utility.

MR. KAISER: Thank you. Mr. Mayor, any submissions on costs?

MR. HABKIRK: Well, we would certainly like to see them -- we would certainly like to see those costs come from NRG. In regards to the stumbling blocks, the time we have invested as a community, the assessment base that we may lose in the future by people hearing such things as this, but the fact of the matter is we have invested a lot of time and effort and legal fees to make sure that this deal came about for the benefit of our community and our residents. So, yes.

MR. KAISER: Thank you, sir. Anything further, Mr. O'Leary?

MR. O'LEARY: No, sir.

MR. KAISER: Thank you, gentlemen, ladies.

MR. THACKER: Sorry, I should have asked this earlier. Are you approving the order in the manner in which it was delivered, or is the order going to be driven by your reasons as read?

MR. KAISER: The latter.

MR. THACKER: Thank you.

--- Whereupon hearing concluded at 2:45 p.m.

APPENDIX "B"

TO

BOARD STAFF SUBMISSION

BOARD COMPLIANCE ORDER DATED JUNE 29, 2007

BOARD FILE NO. EB-2010-0374

DATED: December 23, 2010

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

AND IN THE MATTER OF an Application by Integrated Grain Processors Co-Operative Inc. for an Order compelling Natural Resource Gas Limited to provide gas distribution services to IGPC Ethanol Inc. and construct the natural gas pipeline and ancillary facilities approved by the Board by Decision and Order dated February 2, 2007, in Application EB-2006-0243;

AND IN THE MATTER OF a motion for review and variance of the Application for an Order varying the Decision(s) and Order(s) of the Board in Application EB-2006-0243 and/or EB-2005-0544 directing Natural Resource Gas Limited to provide gas distribution services to IGPC Ethanol Inc. and to construct the natural gas pipeline and ancillary facilities approved in Application EB-2006-0243;

AND IN THE MATTER OF an application for an Order finding that Natural Resource Gas Limited is in contravention of Enforceable Provisions as defined under Subsection 112.1 of the *Ontario Energy Board Act, 1998,* and an Order requiring Natural Resource Gas Limited to comply and remedy its contravention, pursuant to Subsection 112.3 of the Act.

COMPLIANCE ORDER

On June 28, 2007 Integrated Grain Processors Co-Operative Inc. ("IGPC") filed a Notice of Motion/Application with the Ontario Energy Board (the "Board"), under the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15 (Schedule B) (the "Act").

The Board had previously granted Natural Resource Gas Limited (NRG) leave to construct a pipeline to serve a proposed ethanol facility in Aylmer, Ontario. In that proceeding, the Board approved two agreements, a gas delivery agreement and a pipeline cost recovery agreement. The agreements contemplated that the parties execute consents to the assignment agreement to the benefit of the lenders to IGPC, the operator of the proposed ethanol facility.

NRG refused to execute the necessary consents and as a result IGPC was not able to complete its financing. The Board ordered NRG to execute the consents by 4:00 p.m. on June 29, 2007 in order that the financing could proceed. The

Board also ordered NRG to execute a Bundled T Service Receipt Contract as requested by IGPC.

The Board was advised by counsel for NRG after the 4:00 p.m. deadline had passed that NRG refused to execute the agreements. The Board immediately constituted a compliance hearing under section 112.2 of the Act. The Board determined on its own motion that NRG was in contravention of an enforceable provision under the Act because it had failed to execute the agreements as required by the Board's earlier order. Due to the urgency of the financing requirements, the Board determined that it should act under the authority given to it under section 112.2(6) to issue an interim order under section 112.3.

THE BOARD THEREFORE ORDERS THAT:

NRG shall pay an administrative penalty of $20,000.00 Canadian dollars per day to be lifted when the Board's orders regarding the execution of the required consents and Bundled T agreements have been complied with by NRG.

DATED at Toronto, June 29, 2007

ONTARIO ENERGY BOARD

Gordon Kaiser

Vice-Chair and Presiding Member