

March 13, 2013

BY COURIER, EMAIL AND RESS

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

Dear Ms. Walli:

**Re: Integrated Grain Processors Co-operative Inc. Application
Board File No. EB-2012-0406**

We are counsel to Integrated Grain Processors Co-operative Inc. ("IGPC").

We are writing in response to the Ontario Energy Board's ("OEB" or "**Board**") letter dated February 13, 2013 ("**Letter**") requesting a brief submission in respect of the relief sought in IGPC's Application at subparagraph 3(f), for an Order terminating the Leave to Construct ("**LTC**") granted in EB-2006-0243, as amended, applicable to the pipeline constructed to provide natural gas to the IGPC ethanol facility ("**IGPC Pipeline**"). Unless otherwise stated, all references to sections below refer to the *Ontario Energy Board Act*, 1998, S.O. 1998, c.15. ("**OEB Act**").

Introduction

The requested relief should be read in the context of the complaint and the Application of IGPC which asserts that the continued actions of Natural Resource Gas Limited ("**NRG**") have caused IGPC to incur significant unnecessary costs and have raised concerns about the reliability of the natural gas supply. As such, the termination of the LTC is the first step to remove the IGPC Pipeline from the control and ownership of NRG.

During the past number of years, NRG has engaged in conduct that has forced IGPC and others, Union Gas Limited and the Town of Aylmer, to bring forth applications to compel NRG to conduct its affairs as required by the regulatory framework. Before turning to the question of the Board's jurisdiction, we feel it is necessary to speak about the impetus and objective of making such a request. It has been over four years since IGPC began receiving natural gas via the IGPC Pipeline. In that time, NRG has continued a pattern of abuse and has failed to meet the minimum requirements expected of a regulated public utility. For example, NRG has done nothing to advance a baseless claim of malicious falsehood for more than \$20 million regarding a public statement made in 2008. IGPC submits that finding a permanent solution to the current situation – a solution that results in a party other than NRG owning and operating the IGPC Pipeline, is in the public interest.

NRG, while being more than completely secured financially, has asserted that IGPC has created an unacceptable credit risk for NRG. This creates issues for IGPC with its members and business partners.

IGPC is not suggesting that NRG should be deprived of compensation for the balance of the undepreciated portion of the IGPC Pipeline; however, IGPC is requesting that the Board exercise its powers to finally resolve the issues with NRG by removing the IGPC Pipeline from NRG's ownership and control and grant leave to a third party to own and operate the IGPC Pipeline.

These submissions address the Board's authority to terminate the LTC and the authority to take the steps necessary to resolve the issues which NRG has created.

The Law

Our discussion begins with an overview of the Board's explicit statutory authority. The Board has exclusive jurisdiction (19(6)) to grant, by Order (19(2)), LTC as required by Subsection 90(1). Under Subsection 23(1), the Board may attach such conditions as it deems appropriate to any Order relating to the LTC.

The Board is obligated by Subsection 96(1) to determine whether the work is in the public interest. It should be noted that the Board is obligated, by Section 2, in the carrying out of its responsibilities, to be guided by the following objectives:

- "2(2) To protect the interests of consumers with respect to prices and the reliability and quality of gas service.
- (3) To facilitate the rational expansion of transmission and distribution systems.
- (5) To promote energy conservation and energy efficiency in accordance with the policies of the Government of Ontario.
- (5.1) To facilitate the maintenance of a financially viable gas industry for the transmission, distribution and storage of gas."

The above objectives are clearly applicable to the proceeding at hand, and the construction and operation of the IGPC ethanol production facility is in accordance with the conservation and energy efficiency policies of the Government of Ontario.

Under Subsection 18(1), no authority given by the Board shall be transferred or assigned without leave of the Board. This section confirms that the Board has the jurisdiction to transfer or assign authority, such as the LTC.

The Board's jurisdiction also flows from the *Municipal Franchises Act* ("MF Act") which provides, at Subsection 8, that the construction of any works to supply natural gas requires a certificate of public convenience and necessity. Specifically, Subsection 8(3) provides:

"The Ontario Energy Board has and may exercise jurisdiction and power necessary for the purposes of this section and to grant or refuse to grant any certificate of public convenience and necessity, but no such certificate shall be granted or refused until after the Board has held a public hearing to deal with the matter upon application made to it therefor, and of which hearing such notice shall be given to such persons and municipalities as the Board may consider to be interested or affected and otherwise as the Board may direct."

