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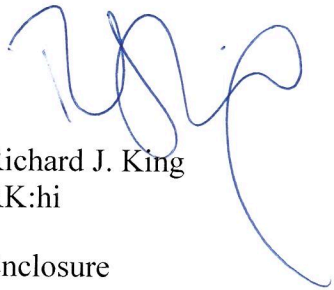
Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
2300 Yonge Street
27th Floor, P.O. Box 2319
Toronto, ON M4P 1E4

Dear Ms. Walli:

Natural Resource Gas Limited
Interrogatory Responses per Board Decision of August 29, 2013
OEB File No. EB-2012-0406/EB-2013-0081

Pursuant to a request from Board staff, I am refileing the information request responses from Natural Resource Gas Limited with the confidential salary information removed in the above-noted matter.

Yours very truly,


Richard J. King
RK:hi

Enclosure

NATURAL RESOURCE GAS LIMITED
**RESPONSE TO INTERROGATORIES FROM
BOARD STAFF**

INTERROGATORY #2

Ref.:

Evidence of NRG, June 3, 2013, Page 13 of 22

Questions:

b) Please describe how costs incurred by the parent company are allocated to NRG and to the regulated or unregulated companies in the corporate organization, including NRG's share of costs such as the president's salary and other corporate overheads.

d) Please provide the legal and regulatory costs that underpin NRG's distribution rates from 2008-2012. Please also provide the proportion of the president's salary included into distribution rates for the same period.

RESPONSE:

(b) NRG has no parent company.

NRG pays a Management Fee to Ayerswood Development Corporation (as outlined in Exhibit D1, Tab 3, Schedule 4 of NRG's last rates proceeding, EB-2010-0018). Ayerswood is technically not an affiliate of NRG (again, as outlined in NRG's last rates proceeding, at Exhibit A1, Tab 3, Schedule 1.

(d) The following legal and regulatory costs underpin NRG's distribution rates for the period from 2008 to 2012. The President's salary is embedded in the Salary and Wage amount. Please also see NRG's IRR to IGPC #12(b) and (i):

	2008	2009	2010	2011	2012
Legal	\$30,000	\$30,000	\$30,000	\$54,432	\$54,432
Regulatory	\$192,700	\$192,700	\$192,700	\$90,000	\$112,800

Of course, the OM&A costs in any rate case should be reviewed, and are managed, on an "envelope" basis. NRG's most recent rate case is a key example, where actual legal and regulatory costs far outstripped the amount currently included in NRG's rates. On that basis, the Board should note that from 2008 through 2010 there was a total deficiency of \$198,000 (please refer to EB-2010-0018, Exhibit F1, Tab 1, Schedule 1 (updated)). In other words, NRG did not over-recover any OM&A expenses through rates even after capitalization of the President's salary.

NATURAL RESOURCE GAS LIMITED

RESPONSES TO INTERROGATORIES FROM
INTEGRATED GRAIN PROCESSORS CO-OPERATIVE INC.

INTERROGATORY #8

Issue 2.1

Legal costs

Preamble:

IGPC wishes to understand the circumstances that lead to the June 2007 motion.

Reference: NRG Evidence, June 3, 2013, paras. 73-90

Question:

(d) Why did NRG refuse to sign the Bundled T Service Receipt Agreement? Has NRG suffered any prejudice or harm by the eventual execution of this agreement?

(f) Why did NRG refuse to sign the Consent and Acknowledgement Agreement?

RESPONSE:

This was explained in NRG's factum appealing the penalty levied on NRG for failing to sign the agreements. Paragraphs 14 through 47 of the factum is attached hereto. NRG did not sign the agreements because it believed that signing the agreements was not in the best interests of NRG or its ratepayers. NRG's obligation is to provide distribution service to any new customer, and to that end, NRG signed two agreements – an agreement to build the pipeline, and a gas delivery agreement. IGPC then demanded that NRG sign two further agreements **for the benefit of IGPC's lenders** (the Bundled-T Service Receipt Agreement and the Consent and Acknowledgement Agreement). NRG's obligation to serve did not (and does not) extend to signing contracts **in order to satisfy requirements that a customer's lenders have** with respect to financing an industrial facility. NRG has not signed agreements for any other customers in order to satisfy the credit requirements imposed by a customer's lenders. Yet OEB Panel member Kaiser, against the advice of their counsel, forced NRG to do just that (see transcript excerpts of Ms. Sebalj at para. 38).

