EB-2012-0396

ONTARIO ENERGY BOARD

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

AND IN THE MATTER OF an Application by Natural Resource Gas Limited to the Ontario Energy Board for an Order or Orders approving or fixing just and reasonable rates and other charges for the sale, transmission and distribution of gas as of October 1, 2010.

NATURAL RESOURCE GAS LIMITED SUBMISSIONS

October 22, 2012

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A. INTRODUCTION

1. We are counsel to Natural Resource Gas Ltd. ("NRG") and are making this submission in response to Notice of Motion to Review and Procedural Order No. 1, issued by the Ontario Energy Board (the "Board") on October 4, 2012.

2. On August 3, 2010, IGPC Ethanol Inc. and Integrated Grain Processors Co-operative ("IGPC") filed a Notice of Motion (the "Motion") in the Leave to Construct Application (EB-2006-0243) related to its dispute over, among other things, the actual capital cost of a 28.5km pipeline. This motion was brought shortly before the rates case hearing. On August 9, 2010, the Board issued Procedural Order No.5, and scheduled an oral hearing on September 7, 2010 to hear the motion followed immediately by the rates case.

3. At the commencement of the hearing of the motion, the Board determined that it would hear those issues raised in the motion that had potential rate impacts as part of the rates case. At the oral hearing on the rates case, IGPC confirmed that, after the Board issued its Decision in the rates case, IGPC would comply with the Board's direction that IGPC recast its Motion to reflect the motion issues decided as part of the rates case.

4. On December 6, 2010, the Board issued its Decision and Reasons in Board Proceeding No. EB- 2010-0018, in which the actual capital cost of the IGPC pipeline was determined and NRG's rates were fixed.

5. On May 17, 2012, the Board issued its Decision and Order on NRG's rates application (EB-2010-0018) in which it determined that it did not have jurisdiction to determine the capital cost of the pipeline.

6. On October 4, 2012, the Board on its own motion issued a Notice of Motion to Review the EB-2010-0018 decision with respect to the issue of whether the Board has jurisdiction to determine the capital cost of the pipeline.

7. NRG submits that the Board Decision in EB-2010-0018 was correct in law and that any change would be legally unsupportable and fundamentally wrong. Accordingly, the

Board should confirm its previous Decision which held that the Board had no jurisdiction to determine the capital cost of the pipeline.

B. ACTUAL COST OF THE IGPC PIPELINE

(a) The Jurisdiction of the Board

8. IGPC provided argument on the jurisdiction of the Board to hear its Motion in its submissions dated August 27, 2010. As cited by IGPC, the Board's authority is set in section 19(6) of the *Ontario Energy Board Act, 1998*, S.O. 1998 Chapter 15, Schedule B, (the "*OEB Act*") which provides, "The Board has in all matters within its jurisdiction authority to hear and determine all questions of law and of fact." IGPC also relies on a recent decision from the Ontario Court of Appeal, *Snopko v. Union Gas Ltd.*, [2010] O.J. No. 1335. There, the Court reviewed the extent of the Board's exclusive jurisdiction to deal with legal and factual issues raised by a party claiming damages arising from the use of natural gas storage pools. IGPC uses passages from this case to establish that "The Court of Appeal has acknowledged the Board's exclusive authority where the dispute is within the Board's jurisdiction."

9. Having established that the Board has exclusive authority where the dispute is within its jurisdiction, the question then becomes whether the *OEB Act* expressly or impliedly grants the Board jurisdiction over the subject matter of IGPC's motion.

10. In a letter filed on July 6, 2011, IGPC recast the Motion and clarified the elements that were, in its view, still outstanding. IGPC submitted that the capital cost of the pipeline was still in dispute, the specific items of which include; (i) the administrative penalty; (ii) NRG's claimed legal costs; (iii) the costs claimed in respect of Mr. Mark Bristoll; and (iv) interest and other costs.

