Ontario Energy Board

Commission de l'énergie de l'Ontario

Ontario

EB-2012-0396

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.

BEFORE: Cathy Spoel
Presiding Member

Christine Long
Board Member

DECISION WITH REASONS

Background

Integrated Grain Processors Co-Operative Inc. ("IGPC") is a co-operative comprised of over 800 members of the community around the Town of Aylmer. IGPC owns and operates an ethanol manufacturing facility in the Town of Aylmer. Natural Resource Gas Limited ("NRG") is a gas distribution utility regulated by the Ontario Energy Board (the "Board" or "OEB") that provides gas in and around the Town of Aylmer.

In January 2007, IGPC and NRG entered into a Pipeline Cost Recovery Agreement ("PCRA") that sets out the terms and conditions on which IGPC would contribute to the capital cost of constructing a 28.5 km natural gas pipeline (the "Pipeline") that was to be used exclusively for distributing natural gas to IGPC's ethanol plant. The formula used

to derive the capital contribution was consistent with the Board's guidelines as established in the 1998 E.B.O. 188 proceeding. The PCRA required IGPC to pay an amount "up-front" that would later be reconciled against actual costs once construction was completed. The up-front payment by IGPC was $3,538,792.47. In the event of a dispute between the parties regarding the total actual costs, the PCRA provided two possible remedies: a dispute resolution clause which named the Board as arbitrator, and a separate clause which stated that all disputes arising out of the agreement were the exclusive jurisdiction of the courts of Ontario. In June 2007, IGPC and NRG entered into a Gas Delivery Contract that specified maximum daily and hourly maximum volume of natural gas that NRG would deliver to IGPC. On February 2, 2007, the Board granted NRG a Leave to Construct (EB-2006-0243).

The Pipeline was completed and began supplying gas to the ethanol plant in July 2008. Since that time, there has been an ongoing dispute between IGPC and NRG regarding the actual costs of constructing the Pipeline.

On February 26, 2010 NRG filed a cost of service rate application under Board file No. EB-2010-0018. IGPC sought to raise this issue in the EB-2010-0018 proceeding. It filed a motion asking the Board to consider the prudency and reasonableness of the total costs of the Pipeline as claimed by NRG. To the extent that the claimed costs were excessive, IGPC argued that it would be entitled to a refund of some portion of its capital contribution.

The Board declined to hear certain issues identified in the motion. Although it did make a determination with respect to the Pipeline costs that entered NRG's rate base (which therefore comprised part of NRG's final rate order), it did not make any assessment of the total reasonable Pipeline costs, or the proper amount of IGPC's capital contribution. At pages 14-15 of the EB-2010-0018 Decision and Order – Phase II issued on May 17, 2012 the Board stated:

> 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.

On June 18, 2012 IGPC appealed this portion of the Board's decision to the Ontario Superior Court of Justice (Divisional Court).**Motion to Review**

On October 4, 2012, the Board issued a procedural order determining that 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 would 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 paid by IGPC.

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

1. 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?

Position of Parties

Board Staff Position

In the EB-2010-0018 proceeding, Board staff submitted that the Board had already opined on issues that impact rate base. Board staff further submitted that the remaining issues that were in dispute were strictly contractual in nature between two parties and that NRG and IGPC should resolve the disputes through other mechanisms rather than approaching the Board.

Board staff in this Application submitted that the Board's powers to set rates for the sale, distribution and transmission of natural gas derive from section 36 of the Act. A distributor such as NRG can only charge for the distribution of gas pursuant to an order of the Board (section 36(1)), and the Board may make orders approving rates that are "just and reasonable" (section 36(2)). In approving just and reasonable rates, the Board may also adopt any method or technique that it considers appropriate (section 36(3)). Similarly, a section 36 order may include conditions, classifications or practices applicable to the sale, transmission, distribution or storage of gas, including rules respecting the calculation of rates (section 36(4)).