As NRG has stated, at the time IGPC (one new customer) was going to double the throughput of the company – a very unique situation – and NRG did not believe it had a sufficient understanding of the financial viability of IGPC or the consequences (e.g., decommissioning) in the event that IGPC discontinued as a business venture. NRG now believes that these concerns have been shown to be true – IGPC's annual government grants appear to be at an end as of 2016 and IGPC has yet to advise NRG or this Board otherwise.

Despite these difficulties, and the aid-to-construct not being received on schedule, NRG constructed the pipeline to supply gas to IGPC on time and under budget.

At issue in this proceeding is whether IGPC should pay for the costs associated with this proceeding. In addition to what was noted above (the the OEB had no jurisdiction to order a utility to sign documentation to satisfy a customer's lender), the other key point is that the "emergency" motion brought by IGPC was in fact not an emergency at all. The OEB Panel, as noted in the transcripts excerpts in the attached factum, pressed IGPC to confirm that the ethanol plant deal would fall through if the agreements were not executed by July 5, 2007 (see paras. 26 and 28). As is now known, the agreements were not executed by NRG by July 5, 2007 (because NRG did not believe it was in the interests of NRG and IGPC, and NRG did not believe that the obligation to serve extended to signing agreements to satisfy a customer's lender that related to non-utility assets (i.e., an industrial ethanol plant)). Moreover, funding was not jeopardized. For both reasons, this emergency motion should never have happened.

**DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE**

BETWEEN:

NATURAL RESOURCE GAS LIMITED

Appellant

and

ONTARIO ENERGY BOARD and
INTEGRATED GRAIN PROCESSORS COOPERATIVE INC.

Respondents

FACTUM OF NATURAL RESOURCE GAS LIMITED

PART I - OVERVIEW

1. The Appellant, Natural Resource Gas Limited ("NRG"), appeals from the decision of the Respondent Ontario Energy Board ("OEB") on the application brought by the Applicant and Respondent Integrated Grain Processors Co-operative Inc. ("IGPC") pursuant to which the OEB:
 - (a) ordered NRG to execute the Assignment Agreement and the Bundled T-Service Agreement; and
 - (b) ordered NRG to pay an administrative penalty of \$20,000, for each and every day until NRG executes the Assignment Agreement and the Bundled T-Service Agreement (as defined herein).
2. NRG submits that the OEB erred in law and exceeded its jurisdiction by refusing to permit NRG any opportunity to:
 - (i) consider its position;
 - (ii) instruct counsel;
 - (iii) prepare responding evidence;
 - (iv) conduct cross-examinations; and
 - (v) present submissions concerning the abridgement of notice requirements and times for preparing a response to the motion.

between NRG and IGPC. On January 31, 2007, the OEB was provided with copies of the Gas Delivery Contract and the Pipeline Cost Recovery Agreement.

Reference: *Kovnats Affidavit*, para. 6, Appeal Record, Tab 10-2, p. 182

13. By Decision and Order dated February 2, 2007, the OEB determined that (a) the terms and conditions of the Gas Delivery Contract and the Pipeline Cost Recovery Agreement adequately protected the interests of NRG and its ratepayers, and (b) the Proposed Pipeline was in the public interest. The OEB granted NRG leave to construct the Proposed Pipeline.

Reference: *Decision and Order of OEB* dated February 2, 2007, Appeal Record, Tab 5, p. 29

The Assignment Agreement and the Bundled T-Service Agreement

14. The financing arrangements entered into by IGPC required that IGPC obtain from NRG and deliver to IGPC's lenders two agreements. The first is the Consent and Acknowledgement Agreement (the "Assignment Agreement") between NRG, IGPC Ethanol Inc., IGPC and Société Générale (Canada Branch).

15. The proposed Assignment Agreement provided that NRG irrevocably consents to, and accepts notice of and acknowledges, the assignment and transfer of all of IGPC's right, title and interest in and to the Gas Delivery Contract and the Pipeline Cost Recovery Agreement.

Reference: *Assignment Agreement*, Appeal Record, Tab 15, p. 341

16. The second agreement is the Bundled T-Service Receipt Contract between NRG and IGPC Ethanol Inc. (the "Bundled T-Service Agreement"). The proposed Bundled T-Service Agreement addressed the upstream transportation arrangement and balancing services for the natural gas required by IGPC's ethanol facility.

