

ONTARIO ENERGY BOARD

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 Natural
Resource Gas Limited for an Order or Orders approving or
fixing just and reasonable rates and other charges for the sale,
distribution, transmission and storage of gas commencing
October 1, 2010;

AND IN THE MATTER OF a hearing on the Board's Own
Motion.

**SUBMISSIONS OF
INTEGRATED GRAIN PROCESSORS CO-OPERATIVE INC.**

1. On October 4, 2012 the Ontario Energy Board issued a Notice of Motion to Review and Procedural Order (the “**Order**”) regarding the Decision and Order of the Ontario Energy Board (the “**Board**”) in EB-2010-0018 – Phase 2 dated May 17, 2012 (the “**Decision**”). In the Decision, the Board decided it lacked the jurisdiction to determine the actual cost of a pipeline (the “**IGPC Pipeline**”) that was constructed as a result of the Board granting leave to construct in EB-2006-0243. As result, the Board further declined to determine the proper amount of the contribution in aid of construction paid by Integrated Grain Processors Co-operative Inc. (“**IGPC**”) to Natural Resource Gas Limited (“**NRG**”) and thereby failed to fix just and reasonable rates regarding the contribution in aid of construction.

2. IGPC submits the Board erred as it did not consider the aid to construct, nor the financial assurance, both of which are “rates” within the meaning of the *Ontario Energy Board Act, 1998* (“**OEB Act**”). IGPC submits the Board's error is illustrated in the following: Had IGPC committed to a longer term in the Pipeline Cost Recovery Agreement (“**PCRA**”) and no contribution in aid of construction was paid, the full cost of the IGPC Pipeline would have been

put into NRG's rate base and there would be no question the Board had jurisdiction to review the costs. The existence of the PCRA, which incorporates the Board-approved methodology of E.B.O. 188, does not remove the Board's exclusive jurisdiction.

3. The Board has set payment terms for contributions in aid of construction for other utilities where the cost of constructing facilities to deliver natural gas to a community fell below a Profitability Index of 1.0.

4. The amount of the contribution in aid of construction is used in the determination of the amount of costs that can be included in rate base. As such the Board has exclusive jurisdiction over this matter. The PCRA does not create a new power but recognizes the Board's existing statutory power.

5. In the event the Board determines it has jurisdiction, IGPC submits the Board should commence a process to determine the actual costs of the IGPC Pipeline and to determine what refund payments and letter of credit adjustments should be made. IGPC submits this process need review the disputed costs included in its original motion, being: (i) the excessive internal costs of M. Bristoll; (ii) the excessive and irrelevant legal costs; (iii) the excessive interest charges; (iv) the improper charges of the administrative penalty and the contingency charges; and (v) the obligation of NRG to pay interest to IGPC for the monies owed to IGPC since October 2008. The Board should as part of the process determine the appropriate amount of financial security to be provided by IGPC to NRG.

Background

6. Pursuant to the Board's earlier Decision and Order in EB-2006-0243, NRG obtained the authorization and obligation to construct the 28.5km IGPC Pipeline to supply natural gas to the ethanol facility (the "**Facility**") being developed by IGPC in the Town of Aylmer, Ontario. The Decision required NRG to abide by certain agreements, a Gas Delivery Contract ("**GDC**") and the PCRA. As such, compliance with the terms and provisions of these agreements became a condition of the approval.

7. The prudently incurred costs of constructing the IGPC Pipeline were to be incorporated into the rates charged by NRG to IGPC. The rates were to be in two components, a contribution in aid of construction and monthly charges to be paid over the duration of time IGPC takes distribution service. For the purpose of calculating the contribution in aid of construction, the agreed to revenue horizon was 7 years.

8. The PCRA contained the Board mandated mechanism to determine the rate to be charged as a contribution in aid of construction – E.B.O. 188. The mechanism requires the total prudent or reasonable capital costs to calculate the contribution in aid of construction.

9. It is well accepted that a utility is only permitted to recover its costs where such costs have been determined by the regulator to be prudently incurred. Given this regulatory principle, why should a utility be permitted to recover imprudently claimed costs in the form of a contribution in aid of construction?

10. In the first rate case filed by NRG following the construction of the IGPC Pipeline, EB-2010-0018, a dispute arose regarding the existence¹ and prudence² of certain costs in respect of the IGPC Pipeline which NRG sought to be recover from IGPC. IGPC had prior to the construction of the IGPC Pipeline paid \$3,538,792.47 as a contribution in aid of construction based on estimated costs. The Board erred when it declined to make any ruling on the prudence of the costs claimed by NRG in respect of the IGPC Pipeline on the basis that the dispute was a private law matter under the PCRA, rather than considering the payment obligations to be related to “rates” charged for distribution services.

