EB-2010-0374
December 24, 2010

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

AND IN THE MATTER OF an Application by Natural Resource Gas Limited for an Order or Orders 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.

AND IN THE MATTER OF a hearing on the Board's own motion to review an order made by the Board on June 29, 2007.

SUBMISSIONS OF INTEGRATED GRAIN PROCESSORS CO-OPERATIVE INC. & IGPC ETHANOL INC. ("IGPC")

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I. OVERVIEW

1. The events of June 28 and 29, 2007 were the culmination of several months of delay and unreasonable behaviour of Natural Resource Gas Limited ("**NRG**"). NRG failed to fulfill its obligations to IGPC Ethanol Inc. and the Integrated Grain Processors Co-operative Inc. (together "**IGPC**"), the Board and the people in the Town of Aylmer and surrounding communities.

2. At the motion, NRG had deliberately retained legal counsel unfamiliar with the matter who had not previously appeared before the Board, rather than have its existing counsel, which included a former Board Legal Counsel who was completely familiar with the Bundled T Service Receipt Contract (the "**Bundled T**") and the Contract Consent and Acknowledgement Agreement (the "**Assignment Agreement**", together the "**Agreements**"), attend the hearing. In fact, NRG's existing counsel, who had previously recommended to NRG that the Agreements be executed, was not only available but was actively consulted during the hearings on June 29, 2007.

3. NRG failed to attend the hearing and has failed to provide any explanation for its conduct.

4. Further confirmation that there was no reasonable explanation for NRG to refuse to execute the Agreements can be found in the fact that after more than 3.5 years, NRG has not once requested an amendment or provided any indication that any term the Agreements are unfair.

5. The regulatory framework is not intended to permit or sanction such behaviour – and when applied properly, it does not. The Board's deliberation in this review motion must

give proper weight and consideration to: (i) the Board's statutory objectives and authority; (ii) the factual background preceding the June 29, 2007 emergency motion; and (iii) the procedural obligations. The Board has an inherent power as a regulatory body to fulfill its role; and the obligation to balance the interests of the regulated utility **and the ratepayer** in fulfilling its duty to regulate the energy market in Ontario in furtherance of the public interest mandate. The law must be interpreted to provide the Board with the necessary tools to ensure these obligations fully implemented.

6. Part VII.1 of the *Ontario Energy Board* Act, S.O.1998, c.15, (Schedule B) (the "**Act**") is not to be read in isolation but must be read with the statutory powers granted by section 125.1 of the *Ontario Energy Board* Act, S.O.1998, c.15, (Schedule B) (the "**Act**") and the *Statutory Powers Procedure Act,* R.S.O. 1990, c. S.22 (the "**SPPA**") and the inherent powers of a regulatory body such as the Board. When considered, the Board had the authority and, in IGPC's submission the duty, to hold the hearing, order the execution of the Agreements, convene the compliance hearing and, order the administrative penalty. The Board must have such powers to be able to fulfill its regulatory role and to prevent a recalcitrant utility from abusing its monopoly powers.

7. NRG's conduct and failure to fulfill its legal obligations created the exceptional circumstances that necessitated the abridgement of timelines, as permitted and ordered by the Board. NRG was not deprived of procedural fairness and its delay tactics should not be sanctioned. The Board is entitled, and the facts compel it to draw an adverse inference from NRG's conduct. NRG deserves no sympathy for its conduct and the passing of time should not lessen or weaken the resolve of the Board displayed June 29, 2007.

8. As such, the issuance of the order, the compliance hearing and the issuance of the administrative penalty against NRG were appropriate, consistent with the Board's statutory requirements, and were not only in keeping with, but demanded by, the principles of procedural fairness and the public interest.

II. THE FACTS:

a. The Parties

9. IGPC is one of the largest agricultural co-operatives in Ontario with approximately 840 members. IGPC has enjoyed the support of its members, the Town of Aylmer ("**Aylmer**"), the surrounding municipalities and both the provincial and federal governments.

10. NRG is a regulated natural gas distribution company that provides natural gas distribution services in Aylmer and the surrounding areas. NRG enjoys the privilege of distributing natural in Aylmer under the authority the Board, the regulatory framework imposed through legislation, regulations and rules and a Franchise Agreement between itself and Aylmer.

11. Aylmer is a small, rural community that worked hard to bring the Ethanol Facility to Aylmer. The development of the Ethanol Facility was important to the economic well-being of the community surrounding Aylmer which had been decimated by the collapse of the tobacco industry.

b. The Leave to Construct

12. A secure supply of natural gas was critical to IGPC's ability to develop the Ethanol Facility and the selection of Aylmer as a host community. The Pipeline was the only viable option to obtain a supply of natural gas in Aylmer sufficient to meet the demand of the Ethanol Facility.

13. The benefits of the Ethanol Facility were obvious from the outset. The Board has, since the public forum held in Aylmer on July 18, 2006 (**EB-2005-0544**, the "**Public Forum**"), urged NRG to cooperate with the Town of Aylmer and IGPC to ensure that the proposed Pipeline proceed in an efficient, cost effective and timely fashion.

14. Specifically, in its Decision with Reasons, the Board stated:

> With respect to the new ethanol plant, the Board recognizes that this is a major opportunity for both NRG and the Town of Aylmer. The Board urges NRG to cooperate with the Town and IGPC to the maximum extent possible in order to ensure that the negotiations proceed in an efficient and timely manner.
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> **EB-2005-0544, Decision with Reasons, dated September 20, 2006, at page 6.**

15. Mark Bristoll ("**Mr. Bristoll**"), the then NRG Chairman, understood the importance of the proposed Pipeline to the community of Aylmer and gave the following assurance:

> **MR. BRISTOLL**: I would like you to know that as a utility we are a community-based utility and that we are dedicated to the growth of the community also. So we look forward to working with the community to make sure that anything possible can happen, provided it makes sense for everybody. So I just want to give you our assurance that, you know, we're all on the same team here.
>
> **EB-2005-0544, Public Forum, July 18, 2006, Transcript, page 10.**

16. To support the development of the Pipeline, a series of agreements between NRG and IGPC were contemplated: (i) a Pipeline Cost Recovery Agreement ("**PCRA**"); (ii) a Gas

Delivery Contract ("**GDC**"); and (iii) the Bundled T. NRG advised IGPC that these three agreements were required to build the Pipeline and receive service. A fourth agreement, the Assignment Agreement, was expressly contemplated in the PCRA and the GDC and was necessary for the completion of the financing of the Ethanol Facility. As such, NRG was completely aware of the importance of the Assignment Agreement in 2006 – several months prior to the motion.

