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.

REPLY SUBMISSIONS OF INTEGRATED GRAIN PROCESSORS CO-OPERATIVE INC.

1. These are the Reply Submissions of Integrated Grain Processors Co-operative Inc. ("**IGPC**") addressing the submissions of Board Staff and Natural Resource Gas Limited ("**NRG**") dated October 22, 2012.

Reply to Board Staff Submissions

2. IGPC agrees with Board Staff's submission that the amount of the capital contribution paid by IGPC to NRG is a "rate" as defined by section 3 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Schedule B (the "**OEB Act**").

3. While Board Staff did not explicitly address the issue, IGPC submits that the same conclusion should result for the determination of the appropriate amount of financial assurance to be provided by IGPC to NRG. Posting a letter of credit in favour of NRG is a condition of receiving service, a cost to IGPC, and a condition to NRG providing gas distribution services. Like the amount of the required capital contribution, the amount of the financial assurance is equally a "rate". It is certainly indistinguishable from the security deposits required by distributors – something over which the Board has exercised jurisdiction for years.

4. As noted by IGPC, counsel to NRG earlier indicated that the PCRA contemplated different types of disputes: a) those that were within the exclusive jurisdiction and authority of the Board; and b) other disputes – such as measurement disputes that would be subject to the

Electricity Gas and Inspection Act and within the jurisdiction of Measurement Canada and therefore not within the Board's exclusive jurisdiction. As such, Section 11.2 of the PCRA should be read in the context of the nature of the dispute.

5. IGPC submits that Board Staff's submission is correct when it asserts that in the matter of a "rate", without prior approval of the Board, the courts do not have jurisdiction to enforce Section 11.2 of the Pipeline Cost Recovery Agreement ("**PCRA**").

Reply to NRG Submissions

6. IGPC submits that the Board has the power to conduct this motion to review its prior decision in EB-2010-0018.

7. This dispute is primarily about the amount of a "rate" charged by NRG to IGPC for gas distribution service. As such, a proceeding before the Board is the proper forum.

8. It is important to note that by a letter dated October 22, 2012, NRG stated its intention to file additional information regarding the financial assurance provided by IGPC to NRG and to seek an Order increasing the amount of the financial assurance. NRG did not qualify this intention or in any way suggest that the Board lacked jurisdiction or was the incorrect forum. To the contrary, NRG requested that this motion to review be postponed so it could file materials in support of the relief it sought from the Board. As such, NRG conceded that the Board has jurisdiction to deal with the financial assurance specified in the PCRA. IGPC submits NRG also conceded jurisdiction for the Board to resolve the dispute about the aid-to-construct as well.

9. In the present situation the dispute is the quantum of the aid-to-construct and the obligations to provide financial assurance to NRG. These obligations are part of the "rate" applicable to the construction of the IGPC Pipeline. The "rate" was approved by the Board by its review and acceptance that the terms of the PCRA were consistent with the economic evaluation rules of E.B.O. 188. The "rate" provisions of the PCRA were not negotiated at arm's length in the same sense that provisions in private contracts are negotiated. The requirement for and the manner in which the aid to construct and financial assurance were calculated was done in accordance with the rules established by the Board for such matters. To now suggest that these

issues are matters of private contract beyond the jurisdiction of the Board in a situation where the monopolistic utility is openly disregarding its obligations is an attempt to avoid the Board's application of its statutory objectives and the enforcement of the OEB Act.

10. NRG is statutorily prohibited from charging an unapproved rate or charge to IGPC. It is only through the statutory authority of the Board that the "rates" in the PCRA were approved and NRG was given leave to construct. It is illustrative that in its submission, NRG did not deal with the representations made by its counsel to the Board in EB-2006-0243 when NRG accepted the Board's jurisdiction. NRG has not explained why it is now taking a position opposite to its prior position that was advanced by its counsel earlier to secure leave to construct the IGPC Pipeline.

Authority to Conduct Motion

11. Contrary to NRG's submissions, IGPC asserts the Board has the jurisdiction to review and vary its rate order. Sections 19(4) and 21(1) of the OEB Act give the Board broad powers, on its own motion, to convene a hearing and compel the production of evidence in respect of any matter that it could decide upon an application. This matter is the determination of a "rate" and within the Board's exclusive jurisdiction. The OEB Act specifically provides the authority to conduct this review.

> 19.(4) The Board of its own motion may, and if so directed by the Minister under section 28 or otherwise shall, determine any matter that under this Act or the regulations it may upon an application determine and in so doing the Board has and may exercise the same powers as upon an application.[1]
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> 21.(1) The Board may at any time on its own motion and without a hearing give directions or require the preparation of evidence incidental to the exercise of the powers conferred upon the Board by this or any other Act.[2]

12. Further, the Board's *Rules of Practice and Procedure,* Rule 43.01, provide the Board with the authority to review any decision at any time.

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[1] OEB Act, section 19(4).
[2] OEB Act, section 21(1).

43.01 The Board may at any time indicate its intention to review all or part of any order or decision and may confirm, vary, suspend or cancel the order or decision by serving a letter on all parties to the proceeding.