THE FACTS

The Parties

11. IGPC, is a co-operative comprised of over 800 members of the community around the Town of Aylmer, Ontario. IGPC owns and operates the Facility in the Town of Aylmer.

12. NRG is a corporation that provides natural gas distribution services in and around the Town of Aylmer and is subject to the regulatory oversight of the Board.

13. IGPC is the largest customer of NRG accounting for approximately \$1,492,305, or 26.7% of NRG’s revenue requirement.³

¹ NRG filed its Post Construction Report for the IGPC Pipeline which included “Contingency” costs of \$132,000 in alleged Actual Costs. During the Technical Conference, NRG confirmed it had not spent the money and had no intention of spending such funds. Further, NRG charged interest where no interest was paid.

² As an example, NRG had included the Administrative Penalty (\$140,000) and more than \$400,000 in costs for Mr. Bristoll for the equivalent of less than 8 months’ work. IGPC contested both the number of hours and the rate were excessive.

³ EB-2012-0342, Ex. 1/T3/S1, Appendix 1, p. 4, Table B1.3, August 7, 2012 - revenue from IGPC as percentage of total revenue.

The IGPC Pipeline

14. The OEB Act, at Section 90, requires that a person must obtain from the Board leave to construct prior to commencing the construction of pipelines longer than 20 km or costing more than the prescribed amount of \$2 million. The Board shall grant leave where the project is in the public interest.

15. As NRG's existing pipeline system did not have the ability to provide natural gas service to the Facility, on October 13, 2006, NRG applied to the Board for leave to construct the IGPC Pipeline. The Board identified this proceeding as EB-2006-0243. The Board granted leave to construct the IGPC Pipeline by Decision and Order, dated February 2, 2007. The IGPC Pipeline included ancillary facilities consisting of a custody transfer station to connect to the upstream Union Gas Ltd. system and a customer meter station located at the ethanol facility in Aylmer.

16. Copies of two agreements, the PCRA and the GDC, entered into by NRG and IGPC, were filed with the Board as part of the evidence in support of the proposed IGPC Pipeline being in the public interest.

17. In essence, the Board-mandated economic analysis known as "E.B.O. 188" was incorporated into the terms and provisions of the PCRA.

18. The economic analysis provided to the Board by NRG in support of its application for leave to construct estimated the total cost of the construction of the IGPC Pipeline to be \$9.1 million with a Net Present Value of \$8.5 million.

19. In order to achieve a profitability index of 1.0, the evidence also indicated an Initial Estimated Aid-to-Construct of \$3.8 million would be required from IGPC.⁴

20. Conceptually, this process is the same as that employed by the Board regulated electricity transmitters and distributors connecting customers. IGPC would note the electricity sector contemplates true up with customers as many as 15 years after the project was put into service.

21. The aid-to-construct is equal to the “Net Present Value of Costs” of \$8,499,908 less the “Net Present Value Revenue plus Tax Shield” of \$4,709,573. The NRG revenue was based upon 7 years of monthly payments from IGPC based upon the Board approved Rate 3 from NRG’s rate order.

Estimated Cost (1)	\$9,100,001
NPV Costs (2) = (NPV(1))	\$8,499,908
NPV Revenue Plus Tax Shield (3)	<u>\$4,709,573</u>
Aid-to Construct (4) = (2) – (3)	<u>\$3,790,336</u> ⁵

22. After construction of the IGPC Pipeline was complete, the PCRA, at Sections 3.13 and 3.14, require NRG to provide its total reasonable actual costs to construct the IGPC Pipeline to IGPC. This reconciliation of reasonable actual costs would protect IGPC and NRG’s other ratepayers. The PCRA further provided that IGPC could disagree and seek the assistance of the Board in the event the issue could not be resolved.

⁴ Decision and Order, EB-2006-0243, February 2, 2007, p. 2

⁵ Decision and Order, EB-2006-0243, February 2, 2007, p. 2

23. During EB-2006-0243, in its submissions to the Board in support of its application, NRG Counsel, Mr. Moran, represented to the Board the following:

MR. MORAN: Overall, Mr. Chair, we recognized that there was the possibility of three kinds of disputes. There can be disputes with respect to subject matter that falls within the jurisdiction of the OEB. There may be metering disputes, which clearly fall within the jurisdiction of Measurement Canada. And then outside of those two areas there might be disputes with respect to rights and obligations that don't necessarily fall within the jurisdiction of the OEB or Measurement Canada.