17. NRG filed an application with the Board on October 13, 2006 (**EB-2006-0243**), pursuant to subsection 90(1) of the Act, for leave to construct the Pipeline. The Board held an oral hearing on December 18, 2006. However, at that time NRG and IGPC had not yet executed the PCRA and the GDC. The Board requested copies the PCRA and GDC for its consideration. NRG resisted filing these agreements so IGPC submitted drafts of the PCRA and GDC to the Board for review.

18. On January 19, 2007, the Board took the unusual step and required IGPC and NRG to appear and provide an update on the progress towards concluding the PCRA and GDC negotiations. The Board reiterated its position that it wished to review the executed GDC and PCRA prior to rendering its decision. On January 30 and 31, 2007, IGPC and NRG executed the PCRA and GDC, respectively.

19. The Board received and carefully reviewed the executed PCRA and the GDC prior to granting leave to construct, and these agreements, including the commitments contained therein, were critical to the granting of leave.

20. By its Decision and Order dated February 2, 2007 (**EB-2006-0243**), the Board stated that it was satisfied that the terms and conditions of the GDC and PCRA adequately

protected the interests of NRG and its ratepayers. The Board further found that the proposed Pipeline, including the contractual commitments between IGPC and NRG, was in the public interest and granted the requested leave to construct:

> The Board is satisfied that the terms and conditions of the two agreements, the [Gas Delivery Contract] and the [Pipeline Cost Recovery Agreement], adequately protect the interests of NRG and its ratepayers against anticipated risks. In making its finding to grant the requested leave to construct, the Board is placing significant reliance on the terms and conditions of both the [Pipeline Cost Recovery Agreement] and [the Gas Delivery Contract] that protect the interest of NRG's ratepayers.
>
> The Board finds that the Proposed Facilities are ***in the public interest*** and grants the requested leave to construct. The Board notes that this is a significant expansion of NRG's facilities and will increase its rate base by approximately 50 per cent.
>
> **EB-2006-0243, Decision with Reasons, dated February 2, 2007, at page 4.**

21. The Board further restricted NRG from making an amendment to the agreements where such amendment could have a material adverse impact on NRG's ratepayers. Therefore, absent adherence to the terms of the agreements and the economic bargain contemplated, NRG would not have been granted leave to construct:

> **5.2** NRG shall not, without the prior approval of the Board, consent to any alteration or amendment to the Gas Delivery Contract or the Pipeline Cost Recovery Agreement as those agreements were executed on January 31, 2007, where such alteration of amendment has or may have any material impact on NRG's ratepayers.
>
> **EB-2006-0243, Decision and Order, Conditions of Approval, February 2, 2007.**

22. Clearly, the Board recognized the importance of the Pipeline to the successful completion of the Ethanol Facility. IGPC and its lenders relied upon the Board's order and the restrictions placed upon NRG to proceed with the financing.

c. Terms of the IGPC Financing

23. In order to design, develop, build and operate the Ethanol Facility, IGPC required financing from a number of sources. IGPC's 840 farmer and rural community members (the "**IGPC Members**") had invested over $45 million of their own funds into the Ethanol Facility project, which investment has and continues to benefit area farmers, including NRG ratepayers, by creating additional markets for Ontario corn and by enabling producers to participate directly in the value-added benefits of ethanol manufacturing.

24. In addition, IGPC had the financial support, approximately $11.9 million, of the Federal Government under the Ethanol Expansion Program administered by Natural Resources Canada.

25. IGPC also secured a $14 million capital grant and ongoing operating grants from the Ontario Ethanol Growth Fund.

26. Finally, as is typical of such projects, IGPC had to borrow the remaining funds from a lending syndicate which, in this case, was led by *Societe Generale*.

27. The financing which IGPC obtained for the Ethanol Facility project was used for, *inter alia*, land acquisition, facility design and construction, the Pipeline and ancillary facilities. An escrow agreement dated December 9, 2003, and amended as of June 12, 2006 (the "**Co-op Escrow Agreement**"), was put in place relating to the funds, *inter alia*, which had been invested by the IGPC Members. The Co-op Escrow Agreement was executed by IGPC and was administered by The Canada Trust Company. The terms of the Co-op Escrow Agreement were set forth in the offering documents used by IGPC under the *Co-*

operatives Corporations Act, R.S.O. 1990, c. C.35, and such terms could not be amended without the consent of the IGPC Members.

28. The Co-op Escrow Agreement required IGPC to fulfill certain condition precedents (the "**Financing Conditions**") by midnight on June 30, 2007 or the approximately $45 million invested by the IGPC Members at that date would have to be immediately returned thereby causing the financing for the Ethanol Facility to be lost. The Financing Conditions required that IGPC:

(a) arrange for the necessary financing to complete the Ethanol Facility; and

(b) satisfy all conditions precedent to the first draw under credit facilities.

29. With respect to the above condition precedents, the arrangement between IGPC and its lending syndicate lead by *Societe Generale* required the following condition precedents to be met prior to the necessary financing being provided to IGPC for the proposed Pipeline and Ethanol Facility:

(a) All material agreements required to build the facility have been executed and delivered by the appropriate parties and that all such agreements have been assigned to the lenders as security (and that the parties to such agreements have agreed to such assignment to the lenders); and

(b) IGPC shall contribute a combination of cash and value of at least $42.5 million, which shall be fully utilized before any advance is made under the credit facilities.

30. A reliable supply of natural gas was critical to the ability to develop the Ethanol Facility and the agreements with NRG were material agreements.

31. With respect to the latter condition, IGPC satisfied, in part, this requirement by accessing approximately $27.3 million of cash which was held in escrow in 2007, being part of the proceeds raised from the sale of shares to the IGPC Members as described above.

32. On June 29, 2007, the only condition precedent remaining to be satisfied under the Co-op Escrow Agreement was NRG's execution of the Assignment Agreement and Bundled T. As NRG had informed IGPC that it would not execute the Agreements, the entire financing was in peril.

d. The Necessary Agreements to Proceed

(i) The Assignment Agreement

33. The Assignment Agreement is designed for the benefit of the secured lenders and is typical in project financing. The Assignment Agreement would provide an acknowledgement by NRG to *Societe Generale* that in the event of a default by IGPC to the lending syndicate, the secured lenders could step in and have a facility that would work, thus providing the lenders with sufficient security to proceed with the financing. With respect to NRG, this included the lenders assuming the PCRA and the GDC.

34. The PCRA and the GDC, for security purposes, expressly contemplated the assignment of these agreements.

35. Specifically, clause 11.2(d) of the PCRA states:

> This Agreement shall 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 [IGPC's] lenders shall be considered reasonable.

36. Similarly, section 7.4 under Schedule B of the GDC provides:

> This contract shall be binding upon, and inure to the benefit of the parties hereto and their respective successors and assigns but shall not be assigned or be assignable by [IGPC] without the prior written consent of [NRG]. [NRG] agrees that such consent shall not be unreasonably withheld. For greater certainty an assignment by way of security to [IGPC's] lenders shall be considered reasonable.