Board staff submitted that the setting of just and reasonable rates is one of the Board's core powers. The courts have recognized the Board's broad powers over rate setting

on several occasions. In *Natural Resource Gas v. Ontario Energy Board*, the court noted that the Board's power to set just and reasonable rates **"**is unconditioned by directed criteria and is broad; the board is expressly allowed to adopt any method it considers appropriate."[1] In *Advocacy Centre for Tenants-Ontario v. Ontario Energy Board*, the court stated that the Board should interpret its rate setting powers in a manner consistent with the objectives of the act, and in a fair, large and liberal manner.[2]

The Court further observed: "The Court must apply a "pragmatic or functional" analysis in determining the issue of jurisdiction, by considering the wording of the *Act* conferring jurisdiction upon the Board, the purpose of the *Act* creating the Board, the reason for the Board's existence, the area of expertise of its members and the nature of the problem before the Board."[3]

Board staff noted that the primary question in this proceeding is whether or not a capital contribution is a "rate" as defined by the Act. Section 3 of the Act defines a rate as: "a rate, charge or other consideration and includes a penalty for late payment." The definition, in Board staff's view, is quite broad. It is not limited simply to the fixed and variable rates typically included in a tariff, nor to the fixed charges that are routinely approved by the Board. Board staff submitted that in conjunction with section 36, it appears to encompass virtually any consideration paid by a customer to a utility.

Board staff submitted that based on the above analysis, a capital contribution can in fact be considered a rate. The Board's powers over rate setting issues are very broad, which has been confirmed by the courts many times. In addition, one of the key purposes of regulation is to protect consumers from the exercise of monopoly power. Board staff noted that IGPC's ethanol plant is located in NRG's service territory, and IGPC therefore has no choice with respect to its natural gas supplier. Under such circumstances, regulatory principles suggest that it is the Board's role to ensure that any payments required for the provision of distribution service are just and reasonable.

Accordingly, Board staff submitted that the Board has to ensure that a party (which is, of course, also a customer and a rate payer) paying a capital contribution does not pay more than is necessary, as this would not be a just and reasonable charge to the customer. Board staff noted that the formula for determining the amount of a capital

[1] [2005] O.J. 1520, para. 24.
[2] 2008 CanLII 23487, paras. 12, 55-56.
[3] *Ibid*., para. 14.

contribution was set by the Board in the E.B.O. 188 proceeding. Board staff submitted that capital contribution is in fact a rate and the Board therefore has jurisdiction over this issue.

IGPC Position

IGPC made a similar argument and noted that if IGPC had committed to a longer term in the PCRA and no contribution in aid of construction was paid, the full cost of the Pipeline would have been added to NRG's rate base and then the Board would definitely have jurisdiction to review the costs, as they would have been a component of NRG's ordinary rates. IGPC submitted that the existence of the PCRA, which incorporated the Board approved methodology of E.B.O. 188 does not remove the Board's exclusive jurisdiction. IGPC submitted that the Board erred when it declined to review a portion of the capital costs related to construction of the Pipeline on the basis that it was a private law matter under the PCRA.

After construction of the Pipeline, the PCRA at Sections 3.13 and 3.14 required NRG to provide its total actual costs of constructing the Pipeline to IGPC which was essentially a true-up to the estimated costs. In the event of a dispute regarding costs, the PCRA provided that the parties could bring their dispute before the Board for resolution.

IGPC noted that in the Leave to Construct proceeding, (EB-2006-0243), counsel for NRG had specifically stated that since the cost recovery agreement was about protecting ratepayers, the dispute resolution clause focusses on the Board as an arbitrator[4]. IGPC submitted that neither Board staff nor NRG challenged this view.

