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
REPLY SUBMISSIONS

November 5, 2012

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REPLY SUBMISSIONS

PART I - OVERVIEW

1. In its submissions, IGPC repeats a number of old allegations that are irrelevant, inadmissible and contrary to the proven facts. Moreover, these allegations have been previously raised by IGPC in OEB proceedings and responded to by NRG. They have been adjudicated by the OEB. The OEB's findings are final and binding upon IGPC.

2. In essence, IGPC argues that because **some** aspects of the capital cost of the Pipeline under the Pipeline Cost Recovery Agreement dated as of January 31, 2007 (the "PCRA") are an element of the rate, therefore **all** of the capital costs under the PCRA must be part of the rate and therefore within OEB jurisdiction.

3. The PCRA is a contract made between two private parties. It is settled law that the OEB does not interpret contracts or adjudicate disputes about contracts, even where those contracts form the basis for OEB approval of certain actions, such as the construction of a pipeline. It is

also settled law, and the clear expectation of all stakeholders, that the interpretation of contracts is within the exclusive jurisdiction of the courts and is not within the jurisdiction of the OEB.

4. Moreover, the OEB issued its Phase One decision in December 2010, in which it determined the actual capital cost of the Pipeline for rate purposes. In doing so it made a very clear determination that some elements of the Pipeline's capital cost pursuant to the PCRA were part of the rate calculation, and some other elements of the capital cost pursuant to the PCRA were outside the rate calculation. That finding is final and binding upon IGPC.

5. Once again IGPC has either fundamentally misunderstood, or intentionally mischaracterized and misrepresented, NRG's position. There is no dispute that the OEB has jurisdiction to order a customer to provide security. Where a customer has never been profitable, and would be insolvent but for a government operating grant that will expire and terminate in December 2016, the OEB has jurisdiction to order the customer to provide security. However, the OEB's jurisdiction to order a customer to provide security has nothing whatsoever to do with whether or not the OEB has jurisdiction to interpret the PCRA or adjudicate a private contractual dispute.

6. Accordingly, the issue IGPC now raises has previously been determined and is *res judicata*. IGPC's core argument that all aspects of the actual capital cost pursuant to the PCRA are part of the rate calculation, and therefore are within the jurisdiction of the OEB, is simply wrong, and has been determined by the OEB to be wrong in December 2010. IGPC has never challenged that finding and it cannot do so now.

7. The correct legal conclusion was properly stated by the OEB in its Final Decision dated May 17, 2012 on the NRG rates application. The OEB stated as follows:

> "The issue between IGPC and NRG is essentially a contractual dispute between two private entities. The Board does not have jurisdiction to consider or remedy contractual disputes."

8. The OEB does not have jurisdiction to determine the quantum of the aggregate capital cost of the pipeline under the PCRA, or to determine the amount IGPC was required to contribute to those costs under the PCRA.

PART II – PIPELINE COST RECOVERY AGREEMENT

The Pipeline Cost Recovery Agreement

9. On or about January 31, 2007, IGPC and NRG entered into a Pipeline Cost Recovery Agreement dated as of January 31, 2007 (the "PCRA") that sets out the terms and conditions on which IGPC would contribute to the capital cost of constructing a 28.5 natural gas pipeline (the "Pipeline") to be used exclusively for distributing natural gas to IGPC's ethanol plant.[1]

10. On or about June 27, 2007, IGPC and NRG entered into the Gas Delivery Contract. The Gas Delivery Contract provides that NRG will provide natural gas distribution service to deliver natural gas to IGPC as required up to specified maximum daily and hourly maximum volumes.[2]

11. By Decision and Order dated February 2, 2007, the OEB determined that (a) the terms and conditions of the Gas Delivery Contract and the PCRA adequately protected the interests of NRG and its ratepayers, and (b) the Pipeline was in the public interest, and (c) granted NRG leave to construct the Pipeline.[3]

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[1] *Pipeline Cost Recovery Agreement*
[2] *Gas Delivery Contract*
[3] *Decision and Order of OEB* dated February 2, 2007

12. The issue on the decision under review is whether or not the OEB has jurisdiction to decide the capital cost of the Pipeline pursuant to the PCRA.

PART III- REVIEW IS ON JURISDICTION ONLY AND NOT THE MERITS

Scope of Decision Under Review

13. On August 2, 2010, the OEB issued Procedural Order No. 7 which defines the scope of the Decision under review as follows:

> "When the Motion was originally filed, the Board sought argument from the parties on various issues, including whether or not the Board should address cost disputes between parties that do not directly impact rates (Procedural Order No. 5). Although the Board received written submissions and heard oral arguments, it did not ultimately make a determination on this issue. Instead, it determined that it would hear all rate related issues in Phase 1 of the proceeding, and to the extent additional issues remained they could be raised at a later date. **Prior to hearing the Motion on its merits, the Board still wishes to make a determination on whether or not the dispute over pipeline costs is properly before it, and will allow parties to again file written arguments on this issue."**

14. Accordingly, the only issue that the OEB considered was whether or not the dispute over pipeline costs is "appropriately before it". There was no issue about the quantum or the appropriateness of the pipeline costs. The OEB Order provides that the merits will not be considered before the OEB determined whether or not it had jurisdiction.