37. The PCRA and the GDC, both approved by the Board, deemed that NRG's execution of the Assignment Agreement in these circumstances would be reasonable.

38. A draft of the Assignment Agreement was first provided by IGPC's counsel to NRG's counsel no later than the spring of 2007. Counsel for IGPC made numerous requests to counsel for NRG for a response ; yet no response was provided.

39. The aforesaid is supported by the affidavit sworn June 28, 2007 of Gordon Baird, a partner with the law firm McCarthy LLP (the "**Baird Affidavit**"), counsel for the lending syndicate lead by Societe Generale. The terms of the Assignment Agreement were settled, finally, as between legal counsel for NRG and IGPC on June 27, 2007.

40. Specifically, counsel for NRG approved the form of the Assignment Agreement and recommended to NRG that it execute the agreement.

41. At the eleventh hour, and contrary to counsel's recommendation, the provisions of the GDC and the PCRA, and to the commitment given to the people of Aylmer and the Board, NRG inexplicably refused to execute the Assignment Agreement .

(ii) The Bundled T

42. The Bundled T addressed the upstream transportation arrangements and balancing services for the natural gas required by the Ethanol Facility. As set out in NRG's rate order, the Bundled T is a required agreement for any direct purchase customer within the NRG franchise area.

43. NRG had advised IGPC in 2006 that IGPC would be required to execute a Bundled T in addition to the PCRA and the GDC. The GDC, as executed by NRG and approved of by the Board on February 2, 2007, specifically contemplated, at schedule A, section 4, the execution of a Bundled T by NRG.

44. It had always been the understanding of IGPC that the Bundled T was viewed by NRG as a standard agreement – a mere formality, which would be subject to minimal discussion and negotiation between NRG and IGPC. At no time did the provisions of the Bundled T pose a risk of an adverse economic impact on NRG or its ratepayers.

45. Following several requests from IGPC, NRG provided a first draft of the Bundled T to IGPC in March 2007.

46. The Bundled T was settled between legal counsel on June 15, 2007 and IGPC executed the Bundled T.

47. Approximately 12 days later, and without explanation, IGPC was informed by NRG that it would not execute the Bundled T. To date, NRG has yet to provide any explanation for its refusal to execute the Bundled T at that time.

48. As a result of NRG's conduct throughout the negotiation of the Agreements, IGPC incurred significant unwarranted costs. Of note, from March 2007 through June 28, 2007, NRG's legal counsel spent approximately 200 hours and Mr. Bristoll spent in excess of 50 hours on IGPC. Given these significant time commitments, NRG was fully apprised of the issues.

e. NRG's Refusal Jeopardizes the Ethanol Facility

49. On several occasions during May and June 2007, the time sensitive nature of IGPC's financing was made known to NRG.

50. At no time prior to June 27, 2007 did NRG provide any indication that it would refuse to execute either the Assignment Agreement or the Bundled T.

51. In fact, when representatives of IGPC were finally able to contact Mr. Bristoll on the evening of June 27, 2007, Mr. Bristoll, when asked when the agreement would be signed, simply and repeatedly stated "talk to my lawyer". Subsequently, on June 28, 2007, counsel to NRG advised counsel to IGPC that "NRG will not be signing today".

52. There can be no explanation for NRG's refusal to execute the Agreements, other than a deliberate refusal to provide natural gas service to the Ethanol Facility, contrary to the Act, the Gas Distribution Access Rule ("**GDAR**"), the Board's Decisions and Orders, and contrary to NRG's public commitments to co-operate.

53. By reason of NRG's failure to execute the Agreements, IGPC was in danger of not being able to satisfy the condition precedents for the release of the escrowed funds and to secure the senior credit facilities.

54. If IGPC did not satisfy these conditions, it would have lost the necessary financing, and the construction and development of the Ethanol Facility and Pipeline would have been unable to proceed. Moreover, substantial costs incurred by IGPC would have been unrecoverable, and the opportunity to build and operate an environmentally friendly and economically significant project in Aylmer, Ontario would have dissipated.

55. Based upon NRG's refusal to execute, IGPC was left with no alternative and on June 28, 2007 IGPC filed a notice of motion with the Board. The notice of motion sought emergency relief from the Board on the grounds that NRG had refused to execute the Assignment Agreement and the Bundled T. IGPC indicated that, if the Agreements were not executed by NRG, the financing for the Ethanol Facility would be lost and the very completion of the Ethanol Facility would be at risk.

f. IPGC's Request for an Emergency Motion

56. The Notice of Motion filed with the Board requested an Order of the Board that NRG be required to execute the Agreements. The Board issued an Emergency Notice of Hearing for June 29, 2007, to hear the motion orally.

57. As is set out in the Affidavit of David Mark Woodward ("**Mr. Woodward**"), sworn June 29, 2007 (the "**Woodward Affidavit**"), Mr. Bristoll was served at his principle residence in London Ontario at 7:15 p.m. on June 28, 2007 with the following motion materials upon which IGPC relied for the purposes of the emergency motion:

(a) The Baird Affidavit;

(b) the Affidavit of Margaret Heather Adams, sworn June 28, 2007 (the "**Adams Affidavit**"). Ms. Adams is the Chief Administrative Officer for the Corporation of the Town of Aylmer;

(c) the Affidavit of Martin Kovnats ("**Mr. Kovnats**"), sworn June 28, 2007 (the "**Kovnats Affidavit**"). Mr. Kovnats is a partner at Aird & Berlis LLP and acts as counsel to IGPC;

(d) the Notice of Motion/Application dated June 28, 2007; and

(e) the Emergency Notice of Hearing from the Board dated June 28, 2007 (collectively, the "**Served Documents**").

58. As is further set out in the Woodward Affidavit, Mr. Bristoll confirmed to Mr. Woodward that he had already received the Served Documents from his solicitors. The Served documents were served immediately on NRG counsel, Ogilvey Renault LLP.

59. The Woodward Affidavit further established that the Served Documents were left in the mailbox at the principle residence of Wes Suchard, whom IGPC understood to be a trustee of the trust that was the controlling shareholder of NRG, at 7:36 p.m. on June 28, 2007.

60. IGPC went to extraordinary lengths to ensure NRG actually received the Served Documents.

g. The Emergency Motion

(i) NRG's Representation at the Motion

61. Lawrence Thacker ("**Mr. Thacker**") appeared as counsel on behalf of NRG at the emergency and compliance hearings, and acknowledged that his retainer had not been

confirmed by NRG. At the outset of the hearing, Mr. Thacker raised several objections to proceeding with the motion on that day. The Board listened to Mr. Thacker's objections, rejected NRG's position, and determined that it should proceed to hear the motion.