IGPC noted a dispute with NRG prior to construction of the Pipeline where NRG required $32 million in security to proceed with the construction which NRG had forecasted to cost $9.1 million in the Leave to Construct proceeding (EB-2006-0243). The Board in its Notice of Review indicated that it would examine the PCRA in light of NRG's demands. The Board determined that NRG's demands were without merit and ordered NRG to proceed on the basis of the provisions in the PCRA[5]. IGPC submitted that in settling this dispute, the Board recognized its jurisdiction and relied upon the provisions of the PCRA.

[4] IGPC Submission, October 22, 2012, pg.7
[5] Decision and Order, EB-2006-0243, March 4, 2008

IGPC further submitted that the quantum of the actual reasonable costs incurred to construct the Pipeline has a direct impact on rates, the monthly charges, the capital contribution paid by IGPC to NRG, and the amount of the security posted by IGPC in favour of NRG. IGPC submitted that the Board could not fulfil its mandate of protecting ratepayers when it declined to review the actual capital costs of constructing the Pipeline post construction.

IGPC noted Section 2 of the OEB Act that gives guidance to the Board in making decisions to carry out its mandate:

2. The Board, in carrying out its responsibilities under this or any other Act in relation to gas, shall be guided by the following objectives:

……..

2. To protect the interests of consumers with respect to prices and the reliability and quality of gas service.

3. To facilitate rational expansion of transmission and distribution systems.

……

5.1 To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas.

IGPC submitted that the Board's objectives include the balancing of interests between the utility and ratepayers. IGPC noted that without the jurisdiction to determine what ratepayers are obligated to pay and utilities are entitled to receive for distribution services, the Board is unable to fulfill its objectives. The Board is obligated to set just and reasonable rates and regulated utilities must only charge approved rates. IGPC submitted that the Board has the authority to order the conditions upon which gas service is provided by virtue of section 42(3) of the OEB Act.

> 42(3) Upon application, the Board may order a gas transmitter, gas distributor or storage company to provide any gas sale, transmission, distribution or storage service or cease to provide any gas sale service. 1998, c. 15, Sch. B, s. 42 (3).

IGPC, being a ratepayer, noted that its interests are deserving of being protected by ensuring that the costs and charges paid by it through the aid-to-construct, the monthly charges, and the security posted are just and reasonable.

IGPC further noted that the amount provided as an aid-to-construct was derived using an economic analysis in accordance with E.B.O. 188. This process ensured that NRG and its other ratepayers were protected if costs were higher than forecast and that IGPC was protected in the event costs were lower than forecast.

IGPC noted that the courts have recognized the Board's purpose to protect customers from the monopolistic powers of the utility.

> "The Board's regulatory power is designed to act as a proxy in the public interest for competition in view of a natural gas utility's geographical natural monopoly. Absent the intervention of the Board as a regulator in rate-setting, gas utilities (for the benefit of their shareholders) would be in a position to extract monopolistic rents from consumers, in particular, given a relatively inelastic demand curve for their commodity. Clearly, a prime purpose of the *Act* and the Board is to balance the interests of consumers of natural gas with those of the natural gas suppliers. The Board's mandate through economic regulation is directed primarily at avoiding the potential problem of excessive prices resulting because of a monopoly distributor of an essential service."[6]

IGPC submitted that the Board would not be able to protect consumers from the monopolistic powers of a utility if it does not have jurisdiction over the amount paid by ratepayers as contributions in aid of construction.

IGPC further quoted Section 3 of the OEB Act that defines rates as a rate, charge or other consideration. IGPC noted that the Board on a previous occasion has determined that a "rate" includes other terms related to the services[7]. IGPC submitted that such other terms must necessarily include the timing of payments, reconciliations and financial assurance. IGPC noted that it has paid over $3 million as an aid-to-construct to secure the construction of the facilities necessary for it to be able to receive natural gas distribution service and it continues to pay approximately $1.5 million per year to continue to receive such service.

IGPC submitted that if a utility is permitted to retain excessive deposits it would make an unreasonable return. As such, it is imperative that the Board has jurisdiction over the entire "rate" charged by a utility to provide service. IGPC therefore submitted that the aid-to-construct, or the contribution in aid of construction, is a "rate or charge" within the meaning of section 3 and 36 of the OEB Act as it is collected by the utility as a pre-condition to providing natural gas distribution service.