The Decision under Review

15. 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. In that proceeding, the OEB made a determination of those parts of the capital costs of the pipeline that could be included in NRG's rate base (which therefore comprised part of NRG's final rate order). IGPC was a party intervenor in that proceeding and

took a fully active role, including filing evidence and making written submissions. IGPC did not appeal this decision which established the NRG rate.

16. On May 17, 2012, the OEB issued its final Decision and Order on the NRG rates application (EB-2010-0018).

17. OEB expressly held that it did not have jurisdiction to determine the quantum of the aggregate capital cost of the pipeline under the PCRA, or to determine the amount IGPC was required to contribute to those costs under the PCRA. The OEB stated as follows:

> 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 of a contract (such as Article IX to the PCRA) can give the Board such a power. The Board has no further statutory powers to resolve the remaining issues concerning the total costs of the pipeline. [...] IGPC is seeking a refund. **The issue between IGPC and NRG is essentially a contractual dispute between two private entities. The Board does not have jurisdiction to consider or remedy contractual disputes.**

OEB's Motion to Review

18. On October 4, 2012, the OEB issued a Notice of Motion to Review and Procedural Order No. 1 in which it stated that the OEB "has determined that it will review on its own motion the decision to refrain from adjudicating the total costs of the pipeline and the appropriate amount of the capital contribution."

19. The OEB defined the scope of the issues for determination on this motion into review as follows:

> **"Motion to Review**
>
> Pursuant to section 19(4) of the Ontario Energy Board Act, 1998, and Rules 42-45 of the Board's Rules of Practice and Procedure, the Board has determined that it will review on its own motion the decision to

> refrain from adjudicating the total costs of the pipeline and the appropriate amount of the capital contribution.
>
> ...
>
> The Board invites parties to make submissions on the following question:
>
> Does the Board have the jurisdiction to determine the proper amount of the capital contribution owed from IGPC to NRG, including any refund that may be owed by NRG to IGPC? If the answer to this question is "yes", what steps, if any, should the Board take to address this situation?"

20. In a motion to review, no new evidence can be considered. The only question is whether the decision under review should be upheld or changed. In making that decision that question must be answered based only on the evidence available to the tribunal that made the decision at the time. It would be fundamentally unfair to allow an initially unsuccessful party to introduce new evidence on the OEB's own motion to review its own decision.

21. In short, the only issue to be determined by the OEB on its motion to review is whether the OEB has jurisdiction to determine the quantum of the aggregate capital cost of the pipeline under the PCRA, or to determine the amount IGPC was required to contribute to those costs under the PCRA. There has been no evidence admitted on these points, nor could any evidence possibly be admissible, because as such evidence would be irrelevant to the question of whether or not the OEB has jurisdiction to decide those issues.

22. Accordingly, even if the unsupportable allegations of IPGC were true, they would be completely irrelevant and inadmissible on this motion to review. The attempt by IGPC to introduce these false allegations yet again, particularly on a motion to reconsider a prior decision, is an abuse of the process of this Honourable Tribunal.

PART IV – REPLY TO ARGUMENTS WITHIN SCOPE OF PROCEEDING

The OEB Determined the Capital Costs for Rate Purposes in December 2010

23. On December 6, 2010, the OEB issued its Decision and Reasons in Board Proceeding No. EB-2010-0018, in which the actual capital cost of the IGPC pipeline was determined. This amount was required to be determined as part of the rates approved by the OEB in the rates case.

24. IGPC's core submission is that the capital cost of the pipeline is an element of "rate". This issue has already been determined by the OEB in its December 6, 2010 Decision. IGPC was party to that proceeding. IGPC did not appeal the rate OEB's determination. At that time certain parts of the capital costs were determined by the OEB to be within the calculation of "rate" and other parts were outside the rate calculation. That determination is *res judica* and binding upon IPGC.

25. IGPC did not appeal that OEB decision. As a result, the actual capital costs have been determined by the OEB as part of the rates case and the OEB has no jurisdiction to revisit the issue.

The OEB has No Jurisdiction to Interpret the PCRA

26. The public interest is absolutely protected by the OEB's defined process of approving agreements that set out the process for determining and funding the capital cost of the Pipeline, as the OEB did in this case. The OEB's process contemplates that agreements can and will be enforced by the Courts.

27. All participants in the process, including IGPC, NRG, and all ratepayers have the same expectation that contracts entered into and submitted to the OEB for approval can and will be

interpreted and enforced by the Courts. No one expects the OEB to have jurisdiction to interpret those agreements, unless jurisdiction to do so is expressly conferred by the parties to those agreements.

