



EB-2012-0406
EB-2013-0081

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 Integrated Grain Processors Co-operative Inc., pursuant to section 42(3) of the Ontario Energy Board Act, 1998 (the "Act"), for an order requiring Natural Resource Gas Limited to provide gas distribution service;

AND IN THE MATTER OF a review of the capital contribution costs paid by Integrated Grain Processors Co-operative Inc. to Natural Resource Gas Limited pursuant to Sections 19 and 36 of the Act.

**DECISION ON MOTION FILED BY
INTEGRATED GRAIN PROCESSORS CO-OPERATIVE INC.
AND PROCEDURAL ORDER NO. 4
August 29, 2013**

On June 11, 2013 pursuant to Procedural Order No. 2, Board Staff filed interrogatories for NRG. On June 12, 2013, Integrated Grain Processors Co-operative Inc. ("IGPC") filed interrogatories for NRG. On June 28, 2013, NRG filed responses to these interrogatories.

On July 12, 2013, IGPC filed a motion pursuant to Rule 29 of the Board's Rules of Practice and Procedure requesting the Board to require NRG to provide full and adequate responses to certain of the interrogatories filed by IGPC and Board Staff. IGPC further requested that the motion be heard orally.

The interrogatories that are the subject of the motion, as listed in IGPC's revised Notice of Motion dated July 22, 2013, are the following:

IGPC interrogatories:

Interrogatory ("IR") # 1 – 1 (d), 2(a) and (d) and 3 (c)

IR # 3 – 1 through 9

IR # 4

IR # 6 – a, b, d and f

IR # 8 – a to f

IR # 10 – d and e

IR # 11 – d

IR # 12 – b, h and i

IR # 13 – a, b, e, g and h

IR # 15 – a to g

IR # 16 – a, b and e

Board staff interrogatories:

IR # 2 – b, c, d, e and f

The Board granted IGPC's request for an oral hearing and the motion was heard orally on July 29, 2013.

IGPC argued that without the information being sought in the motion, the Board would not be in a position to determine issues on the issues list for the proceeding.

Relevant Principles

NRG argued that the Board in making its determination should consider the factors outlined in Rule 29.2 of the Ontario Rules of Civil Procedure, namely whether the time required to produce the responses would be unreasonable, whether the expense required would be unjustified, whether producing the documents would cause the party undue prejudice, whether requiring further answers or production would unduly interfere with the orderly progress of the case and whether the information or documents are already available to the opposing party. NRG provided a reference to a Board case and a case of the Federal Court of Appeal¹ in support of its position. IGPC agreed that the factors put forward by NRG in this regard were the correct factors to consider.

¹ Decision and Order on Notice of Intention to make an Order for Compliance and an Administrative Penalty against Summit Energy Management Inc., Ontario Energy Board, April 2, 2012.

NRG further argued that it should not be responsible for producing any information that IGPC already possesses and that some of the information being requested was in this category.

The Board will set out below its determination on each of the interrogatories that is the subject of IGPC's motion.

In making its determination, the Board has been guided by Rules 28 and 29 of the Board's Rules of Practice and Procedure.

Rule 28.01 provides that the purpose of interrogatories is to clarify evidence, simplify the issues, permit a full understanding of the matters to be considered, and expedite the proceeding.

Rule 29.01 requires "a full and adequate response to each interrogatory". Rule 29.02 contemplates a refusal to respond in circumstances where the interrogatory is not relevant or the requested information cannot be provided with reasonable effort. The Board considers that the principles embodied in Rules 28 and 29 are broadly consistent with the factors in the Ontario Rules of Civil Procedure cited by NRG.

Interrogatories 1 – 1(d) and 3(c)

Interrogatories 1(d) and 3(c) sought the salary of the general manager of NRG and Mr. Graat, an employee of NRG, for 2012. IGPC argued that it required the salary of NRG's employees to determine if the invoices sent to IGPC for NRG services related to IGPC's planned expansion were based on hourly rates or based upon a Board approved tariff structure. IGPC argued that if NRG billed excessive amounts for its participation, this could amount to a denial of service. In reply, NRG argued that this interrogatory was submitted under Issue #1 in the proceeding (Is an Order of the Board requiring NRG to provide gas distribution services and gas sales to IGPC to meet its facility expansion and upgrading plans necessary and appropriate?), but was irrelevant to this issue.