Reference: *Bundled T-Service Agreement*, Appeal Record, Tab 14, p. 324

17. Although there were discussions between the solicitors for NRG and IGPC respectively concerning the proposed form of each of the Assignment Agreement and the Bundled T-Service Agreement, NRG eventually determined that it was not in the best interests of NRG to sign the Assignment Agreement or the Bundled T-Service Agreement.

Reference: *Kovnats Affidavit*, para. 24, Appeal Record, Tab 10-2, p. 186

18. On June 28, 2007, NRG advised IGPC that it would not execute the Assignment Agreement or the Bundled T-Service Agreement.

Reference: *Kovnats Affidavit*, para. 24, Appeal Record, Tab 10-2, p. 186

The IGPC Motion

19. Late in the afternoon of June 28, 2007, IGPC filed a motion with the OEB. The motion record was served on Mark Bristoll, Chief Executive Officer of NRG, at approximately 7:15 in the evening of June 28, by way of service at his personal residence in London, Ontario.

Reference: *Affidavit of Service of David Mark Wood*, sworn June 29, 2007, Appeal Record, Tab 18, p. 490

20. In the afternoon or 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 purportedly served on NRG by way of delivery to Patrick Moran of Ogilvy Renault, solicitors for NRG.

Reference: *OEB Emergency Notice of Hearing*, Appeal Record, Tab 7, p. 43

21. The Emergency Notice of Hearing was issued by the OEB without any notice to NRG or without having any response from NRG, and without allowing NRG any opportunity to respond to IGPC's request that the motion be heard on an urgent basis and without compliance with the notice requirements set out in the OEB's *Rules of Practice and Procedure*.

22. At approximately 7:00 p.m. on June 28, NRG retained counsel to attend at the hearing the next day and seek a brief adjournment to allow NRG time to respond to the motion.

23. 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.

24. 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;
- (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.

Reference: *Transcript of OEB Proceedings*, pp. 2-4, Appeal Record, Tab 8, p. 53-55

25. On the motion, IGPC relied on the IGPC motion record which was not served on NRG until 7:15 pm the previous evening. IGPC also relied on an additional affidavit, the affidavit of Heather Adams sworn June 28, 2007, which was never served on NRG.

Reference: *Transcript of OEB Proceedings*, pp. 7-8, Appeal Record, Tab 8, p. 58-59

26. Counsel for IGPC referred to the Kovnats Affidavit. 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 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 be 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]

Reference: *Transcript of OEB Proceedings*, pp. 9-12 and 14, Appeal Record, Tab 8, p. 60-63 and 65

27. Subsequent events have proven that the evidence of Mr. Kovnats was not true.

28. 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 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 -

Reference: *Transcript of OEB Proceedings*, pp. 10-11, Appeal Record, Tab 8, p. 61-62

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

30. The OEB also inquired into the impact on NRG of the order sought by IGPC. IGPC referred to a reference in the Kovnats Affidavit that refers to an agreement that was not in the IGPC motion record. Upon discovering that the key agreements relating to issue to be determined were not included in the IGPC motion record, the OEB heard lengthy unsworn evidence from Mr. Kovnats, who was appearing apparently both as witness and counsel. Mr. Kovnats referred to four agreements, none of which were included in the motion record. When counsel for NRG objected that these agreements were not in the motion record, the OEB marked the agreements as exhibits on the motion.

MR. KOVNATS: Yes, sir. Mr. Chairman there are, in essence, four material agreements between NRG and IGPC, and for these purposes IGPC includes its wholly-owned subsidiary.

One is an agreement for the design, build and operation of a pipeline, which was signed before the previous hearing, which does require IGPC to pay cash and to put up a letter of credit, all of which it is prepared to do.

There was a second agreement dealing with the supply of gas, which was signed before the hearing that was held with respect to this matter and was signed last January.

We're not here discussing those two agreements.

There are two remaining agreements that we wish to have considered and which have been reviewed extensively by McCarthy on behalf of the lenders, ourselves, on behalf of IGPC, and Ogilvy Renault on behalf of NRG, all of which agreements were -- both agreements were satisfactory to all counsel involved and resolved this week, in which Ogilvy Renault has recommended NRG sign, so they have advised us.