11. NRG, on the other hand, submits that the costs of the pipeline should be determined in accordance with the Pipeline Cost Recovery Agreement ("PCRA") made between NRG and IGPC. As such, any disputes over costs are purely contractual in nature and should be pursued in Court rather than in any proceeding before the Board. (Note that in its July

6th submission, IGPC either misunderstood or mischaracterized NRG's position concerning the jurisdiction of the Board to resolve a purely contractual dispute between NRG and IGPC. NRG has always maintained that any outstanding disputes concerning the actual capital cost of the pipeline is a purely contractual dispute that must be pursued in the Court rather than via the Board.)

12. The exclusive jurisdiction of the Court to determine all issues arising out of the PCRA, including the actual capital cost of the pipeline, is expressly confirmed by section 11(2)(b) of the PCRA, which provides as follows:

> 11.2 This Agreement:...
>
> (b) shall be construed and enforced in accordance with, and the rights of the parties shall be governed by, the laws of the Province of Ontario and the laws of Canada applicable therein, **and the courts of Ontario shall have exclusive jurisdiction to determine all disputes arising out of this Agreement**; [emphasis added]

13. In attempting to paint the Board's jurisdiction as one that encompasses contract-related cost disputes, IGPC relies on certain passages from *Union Gas Ltd. v. Dawn (Township)* (1977), 76 D.L.R. (3d) 613 and *Ontario Energy Board Re:* (1985), 51 OR (2d) 333 in its August 27, 2010 submissions.

14. It is worth noting that IGPC's counsel neglects to include pertinent sections of these passages that help explain and limit the purview of the Board's discretion. *Union Gas Ltd. v. Dawn (Township)*, for instance, addressed an appeal by two gas companies from the Municipal Board's approval of by-laws which were ultra vires the municipality and the Municipal Board (the local problems of the township were deemed insignificant when viewed in the perspective of the need for energy to be supplied to millions of residents of Ontario beyond the township borders). While these passages do speak to the jurisdiction of the Board, it is in the specific context of a municipality and the Municipal Board overstepping their authority – not to the Board's jurisdiction over contractual matters. The Court made specific findings, which IGPC counsel neglected to include. These findings are set out in italics:

> It 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....."*
>
> 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 *and are not subject to legislative authority by municipal councils under the Planning Act. These are matters that are to be considered in the light of the general public interest and not local parochial interest.*"
>
> Union Gas Ltd. v. Dawn (Township) (1977), 76 D.L.R. (3d) 613 (Ont. H.C.J.) at p. 625 and 622. (see Tab B)

15. IGPC has relied on the following passage from *Ontario Energy Board Re:* (1985), 51 OR (2d) 333 in para 7 of its submissions from August 27, 2010: "The jurisdiction of the Ontario Energy Board is very broad. It is charged with the regulatory and quasi-judicial functions covering the entire field of energy within the Province of Ontario". While this quote suggests that the Board has a broad jurisdiction "covering the entire field of energy", the case did not discuss the issue of Board discretion over private law matters between individual parties. Rather, the Divisional Court made this one-off statement regarding the Board's discretion before denying the Board's ability to order interim costs and provide intervenors with funding in advance of a hearing because it was not given these powers under legislation:

> What the Ontario Energy Board here seeks to do is to grant funding, in advance of a hearing, to worthy intervenors and this is not encompassed by its power in s. 28.
>
> However laudable, or desirable it may be for the Ontario Energy Board to have such authority, it does not possess it.
>
> If such jurisdiction is to be given to the Ontario Energy Board, it must be by legislation, and in amplification of the powers now held by the board under its creating and enabling statute. This, in my view, would require a consideration by legislative authority, of policy as to the desirability of such funding and, if desirable, the manner by which it would be accomplished. It is not for a board or tribunal to confer upon itself jurisdiction to fund intervention in advance, under the guise of "costs". The board has no jurisdiction to fund intervention in advance.
>
> *Ontario Energy Board Re:* (1985), 51 OR (2d) 333 at

16. Regardless of these omissions, it has been established in jurisprudence that the process of rate-making may require the Board to consider the terms of a contract entered into by a utility or make orders containing considerations or stipulations about the contract. In this proceeding, however, the Board already issued its rate order on December 6, 2010, where the actual capital cost of the pipeline was determined. This amount was required to be determined as part of the rates approved by the Board in the rates case. Because the rate order has been issued, these contractual issues no longer fall under the jurisdiction of the Board.