> **EB-2006-0243, Transcript from the Emergency Motion, dated June 29, 2007, at pages 1, 2, 3, 44, and 45.**

62. The attendance of new counsel, Mr. Thacker, at the hearing does not insulate NRG from avoiding the issues on an emergency motion, a motion necessitated by NRG's intransigence and attempts to frustrate the Ethanol Facility and Pipeline projects. The purported replacement of NRG's legal counsel with Mr. Thacker was addressed by counsel to IGPC, Dennis O'Leary ("**Mr. O'Leary**"):

> **MR. KAISER**: When did you find out that Ogilvy Renault was no longer on the file [as the legal representative for NRG]
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> **MR. O'LEARY**: In fact, we have not been told that Ogilvy Renault was no longer [representing NRG] on the file. The fact that Mr. Thacker is here is absolutely pristine news to us. All we were advised is that, at the middle of the afternoon [on June 28, 2007] - - and this is in the affidavit of materials as well - - by Ogilvy Renault, is that NRG would not be signing the two remaining [Agreements]. They did not say they were no longer counsel for NRG.
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> **EB-2006-0243, Transcript from the Emergency Motion, dated June 29, 2007, at page 13.**

63. In the months following, IGPC obtained information confirming Mr. O'Leary's submission that Ogilvy Renault LLP not only remained counsel to NRG but was actively advising NRG on June 29, 2007 with respect to the issues arising on the emergency and compliance hearings.

64. In EB-2010-0018, materials were filed (excerpt below) confirming that both Mr. Moran and Richard J. King ("**Mr. King**") of Ogilvy Renault LLP were advising NRG throughout the day on June 29, 2007:

Date	Timekeeper	Description	Hours
29/6/07	Richard J. King	Listen to Ontario Energy Board motion regarding progress of motion, compliance hearing, offers to settle, option for Board, (Redacted) and other matters; obtain Notice of Appeal and Stay Motion precedents.	6.5
09/6/07	Patrick Moran	Numerous conference calls regarding execution of consent and monitoring emergency application brought by IGPC; (Redacted); advice to M. Bristoll and L. Thacker regarding settlement option.	10.0

65. As the transparent ploy for delay was confirmed, the further submissions made by Mr. O'Leary that the absence of Mr. Bristoll and Patrick Moran, counsel to NRG, ("**Mr. Moran**") required that an adverse inference be drawn against NRG for the purposes of the motion were entirely appropriate:

> **Mr. O'Leary**: Sir, if I could just add to those comments. An observation is that the fact that Mr. Bristoll is not here should be viewed with some scepticism by this Panel.
>
> There is no response before you from NRG and they did have the opportunity. Mr. Bristoll could have made it down here today, just like the mayor of Aylmer made it, and could be responding to these questions. So we would submit that you should draw an adverse inference from the fact that he is not here and instead they have sent a counsel that knows nothing about the matter; and, in fact, Mr. Moran who has been handling the matter who should be here today has, presumably been told not to show up.
>
> ...

> **Mr. O'Leary**: ...So, sir, we submit this is just a pattern of conduct on behalf of NRG and its chairman, Mr. Bristoll, that they have deliberately not requested that counsel dealing with these agreements be present today to respond to your questions, to be able to confirm or deny that they had [the relevant Agreements] on the dates in question, and instead have sent my friend here, who is not in a position to respond to your questions, and the fact that Mr. Bristoll is not here is further indication and evidences a pattern of trying to avoid dealing with the agreement and, in our respectful submission, to frustrate the construction of the pipeline.
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> **EB-2006-0243,Transcript from the Emergency Motion, dated June 29, 2007, at pages 27 and 53.**

66. Mr. Bristoll's failure to appear at the emergency motion is even more disconcerting given the Town of Aylmer was alleging that NRG's conduct was in breach of the Franchise Agreement dated February 27, 1984. NRG's largest Franchisor was alleging a potential breach of an agreement upon which NRG's very right to distribute natural gas is based.

67. Specifically, counsel to the Town of Aylmer sent a letter to NRG on June 28, 2007 stating:

> The Project is dead if the Financing does not close tomorrow and if the Project does not go forward, our client will fully enforce all legal remedies available to recover its losses....The execution of the Agreements by the end of business today is required to facilitate an orderly closing of the financing tomorrow.
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> **EB-2006-0243, Document Brief of IGPC for the Emergency Motion, dated June 28, 2007, at Tab 7, page 2.**

(ii) The Urgency of the Board's Intervention

68. The urgency of the emergency motion arose from NRG's last minute refusal to execute the Agreements which placed the financing for the Ethanol Facility and the Pipeline in extreme peril. The Ethanol Facility would be lost and the project would be unable to proceed without NRG having executed the Agreements by midnight on June 30, 2007:

> **MR. O'LEARY**: The financing that is required for this project, including the 28 kilometre pipeline which this Panel approved in February, is dependent upon the financing and the agreements being signed. And there is a requirement that monies that are committed to this project be returned if the matter does not close on or before June 30th, 2007 (p. 4).
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> **EB-2006-0243, Transcript from the Emergency Motion, dated June 29, 2007, at page 4.**

69. This fact was elaborated upon at the emergency hearing by Mr. Kovnats, who made the following submissions in an effort to explain to the Board the urgency of the matter before them:

> **MR. KOVNATS**: Sir, the way the agreements are structured is, it was a condition to the raising of the money under the [*Co-operatives Corporations Act*], that a public disclosure document similar to a prospectus is filed, submitted, reviewed and is used to help raise the funds. It was a condition imposed by the Cooperatives Branch that 94 percent of the amount of money raised is held in escrow and cannot be used by the cooperative until they are relatively certain that the facility will be used. Six percent could be used for working capital and development purposes.
>
> The escrowed money is deposited with Canada Trust, pursuant to an escrow agreement that was reviewed and approved by the Cooperatives Branch. That escrow agreement cannot be amended without the consent of the Cooperatives Branch and all of the members and Canada Trust, the members being the beneficiaries of the escrow arrangements that have been set up. That agreement was amended once a year ago to get an extension from June 30, 2006 to June 30, 2007. The amendment process required the consent of each member, which required holding meetings, town hall meetings, going out to peoples' homes and getting consent documents signed.
>
> **MR. KAISER**: So you're saying without an amendment in the manner you described, Canada Trust has to send this money back?
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> **MR. KOVNATS**: That's correct.
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> **MR. KAISER**: On June 30th?
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> **MR. KOVNATS**: That's correct.
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> **MR. KAISER**: Unless the agreements have been amended.
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> **MR. KOVNATS**: That's correct.
> **MR. KAISER**: It takes a long time to get the agreement amended?

MR. KOVNATS: That is correct.

...

MR. KAISER: You're assuring us that if [the consent to the amendment of the Co-op Escrow Agreement is not obtained from the 840 members who are beneficiaries], this money is going back?

MR. KOVNATS: Yes.