Board Findings

The Board agrees with NRG. This interrogatory was submitted under Issue #1 and the Board does not consider that it has sufficient relevance to this issue. The Board notes that although IGPC in its application requested the Board to declare null and void the invoices sent by NRG to IGPC in relation to IGPC's proposed expansion, the Board did not include the invoices as a separate issue in this proceeding. Accordingly, the Board does not require NRG to respond to these interrogatories.

Interrogatories 1 – 2(a) and (d)

These interrogatories sought confirmation of certain aspects of the role of Ayerswood Development, a company related to NRG, in relation to IGPC. NRG confirmed at the hearing that Ayerswood is not involved in NRG work in relation to IGPC. Accordingly, IGPC withdrew this interrogatory from its motion.

Interrogatories 3 and 4

Interrogatories 3 and 4 referred to the two invoices sent by NRG to IGPC in August 2012 with respect to IGPC's request for information on expansion. The interrogatories requested information on the hourly charges and persons responsible for preparing the invoices. The submissions of the parties were along the same lines as outlined above concerning Interrogatories 1 – 1(d) and 3(c).

Board Findings

For the same reasons as outlined for Interrogatories 1 – 1(d) and 3(c), the Board does not require NRG to respond to these interrogatories.

Interrogatories 6 (a), (b), (d) and (f)

Interrogatories 6(a), (b) and (d) relate to the preliminary cost estimate provided to IGPC for the capital cost of the IGPC pipeline. IGPC sought further details on the preliminary cost estimate and a detailed breakdown of this estimate. IGPC expressed concern that the estimate increased considerably within a couple of weeks, from \$6.5 million to \$9.1 million. NRG argued that this information was already available to IGPC and therefore NRG should not be required to provide it. NRG further submitted that providing preliminary cost estimates was irrelevant as it preceded the Pipeline Cost Recovery Agreement ("PCRA") entered into between NRG and IGPC in which the capital costs were agreed to.

IGPC withdrew its request related to interrogatory 6(f) at the oral hearing and indicated that it would deal with the issue in argument.

Board Findings

The Board does not require NRG to provide the information in interrogatories 6 (a), (b) and (d). IGPC already possesses the relevant information. The Board sees no value in this proceeding in directing NRG to provide further breakdown of the preliminary estimate, given that IGPC agreed to an amount of capital costs in the PCRA.

Interrogatories 8 – (a) to (f)

This interrogatory deals with certain events in the Leave to Construct Application EB-2006-0243 relating to NRG 's refusal to sign the Bundled T-Service Agreement and the Assignment Agreement. The questions relate to the circumstances of an emergency motion filed with the Board by IGPC to deal with NRG's refusal to sign these documents. IGPC submits that legal costs relating to this motion have been claimed as part of the capital cost of the pipeline.

Board Findings

This interrogatory is filed under Issue 2.1, which asks what amount should appropriately be included with respect to legal costs in determining the capital cost of the IGPC pipeline facilities.

Many parts of this interrogatory question the events surrounding the refusal of NRG to sign the agreements, an event that should have been dealt with previously. It would be inappropriate to revisit that issue in this proceeding. The Board therefore does not require NRG to provide the information requested in these interrogatories, with the exception of 8(d) and (f), which may assist in the Board's understanding of the costs included in the capital contribution costs. The Board therefore requires NRG to file responses to issues 8(d) and 8(f).

Interrogatories 10 (d) and (e)

Interrogatories 10(d) and (e) refer to amounts budgeted by NRG for contingencies. At the hearing IGPC stated that it was withdrawing Interrogatory 10(e) and would address the issue in argument as appropriate. Interrogatory 10(d) asks what proportion of the amount budgeted but not spent by NRG for contingencies was closed to rate base.

IGPC submitted that NRG had included an amount of \$132,000 for contingencies in rate base, and that this amount is in dispute in this proceeding. NRG argued that the amount closed to rate base had already been determined in the EB-2010-0018 proceeding and cannot be re-litigated. The amount of contingency that closed to rate base was accordingly, in NRG's view, irrelevant.

Board Findings

Issue 2.2 in this proceeding concerns specifically what amount should appropriately be included for contingency costs in determining the capital cost of the pipeline facilities. Accordingly, the Board believes that it would be assisted by knowing if any unspent contingency amount was closed to NRG's rate base and requires NRG to provide a full response to interrogatory 10(d).