17. As a general principle, courts have the exclusive jurisdiction to hear disputes in contract and in tort which involve a regulated utility, unless clear language in a statute expressly confers jurisdiction on a tribunal. This was established in an oft-cited decision from the Privy Council, which looked at the jurisdiction of the Railway and Municipal Board:

> It may seem natural to observe that the strong powers vested in the railway and Municipal Board should be held to include, not only the doing of such things, but the making of such orders for payment of money as would clear up the situation which had been created; but their Lordships, after full consideration of the statutes, do not see in them any clause which either expressly or by implication gives that Board a power to grant a decree for a sum of money due as upon tort or in respect of breach of contract, as already referred to. **It would require, in their Lordship's opinion, the clearest expression or the clearest implication, in order to confer such a jurisdiction upon a statutory Board, and it would further require the clearest expression or implication in order to oust the jurisdiction of the ordinary Court of the country to whom awards of damages for failure of duty, breach of contract, or commission of tort are matters of plain and everyday jurisdiction.** They accordingly find, agreeing with the courts below, that the Court had jurisdiction to deal with the action and to give a decree in respect to the claim sued for. [emphasis added]
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> *Toronto R. Co. v. Toronto (City)*, (1920), 51 D.L.R. 48 (P.C.), at pp. 51-52.

18. Consequently, we must look to the legislation to see if there is any clear expression of implication that ousts the ordinary jurisdiction of the Courts over private law matters. As pointed out by IGPC at para 13 of its submissions from August 27, 2010, section 36 of the *OEB Act* provides the Board's authority to establish just and reasonable rates:

> 36. (1) No gas transmitter, gas distributor or storage company shall sell gas or charge for the transmission, distribution or storage of gas except in

> accordance with an order of the Board, which is not bound by the terms of any contract.
>
> (2) The Board may make orders approving or fixing just and reasonable rates for the sale of gas by gas transmitters, gas distributors and storage companies, and for the transmission, distribution and storage of gas.
>
> (3) In approving or fixing just and reasonable rates, the Board may adopt any method or technique that it considers appropriate.
>
> (4) An order under this section may include conditions, classifications or practices applicable to the sale, transmission, distribution or storage of gas, including rules respecting the calculation of rates.
>
> *Ontario Energy Board Act, 1998*, S.O. 1998, Chapter 15, Schedule B.

19. While these sections do provide the Board with a certain level of discretion (it is not bound by contracts, can adopt any method it considers appropriate, etc.), it is purely within the context of making orders which approve or fix rates. The legislation does not, however, extend the Board's discretion to the governance of private contractual disputes between utilities and ratepayers after rates are set.

20. As a matter of comparison, in its submissions from August 27, 2010, IGPC relies on a recent decision from the Ontario Court of Appeal. In *Snopko v. Union Gas Ltd.*, [2010] O.J. No. 1335, the Court reviewed the extent of the Board's exclusive jurisdiction to deal with legal and factual issues raised by a party claiming damages arising from the use of natural gas storage pools. The motion judge had concluded that section 38 of the *OEB Act* conferred exclusive jurisdiction on the Board to decide all issues pertaining to compensation from the operation of the gas storage operation run by the respondent Union, and that the various claims by the appellants fell within that exclusive jurisdiction. On appeal, the appellants contended that as their claim attacked the validity of agreements relied upon by the respondent and alleged breach of contract, negligence, unjust enrichment and nuisance, it fell outside the ambit of section 38 or, at the very least, there was a triable issue as to jurisdiction that should not have been decided on a motion for summary judgment.

