ONTARIO ENERGY BOARD

STAFF REPLY SUBMISSION

ON THE BOARD'S OWN MOTION TO REVIEW THE TOTAL CAPITAL COSTS OF THE IGPC PIPELINE
EB-2012-0396

November 5, 2012

Board staff has reviewed the submissions of NRG and IGPC, and offers the following brief reply.

Board staff does not agree with NRG's position as set out in paragraph 23 of its submission:

> Section 36 of the *OEB Act,* in comparison, does not 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.

Board staff observes that the "disputed costs" under the "private contract between parties" are in fact the rate IGPC will pay to NRG for gas distribution service. The issue does not just "loosely" relate to rates - as later argued by NRG in paragraph 32 – the rate to be paid by IGPC is exactly the subject of the disputed costs. As Board staff submitted in its original submission, the definition of a "rate" is very broad, and appears to include a capital contribution. The "disputed costs" are the very issue in determining the final amount of the capital contribution. The disputed costs are therefore part of a rate, and there is no dispute that the Board has exclusive jurisdiction over the setting of rates.

Board staff does not agree with NRG's position that the current situation is akin to the situation in *Garland v. Consumers Gas Co*[1]. ("Garland"). In Garland, the late payment penalty policies of a gas distribution company were found to be (in some case) usurious and in contravention of the *Criminal Code*. The late payment penalty policies had been in effect for many years, and had been approved as a rate pursuant to an order of the Board. A group of consumers sought a restitutionary payment through the courts of Ontario. One of the issues before the courts was whether the court action could proceed, as the distribution company argued that all "rates" issues are within the sole

[1] 57 O.R. (3d) 127 (Court of Appeal)

jurisdiction of the Ontario Energy Board. The Court of Appeal held that the Board was not empowered to make a restititionary order sought by the plaintiffs:

> 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 LPP has been set since 1981.[2]

There are several key differences between this situation and the situation currently before the Board. In the current case, the issue of the capital contribution was before the Board in the leave to construct proceeding. It was agreed to by both parties (through the PCRA), and acknowledged by the Board, that the original estimate for the appropriate amount of the capital contribution would be "trued up" after construction was completed to reflect the actual costs. This is standard industry practice, and is no way akin to a long standing late payment penalty order (approved several times over many years through various Board rate proceedings). The agreement between the parties specifically recognized that the amount of the capital contribution would be trued up at the conclusion of construction. Any refund owing to IGPC, therefore, is not "restitution" – it is proper amount of the capital contribution as expressly recognized by the parties. In other words, it is the proper amount of the rate. It therefore lies within the exclusive jurisdiction of the Board.

- All of which is respectfully submitted. -

[2] Garland, para. 32.