28. In this case, IGPC and NRG specifically agreed in clear and specific language in the PCRA that the Courts would retain exclusive jurisdiction over any dispute relating to the interpretation or enforcement of the PCRA. 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]

29. The Submissions of OEB staff similarly ignore the specific determination made by the OEB in the Phase One decision in December 2010, that only certain elements of the capital cost as defined in the PCRA form part of the "rate" that is within OEB jurisdiction. The OEB staff submissions instead assume the contrary, ignoring the express finding of the OEB.

30. Moreover, the OEB staff Submissions are all based on the assumption that a capital contribution is a "rate". That assumes the very issue to be determined. Moreover, the OEB's December 2010 decision expressly confirms that some elements, but not all elements, of a capital contribution are a "rate".

31. Finally, the staff submissions suggest that the exclusive jurisdiction clause in the PCRA would be unenforceable. However, the only basis for stating that is the unsupportable assumption that a capital contribution is a "rate".

32. In short, the submission of OEB staff dated August 9, 2011, which are reviewed in detail at paragraphs 33-37 of NRG's submissions dated October 22, 2012 correctly conclude that the OEB does not have jurisdiction to determine the capital cost of the Pipeline as defined in the PCRA. These submissions should be accepted and the OEB staff's new submissions should be rejected.

PART V – REPLY TO OUT OF SCOPE ARGUMENTS

IGPC 's False Allegations Have Been Previously Rejected by the OEB

33. All of IGPC's allegations are irrelevant to the question of whether the OEB does or does not have jurisdiction to decide. They also are allegations that (a) are contrary to the facts, and (b) have been raised and fully argued by IGPC in prior OEB proceedings to which IGPC was a party. The OEB findings are *res judicata* and final and binding against IGPC. These arguments now raised again by IPGC constitute a collateral attack on final and binding OEB decisions. As such, they are an abuse of process.

IGPC's History of False Allegations and Abuse of OEB's Process

The 2007 Motion and IGPC's False Evidence

34. The 2007 motion brought by IGPC was an ill-fated fiasco. IGPC relied on false evidence of urgency to cause the OEB to issue orders that were so fundamentally flawed that, when faced with an appeal by NRG to the Divisional Court, the OEB on its own motion

reviewed those orders and eventually vacated and set them aside. In the end, the 2007 IGPC application was dismissed in its entirety. No relief was granted.

35. The financing arrangements entered into by IGPC required that IGPC obtain from NRG and deliver to IGPC's lenders two agreements:

(a) the Consent and Acknowledgement Agreement (the "Assignment Agreement") between NRG, IGPC Ethanol Inc., IGPC and Société Générale (Canada Branch); and

(b) the Bundled T-Service Receipt Contract between NRG and IGPC Ethanol Inc. (the "Bundled T-Service Agreement").

36. NRG:

(a) at no time agreed to sign these contracts;

(b) was never consulted about these contracts in advance; and

(c) received no consideration whatsoever for signing these contracts.

37. After IGPC agreed to obtain these agreements from NRG and deliver them to IGPC's lenders, IGPC demanded that NRG sign them. NRG eventually determined that it was not in the best interests of NRG to sign the Assignment Agreement or the Bundled T-Service Agreement,[4] and refused to do so.

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[4] *Kovnats Affidavit*, para. 24

38. IGPC's response was to commence an emergency motion falsely alleging its financing would be revoked and the entire project cancelled if NRG was not immediately to sign those agreements.

39. In the early evening of June 28, 2007, the OEB issued an Emergency Notice of Hearing ordering that an oral hearing would be held the next day, June 29, 2007 at 8:30 a.m. The Emergency Notice of Hearing was issued by the OEB:

(a) without any notice to NRG or without having any response from NRG;

(b) without allowing NRG any opportunity to respond to IGPC's request that the motion be heard on an urgent basis; and

(c) without compliance with the notice requirements set out in the OEB's *Rules of Practice and Procedure*.

40. The following day, at 8:30 a.m., NRG's counsel attended at the motion, and requested a short adjournment to permit NRG time to respond to the motion. Counsel for NRG submitted that NRG:

(a) had not had any time to retain and properly instruct counsel;

(b) had not had time to consider its position and instruct counsel as to its position;

(c) had not had adequate time to review the evidence or assemble and present responding evidence; and

(d) had no opportunity, prior to the issuance of the Emergency Notice of Hearing, to address the OEB as to whether the hearing should or should not proceed on an expedited basis.