The purpose of these two agreements - we'll call one the bundled T agreement and the other we will call the consent and assignment agreement. The consent and assignment agreement is an agreement that is designed for the benefit of the secured lender so in the event there is a default by IGPC with the secured lending group, who will be advancing approximately \$100 million, the lending group can then step into the shoes of IGPC and take over the agreements relating to the pipeline, the supply of gas, and the bundled T agreement.

There is an acknowledgement in the agreement, and the major purpose of that agreement is to get an acknowledgement from NRG to the lending syndicate that in the event of that financial calamity for IGPC, that the bank can then step in and have a plant that will work and they will have good security.

MR. KAISER: So just stopping you there, sir. That doesn't affect NRG in any sense.

MR. KOVNATS: That is correct.

MR. KAISER: Somebody else just walks into their shoes and continues operating the plant.

MR. KOVNATS: That is correct. The second agreement is the bundled T agreement.

On the completion of this facility, IGPC will be, I think, the largest single customer NRG has in its area, buying a significant amount of natural gas to run its facility. It is a material concern to everybody that NRG has the source and pricing and the flexibility on pricing and source, to be able to allow IGPC to manage its costs of input -- its input production costs.

There have been many conversations with other gas suppliers for us to be able to buy gas from others, and use it through the pipeline, creating a handling charge to NRG for this. That requires sourcing, pricing, delivery, flow measurement and flow allocation. And I am not an energy lawyer, so forgive me, I am going way beyond where I need to go.

MR. KAISER: You're doing very well.

MR. KOVNATS: But that bundled T agreement manages that flexibility for the supply of natural gas through the facility.

MR. KAISER: So do I understand that that agreement, the bundled T agreement allows you or the lenders, I guess --

MR. KOVNATS: No. IGPC. It's one of the --

MR. KAISER: IGPC to go and source their gas elsewhere?

MR. KOVNATS: Yes.

MR. KAISER: And have NRG merely distribute it as opposed to purchasing your gas from NRG?

MR. KOVNATS: That is correct.

...

MR. THACKER: I would like to say one thing, and I don't want to interrupt, but I think I have to at some point. These agreements, which clearly are at the focus of all of this and the rationale for my client's choosing not to sign them at the same time, aren't in the record and I haven't read them, and that's a fundamental flaw.

MR. KAISER: I agree. We're going to get them in the record. We haven't read them either. We'll come to that. [emphasis added]

Reference: *Transcript of OEB Proceedings*, pp. 21-23 and 27-28, Appeal Record, Tab 8, p. 72-74 and 78-79

31. Counsel for NRG also objected that although there were lengthy submissions about the terms of the financing and the terms of the escrow, none of the documents relating to the escrow arrangements were in the IGPC motion record. The OEB agreed, but then directed that those documents would also be marked as exhibits on the motion.

MR. THACKER: One other thing I might ask for this, although there is discussion about the terms of financing and the terms of the escrow, none of those documents are there, either.

MR. KAISER: I understand. We're going to cure that right now.

MR. THACKER: So apart from the other two agreements...

MR. KAISER: We have the two agreements which are outstanding that you want signed.

MR. O'LEARY: Yes, sir. And I have just -- my understanding is that -- we do have copies to share with you -- is that there may be a need or a request for confidential treatment of the documents.

MR. KAISER: We will deal with that. Anything else you need, Mr. Thacker?

Reference: *Transcript of OEB Proceedings*, pp. 30-31, Appeal Record, Tab 8, p. 81-82

32. The OEB then adjourned for a 30-minute break.

Reference: *Transcript of OEB Proceedings*, p. 31, Appeal Record, Tab 8, p. 82

33. Upon resuming, counsel for NRG again objected that, although he had been given some of the documents that had been added to the record, he did not have all of the documents. Some of the documents he had been provided with were incomplete. Eventually, after numerous requests and objections, counsel for NRG was provided with a complete set of the documents that the OEB had decided to mark as exhibits on the motion.

Reference: *Transcript of OEB Proceedings*, pp. 33-42, Appeal Record, Tab 8, p. 84-93

34. Counsel for NRG again requested a short adjournment to allow him time to read the documents that had been newly added to the record, and to discuss those documents with NRG and to obtain instructions.

MR. THACKER: They just became part of the evidentiary record about five or ten minutes ago so I have to object. My client -- I have not had a chance to speak to them about the question you are raising, and I'm not in a position to answer it; certainly haven't had the chance to take instructions or review it with my client and discuss it with him.

So a procedural matter I have to object.