EB-2006-0243, Transcript from the Emergency Motion, dated June 29, 2007, at pages 9-11.

70. Mr. Kovnats elaborated on the implications which would arise in the event that the Co-op Escrow Agreement was not amended prior to June 30, 2007:

MR. KAISER: Does that mean the end of the deal? Or can the 840 shareholders send the money back the next day? In other words, I'm trying to get the practicalities here. If you're telling me that this deal legally is going to fall apart, that's one thing. If it's just an annoyance, and no doubt you are entitled to be annoyed, that's another thing.

MR. O'LEARY: Sir, we don't believe it is an annoyance. We believe the deal is in real peril and jeopardy.

MR. KOVNATS: Mr. Chairman, to just add another level of complexity. In order for a cooperative to raise any money, it has to file a public offering document similar to a prospectus, which is reviewed and accepted by the Cooperatives Branch. That is as complex a document as any public-offering document under the [*Securities Act*, R.S.O. 1990, c. S.5]. A public offering document by a cooperative has a limited life. It automatically expires. The last document we had expired on June 15th, 2007. We do not have a live offering document. In order for us to go back to the members and ask them to make a new investment decision, we would have to prepare, file, review and have accepted a new offering document, which is not a small undertaking in its own right.

In addition, we need to get all 840 people to make a new investment decision. Further, we have contracts for all of our material agreements, some of which are very price sensitive, and delay will change pricing or will - - may change pricing.

Further, as [George Alkalay] pointed out, we have the federal government who said there are no more extensions.

EB-2006-0243, Transcript from the Emergency Motion, dated June 29, 2007, at pages 14-15.

71. Additionally, Mr. Kovnats explained to the Board that in order to receive the funding under the Ethanol Expansion Program, IGPC was required to secure the necessary financing prior to July 5, 2007, which further necessitated NRG's execution of the Agreements.

> **EB-2006-0243, Transcript from the Emergency Motion, dated June 29, 2007, at page 10.**

72. As was thoroughly explained to the Board at the emergency hearing, NRG was aware of the urgency with which the Agreements needed to be executed, yet it chose to provide no explanation to justify its refusal to comply with its obligations and execute the Agreements.

73. Based upon the evidence and submissions, the Board found that NRG had acted unreasonably in failing to execute the Assignment Agreement:

> **MR. KAISER**: We have heard evidence that the assignment in the form contemplated by [IGPC] has been in the hands of NRG's lawyers for over a month. To date, NRG has apparently refused to execute the consent to assignment.
> ...
> It is now apparent this funding will not flow through and the transaction cannot be completed unless the requested [Assignment Agreement] is executed in the form requested by [IGPC].
>
> There is no basis in this record to conclude that a refusal to execute the [Assignment Agreement] is reasonable. The agreement specifically contemplated and the parties agreed that a consent would be executed to the benefit of [IGPC's] lenders and, as such, would be considered reasonable.
> We see no basis for this refusal and hereby order NRG to execute the [Assignment Agreement] in the form provided by [IGPC].
> ...
> In conclusion, we should add that various parties to this proceeding, including 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.
>
> **EB-2006-0243, Transcript from the Oral Decision of the Board on the Emergency Motion, dated June 29, 2007, at pages 85-86.**

74. Similarly, the Board found that NRG had unreasonably failed to execute the Bundled T:

> **MR. KAISER**: 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 [Contract], 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 the agreement.
>
> **EB-2006-0243, Transcript from the Oral Decision of the Board on the Emergency Motion, dated June 29, 2007, at page 87.**

75. As a result of the evidence, the Board ordered that NRG execute the Agreements by 4:00 p.m. on June 29, 2007 (the "**Initial Order**").

76. NRG refused to execute the Agreements in blatant disregard and in contravention of the Board's Initial Order. In other proceedings, such as EB-2010-0018 NRG has touted its construction experience as a valuable asset. Given its experience, the information provided by IGPC, the time expended, NRG was fully aware of the implications of its inaction – yet steadfastly refused to sign the Agreements or explain its behaviour.

h. The Compliance Order

77. Upon learning of NRG's outright refusal to execute the Agreements contrary to the Initial Order, the Board reconvened to conduct a compliance hearing under section 112.2 of

the Act. The Board determined, on its own motion, that NRG had breached an enforceable provision of the Act by refusing to comply with the Initial Order.

78. Given this finding, the Board ultimately ordered that NRG pay an administrative penalty of $20,000.00 per day until such time as NRG executed the Agreements (the "**Compliance Order**"). The Board further stated that it had the authority to issue the Compliance Order (an interim order) under subsection 112.2(6) of the Act given the urgency of the financing requirements which had to be met by IGPC prior to midnight on June 30, 2007. In issuing the Compliance Order, the Board found:

> ...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.
>
> 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 Bundle T agreements have been complied with by NRG.
>
> **EB-2006-0243, Compliance Order, dated June 29, 2007, at page 2.**

79. Based upon the strength of the order and the Board's condemnation of NRG's conduct, IGPC was able to close the financing transaction, in escrow, pending the execution of the Agreements. However, IGPC still required the execution of the Bundled T and the Assignment Agreement to actually close the financing.

80. As a direct result of the Board's action, the financing was not dead. The Ethanol Facility would survive if the Agreements were executed.

81. The Agreements were finally executed by NRG on July 6, 2007, and the total administrative penalty which had accrued was $140,000.00.

III. ISSUES AND ARGUMENT

82. The Board, on December 7, 2010, issued a Notice of Motion to Review the Compliance Order. The Compliance Order will be reviewed to assess the adequacy of the procedural steps taken by the Board as well as the extent to which the requirements of Part VII.1 of the Act were followed.

83. Additionally, on December 16, 2010, the Board issued Procedural Order No. 2, requesting that additional submissions be provided with respect to whether the Board met the requirements of procedural fairness in ordering NRG to execute the Agreements as required by the Board's Initial Order.

84. NRG's conduct constituted the exact behaviour the legislature intended to sanction when it provided the Board with the authority, pursuant to Part VII.1 of the Act, to issue a compliance order.

85. This review motion should give proper weight and consideration to: (i) the Board's duty to protect the public interest and its statutory objectives and authority; (ii) the egregious factual background preceding the June 29, 2007 emergency motion; and (iii) the procedural obligations.

86. The Board has a duty to the regulated utility and the ratepayer and must balance those interests in fulfilling its public interest mandate. The regulated utility has a corresponding duty to adhere to the regulatory requirements and not abuse its monopolistic position.

87. When the provisions of the Act and the SPPA are read together with the inherent power of a regulatory body, the Board had not only the authority but the duty to hold the

hearing, order the execution of the Agreements, convene the compliance hearing and order the administrative penalty. The public interest demanded such action.

a. The OEB's Broad Authority over Substantive and Procedural Matters

88. That the Board has the duty and broad authority to determine ***all matters within its jurisdiction*** is both substantive and procedural. Substance and procedure must work in concert to promote the objectives of the Act and allow the Board the proper mechanisms to ensure such objectives are achieved.