21. The pertinent sections in the *OEB Act* read as follows:

> Authority to store
>
> 38.(1) The Board by order may authorize a person to inject gas into, store gas in and remove gas from a designated gas storage area, and to enter into and upon the land in the area and use the land for that purpose. 1998, c. 15, Sched. B, s. 38(1).
>
> Right to compensation
>
> (2) Subject to any agreement with respect thereto, the person authorized by an order under subsection (1),
>
> > (a) **shall make to the owners of any gas or oil rights or of any right to store gas in the area just and equitable compensation in respect of the gas or oil rights or the right to store gas**; and
> >
> > (b) **shall make to the owner of any land in the area just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order**. 1998, c. 15, Sched. B, s. 38(2).
>
> Determination of amount of compensation
>
> (3) **No action or other proceeding lies in respect of compensation payable under this section and, failing agreement, the amount shall be determined by the Board**. 1998, c. 15, Sched. B, s. 38(3). [emphasis added]

22. In *Snopko v. Union Gas Ltd.*, all of the claims raised by the appellants clearly fell within the language of section 38(2) as claims for "just and equitable compensation in respect of the gas or oil rights or the right to store gas", or for "just and equitable compensation for any damage necessarily resulting from the exercise of the authority given by the order". In addition, section 38(3) clearly precludes other actions or proceedings with respect to any claims which fall under s. 38(2) (effectively barring courts from usurping the jurisdiction of the Board).

23. Section 36 of the *OEB Act*, in comparison, does <u>not</u> clearly set out the Board's jurisdiction over the disputed matters raised by IGPC in its recast Motion, nor preclude courts from getting involved in any matters that may be involved with the distribution of gas. Whereas section 38 establishes the Board's jurisdiction over specific issues and bars the Courts from getting involved in those matters, the *OEB Act* does nothing of the sort when it comes to matters like disputed costs under a contract between private parties.

24. In its materials, IGPC attempts to frame the disputed costs as being a rate-related matter and thus under the Board's jurisdiction. The substance of IGPC's claims, however, are purely contractual in nature and do not clearly fall within the ambit of section 36 of the *OEB Act*. Moreover, the contract itself, the PCRA, confirms that the Ontario Courts have exclusive jurisdiction. Consequently, the Board does not have the jurisdiction to hear IGPC's motion. As stated by the Court of Appeal in *Snopko v. Union Gas Ltd.*:

> It is the substance not the legal form of the claim that should determine the issue of jurisdiction. If the substance of the claim falls within the ambit of s. 38, the Board has jurisdiction, whatever legal label the claimant chooses to describe it.
>
> *Snopko v. Union Gas Ltd.*, [2010] O.J. No. 1335, para 24.

25. The Supreme Court of Canada has also ruled on this issue in its 2004 decision, *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629 ("*Garland*"). The claim arose from an intended class proceeding started in 1994 by the plaintiff against the gas distribution company, Consumers' Gas Company Limited ("Consumers'"). The plaintiff sought a restitutionary payment of $112 million, representing late payment penalties ("LPPs") paid by over 500,000 of Consumers' customers since 1981, as well as declaratory relief in the form of a declaration that the LPPs charged by Consumers' Gas offends s. 347 of the *Criminal Code*, R.S.C. 1985, c. C-46, is illegal, and need not be paid by the proposed plaintiff class. The rates and payment policies of Consumers', including its late penalty payments, were governed by the Board.

26. The motions judge in *Garland* held that the source of the Board's jurisdiction over the essence of the plaintiff's action lied in the Board's exclusive jurisdiction to fix the LPPs as part of its rate-setting function under the *OEB Act*. The LPPs, according to the motions judge (and later reiterated at the Ontario Court of Appeal), were:

> ...sanctioned by the Board and **is an inextricable part of the rate for gas: a variation of the LPP will affect revenue levels of the utility company, which in turn will affect the determination of the appropriate rate**. [emphasis added
>
> *Garland v. Consumers' Gas Co.*, 57 O.R. (3d) 127, para 25.

