

ONTARIO ENERGY BOARD

STAFF SUBMISSION

**ON THE REVISED MOTION
BY INTEGRATED GRAIN PROCESSORS CO-OPERATIVE INC.
AND IGPC ETHANOL INC. FILED ON JULY 6, 2011
IN**

**NATURAL RESOURCE GAS LIMITED
2011 RATES PROCEEDING – PHASE 2
EB-2010-0018**

August 9, 2011

Introduction

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

On August 3, 2010, IGPC filed a Notice of Motion (the "Motion") to resolve certain issues related to the disagreement over the reasonable cost of construction of the 28.5 km pipeline built by NRG to serve natural gas to the Integrated Grain Processors Co-Operative Inc. ("IGPC") ethanol plant. This is relevant to the parties because IGPC is required through the PCRA to pay NRG a contribution in aid of construction to cover the costs of the pipeline that are not recovered through rates.

The Board issued a decision and order on December 6, 2010 that determined rates for the 2011 rate year (effective October 1, 2010). The Board also accepted NRG's request to address the IRM component of the Application for 2012 and beyond (and certain other discrete issues) in a second phase to the proceeding ("Phase 2"). Accordingly, the Board determined that it would deal with IRM, IGPC pipeline maintenance costs and gas costs for purchases from the related company in Phase 2 of the proceeding.

With respect to IGPC's Motion the Board determined at the oral hearing that its decision would only address issues that had potential rate impacts. The Board indicated at that time that IGPC would be free to recast its Motion on any remaining issues at a later date.

IGPC filed a letter on June 7, 2011, requesting the Board to hear the Motion that it had filed on August 3, 2010. In reply, NRG filed a letter on June 22, 2011 submitting that the Board in its Decision of December 6, 2010 had already determined the capital cost of the IGPC pipeline and that the Board did not have jurisdiction to revisit the issue. NRG maintained that if IGPC believed that there were issues remaining in the motion then it needs to recast the motion and file the relevant materials.

Accordingly, IGPC clarified the issues from the Motion that it believed still needed to be addressed by way of a letter filed on July 6, 2011. IGPC submitted that the capital cost of the pipeline was still in dispute and before the Board in the Motion filed by IGPC. Although the Board had made a determination on the appropriate amount of pipeline costs to be included in rates in the December 6, 2010 Decision, the actual total cost of the pipeline had not been directly addressed by the Board. The specific items that IGPC believes have yet to be determined 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.

The Board sought submissions on the Motion when it was originally filed in August, 2010. Board staff filed a submission on August 24, 2010, and to the extent still relevant, (as described in further detail below) Board staff continues to rely on that submission.

Board Staff Submission

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

ARTICLE IX – DISPUTE RESOLUTION

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

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

Board staff submits that 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.

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.

- All of which is respectfully submitted -