So I think you will see that reflected in the gas delivery contract. In this one, because it is a cost recovery agreement and because it is all about protecting ratepayers, the dispute resolution clause really focuses on the OEB as the arbitrator.⁶

24. This statement was not challenged by the Board or Board Staff. Further, NRG has never stated Mr. Moran erred when this representation was made.

25. On February 2, 2007, the Board issued a Decision and Order in EB-2006-0243 granting NRG leave to construct the IGPC Pipeline subject to certain conditions. In finding the IGPC Pipeline was in the public interest and authorizing NRG to construct the IGPC Pipeline, the Board relied upon the balancing of interests provided in the PCRA.

“The Board is satisfied that the terms and conditions in the two agreements, the GDC and the PCRA, 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 reliance on the terms and conditions of both the PCRA and the GDC that protect the interest of NRG’s ratepayers.”⁷

26. The Decision also prevented NRG from amending the terms of the agreements in order that the Board could ensure that ratepayers would remain protected.

⁶ Tr. 3, February 1, 2007, EB-2006-0243, p. 9

⁷ Decision and Order, February 2, 2007, p. 4

27. Subsequent to granting leave to construct and prior to construction, IGPC was forced to request the Board to intervene to resolve certain disputes between IGPC and NRG regarding compliance with terms and provisions of the PCRA and the proposed IGPC Pipeline.

28. In the first dispute in June 2007, IGPC was forced to request the Board's assistance to require NRG to execute certain documents. The first, an assignment for the benefit of lenders for which the obligation to execute was expressly included in the PCRA section 11(2)(d), and the GDC. In addition NRG refused to execute a Board-required upstream gas transportation agreement – Bundled-T Service Receipt Agreement – which NRG is obligated by the Board to enter into with any direct purchase customer in its franchise.

29. The Board's Decision in this Motion concluded the Board had jurisdiction. In the following Decision (Read by Chair Kaiser):

“...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....

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

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."

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."⁸

30. Following NRG's refusal to execute the agreement as ordered by the Board, the Board conducted a compliance hearing and issued an administrative penalty against NRG in the amount of \$20,000/day. After seven days and the accumulation of \$140,000 in administrative penalties, NRG executed the assignment and transportation agreement.

31. NRG appealed this decision to Divisional Court but did not pursue and eventually abandoned its appeal. Ultimately the Board, for procedural reasons only, withdrew the administrative penalty.

32. The Board's finding of jurisdiction has not been reversed either through a rehearing or through an appeal. NRG did not challenge the decision in respect of the Board's jurisdiction regarding the PCRA and the GDC.

33. The second dispute was precipitated by NRG demanding \$32 million in security to carry out the construction of the IGPC Pipeline⁹ which NRG had been forecasted in the evidence in EB-2006-0243 to cost \$9.1 million.

⁸ Tr. 1, Motion Hearing Oral Decision, EB-2006-0243, June 29, 2007, pp. 2 - 7

⁹ IGPC Motion Materials, EB-2006-0243, Letter dated January 31, 2008, from Lawrence E. Thacker, to George R. Alkalay

34. On February 22, 2008, the Board issued a Notice of Review on the Board's own Motion, to consider the matter. Specifically stated that "The examination will include a review of the PCRA".¹⁰

35. Again, in settling the dispute, the Board recognized its jurisdiction and relied upon the provisions of the PCRA. It found that the demands of NRG were without merit and ordered NRG to proceed on the basis of the provisions in the PCRA.¹¹

36. Prior to the commencement of construction of the IGPC Pipeline, IGPC had paid \$3,538,792.47 as the aid-to-construct. In addition, IGPC secured the costs of the remainder of the IGPC Pipeline by providing financial assurance in the form of a letter of credit in the amount of \$5,214,173.00.

37. On July 15, 2008, NRG commenced charging IGPC the monthly distribution rates for gas delivery under Rate 3 of the Board approved rate schedule.¹²

38. Several months later, in 2009, NRG finally provided to IGPC the claimed actual costs to for the construction of the IGPC Pipeline. The costs claimed by NRG from IGPC included:

- (a) \$140,000 for the administrative penalty (which was never paid);
- (b) \$226,088 for contingency costs which NRG had no intention of spending as their witnessed testified during EB-2010-0018;

¹⁰ Notice of Review on the Board's Own Motion, EB-2006-0243, February 22, 2008, p. 2

¹¹ Decision and Order, EB-2006-0243, March 4, 2008

¹² Decision and Order, EB-2010-0018, Phase 1, p. 5

- (c) excessive interest charges as the principal and interest rate exceeded that provided for in the PCRA;
- (d) excessive and unrelated legal fees; and
- (e) excessive administration costs based upon a “market rate” for employees rather than cost based as contemplated by the PCRA.¹³

39. IGPC asserted such claimed “costs” were neither prudent nor reasonable. It attempted to negotiate with NRG but was stonewalled.