Interrogatory 11(d)

Interrogatory 11(d) seeks information on Mr. Graat's salary or remuneration as an NRG employee to help understand any remuneration to Mr. Graat included in the pipeline costs.

NRG stated that Mr. Graat was not an employee of NRG nor was there any consulting or services agreement between NRG and Mr. Graat during the period corresponding to the construction of the IGPC pipeline and that any information for prior to that period was irrelevant to the issues in this proceeding. NRG stated that the capital cost claimed for the pipeline facility did not include any costs related to such payments made to Mr. Graat.

IGPC in reply submitted that if Mr. Graat did not receive any payment as an employee or consultant, it was possible that a payment in some other form such as a dividend could have been paid to Mr. Graat.

Board Findings

Although NRG has confirmed that no employment or contract costs paid to Mr. Graat are included in the capital costs, the Board wishes to be clear on whether payment in some other form has been included. The Board requires NRG to provide information on any payments of any kind made to Mr. Graat that were included in the capital cost of the pipeline. The Board notes that it is requiring NRG to provide this information rather than the specific information requested in 11(d).

Interrogatories 12 (b), (h) and (i)

Interrogatories 12 (b), (h) and (i) relate to the costs allocated to IGPC with respect to Mr. Bristoll's time. IGPC seeks information on the allocation of time spent by Mr. Bristoll and his remuneration.

NRG submitted that it is not Board practice to order individual salary information. NRG submitted that IGPC already had sufficient information from NRG's indication that the rate of \$295 per hour claimed for Mr. Bristoll's time had been arrived at with reference to rates for senior chartered accountants in the London area.

NRG submitted that the question in interrogatory 12(h) concerning whether the charges related to Mr. Bristoll were consistent with the Uniform System of Accounts of the Board should be a matter for argument rather than for an interrogatory.

IGPC submitted that the agreement between IGPC and NRC concerning capital costs of the pipeline was based on the recovery of actual costs. IGPC submitted that the Board was unable to determine the actual costs of constructing the pipeline if the cost of a significant component was not being made available.

Board Findings

The Board's practice is to order parties to provide salary information in proceedings where it considers this appropriate in the context of the circumstances of the particular proceeding. In this proceeding, the actual costs claimed for Mr. Bristoll are a significant portion of the amounts in dispute between the two parties. The Board does not accept NRG's argument that it has already provided adequate information. The Board needs to determine the actual capital costs of the pipeline. It is not appropriate for a utility to provide a proxy rate when actual costs are available.

The Board requires NRG to respond to interrogatories 12(b) and (i). However in doing so the Board does not require NRG to provide supporting information such as a T4 or pay stubs. The Board will treat the responses as confidential.

The Board agrees that interrogatory 12 (h), which is similar to interrogatory 10(e), would more appropriately be addressed in argument. Accordingly the Board does not require NRG to respond to interrogatory 12(h).

Interrogatory 13

Interrogatory 13 deals with interest charged during construction of the pipeline. IGPC sought additional information on the interest rates charged, timeframe over which interest was charged, the basis on which interest was calculated and actual interest paid by NRG.

NRG submitted that IGPC already had all the information that was appropriate and the work that would be entailed to respond to the interrogatory was too onerous. NRG submitted that it was being asked to bear the cost and time required to review documents that IGPC already possesses. NRG submitted that it had provided a detailed interest rate schedule in response to an undertaking² in a rates hearing.

However, NRG agreed to respond to interrogatory 13(e) that deals with interest charged on the purchase of steel pipe.

IGPC submitted that although it did have information concerning interest, including copies of the relevant invoices for which interest was being charged, it was trying to understand the details of the number of days for which interest was being charged and actual interest paid by NRG.

Board Findings

The Board agrees with NRG that IGPC already possesses sufficient information on this issue and that IPGC is able to analyze the information it already has if desired. Accordingly, the Board requires NRG to provide a response to interrogatory 13(e) but not to any other parts of interrogatory 13.

Interrogatory 15

Interrogatory 15 seeks further information on two letters of credit provided by IGPC to NRG, namely, the customer letter of credit and delivery letter of credit, which comprise the financial assurance provided by IPGC to NRC as referred to in Issue 4.

IGPC submitted that the delivery letter of credit had not been reduced over the years despite the obligations set out in the PCRA.