> MR. THACKER: I was retained -- or contacted at 7 o'clock last night. My clients have asked me to attend today and to seek a short adjournment of this hearing on the basis that they have not had adequate time to -- the material was served yesterday, as I understand it, late in the day on my clients through their previous solicitors.
>
> They have not had time to consider their position. They have certainly not had any time to retain and properly instruct counsel. They have not had adequate time to prepare a responding evidentiary record, and they have not had time to consider what position they want to take and instruct me to take that position.
>
> In the circumstances, my submission is this hearing should be adjourned to allow my client time to consider the evidence against them, prepare a responding evidentiary record and properly instruct counsel after considering their position as to how to proceed in this hearing.
>
> So I am seeking a short adjournment to enable them adequate time to do that.
>
> I am aware of the notice of hearing that was issued yesterday by this Board. I am also aware it was done without hearing from my client with respect to whether the hearing should or should not proceed on an expedited basis and my client's position and the merits of whether or not it is appropriate to abbreviate the notice requirements that are set out in the Act.
>
> Having said all of that, the fact you have issued the notice of hearing, we object in the most strenuous terms to the hearing proceeding on its merits today and would object to the basis on which the notice of hearing was issued and the basis on which the time limits that are normally available to my client were abbreviated without hearing from them.[5]

41. On the motion, IGPC relied on an Affidavit sworn by Martin Kovnats, who was both witness and counsel to IGPC.[6]

42. Mr. Kovnats attended at the motion as counsel to IGPC, and made submissions to the OEB on behalf of IGPC in which he explained the basis for the alleged urgency. He stated that the motion was urgent because if NRG did not sign the Assignment Agreement and Bundled T-Service Agreement by the end of the day on June 29, the terms of the escrow agreement

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[5] *Transcript of OEB Proceedings*, pp. 2-4
[6] *Transcript of OEB Proceedings*, pp. 7-8

pursuant to which funds were held in escrow by Canada Trust required that the equity funds raised for the financing be returned to the equity investors.

MR. KAISER: Here is my point, you are raising a condition that says that the escrow provides that the money has to be returned to the shareholders, 840 shareholders.

I want to know, practically, are they 840 shareholders going to enforce that covenant? And who is acting for them?

MR. KOVNATS: Sir, the way the agreements are structured is, it was a condition to the raising of the money under the Cooperatives Act, that a public disclosure document similar to a prospectus is filed, submitted, reviewed and is used to help raise the funds. It was a condition imposed by the Cooperatives Branch that 94 percent of the amount of money raised is held in escrow and cannot be used by the cooperative until they are relatively certain that the facility will be used.

Six percent could be used for working capital and development purposes.

The escrowed money is deposited with Canada Trust, pursuant to an escrow agreement that was reviewed and approved by the Cooperatives Branch. That escrow agreement cannot be amended without the consent of the Cooperatives Branch and all of the members and Canada Trust, the members being the beneficiaries of the escrow arrangements that have been set up. That agreement was amended once a year ago to get an extension from June 30, 2006 to June 30, 2007. The amendment process required the consent of each member, which required holding meetings, town hall meetings, going out to peoples' homes and getting consent documents signed.

MR. KAISER: So you're saying without an amendment in the manner you described, Canada Trust has to send this money back?

MR. KOVNATS: That's correct.

MR. KAISER: On June 30th?

MR. KOVNATS: That's correct.

MR. KAISER: Unless the agreements have been amended.

MR. KOVNATS: That's correct.

MR. KAISER: It takes a long time to get the agreement amended?

MR. KOVNATS: That is correct.

...

MR. KAISER: Anyone here for NRCan? All right.

If you were to able to get consent from the shareholders, would Canada Trust not agree to retain the funds the funds?

MR. KOVNATS: Mr. Chairman, if we had the consent of the 840 members who are the beneficiaries, I am sure we could get Canada Trust to consent.

MR. KAISER: It's just a practicality of getting that done in a short frame.

MR. KOVNATS: Tomorrow, yes.

MR. KAISER: You're assuring us that if that is not done, this money is going back.

MR. KOVNATS: Yes.

MR. KAISER: Because Canada Trust is obligated legally to send it back and they will send it back?

MR. KOVNATS: Yes, sir.

...

MR. KAISER: All right. So I think where we stand, leaving aside the July 5th date, we have the June 30th date. The practicality suggests that that can't be amended over the long weekend, and if I am understanding counsel, if it is not amended the money goes back?

MR. KOVNATS: That is correct, sir.

MR. KAISER: Does that mean the end of the deal? Or can the 840 shareholders send the money back the next day?

In other words, I'm trying to get to the practicalities here. If you're telling me that this deal legally is going to fall apart, that's one thing. If it's just an annoyance, and no doubt you are entitled to be annoyed, that's another thing.

MR. O'LEARY: Sir, we don't believe it is an annoyance. We believe the deal is in real peril and jeopardy. [emphasis added][7]

43. Subsequent events have proven that the evidence of Mr. Kovnats was not correct.

44. Although no affidavit was submitted by Mr. George Alkalay, the OEB nonetheless accepted unsworn evidence from Mr. Alkalay that if the financing transaction did not close by July 5, 2007, IGPC would lose $11.9 million in funding under the Federal Government's ethanol expansion program.

> MR. ALKALAY: Mr. Chairman, can I also add to that point that under the conditions of our federal government funding the ethanol expansion program, we have $11.9 million. The final date for receiving those funds, we have to have financial close by July 5th, 2007. That date has already been extended a couple of times. July 5th is the absolute deadline for that. Even if we were to attempt to

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[7] *Transcript of OEB Proceedings*, pp. 9-12 and 14

amend the provisions of our escrow agreement, we would not be able to amend the provisions of the ethanol expansion program funds.