40. On February 26, 2010, NRG filed its first cost of service rate application, EB-2010-0018 with the Board since the construction of the IGPC Pipeline.

41. Included in the rate application was a request to add \$5,073,000 to the rate base effective October 1, 2008 for the IGPC Pipeline. This was the first time IGPC was aware of what NRG was seeking to include in its rate base.

42. In EB-2010-0018, NRG indicated that the cost of constructing the IGPC Pipeline was \$8,652,814. This included \$226,088 in “contingencies” – costs not incurred – and claimed legal and regulatory costs of \$989,288 that included \$140,000 for the administrative penalty that was not paid. The claimed costs included \$217,073 for interest during construction up to October 1, 2008.¹⁴

¹³ NRG Response to Board Staff IR #11, EB-2010-0018, Phase 1, Ex. 1/T1, pp. 16/17, May 18, 2010

¹⁴ NRG Response to Board Staff IR #11, EB-2010-0018, Phase 1, Ex. 1/T1, pp. 16/17, May 18, 2010

43. Based upon the evidence provided in EB-2010-0018, IGPC brought a motion on August 3, 2010 in EB-2006-0243 to have the Board consider the prudence and reasonableness of the costs of the IGPC Pipeline claimed by NRG.¹⁵

44. In EB-2010-0018, NRG's witness panel confirmed that it did not build the custody transfer meter station at the connection to Union Gas Ltd.

45. During cross-examination, NRG's witness panel further confirmed there was no plan or need to spend the \$226,088 in contingency monies and that it did not abide by the provisions of the PCRA in calculating the interest charge.¹⁶

46. IGPC has provided a table based upon information included in EB-2006-0243 and NRG's response to Undertaking J2.4 filed September 8, 2010 and the Post Construction Report.

Description	EB-2006-0243	NRG's Request ¹⁷	Per \$1.1 Million Reduction ¹⁸	NRG's Post Construction	Line
Pipeline Capital Cost	\$9,100,001	\$8,626,353	\$7,526,353	\$8,399,873 ¹⁹	1
NPV of Costs	\$8,499,908	\$8,751,053	\$7,635,131	?	2
NPV Dx Revenue	\$3,560,009 ²⁰	\$3,645,677	\$3,645,677	\$3,645,677	3
NPV Tax Shield	\$1,149,564	\$1,384,274	\$1,207,757	?	4
Contribution in Aid	\$3,790, 335	\$3,721,102	\$2,781,718	\$ 3,484,381 ²¹	5 =2-(3+4)
Rate Base (amount)	\$5,309,666	\$4,905,251	\$4,744,635	?	6 = 1 - 5

¹⁵ IGPC Notice of Motion, EB-2006-0243, August 3, 2010

¹⁶ Tr. 1, September 9, 2010, EB-2010-0018, p. 46; Undertaking J1.4, Appendices, September 8, 2010

¹⁷ EB-2010-0018, Undertaking J2.4.

¹⁸ EB-2010-0018, Undertaking J2.4.

¹⁹ Post Construction Financial Report, July 24, 2012, EB-2006-0243

²⁰ NRG did not provide this amount but provided a total NPV of Revenue Plus Tax Shield of \$4,709,573 and a NPV of Tax Shield of \$1,149,564.

²¹ This amount is derived from the amount of Aid to Construct paid of \$3,538,792.47 less the NRG admitted refund of \$54,411 contained in the cover letter to the Post Construction Report.

47. IGPC would note the Post Construction Report cost includes \$132,000.00 in contingency monies. Simply put, the mathematics of NRG's various positions does not make sense.

48. There is a mathematical relationship between the total cost, the contribution in aid of construction and the amount closed to rate base.

49. As such, the setting of the contribution in aid of construction and the monthly charge portion of the rate is necessarily dependent upon the total capital cost.

50. The Board, in EB-2010-0018 - Phase 1, agreed that the IGPC Pipeline should have been put into rate prior to October 1, 2008, and only permitted NRG to include in rate base, \$4,872,180 as of August 1, 2008. This amount is recovered by NRG, including a return on shareholder equity, through the monthly rates charged by NRG to IGPC which are approximately \$1.5 million per year.²² IGPC has paid its monthly charges since July 2008.