You asked the question of my friends, who were adverse to me, whether or not these detailed agreements do anything different than the one-line provision in the agreements that this Board approved. And it would be an error, in my submission, to take their word that they're identical, when I have not had a chance to read them or discuss that issue with my client.

So I'm not really able to answer your question because of the time constraints, but I appreciate your asking me.

They are different. There are many pages and words are different than the one liner. So it might well be that you have or that -- it might well be that the agreements you have approved contain the relief that they're seeking, but the many pages of the other agreements are different. They have more words in them than the minimum.

To take their word there is nothing different about the many, many words seems implausible and procedurally unfair.

Reference: *Transcript of OEB Proceedings*, pp. 42-43, Appeal Record, Tab 8, p. 93-94

35. The OEB refused NRG's request for an adjournment and proceeded to hear the motion.

Reference: *Transcript of OEB Proceedings*, pp. 42-44, Appeal Record, Tab 8, p. 93-95

36. Counsel for NRG again objected to the motion proceeding, on the basis that:

- (a) there was no evidence in the record to demonstrate urgency; and

- (b) proceeding on an urgent basis had the effect of denying NRG any opportunity to review the evidence against it, consider its position and instruct counsel, assemble and present responding evidence; conduct cross-examinations, and present its case fully to the OEB.

MR. THACKER: Well, as I said, the bulk of the documents that form the evidentiary foundation for this hearing were admitted into the record in the middle of the hearing. They were not served. They're not sworn. We have not had an opportunity to read them. We have not had an opportunity to review them with our clients. We have not had an opportunity to determine whether we wish to cross-examine and to conduct cross-examinations, and we have not had any opportunity to prepare a responding evidentiary record.

The decision is to proceed with this hearing the absence of my client, without hearing from my client.

And so we are here in a situation where the evidentiary foundation for the ruling that you are being asked to make was introduced in the middle of the hearing, and I have not had any opportunity, other than the lunch break, to try to explain things with my client.

So we are seeking an adjournment on the basis that we have not had adequate time. There is no basis to abbreviate the time requirements that are otherwise set out in the Act.

I am happy to try to -- to answer the first question, which was is there any difference between the two provisions in the agreements that had been approved, and the detailed agreements that this court is -- or that my friends are asking you to order an individual on behalf of the corporation to execute, there is obviously a difference. One is two lines. One is about -- well, many, many pages.

For you to rely simply on their assurance that they're exactly the same thing, they're clearly not, because if they were exactly the same thing, they would be relying on the agreements that have already been signed and already approved. So they're different things.

With respect to the bundled T agreement, our submission is that this is not a service request. There is not a question here of whether or not my client will supply or provide service. The question is whether or not this Board should make an order compelling an individual to sign a piece of paper binding a corporation that is governed by a board of directors.

My submission is that you do not have the jurisdiction to order a corporation to sign an agreement. You may have other remedies that you can impose against a distributor or a regulated entity, but to make an order purporting to compel an individual to sign a contract, where the board of directors of the corporation has chosen not to sign, would be an error of law, in my submission, and in excess of your jurisdiction.

So I object to the hearing proceeding on the basis that there's been a denial of procedural fairness and a denial of natural justice with respect to the time requirements. The evidentiary record was inadequate. Clearly that was recognized and it was coopered up in the middle of the hearing. My client hasn't had a chance to read them and to consider them and to respond.

With respect to the bundled T agreement, the remedy you are being asked to make -- and I am not sure if you're now proposing to deal with the draft order or if you have some other remedy that you are considering, but to order an individual to sign a document on behalf of a corporation that binds the corporation would be an error and would be a significant error in my submission. There is no jurisdiction under the Ontario Energy Act that would enable this Board to make that order.

MR. KAISER: Well, Mr. Thacker, you would agree the Board has jurisdiction to order your client to provide service?

MR. THACKER: That is clear, yes. To characterize the signing of a document that has contractual obligations as the provision of service is strange, in my submission, not correct and an error.

MR. KAISER: Well, it is generally the case that any time the utility provides service to industrial customers, they enter into a contract with them and we generally approve those contracts. And that's what is before us as J1.5.

MR. THACKER: I can understand the concept of approving a contract that has been entered into by the parties. It is a very different thing to order a party to enter into a contract it doesn't wish to enter into.

MR. KAISER: On your basis, the utility could choose when to provide service or when not to provide service, regardless of the Board's decision, by simply not signing an agreement. Is that your position?