MR. KAISER: All right. July 5th date, let me understand that better. That is imposed by, who?

MR. ALKALAY: That is by NRCan, Natural Resources Canada.

MR. KAISER: Federal government.

MR. ALKALAY: Federal government, under the ethanol expansion program.

MR. KAISER: And that can't be extended?

MR. ALKALAY: That cannot be extended. It has already been extended and they have told us that it is the absolute. [8]

45. Subsequent events have proven that the evidence of Mr. Alkalay was not true.

46. At 2:25 p.m. on June 29, the OEB ordered (the "Assignment Order") NRG to execute the Assignment Agreement and the Bundled T-Service Agreement by 4:00 p.m. that day.[9]

47. When NRG did not immediately comply, within minutes, the OEB immediately made a finding of non-compliance and made the Administrative Penalty Order, which imposed an administrative fine of $20,000 per day until NRG signed the assignment agreement.

48. By letter to the OEB sent July 5, 2007, counsel for NRG advised that, contrary to statements in the Kovnats Affidavit, the oral evidence of Martin Kovnats and George Alkalay and representations of counsel made on behalf of IGPC to the OEB, the failure of NRG to sign the Assignment Agreement and the Bundled T-Service Agreement did not cause the IGPC financing arrangements to collapse, and did not require funds held in escrow to be distributed back to equity investors. To the contrary, IGPC and its lenders proceeded to close the financing

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[8] *Transcript of OEB Proceedings*, pp. 10-11
[9] *Transcript of OEB Proceedings*, pp. 81-87

transaction, and all documents relating to the financing were executed and delivered into escrow to be released subject to certain conditions.

49. This letter confirms that the alleged urgency that IGPC relied upon in bringing the emergency motion to the OEB, and the basis on which the OEB proceeded to hear the motion on an urgent basis and without proper notice to NRG, did not exist.

> We are writing to provide a status report of the efforts undertaken by and on behalf of the Integrated Grain Processors Co-operative Inc ("IGPC") to pursue salvaging the financial commitment of lenders to the proposed ethanol plant to be constructed in Aylmer, Ontario and the natural gas pipeline required to serve it.
>
> ...
>
> As a result of discussions after the proceedings last Friday, IGPC and its lenders agreed that all of the documents relating to the financing for the project should be executed and delivered into escrow to be released subject to certain conditions, including, receipt before noon on Wednesday, July 4, of the agreement of IGPC and its proposed lenders to the insertion into the credit agreement of an event of default occurring if the construction of the necessary 28.5 km natural gas pipeline and the continuous uninterrupted supply of natural gas at a reasonable price is not resolved in a satisfactory manner within a specified timeframe.

Assignment Order and Administrative Penalty Order Are Vacated and Set Aside

50. NRG appealed the Assignment Order and Administrative Penalty Order to the Divisional Court. NRG's appeal was scheduled to be heard on January 28, 2011. Within two weeks of receiving notice of that appeal hearing date, the OEB commenced its own motion to review and reconsider those Orders.

51. On December 7, 2010, the OEB issued a Notice of Motion to Review and Procedural Order No. 1 stating that it had determined it would review and reconsider the Administrative Penalty Order.[10]

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[10] Notice of Motion to Review and Procedural Order No. 1, dated December , 2010

Motion to Review

Pursuant to section 19(4) of the Act and Rules 42-45 of the Board's *Rules of Practice and Procedure*, the Board has determined that it will review on its own motion the order imposing the administrative penalty. The Board wishes to review the order to assess the adequacy of the procedural steps taken by the Board, and to assess the extent to which the requirements of Part VII.1 of the Act were followed.

...

The Board invites parties to make submissions on the following question:

1. Did the Board follow the procedural requirements of Part VII.1 of the Act in ordering NRG to pay an administrative penalty? If the answer to this question is "no", what steps, if any, should the Board take to correct this error.

52. On December 16, 2010, the OEB issued Procedural Order No. 2 stating that it had determined it would also be appropriate for the OEB to review and consider the Assignment Order to determine the extent to which procedural fairness requirements were met:

The Board has determined that it would be appropriate to also consider the extent to which procedural fairness requirements were met with respect to the order to execute the contracts...

The Board has added a question (which is highlighted in bold below) to the initial question posed in the Notice:

1. Did the Board follow the procedural requirements of Part VII.1 of the Act in ordering NRG to pay an administrative penalty? If the answer to this question is "no", what steps, if any, should the Board take to correct this error.