In reply, NRG submitted that the delivery letter of credit had not been reduced because the capital cost had still not been determined. NRG submitted that once the capital costs were determined in this proceeding, it would adjust the letter of credit according to the terms set out in the PCRA.

² Undertaking Response J1.5, EB-2010-0018

Board Findings

The information requested in Interrogatory #15 is information concerning the history of the relationship between the parties concerning the letters of credit and information concerning the position of NRG relating to the letters of credit. To the extent that it concerns the history between the parties, IGPC should already have this information. To the extent that it concerns NRG's position, this is subject matter appropriate for argument rather than for interrogatories.

Accordingly, the Board does not require NRG to respond to this interrogatory.

Interrogatory 16 (a), (b) and (e)

At the hearing, IGPC withdrew interrogatory 16(b).

In interrogatory 16(a), IGPC requested further information about any future or unspent costs that were included in the capital cost of the pipeline.

In Interrogatory 16(e), IGPC requested the updated Excel spreadsheet that was used to determine the aid to construct calculation of the pipeline. In the rates proceeding (EB-2010-0018), NRG had indicated that the original Excel model had certain anomalies and a revised Excel model was used to calculate the final aid to construct amount. IGPC wanted the updated live Excel model.

With respect to interrogatory 16(a), NRG submitted that it had already provided a detailed breakdown of the pipeline's capital costs and confirmed that the contingency costs included did reflect future costs. NRG further submitted that IGPC already has the original version of the live Excel model referred to in interrogatory 16(e) and IGPC could make the necessary revisions in the original version. NRG further argued that it owned the intellectual property on the model and IGPC was not entitled to receive it.

IGPC argued that it needed the model to run different scenarios and understand the impact if certain costs were disallowed. IGPC submitted that without the model it would not be able to determine its position on the amount of the aid to construct. IGPC further argued that the request was not onerous.

Board Findings

NRG has already provided a detailed breakdown of the capital costs of the IGPC pipeline. If IGPC disagrees with a claim for any costs that have not been incurred prior to the commissioning of the pipeline, then such matters should be pursued in argument. Accordingly, the Board does not require NRG to respond to interrogatory 16(a).

Regarding interrogatory 16(e) the request of IGPC is not unusual and utilities have provided their live calculation models in a number of past proceedings before the Board. The Board requires NRG to respond fully to 16(e). This response is to include the updated live Excel model.

Board Staff Interrogatories 2 (b) to (f)

NRG submitted that IGPC could not properly make a motion with respect to Board Staff interrogatories, because they were not IGPC interrogatories. Board Staff submitted that the main question was whether the Board would be assisted by responses to the interrogatories.

Board Staff submitted that interrogatories 2(b) and (d) were not adequately responded to. The questions sought information on how corporate costs from NRG's parent company were allocated to NRG including the president's salary and the percentage of Mr. Bristoll's salary included in distribution rates.

In reply, NRG submitted that the information requested was not relevant in determining whether the capital cost of the IGPC pipeline was reasonable.

Board Findings

The Board believes that there is value in knowing how costs incurred by its related companies were allocated to NRG. This information will allow the Board to determine the reasonableness of the cost allocations included in the capital costs of the pipeline.

The Board orders NRG to produce a full and adequate response to Board Staff interrogatory (b), but to include information for all related companies, rather than confining it to any parent company. With respect to interrogatory (d), the Board requires NRG to provide the president's salary information for the years 2006-2009 corresponding to the construction of the IGPC pipeline rather than for the years requested.

At the oral hearing, NRG requested costs incurred as a result of the motion. The Board will deal with any cost related issues at the end of the proceeding.

THE BOARD ORDERS THAT:

1. NRG shall file complete and adequate responses to the interrogatories as ordered in this Decision with the Board and deliver them to the parties on or before **Wednesday, September 11, 2013**.
2. A Settlement Conference shall be convened on **Wednesday, September 18, 2013** at 9:30 a.m. with the objective of reaching a settlement among the parties on the issues. The Settlement Conference will be held in the Board's hearing room at 2300 Yonge Street, 25th Floor, Toronto.
3. Any Settlement Proposal arising from the Settlement Conference shall be filed with the Board no later than **Tuesday, October 1st, 2013**.

DATED at Toronto, August 29, 2013

ONTARIO ENERGY BOARD

Original Signed By

Kirsten Walli
Board Secretary