13. The above provisions make it clear that the Board has the authority to conduct this review and to determine and schedule the necessary process to resolve the dispute and determine the "rate" that should have been paid, the amount of the reconciliation payment and the reduction in financial assurance.

Late Payment – Utility Recovery Remained with the Board

14. The core of NRG's argument is that it believes it can, by contract, impose charges other than "rates" which are not within the jurisdiction of the Board. To permit such an interpretation would render section 36(a) of the OEB Act meaningless, deprive the Board of its ratemaking power and undermine the Boards ability to protect ratepayers from the monopolistic behavior of a utility. NRG points to the *Garland* Decision as being helpful to its position. This is simply not the case.

15. A good background and summary of facts relevant to the *Garland* Decision is found on the Board's website, which states:

> "The Ontario Energy Board approved a 5% late payment penalty in 1975 as an incentive for customers to make timely payments. This approach was consistent with guidelines developed around that time by a task force of public utilities formed by the Ministry of Energy and adopted by many public utilities.
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> In 1981, six years after the late payment penalty was approved, the federal Parliament made changes to the Criminal Code limiting the level of interest rates chargeable to customers. It was not until 1994, when a customer (Gordon Garland) commenced a proceeding against Enbridge Gas Distribution Inc., that the courts were asked to determine whether a late payment penalty was an "interest rate" and therefore subject to the restrictions in the Criminal Code.
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> The *Garland* action was dismissed in a series of judgments by the Ontario Superior Court and Court of Appeal in 1995 and 1996. In these decisions, the Ontario courts held that the late payment penalty was not an "interest rate" and was therefore in compliance with all legislation. However, in 1998, the Supreme Court of Canada held that the 5% late payment penalty, when calculated as an annual interest rate, exceeded the limit for legal interest rates in the Criminal Code. The Supreme Court of Canada directed the Ontario courts to consider a number of other legal issues, such as whether persons who paid the late payment penalty should receive restitution.

> While these issues were being addressed by the Courts, the Board carried out stakeholder consultations to review utilities' policies on late payment penalties and interest rates. The 5% penalty remained in place during this period of court proceedings and stakeholder consultations, which the Ontario Court of Appeal stated was "quite properly" done. In the same ruling, the Ontario Court of Appeal also stated the Board should design a new penalty for late payments. In response to direction provided in December, 2001, the Board set compliant penalties and interest rates for all utilities it regulates by the end of March, 2002.
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> On April 22, 2004, the Supreme Court of Canada determined that anyone who paid the 5% late payment penalty was entitled to restitution, and directed Ontario courts to quantify the amounts owing.
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> In late 2004, the action was approved as a class action. Parties to the suit reached a $22 million settlement with Enbridge in June 2006 and in December 2006 that settlement was approved by the Ontario Superior Court.
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> A utility may only recover its restitution payment from its customers if it obtains the Board's approval. The Board makes its determinations following public hearings, in which it hears the views of the utility and other parties, such as consumer groups, that normally participate in these open processes.
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> In September 2007, Enbridge Gas Distribution made such an application to the Board.
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> In its Decision, the Board found all costs (settlement, legal fees and interest) are recoverable from ratepayers.
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> The Board continues to study policies and practices regarding the charging of late payment penalties by both natural gas and electricity utilities. This includes topics such as: what interest rates are appropriate, for what period they should be charged and what provisions are made for customers who make reasonable efforts to pay bills on time but may pay them after the due date.
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> Similar lawsuits related to late payment penalties are also proceeding against Union Gas Limited and local electricity distributors such as Toronto Hydro. It can be expected that other settlements and applications for rate recovery will be received by the Board in the near future."[3]

16. More specifically, the claim was ultimately successful given the finding that the Board's rate order exceeded the maximum interest rate permitted, contrary to the new Section 347 of the *Criminal Code of Canada*. As such, the Board's rate order had extended beyond its jurisdiction into the realm of the exclusive jurisdiction of the Parliament of Canada and therefore was of no force or effect to the extent of the conflict. Simply stated, *Garland* stands for the proposition

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[3] Taken from the Board's website: http://www.ontarioenergyboard.ca/OEB/Consumers/Electricity/Your%20Electricity%20Bill/Late%20Payment%20Penalties.

that no regulator in Canada may approve an interest rate (or penalty) which exceeds the rate permitted under the *Criminal Code*. It was the rate of interest which the Supreme Court found contrary to the *Criminal Code*. There was no finding that the Board lacked the jurisdiction to approve rate orders which did not breach the *Criminal Code.* The Board's jurisdiction was not limited in such respect except in regards to the rate of interest which could not exceed the *Criminal Code* ceiling.

17. NRG's submissions in respect of *Garland* confuse the question of the jurisdiction of the Board to issue rate orders with the question of its ability to award damages to a ratepayer from a utility. In this motion, the question clearly relates to the Board's authority over a "rate" issue and a regulated utility's compliance with the rules which govern the true-up of rates in cases involving capital contributions made by a ratepayer. IGPC does not seek a damages award in this proceeding – only a review of whether NRG has, as a result of its non-compliance, over-recovered a "rate" which has not been approved, which is therefore unlawful.