MR. THACKER: No. The position is you could order the entity to provide service. You can't order them to execute a contract.

Reference: *Transcript of OEB Proceedings*, pp. 44-47, Appeal Record, Tab 8, p. 95-98

37. NRG also objected to the motion proceeding on the basis that the OEB does not have jurisdiction to compel a corporation to sign an agreement, where the Board of the Directors of the corporation has decided not to sign the agreement.

Reference: *Transcript of OEB Proceedings*, pp. 44-47, Appeal Record, Tab 8, p. 95-98

38. The OEB then asked its counsel to advise it as to the remedies available to the OEB. Counsel for the OEB, Kristi Sebalj, then provided her legal advice to the OEB.

MR. KAISER: Ms. Sebalj, I wonder if you could help us on a point. Let's suppose we find that the consent being requested of NRG, in the two agreements, is being unreasonably withheld.

MS. SEBALJ: Yes.

MR. KAISER: What is our remedy?

MS. SEBALJ: Well, you are taking me to the crux of some submissions that I am prepared to make to you. But I am not sure that the -- and this Panel knows better than I do what was intended when you referred to these two agreements in your decision of February 2nd, 2007, and that decision was with respect to a Section 90 leave to construct application.

This is a private agreement between the two parties and to the extent that the consent was required by that agreement -- and I'm not necessarily, in my, in Board Staff's opinion in agreement with the parties that that was necessarily required of that agreement - but leaving that aside for a moment, if you were to make that finding, I am not sure that the Panel has the ability to enforce the signing by another party of a private commercial agreement.

MR. KAISER: Well, we have approved an agreement. The agreement, and certainly the decision that we did make on February 2nd was conditioned on those agreements.

MS. SEBALJ: Yes.

MR. KAISER: Albeit we were relying upon those agreements to assure that the other ratepayers would not be impacted adversely was the principal concern in the Board's mind.

MS. SEBALJ: Yes.

MR. KAISER: But nonetheless there was an assignment clause, and the assignment clause, it turns out, may have been necessary to secure the financing, which would have which would have been important.

If the assignment is not given, if the utility simply refuses to execute the assignment, notwithstanding the fact that it would appear that it's reasonable that it be given -- at least on the record we have -- are you saying that we have no remedy and this plant simply goes away?

MS. SEBALJ: The issue that I have is what this Board's jurisdiction is with respect to the plant itself. This Board's jurisdiction was grounded in a Section 90 leave to construct application for a pipeline.

The plant itself is, legally speaking, outside the realm of the Ontario Energy Board's jurisdiction. And to the extent that there was a peripheral requirement in an agreement that we would otherwise want to see to satisfy ourselves that the economic feasibility of the pipeline was satisfactory, I am not sure that this Board now gets involved in a financing transaction for an ethanol plant, because our jurisdiction lies with the pipeline itself.

MR. KAISER: Our concern is to make sure the utility serves this customer. You would agree we have jurisdiction to ensure that service is provided?

MS. SEBALJ: Yes.

MR. KAISER: Gas service is provided.

MS. SEBALJ: Yes.

MR. KAISER: And the utility brought a leave to construct and the Board approved it. The Board's relied upon that.

MS. SEBALJ: Yes.

MR. KAISER: And these parties have relied upon that.

MS. SEBALJ: Yes.

MR. KAISER: And now, for no apparent reason, it is all going up in smoke and you say there is nothing we can do?

MS. SEBALJ: I understand the predicament that the Board is in, because the balance is we don't have a satisfactory understanding of why this deal is going up in smoke.

I don't pretend to understand why NRG has not come to the table to sign a consent, a consent to assignment. But I would mention that you're absolutely correct that Section 42(2) is fairly clear that there is an obligation to serve, but the obligation to serve is with respect to the provision of gas distribution service. And gas distribution service, I don't think, is in question at this hearing.

The financing of an ethanol plant is in question at this hearing. And I am sympathetic to Integrated Grain Processors Co-Operative and the predicament that they're in, and I don't begin to understand why Natural Resources Gas hasn't come to the table.

But having said that, I am legal counsel for the Board and I am working within the parameters of the Board's jurisdiction, and the Board's jurisdiction is fairly limited in these circumstances.

Reference: *Transcript of OEB Proceedings*, pp. 54-57, Appeal Record, Tab 8, p. 105-108

39. When OEB asked IGPC to provide it with the basis of its purported jurisdiction for the orders sought, IGPC submitted that jurisdiction arose from section 42(3) of the *Act*.