[6] Advocacy Centre for Tenant-Ontario Energy Board, supra, pp. 8 and 9
[7] Reasons for Decision, E.B.R.O. 410-II, March 23, 1987, Section 4.58

NRG Position

Conversely, NRG submitted that the costs of the Pipeline should be determined in accordance with the PCRA entered into 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.

NRG submitted that the exclusive jurisdiction of the Courts 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]

NRG noted that in the EB-2010-0018 proceeding, the Board issued its Decision on December 6, 2010 at which time the actual capital cost of the Pipeline was determined. NRG submitted that since the decision and rate order has been issued, the contractual issues in dispute no longer fall under the jurisdiction of the Board.

While NRG agreed that the Board had broad powers to set rates under Section 36 of the Act, it noted that the powers were purely within the context of making orders which approve or fix rates. NRG submitted that the legislation does not extend the Board's jurisdiction to the governance of private contractual disputes between utilities and ratepayers after rates are set.

NRG further submitted that Section 36 of the OEB Act does not clearly set out the Board's jurisdiction over the disputed matters raised by IGPC in its motion to review, 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, NRG submitted that the OEB Act does nothing of the sort when it comes to matters like disputed costs under a contract that is between private parties.

NRG noted that IGPC in its submission had framed the disputed costs as a rate-related matter and consequently under the Board's jurisdiction. NRG disagreed with this view and noted that the PCRA itself confirms that the courts have exclusive jurisdiction.

NRG quoted the Supreme Court of Canada ruling in the 2004 Decision Garland v. Consumers' Gas Co. (Enbridge Gas Distribution) [2004] 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. 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 offend 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.

At the Ontario Court of Appeal, Chief Justice McMurtry discussed 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.
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> *Garland v. Consumers' Gas Co.,* 57 O.R. (3d) 127, para 28.

Chief Justice McMurtry further explained 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 bas been set since 1981. [emphasis added]
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> *Garland v. Consumers' Gas Co.,* 57 O.R. (3d) 127, para 32.

NRG referencing the above decision noted that even though the dispute related to LPPs – "an inextricable part of the rate for gas" where "a variation of the LPPs would impact revenue levels of the utility company, which in turn would 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.

The Supreme Court while deliberating on this issue adopted the finding of the Court of Appeal with respect to the Board's jurisdiction although arriving at a different ultimate conclusion. Justice Iacobucci of the Supreme Court 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 72

NRG in its submission reiterated that the Supreme Court was clear in its analysis and noted that where disputed issues are private law matters, the Board does not have jurisdiction to hear them.

NRG further quoted Board staff's submission in the EB-2010-0018 proceeding that provided an analysis of whether the Board was the proper arbiter of contractual disputes between NRG and IGPC. Board staff submitted:

> 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.
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> *Board Staff Submission, EB-2010-0018, August 9, 2011, p.3-4*

NRG also agreed with Board staff's submission in EB-2010-0018 that referenced the dispute between NRG and IGPC as strictly contractual in nature which should be resolved through other mechanisms rather than approaching the Board.

NRG also noted Board staff's concern that accepting IGPC's motion could lead to the Board having to make determination at a mirco-level examining individual invoices. NRG submitted that it was not the Board's job to review every contract for goods or services between utilities and other parties simply because certain costs are in dispute. NRG further submitted that the Board should not get involved in private contractual matters after rates are set simply because disputed costs may theoretically relate to rates.

NRG cautioned the Board that if it were to reverse its Decision in EB-2010-0018, then it would open itself to a broad array of contractual and civil disputes – a degree of oversight that is not comprehended in the OEB Act.