18. It is noteworthy that even though Ontario utilities were required by the Court in *Garland* to pay restitution for the "overcharged" amounts, the utilities have been permitted to recover from ratepayers these amounts and the legal costs defending the various lawsuits. These costs have been added to rates, with the approval of the Board. To IGPC's knowledge there has been no challenge (certainly none which has been sustained) to the Board's jurisdiction to make such rate orders.

19. The issue currently before the Board in this proceeding is straight forward. NRG has over-recovered by receiving cash and security in excess of the prudently incurred costs of the IGPC Pipeline. The Board has the jurisdiction and obligation to set just and reasonable rates and to ensure that NRG only recovers its prudently incurred costs. Such issues are plainly within the Board's jurisdiction.

20. IGPC notes that NRG has admitted to an over-recovery of approximately $54,000, which amount remains non-reconciled and unrefunded. IGPC asserts the true over-recovery is many times this amount. The actual over-recovery should be reconciled and refunded to IGPC.

OEB Act and the Board's Jurisdiction

21. IGPC submits that *Snopko v. Union Gas Ltd.* [2010] O.J. No. 1335 supports a finding by the Board that it has the exclusive jurisdiction to determine this matter. In *Snopko*, the court found it lacked jurisdiction as the matter dealt with "just and equitable compensation" within the parameters of section 38(2) of the OEB Act and was therefore within the jurisdiction of the Board.

22. NRG did not have the authority to construct the IGPC Pipeline until the Board granted leave to construct. The Board can impose the conditions it determines are in the public interest in granting leave to construct.

23. Section 36 of the OEB Act prohibits a gas distributor from charging for the distribution of gas except in accordance with an order of the Board. Section 42(3) of the OEB Act permits the Board to order a gas distributor to provide service and section 23(1) permits to Board to impose conditions the Board consider proper.

> 23(1) The Board in making an order may impose such conditions as it considers proper, and an order may be general or particular in its application.

24. The PCRA was reviewed and relied upon by the Board prior to granting leave to construct and adherence to the terms and provisions of the PCRA was a condition of the Board granting leave and approving the PCRA. As such, the Board, through the numerous and comprehension powers granted in the OEB Act, has the jurisdiction to resolve the current dispute.

Summary

25. If a gas distributor were to enter into a contract that permitted it to recover rates that were not approved by the Board, such a contract would be contrary to the OEB Act and therefore illegal. A gas distributor charging an unapproved rate or a rate contrary to a Board order constitutes an offence under the OEB Act, section 126(1)(d).

26. According to the Post Construction Report for the IGPC Pipeline, NRG is earning a return on $132,000 in "contingencies" that it never spent. Utilities are only permitted to recover prudently incurred costs. This requires two elements: that the costs were prudent and that the utility actually incurred the expense. Neither of these prerequisites exists in respect of the $132,000. Further, IGPC submits many more thousands of dollars claimed by NRG for the construction of the IGPC Pipeline were not prudently incurred and/or were not incurred in connection with the IGPC Pipeline.

27. NRG has, once again, made a number of accusations regarding IGPC's conduct which are unsubstantiated and unfounded. The record shows it was NRG that:

(a) refused to enter certain into agreements, despite clearly being obligated to do so and recommendations from its legal counsel to execute the agreements, and then invoiced IGPC for the administrative penalty the Board ordered NRG to pay;

(b) demanded $32,000,000 in financial assurance for an $8,000,000 project;

(c) refused to reconcile the actual costs of the IGPC Pipeline with the earlier estimated costs and to reduce the financial assurance to the value of the pipeline that remains undepreciated;

(d) refused to discuss additional gas distribution services despite a written request from IGPC, and invoiced IGPC for work refused, at exorbitant rates, none of which received approval from the Board.

(e) nominated $1,000,000 worth of natural gas without authorization;

(f) sued IGPC for more than $20,000,000 for public statements about the scheduling of a motion before the Board – a case that is completely without merit but wastefully occupies the time of IGPC and NRG personnel and counsel; and

(g) invoiced IGPC for legal fees for unrelated work and in lieu of being disentitled to costs because of its conduct.

28. NRG's tactics are the very reason regulators exist to protect ratepayers. NRG's conduct has forced IGPC to expend many tens of thousands of dollars and hundreds of man-hours to defend itself against NRG's monopolistic, aggressive and abusive behavior.

29. The aid-to-construct and the provision of financial assurance to NRG were conditions to NRG providing gas distribution services and were a "rate" as defined by the OEB Act.

30. IGPC submits that the Board has the exclusive jurisdiction to determine the proper amount of the aid-to-construct or contribution in aid of construction and the current proper amount of financial assurance.

31. In order for the Board's rate-making authority to have meaning, the Board must have the jurisdiction to resolve this dispute and establish a just and reasonable rate.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: November 5, 2012

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