Reference: *Transcript of OEB Proceedings*, pp. 58-60, Appeal Record, Tab 8, p. 109-111

40. Counsel by NRG again objected to the relief requested by IGPC on the basis of a lack of jurisdiction.

MR. THACKER: No, we're not hearing entirely different. In this record, there is not one stitch of evidence that my client, NRG, is refusing to provide services, not one piece of evidence. And the reason it is not in the record is there is no evidence. They have not at all refused to provide services.

What NRG is under no obligation to do is sign a contract that Société Générale would like to have because it makes them feel better, and my submission is you have no more jurisdiction to order NRG to sign a document to make NRG - - to make Société Générale feel better than you have jurisdiction over Société -- to order Société Générale to advance the money in the absence of the agreement.

It is a private contract that you are being asked to require a party to sign, and your own counsel is dead right as to what your jurisdiction is and my friend is misdirecting you, and you would be making a serious error. I would urge you to consider what your counsel has told you with respect to your jurisdiction. So that is my first point.

My second point, my friends have failed to give you any legal obligation upon my clients to sign the documents they're asking you to order my client to sign. There is no contractual obligation to sign that particular piece of paper.

It may be that they have an enforceable right to compel my client to comply with the obligations in the two agreements that contain those provisions, but the right place to go is a court, not here, because you don't have the jurisdiction, in my submission, to compel a corporation to enter into a contract. They're in the wrong place, and they're trying to shoehorn the remedy they ought to be seeking from a court from you and they're leading you down the wrong path.

There is no obligation under the Ontario Energy Act for my client to sign contracts. They have an obligation to provide service in certain circumstances. They have never denied it and there is no evidence that they're denying to provide service today.

There is not any order here that requires them to provide service. You are being asked to order them to sign a contract that makes the lenders to the builders of the plant feel better. They're not required to do that under the Ontario Energy Act. My submission is this Board doesn't have jurisdiction to compel them to.

The Board's Counsel's conclusions as to your jurisdiction are correct. My friend, when you asked the question, told you that your jurisdiction came from your inherent jurisdiction. That is not correct. That is just legally wrong. My submission is you don't have any inherent jurisdiction.

You are a creature of statute. You have a mandate and your jurisdiction is prescribed in the statute that creates you. There is no inherent jurisdiction in this Board and he is telling you the wrong thing.

Your counsel is correct as to your jurisdiction.

You have jurisdiction if a distributor is refusing to provide service, but there is no evidence of that here. That is not what is in issue here, and the reason you are being asked to shoehorn this remedy into this provision is that there is no other basis for you to compel a corporation to sign it and this isn't about providing service.

Even if the form of the agreements has been negotiated -- and clearly it was. There is a long record. There is a thin record, but there is evidence of e-mails that drafts were passed back and forth over a period of time. I don't suggest there wasn't.

But that is not the same thing as agreeing to sign. Two parties can negotiate the form of a contract over and over again for many, many months and choose, for economic reasons, not to conclude the deal. That's the essence of an agreement. Until there is a meeting of the minds, until they're ad idem, there isn't a contract. And there is no enforceable obligation to sign a contract.

A contract -- an agreement to agree is not enforceable. There may be an agreement to assign, and that comes from a different place, from contracts that are already signed and already executed, and those should be the subject of litigation, if that is what my friends are seeking.

But they have chosen not to do it. They have got a different kind of proceeding here and they have done it the wrong way, and they're leading you down the wrong path.

They can negotiate proposed financing documents back and forth until they're blue in the face, but my clients, until they choose to accept those terms, are under no obligation to enter into them.

With respect to the compliance order you're being asked to make, there is a number of serious deficiencies in it and you would be making serious error, in my submission, if you made the order. You have no jurisdiction over a trustee, or over anything, under the Ontario Energy Act, and it would be a serious error if you were to do that.

There is no trustee here who has indicated they're willing to act as trustee, and so you can't appoint anybody, anyway. So the order is deficient and has to be changed.

You only have jurisdiction under the provisions you're being urged to employ if there is, in fact, a breach of an enforceable provision, and there isn't one. The only provision you are pointed to, other than some assertion of inherent jurisdiction, which is just dead wrong, is this jurisdiction to compel the provision of service.