51. The Board, in EB-2010-0018 – Phase 1 declined to deal with prudence of costs and the motion and deferred it to Phase 2.

52. The Board, in its Decision and Order in EB-2010-0018 – Phase 2, declined to address IGPC's concerns regarding the prudence of the costs claimed by NRG for the construction of the IGPC Pipeline on the basis that the Board lacked jurisdiction.²³

53. On July 24, 2012 NRG filed its Post Construction Report that claimed an "Actual Cost" of \$8,399,873 and that this amount included \$132,000 in contingency monies that were not spent.

²² Decision and Order, December 6, 2010, EB-2010-0018, Phase 1, p. 5

²³ Decision and Order, May 17, 2012, EB-2010-0018, Phase 2, p. 14

54. In filing the Post Construction Report, NRG has departed from its prior position to indicate that a refund of \$54,411 to IGPC is due. However, based upon the information provided, it is IGPC's position that this amount dramatically understates the refund owed by NRG to IGPC.

55. No such payment of the refund has been made by NRG.

ISSUES AND THE LAW

56. The motion to review gives rise to the following issues:

- (a) Is the contribution in aid of construction of \$3,538,792.47 paid by IGPC for the construction of the IGPC Pipeline to obtain gas distribution service a "rate" and within the sole and exclusive jurisdiction of the Board?
- (b) Does incorporating the aid-to-construct into an agreement, the PCRA, oust the jurisdiction of the Board?
- (c) Should the Board have determined the prudence of the total costs claimed by NRG to expand the natural gas distribution network in constructing the IGPC Pipeline?
- (d) Does the Board have the authority, and should the Board, order NRG to complete the cost reconciliation contemplated in the PCRA to implement just and reasonable rates?

57. The dispute flows from the disagreement regarding the reasonableness or prudence of costs claimed by NRG for constructing the IGPC Pipeline, which is an expansion of its natural gas distribution system.

58. The quantum of the actual reasonable costs incurred to construct the IGPC Pipeline has a direct impact on rates, the monthly charges, the capital contribution paid by IGPC to NRG, and the amount of the security posted by IGPC in favour of NRG.

59. As a result of the Board's characterization of the issue as a private law dispute, it did not perform any review of the prudence or reasonableness of the claimed total costs by NRG for constructing the IGPC Pipeline. As such, the Board could not assess whether such rates were just and reasonable.

60. In order to balance the interests of NRG, NRG's other ratepayers and IGPC, the PCRA provided that the calculation would be reconciled after construction was complete and costs were known. This has not yet occurred as the Board declined its jurisdiction despite this being ordered by the Board in EB-2006-0243.

The Board's Objectives:

61. Section 2 of the OEB Act gives guidance to the Board in making decisions to carry out its mandate:

2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

.....

2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

3. To facilitate rational expansion of transmission and distribution systems.

.....

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

62. The Board's objective includes the balancing of interests between the utility and the ratepayers. Without the jurisdiction to determine what ratepayers are obligated to pay and utilities are entitled to receive for distribution services the Board can't possibly fulfill its objectives.

63. The Board is obligated to set just and reasonable rates and regulated utilities must only charge approved rates. The Board has the authority to order the conditions upon which gas service is provided by virtue of section 42(3) of the OEB Act.

42(3) 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 sale service. 1998, c. 15, Sch. B, s. 42 (3).

64. IGPC is a ratepayer and its interests are deserving of protection by ensuring that the costs and charges paid by it through the aid-to-construct, the monthly charges, and the security posted are just and reasonable.

65. The only way to ensure the Board's fulfills its statutory objectives in this situation is if the Board has reviewed the total costs of the IGPC Pipeline claimed by NRG and found them to be prudent and that the rates resulting from such prudent costs are just and reasonable.

The Board and System Expansions

66. In an expansion of the natural gas distribution system to serve a customer, the Board requires the utility to conduct an economic analysis in accordance with E.B.O 188 which

examines the cost of providing the service – capital and ongoing maintenance – against the revenues to be earned from the customer(s).