2. Did the Board meet the requirements of procedural fairness in ordering NRG to execute the contracts? If the answer to this question is "no", what steps, if any, should the Board take to correct this error?[11]

53. On February 11, 2011, the OEB issued a decision vacating the Assignment Order and the Administrative Penalty Order:

The Board has reviewed the submissions of the Parties and the transcripts of the proceedings giving rise to the Orders which are the subject of this review. The Board has concluded that, in EB

[11] Procedural Order No. 2, dated December 16, 2010

> 2006-0243 it failed to observe the statutory and common law notice requirements respecting the hearing of June 29, 2007, and with respect to the imposition of the administrative penalty. It is the Board's view that the appropriate course of action in light of this serious deficiency is to vacate the administrative penalty in its entirety, together with the finding of non-compliance giving rise to it, effective immediately.
>
> Similarly, the Board concludes that it failed to meet the requirements of procedural fairness in ordering NRG to execute the contracts with IGPC respecting the pipeline and its supply. In light of the fact that the contracts were in fact entered into, and continue to be in full force and effect, the Board does not need to make provision for any remedy arising from this failure of procedural fairness.

IGPC Refused to Give NRG the Letter of Credit Required by the PCRA

54. As a regulated utility whose stakeholders include commercial and industrial consumers, customers and municipalities, NRG has an obligation to ensure that any transaction it enters into did not expose it to inappropriate financial liabilities and/or other unacceptable risks. Accordingly, the purpose and intent of the PCRA was to ensure that NRG would at all times be fully secured for all costs related to the construction of the Pipeline.

55. The PCRA provides for NRG to be fully secured for all costs, obligations and risks by way of letters of credit. There are two letters of credit required:

(a) Customer Letter of Credit (Section 7.1); and

(b) Delivery Letter of Credit (Section 7.3).

56. The fundamental purpose of the letters of credit is to ensure that in the event IGPC defaults on its obligations to purchase natural gas from NRG, NRG would be fully secured for the unrecovered capital cost, as defined in the PCRA, of constructing the Pipeline and related expenses.

57. Article 7.1 of the PCRA provides that IGPC will, prior to NRG ordering the pipe and stations, provide NRG "an irrevocable letter or letters of credit ("Customer Letter of Credit") in an amount equal to the quoted cost of the pipe and the stations minus any payments made by the Customer to the Utility in respect of the pipe and the stations."

58. IGPC breached its obligations under Article 7.1. IGPC never delivered a Customer Letter of Credit. As a result of IGPC's breach, NRG was forced to require IGPC to pay to NRG the amounts required to order the pipe, so those amounts could be paid over to the pipe supplier.

59. IGPC's failure to provide the Customer Letter of Credit caused numerous delays with construction. For example, NRG was unable to provide an aid-to-construct to Union Gas and had to obtain an OEB Order compelling IGPC to comply with its obligations. NRG was also unable to order components and materials from Lakeside Controls Process Controls Ltd. ("Lakeside Controls") for the stations, and IGPC refused to pay Lakeside Controls directly the amounts it required to deliver components and materials according to the construction schedule.

60. Article 9.7.3 of the PCRA provides that prior to the award of the construction agreement by NRG, IGPC will provide to NRG an irrevocable Letter of Credit ("Delivery Letter of Credit") in an amount equal to the difference between the Revised Estimated Capital Cost and the Revised Estimated Aid-to-Construct.

61. As of February 28, 2008, despite repeated requests by NRG, Delivery Letter of Credit, IGPC refused to provide NRG with the Delivery Letter of Credit.

62. Without an appropriate letter of credit, NRG's financial integrity and continuing operations was put at risk. More importantly, any default by IGPC in the payment of money

owed would have had repercussions not only for NRG stakeholders, but also for individual ratepayers across the province. That is, if NRG were forced to absorb a default, the rates paid by Ontario residents would have to be increased. It was fundamentally unfair to place the risk of this project on the shoulders of Ontario farmers, families and businesses.

63. At a hearing held February 28, 2008, the OEB specifically found that IGPC had breached the PCRA by refusing to provide the required Delivery Letter of Credit:

> **"The central issue is, first and foremost, IGPC's failure to deliver credit and the dispute as to the proper amount of that Letter of Credit"**[12]

64. Despite the OEB's ruling, it was not until April 18, 2008, that IGPC provided the required Delivery Letter of Credit to NRG. IGPC was in default of its obligations from October 2007 until October 18, 2008. Nonetheless, NRG proceeded with the design and construction of the Pipeline throughout that period, despite having an absolute contractual right to terminate the Pipeline due to IGPC's ongoing default and breach of its contractual obligations owed to NRG.

Union Gas and Lakeside Controls

65. As a result of IGPC's failure to deliver the required Letter of Credit to NRG, NRG was unable to pay amounts demanded by Union as aid-to-construct for a 1.6 kilometre extension that was an integral part of the Pipeline located in the Union franchise area. This was recognized by the OEB. NRG demonstrated that the complaints of Union Gas were caused solely by IGPC's default. As a result of IGPC's failure to provide NRG with the Delivery Letter of Credit, the OEB ordered IGPC to pay Union Gas the required amounts directly. That was

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[12] Transcript of Proceedings of OEB Hearing held February 28, 2008, T. 138

suggested by NRG, because NRG did not wish to have the progress of the Pipeline impaired by IGPC's default of its financial obligations.