> ***Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sch. B, subsection 19(1), IGPC Book of Authorities, at Tab 6.**

89. The Ontario Court of Appeal recently considered the authority of the Board in a contractual dispute between certain landowners and Union Gas Ltd. ("**Union**"). Union was successful when it brought a motion for summary judgment on the basis that the issues were within the exclusive jurisdiction of the Board. The decision was appealed to the Court of Appeal for Ontario which confirmed the Board's exclusive authority over matters within its jurisdiction:

> Section 19 [of the Act] provides that, in the exercise of its jurisdiction, the Board has "in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." This generous and expansive conferral of jurisdiction ensures that the Board has the requisite power to hear and decide all questions of fact and of law arising in connection with claims or other matters that are properly before it. This includes, *inter alia*, the power to rule on the validity of relevant contracts and to deal with other substantive legal issues.
>
> ...
>
> As the appeal must be resolved on the basis that the Board has exclusive jurisdiction to determine all issues of law and of fact arising from the appellants' claim against Union, it is unnecessary for me to deal with the alternative grounds for dismissal of the claim advanced by Union.

***Snopko v. Union Gas Ltd.* (2010), 317 D.L.R. (4th) 719, [2010] O.J. No. 1335 (QL) (Ont. C.A.) at paras. 27 and 31, IGPC Book of Authorities, at Tab 1.**

90. Ontario courts have afforded a broad interpretation to the jurisdiction of the Board where the Act expressly or impliedly grants the Board with jurisdiction over the subject matter at issue. In *Union Gas Ltd. v. Dawn (Township)* the Ontario Divisional Court held:

> In my view the 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, the location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board....
>
> ...[I]t is clear that the Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest" and hence must be classified as special legislation.
>
> ***Union Gas Ltd. v. Dawn (Township)* (1977), 76 D.L.R. (3d) 613, [1977] O.J. No. 2223 (QL) (Ont. H.C.J.) at paras. 28 and 42, IGPC Book of Authorities, at Tab 2.**

91. Where the Board determines the issue to be within its exclusive jurisdiction, the Board ***must*** decide the issue as the parties have no recourse to other venues. IGPC could not avail itself of a court. Therefore, the Board ***must*** have the power to determine the appropriate remedy as well as the ability to enforce the remedy ordered. The Board has characterized the need for such power as:

> The third factor upon which the Board's ability to compel service and approve contracts is based upon the inherent role of a regulator. This underlies the invocation of the doctrine of jurisdiction by necessary implication to ensure the Board has the power to approve contracts and compel service. This doctrine attempts to ensure that a regulator with a broad mandate ***will have the tools to fulfill that mandate***. [***emphasis added***]
>
> ***Re Contract Carriage Arrangements for the Consumers Gas Company Ltd., ICG Utilities Ltd. and Union Gas Limited, Ontario Distribution Systems*, E.B.R.O. 410-II/411-II/412-II. (1987) at line 834, para. 4.74, IGPC Book of Authorities, at Tab 3. (hereinafter "*Re Contract Carriage*").**

b. The Board's Ability to Control its Own Process

92. Procedures before the Board are generally governed by the SPPA and the Board's *Rules of Practice and Procedure* (the "**Rules**") created pursuant to section 25.1 of the SPPA. The Board's entitlement to control its own process is specifically set out in section 25.0.1 of the SPPA:

> **25.0.1**: A tribunal has the power to determine its own procedures and practices and may for that purpose,
>
> > **(a)** ***make orders with respect to the procedures and practices that apply in any particular proceeding***; and
> >
> > **(b)** establish rules under section 25.1. [***emphasis added***]
>
> ***Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sch. B, s. 25.0.1**

93. The Ontario Divisional Court explained the breadth of the jurisdiction afforded to tribunals, such as the Board, under section 25.0.1 of the SPPA in *Menkes Lakeshore Ltd. v. Toronto (City)* (2007), 37 M.P.L.R. (4th) 42, 2007 CarswellOnt 4637 (WL) (Div. Ct.) ("***Menkes***"). The Court held:

> [30] Under the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22 (*SPPA*), s. 25.0.1, the Board, as an administrative tribunal exercising a statutory power of authority, ***maintains absolute jurisdiction and control over its own procedure***. It has the power to determine its own procedures and practices and to make procedural orders: see *Ontario Municipal Board Act*, R.S.O. 1990, c. O. 28, ss. 37(a) and 91; *Ontario Municipal Board Rules of Practice and Procedure*....
>
> [31] ***The authorities are clear that courts should give deference to procedural orders and rulings and should be reluctant to interfere with procedural orders within a tribunal's jurisdiction***: see *Zellers Inc. v. Royal Cobourg Centres Ltd., supra; Lafarge Canada Inc. v. 1341665 Ontario Ltd.*, [2004] O.J. No. 1572 (Ont. Div. Ct.); *Clark v. Essa (Township)* (2007), 156 A.C.W.S. (3d) 516 (Ont. Div. Ct.) [2007 CarswellOnt 1987 (Ont. Div. Ct.)]. [2007 CarswellOnt 1987 (Ont. Div. Ct.)]. A party who is dissatisfied with an order of the Board should seek leave to appeal in a timely manner before the Board commences its hearing on the merits: see *South Etobicoke Residents Ratepayers Assn. Inc. v. Toronto (City)*, [2001] O.J. No. 3182 (Ont. S.C.J.).

> Refusing to admit evidence is not an automatic breach of natural justice that justifies intervention of the court. ***Only where the refusal to admit evidence has a significant impact on the fairness of the proceeding amounting to a clear denial of natural justice should the court interfere***: see *Syndicat des employés professionnels de l'Université du Québec à Trois-Rivières c. Université du Québec à Trois-Rivières*, [1993] 1 S.C.R. 471 (S.C.C.). [***emphasis added***]
>
> ***Menkes Lakeshore Ltd. v. Toronto (City)* (2007), 37 M.P.L.R. (4th) 42, 2007 CarswellOnt 4637 (WL) (Div. Ct.) at paras. 30 and 31, IGPC Book of Authorities, at Tab 4.**

94. The Board, as an administrative tribunal exercising a statutory power of authority, maintains absolute jurisdiction and control over its own procedure.

c. The Board Followed the Procedural Requirements of Part VII.1

(i) The Compliance Order

95. Section 112.2 of the Act provides the Board with the authority to convene a compliance hearing on its own motion:

> **112.2** (1) An order under section 112.3, 112.4 or 112.5 may only be made on the Board's ***own motion***.
>
> (2) The Board shall give written notice to a person that it intends to make an order under section 112.3, 112.4 or 112.5.
>
> ...
>
> (6) ***An interim order of the Board may be made under section 112.3, with or without a hearing***, and may take effect before the time for giving notice under subsection (4) has expired. [***emphasis added***]
>
> ***Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sch. B, s. 112.2**