The Board is empowered by Subsection 112.3(1) of the OEB Act to take such action as the Board may specify to remedy a contravention of an enforceable provision that has occurred, or to prevent a contravention or further contravention of the enforceable provision. It is noteworthy that there are no limitations included under Section 112 as to the actions that the Board may take.

In addition to the above-noted statutory provisions, the OEB Act prohibits a distributor from operating absent an Order from Board (36(1)), and the Board is empowered to approve rates which are just and reasonable pursuant to any method or technique that it considers appropriate (36(2) and (3)). Subsection 42(3) provides that the Board may order a distributor to provide gas distribution services and it may also, by Order, require a distributor to cease providing gas sales service.

In summary, these statutory provisions exclusively bestow upon the Board the requirement to ensure that regulated natural gas distributors operate in the public interest. The breadth of the Board's jurisdiction is self-evident from the above statutory provisions. As noted below, this has been confirmed by the Courts. From the perspective of the construction of new pipelines, the Board has exclusive jurisdiction to consider virtually all aspects of a proposal to build and maintain a natural gas pipeline, including its economic feasibility, its financial impact on the utility, and the conditions subsequent or precedent to a leave approval which the Board is at liberty to attach to a LTC. In short, the Board has the responsibility to ensure that the construction, operation, and maintenance of a pipeline is undertaken in the public interest, and where there is evidence of conduct occurring which is not in the public interest, the Board has the explicit statutory powers to protect the public interest. This includes the termination, rescission, assignment or transfer of the LTC.

In addition to the explicit authority granted by the enabling statute, it is a recognized principle of law that administrative tribunals also obtain their jurisdiction by the application of the doctrine of necessary implication. The test for reviewing the implied power of an administrative tribunal was summarized by the Ontario Court of Appeal in *Pierre v. McRae* as follows:

In ATCO, the Supreme Court of Canada enumerated the circumstances in which the doctrine of jurisdiction by necessary implication may be applied:

- i. when the jurisdiction sought is necessary to accomplish the objects of the legislative scheme and is essential to the statutory body fulfilling its mandate;
- ii. when the enabling act fails to explicitly grant the power to accomplish the legislative objective;
- iii. when the mandate of the statutory body is sufficiently broad to suggest a legislative intention to implicitly confer jurisdiction;
- iv. when the jurisdiction sought is not one which the statutory body has dealt with through use of expressly granted powers, thereby showing an absence of necessity; and
- v. when the legislature did not address its mind to the issue and decide against conferring the power to the statutory body.

In the Application currently before the Board involving NRG, all five of the above circumstances exist. In respect of circumstances (i) through (iii), it is submitted these circumstances are obvious and need no further commentary. Item (iv) is applicable given that until now, the two other regulated natural gas distributors have operated in a manner which did not necessitate the legislature including specific statutory authority in the OEB Act allowing the Board to terminate a LTC. Of the decades in which natural gas distributors have been regulated, this is the first occasion where circumstances have arisen warranting a request that the Board exercise its jurisdiction in such a manner. Item (v) is also satisfied as there is no evidence that the legislature ever decided against conferring such authority to the Board. Indeed, given the circumstances of the electricity distribution sector at the time that the OEB Act was amended in the late 1990s, the legislature gave the Board explicit statutory authority at Section 59 to go much further and require an electricity distributor to surrender possession and control of its business. The fact is that up until now, such powers have never been requested or required in respect of a natural gas distributor.

As a result of both the explicit statutory powers and the Board's jurisdiction by necessary implication, it is recognized that the OEB has a broad mandate in respect of the oversight of all aspects of regulated natural gas distributors. This broad mandate has been recognized by the Courts, including in the *Union Gas Ltd. v. Dawn (Township)* Decision of the Ontario Divisional Court which held:

In my view the statute makes it crystal clear that all matters relating to or incidental to the production, distribution, transmission or storage of natural gas, including the setting of rates, the location of lines and appurtenances, expropriation of necessary lands and easements, are under the exclusive jurisdiction of the Ontario Energy Board....