66. Eventually, after the OEB order, IGPC paid Union $736,000 as an Aid-To-Construct and delivered a Letter of Credit to Union in the amount of $73,100.

67. Despite IGPC's failure to provide NRG with the Customer Letter of Credit and the consequent breach of the PCRA, NRG continued to move forward with construction of the Facility. NRG obtained quotes from both Union Gas and Lakeside Controls for essential components of the pipeline construction that were required to be purchased in advance to ensure timely delivery. NRG forwarded details about the quotes to IGPC as it acquired that information, and conveyed the requests for payment as well.

68. The PCRA does not specifically contemplate a system whereby NRG makes arrangements with subcontractors and asks IGPC for payment to fulfill the contracts. That is because under the PCRA, NRG would have received the Customer Letter of Credit from IGPC, thus enabling NRG to remit the payments directly to the subcontractors without delay. However, because IGPC refused to deliver the Customer Letter of Credit. NRG was required to seek ad hoc financing or security from IGPC for each advance payment or liability that it incurred to keep the construction on the required timeline.

69. These delays and frustrations were exacerbated by IGPC's refusal to cooperate with NRG. NRG initially asked IGPC to pay directly to Union the $700,000 it required. IGPC refused to do so.

70. The inefficiency inherent in such a process was evident in the inevitable delays in reviewing invoices, requisitioning payments and remitting those payments through multiple parties. However, these were all caused by IGPC's refusal to provide the Letters of Credit it was contractually bound to deliver.

IGPC Delays and Breach of PCRA

71. IGPC was in deliberate and continuous breach of the PCRA from October 2007 to April 18, 2008. Despite this continuing failure, NGR did everything possible to continue with the project, and ensured that the project could proceed. By letter dated February 22, 2008, NRG set out its position with respect to the continuing and deliberate breaches of the PCRA by IGPC:

> I have the five letters you sent to me last night at 7:20 pm.
>
> The obligations and rights of IGPC and NRG are set out in the Pipeline Cost Recovery Agreement dated as of January 31, 2007 ("PCRA").
>
> Article 7.1 of the PCRA provides that IGPC will, prior to NRG ordering the pipe and stations, provide NRG with "an irrevocable letter or letters of credit…in an amount equal to the quoted cost of the pipe and the stations…"

72. IGPC had absolutely failed to comply with its obligations under Article 7.1 and, as a result, IGPC was in breach of the PCRA. Moreover, IGPC's failure to comply with Article 7.1 caused delays with construction.

73. Under Section 3.7 of the PCRA, given IGPC's failure to make payments required and failure to provide the letter of credit required under Section 7.1, NRG had the right to elect not to proceed further with any of its obligations under the PCRA. Moreover, if NRG had elected to exercise this right, the PCRA expressly provides that NRG "shall not be liable for any

liabilities, damages, losses, payments, costs or expense that may be incurred by [IGPC] as a result".

74. NRG chose to move forward with construction, despite IGPC's failure to comply with its obligations under the PCRA. NRG did so in order to cooperate with IGPC and move the project forward as fast as possible.

75. The Pipeline was completed by NRG as agreed by July 1, 2008.

IGPC Fails to Complete Construction by the Agreed Date

76. Throughout the design and tendering stages, IGPC repeatedly alleged that NRG was incapable of completing the project on time. As a result, at an OEB hearing on February 28, 2008, IGPC demanded that NRG commit to a fixed date for the completion of the Pipeline. NRG was willing to do so, provided that IGPC commit to a fixed date to complete its ethanol facility, or agree to pay for the delivery of gas commencing on the fixed date. IGPC agreed. Accordingly, NRG and IGPC agreed at the February 28, 2008 hearing that the in-service date would be July 15, 2008. Based on that agreement, IGPC was required to commence making payments to NRG for gas on July 15, 2008 whether or not IGPC had completed its ethanol facility.

77. NRG demanded IGPC's agreement to a fixed in-service date, because NRG was very concerned based on IGPC's past defaults, delays and failures that IGPC would not complete its ethanol facility by the agreed date. NRG would then be in the position of having incurred unnecessary costs to ensure completion by a specific date, only to face a loss of revenue due to IGPC's failure to complete the ethanol facility by that same date.

78. It is agreed that NRG completed and commissioned the Pipeline well before the agreed in-service date of July 15, 2008. By contrast, IGPC failed to complete the construction and commissioning of its ethanol facility by July 15, 2008.

79. Pursuant to the agreement, NRG delivered an invoice to IGPC for the minimum quantity of natural gas commencing on July 15, 2008. IGPC's liability to pay for the minimum quantity of natural gas commencing on the in-service date was caused solely by IGPC's inability to complete the construction and commissioning of its ethanol facility in a timely and competent manner, and by July 15, 2008.