27. The motions judge had concluded that the courts had no jurisdiction to entertain the plaintiff's claim, since the legislature has given exclusive jurisdiction over rates, including penalties for late payment, to the Board. Like IGPC in its submissions, the motions judge cited s. 19(6) of the *OEB Act*, which states: "The Board has exclusive jurisdiction in all cases and in respect of all matters in which jurisdiction is conferred on it by this or any other Act." The motions judge then ruled that the plaintiff should have availed himself of the appeal and review mechanisms available under the *OEB Act* to challenge the Board orders directly rather than bringing his complaint to the courts.

28. At the Ontario Court of Appeal, Chief Justice McMurtry delved into the issue of whether the Board had exclusive jurisdiction

> The nature of the claim and the basis for the relief sought in this class action are derived from principles of restitution: the essential character of the dispute concerns a restitutionary issue arising from the receipt by CG of LPPss for the past twenty years. The proposed class action is not a collateral attack on the rate orders of the Board but rather is a claim based on unjust enrichment for the return to CG's customers of monies that the plaintiff says were illegally collected and retained by CG. As such, the action raises an issue over which the courts have jurisdiction.
>
> *Garland v. Consumers' Gas Co.*, 57 O.R. (3d) 127, para 28.

29. Chief Justice McMurtry went on to explain that the Board had no clear statutory power to make the compensatory order requested by the plaintiff, citing section 36 of the *OEB Act*:

> In contrast, the plaintiff here is not attempting to raise a matter that has been dealt with in a Board hearing. Also unlike in Sprint, it is not at all clear that the Board has statutory power to make the type of compensatory order sought by the plaintiff. Section 36(2) of the OEBA permits the Board to "make orders approving or fixing just and reasonable rates for the sale of gas ...". Section 23 permits the Board in making an order to "impose such conditions as it considers proper" and provides that "an order may be general or particular in its application." **But the Board's jurisdiction to fix rates for gas and to set penalties for late payment does not empower it to impose a restitutionary order of the type sought by the plaintiff. The Board's power to fix rates is forward-looking, while the subject matter of this dispute is primarily about an alleged unjust enrichment related to the level at which the LPPs has been set since 1981.** [emphasis added]
>
> *Garland v. Consumers' Gas Co.*, 57 O.R. (3d) 127, para 32.

30. Thus, even though the dispute related to LPPs – "an inextricable part of the rate for gas" where "a variation of the LPPs will affect revenue levels of the utility company, which in turn will affect the determination of the appropriate rate" – the Court of Appeal refused to agree that the Board's jurisdiction to fix rates empowered it with an authority to impose contractual remedies.

31. Although arriving at a different ultimate conclusion than Chief Justice McMurtry, Justice Iacobucci, writing for a majority of the Supreme Court, adopted the finding of the Court of Appeal with respect to the Board's jurisdiction over the dispute. Justice Iacobucci held:

> ...the OEB does not have exclusive jurisdiction over this dispute. **While the dispute does involve rate orders, at its heart it is a private law matter under the competence of civil courts and consequently the Board does not have jurisdiction to order the remedy sought by the appellant**. [emphasis added]
>
> *Garland v. Consumers' Gas Co.*, [2004] 1 S.C.R. 629, para 70

32. The Supreme Court is thus very clear on this issue – even where a dispute may loosely involve rate orders, where disputed issues are private law matters, the Board does not have jurisdiction to hear them and they remain within the sole and exclusive jurisdiction of the Courts.