...[I]t is clear that the Legislature intended to vest in the Ontario Energy Board the widest powers to control the supply and distribution of natural gas to the people of Ontario "in the public interest" and hence must be classified as special legislation.

This broad mandate was specifically acknowledged by a Board Panel in an earlier IGPC proceeding. It is clear from the oral Decision rendered by the Presiding Member, Gordon Kaiser, at pages 142 through 149 of the Decision of the Board dated February 28, 2008, in the Motion held in Aylmer, Ontario, in EB-2006-0243 (the "**Decision**") that the Board has the jurisdiction to declare the NRG LTC for the IGPC Pipeline null and void or "expired". The Decision specifically confirms that in the event that the conditions which the Board attached to the LTC were not satisfied, the LTC would be declared null and void or expired. It is noteworthy that this jurisdiction was acknowledged and specifically accepted by counsel to both NRG and IGPC at the time. A copy of pages 142 through 149 of the Decision is attached.

It should further be noted from the Decision that the Board and the parties to the Motion contemplated that in the event that the LTC was declared null and void or expired that a second phase would be required subsequently to determine the entity to which the LTC should be assigned or transferred. In this regard, leave of the Board is required pursuant to Subsection 18(1). IGPC is not seeking approval or leave in the current proceeding for the transfer of the LTC to another entity. IGPC is seeking a confirmation that the LTC is null and void and an interim and Procedural Order setting out the next steps that will deal with the transfer of the LTC and related issues.

While it is submitted that the Board has the jurisdiction to terminate or declare null and void a LTC where it is in the public interest and to grant leave for its assignment or transfer to another entity, in this proceeding, the Board explicitly retained the jurisdiction to declare the LTC null and void by reason of the failure of a party to comply with one of the conditions the Board attached to the LTC. By NRG's failure to comply with all of the conditions attached to the LTC, IGPC submits that the LTC should be declared null and void or expired and to initiate the process necessary to consider that entity to which the LTC should be transferred.

Conclusion

IGPC takes the position that NRG has not complied with all of the conditions to the LTC which, as a result, render the LTC null and void. The conduct of NRG over the last many years in other respects confirms that it is in the public interest to replace NRG as the operator of the IGPC Pipeline. The current proceeding is the first step towards the transfer or assignment of the LTC, namely, a review by the Board of the conduct of NRG to determine whether it has satisfied the conditions to the LTC.

Turning specifically to the relief sought in IGPC's Application at 3(f), it is perhaps prudent to amend the relief sought to provide greater clarity as to the request being made to the Board. Accordingly, IGPC respectfully requests that its Application be amended to add the following relief to paragraph 3:

- (g) in the alternative to 3(f), a determination by the Board that NRG has not complied with all of the conditions to the Leave to Construct ("LTC") and, as a result of this and other conduct, that the LTC has expired or is null and void.
- (h) in the event that the Board terminates the LTC or determines that it has expired or is null and void, IGPC seeks such interim Orders as are appropriate, granting to another entity leave to operate, control and maintain the IGPC Pipeline pending a further hearing by the Board of an Application to award or assign the LTC for the IGPC Pipeline to another entity on a permanent basis.

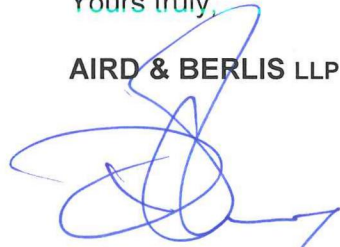
In conclusion, the OEB Act provides the Board with comprehensive exclusive authority over natural gas pipelines in furtherance of the public interest. As such, the powers must be interpreted to provide the Board with the necessary tools to fulfill its objectives. IGPC's Application and the relief sought are consistent with these necessary powers.

This letter is not intended as an exhaustive legal argument regarding the Board's jurisdiction, but is intended to provide a summary of the grounds supporting the relief sought. Given the unique nature of the current situation, IGPC requests that the Board consider scheduling a settlement/mediation conference between NRG and IGPC, conducted by a Board member other than a member involved in the hearing of the current proceeding.

If there are any further clarifications required at this time, please contact the undersigned.

Yours truly,

AIRD & BERLIS LLP



Dennis M. O'Leary / Scott Stoll

Attachment

cc Natural Resource Gas Limited
cc Intervenors in EB-2010-0018

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