- (a) Where the net present value of the revenue received by the utility as paid by the customer through the monthly charges exceeds the costs of the utility in expanding its system, the utility may proceed with the construction of the expansion without receiving a contribution in aid of construction from the customer.
- (b) Where the costs of expanding the distribution exceed the net present value of the revenue from the monthly rates paid over time by the customer, the utility is obligated to receive additional payment from the customer(s) in the form of an aid-to-construct.
- (c) This payment is usually made in the form of a contribution in aid of construction; or by adding a charge to the normal monthly rate paid by the customers or a combination of the two.²⁴

67. In the present situation IGPC paid an aid-to-construct prior to construction. A reasonable person would expect that the contract it enters into with the utility would be consistent with the Board's rules governing system expansion and that the Board would retain jurisdiction to oversee and enforce its rules.

68. The economic analysis is a vital component in the Board determining whether a request to construct the facilities is in the public interest, "*A critical component of any pipeline*

²⁴ Report of the Board – Natural Gas System Expansion, E.B.O., Section 4.3, Schedule 1, January 30, 1998

*application is evidence that the construction of the pipeline is economically feasible, and the construction costs of the pipeline are an important factor in assessing the economic feasibility of the line.”*²⁵

69. In other circumstances the Board has approved the aid to construct to be paid by the customers through additional monthly charges.²⁶

70. In the present circumstances, the public interest was protected by the provision of the PCRA that incorporated E.B.O. 188 and which were specifically included in the Board’s Decision and Order in EB-2006-0243.

71. The PCRA provided, at pages 7/8, the contribution in aid of construction was:

- (a) estimated at the time of negotiating the PCRA;
- (b) was to be updated based upon new information just prior to construction; and
- (c) was to be finally adjusted or reconciled based upon actual reasonable costs.

72. This process ensured NRG, its other ratepayers were protected against costs higher than forecasted and that IGPC would be protected from the utility, NRG, over recovering in the event costs were lower than forecasted.

73. In its Decision and Order dated February 2, 2007, in EB-2006-0243, the Board noted at page 4 the following:

²⁵ *Energy Regulation in Ontario*, Zacher and Duffy, Release No. 7, 2011

²⁶ E.B.L.O. 231, EBC 193/194, E.B.A. 591/592, Final Decision with Reasons, June 28, 1991, pp. 2, 3 and 6

“The Board is satisfied that the terms and conditions in the two agreements, the GDC and the PCRA, 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 reliance on the terms and conditions of both the PCRA and the GDC 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 percent.”

74. The court has recognized the Board’s purpose to protect customers from the monopolistic powers of the utility.

“The Board’s regulatory power is designed to act as a proxy in the public interest for competition in view of a natural gas utility’s geographical natural monopoly. Absent the intervention of the Board as a regulator in rate-setting, gas utilities (for the benefit of their shareholders) would be in a position to extract monopolistic rents from consumers, in particular, given a relatively inelastic demand curve for their commodity. Clearly, a prime purpose of the *Act* and the Board is to balance the interests of consumers of natural gas with those of the natural gas suppliers. The Board’s mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service.”²⁷

75. If the Board does not have jurisdiction over the amount paid by ratepayers as contributions in aid of construction then it does not have the ability to protect consumers from the monopolistic powers of the utility and it will not be able to fulfill its statutory obligations.

The Board’s Exclusive and Comprehensive Jurisdiction to Set Rates

76. Lying at the very core of the Board’s mandate is the obligation to set just and reasonable rates provided by section 36 of the OEB Act.

77. The Court of Appeal recognized the breadth and extent of the Board’s regulatory authority provided by Section 36 of the OEB Act, wherein it provided the following:

²⁷ *Advocacy Centre for Tenant-Ontario Energy Board*, supra, pp. 8 and 9

“It is clear that the Act constitutes the OEB as a specialized expert tribunal with the broad authority to regulate the energy sector in Ontario. In carrying out its mandate, the OEB is required to balance a number of sometimes competing goals. On the one hand, it is required to protect consumers with respect to prices and the reliability and quality of gas service, but on the other hand, it is to facilitate a financially viable gas industry. The legislative intent is evident: the OEB is to have the primary responsibility for setting gas rates in the province.”²⁸

78. As such, the Board must have the ability to ensure monopoly utilities only charge approved just and reasonable rates. The only way to ensure excessive gains are disgorged is if the Board has jurisdiction to order a refund.

79. Section 3 of the OEB Act includes the following definition: “*“rate” means a rate, charge or other consideration and includes a penalty for late payment*”.

80. The Board has stated that “rate” includes other terms related to the services.²⁹ IGPC submits such other “terms” must necessarily include the timing of payments, reconciliations and financial assurance.