IGPC's Adversarial and Litigious Conduct

80. The history of IGPC's dealings with NRG has been one of unnecessary acrimony and litigation commenced and perpetrated by IGPC. NRG has been forced to respond to a series of unnecessary OEB motions and the continuing refusal of IGPC to comply with its obligations owed to NRG under agreements approved by the OEB relating to the construction and operation of the IGPC pipeline. Most of the issues that have arisen have been caused solely by IGPC's inability or failure to obtain adequate financing to construct the IGPC pipeline, and its repeated failures to complete its ethanol production facility according to the agreed timelines due to IGPC's mismanagement and construction delays. This has caused NRG to incur unnecessary legal costs that should be paid solely by IGPC and not by any other NRG rate payer.

81. Moreover, IGPC's repeated attempts to re-litigate these old allegations, serve no purpose except to cause NRG to continue to incur unnecessary costs in responding to them, thereby placing a disproportionate burden on NRG's limited financial resources.

82. As a small utility, NRG has been forced to spend significant management resources and incur legal fees, consultant fees and other costs solely as a result of IGPC's highly adversarial and confrontational approach to dealing with NRG.

83. As described in more detail below, IGPC is able to continue business operations only because it receives substantial funding in the form of government grants. Accordingly, while IGPC is apparently capable of prolonging unnecessary and unreasonable litigation, NRG is privately-owned and does not receive any government funding.

84. IGPC seems to expect that NRG and ultimately NRG's ratepayers should pay for IGPC's own lack of adequate financing, construction mismanagement, and commissioning failures. NRG has at all times been trying to ensure that the interests of all of its ratepayers are protected by ensuring that NRG did not suffer a revenue shortfall due to IGPC's conduct.

85. It appears that IGPC intends to continue its highly adversarial and litigious approach to its relationship with NRG, and once again proposes a full hearing before the OEB that will cause NRG to incur another round of expenses for legal fees and other consultant fees, and other costs.

PART VI – THE SIMPLE TRUTH

IGPC Will Be Insolvent When its Operating Grant Expires in December 2016

86. IGPC is operating at a significant rate of loss. If the operating grant is terminated or significantly reduced, IGPC could be insolvent. Accordingly, NRG is at significant risk that IGPC will not have the financial capability to pay NRG for the undepreciated capital costs of the pipeline.

87. IGPC's financial statements for the fiscal year ended September 30, 2011, clearly indicate that but for an operating grant in the amount of approximately $28.7 million last year (which expires in 2016 and with current government funding cutbacks it could be earlier), IGPC could be rendered unable to meet their future financial commitments. IGPC's net income for its most recent financial fiscal year was $11.7m. The operating grant was $28.7m. Accordingly, without the operating grant, IGPC would have incurred a net loss of $17m.

88. IGPC's financial statements for the nine months ended June 30, 2012, confirm that IGPC's net income for its most more recent nine months was $11.5m. The operating grant was $23.1m. Accordingly, without the operating grant IGPC, IGPC would have occurred a net loss of $11.6m.

89. This confirms that for the last two years, IGPC has been operating at a significant rate of loss, and if the operating grant is terminated or significantly reduced, IGPC would be insolvent. The financial statements also confirmed that the operating grant will terminate on December 31, 2016.

90. Accordingly, it appears that NRG is at a significant risk that IGPC will not have the financial resources to pay NRG for the decommissioning costs, and any other costs not yet recovered through rates specific to IGPC.

NRG Used its Own Money to Construct the Pipeline on Time and Under Budget

91. Despite IGPC's refusal, in breach of the PCRA, to provide the required security in the form of the Delivery Letter of Credit, NRG proceeded at its own risk to commence and continue the construction of the Pipeline, despite having an absolute contractual right under the PCRA to cease construction as a result of IGPC's breach. In the end, NRG completed construction of the

Pipeline before the scheduled completion date and for approximately $1 million less than the budgeted capital cost.

92. By contrast, IGPC failed to complete the construction of its ethanol plant by the targeted completion date.

93. It was only NRG's willingness to continue with construction that enabled the Pipeline to be completed ahead of schedule.

NRG has Never Failed to Provide Service in 30 Years Continuous Service

94. At various times, IGPC has asserted that NRG has failed to provide service. However, the undisputed evidence is that in over 30 years of continuous business operations, NRG has never once failed to provide natural gas distribution services, and there is no evidence of any unreliability in the service NRG has provided for 30 continuous years.

95. On May 5, 2009, the OEB specifically found that there was "no evidence to support the Town's claim that NRG's service was unreliable."

NRG has Consistently Met its Financial Obligations Without Fail for Over 30 years

96. The OEB has also made a clear and specific finding of fact that in over 30 years of continuous operation, NRG had consistently met its obligations to Union Gas. This finding was made after Union Gas admitted that in almost 30 years, NRG had never once missed a payment or failed to pay on time any amount owing to Union Gas. The OEB stated:

> "The Board notes that there is no evidence that NRG has failed to make any payments to Union in the past. While it is accepted that there is a maximum exposure of some $1.9 million dollars at March 31st each year regarding the Bank Gas Account, the situation is not new and NRG has always met its obligations"

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of November, 2012.

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