96. The Board complied with subsections 112.2(1) and 112.2(6) of the Act in issuing the Compliance Order as evidenced below:

> The Board was advised by counsel for N.R.G. 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. [***emphasis added***]
>
> **EB-2006-0243, Compliance Order, dated June 29, 2007, at page 2.**

97. The Board had the jurisdiction to issue an interim order in the manner which it did given that subsection 112.2(6) does not require that a hearing first be held. Further, section 112.2(3) does not obligate the Board to wait 15 days to schedule a hearing. Section 112.2(3), see below, is a procedural safeguard to permit a person, to whom the Board intends to issue an order, the opportunity to require a hearing where the Board does not expressly provide such an opportunity. It does not restrict the Board's ability schedule a hearing in advance of the 15 day window.

> 112.2(3) Notice under subsection (2) shall set out the reasons for the proposed order and shall advise the person that, within 15 days after receiving the notice, the person may give notice requiring the Board to hold a hearing.
>
> ***Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sch. B, s. 112.2**

98. The ability to proceed in the absence of notice in exigent circumstances is provided by section 125.1 of the Act and section 24(1) of the SPPA where the provision of notice is impracticable in the circumstances.

> **125.1** Subsections 18 (2) to (5) and clause 24 (1) (a) of the *Statutory Powers Procedure Act* apply, with necessary modifications, to all notices given by the Board, whether or not a hearing is held.
>
> ***Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sch. B, s. 125.1**
>
> **24.**(1)Where a tribunal is of the opinion that because the parties to any proceeding before it are so numerous *or for any other reason, it is impracticable*,
>
> (a) *to give notice of the hearing*;

> *to* all or *any of the parties individually*, the tribunal may, instead of doing so, *cause reasonable notice of the hearing* or of its decision *to be given to such parties* by public advertisement or *otherwise as the tribunal may direct.* [*emphasis added*]
>
> ***Statutory Powers Procedure Act,* R.S.O. 1990, c. S. 22, cl. 24(1)(a)**

99. In light of the above, the Board proceeded in issuing the Compliance Order, emphasizing that the urgency of the matter necessitated the Board proceeding immediately. The Board exercised its discretion properly in finding that it was impracticable to give a lengthy notice of the compliance hearing to NRG, and that notice of the same was effectively given to NRG through Mr. Thacker's attendance at the hearing. Further, the Board's proceedings are broadcast live over the internet and Mr. Moran and Mr. King were monitoring the proceeding. Support for the procedure implemented by the Board was provided by counsel to IGPC:

> **MR. O'LEARY**: ...I just have several brief submissions and - - in response to my friend and counsel for the Board. While I can understand Ms. Sebalj's desire, we support due process, particularly where administrative penalties or any sort of a punitive sanction is being sought.
>
> This is an exceptional circumstance, and it is not that we have a potential victim that is not aware of what has transpired. Mr. Bristoll has deliberately not attended today. There has not been any explanation given for his non-attendance. It is not like he is tied up in some other important proceeding; he is undoubtedly on notice of your decision to reserve on costs and an administrative penalty. I would be shocked if his counsel did not report on the full extent of your decision.
>
> So he is aware that it is being considered. I am sure he is aware of our submissions a few moments ago
>
> It is our submission, sir, respectfully, that NRG and its chairman are on notice of the Board's consideration of this matter and that you are entertaining the provision that allows you to proceed without a hearing and on short notice. On that basis, sir, we would submit and request that you do in fact apply an administrative penalty for every day that the non-compliance continues, if only to show that the Board will not accept and condone this sort of conduct by a utility.

EB-2006-0243, Transcript from the Compliance Hearing, dated June 29, 2007, at pages 19 and 20.

100. To issue an interim order under section 112.3, the Board needed to further satisfy itself that NRG had contravened or was likely to contravene an "enforceable provision" as defined under section 112.1 of the Act. Section 112.3 states:

> **112.3** (1) If the Board is satisfied that a person has contravened ***or*** is likely to contravene an enforceable provision, the Board may make an order requiring the person to comply with the enforceable provision and to take such action as the Board may specify to,
>
> (a) remedy a contravention that has occurred; or
>
> (b) prevent a contravention or further contravention of the enforceable provision.
>
> ***Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sch. B, s. 112.3.**

101. The Act defines "enforceable provision" as:

> **112.1** In this Part,
> "enforceable provision" means,
> (a) a provision of this Act or the regulations,...
> (d) a provision of the rules made by the Board under section 44,
> (e) a provision of an order of the Board...
>
> ***Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sch. B, s. 112.1.**

102. IGPC submits NRG in fact contravened multiple enforceable provisions as defined under section 112.1 of the Act. Specifically, NRG contravened an enforceable provision when:

(a) pursuant to clause 112.1(d) of the Act, NRG, contrary to section 2.1.2 of GDAR, failed to respond in a timely manner to IGPC request for gas distribution services;

(b) pursuant to clause 112.1(a) of the Act, by refusing to execute the Agreements prior to June 30, 2007; and acted contrary to subsection 42(2) of the Act which requires that a gas distributor provide gas distribution services to any building

along the line of any of the gas distributor's distribution pipe lines upon the request in writing of the owner, occupant or other person in charge of the building; and

(c) pursuant to clause 112.1(e) of the Act, failed to execute the Agreements contrary to the Board's Initial Order.

103. The Board found that NRG had contravened an enforceable provision under the Act because it had failed to execute the Agreements as required by the Board's Initial Order.

(ii) The Administrative Penalty was Proper

104. The Board's authority to issue an administrative penalty is derived from section 112.5 of the Act:

> **112.5** (1) If the Board is satisfied that a person has contravened an enforceable provision, the Board may, subject to the regulations under subsection (5), make an order requiring a person to pay an administrative penalty in the amount set out in the order for each day or part of a day on which the contravention occurred or continues.
>
> ....
>
> (3) An administrative penalty in respect of a contravention shall not exceed $20,000 for each day or part of a day on which the contravention occurs or continues.
>
> ***Ontario Energy Board Act*, 1998, S.O. 1998, c. 15, Sch. B, s. 112.5.**

105. The Board complied with the procedural requirements set out in Part VII.1 of the Act, as NRG's conduct in this proceeding warranted the Board's exercise of its discretion under section 125.1 of the Act and Clause 24(1)(a) of the SPPA to proceed on short notice with the compliance hearing which ultimately resulted in the administrative penalty being imposed.

e. Procedural Fairness was Provided to NRG

(i) No Adjournment Required

106. Contrary to the submissions of Mr. Thacker at the emergency motion, the dockets of Mr. Moran and Mr. King from June 29, 2007 prove that Ogilvy Renault LLP remained counsel to NRG on the date of the emergency and compliance hearings.