81. The proper approach to statutory interpretation has been accepted by the courts as follows:

“The Court is to be guided by the principles of statutory interpretation as set forth in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed., (Toronto: Butterworths, 1994) at 131:

There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the purpose of the legislation, the consequences of proposed interpretations, as well as admissible external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its

²⁸ *Natural Resource Gas Ltd. v. Ontario Energy Board*, 2006 CanLII 24440 (ON CA), p. 6, para. 18

²⁹ Reasons for Decision, E.B.R.O. 410-II, March 23, 1987, Section 4.58

plausibility, that is its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative purpose; and (c) its acceptability, that is, the outcome is reasonable and just.

The words of the *Act* are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme and object of the legislation and the Legislature's intent. *ATCO Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, [2006 SCC 4 \(CanLII\)](#), [2006] 1 S.C.R. 140 at para. 37.”³⁰

82. Without the IGPC Pipeline and without the Board's granting leave to construct, there was no ability for NRG to provide distribution service to IGPC.

83. IGPC has paid \$3,538,792.47 as an aid-to-construct to secure the construction of the facilities necessary for it to be able to receive natural gas distribution service and it continues to pay approximately \$1.5 million per year to continue to receive such service.

84. It is the total bargain to secure distribution services that comprises the “rate”.

85. If a utility is permitted to retain excessive deposits it makes an unreasonable return.

86. As such, it is imperative the Board has jurisdiction over the entire “rate” charged by a utility to provide service.

87. It is submitted that the aid-to-construct, or the contribution in aid of construction, is a “rate or charge” within the meaning of section 3 and 36 of the OEB Act as it is collected by the utility to as a pre-condition to providing natural gas distribution service.

88. The OEB Act, subsection 19(6), states that the Board's has exclusive authority in all matters within its jurisdiction. Therefore as the Board's jurisdiction is exclusive, it is incumbent

³⁰ *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, supra, p. 3

upon the Board to ensure the contribution in aid of construction and the monthly payments are “just and reasonable” as required by section 36 of the OEB Act.

The PCRA does not Remove the Board’s Jurisdiction

89. As outlined in the facts, the Board asserted its jurisdiction over the PCRA on three separate occasions: (i) the leave to construct proceeding; (ii) the first emergency motion; and (iii) the Board’s own motion.

90. The Board relied upon the agreements to find that granting leave to construct was in the public interest.

91. Further, in its Decision, the Board prohibited NRG from deviating from the terms of the PCRA. Clearly, in order for the public interest mandate to be fulfilled, NRG had to comply with the terms and provisions of the OEB Decision and the PCRA.

92. IGPC, its members, lenders and other stakeholders, such as the Province of Ontario, relied upon the Board’s approval of the PCRA and GDC in order to proceed with the funding of the \$160 million ethanol facility.

93. The Board recognized that other stakeholders relied upon the PCRA. As such, the Board is the only proper authority to consider this matter.

94. Without such jurisdiction and authority, a monopoly utility could require customers to make additional payments not included in Board-approved rates and the Board would have no authority and thereby no ability to protect the public interest or the interest of the ratepayer as it

is obligated to do in discharging its duties. This would permit a utility to recover more than a just and reasonable rate.

95. The Board has examined the reasonableness of costs claimed in the construction of pipelines and facility applications in other projects and where such costs were not prudently incurred, it has denied recovery.

96. This dispute does not involve the question of whether a rate set by the Board contravenes a federal statute, the *Criminal Code*. Nor does it involve the equitable remedy of restitution. As such any reference to *Garland* is misplaced.

97. The Board has in a prior decision, confirmed it has jurisdiction over contractual matters.³¹

98. The Board, in the *Distribution System Code* (“DSC”) and the *Transmission System Code* (“TSC”), provide templates of contracts that must be used by utilities in connecting new customers.³²

99. Compliance with the DSC and TSC is an obligation of a utility’s license and the Board cannot extend its jurisdiction through the use a code. The Board has the inherent jurisdiction to impose such agreements and to ensure the provisions of such are enforced.