Reply Submissions - Parties

Each of the parties was provided an opportunity to respond to the submissions of other parties. Board staff in reply disagreed with NRG's submission that Section 36 of the OEB Act does not clearly set out the Board's jurisdiction over the disputed matters raised by IGPC. Board staff also disputed NRG's opinion that the issue just "loosely" relates to rates. Board staff submitted that the rate to be paid by IGPC is exactly the subject of the disputed costs. Board staff reiterated their original submission that "the definition of a rate is fairly broad, and appears to include a capital contribution". The "disputed costs" are the very issue in determining the final amount of the capital contribution. Board staff therefore submitted that the disputed costs were part of a rate, and there was no dispute that the Board had exclusive jurisdiction over the setting of rates.

Board staff also disagreed with NRG's position that the current situation was akin to the situation in *Garland v. Consumers Gas Co*[8]. ("Garland"). Board staff submitted that 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. One of the issues before the courts was whether the court action could proceed, as the distribution company argued that all "rates" issues were within the sole 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.

Board staff noted that there were several key differences between the situation in the Garland case 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. Board staff noted that this was standard industry practice, and was in no way akin to a long standing late payment penalty order (approved several times over many years through various Board rate proceedings). Board staff therefore submitted that

[8] 57 O.R. (3d) 127 (Court of Appeal)

any refund owing to IGPC, was not “restitution” – it is the proper amount of capital contribution as expressly recognized by the parties.

IGPC in reply supported Board staff’s submission and noted that in the Garland case, the Supreme Court found that the rate of interest approved by the Board was 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.

IGPC argued that 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. IGPC submitted that in the current proceeding, 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 submitted that it was not seeking any damages but rather a review of whether NRG has over recovered a rate which has not been approved by the Board.

IGPC further agreed with Board staff that the amount of capital contribution is indeed a “rate” as defined by Section 3 of the OEB Act. IGPC further added that like a capital contribution, the appropriate amount of financial assurance that IGPC had to provide to NRG was also a “rate”. IGPC noted that posting a letter of credit in favour of NRG was a precondition of receiving service and was a cost to IGPC. It was therefore a rate and was indistinguishable from the security deposit required by distributors over which the Board has had jurisdiction for years.

IGPC submitted that the rate provisions of the PCRA were not negotiated at arm’s length in the same manner as provisions in private contracts are negotiated. IGPC noted that 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. IGPC further noted that the “rates” in the PCRA were approved and NRG was given a Leave to Construct only through the statutory authority of the Board. IGPC refuted NRG’s claim that the issues now are a matter between two private parties beyond the jurisdiction of the Board.

NRG in reply refuted Board staff’s and IGPC’s claim that a capital contribution is a “rate”. NRG submitted that the Board in its December 6, 2010 Decision had determined that certain parts of the capital cost were within the calculation of rates and other parts

were outside the rate calculation. This determination was binding upon IGPC according to NRG and IGPC did not appeal the Board's Decision. The Board reiterated its Decision on May 17, 2012 where it noted:

> "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."

NRG submitted that the PCRA is a contract between two private parties and it is settled law that the Board does not interpret contracts or adjudicate disputes about contracts, even where such contracts form the basis for Board approval of certain actions, such as the construction of a Pipeline. NRG further reiterated that it is also settled law that the interpretation of contracts was within the exclusive jurisdiction of the courts and not within the jurisdiction of the Board.

Board Findings

The primary issue in this motion to review is the Board's jurisdiction to determine the contribution amounts to be paid by IGPC to NRG for the construction of the Pipeline. The foundation for such jurisdiction is found in the Board's powers to set rates for the sale, distribution and transmission of natural gas as derived from section 36 of the Act. That IGPC is a customer of NRG is not in dispute. The key question for the Board to resolve is whether a capital contribution is a "rate" as defined by the Act, and therefore subject to the Board's jurisdiction and regulation pursuant to section 36. For the reasons set out below the Board finds that the capital contribution paid (or owed) by IGPC does constitute a rate charged to a customer of NRG as defined in Act.