107. Further, the submissions set out herein and the additional dockets of Mr. King and Mr. Moran from March through to June, 2007 (filed in **EB-2010-0018**), not only demonstrate that NRG's counsel recommended the execution by NRG of the Agreements, but demonstrate that NRG was fully apprised of the issues which ultimately arose at the emergency motion.

108. It was reasonable for NRG to expect that such an emergency motion would be brought given the urgency of the Financing Conditions which had to be met prior to midnight on June 30, 2007. As such, NRG had more than enough time to consider its position in the event that IGPC brought an emergency motion.

109. In *Bank of Montreal v. Lysyk*, (2003), 119 A.C.W.S. (3d) 744, [2003] A.J. No. 62 (QL) (Alta. Crt. Q.B.) ("***Lysyk***"), the court found that an adjournment should be refused where a change of lawyers is a ploy to delay proceedings. While the adjournment was granted in that proceeding, the court recognized there are circumstances, such as a ploy to delay the proceeding, where a change of counsel does not warrant an adjournment:

> Jennifer Lysyk's application for an adjournment to allow her new lawyer, retained after her previous lawyer was served with notice of this motion, is allowed; while the timing of the change of solicitors is unfortunate, that change was precipitated not as a ploy by Ms. Lysyk, not as a whim or attempt at delay by Ms. Lysyk, but as a response to the criminal charge that has now been brought against her. Her

> new lawyer requires some time to become familiar with these proceedings and to conduct any cross-examination of the affiant Vininsky which may be considered appropriate.
>
> ***There are situations in which a change of lawyers is a ploy to delay proceedings***. When a judge is satisfied that such an abuse is occurring, the judge is perfectly justified in refusing an adjournment to accommodate that change of lawyers.
>
> ***Bank of Montreal v. Lysyk*, (2003), 119 A.C.W.S. (3d) 744, [2003] A.J. No. 62 (QL) (Alta. Crt. Q.B.), at paras. 5 and 32, IGPC Book of Authorities, at Tab 5.**

110. NRG's counsel, Ogilvey Renault continued to be retained, were available to attend the hearing and there was no triggering event requiring the attendance of Mr. Thacker. Having Mr. Thacker attend was clearly a "delay tactic" employed by NRG and the Board was correct in holding that an adjournment was not warranted. Such behaviour prevented any representative with knowledge of the circumstances from speaking to the Board on NRG's behalf.

(ii) Expediting the Hearing was Appropriate

111. Subsection 23(1) of the SPPA entitled the Board to proceed with the emergency hearing and to issue the Initial Order in order to avoid the abuse of process presented by NRG. Subsection 23(1) of the SPPA states:

> **23.** (1) A tribunal may make such orders or give such directions in proceedings before it as it considers proper to prevent abuse of its processes.
>
> ***Statutory Powers Procedure Act*, R.S.O. 1990, c. S. 22, ss. 23(1).**

112. NRG should have anticipated that IGPC would have no other alternative but to seek the assistance of the Board by bringing an emergency motion to salvage the Pipeline and Ethanol Facility Projects. NRG's abrupt last minute refusal to execute the Agreements left IGPC with virtually no time to prepare its materials for the emergency motion. Had

NRG truly intended on being an active participant at the hearing, which it clearly made every attempt to avoid, it could have prepared a responding evidentiary record, or, at the very least, provided some explanation for its behaviour.

113. Further, the Board was entitled to abridge the notice requirements in issuing its Emergency Notice of Motion on June 28, 2007, and did so through the implicit exercise of its discretion under clause 24(1)(a) of the SPPA and pursuant to the Board's express reliance on section 7 of the *Rules*:

> **MR. KAISER**:...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.
>
> **EB-2006-0243, Oral Decision of the Board on the Emergency Motion, dated June 29, 2007, at page 86.**
>
> **7.01** The Board may on its own motion or upon a motion by a party extend or abridge a time limit directed by these Rules or by the Board, on such conditions the Board considers appropriate.
>
> **7.02** The Board may exercise its discretion under this Rule before or after the expiration of a time limit, with or without a hearing.
>
> **7.03** Where a party cannot meet a time limit directed by the Rules, Practice Directions or the Board, the party shall notify the Board Secretary as soon as possible before the time limit has expired.
>
> ***Rules of Practice and Procedure*, Rule 7.**

114. For the reasons outlined above, the Board met the requirements of procedural fairness in issuing the Initial Order. NRG was fully aware of the case to be met and that the content of the proposed Agreements provided no material risk to NRG. Despite the recommendation from its own counsel to execute the agreements, NRG refused to do so and refused to provide any explanation to IGPC or its regulator.

IV. SUMMARY & RELIEF REQUESTED

115. Throughout these submissions the duty of the Board has been discussed. There is, however, a corresponding duty for regulated utilities that utilize public assets to provide providing a public service, the distribution of natural gas in Ontario. The duty of the regulated utility, in this case NRG, is to behave in a responsible manner for all of its ratepayers. The regulatory compact requires a utility to constrain its behaviour to prevent the abuse of the monopolistic position enjoyed by the utility.

116. NRG's breach of this duty, by its obfuscation, its attempt to delay, its appointment of new change counsel, and its refusal to adhere to the Orders of the Board, left the Board with no other choice but to use the powers that it has at its disposal to ensure protection of the ratepayers from the capricious and malicious behaviour of NRG.

117. The Board's exercise of its power (which we note should only be exercised sparingly and in exceptional circumstances such as that existed) was necessary in these circumstances.

118. NRG is not an innocent party who did not have adequate time to consult counsel and prepare its case. It would be contrary to the public interest, the principles of procedural fairness and natural justice, and inequitable, to endorse NRG's conduct in this proceeding, and to dispose of the administrative penalty and Orders issued by the Board on June 29, 2007.

119. Furthermore, procedural fairness is a two way street and IGPC is entitled to such fairness.

120. IGPC was forced to take the extraordinary steps to secure the very rights it had contracted for with NRG – the very rights which the OEB had endorsed as being in the public interest.

121. The Board must have the ability to ensure compliance with agreements that are approved by the Board in furtherance of the public interest.

122. That the Board, in reconsidering the procedural steps taken by the Board in issuing of the Initial Order and the Compliance Order, make a finding that:

(a) the requirements of procedural fairness were met by the Board in ordering NRG to execute the Agreements; and

(b) the Board followed the procedural requirements of Part VII.1 of the Act in ordering NRG to pay an administrative penalty for each day in which it failed to execute the Agreements.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

INTEGRATED GRAIN PROCESSORS CO-OPERATIVE INC. and IGPC ETHANOL INC.

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