100. In a dispute between Toronto Hydro and Graywood Investments regarding the cost of extending the electricity distribution network, the Board was asked to determine when a contract came into existence. Despite the nature of the dispute, being a contractual matter and

³¹ EBRO 410/411, Reasons for Decision, March 23, 1987, ss. 4.58 to 4.79

³² *Distribution System Code, Appendices D and E*, October 1, 2011

compliance with a license, there was no issue regarding the Board's jurisdiction to determine when a contract came into existence.³³

Prudence and the Board

101. Utilities are not permitted to recover imprudent expenditures. In *Enbridge Gas Distribution Inc. v. Ontario Energy Board*, 2005 CanLII 4941 (ON SCDC), at pages 2 and 3, [check] the Court made these statements about the prudence standard to which utilities are held:

“[8] Essentially, a utility is entitled to recover its prudently incurred costs. The test of prudence was first developed in United States jurisprudence, but has since been widely accepted in Canada: *State of Missouri ex. rel. Southwestern Bell Telephone Co. v. Public Service Commission of Missouri*, 262 U.S. 276 (1923) at 289; *British Columbia Electric Railway Co. Ltd. v. British Columbia (Utilities Commission)*, [1960 CanLII 44 \(S.C.C.\)](#), [1960] S.C.R. 837 at 854; *Transcanada Pipelines Ltd. v. Canada (National Energy Board)*, [2004] F.C.J. No. 654 (C.A.) at para. 32; *West Ohio Gas Co. v. Public Utilities Commission of Ohio (No.1)*, 294 U.S. 63 (1935) at 68.

[9] Before us, and likewise before the Board, there was no dispute between the parties as to the applicability of the prudence standard and the nature of the test. Expenditures are deemed to be prudent, in the absence of some evidence suggesting the contrary. However, costs that are found to be dishonestly incurred, or which are negligent or wasteful losses, are excluded from the legitimate operating costs of the utility in determining rates that may be charged”.

102. The approach of the OEB to the “prudence” inquiry is captured in the following extract from which the Court recited:

The Board agrees that a review of prudence involves the following:

♦ Decisions made by the utility's management should generally be presumed to be prudent unless challenged on reasonable grounds.

³³ *Graywood Investments Limited v. Toronto Hydro-Electric System Ltd. and Ontario Energy Board*, May 14, 2003, p. 5

♦ To be prudent, a decision must have been reasonable under the circumstances that were known or ought to have been known to the utility at the time the decision was made.

♦ Hindsight should not be used in determining prudence, although consideration of the outcome of the decision may legitimately be used to overcome the presumption of prudence.

♦ Prudence must be determined in a retrospective factual inquiry, in that the evidence must be concerned with the time the decision was made and must be based on facts about the elements that could or did enter into the decision at the time.”³⁴

103. As the Board has previously stated, in E.B.L.O. 186, the leave to construct does not immunize a project from a prudence review.

“The Board has expressed its concern about the risks arising from the Applicant’s proposal to proceed on the basis of the letter of intent from the Department of National Defence and a one-year contract with an option to terminate in the event of any gas cost escalation. It may well be that the risks of proceeding on that basis should not necessarily be borne entirely by the customers. Therefore, the Board considers it important to note that the granting of leave to construct the extension is not a determination of the treatment to be given costs of such facilities in subsequent rate proceedings of the Applicant. In such proceedings the prudence of management in incurring costs to provide utility service is subject to extensive review.”³⁵

104. As noted in paragraphs 41 to 44 above IGPC raised sufficient grounds for the Board to question the prudence of the costs claimed. The claimed costs were not incurred, were intended to thwart the very construction of the IGPC Pipeline and the fulfillment of the statutory obligation to serve, were excessive and imprudent.

105. Therefore, it is proper that the Board be obligated to conduct a prudence review and ensure that the resulting rate – the contribution in aid of construction and the monthly charges - and charges are just and reasonable.

³⁴ *Enbridge Gas Distribution Inc. v. Ontario Energy Board*, 2005, CanLII 4941 (ON SCDC), p. 3

³⁵ E.B.L.O. 186, Reasons for Decision, April 24, 1979, p. 41

ORDER REQUESTED

106. IGPC therefore submits that the Decision regarding the lack of jurisdiction be set aside, and that the Board grant the following relief:

- (a) A declaration the Board erred in declining to exercise its jurisdiction to set just and reasonable rates;
- (b) An Order(s) establishing a timetable for the filing of evidence, written interrogatories to NRG, a technical conference and an oral hearing dealing with:
 - (i) the prudence of the total costs claimed by NRG to expand its distribution system in the construction of the IGPC Pipeline;
 - (ii) the establishment of rates in respect of the contribution in aid of construction, affected monthly charges, and the amount of the letter of credit that are just and reasonable;
- (c) An Order establishing the calculation of interest on amounts owed by NRG to IGPC;
- (d) An Order establishing a timetable for NRG to make any payment to IGPC, and/or to adjust the letter of credit; and
- (e) Such other relief as IGPC may request and the Board deems just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: October 22, 2012

Original signed "Scott Stoll"

Scott Stoll

Original signed "Dennis O'Leary"

Dennis O'Leary

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