There is no indication here that there is a failure or refusal to provide service. So my submission is you don't have any basis on which to compel an individual to sign a piece of paper on behalf of a corporation that isn't properly governed by a board of directors.

You may have other supervisory powers, but what you can do is require someone to provide services, a distributor to provide services. That is not what this proceeding is about. So you can't issue a compliance order, because there is no breach under the enforceable provision and the compliance order isn't seeking to compel an enforceable -- compliance with an enforceable provision. It is seeking to compel an officer of a corporation to sign a piece of paper the corporation doesn't want to enter into.

It is unfortunate, but why is the blame laid at the feet of NRG rather than Société Générale? Why are we not blaming Société Générale for placing this project in jeopardy? Why is it my client's problem because they choose not to accept the terms of a contract that is offered to them? Why not make an order against the lenders?

Nobody would suggest you could do that. And my submission is although you have jurisdiction over NRG in certain areas by virtue of it being a distributor, you don't have jurisdiction to compel it to enter into commercial contracts when it chooses not to.

Unless you have questions, those are my submissions.

Reference: *Transcript of OEB Proceedings*, pp. 71-75, Appeal Record, Tab 8, p. 122-126

41. At 2:25 p.m. on June 29, the OEB ordered NRG to execute the Assignment Agreement and the Bundled T-Service Agreement by 4:00 p.m. that day.

Reference: *Transcript of OEB Proceedings*, pp. 81-87, Appeal Record, Tab 8, p. 132-138

42. Despite repeated requests, the OEB has refused to issue any formal Order. In response to a request for a formal order, the OEB advised that the transcript of the hearing shall constitute the Order of the OEB.

43. NRG did not execute the Assignment Agreement and the Bundled T-Service Agreement by 4:00 p.m.

Reference: *Transcript of OEB Proceedings*, pp. 1, Appeal Record, Tab 9, p. 149

44. At the request of IGPC, the OEB reconvened at 4:29 p.m. and proceeded with a hearing purportedly under section 112.2 of the Act.

45. The OEB determined on its own motion that the failure of NRG to execute the Assignment Agreement and the Bundled T-Service Agreement by 4:00 p.m. that day was in contravention of an enforceable provision under the Act because NRG had failed to execute those agreements as purportedly required by the OEB's Order made earlier that day. The OEB stated that "due to the urgency of the financing requirements", the OEB had determined to act under the authority given to it under section 112.2(6) to issue an interim order under section 112.3.

Reference: *Compliance Order of OEB*, dated June 29, 2007, Appeal Record, Tab 3, p. 18-19

46. The OEB ordered that:

NRG shall pay an administrative penalty of \$20,000.00 Canadian Dollars per day to be lifted when the Board's Orders regarding the execution of the required consents and Bundle T-Agreements have been complied with by NRG.

Reference: *Compliance Order of OEB*, dated June 29, 2007, Appeal Record, Tab 3, p. 18-19

47. By letter to the OEB on July 5, 2007, counsel for NRG advised that, contrary to statements in the Kovnats Affidavit, and representations made on behalf of NRG 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 transaction and all documents relating to the financing were executed and delivered into escrow to be released subject to certain conditions. 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.

PART III - LAW

The Standard of Review is Correctness

48. In reviewing an administrative tribunal's decision, the courts will employ the pragmatic and functional approach to ascertain the appropriate standard of review:

INTERROGATORY #12

Issue 2.3

NRG staff costs (Mr. Bristoll)

Preamble:

IGPC wishes to understand the role of Mr. Bristoll in the construction of the IGPC Pipeline.

Reference:

NRG Evidence, June 3, 2013, para. 31, p. 6 of 22

Question:

(b) What was Mr. Bristoll's salary at NRG for each of the years 2006 – 2009? Please provide documentation to support this salary (such as a T4 or copies of pay stubs). This documentation may be provided confidentially if necessary.

(i) Please calculate the total amount of remuneration paid to Mr. Bristoll by NRG directly and/or any other entity where he was employed or engaged over the same time period that NRG has invoiced IGPC in respect of his services. To be clear, IGPC takes the position that the actual costs of Mr. Bristoll's services are to be calculated using as a base, his actual remuneration earned over the same time frame as NRG has invoiced IGPC less adjustments for time spent by Mr. Bristoll on other matters. Please provide copies of supporting T4s confirming Mr. Bristoll's total compensation during the relevant years being 2006 through 2009.

RESPONSE:

Please see attached schedule.