33. Board Staff has also provided some helpful analysis on this issue, arguing that that many of the issues in IGPC's Motion are beyond the purview of the Board. On the subject of whether the Board is the proper arbiter of contractual disputes between NRG and IGPC, the Board submitted the following:

> Board staff notes that neither IGPC nor NRG appear to have consulted with the Board regarding the Board's proposed role of dispute arbitrator, nor was the Board aware of this provision until the PCRA was filed with the Board after it had been executed.
>
> Board staff submits that the Board is a quasi-judicial regulatory tribunal. Its powers, like those of all tribunals, are granted through legislation. The Board can only act in accordance with those powers specifically provided by legislation, either directly or through the doctrine of necessary implication. **The Board has no legislative authority to act as an arbitrator for contractual disputes, and no provision in a contract (such as Article IX to the PCRA) can give the Board such a power. To a certain degree, the Board has already acted to resolve this**

> **dispute by determining the appropriate costs of the pipeline for ratemaking purposes. However, the Board has no further statutory powers to resolve the remaining issues concerning the total costs of the pipeline. The Board should therefore decline the invitation to act as an arbitrator**. [emphasis added]
>
> Board Staff, Submissions in EB-2010-0018 (August 9, 2011), pp. 3-4.

34. In earlier submissions, Board Staff spoke to the reasonable cost of the pipeline as an issue in the rates case, but one which must only be considered in the context of the rates case.

> This is not to say that all of the issues related to the PCRA are outside the scope of the Board's powers to address. **The reasonable cost of the pipeline is an issue in the rates case, as the Board must determine the appropriate amount to close to rate base. The Board's decision, however, will be in the context of setting rates**.
>
> Board staff therefore recommends that the Board address any rate related issues arising out of IGPC's motion in the context of the current rates case. **To the extent that issues in the motion are not related to rates, they are outside of the Board's purview, and should not be considered**. [emphasis added]
>
> Board Staff, Submissions in EB-2010-0018 (August 24, 2010), p. 3.

35. These arguments were further developed in Board Staff's submissions dated August 11, 2011, which references section 11.2(b) of the PCRA, confirms that the Board has already determined the capital cost of the pipeline that goes into rate base, and contends that NRG and IGPC should resolve their disputes through other mechanisms rather than approaching the Board.

> **Section 11.2(b) of the PCRA indicates that the courts of Ontario shall have exclusive jurisdiction to determine all disputes arising out of this agreement. Board staff suggest that to the extent the parties cannot come to an agreement on the total cost of the pipeline, the courts are the appropriate forum in which this dispute should be resolved**.
>
> Nevertheless, Board staff note that the Board has resolved some of the issues. **The Board has already determined the capital cost of the pipeline that goes into rate base and the associated depreciation amounts.** The Board has also vacated the administrative penalty imposed on NRG for refusing to execute the necessary consents pursuant to the PCRA and the GDC agreements (as per Board's Decision in EB-2010-0374 issued on February 11, 2011). The Board will also make a determination on the maintenance costs of the pipeline in Phase 2 of the proceeding. **In other words, the Board has or will resolve issues that impact rates and which are within its purview. Although IGPC may**

> **be correct that certain issues between IGPC and NRG are not yet resolved, Board staff submits that these are not issues that are properly before the Board.**
>
> Board staff submit that issues impacting rates have already been reviewed in Phase 1 of the proceeding or will be reviewed by the Board in Phase 2. **However, the other items are strictly contractual in nature and Board staff believe that NRG and IGPC should resolve their disputes through other mechanisms rather than approaching the Board.** [emphasis added]
>
> Board Staff, Submissions in EB-2010-0018 (August 9, 2011), p. 4

36. Board Staff also made a compelling argument on the potentially burdensome consequences of accepting IGPC's motion.

> In the event the Board accepts the Motion of IGPC and reviews all the costs, this would mean that the Board would have to review a large number of invoices that have been filed in Tab 7 of the motion evidence. The Board would then be making a determination on the individual invoices or individual items within an invoice. **The Board usually does not make determination at such a micro level. The Board's mandate is to set just and reasonable rates and in this case, the base rates of NRG. It would be arduous to ask the Board to review individual invoices, hear arguments and make a determination on items that in many cases do not even impact rates.** [emphasis added]
>
> Board Staff, Submissions in EB-2010-0018 (August 24, 2010), p. 5.