The Act defines a rate as: "a rate, charge or other consideration and includes a penalty for late payment." The Board agrees with IGPC and Board staff that this definition is very broad, and that it appears to cover virtually any payment from a customer to a utility for the provision of distribution service. There does not appear to be any dispute that the capital contribution is a payment for distribution service, nor that IGPC is a customer of NRG. Although capital contributions are not included in a utility's Board approved tariff of rates, the definition of rate is much broader than this and clearly includes "other compensation".

The finding that a capital contribution is a rate is further supported by general regulatory principles. The Board's first objective under section 1(1) of the Act is to "protect the interests of consumers with respect to prices and the adequacy, reliability and quality of

electricity service." One of the key purposes of the Board's regulation, therefore, is to ensure that utilities are not able to abuse their monopoly power by charging unreasonable amounts to their customers. IGPC is located in NRG's service territory and is a customer of NRG. There is no means for IGPC to receive distribution service from any other utility. IGPC, like any customer, is entitled to a just and reasonable rate for the distribution services it receives from its utility. The Board was created (in part) to make just such a determination. The Board also agrees with IGPC that the amount of financial assurance provided to NRG by IGPC is a rate. As a condition of receiving service, IGPC was required to post a letter of credit in favour of NRG. The Board finds that any such funds held by the utility in order to protect itself and its customers from any financial liability of serving IGPC must be just and reasonable to reflect the financial risks associated with the NRG's assets and liabilities.

The Board recognizes that, as a practical matter, the setting of a rate for a capital contribution cannot be conducted in the same manner as the rates set out in a utility's rate tariff. The amount owing for any capital contribution is fact specific, and will be different depending on the capital costs of the assets and the revenues that the utility is expected to receive through ordinary rates. The need for a capital contribution may arise at any time, and seldom will be the case where the timing allows the Board to review the proposed contribution through a routine rate case. Indeed many projects requiring capital contributions (especially in the electricity sector) will not even be attached to a leave to construct. Under these circumstances the Board has established the formula for calculating the capital contribution. In cases where the parties cannot agree on the appropriate amount (which are rare), the Board will intervene to settle the dispute and ensure that a just and reasonable rate is established.

The Board does not agree with NRG's argument that the PCRA places this issue under the jurisdiction of the courts. Section 19(6) of the Act provides: "[t]he Board has exclusive jurisdiction in all cases and in respect to all matters in which jurisdiction is conferred on it by this or any other Act." There can be no question that the Board has exclusive jurisdiction over all matters related to the setting of just and reasonable rates, and no contract can transfer that jurisdiction to a court or any other body.

The PCRA essentially applies the formula for the calculation of capital contributions as set out by the Board in EBO 188. It is no doubt a useful document agreed to by the parties which formalizes the details surrounding the exact calculations, timing, etc. of the capital contribution. It does not, however, usurp the Board's underlying jurisdiction:

indeed section 36(1) of the Act explicitly recognizes that, in setting just and reasonable rates, "[the Board] is not bound by the terms of any contract." The ultimate responsibility to ensure the rates paid by consumers are just and reasonable lies with the Board.

The Board does not agree with NRG's argument that the Garland decision applies in these circumstances. This is not a matter of a restitutionary or compensatory order, nor does it relate to unjust enrichment: it is a matter of determining a just and reasonable rate. The fact that a true up is contemplated to account for the actual costs of constructing the Pipeline (which were of course not available when the PCRA was executed) does not make this a backward looking analysis.

In summary, the Board finds that a capital contribution is a rate. As such it lies within the exclusive jurisdiction of the Board under section 36. The Board will commence a second phase to the proceeding to determine the appropriate amount of the capital contribution through a Procedural Order to follow.

DATED at Toronto, February 7, 2013

ONTARIO ENERGY BOARD

ORIGINAL SIGNED ON
BEHALF OF THE PANEL BY

Cathy Spoel
Presiding Member