37. Board Staff's analysis brings up a valid concern for the Board – that a potentially onerous precedent could be set by accepting IGPC's Motion. IGPC argues in its submission from August 27, 2010, that because capital costs of the pipeline are to be included in rate base, they are related to the establishment of just and reasonable rates and thus fall under the exclusive jurisdiction of the Board. IGPC's position is contrary to the simple fact that the Board has already issued its rates order, and it is not the Board's job to pore over every contract for goods or services between utilities and other parties simply because certain costs are in dispute.

38. Certain contracts between utilities and other parties would likely fall under the purview of the Board's review powers for the purposes of rate-setting, including standard services contracts that form part of a utility's tariff. The PCRA, however, covers a private

commercial matter between two parties and is not directly linked to NRG's tariff. Accordingly, cost disputes raised under the PCRA should not be governed by the Board.

39. While the Board is welcome to review or amend contracts in the process of rate-making, it should not get involved in private contractual matters after rates are set simply because disputed costs may theoretically relate to rates. Any number of contractual disputes between utilities and other parties (ratepayers or third-party service providers) which involve costs could affect a utility's bottom line and, consequently, be linked to rates.

40. If the Board were to reverse its Decision in EB-2010-0018, the Board could open itself up to a broad array of contractual and civil disputes – a degree of oversight that is not comprehended in the *OEB Act*. Contrary to what IGPC claims, not all cost disputes between utilities and their ratepayers fall under the jurisdiction of the Board.

(b) IGPC's Adversarial and Litigious Conduct

41. While we have addressed this issue in earlier correspondence, NRG feels it necessary to respond to IGPC's ongoing adversarial and litigious approach to its dealings with NRG.

42. First, IGPC has repeatedly refused to comply with its obligations owed to NRG under agreements approved by the Board relating to the construction and operation of the IGPC pipeline. These issues have been caused solely by IGPC's inability or failure to obtain adequate financing to construct the pipeline, and its repeated failures to complete its ethanol production facility according to the agreed timelines due to IGPC's mismanagement and construction delays.

43. Second, IGPC has falsely asserted that NRG has claimed the $140,000 administrative penalty in calculating the actual capital cost of the IGPC pipeline. While NRG's appeal to the Divisional Court was pending, it remained likely that the OEB would enforce the $140,000 administrative penalty against NRG, which was incurred solely as a result of IGPC's adversarial and litigious conduct. However, NRG removed that amount from its calculation of the actual capital cost. Accordingly, that amount has already been deducted from the actual capital cost as determined by NRG. IGPC's suggestion that the administrative penalty continues to be included in the actual capital cost is simply false.

44. Third, as part of IGPC's strategy, it has made false and unfounded allegations against NRG and has caused Union Gas and the Town of Aylmer to become involved in IGPC's adversarial conduct. All of this has placed a tremendous burden on NRG's management and administrative staff, and has caused NRG to incur costs (which should be paid by IGPC as the party solely responsible for those costs being incurred). As a result, NRG will be forced to hire additional staff to manage its relationship with IGPC and the litigation that IGPC intends to continue to pursue. That way the costs directly attributable to IGPC's actions will be segregated, for future recovery, and there will be no dispute in future about the NRG costs that are directly caused by IGPC's actions.

C. CONCLUSION

45. Based on the arguments made above, NRG submits that the Board should confirm its Decision and Order in EB-2010-0018 issued May 17, 2012.

All of which is respectfully submitted this 22nd day of October, 2012.

NATURAL RESOURCE GAS LIMITED

By its Counsel, Lenczner Slaght Royce Smith Griffin LLP
Per: Lawrence E. Thacker